Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 4 March 2021 [1]

Case C-906/19

FO
v
Ministère public

(Request for a preliminary ruling from the Cour de cassation (Court of Cassation, France))

(Reference for a preliminary ruling – Road transport – Social provisions – Regulations (EC) No 561/2006 and (EEC) No 3821/85 – Derogation provided for in Article 3(a) of Regulation (EC) No 561/2006 – Concept of 'vehicle used for the carriage of passengers on regular services where the route covered by the service in question does not exceed 50 km' – Obligations of drivers of mixed-use vehicles – Scope of Article 19(2) of Regulation (EC) No 561/2006 – Extraterritorial penalties – Non-inclusion of infringements of Regulation (EEC) No 3821/85 – Principle that offences and penalties must have a proper legal basis)

I. Introduction

1. As the result of a roadside check in France of a coach operated by a transport undertaking having its registered office in Germany, the driver was found to have driven in Germany without the driver card having been inserted in the vehicle's tachograph. The managing director of the undertaking was subsequently prosecuted in France for the offence of failing to insert the driver card into the vehicle's tachograph. He was ordered at first instance to pay a fine of EUR 10 125. That decision was confirmed on appeal.

2. In these proceedings the Court of Justice is asked to interpret Regulations (EC) No 561/2006 [2] and (EEC) No 3821/85 [3] to determine, first, whether the obligations on drivers under Regulation No 3821/85 applied when vehicles were driven both on regular services covering less than 50 km and on longer journeys and, second, whether the infringing acts at issue could be the subject of a prosecution in France even though they were committed in Germany.

[1] Original language: French.

[2] Regulation 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 (OJ 2006 L 102, p. 1).

[3] Council Regulation of 20 December 1985 on recording equipment in road transport (OJ 1985 L 370, p. 8).

II. Legal context

A. EU law

1. Regulation No 3821/85

3. According to Article 15(2) of Regulation No 3821/85, in the version applicable to the facts of the case:

'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.

…'

4. Article 15(7) of that regulation provided:

'(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 [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 [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 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 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).'

5. Article 19 of that regulation provided:

'…

2. Member States shall assist each other in applying this Regulation and in checking compliance therewith.

3. Within the framework of this mutual assistance the competent authorities of the Member States shall regularly send one another all available information concerning:

– breaches of this Regulation committed by non-residents and any penalties imposed for such breaches,

– penalties imposed by a Member State on its residents for such breaches committed in other Member States.'

6. Regulation No 3821/85 was repealed and replaced by Regulation (EU) No 165/2014 of the European Parliament and of the Council of 4 February 2014 on tachographs in road transport (OJ 2014 L 60, p. 1).

2. Regulation No 561/2006

7. Article 1 of Regulation No 561/2006, in the version applicable to the facts of the case, provides:

'This Regulation lays down rules on driving times, breaks and rest periods for drivers engaged in the carriage of goods and passengers by road in order to harmonise the conditions of competition between modes of inland transport, especially with regard to the road sector, and to improve working conditions and road safety. This Regulation also aims to promote improved monitoring and enforcement practices by Member States and improved working practices in the road transport industry.'

8. Article 3(a) of that regulation states that the regulation does not apply to carriage by road by vehicles used for the carriage of passengers on regular services where the route covered by the service does not exceed 50 km.

9. Article 19, which is in Chapter V of that regulation, on control procedures and sanctions, provides:

'1. Member States shall lay down rules on penalties applicable to infringements of this regulation and Regulation 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 [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 on penalties by the date specified in the second subparagraph of Article 29. The Commission shall inform 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 [No 3821/85] on the part of undertakings, or associated consignors, freight forwarders, tour operators, principal contractors, subcontractors and driver employment agencies.'

3. Directive 2006/22/EC

10. Annex III to Directive 2006/22/EC,[4] in the version applicable to the facts of the case, contains guidelines on a common range of infringements of Regulation No 561/2006 and Regulation No 3821/85, divided into various categories according to their gravity. That annex recommends that the infringement of Article 15(7) of Regulation No 3821/85 consisting of being unable to produce the information for the preceding 28 days (infringement I3) should be classified as a 'very serious' infringement.

