Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

15 June 2023 (*)

(Reference for a preliminary ruling – Social security – Regulation (EC) No 883/2004 – Article 3(1)(a) – Concept of 'sickness benefits' – Scope – Freedom of movement for workers – Article 45 TFEU – Regulation (EC) No 492/2011 – Article 7(2) – Social advantages – Difference in treatment – Justifications – COVID-19 – Isolation of employees ordered by the national health authority – Compensation of those employees by the employer – Reimbursement of the employer by the competent authority – Exclusion of frontier workers required to isolate under a measure taken by the authority of their State of residence)

In Case C-411/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), made by decision of 24 May 2022, received at the Court on 21 June 2022, in the proceedings

Thermalhotel Fontana Hotelbetriebsgesellschaft mbH

intervening party:

Bezirkshauptmannschaft Südoststeiermark,

THE COURT (Seventh Chamber),

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

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Thermalhotel Fontana Hotelbetriebsgesellschaft mbH, by T. Katalan, Rechtsanwältin,

– 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 Finnish Government, by M. Pere, acting as Agent,

– the European Commission, by B.-R. Killmann and D. Martin, 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 3(1)(a) 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), and of Article 45 TFEU and Article 7 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1).

2 The request has been made in proceedings between Thermalhotel Fontana Hotelbetriebsgesellschaft mbH ('Thermalhotel Fontana') and the Bezirkshauptmannschaft Südoststeiermark (district administrative authority, South-East Styria, Austria; 'the administrative authority') concerning the latter's refusal to compensate Thermalhotel Fontana for loss of earnings suffered by its employees during periods of isolation at their respective places of residence in Slovenia and Hungary, imposed in connection with the COVID-19 pandemic by the competent authorities of those Member States.

Legal context

European Union law

Regulation No 883/2004

3 Article 3 of Regulation No 883/2004, entitled 'Matters covered', provides in paragraph 1:

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

(a) sickness benefits;

…'

4 Under Article 5 of that regulation:

'Unless otherwise provided for by this Regulation and in the light of the special implementing provisions laid down, the following shall apply:

…

(b) where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory.'

Regulation No 492/2011

5 Article 7 of Regulation No 492/2011 provides in paragraphs 1 and 2:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.'

Austrian law

6 The Epidemiegesetz 1950 (Law on epidemics of 1950) of 14 October 1950 (BGBl. 186/1950) is applicable to the dispute in the main proceedings in the version of 25 September 2020 (BGBl. I, 104/2020), as regards Paragraphs 7 and 32, and in the version of 24 July 2006 (BGBl. I, 114/2006), as regards Paragraph 17 ('the EpiG').

7 Under Paragraph 7 of the EpiG, entitled 'Isolation of infected persons':

'(1) Diseases subject to compulsory notification in respect of which isolation measures may be ordered in relation to persons infected with, suspected of being infected with, or suspected of being contagious with the disease shall be designated by means of a regulation.

(1a) In order to prevent the further spread of a disease subject to compulsory notification, designated in a regulation referred to in subparagraph 1, persons infected with, suspected of being infected with, or suspected of being contagious with the disease may be required to isolate or their contact with the outside world restricted if, having regard to the nature of the disease and the behaviour of the person concerned, there is a serious and significant risk to the health of other persons which cannot be eliminated by less restrictive measures. …

…'

8 Paragraph 17 of the EpiG, entitled 'Surveillance of certain persons', provides in paragraph 1:

'Persons who are to be regarded as carriers of germs of a disease which is subject to compulsory notification may be subject to special observation or surveillance by the Sanitätspolizei (health authority). Such persons may be subject to a specific notification obligation, a periodic medical examination and, where necessary, to disinfection and isolation at their home; if isolation at home cannot reasonably be carried out, isolation and sustenance in dedicated premises may be ordered.'

9 Paragraph 32 of the EpiG, entitled 'Compensation for loss of earnings', is worded as follows:

'(1) Natural and legal persons as well as commercial-law partnerships shall be compensated for the pecuniary disadvantages caused by the impediment to their professional activities if and to the extent that

1. they have been required to isolate under Paragraph 7 or 17;

…

and thereby suffered a loss of earnings.

…

(2) The compensation shall be paid for each day covered by the administrative decision referred to in subparagraph 1.

