ECLI:EU:C:2020:565

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

16 July 2020(*)

(Reference for a preliminary ruling — Migrant workers — Social security — Legislation applicable — Regulation (EEC) No 1408/71 — Article 14(2)(a) — Concept of 'person who is a member of the travelling personnel of an undertaking' — Regulation (EC) No 883/2004 — Article 13(1)(b) — Concept of 'employer' — Long-distance lorry drivers normally employed in one or more Member States or States of the European Free Trade Association (EFTA) — Long-distance lorry drivers who have entered into an employment contract with one undertaking but are in fact subject to the authority of another undertaking established in the Member State where those drivers reside — Determination of which undertaking is the 'employer')

In Case C-610/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Centrale Raad van Beroep (Higher Social Security and Civil Service Court, Netherlands), made by decision of 20 September 2018, received at the Court on 25 September 2018, in the proceedings

AFMB Ltd and Others

v

Raad van bestuur van de Sociale verzekeringsbank,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, E. Regan (Rapporteur), P.G. Xuereb, L.S. Rossi and I. Jarukaitis, Presidents of Chambers, E. Juhász, M. Ilešič, J. Malenovský, T. von Danwitz, C. Toader, C. Lycourgos and A. Kumin, Judges,

Advocate General: P. Pikamäe,

Registrar: M.-A. Gaudissart, Deputy Registrar,

having regard to the written procedure and further to the hearing on 17 September 2019,

after considering the observations submitted on behalf of:

– AFMB Ltd and Others, by M. van Dam, advocaat,

– the Raad van bestuur van de Sociale verzekeringsbank, by H. van der Most and M. Wickenhagen, acting as Agents,

– the Netherlands Government, by M.K. Bulterman. P. Huurnink and J. Hoogveld, acting as Agents,

– the Czech Government, by M. Smolek, J. Vláčil and J. Pavliš, acting as Agents,

– the French Government, by A.-L. Desjonquères, A. Daly and R. Coesme, acting as Agents,

– the Cypriot Government, by N. Ioannou and D. Kalli, acting as Agents,

– the Hungarian Government, by M.Z. Fehér, M. Tátrai and V. Kiss, acting as Agents,

– the Austrian Government, by J. Schmoll and G. Hesse, acting as Agents,

– the United Kingdom Government, by Z. Lavery, acting as Agent, and by K. Apps, Barrister,

– the European Commission, by D. Martin and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 November 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 14(1)(a) and (2)(a) of 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, in the version as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 631/2004 of the European Parliament and of the Council of 31 March 2004 (OJ 2004 L 100, p. 1) (‘Regulation No 1408/71’), and of Article 12 and Article 13(1)(b) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1), as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149, p. 4) (‘Regulation No 883/2004’).

2 The request has been made in proceedings between AFMB Ltd, a company established in Cyprus, and international long-distance lorry drivers, on the one hand, and the Raad van bestuur van de Sociale verzekeringsbank (Board of Management of the Social Insurance Bank, Netherlands; ‘the Svb’), concerning decisions whereby the Svb declared that the social security legislation of the Netherlands was applicable to those long-distance lorry drivers.

Legal context

Regulation No 1408/71

3 Title II of Regulation No 1408/71, entitled ‘Determination of the legislation applicable’, contains Articles 13 to 17 of that regulation.

4 Article 13 of Regulation No 1408/71, headed ‘General rules’, provides:

‘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 of that regulation provides:

‘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 an 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.

…

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

(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:

…

(ii) where a person is employed principally in the territory of the Member State in which he resides, he shall be subject to the legislation of that State, even if the undertaking which employs him has no registered office or place of business or branch or permanent representation in that territory;

…’

6 Under Article 84a of Regulation No 1408/71, the institutions and the persons covered by that regulation are under a duty of mutual information and cooperation to ensure the correct implementation of that regulation.

Regulation (EEC) No 574/72

7 Article 12a of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71, in the version amended and updated by Regulation No 118/97, as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 (OJ 2005 L 117, p. 1) ('Regulation No 574/72'), prescribes, inter alia, rules relating to the exchange of information between competent national authorities for the application of Article 14(2) of Regulation No 1408/71.

Regulation No 883/2004

8 Recitals 1, 4, 18a and 45 of Regulation No 883/2004 are worded as follows:

'(1) The rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment.

…

(4) It is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination.

…

(18a) The principle of single applicable legislation is of great importance and should be enhanced. …

…

(45) Since the objective of the proposed action, namely the coordination measures to guarantee that the right to free movement of persons can be exercised effectively, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of that action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. …'

9 Article 2(1) of that regulation, that article being headed 'Persons covered', provides:

'This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.'

