ECLI:EU:C:2023:109

Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

16 February 2023 (*)

(Reference for a preliminary ruling – Social policy – Protection of employees in the event of the insolvency of their employer – Directive 2008/94/EC – Article 9(1) – Undertaking that has its registered office in one Member State and offers its services in another Member State – Worker whose place of residence is in that other Member State – Work performed in the Member State in which the worker's employer has its registered office and, one week out of two, in the Member State in which the worker resides – Determining which Member State's guarantee institution is responsible for meeting outstanding wage claims)

In Case C-710/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 14 September 2021, received at the Court on 25 November 2021, in the proceedings

IEF Service GmbH

v

HB,

THE COURT (Seventh Chamber),

composed of M.L. Arastey Sahún (Rapporteur), President of the Chamber, N. Wahl and J. Passer, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– HB, by C. Orgler, Rechtsanwalt,

– the Austrian Government, by A. Posch, J. Schmoll and F. Werni, acting as Agents,

– the Czech Government, by O. Serdula, M. Smolek and J. Vláčil, acting as Agents,

– the German Government, by J. Möller and A. Hoesch, acting as Agents,

– the European Commission, by B.-R. Killmann and D. Recchia, 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 9(1) of Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (OJ 2008 L 283, p. 36).

2 The request has been made in proceedings between IEF Service GmbH and HB concerning the grant to the latter of compensation for outstanding wage claims on account of the insolvency of his employer.

Legal context

European Union law

Directive 2008/94

3 Under Article 1(1) of Directive 2008/94:

‘This Directive shall apply to employees’ claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1).’

4 Article 2(1) of that directive provides:

‘For the purposes of this Directive, an employer shall be deemed to be in a state of insolvency where a request has been made for the opening of collective proceedings based on insolvency of the employer, as provided for under the laws, regulations and administrative provisions of a Member State, and involving the partial or total divestment of the employer’s assets and the appointment of a liquidator or a person performing a similar task, and the authority which is competent pursuant to the said provisions has:

(a) either decided to open the proceedings; or

(b) established that the employer's undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of the proceedings.'

5 The first paragraph of Article 3 of that directive provides:

'Member States shall take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4, payment of employees' outstanding claims resulting from contracts of employment or employment relationships, including, where provided for by national law, severance pay on termination of employment relationships.'

6 Article 9 of that directive, which forms part of Chapter IV thereof, entitled 'Provisions concerning transnational situations', states in paragraph 1 thereof:

'If an undertaking with activities in the territories of at least two Member States is in a state of insolvency within the meaning of Article 2(1), the institution responsible for meeting employees' outstanding claims shall be that in the Member State in whose territory they work or habitually work.'

Regulation (EC) No 883/2004

7 Article 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 (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) ('Regulation No 883/2004'), entitled 'Matters covered', provides in paragraph 1 thereof:

'This Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness benefits;

(b) maternity and equivalent paternity benefits;

(c) invalidity benefits;

(d) old-age benefits;

(e) survivors' benefits;

(f) benefits in respect of accidents at work and occupational diseases;

(g) death grants;

(h) unemployment benefits;

(i) pre-retirement benefits;

(j) family benefits.'

8 Article 12 of that regulation, entitled 'Special rules', provides in paragraph 1 thereof:

‘A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer’s behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that he/she is not sent to replace another posted person.’

9 Article 13 of that regulation, entitled ‘Pursuit of activities in two or more Member States’, provides in paragraph 1 thereof:

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

(a) to the legislation of the Member State of residence if he/she pursues a substantial part of his/her activity in that Member State; or

(b) if he/she does not pursue a substantial part of his/her activity in the Member State of residence:

(i) to the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated if he/she is employed by one undertaking or employer; or

(ii) to the legislation of the Member State in which the registered office or place of business of the undertakings or employers is situated if he/she is employed by two or more undertakings or employers which have their registered office or place of business in only one Member State; or

(iii) to the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated other than the Member State of residence if he/she is employed by two or more undertakings or employers, which have their registered office or place of business in two Member States, one of which is the Member State of residence; or

(iv) to the legislation of the Member State of residence if he/she is employed by two or more undertakings or employers, at least two of which have their registered office or place of business in different Member States other than the Member State of residence.’

Regulation (EC) No 987/2009

10 Article 5 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 on the coordination of social security systems (OJ 2009 L 284, p. 1), entitled ‘Legal value of documents and supporting evidence issued in another Member State’, provides in paragraph 1 thereof:

‘Documents issued by the institution of a Member State and showing the position of a person for the purposes of the application of [Regulation No 883/2004] and of the [present regulation], and supporting evidence on the basis of which the documents have been issued, shall be accepted by the institutions of the other Member States for as long as they have not been withdrawn or declared to be invalid by the Member State in which they were issued.’

