Overview of recent cases before the Court of Justice of the European Union (February 2020-June 2020)

Pauline Melin
Maastricht University, Maastricht, the Netherlands

Abstract
In the reporting period (1 February - 30 June 2020), there were five noteworthy cases in the field of social security. Two cases originated in French courts and concerned E 101 certificates. The Vueling case concerned the conditions for disregarding fraudulent E 101 certificates. Bouygues travaux publics dealt with the effects of E 101 certificates on obligations at the crossroads of social security and labour law. In Pensionsversicherungsanstalt v CW, the issue concerned whether a Member State of origin, Austria, must grant a rehabilitation allowance to a national no longer working or residing there. Caisse d’assurance retraite et de la santé au travail d’Alsace-Moselle v SJ related to the obligation for the competent institution to take into account an allowance paid by another Member State for raising a disabled child when calculating an insurance period for entitlement to an old-age pension. Finally, Caisse pour l’avenir des enfants v FV was a case about access to family benefits by a frontier worker for a child living in the same household but with whom there was no blood relationship.

Keywords
E 101 certificates, frontier workers, family members, sickness benefits, old-age pension

Conditions under which a court or tribunal of the host Member State can disregard fraudulent E 101 certificates: Vueling
The Vueling case1 allowed the Court of Justice to clarify the Altun ruling2 relating to the conditions under which the host Member State can ignore an E 101 certificate when that Member State considers that the certificate has been obtained through fraud.

1. Vueling Airlines, C-370/17 and 37/18, EU: C:2020:260.
2. Altun, C-359/16, EU: C:2018:63.

Corresponding author:
Pauline Melin, Maastricht University, Bouillonstraat 1-3, 6211 LH, Maastricht, 6200 MD, the Netherlands.
E-mail: pauline.melin@maastrichtuniversity.nl
Vueling is an airline company with its registered office in Spain. The airline company operates from Paris-Charles de Gaulle Airport at Roissy, France. Around 75 cabin and flight crew members were posted from Spain to the Paris-Charles de Gaulle Airport, relying on E 101 certificates. The status of the posted workers and the use of E 101 certificates was contested in criminal and civil proceedings against Vueling. Ultimately, Vueling was found guilty of concealed employment in the criminal proceedings before the Court of Appeal in Paris and was ordered to pay a fine. On 17 April 2014, the Spanish issuing institution cancelled the E 101 certificates upon request of the French Union for recovery of social security and family allowance contributions. The case in which questions were referred to the Court of Justice concerned the civil proceedings that ran parallel to the criminal proceedings. The French referring court essentially wanted to know whether Article 11(1)(a) of Regulation 574/72 must be interpreted as allowing that court to disregard the E 101 certificates based on the criminal proceedings where it had been found that those certificates were acquired in an abusive or fraudulent manner.

Whereas the Court agreed with the French referring court that there were significant evidence that the certificates have been fraudulently obtained or relied upon by Vueling, it found that the evidence was not sufficient in itself for the French court to make a definitive finding of the existence of fraud and to disregard the E 101 certificates concerned. Relying on the principle of sincere cooperation under Article 4(3) TEU and the principle of effectiveness of the procedure enshrined in Article 84a(3) of Regulation 1408/71, the Court recalled that the host Member State should not unilaterally declare a fraud and disregard E 101 certificates. Instead, the host Member State should initiate the procedure laid down in Article 84a(3) of Regulation 1408/71 promptly in order to allow the institution that issued the certificates to review its decision and to cancel or withdraw those certificates when appropriate. Recalling the Altun case, the Court reaffirmed that it is only when the host Member State has initiated the procedure under Article 84a(3) and when the issuing institution has failed to review its decision within a reasonable time that the concrete evidence of fraud can lead the host Member State to disregard the certificates. Finally, the Court added that the persons who are alleged to have fraudulently obtained or relied on those certificates should have the opportunity to rebut the evidence, in respect of the right to a fair trial. In conclusion, a court or tribunal of the host Member State can disregard E 101 certificates when two cumulative conditions are found to exist. First, the competent institution of the host Member State has requested that the issuing institution undertake a review of the certificates, and that issuing institution has failed to undertake a review or make an appropriate decision within a reasonable time. Second, there is sufficient evidence for the court or tribunal to find, with due regard to the right to fair trial, that those certificates were obtained fraudulently.

3. Vueling Airlines, C-370/17 and 37/18, EU: C:2020:260, para.61.
4. Ibid, paras. 72 and 81.
5. Ibid, para.72.
6. Ibid, para.77.
7. Ibid, para. 77.
8. Ibid, para. 78.
2. Effects of E 101 and A 1 certificates on obligations under labour law: *Bouygues travaux publics*

The *Bouygues travaux publics* case⁹ is yet another case originating in a French court and about the use of E 101 certificates.