10 Title II of that regulation, entitled 'Determination of the legislation applicable', comprises Articles 11 to 16 of that regulation.

11 Article 11 of that regulation, headed 'General rules', provides:

'1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.

…

3. Subject to Articles 12 to 16:

(a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;

…'

12 Article 12 of Regulation No 883/2004, headed 'Special rules', is worded as follows:

'1. A person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that he/she is not sent to replace another posted person.'

2. A person who normally pursues an activity as a self-employed person in a Member State who goes to pursue a similar activity in another Member State shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such activity does not exceed 24 months.'

13 Article 13(1) of that regulation states :

'A person who normally pursues an activity as an employed person in two or more Member States shall be subject:

(a) to the legislation of the Member State of residence if he/she pursues a substantial part of his/her activity in that Member State; or

(b) if he/she does not pursue a substantial part of his/her activity in the Member State of residence:

(i) to the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated if he/she is employed by one undertaking or employer; or

…'

14 Title V of that regulation, entitled 'Miscellaneous provisions', contains, particularly in Article 76 thereof, that article being headed 'Cooperation', various provisions as to how the institutions and persons covered by that regulation may or must inform each other and cooperate with each other.

15 Title VI of that regulation, on transitional and final provisions, contains Articles 87 to 91 of that regulation.

16 Article 90(1) of Regulation No 883/2004, that article being headed 'Repeal', provides:

[Regulation No 1408/71] shall be repealed from the date of application of this Regulation.

However, Regulation [No 1408/71] shall remain in force and shall continue to have legal effect for the purposes of:

…

(c) the Agreement on the European Economic Area [of 2 May 1992 (OJ 1994 L 1, p. 3)], the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, on the free movement of persons [signed in Luxembourg on 21 June 1999, and approved on behalf of the European Community by Decision 2002/309/EC/Euratom of the Council and of the Commission as regards the Agreement on Scientific and Technological Cooperation of 4 April 2002 on the conclusion of seven Agreements with the Swiss Confederation (OJ 2002 L 114, p. 6)] for as long as those agreements have not been modified in the light of this Regulation.'

Regulation (EC) No 987/2009

17 Article 16 of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation No 883/2004 (OJ 2009 L 284, p. 1), prescribes, as follows from its title, a procedure for implementing Article 13 of Regulation No 883/2004.

The dispute in the main proceedings and the questions referred for a preliminary ruling

18 AFMB, a company formed in Cyprus on 10 May 2011, entered into fleet management agreements with transport undertakings established in the Netherlands whereby AFMB undertook, in consideration of a commission, to take charge of the management of the heavy goods vehicles operated by those undertakings as part of their businesses, on behalf of and at the risk of those undertakings. AFMB also entered into employment contracts, for variable periods, within the period from 1 October 2011 to 26 May 2015, with international long-distance lorry drivers residing in the Netherlands. According to the terms of those contracts, AFMB was named as the employer of those workers and Cypriot employment law was declared to be applicable.

19 According to the findings of fact made by the referring court, before the conclusion of those employment contracts, the international long-distance lorry drivers concerned had never lived nor worked in Cyprus. When those contracts were performed, they continued to live in the Netherlands and worked, on behalf of those transport undertakings, in two or more Member States, and also, in the case of some of those long-distance lorry drivers, in one or more European Free Trade Association (EFTA) States. It is also stated in the order for reference that, in the abovementioned period, those long-distance lorry drivers did not carry out a substantial part of their activities in the Netherlands. Further, some of those drivers had previously been employees of those undertakings.

20 AFMB made an application, under Article 16 of Regulation No 987/2009, to the Svb for confirmation that, during the above period, the international long-distance lorry drivers with whom it had concluded those employment contracts were not subject, under Article 13 of Regulation No 883/2004, to the social security legislation of the Netherlands. AFMB stated in that regard, inter alia, that the competent Cypriot institution could not issue A 1 Certificates for those long-distance lorry drivers until the Svb had confirmed that the Netherlands social security legislation was not applicable to them.

21 By decisions made in October 2013, the Svb declared that the Netherlands social security legislation was applicable to the long-distance lorry drivers and issued A 1 Certificates to that effect.

22 Those decisions were confirmed, after a complaint lodged by AFMB, by decisions of the Svb adopted in July 2014.

23 AFMB and a number of the long-distance lorry drivers with whom it had concluded employment contracts brought an action before the rechtbank Amsterdam (District Court, Amsterdam, Netherlands) challenging the latter decisions of the Svb. By judgment of 25 March 2016, that court dismissed that action.

