The legal nature of the certificate A1 on the determination of applicable legislation under EU Regulation No 883/2004 in the light of the Polish national law

Charakter prawny zaświadczenia A1 o ustaleniu właściwego ustawodawstwa na gruncie rozporządzenia UE nr 883/2004 w świetle polskiego prawa krajowego

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Summary: *This research concerns the assessment of the legal nature of A1 document issued on the basis of EU Regulation No. 883/2004. The author proposes to recognize that this document performs the function of an administrative decision from the functional side, while not having to meet the formal conditions provided for in the decision in the Polish provisions on administrative proceedings.*
Key words: *coordination of social security systems, international social insurance law, certificate A1, the Polish Social Insurance Institution*

Streszczenie: *Analiza przeprowadzona w tekście dotyczy oceny charakteru prawnego dokumentu A1 wydawanego na podstawie rozporządzenia UE nr 883/2004. Autor proponuje uznać, że dokument ten pełni funkcję decyzji administracyjnej od strony funkcjonalnej, przy jednoczesnym braku konieczności spełnienia warunków formalnych przewidzianych dla decyzji w polskich przepisach o postępowaniu administracyjnym.*
Słowa kluczowe: *koordynacja systemów zabezpieczenia społecznego, międzynarodowe prawo ubezpieczeń społecznych, dokument A1, Zakład Ubezpieczeń Społecznych*

Legal basis and function of the certificate A1

In this publication I will examine the issue of the legal nature of the A1 certificate on the determination of applicable legislation on the basis of EU regulations on the coordination of social security systems in the context of the case law of the Polish Supreme Court.

These are EU regulations: Regulation No 883/2004 – Regulation (EC) No 883/2004 of the European Parliament and of the Council of April 29, 2004 on the coordination of social security systems (Official Journal of the EU L 166 of April 30, 2004, p. 1 and further, as amended) and Regulation No 987/2009 – Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16.09.2009 regarding the implementation of Regulation (EC) No 883/2004 on coordination of social security systems (Official Journal of the EU L 284 from 30.10.2009, pp. 1 and further, as amended).

Article 48 of the Treaty on the Functioning of the European Union imposes an obligation to establish at EU level a system of coordination of the national social security schemes of the Member States.

The introduction of the obligation to coordinate the social security systems of the Member States in the content of the Treaty, i.e. an act of fundamental nature for the Euro-

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pean Union, means that no normative act of secondary Community law can prevent this coordination[1]. On the other hand, secondary legislation is to guarantee the implementation of the coordination principle in the Member States.

In Regulation No 883/2004, it applies the so-called. principle of one applicable legislation. The Regulation specifies the legal provisions on social security of which country is subject to a given migrant. In other words, to which country should such person's social security contributions be paid.

This regulation provides that you can only be subject to social security in one EU Member State at the same time (Article 11 of Regulation No 883/2004).

As part of ensuring one applicable legislation, EU Regulation No 883/2004 introduces a system of conflict-of-law rules (anti-collision rules) aimed at determining the country to whose legislation a given person, most often an employee or self-employed person is subject, for the most part – for a labor migration within the EU, although there is also conflict (competence) rule for persons who ceased their professional activity (they are subject to the legislation of the country of residence).

The basic conflict-of-law rule determining the subject of the legislation of a given Member State for working persons is the *lex loci laboris* rule, i.e. indicating the applicable legislation of the state of work performance (Article 12 of Regulation No 883/2004). It should be emphasized that it is about the country of actual performance of the work, and not about, for example, the country in which the employment contract was concluded, or the country of the employer's registered office or registration of activity.

There is also a set of conflict-of-law rules regarding the determination of the applicable legislation when engaging in economic activity in more than one EU Member State. The conflict-of-law rules determine legislation, for example, in the case of the employment of an employed person in more than one Member State, self-employment and mixed situations.

The Regulation No 883/2004 contains a number of provisions specifying the factors that should be taken into account when determining the applicable legislation. These include performance of work, place of residence, employer's seat and others (Article 11(3) – Article 15 of Regulation No 883/2004 and Article 16 providing for so-called exceptional agreements).

