



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

13 July 2017*

(Reference for a preliminary ruling — Application of social security schemes — Migrant workers — Person pursuing an activity as an employed person and an activity as a self-employed person in two different Member States — Determination of the applicable legislation — Regulation (EC) No 883/2004 — Article 13(3) — Regulation (EC) No 987/2009 — Article 14(5b) — Article 16 — Effects of the decisions of the Administrative Commission for the coordination of social security systems — Inadmissibility)

In Case C-89/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic), made by decision of 28 January 2016, received at the Court on 15 February 2016, in the proceedings

Radosław Szoja

v

Sociálna poisťovňa,

intervening parties:

WEBUNG, ebung s.r.o.,

THE COURT (Third Chamber),

composed of L. Bay Larsen (Rapporteur), President of the Chamber, M. Vilaras, J. Malenovský, M. Safjan and D. Šváby, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Slovak Government, by B. Ricziová, acting as Agent,
- the Czech Government, by J. Vláčil and M. Smolek, acting as Agents,
- the Netherlands Government, by C.S. Schillemans, M. Noort and M. Bulterman, acting as Agents,

* Language of the case: Slovak.

— the European Commission, by D. Martin and A. Tokár, acting as Agents,
having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 13(3) and Article 72 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 (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1), as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149, p. 4) ('the Basic Regulation') and Articles 14 and 16 of 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 (OJ 2009 L 284, p. 1), as amended by Regulation No 465/2012 ('the Implementing Regulation') and Article 34(1) and (2) of the Charter of Fundamental Rights of the European Union ('the Charter').
- 2 The request has been made in proceedings between Mr **Radosław** Szoja, a Polish national, pursuing activity as a self-employed person in the Republic of Poland and an activity as an employed person in the Slovak Republic and the Sociálna poisťovňa (Social Insurance Institute) concerning his failure to affiliate to the health insurance, pension insurance and unemployment benefit insurance scheme.

Legal context

European Union law

The Basic Regulation

- 3 Recitals 1, 15, 17 and 45 of the Basic Regulation provide as follows:

'(1) The rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment.

...
(15) It is necessary to subject persons moving within the Community to the social security scheme of only one single Member State in order to avoid overlapping of the applicable provisions of national legislation and the complications which could result therefrom.

...
(17) With a view to guaranteeing the equality of treatment of all persons occupied in the territory of a Member State as effectively as possible, it is appropriate to determine as the legislation applicable, as a general rule, that of the Member State in which the person concerned pursues his/her activity as an employed or self-employed person.

...

(45) Since the objective of the proposed action, namely the coordination measures to guarantee that the right to free movement of persons can be exercised effectively, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of that action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty ...’

4 Article 1 of the Basic Regulation provides:

‘For the purposes of this Regulation:

(a) “activity as an employed person” means any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists;

(b) “activity as a self-employed person” means any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists;

...

(l) “legislation” means, in respect of each Member State, laws, regulations and other statutory provisions and all other implementing measures relating to the social security branches covered by Article 3(1);

...

(n) ‘Administrative Commission’ means the commission referred to in Article 71;

...’

5 Article 11(1) of the Basic Regulation provides:

‘Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.’

6 Article 13(1) and (3) of the Basic Regulation provides:

‘1. A person who normally pursues an activity as an employed person in two or more Member States shall be subject:

...

3. A person who normally pursues an activity as an employed person and an activity as a self-employed person in different Member States shall be subject to the legislation of the Member State in which he/she pursues an activity as an employed person or, if he/she pursues such an activity in two or more Member States, to the legislation determined in accordance with paragraph 1.’

7 Under the heading ‘Exceptions to Articles 11 to 15’, Article 16 of the Basic Regulation provides:

‘1. Two or more Member States, the competent authorities of these Member States or the bodies designated by these authorities may by common agreement provide for exceptions to Articles 11 to 15 in the interest of certain persons or categories of persons.

2. A person who receives a pension or pensions under the legislation of one or more Member States and who resides in another Member State may at his/her request be exempted from application of the legislation of the latter State provided that he/she is not subject to that legislation on account of pursuing an activity as an employed or self-employed person.'

