Case C-815/18

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:

21 December 2018

Referring court:

Hoge Raad der Nederlanden (Netherlands)

Date of the decision to refer:

14 December 2018

Appellant:

Federatie Nederlandse Vakbeweging

Respondents:

Van den Bosch Transporten B.V.

Van den Bosch Transporte GmbH

Silo-Tank Kft

Subject of the action in the main proceedings

In the main proceedings, FNV claims that Van den Bosch et al should be ordered to comply with the cao Goederenvervoer (collective labour agreement ('CLA') Goods Transport) in so far as it concerns the application of the basic conditions laid down in that Dutch CLA to German and Hungarian drivers who have an employment contract with Van den Bosch Transporte GmbH and Silo-Tank Kft, respectively, and who mainly work for international transport operations outside the Netherlands.

Subject and legal basis of the request for a preliminary ruling

The present request is based on Article 267 TFEU and concerns the question whether, and if so, under what conditions, Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of

workers in the framework of the provision of services is applicable to drivers working in international transport operations.

Questions referred

1 Must Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [OJ 1997 L 18, p. 1; 'the Posting of Workers Directive'] be interpreted as meaning that it also applies to a worker who works as a driver in international road transport and thus carries out his work in more than one Member State?

2(a) If the answer to Question 1 is in the affirmative, what criterion or considerations should be used to determine whether a worker working as a driver in international road transport is posted 'to the territory of a Member State' as referred to in Article 1(1) and (3) of the Posting of Workers Directive, and whether that worker 'for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works' as referred to in Article 2(1) of the Posting of Workers Directive?

2(b) When answering question 2 (a), should any significance be attached to the fact that the undertaking posting the worker referred to in question 2(a) is affiliated — for example, in a group of companies — to the undertaking to which that worker is posted and, if so, what should that significance be?

2(c) If the work undertaken by the worker referred to in question 2(a) relates partly to cabotage transport — that is to say: transport carried out exclusively in the territory of a Member State other than that in which that worker habitually works — will that worker then in any case for that part of his work, be considered to be working temporarily in the territory of the first Member State? If so, does a lower limit apply in that regard, for example, in the form of a minimum period per month in which that cabotage transport takes place?

3(a) If the answer to Question 1 is in the affirmative, how should the term 'collective agreements ... which have been declared universally applicable', as referred to in Article 3(1) and the first subparagraph of Article 3(8) of the Posting of Workers Directive, be interpreted? Is that an autonomous concept of European Union law and is it therefore sufficient that the conditions laid down in the first subparagraph of Article 3(8) of the Posting of Workers Directive have for practical purposes been met, or do those provisions also require that the collective labour agreement was declared universally applicable on the basis of national law?

3(b) If a collective labour agreement cannot be regarded as a universally applicable collective labour agreement within the meaning of Article 3(1) and the first subparagraph of Article 3(8) of the Posting of Workers Directive, does Article 56 TFEU preclude an undertaking which is established in a Member State

and which posts a worker to the territory of another Member State from being obliged by contractual means to comply with the provisions of such a collective labour agreement which is in force in the latter Member State?

Provisions of Union law and international law cited

Article 56 TFEU

Article 1(1) and 1(3), Article 2(1) and Article 3(1) and the first subparagraph of Article 3(8) of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

Article 8(1) and 8(2), and Article 9 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6)

Article 6(2)(a) and Article 7 of the Convention on the law applicable to contractual obligations

Provisions of national law cited

Article 44 of the collectieve arbeidsovereenkomst Goederenvervoer (collective labour agreement Goods Transport) and Article 73 of the collectieve arbeidsovereenkomst Beroepsgoederenvervoer over de weg en verhuur van mobiele kranen (collective labour agreement Professional Goods Transport By Road and Mobile Crane Rental)

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

1 Van den Bosch Transporten operates a transport undertaking from Erp. Van den Bosch Transporten, Van den Bosch GmbH (a company under German law) and Silo-Tank (a company under Hungarian law) are subsidiaries and belong to the same group. They have the same director and shareholder, and use the same service provider based in the Netherlands in the field of ICT and finance.

2 Van den Bosch Transporten is a member of the Vereniging Goederenvervoer Nederland (Netherlands Association Goods Transport), which with effect from 1 January 2012 concluded the collectieve arbeidsovereenkomst Goederenvervoer (collective labour agreement Goods Transport; 'CLA GN') with the Federatie Nederlandse Vakbeweging (Federation of Dutch Trade Unions; 'FNV') with a term up to and including 31 December 2013. That CLA was not declared universally applicable. Undertakings covered by the CLA GN were granted exemption by ministerial decree from the application of the cao Beroepsgoederenvervoer (CLA Professional Goods Transport) which was

declared to be universally applicable. That exemption therefore applies to Van den Bosch Transporten.

