

Case C- 13/21**Request for a preliminary ruling****Date lodged:**

4 January 2021

Referring court:

Judecătoria Miercurea-Ciuc (Romania)

Date of the decision to refer:

10 November 2020

Applicant:

Pricoforest SRL

Defendant:Inspectoratul de Stat pentru Controlul în Transportul Rutier
(ISCTR)

[...]

JUDECĂTORIA MIERCUREA-CIUC

[...]

REQUEST FOR A PRELIMINARY RULING

The Judecătoria Miercurea-Ciuc (Court of First Instance, Miercurea-Ciuc, Romania), of its own motion, [...] pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU), requests

THE COURT OF JUSTICE OF THE EUROPEAN UNION

to give a preliminary ruling on the following questions concerning the interpretation of Article 13(1)(b) of Regulation No 561/2006, since the Court's ruling on those questions will be useful for the resolution of the dispute in the national proceedings [...].

1. Is the concept of 'radius of up to 100 km' referred to in Article 13(1)(b) of Regulation No 561/2006 to be interpreted as meaning that a straight line drawn on

the map between the base of the undertaking and the destination must be less than 100 km or as meaning that the distance actually travelled by the vehicle must be less than 100 km?

2. Are the provisions of Article 13(1)(b) of Regulation No 561/2006 to be interpreted as meaning that the carrying out of transport operations within the scope of that provision, some of which remain within a radius of 100 km from the base of the undertaking and others of which exceed that radius, in a period of one month, in the context of the exemption of the situation referred to in Article 13(1)(b) of Regulation No 561/2006 from application of that regulation pursuant to a provision of national law, results in the exemption of all relevant transport operations from application of the regulation, or only those which [do not] [...] exceed the radius of 100 km or none of them?

Subject matter of the dispute. Relevant facts

- 1 By writ of summons registered on the roll at the Judecătoria Miercurea-Ciuc on 25 September 2020, Pricoforest SRL brought an action (*plângere contravențională*) against the Inspectoratul de Stat pentru Controlul în Transportul Rutier (State Road Transport Inspectorate) challenging a report of an offence [...] and seeking the annulment thereof or, in the alternative, the replacement of the fine by a warning.
- 2 In the statement of claim, it is stated that, on 2 September 2020, at 9.43, on county road No 125, at the 16 km mark, the combination of vehicles used by the applicant for the transport of timber, consisting in the vehicle bearing the registration number NT 89 YZO and the trailer bearing the registration number NT 69 YZO, driven by [...], was stopped by an inspection team from the State Road Transport Inspectorate which asked [the driver] for the tachograph card. Subsequently, the applicant was sent at its place of business the report of an offence at issue, which imposed on it a fine for exceeding, by 5 hours and 56 minutes, the maximum daily driving time in the period 17 to 18 August 2020 and for reducing by more than 2 hours the daily rest period on 25 August 2020.

[OR 2]

- 3 The applicant has pointed out that O. G. (Ordonanța Guvernului) n. 37/2007 (privind stabilirea cadrului de aplicare a regulilor privind perioadele de conducere, pauzele și perioadele de odihnă ale conducătorilor auto și utilizarea aparatelor de înregistrare a activității acestora) (Government Decree No 37/2007 establishing the framework for application of the rules on driving times, breaks and rest periods for drivers and on the use of devices for recording drivers' activities) applies solely to drivers carrying out road transport operations that are governed by Regulation No 561/2006, and that that regulation provides for exemption from the application of its provisions for transport operations carried out with vehicles used or hired without a driver by forestry undertakings, for carrying goods as part

of their own entrepreneurial activity within a radius of up to 100 km from the base of the undertaking, and that that exemption has been enacted in national law.

