Reports of Cases

OPINION OF ADVOCATE GENERAL
MAZÁK
delivered on 3 May 2012 [1]

Case C-115/11

Format Urządzenia i Montaże Przemysłowe Spółka z o.o.
v
Zakład Ubezpieczeń Społecznych I Oddział w Warszawie

(Reference for a preliminary ruling from the Sąd Apelacyjny – Sąd Pracy i Ubezpieczeń Społecznych w Warszawie (Poland))

(Social security for migrant workers — Determination of the legislation applicable — Person normally employed in the territory of two or more Member States — Performance of work during consecutive periods and on the basis of successive contracts of employment — E 101 certificate — Divergence between contract of employment and actual performance)

I – Introduction

1. By order of 15 December 2010, received at the Court on 2 March 2011, the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw) (Poland) referred questions to the Court of Justice under Article 267 TFEU for a preliminary ruling on the interpretation of Article 14(2)(b) 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, in the version resulting from Council Regulation (EC) No 118/97 of 2 December 1996, [2] as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006 [3] ('Regulation No 1408/71' or 'the Regulation').

2. The reference was made in proceedings between the company Format Urządzenia i Montaże Przemysłowe Sp. z o.o. ('Format') and the employee Mr Wiesław Kita, on the one hand, and the Zakład Ubezpieczeń Społecznych I Oddział w Warszawie (Social Security Institution, Office 1, Warsaw; 'the ZUS'), on the other, concerning the determination of the legislation applicable to Mr Kita under Regulation No 1408/71.

3. In that regard, the referring court essentially wishes to know whether a person in circumstances such as those of Mr Kita can be regarded as a 'person normally employed in the territory of two or more Member States' for the purposes of the application of Article 14(2)(b) of Regulation No 1408/71, in which case, by way of exception, the legislation of the Member State of residence of the employed person – in this case, Polish legislation – may be applicable.

1 — Original language: English.
2 — OJ 1997 L 28, p. 1.
3 — OJ 2006 L 392, p. 1.

II – Legal framework

4. So far as is relevant for present purposes, Article 13 of Regulation No 1408/71, entitled 'General rules', provides as follows with respect to the determination of the legislation applicable:

'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(1) and (2) of Regulation No 1408/71, entitled 'Special rules applicable to persons, other than mariners, engaged in paid employment', provides, so far as is relevant, as follows:

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

1.(a) A person employed in the territory of a Member State by a[n] undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does not exceed 12 months and that he is not sent to replace another person who has completed his term of posting.

1.(b) If the duration of the work to be done extends beyond the duration originally anticipated, owing to unforeseeable circumstances, and exceeds 12 months, the legislation of the first Member State shall continue to apply until the completion of such work, provided that the competent authority of the Member State in whose territory the person concerned is posted or the body designated by that authority gives its consent; such consent must be requested before the end of the initial 12-month period. Such consent cannot, however, be given for a period exceeding 12 months.

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

2.(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:

…

2.(b) A person other than that referred to in (a) shall be subject:

(i) to the legislation of the Member State in whose territory he resides, if he pursues his activity partly in that territory or if he is attached to several undertakings or several employers who have their registered offices or places of business in the territory of different Member States;

(ii) to the legislation of the Member State in whose territory is situated the registered office or place of business of the undertaking or individual employing him, if he does not reside in the territory of any of the Member States where he is pursuing his activity.'

III – Facts, procedure and questions referred

6. According to the order for reference, Format, which has its registered office in Warsaw, is a subcontracting construction company operating on markets in the various Member States. In 2008, it was involved with around 15 to 18 construction projects being carried out on five or six markets at the same time. Format's *modus operandi* was to employ staff recruited in Poland, but to second them to building projects under way in the various Member States, depending upon the requirements of the company and the nature of the work to be carried out.

7. An employee who was to be seconded to another building site was given instructions to go. When a construction contract came to an end and there was no work for that employee, he would go back to Poland and wait for work, at which time he was either given unpaid leave or his contract of employment was terminated. This depended upon the number of jobs, of which there were fewer in the years 2008 and 2009 (crisis years). In principle, the employee was supposed to work in the countries of the European Union. None of Format's employees performed any work in Poland in the years 2008 and 2009.

