Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

20 May 2021 *

(Reference for a preliminary ruling – Social security – Determination of the legislation applicable – Regulation (EEC) No 1408/71 – Article 13(2)(a) – Article 14(2) – Person normally employed in the territory of two or more Member States – Single employment contract – Employer established in the worker's Member State of residence – Paid employment activity pursued exclusively in other Member States – Work performed in different Member States during successive periods – Conditions)

In Case C-879/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Najwyższy (Supreme Court, Poland), made by decision of 19 September 2019, received at the Court on 2 December 2019, in the proceedings

FORMAT Urządzenia i Montaże Przemysłowe

v

Zakład Ubezpieczeń Społecznych I Oddział w Warszawie,

intervener:

UA,

THE COURT (Eighth Chamber),

composed of N. Wahl, President of the Chamber, F. Biltgen (Rapporteur) and L.S. Rossi, Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– FORMAT Urządzenia i Montaże Przemysłowe, by W. Barański, adwokat,

* Language of the case: Polish.

– the Zakład Ubezpieczeń Społecznych I Oddział w Warszawie, by M. Drewnowski, radca prawny,

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

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

– the European Commission, by D. Martin and A. Szmytkowska, 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 14(2)(b) 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 (OJ 1997 L 28, p. 1), as amended by Council Regulation (EC) No 1606/98 of 29 June 1998 (OJ 1998 L 209, p. 1) ('Regulation No 1408/71').

2 The request has been made in proceedings between the company FORMAT Urządzenia i Montaże Przemysłowe ('Format') and the Zakład Ubezpieczeń Społecznych I Oddział w Warszawie (Social Insurance Institution, Warsaw I Office, Poland) concerning the determination of the social security legislation applicable to UA, an employee of Format ('the person concerned').

Legal context

3 According to the sixth recital of Regulation No 1408/71, the provisions for coordination must guarantee that workers moving within the European Union and their dependants and their survivors retain the rights and the advantages acquired and in the course of being acquired.

4 It is apparent from the eighth recital of that regulation that the provisions of that regulation seek to ensure that the persons concerned are, in principle, subject to the social security scheme of only one single Member State in order to avoid overlapping of legislations applicable and the complications which could result therefrom.

5 Article 1(h) of that regulation provides that, for the purposes of that regulation, 'residence' means habitual residence.

6 Under Title II of that regulation, entitled 'Determination of the legislation applicable', Article 13, entitled 'General rules', provides:

'1. Subject to Articles 14c and 14f, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to Articles 14 to 17:

(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

…'

7 Under that same title, Article 14 of Regulation No 1408/71, entitled 'Special rules applicable to persons, other than mariners, engaged in paid employment', provides:

'Article 13(2)(a) shall apply subject to the following exceptions and circumstances:

1. (a) A person employed in the territory of a Member State by [an] undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does not exceed 12 months and that he is not sent to replace another person who has completed his term of posting.

…

2. A person normally employed in the territory of two or more Member States shall be subject to the legislation determined as follows:
   (a) A person who is a member of the travelling or flying personnel of an undertaking which, for hire or reward or on its own account, operates international transport services for passengers or goods by rail, road, air or inland waterway and has its registered office or place of business in the territory of a Member State shall be subject to the legislation of the latter State …

   …
   (b) A person other than that referred to in (a) shall be subject:
      (i) to the legislation of the Member State in whose territory he resides, if he pursues his activity partly in that territory or if he is attached to several undertakings or several employers who have their registered offices or places of business in the territory of different Member States;
      (ii) to the legislation of the Member State in whose territory is situated the registered office or place of business of the undertaking or individual employing him, if he does not reside in the territory of any of the Member States where he is pursuing his activity.

…'

8 Under Article 12a of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71 (OJ, English Special Edition 1972 (I), p. 160), in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 (OJ 2005 L 117, p. 1), the authorities of the competent Member State for the purposes of Regulation No 1408/71 are required to issue to a person who is

normally employed in the territory of two or more Member States for the purposes of Article 14(2)(b) of that regulation a certificate stating that that person is subject to the legislation of that competent Member State.

