Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 22 June 2023 [1]

Case C-422/22

Zakład Ubezpieczeń Społecznych Oddział w Toruniu
v
TE

(Request for a preliminary ruling
from the Sąd Najwyższy (Supreme Court, Poland))

(Reference for a preliminary ruling – Migrant workers – Social security – Applicable legislation – Regulation (EC) No 883/2004 – Article 76 – Duty of mutual information and cooperation – Regulation (EC) No 987/2009 – A1 Certificate – Withdrawal on the initiative of the issuing institution – Articles 6 and 16 – No obligation for the issuing institution to initiate a dialogue and conciliation procedure with the competent authority of the host Member State – Articles 2 and 20 – Obligation to inform that authority as soon as possible following the withdrawal of the certificate)

I. Introduction

1. This request for a preliminary ruling concerns the interpretation of Regulation (EC) No 987/2009 [2] and relates, more specifically, to the application, by analogy, of Articles 6 and 16 of that regulation to a procedure for the withdrawal of an A1 Certificate.

2. The request has been made in proceedings between TE and Zakład Ubezpieczeń Społecznych Oddział w Toruniu (Social Insurance Institution, Toruń Branch, Poland) ('the SII') concerning the latter's decision to withdraw the A1 Certificate confirming, at the applicant's request, his situation for the purposes of the application of the Polish social security legislation during the period from 22 August 2016 to 21 August 2017.

3. The Court has not yet ruled on the procedure applicable in such a case of the withdrawal of an A1 Certificate on the initiative of the institution which issued it. I shall set out the reasons why the provisions of Regulation No 987/2009 regrading instances of doubt as to the validity of such a certificate or regarding the determination of the legislation applicable are not relevant in such a situation. I am of the view that, in the absence of a dialogue and conciliation procedure in the

[1] Original language: French.

[2] Regulation of the European Parliament and of the Council 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1), as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149, p. 4) ('Regulation No 987/2009' or 'the implementing regulation').

event of the withdrawal of an A1 Certificate on the issuing institution's own initiative, the competent institutions of the Member States concerned must exchange information *ex post facto*, on the basis of the cooperation set up by the EU legislature, so that the rights of the persons concerned are not affected.

II. Legal framework

A. Regulation (EC) No 883/2004

4. Title II of Regulation (EC) No 883/2004,[3] entitled 'Determination of the legislation applicable', consists of Articles 11 to 16.

5. In the words of Article 11 of that regulation:

'1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.

…

3. Subject to Articles 12 to 16:

(a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;

…'

6. Under the heading 'Pursuit of activities in two or more Member States', Article 13 of that regulation provides, in paragraph 2:

'A person who normally pursues an activity as a self-employed person in two or more Member States shall be subject to:

(a) the legislation of the Member State of residence if he pursues a substantial part of his activity in that Member State,

or

(b) the legislation of the Member State in which the centre of interest of his activities is situated, if he does not reside in one of the Member States in which he pursues a substantial part of his activity.'

7. Under Article 72(a) of Regulation No 883/2004, the Administrative Commission for the Coordination of Social Security Systems ('the Administrative Commission') is to deal with all administrative questions and questions of interpretation arising from the provisions of that regulation or those of Regulation No 987/2009.

[3] Regulation of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1 and corrigendum OJ 2004 L 200, p. 1), as amended by Regulation No 465/2012 ('Regulation No 883/2004' or 'the basic regulation').

8. Article 76 of Regulation No 883/2004, entitled 'Cooperation', provides, in paragraphs 3, 4 and 6:

'3. The authorities and institutions of the Member States may, for the purposes of this Regulation, communicate directly with one another and with the persons involved or their representatives.

4. The institutions and persons covered by this Regulation shall have a duty of mutual information and cooperation to ensure the correct implementation of this Regulation.

The institutions, in accordance with the principle of good administration, shall respond to all queries within a reasonable period of time and shall in this connection provide the persons concerned with any information required for exercising the rights conferred on them by this Regulation.

…

6. In the event of difficulties in the interpretation or application of this Regulation which could jeopardise the rights of a person covered by it, the institution of the competent Member State or of the Member State of residence of the person concerned shall contact the institution(s) of the Member State(s) concerned. If a solution cannot be found within a reasonable period, the authorities concerned may call on the Administrative Commission to intervene.'

B. Regulation No 987/2009

9. Recitals 1, 2, 8, and 10 of Regulation No 987/2009 state:

'(1) [Regulation No 883/2004] modernises the rules on the coordination of Member States' social security systems, specifying the measures and procedures for implementing them and simplifying them for all the players involved. Implementing rules should be laid down.

(2) Closer and more effective cooperation between social security institutions is a key factor in allowing the persons covered by [Regulation No 883/2004] to access their rights as quickly as possible and under optimum conditions.

…

(8) The Member States, their competent authorities and the social security institutions should have the option of agreeing among themselves on simplified procedures and administrative arrangements which they consider to be more effective and better suited to the circumstances of their respective social security systems. However, such arrangements should not affect the rights of the persons covered by [Regulation No 883/2004].

…

(10) To determine the competent institution, namely the one whose legislation applies or which is liable for the payment of certain benefits, the circumstances of the insured person and those of the family members must be examined by the institutions of more than one Member State. To ensure that the person concerned is protected for the duration of the necessary communication between institutions, provision should be made for provisional membership of a social security system.'

