JUDGMENT OF THE COURT (First Chamber)

28 July 2011 *

In Case C-554/09,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Stuttgart (Germany), made by decision of 17 December 2009, received at the Court on 31 December 2009, in the criminal proceedings against

Andreas Michael Seeger,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, J.-J. Kasel, A. Borg Barthet, E. Levits and M. Berger (Rapporteur), Judges,

Advocate General: P. Cruz Villalón,
Registrar: A. Calot Escobar,

having regard to the written procedure,

* Language of the case: German.

after considering the observations submitted on behalf of:

— Mr Seeger, by H.-J. Rieder, Rechtsanwalt,

— the United Kingdom Government, by S. Hathaway, acting as Agent,

— the European Commission, by N. Yerrell and F. W. Bulst, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of the second indent of Article 13(1)(d) 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 (OJ 2006 L 102, p. 1).

2 The reference was made in the context of a prosecution brought against Mr Seeger for infringement of the provisions of the first sentence of Article 3(1) and Article 15(7) of Council Regulation (EEC) No 3821/85 of 20 December 1985 on recording equipment in road transport (OJ 1985 L 370, p. 8), as amended by Regulation No 561/2006 ('Regulation No 3821/85').

Legal context

EU Law

3 Article 3 of Regulation No 3821/85 provides:

'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 …

2. Member States may exempt vehicles mentioned in Article 13(1) and (3) of Regulation (EC) No 561/2006 from application of this Regulation.

…'

4 Article 15(7) of Regulation No 3821/85 reads:

‘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;

…

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

…’

5 Article 1 of Regulation No 561/2006 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.’

6 Article 2(1) of the said regulation reads:

‘1. This Regulation shall apply to the carriage by road:

(a) of goods where the maximum permissible mass of the vehicle, including any trailer, or semi-trailer, exceeds 3.5 tonnes, or

(b) of passengers …’

7 Article 3 of the same regulation provides:

‘This Regulation shall not apply to carriage by road by:

…

(h) vehicles or combinations of vehicles with a maximum permissible mass not exceeding 7.5 tonnes used for the non-commercial carriage of goods;

…’

8 Article 13(1) of Regulation No 561/2006 provides:

‘Provided the objectives set out in Article 1 are not prejudiced, each Member State may grant exceptions from Articles 5 to 9 and make such exceptions subject to individual conditions on its own territory or, with the agreement of the States concerned, on the territory of another Member State, applicable to carriage by the following:

…

(d) vehicles or combinations of vehicles with a maximum permissible mass not exceeding 7.5 tonnes used:

…

— for carrying materials, equipment or machinery for the driver’s use in the course of his work.

These vehicles shall be used only within a 50 kilometre radius from the base of the undertaking, and on condition that driving the vehicles does not constitute the driver’s main activity;

…’

National law

9 Article 8 of the Fahrpersonalgesetz (Law on Driving Crews), in the version of 19 February 1987 (BGBl. 1987 I, p. 640), as amended by the law of 6 July 2007 (BGBl. 2007 I, p. 1270; 'the FPG') reads:

'(1) An offence shall be committed by any person who, intentionally or by negligence infringes

1. as a business operator …

2. as a driver …

   (a) a decree under …

   (b) a provision of Regulation (EEC) No 3821/85 …

   …

3. as the owner of a vehicle …

(2) The offence may be punished in the cases of paragraph 1, points 1 and 3, by a fine of up to EUR 15 000 and in the other cases by a fine of up to EUR 5 000.'

10 Article 18 of the Fahrpersonalverordnung (Regulations on Driving Crews) of 27 June 2005 (BGBl. 2005 I, p. 182), as amended by the Regulation of 22 January 2008 (BGBl. 2008 I, p. 54; 'the FPV'), reads as follows:

'(1) Pursuant to Article 13(1) of Regulation (EC) No 561/2006 and Article 3(2) of Regulation (EEC) No 3821/85, the following categories of vehicle are excluded, within the scope of the [FPG], from the application of Articles 5 to 9 of Regulation (EC) No 561/2006 and the application of Regulation (EEC) No 3821/85:

…

4. Vehicles or combinations of vehicles with a maximum permissible weight not exceeding 7.5 tonnes, which are used within a radius of 50 kilometres from the base of the undertaking

…

(b) for carrying materials, equipment or machinery needed by the driver in the course of his work as vehicles having a particular crew for that purpose, which serve as sales vehicles at public markets or for mobile sales,

provided that driving the vehicle does not constitute the driver's principal activity.