The *Bouygues travaux publics* case is a classical situation of the use of several subcontractors, using ultimately posted workers, in order to carry construction work in France. The employer, Bouygues travaux publics, used a subcontractor who itself asked another subcontractor to carry part of the work. That last subcontractor employed Polish posted workers, using E 101 (under the regime of Regulations 1408/71 and 574/72) and A 1 certificates (under the regime of Regulations 883/2004 and 987/2009). After several complaints about the working conditions, the companies were prosecuted for several offences including the failure to declare the names of employees prior to their engagement, which is required by the French *code du travail*. In that context, the referring court asked whether the effects attached to E 101 and A1 certificates regarding the fact that posted workers remain subject to the law of the Member State from where they are posted extends to an obligation to declare workers prior to their engagement.

The Court answered that E 101 and A1 certificates have binding effects only with regard to the obligations imposed by national legislation in the area of social security.¹⁰ Whereas it was for the national court to determine whether the declaration of the name of the workers prior to their engagement required by French law related to a matter of social security or a matter of labour law, the Court provided some guidance. If the purpose of the declaration is to ensure that the workers are affiliated to one or other branch of the social security scheme, the E 101 and A 1 certificates preclude such an obligation.¹¹ However, if the purpose of the declaration is to ensure compliance with conditions of employment and working conditions imposed by employment law without an influence on the affiliation of the workers to one or other branch of the social security scheme, the E 101 and A 1 certificates have no effect on that obligation.¹²

3. Competent State for the grant of sickness benefit to a non-economically active person: *Pensionsversicherungsanstalt v CW*

In *Pensionsversicherungsanstalt v CW*,¹³ the issue concerned whether a Member State of origin, Austria, had to grant a rehabilitation allowance to a national no longer working or residing there.

Mrs CW is an Austrian national who resided and worked in Austria until 1990. She then moved to Germany where she worked until 2013. In 2015, she applied to the Austrian Pension Insurance Institution for an invalidity pension, or in the alternative, medical rehabilitation measures and a rehabilitation allowance. The Austrian Pension Insurance considered that she was not covered by the Austrian statutory social security scheme and therefore could not claim such benefits from it. With its first question, the referring court asked the Court of Justice whether the rehabilitation allowance had to be classified as a sickness benefit, an invalidity benefit or an unemployment benefit under Regulation 883/2004. The Court recalled that the classification of a benefit under the

---

⁹. *Bouygues travaux publics*, C-17/19, EU: C:2020:379.
¹⁰. Ibid, para.44.
¹¹. Ibid, para.53.
¹². Ibid, para.53.
¹³. *Pensionsversicherungsanstalt*, C-135/19, EU: C:2020:177.
Regulation depends on the risk it intends to cover.\textsuperscript{14} In the case at hand, the rehabilitation allowance was aimed at covering the risk of temporary disability, irrespective of whether the person was pursuing an occupational activity.\textsuperscript{15} Hence, the Court found that such an allowance must be considered as a sickness benefit under Regulation 883/2004.\textsuperscript{16}

With its second question, the referring court wanted to know whether Austria, as a former State of residence and employment, had the obligation to pay the rehabilitation allowance to Mrs CW. The Court found that the situation of Mrs CW, who is not economically active, fell within the scope of Article 11(3)(e) of Regulation 883/2004 so that the competent Member State is the Member State of residence, i.e. Germany.\textsuperscript{17} According to the exclusive effect laid down in Article 11(1) of Regulation 883/2004 whereby the social security legislation of a single Member State is to apply, Austria did not have to grant the rehabilitation allowance to Mrs CW.\textsuperscript{18}

4. Increase in the rate of old-age pension when taking into account an allowance paid by another Member State for raising a disabled child: Caisse d’assurance retraite et de la santé au travail d’Alsace-Moselle v SJ

In Caisse d’assurance retraite et de la santé au travail d’Alsace-Moselle v SJ,\textsuperscript{19} SJ is a French mother of a disabled child. She worked in France and Germany. She received an allowance from Germany in order to help her raise her disabled child. Upon retirement, she was denied an increase in her pension in respect of raising her disabled child by the French authorities as French law requires a permanent disability of at least 80\% in order to benefit from that increase in pension. The referring court asked the Court of Justice whether the German allowance falls within the scope of Regulation 883/2004, and if it does, whether the German allowance and the French provision for the determination of the insurance period providing entitlement to an old-age pension are equivalent within the meaning of Article 5(a) of Regulation 883/2004.

With regard to the first question, two conditions have to be fulfilled for a benefit to fall under Article 3 of Regulation 883/2004. First, the benefit is granted to recipients, without any individual and discretionary assessment of their personal needs, on the basis of a legally defined position. Second, the benefit relates to one of the risks expressly listed in Article 3(1) of the Regulation. As the German allowance is granted on the basis of the individual situation of the disabled child with a discretionary assessment of the competent authority, it cannot be considered as a benefit for the purpose of Article 3 of Regulation 883/2004.\textsuperscript{20} The Court added that the German allowance is neither a special non-contributory cash benefit under Article 70 as it is not listed in Annex X.\textsuperscript{21} That being said, the Court found that the French provision on the increase of contribution periods in case of raising a disabled child for the calculation of an old-age pension does fall within the scope of Regulation 883/2004.\textsuperscript{22} As a result, the Court decided to provide an answer to the

