

Case C-329/23

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:

25 May 2023

Referring court:

Verwaltungsgerichtshof (Austria)

Date of the decision to refer:

9 May 2023

Appellant on a point of law:

Sozialversicherungsanstalt der Selbständigen

Interested party:

Dr. W M

Subject matter of the main proceedings

Social security legislation – Self-employment in a Member State, an EEA state and a third state – Coordination rules – Jurisdiction

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Questions for a preliminary ruling

1. Are the rules of EU law on the determination of the applicable legislation in the area of social security according to Regulation (EC) No 883/2004 in conjunction with Regulation (EC) No 987/2009 to be applied to a situation in which an EU citizen is simultaneously self-employed in an EU State, an EEA EFTA State (Liechtenstein) and Switzerland.

If the answer to the first question is in the affirmative:

2. Must the application of Regulation (EC) No 883/2004 in conjunction with Regulation (EC) No 987/2009 in such a case be such that the applicability of the social security legislation must be assessed separately in the relationship between the EU Member State and the EEA-EFTA State, on the one hand, and the relationship between the EU Member State and Switzerland, on the other hand, and must, accordingly, a separate certificate regarding the applicable legislation be issued in each case?

3. Is there a change in the ‘relevant situation’ within the meaning of Article 87(8) of Regulation, (EC) No 883/2004 where a self-employment activity is commenced in another State to which the said regulation is applicable, even if a change in the applicable legislation would not result either under Regulation (EC) No 883/2004 or under Regulation (EEC) No 1408/71 and the activity is so subordinate in extent that only about 3% of total income is thereby obtained?

Does it make any difference whether, within the meaning of the second question, the coordination in the bilateral relationship between the States previously concerned, on the one hand, and between one of the States previously concerned and the ‘other State’, on the other hand, must be conducted separately?

Provisions of EU 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

Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community

Succinct presentation of the facts and procedure in the main proceedings

- 1 The interested party is an Austrian and Liechtenstein national, lives in Austria and, in the period at issue in this case (1.1.2017 to 31.3.2018), worked as a self-employed doctor in Austria, Liechtenstein and Switzerland. He obtained about 19% of his income in Austria, 78% in Liechtenstein and 3% in Switzerland. He commenced his activity in Switzerland on 1.1.2017. He was previously clearly subject to Austrian social security legislation on the basis of his residence in Austria pursuant to Article 14a(2) of Regulation (EEC) No 1408/71.
- 2 On 14 April 2020, the interested party applied for an E 101 form from the appellant, the Sozialversicherungsanstalt (Social Security Institution), pursuant to

Regulation (EEC) No 1408/71, for the period 1.1.2017 to 31.3.2018, from which it is apparent that Austrian social security legislation applies to the applicant.

- 3 The Sozialversicherungsanstalt interpreted the application as an application for an A1 form under Regulation (EC) No 883/2004 in conjunction with Regulation (EC) No 987/2009 and rejected it by decision of 21 October on the ground that, although Regulation (EC) No 883/2004 in conjunction with Regulation (EC) No 987/2009 (or, under the transitional provision in Article 87 of Regulation [EC] No 883/2004, Regulation (EEC) No 1408/71) applied in relation to Liechtenstein under the EEA Agreement and Regulation (EC) No 883/2004 in conjunction with Regulation (EC) No 987/2009 similarly applied in relation to Switzerland under the Agreement on the Free Movement of Persons between the EU and Switzerland, there was no umbrella agreement providing for comprehensive coordination at European level collectively covering the EU States, the EEA-EFTA States and Switzerland. The activities of the interested party in the relevant period were therefore separately subject to the legislations of Austria, Liechtenstein and Switzerland.
- 4 The interested party lodged an appeal against that decision, which the Bundesverwaltungsgericht (Federal Administrative Court) upheld by decision of 28 January 2022. It ruled that the interested party had to be issued with an E 101 or A 1 form certifying that those activities were subject to Austrian social security legislation, both for his activity in Liechtenstein and for his activity in Switzerland in the period at issue in this case.
- 5 According to the Bundesverwaltungsgericht, it is, first of all, clear that the interested party was subject to Austrian social security legislation; however, his commencement of activity in Switzerland raises the issue whether the hitherto decisive provisions of Regulation (EEC) No 1408/71 are still applicable. However, in its view, there is no need for a separate umbrella agreement. The ‘Austria-Liechtenstein self-employment’ situation must be assessed on the basis of the EEA Agreement and the Agreement on the Free Movement of Persons applies to the ‘Austria-Switzerland self-employment’ situation.
- 6 In the present case, Regulation (EC) No 883/2004 is applicable under the EEA Agreement and, pursuant to the transitional provisions of that regulation, the interested party has so far been subject to Regulation (EEC) No 1408/71 in respect of his parallel self-employment in Austria and Liechtenstein. The commencement of his activity in Switzerland is not covered by the EEA Agreement and does not result in any change in the situation within the meaning of Article 87(8) of Regulation (EC) No 883/2004. The interested party must therefore be issued, as before, with an E 101 certificate in respect of his parallel employment in Austria and Liechtenstein certifying that he is subject to compulsory social insurance in Austria.
- 7 The parallel self-employment in the Austria-Switzerland relationship must be assessed on the basis of the Agreement on the Free Movement of Persons in

