Case C-411/22

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:

21 June 2022

Referring court:

Verwaltungsgerichtshof (Austria)

Date of the decision to refer:

24 May 2022

Appellant on a point of law:

Thermalhotel Fontana Hotelbetriebsgesellschaft m.b.H.

Respondent authority before the Verwaltungsgericht (Austria):

Bezirkshauptmannschaft Südoststeiermark

Subject matter of the main proceedings

Granting of compensation for loss of earnings suffered by workers as a result of isolation ('quarantine') ordered by the health authorities in the case of a positive COVID-19 test result – Concept of 'sickness benefit' within the meaning of Article 3(1)(a) of Regulation (EC) No 883/2004 – Frontier workers – Restriction of the freedom of movement for workers as a result of the condition that the isolation must have been ordered by an Austrian authority

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1. Does compensation which is due to workers during their isolation as persons infected with, suspected of being infected with, or suspected of being contagious with COVID-19 for the pecuniary disadvantages caused by the impediment to their employment, and which is initially payable to the workers by their employer, with the entitlement to compensation vis-à-vis the Austrian Federal Government

then being transferred to the employer at the time of payment, constitute a sickness benefit within the meaning of Article 3(1)(a) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems?

If Question 1 is answered in the negative:

2. Must Article 45 TFEU and Article 7 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union be interpreted as precluding national legislation under which the granting of compensation for loss of earnings suffered by workers as a result of isolation ordered by the health authorities in the case of a positive COVID-19 test result (with the compensation being initially payable to the workers by their employer, and the entitlement to compensation vis-à-vis the Austrian Federal Government then being transferred to the employer to that extent) is subject to the condition that the isolation is ordered by an Austrian authority on the basis of provisions of national law relating to epidemics, with the result that such compensation is not paid to workers who, as frontier workers, are resident in another Member State and whose isolation ('quarantine') is ordered by the health authorities of their Member State of residence?

Provisions of European Union law relied on

Article 45 TFEU; Article 7 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union; Articles 1 to 3, 5 and 11 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems

Provisions of national law relied on

Paragraph 7(1) of the Epidemiegesetz (Law on epidemics; 'the EpiG'): 'Diseases subject to compulsory notification in respect of which isolation measures may be ordered in relation to persons infected with, suspected of being infected with, or suspected of being contagious with the disease shall be designated by means of a regulation. …'

Paragraph 32 of the EpiG: '(1) Natural and legal persons as well as commercial-law partnerships shall be compensated for the pecuniary disadvantages caused by the impediment to their business activities if and to the extent that

1. they have been required to isolate under Paragraph 7 or 17; […]

and thereby suffered a loss of earnings.

(2) The compensation shall be paid for each day covered by the administrative order referred to in subparagraph 1.

(3) Compensation for persons who are in an employment relationship shall be assessed on the basis of their regular remuneration … . The amount of compensation due shall be paid by employers on the dates on which remuneration is customarily paid in the business concerned. The entitlement to compensation vis-à-vis the Federal Government shall be transferred to the employer at the time of payment … .'

Succinct presentation of the facts and procedure and the essential arguments of the parties in the main proceedings

1 The appellant on a point of law has its registered office in Austria, where it operates a hotel. Several workers tested positive for COVID-19 in the course of control testing carried out at that hotel. The appellant on a point of law notified those results to the Austrian health authority, which, however, did not impose isolation on the workers concerned, because they were resident in Slovenia or Hungary. However, the Austrian authority informed the competent authorities of those other Member States, which subsequently ordered the isolation of the workers at their respective places of residence in Slovenia and Hungary for specified periods (from 23 October 2020 to 18 November 2020, from 21 October 2020 to 17 November 2020 and from 26 October 2020 to 13 November 2020, respectively). During those periods of isolation, the appellant on a point of law continued to pay to the workers concerned their respective remuneration.