10. Title I, Chapter II of Regulation No 987/2009, entitled 'Provisions concerning cooperation and exchanges of data', consists of Articles 2 to 7.

11. Article 2 of that regulation, entitled 'Scope and rules for exchanges between institutions', provides, in paragraph 2:

'The institutions shall without delay provide or exchange all data necessary for establishing and determining the rights and obligations of persons to whom the basic Regulation applies. Such data shall be transferred between Member States directly by the institutions themselves or indirectly via the liaison bodies.'

12. Article 5 of Regulation No 987/2009, entitled 'Legal value of documents and supporting evidence issued in another Member States', states:

'1. Documents issued by the institution of a Member State and showing the position of a person for the purposes of the application of the basic Regulation and of the implementing Regulation, and supporting evidence on the basis of which the documents have been issued, shall be accepted by the institutions of the other Member States for as long as they have not been withdrawn or declared to be invalid by the Member State in which they were issued.

2. Where there is doubt about the validity of a document or the accuracy of the facts on which the particulars contained therein are based, the institution of the Member State that receives the document shall ask the issuing institution for the necessary clarification and, where appropriate, the withdrawal of that document. The issuing institution shall reconsider the grounds for issuing the document and, if necessary, withdraw it.

3. Pursuant to paragraph 2, where there is doubt about the information provided by the persons concerned, the validity of a document or supporting evidence or the accuracy of the facts on which the particulars contained therein are based, the institution of the place of stay or residence shall, in so far as this is possible, at the request of the competent institution, proceed to the necessary verification of this information or document.

4. Where no agreement is reached between the institutions concerned, the matter may be brought before the Administrative Commission by the competent authorities no earlier than one month following the date on which the institution that received the document submitted its request. The Administrative Commission shall endeavour to reconcile the points of view within six months of the date on which the matter was brought before it.'

13. Article 6 of Regulation No 987/2009, entitled 'Provisional application of legislation and provisional granting of benefits, is worded as follows:

'1. Unless otherwise provided for in the implementing Regulation, where there is a difference of views between the institutions or authorities of two or more Member States concerning the

determination of the applicable legislation, the person concerned shall be made provisionally subject to the legislation of one of those Member States …

…

2. Where there is a difference of views between the institutions or authorities of two or more Member States about which institution should provide the benefits in cash or in kind, the person concerned who could claim benefits if there was no dispute shall be entitled, on a provisional basis, to the benefits provided for by the legislation applied by the institution of his place of residence or, if that person does not reside on the territory of one of the Member States concerned, to the benefits provided for by the legislation applied by the institution to which the request was first submitted.

3. Where no agreement is reached between the institutions or authorities concerned, the matter may be brought before the Administrative Commission by the competent authorities no earlier than one month after the date on which the difference of views, as referred to in paragraph 1 or 2 arose. The Administrative Commission shall seek to reconcile the points of view within six months of the date on which the matter was brought before it.

4. Where it is established either that the applicable legislation is not that of the Member State of provisional membership, or the institution which granted the benefits on a provisional basis was not the competent institution, the institution identified as being competent shall be deemed retroactively to have been so, as if that difference of views had not existed, at the latest from either the date of provisional membership or of the first provisional granting of the benefits concerned.

5. If necessary, the institution identified as being competent and the institution which provisionally paid the cash benefits or provisionally received contributions shall settle the financial situation of the person concerned as regards contributions and cash benefits paid provisionally, where appropriate, in accordance with Title IV, Chapter III, of the implementing Regulation.

Benefits in kind granted provisionally by an institution in accordance with paragraph 2 shall be reimbursed by the competent institution in accordance with Title IV of the implementing Regulation.'

14. In the words of Article 7 of that Regulation, entitled 'Provisional calculation of benefits and contributions':

'1. Unless otherwise provided for in the implementing Regulation, where a person is eligible for a benefit, or is liable to pay a contribution in accordance with the basic Regulation, and the competent institution does not have all the information concerning the situation in another Member State which is necessary to calculate definitively the amount of that benefit or contribution, that institution shall, on request of the person concerned, award this benefit or calculate this contribution on a provisional basis, if such a calculation is possible on the basis of the information at the disposal of that institution.

2. The benefit or the contribution concerned shall be recalculated once all the necessary supporting evidence or documents are provided to the institution concerned.'

15. Title II of that regulation, entitled 'Determination of the legislation applicable', consists of Articles 14 to 21.

16. Article 16 of that regulation, entitled 'Procedure for the application of Article 13 of the basic Regulation', provides:

'1. A person who pursues activities in two or more Member States shall inform the institution designated by the competent authority of the Member State of residence thereof.

2. The designated institution of the place of residence shall without delay determine the legislation applicable to the person concerned, having regard to Article 13 of the basic Regulation and Article 14 of the implementing Regulation. That initial determination shall be provisional. The institution shall inform the designated institutions of each Member State in which an activity is pursued of its provisional determination.

3. The provisional determination of the applicable legislation, as provided for in paragraph 2, shall become definitive within two months of the institutions designated by the competent authorities of the Member States concerned being informed of it, in accordance with paragraph 2, unless the legislation has already been definitively determined on the basis of paragraph 4, or at least one of the institutions concerned informs the institution designated by the competent authority of the Member State of residence by the end of this two-month period that it cannot yet accept the determination or that it takes a different view on this.

