Case C-33/21

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

Date lodged:

18 January 2021

Referring court:

Corte suprema di cassazione (Supreme Court of Cassation, Italy)

Date of the decision to refer:

21 December 2020

Applicants:

Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)

Istituto nazionale della previdenza sociale (INPS)

Defendant:

Ryanair DAC

Subject of the action in the main proceedings

Appeal on a point of law against the judgment of the Corte d'appello di Brescia (Court of Appeal, Brescia, Italy) which dismissed the appeals by the Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (National Institute for Insurance against Accidents at Work, Italy; 'INAIL') and the Istituto Nazionale della Previdenza Sociale (National Social Security Institute, Italy; 'INPS') against the judgment of the Tribunale di Bergamo (District Court, Bergamo, Italy) dismissing their actions seeking a declaration that Ryanair DAC ('Ryanair') was required to insure, under Italian law, 219 employees assigned to Orio al Serio Airport (Bergamo, Italy) as travelling personnel.

Subject matter and legal basis of the reference

The Corte di cassazione (Court of Cassation, Italy), the referring court, must determine whether the employees of an airline established in Ireland, assigned to a home base in Italy, should be subject to Italian social security legislation.

The lower courts had ruled out the possibility of that airline having a 'branch' or 'permanent representation' in Italy, which precluded the application of the rule contained in Article 14(2)(a)(i) of Regulation (EEC) No 1408/71, according to which the travelling personnel of a transport undertaking are subject to the legislation of the Member State in whose territory such branch or permanent representation is situated.

However, the referring court questions the possibility of applying to the present case the provision contained in Article 14(2)(a)(ii), interpreting the concept of a person 'employed principally in the territory of the Member State in which he resides' on the basis of criteria developed by the Court of Justice regarding the concept of 'place where the employee habitually carries out his work', within the meaning of Article 19(2)(a) of Council Regulation (EC) No 44/2001.

Question referred

Can the concept of a person 'employed principally in the territory of the Member State in which he resides' contained in Article 14(2)(a)(ii) [of Regulation (EEC) No 1408/71, as amended] be interpreted in the same way as that which (concerning judicial cooperation in civil matters, jurisdiction and individual contracts of employment (Council Regulation (EC) No 44/2001)) Article 19(2)(a) [of the latter Regulation] defines as the 'place where the employee habitually carries out his work', including in the aviation and airline crew sector (Council Regulation (EEC) No 3922/91), as expressed in the case-law of the Court of Justice of the European Union referred to in the grounds?

Provisions of EU law cited

Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ 1971 L 149, p. 2), and in particular Articles 13 and 14.

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), in particular Article 19(2)(a).

Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonization of technical requirements and administrative procedures in the field of civil aviation (OJ 1991 L 373, p. 4).

Provisions of national law cited

Article 37 of regio decreto-legge del 4 ottobre 1935, n. 1827 – Perfezionamento e coordinamento legislativo della previdenza sociale (Royal Decree-Law No 1827 of 4 October 1935 – Improvement and coordination of social security legislation) (*Gazzetta ufficiale della Repubblica italiana* No 251 of 26 October 1935 – Ordinary Supplement No 251), which provides that insurance for disability, retirement, tuberculosis and involuntary unemployment are compulsory for both men and women of any nationality who are between the ages of 15 and 65 and who are employed to do paid work.

Article 1 of the decreto del presidente della Repubblica del 30 giugno 1965 n. 1124 – Testo unico delle disposizioni per l'assicurazione obbligatoria contro gli infortuni sul lavoro e le malattie professionali (Presidential Decree No 1124 of 30 June 1964 – Consolidated text of the provisions on compulsory insurance against workplace accidents and occupational illness) (*Gazzetta ufficiale della Repubblica italiana* No 257 of 13 October 1965 – Ordinary Supplement No 0), which introduces the requirement to have INAIL insurance against workplace accidents for persons who 'are responsible for machinery not operated directly by the person using it, for pressurised equipment, and for electrical or thermal systems and equipment, and persons otherwise employed in factories, laboratories or organised settings for works, construction or services, involving the use of such machinery, equipment or systems …'.

Article 4 of that decree states that 'the insurance shall include: (1) those who are employed permanently or temporarily to do paid manual labour under the supervision of others, regardless of the form of payment; …'.