24 AFMB and a number of those long-distance lorry drivers brought an appeal before the referring court.

25 Following the bringing of that action, the dialogue and conciliation procedure which had been initiated, in relation to the A 1 Certificates issued by the Svb, by the competent Cypriot institution pursuant to Decision No A1 of the Administrative Commission for the coordination of social security systems of 12 June 2009 concerning the establishment of a dialogue and conciliation procedure concerning the validity of documents, the determination of the applicable legislation and the provision of benefits under Regulation No 883/2004 (OJ 2010 C 106, p. 1), was suspended.

26 In the main proceedings, first, the referring court is uncertain whether the long-distance lorry drivers in those proceedings are to be regarded as 'members of the personnel' of AFMB or of the transport undertakings, for the purposes of Article 14(2)(a) of Regulation No 1408/71, and as having the former or the latter as their 'employer', for the purposes of Article 13(1)(b) of Regulation No 883/2004. That court accordingly wishes to determine which undertaking or undertakings ought to be recognised as the employer of those drivers for the purposes of the application of those provisions and what criteria should be applied for that purpose. That issue is of crucial importance for the dispute in the main proceedings, in that it will make it possible to identify the national social security legislation that is applicable to those drivers.

27 In that regard, the referring court observes that Regulations No 1408/71 and No 883/2004 do not define the concept of an 'employer' and do not refer to national legislation for that purpose.

28 That court considers, however, that numerous factors point in the direction of EU law being interpreted as meaning that, in a case such as that in the main proceedings, the transport undertakings ought to be recognised as the employer of the long-distance lorry drivers, but it observes that such an interpretation also creates difficulties in terms of the identification of the national social security legislation that is applicable.

29 Second, if the Court were to consider that an undertaking that has concluded employment contracts with the long-distance lorry drivers, such as AFMB, ought to be regarded as their employer, the referring court is uncertain as to the possible application to that particular situation, by analogy, of the conditions that are specific to the rules on posting of workers laid down by Regulations No 1408/71 and No 883/2004.

30 Third, in the scenario envisaged in the preceding paragraph and in the event that the answer to the second question referred is in the negative, the referring court is uncertain whether circumstances such as those at issue in the main proceedings constitute an abuse of law. In that regard, the referring court observes that, in this case, even though EU law enshrines the principle of freedom of establishment, the main objective pursued by both the transport undertakings in the main proceedings and AFMB was plainly to circumvent the Netherlands legislation and regulations by artificially creating conditions where an advantage could be gained from EU law. If such an

abuse were to be identified, the referring court is uncertain what action should be taken in response for the purposes of resolving the dispute in the main proceedings.

31 In those circumstances, the Centrale Raad van Beroep (Higher Social Security and Civil Service Court, Netherlands) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) (a) Must Article 14(2)(a) of [Regulation No 1408/71] be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, a driver of a heavy goods vehicle employed in international road transport is to be regarded as being a member of the travelling personnel of:

(i) the transport undertaking which has recruited the person concerned, to which the person concerned is in fact fully available for an indefinite period, which exercises actual authority over the person concerned and which actually bears the wage costs; or

(ii) the undertaking which has formally concluded an employment contract with the heavy goods vehicle driver and which, by agreement with the transport undertaking referred to under (i), paid the person concerned 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 undertaking referred to in (i) has its registered office; or

(iii) both the undertaking referred to in (i) and the undertaking referred to in (ii) ?

(b) Must Article 13(1)(b) of [Regulation No 883/2004] be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, the employer of a heavy goods vehicle driver employed in international road transport is considered to be:

(i) the transport undertaking which has recruited the person concerned, to which the person concerned is in fact fully available for an indefinite period, which exercises actual authority over the person concerned and which actually bears the wage costs; or

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

(iii) both the undertaking referred to in (i) and the undertaking referred to in (ii) ?

(2) In the event that, in circumstances such as those at issue in the main proceedings, the employer is regarded as being the undertaking referred to in Question 1(a)(ii) and in Question 1(b)(ii):

Do the specific conditions under which employers, such as temporary employment agencies and other intermediaries, can invoke the exceptions to the State-of-employment principle set out in Article 14(1)(a) of [Regulation No 1408/71] and in Article 12 of [Regulation No 883/2004] also apply by analogy, wholly or in part, to the dispute in the main proceedings for the purposes of Article 14(2)(a) of [Regulation No 1408/71] and of Article 13(1)(b) of [Regulation 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 1(a)(ii) and in Question 1(b)(ii), and Question 2 is answered in the negative:

Do the facts and circumstances [of the dispute in the main proceedings] 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?'