8. More specifically, so far as Mr Kita is concerned, his residence within the meaning of the definition in Article 1(h) of Regulation No 1408/71 (his habitual residence) is, according to the referring court, Poland.

9. On three occasions, Mr Kita was employed full-time by Format on the basis of fixed-term contracts of employment.

10. The first fixed-term contract was concluded for the period from 17 July 2006 to 31 January 2007 and was extended until 22 December 2007. That contract was terminated on 30 November 2006. In clause 2(2), the place of employment was stated to be: operations and building sites in Poland and within the territory of the European Union (Ireland, France, Great Britain, Germany, Finland), as instructed by the employer. However, Mr Kita worked under that contract solely in France.

11. The ZUS, as the competent pensions office, issued – for the period from 17 July 2006 to 22 December 2007 – an E 101 certificate as provided for under Article 11a of Regulation (EEC) No 574/72[4] confirming, on the basis of Article 14(2)(b) of Regulation No 1408/71, that the Polish legislation was the legislation applicable to Mr Kita. Following termination of the contract, the certificate was subsequently amended so as to apply until 30 November 2006.

12. The second fixed-term contract of employment was concluded between Format and Mr Kita on 2 January 2007 for the period from 4 January 2007 to 21 December 2008. In clause 2(2) of that contract, the place of employment was stated to be: in Poland and within the territory of the European Union (Ireland, France, Great Britain, Germany, Finland), as instructed by the employer.

4 — Regulation of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1972(I), p. 159), in the version applicable at the material time.

13. Under that contract, Mr Kita worked outside Poland, in France. The contract was terminated by agreement between the parties of 5 April 2008 but, from 22 August 2007 to 31 December 2007, Mr Kita was unable to work because of illness. On 8 January 2008, therefore, the ZUS amended the E 101 certificate issued in respect of the period covered by that contract so that it applied up to 22 August 2007.

14. By decision of 23 July 2008 ('the contested decision') addressed to Format and Mr Kita, the ZUS – acting on the basis of Polish law and of Article 14(1)(a) and 14(2)(b) of Regulation No 1408/71 – refused to issue an E 101 certificate regarding the legislation applicable to Mr Kita or to confirm on that certificate that, during the periods between 1 January 2008 and 21 December 2008 and between 1 January 2009 and 31 December 2009, he came under the Polish social security scheme. According to that decision, Mr Kita was not a person normally employed within the territory of several Member States of the European Union or the European Economic Area but an employee posted by reference to the employer's situation.

15. On 24 July 2008, following the pronouncement of the contested decision, a third fixed-term contract of employment was concluded between Format and Mr Kita. This contract was for the period from 30 July 2008 to 31 December 2012, and the place of employment was stated to be the same as under the two previous contracts. However, provision was made in a supplement to the contract of 24 July 2008 that the place of employment in Finland was to be the nuclear power station in Olkiluoto. After working in Finland, Mr Kita was granted unpaid leave from 1 November 2008 to 30 September 2009 and thereby released from any obligation to do paid work. The contract of employment was terminated by agreement between the parties on 16 March 2009.

16. Format challenged the contested decision before the Sąd Okręgowy – Sąd Ubezpieczeń Społecznych w Warszawie (Regional Court – Social Security Court Warsaw), which dismissed the action by judgment of 12 February 2009, on the grounds that the preconditions for assuming that Mr Kita had been posted pursuant to Article 14(1)(a) of Regulation No 1408/71 were not satisfied because Format did not carry on its activity principally in the State in which it had its registered office. The Sąd Okręgowy also found that Mr Kita was not 'normally employed in the territory of two or more Member States' but rather that, over a period of several months or for more than 10 months, he had permanently worked in the territory of a single Member State (first France and then Finland), which meant that his situation was governed by the general rule of Community coordination, under which the legislation to be applied is determined by reference to the principle of the place at which the work is performed.

