



**REPORT FOR THE HEARING**  
in Case E-6/19

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Princely Court of Appeal (*Fürstliches Obergericht*) in criminal proceedings against

**H and I**

concerning the interpretation 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) 2135/98 and repealing Council Regulation (EEC) No 3820/85.

**I Introduction**

1. By a letter of 20 August 2019, registered at the Court on the same day, the Princely Court of Appeal (*Fürstliches Obergericht*) made a request for an Advisory Opinion in criminal proceedings against H and I.

2. The case before the referring court concerns the interpretation 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) 2135/98 and repealing Council Regulation (EEC) No 3820/85 (“the Regulation”), in particular Articles 6(5), 13(1) and 19(1) thereof. Specifically, the referring court has asked for guidance on the interpretation of the exceptions allowed for specialised vehicles transporting money and/or valuables under those provisions.

**II Legal background**

*EEA law*

3. The Regulation was incorporated into the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”) by Decision of the EEA Joint Committee No 154/2006 of 8 December 2006 (OJ 2007 L 89, p. 27), inserting it as point 24e of Annex

XIII (Transport). Constitutional requirements were indicated by Norway. They were fulfilled on 14 March 2008, and the decision entered into force on 1 May 2008.

4. Recital 17 of the Regulation reads:

*This Regulation aims to improve social conditions for employees who are covered by it, as well as to improve general road safety. It does so mainly by means of the provisions pertaining to maximum driving times per day, per week and per period of two consecutive weeks, the provision which obliges drivers to take a regular weekly rest period at least once per two consecutive weeks and the provisions which prescribe that under no circumstances should a daily rest period be less than an uninterrupted period of nine hours. Since those provisions guarantee adequate rest, and also taking into account experience with enforcement practices during the past years, a system of compensation for reduced daily rest periods is no longer necessary.*

5. Article 1 of the Regulation reads:

*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) and (2) of the Regulation reads:

*1. This Regulation shall apply to 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 by vehicles which are constructed or permanently adapted for carrying more than nine persons including the driver, and are intended for that purpose.*

*2. This regulation shall apply, irrespective of the country of registration of the vehicle, to carriage by road undertaken:*

*(a) exclusively within the Community; or*

*(b) between the Community, Switzerland and the countries party to the Agreement on the European Economic Area.*

7. Article 4 of the Regulation reads, in extract:

*For the purposes of this Regulation the following definitions shall apply:*

*(a) 'carriage by road' means any journey made entirely or in part on roads open to the public by a vehicle, whether laden or not, used for the carriage of passengers or goods;*

...

*(c) 'driver' means any person who drives the vehicle even for a short period, or who is carried in a vehicle as part of his duties to be available for driving if necessary;*

...

*(e) 'other work' means all activities which are defined as working time in Article 3(a) of Directive 2002/15/EC except 'driving', including any work for the same or another employer, within or outside of the transport sector;*

...

*(o) 'multi-manning' means the situation where, during each period of driving between any two consecutive daily rest periods, or between a daily rest period and a weekly rest period, there are at least two drivers in the vehicle to do the driving. For the first hour of multi-manning the presence of another driver or drivers is optional but for the remainder of the period it is compulsory;*

...

8. Article 6(5) of the Regulation reads:

*A driver shall record as other work any time spent as described in Article 4(e) as well as any time spent driving a vehicle used for commercial operations not falling within the scope of this Regulation, and shall record any periods of availability, as defined in Article 15(3)(c) of Regulation (EEC) No 3821/85, since his last daily or weekly rest period. This record shall be entered either manually on a record sheet, a printout or by use of manual input facilities on recording equipment.*

9. Article 13 of the Regulation reads, in extract:

*1. 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:*

...

*(h) vehicles used in connection with sewerage, flood protection, water, gas and electricity maintenance services, road maintenance and control, door-to-door household refuse collection and disposal, telegraph and telephone services, radio and television broadcasting, and the detection of radio or television transmitters or receivers;*

...

*(l) vehicles used for milk collection from farms and the return to farms of milk containers or milk products intended for animal feed;*

*(m) specialised vehicles transporting money and/or valuables;*

...

10. Article 19 of the Regulation reads, in extract:

*1. Member States shall lay down rules on penalties applicable to infringements of this Regulation and Regulation (EEC) 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 (EEC) 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.*

...

11. Council Regulation (EEC) No 3821/85 of 20 December 1985 on recording equipment in road transport (OJ 1985 L 370, p. 8) was incorporated into point 21 of Annex XIII by virtue of the entry of the EEA.