Consideration of the questions referred

Preliminary observations

32 The Czech, Cypriot, Austrian and United Kingdom Governments question the applicability *ratione temporis* of Regulation No 1408/71 to the dispute in the main proceedings on the ground that the periods of activity concerned are all subsequent to the date when that regulation was replaced by Regulation No 883/2004. They consider that the Court should, consequently, answer the questions referred solely in so far as they relate to Regulation No 883/2004.

33 In that regard, it must be observed that, as is apparent from paragraph 18 of the present judgment, the periods during which the long-distance lorry drivers in the main proceedings were bound to AFMB by employment contracts are all subsequent to 1 May 2010, the date when Regulation No 1408/71 was repealed and replaced by Regulation No 883/2004.

34 It follows that the latter regulation is applicable to the situation of the long-distance lorry drivers in the main proceedings who were employed as such in two or more Member States.

35 As regards the long-distance lorry drivers in the main proceedings who were employed as such both in one or more Member States and in one or more EFTA States, it must be recalled that, in accordance with Article 90 of Regulation No 883/2004, Regulation No 1408/71 remained in force and its legal effects were preserved, for the purposes of, inter alia, the Agreement on the European Economic Area and the Agreement between the European Union and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, for as long as those agreements were not modified to reflect Regulation No 883/2004. However, the latter regulation became applicable, following such modifications, only from 1 April 2012 to the Swiss Confederation and from 1 June 2012 to Iceland, Liechtenstein and Norway.

36 It follows that Regulation No 1408/71 was still in force, in those EFTA States, during part of the periods at issue in the main proceedings and that, if it were the case, which it is for the referring court to determine, that long-distance lorry drivers worked in the territory of one of those States during periods prior to one of those dates, that regulation would be applicable to that extent.

37 That being so, it is necessary, in order to provide the referring court with an answer that is helpful in all respects, to take into account, in the context of the present case, both Regulation No 1408/71 and Regulation No 883/2004.

The first question

38 By its first question, the referring court seeks, in essence, to ascertain whether Article 14(2)(a) of Regulation No 1408/71 and Article 13(1)(b) of Regulation No 883/2004 must be interpreted as meaning that the employer of an international long-distance lorry driver, for the purposes of those provisions, is the transport undertaking which recruited that driver, where that driver is in fact

entirely at the disposal of that undertaking, which exercises actual authority over that driver and which bears, in reality, the relevant wage costs, or the undertaking with which that long-distance lorry driver has concluded an employment contract and which pays the driver his or her wages pursuant to an agreement concluded with the transport undertaking.

39 It is apparent from the order for reference that that question arises in the context of a dispute between the parties in the main proceedings concerning the national social security legislation that is applicable to international long-distance lorry drivers, who are parties to an employment contract with AFMB but who work on behalf of the transport undertakings concerned in the main proceedings. The Svb considers that only those transport undertakings, which are established in the Netherlands, ought to be categorised as the employers of those drivers, with the result that the Netherlands legislation is applicable to them, whereas AFMB and those long-distance lorry drivers consider that AFMB ought to be regarded as the employer and that, since its registered office is in Cyprus, Cypriot legislation is applicable to them.

40 In that regard, it must be recalled that the provisions of Title II of Regulation No 1408/71, one of which is Article 14(2)(a) of that regulation, and the provisions of Title II of Regulation No 883/2004, one of which is Article 13(1)(b) of that regulation, constitute uniform and comprehensive systems of conflict of law rules. Those provisions are intended not only to prevent the simultaneous application of a number of national legislative systems and the complications which might ensue, but also to ensure that persons falling within the scope of one of those regulations are not left without social security protection because there is no legislation which is applicable to them (see, to that effect, judgments of 1 February 2017, *Tolley*, C-430/15, EU:C:2017:74, paragraph 58, and of 25 October 2018, *Walltopia*, C-451/17, EU:C:2018:861, paragraph 41).

41 Accordingly, provided that a person falls within the scope *ratione personae* of Regulation No 1408/71 or of Regulation No 883/2004, as that scope is defined in Article 2 of each of those regulations, the single legislation rule, laid down in Article 13(1) of Regulation No 1408/71 and Article 11(1) of Regulation No 883/2004 respectively, is, in principle, applicable, and the national legislation applicable is to be determined in accordance with the provisions of Title II of one of those regulations (see, to that effect, judgments of 1 February 2017, *Tolley*, C-430/15, EU:C:2017:74, paragraph 59, and of 25 October 2018, *Walltopia*, C-451/17, EU:C:2018:861, paragraph 42).

42 To that end, Article 13(2)(a) of Regulation No 1408/71 and Article 11(3)(a) of Regulation No 883/2004 lay down the general rule that a person who pursues an activity as an employed person in the territory of a Member State is subject to the legislation of that State.

