ECLI:EU:C:2022:402

Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

19 May 2022(*)

(Reference for a preliminary ruling – Migrant workers – Social security – Legislation applicable – Regulation (EEC) No 1408/71 – Article 14(2)(a)(i) and (ii) – Regulation (EC) No 883/2004 – Article 11(5) – Article 13(1)(a) and (b) – Concept of 'operating base' Flight and cabin crew – Workers employed in the territory of two or more Member States – Connecting factors)

In Case C-33/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Supreme Court of Cassation, Italy), made by decision of 21 December 2020, received at the Court on 18 January 2021, in the proceedings

Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL),

Istituto nazionale della previdenza sociale (INPS),

v

Ryanair DAC

THE COURT (Seventh Chamber),

composed of J. Passer, President of the Chamber, F. Biltgen (Rapporteur) and M.L. Arastey Sahún, 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:

– Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL), by L. Frasconà and de G. Catalano, avvocati,

– Istituto nazionale della previdenza sociale (INPS), by A. Sgroi, L. Maritato, E. De Rose and C. D'Aloisio, avvocati,

– Ryanair DAC, by S. Piras, avvocato, E. Vahida, avocat, S. Rating, abogado and Rechtsanwalt, I.-G. Metaxas-Maranghidis, dikigoros, and by S. Bargellini, avvocata,

– the Italian Government, by G. Palmieri, acting as Agent, and by G. Rocchitta, avvocato dello Stato,

– Ireland, by M. Browne, E. Egan McGrath, Barrister-at-Law, and J. Quaney and T. Joyce, acting as Agents,

– the European Commission, by D. Martin 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 14(2)(a) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 631/2004 of the European Parliament and of the Council of 31 March 2004 (OJ 2004 L 100, p. 1) ('Regulation No 1408/71').

2 The request has been made in proceedings between, respectively, the Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL) (National Institute for Insurance against Accidents at Work (INAIL), Italy) and the Istituto Nazionale della Previdenza Sociale (INPS) (National Institute for Social Security (INPS), Italy) and Ryanair DAC, established in Ireland, concerning the latter's refusal to obtain insurance from those institutes for that company's itinerant staff assigned to the airport of Orio al Serio (Bergamo, Italy.

Legal context

European Union law

Regulation No 1408/71

3 Regulation No 1408/71 was repealed and replaced as from 1 May 2010. Since the disputes in the main proceedings concern the failure to pay social security contributions between June 2006 and February 2010 and insurance premiums between January 2008 and January 2013, they are capable of falling within the scope of Regulation No 1408/71. That regulation included Title II, headed 'Determination of the legislation applicable', within which Articles 13 to 17 are found.

4 Article 13 of that regulation, entitled ‘General rules’, provided:

‘1. Subject to Articles 14c and 14f, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to Articles 14 to 17:

(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

…’

5 Article 14 of that regulation, entitled ‘Special rules applicable to persons, other than mariners, engaged in paid employment’, stated:

‘Article 13(2)(a) shall apply subject to the following exceptions and circumstances:

…

2 A person normally employed in the territory of two or more Member States shall be subject to the legislation determined as follows:

(a) a person who is a member of the travelling or flying personnel of an undertaking which, for hire or reward or on its own account, operates international transport services for passengers or goods by rail, road, air or inland waterway and has its registered office or place of business in the territory of a Member State, shall be subject to the legislation of the latter State, with the following restrictions:

(i) where the said undertaking has a branch or permanent representation in the territory of a Member State other than that in which it has its registered office or place of business, a person employed by such branch or permanent representation shall be subject to the legislation of the Member State in whose territory such branch or permanent representation is situated;

(ii) where a person is employed principally in the territory of the Member State in which he resides, he shall be subject to the legislation of that State, even if the undertaking which employs him has no registered office or place of business or branch or permanent representation in that territory.’

6 Article 17 of that regulation, entitled ‘Exceptions to Articles 13 to 16’, was worded as follows:

‘Two or more Member States, the competent authorities of these States or the bodies designated by these authorities may by common agreement provide for exceptions to the provisions of Articles 13 to 16 in the interest of certain categories of persons or of certain persons.’

