Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

23 January 2025 *

(Reference for a preliminary ruling – Migrant workers – Social security – Applicable legislation – Posted workers – Documents in the form of A1 certificates allegedly issued by the institution competent to issue those certificates – Regulation (EC) No 883/2004 – Article 76(6) – Obligation of the authorities of the host Member State to initiate a dialogue and conciliation procedure for the purpose of determining whether fraud has occurred)

In Case C-421/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the cour d'appel de Liège (Court of Appeal, Liège, Belgium), made by decision of 25 May 2023, received at the Court on 10 July 2023, in the criminal proceedings against

EX

in the presence of:

Ministère public,

Office national de sécurité sociale (ONSS)

THE COURT (Seventh Chamber),

composed of F. Biltgen, President of the First Chamber, acting as President of the Seventh Chamber, M.L. Arastey Sahún (Rapporteur), President of the Fifth Chamber, and J. Passer, Judge,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Ministère public (Public Prosecution Service, Belgium), by J. Deumer, acting as Agent,

– the Belgian Government, by S. Baeyens, C. Pochet and L. Van den Broeck, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

* Language of the case: French.

– the Portuguese Government, by C. Alves, P. Barros da Costa, A. Pimenta and E. Silveira, acting as Agents,

– the European Commission, by F. Clotuche-Duvieusart and B.-R. Killmann, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 76(6) of Regulation (EC) No 883/2004 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 (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149, p. 4) ('Regulation No 883/2004').

2 The request has been made in criminal proceedings brought against EX for, in particular, committing fraud in relation to social security contributions.

The legal framework

Regulation No 883/2004

3 Article 1(l) of Regulation No 883/2004 defines the term 'legislation', for the purposes of that regulation, as meaning, in respect of each Member State, the laws, regulations and other statutory provisions and all other implementing measures relating to the social security branches referred to in Article 3(1) of that regulation.

4 Article 2 of Regulation No 883/2004 states:

'1. This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.

2. It shall also apply to the survivors of persons who have been subject to the legislation of one or more Member States, irrespective of the nationality of such persons, where their survivors are nationals of a Member State or stateless persons or refugees residing in one of the Member States.'

5 Article 3 of Regulation No 883/2004, entitled 'Matters covered', provides in paragraph 1 that that regulation is to apply to all legislation relating to the social security branches listed therein.

6 Title II of that regulation, entitled 'Determination of the legislation applicable', contains Articles 11 to 16.

7 Article 11 of Regulation No 883/2004 provides:

‘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;

…’

8 Article 12(1) of that regulation reads as follows:

‘A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer’s behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that he/she is not sent to replace another posted person.’

9 Under the terms of Article 72(a) of that regulation, the Administrative Commission for the Coordination of Social Security Systems (‘the Administrative Commission’) is responsible in particular for dealing with any administrative question or question of interpretation arising from the provisions of that regulation or those of its Implementing Regulation.

10 Article 76 of Regulation No 883/2004, entitled ‘Cooperation’, provides:

‘…

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.’

Regulation No 987/2009 (EC)

11 Article 5 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 (OJ 2009 L 284, p. 1), as amended by Regulation No 465/2012 ('Regulation No 987/2009'), entitled 'Legal value of documents and supporting evidence issued in another Member State', provides:

'1. Documents issued by the institution of a Member State and showing the position of a person for the purposes of the application of [Regulation No 883/2004] and of the [present 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.'

12 Article 19(2) of Regulation No 987/2009 reads as follows:

'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 [Regulation No 883/2004] shall provide an attestation that such legislation is applicable and shall indicate, where appropriate, until what date and under what conditions.'

The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

13 EX, a Portuguese contractor, employed, through several companies, 650 workers of Portuguese nationality who were posted to the territory of the Kingdom of Belgium, during the years 2012 to 2017, to work on construction sites in that Member State. Such secondment was effected by means, inter alia, of documents in the form of A1 certificates purportedly issued, under Regulation No 883/2004, by the Portuguese institution competent to issue such certificates, in order to certify, pursuant to Article 19(2) of Regulation No 987/2009, the affiliation of the workers concerned to the Portuguese social security scheme during the period of secondment ('the period at issue').