43 That general rule is, however, stated, in the former provision, to be ‘subject to Articles 14 to 17’ of Regulation No 1408/71, and, in the latter provision, ‘subject to Articles 12 to 16’ of Regulation No 883/2004. In certain specific situations, the unrestricted application of that principle might in fact create, rather than prevent, administrative complications for workers as well as for employers and social security authorities, which could impede the freedom of movement of the persons covered by those regulations (see, to that effect, judgments of 13 September 2017, *X*, C-570/15, EU:C:2017:674, paragraph 16, and of 6 February 2018, *Altun and Others*, C-359/16, EU:C:2018:63, paragraph 31).

44 One of those specific situations is that which is the subject of Article 14(2) of Regulation No 1408/71 and Article 13(1) of Regulation No 883/2004 respectively, namely the situation of a person who normally pursues an activity as an employed person in two or more Member States.

45 In particular, in accordance with Article 14(2)(a) of Regulation No 1408/71, a person who is a member of the travelling personnel of an undertaking which, for hire or reward or on its own account, operates international transport services for goods by road and which has its registered office in the territory of a Member State is subject to the legislation of the latter State unless, as is the case for the drivers concerned in the main proceedings to whom that regulation is applicable, that person is employed principally in the territory of the Member State where he or she resides, in which case that person would be subject to the legislation of the Member State where he or she resides.

46 As regards Article 13(1) of Regulation No 883/2004, Article 13(1)(b)(i) provides that a person who normally pursues an activity as an employed person in two or more Member States and who does not pursue a substantial part of that activity in the Member State where he or she resides is subject to the legislation of the Member State in which the undertaking or the employer has its registered office or place of business, if the person is employed by one undertaking or one employer. The Court has stated, in that regard, that a person can fall within the scope of Article 13 only on the condition that he or she habitually carries out significant activities in the territory of two or more Member States (see, to that effect, judgment of 13 September 2017, *X*, C-570/15, EU:C:2017:674, paragraphs 18 and 19). As is apparent from the documents available to the Court, that condition is satisfied in the case of the long-distance lorry drivers in the main proceedings.

47 It is apparent from the information provided by the referring court that the transport undertakings concerned in the main proceeding all have their registered offices in the Netherlands. As regards AFMB, the referring court states that its registered office must be regarded as being located in Cyprus, and it is appropriate to proceed on that assumption.

48 In those circumstances, and as observed, in essence, by the referring court, the interpretation of the concept of a ‘person who is a member of the personnel … of an undertaking’, within the meaning of Article 14(2)(a) of Regulation No 1408/71, and of the concept of an ‘employer’ within the meaning of Article 13(1)(b)(i) of Regulation No 883/2004, a concept which must be treated as equivalent, in this context, to that of an ‘undertaking’, also used in the same provision of Regulation No 883/2004, is of crucial importance for the purpose of determining the national social security legislation that is applicable to the long-distance lorry drivers in the main proceedings.

49 In that regard, it must be observed that those regulations do not, in order to determine the meaning of those concepts, make any reference to national legislation or practice.

50 It follows from the requirements of the uniform application of EU law and of the principle of equal treatment that the terms of a provision of EU law which does not contain any express reference to the law of the Member States for the purpose of determining its meaning and scope must be given an autonomous and uniform interpretation throughout the European Union, which interpretation must take into account not only the wording of that provision but also its context and the objective pursued by the legislation in question (judgment of 19 March 2020, *Compañía de Tranvías de La Coruña*, C-45/19, EU:C:2020:224, paragraph 14 and the case-law cited).

51 Since the concepts referred to in paragraph 48 of the present judgment play a crucial role in the identification of the applicable national social security legislation in accordance with the conflict of law rules laid down, respectively, in Article 14 of Regulation No 1408/71 and in Article 13 of Regulation No 883/2004, an autonomous interpretation of those concepts becomes all the more essential, as the Advocate General stated, in essence, in point 39 of his Opinion, given the single legislation rule mentioned in paragraph 41 of the present judgment, which means that the legislation of one single Member State must be designated as being applicable.

52 As regards, first, the terms used, account must be taken, in accordance with the Court's settled case-law, of their usual meaning in everyday language, in the absence of any definition, in Regulation No 1408/71 or Regulation No 883/2004, of the relevant concepts of a 'person who is a member of the personnel … of an undertaking', within the meaning of Article 14(2)(a) of Regulation No 1408/71, and of an 'employer', within the meaning of Article 13(1)(b)(i) of Regulation No 883/2004 (see, by analogy, judgment of 3 September 2014, *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, paragraph 19 and the case-law cited).