(3) Compensation for persons who are in an employment relationship shall be assessed on the basis of their regular remuneration within the meaning of the Entgeltfortzahlungsgesetz (Law on the continuation of remuneration), BGBl. No 399/1974. The amount of compensation due shall be paid by employers on the dates on which remuneration is customarily paid in the business concerned. The entitlement to compensation vis-à-vis the Federal Government shall be transferred to the employer at the time of payment. …

…'

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

10 Thermalhotel Fontana is established in Austria, where it operates a hotel.

11 In the fourth quarter of 2020, several employees of that hotel were subject to COVID-19 tests, the result of which was positive, which Thermalhotel Fontana notified to the Austrian health authority.

12 In view of the fact that those employees were resident in Slovenia and Hungary, that authority did not impose on them the isolation measures referred to in the provisions of the EpiG, but informed the competent authorities of those Member States, which imposed periods of isolation on those employees at their respective places of residence.

13 During those periods of isolation, Thermalhotel Fontana continued to pay the employees concerned their remuneration in accordance, as is apparent from the observations of the Austrian Government, with the relevant provisions of the Austrian Civil Code and the Angestelltengesetz (Law on employees) (BGBl. No 292/1921), as amended by the Bundesgesetz (Federal law) (BGBl. I No 74/2019), applicable in so far as their employment contract was governed by Austrian law.

14 By letters of 1 December 2020, Thermalhotel Fontana applied to the administrative authority, under Paragraph 32 of the EpiG, for compensation for loss of earnings suffered by those employees during their periods of isolation, taking the view that their right to compensation had been transferred to it by virtue of the payment of their remuneration during those periods. By decisions of 29 December 2020, those applications were refused.

15 The Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria, Austria) dismissed as unfounded the actions brought against those decisions. Noting that the documents annexed to the applications for compensation were decisions or attestations from foreign authorities which imposed an isolation measure on the employees concerned, that court stated that only a decision based on an administrative measure taken under the EpiG and leading to a loss of earnings for the employees was to give rise to the right to compensation under that law.

16 Thermalhotel Fontana brought extraordinary appeals on a point of law against the judgments dismissing its actions before the Verwaltungsgerichtshof (Supreme Administrative Court), which is the referring court, by which it challenged the compatibility of Paragraph 32(1) and (3) of the EpiG, as interpreted by the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria), with Article 45 TFEU and Regulation No 883/2004.

17 According to the referring court, if the compensation referred to in Paragraph 32 of the EpiG were to be regarded as a 'sickness benefit' within the meaning of Article 3(1)(a) of Regulation No 883/2004, the Austrian authorities and courts would, in accordance with Article 5(b) of that regulation, have to take into account a decision ordering isolation adopted by another Member State as if it had been adopted by an Austrian authority. However, the referring court takes the view that that is not the case and that, therefore, that compensation does not come within the scope of that regulation. In that regard, it observes, first, that the beneficiary, who is prevented from performing his or her work, is compensated for loss of earnings without necessarily being infected with a disease, since an isolation measure might have been imposed on him or her because he or she is merely suspected of being infected or contagious with a disease. Secondly, the imposition of an isolation measure does not serve to enable the recovery of the person required to isolate, but to protect the population from being infected by that person, and the compensation provided for in Paragraph 32 of the EpiG is not intended to cover medical expenses or the cost of treatment.

18 As regards Article 45 TFEU and Article 7 of Regulation No 492/2011, the referring court observes that the national legislation at issue indirectly imposes, as a condition for compensation from the employer, the residence of its employees on national territory and that that condition therefore constitutes unequal treatment of workers indirectly based on their nationality. In that regard, it observes that frontier workers such as those employed by Thermalhotel Fontana, whose COVID-19 test results were positive, were not, unlike workers residing in Austria in the same situation, required to isolate by the Austrian authority. However, they were subject to isolation measures comparable to those imposed by that authority under the measures in force in their Member State of residence, in respect of which the EpiG does not provide for a right to compensation for loss of earnings. The referring court is of the opinion that the fact that it is the employer who, after paying the remuneration due to the workers thus required to isolate, asserts a right to compensation derived from that of the workers concerned, has no bearing on that analysis.

19 As a possible justification for such unequal treatment, that court observes that a justification based on public health could enter into consideration, since compliance with decisions ordering isolation can be monitored by the Austrian authorities only on national territory, where the pandemic situation may be different from that prevailing in another Member State. Another justification might be that the Austrian State is solely responsible for the impediment to the employment of a worker subject to an isolation measure ordered by the Austrian authorities. Consequently, frontier workers who are subject to isolation measures ordered by the authorities of their Member State of residence could be referred to that State in order to seek the benefit of any compensation rules existing in that State. In any event, the referring court doubts whether the unequal treatment concerned is proportionate.