On the basis of Regulation No 883/2004 and the coordination system, it is legally and axiologically important to maintain one legislation and to ensure, as far as possible, that the employee or the self-employed will not be in the course of conducting this activity, having to move between the legislation of different EU Member States, i.e. between the social security legal systems of different countries.

To implement this legal value, a legal institution of detachment of employee (self-employed) was created. For the purposes of maintaining the applicable legislation, a person who temporarily carries out work / activities in a Member State other than the one to which he is subject may still be subject to the legislation of that country of insurance (continue to be subject to it and pay contributions there), provided that the conditions relating to the posting employer are met and a posted person (or self-employed who temporarily transferring business abroad). The condition is that the estimated working period does not exceed 24 months and that the employee is not sent in order to replace another person whose posting period has ended[2].

The establishment of the applicable legislation is dealt with by competent institutions, i.e. relevant competent social security authorities of the Member States. In Poland, the territorial branches of the Social Insurance Institution (Zakład Ubezpieczeń Społecznych, ZUS) play such a role.

[1] A. Szybkie, „Koordynacja systemów zabezpieczenia społecznego we Wspólnocie Europejskiej". *Polityka Społeczna* 11–12 (2007).

[2] More on this subject in: K. Ślebzak, *Koordynacja systemów zabezpieczenia społecznego* (Warszawa: Wolters Kluwer, 2012) and G. Uścińska, *Zabezpieczenie społeczne osób korzystających z prawa do przemieszczania się w Unii Europejskiej* (Warszawa: Wolters Kluwer, 2013).

The legal basis for the confirmation by the competent institution of the legislation applicable under Regulations Nos 883/2004 and 987/2009 is Art. 19 paragraph 2 of Regulation 987/2009. It provides that, at the request of the interested party or employer, the competent institution of a Member State whose legislation applies in accordance with the provisions of Title II of Regulation No 883/2004, certifies that that legislation applies and indicates, if applicable, how long and under what conditions it apply.

Based on this provision, the Administrative Commission for the Coordination of Social Security Systems (body acting on the basis of Art. 71–72 of Regulation No 883/2004) has determined the template of the document confirming the relevant legislation, the so-called a portable document with the symbol A1.

Legal nature of the A1 document

It should be noted at the outset that the issuing of the A1 document by the competent authority is declarative. This document does not create the law, but only confirms what results from the force of law. Because of this, sometimes it is perceived as a certificate, however, its role is different from certifying a fact or law based on the case files collected by the authority.

The legal nature of the A1 document has been the subject of inquiries and analysis of lawyers since the accession of the Republic of Poland to the European Union. Document A1 has imperious and decisive nature because it not creates but determines existing under EU law rights and obligations of the entity to which it relates.

This document confirms the applicable legislation under EU regulations on the coordination of social security systems. Therefore, it indicates the legal regulations of social security law of which country a migrant is subject in the light of Regulation No 883/2004.

An indication of the applicable legislation of a particular Member State undoubtedly affects the rights and obligations of the person to whom the determination relates. Thus, the issue of this document is imperious or decision-making in the sense of the provisions on administrative proceedings.

On the other hand, under EU law, which is the basis for issuing this document, it is called a certificate, and the specimen of this document has been specified in all versions of official EU languages by the Administrative Commission for the Coordination of Social Security Systems, established and functioning on the basis of Regulation No. 883/2004.

There is doubt as to whether the A1 document is a decision, whether it is a decision or a certificate. In particular, in the context of Polish provisions on administrative proceedings, this document is not called a decision, nor does it contain a set of elements indicated in the Code of Administrative Procedure for a decision. It is also not a certificate, because it does not meet the conditions specified for certificates from the Polish provisions on administrative proceedings.

So what is an A1 document? This question he tried to answer in Poland, among others Supreme Court.

Initially, in the jurisprudence of the Supreme Court it was assumed that the certificate issued on the basis of the provisions on the coordination of social security systems is a certificate within the meaning of Art. 217 § 2 of the Polish Code of Administrative Procedure, while its refusal is issued by way of a decision terminating the procedure regarding the issue of a certificate, and therefore in accordance with Art. 83b of the Polish Act on the social insurance system takes the form of a decision from which, pursuant to Art. 83 paragraph 2 of this Act may be appealed to the court with jurisdiction under the provisions of the Code of Civil Procedure[3].