14 In a judgment dated 10 November 2021, the tribunal de première instance de Namur (Court of First Instance, Namur, Belgium) found EX guilty of several offences, including fraud in relation to social security contributions and the use of false documents.

15 In that context, that court found, first, that the documents in the form of A1 certificates produced by EX were false documents which had not been issued by the Portuguese authorities, which the defendant in the main proceedings did not dispute, secondly, that the companies, set up or managed by the latter, through which the workers concerned were posted to Belgium did not carry out any substantial activity in Portugal in the construction sector and had no purpose other than that of providing cheap labour in Belgium and, thirdly, that the Portuguese institution competent to issue A1 certificates had confirmed that those companies had either not applied for the issue of such certificates or had been refused such issue on the grounds that they had no substantial activities in Portugal in the construction sector.

16 Both the defendant in the main proceedings and the Ministère public (Public Prosecution Service, Belgium) appealed against that judgment to the cour d'appel de Liège (Court of Appeal, Liège, Belgium), which is the referring court.

17 In the context of that appeal, EX, which does not dispute that the documents in the form of A1 certificates which it produced are false documents, as is apparent from the judgment of the tribunal de première instance de Namur (Court of First Instance, Namur) of 10 November 2021, submits that, where there are indications of fraud, which, according to him, would include the case of use of false A1 certificates, the dialogue and conciliation procedure referred to in Article 76(6) of Regulation No 883/2004 is a mandatory prerequisite for establishing the existence of such fraud.

18 The referring court refers to the Court's case-law, arising in particular from the judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309), which enshrines the principle of single legislation applicable to social security cover and the exclusive competence of the issuing institution, where there is evidence of fraud, to assess the validity of A1 certificates which it has issued. Furthermore, that court refers to the judgment of 2 April 2020, *CRPNPAC and Vueling Airlines* (C-370/17 and C-37/18, EU:C:2020:260), from which it would appear that the dialogue and conciliation procedure is a mandatory prerequisite for determining whether the conditions for the existence of fraud have been met.

19 However, that court questions the application of the principles derived from that case-law in circumstances such as those at issue in the main proceedings, in which, first, the tribunal de première instance de Namur (Court of First Instance, Namur) found that the documents in the form of A1 certificates at issue were not issued by the institution referred to in those documents, without that finding being contested in the appeal, and, secondly, that contributions were paid to the Portuguese social security system during the period at issue even though, according to the Ministère public (Public Prosecution Service) and the Office national de sécurité sociale (National Social Security Office, Belgium (ONSS)), the companies through which EX seconded the workers concerned to Belgium had never carried out any substantial activity in Portugal.

20 In those circumstances, the cour d'appel de Liège (Court of Appeal, Liège) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is [Regulation No 883/2004] to be interpreted as applying in a situation where it has been held, without the point being contested by the parties, that, first, the A1 certificates produced are forged according to the judicial authorities of the host [Member] State and, second[ly], the investigations duly carried out by the judicial authorities of that host [Member] State appear to show that the certificates at issue were not issued by the competent authority of the issuing [Member] State, even though social security contributions have been paid to that authority?

(2) If the answer to the previous question is in the affirmative, is the dialogue and conciliation procedure established by Article 76(6) of Regulation No 883/2004 (which reproduces the procedure provided for in Article 84a(3) of [Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ 1971 L 149, p. 2)] an essential prerequisite for determining whether the conditions for the existence of … fraud are met?

(3) If the answers to the previous two questions are in the affirmative, in accordance with the principle of prohibition of fraud and abuse of rights, which is a general principle of EU law which individuals must comply with, may the authorities of the [Member] State in which the employees exercised their activity disregard the abovementioned A1 certificates, including in the absence of recourse to the dialogue and conciliation procedure in the event of suspicion of fraud, where the facts submitted for assessment by them support the conclusion that those certificates were produced as a result of conduct on the part of the employer which a judicial authority of the host [Member] State found to be fraudulent?'