8 Article 72 of the Basic Regulation is worded as follows:

'The Administrative Commission shall:

(a) deal with all administrative questions and questions of interpretation arising from the provisions of this Regulation or those of the Implementing Regulation, or from any agreement concluded or arrangement made thereunder, without prejudice to the right of the authorities, institutions and persons concerned to have recourse to the procedures and tribunals provided for by the legislation of the Member States, by this Regulation or by the Treaty;

...'

The Implementing Regulation

9 Article 14(5)(b) of Regulation No 987/2009, in its original version, provided:

'For the purposes of the application of Article 13(1) of the basic Regulation a person who "normally pursues an activity as an employed person in two or more Member States" shall refer, in particular, to a person who:

...

(b) continuously pursues alternating activities, with the exception of marginal activities, in two or more Member States, irrespective of the frequency or regularity of the alternation.'

10 Article 14(5), (5b) and (8) of the Implementing Regulation provide:

'5. For the purposes of the application of Article 13(1) of the basic Regulation, a person who "normally pursues an activity as an employed person in two or more Member States" shall refer to a person who simultaneously, or in alternation, for the same undertaking or employer or for various undertakings or employers, exercises one or more separate activities in two or more Member States.

...

5b. Marginal activities shall be disregarded for the purposes of determining the applicable legislation under Article 13 of the basic Regulation. Article 16 of the implementing Regulation shall apply to all cases under this Article.

...

8. For the purposes of the application of Article 13(1) and (2) of the basic Regulation, a "substantial part of employed or self-employed activity" pursued in a Member State shall mean a quantitatively substantial part of all the activities of the employed or self-employed person pursued there, without this necessarily being the major part of those activities.

...'

11 Article 16 of the Implementing Regulation provides:

‘1. A person who pursues activities in two or more Member States shall inform the institution designated by the competent authority of the Member State of residence thereof.

2. The designated institution of the place of residence shall without delay determine the legislation applicable to the person concerned, having regard to Article 13 of the basic Regulation and Article 14 of the implementing Regulation. That initial determination shall be provisional. The institution shall inform the designated institutions of each Member State in which an activity is pursued of its provisional determination.

3. The provisional determination of the applicable legislation, as provided for in paragraph 2, shall become definitive within two months of the institutions designated by the competent authorities of the Member States concerned being informed of it, in accordance with paragraph 2, unless the legislation has already been definitively determined on the basis of paragraph 4, or at least one of the institutions concerned informs the institution designated by the competent authority of the Member State of residence by the end of this two-month period that it cannot yet accept the determination or that it takes a different view on this.

4. Where uncertainty about the determination of the applicable legislation requires contacts between the institutions or authorities of two or more Member States, at the request of one or more of the institutions designated by the competent authorities of the Member States concerned or of the competent authorities themselves, the legislation applicable to the person concerned shall be determined by common agreement, having regard to Article 13 of the basic Regulation and the relevant provisions of Article 14 of the implementing Regulation.

...

5. The competent institution of the Member State whose legislation is determined to be applicable either provisionally or definitively shall without delay inform the person concerned.

6. If the person concerned fails to provide the information referred to in paragraph 1, this Article shall be applied at the initiative of the institution designated by the competent authority of the Member State of residence as soon as it is appraised of that person’s situation, possibly via another institution concerned.’

Slovak law

12 Under Article 3(1)(a) of Law No 461/2003 of the zákon č. 461/2003 Z. z. o sociálnom poistení (Law No 461/2003 on social security), in the version applicable to the dispute in the main proceedings (‘the Social Security Law’):

‘Paid activity within the meaning of the present Law shall mean, subject to any special provision to the contrary or a provision of an international agreement taking precedence over the legislation of the Slovak Republic, the activity deriving from a legal relationship, which gives rise to:

(a) the right to remuneration for activity as an employee within the meaning of a special provision, save for non-pecuniary remuneration deriving from an earlier legal relationship, on which was based the entitlement to remuneration for activity as an employee within the meaning of a special provision, deriving from resources of a social fund,

...’

13 Paragraph 4(1) of the Social Security Law provides:

‘A worker, for the purposes of health and pension insurance and unemployment benefit, shall be deemed, if not otherwise provided by the present Law, to be a natural person covered by a legal relationship that is the basis for the latter’s right to remuneration on a regular monthly basis within the meaning of Article 3(1)(a), (2) and (3) ...’