53 With respect to the usual meaning of those terms, it must be observed that, as a general rule, the relationship between an 'employer' and the 'personnel' employed implies the existence of a hierarchical relationship.

54 Next, as regards the context surrounding the concepts mentioned in paragraph 48 of the present judgment, it must, first, be recalled that the application of the system of conflict of law rules established by the regulations in which those concepts are used depends solely on the objective situation of the worker concerned (see, to that effect, judgment of 4 June 2015, *Fischer-Lintjens*, C-543/13, EU:C:2015:359, paragraph 38 and the case-law cited).

55 In addition, in interpreting the social security regulations that preceded Regulation No 883/2004 and, in particular, the provisions relating to conflict of law rules concerning posting of workers, contained in Article 13(a) of Regulation No 3 of the Council of the EEC of 25 September 1958 on the social security of migrant workers (JO 1958 30, p. 561), later in Article 14(1)(a) of Regulation No 1408/71, the Court has held, in essence, that the undertaking to which a worker is 'normally attached', for the purposes of those provisions, is the undertaking under the authority of which he or she is placed, such a condition to be deduced from all the circumstances of the employment concerned (see, to that effect, judgments of 5 December 1967, *van der Vecht*, 19/67, EU:C:1967:49, p. 354, and of 10 February 2000, *FTS*, C-202/97, EU:C:2000:75, paragraph 24).

56 The Court has held, in particular, that an undertaking that has posted an employed worker to the territory of another Member State in order to carry out work there at the premises of another entity must be considered to be the sole employer of that worker, having particular regard to the continuity, for the entire duration of the posting, of the hierarchical relationship between that worker and that employer, so that that work was to be deemed to have been carried out for that undertaking, within the meaning of Article 13(a) of Regulation No 3. The Court stated that that hierarchical relationship resulted from, inter alia, the fact that the undertaking in question paid the worker's wages and could dismiss him or her on the ground of faults he or she might have committed in the performance of the work at the premises of the entity making use of the work (see, to that effect, judgment of 17 December 1970, *Manpower*, 35/70, EU:C:1970:120, paragraphs 17, 18 and 20).

57 The Court has also stated that, in order to assess whether a worker falls within the scope of concept of a 'person who normally pursues an activity as an employed person in the territory of two or more Member States', within the meaning of Article 14(2) of Regulation No 1408/71, a concept that now appears in Article 13(1) of Regulation No 883/2004, account must be taken of any possible divergence between, on the one hand, the information provided by the employment contracts at issue and, on the other, the way in which the obligations under those contracts were performed in practice (see, to that effect, judgment of 4 October 2012, *Format Urządzenia i Montaże Przemysłowe*, C-115/11, EU:C:2012:606, paragraph 41).

58 In particular, the Court has stated that the institution concerned may, where appropriate, take account not only of the wording of contractual documents, but also of factors such as the way in

which employment contracts between the employer and the worker concerned had previously been performed in practice, the circumstances surrounding the conclusion of those contracts and, more generally, the characteristics and conditions of the work performed by the undertaking concerned, in so far as those factors may throw light on the actual nature of the work in question (judgment of 4 October 2012, *Format Urządzenia i Montaże Przemysłowe*, C-115/11, EU:C:2012:606, paragraph 45).

59 The Court added that, if it is apparent from relevant factors other than contractual documents that an employed person's situation in fact differs from that described in such documents, the obligation to apply Regulation No 1408/71 correctly means that it is incumbent on the institution concerned, whatever the wording of those contractual documents, to base its findings on the employed person's actual situation (see, to that effect, judgment of 4 October 2012, *Format Urządzenia i Montaże Przemysłowe*, C-115/11, EU:C:2012:606, paragraph 46).

60 Having regard to the matters mentioned in paragraphs 52 to 59 of the present judgment, it is necessary, with respect to the concepts mentioned in paragraph 48 of this judgment, to take account of the objective situation of the employed person concerned and all the circumstances of his or her employment.

61 Against that background, while the conclusion of an employment contract between the employed person and an undertaking may be an indication that there is a hierarchical relationship between the former and the latter, that circumstance alone cannot permit a definitive conclusion that there exists such a relationship. It remains necessary, in order to arrive at such a conclusion, to have regard not only to the information formally contained in the employment contract but also to how the obligations under the contract incumbent on both the worker and the undertaking in question are performed in practice. Accordingly, whatever the wording of the contractual documents, it is necessary to identify the entity which actually exercises authority over the worker, which bears, in reality, the relevant wage costs, and which has the actual power to dismiss that worker.

62 It should be stated that the interpretation set out in paragraphs 60 and 61 of the present judgment is supported by the objectives pursued by the provisions mentioned in paragraph 48 of this judgment and, more generally, by Regulations No 1408/71 and No 883/2004 taken as a whole.

