

## **Case regarding breach of the rules on the use of the recording equipment (tachograph) for road transport drivers**

### **Legal context**

#### *European Union law*

Articles 13 to 16 of Regulation (EEC) 3821/85 on recording equipment in road transport lay down the obligations of employers and drivers in respect of the use of recording equipment and record sheets.

Under Article 15.3:

Drivers shall:

ensure that the time recorded on the sheets agrees with the official time in the country of registration of the vehicle,

operate the switch mechanisms enabling the following periods of time to be recorded separately and distinctly:

under the sign “wheel”: driving time;  
under the sign “crossed hammers”: all other periods of work;  
under the sign “box”: other periods of availability;  
under the sign “bed”: breaks in work and daily rest periods.

Article 15.7 provides as follows:

Whenever requested by an authorized inspecting officer to do so, the driver must be able to produce

(i) the record sheets for the current week and those used by the driver in the current day and the previous 28 days....

Regulation (EC) 561/2006 on the harmonization of certain social legislation relating to road transport ..

Article 10 (2) and (3) states:

2. A transport undertaking shall organize the work of drivers [it employs] in such a way that the drivers are able to comply with Regulation (EEC) 3821/85 and Chapter II of this Regulation [regarding driving times, breaks and rest periods]. The transport undertaking shall properly instruct the driver and shall make regular checks to ensure that Regulation (EEC) 3821/85 and Chapter II of this Regulation are complied with.

3. A transport undertaking shall be liable for infringements committed by drivers of the undertaking, even if the infringement was committed on the territory of another Member State or a third country.

Article 19 (1) and (4) states:

1. Member States shall lay down rules on penalties applicable to infringements of this Regulation and Regulation (EEC) 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) 3821/85 shall be subjected to more than one penalty or procedure...

4. Member States shall ensure that a system of proportionate penalties, which may include financial penalties, is in force for infringements of this Regulation or Regulation (EEC) 3821/85 on the part of undertakings, or associated consignors, freight forwarders, tour operators, principal contractors, subcontractors and driver employment agencies.

Directive 2006/22/EC article 9 (3):

An initial list of infringements of Regulation (EEC) 3820 and 3821/85 is set out in Annex III.

Annex III, part G22: Incorrect use of switch mechanism: level of seriousness: Very serious infringement (different from Serious infringement and Minor infringement)

Judgment of the ECJ in Case C-210/10, a preliminary ruling regarding road transport, paragraphs 53 and 54:

“With regard to the severity of the fine provided for by the system of penalties at issue in the main proceedings, it is appropriate to recall the case law...according to which the Member States are empowered to choose the sanctions which seem to them to be appropriate. The Member States are, however, required to exercise that power in accordance with EU law and its general principles, and consequently in accordance with the principle of proportionality. Measures imposing penalties must not, therefore, *inter alia*, exceed the limits of what is necessary in order to attain the objectives legitimately pursued by the legislation in question or be disproportionate to those aims.

It is, however, necessary to point out, in that respect, that Member States are required to comply with the principle of proportionality not only as regards the determination of factors constituting an infringement and the determination of the rules concerning the severity of fines, but also as regards the assessment of the factors which may be taken into account in the fixing of a fine.”

### *National law*

“An incorrect use of the switch mechanism is a very serious infringement and should be fined with 4 000 SEK (430 Euro).

“No sanction fee should be imposed if a criminal punishment can be imposed for the same infringement”.

## The main proceedings

On the 18 April 2012 during a roadside inspection conducted by a police patrol a lorry driver was stopped and an examination of the vehicles recording equipment was carried out. The police found by examining the tachograph that there had been a violation of article 15.3 in the Regulation 3821/85, incorrect use of switch mechanism, at in total 31 times during the period 2012-03-01 – 2012-04-18. The driver had forgotten to change the switch – it was showing the sign “bed” all the time. The police reported this violation to the administrative body in charge, The Transport Agency. However, the police did not regard this infringement as a criminal offence.

The Transport Agency decided that the employer, a transport undertaker, was responsible for not instructing the driver properly and decided that this infringement should cost the transport undertaker, 31 x 430 Euros = 13 330 Euros.

