Case C-610/18

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

25 September 2018

Referring court:

Centrale Raad van Beroep (Netherlands)

Date of the decision to refer:

20 September 2018

Appellants:

AFMB Ltd and Others

Respondent:

Raad van bestuur van de Sociale verzekeringsbank

Subject matter of the action in the main proceedings

The main proceedings relate to A1 certificates issued by the Sociale verzekeringsbank (Social Insurance Bank; 'Svb') between 2 October 2013 and 9 July 2014, stating that Netherlands social security legislation applies to the international truck drivers in these proceedings ('the persons concerned') for the periods in which, according to information supplied by AFMB, they worked as international truck drivers in the paid employment of AFMB in two or more Member States of the European Union (EU) or of the European Free Trade Association (EFTA).

Subject matter and legal basis of the request for a preliminary ruling

This request under Article 267 TFEU concerns the question of which social security legislation applies to the persons concerned for the periods germane to the cases in the main proceedings. If cross-border work is carried out within the EU and the EFTA, the designation rules of Regulation (EEC) No 1408/71 and of Regulation (EC) No 883/2004 usually result in the social security legislation of

the current country of employment being applicable. Those provisions are intended to ensure that workers working in the same country are subject to the same social security legislation (see the Opinion of Advocate General Bot in the *Chain* case, C-189/14, EU:C:2015:345, point 60 et seq.). In that way, undesirable forms of wage competition with undesirable downward pressure on national social security schemes are avoided, which should guarantee the free movement of workers.

In certain situations involving cross-border work, including, in particular, that in the sector of international road transport, the free movement of workers cannot be properly ensured in the case of the undiluted application of the country-of-employment principle. In order to prevent this, rules have been included in Article 14(2)(a) of Regulation (EEC) No 1408/71 and in Article 13(1)(b) of Regulation (EC) No 883/2004 providing for exceptions to the country-of-employment principle by designating the social security legislation of either the employer's country of establishment, or the worker's country of residence, or — if the country of residence and the country of establishment coincide — both. For the assessment of the cases in the main proceedings, it is of crucial importance whether or not AFMB is to be treated as being the employer of the persons concerned.

If AFMB cannot be regarded as the employer, the question then arises whether the specific conditions under which temporary employment agencies and other intermediaries can rely on the exceptions to the country-of-employment principle set out in Article 14(1)(a) of Regulation (EEC) No 1408/71 and in Article 12 of Regulation (EC) No 883/2004 when posting workers to a single other Member State can apply by analogy to the cases in the main proceedings.

Questions referred

1A. Must Article 14(2)(a) of Regulation (EEC) No 1408/71 be interpreted as meaning that, in circumstances such as those of the cases in the main proceedings, an international truck driver in paid employment is to be regarded as being a member of the driving staff of:

(a) the transport company which has 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; or

(b) the company which has formally concluded an employment contract with the truck driver and which, by agreement with the transport company referred to under (a), paid the worker a salary and paid contributions in respect thereof in the Member State where that company has its registered office and not in the Member State where the transport company referred to in (a) has its registered office;

(c) both the company under (a) and the company under (b)?

1B. Must Article 13(1)(b) of Regulation (EC) No 883/2004 be interpreted as meaning that, in circumstances such as those of the cases in the main proceedings, the employer of an international truck driver in paid employment is considered to be:

(a) the transport company which has 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; or

(b) the company which has formally concluded an employment contract with the truck driver and which, by agreement with the transport company referred to under (a), paid the worker a salary and paid contributions in respect thereof in the Member State where that company has its registered office and not in the Member State where the transport company referred to in (a) has its registered office;

(c) both the company under (a) and the company under (b)?

2. In the event that, in circumstances such as those of the cases in the main proceedings, the employer is regarded as being the undertaking referred to in Question 1A(b) and in Question 1B(b):

Do the specific conditions under which employers, such as temporary employment agencies and other intermediaries, can invoke the exceptions to the country-of-employment principle set out in Article 14(1)(a) of Regulation (EEC) No 1408/71 and in Article 12 of Regulation (EC) No 883/2004 also apply by analogy, wholly or in part, to the cases in the main proceedings for the purposes of Article 14(2)(a) of Regulation (EEC) No 1408/71 and of Article 13(1)(b) of Regulation (EC) No 883/2004?