3 Within the Van den Bosch Transporten group, drivers from Germany and Hungary work under contracts concluded with Van den Bosch GmbH and Silo-Tank, respectively. The basic conditions of employment laid down in the CLA GN are not applied to them.

4 Van den Bosch Transporten concludes charter agreements for international transport operations with Van den Bosch GmbH and Silo-Tank. Those transport operations take place predominantly outside the territory of the Netherlands.

5 Under the charter provision in Article 44 of the CLA GN, and the almost identical Article 73 of the CLA Beroepsgoederenvervoer, an employer is obliged to stipulate in subcontracting agreements, executed in or from the employer's undertaking established in the Netherlands, that the workers of the independent subcontractor are granted the basic conditions of employment laid down in the CLA GN if that results from the Posting of Workers Directive, even if the law of a country other than the Netherlands has been chosen. The employer must inform the workers concerned about the basic conditions that apply to them.

Main submissions of the parties to the main proceedings

6 FNV claims that Van den Bosch Transporten et al should be ordered to comply with the CLA GN, because when Van den Bosch posts German and Hungarian drivers, it is obliged under the charter provision to stipulate that the basic conditions of the CLA GN are granted to those drivers. After all, the Posting of Workers Directive applies.

7 In cases where the Netherlands is the country in which the employee habitually carries out his work, under Article 6[2](a) of the Convention on the law applicable to contractual obligations and Article 8(1) of Regulation (EC) No 593/2008, Dutch wages should be paid. By not applying the Dutch basic conditions, Van den Bosch GmbH and Silo-Tank are acting unlawfully towards FNV. Van den Bosch Transporten is also liable for that unlawful act.

8 According to Van den Bosch Transporten et al, Article 44 of the CLA GN is null and void, because the resulting obligation for Van den Bosch Transporten et al constitutes an unlawful restriction on the free movement of services under Article 56 TFEU. After all, the CLA GN has not been declared universally applicable and is therefore not a mandatory provision.

Brief summary of the reasons for the referral

9 The court of first instance ruled in an interim judgment that the basic conditions of the CLA GN apply to German and Hungarian drivers. The court of second

instance annulled that interim judgment and referred the case back with the following considerations.

10 The charter provision of the CLA GN has indeed not been declared universally applicable. However, the CLA Beroepsgoederenvervoer has been declared universally applicable. Since the provisions in both CLAs are virtually identical and Van den Bosch Transporten has been granted exemption from the application of the CLA Beroepsgoederenvervoer on the ground that it was covered by the CLA GN, the situation must be materially aligned with the situation in which the CLA GN would have been declared universally applicable.

11 In that case, the condition of universal applicability laid down in Article 3(8) of the Posting of Workers Directive has been fulfilled and Article 44 of the CLA GN cannot be regarded as an unlawful restriction on the freedom to provide services.

12 As regards the requirement in Article 44 of the CLA GN that this must relate to subcontracting agreements to which the Posting of Workers Directive applies, the question arises, according to the court of second instance, whether the term '(post workers) to the territory of a Member State' as referred to in Article 1(1) and (3) of the Posting of Workers Directive must be interpreted literally or as 'to *or from* the territory of a Member State', as FNV contends. In the latter case, it is irrelevant in which Member State the driver actually carries out his work within the framework of the charter.

13 According to the court of second instance, a broad interpretation of that term is not consistent with the aim of the Posting of Workers Directive to do justice not only to the freedom to provide services within the European Union, but also to the interests of the domestic labour market of the respective Member State for which the service concerned is intended. Not only is it difficult to determine which labour market exactly should be taken into account, but that interpretation is also not evident from the explanatory memorandum to the Commission's original proposal for the directive. That proposal clearly shows that the Posting of Workers Directive intentionally does not refer to international charter transport, but only to nationally executed charters.

14 Recital 2 of Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC on the posting of workers in the framework of the provision of services, etc., also provides no support for a broad interpretation.

15 According to the court of second instance, therefore, the requirement of posting workers to the territory of the Netherlands is also not satisfied. Since the charter provision is in keeping with the scope of the Posting of Workers Directive, that provision does not apply.