12. Article 3(2) of Regulation (EEC) No 3821/85 reads:

*Member States may exempt vehicles mentioned in Article 13(1) of Regulation (EEC) No 3820/85 from application of this Regulation. Member States shall inform the Commission of any exemption granted under this paragraph.*

13. Council Regulation (EEC) No 3821/85 was repealed by Regulation (EU) No 165/2014 of the European Parliament and of the Council of 4 February 2014 on tachographs in road transport, repealing Council Regulation (EEC) No 3821/85 on recording equipment in road transport and amending Regulation (EC) No 561/2006 of the European Parliament and the Council on the harmonisation of certain social legislation relating to road transport (OJ 2014 L 60, p. 1). Regulation (EU) No 165/2014 was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 122/2016 of 3 June 2016 (OJ 2017 L 308, p. 27), inserting it as point 21b of Annex XIII (Transport). Constitutional requirements were indicated by Norway. These were fulfilled on 6 July 2018 and the decision entered into force on 1 September 2018.

14. Recital 3 of Regulation (EU) No 165/2014 reads:

*Certain vehicles are subject to an exemption from the provisions of Regulation (EC) No 561/2006 of the European Parliament and of the Council. In order to ensure coherence, it should also be possible to exempt such vehicles from the scope of this Regulation.*

15. Article 3(2) of Regulation (EU) No 165/2014 reads:

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

16. Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities (OJ 2002 L 80, p. 35) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 50/2003 of 16 May 2003 (OJ 2003 L 193, p. 24), which inserted it as point 24d of Annex XIII (Transport). The Directive entered into force on 1 May 2004.

17. Article 3(a)(1) of Directive 2002/15/EC reads:

*Definitions*

*For the purposes of this Directive*

*(a) “working time” shall mean:*

*1. in the case of mobile workers: the time from the beginning to the end of work, during which the mobile worker is at his workstation, at the disposal of the employer and exercising his functions or activities, that is to say:*

*– the time devoted to all road transport activities. These activities are, in particular, the following:*

*(i) driving;*

*...*

*(v) all other work intended to ensure the safety of the vehicle, its cargo and passengers or to fulfil the legal or regulatory obligations directly linked to the specific transport operation under way, including monitoring of loading and unloading, administrative formalities with police, customs, immigration officers etc.,*

*– the times during which he cannot dispose freely of his time and is required to be at his workstation, ready to take up normal work, with certain tasks associated with being on duty, in particular during periods awaiting loading or unloading where their foreseeable duration is not known in advance, that is to say either before departure or just before the actual start of the period in question, or under the general conditions negotiated between the social partners and/or under the terms of the legislation of the Member States;*

*...*

*National law*

18. The Regulation was implemented by the Liechtenstein Government Regulation of 24 May 2011 on working and driving time and rest periods for drivers of motor vehicles for the transport of goods and persons (Regierungsverordnung vom 24.05.2011 über die Arbeits-, Lenk- und Ruhezeit der Führer von Motorfahrzeugen zum Güter- und Personentransport; “ARV”).

19. By way of Article 3(2)(o) of the ARV, the Principality of Liechtenstein has exercised the right pursuant to Article 13(1)(m) of the Regulation to grant exceptions from Articles 5 to 9 of the Regulation for road carriage by specialised vehicles transporting money and/or valuables.

20. Under Article 25(1)(c) of the ARV, the driver of a specialised vehicle transporting money and/or valuables is obliged to provide the evidence referred to in Article 36 of Regulation (EU) No 165/2014, including the records of correctly recorded working time.

21. Article 35 of the ARV states that a person shall be subject to a fine of up to CHF 20 000 (or in the event of default, up to 3 months' imprisonment) for infringement of the provisions on working and driving times and rest periods (with specific reference to Articles 5 to 9 of Regulation (EC) No 561/2006) (Article 35(1)(a)), as well as the corresponding recording requirements (Article 35(1)(b)), including a failure to carry or operate the recording equipment correctly (point 1) and a failure to keep the tachograph active or to operate it correctly (point 3).

22. Article 36(1) of the ARV states that offences contrary to the ARV (as well as Articles 5 to 9 of Regulation (EC) No 561/2006 and Regulation (EU) No 165/2014) shall be punishable as an administrative offence even if the offence was not committed on the national territory but on a journey within the territorial scope of those provisions (as defined in Article 2(2) and (3) of Regulation (EC) No 561/2006). In such cases, the place on the national territory where the control took place and the offence was detected shall be treated as the place where the offence was committed. However, no penalty shall be applied if the administrative offence on national territory no longer persists and the driver demonstrates that he has already been subject to a penalty or this offence in another State.