7 In Title IV of Regulation No 1408/71, headed ‘Administrative Commission on Social Security for Migrant Workers’, Article 80 of that regulation, itself entitled ‘Composition and working methods’, provided in paragraph 1:

‘There shall be attached to the [European] Commission an Administrative Commission on Social Security for Migrant Workers (hereinafter called “the Administrative Commission”) made up of a government representative of each of the Member States, assisted, where necessary, by expert advisers. A representative of the Commission shall attend the meetings of the Administrative Commission in an advisory capacity.’

8 In Title VI of that regulation, headed ‘Miscellaneous provisions’, Article 84a thereof, itself entitled ‘Relations between the institutions and the persons covered by this Regulation’, provided in paragraph 3 as follows:

‘In the event of difficulties in the interpretation or application of this Regulation which could jeopardise the rights of a person covered by it, the institution of the competent State or of the State of residence of the person involved shall contact the institution(s) of the Member State(s) concerned. If a solution cannot be found within a reasonable period, the authorities concerned may call on the Administrative Commission to intervene.’

Regulation (EC) No 883/2004

9 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) repealed and replaced, as from 1 May 2010, the date of its application, Regulation No 1408/71. Prior to that date, Regulation No 883/2004 was amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009 (OJ 2009 L 284, p. 43) (‘Regulation No 883/2004 as amended in 2009’). It was also 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 as amended in 2012’), which entered into force on 28 June 2012. Regulation No 883/2004 in its two versions applies to the present case in so far as concerns the refusal to pay insurance premiums for the period between 25 January 2008 and 25 January 2013.

10 Recital 18b of Regulation No 883/2004 as amended in 2012 is worded as follows:

‘In Annex III to Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonisation of technical requirements and administrative procedures in the field of civil aviation, the concept of “home base” for flight crew and cabin crew members is defined as the location nominated by the operator to the crew member from where the crew member normally starts and ends a duty period, or a series of duty periods, and where, under normal conditions, the operator is not responsible for the accommodation of the crew member concerned. In order to facilitate the application of Title II of this Regulation for flight crew and cabin crew members, it is justified to use the concept of “home base” as the criterion for determining the applicable legislation for flight crew and cabin crew members. However, the applicable legislation for flight crew and cabin crew members should remain stable and the home base principle should not result in frequent changes of applicable legislation due to the industry’s work patterns or seasonal demands.’

11 Regulation No 883/2004 in its two versions contains, in Title II headed ‘Determination of the legislation applicable’, Articles 11 to 16 thereof. It reproduces the provisions of Title II of Regulation No 1408/71.

12 Article 11 of Regulation No 883/2004 as amended in 2009 comprises four numbered paragraphs, the first and third of which provide:

‘1. 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.

…

3. Subject to Articles 12 to 16:

(a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;

…’

13 Regulation No 465/2012 added a paragraph 5 to Article 11 which provides that the ‘activity as a flight crew or cabin crew member performing air passenger or freight services shall be deemed to be an activity pursued in the Member State where the home base, as defined in Annex III to Regulation (EEC) No 3922/91, is located.’

14 Under the heading ‘Pursuit of activities in two or more Member States’, Article 13 of Regulation No 883/2004 in its two versions provides, in essence, in paragraph 1(a) that a person who normally pursues an activity as an employed person in two or more Member States is to be subject to the legislation of the Member State of residence if he or she pursues a substantial part of his or her activity in that Member State. Article 13(1)(b) provides that that person, if he or she does not pursue a substantial part of his or her activity in the Member State of residence, is to be subject to the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated.

15 Article 16(1) of Regulation No 883/2004 in its two versions reproduces, in identical terms, the wording of Article 17 of Regulation No 1408/71.

16 Article 71 and Article 76(6) of that regulation in its two versions correspond, in essence, to Article 80 and Article 84a(3) of Regulation No 1408/71.

17 Article 87(8) of Regulation No 883/2004 in its two versions is worded as follows:

‘If, as a result of this Regulation, a person is subject to the legislation of a Member State other than that determined in accordance with Title II of Regulation (EEC) No 1408/71, that legislation shall continue to apply while the relevant situation remains unchanged and in any case for no longer than 10 years from the date of application of this Regulation unless the person concerned requests that he/she be subject to the legislation applicable under this Regulation. The request shall be submitted within 3 months after the date of application of this Regulation to the competent institution of the Member State whose legislation is applicable under this Regulation if the person concerned is to be subject to the legislation of that Member State as of the date of application of this Regulation. If the request is made after the time limit indicated, the change of applicable legislation shall take place on the first day of the following month.’

