

OPINION OF ADVOCATE GENERAL
TIZZANO

delivered on 4 July 2002 ¹

1. The Cour d'Appel de Pau (Court of Appeal, Pau (France) ('the Court of Appeal')) and the Tribunal de Grande Instance de Dax (Regional Court, Dax (France) ('the Regional Court')) referred certain questions of a similar nature to the Court of Justice for a preliminary ruling on the interpretation 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 ² ('the Directive'), in particular Article 2 thereof.
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;

The Community provisions

2. Article 2 of the Directive provides as follows:
4. the hired vehicle is driven by personnel of the undertaking using it;

'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;
3. Article 4(1) provides that the Directive:

¹ — Original language: Italian.

² — OJ 1984 L 335, p. 72.

'... shall not affect the regulations of a Member State which lays down less

restrictive conditions for the use of hired vehicles than those specified in Articles 2 and 3.’

6. Article 3(1) of Regulation No 881/92 provides that:

4. Article 5 provides:

‘International carriage shall be carried out subject to Community authorisation.’

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

7. Article 5 of Regulation No 881/92 provides that:

— the organization 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,

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

...’

5. International carriage of goods by road is governed essentially, as regards access to the market, by 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 States³ (‘Regulation No 881/92’).

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 purchase, hire or leasing contracts.

3 — OJ 1992 L 95, p. 1.

...

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.'

Facts and procedure

The Bourrasse case

8. Lastly, it should be noted that the Council adopted Regulation (EEC) No 3821/85 of 20 December 1985 on recording equipment in road transport⁴ ('Regulation No 3821/85'), Article 14 of which provides as follows:

'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.'

9. In Case C-228/01 the question arose in the course of proceedings pending before the Court of Appeal initiated by the Ministère public against the owner of a French undertaking engaged in the carriage of goods by road, who is charged with a series of offences under French criminal law. The alleged facts, relating to the period from the end of 1994 to June 1996, concern a process of relocation of business activity, consisting in a French undertaking belonging to the accused ('the lessor undertaking' or 'the lessor') making available vehicles without drivers to a Portuguese transport undertaking ('the lessee undertaking' or 'the lessee'), also owned by the accused undertaking. The vehicles in question are registered in France. In carrying out its own business of international haulage the lessee uses the same workers who, before the vehicles were leased, were employed by the lessor undertaking; moreover, the lessee uses the carriage authorisations obtained by the lessor. Furthermore, the lessor, and not the lessee, appears to be in possession of the tachograph discs used by the drivers in the recording equipment in the vehicles made available to the lessee.

10. Mr Bourrasse is charged with engaging in the concealed employment of those workers, who drove lorry-and-trailer com-

⁴ — OJ 1985 L 370, p. 8.

binations bearing the distinctive badge of the lessor undertaking, from which they in fact took orders, even though appearing officially to be employed by the lessee undertaking. The criminal proceedings concern, in particular, the contravention of the provisions of the French Labour Code on the issuing of pay slips to employees, the keeping of a payroll ledger and the keeping of a staff register.

11. In its judgment of 6 December 1999 the Tribunal correctionnel de Dax (Criminal Court, Dax) found Mr Bourrasse guilty of engaging in concealed employment, holding, in particular, that ‘the employees [of the Portuguese lessee undertaking] are in reality persons working under the direction of Transports Bourrasse, which uses a relocated structure and commits, through its managers, the offence of concealed employment’.

12. Following the appeal of that judgment to the Court of Appeal, that court considered that the determination of the case depended on the interpretation of a provision of Community law and so, by order of 6 December 1999, decided to stay proceedings and referred the following questions to the Court of Justice 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 inter-

preted 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 disc of the drivers employed by that company?

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

The Perchicot case

13. Case C-289/01 arises from criminal proceedings pending before the Regional Court concerning a factual and legal situation substantially similar to that in Case C-228/01, save that in this case the relocation arises between a French transport undertaking, Perchicot France, and an

undertaking governed by Spanish law specifically set up and controlled by the former, Perchicot Spain. The alleged facts concern the period from the end of 1999 to the beginning of 2000.

14. Also considering that the determination of the dispute depends on the interpretation of a provision of Community law, by order of 2 July 2001, the Regional Court referred the following question to the Court of Justice of the European Communities 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 [Spanish] 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?’

15. By order of the President of the Court of Justice of 23 January 2002 the two cases were joined on the ground that they are related cases.