11 Article 19 of that regulation, entitled ‘Provision of information to persons concerned and employers’, provides in paragraph 2 thereof:

‘At the request of the person concerned or of the employer, the competent institution of the Member State whose legislation is applicable pursuant to Title II of [Regulation No 883/2004] shall provide an attestation that such legislation is applicable and shall indicate, where appropriate, until what date and under what conditions.’

Austrian law

12 Paragraph 1(1) of the Insolvenz-Entgeltsicherungsgesetz (Law on the guarantee of remuneration in the event of insolvency, BGBl. 324/1977), last amended by BGBl. I, 218/2021 (‘the IESG’), is worded as follows:

‘Employees, independent contractors within the meaning of Paragraph 4(4) of the Allgemeines Sozialversicherungsgesetz [(General Law on social security, BGBl. 189/1955) (‘the ASVG’)], home workers and their survivors and successors in law on death (entitled claimants) shall have a claim to insolvency benefit in respect of the claims secured under subparagraph 2 where they are or have been in an employment relationship (independent contractor relationship, agency relationship) and are (were) deemed to be employed in the national territory in accordance with Paragraph 3(1) or (2)(a) to (d) of the ASVG and insolvency proceedings are instituted within the national territory in respect of the assets of the employer (principal) pursuant to the Insolvenzordnung (Insolvency Code).’

13 Paragraph 12(1) of that law provides:

‘Expenditure from the Insolvency Remuneration Fund shall be met from:

…

4. … a supplement, to be borne by the employer, to the share of the unemployment insurance contribution to be paid by the employee …’

14 Paragraph 3 of the ASVG provides:

‘1. Employed persons whose place of employment … is in the national territory shall be deemed to be employed in the national territory, and self-employed persons shall be deemed to be employed in the national territory if the registered office of their business is in the national territory.

2. The following persons shall also be deemed to be employed in the national territory

(a) employees who are members of the travelling personnel of a shipping company carrying out international transport operations on rivers or lakes …

(d) employees whose employer has its registered office in Austria and who are posted abroad, provided that their employment abroad does not exceed a period of five years; …’

15 Paragraph 4(1) of that law provides:

‘The following persons are covered by sickness, accident and retirement insurance schemes (full cover) on the basis of this Federal Law where the employment in question is neither exempt from full cover pursuant to Paragraphs 5 and 6 nor gives rise to only partial cover pursuant to Paragraph 7:

1. employees employed by one or more employers; …’

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

16 Since 1 July 2017, HB had been employed as head of strategic business development by S GmbH (‘S’), whose registered office is in Graz (Austria). That company also offered its services in Germany and collaborated with a self-employed sales engineer there, but did not employ other staff there.

17 HB’s employment contract provided that the place where he primarily and habitually worked was Austria. HB managed two departments and was responsible for the employees in the office in Graz. HB in fact worked alternately for one week in the office in Graz and for one week at his home office in Germany, where he had his main residence.

18 HB has a certificate issued by a German insurance body in accordance with Article 19(2) of Regulation No 987/2009, informing him that German social security legislation is applicable to him.

19 On 4 June 2019, insolvency proceedings without self-administration were initiated against S.

20 IEF Service represents the fund providing compensation in the event of the insolvency of an employer, namely the Austrian guarantee institution, within the meaning of Directive 2008/94.

21 HB applied for insolvency benefit in respect of his wage claims that were still outstanding at the time administration proceedings commenced. He applied to both IEF Service and the German guarantee institution. As is apparent from the order for reference, the outcome of the proceedings in Germany is not yet known.

22 By judgment of 14 October 2019, the Landesgericht für Zivilrechtssachen Graz (Regional Court for Civil Matters, Graz, Austria) upheld HB’s application.

23 IEF Service brought an appeal against that judgment before the Oberlandesgericht Graz (Higher Regional Court, Graz, Austria), which upheld that judgment by a judgment of 18 June 2020.

24 In those circumstances, IEF Service brought an appeal on a point of law (‘Revision’) against that judgment before the Oberster Gerichtshof (Supreme Court, Austria), the referring court.

25 The referring court is of the view that, as is apparent from the judgment of 6 September 2018, *Alpenrind and Others* (C-527/16, EU:C:2018:669), a valid A1 certificate issued by the competent institution of a Member State in accordance with Article 19(2) of Regulation No 987/2009 is binding not only on the institutions of the Member State in which the activity is carried out, but also on the courts of that Member State.

26 Therefore, although HB concluded his contract of employment in Austria and carried out his paid employment for half of the time at the registered office of S in Austria, he satisfies the conditions for compulsory insurance in his State of residence, namely Germany, and the German legislation is applicable in the present case. Furthermore, in accordance with that legislation, it would appear that he has a place of employment, at least notionally, in Germany.