17. Both Format and Mr Kita have appealed to the referring court against the judgment of the Sąd Okręgowy.

18. In the proceedings before the referring court, Format argues that the system under which its employees work is that provided for under Article 14(2)(b)(ii) of Regulation No 1408/71, which does not require there to be employment in the territory of two or more Member States over the same period, just as it does not make any reference to computation periods of any sort or to the frequency with which an employee changes locations or crosses borders.

19. Mr Kita puts forward the same argument, maintaining in his appeal that application of the rule laid down in Article 14(2)(b)(ii) of Regulation No 1408/71 is appropriate in his situation as he has already been 'normally employed in the territory of more than two Member States' in the course of his employment relationship with Format, that is to say, under contracts which have been concluded for the territory of six Member States, albeit performed in the territory of only two Member States (France and Finland) until now. Moreover, if he were to move to a construction site in Poland, Article 14(2)(b)(i) would also be applicable.

20. The referring court states in the order for reference that, in another case concerning an employee working for Format, the Sąd Najwyższy (Supreme Court) held that the concept of a 'person normally employed in the territory of two or more Member States', as used in Article 14(2)(b)(ii) of Regulation No 1408/71, was not entirely clear. That term could signify either (i) an employee who, within the framework of a single employment relationship, performs work in several Member States at the same time (simultaneously) or (ii) a person who works in many Member States during successive periods of time on the basis of a contract of employment concluded with a single employer. However, in the light of the objectives of the Regulation, and specifically that of overcoming the administrative or technical difficulties which would arise from application of the *lex loci laboris* principle in the case of temporary employment and of promoting the free movement of workers, it would be reasonable, in the view of that court, to regard a person as 'normally employed' in the territory of several Member States for the purposes of Article 14(2)(b)(ii) of the Regulation where, in the context of a single employment relationship, that person is obliged permanently (normally) to perform work in several Member States other than the one in which he resides.

21. According to the referring court, that interpretation raises two questions. First, it is not clear whether the length of the consecutive periods of time during which obligations are performed in the individual Member States and of the intervals between those periods is a significant factor. When determining this, the terms of Article 14(1)(a) of Regulation No 1408/71, which lays down a temporal limit of 12 months in relation to the temporary posting of employees, cannot be disregarded.

22. Secondly, the question arises as to whether Article 14(2)(b)(ii) of Regulation No 1408/71 applies where an obligation under an employment contract to perform work in several Member States on a permanent basis includes performance of obligations in the employee's Member State of residence where the performance of work in that particular State nevertheless appears to have been ruled out at the time when the contract was entered into. In the event of the answer being in the negative, the further question arises as to whether Article 14(2)(b)(i) of the Regulation is applicable.

23. In those circumstances, the Sąd Apelacyjny decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Does the fact that the personal scope of the first sentence of Article 14(2) of Council Regulation (EEC) No 1408/71 ... covers "a person normally employed in the territory of two or more Member States" – in respect of whom it is specified in Article 14(2)(b) that this is a person other than that referred to in Article 14(2)(a) – mean, in the case of an employed person who is employed in an employment relationship by a single employer,

(a) that he is to be considered such a person if, on account of the nature of the employment, he performs work in different Member States at the same time (simultaneously), which also includes relatively short periods of time, and therefore frequently crosses State borders,

and also

(b) that he is to be considered such a person too if in the context of a single employment relationship he is obliged to perform work permanently (normally) in several Member States, including the State in which he resides, or in several Member States other than that of his State of residence

– either irrespective of the length of the consecutive periods in which he performs his obligations in the individual Member States and the length of the intermissions between them, or with a temporal limit?

2. If the interpretation set out in (b) above is accepted, can Article 14(2)(b)(ii) of Regulation No 1408/71 be applied in a situation in which the obligation existing in the context of the employment relationship between the employee and a single employer to permanently perform work in several Member States covers performance of obligations in the Member State in which the employee resides even though such a situation – the performance of work in that very State – appears to be precluded at the time that the employment relationship is entered into and, in the event of the answer being in the negative, can Article 14(2)(b)(i) of Regulation No 1408/71 be applied?'

