

OPINION OF ADVOCATE GENERAL
DARMON

delivered on 8 April 1992 *

*Mr President,
Members of the Court,*

vehicles registered in a Member State which are used for the carriage of passengers or goods by road.

1. Petersfield Magistrates' Court has referred to this Court a question as to the conditions under which vehicles used in connection with the gas service are subject to the obligation to be equipped with a tachograph.

4. That general principle is subject to the same exceptions as are laid down by Regulation No 3820/85, to which Article 3(1) of Regulation No 3821/85 simply refers.

2. In order, in particular, to improve, in the field of road transport, working conditions and road safety, Council Regulation (EEC) No 3820/85 of 20 December 1985 on the harmonization of certain social legislation relating to road transport,¹ adopted pursuant to Article 75 of the EEC Treaty, lays down a minimum age for driving vehicles for the carriage of passengers or goods (Section III), sets limits on driving periods (Section IV), prescribes breaks and rest periods (Section V) and prohibits as a matter of principle remuneration related to distances travelled or the amount of goods carried (Section VI).

5. Under Article 3(1) of Regulation No 3821/85 in conjunction with Article 4 of Regulation No 3820/85, carriage by certain vehicles is excluded from the scope of those two regulations, in particular: 'vehicles used in connection with the sewerage, flood protection, water, gas and electricity services, highway maintenance and control, refuse collection and disposal, telegraph and telephone services, carriage of postal articles, radio and television broadcasting and the detection of radio or television transmitters or receivers'.³

3. In order to ensure effective checking of the rules relating to driving periods and other working periods laid down by that regulation, Article 3 of Council Regulation (EEC) No 3821/85 of 20 December 1985,² provides that approved recording equipment known as 'tachographs' must be installed in

6. When proceedings were brought against it by the Licensing Authority South Eastern Traffic Area for allowing a vehicle without a tachograph to be used on 8 June 1990, British Gas plc sought to rely on the abovementioned provisions.

* Original language: English.

1 — OJ 1985 L 370, p. 1.

2 — Council Regulation on recording equipment in road transport (OJ 1985 L 370, p. 8).

3 — Article 4(6) of Regulation No 3820/85.

7. The case would doubtless not have got as far as this Court if the vehicle in question had been exclusively used in connection with the gas services within the meaning of Article 4(6) of Regulation No 3820/85.

8. However, the lorry in question had a dual use: it carried 'engineering products', such as gas supply meters to be fitted to the network, and 'marketing products', such as domestic gas cookers,⁴ thus reflecting British Gas plc's two sectors of activity.

9. British Gas plc owns, maintains and develops a network of gas mains and pipes and supplies gas to individuals. *It does not face competition in this sector of its activities.*⁵

10. In order to increase its gas sales,⁶ it also sells and installs domestic gas appliances: *this it does in competition* with retailers of such goods.

11. Are the vehicles of a company responsible for gas services which transport both 'engineering products' for the maintenance of the network and 'marketing products' subject to the requirement to be fitted with a tachograph and must a distinction be drawn according to the nature of the load carried? That is the purport of the two questions asked by the national court to which I propose to give a single answer.⁷

12. Regulation No 3820/85 and Regulation No 3821/85, which supplements it, have three aims which are set out in the first recital in the preamble to Regulation No 3820/85: *the harmonization of conditions of competition between carriers and the improvement of working conditions and road safety.* These aims are the same as those of Regulation (EEC) No 543/69⁸ which was replaced by Regulation No 3820/85.

13. The Court has held, regarding Regulation No 543/69, that

'since *common* provisions ensure an improvement of road safety as well as the social protection of the driver, they cannot but contribute to the elimination of disparities liable to cause substantial distortion in competition in the transport sector, and thus prove 'appropriate' within the meaning of Article 75(1)(c) of the Treaty for the purpose of establishing a common transport policy'.⁹

14. In the judgment in the case of *Nehlsen v Bremen*,¹⁰ where the Court noted that the provisions of Regulation No 543/69 had 'amongst their objectives the elimination of disparities liable to cause distortion in competition in the transport sector by abolishing

4 — See p. 6 of the order for reference.

5 — *Ibid.*, p. 2.

6 — *Ibid.*, p. 4.

7 — As also does the United Kingdom in point 8 of its observations.

8 — OJ, English Special Edition 1969 (I), p. 170.

9 — Judgment in Case 97/78 *Schumalla* [1978] ECR 2311, paragraph 6.

10 — Judgment in Case 47/79 *Nehlsen v Bremen* [1979] ECR 3639.

trade practices based on the improper use of manpower',¹¹ the Court laid down the principle, which has been consistently upheld since then,¹² that the scope of exemptions had to be established 'in the light of those objectives'.¹³

15. Those aims can only be achieved, by definition, if the rules are general and *uniform*, and the Court concluded that a broad interpretation of the scope of the provisions for the protection of drivers had to go hand in hand with a *strict interpretation* of the scope of exemptions.

16. Thus the Court has held that the daily rest requirement under the first subparagraph of Article 11(2) of Regulation No 543/69 had to be observed by all the crew members of road vehicles since the aim of improving road safety would not be achieved if the rest requirement related only to the employer.¹⁴ Furthermore, if that regulation applies to employed drivers, it must also be applicable to self-employed persons.¹⁵

17. Conversely, the Court reserved the exemption from the tachograph requirement for 'specialized vehicles' for 'door-to-door selling'¹⁶ to 'vehicles whose construction,

fitments or other permanent characteristics guarantee that they are used primarily for one of those operations'.¹⁷ In the case of such vehicles the prescribed driving and rest periods are likely to be complied with since they are fitted out in such a way that their use for anything other than a selling activity involving frequent stops is precluded. Similarly, the Court has held that in order to qualify for exemption from the tachograph requirement as a 'specialized breakdown vehicle',¹⁸ the vehicle must be one whose fitments or other characteristics are such that in the main it can only be used for removing vehicles that have recently been involved in an accident *and not for merely transporting other vehicles*.¹⁹ The Court has thus *minimized the extent to which the objectives* of the Community rules on tachographs may be *undermined* by the possibilities of derogating therefrom.