Regulation (EEC) No 574/72

18 Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71, as amended and updated by Regulation No 118/97 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 (OJ 2005 L 117, p. 1), contained an Article 12a, entitled ‘Rules applicable

in respect of the persons referred to in Article 14(2) and (3), Article 14a(2) to (4) and Article 14c of [Regulation No 1408/71] who normally carry out an employed or self-employed activity in the territory of two or more Member States' which stated at paragraph 1(a):.

'Where, in accordance with Article 14(2)(a) of [Regulation No 1408/71], a person who is a member of the travelling or flying personnel of an international transport undertaking is subject to the legislation of the Member State in whose territory the registered office or place of business of the undertaking, or the branch or permanent establishment employing him, is located, or where he resides and is predominantly employed, the institution designated by the competent authority of that Member State shall issue to the person concerned a certificate stating that he is subject to its legislation.'

Regulation (EC) No 987/2009

19 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 (OJ 2009 L 284, p. 1) repealed and replaced, as from 1 May 2010, Regulation No 574/72, in the version amended and updated by Regulation No 118/97, as amended by Regulation 647/2005.

20 Article 5 of Regulation No 987/2009 provides as follows:

'1. 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 [this] 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.

2. Where there is doubt about the validity of a document or the accuracy of the facts on which the particulars contained therein are based, the institution of the Member State that receives the document shall ask the issuing institution for the necessary clarification and, where appropriate, the withdrawal of that document. The issuing institution shall reconsider the grounds for issuing the document and, if necessary, withdraw it.

3. Pursuant to paragraph 2, where there is doubt about the information provided by the persons concerned, the validity of a document or supporting evidence or the accuracy of the facts on which the particulars contained therein are based, the institution of the place of stay or residence shall, in so far as this is possible, at the request of the competent institution, proceed to the necessary verification of this information or document.

4 Where no agreement is reached between the institutions concerned, the matter may be brought before the Administrative Commission by the competent authorities no earlier than one month following the date on which the institution that received the document submitted its request. The Administrative Commission shall endeavour to reconcile the points of view within six months of the date on which the matter was brought before it.'

21 Article 14(8) of that regulation states:

'For the purposes of the application of Article 13(1) and (2) of [Regulation No 883/2004], 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.

To determine whether a substantial part of the activities is pursued in a Member State, the following indicative criteria shall be taken into account:

(a) in the case of an employed activity, the working time and/or the remuneration; and

(b) in the case of a self-employed activity, the turnover, working time, number of services rendered and/or income.

In the framework of an overall assessment, a share of less than 25% in respect of the criteria mentioned above shall be an indicator that a substantial part of the activities is not being pursued in the relevant Member State.'

Regulation (EC) No 44/2001

22 Section 5 of Chapter II of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), which comprises Articles 18 to 21 of that regulation, sets out the rules of jurisdiction relating to disputes concerning individual contracts of employment.

23 Article 18(1) of that regulation is worded as follows:

'In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.'

24 Article 19 of that regulation provides:

'An employer domiciled in a Member State may be sued:

1. in the courts of the Member State where he is domiciled; or

2. in another Member State:

(a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or

(b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.'

Italian law

25 Regio decreto legge, n. 1827 convertito con modificazioni dalla L. 6 aprile 1936, n. 1155 – Perfezionamento e coordinamento legislativo della previdenza sociale (Royal Decree-Law No 1827 converted with amendments by Law No 1155 of 6 April 1936 – concerning the improvement and legislative coordination of social security) of 4 October 1935 (*Gazzetta Ufficiale del Regno d'Italia* No 147 of 26 June 1936) provides, in Article 37, that insurance for disability, retirement, tuberculosis and involuntary unemployment are, subject to the exclusions provided for in that decree, compulsory for men and women of any nationality who have reached 15 years of age and are less than 65 years of age and are in paid employment.

