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Flying around social security[1]

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Abstract

INAIL and INPS is a decision about social security and insurance contributions. The case was brought against Ryanair, alleging that contributions were owed to the relevant Italian authorities where the documentation (an E101 certificate, now an A1 form) had not been properly completed by the employing airline. Aircrew personnel were employed under Irish employment contracts, but resided in Italy. Other than 45 minutes per day in the crew room at the airport in Bergamo, these staff were on board an aircraft registered in Ireland.

Keywords

Social security, low-cost airlines, E101/A1 forms, aviation personnel contracts, self-employment, jurisdiction

Case: Judgment of 19 May 2022, *INAIL and INPS*, C-33/21, EU:C:2022:402.

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I. Flight personnel working from Italy on Irish employment contracts

The Court's decision[2] in *INAIL and INPS*[3] considered the complicated issue of social security and insurance in the EU aviation sector where pilots, hostesses, and stewards carried out their work in two or more EU Member States. The disputes concerned social security contributions made between June 2006 and February 2010, as well as insurance premiums paid between January 2008 and January 2013. Social security payments for these Ryanair personnel based in Italy were made to Irish authorities, as opposed to those in Italy. The matter was a long-standing one, dating back to 2012 when Italian authorities alleged that Ryanair avoided paying €12 million to the Italian authorities from 2010.

The case centred around 219 aircrew whose work was itinerant: they spent about 45 minutes each day in the crew room Ryanair operated inside the Orio al Serio airport in the Province of Bergamo, and the rest of the time in the Irish-registered airplane. Ryanair considered these individuals to be subject to Irish social security. They had been hired under Irish contracts as self-employed individuals, but without an E101 social security certificate.[4] The Court ruled these employees should have been subject to Italian social security and insurance legislation.

INAIL and INPS demonstrates the complexity of the aviation industry, which in Italy is complicated (more than other jobs falling under so-called 'mobile work')[5] by multiple national and international sources, as well as by specific requirements to balance the protection of workers and the public interest in the safety and regularity of navigation.[6] The sector is, additionally, notoriously affected by issues of gender equality,[7] with a sharp contrast between the duties of female and

2. This is the interpretation provided by the Court of Justice of Article 14(2)(a)(i) 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, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996. Regulation 1408/71 was subsequently repealed and replaced by Regulation (EC) No 631/2004 of the European Parliament and of the Council of 6 December 2004 631/2004 of the European Parliament and of the Council of 31 March 2004, Articles 13(1)(a) and 87(8) 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, as amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009 and, subsequently, by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012, as well as Article 11(5) of Regulation No 883/2004, as amended by Regulation No 465/2012.
3. ECLI:EU:C:2022:402 (Seventh Chamber).
4. The E101 (now A1) is an EU and EFTA certificate, which is issued pursuant to Article 14(1)(a) of EEC Council Regulation 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 European Union. With this certificate, the employed or self-employed person can prove that he or she is affiliated to the social security system of a particular EU or EFTA Member State.
5. According to Dir. 2000/34/EC, a mobile worker is 'any worker employed as a member of travelling or flying personnel by an undertaking which operates transport services for passengers or goods by road, air or inland waterway'.
6. L. GIASANTI, *Collegato lavoro, legge Fornero e lavoro nautico*, in *Riv. giur. econ. trasp*., 2012, X, 291 ss., parla di 'specialità aggravata' contrapposta a 'specialità attenuata' del diritto dei trasporti; A. VALLEBONA, *Breviario di Diritto del lavoro,* 2015, Torino, 456 ss.; M. ESPOSITO - L. GAETA - R. SANTUCCI - A. ZOPPOLI - I. ZOPPOLI, *Istituzioni di diritto del lavoro e sindacale*, III, *Mercato, contratto e rapporto di lavoro*, Torino, 2015.
7. See ILO, *Civil aviation and its changing world of work* (GDFCAI/2013), Geneva, 2013, https://www.ilo.org/wcmsp5/groups/public/—ed_dialogue/—sector/documents/meetingdocument/wcms_201282.pdf ; *When decent work take flight: safe work in airports as an example of making decent work a local reality*, 2007, in www.ilo.org; M. TURNBULL, *Promoting the employment of women in the transport sector- Obstacles and policy options*, ILO, *Sectoral Activities Department*, Ginevra, 2013; A. J. MILLS, *Cockpits - Hangers, Boys and Galleys: Corporate masculinities and the development of British Airways, Gender, Work and Organization*, 1998, 5(3), 172; D. CHAN, *Beyond Singapore Girl: grand and product/service differentiation strategies in the new millennium*, in *Journal of Management development*, 2000, 19(6), 456; G. WILLIAMS, *Sky service: the demands of emotional labour in the airline industry*. *Gender*, *Work and Organization*, 2003, 10(5), 523.

