



According to Advocate General Pikamäe, the employer of lorry drivers employed in the international road transport sector is the transport undertaking which recruited those drivers for an indefinite period, exercises effective control over the drivers and actually bears the wage costs

AFMB, a company established on 11 May 2011 in Cyprus, entered into contracts with transport undertakings and drivers resident in the Netherlands. A dispute has arisen between, on the one hand, AFMB and those drivers and, on the other hand, the Raad van bestuur van de Sociale verzekeringsbank (Board of Management of the Social Insurance Bank; 'RSVB', Netherlands) concerning the latter's decision that the Netherlands social security legislation applies to those drivers and not the Cypriot social security legislation.

Between October 2013 and July 2014, the RSVB issued certificates, in which it certifies that the workers in question were subject to Netherlands social security legislation. The RSVB took the view that the Netherlands transport undertakings that had recruited the drivers – to which those drivers are fully available for an indefinite period, which exercise effective control over the drivers and which actually bear the wage costs – must be regarded as the 'employers' for the purposes of applying EU rules on the coordination of social security systems.

The position adopted by the RSVB is disputed by AFMB, which takes the view that the employment contracts concluded with the drivers are subject to Cypriot social security legislation since, in those contracts, AFMB is expressly designated as the 'employer', even though those drivers are usually made available to Netherlands transport undertakings with which AFMB has entered into fleet management agreements.

The Centrale Raad van Beroep (Higher Social Security and Civil Service Court, Netherlands), before which AFMB brought the proceedings currently pending before that court, has made a reference to the Court of Justice as it is of the opinion that the resolution of the dispute depends, *inter alia*, on the interpretation of EU rules on the coordination of social security systems. That court seeks clarification from the Court of Justice as to who is the 'employer' of the drivers: the transport undertakings established in the Netherlands or AFMB.

In today's Opinion, Advocate General Priit Pikamäe recalls that the EU has established a complete and uniform system of rules on the coordination of social security systems, the aim of which is to ensure that workers moving within the EU are subject to the social security scheme of only one Member State. The objective of those rules is to prevent the national legislation of more than one Member State from being applicable and to ensure that persons covered by those rules are not left without social security cover because there is no social security legislation applicable to them.

Advocate General Pikamäe then states that according to the Regulation on the coordination of social security systems,¹ the connecting factor for determining the applicable national legislation is the registered office of the employer. He points out that the concept of 'employer' is not defined by

¹ Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2009 on the coordination of social security systems (OJ 2004 L 166, p. 1).

EU law and that the rules on the coordination of social security systems also do not contain any express reference to the law of the Member States for the purpose of determining the meaning and scope of that concept.

Thus, after having identified a series of criteria, in particular in the case-law of the Court of Justice, Advocate General Pikamäe notes that **the contractual relationship, under which AFMB is formally the drivers' employer, is only indicative in nature, and it seems legitimate to call into question the status of employer** on which that undertaking relies. He then observes that the drivers concerned worked both before and during the periods referred to by the RSVB as drivers employed in the international road transport sector and drove only heavy goods vehicles operated on behalf of and at the risk of transport undertakings established in the Netherlands. He also points out, so far as concerns the wage costs that, even though AFMB paid wages directly to the drivers, those wages were apparently financed by the undertakings established in the Netherlands which were liable to pay certain amounts to AFMB under the agreements concluded between the undertakings and AFMB.

Advocate General Pikamäe concludes therefore that the **employer of lorry drivers employed in the international road transport sector is deemed to be the transport undertaking which recruited the person concerned, to which the person concerned is de facto fully available for an indefinite period, which exercises effective control over the person concerned and which actually bears the wage costs, subject to findings of fact to be made by the referring court.**

The Advocate General goes on to examine the two further questions referred by the Centrale Raad van Beroep, despite his recommendation as to AFMB's status as employer. Those questions relate to (i) the possibility of applying the posted workers scheme to the drivers concerned, and (ii) the existence of an abuse by the Cypriot company.

The Advocate General clearly states that **the issue is not a 'posting' in the strict sense, but rather AFMB's 'making available' of workers, for an indefinite period, to the undertakings established in the Netherlands**, bearing in mind, inter alia, that the role played by AFMB with regard to the drivers was limited essentially to the payment of wages and payment of social security contributions to the Cypriot authorities. He therefore proposes that the question referred by the Netherlands court be answered in the negative.

So far as concerns the issue of an abuse of law, the Advocate General states that AFMB was only accorded the status of 'employer' through a sophisticated legal arrangement governed by private law, while its contractual partners exercised the effective control over employees which is normally the prerogative of the employer in the context of an employment relationship, and that it was able to avail itself of the fundamental freedoms of the internal market in order to establish itself in Cyprus and, from there, to provide services to undertakings established in the Netherlands. He points out, moreover, that the implementation of that legal arrangement appears to have resulted in deterioration in the drivers' social protection, while the former employers appear to have benefited in terms of wage costs. He thereby concludes, subject to the assessment to be made by the Centrale Raad van Beroep, that **there exists an abuse of law which prevents AFMB from relying on its alleged status of employer in order to request that the RSVB declare the Cypriot legislation applicable to the drivers in question.**

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

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 Opinion is published on the CURIA website on the day of delivery.

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