Provisional text

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 26 November 2019 (1)

Case C-610/18

AFMB Ltd and Others
v
Raad van bestuur van de Sociale verzekeringsbank

(Request for a preliminary ruling from the Centrale Raad van Beroep (Higher Social Security and Civil Service Court, Netherlands)

(Reference for a preliminary ruling — Determination of the legislation applicable — Regulation (EEC) No 1408/71 — Article 14(2)(a) — Regulation (EC) No 883/2004 — Article 13(1)(b) — International drivers in the road transport sector — Setting up of a company in another Member State — Definition of employer — Definition of abuse of law)

1. In the present reference for a preliminary ruling under Article 267 TFEU, the Centrale Raad van Beroep (Higher Social Security and Civil Service Court, Netherlands) asks the Court three questions concerning the interpretation of 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 (OJ English Special Edition 1971 (II), p. 416), as amended by Council Regulation (EC) No 1606/98 of 29 June 1998 (2) ('Regulation No 1408/71'), and of 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, (3) as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (4) ('Regulation No 883/2004').

2. This reference for a preliminary ruling arises from a dispute between, on the one hand, AFMB Ltd ('AFMB'), a company established in Cyprus, and several international drivers in the road transport sector and, on the other hand, the Raad van bestuur van de

Sociale verzekeringsbank (Board of Management of the Social Insurance Bank, Netherlands; 'the RSVB'), concerning the latter's decision that the Netherlands social security legislation would apply to those drivers and not the Cypriot social security legislation. That administrative decision is challenged by AFMB, which relies, for the purposes of the application of the Cypriot legislation, on the contracts of employment concluded with those drivers, in which AFMB is expressly designated as the 'employer', notwithstanding the fact that those drivers are usually made available to the Netherlands transport undertakings with which AFMB has entered into fleet management agreements.

3. Clarification of the disputed question of who should be regarded as the 'employer' within the meaning of Article 13(1)(b)(i) of Regulation No 883/2004 in the case in the main proceedings — AFMB or the Netherlands undertakings — is of considerable importance, since it will make it possible to determine the applicable national social security legislation, in order to secure for international drivers in the road transport sector their right of access to national social security systems regardless of whether they have been engaged in Member States other than their State of origin. In that context, however, it is necessary not to overlook the possible impact on the European Union's single market, in particular on the principles of free movement and free competition, resulting from the application of a Member State's national legislation under which the social costs are potentially lower than those of the Member State where the employee generally resides or works. Since EU law, as it now stands, merely coordinates national social security systems instead of harmonising them, (5) the differences between those systems can be considerable. Therefore, it cannot be ruled out that, in some situations, what is regarded by one Member State as a legitimate competitive advantage relating to the undertaking's registered office will be perceived by another Member State as an abuse of the fundamental freedoms referred to in the Treaties. These situations are just a few examples of the particularly sensitive issues which should be taken into account in the analysis of the underlying legal issues.

I. Legal context

A. Regulation No 1408/71

4. Regulation No 1408/71 was adopted on 14 June 1971 and entered into force on 1 October 1972. Since then, that regulation has been amended several times. The regulation is also applicable to the European Free Trade Association ('EFTA') States, pursuant to the Agreement on the European Economic Area ('the EEA Agreement') (6) and to bilateral agreements concluded with the Swiss Confederation, (7) respectively. (8)

5. Title II of Regulation No 1408/71, entitled 'Determination of the legislation applicable', contains Articles 13 to 17.

6. Article 13(1) of Regulation No 1408/71, entitled 'General rules', provides:

'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.'

7. Article 13(2) of that regulation provides:

‘Subject to the provisions of 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;

…’

8. Article 14(1) of that regulation, entitled ‘Special rules applicable to persons, other than mariners, engaged in paid employment’, states:

‘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.

…’

9. Article 14(2) of that regulation provides:

‘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.

…’

B. Regulation No 883/2004

10. Regulation No 1408/71 was repealed by Regulation No 883/2004, which was adopted on 29 April 2004 and entered into force on 1 May 2010. It is applicable to the EFTA States pursuant to the EEA Agreement (9) and to bilateral agreements concluded with the Swiss Confederation, (10) respectively.

11. Title II of Regulation No 883/2004, entitled 'Determination of the legislation applicable', comprises Articles 11 to 16.

12. Article 11(1) of Regulation No 883/2004, entitled 'General rules', provides:

'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.'

13. Article 12(1) of that regulation, entitled 'Special rules', provides:

'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.'

14. Article 13(1) of that regulation provides:

'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

…'

15. Article 90(1) of Regulation No 883/2004, entitled 'Repeal', states:

'Council 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 and 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 and other agreements which contain a reference to Regulation [No 1408/71], for as long as those agreements have not been modified in the light of this Regulation.'

II. The facts giving rise to the dispute, the main proceedings and the questions referred

16. As stated above, the request for a preliminary ruling was made in the context of a dispute between, on the one hand, AFMB and several heavy goods vehicle drivers in the international transport sector who are resident in the Netherlands and, on the other hand, the RSVB, concerning the issuing of 'A1 certificates' (11) between 2 October 2013 and 9 July 2014, in which the RSVB certified that the workers in question were subject to Netherlands social security legislation. The periods covered by those certificates vary on a case-by-case basis but none of the periods pre-dates 1 October 2011 or post-dates 26 May 2015 ('the periods at issue').

17. The RSVB took the view that the Netherlands transport undertakings that had recruited the drivers — to which those drivers are fully available for an indefinite period, which exercise effective control over the drivers and which actually bear the wage costs — must be regarded as the 'employers' for the purposes of applying EU rules on the coordination of social security systems.

18. AFMB disputes that assessment, maintaining in essence that AFMB must be regarded as the 'employer' on account of the employment contracts concluded with the drivers, under which the application of Cypriot law was expressly agreed upon, and arguing that, for this reason, Cypriot social security legislation must be held to be applicable.

19. Pursuant to several decisions delivered in July 2014, the RSVB found that the complaints made on behalf of AFMB against the decisions of October 2013 were unfounded.

20. By judgment of 25 March 2016, the Rechtbank Amsterdam (Court of First Instance, Amsterdam, Netherlands) dismissed as unfounded the actions brought on behalf of AFMB against the above decisions of July 2014.