The transport undertaker appealed to the Administrative first instance court seeking the cancellation or reduction of the fine imposed on the following grounds:

*Ne bis in idem:* The police did not give the driver any fine but it was all the same a procedure in front of the police. Therefore there has been a violation of article 19 (1) in Regulation (EC) which forbids more than one penalty or procedure.

*Unproportionality:* The driver has admitted that he did not use the switch mechanism in a proper way. He has said that he never used the switch since he never thought of documenting the difference between “other work” and “breaks/rest period”. During the period in question the driver has been driving only for short periods and never more than 100 – 200 km per day. Often he drove so little that there was never a question of taking a break which you have to do after 4 hours and 30 minutes. The violation of the rules has not prevented or made more difficult the control of driving and rest periods. Also, there was only one violation – not 31. The decision of the Transport Agency is not proportionate at all. It is unreasonable to impose such a very high fine as 13 330 Euros.

The Transport Agency was the counterpart at court and replied:

The principle of proportionality has been taken into account in Swedish law through the differentiation of the fees in the categories very serious, serious and not so serious. It is not disproportionate to give a higher fee after a repetition of violations. Otherwise it would mean giving a “discount” when you have made a lot of violations and that would not be fair. The Transport Agency acknowledges the fact that the driver has been driving for short periods each day.

How would you decide in this case?

## **The Verdicts**

### **The First instance administrative court**

*Ne bis in idem:*

The Police did not give the driver any fines so there is no double sanction. The police control is not such a procedure that prevents a sanction fee.

*The principle of proportionality:*

In this case there are 31 record sheets that show that during the period 1 March – 18 April 2012 the driver did not use the switch mechanism in a proper way since he kept the switch on the “bed” symbol all the time. The driver has admitted this and has said that he had been given instruction from his employer “once upon a time”.

The Court finds it established – because of the driver’s admittance and the 31 record sheets – that the driver has violated article 15.3 in Regulation 3821/85.

There have been 31 violations – one every day during which the switch mechanism has been wrongly used. According to the Swedish regulation this is a “very serious” violation. The reason for this is that this kind of violation risks hindering the control so that the periods for driving and rest can be concealed.

The Transport Agency has been right in giving the employer, the transport undertaker, an administrative sanction because it is clear that the employer has not controlled if the driver knew how to use the switch mechanism at the tachograph. This means in turn that the employer has not done what he should have to prevent this violation.

But, the 31 recording sheets show that there have been only short daily driving periods. The driving time each day has been so short that there could not have been any violation of the rules for taking breaks.

With regard to the purpose of the relevant EU rules – to enhance the working conditions for the drivers and the traffic security the Court finds the sanction fee,  $31 \times 430 = 13\,330$  Euros is unreasonable and against the principle of proportionality.

The First instance administrative court decided on a sanction fee of 10 000 SEK (1 075 Euros).

### **The Administrative court of appeal**

The Transport Agency appealed to the Administrative court of appeal and demanded that its decision of 13 330 Euros should be affirmed.

The Court granted leave to appeal, quoted the ECJ Case C-210/10, paragraphs 53-54 (see above) regarding the principle of proportionality and continued:

It is true that the control has been hindered but the violation is more due to the driver's ignorance than it was a deliberate action with the purpose to conceal the violation of the rules.

The Court finds the sanction fee,  $31 \times 430 = 13\,330$  Euros is unreasonable and against the principle of proportionality.

Instead, the sanction fee shall be reasonable 20 000 SEK (2 150 Euros).

The Transport Agency appealed to the Supreme Administrative Court who did not grant leave to appeal 2015-02-03.

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The Transport Agency has made an evaluation of the application of sanction fees. In a document 2015-03-11 the Agency comments the actual case and its consequences:

“The case deals with the important question of how the EU principle of proportionality should be applied when deciding if a sanction fee is reasonable in a certain case. The Agency used to have the opinion that the principle of proportionality was granted by the differentiation of the fees according to Swedish law.

Due to the outcome of this case the Agency will apply the principle of proportionality also when deciding if it reasonable to impose a sanction fee with the full amount. From now on the Agency will make sure that the fees will be decided according to the judgment and the rule of law.”