

Anonymised version

Translation

C-906/19 — 1

Case C-906/19

Request for a preliminary ruling

Date lodged:

11 December 2019

Referring court:

Cour de Cassation (France)

Date of the decision to refer:

7 May 2019

Appellant:

FO

Defendant:

Ministère public

...

FRENCH REPUBLIC

IN THE NAME OF THE FRENCH PEOPLE

THE COURT OF CASSATION, CRIMINAL CHAMBER, gave the following judgment at a public hearing ...on 7 May 2019.

...

The Court of Cassation hereby gives a ruling on the appeal brought by:

- FO,

against the judgment of the Versailles Court of Appeal (18th chamber) dated 2 May 2018, by which he was fined EUR 10 125 for infringements of the legislation concerning working conditions in the road transport sector.

...

The dispute

1. ... [Or. 2] ...[Citation conventions used in the judgment]
2. On 2 April 2013, in Versailles, officers of the division for preventing and penalising road traffic offences carried out a roadside check of a coach operated by Omnibusunternehmen FO, a company whose registered office is in Segenthal, Germany.
3. In the course of that check, the officers asked the driver to produce records of his activity for the current day and the previous 28 days, pursuant to Article 26 of [Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 ('Regulation No 561/2006')]. They noted that from 5 to 9 March, and then from 14 to 16 March — a total of nine days — the vehicle had been used without the driver card required by Article 1 of Decree No 2006-203 of 10 March 2006, which was then in force (Art. R. 3313-19 of the Transport Code), having been inserted in the tachograph (the French term for which has changed since the entry into force of [Regulation (EU) No 165/2014 of the European Parliament and of the Council of 4 February 2014 on tachographs in road transport, repealing Council Regulation (EEC) No 3821/85 on recording equipment in road transport and amending Regulation (EC) No 561/2006 of the European Parliament and of the Council on the harmonisation of certain social legislation relating to road transport] ('Regulation No 165/2014')).
4. Following those events, FO, the managing director of the company, was prosecuted under the first subparagraph of Article L. 3315-5 of the Transport Code for the offence of failing to insert the driver card into the vehicle's tachograph, which he was alleged to have committed in Versailles, on the nine occasions corresponding to the days referred to above.
5. The Criminal Court of Versailles found the allegations proved and fined FO EUR 10 125. The Court of Appeal of Versailles, hearing an appeal brought by FO and a cross-appeal brought by the ministère public (public prosecution service), upheld both conviction and sentence.
6. Before the Court of Appeal, FO argued that the French criminal courts did not have territorial jurisdiction to hear the matter, on the grounds that the offences with which he had been charged, although detected in France, had been committed

in Germany (the vehicle having been in Germany on the days on which he was accused of failing to ensure that the driver card was inserted in the recording equipment), and that neither French law (having regard to the criminal law principle of territoriality) or EU law (and more specifically [Article 19(2)] of Regulation No 561/2006, given that that provision does not refer to Regulation No 3821/85, which provides the basis for criminal proceedings) permitted the French authorities, having detected the offences, to prosecute the person who had committed them in circumstances where they had been committed in another EU Member State. **[Or. 3]**

7. In order to reject that argument, the judges held that the matters detected in the course of the roadside check fell within Article L. 3315-5 of the Transport Code, under which engaging in road transport with a driver card which is irregular or does not belong to the driver using it, or in circumstances where there is no driver card inserted in the vehicle's tachograph, is punishable by six months' imprisonment and a fine of EUR 3 750. They observed that that legislation had been enacted by way of implementation of Regulation No 3821/85.

8. The Court of Appeal added that Article 19(2) of Regulation No 561/2006 contains an express derogation from the principle of territoriality as regards prosecutions, permitting a Member State to impose penalties in respect of infringements of that regulation even where they have been committed on the territory of another Member State. Observing that the derogation relates expressly to 'this Regulation', they reasoned that that reference encompassed Article 19(1), which refers to Regulation No 3821/85.

