Case C-357/24

Request for a preliminary ruling

Date lodged:

16 May 2024

Referring court:

Visoki trgovački sud Republike Hrvatske (Croatia)

Date of the decision to refer:

3 May 2024

Appellant:

Freistaat Bayern

Respondent:

Euroherc osiguranje d.d.

I. Name of the referring court

Referring court: Visoki trgovački sud Republike Hrvatske (Commercial Court of Appeal of the Republic of Croatia)

[…]

II. Parties to the main proceedings

Appellant: Freistaat Bayern, […]Augsburg, Federal Republic of Germany, […]

[…]

Respondent: Euroherc osiguranje d.d.[,] Zagreb […]

III. Succinct presentation of the facts and procedure in the main proceedings

1 The dispute concerns the appellant's demand that the respondent compensate the damage the appellant suffered as a result of paying its employee (person X) sick pay for three periods of incapacity to work from 21 April 2015 until 21 May 2015, from 16 February 2016 until 15 April 2016, and from 8 November 2016 until 5 January 2017. The benefits paid for these periods of incapacity to work amounted to EUR 28 825.83.

2 Person X received treatment in Germany after being injured in a road accident that occurred on 18 April 2015 in Šibenik (Croatia). The accident involved a bicycle and a passenger car. The cyclist was person X, the appellant's employee, and the passenger car was driven by person Y, the respondent's insured with respect to compulsory third-party motor insurance.

3 Person Y was found to be at fault, but at this stage of the proceedings his sole responsibility for causing the accident is still in dispute, as the respondent claims that person X, the appellant's employee, also contributed to the accident.

4 After the road accident, under the amicable settlement procedure, the respondent paid compensation to person X for actual damage caused (injuries sustained in the road accident), including compensation for non-pecuniary damage, benefits in connection with third-party assistance and care, compensation for damage to property, other costs and costs of legal representation amounting to HRK 43 433.43 or EUR 5 764.61 in total.

5 The legal basis on which the appellant bases its claim is 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 No 883/2004'). The appellant believes that as the employer of person X, it is a 'competent institution' as referred to in Article 1(q)(iv) of Regulation No 883/2004, since the benefits at issue are those provided for in Article 3(1), and therefore the sick pay paid in this case falls within the concept of 'sickness benefits' referred to in Article 3(1)(a) of that regulation.

6 The appellant relies on Article 85(1) of Regulation No 883/2004 and argues that by paying sick pay it is subrogated to the rights of its employee against the third party (the respondent as the insurer of person Y, who is responsible for the damage), and that such subrogation should be recognised in the present proceedings, since the case concerns benefits that person X received under German legislation due to injuries resulting from an accident that took place in Croatia.

7 In that regard, the appellant refers to Article 6(1) of the Gesetz über die Zahlung des Arbeitsentgelts an Feiertagen und im Krankheitsfall (Bavarian Law on Payment of Benefits for Work on Public Holidays and in the Event of Sickness), which […] reads as follows: 'If under this law, an employee can claim

compensation from a third party for loss of earnings due to incapacity to work, then this claim shall be transferred to the employer to the extent that the employer, under this law, continued to pay the employee's remuneration and also the contributions due from the employee, which the employer pays to the Federal Labour Agency, the employer's share of social security and care insurance contributions, and supplementary pension and survivors' insurance contributions'.

8 The respondent opposes those claims, arguing that Regulation No 883/2004 cannot be applied to the facts of the case, primarily because it regulates the issue of social security coordination rather than compensation for indirect damage suffered by an employer due to the payment of sick pay to its employee, and that the appellant does not have the status of a competent institution, being solely an institution that deals with social security issues.

9 The court of first instance accepted the appellant's claims about the applicability of Regulation No 883/2024 in the present case without specifically giving grounds for its position; it dismissed all of the respondent's pleas as unfounded and allowed the claim (Trgovački sud u Zagrebu (Zagreb Commercial Court) judgment […] of 21 November 2023).

10 In its appeal against the judgment at first instance, the respondent argues that issues concerning the application of Regulation No 883/2004 to the facts of the case have not been resolved. Consequently, the court of appeal has doubts as to whether the appellant in this particular case can be considered a competent institution within the meaning of Article 1 of Regulation No 883/2004, and whether the concept of sickness benefits referred to in Article 3(1)(a) also includes benefits for the period of incapacity to work resulting from injuries sustained in another Member State, which are not benefits in respect of accidents at work and occupational diseases [Article 3(1)(f)]. The court of appeal also has doubts as to whether the respondent can be the person obliged to reimburse the benefits, since it is the insurer for third-party motor insurance.