21. The referring court, before which judicial proceedings are currently pending, is of the opinion that the resolution of the dispute in the main proceedings depends, inter alia, on the interpretation of the EU rules on the coordination of social security systems. It seeks to obtain clarification as to who constitutes the 'employer' of the drivers during the periods at issue — the transport undertakings established in the Netherlands or AFMB — and thus to determine the Member State whose social security legislation must apply.

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

'(1A) Must Article 14(2)(a) of [Regulation 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 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 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 cases 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 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?'

III. Procedure before the Court

23. The order for reference, dated 20 September 2018, was received at the Registry of the Court on 25 September 2018.

24. The parties to the main proceedings, the Netherlands, Czech, French, Cypriot, Hungarian, Austrian and United Kingdom Governments and the Commission submitted written observations within the period prescribed by Article 23 of the Statute of the Court of Justice.

25. At the hearing on 17 September 2019, oral argument was presented by the legal representatives of the parties to the main proceedings, the Netherlands, French, Cypriot and Austrian Governments and the Commission.

IV. Legal analysis

A. Preliminary remarks

1. The objectives and operation of the EU rules on the coordination of social security systems

26. In order to gain a better understanding of the questions referred by the referring court and the challenges facing the referring court in the main proceedings, it is necessary to recall, as a preliminary point, the objectives and operation of the EU rules on the coordination of social security systems.

27. It is clear from recitals 1 and 45 of Regulation No 883/2004, which modernised and simplified the rules contained in Regulation No 1408/71 while retaining the same objective as the latter, that Regulation No 883/2004 aims to coordinate the national social security systems of the Member States in order to guarantee that the right to free movement of persons can be exercised effectively and, thereby, contribute towards improving their standard of living and conditions of employment within the European Union. (12)

28. The provisions in Title II ('Determination of the legislation applicable') of those regulations, which include the provisions that the Court is called upon to interpret in the present case, constitute a complete and uniform system of conflict of laws rules, the aim of which is to ensure that workers moving within the European Union are subject to the social security scheme of only one Member State, in order to prevent the national legislation of more than one Member State from being applicable and to avoid the attendant complications of such a situation, but also to ensure that persons covered by those regulations are not left without social security cover because there is no legislation which is applicable to them. (13)

29. EU legislation concerning the coordination of social security systems therefore provides objective criteria for determining the national legislative provisions applicable to a worker in a cross-border situation. Article 11(3)(a) of Regulation No 883/2004 establishes the general principle of '*lex loci laboris*', under which a worker is to be subject to the legislation of the Member State in which he or she carries on his or her paid employment. That general principle aims to ensure that all employees working in the same country are covered by the same social security legislation and receive the same

social benefits. (14) Only in that way is it possible to prevent undesirable forms of wage cost competition and, consequently, pressure on national social security schemes.

30. Nevertheless, several exceptions to that principle apply in specific cases set out in the following provisions and, in particular, in Article 13(1)(a) of that regulation, from which it is apparent that a person who normally pursues an activity as an employed person in two or more Member States is to be subject to the legislation of the Member State of residence if he or she pursues a substantial part of his or her activity in that Member State. On the other hand, where that person does not pursue a substantial part of his or her activities in the Member State of residence, Article 13(1)(b) of that regulation provides for the application of the legislation of the Member State in which the registered office or place of business of the undertaking or employer is situated, if that person is an employee of an undertaking or employer.

31. It is apparent from the order for reference (15) that the national court considers that Article 13(1)(b) of Regulation No 883/2004 applies to the case in the main proceedings, on the ground that the drivers were normally employed in two or more EU or EFTA Member States. As the referring court points out, the drivers worked partly but not primarily in their country of residence, namely the Netherlands, and did not pursue there a substantial part of their activities to be taken into account. The referring court infers from this that a finding that the Netherlands legislation is applicable cannot be made by determining the country of residence, as provided for in Article 13(1)(a) of that regulation, but can only be made by determining the country of the employer's registered office, as provided for in Article 13(1)(b). The referring court explains that the status of employer is of decisive importance for the decision to be given in the main proceedings, since AFMB has its registered office in Cyprus. In my view, that assessment cannot be called into question, since it is for the national court to establish the facts of the case in the main proceedings and to apply to it the relevant EU provisions.

32. As the possible application of Article 13(1)(b) of Regulation No 883/2004 lies at the heart of the dispute in the main proceedings, it is necessary to examine that provision more closely. According to that provision, the connecting factor for determining the applicable national legislation is the registered office of the employer. In that context, I note that the legislature did not reproduce the wording of former Article 14(2)(a) of Regulation No 1408/71, which contained a specific provision applicable to travelling personnel working for an undertaking that, for hire, operates international transport services for passengers or goods by road, and which also advocated application of the national legislation of the Member State in which the employer had its registered office. I note that, despite that difference in wording, the two provisions have exactly the same aim. (16) It would seem that the legislature simply abandoned the more detailed wording of the provision previously in force, which referred to the specific case of international road transport, in favour of a provision worded in more general terms. The new provision is now worded in a manner which is sufficiently broad to include not only international road transport but also other types of paid employment carried on in two or more Member States. The referring court seems to have been aware of this, for which reason it referred to both provisions in formulating its first question. It follows from this that the facts of the case in the main proceedings are capable of falling within the scope of both provisions. Therefore, in principle, it seems to me possible to provide an interpretation common to both Article 14(2)(a) of Regulation No 1408/71 and Article 13(1)(b) Regulation No 883/2004.

2. The geographical and temporal application of Regulations No 1408/71 and No 883/2004 to the present case

33. Notwithstanding their identical legislative aim, it is necessary to consider the question of the geographical and temporal application of those two regulations, since some of the Member States that submitted observations expressed doubts as to the admissibility of Question 1A, which concerns the interpretation of Regulation No 1408/71.

34. As stated in the summary of the facts giving rise to the dispute in the main proceedings, it must be noted, first, that AFMB was incorporated on 10 May 2011 and, secondly, that the periods at issue, during which the drivers carried out their professional activity, extended from 1 October 2011 to 26 May 2015. In other words, all those events were subsequent to 1 May 2010, the date of the entry into force of Regulation No 883/2004 in the European Union. Accordingly, it seems at first sight necessary for that regulation alone to be applied to the case in the main proceedings.