23. Section 9(1) of the Liechtenstein Criminal Code states that any person who does not recognise the wrongfulness of an act because of a mistake of law shall not be deemed to act culpably if he cannot be blamed for the mistake. However, Section 9(2) of the Liechtenstein Criminal Code provides that a perpetrator shall be blamed for a mistake of law if it was as easily recognisable for the perpetrator as for anyone else or if the perpetrator did not acquaint himself with the relevant provisions, even though he would have been required to do so in light of his profession, occupation or other circumstances.

### **III Facts and procedure**

24. H and I are both employees of the Liechtenstein company X, which provides various services within the security sector. The company specialises in the transport of valuables and money.

25. On 15 June 2018, the Liechtenstein national police force carried out checks on company X in Liechtenstein in relation to the months of March and April 2018. It identified

infringements of the provisions on rest periods and of the recording provisions. The Liechtenstein Public Prosecutor's Office then brought criminal proceedings before the Princely Court (*Fürstliches Landgericht*) seeking the conviction of the two accused, H and I.

26. H was accused of having infringed the provisions on working time, driving time and rest periods and the recording provisions of the ARV in Liechtenstein and at other locations in the European Economic Area in his capacity as a truck driver for company X, in particular for having worked continuously for 49 hours in total between 22 April to 24 April 2018 without the required rest period, and for failing to record his actual working time.

27. I was accused of having infringed the provisions on working time, driving time and rest periods and the recording provisions of the ARV in Liechtenstein, Germany, France and Spain in his capacity as a truck driver for company X, in particular for having worked continuously for more than 20 hours in total between 20 March and 21 March 2018 without the required rest period, for more than 40 hours in total between 3 April and 4 April 2018 without the required rest period, and for failing to record his actual working time.

28. During the journeys in question both H and I had been travelling in trucks (armoured vans) or in escort vehicles (limousines). The journeys at issue involved the transport of money and/or valuables. Both H and I took the view that the periods in which they were passengers and rested in the limousine did not constitute working time. Further they took the view that they did not need to register the working time and rest periods because an exception to registering and recording applied since the journey consisted of the transport of money and/or valuables.

29. The Princely Court acquitted both accused of the charges brought against them; in H's case by judgment of 15 April 2019 (case number 13 EU.2019.31-15) and in I's case by judgment of the same date (case number 11 EU.2019.33-20).

30. The Liechtenstein Public Prosecutor's Office brought an appeal against the two judgments to the Princely Court of Appeal (*Fürstliches Obergericht*). For the purpose of the appeal proceedings, the two cases have been joined.

31. Against this background, the Princely Court of Appeal has referred the following questions to the Court:

**1. In relation to Article 13(1)(m) of Regulation (EC) No 561/2006:**

**(a) Does this provision also apply to “empty journeys” by the specialised vehicles transporting money and/or valuables mentioned therein, in other words, to journeys by those vehicles for the purpose of collecting money or valuables and to return journeys after the delivery of money or valuables?**



**(b) Does this provision also apply to vehicles escorting specialised vehicles transporting money and/or valuables?**

**2. Is it necessary or proportionate, by reason of Article 19(1) of Regulation (EC) No 561/2006, for a Member State to impose penalties for infringements of this Regulation where the journeys at issue were effected by specialised vehicles transporting money or valuables on the territory of other Member States and those Member States have exercised the exception provided for in Article 13(1)(m) of this Regulation such that under the relevant national law of the Member States concerned no infringement exists?**

**3. Must Article 6(5) of Regulation (EC) No 561/2006 be interpreted as meaning that even where a Member State has exercised the exception provided for in Article 13(1)(m) of this Regulation, any time spent as described in Article 4(e) of this Regulation and time spent driving vehicles (in each case in relation to journeys involving specialised vehicles transporting money and/or valuables) must be recorded as “other work” in accordance with Article 6(5) of the Regulation mentioned?**

**If the answer to the question is in the affirmative, must Article 6(5) of Regulation (EC) No 561/2006 be applied also where the relevant Member State has exempted the vehicles concerned in accordance with Article 3(2) of Regulation (EEC) No 3821/85 (now Article 3(2) of Regulation (EU) No 165/2014)?**

#### **IV Written observations**

In accordance with Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the Government of Liechtenstein, represented by Dr Andrea Entner-Koch, Director, and Thomas Bischof, Deputy Director, EEA Coordination Unit, acting as Agents;
- the EFTA Surveillance Authority (“ESA”), represented by Erlend Møinichen Leonhardsen, Michael Sánchez Rydelski and Carsten Zatschler, Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission (“the Commission”), represented by Cécile Vrignon and Nicola Yerrell, members of its Legal Service, acting as Agents.

