Case C-203/24 [*Hakamp*] [i]

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:

15 March 2024

Referring court:

Hoge Raad der Nederlanden (Netherlands)

Date of the decision to refer:

15 March 2024

Applicant:

KN

Defendant:

Raad van bestuur van de Sociale verzekeringsbank

Subject matter of the main proceedings

The main proceedings concern the determination of which social security legislation applies to an employee resident in the Netherlands who performed activities, for an employer based in Liechtenstein, on a barge in Belgium, the Netherlands and Germany.

Subject matter and legal basis of the request

In particular, this request for a preliminary ruling under Article 267 TFEU raises the issue of how to determine whether an employee who is gainfully employed in two or more Member States can be deemed to perform a substantial part of his activities in the Member State of residence.

[i] The present case is designated by a fictitious name which does not correspond to the actual name of a party to the proceedings.

Questions referred for a preliminary ruling

1. What circumstances or types of circumstances are appropriate for assessing on the basis of Article 14(8) of the Implementing Regulation the question whether a person who normally pursues an activity as an employed person in two or more Member States pursues a substantial part of his activities in the State of residence in a case in which it is established that he performs activities there for 22 percent of his working time? Is it required in that respect that: (i) a circumstance be directly linked to the pursuit of activities, (ii) a circumstance contain an indication as to the place where the activities are performed, and (iii) quantitative conclusions can be drawn from the circumstance as to the weight that can be attributed to the activities that are performed in the State of residence as compared with the total of all the activities of the person concerned?

2. Must or can this assessment, in view of the answer to question 1, take into account: (i) the residence of the employee, (ii) the place of registration of the barge on which the employee performs his activities, (iii) the place of establishment of the owner and operator of the barge, (iv) the place where the vessel sailed during other periods in which the employee was not working on it and was not yet in the service of the employer, (v) the place of establishment of the employer, and (vi) the place where the employee boards and disembarks the vessel?

3. Over which period must it be assessed whether an employee pursues a substantial part of his activities in his State of residence?

4. Does the competent body of a Member State, in determining the legislation applicable, have discretion which the courts must in principle respect with regard to the concept of 'substantial part of his activity' in Article 13(1) of the Basic Regulation and, if so, how far does that discretion extend?

Provisions of European Union law relied on

Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems

Provisions of national law relied on

(none)

Succinct presentation of the facts and procedure in the main proceedings

1 In 2016, the applicant was living in the Netherlands. From 4 February 2016 to 31 December 2016, he worked on a barge that is registered in the Netherlands. A shipping company registered and based in the Netherlands owns and operates the vessel. During that period, the applicant was gainfully employed by an employer in Liechtenstein and performed activities on the vessel in Belgium, Germany and the Netherlands. According to its logbook, the vessel spent about 22 per cent of its time in the Netherlands in 2016.

2 By letter dated 25 July 2017, the competent body for Liechtenstein asked the defendant, the Board of Directors of the Sociale Verzekeringsbank, to determine provisionally, in accordance with Article 6 of Regulation (EC) No 987/2009 ('the Implementing Regulation'), which social security legislation was applicable to the applicant during the time he was working on the vessel. By decision of 6 March 2020, the defendant provisionally found that it was Dutch social security legislation that applied.

3 The applicant lodged an objection to this decision with the defendant. The defendant rejected this objection, assuming that the applicant performed a substantial part of his activities in the Netherlands within the meaning of Article 13(1) of Regulation (EC) No 883/2004 ('the Basic Regulation'). In doing so, it considered that the logbook shows that the vessel spent about 22 per cent of its time in the Netherlands in 2016, 22 per cent in 2013 and 24 per cent in 2014. It also took into account that the applicant lives in the Netherlands, that the vessel is registered in the Netherlands, and that the owner and operator of the vessel are based in the Netherlands.

4 After the applicant's appeal was dismissed by the district court, he appealed to the Central Appeals Tribunal ('the Central Tribunal'). This judicial authority also found that the applicant performed a substantial part of his activities in the Netherlands. By way of justification, the Central Tribunal explained that an employee who works less than 25 per cent of his working time in his State of residence may nevertheless be deemed to perform a substantial part of his activities there if there are sufficient other circumstances that point to that being the case. The less an employee works in a Member State, more or more weighty other circumstances will have to be plausible for this to apply.