4. Where uncertainty about the determination of the applicable legislation requires contacts between the institutions or authorities of two or more Member States, at the request of one or more of the institutions designated by the competent authorities of the Member States concerned or of the competent authorities themselves, the legislation applicable to the person concerned shall be determined by common agreement, having regard to Article 13 of the basic Regulation and the relevant provisions of Article 14 of the implementing Regulation.

Where there is a difference of views between the institutions or competent authorities concerned, those bodies shall seek agreement in accordance with the conditions set out above and Article 6 of the implementing Regulation shall apply.

…'

17. Article 19 of Regulation No 987/2009, entitled 'Provision of information to persons concerned and employers', provides, in paragraph 2:

'At the request of the person concerned or of the employer, the competent institution of the Member State whose legislation is applicable pursuant to Title II of the basic Regulation shall provide an attestation that such legislation is applicable and shall indicate, where appropriate, until what date and under what conditions.'

18. Article 20 of Regulation No 987/2009, entitled 'Cooperation between institutions', provides:

'1. The relevant institutions shall communicate to the competent institution of the Member State whose legislation is applicable to a person pursuant to Title II of the basic Regulation the necessary information required to establish the date on which that legislation becomes applicable

and the contributions which that person and his employer(s) are liable to pay under that legislation.

2. The competent institution of the Member State whose legislation becomes applicable to a person pursuant to Title II of the basic Regulation shall make the information indicating the date on which the application of that legislation takes effect available to the institution designated by the competent authority of the Member State to whose legislation that person was last subject.'

III. The facts of the dispute in the main proceedings and the questions referred for a preliminary ruling

19. TE, a businessman enrolled on the Polish commercial register and pursuing a self-employed activity the proceeds of which are taxed in Poland, signed a contract on 11 August 2016 with a company established in Warsaw (Poland) under which he was to provide, in France, in the context of a specific project, services normally forming part of the duties of a 'second site manager', from 22 August 2016 until the end of that project.

20. On the basis of that contract, an A1 Certificate [4] was issued by the SII, [5] certifying that TE was covered by the Polish legislation during the period from 22 August 2016 to 21 August 2017 ('the period at issue').

21. Following a reconsideration, on its own initiative, the SII established that, during the period at issue, TE pursued his activity in a single Member State, namely France. Thus, by a decision of 1 December 2017 ('the decision at issue'), the SII withdrew that A1 Certificate [6] and considered that TE was not subject to the Polish legislation during the period at issue. Being of the view that the relevant provision for determining the legislation applicable to TE was Article 11 of Regulation No 883/2004, the SII adopted that decision without having first followed the procedure referred to in Article 16 [7] of Regulation No 987/2009 concerning coordination with the competent French institution as regards the determination of the applicable legislation.

22. TE brought an action before the Sąd Okręgowy w Toruniu (Regional Court, Toruń, Poland) against the decision at issue. By decision of 5 June 2019, that court considered, first, that, during the period at issue, TE did not work in a single Member State, and was therefore covered by Article 13(2) of Regulation No 883/2004, and, second, that the SII had not exhausted the coordination provided for in Articles 6, 15 [8] and 16 of Regulation No 987/2009, although that

4 As recalled in the judgment of 2 March 2023, *DRV Intertrans and Verbraeken J. en Zonen* (C-410/21 and C-661/21, 'the judgment in *DRV Intertrans*', EU:C:2023:138, paragraph 42 and the case-law cited), 'the A1 certificate, which replaced the E 101 certificate provided for by [Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1972 (I), p. 160)], corresponds to a standard form issued, in accordance with Title II of Regulation No 987/2009, by the institution designated by the competent authority of the Member State whose social security legislation is applicable, in order to certify, in accordance with, inter alia, Article 19(2) of that regulation, that workers who are in one of the situations referred to in Title II of Regulation No 883/2004 are subject to the legislation of that Member State'. See, for example, practical explanations and model form available on the website of the Centre des liaisons européennes et internationales de sécurité sociale (France): https://www.cleiss.fr/reglements/a1.html.

5 In its written observations, the SII stated that that certificate had been issued on 19 August 2016, that it was based on Article 13(2) of Regulation No 883/2004, on the ground that it governs the situation of the person concerned, who pursued an activity as a self-employed person in two or more Member States, and that it had been sent to the competent French institution.

6 The Sąd Najwyższy (Supreme Court, Poland), the referring court, states that that decision was taken in application of Article 83a(1) of the ustawa o systemie ubezpieczeń społecznych (Law on social security) of 13 October 1998 (Dz. U. 2021, position 430).

7 See point 16 of this Opinion.

8 According to its title, that article determines the procedures for the application of Article 11(3)(b) and (d), Article 11(4) and Article 12 of the basic regulation (on the provision of information to the institutions concerned).

procedure is compulsory for the purposes of determining the applicable legislation. Thus, during the judicial procedure, that court asked the SII to initiate that cooperation procedure with the competent French institution, which the SII refused to do, being of the view that that course of action was not justified. In order to avoid a situation in which TE was not covered by any social security scheme, the Sąd Okręgowy w Toruniu (Regional Court, Toruń) held that, during the period at issue, TE was subject to the Polish legislation and, consequently, maintained the A1 Certificate at issue in the main proceedings in force.

23. By judgment of 5 February 2020, the Sąd Apelacyjny w Gdańsku (Court of Appeal, Gdansk, Poland) dismissed the SII's appeal against that decision.

