

## ECJ 27 April 2017, C-620/15 (A-Rosa Flussschiff), Free movement, social insurance

*A-Rosa Flussschiff GmbH – v – Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales d'Alsace (URSSAF), venant aux droits de l'URSSAF du Bas-Rhin and Sozialversicherungsanstalt des Kantons Graubünden, French case*

### Summary

An E101 certificate, issued by the institution designated by the competent authority of a Member State under Article 14(2)(a) of Regulation No 1408/71, is binding on both the social security institutions of the Member State in which the work is carried out and the courts of that Member State – even when it is found by those courts that the conditions under which the workers carried out their activities did not fall within the scope of the provisions of Regulation No 1408/71.

### Facts

A-Rosa, which has its registered office in Germany, operates two cruise ships sailing on the Rhone (France) and the Saone (France). On board 45 and 46 seasonal workers, respectively, were employed and they were nationals of Member States other than France. Both ships sail exclusively on French inland waterways. All the employment contracts of the seasonal workers were subject to Swiss law.

Following an inspection of the two ships in June 2007, the URSSAF found irregularities concerning the insurance cover of the employees. That finding gave rise to a recovery notice, which was sent to A-Rosa on 22 October 2007, for the amount of € 2.024.123, in respect of arrears of social security contributions to the French social security system for the period from 1 April 2005 to 30 September 2007. During those inspections,

A-Rosa provided an initial batch of E101 certificates for the year 2007, issued by the Swiss Social Insurance Office pursuant to Article 14(2)(a) of Regulation No 1408/71.

### National proceedings

A-Rosa challenged the recovery notice before the Social Security Court (Bas-Rhin, France). However, that action was dismissed by the Social Security Court. The court considered that A-Rosa's activities were entirely geared towards the territory of France and that they were carried out in France on a habitual, stable and continuous basis. Article 14 of Regulation No 1408/71 could not be a ground to challenge the recovery notice, as that provision governs the situation of workers who are posted to the territory of another Member State.

A-Rosa lodged an appeal against that judgment before the Court of Appeal (Colmar, France). In the meantime the URSSAF submitted a request for withdrawal of the E101 certificates to the Swiss Social Insurance Office, given that those forms should not have been drawn up on the basis of Article 14 (2)(a) of Regulation No 1408/71. The periodic declarations concerning the employees on the ship should have been made to the French social security authorities, as the activities on the ship were carried out permanently and exclusively in France. During the appeal, A-Rosa provided a second batch of E101 certificates, for the years 2005 and 2006, issued by the Swiss Social Insurance Office.

The Court of Appeal dismissed the appeal, mainly on the grounds that the employees worked solely in France and that A-Rosa had not provided evidence of exceptions enabling it to avoid the principle of territoriality laid down in Article 13(2)(a) of Regulation No 1408/71.

A-Rosa then appealed against the judgment before the Court of Cassation. That Court was uncertain whether the issuing of an E101 certificate by the competent institution of a Member State pursuant to Article 14(2)(a) of Regulation No 1408/71 had the force of law if the employee covered by the certificate actually worked in another Member State – given that that situation was not one of the exceptions to the Article. The Court of Cassation decided to stay the proceedings and refer a question to the ECJ for a preliminary ruling.

## Question put to the ECJ

Is the effect of an E101 certificate issued in accordance with Articles 11(1) and 12a(1a) of Regulation No 574/72 by the institution designated by the competent authority of the Member State, whose social security legislation remains applicable to an employee, binding on the courts of that Member State if the conditions under which the employee carries out his activities manifestly do not fall within the scope of the exceptions set out in Article 14(1) and (2) of Regulation No 1408/71?

## ECJ's findings

As long as an E101 certificate is not withdrawn or declared invalid, the competent institution of the Member State in which an employee actually works must take account of the fact that the person is already subject to the social security legislation of the Member State in which the undertaking employing him is established, and that institution cannot subject the worker to its own social security system.

However, it is incumbent on the competent institution of the Member State which issued the E101 certificate to reconsider whether it was properly issued and, if appropriate, to withdraw the certificate if the competent institution of the Member State in which the employee actually works expresses doubts about the basis on which it was issued, in particular because the information it was based on does not correspond to the requirements of Article 14(2)(a) of Regulation No 1408/71.

The Court noted that if the institutions concerned do not reach agreement about how to interpret the facts, it is open to them to refer the matter to the Administrative Commission. If the Administrative Commission does not manage to reconcile the conflicting views, the Member State in which the employee actually works may bring infringement proceedings under Article 259 TFEU in order to enable the court to examine the relevant legislation and whether the information in the E101 certificate is correct.

As long as an E101 certificate has not been withdrawn or declared invalid, the certificate takes effect in the internal legal order of the Member State to which the employee goes in order to work and therefore, binds the institutions of that Member State. In addition, a person who uses the worker's services must act in reliance on the certificate. If that person doubts the validity of the certificate, he or she must inform the relevant institution.

In the case at hand, however, it seems the French authorities did not communicate their concerns sufficiently to the Swiss Social Insurance Office and did not attempt to refer the matter to the Administrative Commission. Therefore, the case did not actually reveal any

deficiencies in the procedure determined by ECJ case-law, nor did it show that it is impossible to resolve instances of unfair competition or social dumping.

## Ruling

The answer to the question referred is that an E101 certificate issued by the institution designated by the competent authority of a Member State pursuant to Article 14(2)(a) of Regulation No 1408/71, is binding on both the social security institutions of the Member State in which the work is carried out and the courts of that Member State, even if it is found by the courts in that Member State that the conditions under which the workers carried out their activities manifestly do not fall within the material scope of the provisions of Regulation No 1408/71.

## ECJ 2 March 2017, case C-97/16 (Perez Retamero), Employment status

José María Pérez Retamero – v – TNT Express Worldwide Spain SL and Others, Spanish case

## Summary

Based on a challenge to the dismissal of a transporter of goods, certain questions were referred to the ECJ under Directive 2002/15 on the organisation of working time for persons performing mobile road transport activities. However, the questions related, not to dismissal, but to how 'mobile workers' were defined in the Directive (as the worker sought to establish that he was employed and therefore entitled to full employment rights). The Court ruled that, as the Directive related to how working time is organised, rather than dismissal, the questions were inadmissible.

## Facts

Mr Perez Retamero worked as a transporter of goods for TNT, with whom he had concluded a contract governing the provision of transport services. TNT entrusted him with the task of delivering goods in Catalonia, in Spain. The contract provided that TNT could unilaterally change the principles and rules applicable to transport services, either wholly or in part.