## V Summary of the arguments submitted

### *The Government of Liechtenstein*

32. As a preliminary observation, the Liechtenstein Government notes that the transport of money and/or valuables is one of few activities where driving is only an ancillary activity to the main activity of the driver or the business. Such transports are typically carried out over shorter times and distances, and a derogation from the Regulation is unlikely to undermine the objectives of the Regulation as regards the improvement of working conditions and road safety. Extending the derogation also to longer journeys could undermine those objectives.<sup>1</sup> It is therefore an open question whether long journeys by specialised vehicles transporting money/and or valuables such as the journeys in the case at hand can fall under the exceptions of Article 13 of the Regulation.

33. As regards Question 1(a), the Liechtenstein Government contends that the wording of Article 13(1)(m) of the Regulation does not give a clear answer to whether “empty journeys” are included in the exception. It is of the opinion, however, that the purpose underlying the exception does not apply to “empty journeys” as the aim of the exception is to avoid breaks in unsafe places as well as the misuse of inspections for staging attacks, and thereby to ensure the safety of the crew. In the view of the Liechtenstein Government, these objectives are prominent when the vehicle is loaded with valuables, however, they are not noticeably present in cases where the vehicles are empty.

34. The Liechtenstein Government further notes that, although there is no relevant case-law from the Court of Justice of the European Union (“ECJ”) on the interpretation of Article 13(1)(m) of the Regulation, the ECJ has held that the conditions under which Article 13(1)(d) and 13(1)(p) of the Regulation applies are to be interpreted restrictively.<sup>2</sup> The Liechtenstein Government does not see any reason why this should not similarly apply to Article 13(1)(m). In its view, a similar approach would best preserve the aims of protecting the working conditions of drivers, as well as protecting road safety, as set out in Article 1.<sup>3</sup>

35. Finally, the competitive aspect must also be taken into account. Article 1 of the Regulation aims to eliminate inequalities that could distort competition in the transport

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<sup>1</sup> Reference is made to the judgment in *A. Karuse*, C-222/12, EU:C:2014:142, paragraphs 40 and 41.

<sup>2</sup> Reference is made to the judgment in *NK*, C-231/18, EU:C:2019:103, paragraph 21, and the judgment in *Andreas Michael Seeger*, C-554/09, EU:C:2011:523, paragraph 33.

<sup>3</sup> Reference is made to the judgment in *Andreas Michael Seeger*, cited above, paragraph 33.

sector. The exception pursuant to Article 13(1)(m) of the Regulation must not run counter to this purpose. The absence of competition therefore plays a central role.<sup>4</sup>

36. Against this background, the Government of Liechtenstein submits that the answer to Question 1(a) must be that Article 13(1)(m) of the Regulation does not apply to “empty journeys” by specialised vehicles transporting money and/or valuables.

37. As for Question 1(b), the Liechtenstein Government contends that vehicles escorting specialised vehicles are not excluded under Article 13(1)(m). Such vehicles are not expressly mentioned under Article 13(1) of the Regulation, nor has Liechtenstein, Germany or Austria provided an exception for escort vehicles in the national measure implementing the Regulation. In the view of the Liechtenstein Government, it would be excessive to interpret the exception of Article 13(1)(m) of the Regulation so broadly as to cover escort vehicles.<sup>5</sup>

38. The Liechtenstein Government therefore concludes that Article 13(1)(m) of the Regulation should not apply to vehicles escorting specialised vehicles transporting money and/or valuables.

39. In relation to Question 2, the Liechtenstein Government observes that, although it is possible to establish cross-national exceptions to the Regulation, no such exception has been agreed between the EEA States concerned. Therefore, all exceptions relevant to this case are purely national in scope.

40. The Liechtenstein Government further notes that the Court of Appeal refers to Liechtenstein, Germany, France and Spain as the EEA States concerned in the present case. However, it is not possible to enter Liechtenstein without crossing through either Switzerland or Austria. These EEA States are not mentioned by the referring court. The Liechtenstein Government leaves it to the Court to assess whether this has any bearing on the admissibility of Question 2.

41. The Liechtenstein Government argues that the Regulation, as stated in Article 19(2) thereof, is intended to allow national authorities to impose penalties for an infringement detected on its territory, even where that infringement was committed on the territory of another EEA State. Further, an exception under Article 13(1)(m) the Regulation was not intended to allow for “chain journeys” through the whole of the EEA, but to provide national exceptions for an EEA State’s own territory, specifically for short journeys. Thus, it is both necessary and proportionate to impose sanctions.

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<sup>4</sup> Reference is made to the judgement in *Anders Sjoberg*, C-387/96, ECLI :EU:C:1998:112, paragraph 18

<sup>5</sup> Reference is made to the judgment in *Andreas Michael Seeger*, cited above, paragraph 33.