24. The SII appealed on a point of law against that judgment before the Sąd Najwyższy (Supreme Court). It claims that, since the withdrawal of the A1 Certificate at issue required the prior exhaustion of the coordination procedure laid down by Regulation No 987/2009, the decision at issue was vitiated by an irregularity which could be remedied only in the procedure before the SII itself. Thus, the judicial decisions delivered by the Okręgowy w Toruniu (Regional Court, Toruń) and by the Sąd Apelacyjny w Gdańsku (Court of Appeal, Gdansk) are flawed on the ground that those courts ought to have brought the matter before the SII so that it could have reconsidered that A1 Certificate in collaboration with the competent French institution, instead of adjudicating on the applicable legislation.

25. In those circumstances, the Sąd Najwyższy (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is the institution of a Member State which has issued an A1 form and which, of its own motion (without a request from the competent institution of the Member State concerned), intends to cancel/withdraw or invalidate the issued form, obliged to make arrangements with the competent institution of another Member State in accordance with rules analogous to those set out in Articles 6 and 16 of [Regulation No 987/2009]?

(2) Are the arrangements to be made even before the cancellation/withdrawal or invalidation of the issued form, or is the cancellation/withdrawal or invalidation provisional in nature [in accordance with Article 16(2) of Regulation No 987/2009] and will become final in the event that the Member State institution concerned does not raise any objection or present a different view on the matter?'

26. The SII, the Polish, Belgian, Czech and French Governments and the European Commission lodged written observations.

IV. Analysis

27. By its two questions, which in my view may be examined together, the referring court seeks to ascertain, in essence, whether Articles 6 and 16 of Regulation No 987/2009 must be interpreted as meaning that an institution which, following verifications carried out on its own initiative, has found that it incorrectly issued an A1 Certificate, may withdraw that certificate without first initiating a dialogue and conciliation procedure with the competent institutions of the Member States concerned with a view to determining the applicable legislation.

28. It should be stated at the outset that neither Regulation No 883/2004 nor Regulation No 987/2009 contains a provision that is directly applicable to the circumstances of the present case, in which an A1 Certificate has been withdrawn.

29. Article 76(6) of Regulation No 883/2004 merely establishes the general framework of a *dialogue and conciliation procedure*, with the former preceding the latter.[9] Regulation No 987/2009 defines the situations in which that procedure is implemented.

30. Thus, as regards the withdrawal of an A1 Certificate, only Article 5 of the latter regulation determines a specific procedure '*where there is doubt* about the validity of a document [showing the position of a person] or the accuracy of the facts on which the particulars contained therein are based'.[10]

31. The different stages of that procedure, described in paragraphs 2 and 4 of Article 5, aim, first, to gather the information that will be of use in confirming the validity or invalidity of the A1 Certificate, in the context of consultation between the competent institutions, and, second, to overcome any disagreement between those institutions.[11]

32. It is clear from those provisions that it is on the initiative of 'the institution of the Member State that receives the document'[12] that that procedure is initiated. Consequently, there is no provision governing a situation in which the issuing institution, after carrying out verifications on its own initiative, is not in any doubt that the A1 Certificate must be withdrawn.[13]

33. Accordingly, the questions referred for a preliminary ruling invite the Court to rule on whether, in the light of Regulations Nos 883/2004 and 987/2009 and their interpretation in the case-law, an A1 Certificate can be withdrawn only after prior *consultation* between the competent institutions of the Member States concerned with a view to determining the legislation applicable to the person concerned.

34. *As regards the legislative framework* to which the referring court's questions belong, in the first place, it must be borne in mind, first, that Regulation No 987/2009 codified the Court's case-law on the scope and the legal effects of the E 101 Certificate[14] and the procedure to be followed in order to *resolve any disputes between the institutions of the Member States* concerned regarding the validity or accuracy of that certificate.[15]

9 See also recitals 10 and 11, as well as points 1, 2 and 17 of Decision No A1 of 12 June 2009 concerning the establishment of a dialogue and conciliation procedure concerning the validity of documents, the determination of the applicable legislation and the provision of benefits under Regulation (EC) No 883/2004 of the European Parliament and of the Council (OJ 2010 C 106, p. 1) ('the A1 Decision'). See also judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, 'the judgment in *A-Rosa Flussschiff*', EU:C:2017:309, paragraph 58, concerning Article 84a(3) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416), the provisions of which were reproduced in Article 76(6) of Regulation No 883/2004).

10 Paragraph 2 of that article. Emphasis added.

11 See judgment in *DRV Intertrans* (paragraph 46).

12 Article 5(2).

13 See, in the present case, concerning the ground of withdrawal based on the fact that the person concerned did not work in two different Member States, point 21 of this Opinion.