…'

11 Article 23 of the FPV provides:

‘(1) An offence within the meaning of Article 8(1)(1)(b) of the [FPG] shall be committed by any person who as a business operator …

(2) An offence within the meaning of Article 8(1)(2)(b) of the [FPG] shall be committed by any person who as driver... intentionally or negligently

1. does not use the recording equipment in breach of the first sentence of Article 3(1)

…

11. does not present or does not present on time and in breach of Article 15(7)(a) and (b), a record sheet, the driver’s card, a print or a manual reading,

…’

The procedure in the main proceedings and the question referred for a preliminary ruling

12 Mr Seeger is the owner of a wine and drinks business in Stuttgart (Germany) which offers its customers a home delivery service. He delivers on average once a week to 30 to 40 customers within a maximum radius of 10 to 15 kilometres. For that purpose, he employs one staff member.

13 On 3 March 2008, Mr Seeger was driving his lorry, the total admissible weight of which amounted to 7.49 tonnes, in the territory of the commune of Esslingen-am-Neckar (Germany), about 15 kilometres from Stuttgart, without using the recording equipment installed on board pursuant to Regulation No 3821/85. He had not inserted a record sheet and was not able to show the officer who arrested him record sheets for the past 28 days.

14 Mr Seeger's vehicle contained empty packaging, namely empty drinks bottles, which he wished to carry to a supplier based in Esslingen-am-Neckar. The empty packaging itself came not from Mr Seeger's own consumption but from his commercial activity.

15 The Amtsgericht Suttgart found two infringements of Article 8(1)(2)(b) of the FPG and Article 23(2), point 11, of the FPV and fined Mr Seeger EUR 200 by judgment of 17 March 2009.

16 That court found that Mr Seeger's driving activity did not constitute his principal activity, the latter taking place in his shop where he essentially received and served customers, the home delivery service being merely an additional service carried out once a week. The court also found that the transports for the purchase of drinks and the return of empty packaging did not take place every day and required much less time than sales in the shop.

17 The Amtsgericht Stuttgart declined to apply the exception in Article 18(1)(4)(b) of the FPV, on the ground that the empty packaging transported did not constitute 'materials' within the meaning of that provision since they were not subject to a transformation process, but were to be regarded as merchandise intended for sale.

18 Mr Seeger appealed against the judgment of 17 March 2009 before the Oberlandesgericht Stuttgart, arguing that, in this case, the purpose of Regulation No 561/2006, namely road safety and the regulation of competition, does not prevent a broad interpretation of the expression 'materials' appearing in Article 13(1)(d) of that regulation.

19 The Stuttgart prosecuting authority requested that the proceedings be stayed and a reference be made to the Court of Justice for a preliminary ruling, since the question whether the expression 'materials' also covered drinks bottles and the empty packaging of a drinks merchant had to be determined in relation to EU law.

20 The Oberlandesgericht Stuttgart notes that, to date, the Court of Justice has considered the interpretation of 'materials' within the meaning of Article 13(1)(g) of Council Regulation (EEC) No 3820/85 of 20 December 1985 on the harmonisation of certain social legislation relating to road transport (OJ 1985 L 370, p. 1), which was repealed and replaced by Regulation No 561/2006 with effect from 11 April 2007, only in Case C-128/04 *Raemdonck and Raemdonck-Janssens* [2005] ECR I-2445. It considers that, taking account of the wording, the context and the purpose of that provision, which is repeated in Article 13(1)(d), second indent, of Regulation No 561/2006, it cannot be clearly deduced from that judgment that the expression 'materials' within the meaning of that provision covers empty bottles, that is to say the packaging material of a drinks merchant.