35. However, I consider that the interpretation which must be given of Regulation No 883/2004 could also be useful to ensure a better understanding of Regulation No 1408/71, in particular as the latter remained in force for some time in the EFTA States, (17) where the drivers are presumed to have also worked during the periods at issue. The Court's common interpretation of the provisions of both regulations could provide useful guidance in other similar cases which fall within the scope of one of the two regulations, thus ensuring their uniform application in the territory of the European Union and the EFTA States. (18) It is against that background that Question 1A, which asks the Court also to give a ruling on the interpretation of Regulation No 1408/71, must be regarded as admissible.

36. In the light of the foregoing considerations, my analysis will focus in particular on the provisions of Regulation No 883/2004, with reference also to the corresponding provisions of Regulation No 1408/71, when this seems to me to be necessary. The comments set out below are relevant to the equivalent provisions in the two regulations. (19)

B. The first question referred

1. The need to develop criteria for determining the applicable national legislation

37. By its first question — to which it is necessary to provide a joint answer concerning the issues relating to the two regulations referred to in the question, for the reasons set out above — the referring court seeks to ascertain, essentially, who, for the purposes of Article 13(1)(b) of Regulation No 883/2004, (20) is the 'employer' of a heavy goods vehicle driver employed in the international road transport sector, where that driver is fully available to a transport undertaking which actually bears the wage costs and which exercises effective control over the person concerned, but the driver entered into his or her employment contract with another undertaking which pays his or her salary under an agreement concluded with the transport undertaking.

38. The concept of 'employer' is not defined by EU law. Nor do the regulations on the coordination of social security systems expressly refer to the law of the Member States

for the purpose of determining the meaning and scope of that concept. According to the settled case-law of the Court, it follows from the requirements both of the uniform application of EU law and of the principle of equality in such a situation that the concept in question must be given an autonomous and uniform interpretation throughout the European Union, (21) which must be sought taking into account the context of the provision in which that concept is used and the objective pursued by the coordination regulations. (22)

39. An autonomous interpretation seems to me all the more necessary since the concept of 'employer' is the connecting factor for application of the conflict of laws rule seeking to determine a single State's social security legislation as the applicable law. That objective is clearly not achieved if differences between the legislations of the Member States result in distinct legal schemes.

40. The referring court seeks guidance as to whether it is appropriate to rely on the contract of employment alone or on a number of objective criteria, or whether it is appropriate to use a combination of both elements in order to determine who has the status of 'employer' in circumstances such as those in the main proceedings. In my view, relying solely on the existence of a contractual relationship would be tantamount to the adoption of an excessively formalistic approach. There are legitimate reasons for rejecting such an approach, in particular the risk of circumvention of the protection afforded by the coordination regulations through artificial legal arrangements. It would therefore seem more appropriate to opt for an approach that takes due account of the reality of workers in the single market and the complexity of working relationships today. In fact, the diversity of conceivable legal arrangements under private law between a person requesting a service and the service provider, which can in turn itself provide the service, use a subcontractor or posted worker or employ other means to fulfil its contractual obligations, requires a more flexible analytical approach. That said, identifying the 'employer' on the basis of a case-by-case examination of all relevant circumstances and by using objective criteria seems to me to be the most appropriate approach. That approach should prevent the fundamental freedoms of the single market from being exploited or contributing to the achievement of circumvention.

2. Analysis of the case-law of the Court

41. The Court's case-law on social security, employment relationships and private international law seems to me to offer many points of reference supporting a differentiated approach. In the following considerations, I shall attempt to identify some useful criteria for carrying out that case-by-case examination.

(a) Elements characterising an employment relationship

42. I would like to point out that, in the case-law, more attention seems to have been paid to the role of 'worker' than to the role of 'employer'. There are relatively few elements in the case-law from which it is possible to infer the nature of an employer's role. Of course, it is clearly impossible to analyse the rights and obligations of an employee, while disregarding those of the employer, since both are ultimately connected by an employment relationship.

43. Therefore, in order to clarify the role of the 'employer', it is first necessary to refer to the general definition of employment relationship in the case-law. According to settled case-law, the essential feature of an employment relationship is that for a certain period of time one person performs services for and under the direction of another person in return for which he or she receives remuneration. (23) That said, it is necessary to identify the criteria which the Court has developed to determine whether there exists a hierarchical relationship between a worker and employer, which characterises an employment relationship in the three fields of EU law referred to above.

(b) Criteria from the case-law on social security

44. It is clear from the case-law on social security that the worker's actual employment situation is decisive, and not only the contractual relationship. All the relevant objective circumstances of the case are taken into account to determine whether there exists a hierarchical relationship characterising an employment relationship.

45. According to settled case-law, the application of the system of conflict rules for coordination regulations depends solely on the objective situation of the worker as evidenced by the information in the file as a whole. (24) More specifically, in its judgment of 4 October 2012 in *Format Urządzenia i Montaże Przemysłowe*, (25) the Court indicated how to proceed in determining the applicable national social security legislation where an employee has worked in two or more Member States. In that case, the Court ruled that, where appropriate, it is also necessary to '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 implemented in practice, the circumstances surrounding the conclusion of those contracts and, more generally, the characteristics and conditions of the work performed by the company concerned, in so far as those factors may throw light on the actual nature of the work in question'. The Court added that 'whatever the wording of those contractual documents, [the national authority called upon to carry out the relevant examination is required] to base its findings on the employed person's actual situation'. (26)

46. The case which gave rise to the judgment in *Manpower*, (27) concerning the posting of workers by a temporary employment agency, seems to me to be of particular relevance in the present context, in so far as the Court laid down useful criteria therein. It may be inferred from that judgment that the party responsible for engaging the worker, paying the salary and sanctioning and dismissing him or her may be regarded as an 'employer' within the meaning of the coordination regulations. (28) This shows that the Court takes into account the actual employment situation and does not rely solely on the employment contract.

(c) Criteria from the case-law on employment relationships

47. An analysis of the case-law on employment relationships also suggests that all the relevant objective circumstances of the case must be used in determining the identity of the employer. From that point of view, the party with whom the worker has formally concluded a contract of employment need not be the 'employer'.