42. As regards the first part of Question 3, the Liechtenstein Government notes that Article 6(5) of the Regulation refers to vehicles used for commercial operations outside the scope of the Regulation. Article 6(5) of the Regulation thus applies to vehicles benefiting from an exemption under Article 3 of the Regulation, as those vehicles do not fall within the scope of the Regulation. In the Liechtenstein Government's view, the question is whether Article 6(5) also applies to vehicles mentioned under Article 13 of the Regulation.

43. Based on the history of the current Article 6(5) of the Regulation, and in particular the Explanatory Memorandum prepared by the European Commission, the Liechtenstein Government contends that a driver should record any time spent as described in Article 4(e) of the Regulation and time spent driving as "other work" in accordance with Article 6(5) where an EEA State has exercised the exception provided for in Article 13(1)(m).<sup>6</sup> Article 6(5), as drafted in the original proposal, expressly mentioned both the exemption under Article 3 and the derogations under Article 13. Although the wording of Article 6(5) as adopted does not expressly refer to Article 13, the Liechtenstein Government argues that no material change was intended by the changes to the legislative proposal.<sup>7</sup> According to the Liechtenstein Government, it follows that time spent driving vehicles exempted under Article 13 must be recorded as "other work" in accordance with Article 6(5). In its view, such an interpretation is in line with the objectives of the Regulation.

44. As for the second part of Question 3, the Liechtenstein Government understands the referring court as seeking clarification on the relationship between Article 6(5) of the Regulation and Article 3(2) of Regulation (EEC) No 3821/85, now Article 3(2) of Regulation (EU) No 165/2014, in terms of whether Article 6(5) of the Regulation must be applied to vehicles when the relevant EEA State has exempted them in accordance with Article 3(2) of Regulation (EEC) No 3821/85.

45. According to the Liechtenstein Government, Regulation (EU) No 165/2014 directly serves to enforce the Regulation. Recital 3 of Regulation (EU) No 165/2014 states that it should also be possible to exempt vehicles from Regulation (EU) No 165/2014 that are exempt from the provisions of the Regulation, in order to ensure coherence. Their interrelated nature suggests that the two regulations must be interpreted in a systematic and coherent manner. Consequently, it is the view of the Liechtenstein Government that Article

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<sup>6</sup> Reference is made to the explanatory memorandum to the Proposal for a Regulation of the European Parliament and of the Council on the harmonisation of certain social legislation relating to road transport, COM(2001) 573 final (OJ 2002 C 51E, p. 234).

<sup>7</sup> Reference is made to Report A5-0388/2002 of the European Parliament of 12 November 2002 on the proposal for a European Parliament and Council regulation on the harmonisation of certain social legislation relating to road transport, p. 24, and the Amended proposal for a Regulation of the European Parliament and of the Council on the harmonisation of certain social legislation relating to road transport and amending Council Regulation (EEC) 3821/85 on recording equipment in road transport (presented by the Commission pursuant to Article 250(2) of the EC Treaty) (COM(2003) 490 final).

6(5) of the Regulation must also be applied where the EEA State has exempted those vehicles under Article 3(2) of Regulation (EU) No 165/2004.

46. Accordingly, the Liechtenstein Government proposes that the Court should answer the questions referred as follows:

1) Question 1(a)

*Article 13(1)(m) of Regulation (EC) No 561/2006 does not apply to “empty journeys” by the specialised vehicles transporting money and/or valuables mentioned therein.*

2) Question 1(b)

*Article 13(1)(m) of Regulation (EC) No 561/2006 does not apply to vehicles escorting specialised vehicles transporting money and/or valuables.*

3) Question 2

*It is necessary and proportionate, by reason of Article 19(1) of Regulation (EC) No 561/2006, for an EEA State to impose penalties for infringements of this Regulation where the journeys at issue were effected by specialised vehicles transporting money or valuables on the territory of other EEA States and those EEA States have exercised the exception provided for in Article 13(1)(m) of this Regulation such that under the relevant national law of the EEA States concerned no infringements exist.*

4) Question 3

*Article 6(5) of Regulation (EC) No 561/2006 must be interpreted as meaning that even where an EEA State has exercised the exception provided for in Article 13(1)(m) of this Regulation, any time spent as described in Article 4(e) of this Regulation and time spent driving vehicles (in each case in relation to journeys involving specialised vehicles transporting money and/or valuables) must be recorded as “other work” in accordance with Article 6(5) of the Regulation mentioned. Article 6(5) of Regulation (EC) No 561/2006 must also be applied where the relevant EEA State has exempted the vehicles concerned in accordance with Article 3(2) of Regulation (EEC) No 3821/85 (now Article 3(2) of Regulation (EU) No 165/2014).*

ESA

47. In relation to the first and second limbs of the first question, ESA addresses these together, submitting that the exception in Article 13(1)(m) of the Regulation applies both to “empty journeys” and escorting vehicles.

