

Case C-218/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

27 May 2020

Referring court:

Tribunalul Mureş (Romania)

Date of the decision to refer:

10 December 2019

Applicants:

Sindicatul Lucrătorilor din Transporturi, TD

Defendant:

SC Samidani Trans SRL

Subject matter of the main proceedings

Action brought by Sindicatul Lucrătorilor din Transporturi (transport workers' union), the applicant, for and on behalf of TD, a member of the union, concerning the challenge to a decision constituting a penalty.

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of Articles 3 and 8 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

Questions referred

1. Interpretation of Article 8 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)[:] does the choice of law applicable to an individual employment contract exclude the application of the law of the country

in which the employee has habitually carried out his or her work or does the fact that a choice of law has been made exclude the application of the second sentence of Article 8(1) of that regulation?

2. Interpretation of Article 8 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I): is the minimum wage applicable in the country in which the employee has habitually carried out his or her work a right that falls within the scope of ‘provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable’, within the meaning of the second sentence of Article 8(1) of the regulation?

3. Interpretation of Article 3 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I): does the specification, in an individual employment contract, of the provisions of the Romanian Labour Code equate to a choice of Romanian law, in so far as, in Romania, it is well-known that the employer predetermines the content of the individual employment contract?

Provisions of EU law relied on and the EU case-law relied on

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Article 3 (Freedom of choice) and Article 8 (Individual employment contracts)

Judgment of the Court of Justice of 15 March 2011, *Koelzsch* (C-29/10, ECLI:EU:C:2011:151)

Provisions of national law cited and relevant national case-law

Legea nr. 53/2003 privind Codul muncii (Law No 53/2003 establishing the Labour Code), Article 111, which defines working time, and Article 133, which defines rest periods

Legea nr. 344/2006 privind detaşarea salariaţilor în cadrul prestării de servicii transnaţionale (Law No 344/2006 concerning the posting of workers in the framework of transnational service provision)

Article 1

‘This law shall apply:

...

(b) to undertakings established in Romania which, in the framework of the transnational provision of services, post to the territory of a Member State of the European Union, of the European Economic Area or of the Swiss Confederation,

workers with whom they have entered into an employment relationship, on the conditions laid down in Article 4(2)'.

Article 4(2)

'This law shall apply to the extent that undertakings as referred to in Article 1(b) take any of the following transnational measures:

(a) the posting of workers from Romania on the account of those undertakings and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are rendered, operating in the territory of a Member State of the European Union, of the European Economic Area or of the Swiss Confederation, provided that there is an employment relationship, during the period of posting, between the worker and the undertaking making the posting;

(b) the posting of workers from Romania to a branch or undertaking owned by the group of undertakings, located in the territory of a Member State of the European Union, of the European Economic Area or of the Swiss Confederation, provided that there is an employment relationship, during the period of posting, between the worker and the undertaking making the posting;

(c) the making available of a worker by a temporary employment agency to an undertaking established or operating in the territory of a Member State of the European Union, of the European Economic Area or of the Swiss Confederation, provided that there is an employment relationship, during the period of posting, between the worker and the temporary employment agency.'

Article 7¹

'The provisions of Article 43 of Law No 53/2003 establishing the Labour Code, as amended and supplemented, shall apply to the staff of employers established in Romania which carry out international transport operations, who are sent to work for a limited period in the territory of a Member State of the European Union, of the European Economic Area or of the Swiss Confederation, but who are not covered by one of the situations provided for by Article 4(2); such staff shall enjoy the rights provided for by Article 44(2) of that law.'

Ordinul ministrului muncii și protecției sociale nr. 64/2003 pentru aprobarea modelului-cadru al contractului individual de muncă (Order No 64/2003 of the Minister for Employment and Social Affairs approving the standard-form individual employment contract), which stipulates, under Section N of Annex I, that all individual employment contracts concluded in Romania must necessarily include the following clause: 'The provisions of this individual employment contract are supplemented by the provisions of Law No 53/2003 establishing the Labour Code'.

In so far as concerns judicial practice, reference is made to the civil judgment of 18 December 2018 of Tribunalul Mureş (Regional Court, Mureş), confirmed by the superior court, dismissing an applicant's action for an order requiring the company employing him to pay the difference in remuneration entitlements between the minimum wage in Austria in the road transport sector, to which he would have been entitled under Regulation No 593/2008, and the wages actually paid. Tribunalul Mureş (Regional Court, Mureş) found that the parties had chosen Romanian law as the law governing the individual employment contract, that the employee's performance of his duties did not take place in any fixed place of work and that the employee was constantly travelling, that the employee had received a daily allowance in addition to his wages, and that the parties to the individual employment contract had intended that wages should be paid in Romanian Lei, not the minimum Austrian wage, paid in euros. That court also found that the fact that the 'work tools' (the lorries which the employee drove) were stationed at the company's premises in Austria, the fact that the place to which the applicant returned after completing his tasks was in Austria and the fact that the country in which the applicant habitually carried out his work in performance of the contract was Austria were not sufficient to exclude the choice of Romanian law as the law governing the individual employment contract.