11 Assuming those questions are answered in the affirmative, a question arises regarding the application of Article 85(1) of Regulation 883/2004. Namely, Croatian substantive legislation in the area of compulsory motor insurance does not recognise the institution of compensation for so-called indirect damage suffered by a third party as a result of damage suffered by the injured party. The right to compensation for such damage must be expressly provided for in law, and to date, that right has only been provided for establishments engaged in the provision of health, pension or disability insurance. On the other hand, the employee enjoys the right to sickness benefits, which are paid by the employer or by the Hrvatski zavod za osiguranje (Croatian Health Insurance Fund) depending on the duration of incapacity to work, regardless of the cause of the illness, and the employer has no right of action against the party responsible for the damage or its insurer. The legal basis for the payment of the benefit under consideration during the period of temporary incapacity to work due to illness is the contract of employment and the employee's compulsory health insurance.

IV. Provisions of national law and case-law relied on

12 Zakon o obveznim osiguranjima u prometu (Law on Compulsory Motor Insurance) (*Narodne novine* No 151/05, 36/09, 75/09, 76/13 and 152/14) in effect on the date of the event that caused the damage and the commencement of the main proceedings:

Article 2

(1) Compulsory motor insurance includes:

[…][1] 2. insurance for the owner or user (‘the owner’) of a vehicle against liability for damage caused to third parties (‘third-party motor insurance’).

Article 3

(1) The following terms are defined as follows within the meaning of this Law […]

8. ‘injured person’ is any person who has suffered damage to property and/or personal injury who is entitled to claim compensation under this Law […].

Article 11

(1) The injured person may file a claim for compensation under the insurance referred to in Article 2(1) of this Law directly with the liable insurer.

Article 22

(1) The owner of a vehicle is required to take out liability insurance for damage that may be caused to third parties as a result of using the vehicle, in the event of death, bodily injury, damage to health, destruction of property or damage to property.

Article 27

(1) The insurance company is obliged to compensate establishments engaged in the provision of health, pension or disability insurance for actual damage within the scope of liability of its insured person and within the limits of the obligations assumed in the insurance contract.

(2) Actual damage within the meaning of paragraph 1 above means the costs of medical treatment and other necessary costs incurred in accordance with the laws on health insurance as well as the proportionate amount of the old-age pension or disability pension of the injured person or his or her family members.

[1] […] means that a passage from the statute has been omitted as irrelevant.

13 Zakon o obveznom zdravstvenom osiguranju (Law on Compulsory Health Insurance) (*Narodne novine* No 80/13 and 137/13) in effect on the date of the event that caused the damage and the commencement of the main proceedings:

Article 36

(1) Within the framework of the rights arising from compulsory health insurance, insured persons are entitled to:

1. benefit for the period of temporary incapacity to work or impediments to returning to work due to the use of health care or in connection with other circumstances listed in Article 39 of this Law ('benefit') […]

Article 39

An insured person is entitled to a benefit in connection with the use of health care under compulsory health insurance or in connection with other circumstances stipulated in this Law if:

1. the insured person is temporarily unable to work due to illness or injury, or if he or she has been admitted to a medical facility for treatment or tests […]

Article 40

The benefit in connection with the use of health care referred to in Article 39(1) and (2) of this Law is paid to the insured person:

1. by the legal or natural person – the employer – for the first 42 days of temporary incapacity to work, and also for as long as the insured person works in a third country to which the legal or natural person has delegated him or her or is himself or herself employed in a third country […].

Article 41

[…] (3) The benefit for the period of temporary incapacity to work referred to in Article 39(1) and (2) of this Law from the 43rd day or the 8th day of temporary incapacity to work, respectively, is calculated and paid by the legal or natural person – the employer, with the proviso that the Fund [2] is obliged to reimburse the benefit paid within 45 days from the date of receipt of the request for its reimbursement.

Article 136

[2] The Hrvatski zavod za zdravstveno osiguranje (Croatian Health Insurance Fund), which, under Article 3 of the Law on Compulsory Health Insurance, is responsible for compulsory health insurance in the Republic of Croatia.

(1) The Fund is obliged to seek compensation for the damage caused from the person who caused the illness, injury or death or the insured person.

(2) The legal or natural person – the employer – is liable for the damage caused to the Fund by an employee in the course of his or her work or in connection with his or her work in the cases listed in paragraph 1 above.

(3) In the cases listed in paragraph 2 above, the Fund is also obliged to seek compensation directly from the employee if the damage was caused deliberately or through gross negligence.

(4) Where the Fund seeks compensation from a legal or natural person and from an employee, they are jointly and severally liable for the damage.

Article 140

In the cases listed in Article 136 of this Law, the Fund is also obliged to seek compensation for the damage caused directly from the insurer who provides insurance against liability for damage caused to third parties to the persons referred to therein, in accordance with the laws on compulsory insurance against that risk.

Article 142

The Fund is obliged to seek compensation in the cases provided for in this Law irrespective of whether the damage was caused by the payment of benefits to which the insured person is entitled from the funds accumulated under compulsory health insurance, that is to say, from state budget funds.

Article 143

The compensation that the Fund is entitled to claim in the cases referred to in Articles 135 and 136 and in Articles 138–142 of this Law includes the costs of medical treatment and other services as well as cash and other benefits paid by the Fund.

