JUDGMENT OF THE COURT (Second Chamber)

7 November 2002 *

In Joined Cases C-228/01 and C-289/01,

REFERENCE to the Court under Article 234 EC by the Cour d'appel de Pau (C-228/01) and the Tribunal de grande instance de Dax (C-289/01) (France) for a preliminary ruling in the criminal proceedings pending before those courts against

Jacques Bourrasse (C-228/01)

and

Jean-Marie Perchicot (C-289/01)

Third parties:

Union régionale syndicale des petits et moyens transporteurs du Sud-Ouest (Unostra Aquitaine) (C-228/01),

Fédération générale des transports et de l'équipement CFDT (FGTE-CFDT) (C-289/01)

and

Inspection du travail des transports (C-228/01 and C-289/01),

* Language of the case: French.

on the interpretation of Article 2 of Council Directive 84/647/EEC of 19 December 1984 on the use of vehicles hired without drivers for the carriage of goods by road (OJ 1984 L 335, p. 72), as amended by Council Directive 90/398/EEC of 24 July 1990 (OJ 1990 L 202, p. 46),

THE COURT (Second Chamber),

composed of: C. Gulmann, acting for the President of the Second Chamber, V. Skouris and N. Colneric (Rapporteur), Judges,

Advocate General: A. Tizzano,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— the Union régionale syndicale des petits et moyens transporteurs du Sud-Ouest (Unostra Aquitaine), by P. Hontas, avocat (C-228/01),

— the Inspection du travail des transports, by Y. Davidoff, inspecteur de travail (C-228/01 and C-289/01),

— the French Government, by G. de Bergues and S. Pailler, acting as Agents (C-228/01 and C-289/01),

— the Commission of the European Communities, by M. Wolfcarius, acting as Agent (C-228/01 and C-289/01),

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Bourrasse, represented by G. Duvignac, avocat; of the Union régionale syndicale des petits et moyens transporteurs du Sud-Ouest (Unostra Aquitaine), represented by P. Hontas; of the French Government, represented by S. Pailler; and of the Commission, represented by W. Wils, acting as Agent, at the hearing on 29 May 2002,

after hearing the Opinion of the Advocate General at the sitting on 4 July 2002,

gives the following

Judgment

1 By judgments of 15 May 2001 and 2 July 2001, received at the Court on 11 June 2001 and 20 July 2001 respectively, the Cour d'appel de Pau (Pau Court of Appeal) (C-228/01) and the Tribunal de grande instance de Dax (Dax Regional Court) (C-289/01) referred to the Court under Article 234 EC, in the first case, two questions for a preliminary ruling, and in the other one question for a preliminary ruling, on the interpretation of Article 2 of Council Directive 84/647/EEC of 19 December 1984 on the use of vehicles hired without drivers for the carriage of goods by road (OJ 1984 L 335, p. 72), as amended by Council Directive 90/398/EEC of 24 July 1990 (OJ 1990 L 202, p. 46, 'Directive 84/647').

2 Those questions arose in the course of criminal proceedings brought against, respectively, Mr Bourrasse, the managing director of Transports Bourrasse SA

('Bourrasse'), established in Soorts-Hossegor (France), and Mr Perchicot, the manager of Transports Perchicot ('Perchicot France'), established at Saint-Martin-de-Seignanx (France), both charged with the offence of concealing the employment of staff.

3 By order of 23 January 2002, made pursuant to Article 43 of the Rules of Procedure, the President of the Court of Justice ordered the two cases to be joined for the purposes of the written and oral procedure and of the judgment.

Legislation applicable

Community law

4 Articles 1, 2 and 3 of Directive 84/647 provide:

'Article 1

For the purposes of this Directive:

— "vehicle" means a motor vehicle, a trailer, a semi-trailer, or a combination of vehicles intended exclusively for the carriage of goods,

— "hired vehicle" means any vehicle which, for remuneration and for a determined period, is put at the disposal of an undertaking which engages in the carriage of goods by road for hire or reward or for its own account on the basis of a contract with the undertaking which makes the vehicles available.