26 Decreto del Presidente della Repubblica, n. 1124 – Testo unico delle disposizioni per l'assicurazione obbligatoria contro gli infortuni sul lavoro e le malattie professionali (Presidential

Decree No 1124 concerning the consolidated text of the provisions on compulsory insurance against workplace accidents and occupational illness) of 30 June 1965 (GURI No 257 of 13 October 1965) states that that insurance is to include persons who are employed permanently or temporarily to do paid manual labour under the supervision of others, regardless of the form of payment, or persons who fulfil those criteria but, while not physically participating in the work, supervise the work of others.

The disputes in the main proceedings and the question referred for a preliminary ruling

27 Following an inspection, the INPS took the view that the 219 Ryanair employees assigned to Orio al Serio airport in Bergamo were employed on Italian territory and were required, pursuant to Italian law and Article 13 of Regulation No 1408/71, to be insured with the INPS for the period from June 2006 to February 2010.

28 The INAIL also took the view that, under Italian law, those employees had to be insured with the INAIL for risks connected with non-air work for the period from 25 January 2008 to 25 January 2013 since they were, according to that institute, connected to Ryanair's operating base located in Orio al Serio airport.

29 The INPS and the INAIL therefore demanded that Ryanair pay the social security contributions and insurance premiums relating to those periods ('the periods concerned'), which Ryanair challenged before the Italian courts.

30 The Tribunale di Bergamo (District Court, Bergamo, Italy) and the Corte d'appello di Brescia (Court of Appeal, Brescia, Italy) dismissed the claims of the INPS and the INAIL as unfounded, taking the view that the Ryanair employees were covered by Irish legislation in respect of those periods.

31 Those courts permitted Ryanair's late submission of E101 certificates issued by the competent Irish institution, certifying that Irish social security legislation was applicable to the employees referred to therein.

32 The court before which the appeal was brought confirmed that, according to the settled case-law of the Court of Justice, E101 certificates are binding on the national courts and concluded that the Ryanair employees covered by the E101 certificates adduced by Ryanair were, during the periods concerned, subject to Irish social security legislation. However, after examining those certificates, that court found that they were not numbered or arranged in an intelligible or orderly manner, that there were 321 certificates, thus some were probably duplicates, and that they did not cover all of the 219 Ryanair employees assigned to Orio al Serio airport during the whole of the periods concerned. It concluded that, as regards the employees for whom no E101 certificate had been shown to exist, it was necessary to determine the social security legislation applicable, pursuant to Regulation No 1408/71.

33 That court stated, in that regard, that Ryanair's 219 employees assigned to Orio al Serio airport were employed under an Irish employment contract, were managed in practice by instructions coming from Ireland, that they worked for 45 minutes each day in Italian territory and that for the remaining working time, they were on aircraft registered in Ireland. That court held that Ryanair did not have a branch or permanent representation on Italian territory and deduced that, pursuant to Regulation No 1408/71, Italian social security legislation was not applicable.

34 As regards the period thereafter during which that regulation was applicable, the court before which the appeal was brought held that it did not have the necessary factual material to apply the criteria laid down by Regulations No 883/2004 and No 987/2009 and that, in any event, the new connecting factor relating to the 'operating base' provided for in Regulation No 883/2004 as amended in 2012, was not applicable *ratione temporis*. That court concluded that, during that period, Irish social security legislation was applicable to those of the 219 Ryanair employees who were not covered by an E101 certificate.

35 The INPS and the INAIL appealed on a point of law to the referring court, the Corte suprema di cassazione (Supreme Court of Cassation, Italy).

36 While the referring court acknowledges that the E101 certificates adduced by Ryanair are binding, it takes the view, however, that, in so far as the court before which the appeal has been brought, on the basis of its assessment of the facts which the referring court cannot call into question, considered that the E101 certificates produced by Ryanair did not in fact cover all of the 219 Ryanair employees assigned to Orio al Serio airport for whole of the periods concerned, it is necessary, for the purposes of resolving the disputes in the main proceedings, to establish, in accordance with Regulation No 1408/71, the social security legislation applicable.

37 The referring court questions, more specifically, whether that legislation must be determined pursuant to Article 14(2)(a)(i) or Article 14(2)(a)(ii) of Regulation No 1408/71.