48. In its judgment in *Danosa*, (29) which concerned the interpretation of Directive 92/85/EEC, (30) the Court first recalled the essential characteristic of an employment

relationship, already referred to above, (31) consisting in the hierarchical relationship under which the worker is subject to supervision, (32) and then went on to specify that 'the legal characterisation under national law and the form of that relationship, as well as the nature of the legal relationship between those two persons, [are] not … decisive in that regard'. (33)

49. It is also important to refer to the judgment in *Albron Catering*, (34) concerning the interpretation of Directive 2001/23/EC, (35) in which the Court held that the undertaking to which the workers are actually posted may also be the employer 'despite the absence of contractual relations with those staff'. (36)

50. Lastly, as regards the hierarchical relationship characterising any employment relationship, it is necessary to cite the judgment in *Haralambidis*, (37) which concerned the question whether the President of a Port Authority was a worker within the meaning of Article 45(1) TFEU. The Court replied in the affirmative, holding that the Italian Minister for Infrastructure and Transport had powers of management and supervision and, where appropriate, could sanction that President. (38) As regards the legal nature of the relationship between those two persons, the Court recalled its established case-law, according to which 'the public law or private law nature of the legal relationship of the employer and employee is of no consequence'. (39)

(d) Criteria from the case-law on private international law

51. The Court also favoured an assessment of all the circumstances of a particular case when interpreting conflict of laws rules in the field of private law. According to that case-law, in order to determine in practice the place where the employee fulfils his or her obligations towards his or her employer, it is necessary for the national court to have regard to a set of indicia.

52. In the judgment in *Voogsgeerd*, (40) which concerned the interpretation of the provisions of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 ('the Rome Convention'), (41) the Court held that the national court must, in assessing whether an undertaking is actually the employer, take into consideration 'all the objective factors making it possible to establish that there exists a real situation different from that which appears from the terms of the contract'. (42)

53. In its judgment in *Koelzsch*, (43) which also related to the interpretation of the provisions of the Rome Convention and concerned, as in the present case, work in the transport sector, the Court held that the national court must take account of all the factors which characterise the activity of the employee, and in particular 'in which State is situated the place from which the employee carries out his transport tasks, receives instructions concerning his tasks and organises his work, and the place where his work tools are situated'. (44) The national court 'must also determine the places where the transport is principally carried out, where the goods are unloaded and the place to which the employee returns after completion of his tasks'. (45)

54. The judgment of 14 September 2017 in *Nogueira and Others*, (46) the aim of which was to interpret Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (47) in the passenger air transport sector, is also relevant for the purpose of

determining the place where the employee fulfils his or her obligations towards his or her employer. In that judgment, the Court reiterated the validity of the above-mentioned indicia, which apply to employment relationships in the transport sector and which must be taken into consideration by the national courts. (48) According to the Court, that circumstantial method 'makes it possible … to reflect the true nature of legal relationships, in that it must take account of all the factors which characterise the activity of the employee'. (49) It is important to highlight in that context the Court's warning against the risk of the connecting factor for applying EU law 'being exploited or contributing to the achievement of circumvention strategies'. (50)

55. More recently, in its judgment of 11 April 2019 in *Bosworth and Hurley*, (51) the Court was required to interpreted the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (52) and in particular the concept of 'worker'. After referring to the hierarchical relationship which underlies any employment relationship, as well as the need to establish whether such a hierarchical relationship exists in each particular case, on the basis of all the factors and circumstances characterising the relationship between the parties, the Court held that 'the absence of any formal contract does not preclude the existence of an employment relationship' within the meaning of the relevant provisions of that convention. (53)

3. Application of the abovementioned criteria to the circumstances of the case in the main proceedings

56. Having identified a series of useful criteria for determining employer status in an employment relationship, it is then appropriate to apply them to the circumstances of the disputes in the main proceedings. Although it is for the referring court to carry out the necessary verification of the facts and to apply, where appropriate, Article 13(1)(b) of Regulation No 883/2004 (54) to the dispute before it, the fact remains that the Court is required to interpret EU law in the light of the factual and legal situation as described by the referring court, in order to provide that court with such guidance as will assist it in resolving the dispute before it. (55)

57. I should first point out that the contractual relationship, under which AFMB is formally the drivers' employer, is only indicative in nature. Accordingly, it seems legitimate to call into question the status of 'employer' on which AFMB relies — at least as regards the social security coordination rules — in the event that such status does not reflect the reality of the employment relationship, which must be ascertained below on the basis of the facts of the case.

58. As the referring court states, (56) the persons concerned worked both before and during the periods in question as drivers employed in the international road transport sector and drove only heavy goods vehicles operated on behalf of and at the risk of the transport undertakings established in the Netherlands. During the periods in question, those drivers were in fact, for an indefinite period, fully available to those transport undertakings, which had employed the majority of the drivers before the periods in question.

59. As the referring court points out, (57) little or nothing had changed in the relationship between the workers and their original employers established in the Netherlands, in terms of the daily course of business, after AFMB's formal involvement

in October 2011. The original employers continued in practice to determine the workers' recruitment, basic working conditions, activities and dismissal. It appears that AFMB did not itself engage the drivers, but instead that the transport undertakings established in the Netherlands placed their workers under the supervision of AFMB. Moreover, the referring court refers, (58) as an example of the power of supervision of the transport undertakings established in the Netherlands over the basic working conditions, to AFMB's practice of immediately dismissing drivers who were no longer needed by those undertakings.

60. As far as wage costs are concerned, it should be noted that even though AFMB paid wages directly to the drivers, those wages were apparently financed by the undertakings established in the Netherlands which, according to the information provided by the referring court, (59) were liable to pay certain amounts to AFMB under the agreements concluded between the undertakings and AFMB. That said, even if AFMB cannot be regarded as simply a 'letterbox' company, it is possible nonetheless to regard it as a kind of payroll service, but not as an actual employer. In its description of the factual background, (60) the referring court goes so far as to say that AFMB was virtually a 'paper' employer only. Such information, together with the wording of the first question, suggests that the power of management and supervision over the drivers lay with the undertakings established in the Netherlands.

61. In the light of the foregoing, and without prejudice to the factual assessment which it is for the referring court to carry out, I consider that only the transport undertakings established in the Netherlands should be regarded as the 'employers' of the drivers in question in the main proceedings, for the purposes of Article 13(1)(b) of Regulation No 883/2004.

62. It follows that the social security legislation applicable to a situation such as that in the main proceedings is that of the State of the transport undertaking 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, that is to say the Netherlands in the present case.