male personnel, as well as the phenomenon of so-called 'cabin crew jobs'. Moreover, it is a sector where technological development and the quest to increase the profitability of companies has led to very rapid and unprecedented changes in just a few years,[8] thereby aggravating the difficulties of the legal systems, including the identification of the applicable regulatory framework.

The subject matter of *INAIL and INPS* draws attention to the business model of low-cost airlines. As one of the main ways in which operation costs are lowered, as compared to so-called legacy airlines, these carriers contract out of costs related to employment relationships by classifying individuals (such as pilots and cabin crew) as self-employed contractors. *INAIL and INPS* deals with another aspect of controlling operation costs. It centres on social security payments, specifically questioning the legitimacy of social security payments Ryanair made to Irish authorities for the employees in question, where contributions are lower than they are in Italy.[9]

This discussion contains extended elaboration of the case within the social security context due to the complicated facts and regulations. Nevertheless, the decision points out some of the considerations for EU-wide industries, particularly the employment and social security factors. It should be noted that E101 certificates were originally devised for posted workers or cross-border workers (who live and work in separate countries, but return to their residence daily or weekly).[10]

II. Social security for airline employees

Different regulations applied to different periods over the course of this case. Regulation No. 1408/71 was in effect until 1 May 2010, when it was repealed and replaced by Regulation (EC) No. 883/2004. This 2004 Regulation was amended by the European Parliament on 16 September 2009. It was again amended by Regulation (EU) No.465/2012, which came into force on 28 June 2012.

An E101 certificate issued by the relevant Irish authority meant that the Ryanair employees would be subject to Irish social security legislation. Since the referring court found that the E101 certificates did not cover all the Ryanair employees in question, the question remained as to what social security legislation applied (Irish or Italian) to the Ryanair employees falling outside the scope of application of the E101 certificates. The relevant law during each period of time[11] suggested that two conditions were to be met: i) the airline had a branch office in a Member State other than the one in which it had a registered office; and ii) the employee in question was employed by that entity.[12] Regarding the first condition, a branch office must be a 'form of secondary establishment, with an appearance of stability and continuity … and having … a certain autonomy in relation to the main establishment'.[13] As regards the second condition, it was noted that the work relationship 'has a significant connection with the place from which they principally discharge their

8. The survey conducted by Eurostat ('Young air transport workers impact by COVID crisis' (10 August 2022) https://ec.europa.eu/eurostat/en/web/products-eurostat-news/-/ddn-20220810-1) reveals that the 325,600 employees in the EU aviation sector surveyed in the first quarter of 2022 represent the lowest number recorded in the last 14 years. The position mainly concerns workers aged between 15 and 39, which fell from 204,400 in Q1 2008 to 121,400 in Q1 2022, i.e., 83,000 fewer.
9. According to the OECD, as a percentage of taxation, there is a difference of about 15% between these two countries: OECD, 'Social Security Contributions' https://data.oecd.org/tax/social-security-contributions.htm.
10. See the elaboration in the European Union hosted site 'FAQs – Standard forms for social security rights' https://europa.eu/youreurope/citizens/work/unemployment-and-benefits/social-security-forms/faq/index_en.htm
11. EU Regulation No.1408/71 and EU Regulation 883/2004 (in its two versions).
12. *Vueling Airlines*, C-370/17 and C-37/18, EU:C:2020:260, para. 55.
13. *Ibid*, para. 56.

obligations to their employer.'[14] This would be these employees' 'home base'.[15] Regulation No. 465/2012 provided a new definition of a home base[16]: 'the location nominated by the operator to the crew member from where the crew member normally starts and ends a duty period, or a series of duty periods, and where, under normal conditions, the operator is not responsible for the accommodation of the crew member concerned.'

In the light of the foregoing, it would seem permissible to interpret the law in such a way that, for the purposes of identifying the applicable social security rules, the place (and thus the law of the Member State) where the base of service is located (the airport) must take precedence over the place from which the work originates (the aircraft). However, Italian first instance case law[17] adopted the opposite approach, according to which the mere presence of a crew room area would not in itself justify the application of the social security protection of the country hosting the crew room, as it would not constitute a branch or permanent representation of the employer. For a social security obligation to arise, it would be necessary for the crew room to be characterised by such autonomy and relevance as to make it an actual operational centre where the employment relationship is managed.