21 On 24 April 2024, the Court of Justice sent a request for information to the referring court asking it to state whether the tribunal de première instance de Namur (Court of First Instance, Namur) had relied on the information concerning cooperation between the competent Belgian and Portuguese institutions contained in the observations lodged by the Belgian and Portuguese Governments in order to find, in particular, that all the documents in the form of A1 certificates produced by the defendant in the main proceedings constituted false documents. Following that request, the referring court sent the Court of Justice a copy of the judgment of 10 November 2021 referred to in paragraph 14 of this judgment.

The questions referred for a preliminary ruling

The first question

22 By its first question, the referring court asks, in essence, whether Regulation No 883/2004 must be interpreted as meaning that, in a situation in which nationals of a Member State employed by a contractor established in that Member State carry out, by means of documents in the form of A1 certificates purportedly issued by the institution of that Member State competent to issue that type of certificate, work on behalf of that contractor in another Member State, in respect of which that institution collects social security contributions, that regulation is to apply even

where, in the course of criminal proceedings brought against that contractor before the courts of the latter Member State for the commission of social security fraud, those courts find, without being contradicted by the same contractor, that those documents are false documents.

23 It should be noted that, in order to rule on the commission of social security fraud, in the context of criminal proceedings brought, in the Member State in which the work is carried out, against a contractor for having fraudulently made use of the posting of workers, a national court hearing those proceedings must determine, in particular, whether the social security legislation of that Member State is applicable to the workers concerned.

24 In that regard, it should be noted that, in accordance with Article 11(1) of Regulation No 883/2004, read in the light of Article 1(l) of that regulation, persons to whom it applies are subject only to the legislation of a single Member State relating to the branches of social security listed in Article 3(1) of that regulation. According to Article 11(1) of Regulation No 883/2004, that legislation is determined in accordance with Title II of that regulation.

25 Consequently, where a person falls within the personal scope of Regulation No 883/2004, as defined in Article 2 thereof, the rule of uniqueness of the applicable national social security legislation, set out in Article 11(1) of that regulation, is in principle relevant (judgment of 8 May 2019, *Inspecteur van de Belastingdienst*, C-631/17, EU:C:2019:381, paragraph 20 and the case-law cited).

26 Having regard to the wording of Article 2 of Regulation No 883/2004, that is clearly the case where nationals of a Member State employed by a contractor established in that Member State carry out work on behalf of that contractor in another Member State, in respect of which the competent social security institution of the first Member State collects social security contributions.

27 Consequently, a national court hearing criminal proceedings against such a contractor for committing social security fraud must apply Regulation No 883/2004.

28 In particular, that court must verify whether the conditions to which Regulation No 883/2004 makes the posting of workers subject, as set out in Article 12(1) of that regulation, have been met, such that the workers concerned would be subject to the social security legislation of the Member State in which the contractor concerned is established, or if, on the contrary, those conditions are not met, such that those workers would, by virtue of Article 11(3)(a) of that regulation, be subject to the social security legislation of the Member State to which that court or tribunal belongs.

29 The existence of documents in the form of A1 certificates allegedly issued, in respect of workers, by the competent institution of the Member State in which the contractor concerned is established, as well as the fact that those documents were considered, by the national court seised at first instance in the criminal proceedings brought against that contractor, to be false documents, without being contradicted by that contractor, in no way affect the applicability of Regulation No 883/2004 in the context of those criminal proceedings.

30 It is sufficient to note that Article 2 of that regulation does not require the possession of an A1 certificate in order to fall within its personal scope.