Succinct presentation of the facts and the main proceedings

- 1 The originating application states that TD, a member of the applicant trade union, was employed by the defendant company as a lorry driver and that he carried out his work in the territory of the European Community. The individual employment contract which he had concluded with the defendant stated: 'The provisions of this individual employment contract are supplemented by the provisions of Law No 53/2000 establishing the Labour Code and of the collective labour agreement applicable at unit/sectoral level' and that 'Disputes relating to the conclusion, performance, amendment, suspension or termination of this individual employment contract shall be resolved by the court having jurisdiction *ratione materiae* and *ratione loci*, in accordance with the law'.
- 2 The individual employment contract did not refer, as regards the place of work of the trade union member, to the exact place in which the work would be carried out.
- 3 By application lodged at Tribunalul Mureş (Regional Court, Mureş), an order was sought requiring, in particular, the defendant to pay the trade union member his salary entitlements under Regulation (EC) No 593/2008 (Rome I), that is to say, the difference between the wages he actually received and the minimum wage applicable in Germany in the road transport sector, along with pay in respect of a 'thirteenth' and 'fourteenth' month, which would have been due to him under Regulation (EC) No 593/2008 (Rome I) in conjunction with the minimum wage law in Germany pursuant to the Mindestlohngesetz - MiLoG (Paragraph 1(2)); such sums were, it was claimed, to be indexed at the rate of inflation at the date of

payment, and statutory interest paid from the monthly due date of each sum so calculated.

- 4 In its defence, the defendant SC Samidani Trans SRL contended that the parties to the individual employment contract had chosen Romanian law as the applicable law and that, therefore, Article 8 of the Rome I Regulation did not apply.
- 5 In those circumstances, at the request of the applicant trade union, Tribunalul Mureş (Regional Court, Mureş) decided to refer to the Court of Justice of the European Union questions on the interpretation of Articles 3 and 8 of Regulation No 593/2008.

Essential arguments of the parties to the main proceedings

- 6 In support of his claim, TD submits that, although the individual employment contract was registered in Romania, the country in which he habitually carried out his work in performance of the contract is Germany and that he is, therefore, entitled to the minimum wage in Germany, rather than to the minimum wage in Romania, which is what he was paid. He also relies on the judgment of the Court of 15 March 2011, *Koelzsch* (C-29/10, ECLI:EU:C:2011:151).
- 7 More specifically, the trade union member states that the place from which he carried out his transport tasks and from which he received instructions was Germany, his ‘work tools’, in this case lorries, were stationed in Germany, the places where the transport was principally carried out and the places where the goods were unloaded were in Germany and the place to which he returned after completing his tasks was in Germany.

Succinct presentation of the reasons for the reference

- 8 By its first question, the referring court asks, in essence, for a decision on whether Article 8(1) of Regulation No 593/2008 is to be interpreted as meaning that, in the case where a worker habitually carries out the work which is the subject of his or her employment contract in a country other than the country whose laws have been expressly chosen by the parties, a national court may, on the basis of the last sentence of Article 8(1), override the parties’ choice of law where it appears from all the circumstances that the contract is more closely connected with a different country.
- 9 By its second question, the referring court requests a decision on whether the minimum wage applicable in the country in which the employee has habitually carried out his or her work is a right falling within the scope of ‘provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable’, within the meaning of the second sentence of Article 8(1) of the regulation.

- 10 If that question is answered in the negative, the employee will, therefore, be entitled to the national minimum wage in the country the law of which has been expressly chosen by the parties, even if the minimum wage under the law of the country with which the contract is more closely connected is higher, with the result that the worker will suffer a loss in that respect.
- 11 On the other hand, if the question is answered in the affirmative, that would mean that two different laws apply to the contract, that is, the law expressly chosen and the law which contains the 'provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable'.
- 12 The third question seeks a ruling on whether, where an employer uses a standard-form individual employment contract, one that has been pre-formulated in accordance with national legislation and must necessarily contain a clause specifying that the Romanian Labour Code applies, that equates to a choice of Romanian law.
- 13 Should the Court of Justice rule that such national legislation and practice is contrary to Article 3 of Regulation No 593/2008, the referring court will be able to remove from the contract that compulsory clause specifying the choice of the applicable law.