IV – Legal analysis

A – *Preliminary remarks*

24. Before embarking on the analysis, some preliminary remarks appear appropriate in order to identify the issues which emerge from the questions referred.

25. By its questions, which it is appropriate to consider together, the referring court essentially wishes to ascertain whether, during the periods at issue in the case before it, Mr Kita was to be regarded – on a proper application of Regulation No 1408/71 and, in particular, of the exceptions provided for under Article 14 thereof – as being subject to Polish social security legislation, that is to say, the legislation of the Member State where he resides, which would mean that the ZUS, as the competent institution, should have issued an E 101 certificate confirming affiliation to that social security system.

26. In that regard it should be noted, first of all, that it appears from the order for reference that the referring court starts from the assumption that Article 14(1)(a) of Regulation No 1408/71 on the temporary posting of workers is not applicable to the situation of Mr Kita, on the grounds – it would seem – that Format, as the company employing him, does not normally carry on significant activities in Poland, the Member State where it is established, as required under that provision. [5]

27. I shall not call into question that assessment for the purposes of the present proceedings, as it has also been confirmed at the hearing that, during the relevant periods of time, Format did not in fact carry out any construction work in Poland.

28. Accordingly, the national court limits itself in its questions to inquiring, in essence, whether a situation such as that of Mr Kita may come either under Article 14(2)(b)(i) or 14(2)(b)(ii) of Regulation No 1408/71, the application of both provisions being, according to the first sentence of Article 14(2) of that regulation, conditional upon there being 'a person normally employed in the territory of two or more Member States'.

29. It is important to note in that regard, next, that the facts of the present case are marked – as some of the parties to the present proceedings have correctly observed and, in particular, as is reflected in the wording of Question 2 – by a divergence between, on the one hand, the terms of the respective employment contracts concluded between Format and Mr Kita and, on the other, the way in which those contracts have actually been implemented in practice, which also accounts for a certain measure of ambiguity in the questions asked by the national court.

30. Thus, in the employment contracts, the place of employment was, in each case, described as being: operations and building sites in Poland and within the territory of the European Union (Ireland, France, Great Britain, Germany, Finland), as instructed by the employer.

5 — See, to that effect, in particular Case C-202/97 *FTS* [2000] ECR I-883, paragraph 45.

31. In reality, however, as appears from the information provided by the national court and the parties, the situation of Mr Kita was such that successive fixed-term contracts of employment were concluded with a single employer (Format), under each of which the employee permanently carried out work over a period of several months or more than 10 months in the territory of a single Member State, that is, under the first contract in question – as under other fixed-term contracts before that – in France and, under the following contract, in Finland. It should be added that, according to the findings of the national court, Mr Kita's habitual residence within the meaning of Article 1(h) of Regulation No 1408/71 remained, even during the periods in which he carried out work in France or Finland, Poland.

32. It appears also that, in each case, on termination of the work, the employee was granted unpaid leave and the contract of employment was subsequently prematurely terminated by agreement of the parties. It appears, furthermore, to be common ground and also to be an assumption underlying Question 2 that, under those contracts, Mr Kita did not in fact perform any work on the territory of Poland, his Member State of residence.

33. In my view, it is therefore necessary, in order to provide the national court with a proper and useful answer, to distinguish conceptually between, first, the question of interpretation as to the conditions of applicability of Article 14(2)(b)(i) and 14(2)(b)(ii), respectively, of Regulation No 1408/71 and, second, the aspect of the divergence, in the case under consideration, between the employment contracts and the places of employment 'predicted' therein – on the basis of which Format requested an E 101 certificate – and the way in which obligations were actually performed in practice under those contracts.

34. Accordingly, I shall now discuss, with a view to the actual situation of Mr Kita as described above, the requirements of the aforementioned provisions of Article 14(2) of Regulation No 1408/71 and then address the issue of the divergence between the terms of the contracts concerned and their actual performance. That latter aspect boils down, in essence, to the question as to how – or, rather, on what factual and evidential basis – the competent authority must, for the purposes of issuing an E 101 certificate, determine whether the requirements for application of one of the exceptions under Article 14(2) of the Regulation are fulfilled in a given case.