31 In the light of the foregoing considerations, the answer to the first question is that Regulation No 883/2004 must be interpreted as meaning that, in a situation in which nationals of a Member State employed by a contractor established in that Member State carry out, by means of documents in the form of A1 certificates purporting to be issued by the institution of that Member State competent to issue such certificates, work on behalf of that contractor in another Member State, in respect of which that institution collects social security contributions, that regulation shall also apply where, in the course of criminal proceedings brought against that contractor before the courts of the latter Member State for the commission of social security fraud, those courts find, without being contradicted by the same contractor, that those documents are false documents.

The second question

32 By its second question, the referring court asks, in essence, whether Article 76(6) of Regulation No 883/2004 is to be interpreted as meaning that, in a situation in which nationals of a Member State employed by a contractor established in that Member State carry out, by means of documents in the form of A1 certificates purporting to be issued by the institution of that Member State competent to issue such certificates, work on behalf of that contractor in another Member State, in respect of which that institution collects social security contributions, the dialogue and conciliation procedure referred to in that provision constitutes a compulsory precondition to the establishment, by a court of the latter Member State, seised in criminal proceedings brought against that contractor for having had recourse to the posting of those workers, under cover of false A1 certificates, of such fraud.

33 It should be borne in mind that, as follows from Article 76(6) of Regulation No 883/2004, read in the light of Article 72(a) of that regulation, the dialogue and conciliation procedure constitutes a means introduced by the EU legislature in order to resolve disputes between the competent institutions of the Member States concerned regarding, inter alia, the interpretation or application of that regulation (judgment of 16 November 2023, *Zakład Ubezpieczeń Społecznych Oddział w Toruniu*, C-422/22, EU:C:2023:869, paragraph 41).

34 In particular, the EU legislature has provided, as a first step, for the initiation of a dialogue between the competent institutions of the Member States concerned with a view to reaching an agreement as regards the assessment of the facts relevant to the application of the rules relating to the determination of the national social security legislation applicable to a specific situation and, as a second step, in the event that those institutions are unable to reach an agreement on the assessment of such facts and, consequently, on the determination of the social security scheme applicable to the situation in question, the possibility of referring the matter to the Administrative Commission so that the latter may attempt to reconcile the points of view of those institutions concerning the national legislation applicable to that situation.

35 In that context, Regulation No 987/2009 expressly provides for recourse to the dialogue and conciliation procedure as a means of resolving disputes between the institutions of the Member States concerned regarding the validity of documents drawn up by the institution of a Member State to certify a person's situation for the purposes of the application of Regulations No 883/2004 and No 987/2009 – including the A1 certificate – and the supporting documents relating thereto, or the accuracy of the facts underlying the information contained in those documents and supporting documents, or the determination of the legislation applicable to the workers concerned.

36 With regard, in particular, to disputes concerning the validity of those documents and supporting documents or the accuracy of the facts on which the information contained therein is based, Article 5 of Regulation No 987/2009, after establishing, in paragraph 1, the binding nature of such documents and supporting documents vis-à-vis the institutions of the other Member States and the exclusive competence of the issuing institution to assess their validity and accuracy, provides, in paragraphs 2 to 4, for recourse to the dialogue and conciliation procedure for the resolution of disputes between the institution of the Member State receiving the same documents and supporting evidence and the institution issuing them.

37 In that regard, the Court stated, first, that an A1 certificate issued by the competent institution of a Member State is binding not only on the institutions of the Member State in which the activity is pursued but also on the courts of that Member State and, secondly, that the dialogue and conciliation procedure referred to in Article 76(6) of Regulation No 883/2004 must be observed by the institutions of the Member States called upon to apply Regulations No 883/2004 and No 987/2009 where there are disputes between the institutions of the Member States concerned as to the validity or accuracy of such a certificate (judgment of 2 March 2023, *DRV Intertrans and Verbraeken J. en Zonen*, C-410/21 and C-661/21, EU:C:2023:138, paragraphs 45 and 52 and the case-law cited).