2 On 1 December 2020, the appellant on a point of law applied to the Bezirkshauptmannschaft Südoststeiermark (district administrative authority, South-East Styria) for compensation for the loss of earnings, since the workers' entitlement thereto had been transferred to the appellant on a point of law upon payment of the remuneration. Those applications were refused by administrative decisions of the district administrative authority of 29 December 2020.

3 By five judgments, the complaints lodged by the appellant on a point of law against those administrative decisions were dismissed as unfounded by the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria), since, in its view, no entitlement was due under the EpiG in the case of isolation measures ordered by foreign authorities.

4 The appellant on a point of law brought the present 'extraordinary' appeals on a point of law against those judgments before the Verwaltungsgerichtshof (Supreme Administrative Court), by which, above all, it raised doubts as to the compatibility of Paragraph 32(1) and (3) of the EpiG, as interpreted by the Regional Administrative Court, with the freedom of movement for workers under Article 45 TFEU and Regulation (EC) No 883/2004. The Supreme Administrative Court joined those appeals on a point of law for the purposes of ruling on them together.

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

5 The Supreme Administrative Court is a court against whose decisions there is no judicial remedy under national law within the meaning of Article 267 TFEU.

6 Conceptually, the amount of compensation paid to the worker under the first and second sentences of Paragraph 32(3) of the EpiG does not constitute remuneration, but rather recompense (compensation) paid by the Federal Government on the basis of an authority conferred under public law.

7 In the present case, it must be clarified whether, in its capacity as employer, the appellant on a point of law is also entitled to assert a claim for compensation for loss of earnings – transferred to it in accordance with the third sentence of Paragraph 32(3) of the EpiG – where the order on the basis of which the workers who were infected with, suspected of being infected with, or suspected of being contagious with COVID-19 were required to isolate was issued not by an administrative decision of an Austrian health authority but by a measure (of a public authority) of another Member State, due to the fact that they were not resident in Austria.

8 The Supreme Administrative Court proceeds on the assumption that the workers concerned are frontier workers within the meaning of Article 1(f) of Regulation No 883/2004 and that those workers are therefore subject, within the scope of that regulation, to Austrian legislation within the meaning of Article 11(1) and (3)(a) of that regulation.

9 If the compensation provided for in Paragraph 32 of the EpiG were to be regarded as a sickness benefit within the meaning of Article 3(a) of Regulation No 883/2004, the Austrian authorities and courts would, in accordance with Article 5(b) of that regulation, be required to take an isolation order imposed by the competent authority of another Member State into account as if it had been imposed by an Austrian authority on its own territory.

10 In accordance with the case-law of the Court of Justice of the European Union ('the Court'), a benefit is regarded as a social security benefit within the meaning of Article 3 of Regulation No 883/2004 where it is granted without any individual and discretionary assessment of personal needs, on the basis of a statutorily defined position, and it relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71 (now Article 3(1) of Regulation No 883/2004). In order to distinguish between the various categories of social security benefits, the risk covered by each benefit must be taken into consideration (see, in relation to the predecessor provision in Regulation No 1408/71, judgment of 1 February 2017, *Tolley*, C-430/15, EU:C:2017:74, paragraphs 43 and 45). A sickness benefit covers the risk connected to a morbid condition involving temporary suspension of the concerned person's activities (see judgment of 21 July 2011, *Stewart*, C-503/09, EU:C:2011:500, paragraph 37).

11 The benefit in question in the present case is granted by the Federal Government on the basis of a statutorily defined position. However, it is not tied to the existence of an illness, but is based on the fact that the person to whom the benefit is due is prevented from performing his or her work by virtue of an order of the public health authorities and thereby suffers a loss of earnings, which is compensated by the Federal Government. The EpiG classifies isolation imposed by the authorities as a 'precaution for the prevention and control of diseases subject to compulsory notification'. In accordance with its objective, isolation does not serve to enable the recovery of individuals, but rather to protect the population from being infected by the isolated person and thereby to contain the general health risk posed by the disease subject to compulsory notification.