16. The Commission, the French Government, the Union régionale syndical des petits et moyens transporteurs du sud ouest (‘UNOSTRA Aquitaine’), which intervenes in the criminal proceedings against Mr Bourrasse, and the Inspection du travail des transports, Bayonne subdivision, (‘the employment inspectorate’), which intervenes in the proceedings against Mr Perchicot, lodged written observations in the proceedings before the Court of Justice. Mr Bourrasse presented further submissions at the hearing.

The question common to the two cases

17. Apart from Mr Bourrasse, who claims that the Court should reply in the affirmative to that question, all of the parties intervening in the present case tend towards the opposite conclusion.

18. The French Government observes primarily that, on the contrary, that question should really be reformulated because the proceedings *a quibus* do not in fact give rise to an issue under Article 2 of Directive

84/647, but rather under Articles 3 and 5 of Regulation No 881/92 concerning access to the market in the international carriage of goods by road, and Article 14 of Regulation No 3821/85 on recording equipment. In that legal context the Court should reply that the said provisions do not permit a transport company governed by French law which leases motor vehicles to a company of another Member State to transfer its own Community carriage authorisations to the lessee, or to continue to manage the tachograph discs of the leased vehicles.

19. If, instead, the Court wishes to leave aside any express reference to those regulations on access to the market and tachograph recording equipment on the basis that the referring court has not mentioned them, the French Government considers, in the alternative, and in common with UNOSTRA Aquitaine, that the answer to the question in common should be sought in Article 2(4) of the Directive. As has been seen that provision makes the permissibility of the hire subject to the condition that 'the hired vehicle is driven by personnel of the undertaking using it'. According to the Court's case-law⁵, even though 'personnel of the undertaking' is a Community law concept, it should nonetheless be defined in the light of each Member State's legislation. It follows that it is for the State concerned

to assess whether the fact that the lessor allows the lessee to use the former's own Community carriage licences and itself manages the tachograph discs implies that the transport is not carried out 'by personnel of the undertaking using it', as required by Article 2(4) of the Directive.

20. The Commission, for its part, shares in large part the French Government's legal analysis in relation to its primary submission and proposes that the Court should find that the Directive does not govern expressly the use of the carriage authorisations and tachograph discs, but refers to Regulation No 881/92, pursuant to which the Community authorisation is registered in the name of the person who in fact operates as a haulier and may not be transferred to any third party.

21. In support of its own submissions the Commission hastens to point out, citing the *Centros* judgment, that even though the freedom of establishment recognised by the Treaty includes the right of Community citizens 'to carry on their business in another Member State through an agency, branch or subsidiary', that does not alter the fact that 'a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advan-

⁵ — Case 327/82 *Ekro* [1984] ECR 107 and Case 105/84 *Dammols* [1985] ECR 2639.

tage of provisions of Community law'⁶. It follows from this that in the circumstances of the present case, neither Mr Bourrasse nor Mr Perchicot can rely on the liberalisation of cross-border leases laid down by the Directive.

22. The employment inspectorate also tends to the same conclusion, stressing in particular that, besides depriving employees of the wages to which they would be entitled pursuant to the employment contract and of the protection of the applicable collective rules if they were formally employed by the French transport undertaking, the fictitious relocation implemented by the accused in the main proceedings would circumvent the French rules on social security and staff representation.

Assessment

23. As has been seen, the real issue raised by the question under consideration is the identification of the relevant rules given that, as emerges from the positions of the parties, the applicable provisions of Community law in the present case appear to differ from those mentioned by the referring court.

24. I begin by stating that, even supposing that to be the case, that would not preclude the possibility of replying to the question in this case given that, as the Community case-law makes clear, '[i]n 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'⁷.

25. Having said that, I note that the argument of the French Government and of the Commission seems to me to be well founded given that the Directive does not in fact contain provisions relating to recording equipment and tachograph discs. Those matters are governed instead by Regulation No 3821/85, which brings together in a single text the various provisions previously adopted on the subject, laying down, in particular under Chapter IV, provisions relating to the use and management of the equipment and of the relevant record sheets. On the other hand, not only does the Directive not address access to the market in the road haulage sector, but it is expressly subject to the other Community provisions in force on the subject, namely Regulation No 881/92 for international carriage and Regulation No 3118/93⁸ for cabotage. Since the present case is indisputably concerned with carriage between

⁶ — Case 212/97 *Centros* [1999] ECR I-1459, paragraph 20 *et seq.*

⁷ — Case 35/85 *Tissier* [1986] ECR 1207, paragraph 9; Case C-315/88 *Bagli Pennacchiotti* [1990] ECR I-1323, paragraph 10; Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 39.