B. French law

11. Under the first subparagraph of Article L. 3315-5 of the code des transports (Transport Code), 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 by a fine of EUR 3 750.

[4] Directive of the European Parliament and of the Council of 15 March 2006 on minimum conditions for the implementation of Council Regulations (EEC) No 3820/85 and (EEC) No 3821/85 concerning social legislation relating to road transport activities and repealing Council Directive 88/599/EEC (OJ 2006 L 102, p. 35).

III. Facts, procedure and the questions referred

12. On 2 April 2013, in Versailles, France, officers of the division for preventing and penalising road traffic offences carried out a roadside check of a coach operated by a transport undertaking whose registered office is in Sengenthal, Germany.

13. 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. 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 being inserted in the tachograph.

14. As a result of those facts, the managing director of the company in question (the person prosecuted in the main proceedings), was prosecuted under the first subparagraph of Article L. 3315-5 of the Transport Code (France) for nine counts of the offence of failing to insert the driver card into the vehicle's tachograph on the dates indicated above.

15. The tribunal correctionnel de Versailles (Criminal Court, Versailles, France) found the facts to be proven and imposed a fine of EUR 10 125 on the person prosecuted in the main proceedings.

16. The cour d'appel de Versailles (Court of Appeal, Versailles, France) upheld both conviction and penalty. Before that court, the person prosecuted in the main proceedings argued that the French criminal courts did not have territorial jurisdiction. According to that party, the offences with which he had been charged, although detected in France, had been committed in Germany, since the vehicle was in Germany on the days on which he was accused of failing to ensure that the driver card was inserted in the recording equipment. Further, neither French law, having regard to the criminal law principle of territoriality, nor Article 19(2) of Regulation No 561/2006 permitted the French authorities, having detected the offences, to prosecute the person who committed them in circumstances where they were committed in another EU Member State.

17. Rejecting that argument, the cour d'appel de Versailles (Court of Appeal, Versailles) held, in its judgment of 2 May 2018, that the matters detected in the course of the roadside check fell within Article L. 3315-5 of the Transport Code, adopted in implementation of Regulation No 3821/85. That court of appeal added that Article 19(2) of Regulation No 561/2006 expressly derogates from the principle of territoriality in relation to prosecutions. Observing that the derogation in question relates expressly to Regulation No 561/2006, the said court of appeal reasoned that it also encompassed infringements of Regulation No 3821/85 since Article 19(1) of Regulation No 561/2006 also refers to Regulation No 3821/85.

18. The cour d'appel de Versailles (Court of Appeal, Versailles) accordingly rejected the plea of lack of jurisdiction raised by the person prosecuted in the main proceedings and confirmed the EUR 10 125 fine imposed at first instance for infringing the rules on working conditions in the road transport sector.

19. The person prosecuted appealed on a point of law against the judgment of the cour d'appel de Versailles (Court of Appeal, Versailles). In essence repeating his submissions at first instance, the person prosecuted in the main proceedings asked the Cour de cassation (Court of Cassation, France) to make a reference to the Court of Justice in order for it to give a preliminary ruling on the matter. That person also complained that the cour d'appel de Versailles (Court of Appeal, Versailles) had not addressed 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. According to him, for such journeys, the tachograph may be changed to the 'out of scope' setting and drivers are not required to insert their driver card.

20. In those circumstances, the Cour de cassation (Court of Cassation) stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Article 19(2) of Regulation [No 561/2006], 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 the provisions of Regulation [No 3821/85], which has been replaced by Regulation [No 165/2014]?

(2) Is Article 3(a) of Regulation [No 561/2006] to be interpreted as permitting a driver to derogate from the provisions of Article 15(2) and (7) of Regulation [No 3821/85], which has been replaced by Regulation [No 165/2014], 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?'

21. Written observations were submitted by the French Government and the European Commission. That government and the Commission also gave written answers to questions put by the Court.