16 In cassation before the referring court, FNV essentially argues that the court of second instance failed to recognise that the term 'to the territory of a Member State' must be interpreted as 'to *or from* the territory of a Member State' and that

the Posting of Workers Directive therefore applies to drivers working in international road transport, as is the case here.

17 According to the referring court, the scheme of the Posting of Workers Directive must be viewed in conjunction with the rules of reference applicable to international contracts of employment in Article 6(2)(a) of the Convention on the law applicable to contractual obligations ('the 1980 Rome Convention'), and Article 8 of the Rome I Regulation, and with the rules of precedence in Article 7 of the 1980 Rome Convention and Article 9 of the Rome I Regulation.

18 However, it does not automatically follow from the joint consideration of those provisions how Article 1(1) and (3) and Article 2(1) of the Posting of Workers Directive are to be interpreted. It is conceivable, for example, that the term 'to the territory of a Member State' should be interpreted in accordance with the interpretation given by the Court of Justice in its judgment of 15 March 2011, *Koelzsch* (C-29/10, ECLI:EU:C:2011:151), that is to say, 'the Member State in which or, failing that, from which the employee temporarily carries out his work in performance of the contract'. It is also conceivable that there should be a 'close connection' between the employment contract and the Member State concerned, and that in that regard there should be the fulfilment of a condition that the worker concerned should carry out his work for a minimum number of consecutive days per month in the Member State concerned, or other conditions.

19 The question also arises to what extent it is important that the undertakings which post the workers concerned are linked in the group context to the undertaking to which those workers are posted.

20 Since Court of Justice case-law on those questions is lacking, doubt may reasonably exist as to the correct interpretation of the term 'to the territory of a Member State' as referred to in Article 1(1) and (3) and Article 2(1) of the Posting of Workers Directive, and on the question whether international road transport falls within the scope of the Posting of Workers Directive. A question in that regard will therefore be referred for a preliminary ruling.

21 FNV submits that some of the journeys at issue in the main proceedings take place entirely in the Netherlands, so that the drivers in question can derive rights from the Posting of Workers Directive for those journeys.

22 That part of FNV's plea therefore relates to cabotage transport operations. If it is assumed that the term 'to the territory of a Member State' must be interpreted strictly, as the court of second instance has done, the question arises whether cabotage falls within the scope of the Posting of Workers Directive.

23 The referring court also examines the question of how the term 'universally applicable' as referred to in Article 3(1) and (8) of the Posting of Workers Directive should actually be interpreted. Is this an autonomous concept of European Union law or should harmonisation be sought — exclusively or in part — with the provisions of national law in that regard?

24 Under Article 3(8) of the Posting of Workers Directive, collective agreements which have been declared universally applicable means collective agreements or awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

25 That article could thus be interpreted as meaning that the term ‘declared universally applicable’ should be regarded as an autonomous concept of European Union law. In that interpretation it is irrelevant whether the CLA in question has been declared universally applicable under national law, but only whether the CLA has been declared universally applicable within the meaning of Article 3(8) of the Posting of Workers Directive.

26 However, the term ‘declared universally applicable’ could also be interpreted as meaning that the CLA must be declared universally applicable in accordance with national law, and that the application of that national law must also result in compliance with the condition laid down in the first subparagraph of Article 3(8) of the Posting of Workers Directive.

27 In the judgment of the Court of Justice of 3 April 2008, *Rüffert* (C-346/06, ECLI:EU:C:2008:189), an indication can be found that Article 3(1) and (8) of the Posting of Workers Directive relates to an autonomous concept of European Union law. At paragraph 26 of that judgment, the Court of Justice first established that the CLA in question had not been declared universally applicable under German law, and then considered it relevant whether that CLA ‘is nevertheless capable of being treated as universally applicable within the meaning of [...] the Posting of Workers Directive [...]’

28 Doubt therefore exists as to the way in which that concept must be interpreted and a question in that regard will therefore be referred to the Court of Justice for a preliminary ruling.

29 If, pursuant to the answers to the questions referred for a preliminary ruling, Van den Bosch GmbH and Silo-tank cannot be required to comply with the provisions of the CLA GN, it remains to be considered whether they can be obliged to comply with the employment conditions of that CLA by contractual means on the basis of the charter provision of article 44 of the CLA GN. In that case, the question arises whether there is then a violation of Article 56 TFEU. For reasons of procedural economy, the referring court includes that issue in the questions referred for a preliminary ruling.