⁸ — Council Regulation (EEC) No 3118/93 of 25 October

two different Member States it is the first and not the second which applies.

drivers for the carriage of goods by road to a company of another Member State to transfer its own Community carriage authorisation to the lessee.

26. Having thus identified the applicable provisions I note that, as regards access to the market, Regulation No 881/92 provides that international carriage shall be carried out subject to Community authorisation (Article 3(1)), and that the original authorisation certificate and a certified copy thereof for each vehicle at the disposal of the holder of the Community authorisation under a hire agreement shall be granted by the Member State in which the transport undertaking is established (Article 5(1) and (2)). It is therefore clear that it is for the lessee and not the lessor to obtain the Community authorisation for the hired vehicles.

29. Next, as regards the management of the tachograph discs, I note that Article 14 of Regulation No 3821/85 provides that it is for the employer (therefore the carrier) to issue the discs to the drivers, managing their use and replacing them when needed (Article 14(1)), and then keeping them for a certain time (Article 14(2)). It follows that a haulage company governed by French law which hires out vehicles without drivers for the carriage of goods by road to a company of another Member State may not continue to manage the tachograph discs of the hired vehicles.

27. To remove all remaining doubt, however, it may again be stressed that, pursuant to Article 5(4), that authorisation 'shall be made out in the haulier's name, he may not transfer it to any third party'; that clearly applies to the case in which vehicles originally used by one party holding a Community carriage authorisation are then leased or transferred to another party.

30. Having thus identified the factors necessary to reply to the question under consideration, I do not consider it necessary to have to take a position on the question raised by the French Government in the alternative on the interpretation of 'personnel of the undertaking' in Article 2(4) of the Directive. I only note in passing that, as the Commission pointed out at the hearing, the cases of *Ekro* and *Danmols*⁹, on which the French Government relies in support of its proposed solution to that question, are not relevant. Those cases are in fact concerned, respectively, with the interpretation of terms contained in a regulation on export refunds for beef and veal and in a

28. It may therefore be concluded from this that Articles 3 and 5 of Regulation No 881/92 do not allow a French haulage company which hires out vehicles without

⁹ — Cited above.

directive on the harmonisation of national measures on the safeguarding of employees' rights on the transfer of undertakings. The present case is concerned instead with the interpretation of a concept which determines the scope of application of a directive on liberalisation, the extent of which cannot therefore be entirely left to the unilateral choice of individual Member States.

31. In conclusion, I consider that the answer to the first question should be that Articles 3 and 5 of Regulation No 881/92 and Article 14 of Regulation No 3821/85 do not permit a company governed by French law which hires out vehicles without drivers for the carriage of goods by road to a haulage company of another Member State to transfer its own Community carriage authorisation to the lessee or to continue to manage the tachograph discs of the hired vehicles.

33. For my part I cannot but agree in principle with the intervening parties in that it also seems to me to be beyond doubt that Article 2 only applies where the hired vehicles are registered in the Member State in which the lessee transport undertaking is established.

34. I note, however, that under Article 4 of the Directive the provisions of Article 2 do not preclude a Member State from laying down conditions less restrictive of the use of hired vehicles. In other words, and in so far as this case is concerned, the provisions of the Directive are not such as to preclude the possibility of the lawful cross-border hire of vehicles for the carriage of goods, in accordance with the applicable national law, even if the hired vehicles are not registered in the Member State in which the hiring transport undertaking is registered.

The second question in Case C-228/01

32. In respect of the second question in Case C-228/01, all of the parties agree that, according to the express wording of Article 2(1) of the Directive, the hired vehicles must be registered in the Member State of establishment of the lessee. They propose consequently that the Court reply to the referring court accordingly.

35. Having said that, I propose that the Court should reply to the second question that Article 2(1) of Directive 84/647/EEC should be interpreted as meaning that, subject to the possible application of Article 4 of that directive, hired vehicles must be registered in the Member State in which the hiring transport undertaking is established, in this case Portugal.

Conclusion

36. In the light of the foregoing I propose that the Court reply to the questions referred for a preliminary ruling in the following terms:

- (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 do not permit a company governed by French law which hires out vehicles without drivers for the carriage of goods by road to a haulage company of another Member State to transfer its own Community carriage authorisation to the lessee or to continue to manage the tachograph discs of the hired motor 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 should be interpreted as meaning that, subject to the possible application of Article 4 of that directive, hired vehicles must be registered in the Member State in which the lessee haulage undertaking is established, in this case Portugal.