Anonymised version

Case C-246/22

Request for a preliminary ruling

Date lodged:

8 April 2022

Referring court:

Amtsgericht Köln (Germany)

Date of the decision to refer:

25 March 2022

Concerned party:

BW

Other parties:

Staatsanwaltschaft Köln

Bundesamt für Güterverkehr

[…] […]

Amtsgericht Köln (District Court, Cologne)

Order

In the administrative penalty procedure

against BW,
resident in […] Romania
[…]

concerning an administrative offence under cabotage law

the District Court, Cologne

[…]

on 25 March 2022,

made the following order:

In accordance with Article 267(a) TFEU, the case is referred to the Court of Justice of the European Union (‘the Court’) for a preliminary ruling on the following question:

Is the transport of empty containers to or from the loading or the unloading point an inseparable part of the transport of the loaded containers such that the transport of the empty containers benefits from the privileged treatment afforded to the transport of the full containers in so far as those empty containers are exempt from the cabotage rules in the context of combined transport?

The legal question relevant to the decision to be given is whether the transport of empty containers, which does not in itself fulfil the requirement for combined transport within the meaning of Paragraphs 15 to 17 of the ‘Verordnung über den grenzüberschreitenden Güterkraftverkehr und den Kabotageverkehr’ (Ordinance on international road haulage and cabotage), is in fact privileged within the meaning of those rules, and thus exempt from the restrictions with regard to cabotage, in the case where the transport of the loaded container fulfils the requirements for combined transport within the meaning of those rules.

The proceedings are stayed pending the preliminary ruling of the Court.

Grounds

I.

On 22 January 2020 and 6 February 2020, the Bundesamt für Güterverkehr (Federal Office for the Carriage of Goods) carried out an on-the-spot check at Contargo Rhein-Neckar GmbH, […] Ludwigshafen; the Federal Office objected to a total of 60 transport operations that TIM-Trans Impex SRL […] carried out for Contargo in the period from 6 May 2019 to 27 May 2019. The concerned party is the managing director of TIM-Trans. The Federal Office accuses her of having transported empty containers in at least 57 cases, which do not come within the scope of the privileged treatment of combined transport in accordance with Paragraph 15 et seq. of the Ordinance on international road haulage and cabotage and were thus cabotage operations. Therefore, according to the Federal Office, the concerned person, in her capacity as managing director, infringed the ‘3-in-7’ restriction under Article 8 of Regulation (EC) No 1072/2009.

The concerned party does not object to the fact that the transport operations themselves were carried out. However, she takes the legal view that the transport of the empty containers was part of the transport of the loaded containers, which – and the Federal Office for Goods Transport and the concerned party agree on this

point – come within the scope of the privileged treatment of 'combined transport' and fulfilled all the requirements laid down in Paragraphs 15 et seq. of the Ordinance on international road haulage and cabotage. She takes the view that those transports of the empty containers to a new loading point after having been unloaded are part of the overall freight contract and cannot be considered in isolation. This is because, according to the concerned party, the commercial object pursued by her is the transport of full containers to the consignee in question after having collected them from an inland container terminal, and then the further transport of those now empty containers to an inland container terminal following unloading. The full container remains on the lorry chassis during unloading, and the empty container is loaded in the same way. After reloading, the container is then transported to the inland container terminal and from there to ports for shipment by sea. Taking into account both the general objective of the EU – to ensure that transport flows effectively and to reduce the burden on roads and the environment to the greatest extent possible – and that specific business model, it is therefore correct not to consider the transport of empty containers in isolation, but rather to regard it as part of the overall transport contract and thereby to allow it to benefit from the privileged treatment of combined transport. The concerned party explained this in detail in her defence counsel's written submission of 4 January 2022 (p. 40 et seq. of the main case file). In that written submission, she refers in particular to an opinion of the European Commission – Directorate-General for Mobility and Transport – of 20 July 2020, the official German translation of which can be found on page 21 et seq. of the main case file; the original English version of that information can be found on page 17 et seq. of the main case file. In that information, which was provided in response to an enquiry from the managing director of DSLV Bundesverband Spedition und Logistik e. V. in Berlin, the Commission states that there are different interpretations of the relevant provisions of EU law as regards the legal classification of the transport of empty containers before or after the actual 'main transport'. It is also stated that German authorities, in particular, claim that the transport of empty containers before a [loading] or after an unloading falls within the scope of the provisions of Regulation (EC) No 1072/2009 and must therefore also fulfil the conditions for cabotage. The Commission takes the view that transport operations such as that at issue in the present case, which serve the sole purpose of transporting an empty container to a loading or unloading point, must also be regarded as part of the overall transport operation and must be distinguished in that respect from the autonomous transport of containers, for example in the case where they are purchased or leased. Regulation (EC) No 1072/2009 may well apply in that regard. However, there are also cases where the transport of the empty container is an integral part of a transport contract covered by Council Directive 92/106/EEC and therefore benefits from the privileged treatment of combined transport. Conversely, however, there are no reasons to consider that the transport of empty containers made in the context of a combined transport is a separate operation, which is subject to the provisions of Regulation (EC) No 1072/2009, particularly as regards cabotage rules. The Commission also states the following in its opinion: 'Finally, it should also be clarified that a possible further transport of the