9 That certificate, the model for which is included in Decision No 202 of the Administrative Commission of the European Communities on Social Security for Migrant Workers of 17 March 2005 on model forms necessary for the application of Council Regulations No 1408/71 and No 574/72 (E 001, E 101, E 102, E 103, E 104, E 106, E 107, E 108, E 109, E 112, E 115, E 116, E 117, E 118, E 120, E 121, E 123, E 124, E 125, E 126 and E 127) (OJ 2006 L 77, p. 1), is generally known as an 'E 101 form' or an 'E 101 certificate'.

The dispute in the main proceedings and the question referred for a preliminary ruling

10 The person concerned, a Polish national residing in Poland, worked for Format, whose registered office is in Poland, under a fixed-term employment contract for the period from 20 October 2006 to 31 December 2009. During that period, he worked in France from 23 October 2006, in the United Kingdom from 5 November 2007 to 6 January 2008, then again in France from 7 January 2008.

11 By decision of 13 February 2008, based on Article 14(1)(a) and (2)(b) of Regulation No 1408/71, the Social Insurance Institution, Warsaw I Office, refused to issue the person concerned with an E 101 certificate stating that, from 23 December 2007 to 31 December 2009, that person was covered by the Polish social security scheme in respect of the work which he had performed on behalf of Format.

12 Format and the person concerned brought an action against that decision before the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland), which was dismissed. That court held that, in so far as the person concerned had worked on behalf of Format for several months in the territory of two successive Member States, he did not fall within the scope of Article 14(2)(b) of Regulation No 1408/71, but within that of Article 13(2)(a) of that regulation.

13 Format brought an appeal against the decision of that court before the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw, Poland), which was dismissed by decision of 23 January 2018.

14 That court noted that it is apparent from the judgment of 4 October 2012, *Format Urządzenia i Montaże Przemysłowe* (C-115/11, EU:C:2012:606), that the concept of 'a person normally employed in the territory of two or more Member States' for the purposes of Article 14(2)(b)(ii) of Regulation No 1408/71 does not cover a situation where employment in the territory of a single Member State constitutes the normal arrangement for the person concerned. That court held that, in view of the fact that the work which the person concerned performed in each Member State lasted several months, the nature of his work, namely construction work, and Format's activity profile, namely the carrying out of construction work in several Member States, the person concerned was in fact pursuing normal work in the territory of a single Member State and therefore fell within the scope of Article 13(2)(a) of that regulation.

15 Format brought an appeal on a point of law against that decision before the referring court.

16 That court considers that the judgment of 4 October 2012, *Format Urządzenia i Montaże Przemysłowe* (C-115/11, EU:C:2012:606), which concerned a case in the main proceedings also involving Format and concerning events which occurred during the period at issue in the main proceedings, does not dispel the doubts relating to the interpretation of Article 14(2) of Regulation No 1408/71 raised by the present case. By that judgment, it is true that the Court of Justice ruled that that provision had to be interpreted as meaning that a person who, under successive employment contracts specifying the territory of more than one Member State as the place of employment, in practice, for the duration of each of those contracts, in fact pursues his or her paid employment activity in the territory of only one of those States at a time, is not covered by the concept of 'a person normally employed in the territory of two or more Member States' for the purposes of that provision. However, the facts at issue in the case in the main proceedings which gave rise to that judgment, namely that the person concerned had, on the basis of successive employment contracts, worked in several Member States and had been employed, for the duration of each of those contracts, exclusively in the territory of one of those Member States, differ from those at issue in the present case in the main proceedings in so far as the person concerned performed, under a single employment contract, paid employment activity, during two directly consecutive, successive periods, in the territory of two different Member States.

17 In addition, in the referring court's view, it is apparent from the judgment of 12 July 1973, *Hakenberg* (13/73, EU:C:1973:92, paragraph 19), that the concept of 'a person normally employed' for the purposes of Article 14(2) of Regulation No 1408/71 refers to persons who are in a consistent and continuous employment relationship that covers the territory of several Member States, either simultaneously or during successive periods, but does not refer to persons who, during the period in question, actually work under an employment contract in a single Member State and perform, during the following year, work in another Member State under another employment contract.

18 The referring court, which states that it has interpreted that concept differently in two cases brought before it, considers that it is necessary to refer a question to the Court of Justice in order to dispel the doubts which exist in that regard.

19 In those circumstances, the Sąd Najwyższy (Supreme Court, Poland) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is the expression "a person normally employed in the territory of two or more Member States" used in the first sentence of Article 14(2) of [Regulation No 1408/71] to be interpreted as also applying to a person who, during the period covered by and within the framework of one and the same contract of employment concluded with a single employer, performs work in the territory of each of at least two Member States not simultaneously or concurrently, but during directly consecutive, successive periods of several months?'