[3] See: Supreme Court judgment of July 4, 2007, II UK 279/06, *Orzecznictwo Sądu Najwyższego Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych* 2008, No. 17–18, item 259 and resolutions of 5 December 2007, II PPO 4/07, OSNP 2008, No. 5–6, item 74 with a critical voice by P. Brzozowski, „Charakter prawny rozstrzygnięcia o odmowie wydania zaświadczenia w przedmiocie zalegania z opłacaniem składek na ubezpieczenia społeczne. Glosa do uchwały SN z dnia 19 lutego 2008 r., II UZP 8/07". *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa* 4 (2008): 35.

It was only in the resolution of 18 March 2010 II UZP 2/10 that the Polish Supreme Court decided that the A1 certificate (formerly E101 form) is an administrative decision and that its issue and refusal to issue it must be preceded each time by an assessment by the Social Security Institution (ZUS) whether there is an exception to the collision rule places of work.

In addition, according to the Supreme Court, the issue or refusal of the disability authority to issue the E101 certificate (currently A1) constitutes, in essence, the decision of that body, as to the coverage or refusal to cover a posted worker with Polish social security in a given period, and is of an assessment (decisive) nature.

Continuing its considerations, the Supreme Court stated in this resolution that in the case of certification E101 (currently A1), the competent institution does not certify a given factual or legal state, but speaks with authority as to the inclusion of a particular person in the Polish social security system. The SC emphasized that the obstacle to such classification of the nature of the E101 (A1) certificate is not the imposed form. Its framework is so included that it meets the minimum formal requirements to be met by a decision, which includes: the designation of the authority issuing the act, indication of the addressee of the act, decision on the substance of the case and the signature of a person acting on behalf of the body. Such a decision can only be issued following the full consideration of a party-'s request, which is why pursuant to Art. 107 § 4 of the Code of Civil Procedure it does not require justification.

According to the doctrine, in this context there should be no doubt that the Social Insurance Institution's refusal to issue a certificate regarding the applicable legislation takes place by way of a decision (based on Article 83 (1) (2) of the Act on the social security system) which can be appealed to the court competent in matters relating to social security. The same applies to the issue of the certificate. Otherwise, the entire procedure in Poland would be based on material and technical activities, without any imperious resolution[4].

M. Zieliński advocates the need to issue (additionally to certificate A1) a separate decision also in the event of issuing the A1 document, i.e. an act that takes into account claims[5]. He argues that a separate decision is desirable primarily in the context of the statement that lege non distinguente is entitled to appeal to the social security court. After all, one cannot rule out a situation in which for some reason the employer will be interested in maintaining the application of Polish legislation to the insured, and the insured person will not. Thus, M. Zieliński notes the important issue of the potential conflict of interests of the insured and the employer in determining the legislation applicable to the insured in a given period in a given country.

However, it seems that recognizing the A1 document as a decision of a functional nature, which does not have to meet the formal requirements set out in the provisions on administrative proceedings (because the document template is specified at the level of the body applying EU law), is sufficient to take into account the postulate of the author. Therefore, nothing prevents you from considering that the decision in the A1 issued by the competent institution is entitled to both the insured and the payer (employer) to appeal to a Polish court, and, moreover, they are entitled at any time. It seems that such a legal guarantee of the possibility of appealing against the A1 document, and not only against the decision to refuse to issue an A1 document, is necessary to ensure the effective implementation of EU law on the coordination of social security systems.

The correctness of establishing the appropriate applicable legislation by the competent institution of a given EU Member State and

[4] See: D. Dzienisiuk, „Glosa do uchwały SN z dnia 18 marca 2007 r., II UZP 2/10". *Orzecznictwo Sądów Polskich* 6 (2011): 70 and M. Zieliński, „Wybrane problemy interpretacyjne w zakresie podlegania ustawodawstwu właściwemu na podstawie unijnych przepisów o koordynacji systemów zabezpieczenia społecznego". *Ubezpieczenia Społeczne. Teoria i Praktyka* 3 (2017): 15.