4. Answer to the first question referred

63. In the light of those considerations, the answer to the first question referred must be that Article 13(1)(b)(i) of Regulation No 883/2004 must be interpreted as meaning that, in circumstances such as those of the disputes in the main proceedings, the employer of heavy goods vehicle drivers employed in international road transport is deemed to be the transport undertaking 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, subject to findings of fact which it is for the referring court to make.

C. The second question referred

64. By its second question, raised in the alternative, the referring court seeks to ascertain, in essence, whether, if AFMB is to be regarded as the 'employer', the specific conditions in the event of a posting of workers, for the purposes of Article 14(1)(a) of Regulation No 1408/71 and Article 12 of Regulation No 883/2004, apply by analogy,

wholly or in part, to the disputes in the main proceedings. The reference to a possible analogy is explained by the fact that it is not disputed by the parties to the main proceedings that those provisions do not apply in the main proceedings.

65. Since it is proposed that the first question be answered to the effect that only the undertakings established in the Netherlands should be regarded as the 'employer', there is no need to take a view on the second question. In the event that the Court should conclude otherwise, I consider that it is necessary to answer that question in the negative, for the reasons that I shall set out below.

66. As in my analysis of the first question, I shall focus on the interpretation of Article 12 of Regulation No 883/2004, since it contains, in essence, the same provision as Article 14(1)(a) of Regulation No 1408/71, despite the slight differences in their wording. (61)

67. In my view, Article 12 of Regulation No 883/2004 cannot apply because, in the cases in the main proceedings, the issue is not a 'posting' in the strict sense, but rather AFMB's 'making available' of workers, for an indefinite period, to the undertakings established in the Netherlands.

68. The need clearly to make that distinction becomes evident in the light of the interpretation of the concept of 'posting' in the case-law. In its judgment in *FTS*, (62) the Court held that exceptions to the State-of-employment principle, laid down by the provisions referred to above, can be applied in the event of the involvement of an undertaking providing temporary personnel only if two conditions are fulfilled: under the first condition, which concerns the necessary link between the undertaking posting the worker to a Member State other than that in which it is established and the worker so posted, a direct link must be maintained between that undertaking and that worker during the period of the worker's posting. The second condition, which relates to the relationship between the undertaking and the Member State in which it is established, requires that the latter habitually carries out significant activities in the territory of that Member State. (63)

69. In order to establish the existence of such a direct link, it is necessary, according to the case-law, (64) to deduce from all the circumstances that the worker is under the authority of that undertaking. That condition necessarily implies that the undertaking providing temporary personnel must have powers of management and supervision and, where appropriate, be able to sanction the worker. In other words, the undertaking providing temporary personnel must exercise the powers typically reserved to the 'employer'. It has already been established in the context of the answer to the first question that, in the main proceedings, that role was performed by the transport undertakings established in the Netherlands. (65) Moreover, it is apparent from the file that the relationship between the drivers and AFMB was essentially limited to the payment of wages and payment of social security contributions to the Cypriot authorities. Moreover, it should be noted that that information was not refuted by AFMB in its observations. Consequently, the first condition does not seem to me to be satisfied in the present case.

70. As regards the second condition, it must first be stated — as have several participants in the proceedings — that this is not provided for by Article 13(1)(b)(i) of

Regulation No 883/2004. (66) The connecting factor provided for in that provision is simply the place of establishment of the employer. That said, it is in my view problematic to introduce by means of interpretation an additional condition requiring 'significant activities in the Member State in which [the undertaking] is established', despite the unambiguous wording of those provisions. It should be borne in mind that the condition in question was originally introduced through the case-law concerning a separate provision, namely Article 14(1)(a) of Regulation No 1408/71, (67) which corresponds to Article 12(1) of Regulation No 883/2004 currently in force. To apply it to another provision without taking account of its specific nature would be tantamount to disregarding the limits of the scope of the provision provided for in Article 13(1)(b)(i) of Regulation No 883/2004. In addition, a proposal for a legislative amendment to that effect was recently rejected by the Council, as the Commission has pointed out in its observations. (68) Irrespective of any doubts raised by use of that approach in practice, I note that the referring court itself is having difficulty in applying the proposed 'substantial activity' condition, in the light of the absence of information in that respect. It is apparent from the order for reference that the referring court is unable to deduce from the documents in the file whether or not AFMB fulfils that condition. (69) Consequently, I do not see how that approach could be relevant to the resolution of the present disputes in the main proceedings.

71. For the reasons set out above, I propose that the second question should be answered in the negative.

D. The third question referred

1. The concept of abuse of law according to the case-law

72. By its third question, raised in the further alternative, the referring court seeks to ascertain whether, in the event that AFMB should be regarded as the 'employer' and the specific conditions for the posting of workers do not apply, circumstances such as those of the disputes in the main proceedings amount to an abuse of EU law. (70)

73. In view of the proposed answers to the first and second questions, I shall deal with that third question only for the sake of completeness, in the event that the Court provides other answers to the first two questions.

74. According to settled case-law, European Union law cannot be relied on for abusive or fraudulent ends. (71) The same applies to provisions of EU legal acts which have been incorporated into the EEA Agreement (72) and into bilateral agreements with the Swiss Confederation. A finding of an abusive practice requires a combination of objective and subjective elements. (73) First, with regard to the objective element, such a finding requires that it must be apparent from a combination of objective circumstances that, despite formal observance of the conditions laid down by EU rules, the purpose of those rules has not been achieved. (74) Secondly, such a finding requires a subjective element, namely that it must be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain an undue advantage. (75) The prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of an advantage.

2. Application of the criteria established in the case-law to the present case

75. It is apparent from a reading of the order for reference (76) that a critical eye should be cast over the legal arrangement put in place by AFMB and its contractual partners, that is to say the road transport undertakings established outside Cyprus. More specifically, the referring court has doubts as to the compatibility with EU law of a legal arrangement which allows a company to choose a particular registered office with the aim, in essence, of making its personnel legally subject to the social security legislation of a Member State of the European Union or EFTA in which the social security contributions payable are relatively low.