Article 2

Each Member State shall allow the use within its territory, for the purposes of traffic between Member States, of vehicles hired by undertakings established on the territory of another Member State provided that:

1. the vehicle is registered or put into circulation in compliance with the laws in the latter Member State;

2. the contract relates solely to the hiring of a vehicle without a driver and is not accompanied by a service contract concluded with the same undertaking covering driving or accompanying personnel;

3. the hired vehicle is at the sole disposal of the undertaking using it during the period of the hire contract;

4. the hired vehicle is driven by personnel of the undertaking using it;

5. proof of compliance with the above conditions is provided by the following documents, which must be on board the vehicle:

(a) the contract of hire, or a certified extract from that contract giving in particular the name of the lessor, the name of the lessee, the date and duration of the contract and the identification of the vehicle;

(b) where the driver is not the person hiring the vehicle, the driver's employment contract or a certified extract from that contract giving in particular the name of employer, the name of the employee and the date and duration of the employment contract or a recent pay slip.

If need be, the documents referred to in (a) and (b) may be replaced by an equivalent document issued by the competent authorities of the Member State.

Article 3

1. Member States shall take the necessary measures to ensure that their undertakings may use, for the carriage of goods by road, under the same conditions as vehicles owned by them, hired vehicles registered or put into circulation in compliance with the laws in their countries, provided that those undertakings fulfil the conditions laid down in Article 2.

2. Member States may exclude from the provisions of paragraph 1 own-account transport operations carried out by vehicles with a total permissible laden weight of more than 6 tonnes.'

5 Article 4 of Directive 84/647 provides:

'This Directive shall not affect the regulations of a Member State which lay down less restrictive conditions for the use of hired vehicles than those specified in Articles 2 and 3.'

6 The first indent of Article 5 of Directive 84/647 provides:

'Without prejudice to Articles 2 and 3, this Directive shall not affect the application of the rules concerning:

— the organisation of the market for the carriage of goods by road for hire or reward and own account and in particular access to the market and, in particular, concerning quota restrictions on road capacities.'

7 Article 1(1) of Council Regulation (EEC) No 881/92 of 26 March 1992 on access to the market in the carriage of goods by road within the Community to or from the territory of a Member State or passing across the territory of one or more Member States (OJ 1992 L 95, p. 1) provides that that regulation is to apply to

the international carriage of goods by road for hire or reward for journeys carried out within the territory of the Community. Article 3(1) of that regulation provides that international carriage is to be carried out subject to Community authorisation.

8 Article 5 of Regulation No 881/92 provides that:

'1. The Community authorisation referred to in Article 3 shall be issued by the competent authorities of the Member State of establishment.

2. The Member States shall issue the holder with the original of the Community authorisation, which shall be kept by the haulage undertaking, and the number of certified true copies corresponding to the number of vehicles at the disposal of the holder of the Community authorisation, whether wholly owned or, for example, under... hire... contracts.

3. ...

4. The Community authorisation shall be made out in the haulier's name, he may not transfer it to any third party. A certified true copy shall be kept in the vehicle and must be produced whenever required by an authorised inspecting officer.'

9 Article 1(1) of Council Regulation (EEC) No 3118/93 of 25 October 1993 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State (OJ 1993 L 279, p. 1) provides:

'Any road haulage carrier for hire or reward who is a holder of the Community authorisation provided for in Regulation (EEC) No 881/92 shall be entitled, under the conditions laid down in this Regulation, to operate on a temporary basis national road haulage services for hire and reward in another Member State, hereinafter referred to respectively as "cabotage" and as the "host Member State", without having a registered office or other establishment therein.'

10 Article 3(1) and the first subparagraph of Article 3(3) of that regulation provide:

'1. The cabotage authorisations... allow the recipient to carry out the cabotage operations.

...

3. A cabotage authorisation shall be made out in the name of the carrier. That carrier may not transfer it to a third party. Each cabotage authorisation may be used by only one vehicle at a time.'