38 It notes, in that regard, that, in its judgments of 14 September 2017, *Nogueira and Others* (C-168/16 and C-169/16, EU:C:2017:688) and of 2 April 2020, *CRPNPAC and Vueling Airlines* (C-370/17 and C-37/18, EU:C:2020:260, paragraphs 54 to 59), the Court provided pertinent guidance for assessing whether Article 14(2)(a)(i) of Regulation No 1408/71 was applicable in the present case.

39 However, the referring court expresses doubts concerning the interpretation of the term 'person is employed principally in the territory of the Member State in which he resides', within the meaning of Article 14(2)(a)(ii) of that regulation, as regards flight and cabin crew. It asks, specifically, whether that concept ought to be interpreted by analogy with the interpretation given by the Court of the concept of the 'place where the employee habitually carries out his work' in Article 19(2)(a) of Regulation No 44/2001, in particular in the judgment of 14 September 2017, *Nogueira and Others* (C-168/16 and C-169/16, EU:C:2017:688, paragraph 57), which concerned workers employed as members of the flight and cabin crew of an airline or made available to it and in which the Court held that that concept had to be interpreted broadly (see, by analogy, judgment of 12 September 2013, *Schlecker*, C-64/12, EU:C:2013:551, paragraph 31 and the case-law cited) in so far as it refers to the place where, or from which, the employee actually performs the essential part of his or her duties vis-à-vis his or her employer.

40 In those circumstances, the Corte suprema di cassazione (Supreme Court of Cassation) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Can the concept of a "person employed principally in the territory of the Member State in which he resides" contained in Article 14(2)(a)(ii) [of Regulation No 1408/71] be interpreted in the same way as that which (concerning judicial cooperation in civil matters, jurisdiction and individual contracts of employment), Article 19(2)(a) [of Regulation No 44/2001] defines as the "place where the employee habitually carries out his work" including in the aviation and airline crew sector

[Regulation No 3922/91] as expressed in the case-law of the Court of Justice of the European Union referred to in the grounds?'

Admissibility of the request for a preliminary ruling

41 Ryanair and Ireland submit that the present request for a preliminary ruling is inadmissible. In their view, the E101 certificates adduced by Ryanair are, in accordance with the settled case-law of the Court, binding on the national courts, with the result that neither the court before which the appeal was brought, nor the referring court has jurisdiction to determine, pursuant to Regulation No 1408/71, the social security legislation applicable to the 219 Ryanair employees assigned to Orio al Serio airport.

42 As to those submissions, it should be borne in mind that, in proceedings under Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (judgment of 12 October 2016, *Ranks and Vasiļevičs*, C-166/15, EU:C:2016:762, paragraph 21 and the case-law cited).

43 It is settled case-law that questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling from a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material to give a useful answer to the questions submitted to it (judgment of 12 October 2016, *Ranks and Vasiļevičs*, C-166/15, EU:C:2016:762, paragraph 22 and the case-law cited).

44 In the present case, it is apparent from the documents before the Court that the court before which the appeal was brought referred expressly to the settled case-law of the Court which provides that E101 certificates are binding on national courts, then examined the E101 certificates adduced before it by Ryanair and concluded that it was not established that those certificates covered all of the 219 Ryanair employees assigned to Orio al Serio airport during the whole of the periods concerned. Therefore, that court took the view that it was necessary to determine the social security legislation applicable pursuant to Regulation No 1408/71 to the employees, from the group of 219 employees, in respect of whom it had not been established that there was an E101 certificate.

45 Therefore, the disputes in the main proceedings concern the question of the social security legislation applicable during the periods concerned to the Ryanair employees assigned to Orio al Serio airport who are not covered by the E101 certificates adduced by Ryanair ('the workers in question').

46 Accordingly, the request for a preliminary ruling is admissible.

Consideration of the question referred

47 As a preliminary point, it should be noted that, even if, formally, the referring court has limited its question to the interpretation of the concept of a 'person employed principally in the

territory of the Member State in which he resides' contained in Article 14(2)(a)(ii) of Regulation No 1408/71, that does not prevent the Court from providing the referring court with all the elements of interpretation of EU law which may be of assistance in adjudicating on the case before it, whether or not the referring court has referred to them in the wording of its question.