IV. Analysis

22. This Opinion is structured as follows. I will begin by answering the referring court's second question since it makes better sense, before addressing the matter of penalties, to determine the nature and extent of the obligations on vehicle drivers under Article 15 of Regulation No 3821/85 where those vehicles are in principle within the scope of Regulation No 561/2006 but are also sometimes used for regular services covering less than 50 km (A). I will then examine the first question referred which relates specifically to the question of which authorities have territorial jurisdiction to penalise infringements of those obligations (B).

A. The second question: What were the obligations on drivers of mixed-use vehicles under Regulation No 3821/85?

23. By its second question, the referring court seeks in essence to ascertain whether all drivers must comply with the obligations under Article 15 of Regulation No 3821/85[5] at all times in a situation where a vehicle is operated as a mixed-use vehicle, that is to say, where a single vehicle is used both for regular services covering less than 50 km and for longer journeys. In particular,

[5] Now replaced by Articles 34 to 36 of Regulation No 165/2014.

what, if any, is the effect of the derogation in Article 3(a) of Regulation No 561/2006 on the extent of those obligations where such a vehicle is used for regular services covering less than 50 km?

24. According to the French Government, for vehicles fitted with recording equipment, drivers must be able to provide evidence of their driving activity at all times, including in relation to the part of their activity covered by the exclusion in Article 3(a) of Regulation No 561/2006, wherever part of their activity is governed by that regulation.

25. According to the Commission, in the case of a mixed-use vehicle, the drivers of that vehicle must insert their driver card whenever they use the vehicle for a transport operation falling within the scope of Regulation No 561/2006. Although drivers are not required to insert their driver card when they are driving 'out of scope', that driving time must nevertheless be recorded on the driver card as 'other work', whether automatically by inserting the card during the 'out of scope' operation or using the tachograph's manual facility when the activity within the scope of the regulation is resumed.

26. I broadly share the Commission's analysis.

27. In my view, when a vehicle is not *used exclusively* for the carriage of passengers on regular services where the route covered by the service does not exceed 50 km within the meaning of Article 3(a) of Regulation No 561/2006 but is operated as a *mixed-use* vehicle, it falls entirely within the scope of application of that regulation. Any driver of that vehicle must therefore discharge the obligations arising in particular under Article 15 of Regulation No 3821/85, including where the vehicle is used occasionally for regular services covering less than 50 km.

28. It should be observed as a preliminary point that although under Article 15 of Regulation No 3821/85 drivers must record driving time, other work, availability, breaks in work and daily rest periods so that at the time of any check it is possible to verify that any driver is complying with the rules on driving time, breaks and rest periods established in Chapter II of Regulation No 561/2006, the scope of those obligations varies not according to the identity of the driver or the type of transport operation taking place but according to the *vehicle* used. Whether Regulation No 561/2006 applies [6] or not [7] – which itself determines the applicability of Regulation No 3821/85 and the obligations under it [8] – in fact depends on the characteristics of the vehicles and/or the specific use to which they are put. This means that any driver of a vehicle covered by Regulation No 561/2006 was subject to the obligations under Article 15 of Regulation No 3821/85 to record various types of driving data.

29. However, does a mixed-use vehicle fall entirely within Regulation No 561/2006 or can it enjoy the derogation under Article 3(a) of that regulation according to which the said regulation does not apply to carriage by road by 'vehicles used for the carriage of passengers on regular services where the route covered by the service does not exceed 50 km'?

[6] Article 2(1) of Regulation No 561/2006 states that the said regulation applies to the carriage by road of goods where the maximum permissible mass of the vehicle exceeds 3,5 t and to the carriage by road of passengers by vehicles which are constructed or permanently adapted for carrying more than nine persons and are intended for that purpose.

[7] Article 3 of Regulation No 561/2006 establishes a number of derogations defined according to vehicle type. Among the vehicles to which Regulation No 561/2006 does not apply, besides those under the derogation referred to in the case in the main proceedings, Article 3 refers for example to vehicles with a maximum authorised speed not exceeding 40 km per hour, vehicles of the civil defence or armed services, vehicles used for medical purposes and 'commercial vehicles, which have a historic status … and which are used for the non-commercial carriage of passengers or goods.' See also Article 13(1) of Regulation No 561/2006.