11 Under Article 14 of Council Regulation (EEC) No 3821/85 of 20 December 1985 on recording equipment in road transport (OJ 1985 L 370, p. 8):

'1. The employer shall issue a sufficient number of record sheets to drivers, bearing in mind the fact that these sheets are personal in character, the length of the period of service and the possible obligation to replace sheets which are damaged, or have been taken by an authorised inspecting officer. The employer shall issue to drivers only sheets of an approved model suitable for use in the equipment installed in the vehicle.

2. The undertaking shall keep the record sheets in good order for at least a year after their use and shall give copies to the drivers concerned who request them. The sheets shall be produced or handed over at the request of any authorised inspecting officer.'

12 Article 14(1) of Regulation No 3821/85 was amended in order to clarify certain points by Council Regulation (EC) No 2135/98 of 24 September 1998 (OJ 1998 L 274, p. 1), but its content remains the same in all essential respects.

National law

13 Article 1 of the Order of the Minister of Infrastructure, Housing, Transport and the Sea of 29 June 1990 on the use by undertakings established in the territory of

a Member State of the European Economic Community of vehicles hired without drivers for the carriage of goods by road (JORF of 19 July 1990, p. 8563), which refers to Directive 84/647, provides:

'Undertakings established in the territory of a Member State of the Community which carry goods by road to or from, or in transit through French territory may, for the purposes of such traffic, use vehicles hired from a road vehicle hire undertaking, provided that:

— the hired vehicle is registered or put into circulation in compliance with the laws in force in that Member State;

— ...

— the vehicle is driven by the hirer or persons employed by the hirer.'

The main proceedings and the questions referred for a preliminary ruling

Case C-228/01

14 Bourrasse is a road haulage company established in France, the managing director of which is Mr Bourrasse. It is the holder of a Community authorisation

issued by the Department of Infrastructures for the Aquitaine region. Bourrasse's vehicles, which are registered in France, are each supplied with a certified true copy of that authorisation.

15 On 23 April 1993, Bourrasse acquired Ver Coelho, a road haulage company established in Portugal, the management of which Mr Bourrasse took over. The two companies have separate legal personality.

16 During an inspection of Bourrasse by the Inspection du travail des transports (Labour Inspectorate for Transport, 'the Labour Inspectorate') on 24 June 1996, it was found that 13 employees with Portuguese-sounding names employed by Bourrasse on 1 January 1992 had been transferred to Ver Coelho, some at the end of 1994 and the others at the end of 1995.

17 It was also established that Bourrasse hired out lorry-and-trailer combinations without a driver to Ver Coelho. Ver Coelho used Portuguese international carriage authorisations issued in the name of the lessor for its international haulage operations to France. The tachograph record sheets for the vehicles hired to Ver Coelho were managed by Bourrasse. Two Portuguese drivers employed by Ver Coelho said in their statements to the French Police that they only drove lorry-and-trailer combinations belonging to Mr Bourrasse, and one of them added that he had dealt directly with Mr Bourrasse.

18 In the light of those factors, the Labour Inspectorate concluded that the employees of Ver Coelho were in reality working under the direction of Bourrasse and charged Mr Bourrasse with the offence of concealing the employment of staff.

19 At a hearing before the Tribunal de grande instance de Dax, Mr Bourrasse denied the charge, claiming that the Portuguese drivers had contracts of employment drawn up by Ver Coelho and that Directive 84/647 authorises Bourrasse to hire lorry-and-trailer combinations to Ver Coelho provided that they are registered in the Member State where they are hired out and are driven by the lessee or persons under his direction.

20 By judgment of 6 December 1999, the Tribunal de grande instance de Dax found Mr Bourrasse guilty.

21 Mr Bourrasse and the Public Prosecutor appealed against that judgment to the Cour d'appel de Pau.

22 It is in those circumstances that the Cour d'appel de Pau decided to stay proceedings and refer to the Court of Justice the following questions for a preliminary ruling:

'1. Can the hiring of a vehicle without a driver as envisaged by Article 2 of Council Directive 84/647/EEC be interpreted as permitting the lessor, a road haulage company governed by French law:

— to obtain the carriage authorisations necessary within French territory on behalf of the lessee, a road haulage company governed by Portuguese law;

— to manage on behalf of the lessee, a road haulage company governed by Portuguese law, the tachograph discs of the drivers employed by that company?