48 It is, in this regard, for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision to make the reference, the points of EU law which require interpretation in view of the subject matter of the dispute (judgment of 8 July 2021, *Staatsanwaltschaft Köln and Bundesamt für Güterverkehr*, C-937/19, EU:C:2021:555, paragraph 23 and the case-law cited).

49 In the present case, it is apparent from the request for a preliminary ruling that the disputes in the main proceedings concern the determination of the social security legislation applicable during the periods concerned to the workers in question. While, during the whole of the relevant period in the dispute between the INPS and Ryanair, which is between June 2006 and February 2010, Regulation No 1408/71 was actually in force, which is not the case as regards the relevant period in the dispute between the INAIL and Ryanair, namely the period from 25 January 2008 to 25 January 2013. Regulation No 1408/71 was repealed and replaced by Regulation No 883/2004 with effect from 1 May 2010. Consequently, the determination of the social security legislation applicable in the present case must be founded on not only Regulation No 1408/71, to which the referring court makes reference, but also on Regulation No 883/2004 in its two versions.

50 The question referred must therefore be understood as seeking, in essence, to determine, in accordance with the relevant provisions of Regulation No 1408/71 and Regulation No 883/2004, in its two versions, the social security legislation applicable to flight and cabin crew of an airline, established in one Member State, where that crew is not covered by E101 certificates and where that crew works for 45 minutes per day in premises intended to be used by staff, known as the 'crew room' which that airline has in the territory of another Member State in which that flight and cabin crew reside, and, for the remaining working time, that crew is on board that airline's aircraft.

51 In the first place, it should be noted that, as regards Regulation No 1408/71, it is apparent from the request for a preliminary ruling that the referring court is uncertain whether the social security legislation applicable in the cases in the main proceedings must be determined in accordance with Article 14(2)(a)(i) of that regulation or Article 14(2)(a)(ii) of that regulation.

52 It should be pointed out that those provisions – which constitute a derogation from the principle laid down in Article 14(2)(a) of Regulation No 1408/71, according to which a person who is a member of the travelling or flying personnel of an undertaking which, for hire or reward or on its own account, operates international transport services for passengers or goods by rail, road, air or inland waterway and has its registered office or place of business in the territory of a Member State, is to be subject to the legislation of the latter State – lay down different rules which are mutually exclusive. It is only if the relevant social security legislation cannot be determined under Article 14(2)(a)(i) of that regulation that Article 14(2)(a)(ii) of that regulation is to be applied.

53 Under Article 14(2)(a)(i) of Regulation No 1408/71, a person who is a member of the flight and cabin crew of an airline operating international flights and is employed by a branch or permanent representation owned by that airline in the territory of a Member State other than that in which it has its registered office or place of business, is subject to the legislation of the Member State in whose territory such branch or permanent representation is situated.

54 The application of that provision requires, accordingly, that two cumulative conditions are satisfied: (i) that the airline concerned has a branch or permanent representation in a Member State other than that where it has its registered office and (ii) that the person concerned is employed by that entity (judgment of 2 April 2020, *CRPNPAC and Vueling Airlines*, C-370/17 and C-37/18, EU:C:2020:260, paragraph 55).

55 As regards the first condition, the Court stated that the concepts of 'branch' and 'permanent representation' are not defined by Regulation No 1408/71, which also makes no reference, in that respect, to the law of the Member States, and those concepts must, therefore, be given an autonomous interpretation. Like similar or identical concepts to be found in other provisions of EU law, they must be understood as referring to a form of secondary establishment, with an appearance of stability and continuity, intended for the carrying out of an actual economic activity and having, for that purpose organised material and human resources and a certain autonomy in relation to the main establishment (judgment of 2 April 2020, *CRPNPAC and Vueling Airlines*, C-370/17 and C-37/18, EU:C:2020:260, paragraph 56).