14 Paragraph 7(1)(c) of the Social Security Law provides:

‘For the purposes of this Law, “employer” means:

...

(c) a natural person who carries on a paid activity within the meaning of Article 3(1)(a), (2) and (3)

1. a natural person who is under an obligation to pay the worker the remuneration referred to in Article 3(1)(a), (2) and (3) and who resides in a Member State of the European Union or in a State party to the Agreement on the European Economic Area, such as the Slovak Republic, or in the territory of the Swiss Confederation or in a State with which the Slovak Republic has concluded an international agreement taking precedence over the laws of the Slovak Republic, or

2. a legal person who is under an obligation to pay the worker the remuneration referred to in Article 3(1)(a), (2) and (3) which has its registered office, or whose branch has headquarters, in a Member State of the European Union or in a State party to the Agreement on the European Economic Area, or in the territory of the Swiss Confederation, or in a State with which the Slovak Republic has concluded an international agreement taking precedence over the laws of the Slovak Republic.’

15 Under Paragraph 14(1)(a) of the Social Security Law:

‘The following persons shall be compulsorily affiliated to health insurance:

(a) an employee within the meaning of Article 4(1) ...’

16 Paragraph 15(1)(a) of the Social Security Law provides:

‘The following persons shall be compulsorily affiliated to pension insurance:

(a) an employee within the meaning of Article 4(1) and (2) ...’

17 Under Paragraph 19(1) of the Social Security Law:

‘An employee affiliated to a compulsory health insurance scheme shall be compulsorily insured against unemployment, unless otherwise provided by the present Law.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

18 Mr Szoja is a Polish national who, as is clear from the order for reference, pursues an activity as a self-employed person in Poland and as an employed person in Slovakia where he is registered on the national register of assured persons since 1 February 2013.

19 The referring court states that as is clear from the correspondence between the Zakład Ubezpieczeń Społecznych (Social Insurance Institution, Poland, ‘the Polish social insurance institution’) and the Slovak social insurance fund that since the applicant in the main proceedings has a residence in

Poland, where he also pursues an activity as a self-employed person, that body decided that Mr Szoja was covered, since 1 July 2012, by the Polish legislation on social security and that in accordance with the combined provisions of Article 13(3) of the Basic Regulation and Article 14(5)(b) of the Implementing Regulation.

- 20 That decision of the Polish social insurance institution was based on the marginal nature of the activity pursued by Mr Szoja in Slovakia.
- 21 Therefore, on 22 April 2013, that body informed the Slovak social insurance fund, in accordance with Article 16(3) of the Implementing Regulation, that Mr Szoja had been covered by the Polish legislation since 1 February 2013.
- 22 The Slovak social insurance fund has not challenged that provisional determination of the applicable law, so it became definitive for the purposes of Article 16(3) of the Implementing Regulation.
- 23 The Slovak social insurance fund therefore decided that, from 1 February 2013, Mr Szoja was not covered by the compulsory health insurance, pension insurance and unemployment benefit insurance with his Slovakian employer.
- 24 That decision was confirmed by the Slovakian social insurance fund.
- 25 On an unspecified date, Mr Szoja brought an appeal against the judgment of 3 December 2014 of Krajský súd v Žiline (Regional Court Žilina, Slovakia) before the referring court.
- 26 According to the referring court, the Polish social insurance institution examined Mr Szoja's situation on the basis of Article 14(5)(b) of the Implementing Regulation, so that that institution applied Article 13(1) of the Basic Regulation in the light of its decision on Mr Szoja's situation.
- 27 That court took the view that Article 13(1) of the Basic Regulation covers only activities as an employed person, whereas the present case concerns a national who performs employed work and self-employed work in various Member States so that the connecting factor for the purposes of determining the applicable law is the place where the person concerned pursues a substantial part of his activity in accordance with Article 14(8) of the Implementing Regulation.
- 28 Furthermore, it is apparent from the order for reference that the Slovak social insurance fund has not relied on any specific agreement derogating from the provisions of Article 13 of the Basic Regulation which is based on Article 16 thereof.
- 29 In those circumstances, the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:
- ‘(1) May Article 13(3) of [the Basic Regulation], in conjunction with the right to social security benefits and social services enshrined in Article 34(1) and (2) of the [Charter], be interpreted without taking into account the clarifications in Article 14 of [the Implementing Regulation], and without any possibility of consequently applying the procedure mentioned in Article 16 of the abovementioned regulation, in such a way that the shortness of the working time or the low level of remuneration of employees has no effect on the choice of the national law applicable when a person is both employed and self-employed, in other words: the abovementioned Article 14 of the Implementing Regulation does not apply to the interpretation of Article 13(3) of the Basic Regulation?’