2. Did the hired vehicles have to be registered in Portugal?'

Case C-289/01

23 Mr Perchicot is the manager of Perchicot France, a company established in France engaged in transport between France and Spain. It owns vehicles registered in France each of which is provided with a certified true copy of the Community authorisation issued to that company by the Department of Infrastructures for the Aquitaine region.

24 In 1999, Mr Perchicot set up a transport company, managed by himself, under Spanish law ('Perchicot Spain') to which were transferred the employment contracts of 13 employees who, until then, had been employed by Perchicot France. From 1 December 1999, new employees were systematically recruited by Perchicot Spain. Perchicot France's lorry-and-trailer combinations, whilst remaining registered in France, were hired out without a driver to Perchicot Spain.

25 Following inspections carried out at the beginning of 2000, the Labour Inspectorate found that the management of the tachograph discs of the hired vehicles, the obtaining of carriage authorisations for those vehicles and the

management of the transferred employees was still being carried out by the lessor, Perchicot France. It concluded that the relocation was fictitious and that the undertaking continued to be managed, directed and operated in France. The Labour Inspectorate considered that the legal framework within which the business was being carried on contravened the French regulations prohibiting the hiring of vehicles between Member States of the European Union, since only the transit of vehicles hired by one company from another in the same Member State is permitted. Accordingly, the Labour Inspectorate charged Mr Perchicot with concealing the employment of staff and 12 other offences.

26 In the criminal proceedings against Mr Perchicot before the Tribunal de grande instance de Dax, the court was faced with the question whether the French regulations were compatible with Directive 84/647, which allows lorry-and-trailer combinations to be made available between undertakings, and so decided to stay proceedings and refer to the Court of Justice the following question for a preliminary ruling:

'Where a vehicle is hired without a driver as provided for by Article 2 of Council Directive 84/647/EEC is the lessor, a French road haulage company, permitted:

— to obtain the carriage authorisations necessary within French territory on behalf of the lessee, a road haulage company governed by French law;

— to manage on behalf of the lessee, a road haulage company governed by Spanish law, the tachograph discs of the drivers employed by that company?'

27 Given the facts in the main proceedings, the first indent of the question is to be understood as referring to a lessee road haulage company governed by Spanish law.

The questions referred for a preliminary ruling

The first question in Case C-228/01 and the sole question in Case C-289/01

28 By those questions, the national courts ask essentially whether Article 2 of Directive 84/647 permits a road haulage company established in one Member State, which hires out vehicles without drivers to a road haulage company established in another Member State to obtain the carriage authorisations necessary within the territory of the first State on behalf of the lessee and to manage the tachograph discs of the drivers employed by the lessee on behalf of the latter.

29 As a preliminary point, Article 2 of Directive 84/647 sets out the conditions in which each Member State must allow the use within its territory, for the purposes of traffic between Member States, of vehicles hired by undertakings established within the territory of another Member State.

30 Under the first indent of Article 5 of Directive 84/647, without prejudice, *inter alia*, to Article 2 thereof, the directive is not to affect the application of the rules concerning access to the international carriage market and, therefore, the use of authorisations for carriage of goods for hire or reward.

31 Article 2 of Directive 84/647 makes no mention of drivers' tachograph discs.

32 Consequently, Article 2 of Directive 84/647 does not govern the use of carriage authorisations and tachograph discs.

33 However, in order to provide a satisfactory answer to the national court which has referred a question to it, the Court of Justice may deem it necessary to consider provisions of Community law to which the national court has not referred in its question (see, *inter alia*, Case 35/85 *Tissier* [1986] ECR 1207, paragraph 9; Case C-315/88 *Bagli Pennacchiotti* [1990] ECR I-1323, paragraph 10; and Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 39).