Outline of the facts and the main proceedings

1 The INPS and INAIL applied to the court for Ryanair to be found to have an obligation to insure, under Italian law, 219 employees assigned to Orio al Serio airport as travelling personnel during the period from June 2006 to February 2010 (for INPS insurance) and between 25 January 2008 and 25 January 2013 (for INAIL insurance).

2 The INPS action was based on an inspection which revealed that the staff worked in Italian national territory, with the application, in this case, of Article 37 of Royal Decree-Law No 1827/1935 and Article 13 of Regulation (EEC) No 1408/71.

3 Meanwhile, the INAIL had discovered that the same workers were employed at the operating base (or 'crew room'), which had workstations, computers, printers, telephones, a fax machine and storage units for business correspondence. It had concluded from this that the workers were required to have INAIL insurance, pursuant to Articles 1 and 4 of Presidential Decree No 1124/1965 and Article 37 of Royal Decree-Law No 1827/1935.

4 Both Bergamo District Court and the Court of Appeal of Brescia held the INPS and INAIL actions to be unfounded. In particular, the Court of Appeal of Brescia, after concluding that it had not been proven that all 219 workers were covered by the E101 certificates produced by Ryanair, proceeded to identify the social security law applicable under Regulation (EEC) No 1408/71. The Court of Appeal found that all the employees in question had been hired under an Irish employment contract managed according to instructions received from Ireland, and that those employees worked in Italian territory for 45 minutes a day, spending the rest of the time working in aircraft of Irish nationality; it further concluded that Ryanair did not have a 'branch' or 'permanent representation' in Italy, as required under EU law in order for there to be an obligation to have insurance in Italy.

5 The Court of Appeal of Brescia also held that the additional linking factor consisting of the presence, in Orio al Serio, of Ryanair's 'operating base' within the meaning of Annex III to Council Regulation (EEC) No 3922/91 was not applicable *ratione temporis*: that regulation concerned the harmonisation of technical requirements and administrative procedures in the field of civil aviation safety; only after the entry into force of Regulation (EC) No 883/2004, in May 2010, as amended by Regulation (EU) No 465/2012, was that criterion extended to social security.

6 In relation to INAIL's action, the Court of Appeal of Brescia held that, for the period after April 2010, any application of the 'operating base' criterion was precluded by the absence of any factual circumstances able to demonstrate that this criterion was relevant.

7 The INPS and INAIL appealed the Court of Appeal's judgment before the Court of Cassation.

Succinct presentation of the reasons for the request for a preliminary ruling

8 The facts at issue in the main proceedings – governed, at the national level, by Article 37 of Royal Decree-Law No 1827/1935 and Articles 1 and 4 of Presidential Decree No 1124/1965 – fall within the scope of EU law in so far as they relate to the identification of the social security legislation applicable to employees of companies established in Ireland and airline crew members, including on international flights, with a home base at Orio al Serio airport.

9 The dispute in the main proceedings primarily centres on the interpretation of Articles 13 and 14 of Regulation (EEC) No 1408/71, in force until the entry into force (on 1 May 2010) of Regulation (EC) No 883/2004 on the coordination of social security systems of the Member States of the European Union, following the adoption on 16 September 2009 of Regulation (EC) No 987/2009.

10 The Court of Appeal of Brescia has ruled out the existence in the present case of the linking factor referred to in Article 14(2)(a)(i) of Regulation No 1408/71,

according to which persons who are part of the travelling personnel of an airline operating international flights and who report to a branch or permanent representation of the airline concerned in the territory of a Member State other than that in which it has its registered office are subject to the legislation of the Member State in whose territory such branch or permanent representation is situated. Indeed, as noted by the Court of Justice in the judgment of 2 April 2020, C-370/17 and C-37/18 (EU:C:2020:260), the application of that provision requires that two cumulative conditions are satisfied: (i) that the airline concerned has a branch or permanent representation in a Member State other than that where it has its registered office and (ii) that the person concerned is employed by that entity.

11 However, the possibility should also be considered of applying to the case at issue in the main proceedings the provision contained in Article 14(2)(a)(ii), according to which 'where a person is employed principally in the territory of the Member State in which he resides, he shall be subject to the legislation of that State, even if the undertaking which employs him has no registered office or place of business or branch or permanent representation in that territory.'