9. On that basis, the judges concluded that Regulation No 561/2006, which takes precedence over national legislation, derogates from the principle of territoriality as regards prosecutions, and that that derogation applies not only to the provisions contained in the Regulation itself, but also to those it refers to, including that of Regulation No 3821/85.

10. They therefore rejected FO's plea of lack of jurisdiction.

11. FO appealed on a point of law against that decision. Essentially repeating the submissions he had made to the judges of the lower courts, he asked the Court of Cassation to make a reference to the Court of Justice of the European Union, in order for it to give a preliminary ruling on the matter.

12. The appellant also asked the Court of Cassation to set aside the judgment of the Court of Appeal of Versailles on another point. He complains that the Court of Appeal did not address his submission that he could not have committed the offences charged, since the regulations concerning driving time and rest periods do not apply to regular services covering less than 50 km, and the same is true of the requirement for the driver to insert the driver card into the tachograph. In that regard, FO stated that the tachograph had been set to 'out of scope', and that the

driver card had never been inserted when the journey was outside the scope of the regulations concerning driving time and rest periods.

13. It would follow from that argument that it is permissible for road transport undertakings to operate mixed-use vehicles, and for the drivers of such vehicles to disable the tachograph when they are assigned to journeys falling within Article 3(1) of Regulation No 561/2006, subsequently re-enabling it for journeys not falling within that exception. **[Or. 4]**

14. That proposition, which involves an interpretation of EU law, cannot be accepted without further discussion.

Applicable legislation

15. The legislation applicable to road transport is based on two Regulations, enacted on 20 December 1985, and the texts which have amended or replaced them.

16. The first of these is Regulation No 3821/85. This regulation was amended on numerous occasions before being replaced by Regulation No 165/2014 of 4 February 2014 (which, as it post-dates the facts giving rise to the prosecution, is not applicable in the present case).

17. The second is Regulation No 3820/85. This regulation was replaced by Council Regulation (EC) No 561/2006 of 15 March 2006, and it is that regulation which applies in the present case. In addition to provisions amending Regulation No 3821/85, which provide the basis for the prosecution brought in the present case, it contains a provision empowering Member States to impose penalties where they detect infringements of its provisions, even where those infringements occurred on the territory of another Member State.

18. These two sets of legislative texts appear to be the two parts of a whole, inasmuch as an infringement of the regulations concerning driving time — which are essentially contained in Regulation No 3820/85 (now Regulation No 561/2006) — can only be made out if the regulations concerning recording equipment (tachographs) — which are essentially contained in Regulation No 3821/85 — are complied with.

19. As at the date of the events at issue, Article 15(2) and (7) of Regulation No 3821/85, having been amended by Article 26 of Regulation No 561/2006, read as follows:

‘2. Drivers shall use the record sheets or driver cards every day on which they are driving, starting from the moment they take over the vehicle. The record sheet or driver card shall not be withdrawn before the end of the daily working period unless its withdrawal is otherwise authorised. No record sheet or driver card may be used to cover a period longer than that for which it is intended.

When as a result of being away from the vehicle, a driver is unable to use the equipment fitted to the vehicle, the periods of time referred to in paragraph 3, second indent (b), (c) and (d) shall: **[Or. 5]**

(a) if the vehicle is fitted with recording equipment in conformity with Annex I, be entered on the record sheet, either manually, by automatic recording or other means, legibly and without dirtying the sheet; or

(b) if the vehicle is fitted with recording equipment in conformity with Annex IB, be entered onto the driver card using the manual entry facility provided in the recording equipment.

Where there is more than one driver on board the vehicle fitted with recording equipment in conformity with Annex IB, each driver shall ensure that his driver card is inserted into the correct slot in the tachograph.

Drivers shall amend the record sheets as necessary should there be more than one driver on board the vehicle, so that the information referred to in Chapter II (1) to (3) of Annex I is recorded on the record sheet of the driver who is actually driving.