38 Thus, as regards, in particular, a situation involving the posting of workers in which the competent institution of the Member State in which the work was carried out had concrete evidence to suggest that the E 101 certificates – which had been replaced by A1 certificates – issued by the competent institution of another Member State in respect of the workers concerned had been obtained or relied on fraudulently, the Court noted that, in the context of suspected fraud, the implementation of that dialogue and conciliation procedure, prior to any definitive finding of fraud by the competent authorities of the host Member State, is of particular importance. According to the Court, that procedure is such as to enable the competent institution of the issuing Member State and that of the host Member State to enter into dialogue and to collaborate closely in order to verify and gather, by making use of the investigative powers available to them respectively under their national law, any relevant factual or legal element capable of dispelling or, on the contrary, confirming the reality of the doubts expressed by the competent institution of the host Member State concerning the circumstances surrounding the issue of the certificates in question (see, with regard to Regulation No 1408/71, judgment of 2 April 2020, *CRPNPAC and Vueling Airlines*, C-370/17 and C-37/18, EU:C:2020:260, paragraph 66).

39 The Court thus held that the presence of concrete evidence suggesting that E 101 certificates have been obtained or relied on fraudulently must lead the competent institution of the host Member State not to make a unilateral finding of fraud and to disregard those certificates but to initiate promptly the dialogue and conciliation procedure so that the institution issuing those certificates, having been approached by the institution of the host Member State, may undertake, within a reasonable period, in accordance with the principle of sincere cooperation, a review of the grounds for the issue of those certificates in the light of that evidence and, where appropriate, decide to cancel or withdraw those certificates (see, with regard to Regulation No 1408/71, judgment of 2 April 2020, *CRPNPAC and Vueling Airlines*, C-370/17 and C-37/18, EU:C:2020:260, paragraph 72 and the case-law cited).

40 In accordance with that case-law, a court or tribunal of the host Member State seised in criminal proceedings brought against an employer in respect of facts capable of revealing that A1 certificates were obtained or used fraudulently may give a final ruling on the existence of such

fraud and disregard those certificates only if it finds, after having, in so far as necessary, suspended the judicial proceedings under its national law, that, the dialogue and conciliation procedure having been initiated promptly, the institution that issued those certificates has failed to undertake a review of those certificates and to adopt a decision, within a reasonable time, on the evidence submitted to it by the competent institution of the host Member State, cancelling or withdrawing those certificates, as appropriate (judgment of 2 March 2023, *DRV Intertrans and Verbraeken J. en Zonen*, C-410/21 and C-661/21, EU:C:2023:138, paragraph 61 and the case-law cited).

41 The Court has also held that the dialogue and conciliation procedure is an essential prerequisite for determining whether the conditions for the existence of fraud have been met and, consequently, for drawing any useful conclusions as regards the validity of the A1 certificates at issue and the social security legislation applicable to the workers concerned, so that a court of the host Member State hearing such criminal proceedings cannot disregard that dialogue and conciliation procedure (see, to that effect, judgment of 2 March 2023, *DRV Intertrans and Verbraeken J. en Zonen*, C-410/21 and C-661/21, EU:C:2023:138, paragraphs 60 and 62 and the case-law cited).

42 Admittedly, the case-law referred to in paragraphs 38 to 41 of this judgment was given in the context of cases in which the E 101 or A1 certificates at issue had been issued by the competent institution of a Member State, so that the institution or court of the host Member State had doubts not as to the authenticity of those certificates but as to their validity in the light of the factors on the basis of which they had been issued (see, to that effect, judgment of 27 April 2017, *A-Rosa Flussschiff*, C-620/15, EU:C:2017:309, paragraph 49 and the case-law cited).

43 However, there is nothing in the wording of Article 5 of Regulation No 987/2009 or in that of any other provision of that regulation to suggest that the EU legislature intended to exclude from disputes concerning the validity of A1 certificates, as referred to in Article 5, those concerning their authenticity, so that, as regards such disputes, the dialogue and conciliation procedure does not constitute an obligatory precondition which must be complied with by the institutions and courts of the Member States raising doubts as to the authenticity of such certificates with a view to setting them aside.