B – *Main submissions of the parties*

35. In relation to the present reference for a preliminary ruling, written observations have been submitted by Format and by the ZUS, and also by the Polish, Belgian and German Governments and by the Commission. With the exception of the German Government, those parties were also represented at the hearing on 29 February 2012.

36. Format argues that Article 14(2) of Regulation No 1408/71 also covers a person who, in the context of a single employment relationship, is obliged to perform work permanently in several Member States, irrespective of the length of the consecutive periods over which obligations are performed in the Member States concerned and the length of the intervals between those periods, and proposes, in essence, that the questions referred be answered in the affirmative. The other parties – whose respective submissions I likewise do not summarise in detail – suggest a variety of definitions of the concept of a 'person normally employed in the territory of two or more Member States' as used in that provision, most arguing in favour of a more restrictive interpretation of Article 14(2)(b)(ii) of the Regulation than that argued for by Format.

C – *Appraisal*

37. It should be recalled at the outset that the provisions of Title II of Regulation No 1408/71, of which Article 14(2) forms part, constitute, according to the settled case-law of the Court, a complete and uniform system of conflict rules the aim of which is to ensure that workers moving within the Community are subject to the social security scheme of only one Member State, in order to prevent the legislation of more than one Member State from being applicable and to avoid the attendant complications. That principle is, more specifically, expressed in Article 13(1) of Regulation No 1408/71, which provides that a worker to whom that legislation applies is to be subject to the legislation of a single Member State only. [6]

38. In that connection, Article 14(2) of Regulation No 1408/71 sets out exceptions to the rule, laid down in Article 13(2)(a) thereof, under which a worker is to be subject to the legislation of the Member State in the territory of which he is employed (the *lex loci laboris* principle). [7]

39. As is clear from the first sentence of Article 14(2) of Regulation No 1408/71, those exceptions relate to persons who are 'normally employed in the territory of two or more Member States'.

40. In that regard, Article 14(2)(b) of Regulation No 1408/71, which applies to such persons (other than members of the travelling or flying personnel of an undertaking within the meaning of Article 14(2)(a)), provides, first, under Article 14(2)(b)(i), that the legislation of the Member State of residence is to apply if the person concerned pursues his activity partly in the territory of that Member State. [8]

41. However, it must be noted in that respect – as the Belgian Government has underlined – that the situation of Mr Kita does not appear to match those conditions in so far as it seems established that, during the relevant period of time, he did not pursue any activity in the territory of Poland, the Member State of residence. Consequently, in my view – but subject to the final determination of that issue by the national court and to the value to be attributed in this context to the wording of the employment contract, as referred to below – it is already to be excluded, on that ground alone, that Article 14(2)(b)(i) of Regulation No 1408/71 is applicable in the circumstances of the present case.

42. Article 14(2)(b)(ii) of the regulation, on the other hand, provides that a person is to be subject to the social security legislation of the Member State in whose territory the undertaking employing him is established if he does not reside in the territory of any of the Member States where he is pursuing his activity.

43. Although, according to the information provided in the order for reference, Mr Kita appears to fulfil that latter condition, the applicability to his situation of Article 14(2)(b)(ii) of Regulation No 1408/71 depends – as does that of Article 14(2)(b)(i) – on whether he can be regarded as a 'person normally employed in the territory of two or more Member States'.

6 — See, inter alia, Case C-352/06 *Bosmann* [2008] ECR I-3827, paragraph 16; *FTS*, cited in footnote 5, paragraph 20; Case C-425/93 *Calle Grenzshop Andresen* [1995] ECR I-269, paragraph 9; Case C-131/95 *Huijbrechts* [1997] ECR I-1409, paragraph 17; and Case C-275/96 *Kuusijärvi* [1998] ECR I-3419, paragraph 28.

7 — See, to that effect, Case C-404/98 *Plum* [2000] ECR I-9379, paragraphs 14 and 15.

8 — The second case envisaged by that provision – attachment to several undertakings or several employers – is not of relevance in the present case.