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

'(1) Does compensation which is due to workers during their isolation as persons infected with, suspected of being infected with, or suspected of being contagious with COVID-19 for the pecuniary disadvantages caused by the impediment to their employment, and which is initially

payable to the workers by their employer, with the entitlement to compensation vis-à-vis the Austrian Federal Government then being transferred to the employer at the time of payment, constitute a sickness benefit within the meaning of Article 3(1)(a) of [Regulation No 883/2004]?

(2) If Question 1 is answered in the negative: must Article 45 TFEU and Article 7 of [Regulation No 492/2011] be interpreted as precluding national legislation under which the granting of compensation for loss of earnings suffered by workers as a result of isolation ordered by the health authorities in the case of a positive COVID-19 test result (with the compensation being initially payable to the workers by their employer, and the entitlement to compensation vis-à-vis the Austrian Federal Government then being transferred to the employer to that extent) is subject to the condition that the isolation is ordered by an Austrian authority on the basis of provisions of national law relating to epidemics, with the result that such compensation is not paid to workers who, as frontier workers, are resident in another Member State and whose isolation ('quarantine') is ordered by the health authorities of their Member State of residence?'

The questions referred for a preliminary ruling

The first question

21 By its first question, the referring court asks, in essence, whether Article 3(1)(a) of Regulation No 883/2004 must be interpreted as meaning that compensation, financed by the State, which is due to workers for the pecuniary disadvantages caused by the impediment to their employment during their isolation as persons infected with, suspected of being infected with, or suspected of being contagious with COVID-19 constitutes a 'sickness benefit', referred to in that provision, and therefore comes within the scope of that regulation.

22 In that regard, it should be borne in mind that the distinction between benefits falling within the scope of Regulation No 883/2004 and those which are outside it is based essentially on the constituent elements of each benefit, in particular its purpose and the conditions for its grant, and not on whether it is classified as a social security benefit by national legislation (judgment of 15 July 2021, *A (Public health care)*, C-535/19, EU:C:2021:595, paragraph 28 and the case-law cited).

23 The Court of Justice has consistently held that a benefit may be regarded as a social security benefit in so far as it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and provided that it relates to one of the risks expressly listed in Article 3(1) of Regulation No 883/2004. These two conditions are cumulative (judgment of 15 July 2021, *A (Public health care)*, C-535/19, EU:C:2021:595, paragraph 29 and the case-law cited).

24 It should be recalled that the first of the conditions mentioned in the preceding paragraph is satisfied if a benefit is granted in the light of objective criteria which, if they are met, confer entitlement to the benefit, the competent authority having no power to take account of other personal circumstances (judgment of 15 July 2021, *A (Public health care)*, C-535/19, EU:C:2021:595, paragraph 30 and the case-law cited).

25 In the present case, it should be held that the first condition is satisfied, since the benefit at issue in the main proceedings is granted on the basis of legally defined objective criteria, without the competent authority taking into account personal circumstances of employees other than their isolation and the amount of their regular remuneration.

26 As regards the second condition set out in paragraph 23 above, it should be recalled that Article 3(1)(a) of Regulation No 883/2004 expressly mentions ‘sickness benefits’.

27 In that regard, the Court has held that the essential aim of ‘sickness benefits’ within the meaning of that provision is the patient’s recovery, by securing the care which his or her condition requires, and that they thus cover the risk connected to a state of ill health (judgment of 15 July 2021, *A (Public health care)*, C-535/19, EU:C:2021:595, paragraph 32 and the case-law cited).

28 However, that is not the case as regards compensation such as that provided for in Paragraph 32 of the EpiG.

29 First, in order to obtain such compensation, it is irrelevant whether or not the person subject to an isolation measure under the EpiG is actually infected with a disease or not, or whether, in the present case, the risk connected to the COVID-19 disease materialises or not, since it is sufficient, in order thus to be required to isolate, that he or she is suspected of being infected with or suspected of being contagious with COVID-19. Secondly, the isolation measure with which such compensation seeks to encourage compliance is imposed not for the purposes of the recovery of the person required to isolate, but in order to protect the population from being infected by that person.

30 In the light of the foregoing, the answer to the first question is that Article 3(1)(a) of Regulation No 883/2004 must be interpreted as meaning that compensation, financed by the State, which is due to workers for the pecuniary disadvantages caused by the impediment to their employment during their isolation as persons infected with, suspected of being infected with, or suspected of being contagious with COVID-19 does not constitute a ‘sickness benefit’, referred to in that provision, and does not therefore come within the scope of that regulation.