14 The E 101 Certificate has been replaced by the A1 Certificate. See footnote 4 to this Opinion.

15 See judgment in *DRV Intertrans* (paragraphs 43 and 52 and the case-law cited).

35. Second, that regulation thus enshrined the principles resulting from that case-law, namely:

– the binding nature of such a certificate, which is based on the obligatory rules on the application of the legislation of a single Member State, sincere cooperation and legal certainty, on which particular importance was also placed in Regulation No 883/2004; [16]

– *the exclusive competence of the issuing institution to assess their validity*, [17] and

– the action *to resolve disputes* between the competent institutions of the Member States concerned, as to both *the accuracy of the documents* established and the *determination of the legislation applicable* to the worker concerned, to the dialogue procedure between those institutions and the conciliation procedure before the Administrative Commission. [18]

36. It therefore appears, in the second place, that *the EU legislature did not intend that dialogue and conciliation procedure to have a broad scope*, but reserved it for specific needs of sincere cooperation. [19]

37. I also note that the Commission's Practical guide on the applicable legislation in the European Union (EU), the European Economic Area (EEA) and in Switzerland, [20] contains examples where the situation of the person concerned is reconsidered, on the initiative of the issuing institution, followed, where appropriate, by the withdrawal of the certificate. However, nowhere in that guide is it recommended that the dialogue and conciliation procedure be initiated. The same applies to the A1 Decision, [21] which deals solely with the situation in which either an institution

[16] See judgments of 16 July 2020, *AFMB* (C-610/18, EU:C:2020:565, paragraphs 72 and 74), and in *DRV Intertrans* (paragraphs 43 and 54 and the case-law cited). In the case that gave rise to that judgment, the effects of an A1 Certificate had been provisionally suspended by a decision of the issuing institution. The Court held that, in the light of the wording of Article 5(1) of Regulation No 987/2009, only the withdrawal of the certificate can remove its binding effects (paragraphs 48, 49, 51 and 59).

[17] On the principle of sincere cooperation, laid down in Article 4(3) TEU, which requires the issuing institution to carry out a proper assessment of the facts relevant for the application of the rules relating to the determination of the legislation applicable to social security and, consequently, to ensure that the information contained in an E 101 Certificate (now A1 Certificate) is accurate, see judgment in *A-Rosa Flussschiff* (paragraph 39 and the case-law cited). The Court has also held that that principle applies even though the Administrative Commission has held that that certificate had been incorrectly issued (see judgment of 6 September 2018, *Alpenrind and Others* (C-527/16, 'the judgment in *Alpenrind and Others*', EU:C:2018:669, paragraph 64)) or a court or tribunal of a Member State has been seised of an action in legal proceedings brought against an employer with respect to facts that might indicate that certificates had been fraudulently obtained or used (see judgment of 2 April 2020, *CRPNPAC and Vueling Airlines* (C-370/17 and C-37/18, 'the judgment in *Vueling*', EU:C:2020:260, paragraph 86)).

[18] See judgment in *DRV Intertrans* (paragraphs 43 and 55). In that judgment, the Court also held that the institution which had issued the A1 Certificates at issue, seised of an application to withdraw the certificates in the context of the dialogue and conciliation procedure, could not decide to defer the reconsideration of the validity of those certificates and the determination of the social security system applicable to the workers concerned until the conclusion of the criminal proceedings pending before the courts of the Member State in which the work is carried out (paragraphs 27, 53, 55 and 63).

[19] That legislative choice might also be justified by the small number of cases to be dealt with. See statistics in the Commission report entitled 'Posting of workers, Report on A1 Portable Documents issued in 2020', October 2021, in particular, commentary in paragraph 5 and Table 20, where it is stated that cases of errors represent less than 0.1% of the number of certificates issued by the competent Member States. See also Table 22, on the number of certificates withdrawn. The analysis is as follows (under Table 21): 'In absolute figures, the highest number of [A1 Certificates] were withdrawn by Poland (528 …) and Slovakia (766 …). In relative terms (i.e. as a share in the total number of [certificates] issued, all Member States which provided figures withdrew less than 1% of the total number of [A1 Certificates] issued in 2020. For instance, Poland and Slovakia withdrew 0.1% and 0.7% respectively of the total number of [A1 Certificates] issued in 2020. Nonetheless, it should be noted that … [A1 Certificates] issued in 2019 or even earlier could be withdrawn in 2020. For Poland, the number of [A1 Certificates] withdrawn decreased significantly compared to 2019 (from 1 197 … in 2019 to "only" 528 … in 2020)'.

[20] Practical guide prepared and agreed by the Administrative Commission, available at the following internet address: https://ec.europa.eu/social/BlobServlet?docId= 11366&langId=en ('the practical guide'), in particular p. 25, penultimate paragraph, and p. 35, first paragraph.

[21] As the Court observed in the judgment of 11 July 2018, *Commission* v *Belgium* (C-356/15, EU:C:2018:555, paragraph 111), Decision No A1 is not a legislative act. According to settled case-law, however, that decision is capable of providing assistance to social security institutions responsible for applying EU law in that sphere (see the same judgment, paragraph 110 and the case-law cited).

expresses doubt about the validity of a document issued by an institution of another Member State, or where there is a difference of views about the determination of the applicable legislation. [22]

38. That point, on which all the parties that lodged written observations are agreed, is to my mind the logical and inevitable consequence of the principle of mutual trust. [23] It justifies the recognition of the substance of the decision taken by the issuing institution to issue a certificate, [24] without further formalities. Therefore, that principle must equally be applied to the decision to withdraw it, unilaterally, in the absence of doubt about the circumstances [25] of the person concerned. [26] In other words, it is difficult to imagine, owing to the system established by Regulation No 987/2009, on the basis of the principles stated in Regulation No 883/2004, that the withdrawal of the certificate should be subject to the agreement of an institution of another Member State, or indeed to prior consultation, *a fortiori* in such a scenario. [27] In addition, if fraud is established, the issuing institution is bound to withdraw the certificate. [28]