27 The Austrian legislature transposed the provisions of Directive 2008/94 in Paragraph 1(1) of the IESG to the effect that work is deemed to be performed in the national territory if there is an 'employment relationship' within the meaning of Paragraph 3(1) or (2)(a) to (d) of the ASVG. In that regard, there is an insurance obligation in Austrian territory.

28 In accordance with the case-law of the Oberster Gerichtshof (Supreme Court), there is no entitlement to insolvency benefit under Paragraph 1(1) of the IESG where an employee employed abroad is not subject to compulsory insurance in Austria on the basis of his or her activity.

29 In the present case, since HB shared his working time equally between Austria and Germany while being subject to the German social security system, the question arises as to whether Article 9 of Directive 2008/94, which concerns transnational situations, has to be applied. The referring court considers that the answer to that question depends on whether the provision of services offered by S in Germany, the partnership established with a self-employed sales engineer in that Member State and the regular work carried out by HB from his place of residence in Germany are sufficient connecting factors to conclude that the employer had a 'stable economic presence' in Germany, within the meaning of the judgments of 16 October 2008, *Holmqvist* (C-310/07, EU:C:2008:573), and of 10 March 2011, *Defossez* (C-477/09, EU:C:2011:134).

30 If that should be the case, it would be necessary to ascertain – in view of the equal distribution of working time and the identical content of the activity, and in accordance with the criteria of HB's residence and compulsory insurance in the Member State in which he 'habitually' worked within the meaning of Article 9(1) of Directive 2008/94, in order subsequently to be able to determine the competence of the national guarantee institution.

31 The referring court adds that, even if there does not have to be a link between the obligation to contribute and the entitlement to guarantees (see, to that effect, judgment of 25 February 2016, *Stroumpoulis and Others*, C-292/14, EU:C:2016:116, paragraph 68), it would appear to be in line with the objective of the fundamental freedoms to avoid imposing a double burden on employers whose employees work in two Member States and are, therefore, guaranteed to receive compensation in the event of insolvency, financed by means of contributions.

32 In those circumstances, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 9(1) of [Directive 2008/94] to be interpreted as meaning that an undertaking within the meaning of that [provision] carries out activities in the territories of at least two Member States where it offers its services in another Member State, employs a freelance sales engineer there for that purpose and an employee employed at the registered office of the undertaking regularly works every second week in his or her home office in the other Member State?

If the first question is answered in the affirmative:

(2) Is Article 9(1) of Directive 2008/94 to be interpreted as meaning that an employee of such an undertaking who is resident in the second Member State and is subject to compulsory social insurance there, but alternately works for one week in the Member State in which the employer has its registered office and then the next week in the Member State in which he or she is resident and is subject to compulsory social insurance, 'habitually' works in both Member States within the meaning of that article?

If the second question is answered in the affirmative:

(3) Is Article 9(1) of Directive 2008/94 to be interpreted as meaning that the guarantee institution responsible for meeting the outstanding claims of an employee who works or habitually works in two Member States is:

(a) the guarantee institution of the Member State to the legislation of which he or she is subject in the context of the coordination of social security (social insurance) systems where the guarantee institutions pursuant to Article 3 of Directive 2008/94 in both States are structured in such a way that the employer's contributions to the financing of the guarantee institution are payable as part of the compulsory social insurance contributions; or

(b) the guarantee institution of the other Member State in which the undertaking which is in a state of insolvency has its registered office; or

(c) the guarantee institutions of both Member States, with the result that the employee can choose which one he or she wants to claim from when submitting his or her application?'

Consideration of the questions referred

The first question

33 By its first question, the referring court asks, in essence, whether Article 9(1) of Directive 2008/94 must be interpreted as meaning that, in order to determine which Member State's guarantee institution is responsible for meeting employees' outstanding claims, it must be held that an employer in a state of insolvency carries out activities in the territories of at least two Member States, within the meaning of that provision, where the employment contract of the worker in question provides that his or her primary and habitual place of employment is in the territory of the Member State in which the employer has its registered office, but that, during an equal amount of his or her working time, that worker performs his or her duties remotely from another Member State where his or her main place of residence is situated.

34 In order to answer that question, it should be noted from the outset that, in accordance with the first paragraph of Article 3 of Directive 2008/94, Member States are to take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4 of that directive, payment of employees' outstanding claims resulting from contracts of employment or employment relationships, including, where provided for by national law, severance pay on termination of employment relationships.

35 Article 9(1) of Directive 2008/94, which relates to 'transnational situations', provides that, if an undertaking with activities in the territories of at least two Member States is in a state of insolvency within the meaning of Article 2(1) of that directive, the institution responsible for meeting employees' outstanding claims is that of the Member State in whose territory they work or habitually work.