\textsuperscript{14} Ibid, para. 31.
\textsuperscript{15} Ibid, paras. 36-39.
\textsuperscript{16} Ibid, para. 39.
\textsuperscript{17} Ibid, paras. 50-51.
\textsuperscript{18} Ibid, paras. 52-53.
\textsuperscript{19} Caisse d’assurance retraite et de la santé au travail d’Alsace-Moselle v SJ, C-769/18, EU: C:2020:203.
\textsuperscript{20} Ibid, paras. 30-31.
\textsuperscript{21} Ibid, paras. 34-35.
\textsuperscript{22} Ibid, paras. 46-50.
referring court on the basis of Article 5(b) of Regulation 883/2004. The Court held that Article 5(b) of Regulation 883/2004 requires the French authorities to take into account similar facts occurring in Germany, such as the allowance for raising a disabled child, when assessing the permanent incapacity of that disabled child for the purpose of applying the French provision on the determination of the insurance period for the calculation of an old-age pension.23

5. Equal treatment in granting family benefit to a child with whom the frontier worker has no blood relationship: Caisse pour l’avenir des enfants v FV

In case Caisse pour l’avenir des enfants v FV,24 FV stopped receiving family benefit for one of his children with whom he had no blood relationship after a change in Luxembourgish law. FV works in Luxembourg but lives in France with his wife, GW, and their 3 children including HY who was born from GW’s previous marriage. GW, the mother of HY; and FV, the step-father of HY, are the primary carers of HY.25 Following a change in the Luxembourgish law on family benefits, HY was no longer considered as a ‘family member’ of FV given the lack of blood relationship. As a result, FV no longer received family benefits for HY. FV claimed that he should receive family benefits for HY based on equal treatment. Indeed, it seems that children residing in Luxembourg are granted family benefits, whether they are directly related to their carer or not.26 Furthermore, FV claimed that the definition of family member under Article 7(2) of Regulation 492/2011 adopted in the Depesme case27 should apply to his situation. In that context, the referring court asked the Court whether the Luxembourgish family benefits could be considered as a social advantage under Article 45 TFEU and Article 7(2) of Regulation 492/2011. The referring court also asked whether the definition of ‘family member’ under Article 1(i) of Regulation 883/2004, combined with Article 7(2) of Regulation 492/2011 and Article 2(2) of Directive 2004/38, must be interpreted as precluding a national law which permits a frontier worker to receive family benefits only for children with whom they have a direct blood relationship whereas family benefits are granted for all children residing in Luxembourg.

Firstly, the Court found that the Luxembourgish family benefits are to be considered as ‘social advantages’ under Article 7(2) of Regulation 492/2011.28 Additionally, the Court found that it could be classified as a family benefit under Article 3(1)(j) of Regulation 883/2004.29 Concerning the issue of the notion of ‘family member’ under the different instruments, the Court recalled that the notion of ‘family member’ of a frontier worker under Regulation 492/2011 corresponds to the notion of ‘family member’ under Article 2(2) of Directive 2004/38. Under this notion, family members include the registered partner of an EU citizen, the direct descendants of the EU citizen who are aged below 21, and the direct descendants of the partner of the EU citizen who are aged below 21.30 While it is true that Article 1(i) of Regulation 883/2004 provides that

23. Ibid, paras. 53-55.
24. Caisse pour l’avenir des enfants v FV, C-802/18, EU: C:2020:269.
25. The Court specifies that it is up to the national court to verify this fact. Ibid, para. 52.
26. Ibid, para. 55.
27. Depesme, C-401/15-403/15, EU: C:2016:955.
28. Caisse pour l’avenir des enfants v FV, C-802/18, EU: C:2020:269, paras. 25-28.
29. Ibid, paras. 39-40.
30. Ibid, para. 51.
‘family members’ are those defined as such in the national law on family benefits, the Court held
that the national law on family benefits must respect EU law including the provisions on free
movement of workers enshrined in Article 7(2) of Regulation 492/2011 and Article 45 TFEU.31
The Court recalled that family members of a migrant worker can benefit, albeit indirectly, from
the equal treatment provision enshrined in Article 7(2) of Regulation 492/201132 and Article 45
TFEU.33 These provisions apply also to children who are indirectly related to a migrant worker to
the extent that such a migrant worker takes care of those children.34 As for Regulation 883/2004,
the Court referred to Article 67, which provides that a person is entitled to family benefits under
the national legislation, including for the family members residing in another Member State, in the
same way as if they were living in that Member State.35 In the present case, the Court found that the
Luxembourgish law on family benefits created a distinction based on residence which amounted to
an indirect discrimination,36 as none of the justifications put forward by Luxembourg were
satisfactory.37

Declaration of conflicting interests
The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or
publication of this article.

Funding
The author(s) received no financial support for the research, authorship, and/or publication of this article.

ORCID iD
Pauline Melin https://orcid.org/0000-0002-1173-7126

31. Ibid, paras. 68-70.
32. Ibid, para. 49.
33. Ibid, para. 50.
34. Ibid, para. 50.
35. Ibid, para. 65.
36. Ibid, para. 56.
37. Ibid, paras. 59-63.