The second question

31 In the light of the negative answer given to the first question, it is necessary to answer the second question, by which the referring court asks, in essence, whether Article 45 TFEU and Article 7 of Regulation No 492/2011 must be interpreted as precluding legislation of a Member State under which the granting of compensation for loss of earnings suffered by workers as a result of isolation ordered following a positive COVID-19 test result is subject to the condition that the imposition of the isolation measure be ordered by an authority of that Member State under that legislation.

32 In that regard, it should be recalled that Article 45(2) TFEU provides that freedom of movement for workers entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

33 The principle of equal treatment laid down in that provision is also given specific expression in Article 7(2) of Regulation No 492/2011, which states that a worker who is a national of a Member State is to enjoy, in the territory of the other Member States, the same social and tax advantages as national workers (judgment of 28 April 2022, *Gerencia Regional de Salud de Castilla y León*, C-86/21, EU:C:2022:310, paragraph 29 and the case-law cited).

34 In addition, the Court of Justice has held that Article 7(2) of that regulation benefits equally both migrant workers resident in a host Member State and frontier workers employed in that Member State while residing in another Member State (judgment of 2 April 2020, *Caisse pour*

l'avenir des enfants (Child of the spouse of a frontier worker), C-802/18, EU:C:2020:269, paragraph 26 and the case-law cited).

35 The concept of a 'social advantage', extended by Article 7(2) of Regulation No 492/2011 to workers who are nationals of other Member States, comprises all advantages which, whether or not linked to a contract of employment, are generally granted to national workers, primarily because of their objective status as workers or by virtue of the mere fact of their residence in the national territory, and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the European Union and, consequently, their integration into the host Member State. Furthermore, the reference made by that provision to 'social advantages' cannot be interpreted restrictively (judgment of 16 June 2022, *Commission* v *Austria (Indexation of family benefits)*, C-328/20, EU:C:2022:468, paragraph 95 and the case-law cited).

36 It must be held that compensation such as that referred to in Paragraph 32 of the EpiG constitutes such a 'social advantage'. According to the actual wording of subparagraph 1 of that paragraph, compensation is paid, inter alia, to persons required to isolate under that law on account of the pecuniary disadvantages caused by the impediment to their employment.

37 It is settled case-law that the equal-treatment rule laid down in Article 45(2) TFEU and Article 7(2) of Regulation No 492/2011 prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, through the application of other distinguishing criteria, lead in fact to the same result. Thus, a provision of national law, even if it applies regardless of nationality, must be regarded as indirectly discriminatory if it is intrinsically liable to affect workers who are nationals of other Member States more than national workers and if there is a consequent risk that it will place the worker from a different Member State at a particular disadvantage, unless it is objectively justified and proportionate to the aim pursued (judgment of 8 December 2022, *Caisse nationale d'assurance pension*, C-731/21, EU:C:2022:969, paragraphs 31 and 32 and the case-law cited).

38 In the main proceedings, it is common ground that the compensation referred to in Paragraph 32 of the EpiG is granted only to persons required to isolate under that law, specifically Paragraphs 7 and 17 thereof. It is apparent from the order for reference that the persons thus required to isolate reside, as a general rule, on Austrian territory. However, the frontier workers at issue in the main proceedings, who reside in another Member State, were required to isolate not under the EpiG, but under the health legislation of their State of residence. Consequently, the pecuniary disadvantages caused by their isolation are not compensated under Paragraph 32 of the EpiG.

39 It follows, as the referring court observes, that eligibility for the compensation in question is indirectly linked to a condition of residence on Austrian territory. In accordance with the criteria resulting from the case-law cited in paragraph 37 above, such a requirement of residence on national territory constitutes, in the absence of justification, indirect discrimination in that it is intrinsically liable to affect migrant workers more than national workers and there is a consequent risk that it will place the former at a particular disadvantage (see, to that effect, judgment of 2 April 2020, *PF and Others*, C-830/18, EU:C:2020:275, paragraph 31 and the case-law cited).

40 That conclusion is not affected by the fact that, under Paragraph 32(3) of the EpiG, it is the employers of workers affected by an isolation measure under that law who are required to pay them the amount of compensation due and therefore have an entitlement vis-à-vis the State, whereas, in respect of frontier workers who are required to isolate under the health legislation of another Member State, those employers are not entitled, on the basis of the EpiG, to be compensated by the

Austrian State for the remuneration that they continue to pay to those frontier workers during their isolation.