Consideration of the question referred

20 By its question, the referring court asks, in essence, whether Article 14(2) of Regulation No 1408/71 is to be interpreted as applying to a person who, under a single employment contract concluded with a single employer providing for the pursuit of professional activity in several Member States, works, for several successive months, solely in the territory of each of those Member States.

21 In that regard, it should be borne in mind that, to fall within Article 14(2) of Regulation No 1408/71, a person must normally be employed in the territory of two or more Member States (judgment of 4 October 2012, *Format Urządzenia i Montaże Przemysłowe*, C-115/11, EU:C:2012:606, paragraph 39).

22 According to the case-law of the Court, in order to determine whether a person should be considered to be normally employed in two or more Member States or, conversely, whether they work merely occasionally in several Member States, regard must be had, in particular, to the duration of periods of activity and to the nature of the employment as defined in the contractual documents, as well as to the actual work performed, where appropriate, namely, inter alia, the way in which the employment contracts concluded between the employer and the worker concerned have been performed in practice in the past, the circumstances surrounding the conclusion of those contracts and, more generally, the characteristics and modalities of the activities pursued by the undertaking concerned (judgment of 13 September 2017, *X*, C-570/15, EU:C:2017:674, paragraph 21 and the case-law cited).

23 In the present case, the order for reference does not specify what information is contained in the employment contract concluded between the person concerned and Format, in particular as regards the places of performance of the work carried out by the person concerned and the duration of that work.

24 However, it appears, from a reading of the file submitted to the Court, that, under the employment contract concluded between Format and the person concerned, for the period from 20 October 2006 to 31 December 2009, the person concerned worked in France from 23 October 2006, then in the United Kingdom from 5 November 2007 to 6 January 2008, and once again in France from 7 January 2008.

25 If this is indeed the case, which it is for the referring court to verify, it would be necessary to consider that the person concerned performed his paid employment activity in two successive Member States but that the uninterrupted periods of work completed in the first Member State lasted, respectively, around 13 months and for nearly two years, with an intermediate period of around two months completed in the second Member State. Thus, it would have to be held that, under his employment contract concluded for the period from 20 October 2006 to 31 December 2009, the person concerned performed nearly all of his paid employment activity in the territory of a single Member State.

26 It is true that, as regards the possible successive periods of work completed in the territory of more than one Member State, Article 14(2) of Regulation No 1408/71 does not establish any temporal limits.

27 However, it is apparent from the case-law of the Court that, if employment in the territory of a single Member State constitutes the normal arrangement for the person concerned, such employment cannot fall within the scope of Article 14(2) of Regulation No 1408/71 (see, to that effect, judgment of 4 October 2012, *Format Urządzenia i Montaże Przemysłowe*, C-115/11, EU:C:2012:606, paragraph 40).

28 Accordingly, it cannot be accepted that a person who is employed under conditions such as those at issue in the main proceedings, described in paragraphs 24 and 25 of the present judgment, is covered by the concept of ‘a person normally employed in the territory of two or more Member States’ for the purposes of Article 14(2) of Regulation No 1408/71.

29 Such an interpretation would have the effect of extending the scope of that provision to situations in which, in reality, the period during which the person concerned performs his or her paid employment activity in the territory of a single Member State is so long that that activity should be regarded as the normal working arrangement for the person concerned.

30 It should, moreover, be emphasised that the provisions of Title II of Regulation No 1408/71, which includes Article 14 of that regulation, constitute, according to settled case-law, a complete and uniform system of conflict rules, the aim of which is to ensure that workers moving within the European Union are subject to the social security scheme of only one Member State, in order to prevent more than one national legislative system from being applicable and to avoid the complications which may result from that situation (see, to that effect, judgments of 16 February 1995, *Calle Grenzshop Andresen*, C-425/93, EU:C:1995:37, paragraph 9; of 13 September 2017, *X*, C-570/15, EU:C:2017:674, paragraph 14; and of 8 May 2019, *Inspecteur van de Belastingdienst*, C-631/17, EU:C:2019:381, paragraph 33).