3. In the event that, in circumstances such as those of the cases in the main proceedings, the employer is regarded as being the company referred to in Question 1A(b) and in Question 1B(b), and Question 2 is answered in the negative:

Do the facts and circumstances set out in this request constitute a situation that is to be interpreted as an abuse of EU law and/or an abuse of EFTA law? If so, what is the consequence thereof?

Provisions of EU law cited

Regulation (EEC) No 1408/71 of the Council 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; Article 14(1)(a) and 14(2)(a)

Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems; Article 12, Article 13(1)(a) and 13(1)(b)

Regulation (EEC) No 574/72 of the Council of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community

Regulation (EC) No 987/2009 of the European Parliament and the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems; Article 16

The term 'EU law' in the present request also includes the law governing the EFTA, in so far as it is applicable to the cases in the main proceedings.

Provisions of national law cited

No provisions of national law are cited.

Brief summary of the facts and the procedure in the main proceedings

1 AFMB was established in Cyprus on 10 May 2011. The company entered into agreements both with transport companies established in the Netherlands and with 38 truck drivers, seven of whom are cited in the present request. In the periods relevant to the cases in the main proceedings, those truck drivers lived in the Netherlands and worked as international truck drivers in paid employment both before and during those periods. During those periods, the persons concerned were de facto fully available for an indefinite period to the transport companies established in the Netherlands, where they were in paid employment before the relevant periods in at least a considerable number of cases.

2 The cases in the main proceedings concern the question whether, for purposes of Article 14(2)(a) of Regulation (EEC) No 1408/71 and Article 13(1)(b) of Regulation (EC) No 883/2004, with a view to the designation of the country of establishment of the employer, AFMB is to be regarded as the employer of the persons concerned and whether Cypriot social security legislation is therefore applicable to the persons concerned.

3 By decisions taken in October 2013, the Svb declared the Netherlands social security legislation to be applicable to the persons concerned for the relevant periods and issued to them A1 certificates to that effect. The periods to which these A1 certificates apply differ from case to case, but none of them starts before 1 October 2011 and none of them ends after 26 May 2015. AFMB and Others lodged objections to those decisions of October 2013, which objections the Svb declared unfounded by decisions of July 2014. By judgment of 25 March 2016,

the rechtbank Amsterdam (Amsterdam District Court) dismissed the appeals submitted on behalf of AFMB and Others against the decisions of July 2014.

Main submissions of the parties to the main proceedings

4 The main submission of the Svb is that the transport companies established in the Netherlands, to which the persons concerned were de facto fully and virtually indefinitely available during the relevant periods, should be regarded as the employers of the persons concerned for the purposes of Regulation (EEC) No 1408/71 and of Regulation (EC) No 883/2004.

5 In the alternative, the Svb submits that, during the relevant periods, AFMB must be regarded as having been established in the Netherlands for the purposes of the application of those regulations to the persons concerned.

6 Since the persons concerned generally performed their duties in two or more Member States of the EU/EFTA and, in the view of the Svb, it must in any event be assumed that the employer of the persons concerned was established in their country of residence, the Netherlands, the Svb is of the opinion that during the relevant periods Netherlands social security legislation was applicable to the persons concerned.

7 In the further alternative, the Svb submits that there has been (attempted) abuse of EU law on the part of AFMB because the legal construction does not correspond to the physical reality which is decisive for the application of Regulation (EEC) No 1408/71 and Regulation (EC) No 883/2004. According to the Svb, AFMB is, in so far as is relevant to the cases in the main proceedings, in fact merely acting as a payroll company/salary administrator and there is no organic link between AFMB and the persons concerned. After all, the workers were recruited and selected by the transport companies in the Netherlands in order to carry out work for the same transport companies on a structural basis (i.e. not primarily in order to replace other workers during periods of holiday and sickness). The transport companies thus continue to exercise the authority of the employer. If the worker, on the instruction of such a transport company, enters into a written agreement with another company, which pays him the wages owed, that other company may well be the employer within the meaning of Netherlands civil law, but not within the meaning of Article 14(2)(a) of Regulation (EEC) No 1408/71 or of Article 13(1)(b) of Regulation (EC) No 883/2004. According to the Svb, this is not altered by the fact that, during part of the periods relevant to the cases in the main proceedings, AFMB was (also) the holder of a Cypriot road transport operator licence or that the contracts concluded between AFMB and the transport companies are referred to as fleet management agreements and the agreements concluded (on paper) with the persons concerned as employment contracts.