[5] M. Zieliński, „Wybrane problemy…", pp. 15–16.

the possibility of reviewing that determination by the national courts is so important that it is impossible to use national legal institutions that eliminate the possibility of effective revocation at any time of the decision of a national authority taken in this respect. In particular, reference should not be made, in order to prevent the A1 document from being revoked, to national legal institutions, such as the limitation period or the validity of an A1 decision / document. The application of the law must therefore guarantee the absence of such restrictions provided for in the EU regulations on the coordination of social security systems. This, as I mentioned, protects the effectiveness of EU law and serves to protect migrants by correctly establishing the relevant legislation.

It seems that additionally, under Polish law, the adoption of such a thesis is also supported in the judgment of the Supreme Administrative Court of July 20, 1981, reference number act SA 1163/81. In this judgment, the Supreme Administrative Court explained that letters containing decisions in a case settled by way of decision are decisions, despite not having the full form provided for in art. 107 par. 1 of the Code of Administrative Procedure, if they contain the minimum elements necessary to qualify them as a decision. Such elements include: the designation of the state administration body issuing the act, indication of the addressee of the act, decision on the substance of the case and signature of the person representing the administration body.

It is worth mentioning that recognition of the portable A1 as an administrative decision issued on the basis of art. 83 paragraph 1 point 2 of the Act on social insurance also means at the very stage of issuing this document that the case for issuing the A1 document should be dealt with within the time limits resulting from art. 35 of the Code of Administrative Procedure. In art. 35 § 1 of the Code of Administrative Procedure, there is a general rule obliging public administration bodies to settle matters without undue delay. This principle is also included in art. 12 § 1 of the Code of Administrative Procedure, which stipulates that public administration bodies should act in the matter thoroughly and quickly, using the simplest possible means to deal with it.

Considering that the template of the A1 certificate specified by the Administrative Commission for the Coordination of Social Security Systems applies in all EU Member States (the template has been introduced in all versions of official languages of EU countries), the Polish institution issuing such a certificate may not change the content or this template and adapt it to the requirements of administrative decisions in the Polish Code of Administrative Procedure.

In the event of a refusal to issue an A1 certificate, the body (Social Insurance Institution) should issue an administrative decision against which an appeal may be lodged with the labor and social security court. The act of refusal to issue the A1 document was not formalized at EU level. Therefore, the authority is free to apply legal institutions of national administrative law. There is no doubt, therefore, that in the event of refusal to issue an A1 certificate, the Polish authority should issue a formal administrative decision containing all elements applicable to this type of decision act in the Polish provisions on administrative proceedings in matters of social insurance.

Refusal by the authority to issue the A1 document with the content requested by the claimant

An interesting issue is the situation when the authority refuses to issue the A1 document with the content requested by claimant (employer/employee). The question arises how to qualify this type of situation. This is the case where the authority, on the one hand, agrees to issue an A1 certificate, but not one hundred percent of the scope of the application scope (claim), i.e. in fact the authority partly agrees to the claim. This may include a situation where, for example, the authority agrees to issue an A1 certificate for a posted worker, but for a different period than indicated in the employer's application form. There

is doubt as to how to proceed with this type of application and what act to resolve it. On the one hand, the authority issues a certificate, but on the other hand, the decision does not fully match the expectation deriving from the application form.

The following solutions are possible here:

1) issuing a negative decision for the entire application together with an explanation of the reasons (legal and factual justification) and then only issuing a positive A1 certificate in the case of a re-submission of a corrected application for an A1 certificate – this type of action strongly formalizes the procedure;
2) issuing the A1 certificate in such a framework as the competent institution deems admissible, but this means omitting those elements of the application that are not acceptable to the authority – this action is very flexible, but blocks the possibility of the applicant's appeal from those elements of the application that were not accepted by the institution in the A1 certificate (there is no formal refusal or partially refusal to appeal against it); it seems that there should be protected the right to appeal against the A1 certificate to the court even if the certificate is issued, i.e. the decision is positive, but not one hundred percent corresponds to the request expressed in the application;
3) issuing the A1 certificate while issuing a negative decision regarding the elements of the claim expressed in the application to the authority, which the authority did not take into account, i.e. refused, e.g. taking into account the period of posting requested (e.g. exceeding 24 months); On the one hand, this allows you to defend the positive nature of the A1 certificate issued and its functioning immediately in the legal circulation (even in a narrower scope than the one requested), while allowing the applicant to appeal against the decision that was issued in relation to those elements of the application that are not may have been found to be fulfilled.