31 To that end, Article 13(2)(a) of Regulation No 1408/71 lays down the principle that an employed person is to be subject, in social security matters, to the legislation of the Member State in which he or she works (see, to that effect, judgment of 13 September 2017, *X*, C-570/15, EU:C:2017:674, paragraph 15 and the case-law cited).

32 Nevertheless, that principle is stated to be 'subject to the provisions of Articles 14 to 17' of Regulation No 1408/71. However, in certain specific situations the unrestricted application of the rule set out in Article 13(2)(a) of that regulation might in fact create, instead of prevent, administrative complications for workers as well as for employers and social security authorities, which would place obstacles in the way of the freedom of movement of the persons covered by that regulation (judgment of 4 October 2012, *Format Urządzenia i Montaże Przemysłowe*, C-115/11, EU:C:2012:606, paragraph 31 and the case-law cited).

33 Thus, Article 14(2) of Regulation No 1408/71 constitutes, in the same way as Article 14(1)(a) of that regulation, a derogation from the general principle laid down in Article 13(2)(a) thereof. Article 14(2) of that regulation must therefore be interpreted strictly (see, to that effect, judgment of 16 January 2007, *Perez Naranjo*, C-265/05, EU:C:2007:26, paragraph 29).

34 However, account must be taken of the fact that, for the purposes of the exception provided for in Article 14(1)(a) of Regulation No 1408/71, the EU legislature obviously deemed the temporary and short term posting of a worker to another Member State for a maximum period of 12 months as justifying an exception to the rule of the Member State of the place of performance of the activity concerned laid down in Article 13(2)(a) of that regulation (see, to that effect, Opinion of Advocate General Mazák in *Format Urządzenia i Montaże Przemysłowe*, C-115/11, EU:C:2012:267, point 55).

35 It follows that, in order to ensure a consistent interpretation of the provisions of Article 14(1)(a) of Regulation No 1408/71 and Article 14(2) thereof, it must be considered that a person who performs, during successive periods of work, paid employment activity in different Member States must be regarded as being normally employed in the territory of two or more Member States for the purposes of Article 14(2) of Regulation No 1408/71, so long as the duration of the uninterrupted periods of work completed in each of those Member States does not exceed 12 months. Only such an interpretation is capable of preventing circumvention of the principle laid down in Article 13(2)(a) of that regulation.

36 It must therefore be held that Article 14(2)(b) of Regulation No 1408/71, subject to verification by the referring court, is not applicable to a situation such as that at issue in the main proceedings.

37 It should be added that such a situation is not, a priori, covered by Article 14(1)(a) of Regulation No 1408/71 either. Only an undertaking which habitually carries on significant activities in the Member State in which it is established may be allowed the benefit of the advantage afforded by the exception provided for by that provision (judgment of 10 February 2000, *FTS*, C-202/97, EU:C:2000:75, paragraph 40). However, in the present case, the order for reference does not specify whether, during the period from 20 October 2006 to 31 December 2009, Format habitually carried on significant activities in Poland, which is the Member State in which it is established. In addition, it follows from the judgment of 4 October 2012, *Format Urządzenia i Montaże Przemysłowe* (C-115/11, EU:C:2012:606, paragraph 32), which concerned a case in the main proceedings also involving Format and concerning events which occurred during the period at issue in the main proceedings, that that company does not habitually carry on significant activities in Poland. It does not therefore appear, a priori, that that condition is satisfied in the present case, which it is nevertheless for the referring court to verify.

38 By contrast, such a situation may come within the scope of the principle laid down in Article 13(2)(a) of Regulation No 1408/71.

39 In the light of all of the foregoing, the answer to the question referred is that Article 14(2) of Regulation No 1408/71 must be interpreted as not applying to a person who, under a single employment contract concluded with a single employer providing for the pursuit of professional activity in several Member States, works, for several successive months, solely in the territory of each of those Member States, where the duration of the uninterrupted periods of work completed by that person in each of those Member States exceeds 12 months, which it is for the referring court to verify.

Costs

40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Eighth Chamber) hereby rules:

Article 14(2) 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, as amended by Council Regulation (EC) No 1606/98 of 29 June 1998, must be interpreted as not applying to a person who, under a single employment contract concluded with a single employer providing for the pursuit of professional activity in several Member States, works, for several successive months, solely in the territory of each of those Member States, where the duration of the uninterrupted periods of work completed by that person in each of those Member States exceeds 12 months, which it is for the referring court to verify.

[Signatures]