44 Such an exclusion would, moreover, be inconsistent with the binding effect attached to A1 certificates and would undermine the principles underlying both the Court's case-law relating to such effect and Regulations No 883/2004 and No 987/2009, namely, as is apparent from the judgment of 2 March 2023, *DRV Intertrans and Verbraeken J. en Zonen* (C-410/21 and C-661/21, EU:C:2023:138, paragraph 54 and the case-law cited), the principles of unity of the applicable national social security legislation, cooperation in good faith and legal certainty.

45 Consequently, the case-law referred to in paragraphs 38 to 41 of this judgment is also applicable to the case of suspected use of false A1 certificates with the aim of evading the conditions to which Regulations No 883/2004 and No 987/2009 make the posting of workers subject.

46 That being so, it should be made clear, first, that where, in the context of the dialogue and conciliation procedure referred to in Article 76(6) of Regulation No 883/2004, the institution which allegedly issued the documents in the form of A1 certificates, the authenticity of which is in dispute, confirms that it did not issue them and that, consequently, they constitute false

documents, those documents cannot therefore be regarded as A1 certificates or, consequently, as having the effects peculiar to such certificates, which include the binding effect vis-à-vis the institutions and courts of the host Member State.

47 It follows that, where a court of the Member State in which the work is carried out, seised in the context of criminal proceedings brought against a contractor suspected of having posted workers to that Member State by means of false documents in the form of A1 certificates, finds that the institution which allegedly issued those documents has, in the context of that dialogue and conciliation procedure, confirmed that it did not issue them, that court may find that they are false documents and that it is not bound by the particulars contained therein.

48 Secondly, it should be pointed out that, where, as in the present case, it is established that the institution which allegedly issued the documents in the form of A1 certificates produced by the contractor concerned collected social security contributions in respect of the work carried out by the workers allegedly posted, that court cannot give a final ruling on the existence of the fraudulent posting of those workers without first verifying that that dialogue and conciliation procedure has been complied with as regards not only the authenticity of those documents but also the determination of the social security legislation which should have been applied to the workers concerned during the period of the alleged posting.

49 Given that the dialogue and conciliation procedure referred to in Article 76(6) of Regulation No 883/2004 was established by the EU legislature in order to resolve any dispute concerning the interpretation and application of Regulation No 883/2004, including, in particular, disputes relating to the determination of the legislation applicable to workers falling within the scope of that regulation, a court of the host Member State seised in the context of criminal proceedings, such as those at issue in the main proceedings, which considers that there are grounds for considering that the conditions to which the posting of workers is subject have not been met, thus calling into question the submission of the workers concerned to the social security scheme of the institution which has collected social security contributions for the work carried out by them, cannot unilaterally establish the existence of such fraudulent secondment, without initiating the dialogue and conciliation procedure with that institution for the purposes of consultation on the social security legislation applicable to those workers.

50 Any other interpretation would, moreover, be contrary to the principles of the application of the legislation of a single Member State, sincere cooperation and legal certainty underlying Regulations No 883/2004 and No 987/2009.

51 Accordingly, the case-law referred to in paragraphs 38 to 41 of this judgment must also be regarded as applying *mutatis mutandis* where an institution or a court of the Member State in which the work is carried out questions whether the workers concerned are subject to the social security legislation of the institution of the Member State which has collected social security contributions in respect of the work carried out by those workers.

52 It follows from the foregoing that a court or tribunal of the host Member State, seised in the context of criminal proceedings brought against an employer suspected of having had recourse to the posting of workers by means of false documents in the form of A1 certificates, may rule on the authenticity of those documents and set them aside only if, first, it finds, after having, in so far as necessary, suspended the judicial proceedings under its national law, that the institution alleged to have issued them has, in the context of the dialogue and conciliation procedure initiated by the institution of the host Member State, confirmed that it did not issue those documents or that, the

dialogue and conciliation procedure having been promptly initiated, the institution allegedly issuing the documents refrained from taking a position, within a reasonable period of time, on the authenticity of the same documents, and, secondly, whether the guarantees inherent in the right to a fair hearing which must be afforded to the contractor concerned are respected (see, to that effect, judgment of 2 March 2023, *DRV Intertrans and Verbraeken J. en Zonen*, C-410/21 and C-661/21, EU:C:2023:138, paragraphs 61, 66 and 67 and the case-law cited).