7. (a) Where the driver drives a vehicle fitted with recording equipment in conformity with Annex I, the driver must be able to produce, whenever an inspecting officer so requests:

(i) the record sheets for the current week and those used by the driver in the previous 15 days;

(ii) the driver card if he holds one, and

(iii) any manual record and printout made during the current week and the previous 15 days as required under this regulation and Regulation (EC) No 561/2006.

However, after 1 January 2008, the time periods referred to under (i) and (iii) shall cover the current day and the previous 28 days.

(b) Where the driver drives a vehicle fitted with recording equipment in conformity with Annex IB, the driver must be able to produce, whenever an inspecting officer so requests:

(i) the driver card of which he is holder;

(ii) any manual record and printout made during the current week and the previous 15 days as required under this Regulation and Regulation (EC) No 561/2006, and

(iii) the record sheets corresponding to the same period as the one referred to in the previous subparagraph during which he drove [Or. 6] a vehicle fitted with recording equipment in conformity with Annex I.

However, after 1 January 2008, the time periods referred to under (ii) shall cover the current day and the previous 28 days.

(c) An authorised inspecting officer may check compliance with Regulation (EC) No 561/2006 by analysis of the record sheets, of the displayed or printed data which have been recorded by the recording equipment or by the driver card or, failing this, by analysis of any other supporting document that justifies non-compliance with a provision, such as those laid down in Article 16(2) and (3).'

20. Directive No 2006/22/EC of 15 March 2006 has an Annex III, amended by Directive No 2009/5/EC of 30 January 2009, which, as it then stood, recommended that the infringement of Article 15(7) of Regulation No 3821/85 committed where the driver is 'unable to produce records of previous 28 days' (infringement I3) should be punished as a 'very serious' infringement.

21. In national law, this infringement is enacted in Article L.3315-5 of the Transport Code, under which engaging in road transport with a driver card which is irregular or does not belong to the driver using it, or in circumstances where there is no driver card inserted in the vehicle's tachograph, is punishable by six months' imprisonment and a fine of EUR 3 750.

22. The Criminal Chamber of the Court of Cassation has, moreover, directly applied the provisions of Regulation No 3820/85, Regulation No 3821/85, and the Regulations which have replaced them, on numerous occasions [Reference to case-law]

23. The power of the Member State conducting the check to impose a penalty for such an infringement, in circumstances where it appears that for all or part of the 28-day period preceding the check, the vehicle was within the territory of another Member State of the European Union, is challenged by the appellant, on the basis of an interpretation of Article 19 of Regulation No 561/2006.

24. Article 19 of Regulation No 561/2006 is worded as follows:

'1. Member States shall lay down rules on penalties applicable to infringements of this Regulation and Regulation (EEC) No 3821/85 and shall take all measures necessary to ensure that they are implemented. Those penalties shall be effective, proportionate, dissuasive and non-discriminatory. No infringement of this Regulation and Regulation (EEC) No 3821/85 shall be subjected to more than one penalty or procedure. The Member States shall notify the Commission of these measures and the rules [Or.7] on penalties by the date specified in the second subparagraph of Article 29. The Commission shall inform the Member States accordingly.

2. A Member State shall enable the competent authorities to impose a penalty on an undertaking and/or a driver for an infringement of this Regulation detected on its territory and for which a penalty has not already been imposed, even where that infringement has been committed on the territory of another Member State or of a third country.

By way of exception, where an infringement is detected:

- which was not committed on the territory of the Member State concerned, and
- which has been committed by an undertaking which is established in, or a driver whose place of employment is, in another Member State or a third country,
- a Member State may, until 1 January 2009, instead of imposing a penalty, notify the facts of the infringement to the competent authority in the Member State or the third country where the undertaking is established or where the driver has his place of employment.

3. Whenever a Member State initiates proceedings or imposes a penalty for a particular infringement, it shall provide the driver with due evidence of this in writing.

