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Judgment of the Court in Case C-411/22 | Thermalhotel Fontana

The freedom of movement for workers precludes the legislation of a Member State, which makes compensation conditional on the imposition of an isolation measure by its own administrative authorities

Such legislation is liable to give rise to indirect discrimination of migrant workers

At the end of 2020, several employees of the Austrian hotel Thermalhotel Fontana were tested for Covid-19. The hotel reported the positive test results to the Austrian competent health authority. Some of the employees concerned were resident in Slovenia and Hungary. Therefore, the Austrian health authority did not impose on them isolation measures in accordance with the applicable Austrian law (the EpiG ¹), but informed the Hungarian and Slovenian competent authorities. Those authorities imposed isolation measures on the employees concerned at their respective places of residence, pursuant to national law. During those periods of isolation, Thermalhotel Fontana continued to pay the employees concerned their remuneration in accordance with Austrian labour law. Taking the view that the right to compensation of its employees had been transferred to it by virtue of the payment of their wages, the hotel applied to the Austrian competent administrative authority for compensation for loss of earnings suffered by its employees during those periods, pursuant to the EpiG. Those applications were refused by the administrative authority.

The actions brought against that decision were also rejected as unfounded at first instance, because the court took the view that only decisions 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.

The Austrian administrative court decided to stay the proceedings pending the ruling of the Court of Justice on **the question of whether the compensation granted to employees during their isolation constitutes a 'sickness benefit' within the meaning of the Regulation on the coordination of social security systems ² and, therefore, whether that compensation comes within the scope of that regulation**. If this were the case, the referring court takes the view that, in accordance with those provisions, the Austrian authorities would have to take into account a decision ordering isolation from authorities of other Member States as if it had been adopted by a national authority.

If, however, the first question were to be answered in the negative, **the referring court asks whether the principle of freedom of movement for workers, reflected in Article 45 TFEU and Article 7 of Regulation No 492/2011, ³ precludes legislation of a Member State which makes the granting of compensation**

¹ Epidemiegesetz (Law on epidemics).

² 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).

³ 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).

conditional upon the isolation measure having been imposed by that same Member State.

The Court answers the first question in the negative. In its view, the Regulation on the coordination of social security systems applies, first, to benefits, which are granted without any individual assessment of personal needs to recipients on the basis of a legally defined position and, secondly, to benefits which relate to the risks expressly listed in Article 3(1) of Regulation No 883/2004. The Court then finds that the second condition is not satisfied. According to its settled case-law, **the essential aim of 'sickness benefits' within the meaning of that provision is the patient's recovery.** ⁴ However, that is not the case as regards compensation such as that provided for in the EpiG because, in order to obtain such compensation, it is irrelevant whether or not the person subject to the isolation measure is actually infected with a disease or not. **Such an isolation measure is imposed not for the purposes of the recovery of the person concerned, but in order to protect the population from being infected by that person.**

As regards the second question, the Court answers it in the affirmative by recalling that the principle of freedom of movement for workers entails the abolition of any discrimination based on nationality as regards employment, remuneration and other conditions of work and employment. Thus, 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. This gives rise to settled case-law **according to which a provision of national law must be regarded as indirectly discriminatory if it is liable to affect workers who are nationals of other Member States more than national workers and thus to place the former at a greater disadvantage than the latter.** ⁵ The compensation provided for in the EpiG is granted only to persons required to isolate under that law following a measure implemented by the national health authorities and therefore only to persons residing on Austrian national territory. **Thus, the compensation is indirectly linked to a condition of residence on Austrian territory, which affects migrant workers to a greater extent and thus constitutes indirect discrimination.**

As for whether there is an objective justification for the measure, the Court took the view that it is admittedly in the interests of public health – which is a ground permitting the restriction of the freedom of movement for workers – that isolation measures be imposed and that the payment of compensation be provided for in order to encourage compliance with them. **However, the compensation only of persons required to isolate under national legislation 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.** Thus, the compensation of such migrant workers would be just as likely to encourage them to comply with an isolation measure imposed on them, in the interests of public health.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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⁴Judgment of 15 July 2021, *A (Public health care)*, [C-535/19](#) (see also [PR No 136/21](#)).

⁵Judgment of 8 December 2022, *Caisse nationale d'assurance pension*, [C-731/21](#) (see also [PR No 199/22](#)).

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