[8] It can be seen from Article 3 of Regulation No 3821/85 that the scope of this regulation is identical to that of Regulation No 561/2006.

30. To my mind, that derogation cannot be interpreted as including the occasional use of certain vehicles for regular services covering less than 50 km. It relates only to the use of vehicles used exclusively for the carriage of passengers on regular services where the route covered by the service does not exceed 50 km.

31. First of all, according to settled case-law, a derogation may not be interpreted in such a way as to extend its effects beyond what is necessary to safeguard the interests which it seeks to secure. Moreover, the scope of derogations must be determined in the light of the aims pursued by the regulation.[9] The derogation established by Article 3(a) of Regulation No 561/2006 must therefore be interpreted strictly.

32. Second, Article 3(a) of Regulation No 561/2006 relates only to vehicles 'used for' the carriage of passengers on 'regular services' where the route covered by the service does not exceed 50 km. That wording suggests that the derogation applies only to vehicles that are used *exclusively* to carry passengers on 'services which provide for the carriage of passengers at specified intervals along specified routes' involving short journeys of less than 50 km.[10] Specifically, these may be vehicles used for urban transport, school buses that take schoolchildren from home to school or from school to home or buses taking workers from home to work and from work to home.[11] Article 3(a) of Regulation No 561/2006 therefore does not encompass vehicles that are used occasionally,[12] at the carrier's initiative, to carry passengers on short journeys because, among other reasons, those vehicles do not provide 'regular services'.[13]

33. To interpret Article 3(a) of Regulation No 561/2006 otherwise (and by definition more broadly) would run counter not only to the objectives of that regulation of improving working conditions and road safety but to the imperative of legal certainty for drivers and persons responsible for transport undertakings.

34. It is possible to imagine a scenario in which a single driver has used a vehicle for a long journey of more than 50 km and, immediately afterwards (or before), for a journey (or several journeys) of less than 50 km. The objectives of improving working conditions and road safety necessarily require that a single driver in such a situation record all his driving data so that the inspecting officers can check that the driver has not breached the provisions of Chapter II of Regulation No 561/2006, irrespective of the type of journey for which the vehicle was used.[14] The fact of

9 For example, judgment of 3 October 2013, *Lundberg* (C-317/12, EU:C:2013:631, paragraph 20 and the case-law cited).

10 As emerges from the definition of 'regular … services' in Article 4(n) of Regulation No 561/2006, which refers to Article 2(1) of Council Regulation (EEC) No 684/92 of 16 March 1992 on common rules for the international carriage of passengers by coach and bus (OJ 1992 L 74, p. 1), which has since been repealed.

11 See, for example, judgment of 2 March 2017, *Casa Noastră* (C-245/15, EU:C:2017:156), in which the Court held that the service of carriage by road of workers between home and work, organised by their employer, where the route covered does not exceed 50 km, falls within the scope of the derogation laid down in Article 3(a) of Regulation No 561/2006.

12 See the definition of 'occasional services' in Article 2(3) of Regulation No 684/92.

13 See to that effect, judgment of 30 April 1998, *Clarke & Sons and Ferne* (C-47/97, EU:C:1998:185), in which the Court held that a passenger transport service, supplied on a number of occasions pursuant to a block reservation made by a tour operator and providing for a single journey from an airport to a hotel with a stop, on occasions, at a tourist attraction, where the precise route to be taken was not predetermined, did not constitute a regular service within the meaning of the derogation established by the regulation that preceded Regulation No 561/2006.