41 The Court of Justice has held that the rules governing freedom of movement for workers could easily be frustrated if Member States were able to circumvent prohibitions under those rules merely by imposing on employers obligations or conditions with regard to a worker employed by them, which, if imposed directly on the worker, would constitute restrictions of the exercise of the worker's right to freedom of movement under Article 45 TFEU (see, to that effect, judgment of 4 September 2014, *Schiebel Aircraft*, C-474/12, EU:C:2014:2139, paragraph 26 and the case-law cited).

42 As regards the existence of an objective justification, within the meaning of the case-law cited in paragraph 37 above, the referring court and the Austrian Government refer to the objective of public health, since compensation for loss of earnings during the period of isolation is intended to promote compliance with an isolation measure taken by the health authorities to reduce infection rates. In that context, compensation only for isolation measures ordered under the EpiG is justified by the fact that compliance with such measures can be monitored only on national territory.

43 In that regard, it should, admittedly, be held that it is in the interests of public health – which, in accordance with Article 45(3) TFEU, is one of the grounds permitting the restriction of the freedom of movement for workers – that isolation measures, such as those at issue in the main proceedings, be imposed and that the payment of compensation be provided for in order to encourage compliance with them.

44 However, the compensation only of persons required to isolate under national legislation, in the present case the EpiG, to the exclusion, inter alia, of migrant workers required to isolate under the health measures in force in their Member State of residence, does not appear to be appropriate to achieve that objective. The compensation of such migrant workers would be just as likely to encourage them to comply with an isolation measure imposed on them, to the benefit of public health. Furthermore, as regards the possibility of monitoring compliance with an isolation measure, it appears, subject to verification by the referring court, that the compensation referred to in Paragraph 32 of the EpiG is granted to eligible persons as a result of the imposition of an isolation measure on them and not on account of their compliance with that measure.

45 The referring court and the Austrian Government also put forward, as a possible justification, that the compensation only of persons required to isolate under the EpiG follows from the fact that it is only in respect of those persons that the Austrian State is responsible for the impediment to employment caused by the isolation measure and that migrant workers required to isolate under the health legislation of their Member State of residence could turn to the competent authorities of that State in order to assert their possible right to compensation under that legislation.

46 However, such an argument does not relate, as such, to a specific objective capable of justifying an obstacle to the freedom of movement for workers. In so far as – as observed, inter alia, by the Czech Government – it is based on the concern to limit the financial cost of the compensation referred to in Paragraph 32 of the EpiG, it must be borne in mind that, although budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against migrant workers (judgment of 20 June 2013, *Giersch and Others*, C-20/12, EU:C:2013:411, paragraph 51 and the case-law cited).

47 In that context, even if, as the Austrian Government submits, the refusal to grant compensation for loss of earnings caused by isolation measures not ordered under Paragraph 32 of the EpiG is intended to avoid the unjust enrichment of migrant workers who are also compensated by their Member State of residence for the isolation imposed by the competent authorities of that State, it must be stated that such a refusal goes beyond what is necessary to avoid such overcompensation. As the Commission has observed, in order to preclude that possibility, it is sufficient that, when granting compensation, the Austrian authorities take account of compensation already paid or due under the legislation of another Member State, where appropriate by reducing the amount thereof.

48 In the light of the foregoing, the answer to the second question is that Article 45 TFEU and Article 7 of Regulation No 492/2011 must be interpreted as precluding legislation of a Member State under which the granting of compensation for loss of earnings suffered by workers as a result of isolation ordered following a positive COVID-19 test result is subject to the condition that the imposition of the isolation measure be ordered by an authority of that Member State under that legislation.

Costs

49 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:

1. **Article 3(1)(a) 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**

must be interpreted as meaning that compensation, financed by the State, which is due to workers for the pecuniary disadvantages caused by the impediment to their employment during their isolation as persons infected with, suspected of being infected with, or suspected of being contagious with COVID-19 does not constitute a 'sickness benefit', referred to in that provision, and does not therefore come within the scope of that regulation.

2. **Article 45 TFEU and Article 7 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union**

must be interpreted as precluding legislation of a Member State under which the granting of compensation for loss of earnings suffered by workers as a result of isolation ordered following a positive COVID-19 test result is subject to the condition that the imposition of the isolation measure be ordered by an authority of that Member State under that legislation.

[Signatures]

---

* Language of the case: German.