76. Before answering the question referred, it should be recalled that the Court cannot itself rule on whether conduct must be regarded as abusive. It is for the national court to verify, in accordance with the rules of evidence of national law, whether the factors constituting an abusive practice are present in the case before it. (77) The Court, when giving a preliminary ruling, may however provide clarification designed to give the national court guidance on the application of EU law. (78)

(a) Verification of the objective element

77. Having carried out a thorough examination of the factual background, I consider as regards the objective element that, for the purposes of the application of Article 13(1)(b)(i) of Regulation No 883/2004, AFMB fulfils only in a formal manner the conditions attached to the status of 'employer', in the disputes in the main proceedings. As stated above, (79) AFMB was only accorded that status through a sophisticated legal arrangement governed by private law, while its contractual partners exercised the effective control over employees which is normally the prerogative of the employer in the context of an employment relationship. (80) In addition, AFMB was able to avail itself of the fundamental freedoms of the internal market in order to establish itself in Cyprus and, from there, to provide services — concerning the management of payroll and social security contributions — to undertakings established in the Netherlands. It is as a result of all those factors that AFMB managed formally to present itself as the 'employer' before the competent social security authorities and apparently to obtain recognition as such in certain Member States. (81)

78. In my view, the fact that the competent national authorities recognise, in some circumstances, AFMB as an 'employer' — and consequently issue A1 certificates on the basis of the information set out in the case files in the main proceedings — constitutes an incorrect application of Article 13(1)(b)(i) of Regulation No 883/2004, since it would lead to the application of Cypriot and not Netherlands social legislation to the drivers — in spite of the fact that the actual employers are established in the Netherlands. (82) Such a result would be contrary to the legislative aim underlying the conflict of laws rules, which is to allow national authorities to establish without difficulty, that is to say on the basis of objective, clear and predetermined criteria, the worker's actual employer and the location of its registered office or place of business and, in doing so, ultimately to determine the social security system applicable in a given case. Moreover, I note that, notwithstanding the relative simplicity of the conflict of laws rules, the gap between appearances and the actual situation in the present case may lead to confusion on the part of the competent national authorities and must, therefore, be considered likely to prejudice the proper functioning of the mechanism for the coordination of social security systems established by the EU legislature.

(b) Verification of the subjective element

79. As regards the subjective element, I note that the Court has held that, in order to establish the existence of the second element, which relates to the intention of operators, account may be taken, in particular, of the purely artificial nature of the transactions concerned. (83) The subjective element seems to me to be apparent, in this case, from the clear intention of AFMB and its contractual partners to circumvent Netherlands social security legislation for the purpose of optimising their economic activities. (84) As stated above, (85) most of the drivers in question were employees settled in the Netherlands before being employed by AFMB. The formal engagement by AFMB appears to have had the aim of excluding them from the application of Netherlands legislation, which would normally have been applicable, on the basis of Article 13(1)(b)(i) of the Regulation No 883/2004.

80. As the Court has pointed out in its case-law, (86) the conflict rules laid down in the coordination regulations are mandatory for the Member States and it cannot be accepted that insured persons falling within the scope of those rules can counteract their effects by being able to elect to withdraw from their application. The mandatory nature of those rules makes it possible to ensure the proper functioning of the coordination mechanism established. That said, it seems essential that other operators, including employers, who are normally required to pay social security contributions, also respect their application.

81. Subject to the assessment to be made by the referring court, the implementation of that legal arrangement appears to have resulted in a deterioration in the drivers' social protection, while the former employers appear to have benefited in terms of wage costs. This seems to have been precisely the objective of AFMB, in the light of various testimonials by its clients, referred to by the referring court, (87) which have been published on AFMB's website and in which those clients boast about those advantages, that is to say about having made savings in wage costs while maintaining effective control over the drivers.

82. Accordingly, I am inclined to conclude that there has been an abuse of law on the basis of the information available.

83. If the referring court determines that the two elements characterising an abuse of law are present, it is bound to draw from this the appropriate conclusions, by refusing to apply Article 13(1)(b)(i) of Regulation (EC) No 883/2004 (88) to the disputes in the main proceedings. AFMB therefore cannot rely on its alleged status of employer in order to request that the RSVB declare the Cypriot legislation applicable to the drivers in question. (89)

3. Answer to the third question

84. In the light of all those considerations, the answer to the third question must be that the facts and circumstances set out in the order for reference establish the existence of an abuse of law. Consequently, AFMB cannot rely on Article 13(1)(b) of Regulation No 883/2004 to establish a connection to Cypriot social security law.

V. Conclusion

85. In the light of the foregoing considerations, I propose that the Court should answer as follows the questions referred by the Centrale Raad van Beroep (Higher Social Security and Civil Service Court, Netherlands):

(1) 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 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, 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, in circumstances such as those of the disputes in the main proceedings, the employer of heavy goods vehicle drivers employed in international road transport is deemed to be the transport undertaking 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, subject to the verification of the facts which it is for the referring court to carry out.

(2) The specific conditions under which employers, such as temporary employment agencies and other intermediaries, can invoke the exceptions to the State-of-employment principle as laid down in Article 14(1)(a) of Regulation No 1408/71 and Article 12 of Regulation No 883/2004 do not apply by analogy for the purposes of the application of Article 14(2)(a) of Regulation No 1408/71 and Article 13(1)(b) of Regulation No 883/2004.

(3) The facts and circumstances set out in the order for reference establish the existence of an abuse of law. Consequently, AFMB cannot rely on Article 14(2)(a) of Regulation No 1408/71 or Article 13(1)(b) of Regulation No 883/2004 to establish a connection to Cypriot social security law.

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1 Original language: French.

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2 OJ 1998 L 209, p. 1.

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3 OJ 2004 L 166, p. 1.

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4 OJ 2012 L 149, p. 4

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5 Judgment of 14 October 2010, *van Delft and Others* (C-345/09, EU:C:2010:610, paragraph 84).

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6 Agreement on the European Economic Area (OJ 1994 L 1, p. 3). Regulation No 1408/71 formed part of that agreement at the time of its signature and entered into force with that agreement on 1 January 1994.

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7 Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons (OJ 2002 L 114, p. 6).

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8 For the sake of simplicity, the term 'Member State' as used in this Opinion must be understood to include, in addition to the Member States of the European Union, the EEA States and the Swiss Confederation.

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9 Regulation No 883/2004 was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 76/2011 of 1 July 2011 amending Annex VI (Social Security) and Protocol 37 to the EEA Agreement (OJ 2011 L 262, p. 33). It has been applicable to Iceland, Liechtenstein and Norway since 1 June 2012.