accordance with Regulation (EC) No 883/2004. Since the self-employment activity occurred mainly in Austria (the Member State of residence), the self-employment activity in Switzerland is also subject to compulsory social insurance in Austria.

- 8 The Sozialversicherungsanstalt brought an appeal on a point of law before the Verwaltungsgerichtshof (Supreme Administrative Court) against that decision. It submitted that the question arises how Regulation (EC) No 883/2004, Regulation (EC) No 987/2009 and Regulation (EEC) No 1408/71 interact in the present case. It maintains that the assessment of the Bundesverwaltungsgericht is incorrect, since the EU legislation is not applicable in relation to the three States involved. The interested party's activities are instead separately subject to the legislations of Austria, Liechtenstein and Switzerland.
- 9 The interested party contended that the Bundesverwaltungsgericht's decision is ultimately correct, that, however, the situation does not need to be divided into an Austria-Liechtenstein relationship and an Austria-Switzerland relationship. In its view, whether Austrian or Liechtenstein social security legislation is applicable is relevant only in the relationship between the Austrian social security institution and the Liechtenstein authorities. There is no need for an umbrella agreement and it is also not apparent why, without such an agreement, Regulation (EC) No 883/2004 should not be applicable. The matter relates to the EEA Agreement together with its annexes and thereby Regulation (EC) No 883/2004, which results in the applicability of Regulation (EEC) No 1408/71.
- 10 He also submitted that it is not a typical third State situation, since both of the aforementioned regulations also apply in relation to Liechtenstein and Switzerland, in the latter case, under the Free Movement of Persons Agreement. It would be paradoxical if mandatorily applicable EU legislation were circumvented by the bilateral Switzerland-Liechtenstein relationship in Austria. The application of Regulation (EC) No 883/2004 also does not depend on the existence of an umbrella agreement. Since the relevant situation remains unchanged by his activity in Switzerland (amounting to 3% of income), his self-employment activity remains subject to compulsory social insurance in Austria.

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

- 11 In the case of the EU Member States, the matter of which social security regulations apply to a citizen who is self-employed in more than one State is provided for under Regulation (EC) No 883/2004 in conjunction with Regulation (EC) No 987/2009. That coordination of EU legislation was declared to be applicable also in the relationship with other States by means of agreements such as the EEA Agreement or the Agreement on Free Movement of Persons between the EU and Switzerland. Neither of those two agreements contains a basis for including third-country nationals in the coordination, nor is there any provision

regarding the coordination in respect of any other agreement or any overarching agreement covering both the EEA States and Switzerland.