39. In the third place, the absence of intention of the EU legislature to take special steps in such a situation is borne out by two other points. First, it is only in the event of '*uncertainty* about the determination of the applicable legislation' [29] and in the particular case of the application of Article 13 of Regulation No 883/2004 that *contacts between institutions or authorities* are provided for in Article 16(4) of Regulation No 987/2009. [30]

40. Second, *the provisional solutions to protect* the person concerned, relating to the applicable law and to the granting of benefits, are provided for by Article 6 of that regulation only where there is a '*difference of views*' [31] between those institutions or authorities. That restriction of instances where consultation is required seems to me to be consistent with the requirement of expedition [32] which must be met in the determination of the law applicable to the situation of the person concerned and the need not to increase the cases brought before the Administrative Commission, provided for in Article 5(4) and also in Article 6(3) of that regulation. [33]

22 See paragraph 1 of that decision.

23 See judgment of 14 May 2020, *Bouygues travaux publics and Others* (C-17/19, EU:C:2020:379, paragraph 40 and the case-law cited).

24 In addition, the Court has held that the binding effect of the certificates is not affected by any irregularities. See judgment in *Alpenrind and Others* (paragraph 76).

25 See recital 10 of Regulation No 987/2009 and footnote 34 to this Opinion.

26 In the present case, the SII emphasised in its written observations that the finding of the *absence* of activity in Poland by TE during the period covered by the A1 Certificate which it had issued did not give rise to any doubt about the obligation to withdraw that certificate, since it was based on Article 13 of Regulation No 883/2004. In that regard, this scenario is very different from one in which difficulties arise when assessing the activities of the person concerned. For explanations and concrete examples, see the practical guide, p. 22 et seq..

27 Conversely, it would be necessary to envisage that such a discussion has taken place on the reality of the facts established by the institution which wishes to withdraw a certificate which it has incorrectly issued, since it guarantees the accuracy of the information contained in the certificate. See footnote 17 to this Opinion.

28 See judgment of 11 July 2018, *Commission* v *Belgium* (C-356/15, EU:C:2018:555, paragraph 99 and the case-law cited, cf. paragraph 98).

29 Emphasis added.

30 Where there is a difference of views about the applicable law, the second subparagraph of that provision refers to Article 6 of Regulation No 987/2009. See also recital 8 and point 1(b) of the A1 Decision.

31 Emphasis added.

32 See, to that effect, Article 76(6) of Regulation No 883/2004 and recital 2 of Regulation No 987/2009. For cases in which the Court has ruled taking into consideration the speed of the actions of each institution or authority concerned and situations in which the relevant periods were unreasonable, see judgments of 6 February 2018, *Altun and Others* (C-359/16, EU:C:2018:63, paragraphs 55, 59 and 60), and in *Vueling* (paragraphs 80 and 81, and also paragraphs 85 and 86).

33 On the role of that Administrative Commission, see judgment in *Alpenrind and Others* (paragraph 58 et seq., in particular paragraphs 59 and 60, and also paragraph 62, as regards the fact that its role is merely to reconcile the points of view of the competent authorities of the Member States which brought the matter before it).

41. To my mind, therefore, it cannot follow from an exclusively teleological interpretation of Regulations Nos 883/2004 and 987/2009 that the withdrawal of the A1 Certificate should be subject to the opinion or decision of another Member State on the determination of the social security system applicable to the worker concerned, even where the certificate was withdrawn a considerable time after it had been issued,[34] given that the provisions of those regulations are limited to situations in which difficulties arise for the determination of the applicable law.

42. In the fourth place, as regards social security cover, I am of the view that it is appropriate to take into consideration the principle that the A1 Certificate gives rise to a presumption of the regularity of the affiliation of the worker concerned to a social security system[35] based on a situation which that document certifies.[36] Like the Commission and the French Government, I emphasise that that certificate does not create rights.[37] Consequently, its withdrawal only has the effect of releasing the competent authorities from the binding effects of that certificate.

43. In addition, the risk of double contributions does not exist where the decision to withdraw the certificate is taken by the issuing institution.[38]

44. Consequently, all of those considerations argue in favour of there being no requirement of consultation or prior conciliation between competent institutions of the Member States concerned where an A1 Certificate is withdrawn on the initiative of an institution.

45. However, I am inclined to take the view that the analysis would be incomplete if it did not take account of the distinction that must be drawn between the withdrawal of a certificate and its issuance, in that its withdrawal necessarily has an adverse effect for the worker and it is capable of having significant actual, and indeed harmful, consequences, because the assessment of the worker's legal position is called into question.[39]

[34] In the present case, according to the written observations of the SII, the certificate, issued on 19 August 2016, was withdrawn on 1 December 2017, less than three months after the first findings showing new evidence relating to the situation of the person concerned.

[35] See judgment of 6 February 2018, *Altun and Others* (C-359/16, EU:C:2018:63, paragraphs 36 and 39).

[36] See Article 5(1) and Article 19(2) of Regulation No 987/2009, and also the judgment in *Alpenrind and Others* (paragraph 75). See also, for a reminder that the facts form the basis on which a certificate is issued, judgment in *A-Rosa Flussschiff* (paragraph 57).