56 As regards the second condition, the Court has pointed out that the work relationship of flight and cabin crew of an airline has a significant connection with the place from which they principally discharge their obligations to their employer. That place is the place where or from which those persons carry out their transport-related tasks, where they return to after their tasks, receive instructions concerning their tasks and organise their work, and the place where their work tools are situated, which may be the same place as their 'home base' (judgment of 2 April 2020, *CRPNPAC and Vueling Airlines*, C-370/17 and C-37/18, EU:C:2020:260, paragraph 57). Consequently, the Court held that the place in which the flight and cabin crew were employed could be characterised as a branch or a permanent representation within the meaning of Article 14(2)(a)(i) of Regulation No 1408/71, since that place was the place where they essentially discharged their obligations to their employer (see, to that effect, judgment of 2 April 2020, *CRPNPAC and Vueling Airlines*, C-370/17 and C-37/18, EU:C:2020:260, paragraph 58).

57 The Court accordingly relied on the case-law concerning determination of the law applicable to individual contracts of employment, as provided for in Article 19(2)(a) of Regulation No 44/2001, and in particular on the judgment of 14 September 2017, *Nogueira and Others* (C-168/16 and C-169/16, EU:C:2017:688). In that regard, in order to identify the place from which flight and cabin crew essentially discharged their obligations to their employer, use must be made of a body of evidence which takes account of all the elements which characterise the activity of the employee and which, in particular, make it possible to establish in which Member State is situated the place from which the employee carries out his or her transport-related tasks, the Member State where he or she returns to after his or her tasks, receives instructions concerning his or her tasks and organises his or her work, and the place where his or her work tools are located (see, to that effect, judgment of 2 April 2020, *CRPNPAC and Vueling Airlines*, C-370/17 and C-37/18, EU:C:2020:260, paragraph 57).

58 In the present case, it is apparent from the order for reference that, during the periods concerned, Ryanair had premises intended to be used by the staff at Orio al Serio airport, which was used to manage and organise its staff's shifts. Those premises were equipped with computers, telephones, fax machines and storage units for documents concerning staff and flights, they were used by all Ryanair staff for the activities preceding and following each shift (check in and check out via badging in and out of the premises, operational briefing and final report) and to communicate with the staff located in Ryanair's head office in Dublin (Ireland). Staff who were temporarily grounded had to work in those premises. The 'supervisor' for staff at the base and also for those on-call, who coordinated the crews, managed, from his or her location in those premises,

the staff working at the airport and summoned, where appropriate, on-call staff. Lastly, Ryanair staff were not permitted to reside more than one hour away from those premises.

59 In the light of the foregoing, it must be held that the premises intended to be used by Ryanair staff, located at Orio al Serio airport, constitute a branch or permanent representation within the meaning of Article 14(2)(a)(i) of Regulation No 1408/71, in which the workers in question were employed during the periods concerned, with the result that, during the part of those periods when that regulation was in force, the workers in question were, in accordance with that provision, subject to Italian social security legislation.

60 It must therefore be held that the relevant social security legislation may be determined on the basis of Article 14(2)(a)(i) of Regulation No 1408/71 and that there is, consequently, no need to apply Article 14(2)(a)(ii) of that regulation.

61 In the second place, it must be pointed out as regards Regulation No 883/2004, that that regulation as amended in 2009 did not lay down, contrary to Regulation No 1408/71, rules on conflict-of-laws specific to flight and cabin crew.

62 By contrast, Article 13(1)(a) of Regulation No 883/2004 in its two versions lays down the principle that a person who normally pursues an activity as an employed person in two or more Member States is to be subject to the legislation of the Member State of residence if he or she pursues a substantial part of his or her activity in that Member State.

63 Article 14(8) of Regulation No 987/2009 provides that, for the purposes of the application of Article 13(1) and (2) of Regulation No 883/2004 in its two versions, a ‘substantial part’ of employed or self-employed activity pursued in a Member State is to 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. To determine whether a substantial part of the activities is pursued in a Member State, account is to be taken, in the case of an employed activity, of working time and/or remuneration. The fact that less than 25% in respect of those criteria are met is to be an indicator that a substantial part of the activity is not being pursued in the relevant Member State.

64 In the present case, the order for reference contains no information on the remuneration of the workers in question. As regards their working time, the referring court states that during the periods concerned the workers in question resided in Italy, worked in the territory of that Member State, more particularly in the premises intended to be used by staff located in Orio al Serio airport for 45 minutes per day and that those staff were, for the remaining working time, on board Ryanair’s aircraft. Therefore, subject to the determination of the total daily working time of the workers in question, it does not appear that at least 25% of the working time of those workers occurred in their Member State of residence.