36 In order to determine whether Article 9(1) of Directive 2008/94 applies in a case such as that referred to in paragraph 33 above, it is necessary to examine whether the employer has 'activities in the territories of at least two Member States' within the meaning of that provision.

37 In that regard, it should be noted that, in the case giving rise to the judgment of 16 October 2008, *Holmqvist* (C-310/07, EU:C:2008:573), the Court was called upon to interpret Article 8a(1) of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their

employer (OJ 1980 L 283, p. 23), as amended by Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 270, p. 10), the content of which is identical to that of Article 9(1) of Directive 2008/94.

38 The Court held that, even though Article 8a(1) of Directive 80/987, as amended by Directive 2002/74, does not impose strict connecting conditions, but concerns a weaker link than that of the undertaking having a presence by way of a branch or fixed establishment, the reasoning – to the effect that, in order for an undertaking to be regarded as having activities in the territory of another Member State, it is sufficient that an employee performs some sort of work in that other Member State for his employer, that the work is needed by the employer and is performed on the latter's instruction – should nevertheless not be adopted (judgment of 16 October 2008, *Holmqvist*, C-310/07, EU:C:2008:573, paragraph 29).

39 The concept of 'activities' in that provision must be understood as referring to factors denoting a degree of permanence in the territory of a Member State. That permanence takes the form of the enduring employment of a worker or workers in that territory (judgment of 16 October 2008, *Holmqvist*, C-310/07, EU:C:2008:573, paragraph 30).

40 Admittedly, in view of how forms of cross-border work may vary and given the changes in terms and conditions of employment and the progress of the telecommunications sector, to require an undertaking necessarily to have a physical infrastructure in order for it to have a stable economic presence in a Member State other than that in which it has its seat is untenable. Indeed, the various aspects of an employment relationship, inter alia communication of instructions to the employee and his reporting back to the employer, and payment of remuneration, can now be performed remotely (judgment of 16 October 2008, *Holmqvist*, C-310/07, EU:C:2008:573, paragraph 32).

41 Nevertheless, in order for an undertaking established in a Member State to be regarded as having activities in the territory of another Member State, that undertaking must have a stable economic presence in the latter State, featuring human resources which enable it to perform activities there (judgment of 16 October 2008, *Holmqvist*, C-310/07, EU:C:2008:573, paragraph 34).

42 In the present case, as is apparent from the documents before the Court, although HB carried out de facto half of his work, as regards the temporal dimension, from his place of residence in Germany, the principal work, which consisted in managing two departments and assuming responsibility for the employees of the employer's office in Austria, was, in accordance with the employment contract and in practice, in Austria.

43 Furthermore, the fact that HB's employer had no other employees in Germany, with the exception of a self-employed sales engineer with whom that employer collaborated in Germany, confirms that HB's activities could not be linked to any lasting presence of that employer in that Member State.

44 Accordingly, it must be held that, in the light of the case-law referred to in paragraphs 38 to 41 of this judgment, an employer such as HB's employer does not have activities in the territories of at least two Member States within the meaning of Article 9(1) of Directive 2008/94.

45 That conclusion is not called into question by the fact that HB has a certificate issued in accordance with Article 19(2) of Regulation No 987/2009, pursuant to which he is subject to German legislation. As the European Commission pointed out in its written observations, although it is true that, as is apparent from Article 5(1) of Regulation No 987/2009, that certificate has

binding effect as regards the obligations imposed by national social security legislation referred to in the coordination established by Regulation No 883/2004, such a certificate, however, has no bearing on the determination of the Member State in which HB must assert his outstanding wage claims, in accordance with Directive 2008/94.

46 In the light of all the foregoing considerations, the answer to the first question is that Article 9(1) of Directive 2008/94 must be interpreted as meaning that, in order to determine which Member State's guarantee institution is responsible for meeting employees' outstanding claims, it must be considered that an employer in a state of insolvency does not carry out activities in the territories of at least two Member States, within the meaning of that provision, where the employment contract of the worker in question provides that his or her primary and habitual place of employment is in the territory of the Member State in which the employer has its registered office, but during an equal proportion of his or her working time that worker performs his or her duties remotely from another Member State where his or her main place of residence is situated.

The second and third questions

47 In view of the answer given to the first question, there is no need to answer the second or third questions.

Costs

48 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 (Seventh Chamber) hereby rules:

Article 9(1) of Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer

must be interpreted as meaning that in order to determine which Member State's guarantee institution is responsible for meeting employees' outstanding claims, it must be considered that an employer in a state of insolvency does not carry out activities in the territories of at least two Member States, within the meaning of that provision, where the employment contract of the worker in question provides that his or her primary and habitual place of employment is in the territory of the Member State in which the employer has its registered office, but during an equal proportion of his or her working time that worker performs his or her duties remotely from another Member State where his or her main place of residence is situated.

[Signatures]

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* Language of the case: German.