63 In that regard, it must be recalled that the objective of Regulation No 1408/71 is to ensure freedom of movement for employed and self-employed persons within the European Union, while respecting the special characteristics of national social security legislation (see, to that effect, judgment of 9 March 2006, *Piatkowski*, C-493/04, EU:C:2006:167, paragraph 19). Likewise, as is clear from, inter alia, recitals 1 and 45 of Regulation No 883/2004, the aim of that regulation is to coordinate the national social security systems of the Member States in order to guarantee that the right to the free movement of persons can be exercised effectively and, thereby, to contribute towards improving the standard of living and conditions of employment of persons who move within the European Union (judgment of 13 July 2017, *Szoja*, C-89/16, EU:C:2017:538, paragraph 34). That regulation modernised and simplified the rules contained in Regulation No 1408/71, while retaining the same objective as the latter regulation (judgment of 6 June 2019, *V*, C-33/18, EU:C:2019:470, paragraph 41 and the case-law cited).

64 As is apparent from paragraphs 42 to 44 of the present judgment, Article 14(2) of Regulation No 1408/71 contributes to that objective in that it lays down rules which derogate from the rule of the Member State of employment laid down in Article 13(2)(a) of that regulation precisely in order to avoid the complications which, otherwise, might arise if the latter rule were to be applied to situations involving the pursuit of activities in two or more Member States. The same can be said of

Article 13(1) of Regulation No 883/2004, which simplified the rules set out in Article 14(2) of Regulation No 1408/71 with the aim, like the latter provision, of avoiding such complications.

65 From that perspective, the aim of the derogating rules laid down in the provisions mentioned in paragraph 48 of the present judgment is to ensure that, in accordance with the rule of a single applicable legislation referred to in paragraph 41 of this judgment, employed persons working in two or more Member States are subject to the legislation of only one single Member State, by establishing for that purpose criteria of attachment which take into account the objective situation of those persons in order to facilitate their freedom of movement.

66 However, if an interpretation of the concepts employed in those provisions were not to take into account the objective situation of the employed person but were to be based solely on formal considerations, such as the conclusion of an employment contract, that would amount to allowing undertakings to transfer the place which is to be regarded as relevant to the determination of which national social security legislation is applicable, when such a transfer does not, in reality, contribute to the objective of guaranteeing that workers can genuinely exercise their right to freedom of movement.

67 Moreover, if undertakings were allowed to transfer the place which is to be regarded as relevant to the determination of which national social security legislation is applicable, in the way set out in the preceding paragraph, that would disregard the fact that, as is apparent from the case-law cited in paragraph 54 of the present judgment, the conflict of law rules laid down, in particular, in Article 14(2) of Regulation No 1408/71 and Article 13(1) of Regulation No 883/2004 depend not on the free choice of the employed person, employers or competent national authorities, but on the objective situation of that employed person.

68 Admittedly, the system introduced by each of those regulations is solely a system for the coordination of the social security legislation of the Member States and not for the harmonisation of such legislation. It is inherent in such a system that differences may remain between the social security rules of the Member States, not least with regard to the level of social contributions to be paid in respect of a given activity (see, to that effect, judgments of 15 January 1986, *Pinna*, 41/84, EU:C:1986:1, paragraph 20, and of 9 March 2006, *Piatkowski*, C-493/04, EU:C:2006:167, paragraph 20 and the case-law cited).

69 However, the objective of those regulations, as recalled in paragraph 63 of the present judgment, might be undermined if the interpretation adopted of the concepts mentioned in paragraph 48 of this judgment were to make it easier for employers to be able to resort to purely artificial arrangements in order to exploit the EU legislation with the sole aim of obtaining an advantage from the differences that exist between the national rules. In particular, such exploitation of that legislation would be likely to have a ‘race to the bottom’ effect on the social security systems of the Member States and perhaps, ultimately, reduce the level of protection offered by those systems.

70 Last, the foregoing considerations cannot be called into question by the argument that those concepts should be based exclusively on the criterion of the existence of an employment contract, on the ground that that criterion, being readily verifiable, might have advantages in terms of legal certainty, in that it would be possible to ensure that the applicable social security legislation will be more predictable.

71 As rightly submitted by the Netherlands Government, an interpretation of those concepts which relies on criteria that are designed to determine the real situation of the worker concerned serves precisely to ensure due regard to the principle of legal certainty.

72 Further, both Regulations No 1408/71 and No 574/72, on the one hand, and Regulations No 883/2004 and No 987/2009, on the other, lay down mechanisms for information and cooperation that are intended to ensure the correct application of the provisions mentioned in paragraph 48 of the present judgment.