5 The Central Tribunal considered that the defendant had relied on sufficient grounds in the contested decision to establish that the applicant had performed a substantial part of his activities in his State of residence, the Netherlands. According to this judicial authority, the defendant was entitled to factor into that determination that the vessel on which the applicant worked also spent 22 per cent of its time in the Netherlands in 2013 and 24 per cent in 2014. It was also entitled to take into account that the applicant lives in the Netherlands, the vessel is registered in the Netherlands and the owner and operator of the vessel are based in the Netherlands.

The essential arguments of the parties in the main proceedings

6 The applicant lodged an appeal in cassation against the judgment of the Central Tribunal before the referring court, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). Only his first plea is relevant to the preliminary questions.

7 The applicant submits that in finding that he performed a substantial part of his activities in the Netherlands, the Central Tribunal misapplied Article 13 of the Basic Regulation and Article 14(8) of the Implementing Regulation. In that context, he argues that the circumstances taken into account by the Central Tribunal are not relevant in assessing whether a substantial part of his activities were performed in the Netherlands. He further argues that the Central Tribunal erred in not including in its considerations the fact that his employer was based in Liechtenstein and that he boarded and disembarked the vessel not in the Netherlands but in Belgium.

Succinct presentation of the reasoning in the request for a preliminary ruling

8 The referring court notes that, according to Article 14(8) of the Implementing Regulation, the concept of 'a substantial part of the activities' in Article 13(1)(a) of the Basic Regulation must be interpreted as meaning a quantitatively substantial part of all the activities, without necessarily involving the major part of those activities. According to Article 14(8) of the Implementing Regulation, in the case of activities in gainful employment, whether a substantial part of the activities are performed in a Member State is also to be assessed by reference to the indicative criteria of working time and/or remuneration. According to that same provision, if the application of those criteria results in a share of less than 25 per cent, that is an indication that a substantial part of the activities are not performed in the Member State concerned.

9 It follows from the use of the words 'partly', 'indicative criteria' and 'indicator' in Article 14(8) of the Implementing Regulation that, in the case of working time and/or remuneration of less than 25 per cent in the State of residence, there is the possibility that other circumstances, in the context of an overall assessment, mean that activities in that State must nevertheless be regarded as constituting a substantial part of the person's total activities.

10 The first question is what circumstances are relevant for determining that employees who perform less than 25 per cent of their activities in their State of residence can nevertheless be deemed to perform a substantial part of their activities there. Secondly, it is also unclear over which time period that assessment should be made.

11 According to the referring court, the relevant circumstances in the present case do not include remuneration. If there were any difference in remuneration, the parties did not invoke that criterion. However, it is unclear which criteria do matter. The

Implementing Regulation merely provides that the substantiality or otherwise of activities is to be determined 'partly' on the basis of the indicative criteria of working time and/or remuneration, without specifying what other circumstances may play a role.

12 The referring court is inclined to infer from the wording in Article 18(8) of the Implementing Regulation that the proportion of the activities pursued in the State of residence must be 'quantitatively substantial' that the other circumstances to be taken into account, in addition to working time and/or remuneration, must (i) be directly linked to the pursuit of activities (ii) contain an indicator as to the place where the activities are performed, and (iii) be such as to allow quantitative inferences to be drawn as to the weight that may be attributed to the activities performed in the State of residence as compared with the total of all the activities of the person concerned.

13 It doubts the relevance of the circumstances on which the Central Tribunal based its assessment in that regard, in particular because those circumstances are not directly related to the pursuit of activities. There is no mention of where the activities are performed or the quantitative weight of activities in the State of residence as compared with the total of all activities.

14 It goes without saying that the place where the vessel is registered and the place where the owner and operator of the vessel are based are not related to the activities. This also seems to apply to where the vessel sailed in other years when the applicant was not working on it (see also paragraphs 15 to 18 below). According to the referring court, since Article 13(1) of the Implementing Regulation by definition refers to an employee who performs part of his activities in his State of residence, the criterion of residence is not relevant either. The applicant further invoked the employer's place of business and where he boarded and disembarked the vessel. The first criterion is in no way related to the activities and the second reveals nothing about the quantitative weight of the activities in the State of residence. Since the text and logic of the Basic Regulation and the Implementing Regulation, as well as the case-law of the Court, do not provide sufficient guidance as to the criteria that are relevant in that case, the referring court refers the first two questions for a preliminary ruling.