53 Furthermore, where it is established that the institution which allegedly issued the documents in the form of A1 certificates has collected social security contributions in respect of the work carried out by the workers allegedly posted, the national court may find that there has been fraudulent posting of workers only if, first, in the context of the dialogue and conciliation procedure initiated between the institutions concerned, the institution which collected the social security contributions has confirmed that the social security legislation which should have been applied to the workers concerned is that of the host Member State, or that that institution has refrained, within a reasonable period of time, from reviewing, taking into account the evidence put forward by the institution of the host Member State and having regard to the actual situation of those workers, the facts on the basis of which it made them subject to its social security scheme and from taking a position on the national social security legislation applicable to those workers, and, secondly, the guarantees inherent in the right to a fair hearing which must be afforded to the contractor concerned are respected.

54 Finally, it should be added that the EU legislature has not provided for any particular form to be followed by the institutions concerned in order to initiate dialogue or to refer matters to the Administrative Commission in order to resolve their disputes concerning the interpretation or application of Regulations No 883/2004 and No 987/2009.

55 Article 76(6) of Regulation No 883/2004 merely states that 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 and that, failing a solution within a reasonable period, the authorities concerned 'may call on the Administrative Commission to intervene'.

56 Regulation No 987/2009 does not contain any further details in that regard.

57 As regards, in particular, the dialogue route, which corresponds to the first stage of the dialogue and conciliation procedure referred to in Article 76(6) of Regulation No 883/2004, it is necessary to consider, as is apparent from point 6 of Decision No A1 of the Administrative Commission, 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), that it is sufficient for the institution which has doubts concerning the validity of an A1 certificate or the determination of the legislation applicable to a given worker to contact the institution which issued such a certificate and/or which decided to apply its social security scheme to such a worker in order to ask it for the necessary clarifications concerning its decision to make that worker subject to that scheme and, possibly, to withdraw or declare invalid that certificate or to review or annul that decision, in order to consider that such a procedure has been initiated.

58 In the present case, it is apparent from the request for a preliminary ruling, the information provided by the referring court at the request of the Court of Justice and the observations of the interested parties that, before the criminal proceedings against EX were brought, the competent

Belgian and Portuguese institutions initiated a dialogue concerning the authenticity of the documents in the form of A1 certificates produced by EX and the assessment of the facts underlying those documents. In the course of that dialogue, the Portuguese institution confirmed, as the tribunal de première instance de Namur (Court of First Instance, Namur) found in its judgment of 10 November 2021, that it had not issued those documents, which EX did not contest either before that court or before the referring court.

59 It thus appears that, as regards the authenticity of those documents, the dialogue and conciliation procedure referred to in Article 76(6) of Regulation No 883/2004 was complied with.

60 Accordingly, having regard to the considerations set out in paragraph 47 of this judgment, the tribunal de première instance de Namur (Court of First Instance, Namur), was entitled to find that the documents at issue in the main proceedings constituted false documents and that it was not bound by them.

61 Furthermore, it is apparent from the observations of the Portuguese Government that, in the context of the dialogue between the competent Belgian and Portuguese institutions, the Portuguese institution found, first, that the companies through which the defendant in the main proceedings posted the workers concerned by means of documents in the form of A1 certificates did not carry out any substantial activity in Portugal in the construction sector and had no purpose other than that of providing cheap labour in Belgium, which was confirmed by the tribunal de première instance de Namur (Court of First Instance, Namur) in its judgment of 10 November 2021, and, secondly, that the legislation that should have been applied to the workers concerned during the period at issue was Belgian legislation.