12 The Supreme Administrative Court is therefore inclined to the view that the compensation at issue in the present case does not constitute a sickness benefit within the meaning of Article 3(1)(a) of Regulation No 883/2004. However, since the Court has hitherto not ruled on that question, and the correct application of EU law is also not so obvious as to leave no scope for any reasonable doubt, the question is referred to the Court for a ruling pursuant to Article 267 TFEU.

13 In the event that Question 1 is answered in the negative, it must be clarified whether the freedom of movement of workers under Article 45 TFEU and the principle of equal treatment under Article 7 of Regulation No 492/2011 preclude a compensation regime such as that provided for in Paragraph 32 of the EpiG.

14 The workers affected by the isolation measure in the case in the main proceedings are employed in Austria, but are resident in Slovenia or Hungary, to which they return on a daily basis. They must therefore be regarded as workers who have exercised their right to freedom of movement, provided for in Article 45 TFEU.

15 The entitlement to compensation asserted by the appellant on a point of law in the case in the main proceedings is based on the fact that such entitlement vis-à-vis the Federal Government, which arises for the worker by operation of law, is first satisfied by the employer vis-à-vis the workers and is then transferred, to that extent, to the employer. The employer's entitlement is therefore directly related to employment within the meaning of Article 45 TFEU, with the result that, in the view taken by the Supreme Administrative Court – and also in the light of the case-law (see judgment of 7 May 1998, *Clean Car Autoservice* v *Landeshauptmann von Wien*, C-350/96, EU:C:1998:205, paragraph 18 et seq.) – there are no concerns as to the fact that the employer is also able to rely on the freedom of movement for workers under Article 45 TFEU in that connection.

16 Residence in Austria is – indirectly – prescribed by a provision of national law as a condition for the assertion of entitlement to compensation. The Supreme Administrative Court takes the view that this is to be regarded as indirect discrimination because it is intrinsically liable to affect migrant workers more than national workers and there is a consequent risk that it will place the former at a particular disadvantage (see judgment of 18 July 2007, *Hartmann*, C-212/05,

EU:C:2007:437, paragraphs 29-31); in the view taken by the Supreme Administrative Court, that outcome is also not affected if the entitlement derived by the worker is asserted by the employer.

17 With respect to the regime at issue in the present case, it is not possible to infer from the legislative material any special justification for taking as the basis in that regard an administrative decision by an Austrian authority and thus, indirectly, the fact that the worker is resident in Austria. At best, public health may enter into consideration as justification. The ordering of isolation measures in respect of persons infected with, suspected of being infected with, or suspected of being contagious with a disease facilitates the tracing of infections and has the effect that (possibly) infected persons are not permitted to spend time outside their residence, with the result that the risk of COVID-19 spreading further can be reduced. The statutory entitlement to compensation for loss of earnings during the period of isolation also serves to promote compliance with the quarantine measures and thereby to increase the effectiveness of the measures taken by the health authorities to contain infections. A possible justification for taking as the basis orders issued only by Austrian authorities could be that monitoring compliance with such orders is also possible only if the isolation takes place in the national territory and that the objective of containing infections relates to the situation in the national territory, which may differ from the epidemic situation in the other Member State (the country of residence of the worker concerned). Lastly, a possible justification for the compensation provided by the Federal Government being limited to those workers who have been required to isolate by Austrian authorities could be that it is only in those cases that the Austrian State is responsible for the impediment to the worker's employment. The worker, in the event of a quarantine order in his or her country of origin, would have to be referred to that country in so far as corresponding compensation rules exist there.

18 In any event, it does not seem to be manifestly apparent that the unequal treatment between employers who employ workers resident in the national territory and employers who also employ frontier workers is proportionate. Since, therefore, the correct application of EU law does not appear to be so obvious as to leave no scope for any reasonable doubt, Question 2 is also referred for a preliminary ruling pursuant to Article 267 TFEU.