44. It is true that the Regulation gives no further definition of that concept, but it can at least generally be said, to begin with, that it obviously denotes employment which is not confined to the territory of one and the same Member State, but which extends normally and habitually – that is to say, as a rule rather than merely exceptionally or temporarily – over the territory of several Member States. [9]

45. Some examples of the kind of employment contemplated by the first sentence of Article 14(2) are provided by the Regulation itself and by the case-law of the Court.

46. Thus, as follows from Article 14(2)(a) of Regulation No 1408/71, members of the travelling or flying personnel of an undertaking operating international transport services are, in principle, to be regarded as persons normally employed on the territory of several Member States.

47. Furthermore, the Court accepted, for example, that Article 14(2)(b)(i) of Regulation No 1408/71 covers the situation of a worker, residing in one Member State and employed exclusively by an undertaking with its seat in another Member State, who in the course of the employment relationship, regularly – for several hours each week and for a period not limited to 12 months – pursues his activity in the former Member State. [10]

48. Those cases refer to situations where, in principle, in the framework of a working relationship, a person performs work more or less simultaneously or concurrently in several – that is, at least in two – Member States.

49. In my view, however, it is also possible that the concept of normal employment in the territory of several Member States covers a situation, such as that referred to by the national court, which is characterised by the successive or alternate carrying out of work assignments or projects in more than one Member State.

50. In that regard, it should be pointed out that the purpose of the exceptions provided for under Article 14(2)(b) of Regulation No 1408/71 – as in the case of the other exceptions to the State of employment rule, provided for under Articles 14 to 17 of the Regulation – is to overcome obstacles likely to impede freedom of movement for workers and to encourage economic interpenetration whilst avoiding administrative complications, in particular for workers and undertakings. [11]

51. Such obstacles and complications can clearly also arise in the case of a worker whose employment does not, within the meaning used above, extend simultaneously over the territory of several Member States, but consists in work assignments carried out in different Member States during successive periods or in alternation.

9 — It should be noted that, in the context of the interpretation of other provisions of Article 14 of Regulation No 1408/71, such as, in particular, Article 14(a)(1) and Article 14(1)(a), the Court has in some instances contrasted 'normally' with 'temporarily' or has regarded 'normally' as being synonymous with 'habitually': see, for example, *Plum*, cited in footnote 7, paragraphs 20 and 21; *FTS*, cited in footnote 5, paragraphs 22 and 23; and Case C-178/97 *Banks and Others* [2000] ECR I-2005, paragraph 25.

10 — See *Calle Grenzshop Andresen*, cited in footnote 6, paragraph 15.

11 — See, to that effect, inter alia, *Plum*, cited in footnote 7, paragraphs 19 and 20; *FTS*, cited in footnote 5, paragraphs 28 and 29; and Case 35/70 *Manpower* [1970] ECR 1251, paragraph 10.

52. In this context and on the same theme, it is also illustrative – although it relates to the new Regulation (EC) No 883/2004,[12] which is not applicable *ratione temporis* in the present case – that, under Article 14(5) of Regulation (EC) No 987/2009,[13] a person who 'normally pursues an activity as an employed person in two or more Member States' refers both to a person who does so simultaneously and to a person who, in pursuing his activities, continuously alternates between two or more Member States.

53. It is noteworthy in that regard that, under that provision, the latter case applies irrespective of the frequency or regularity of the alternation.

54. It also seems difficult to infer from Article 14(2) of Regulation No 1408/71, in the absence of any provision to that effect, a specific frequency of alternation, or a specific duration which a period of activity in one of the Member States concerned may not exceed, for the purposes of the applicability of that provision, as variously proposed in particular by the parties at the hearing.

55. On the other hand, as the referring court and the Commission have noted, the fact cannot be overlooked that, for the purposes of the exception laid down in Article 14(1)(a) of Regulation No 1408/71, the legislature obviously deemed the sending of a worker to other Member States for a duration of up to 12 months as being 'temporary' and of 'short duration', justifying therefore an exception to the rule of the Member State of employment, motivated by the encouragement of economic interpenetration and the avoidance of administrative complications.[14]

56. By the same token, it is arguably acceptable that a person carrying out – in the course of successive periods of work – activities in different Member States could qualify as a 'person normally employed in the territory of two or more Member States' if the duration of a period of continuous work in one Member State goes up to – but does not exceed – 12 months.