III. The previous instances of judgment

Despite the fact that Italian case law does not deem the work activity carried out in the crew room relevant for social security purposes, the Italian National Social Security Institute (INPS) and the National Institute for Insurance against Occupational Injuries (INAIL) first brought proceedings before the Italian national courts and then before the Court of Justice, claiming that Ryanair's employees were obliged to be insured by these bodies.

In the first two instances in Italian courts, the claims of INPS and INAIL were rejected, as Ryanair's employees were held to be subject exclusively to Irish legislation. Although filed late, the E101 certificates were considered binding.

However, the Brescia Court of Appeal found that the certificates were not numbered and had no comprehensible classification. The employer had filed 321 certificates and, despite this, not all individuals (219) were covered for the entire duration of the periods concerned. Consequently, the Court of Appeal determined the applicable social security legislation under Regulation No. 1408/71 for the non-covered workers. For the purposes of that determination, the Court found that the 219 Ryanair employees assigned to Orio al Serio airport were employed under an Irish employment contract, managed in practice by instructions from Ireland, that they worked for a period of 45 minutes each day in Italian territory and that, for the remaining working time, they were on board Irish-registered aircraft. On the basis of that information, it held that Ryanair did not have a branch or permanent representation on Italian territory and ruled that, by virtue of Regulation No 1408/71, Italian social security legislation was not applicable.

As regards the period after the applicability of Regulation No. 1408/71, the appeal court held that it did not have the factual elements necessary to apply the criteria laid down in Regulations No. 883/

14. *Ibid,* para. 57.
15. *Ibid.*
16. Pursuant to Article 11 of Regulation (EC) No. 883 of 2004, as amended by Regulation No. 465 of 2012, an activity performed by flight and cabin crews engaged in air passenger or freight transport services shall be deemed to be an activity pursued in the Member State in which the base of employment is located.
17. See Trib. Velletri 3 December 2013; and Trib. Velletri 19 February 2015; Trib. Pisa 25 September 2014; Trib. Rome 18 June 2015; Trib. Bologna 24 September 2015; Trib. Bergamo 23 March 2016, no. 237.

2004 and No. 987/2009 and that, in any event, the new connecting factor relating to the 'basis of service' laid down in Regulation No. 883/2004, as amended in 2012, was not applicable *ratione temporis*.

INPS and INAIL appealed against this ruling to the Court of Cassation, which, in turn, referred the matter to the European Court of Justice (while recognising the binding nature of the social security certificates filed at first instance by Ryanair), raising the query as to which social security legislation was applicable, under Regulation 1408/71 and Regulation No 883/2004 (as amended), to the 219 Ryanair personnel without an E101 certificate.

IV. The decision of the Court of Justice

The Court of Justice found the questions raised concerned the interpretation of European Union law, on which the Court is in principle bound to rule.[18] Second, on the basis of the principle, almost granitic in Community case law, the Court ruled that questions concerning the interpretation of European Union law, raised by the national court in the legal and factual context which it identifies on its own responsibility (the accuracy of which it is not for the Court to verify), are presumed to be relevant to the Court itself. In this case, the Italian court had examined the E101 certificates produced by Ryanair and had verified the lack of coverage of all of Ryanair's 219 personnel assigned to Orio al Serio airport for the entire period considered, and therefore the claim was admissible.

Referring to the substance of the question and to Regulation No.1408/71, the Italian court inquired whether the social security legislation applicable in the cases in the main proceedings should be determined by application of Article 14(2)(a)(i) or Article 14(2)(a)(ii) of that regulation. The Court of Justice observed that these provisions, which constitute a derogation from the principle laid down in Article 14(2)(a) of Regulation No. 1408/71,[19] provided for separate and mutually exclusive rules. Where the relevant social security legislation cannot be determined by virtue of Article 14(2)(a)(i) of the regulation, Article 14(2)(a)(ii) of the regulation applies. The Seventh Chamber Court found that Article 14(2)(a)(i) of Regulation No. 1408/71 was applicable here.