container from a terminal which was designated in the transport contract for the purpose of leaving that empty container, to the terminal from where it originally came, may not fall under the considerations explained above, and may indeed well be an autonomous transport operation.'

On 30 October 2020, the Federal Office for Goods Transport, which is responsible for imposing sanctions, issued a fine of EUR 8 625 for negligent infringement of the provisions on cabotage operations (page 211 et seq. of the case file submitted with the order for reference).

That decision was served on the then defence counsel on 5 November 2020 (page 222 of the case file submitted with the order for reference). His objection is dated 9 November 2020 and was received by the authority on the same day (page 223 of the case file submitted with the order for reference). The concerned party gives the same reasons for the objection as those which the defence counsel had already put forward at the hearing. In particular, the concerned party expressed her legal view that the transport operations objected to came within the exemption for combined transport under Directive 92/106/EEC or Paragraph 13 of the Ordinance on international road haulage and cabotage; moreover, those operations constituted a single freight contract under Paragraph 407(1) of the German Handelsgesetzbuch (Commercial Code). That was because the transport operations were to be considered not in isolation, but as part of a main contract.

The Federal Office for Goods Transport takes the legal view that the transport of empty containers before or after a loading/unloading operation did not benefit from the privileged treatment of combined transport within the meaning of Paragraph 13 et seq. of the Ordinance on international road haulage and cabotage, but rather must be considered in isolation as individual transport orders. Therefore, in the event that that transport was carried out by undertakings established abroad, the operations came within the scope of the provisions of Article 8 of Regulation (EC) No 1072/2009, with the consequence that the restrictions on cabotage laid down therein – in particular the obligation to carry out an international transport operation and the 3-in-7 rule – must be complied with.

II.

On the basis of the state of affairs to date, the referring court – the District Court, Cologne – […] – takes the view that the decisive issue in the case referred is whether the transport of empty containers before or after loading/unloading forms part of the transport of the loaded container in the context of combined transport or must be assessed as being legally independent transport.

EU law does not contain any clear provision in that regard. Nor does German national law appear to do so.

1.

First, Regulation (EC) No 1072/2009 does not contain any clear provision. In accordance with recital 16, that regulation precisely does not apply to combined transport, in so far as it reads as follows:

‘(16) This Regulation is without prejudice to the provisions concerning the incoming or outgoing carriage of goods by road as one leg of a combined transport journey as laid down in Council Directive 92/106/EEC of 7 December 1992 on the establishment of common rules for certain types of combined transport of goods between Member States (2) OJ 1992 L 368, p. 38. (2).

National journeys by road within a host Member State which are not part of a combined transport operation as laid down in Directive 92/106/EEC fall within the definition of cabotage operations and should accordingly be subject to the requirements of this Regulation.’

This means that the provisions concerning the incoming or outgoing carriage of goods in the context of combined transport are not to be affected, but the recital remains silent on the question of what exactly forms part of such combined transport.