[37] See, to that effect, judgment in *A-Rosa Flussschiff* (point 38). For a reminder that the sole purpose of the conflict rules laid down in Regulation No 883/2004 is to determine the legislation applicable to persons who are in one of the situations referred to by the provisions fixing those rules and that, as such, those provisions are not intended to lay down the conditions creating the right or the obligation to become affiliated to a particular social security scheme, see judgment of 15 September 2022, *Rechtsanwaltskammer Wien* (C-58/21, EU:C:2022:691, paragraph 50 and the case-law cited). Cf. recital 17a of Regulation No 883/2004 and the consistent case-law of the Court recalling that the application of the conflict of laws rules established by that regulation depends solely on the objective situation of the worker concerned (see judgment of 16 July 2020, *AFMB* (C-610/18, EU:C:2020:565, paragraph 54)).

[38] This situation must therefore be distinguished from a situation in which the competent institution of the host Member State unilaterally withdraws E 101 or A1 certificates issued by the competent authority of another Member State, on the ground of the mere presence of concrete evidence of the existence of fraud. See judgment in *Vueling* (paragraph 68).

[39] On the actual consequences that may be envisaged, see, by way of illustration, Morsa, M., 'Retrait des documents A1 dans le cadre d'une procédure pénale et recours introduit par le prévenu devant une juridiction administrative dans l'État membre d'établissement', *Droit pénal de l'entreprise*, Larcier, Brussels, 2021, No 4, pp. 352 to 362, especially p. 361, paragraph 23. For the administrative problems associated with the repayment of contributions already paid and the recovery of any benefits already granted to the workers concerned, see Opinion of Advocate General Saugmandsgaard Øe in *Alpenrind and Others* (C-527/16, EU:C:2018:52, point 20 and footnote 13). On the obligation to preclude any risk that persons falling within the scope of Regulation No 883/2004 are left without social security protection because there is no legislation which is applicable to them, see judgment of 3 June 2021, *TEAM POWER EUROPE* (C-784/19, EU:C:2021:427, paragraph 32).

46. According to settled case-law, the purpose of the A1 Certificate is to facilitate the movement of the worker [40] and to contribute to legal certainty, both for the worker and for the institutions concerned. The Court has placed particular emphasis on that aspect in its case-law relating to the binding effects of that certificate and, most recently, to a decision suspending its effects. [41]

47. That is why in my view, irrespective of the circumstances in which the A1 Certificate was withdrawn, [42] it is necessary, in order to propose an answer that will be of use to the referring court, to take account of two sources of complexity, namely:

– that certificate may, like the E 101 certificate, have retroactive effect. [43] The Court has stated that, 'while it is preferable that such a certificate is issued before the beginning of the period concerned, it may also be issued during that period or indeed after its expiry', [44] and

– the limitation rules, in particular, which would have consequences on the repayment of social contributions. [45]

48. Furthermore, the Polish Government has drawn the Court's attention, more specifically, to the risk of the worker having no social insurance cover.

49. In that context, it must therefore be pointed out, in my view, that the dialogue and conciliation procedure, laid down in Article 76(6) of Regulation No 883/2004, [46] is not the only framework provided for by the EU legislature in order to ensure the effective exercise of freedom of movement for workers by social protection. [47]

50. A number of other provisions provide for *exchanges of information for the needs of the determination of the rights and obligations of the persons concerned*.

51. First, within the framework of cooperation provided for in Article 76(4) of Regulation No 883/2004, Article 2(2), Article 15, Article 16(2) and (3) and Article 20 of Regulation No 987/2009 provide for the exchange of information directly between institutions or liaison bodies, in accordance with the objectives expressed in recitals 1 and 2 of that regulation.

52. Second, Article 16 of Regulation No 883/2004, entitled 'Exceptions to Articles 11 to 15', provides, in paragraph 1, that 'two or more Member States, the competent authorities of these Member States or the bodies designated by these authorities *may by common agreement provide for exceptions to Articles 11 to 15* in the interest of certain persons or categories of persons'. [48]

[40] See recitals 1 and 45 of Regulation No 883/2004 and 23 of Regulation No 987/2009. See judgments of 3 June 2021, *TEAM POWER EUROPE* (C-784/19, EU:C:2021:427, paragraph 58 and the case-law cited), and *DRV Intertrans* (paragraph 58).

[41] See judgment in *DRV Intertrans* (paragraphs 56 and 57).

[42] Apart from the circumstances of the case in the main proceedings, the rule laid down in Article 14(10) of Regulation No 987/2009, that, in some cases, for the determination of the applicable legislation, the institutions concerned are to take into account the assumed future in the following 12 calendar months, makes it more likely that grounds for review will emerge. See the practical guide, p. 28 (by analogy with the case preceding Example 3) and pp. 34 and 35.

[43] On that effect, in the event of provisional affiliation, see Article 6(4) of Regulation No 987/2009.

[44] See judgment in *Alpenrind and Others* (paragraphs 70 and 71 and the case-law cited).

[45] See judgment in *Vueling* (paragraph 69). As regards, in the event of fraud, the difficulties in recovering sums due and the difficulties arising from a pending decision to withdraw the A1 Certificate, see Emeriau, A., 'Le travail détaché en Europe: concurrence sociale déloyale ou garantie d'un socle minimal de protection?', *Informations sociales*, Caisse nationale d'allocations familiales, Paris, 2021, No 203-204, pp. 144 to 152, especially p. 150.

[46] See points 30 to 32 of this Opinion.

[47] See footnote 40 to this Opinion.

[48] Emphasis added.