Consequently, for this rule to apply, both the conditions of (1) the airline having a branch or permanent representation in a Member State other than the State where the airline has its head office and (2) the personnel being employed by that entity must be fulfilled. As regards the configurability of 'branch' and 'permanent representation', in the absence of a definition in the regulation, the Court used previous case law[20] for the purposes of the decision. For the purposes of determining the place of work, the Court must take into account the place where the workers carry out the missions, the place to which they return at the end of the missions, the place where the working tools are located and the place where the workers organise and receive instructions. In other words, the Court must take into account every element of the work activity that makes it possible to establish in which Member State the workers are actually located when carrying out their activity.

18. Cort. Just. of 12 October 2016, Ranks and Vasiļevičs, C 166/15, EU:C:2016:762, paragraph 21; Cort. Just. of 8 July 2021, Staatsanwaltschaft Köln and Bundesamt für Güterverkehr, C 937/19, EU:C:2021:555, paragraph 23.
19. According to which a person who is a member of the travelling or flying personnel of a company which, for hire or reward or on its own account, operates international carriage of passengers or goods by rail, road, air or inland waterway and has its registered office in the territory of a Member State, shall be subject to the legislation of the latter State.
20. Cort. Giust. of 27 February 2002, Weber, C-37/00, EU:C:2002:122, par. 49; Cort. Just. of 27 February 2002, Weber, C-37/00, EU:C:2002:122, paragraph 53; Cort. Just. of 12 September 2013, Schlecker, C-64/12, EU:C:2013:551, paragraph 38.

The Seventh Chamber Court ruled that the premises at the Orio al Serio airport constituted a 'branch' of Ryanair in Italy for the purposes of determining the applicable social security legislation. These premises were used to manage and organise staff shifts. They were also equipped with PCs, telephones and all that was necessary for the organisation of activities, including the archive of documentation, and the equipment necessary to control entry and exit times. Additionally, the supervisor of staff worked from this Bergamo location.

The Seventh Chamber Court also ruled on Regulation No. 883/2004, which repealed Regulation No 1408/71. Unlike the 1971 regulation, the 2004 Regulation provides that a person who normally pursues an activity as an employed person in two or more Member States shall be subject to the legislation of the Member State of residence if he/she pursues a substantial part of his/her activity in that Member State (Article 13). In order to define the 'substantial part' of the activity, working hours and remuneration are taken into account. The Court pointed out that Regulation No 883/2004 was amended in 2012 (Regulation No.465/2012), with the introduction of a new conflict rule (in Article 11) under which the activity of a flight crew member or cabin crew member providing services for the carriage of passengers or goods is deemed to be an activity pursued in the Member State in which the home base as defined as the place designated by the operator for the crew member, where the crew member normally begins and ends a period of service or a series of periods of service and where, in normal circumstances, the operator is not required to accommodate that crew member. The Seventh Chamber Court determined that Orio al Serio airport was such a home base for these employees because they 'started and completed their day there and had to reside within one hour of those premises' for the period 28 June 2012 to 25 January 2013.[21]

In the light of the new rules and in order to guarantee social security protection for all workers, the Seventh Chamber Court ruled that the social security legislation applicable to the crew in question, not covered by E101 certificates and working for a period of 45 minutes per day in a crew room available to that airline on Italian territory, was Italian law.[22]

V. Conclusion

INAIL and INPS reveals a business strategy that has more often been seen in the area of corporate tax. Here, the difference is social security payments. Ireland remains the common link.[23] In both examples, an argument is made that money has been improperly withheld from the state - funds which could be used for the benefit of residents. Conversely, the purported benefit of the jobs related to the reduced payments has been used to justify the tax policy. For social security, the situation is less clear. The Ryanair personnel in question pay into the Irish social security system, but they do not necessarily derive the full suite of benefits since they reside in Italy. Many questions arise as a result, including: are these Ryanair personnel disadvantaged if they do not pay into their country of residence social security system; and is Ireland deriving a benefit from its support of Ryanair (bearing in that Ireland supported Ryanair in this litigation)? It is not suggested that Ryanair is acting unlawfully. Instead, the present discussion considers the social security

21. *Vueling Airlines*, para.71.
22. *Ibid,* para. 72.
23. Consider the on-going litigation regarding Apple and its Irish taxes: https://www.reuters.com/technology/eu-seeks-top-court-backing-14-billion-tax-fight-against-apple-2023-05-23/#:~:text=The%20European%20Commission%20in%20a,had%20enjoyed%20an%20unfair%20advantage.

implications of this work arrangement, a matter of greater importance at this time of an increased cost of living within EU Member States.

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