4. Member States shall ensure that a system of proportionate penalties, which may include financial penalties, is in force for infringements of this Regulation or Regulation (EEC) No 3821/85 on the part of undertakings, or associated consignors, freight forwarders, tour operators, principal contractors, subcontractors and driver employment agencies.'

25. Finally, Article 3(a) of Regulation No 561/2006 provides as follows:

'This Regulation shall not apply to carriage by road by: (a) vehicles used for the carriage of passengers on regular services where the route covered by the service in question does not exceed 50 kilometres;'

26. Article 15 of that regulation further stipulates that:

'Member States shall ensure that drivers of vehicles referred to in Article 3(a) are governed by national rules which provide adequate protection in terms of permitted driving times and mandatory breaks and rest periods.' **[Or. 8]**

27. Article 3 of Regulation No 3821/85, as amended by Article 26 of Regulation No 561/2006, adds that:

'1. Recording equipment shall be installed and used in vehicles registered in a Member State which are used for the carriage of passengers or goods by road, except the vehicles referred to in Article 3 of Regulation (EC) No 561/2006. ...'.

The issues and their ramifications

28. First, the appellant submits that Article 19(2) of Regulation No 561/2006 is to be understood as permitting a State to impose a penalty in respect of an infringement detected on its territory, but committed on the territory of another Member State, where that infringement relates to Regulation No 561/2006, but not where it relates to Regulation No 3821/85.

29. In the absence of any other provision of EU law, it would follow that the Member States had no power to punish infringements consisting in non-compliance with Article 15 of Regulation No 3821/85, in so far as it appeared that during the 28-day period preceding the check, the driver had been on the territory of another Member State of the European Union.

30. On the other hand, however, it can be argued that it is necessary to punish infringements of Regulation No 3821/85, and that this supports the suppression of infringements of Regulation No 561/2006 — which may justify a different interpretation of Article 19 of that regulation, such as that adopted by the Court of Appeal of Versailles (referred to in paragraph 8 above).

31. Reference can also be made to the principles established by the Court of Justice of the European Union, under which ‘in construing a provision of European Union law, it is necessary to consider the objectives pursued by the legislation in question and its effectiveness’ (Court of Justice, judgment of 3 October 2013, *Lundberg*, C-317/12) and ‘in interpreting a provision of EU law it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it forms part’ (Court of Justice, judgment of 26 September 2018, *Baumgartner*, C-513/17, paragraph 23).

32. However, the Court of Justice of the European Union has observed that ‘in view of [the objective of improving the working conditions of employees in the road transport sector and improving general road safety], and in order to guarantee effective enforcement of Regulation No 561/2006, as recital 14 of that regulation confirms, it is essential that the competent authorities, when carrying out roadside checks, and after a transitional period, should be able to ascertain that driving times and rest periods [Or.9] have been properly observed on the day of the check and over the preceding 28 days’, and that ‘... with a view to the effective implementation of Regulation No 561/2006 in the interests of road safety, not only is it necessary to check that the provisions of the regulation are complied with, but the Member States must also be able to impose penalties that are effective, proportionate and dissuasive when an infringement is detected, as provided by Article 19(1) of the regulation. (Court of Justice, judgment of 26 September 2018, *Baumgartner*, C-513/17, paragraphs 28 and 29).

33. In the same vein, it can be observed that the two regulations originally established a unitary system of penalties under which, from the beginning, non-residents could be punished for infringements (Court of Justice, judgment of 23 January 1997, *Pastoor and Trans-Cap v Belgian State*, C-29/95).

34. Yet another approach could be argued for, in the light of Article 15(7) of Regulation No 561/2006, which provides that ‘the driver must be able to produce, whenever an inspecting officer so requests ... the record sheets ... and ... any manual record and printout made during the current day and the previous 28 days’. On this approach, the mere fact of being unable to provide the documents requested on the day of the check would constitute an infringement of EU law. Such a conception seems to be compatible with that of infringement I3 in Annex III of Directive No 2006/22/EC, consisting in the fact of being ‘unable to produce records of previous 28 days’.