21 According to the referring court, such a broad interpretation of the expression 'materials' finds support both in national case-law and in legal writing. However, the Oberlandesgericht Stuttgart points out that packaging material is not the heart of the activity of a wine and drinks merchant in the sense that that service activity is carried out with that purpose, as was the case in *Raemdonck and Raemdonck-Janssens*, concerning construction materials or machines. At the same time, the transport journeys at issue in the main proceedings do not go against the purposes pursued by Regulation No 561/2006.

22 The Oberlandesgericht Stuttgart therefore decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Can the term "materials" in the second indent of Article 13(1)(d) of Regulation... No 561/2006... be interpreted as also capable of including packaging materials, such as empty drinks bottles (empties), carried by a wine and drinks merchant who runs a shop, makes deliveries to his customers once a week and, while doing so, collects the empties to take them to his wholesaler?'

The question referred for a preliminary ruling

23 In order to reply to that question, it must first be noted that the expression 'materials', then contained in Article 13(1)(g) of Regulation No 3820/85, has already been the subject-matter of an interpretation by the Court of Justice in *Raemdonck and Raemdonck-Janssens*.

24 Given that Regulation No 561/2006 made no substantial changes as regards the conditions to which the derogation under Article 13(1)(g) of Regulation No 3820/85 was subject, save for the extra condition that the maximum permissible weight must not exceed 7.5 tonnes and the clarification that the driver may also transport 'machines' in carrying out his work, the interpretation given in *Raemdonck and Raemdonck-Janssens* of the expression 'materials' appearing in that provision is also applicable to the expression 'materials' appearing in Article 13(1)(d), second indent, of Regulation No 561/2006.

25 It follows from that judgment that the concept of materials must be understood in a wider sense that the concept of equipment, that first concept covering goods which are required or used for carrying out the occupation of the driver of the vehicle concerned, and thus being able to include components of the final product to be manufactured or works to be carried out by the latter. It follows that the materials are intended to be used or are required to create, modify or transform something else and are not intended to be simply transported for their own delivery, sale or disposal. The materials being thus subject to a transformation process, they do not constitute goods intended for sale by their user.

26 In that respect, it should be noted that a wine and drinks merchant, like Mr Seeger, merely transports empty bottles. The latter do not constitute goods necessary in carrying out his principal activity, as the Government of the United Kingdom and the European Commission rightly argue in their observations. The empty bottles transported by Mr M. Seeger are not processed or transformed and are neither added to another product or used in the carrying on of an activity. They are not necessary as components, raw materials or ingredients for any product manufactured by such a trader or for works carried out by the latter. Finally, they do not constitute either apparatus or instruments necessary for manufacturing any product.

27 Moreover, whilst it is true that the empty bottles at issue in the main proceedings are used for a commercial purpose and Mr Seeger, in all probability, has no other choice, for reasons of profitability and thus purely subjective considerations, than to collect them himself from his customers, that fact is not sufficient to signify that they fall within the concept of 'materials' within the meaning of Article 13(1)(d), second indent, of Regulation No 561/2006.

28 Such an interpretation of the concept of 'materials' is corroborated by a systematic interpretation of all the derogations appearing in Article 13(1) of Regulation No 561/2006.

29 That provision provides for derogations from Articles 5 to 9 of the said regulation, particularly for vehicles used for collecting milk from farms or returning milk churns to farms or for vehicles used in the context of activities in connection with the collection or elimination on a door-to-door basis of household waste.

30 In that respect, it should be noted that the interpretation of the concept of 'materials' for which Mr Seeger is arguing extends to packaging and empty containers, so that it would also cover the exceptions specifically mentioned above and render them substantially or even entirely devoid of purpose. If the Union legislature had intended to create a general derogation for all vehicles carrying goods of a business nature, Article 13(1) of Regulation No 561/2006 would not have limited the derogation which it establishes to specific categories of goods transported, but would have simply referred to objects of a business nature.

31 Moreover, the interpretation of the expression 'materials' argued for by Mr Seeger would have the effect of making it more difficult if not impossible to distinguish it from the concept of goods, as used a number of times in Regulation No 561/2006, particularly in Articles 2(1)(a), 4(a), and 10(1) of the latter.