14 See also, to that effect, by analogy, Article 6(5) of Regulation No 561/2006, under which all drivers must record as 'other work' any time spent driving a vehicle used for commercial operations not falling within the scope of that regulation. See also judgment of 18 January 2001, *Skills Motor Coaches and Others* (C-297/99, EU:C:2001:37), in which the Court held that the driver of vehicle A falling within the scope of Regulation No 561/2006 was required to record all his driving activity, including where it was carried out, as part of his work, in vehicle B to which that regulation did not apply.

driving a vehicle, even on a short journey, constitutes a period when drivers are actually engaged in activities liable to have a bearing on driving, during which they do not freely dispose of their time. [15]

35. Similarly, where a check takes place, discrepancies may become apparent, as it seems they did in the case in the main proceedings, between the data for the last 28 days in respect of the *vehicle* and the data in respect of the *driver*, including where the tachograph has been set to 'out of scope'. Because those discrepancies might sometimes conceal a failure to comply with the various times laid down in Chapter II of Regulation No 561/2006, on the pretext that mixed use of the vehicle meant that the tachograph could be set to 'out of scope' and there was no requirement to record the relevant data, it is in the interests of the driver (and, in the present case, of the person responsible for the undertaking) to record those data in order to be in a position to explain the discrepancies by producing supporting documents relating to use of the vehicle. The proposed interpretation of Article 3(a) of Regulation No 561/2006 is therefore likely to increase legal certainty for the driver and the person responsible for the undertaking.

36. Accordingly, whenever a vehicle that falls within Regulation No 561/2006 is operated as a mixed-use vehicle, any driver who drives that vehicle is subject to the obligations under Article 15 of Regulation No 3821/85.

B. The first question: Who can impose a penalty?

37. By its first question, the referring court seeks to determine in essence which competent authorities are entitled to prosecute infringements of Regulation No 3821/85: are these only the authorities of the Member State where the infringement was committed or may they also be the authorities of the country in whose territory the infringement was not committed but merely detected?

38. In my view it is not necessary to answer that question since, subject to verification by the referring court, the infringement at issue appears to have been *both* committed *and* detected in France, with the effect that the authorities of that country were entitled to penalise the infringer given that national law offers an appropriate legal basis (1). However, I would add for the sake of completeness that in my view a Member State may not impose a penalty under Article 19(2) of Regulation No 561/2006 for an infringement of Regulation No 3821/85 unless there is a connecting factor between the infringement committed and that Member State (2).

1. Which infringement and on which territory?

39. It emerges from the request for a preliminary ruling that the person prosecuted in the main proceedings was ordered to pay a fine of EUR 10 125 for the offence under the first subparagraph of Article L. 3315-5 of the Transport Code of failing to insert the driver card into the vehicle's tachograph, committed nine times *in Germany*. However, the request for a preliminary ruling is equally explicit in mentioning *Versailles* as the place where that offence was committed. Moreover, the referring court suggests that the offence defined in French law by Article L. 3315-5 of the Transport Code corresponds to the infringement defined in Article 15(7) of Regulation No 3821/85 which consists not in failing to insert the driver card in the tachograph but in being unable to produce records for the previous 28 days.

[15] See, again by analogy, judgment of 18 January 2001, *Skills Motor Coaches and Others* (C-297/99, EU:C:2001:37, paragraph 37).

40. Those incongruities leave me somewhat perplexed as to the exact nature of the infringement detected by the French authorities. Was the person in question prosecuted for the offence, of failing to insert the driver card in the tachograph, as provided for under French law, which was detected in France but committed repeatedly in Germany? Or was he in fact prosecuted for being unable to produce, in France, the prescribed records for the 28 days preceding the check, in breach of Article 15(7) of Regulation No 3821/85?

41. It is for the national court to provide those answers. However, the dispute in the main proceedings would appear to correspond *formally* to the first scenario whereas in actual fact in *substantive terms* it falls within the second.

42. It should be noted first of all that under EU law the drivers of vehicles covered by Regulation No 561/2006 are not required to have a driver card in all circumstances. As well as the fact that not all vehicles are fitted with recording equipment that functions with a driver card,[16] Article 15(7)(a)(ii) of Regulation No 3821/85 stated expressly that a driver, quite logically, was only obliged to produce a driver card to an inspecting officer 'if he holds one'.[17] In contrast, as noted above,[18] drivers are obliged to record (and, where they undergo a check, to produce) the relevant information in order to secure due application of the rules in Chapter II of Regulation No 561/2006. Article 15(7) of Regulation No 3821/85 envisages various types of supporting document for that purpose, ranging from record sheets to driver cards and, in much simpler terms, 'any manual record and printout' for the current day and the previous 28 days.