8 AFMB and Others take the position that, for the purposes of Regulation (EEC) No 1408/71 and Regulation (EC) No 883/2004, AFMB should be regarded as the employer of the persons concerned in the periods relevant to the cases in the main

proceedings, that AFMB is established in Cyprus for the purposes of those regulations and that there is no question of an abuse of EU law. Since the persons concerned were accustomed to carry out their activities in two or more EU/EFTA Member States in the relevant periods and since, during those periods, they did not perform the activities concerned mainly or for a substantial part of the time in their country of residence, the Netherlands, AFMB and Others submit that, during the relevant periods, Cypriot social security legislation applied to the persons concerned.

9 AFMB and Others argue that, in the cases in the main proceedings, there is no question of payrolling or any form of temporary agency work, but rather of collegial secondment and that the company also provides other services on a commission basis. If a client terminates a fleet management agreement in whole or in part, AFMB endeavours to reallocate the workers concerned to another client. It is only if this does not succeed that AFMB will proceed to dismiss those workers. According to AFMB and Others, it is no longer possible to determine how often this happened during the relevant periods. They claim that the competent institutions in Spain, Poland, Germany, Belgium and Romania have, in cases similar to the present one, considered Cypriot social security legislation to be applicable to international truck drivers originating from and resident in those respective countries.

Brief summary of the grounds for the referral

10 Under the EU and EFTA rules on the coordination of social security, workers who are employed in two or more EU/EFTA Member States are subject exclusively to the social security legislation of one single EU or EFTA Member State. The question of which social security legislation that is must be determined in accordance with the designation rules set out in the applicable regulations.

In most cases, the designation rules of Regulation (EEC) No 1408/71 and Regulation (EC) No 883/2004 mean that the social security legislation of the current country of employment is applicable, in order that the same social security legislation applies to employees working in the same country and the same contributions are payable. This prevents undesirable forms of competition in relation to wage costs and the resulting undesirable downward pressure on national systems of social security legislation.

In accordance with Article 48 TFEU, the designation rules of Regulation (EEC) No 1408/71 and Regulation (EC) No 883/2004 are also aimed at guaranteeing the free movement of workers in order to contribute towards raising the standard of living and improving the conditions of employment of persons moving within the European Union (see judgment of 13 July 2017, C-89/16, *Szoja*, EU:C:2017:538, paragraph 34). In some instances of cross-border work, in particular in international road transport, the free movement of workers cannot be properly ensured in the event of the undiluted application of the country-of-employment

principle. In order to prevent this, rules have been included in Article 14(2)(a) of Regulation (EEC) No 1408/71 and in Article 13(1)(b) of Regulation (EC) No 883/2004, providing for exceptions to the country-of-employment principle by designating the social security legislation of either the employer's country of establishment, or the worker's country of residence, or — if the country of residence and the country of establishment coincide — both.

11 The referring court has determined that the persons concerned generally carried out their activities in two or more Member States of the EU/EFTA. In the periods relevant to the cases in the main proceedings, they worked in part, but not primarily, in their country of residence, the Netherlands, and they did not perform a substantial part of the relevant work there. In the cases in the main proceedings, Netherlands social security legislation cannot therefore be declared applicable on the basis of the designation of the country of residence as provided for in Article 14(2)(a)(ii) of Regulation (EEC) No 1408/71 or Article 13(1)(a) of Regulation (EC) No 883/2004, but only on the basis of the designation of the country of establishment of the employer as laid down in those provisions.