36. Given that a failure to comply of this kind can only be detected on the day of the check, on the territory of the Member State which therefore brings the prosecution, it is necessarily of a momentary character, such that the question of whether the infringement was committed partly on the territory of another Member State no longer arises.

37. To date, the Court of Justice of the European Union does not appear to have interpreted the legislation at issue in terms which would dictate the outcome of the appellant’s plea, although it has had occasion to consider the scope of Article 19 of Regulation No 561/2006 (Court of Justice, judgment of 26 September 2018, *Baumgartner*, C-513/17).

38. It does not seem, therefore, that the correct application of EU law can be regarded as being so obvious as to leave no scope for any reasonable doubt (Court of Justice, judgment of 4 October 2018, *Commission v France*, C-416/17, paragraph 110). The question raised necessitates a reference for a preliminary ruling.

39. Secondly, the appellant submits that it is permissible for a driver to set the tachograph to ‘out of scope’ mode during part of the 28-day period [Or.10] preceding the check, for journeys falling within the exception in Article 3(a) of Regulation No 561/2006.

40. The Court of Justice of the European Union, ruling on a question relating to the scope of another derogation provided for by that article, namely the meaning of ‘non-commercial carriage of goods’ in Article 3(h) of the regulation, observed (Court of Justice, judgment of 3 October 2013, *Lundberg*, C-317/12) that it was not appropriate, having regard to the objectives pursued by the legislation at issue, to ‘undermine the effect of the derogation laid down ...’ (paragraph 34), that it had to be noted that such a carriage of goods ‘[did] not affect competition in the road transport sector’ (paragraph 35), and finally, that the envisaged interpretation of provision of EU law at issue ‘ought not to have significant negative effects on road safety’ (paragraph 37).

41. It is not certain that those considerations remain relevant in a situation where, over a continuous period of 28 days, a vehicle is used for some journeys

which are subject to the ordinary rules, and some which fall within the exception in Article 3(a).

42. The possibility of such combined use of the provisions of Regulation No 561/2006 and Regulation No 3281/85, laying down the ordinary rule and the exception, would not appear to have been contemplated by Article 3 of Regulation No 3821/85, which simply provides that where Article 3(a) of Regulation No 561/2006 applies, recording equipment is not ‘installed and used’.

43. The interpretation put forward by the appellant is not so obviously correct as to leave no room for reasonable doubt. A second question will therefore be referred for a preliminary ruling.

ON THOSE GROUNDS, the Court:

REFERS the following questions to the Court of Justice of the European Union:

Does Article 19(2) of Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85, which provides that ‘a Member State shall enable the competent authorities to impose a penalty on an undertaking and/or a driver for an infringement of this Regulation detected on its territory and for which a penalty has not already been imposed, even where that infringement has been committed on the territory of another Member State or of a third country’, apply only to infringements of the provisions of that regulation, or does it also apply to infringements of [Or.11] the provisions of Council Regulation (EEC) No 3821/85 of 20 December 1985 on recording equipment in road transport, which has been replaced by Regulation (EU) No 165/2014 of the European Parliament and of the Council of 4 February 2014 on tachographs in road transport?

Is Article 3(a) of Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 to be interpreted as permitting a driver to derogate from the provisions of Article 15(2) and (7) of Regulation No 3821/85 of 20 December 1985 on recording equipment in road transport, which has been replaced by Regulation (EU) No 165/2014 of the European Parliament and of the Council of 4 February 2014 on tachographs in road transport, under which the driver must be able to produce, whenever an inspecting officer so requests, the record sheets and any manual record and printout made during the current day and the previous 28 days, where a vehicle is used, during a period of 28 days, for some journeys falling within the exception referred to above, and some journeys in respect of which there is no relevant derogation from the requirement to use recording equipment?

STAYS the proceedings pending the ruling of the Court of Justice of the European Union;

...

...[formalities]

WORKING DOCUMENT