14 The legal position according to which neither the employer nor its liability insurer are entitled to compensation for the benefits paid due to an employee's temporary incapacity to work caused by an accident at work is clearly set out in the current case-law of the Vrhovni sud Republike Hrvatske (Supreme Court of the Republic of Croatia). By way of confirmation, the judgment […] of 18 March 2014 is enclosed with the application. It follows from that judgment that employers do not have the right to seek compensation from the entity responsible for the injury or its insurer in respect of the amount they paid to their employee for the period of sick leave resulting from the injury. Nor do they have that right in the case of an accident at work or occupational disease. Such a right is not available to the employer's insurer either, even though an obligation has been established for the

employer to insure itself against liability for the accidents at work and occupational diseases of its employees.

15 The relevant passage of the above judgment reads:

‘An employer who, acting in accordance with the aforementioned legal provisions, [3] pays its employee a benefit for a period of sick leave due to an accident at work caused by a third party (the entity responsible for the damage), is not, under the general principles of liability for damages, a party to a non-contractual liability relationship in respect of the damage arising from the employee’s injuries, because the action that caused the damage in question was not directed at that employer. In a situation where the action that caused the damage was directed at a certain person, and the effects of the action that caused the damage also affected another person, in order for that other person to have a right to compensation, that other person’s right must be expressly provided for in law.

By paying its employee […] a benefit for a period of sick leave due to an accident at work, the applicant’s insurer […] fulfilled its statutory obligation under Articles 51 and 26 of the Zakon o zdravstvenom osiguranju (Law on Health Insurance).

No provision of the Law on Health Insurance provides for recourse by the employer for benefits paid to an employee due to an accident at work against the person who is responsible for the damage, and that right, by virtue of Article 85(1) of that Law, is expressly vested in the Croatian Health Insurance Fund’.

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

16 Thus, in a situation where Croatian legislation does not provide for a right to compensation for indirect damage suffered by an employer as a result of the payment of benefits for the period of its employee’s incapacity to work, the question arises as to whether, on the basis of Article 85(1) of Regulation No 883/2004, a German employer can subrogate to the rights of its employee or even make a direct claim for compensation against a third party, in this case against the insurer of the person responsible for the occurrence and consequences of the event that caused the damage.

17 The Court of Justice has interpreted Article 93(1) of Council Regulation (EEC) No 1408/71 of 14 June 1971, which corresponds in its content to Article 85(1) of Regulation No 883/2004, in two judgments (C-397/96 and C-428/92) but in the opinion of the referring court, those judgments do not answer the question of

[3] The Zakon o zdravstvenom osiguranju (Law on Health Insurance) (*Narodne novine* No 75/93, 55/96 and 1/97 – consolidated text, 109/07, 13/98, 88/98, 150/98, 10/99, 34/99, 69/00, 59/01, 82/01) is referred to here.

whether an employer can claim recourse in connection with the benefits it has paid as the institution responsible for paying benefits if the injured party cannot claim such compensation in the Member State where the injury occurred, that is to say, there is no legal basis for claiming such compensation.

18 The Court is currently considering case C-7/24, in which a Danish court has requested a preliminary ruling in regard to the interpretation of Article 85(1) of Regulation No 883/2004. It appears from the contents of the Danish request, published in the form of a working document, that the main proceedings are similar to the main proceedings in the present case. An important difference is that the applicants in the Danish case are German public pension insurance companies (legally obliged social security institutions), while in the case before the Croatian court, the appellant is the injured person's employer. The defendant, similarly to the respondent in the present case before the Croatian court, is a Danish insurance company. The Danish request likewise raises the question of whether the substantive rules of the law of the Member State in which the injury occurred can limit the recourse claim of the obliged social security institution where the social security benefits for which recovery is sought are not identical, or at least not comparable in nature, to the claim which the injured party could recover under those substantive rules (paragraph 58 of the request for a preliminary ruling in Case C-7/24).

VI. Question referred for a preliminary ruling

In light of the above, the Commercial Court of Appeal of the Republic of Croatia, as the court of second instance in the present case, pursuant to Article 19(3)(b) TEU and Article 267 TFEU, considers that there is a need to refer the following question to the Court of Justice of the European Union for a preliminary ruling:

Must Article 85(1) 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 be interpreted as meaning that in order for an employer, as the institution obliged to pay benefits, to have a recourse claim for sickness benefits paid to an employee for an injury resulting from events that occurred in the territory of another Member State against the third party liable to provide compensation for the injury or against its civil liability insurer, it is necessary for there to exist a legal basis for claiming such compensation in the Member State where the injury occurred?

Zagreb, 3 April 2024

[…]

Attachments:

- copies of the first-instance judgment, the appeal, and relevant excerpts from the case file of the court of first instance

- a copy of the judgment in *Rev-x*, Ref. No 1048/13-2 of 18 March 2014

[…]