73 Thus, first, in addition to the fact that Article 84a of Regulation No 1408/71 imposes on the institutions and persons covered by that provision a mutual obligation of information and cooperation, Article 12a of Regulation No 574/72 lays down, in particular, rules on the exchange of information for the purposes of the application of Article 14(2) of Regulation No 1408/71.

74 Second, the rules governing what the institutions and persons covered by that regulation may or must do in terms of the mutual information and cooperation provided for by Regulation No 883/2004, as set out in Article 76 of that regulation, as well as the procedure for the application of Article 13 of that regulation, laid down in Article 16 of Regulation No 987/2009, are intended to enable the institutions and persons concerned to have the necessary information for the purposes of ensuring the correct application of the concept of an 'employer' in the determination of the legislation applicable under Article 13(1)(b) of Regulation No 883/2004.

75 It follows from the foregoing that, for the purposes of both Article 14(2)(a) of Regulation No 1408/71 and Article 13(1)(b)(i) of Regulation No 883/2004, an international long-distance lorry driver must be regarded as being employed, not by the undertaking with which he or she has formally concluded an employment contract, but by the transport undertaking that has actual authority over him or her, that does, in reality, bear the costs of paying his or her wages, and that has the actual power to dismiss him or her.

76 In this case, it is clear from the information provided by the referring court that the long-distance lorry drivers concerned were bound, during the periods at issue in the main proceedings, to AFMB by employment contracts in which AFMB was named as the employer of those workers and Cypriot employment law was declared to be applicable.

77 However, it is clear from the request for a preliminary ruling that those long-distance lorry drivers, who always maintained their place of residence in the Netherlands throughout those periods, had, before the conclusion of the employment contracts with AFMB, been chosen by the transport undertakings themselves and that they worked, after the conclusion of those contracts, on behalf of and at the risk of those transport undertakings. Further, while the fleet management agreements concluded between those transport undertakings and AFMB conferred on the latter the management of the heavy goods vehicles and while AFMB was responsible for the management of wages, it is apparent from the information provided by the referring court that, in reality, the actual cost of those wages was borne, via the commission paid to AFMB, by the transport undertakings concerned in the main proceedings. Moreover, the decision of a transport undertaking that it no longer required the services of a long-distance lorry driver entailed, as a general rule, the immediate dismissal of that driver by AFMB, so that, subject to verification by the referring court, the transport undertaking held the actual power of dismissal.

78 Last, it must be added that a number of the long-distance lorry drivers in the main proceedings were, prior to conclusion of the employment contracts with AFMB, previously employed by the transport undertakings and that, according to the findings made by the referring

court, ‘little or nothing changed in the daily routine after the intervention of AFMB in the relationship between the [long-distance lorry drivers] and [those undertakings]’, those drivers continuing, in fact, to be entirely at the disposal of and subject to the authority of those undertakings.

79 It follows from the foregoing indications that, whatever the EU legislation that is applicable to the long-distance lorry drivers in the main proceedings, whether Regulation No 1408/71 or Regulation No 883/2004, those drivers seem to have been, during the periods at issue, members of the personnel of the transport undertakings and to have had those undertakings as their employers, within the meaning of Article 14(2)(a) of the former regulation and Article 13(1)(b) of the latter regulation, respectively, with the result that the social security legislation that is applicable to them seems to be the legislation of the Netherlands, which, however, it is for the referring court to determine.

80 In the light of all the foregoing, the answer to the first question is that Article 14(2)(a) of Regulation No 1408/71 and Article 13(1)(b)(i) of Regulation No 883/2004 must be interpreted as meaning that the employer of an international long-distance lorry driver, for the purposes of those provisions, is the undertaking which has actual authority over that long-distance lorry driver, which bears, in reality, the costs of paying his or her wages, and which has the actual power to dismiss him or her, and not the undertaking with which that long-distance lorry driver has concluded an employment contract and which is formally named in that contract as being the employer of that driver.

The second and third questions

81 In view of the answer given to the first question, there is no need to answer the second and third questions.

Costs

82 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 14(2)(a) of 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, in the version as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Regulation (EC) No 631/2004 of the European Parliament and of the Council of 31 March 2004, and Article 13(1)(b)(i) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012, must be interpreted as meaning that the employer of an international long-distance lorry driver, for the purposes of those provisions, is the undertaking which has actual authority over that long-distance lorry driver, which bears, in reality, the costs of paying his or her wages, and which has the actual power to dismiss him or her, and not the undertaking with which that long-distance lorry driver has concluded an employment contract and which is formally named in that contract as being the employer of that driver.

[Signatures]

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* Language of the case: Dutch.