48. As a starting point, ESA notes that the choice of the present participle, i.e. “transporting” suggests that “empty journeys” are not covered by the exception. This conclusion is also supported by the wording of subparagraphs (h) and (l), which, by comparison, are drafted in a broad manner that allows for “empty journeys”.

49. ESA is not aware of any directly relevant case-law on Article 13(1)(m) of the Regulation. However, case-law of the ECJ in relation to other exceptions under Article 13 of the Regulation has established that the exceptions to Article 5 to 9 of the Regulation are to “be interpreted strictly” and that “the scope of that exception must be determined in the light of the aims pursued by the rules at issue”.<sup>8</sup>

50. ESA notes that, with regard to the interests Article 13(1)(m) of the Regulation seeks to safeguard, the derogation appears to be based on the nature of the goods being transported. The aim of safeguarding such goods would, therefore, by itself, support the conclusion that empty vehicles are not covered by the derogation.

51. ESA stresses, however, that the objective of the Regulation is “to harmonise the conditions of competition with regard to the road sector and to improve working conditions for the employees in that sector and road safety”, as set out in Article 1 and recital 17.<sup>9</sup> In light of this objective, ESA argues that, as the nature and existence of such goods as money/valuables in the transport vehicle are often kept secret, the employees undertaking the journey will be at risk regardless of whether the vehicle contains such goods. Consequently, it concludes that “empty journeys” by specialised transport vehicles should be covered by the exception.

52. According to ESA, the same analysis should also apply to escort vehicles. However, in respect of escort vehicles, ESA highlights two further considerations. First, it has to be ascertained whether escort vehicles are covered by the Regulation. According to Article 2(1)(a) of the Regulation, it applies to carriage by road “of goods where the maximum permissible mass of the vehicle ... exceeds 3,5 tonnes”. Second, it must be assessed whether the use of escort vehicles is mandatory in the sense that it is required by public regulation. If so, ESA proposes a test of whether the function of escort vehicles is “ancillary to” the vehicles transporting the money.<sup>10</sup>

53. ESA considers that the function of escort vehicles would be ancillary to the specialised vehicles if their use is required by mandatory public regulation. The use of escort vehicles would also be ancillary to the specialised vehicles if it is impossible to undertake the logistical operation without escort vehicles without also jeopardising the security of the drivers of the specialised vehicles, and thereby their working conditions. In

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<sup>8</sup> Reference is made to the judgment in *NK*, cited above, paragraph 21.

<sup>9</sup> Reference is made to the judgment in *A. Karuse*, cited above, paragraph 29.

<sup>10</sup> Reference is made to the judgment in *A. Karuse*, cited above, paragraphs 33 to 36.

ESA's view, provided that the use of escort vehicles is mandatory, this interpretation would also be consistent with the Regulation's objective of eliminating disparities capable of distorting competition in the road transport sector, as set out in Article 1.

54. As regards the question of whether the exception also applies to passengers, ESA submits that, under Article 4(c) of the Regulation, the term driver encompasses both "any person who drives the vehicle even for a short period" and any person "who is carried in a vehicle as part of his duties to be available for driving if necessary". Under Article 4(o) of the Regulation, the situation where there are two or more drivers in the vehicle to do the driving in between certain rest periods is referred to as "multi-manning".

55. On the basis of the above, ESA submits that Article 13(1)(m) of the Regulation must be interpreted as applying to empty journeys by the specialised vehicles transporting money and/or valuables, as well as to vehicles escorting specialised vehicles transporting money and/or valuables.

56. In relation to Question 2, ESA finds it useful to set out the interplay between Articles 13 and 19 of the Regulation. Article 13 allows EEA States to grant exceptions from Article 5 to 9 and to make them either subject to individual conditions on their own territory or, alternatively, on the territory of another EEA State. The second alternative, however, requires "the agreement of the States concerned". Pursuant to Article 13(2) of the Regulation, such exceptions must be notified to the ESA or the Commission. ESA is not aware of any notifications concerning Liechtenstein, whether regarding the first or the second alternative, and therefore assumes that no agreement within the meaning of the second alternative exists.

57. Under Article 19 of the Regulation, there is an obligation on EEA States to impose penalties for infringements of the Regulation on both their own territory and "where that infringement has been committed on the territory of another EEA State or of a third country". This entails an obligation to penalise infringements also where they are committed abroad, and to take all measures necessary to ensure that also those penalties are implemented and that they are effective and dissuasive, provided that no exceptions apply. However, if such exceptions apply on the relevant territory, no infringement exists.