62 Accordingly, it appears, subject to the verifications which it is for the referring court to carry out, that that dialogue and conciliation procedure between the institutions concerned was also complied with as regards the determination of the national social security legislation which should have been applied to the workers concerned during the period at issue.

63 In the light of the foregoing considerations, the answer to the second question is that Article 76(6) of Regulation No 883/2004 must be interpreted as meaning that, in a situation in which nationals of a Member State employed by a contractor established in that Member State carry out, by means of documents in the form of A1 certificates purportedly issued by the institution of that Member State competent to issue that type of certificate, work on behalf of that contractor in another Member State, in respect of which that institution collects social security contributions, the dialogue and conciliation procedure referred to in that provision constitutes a compulsory precondition for a finding, by a court of the latter Member State, seised in the context of criminal proceedings brought against that contractor for having fraudulently made use of the posting of those workers, under cover of false A1 certificates, of such fraud.

The third question

64 By its third question, the referring court asks, in essence, whether the principle of the prohibition on fraud and abuse of rights must be interpreted as meaning that, where, in the context of criminal proceedings brought before the courts of a Member State against a contractor suspected of having posted workers to that State by means of documents in the form of A1 certificates, the tribunal de première instance de Namur (Court of First Instance, Namur) has found that those documents constitute false documents and that that finding has not been challenged before the court hearing the appeal, the latter court may refrain from taking those documents into account even

though such a finding was made by the tribunal de première instance de Namur (Court of First Instance, Namur) without the dialogue and conciliation procedure referred to in Article 76(6) of Regulation No 883/2004 having been initiated.

65 In that regard, it is important to note that it is for the national court alone which is seised of the main proceedings to assess the need for a preliminary ruling and the relevance of the questions which it puts to the Court, which are presumed to be relevant. Thus, the Court is, in principle, obliged to give a ruling where the question referred concerns the interpretation or validity of a rule of EU law, unless it is quite obvious that the interpretation sought bears no relation to the actual facts of the main proceedings or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to that question (judgment of 22 February 2024, *Unedic*, C-125/23, EU:C:2024:163, paragraph 35 and the case-law cited).

66 In the present case, it should be noted that the third question, which relates exclusively to the finding that the documents in the form of A1 certificates at issue in the main proceedings constitute false documents, made by the tribunal de première instance de Namur (Court of First Instance, Namur) in the context of criminal proceedings such as those at issue in the main proceedings, is based on the premiss that that finding was made by that court without that dialogue and conciliation procedure having been initiated.

67 As noted in paragraphs 58 and 59 of this judgment, on the basis in particular of the information provided by the referring court, it appears that, in the present case, the dialogue and conciliation procedure relating to the authenticity of those documents was complied with.

68 Since the third question is thus of a hypothetical nature, it must be regarded as inadmissible.

Costs

69 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Seventh Chamber) hereby rules:

1. **Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 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 in a situation in which nationals of a Member State employed by a contractor established in that Member State carry out, by means of documents in the form of A1 certificates purportedly issued by the institution of that Member State competent to issue that type of certificate, work on behalf of that contractor in another Member State, in respect of which that institution collects social security contributions, that regulation is to apply even where, in the course of criminal proceedings brought against that contractor before the courts of the latter Member State for the commission of social security fraud, those courts find, without being contradicted by the same contractor, that those documents are false documents.

2. Article 76(6) of Regulation No 883/2004, as amended by Regulation No 465/2012,

must be interpreted as meaning that in a situation in which nationals of a Member State employed by a contractor established in that Member State carry out, by means of documents in the form of A1 certificates purportedly issued by the institution of that Member State competent to issue that type of certificate, work on behalf of that contractor in another Member State, in respect of which that institution collects social security contributions, the dialogue and conciliation procedure referred to in that provision constitutes a compulsory precondition for a finding, by a court of the latter Member State, seised in the context of criminal proceedings brought against that contractor for having fraudulently made use of the posting of those workers, under cover of false A1 certificates, of such fraud.

[Signatures]