12 In the cases in the main proceedings, the referring court proceeds on the assumption that, during the relevant periods, for the purposes of Article 14 of Regulation (EEC) No 1408/71 and Article 13 of Regulation (EC) No 883/2004, AFMB had its registered office in Cyprus as regards the persons concerned, and cannot be regarded as a pure letterbox company established in Cyprus. For that reason, it is crucial for the assessment of the cases in the main proceedings to determine whether or not AFMB is to be regarded as the employer of the persons concerned.

13 The term 'employer' was not defined by the EU legislature in Regulation (EEC) No 1408/71 and Regulation (EC) No 883/2004. In the provisions of EU law which are relevant for the assessment of the cases in the main proceedings, there is no reference to national legislation, which is not the case for certain other terms. The referring court points out that, to the extent that AFMB, under the contracts concluded with the persons concerned, would have to be regarded as an employer under national (civil) law, that does not necessarily mean that AFMB is also to be regarded as the employer of the persons concerned for the purposes of Article 14(2)(a) of Regulation (EEC) No 1408/71 and of Article 13(1)(b) of Regulation (EC) No 883/2004, and that Cypriot social security legislation is applicable to the persons concerned. During the periods which are relevant to the cases in the main proceedings, the persons concerned were fully and indefinitely available to the transport companies established in the Netherlands with which they had previously had an employment contract in at least a considerable number of cases. In so far as the referring court was able to determine, the fact that transport companies established in the Netherlands no longer made use of workers who were on AFMB's payroll generally led to the immediate dismissal of those workers by AFMB. The transport companies established in the Netherlands may, for the purposes of application of Article 14(2)(a) of [Regulation] (EEC) No 1408/71 and of Article 13(1)(b) of Regulation (EC) No 883/2004 possibly —

exclusively or also — be regarded as the employers of the persons concerned. In the former case, Netherlands social security legislation applies to the persons concerned. In the latter case, under Article 13(1)(b)(iii) of Regulation (EC) No 883/2004, Cypriot legislation applies.

14 Even if it is not necessary to regard the Netherlands transport companies as the exclusive employers purely by virtue of the actual exercise of employer responsibilities — authority over the workforce —, the referring court states that there is some room for interpretation whereby the designation of the country of establishment as laid down in Article 14(2)(a) of Regulation (EEC) No 1408/71 and in Article 13(1)(b) of Regulation (EC) No 883/2004 may be interpreted in accordance with their purpose. The referring court proceeds on the assumption that the choice of the country of establishment of an undertaking which actually exercises the employer's authority, as opposed to an undertaking which is the employer (almost) solely on paper, is best suited to that purpose, especially if the workers also live in the country of establishment of the company that actually exercises the employer's authority. Since the Member States in which workers in international transport carry out their activities may also vary considerably during employment, as a result of which they may, in one period, indeed perform a substantial part of their work in their country of residence, whereas in another period they do not, such changes may, according to the referring court, also lead to breaches in the social security protection of employees, which would not occur if, when applying the principle of the country of establishment, the starting point is a country of establishment in which the workers in fact live.

15 The referring court notes that, when interpreting the designation rules laid down in Article 14(2)(a) of Regulation (EEC) No 1408/71 and in Article 13(1)(b) of Regulation (EC) No 883/2004, it could be taken into account that there are indications that the EU legislature did not envisage that, under circumstances such as those in the cases in the main proceedings, it is only through the intervention of a third party that an entitlement to a substantial wage cost advantage arises. The procedure laid down in Article 16 of Regulation (EC) No 987/2009 does not, after all, expressly provide that the institution designated by the place of residence for the application of Article 13 of Regulation (EC) No 883/2004 must also inform the institution of the country of establishment, which is not the country of employment, of the provisional determination of the applicable social security legislation. The referring court points out that the EU legislature probably proceeded on the assumption that the employer's country of establishment is also one of the countries of employment of workers coming within the scope of Article 13 of Regulation (EC) No 883/2004. In addition, it reiterates the Opinion of Advocate General Bot in which it was noted that the rules laid down in Article 14(2)(a) of Regulation (EEC) No 1408/71 and in Article 13(1)(b) of Regulation (EC) No 883/2004 have not undergone any fundamental changes, whereas their economic and social context has fundamentally changed, notably with the enlargement of the EU in 2004, which could lead to a controversial use or incorrect application of the rules laid down in Article 14(2)(a) of Regulation (EEC) No 1408/71 and in Article 13(1)(b) of Regulation (EC) No 883/2004 (see

Opinion of Advocate General Bot in the *Chain* case, C-189/14, EU:C:2015:345, points 25 and 31 to 35).