57. However, there is yet another aspect, which has also been addressed by some of the parties, which seems to me to be more decisive with respect to the facts on which the present case is based. Arguably, the question whether someone is 'normally' employed in the territory of several Member States – that is to say, whether that person's job profile is indeed characterised by the successive, alternating performance of work in different Member States – can be determined only in relation to a framework of reference, which is, in my view, the employment relationship as defined by the employment contract.

58. To my mind, the employment situation envisaged under the first sentence of Article 14(2) of Regulation No 1408/71 is not the situation, for example, where, in a particular year, a person takes up employment in Member State A and, the next year, on the basis of a different contract of employment, another employment in Member State B, but rather an employment relationship of a consistent and continuous nature which extends, either simultaneously or during successive periods, over the territory of several Member States.[15]

12 — Regulation 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).

13 — Regulation 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).

14 — See to that effect, inter alia, *Plum*, cited in footnote 7, paragraphs 19 and 20; see also *Calle Grenzshop Andresen*, cited in footnote 6, paragraphs 9 to 11.

15 — Cf. in that regard, Case 13/73 *Hakenberg* [1973] ECR 935, paragraph 19.

59. It is then clear that, conversely, if a person performs work under a single contract of employment and during the period covered by that employment relationship works only in a single Member State, that person cannot be regarded as a person who is normally employed in the territory of two or more Member States. It should be added that this should apply even where, under a successive, separate contract of employment with the same employer, the person may be employed in the territory of a Member State other than the State named in the first contract of employment. [16]

60. In the light of all the foregoing considerations, I would propose that, as a first part of the answer to be given to the referring court, it be stated that the concept of a 'person normally employed in the territory of two or more Member States', as used in the first sentence of Article 14(2) of Regulation No 1408/71, is to be interpreted as also covering a person who, during the period covered by and within the framework of one and the same contract of employment concluded with a single employer, performs work assignments not simultaneously or concurrently, but during successive periods in the territory of at least two Member States, although the period of continuous work in each Member State must not exceed a duration of 12 months.

61. As regards, next, the issue – relating to the issuing of an E 101 certificate – of a possible divergence between the terms of the employment contract concerned and the actual situation of the worker to whom that contract relates, it is clear, first of all, that in determining whether a person is covered by a particular provision of Article 14(2) of Regulation No 1408/71, the competent institution must proceed correctly, that is to say, it may declare that the social security legislation of the Member State of residence remains applicable throughout a given period only if the situation of the worker concerned meets, in actual fact and genuinely, the relevant requirements of the Regulation.

62. In that regard and to that end, according to the case-law of the Court, the principle of sincere cooperation, laid down in Article 4(3) TEU (formerly Article 10 EC), requires the issuing institution to carry out a proper assessment of the facts relevant to application of the rules for determining the applicable social security legislation and, consequently, to guarantee the correctness of the information entered on an E 101 certificate. [17]

63. In that respect, it must nevertheless be borne in mind that the E 101 certificate is, as a rule, issued – and, in consequence, the aforementioned assessment of facts made – before the beginning of the period to which it relates and establishes, in essence, a presumption as to the legislation applicable. [18] It is thus issued by the competent institution on the basis of the anticipated employment situation of the worker concerned, which must, consequently, mainly be established on the basis of the contract of employment describing the nature of the employment.

64. If it appears, however, from other relevant factors and circumstantial evidence that a worker's employment situation in fact differs substantially from that described in his contract of employment, the aforementioned obligation to apply Regulation No 1408/71 correctly means that it is incumbent on the competent institution, notwithstanding the wording of that contract, to base its findings on the worker's actual situation and, as the case may be, to refuse to issue the E 101 certificate. Also, if the facts on which the certificate is based later turn out to be substantially incorrect, the competent institution – or, in judicial proceedings, the relevant court – may be required, if appropriate, to withdraw the certificate or to declare it invalid. [19]

16 — As the Belgian Government has rightly pointed out to that effect, to consider subsequent and separate contractual relationships as those forming the factual circumstances of the present case, for the purposes of the application of Article 14(2)(b) of Regulation No 1408/71 as one continuous employment relationship would in fact amount to establishing *a posteriori* the alternating, successively changing character of employment, which would indeed appear artificial and may open the door to modes of abuse and circumvention.