43. This means that the fact that no driver card has been inserted in the tachograph is not, of itself alone, an infringement of Regulation No 3821/85.[19] It also means that the infringement of Article 15(7) of the regulation consists of *being unable to produce the supporting documents* proving that the vehicle has been correctly used over the 28 days preceding the check.[20]

44. As the Commission has correctly observed, that infringement is necessarily committed in the territory of the Member State which detects it. Provided that Member State has a legal framework appropriate for that purpose, the authorities of that country are therefore entitled, under the criminal law principle of territoriality, to impose a penalty on the infringer, including where that person is non-resident.[21]

2. Scope of Article 19(2) of Regulation No 561/2006

45. Although I do not believe it is appropriate to reply formally to the referring court's first question since it is not necessary for resolution of the dispute, I will nevertheless answer it briefly, in the light of the presumption that questions referred for a preliminary ruling are relevant and of the task conferred on Advocates General.

16 Driver cards are not referred to in Annex I to Regulation No 3821/85 on analogue tachographs. In these situations the employer issues only record sheets to the drivers of vehicles equipped with recording equipment in conformity with that annex.

17 See also Article 14(3) of Regulation No 3821/85 according to which, even for vehicles equipped with recording equipment in conformity with Annex IB (digital tachographs), a Member State *may* require a driver subject to the provisions of Regulation No 561/2006 to hold a driver card.

18 Point 28 of this Opinion.

19 As confirmed by Annex III to Directive 2006/22, in which it is not recommended that this circumstance be classified as an infringement.

20 Infringement I3, which, in Annex III to Directive 2006/22, it is recommended should be classified as an infringement (see point 10 of this Opinion).

21 See, to that effect, the first indent of Article 19(3) of Regulation No 3821/85.

46. According to the first subparagraph of Article 19(2) of Regulation No 561/2006, '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'. The wording of Article 19(2) therefore clearly refers to infringement *of this regulation*.

47. To counter the wording of Article 19(2) of Regulation No 561/2006, the French Government and the Commission rely in essence on contextual and teleological interpretations, inferring that, under Article 19(2) of Regulation No 561/2006, the Member States are entitled to penalise infringements of both that regulation and Regulation No 3821/85 where those infringements were merely detected on their territory even though they were committed in a different Member State or a third country. According to the interested parties in question, those regulations form an inseparable whole. Regulation No 561/2006, they argue, is dependent on Regulation No 3821/85 being applied in order to be effective because it cannot be implemented without use of the recording equipment. Moreover, since both of those regulations pursue the same objectives, it is not only reasonable but necessary, because road transport activities are cross-border by nature, to allow the authorities of one Member State to penalise infringements of both regulations detected on the territory of that State, on pain of causing an increase in both infringements and accidents.

48. The Commission emphasises in particular, in the light of the *travaux préparatoires*, that the absence of an express reference to Regulation No 3821/85 in Article 19(2) of Regulation No 561/2006 was unintentional. If the Commission's initial proposal for a regulation contained no 'extraterritorial jurisdiction clause', it was in fact because no such clause is necessary, because there is no extraterritorial jurisdiction. Article 19, according to the Commission, is not about the establishment of national penalty regimes, but of an EU penalty regime applying throughout the territory of the European Union. That being so, the Member States were already able, provided their national system allowed them to do so, to lay down penalties for infringements that were merely detected by their competent authorities on the territory in question. During the legislative work, a new Article 19(2) that had not featured in the Commission's proposal was initially included for the sole purpose of turning that possibility into an obligation. Article 19(2) of what would become Regulation No 561/2006 was subsequently redrafted so that ultimately it contained no obligation.