It seems that the third solution would be the most legitimate.

Assessment of the Polish Supreme Court's decision

At the beginning it is worth noting that the Polish Supreme Court does not avoid the matter of European law, even in terms of provisions raising doubts in interpretation. This matter is subject to review by the Court of Justice of the European Union (CJEU), however, the Supreme Court is trying to find a solution to the issue of placing A1 document in the Polish legal order, taking into account the provisions of European law directly applicable in the Polish legal order and taking into account the legal institutions of Polish law on administrative proceedings.

This can be picked up in two ways. On the one hand, one may wonder whether, in the event of doubts regarding the application of Regulation No 883/2004, Polish courts should not use the institution of preliminary questions to the CJEU and address questions to the European Court. This approach is supported by argument that a potential decision regarding the interpretation of e.g. art. 19 paragraph 2 of Regulation No 987/2009, may subsequently have legal significance for the competent institutions of all EU / EFTA member states. A CJEU ruling would also ensure uniform interpretation of questionable provisions across the EU and a uniform understanding of the legal nature of the A1 document throughout the European Union.

On the other hand, the decisions of national administrative bodies provided for in individual Member States in social security cases are different. Sometimes these are decisions, sometimes letters, or documents called insured documents, defined by the national law of a given country. For these reasons, one cannot fully detach from the national specificity of acts of imperative nature (decisions) in individual cases, when assessing their legal significance for deciding on the relevant legislation.

It is worth noting that the Court of Justice of the European Union has set out a certain legal framework, which indicates that the A1 document binds the institutions of Member States other than the country whose institution issued it until it is withdrawn. In particu-

lar, recent case-law deals with the question of the validity of an A1 document and its binding force and the possibility of challenging that document if it is obtained as a result of abuse. It is worth mentioning here the judgment of the Court of Justice of the EU of 6 February 2018 in the Altun case, C 359/16 (obtaining a certificate or referring to a certificate in a manner that is fraudulent), or the judgment of 6 September 2018 in the Alpenrind case GmbH C 527/16 (binding and retroactive effect of A1 certificates).

In addition, there is no doubt the declarative nature of the A1 document, i.e. it confirms the rights, and does not create them for the future from the date of issue. Thus, the A1 document can be issued retroactively.

Therefore, the Supreme Court takes into account in its resolution of 2010 the national context of determining the applicable legislation in the sense of the local situation of competent institutions operating in Poland and Polish rules of claim proceeding in social security area. In addition, referring cases to the CJEU is not supported by the urgency of resolving the case in the main proceedings, as the preliminary ruling procedure takes months. Therefore, procedural economics also inclines towards making decisions by Polish national courts, being aware that the final decisive issue of interpretation of EU law in the framework of follow-up control is the CJEU.

Conclusions regarding the legal nature of the A1 document

It seems that in order to assess the legal nature of Document A, it is necessary to take into account both the legal framework resulting from the EU Regulations on coordination of social security systems, the case law of the CJEU and the Polish Supreme Court, as well as an analysis of Polish provisions on proceedings in the field of social security.

Considering this, it seems reasonable to assume that A1 is an administrative decision in a functional rather than a formal sense. The form of this certificate has been determined by European Union law, while the issue of this document is imperative and concerns an individual case.

Therefore, this document plays the role of an administrative decision, but it does not have to meet the formal requirements set out for administrative decisions in the Polish Code of Administrative Procedure, because the form (content, template) is determined by the body appointed under EU law, i.e. Regulation No. 883/2004, that is, indirectly, this model results from the decision of the body operating in the structure of bodies applying EU law.

Therefore, the A1 document is a kind of 'mixed' nature act (hybrid act), on the one hand as a decision-making act in an individual case (decision in a functional sense), and on the other hand as a document with a formally defined in advance model that does not fully meet the requirements as to the elements of the administrative decision, specified in Polish regulations on administrative proceedings.

Consequently, the Polish competent institution should apply to the procedure of issuing the A1 document guarantees regarding proceedings in social security matters, and apply the deadlines for issuing the decision specified in Polish law. The appeal procedure against the A1 document, refusal to issue the A1 document of the requested content and the refusal to issue it (both by the insured and the payer – separately) to the labor and social security court are also applicable.

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