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10 Regulation No 883/2004 was incorporated into the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, by Decision No 1/2012 of 31 March 2012 of the Joint Committee established under the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, replacing Annex II to that Agreement on the coordination of social security schemes (OJ 2012 L 103, p. 51). It has been applicable to the Swiss Confederation since 1 April 2012.

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11 The 'A1 certificate' is a document issued by the competent institution of a Member State under Regulation No 883/2004 (formerly known as the 'E101 certificate' under Regulation No 1408/71), which certifies that a worker moving within the European Union is covered by the social security scheme of that Member State. It is helpful in order to prove that social security contributions are paid in another Member State of the European Union, for example for posted workers or persons working in several Member States at the same time.

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12 Judgment of 13 July 2017, *Szoja* (C-89/16, EU:C:2017:538, paragraph 34).

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13 See, to that effect, judgment of 9 March 2006, *Piatkowski* (C-493/04, EU:C:2006:167, paragraph 21).

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14 Judgment of 6 September 2018, *Alpenrind and Others* (C-527/16, EU:C:2018:669, paragraphs 97 and 98).

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15 See paragraph 7.1.3 of the order for reference.

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16 As Advocate General Bot stated in his Opinion in *Chain* (C-189/14, not published, EU:C:2015:345, point 25), the wording of Article 13(1)(b) of Regulation No 883/2004 has not undergone any fundamental changes.

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17 Until 31 May 2012 in Iceland, Liechtenstein and Norway and until 31 March 2012 in Switzerland.

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18 Concerning Iceland, Liechtenstein and Norway, as the Court has stated in its case-law, the Court's jurisdiction to interpret the EEA Agreement under Article 267 TFEU applies solely with regard to the European Union, whereas the EFTA Court has jurisdiction to rule on the interpretation of the EEA Agreement in the EFTA States pursuant to Article 108(2) of that agreement and Article 34 of the EFTA Surveillance Agreement (see judgment of 15 June 1999, *Andersson and Wåkerås-Andersson*, C-321/97, EU:C:1999:307, paragraphs 28 and 29). Notwithstanding that division of jurisdiction, which reflects the institutional structure of the 'two pillars' of the EEA — which are the European Union and EFTA — a judicial dialogue has been established, which contributes to uniformity in the interpretation and application of common legal acts (see the Opinion of Advocate General Trstenjak in *Marques Almeida*, C-300/10, EU:C:2012:414, footnote 25). Concerning Switzerland, parallelism of institutions also exists, in the sense that the Court's jurisdiction to interpret bilateral agreements under Article 267 TFEU is valid only for the European Union, whereas the courts of the Swiss Confederation and, in the last instance the Federal Court, have jurisdiction in Switzerland (see judgment of 6 October 2011, *Graf and Engel*, C-506/10, EU:C:2011:643). Nevertheless, the Federal Court takes into account, in particular in the field of free movement of persons, the relevant case-law of the Court. Therefore, it cannot be excluded that the EFTA Court and the Swiss courts will in the future be called upon to contemplate applying the case-law of the Court arising from the present case to the social coordination regulations which are incorporated into the EEA Agreement and to the bilateral agreement on free movement of persons.

19 With respect to the Court's practice of reformulating questions referred for a preliminary ruling in the light of the applicability *ratione temporis* of EU law in order to give a useful answer to the national court, see the judgments of 14 September 2017, *Delgado Mendes* (C-503/16, EU:C:2017:681, paragraphs 31 and 32), and of 25 October 2018, *Roche Lietuva* (C-413/17, EU:C:2018:865, paragraphs 17 to 20).

20 Provision equivalent to that of Article 14(2)(a) of Regulation No 1408/71, for the purposes of the legal analysis.

21 See, inter alia, judgment of 18 October 2016, *Nikiforidis* (C-135/15, EU:C:2016:774, paragraph 28 and the case-law cited).

22 See judgment of 6 September 2018, *Alpenrind and Others* (C-527/16, EU:C:2018:669, paragraphs 88 to 98).

23 Judgment of 4 December 2014, *FNV Kunsten Informatie en Media* (C-413/13, EU:C:2014:2411, paragraph 34).

24 See judgments of 14 October 2010, *van Delft and Others* (C-345/09, EU:C:2010:2010, paragraph 52 and the case-law cited), and of 16 May 2013, *Wencel* (C-589/10, EU:C:2013:303, paragraph 52).

25 C-115/11, EU:C:2012:606.

26 Judgment of 4 October 2012, *Format Urządzenia i Montaże Przemysłowe* (C-115/11, EU:C:2012:606, paragraphs 45 and 46).

27 Judgment of 17 December 1970 (35/70, EU:C:1970:120).

28 Judgment of 17 December 1970, *Manpower* (35/70, EU:C:1970:120, paragraphs 17 and 18).

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29 Judgment of 11 November 2010 (C-232/09, EU:C:2010:674).

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30 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (OJ 1992 L 348, p. 1).

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31 See point 43 of this Opinion.

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32 Judgment of 11 November 2010, *Danosa* (C-232/09, EU:C:2010:674, paragraphs 46 and 47).

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33 Judgment of 11 November 2010, *Danosa* (C-232/09, EU:C:2010:674, paragraphs 39 and 40).

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34 Judgment of 21 October 2010 (C-242/09, EU:C:2010:625).

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35 Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16).

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36 Judgment of 21 October 2010, *Albron Catering* (C-242/09, EU:C:2010:625, paragraphs 21 and 31).

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37 Judgment of 10 September 2014 (C-270/13, EU:C:2014:2185).

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38 Judgment of 10 September 2014, *Haralambidis* (C-270/13, EU:C:2014:2185, paragraph 30).

39 Judgment of 10 September 2014, *Haralambidis* (C-270/13, EU:C:2014:2185, paragraph 40).

40 Judgment of 15 December 2011 (C-384/10, EU:C:2011:842).

41 OJ 1980 L 266, p. 1.

42 Judgment of 15 December 2011, *Voogsgeerd* (C-384/10, EU:C:2011:842, paragraph 62).

43 Judgment of 15 March 2011 (C-29/10, EU:C:2011:151).

44 Judgment of 15 March 2011, *Koelzsch* (C-29/10, EU:C:2011:151, paragraph 49).

45 Judgment of 15 March 2011, *Koelzsch* (C-29/10, EU:C:2011:151, paragraph 49).

46 C-168/16 and C-169/16, EU:C:2017:688.

47 OJ 2001 L 12, p. 1.

48 Judgment of 14 September 2017, *Nogueira and Others* (C-168/16 and C-169/16, EU:C:2017:688, paragraphs 59 and 60).

49 Judgment of 14 September 2017, *Nogueira and Others* (C-168/16 and C-169/16, EU:C:2017:688, paragraph 62).

50 Judgment of 14 September 2017, *Nogueira and Others* (C-168/16 and C-169/16, EU:C:2017:688, paragraph 62).

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51 C-603/17, EU:C:2019:310.