16 Furthermore, the referring court points out that Article 14(2)(a) of Regulation (EEC) No 1408/71 and Article 13(1)(b) of Regulation No 883/2004 must, where possible, be interpreted in accordance with the fundamental social rights enshrined in Article 12 of the European Social Charter (ESC), point 10 of the Community Charter of the Fundamental Social Rights of Workers and Article 34 of the Charter of Fundamental Rights of the European Union.

17 The referring court also notes that, in interpreting Article 14(2)(a) of Regulation (EEC) No 1408/71 and Article 13(1)(b) of Regulation (EC) No 883/2004, account may be taken of the fact that the functioning of the internal market will be hampered if abuse is combated by interpreting EU law purposively and not by highlighting occasional abuse in individual cases.

18 If AFMB cannot be regarded as the employer, this raises the question for the referring court of whether the specific conditions under which temporary employment agencies and other intermediaries can rely on the exceptions to the country-of-employment principle set out in Article 14(1)(a) of Regulation (EEC) No 1408/71 and in Article 12 of Regulation (EC) No 883/2004 when posting workers to a single other Member State may apply by analogy to the cases in the main proceedings. If that were the case, it would be necessary to verify whether there is an organic link between AFMB and the persons concerned and whether AFMB normally carries out significant activities in the territory of the Member State in which the company is established. According to the referring court, the facts relevant to the assessment of the relationship between AFMB and the persons concerned have remained unclear, but this does not rule out the possibility of that first condition being considered applicable to the cases in the main proceedings. In addition, according to the referring court, it cannot be inferred from the available pleadings whether or not AFMB complies with the second condition and normally performs significant activities in the territory of Cyprus. The referring court proceeds on the assumption that, of the conditions mentioned, only the first condition might be applicable to the cases in the main proceedings, which would mean that Cypriot social security legislation does not apply to the persons concerned in the cases in the main proceedings.

19 In conclusion, the referring court points out that the freedom of establishment guaranteed by the Treaty on European Union includes the right to establish or transfer companies in accordance with the law of individual Member States. This also applies when the company continues to develop its main economic activities in Member States in which its employees or legal predecessors were already active. In so far as a company, by its choice of a particular registered office, has as its objective that its employees should be subject by law to the social security legislation of an EU or EFTA Member State under which relatively small contributions are levied, it appears to follow by analogy from the judgment of the Court of Justice of the European Union of 25 October 2017 (C-106/16, *Polbud* —

Wykonawstwo, EU:C:2017:804), that this in itself does not constitute abuse. However, according to the referring court, in accordance with the judgments of the Court of Justice of 21 February 2006, *Halifax plc and Others* (C-255/02, EU:C:2006:121), and of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 53), it could also be argued that in such a case there is indeed an abuse of EU law.

20 If Article 14(2)(a) of Regulation (EEC) No 1408/71 and Article 13(1)(b) of Regulation (EC) No 883/2004 are to be interpreted as meaning that in the cases in the main proceedings AFMB is to be regarded as being the employer of the persons concerned, it can still be argued, according to the referring court, that, notwithstanding formal compliance with the applicable EU-law provisions, the objective pursued by the relevant EU schemes (guaranteeing the free movement of workers without inadvertently facilitating undesirable forms of wage-cost competition, in order thereby to contribute to raising living standards and improving the working conditions of people moving within the European Union) is not achieved in the cases in the main proceedings. After all, the transport companies established in the Netherlands and AFMB established in Cyprus manifestly have the agreed essential purpose of circumventing the national laws and regulations of the Netherlands by artificially creating the conditions under which an advantage can be secured under EU law. The referring court recalls in this connection the judgments of the Court of Justice of 6 February 2018, *Altun and Others* (C-359/16, EU:C:2018:63, paragraphs 48 to 50), and of 11 July 2018, *Commission* v *Kingdom of Belgium* (C-356/15, EU:C:2018:555).