49. I disagree with that approach. Article 19(2) of Regulation No 561/2006 cannot, to my mind, be interpreted as including infringements of Regulation No 3821/85 in its scope even though that regulation is not expressly referred to in that article, solely on the ground that Regulations No 3821/85 and No 561/2006 are complementary.

50. First of all, although paragraphs 1 and 4 of Article 19 of Regulation No 561/2006 apply transversally in so far as they refer to both Regulation No 561/2006 and Regulation No 3821/85, those paragraphs are extremely generic and in essence merely require the Member States to establish a penalty regime for infringements of either of those regulations. They therefore have a very different purpose from the very specific purpose of Article 19(2) of permitting extraterritorial penalties.

51. Second, although Regulations No 3821/85 and No 561/2006 are undeniably complementary, [22] Annex III to Directive 2006/22 clearly distinguishes between a group of infringements against Regulation No 561/2006 (failure to comply with the rules on crew, driving time, breaks, rest periods and payment arrangements) and a group of infringements against Regulation No 3821/85 (failure to comply with the rules on, inter alia, installation of the recording equipment, use of the recording equipment, driver card and record sheets, the information to be entered and the production of information). The EU legislature did therefore clearly distinguish between the two groups of infringements, [23] so that it cannot be said with certainty that the fact that infringements of Regulation No 3821/85 were not expressly included in Article 19(2) of Regulation No 561/2006 was the result of a merely inadvertent omission. Accordingly, it can perfectly well be argued, in direct contrast to the Commission's thesis, that the very absence in Article 19(2) of Regulation No 561/2006 of any reference to Regulation No 3821/85 in fact highlights that it was deliberately omitted by the EU legislature. [24]

52. Third, when the EU legislature confers power on the Member States to penalise infringements committed on the territory of other Member States, it appears to do so expressly and to a limited extent, as other legislative texts testify. For example, under Article 11 of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, [25] adopted on the basis of Article 83(2) TFEU, [26] a Member State's jurisdiction to impose penalties for criminal offences committed *outside* its jurisdiction can only be extended subject both to the Commission being informed and to there being a connection between the offence at issue and that Member State. [27] That example shows that, when it wishes to enable a Member State to penalise an infringement that was not committed on its territory, the EU legislature does so expressly, specifically and exclusively in respect of infringements which also have a connection with that Member State. [28]

53. Last, and with a bearing on the foregoing, according to settled case-law the principle that offences and penalties must have a proper legal basis requires the law to clearly define offences and the penalties which they attract. That condition is met in the case where the individual

[22] Regulation No 3821/85 is a direct corollary of Regulation No 561/2006. Although its immediate purpose is to require drivers to record certain driving data, its ultimate objective is in fact to enable inspecting officers, by means of various kinds of supporting document, to be confident that the rules in Chapter II of Regulation No 561/2006 have been complied with. See, for example, judgment of 26 September 2018, *Baumgartner* (C-513/17, EU:C:2018:772, paragraph 28).

[23] It must be conceded that the distinction is not always so clear in practice since certain conduct can amount to an infringement both of Regulation No 3821/85 and of Regulation No 561/2006 (see, for example, judgments of 9 June 2016, *Eurospeed* (C-287/14, EU:C:2016:420) and of 26 September 2018, *Baumgartner* (C-513/17, EU:C:2018:772)).

[24] Furthermore, it should be observed that the EU legislature did not change the wording of Article 19(2) of Regulation No 561/2006 in its most recent version of 20 August 2020, following amendment by Regulation (EU) 2020/1054 of the European Parliament and of the Council of 15 July 2020 (OJ 2020 L 249, p. 1).

[25] OJ 2017 L 198, p. 29.

[26] According to which: 'If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned.'

[27] According to Article 11(3) of Directive 2017/1371, a Member State is to inform the Commission where it decides to extend its jurisdiction to criminal offences which have been committed outside its territory in any of the following situations: (a) the offender is a habitual resident in its territory; (b) the criminal offence is committed for the benefit of a legal person established in its territory; or (c) the offender is one of its officials who acts in his or her official duty.