- (2) If a negative answer is given to the first question, is it the case, if there is a conflict when two regulations are applied, that is to say: conflict between a basic regulation and an implementing regulation, which in the present case are [the Basic Regulation] and [the Implementing Regulation] that the national court may assess the provisions thereof on the basis of their legislative force, or on the basis of their rank in the hierarchy of Union law?
- (3) May the interpretation of the provisions of the Basic Regulation adopted by the Administrative Commission under Article 72 of the Basic Regulation be considered a binding interpretation made by an EU institution, from which the national court may not depart, which at the same time precludes a reference for a preliminary ruling, or is that interpretation merely one of the permissible interpretations of EU law that the national court must take into account as one of the factors underlying its decision?’

Consideration of the questions referred

The first question

- 30 By its first question, the referring court asks essentially whether Article 13(3) of the Basic Regulation, read in the light of Article 34(1) and (2) of the Charter, may be interpreted without taking into account Articles 14 and 16 of the Implementing Regulation.
- 31 In that connection, it should be recalled that, in the procedure laid down by Article 267 TFEU, providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it and, to that end, the Court may have to reformulate the questions referred to it (judgment of 18 May 2017, *Lahorgue*, C-99/16, EU:C:2017:391, paragraph 21).
- 32 Thus, it must be observed that, in the light of the facts in the main proceedings, as they appear from the order for reference, reference should be made not to Article 14(5)(b) of the Implementing Regulation in its original version, but to Article 14(5b) thereof.
- 33 Therefore, the first question must be understood as asking whether Article 13(3) of the Basic Regulation must be interpreted as meaning that, in view of the determination of the national legislation applicable by virtue of that provision to a person such as the applicant in the main proceedings who normally pursues an activity as an employed person and an activity as a self-employed person in different Member States, the requirements laid down in Articles 14(5b) and 16 of the Implementing Regulation must be taken into account.
- 34 As is clear from recitals 1 and 45 of the Basic Regulation, that regulation aims to coordinate the national social security systems of the Member States in order to guarantee that the right to free movement of persons can be exercised effectively and, thereby, contribute towards improving their standard of living and conditions of employment within the Union.
- 35 Article 11(1) of the Basic Regulation lays down the principle of a single applicable law, pursuant to which the persons to whom that law applies are subject to the legislation of a single Member State. Therefore, that principle also aims to avoid the complications which may arise from the simultaneous application of several national laws and to eliminate unequal treatment which, for employed and self-employed workers moving within the Union, is the consequence of partial or total overlapping of the applicable legislation (see, to that effect, judgment of 9 March 2006, *Piatkowski*, C-493/04, EU:C:2006:167, paragraph 21).