32 Application of the derogation established in Article 13(1)(d), second indent, of Regulation No 561/2006 depends, in particular, on the type of goods transported and does not concern all types of goods, even if the other conditions laid down in that provision are met. The terms 'materials', 'equipment' and 'machinery' thus necessarily designate only some of the goods the transport of which falls within the scope of that regulation. It follows that business goods in the full sense are excluded by that limitation as are goods which are merely transported from one place to another, without being processed, transformed or used in carrying out an activity. Otherwise, the concept of 'materials' would not permit limitation of the application of the derogations established in Article 13(1) of the said regulation by reference to the goods transported, which would amount to removing all distinction between the concept of materials and the concept of goods.

33 Moreover, it should also be remembered that the conditions for applying Article 13(1)(d), second indent, of Regulation No 561/2006 are to be interpreted strictly, given that that provision constitutes a derogation from Articles 5 to 9 of that regulation.

34 In that regard, it should be noted that, if the interpretation of the concept of 'materials' argued for by Mr Seeger were adopted, the derogation in Article 13(1)(d), second indent, of Regulation No 561/2006 would extend, in principle, to all goods of a business nature, which would thus undermine the objectives of that regulation, namely improvement of the working conditions of personnel in the road transport sector and road safety.

35 Such an interpretation would, moreover, go against the requirement laid down in Article 13(1) of the said regulation, in so far as that interpretation would have the consequence, first, that a large number of drivers would no longer benefit from the protection of their working conditions as laid down by Regulation No 561/2006.

36 Secondly, such an extension of the derogation provided for in Article 13(1)(d), second indent, of Regulation No 561/2006 would have the effect that a large number of vehicles would be likely to be driven by such drivers who might thus legally drive long hours without a rest, which would be likely seriously to undermine the objective of road safety.

37 In that regard, it should also be noted that Regulation No 561/2006 intended in particular, according to the second sentence of Article 1 thereof, to promote improved monitoring and enforcement practices by Member States in the road transport industry and, according to the fourth recital thereof, the establishment of 'a clearer and simpler set of rules... which will be more easily understood, interpreted and applied by the road transport industry and the enforcement authorities'.

38 Therefore, an extension of the derogation provided for in Article 13(1)(d), second indent, of Regulation No 561/2006 would be likely to create uncertainty for the road transport industry and the public enforcement authorities and could cause difficulties to arise in the interpretation, application, implementation and monitoring of those rules. That would not only be contrary to the objectives referred to in the previous paragraph, but could also compromise the realisation of the objective of the effective and uniform application of the rules on driving times and rest periods as provided for in the thirteenth recital of the said regulation.

39 Nor, finally, can the Court accept Mr Seeger's argument based on the obligation, under the national legislation on packaging aimed at protecting the environment by the use of reusable bottles and which has therefore introduced a deposit for certain drinks placed in bottles, to participate in the system for recovering the latter so that the transport of empty bottles is necessary for his commercial activities.

40 In that respect, it should be noted that the obligation arising from national legislation on protection of the environment, even if that legislation transposes an obligation laid down by a directive, is not sufficient to signify that empty bottles transported by a wine and drinks merchant fall within the expression 'materials' within the meaning of Article 13(1)(d), second indent, of Regulation No 561/2006. Moreover, that argument could be accepted only if Mr Seeger transported exclusively empty bottles bearing a deposit, which is not apparent from the documents before the Court.

41 Having regard to the above, the answer to the question referred is that the expression 'materials' appearing in Article 13(1)(d), second indent, of Regulation No 561/2006 must be interpreted as not covering packaging materials, such as empty bottles, carried by a wine and drinks merchant who runs a shop, makes deliveries to his customers once a week and, while doing so, collects the empty bottles to take them to his wholesaler.

Costs

42 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

The expression 'materials' appearing in Article 13(1)(d), second indent, 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 must be interpreted as not covering packaging materials, such as empty bottles, carried by a wine and drinks merchant who runs a shop, makes deliveries to his customers once a week and, while doing so, collects the empty bottles to take them to his wholesaler.

[Signatures]