12 In the course of the substantive assessments, it was indeed found that: (1) the airline had an 'operating base' at Orio al Serio airport which was used to manage and organise the work of personnel; (2) the base had computers, telephones, a fax machine and storage units for personnel and flight documents; (3) the room was used by all Ryanair personnel before and after each shift; (4) personnel who were temporarily grounded had to work at the base; (5) personnel at the base reported to the 'supervisor', who coordinated the airline crew; (6) the supervisor managed the personnel and if necessary contacted them at their home, which could not be more than an hour away from the airport.

13 In the light of those facts, it is necessary to determine how the concept of person 'employed principally in the territory of the Member State in which he resides' is to be interpreted, taking into account that, as specified in Article 14(2)(a) of Regulation (EEC) No 1408/71, this is '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 …'.

14 The wording of the provision requires an assessment as to whether employment is principally in the territory of a given Member State. To that end, it is unreasonable to take into account the nationality of the aircraft in which the airline crew work, considering that aircraft to be the national territory of the State in which it is registered and equating the principal place of employment with the aircraft's nationality.

15 Such an interpretation seems incorrect because self-evidently, airline crew predominantly work on board aircraft. Moreover, the provision contained in Article 14(2)(a)(ii) is construed as an exception to the criterion of the place where the employer has its registered office. Arguably, the principal place of

employment should be construed as the place where the substantial part of the work takes place. This must be interpreted as referring to the place where or from which the employee actually performs the essential part of his duties vis-à-vis his employer, excluding work carried out on board the aircraft, since otherwise that would end up being the location provided for in Article 14(2)(a), from which said provision derogates (as evidenced by the phrase 'with the following restrictions').

16 As for the applicable social security legislation, the purpose of the provision seems to be to give precedence to the place where the essential aspects of the work are carried out, rather than the linking factor relating to the place where the employer has its registered office – a solution that ensures more effective control by the bodies responsible for enforcing social security measures and ensuring their full application with optimum access to social security benefits for the interested parties.

17 That purpose may be achieved by an interpretation of the concept of 'person … employed principally in the territory of the Member State in which he resides' based on the same criteria as those with which the Court of Justice, also in the aviation and airline crew sector, interpreted the concept of 'place where the employee habitually carries out his work' provided for in Article 19(2)(a) of Council Regulation (EC) No 44/2001.

18 In this respect, it should be noted that, in paragraph 57 of the judgment of 14 September 2017, *Sandra Nogueira and Others* (C-168/16 and C-169/16, EU:C:2017:688), the Court of Justice found – as regards the determination of the 'place where the employee habitually carries out his work', within the meaning of Article 19(2)(a) of Council Regulation (EC) No 44/2001 – that the criterion of the Member State where the employee habitually carries out his work must be interpreted broadly (see, by analogy, judgment of 12 September 2013, *Schlecker*, C-64/12, EU:C:2013:551, paragraph 31 and the case-law cited).

19 In that ruling, which also concerns personnel employed as air crew by an airline, the Court of Justice ruled that the court of a Member State, '… when it is not able to determine with certainty the "place where the employee habitually carries out his work"', must identify 'the place from which' that employee principally discharges his obligations towards his employer, and this through the research and evaluation of a set of indicia, a method that makes it possible to take account of all the factors which characterise the activity of the employee, but also to prevent a concept such as that of 'place where, or from which, the employee habitually performs his work' from being exploited or contributing to the achievement of circumvention strategies (see, by analogy, judgment of 27 October 2016, *D'Oultremont and Others*, C-290/15, EU:C:2016:816, paragraph 48 and the case-law cited).

20 In addition, the Court of Justice, as regards work relationships in the transport sector, in the judgments of 15 March 2011, *Koelzsch* (C-29/10, EU:C:2011:151, paragraph 49), and of 15 December 2011, *Voogsgeerd* (C-384/10,

EU:C:2011:842, paragraphs 38 to 41), mentioned several indicia that might be taken into consideration by the national courts: determining in which Member State is situated the place from which the employee carries out his transport-related tasks, the place where he returns after his tasks, receives instructions concerning his tasks and organises his work, and the place where his work tools are to be found, in addition to the place where the aircraft aboard which the work is habitually performed are stationed.

21 In the light of those considerations, the main proceedings were stayed and the abovementioned question referred to the Court of Justice for a preliminary ruling.