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52 Convention signed at Lugano on 30 October 2007, the conclusion of which was approved on behalf of the Community by Council Decision 2009/430/EC of 27 November 2008 (OJ 2009 L 147, p. 1).

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53 Judgment of 11 April 2019, *Bosworth and Hurley* (C-603/17, EU:C:2019:310, paragraph 27)

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54 Or, where appropriate, Article 14(2)(a) of Regulation No 1408/71, depending on the territorial and temporal application of the coordination rules in social matters.

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55 Judgment of 9 November 2006, *Chateignier* (C-346/05, EU:C:2006:711, paragraph 22).

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56 See paragraph 5.2.2 of the order for reference.

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57 See paragraph 5.2.6 of the order for reference.

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58 See paragraph 5.2.6 of the order for reference.

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59 See paragraph 5.2.3 of the order for reference.

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60 See paragraph 7.1.5 of the order for reference.

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61 See point 36 of this Opinion.

62 Judgment of 10 February 2000 (C-202/97, EU:C:2000:75).

63 Judgments of 10 February 2000, *FTS* (C-202/97, EU:C:2000:75, paragraphs 21 to 24), and of 6 February 2018, *Altun and Others* (C-359/16, EU:C:2018:63, paragraph 34).

64 Judgment of 10 February 2000, *FTS* (C-202/97, EU:C:2000:75, paragraph 24).

65 See point 61 of this Opinion.

66 Nor in Article 14(2)(a) of Regulation No 1408/71, the equivalent provision.

67 Judgment of 10 February 2000, *FTS* (C-202/97, EU:C:2000:75, paragraph 40).

68 In 2016, the Commission suggested, in its proposal for a regulation amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (COM (2016) 815), that the existing Article 14(5a) of Regulation (EC) No 987/2009 should be replaced with the following subparagraph: '5a. For the purpose of the application of Title II of the basic Regulation, "registered office or place of business" shall refer to the registered office or place of business where the essential decisions of the undertaking are adopted and where the functions of its central administration are carried out, *provided the undertaking performs a substantial activity in that Member State*.' Emphasis added. The Council of Ministers, however, rejected the introduction of the 'substantial activity' criterion.

69 See paragraph 7.2.5 of the order for reference.

70 The referring court refers to 'EFTA law' in its question. Nevertheless, it is likely that the referring court is actually referring to EEA law and the Association Agreement with the Swiss Confederation. Accordingly, that question needs to be reformulated.

71 See judgments of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 68), and of 28 July 2016, *Kratzer* (C-423/15, EU:C:2016:604, paragraph 37).

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72 See the judgments of the EFTA Court of 13 September 2017, *Yara International ASA* (E-15/16, [2017] EFTA Ct. Rep. 434, paragraph 49), from which it is clear that the prohibition of abuse of rights constitutes an 'essential feature of EEA law', and of 3 October 2012, *Arcade Drilling* (E-15/11, [2012] EFTA Ct. Rep. 676, paragraphs 88 and 89), in which the EFTA Court relies on the case-law of the Court.

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73 See judgment of 28 July 2016, *Kratzer* (C-423/15, EU:C:2016:604, paragraph 38).

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74 See judgment of 28 July 2016, *Kratzer* (C-423/15, EU:C:2016:604, paragraph 39 and the case-law cited).

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75 See judgment of 28 July 2016, *Kratzer* (C-423/15, EU:C:2016:604, paragraph 40 and the case-law cited).

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76 See paragraph 7.3 of the order for reference.

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77 See judgment of 28 July 2016, *Kratzer* (C-423/15, EU:C:2016:604, paragraphs 41 and 42 and the case-law cited).

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78 See judgments of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 34), and of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881 paragraph 59).

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79 See points 57 to 61 of this Opinion.

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80 See, in that context, judgment of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 50), in which the Court rejects abusive practices, referring, as an example, to the conclusion of agreements constituting a wholly artificial arrangement intended to conceal the identity of the provider of a service.

81 According to the information provided by AFMB, Member States such as Belgium, Germany, Spain, Poland and Romania have regarded AFMB as an employer and considered, on the basis of its registered office, the Cypriot social security legislation to be applicable to their respective residents.

82 As the Court stated in the judgment of 6 February 2018, *Altun and Others* (C-359/16, EU:C:2018:63, paragraph 51), the objective factor consists in the fact that the conditions for obtaining and relying on an E101 certificate are not met.

83 See judgment of 28 July 2016, *Kratzer* (C-423/15, EU:C:2016:604, paragraphs 41 and 42 and the case-law cited).

84 See judgment of 6 February. *Altun and Others* (C-359/16, EU:C:2018:63, paragraph 52), from which it is clear that the subjective element is normally present as soon as the party concerned has the intention to evade or circumvent the conditions for the issue of an E101 certificate, with a view to obtaining the advantage attached to it.

85 See point 58 of this Opinion.

86 See judgments of 14 October 2010, *van Delft and Others* (C-345/09, EU:C:2010:610), and of 13 July 2017, *Szoja* (C-89/16, EU:C:2017:538, paragraph 42).

87 See paragraph 5.2.9 of the order for reference.

88 The same applies as regards Article 14(2)(a) of Regulation No 1408/71, depending on the territorial and temporal application of the coordination rules in social matters.

89 That consequence arises, in my view, from the reasoning of Advocate General Poiares Maduro in his Opinion in *Halifax and Others* (C-255/02, EU:C:2005:200, points 68, 71 and 97), according to which it is prohibited to rely on a legal provision conferring a right for the achievement of an improper advantage, manifestly contrary to the objective of that provision.

In practice, this means that the legal provision in question must be interpreted, contrary to its literal meaning, as not in fact conferring the right.