58. ESA further contends that it would not be proportionate to impose a penalty if no infringement has been committed. Consequently, it is neither required nor permitted to impose sanctions for infringements of national provisions implementing the Regulation where the journeys at issue took place in EEA States which have exercised the exception provided for in Article 13(1)(m) of the Regulation. In ESA's view, this follows from the plain wording of Article 19 of the Regulation. In such a situation, the driver has not committed an infringement on the territory of that EEA State, and there cannot be any requirement under Article 19 to impose a penalty. Any other interpretation would, in ESA's view, be contrary to the fundamental freedoms of the EEA Agreement.

59. In relation to Question 3, as a preliminary remark, given the facts of the case, ESA expresses doubts as to the relevance of this question. However, on the basis of the Court’s case-law, according to which questions referred by a national court on the interpretation of EEA law “enjoy a presumption of relevance”, it submits the following observations.<sup>11</sup>

60. The obligation to record “other work” follows from Article 6(5) of the Regulation. The term “other work” is defined in Article 4(e) of the Regulation as all activities defined as working time in Article 3(a)(1) of Directive 2002/15/EC, except driving. This provision mentions activities such as loading and unloading, cleaning and technical maintenance, and other work intended to ensure the safety of the vehicle or its cargo. In addition to this, Article 6(5) of the Regulation also requires the recording of time spent driving commercial vehicles outside the scope of the Regulation.

61. ESA notes, however, that Liechtenstein has made exceptions from this provision in Article 3(2) of the ARV.

62. ESA submits that drivers of vehicles falling under one of the exceptions set out in Article 13 of the Regulation, which also applies to Article 6(5) of the Regulation, are not required to record their work. In ESA’s view, this is subject to one caveat. Drivers of a vehicle falling within one of the exceptions set out in Article 13 are subject to Article 6(5) if they also carry out other road carriage with vehicles not covered by the exception. In that case, drivers are required under Article 6(5) to record any time spent driving vehicles exempted under Article 13 as other work.

63. Against this background, ESA submits that answer to the third question must be that Article 6(5) of the Regulation must be not interpreted as meaning that where an EEA State has exercised the exception provided for in Article 13(1)(m) of the Regulation, any time spent as described in Article 4(e) of the Regulation and time spent driving vehicles covered by Article 13(1)(m) must be recorded. However, where a driver first carries out road carriage with a vehicle, which falls under the Regulation and is not covered by an exemption, and that driver subsequently carries out road carriage with a vehicle, which is covered by an exemption, the latter activity should be recorded as “other work” pursuant to Article 6(5) of the Regulation.

64. ESA proposes that the Court should answer the questions in the following manner:

*(1) Article 13(1)(m) 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*

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<sup>11</sup> Reference is made to Joined Cases E-15/15 and E-16/15 *Hagedorn and Armbruster* [2016] EFTA Ct. Rep. 347, paragraph 26.



*interpreted as covering empty journeys by specialised vehicles transporting money and/or valuables, as well as vehicles escorting these specialised vehicles.*

*(2) It is neither required nor permitted, pursuant to Article 19 of Regulation (EC) No 561/2006, for a Contracting Party to impose penalties for infringements of national provisions implementing the Regulation where the journeys at issue were effected by specialised vehicles transporting money or valuables on the territory of other Contracting Parties and those Contracting Parties have exercised the exception provided for in Article 13(1) (m) of the Regulation.*

*(3) Article 6(5) of Regulation (EC) No 561/2006 must not be interpreted as meaning that where a Contracting Party has exercised the exception provided for in Article 13(1)(m) of the Regulation, any time spent as described in Article 4(e) of the Regulation and time spent driving vehicles covered by Article 13(1)(m) must be recorded as “other work”. However, when a driver first carries out road carriage with a vehicle, which falls under the Regulation and is not covered by an exemption, and that driver subsequently carries out road carriage with a vehicle, which is covered by an exemption, the latter activity should be recorded as “other work” pursuant to Article 6(5) of Regulation (EC) No 561/2006.*

### *The Commission*

65. With regard to Question 1, the Commission identifies two separate issues related to the scope of the exception in Article 13(1)(m) of the Regulation.

66. The first issue is whether empty journeys, such as those to collect money or valuables, are covered by the exception. Having regard to Article 4(a) of the Regulation, the Commission submits that this question must be answered in the affirmative. Article 4(a) defines the term “carriage by road” as “any journey made entirely or in part on roads open to the public by a vehicle, whether laden or not, used for the carriage of passengers or goods”. In the Commission’s view, it follows clearly that unladen journeys constitute “carriage” and that such vehicle accordingly falls within the scope of the exception.