34 As regards carriage authorisations, according to the combined provisions of Articles 1(1) and 3(1) of Regulation No 881/92, a Community authorisation is required to carry out the international carriage of goods by road for hire or reward within the territory of the Community and, pursuant to Article 5(1) and (2) of the same regulation, that authorisation is to be issued by the authorities of the Member State in which the transport undertaking is established, which will issue the holder with the original and the number of certified true copies of the authorisation corresponding to the number of vehicles at the disposal of the holder, including those held under hire contracts. Consequently, it is for the lessee not the lessor to obtain a Community authorisation for the hired vehicles from the authorities of the Member State in which he is established.

35 Furthermore, under Article 5(4) of Regulation No 881/92, the Community authorisation is to be made out in the haulier's name and he may not transfer it to any third party. It follows that where vehicles originally used by a road haulier holding a Community authorisation are then hired out to another road haulier, the lessor is not entitled to transfer the benefit of his own Community authorisation to the lessee.

36 As regards the management of the tachograph discs, under Article 14(1) and (2) of Regulation No 3821/85, both in its original version and in that resulting from Regulation No 2135/98, it is the employer who issues the discs to the drivers, replaces them where necessary and then retains them for at least a year.

37 It follows that a haulage company established in one Member State, which hires out vehicles without a driver for the carriage of goods by road to a company established in another Member State, cannot retain the management of the tachograph discs of the hired vehicles.

38 Consequently, the answer to the first question in Case C-228/01 and the sole question in Case C-289/01 must be that Articles 3 and 5 of Regulation No 881/92, and Article 14 of Regulation No 3821/85, both in its original version and in that resulting from Regulation No 2135/98, do not permit a road haulage company established in one Member State, which hires out vehicles without drivers to a road haulage company established in another Member State, to transfer the benefit of its own Community authorisation to the lessee or to retain the management of the tachograph discs of the hired vehicles.

The second question in Case C-228/01

39 By the second question in Case C-228/01, the national court wishes to know whether, in the case of a cross-border hire of a vehicle without a driver, the vehicles must be registered in the Member State of the lessee.

40 Article 2(1) of Directive 84/647 provides in this regard that each Member State is to allow the use within its territory of vehicles hired by undertakings established on the territory of another Member State provided that, *inter alia*, the vehicles are registered or put into circulation in compliance with the laws in the Member State in which the haulier lessee is established.

41 However, under Article 4(1) of that directive, a Member State may lay down less restrictive conditions for the use of hired vehicles. That does not appear to be the case in the main proceedings.

42 Consequently, the answer to the second question in Case C-228/01 must be that Article 2(1) of Directive 84/647 should be interpreted as meaning that, subject to the possible application of Article 4 of that directive, vehicles hired without drivers must be registered in the Member State in which the lessee road haulage company is established.

Costs

The costs incurred by the French Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national courts, the decision on costs is a matter for those courts.

On those grounds,

THE COURT (Second Chamber),

in answer to the questions referred to it by the the Cour d'appel de Pau and the Tribunal de grande instance de Dax by judgments of 15 May 2001 and 2 July 2001 respectively, hereby rules:

1. **Articles 3 and 5 of Council Regulation (EEC) No 881/92 of 26 March 1992 on access to the market in the carriage of goods by road within the Community to or from the territory of a Member State or passing across the territory of one or more Member States, and Article 14 of Council Regulation (EEC) No 3821/85 of 20 December 1985 on recording equipment in road transport, both in its original version and in that resulting from**

Council Regulation (EC) No 2135/98 of 24 September 1998, do not permit a road haulage company established in one Member State, which hires out vehicles without drivers to a road haulage company established in another Member State, to transfer the benefit of its own Community authorisation to the lessee or to retain the management of the tachograph discs of the hired vehicles.

2. Article 2(1) of Council Directive 84/647/EEC of 19 December 1984 on the use of vehicles hired without drivers for the carriage of goods by road, as amended by Council Directive 90/398/EEC of 24 July 1990, should be interpreted as meaning that, subject to the possible application of Article 4 of that directive, vehicles hired without drivers must be registered in the Member State in which the lessee road haulage company is established.

Gulmann Skouris Colneric

Delivered in open court in Luxembourg on 7 November 2002.

R. Grass

Registrar

R. Schintgen

President of the Second Chamber