- 4 In the alternative, the applicant has requested that the fine be replaced by a warning.
- 5 In law, the applicant relies on the legislation mentioned above.
- 6 For evidential purposes, the applicant has lodged the report of an offence at issue as well as other documents and has requested that it be allowed to give oral evidence.
- 7 The defendant Inspectorate has lodged a **defence** in which it requests the dismissal of the claim and confirmation of the report of an offence as lawful and well-founded.
- 8 In the grounds of its defence, it has stated, in substance, that the applicant has committed the offence of exceeding by 5 hours or more the maximum daily driving time of 10 hours and the offence of reducing by 2 hours or more the minimum period of reduced daily rest. The inspectorate has also stated that the official who drew up the report described the facts constituting the offence and set out all the circumstances relevant to the assessment of the gravity of the offence, that the report enjoys a presumption of legality and veracity and that the failure to observe the driving times and rest periods represents a grave social threat, because it jeopardises the safety of road traffic and of other road users, inasmuch as fatigue and lack of rest are the principal causes of road accidents.
- 9 In law, that inspectorate has referred to Regulation (EC) No 561/2006, Decision 2009/959/EU, H.G. (Hotărârea Guvernului, Government Decision) n. 1088/2011, O.G. (Ordonanța Guvernului, Government Decree) n. 26/2011, O.G. (Ordonanța Guvernului, Government Decree) n. 37/2007, OMTI (Ordinul ministrului transporturilor și infrastructurii, Decree of the Minister for Transport and Infrastructure) n. 980/2011, O.G. (Ordonanța Guvernului, Government Decree) n. 27/2011, Regulation (EC) No 1071/2009, Regulation (EC) No 1072/2009 and Regulation (EC) No 1073/2009.
- 10 For evidential purposes, the defendant has lodged written documents and photographic evidence.
- 11 On 6 November 2020, the defendant lodged **written observations** in which it stated that the exception under Article 13(1)(b) of Regulation (EC) No 561/2006 relates to transport operations carried out strictly within a radius of 100 km from the place where the business is based. In the present case, that is in the village of Pitiligeni in Neamț County, and the vehicle was stopped by the inspection team in the town of Bălan in Harghita County, which is 130 km away from the undertaking's base.

- 12 The applicant has lodged a **reply** in which it has stated that it does not dispute the recordings on the tachograph card used by the driver [...], although it does dispute the way in which the reporting official interpreted them, inasmuch as he used the report generated by the TachoScan Control program without taking into account the other documents which, had they been requested, would have led to the conclusion that the times recorded on the tachograph card related to certain types of transport operation that are exempt [under] the provisions of Article 13(1)(b) of Regulation No 561/2006. The applicant has also stated that the official who reported the offence equated the radius of 100 km with the distance by road between the two places mentioned above.
- 13 As regards the facts, the referring court notes that it is apparent from the report of the offence [...] that, on 2 September 2020, at 9.43, on county road No 125, at the 16 km mark, in the town of Bălan in Harghita County, the combination of vehicles consisting in the vehicle bearing the registration number NT 89 YZO and the trailer bearing the registration number NT 69 YZO, used by the applicant on the basis of a certified copy [...] of a transport licence, driven by [...], who was transporting goods (timber) for consideration on the public highway, was stopped and checked. At the time, following the checks that were carried out and the analysis of the data downloaded from the driver's tachograph card [OR 3] using the TachoScan Control program, it was found that the maximum daily driving time of 10 hours, when it is permitted to exceed the same, had been exceeded by 5 hours or more, that is to say, between 5.15 on 17 August 2020 and 19.23 on 18 [August] 2020, the driver had driven for 15 hours and 56 minutes, when the maximum daily driving time is 10 hours, thus giving rise to an excess of 5 hours and 56 minutes. This was due to the fact that, during that interval of time, the driver was legally required to take a daily rest of at least 9 hours, but the longest period was only 6 hours and 48 minutes. As a result of this, the applicant was given a fine of 9 000 Romanian lei (RON) (or RON 4 500 lei if paid within 15 days). In addition, it was noted that the minimum period of reduced daily rest had been reduced by 2 hours or more, when daily rest may be reduced only to 9 hours: on 25 August 2020, between 00.54 and 4.24, the driver [...] had completed a period of daily rest of only 3 hours and 30 minutes, as opposed to the minimum daily rest of 9 hours he was legally required to take, resulting in a reduction of that period by 5 hours and 30 minutes. As a result of this, the applicant was given a fine of RON 4 000 lei (or RON 2 000 lei if paid within 15 days).
- 14 The applicant has its place of business in the municipality of Pipirig in Neamț County.
- 15 The applicant has placed on the file three delivery notes (for the transport of timber), one dated 17 August 2020, [for a delivery to] Târgu Neamț (30 km by road from the applicant's base), another, dated 25 May 2020, from the municipality of Pipirig in Neamț County to the city of Rădăuți in Suceava County (approximately 120 km by road) and the third, dated 2 September 2020, from the municipality of Sândominic in Harghita County to the municipality of Bogdănești in Suceava County (approximately 180 km by road).

Applicable national provisions. Relevant national case-law

Government Decree No 37/2007 establishing the framework for application of the rules on driving times, breaks and rest periods for drivers and on the use of devices for recording drivers' activities:

'Article 1

(1) This decree establishes the framework for application of the rules on driving times, breaks and rest periods for drivers carrying out road transport operations under 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 (EC) No 561/2006"), and road transport operations under the European Agreement concerning the Work of Crews of Vehicles engaged in International Road Transport (AETR) ("the AETR Agreement").