- 36 According to the first situation set out in Article 13(3) of the Basic Regulation, aiming to determine the national legislation applicable to a person who normally pursues an activity as an employed person in one Member State and an activity as a self-employed person in another Member State, that person is subject to the legislation of the Member State in which he pursues the activity as an employed person.
- 37 Thus, in a situation such as that at issue in the main proceedings, in which it is common ground that Mr Szoja pursues an activity as an employed person in Slovakia and an activity as a self-employed person in Poland, he must be regarded as being covered by the first situation referred to in Article 13(3) of the Basic Regulation.
- 38 That being the case, the Implementing Regulation which aims to lay down the detailed rules for implementing the Basic Regulation provides, in Article 14(5b), that marginal activities are to be disregarded for the purposes of determining the applicable legislation under Article 13 of the Basic Regulation.
- 39 In that connection, as stated in paragraphs 20 and 22 of the present judgment, it is apparent from the order for reference that, according to the decision of the Polish social insurance institution, the activity which Mr Szoja pursues in Slovakia is marginal and that the determination of the applicable legislation has become final in the light of Article 16(3) of the Implementing Regulation.
- 40 Therefore, the legislation applicable to which a person, such as Mr Szoja, who normally pursues an activity as an employed person and an activity as a self-employed person in different Member States, is subject under Article 13(3) of the Basic Regulation must be determined taking account of Article 14(5b) of the Implementing Regulation, which excludes the consideration of marginal activities.
- 41 Furthermore, it follows from Article 14(5b) of the Implementing Regulation that Article 16 of that regulation applies to all the situations laid down in Article 14. Therefore, in a case such as that at issue in the main proceedings, Article 16 thereof, which indicates the procedure to follow in order to determine the legislation applicable under Article 13 of the Basic Regulation, must be taken into consideration.
- 42 In that connection, it must be recalled that since the conflict rules laid down by the Basic Regulation are mandatory for the Member States, a fortiori it cannot be accepted that insured persons falling within the scope of those rules can counteract their effects by being able to elect to withdraw from their application (see, to that effect, judgment of 14 October 2010, *von Delft and Others*, C-345/09, EU:C:2010:610, paragraph 52).
- 43 As to the questions of the referring court relating to Article 34 of the Charter, it must be observed that that article has no impact on the foregoing considerations, since no provision of that article dismisses as irrelevant the application of Articles 14 and 16 of the Implementing Regulation in the case in the main proceedings.
- 44 In the light of all of the foregoing considerations, the answer to the first question is that Article 13(3) of the Basic Regulation must be interpreted as meaning that, in order to determine the national legislation applicable under that provision to a person, such as the applicant in the main proceedings, who normally pursues an activity as an employed person and an activity as a self-employed person in different Member States, the requirements laid down in Article 14(5b) and Article 16 of the Implementing Regulation must be taken into account.

The second question

- 45 Having regard to the reply given to the first question, there is therefore no need to answer the second question.

The third question

- 46 By its third question, the referring court asks, essentially whether Article 72 of the Basic Regulation must be interpreted as meaning that the decisions of the Administrative Commission are binding.
- 47 In that regard, it must be noted that, according to the settled case-law of the Court, the procedure provided for in Article 267 TFEU is an instrument for cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them (order of 20 July 2016, *Stanleybet Malta and Stoppani*, C-141/16, not published, EU:C:2016:596, paragraph 6 and the case-law cited).
- 48 It is also clear from settled case-law that the need to provide an interpretation of EU law which will be of use to the national court makes it necessary for the national court to define the factual and legal context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based. The order for reference must also set out the precise reasons why the national court is unsure as to the interpretation of EU law and considers it necessary to refer a question to the Court for a preliminary ruling (order of 20 July 2016, *Stanleybet Malta and Stoppani*, C-141/16, not published, EU:C:2016:596, paragraph 7 and the case-law cited).
- 49 It must also be emphasised in that regard that the information provided in orders for reference serves not only to enable the Court to give useful answers but also to ensure that it is possible for the governments of the Member States and other interested parties to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union. It is the Court's duty to ensure that that opportunity is safeguarded, given that, under that provision, only the orders for reference are notified to the interested parties (order of 20 July 2016, *Stanleybet Malta and Stoppani*, C-141/16, not published, EU:C:2016:596, paragraph 10 and the case-law cited).
- 50 In the present case, it must be stated that the third question does not fulfil those requirements, since the order for reference does not contain enough factual evidence regarding the existence of a specific decision of the Administrative Commission and any impact of that decision on the case in the main proceedings. Thus, the Court does not have any information on the reasons for which the interpretation of EU law requested is necessary to answer that question. In those circumstances, the Member States and other interested parties, within the meaning of Article 23 of the Statute of the Court of Justice of the European Union, were unable, or only very briefly, to properly submit their observations on that question.
- 51 Having regard to the foregoing considerations, it must be held that the third question is inadmissible.

Costs

- 52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 13(3) 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, as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012, must be interpreted as meaning that, in order to determine the national legislation applicable under that provision to a person, such as the applicant in the main proceedings, who normally pursues an activity as an employed person and an activity as a self-employed person in different Member States, the requirements laid down in Article 14(5b) and Article 16 of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation No 883/2004, as amended by Regulation No 465/2012, must be taken into account.

[Signatures]