17 — See *Banks and Others*, cited in footnote 9, paragraph 38, and *FTS*, cited in footnote 5, paragraph 38.

18 — Cf. in this context, *Banks and Others*, cited in footnote 9, paragraphs 40 and 53.

19 — Cf. *FTS*, cited in footnote 5, paragraph 55, and *Banks and Others*, cited in footnote 9, paragraph 43.

65. In assessing the facts with a view to determining the applicable social security legislation for the purposes of issuing an E 101 certificate, the issuing institution may take account, in addition to the wording of the employment contract, of factors such as the way in which similar contracts of that kind between the employer and worker concerned have previously been implemented in practice or, more generally, the characteristics of the activities carried on by the undertaking concerned,[20] in so far as those factors may throw light on the actual nature of the work concerned or, otherwise, be indicative of abusive practices.

66. It follows also that, if it appears on the basis of that assessment that, despite the wording of the employment contract submitted, it is immediately clear that the employee concerned fails to meet one of the requirements for the application of a particular provision of Regulation No 1408/71 – such as the requirement to which the national court refers in Question 2, that, for the purposes of the application of Article 14(2)(b)(i) of the Regulation, work must be performed in the Member State in which the employee resides – that provision cannot be applied.

67. In the light of the foregoing, I would propose that, as a second part of the answer to be given to the referring court, it be stated that, in order to determine, for the purposes of issuing an E 101 certificate, whether a person's situation falls under Article 14(2)(b)(i) or Article 14(2)(b)(ii) of Regulation No 1408/71, a proper assessment of the facts relevant to the application of those rules must be carried out, with the aim of ensuring that the situation of the worker concerned in actual fact meets the relevant requirements under those rules. That assessment must be undertaken, principally, on the basis of the employment contract, but account may also be taken of other relevant factors such as the way in which similar contracts between the undertaking and the person concerned have previously been implemented in practice and, more generally, the characteristics of the activities engaged in by the undertaking concerned. If it then appears clear that, despite the wording of the employment contract, the person's situation does not in fact meet a requirement under a rule laid down in Regulation No 1408/71 – such as the rule under Article 14(2)(b)(i) or Article 14(2)(b)(ii) – that rule cannot be applied.

V – Conclusion

68. For the reasons given above, I propose that the questions referred by the Sąd Apelacyjny be answered as follows:

— The concept of a 'person normally employed in the territory of two or more Member States', as used in the first sentence of Article 14(2) 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, in the version resulting from Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006 ('Regulation No 1408/71'), is to be interpreted as also covering a person who – during the period covered by, and within the framework of, one and the same contract of employment concluded with a single employer – performs work assignments not simultaneously or concurrently, but during successive periods in the territory of at least two Member States, although the period of continuous work performed in a single Member State must not exceed a duration of 12 months

— In order to determine, for the purposes of issuing an E 101 certificate, whether a person's situation falls under Article 14(2)(b)(i) or Article 14(2)(b)(ii) of Regulation No 1408/71, a proper assessment of the facts relevant to the application of those rules must be carried out with the aim of ensuring that the situation of the worker concerned in actual fact meets the relevant requirements under those rules. That assessment must be undertaken, principally, on the basis of the employment

20 — Cf. to that effect, *FTS*, cited in footnote 5, paragraphs 42 and 43.

contract, but account may also be taken of other relevant factors such as the way in which similar contracts between the undertaking and the person concerned have previously been implemented in practice and, more generally, the characteristics of the activities engaged in by the undertaking concerned. If it then appears clear that, despite the wording of the employment contract, the person's situation does not in fact meet a requirement under a rule laid down in Regulation No 1408/71 – such as the rule under Article 14(2)(b)(i) or Article 14(2)(b)(ii) – that rule cannot be applied.