67. The second issue is whether vehicles escorting the main transport vehicle are covered by the exception. As an initial comment, the Commission notes that the question appears to be based on the understanding that such vehicles fall within the general scope of the Regulation and provides its observations on that basis.

68. With regard to the exception provided for in Article 13(1)(h) of the Regulation, the Commission observes that, according to the case-law of the ECJ, any derogation from the social and road safety objectives of the Regulation must be interpreted restrictively.<sup>12</sup>

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<sup>12</sup> Reference is made to the judgment in *A. Karuse*, cited above, paragraph 28.

69. The Commission observes that, according to the ECJ, the derogation in Article 13(1)(h) of the Regulation is based on the nature of the services in connection with which the vehicles are used, and will apply if the vehicles are “wholly or exclusively” used in connection with one of those services.<sup>13</sup> The Commission argues that the same reasoning can be applied by analogy to Article 13(1)(m) of the Regulation. If an escort vehicle plays an integral role in the transport of money or valuables by the specialised vehicle, it is subject to the same constraints. In such situations, where the role of the escort vehicle cannot be dissociated from that of the specialised vehicle itself, the Commission considers that escort vehicles also fall within the scope of Article 13(1)(m).

70. As a preliminary point in relation to Question 2, the Commission indicates that it understands the question from the referring court as asking whether there can be said to be an agreement within the meaning of Article 13(1) of the Regulation between those States in which the relevant journeys took place, with the result that there is no infringement for the purposes of Article 19(2) of the Regulation.

71. The Commission underlines that there is an infringement of the Regulation in any situation where a driver has not complied with its rules on driving times, breaks and rest periods. Such infringements may be detected by one State even where they occurred in another. Article 19(2) of the Regulation accordingly sets up a coordination mechanism to ensure that a driver is not sanctioned twice for a single offence.

72. The Commission understands the reference in Article 13 of the Regulation to an agreement between EEA States in the granting of exceptions to be relevant only in the situation where State A applies an exception for its national territory and State B does not (or only partially), or where the conditions to be able to benefit from the exception are different between States A and B. The conclusion of such an agreement determines the rules applicable in each State, and whether an infringement has occurred.

73. By contrast, in the present case, all four States (Liechtenstein, Germany, France and Spain) through which H and I travelled have made use of the exception in Article 13(1)(m) of the Regulation. The fact that no agreement has been concluded between these EEA States is simply irrelevant, as all four have granted an exception pursuant to Article 13(1)(m). The fact that there was no formal agreement cannot be decisive in assessing whether an infringement occurred.

74. According to the Commission, the question of sanctions and their proportionality does not arise therefore in the present case.

75. Finally, in answering Question 3, the Commission contends that where Article 13(1)(m) of the Regulation applies, the driver is exempted from the obligations in Articles

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<sup>13</sup> Reference is made to the judgment in *A. Karuse*, cited above, paragraph 30.

5 to 9 of the Regulation. The driver is thus not required to register time spent driving such vehicles, either as driving time or other work under Article 6(5), unless an EEA State has chosen to apply a more restrictive exception.

76. In the Commission's view, however, this does not apply where the driver is also involved in activities to which Articles 5 to 9 do in fact apply within the same 24-hour period. In those cases, the first activity should be recorded as "other work".

77. In light of the above, the Commission proposes that the Court should answer the questions as follows:

*(1) Article 13(1)(m) of Regulation (EC) No 561/2006 should be interpreted as applying to empty journeys carried out by specialised vehicles transporting money and/or valuables.*

*It may also apply to a vehicle escorting a specialised vehicle transporting money and/or valuables where such vehicle is integral to the transport operation as a whole, provided that this vehicle falls within the scope of Regulation (EC) No 561/2006.*

*(2) In accordance with Article 19(1) of Regulation (EC) No 561/2006, penalties should be imposed for infringements of the Regulation. However, in cases where all relevant journeys take place in EEA States which have exercised the exception provided for in Article 13(1)(m) of Regulation (EC) No 561/2006 and are accordingly covered thereby, no such infringement occurs. In this regard, it is of no relevance that an agreement within the meaning of Article 13(1) has not been concluded between those States.*

*(3) In cases where Article 13(1)(m) of Regulation (EC) No 561/2006 applies, carriage by vehicles falling within its scope is exempted from the obligations in Articles 5 to 9 of the Regulation. However, if the driver of a vehicle falling within the scope of that exception is also involved in the same 24 hour period in driving vehicles to which Articles 5 to 9 apply, then the first activity should be recorded as "other work" in accordance with Article 6(5).*

Per Christiansen  
Judge-Rapporteur