Recital 16 also states that national journeys which are not part of a combined transport operation are to be covered by the cabotage rules, but likewise remains silent on the question as to whether or not the transport operations that are the subject of these proceedings are part of a combined transport operation.

2.

Nor does Council Directive 92/106/EEC of 7 December 1992 on the establishment of common rules for certain types of combined transport of goods between Member States contain any express provision. It is true that the recital, in which it is considered that the further development of combined transport as an alternative to road transport is necessary in the general interest, might militate in favour of a broad interpretation. However, the very detailed provision in Article 1 – which, inter alia, not only requires that the container has a certain minimum length (20 feet), but also provides further that the container must use the road on the initial or final leg of the journey and, on the other leg, rail or inland waterway or maritime services where this section exceeds 100 km as the crow flies, and further that the goods must be transported between the point where the goods are loaded and the nearest suitable rail loading station for the initial leg, and between the nearest suitable rail unloading station and the point where the goods are unloaded for the final leg, or within a radius not exceeding 150 km as the crow flies from the inland waterway port or seaport of loading or unloading – might go against such an interpretation. That very detailed provision militates in favour of not regarding, automatically and in all cases, the transport of empty containers before [the loading] or after unloading as being part of privileged combined transport, because it is not only in exceptional cases but on a regular basis that such transport of empty containers could take place over distances considerably

longer than 100 or 150 km and also between European countries; therefore, the question would arise as to whether the spirit and purpose of the privileged treatment of combined transport – namely to relieve the burden on the environment and European roads – would still be fulfilled and whether privileged treatment of the transport of empty containers would thus be justified.

The referring court takes the view that Article 3 of Council Directive 92/106/EEC of 7 December 1992 on the establishment of common rules for certain types of combined transport of goods between Member States also militates against an extended interpretation, as it does not provide that details regarding the points and legs of the transport of empty containers are to be specified and confirmed in the transport document.

The referring court considers that the controls of the conditions relating to compliance with the requirements of combined transport for hire or reward – in particular the requirement to specify the rail loading and unloading stations and maritime loading and unloading ports – which are evidently intended by Article 3 and which must be recorded before the transport operation is carried out and confirmed by means of a stamp affixed by the relevant competent authority, do not cover the transport of empty containers on roads between loading and unloading. Such transport operations would not be covered by the strict substantive requirements of Article 1 and the strict formal requirements of Article 3 with regard to confirmation, control and determination of the transport route, and there would therefore be a relatively high degree of freedom as regards the form taken by those transport operations. That clearly does not reflect the Council's intention in that directive.

3.

Finally, German commercial law, in particular Paragraph 407 of the German Commercial Code (HGB), does not provide any guidance for an interpretation either. In that respect, the referring court proceeds on the assumption that the specific contractual arrangement – in particular the question as to whether the transport of the empty containers forms part of the contract of carriage with regard to the full containers – cannot play a role from a legal point of view. This is because private contract law cannot determine or influence public-law provisions such as the provisions of EU law in the present case. In particular, the parties cannot be left free to circumvent public-law provisions and provisions on fines by formulating their civil-law freight contract in a particular way.

III.

On the one hand, the referring court considers that, as stated above, clarification of that question is relevant to the decision to be given. On the other hand, it also considers that such clarification would be appropriate in the interest of a uniform approach in Member States of the European Union, as that question may be answered differently, with the consequence that combined transport would include

the transport of empty containers in some Member States and not in others. The consequence would be unequal treatment, since, in the Member States that advocate a stricter interpretation, as the Federal Republic of Germany currently does, infringements of the cabotage rules and thus significant fines are inevitably to be expected, whereas, in countries that adopt a broader interpretation, the privileged treatment of combined transport will apply and undertakings can therefore act more freely. For reasons of legal certainty and equal treatment of all transport companies that transport empty containers in connection with combined transport operations, it therefore seems appropriate to seek an answer to this question which is uniform throughout Europe.

So far as can be ascertained, the Court of Justice of the European Union has not yet given any rulings on this question.

[…]