[28] For a further similar example, see Article 10 of Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) (OJ 2014 L 173, p. 179).

concerned is in a position, on the basis of the wording of the relevant provision and with the help of the interpretative assistance given by the courts, to know which acts or omissions will make him criminally liable. [29]

54. What ultimately matters is the text of the (EU) legislation as it was adopted. Conversely, intentions and ideas expressed during the legislative process but not indicated in the text, and, with all the more reason, omissions by the legislature, are irrelevant. If the legislature was unable to state clearly what it wanted, it is problematic to start doing so later, via interpretation, even though the individuals concerned might reasonably have thought differently. [30] Such an approach becomes even more problematic if it results in practice in behaviour being penalised, by analogy or connection, without an express legal basis. In the field of criminal law, offences must be defined clearly and precisely in advance.

55. Accordingly, in contrast to the French Government's contention, in the light of the wording of Article 19(2) of Regulation No 561/2006, a prosecution, on the basis of that article, for infringements of Regulation No 3821/85 detected but not committed on the territory of a Member State undoubtedly cannot be regarded as being reasonably foreseeable by the person on whom its consequences fall.

56. This means that, as currently worded, Article 19(2) of Regulation No 561/2006 does not empower the authorities of a Member State to impose a penalty on a person responsible for an undertaking and/or the driver of a vehicle covered by that regulation for an infringement of Regulation No 3821/85 that was not committed on its territory and has no other connection with that Member State.

57. By way of conclusion, I acknowledge that such an outcome is not completely satisfactory. Because the two regulations are so highly complementary, it may be appropriate to include infringements of Regulation No 3821/85 in Article 19(2) of Regulation No 561/2006. [31] However, as I have already emphasised, being appropriate does not mean a situation has a basis in law, especially as regards criminal law. If the current wording of Article 19(2) of Regulation No 561/2006 were found to be wanting, [32] it would be for the EU legislature to amend it.

V. Conclusion

58. I propose that the Court should answer the questions referred by the Cour de cassation (Court of Cassation, France) as follows:

– 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 must be interpreted as meaning that it applies only to vehicles used exclusively for the carriage

[29] For example, judgments of 3 June 2008, *Intertanko and Others* (C-308/06, EU:C:2008:312, paragraph 71); of 22 October 2015, *AC-Treuhand* v *Commission* (C-194/14 P, EU:C:2015:717, paragraph 40); and of 20 December 2017, *Vaditrans* (C-102/16, EU:C:2017:1012, paragraph 51).

[30] See my Opinion in *Presidenza del Consiglio dei Ministri* (C-129/19, EU:C:2020:375, points 119 to123). See also my Opinion in *Entoma* (C-526/19, EU:C:2020:552).

[31] In its judgment of 26 September 2018, *Baumgartner* (C-513/17, EU:C:2018:772, paragraph 30), the Court held that, 'in view of the cross-border nature of road transport activities, an interpretation of the first subparagraph of Article 19(2) of Regulation No 561/2006 to the effect that the Member States are to enable their competent authorities to impose a penalty for an infringement detected in their territory even if the infringement has been committed in the territory of another Member State or a third country corresponds better to the objectives of the regulation.' That statement is perfectly applicable, *mutatis mutandis*, to infringements of Regulation No 3821/85.

[32] Which, to my mind, for the reasons set out in points 39 to 44 of this Opinion, is not necessarily the case.

of passengers on regular services where the route covered by the service does not exceed 50 km. In the case of the mixed use of a vehicle in circumstances such as those of the case in the main proceedings, any driver was subject to the obligations under Article 15 of Council Regulation (EEC) No 3821/85 of 20 December 1985 on recording equipment in road transport.

– As currently worded, Article 19(2) of Regulation No 561/2006 does not empower the authorities of a Member State to impose a penalty on a person responsible for an undertaking and/or the driver of a vehicle covered by that regulation for an infringement of Regulation No 3821/85 that was not committed on its territory and has no other connection with that Member State.