53. Consequently, I am of the view, in the first place, like the Czech, Belgian and French Governments, on the basis of Article 76(4) of Regulation No 883/2004 and of Articles 2 and 20 of Regulation No 987/2009, in conjunction with Article 6 of that regulation, that, where an A1 Certificate is withdrawn on the initiative of the issuing institution, those provisions provide a legal framework, sufficiently protective of workers, [49] to the procedure which consists of the following stages:

– the unilateral decision to withdraw the A1 Certificate as soon as the institution becomes aware of the factors that render it manifestly invalid, [50] and

– informing the person concerned and the institutions of the host Member State [51] as soon as possible. [52]

54. In the second place, at this stage, the protection of the worker may also be implemented by three means. First of all, he or she or his or her employer may request an A1 Certificate from the institution of the host Member State. [53]

55. Next, where there is a difference of views between the institution informed of the withdrawal of the A1 Certificate and the institution which decided to withdraw it, the former may grant benefits on a provisional basis in the conditions provided for in Article 6(2) of Regulation No 987/2009. [54] As regards the fear, expressed by the Polish Government, that the competent institution will fail to take action, I note that it cannot be inferred from the written observations submitted to the Court that the actual difficulties that must be overcome in the interest of the worker concerned [55] are different from those caused by the withdrawal of an A1 Certificate at the request of an institution of another Member State. [56]

56. On the other hand, in my view, it is not enough, in the light of the situation at issue, to recommend, by analogy with certain provisions of Regulation No 987/2009, reasonable periods of consultation before the decision to withdraw the A1 Certificate is taken. Withdrawal, in the situation at issue, puts an end to the effects of a certificate where the incorrectness of that certificate is not in doubt and those effects cannot be maintained provisionally. [57] Furthermore, I note, first, that solutions may be implemented in the interest of workers according to the institutions, in practice, as the Czech, Belgian [58] and French Governments have emphasised. Second, the cooperation between Member States may be given concrete form in a bilateral framework, which respects the rights of the persons concerned by Regulation No 883/2004. [59]

[49] On the principles of worker protection and legal certainty in the context of freedom of movement, see footnote 40 to this Opinion.

[50] For the record, this is because of the issuing authority's obligation to carry out a correct assessment of the relevant facts in order to apply Regulations Nos 883/2004 and 987/2009 and to ensure that the information contained in the certificate is accurate, see footnote 17 to this Opinion. On the absence of potential disagreement resulting from the manifestly incorrect nature of the situation certified, see footnote 27 to this Opinion.

[51] On account of the principle of sincere cooperation, see point 35 of this Opinion.

[52] See also, on the principle of effectiveness and speed, point 40 of this Opinion. See also, on the flow of requests for verification, the Commission Report cited in footnote 19 to this Opinion, especially under Table 22.

[53] See Article 5 and Article 19(2) of Regulation No 987/2009, and also footnote 4 to this Opinion.

[54] See, to that effect, judgment in *Alpenrind and Others* (paragraph 76), because of the withdrawal of the A1 Certificate.

[55] See points 45 and 47 of this Opinion. I note, in that regard, that no evidence is provided concerning the present case.

[56] See, in that regard, the Report cited in footnote 19 to this Opinion, p. 51, Table 23. See also Morsa, M., op. cit., p. 362, paragraph 25.

[57] See judgment in *DRV Intertrans* (paragraphs 27 and 57).

[58] See also the report cited in footnote 19 to this Opinion, p. 51, Table 23.

[59] See Articles 8 of Regulations Nos 883/2004 and 987/2009, and also recital 8 of the latter regulation. For an illustration of cooperation in combating fraud, see Emeriau, A., op. cit., p. 149, and Morsa, M., op. cit., p. 361, paragraph 24.

57. In addition, disagreement or difficulties in the interpretation or application of Regulation No 883/2004 will justify recourse to the dialogue and conciliation procedure, provided for by Regulations Nos 883/2004 and 987/2009 in those precise situations. [60]

58. Last, at the same time, in the absence of a certificate, the worker concerned or his or her employer still have the option of bringing the matter before a court for a determination of the worker's affiliation, as the case in the main proceedings demonstrates. [61]

59. In the third place, I note that the risk of harmful consequences for the worker is limited in situations not involving fraud. [62]

60. Consequently, I propose that the Court should consider that, in the absence of a dialogue and conciliation procedure, as provided for in Regulations Nos 883/2004 and 987/2009, where an A1 Certificate is withdrawn by the institution that incorrectly issued it, that institution must inform the institution of the host Member State as soon as possible, without being required to previously consult that institution.

V. Conclusion

61. Having regard to all of the foregoing considerations, I propose that the Court answer the questions for a preliminary ruling referred by the Sąd Najwyższy (Supreme Cour, Poland) as follows:

Articles 5, 6 and 16, on the one hand, and Articles 2 and 20, on the other hand, of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012,

must be interpreted as meaning that:

– an institution, which has found, following verifications carried out on its own initiative, that it has incorrectly issued an A1 Certificate, may withdraw that certificate without first initiating a dialogue and conciliation procedure with the competent institutions of the Member States concerned with a view to determining the applicable legislation;

– that institution, however, is required to inform the competent institutions of the Member States concerned of its withdrawal decision as soon as possible.

60 See points 29 and 34 to 36 of this Opinion.

61 See, to that effect, judgment in *Alpenrind and Others* (paragraph 61).

62 See the practical guide, pp. 36, *in fine*, and 37.