65 However, it is for the referring court to ascertain, on the basis of the criteria set out above, whether or not during the periods concerned the workers in question pursued a substantial part of their activity in the Member State in which they reside, namely in Italy. If the answer is in the affirmative, they must, in accordance with Regulation No 883/2004 as amended in 2009, be regarded as falling under Italian social security legislation as from 1 May 2010, the date on which that regulation entered into force.

66 If the answer is in the negative, Article 13(1)(b)(i) of Regulation No 883/2004 in its two versions is to be applied – in so far as it provides that if a person who pursues an activity as an

employed person in two or more Member States does not pursue a substantial part of his activity in the Member State of residence, that person is to be subject to the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated, with the result that, as from 1 May 2010, the workers in question were, in principle, subject to Irish social security legislation.

67 It should, however, be noted that, in such a case, Article 87(8) of Regulation No 883/2004 in its two versions provides that, where the application of that regulation results in social security legislation being established which does not correspond to that applicable under Title II of Regulation No 1408/71, the legislation to which that person was subject under Regulation No 1408/71 is to continue to apply, unless that person requests that the legislation resulting from Regulation No 883/2004 be applied to him or her.

68 In the present case, it is not apparent from the order for reference that the workers in question have made such requests, however, that is for the referring court to ascertain. If no request has been made, the workers in question must, in accordance with Article 87(8) of Regulation No 883/2004, be regarded as continuing to be subject, after 1 May 2010, to Italian social security legislation.

69 In the third place, it should be noted that Regulation No 883/2004 as amended in 2012 includes, at Article 11(5), a new conflict-of-laws rule under which the activity of a member of the flight crew or cabin crew performing air passenger or freight services is to be deemed to be an activity pursued in the Member State where the home base, as defined in Annex III to Regulation No 3922/91, is located.

70 In accordance with that annex, the home base is defined as the location nominated by the operator to the crew member from where the crew member normally starts and ends a duty period or a series of duty periods and where, under normal conditions, the operator is not responsible for the accommodation of the crew member concerned.

71 In the light of the information provided by the referring court concerning the premises intended to be used by the Ryanair staff located in Orio al Serio airport, in particular the fact that the workers in question started and completed their day there and had to reside within one hour of those premises, such premises must be regarded as constituting a ‘home base’ within the meaning of Article 11(5) of Regulation No 883/2004 as amended in 2012. Accordingly, between 28 June 2012 and 25 January 2013, the workers in question were, in accordance with Regulation No 883/2004 as amended in 2012, subject to Italian social security legislation.

72 It follows from all the foregoing considerations that the social security legislation applicable during the periods concerned to Ryanair employees assigned to Orio al Serio airport who are not covered by the E101 certificates adduced by Ryanair is, subject to verification by the referring court, Italian legislation.

73 Consequently, the answer to the question referred is that Article 14(2)(a)(i) of Regulation No 1408/71, Article 13(1)(a) and Article 87(8) of Regulation No 883/2004 in its two versions, and Article 11(5) of Regulation No 883/2004 as amended in 2012, must be interpreted as meaning that the social security legislation applicable to the flight and cabin crew of an airline, established in a Member State, which crew is not covered by E101 certificates and which work for 45 minutes per day in premises intended to be used by staff, known as the ‘crew room’ which that airline has in the territory of another Member State in which that flight and cabin crew reside and which, for the remaining working time, are on board that airline’s aircraft is the legislation of the latter Member State.

Costs

74 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 14(2)(a)(i) of Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Regulation (EC) No 631/2004 of the European Parliament and of the Council of 31 March 2004, Article 13(1)(a) and Article 87(8) 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 (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009, and subsequently by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012, and Article 11(5) of Regulation No 883/2004, as amended by Regulation No 465/2012 must be interpreted as meaning that the social security legislation applicable to the flight and cabin crew of an airline, established in a Member State, which crew is not covered by E101 certificates and which work for 45 minutes per day in premises intended to be used by staff, known as the 'crew room', which that airline has in the territory of another Member State in which that flight and cabin crew reside and, whichfor the remaining working time, are on board that airline's aircraft is the legislation of the latter Member State.

[Signatures]

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* Language of the case: Italian.