15 As regards the second issue, namely what the relevant time period is for the purpose of examining whether a substantial part of the applicant's activities were performed in the Netherlands, the referring court considers several possibilities. As social insurance contributions in the Netherlands are levied per calendar year, the relevant calendar year could be taken as the starting point. However, this has the disadvantage of relying on national law, which may lead to differences in approach between the Member States concerned. An assessment over a period of time during which the employee has an unchanged employment relationship could also be considered, a period that could be longer but also shorter than a year. In that regard, the question also arises again as to whether circumstances during

periods when the employee was not employed on the vessel can be taken into account (compare paragraph 14 above).

16 By way of explanation, the referring court notes that it follows from Article 14(10) of the Implementing Regulation that the expected situation in the following 12 calendar months must also be taken into account when determining the applicable legislation. Moreover, the Implementing Regulation does not specify the point from which that 12-month period should be counted.

17 In contrast, the Implementing Regulation does not comment on the situation in the past. In the December 2013 Practical Guide to Applicable Laws in the European Union (EU), the European Economic Area (EEA) and Switzerland ('the Practical Guide'), on page 31, the Administrative Commission for the Coordination of Social Security Systems ('the Administrative Commission') notes that past work is also a reliable indicator of future behaviour. According to the Practical Guide, if a decision cannot be made on the basis of planned work patterns or duty rosters, it would be reasonable to look at the situation in the previous 12 months and use this information when assessing substantial activities. However, this view of the Administrative Commission is not decisive. The views of this Commission, as set out in the Practical Guide, are to be regarded as opinions. These may provide useful guidance in interpreting the Basic Regulation and the Implementing Regulation, but do not affect the court's jurisdiction to assess the content of the provisions of those regulations, according to the case-law of the Court (see judgment of 5 December 1967, Van der Vecht, 19/67, EU:C:1967:49, and 8 May 2019, SF, C-631/17, EU:C:2019:381, § 41).

18 In the present case, the Central Tribunal took into account the situation as it existed in 2012 and 2013, i.e. more than 12 months before the commencement of activities, which is therefore contrary to the opinion of the Administrative Commission and the rule in the Implementing Regulation. On the one hand, according to the referring court, it may be obvious to take into account a trend in the activities performed in recent years, but this argument seems to apply only if the employee in question was already performing those activities at the time. On the other hand, the fact that the Basic Regulation and Implementing Regulation contain no indicators that the past situation should be taken into account is a reason not to do so. This is all the more true in a situation that occurred years before and even more so if the employee's employment did not exist at that time. Since insufficient guidance can be drawn from the text and the logic of the Basic Regulation and the Implementing Regulation, as well as from the case-law of the Court, in this balancing exercise, the Court refers the third question for a preliminary ruling.

19 Furthermore, according to the referring court, the question is how much discretion the competent body has in determining that an employee is covered by the relevant social security legislation because he carries out a substantial part of his activities in his State of residence. When the court has to rule on this determination, the question arises as to whether it should fully form its own

judgment on the matter, substituting, if necessary, the judgment of the competent body, or whether it should grant that body a certain margin of discretion.

20 The Central Tribunal seems to be of the opinion that the competent body has such a margin of discretion. On page 33 of the Practical Guide, the Administrative Commission writes, in relation to road transport, that the designated bodies responsible for determining the applicable legislation may use other indicators than those set out in the Basic Regulation, the Implementing Regulation and this Guide, if they consider them more appropriate to the situation at hand. This seems to indicate discretion for designated bodies. However, this comment is not decisive, firstly because the views of the Administrative Commission are not legally binding, and secondly because the concept of 'designated bodies' in this passage could also include, where appropriate, the court that is required to rule on the correctness of the view of the competent body of a Member State.

21 The argument against accepting discretion for the competent body is that the concept of 'substantial part of his activities' is a legal concept, which lends itself to application in a concrete case by the court without the need to grant a margin of discretion to an administrative body. Moreover, accepting a margin of discretion for competent bodies increases the likelihood that the competent bodies of several Member States concerned will reach different conclusions regarding the applicable legislation in respect of the same case, whereas the very purpose of the Basic Regulation (Article 11(1)) is to ensure that those to whom it applies are subject to the social security legislation of only one Member State.

22 Since insufficient guidance on a possible margin of discretion can also be drawn from the text and the logic of the Basic Regulation and the Implementing Regulation, as well as from the case-law of the Court, the Court refers the fourth question for a preliminary ruling.