Questions 1 and 2

- 12 Since such an overarching agreement does not exist, the Bundesverwaltungsgericht concludes that the EEA Agreement and the Agreement on Free Movement of Persons must be considered separately and that two separate certificates regarding the applicable social security provisions must be issued, one in respect of the Austria-Liechtenstein relationship and the other in respect of the Austria-Switzerland relationship.
- 13 The interested party considers that the Austria-Liechtenstein relationship must likewise be assessed separately, whereas the Austria-Switzerland relationship does not need to be decided in this case.
- 14 The Sozialversicherungsanstalt considers that there is absolutely no need for coordination under Regulation (EC) No 883/2004 in conjunction with Regulation (EC) No 987/2009 in this case.
- 15 The procedure of the Bundesverwaltungsgericht does not appear to be compatible with the aim of coordination law to provide for a single legal system applicable to each person in a specific period of time. That principle of a single system also means that the establishment of applicable regulations under coordination law is not activity-related, but person-related. Issuing two different E 101 or A1 certificates for the same person and the same period is accordingly precluded from the outset.
- 16 In this case, the Bundesverwaltungsgericht's two separate assessments resulted in the applicability of Austrian regulations only by chance. A slightly altered situation might result, in the case of separate assessment only of the bilateral relationships, in the legislation of different States being simultaneously applicable. The interested party's approach would also ultimately have the same result. As soon as a dispute arose about the provisions applicable in relation to Switzerland, a decision would have to be made which might conflict with the establishment of the regulations applicable in relation to Liechtenstein.
- 17 Such an outcome can be avoided only if it were to be concluded from the applicability of the EU coordination legislation under the EEA Agreement and the Agreement on Free Movement of Persons with Switzerland that, in a trilateral case such as that in the present proceedings, the coordination must be conducted jointly among all States and not separately in relation to the respective bilateral situations. In the absence of an overarching agreement, there is apparently, however, no legal basis for that.
- 18 The referring court considers that, for those reasons, the EU law coordination rules cannot be applied directly or indirectly in this case. However, that does not

mean that the applicability of the coordination legislation in the Austria-Liechtenstein relationship is circumvented by the agreement with Switzerland, since that agreement contains no provisions opposing the applicability of Regulation (EC) No 883/2004. Its inapplicability stems rather from the fact that neither the regulation nor the agreement provides for a trilateral situation and that a separate assessment by respectively applying that regulation to bilateral situations is contrary to the principle that a single social security system should apply.

- 19 Since the referring court's interpretation is not so clear as to leave no reasonable room for doubt, the first two questions had to be referred for a preliminary ruling.

Question 3

- 20 Should Regulation (EC) No 883/2004 be applicable to the present case, the question arises how the transitional provision in Article 87(8) is to be interpreted.
- 21 Until he commenced his self-employment activity in Switzerland, the interested party was clearly subject to Austrian social security legislation on the basis of his residence in Austria pursuant to Article 14a(2) of Regulation (EEC) No 1408/71. Regulation (EC) No 883/2004 contains no comparable provision. Under Article 13(2) thereof, the legislation of the Member State of residence applies instead to self-employment in more than one Member State only if a substantial part of the self-employment activity is pursued there; otherwise, the legislation of the Member State in which the centre of interest of the activity is situated applies. In the present case, that provision would actually result in the applicability of the Liechtenstein social security legislation, although the Austrian legislation was initially still applicable on the basis of the transitional provision in Article 87(8) of Regulation (EC) No 883/2004. The commencement of an additional self-employment activity accounting for 3% of total income in another State subject to the coordination legislation could not have resulted, within the scope of application of Regulation (EEC) No 1408/71, in a different jurisdiction, since, under Article 14a(2) thereof, it is only the State of residence which is decisive, as long as a part of the activity is pursued there. Within the scope of application of Regulation (EC) No 883/2004, a self-employment activity on such a small scale likewise does not alter the applicability of the legislation of the Member State of residence in which a substantial part of the activity is pursued.
- 22 In those circumstances, a change in the 'relevant situation' within the meaning of Article 87(8) of Regulation (EC) No 883/2004 might be ruled out where only minor self-employment activity in another State subject to the coordination legislation (which is not the State of residence) is added to self-employment activities which have already been pursued, since that is irrelevant to the determination of the applicable legislation both under Regulation (EC) No 883/2004 and under Regulation (EEC) No 1408/71.

- 23 However, it might also be argued that further self-employment activity in another State subject to the coordination legislation implies a change in the relevant situation in any event, since a further State must now be included in the coordination, even where this would not result in any change in jurisdiction. If one were to take that view, the question arises, however, whether activity on such a small scale also causes a change in the relevant situation in this case.
- 24 If the applicability of the social security legislation in the relationship between two EEA States were to be assessed independently of the situation existing in relation to Switzerland, the commencement of a self-employment activity in Switzerland should, at the outset, have no bearing on the assessment of the relationship of the EEA States. Therefore, the referring court's view (which in that regard coincides with that of the Bundesgerichtshof) is that the activity in Switzerland also cannot cause a change in the relevant situation within the meaning of Article 87(8) of Regulation (EC) No 883/2004.
- 25 Since the answers to that question and the supplementary question also do not appear to be sufficiently clear, they had to be referred to the Court of Justice for a preliminary ruling.

WORKING DOCUMENT