(2) This decree establishes the framework for application of the rules on the use of devices for recording driving times, breaks and rest periods for drivers ("tachographs or digital tachographs"), as defined in Annex I and Annex IB to Council Regulation (EEC) No 3821/85 of 20 December 1985 on recording equipment in road transport, as amended.

(3) This decree establishes the framework for application of the provisions 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 [OR 4] 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 (EU) No 165/2014").

[...]

Article 2

The road transport operations referred to in Article 13(1)(a) to (d), (f) to (h) and (i) to (p) of Regulation (EC) No 561/2006 shall be exempt, on the territory of Romania, from application of the provisions of that regulation.'

Reasons for which the referring court has made the request for a preliminary ruling

- 16 As regards the first question, the referring court has decided to refer the matter to the Court of Justice because the concept of 'radius' may mean the distance up to which an action is performed from the centre from which it is commenced. In the case of such an interpretation, a transport operation may not exceed a radius of

100 km from the undertaking's base, but the vehicle may well travel further than 100 km if the journey is not in a straight line. However, an interpretation consistent with the spirit of Regulation No 561/2006 would be that the concept of 'radius' must refer to the distance actually travelled by the vehicle (the journey distance), because the regulation is aimed at improving social conditions for the employees to whom it applies, as well as improving road safety in general. Those aims cannot be achieved if the concept of 'radius', for the purposes of Article 13(1)(b), were to refer to transport operations carried out within a circle having a radius of 100 km and the undertaking's base at the centre of that circle, because that would in practice allow transport operations to be carried out over a much greater distance by road, without leaving the circle, depending on the journey taken.

- 17 The confusing nature of the rules is exacerbated by the other references to distance in the regulation:
- Recital 24 uses [the expression] **where the route covered does not exceed 50 km**; in this instance the EU legislature's intention is clear, because it refers to the distance by road;
 - Article 3(a) concerns vehicles used for the carriage of passengers on regular services **where the route covered by the service in question does not exceed 50 kilometres**;
 - Article 3(f) relates to specialised breakdown vehicles operating **within a 100 km radius of their base**;
 - Article 5(2)(a) [provides that] the carriage by road is carried out within one Member State within a 50 kilometre radius of the place where the vehicle is based, including local administrative areas the centre of which is situated within that radius;
 - Article 16(1)(b) refers to regular international passenger services whose route terminals are located within a distance of 50 km as the crow flies from a border between two Member States and whose route length does not exceed 100 km.
- 18 Thus, the legislature has made clear references in recital 24 and in Article 3(a) [...] to the journey (that is to say, to the distance by road actually travelled by the vehicle) and in Article 16(1)(b) [...] to the fact that the two route terminals in question must be within a distance of 50 km as the crow flies, as well as to the fact that the route must not exceed 100 km. By contrast, in other cases, the legislature refers to the concept of 'radius', which, interpreted literally, would mean that the provisions of the regulation would not be applicable regardless of the distance a driver travels and the time taken to cover that distance. That, in the view of the referring court, would not be consistent with the purpose of the rules.
- 19 The dispute between the parties depends on the resolution of that question of law, since it is possible that the transport operations which the applicant maintains it

carried out, on the basis of the documents lodged, did not [OR 5] go outside a circle having a radius of 100 km and its centre at the applicant's base, albeit the distance actually travelled by the vehicle could in some cases be greater than 100 km.

- 20 As regards the second question, that is justified by the fact that Regulation No 561/2006 contains provisions not only on daily rest but also weekly rest. In the context of the exemption of the situation referred to in Article 13(1)(b) of Regulation No 561/2006 from application of the regulation, by means of a provision of national law, and where transport operations are carried out within the scope of that provision, some of which remain within the radius of 100 km from the undertaking's base and others of which exceed that radius, the question arises as to whether the regulation may be applied only in relation to the operations exceeding that radius. In particular, it is not inconceivable that the regulation should apply only in part, in respect of those days on which such transport operations are carried out, having regard to daily rest times. However, such partial application would make it impossible to check weekly rest times. Therefore, the exception under Article 13(1)(b) of Regulation No 561/2006 should instead be interpreted either as meaning that an undertaking that usually carries out transport activities without going beyond the radius of 100 km is exempt from application of the regulation even in respect of transport operations that do exceed that radius, or alternatively as meaning that the fact of carrying out at least some transport operations beyond that radius causes the regulation to apply automatically in relation to all transport operations carried out by the undertaking in question.
- 21 In the present case, although the offences under consideration concern a failure to observe daily driving times and daily rest periods, the answer to the question referred will affect the outcome of the dispute, since the total exclusion from application of the regulation of all the transport operations carried out in this case, including those beyond the radius of 100 km, would lead to a finding that the applicant has no liability.