18. Let me cite here the particularly cogent formulation in the Court's judgment in *Paterson v Weddel*:²⁰

'since Article 14a(2) [of Regulation No 543/69] envisages derogations from the general rules contained in Regulation No 543/69, it cannot be interpreted so as to extend its effects further than is necessary for the protection of the interests which it is intended to safeguard'.²¹

11 — *Ibid.*, paragraph 6.

12 — See for example the judgment in Case 133/83 *Regina v Scott* [1984] ECR 2863, paragraph 15.

13 — Judgment in *Nehlsen v Bremen*, cited above, paragraph 7, emphasis added; see also paragraph 4 of that judgment.

14 — Judgment in Case 69/74 *Auditeur du Travail v Cagnon and Taquet* [1975] ECR 171, paragraph 8.

15 — Judgment in Case 65/76 *Derycke* [1977] ECR 29.

16 — Exemption laid down by Article 14a(3)(a) of Regulation No 543/69 as amended by Article 1(8) of Council Regulation (EEC) No 2827/77 of 12 December 1977 (OJ 1977 L 334, p. 1).

17 — Judgment in *Regina v Scott*, cited above.

18 — Exemption laid down by point 9 of Article 4 of Regulation No 543/69 as amended by Article 1(1) of Council Regulation No 2827/77, cited above.

19 — Judgment in Case 79/86 *Hamilton v Whitelock* [1987] ECR 2363, paragraph 10.

20 — Judgment in Case 90/83 *Paterson v Weddel* [1984] ECR 1567.

21 — Paragraph 16.

19. The exemptions under Article 4 of Regulation No 3820/85 and the derogations that the Member States may allow pursuant to Article 13 of that regulation are enumerated in an extremely precise manner. There can be no doubt that the Community legislature thus intended that list to be exhaustive.
20. Certain exemptions are justified on the grounds that there is no risk to road safety: that applies to vehicles less than 3.5 tonnes in weight (Article 4(1)), vehicles carrying not more than nine persons (Article 4(2)) or vehicles with a speed not exceeding 30 km/hour (Article 4(4)).
21. The reason for other exemptions is that the short driving time makes it impossible for the authorized driving periods to be exceeded (Article 4(3) for example).
22. As we have seen under Article 4(6) vehicles used in connection with gas services are exempt from the tachograph requirement like those used in connection with the sewerage, flood protection, water and highway services etc. That paragraph is placed between a paragraph relating to vehicles of the armed forces and of the fire services and two paragraphs relating to vehicles used in emergencies or for medical purposes.
23. It is true that Article 4(4) of Regulation No 543/69, as last amended by Article 1(1) of Regulation No 2827/77 exempted only vehicles '*used by the ... gas ... services*' and that Article 4(6) of Regulation No 3820/85 uses the wording '*vehicles used in connection with the ... gas ... services*'.
24. Even if the new wording is more comprehensive, it must be interpreted in accordance with the objectives of the regulation, as required by the first recital in the preamble to Regulation No 3820/85 under which 'it is necessary to make the provisions of the said regulation [No 543/69, as amended] more flexible *without undermining their objectives*'.²²
25. As the Commission's representative rightly pointed out at the hearing, although the terms of the applicable rules have changed, their objectives remain the same.
26. All the vehicles referred to in Article 4(6) of Regulation No 3820/85 have one thing in common: *they are used for the purposes of a public service in the general interest* in sectors which are — generally — non-competitive and where, consequently, the absence of tachographs does not lead to any distortion of competition.
27. As regards, precisely, public services, Article 4(4), as amended, of Regulation No 543/69 provided for the exemption of vehicles 'which are used by other public

22 — Emphasis added. British Gas is mistaken in referring in its observations (at point 3.23) to the twenty second recital in the preamble which relates to the derogations allowed by Member States under Article 13 and not to exemptions under Article 4 which are covered by the eleventh and twelfth recitals.

authorities for public services and which are not in competition with professional road hauliers'. The Court has held that that admittedly unequivocal formulation excluded vehicles of private persons used for public services or on behalf of public authorities since the exemption in question related only to 'situations where no element of competition can exist'.²³

28. Where a vehicle is engaged in transport for purposes which are not part of a public service and in a sector open to competition, as is the case of the vehicles of an undertaking responsible for the gas service when they are carrying 'marketing products', it falls outside the scope of the exemptions and is subject to the general rules. Transport for commercial purposes in a sector subject to competition therefore falls within the ordinary scope of the abovementioned regulations and not within the exemptions.

29. To allow an undertaking responsible for the gas service to supply domestic gas appliances using vehicles without tachographs where such equipment must be fitted to the vehicles of competing traders would create distortion of competition between economic operators *who, in part, are engaged in exactly the same activity* and would fly in the face of the rules seeking to ensure equality of competition between transporters.

30. Furthermore, to extend the exemption under Article 4(6) to other suppliers of gas appliances would negate the objective of improving road safety and working conditions pursued by Regulations Nos 3820/85 and 3821/85.

31. In my view, therefore, an undertaking responsible for providing the gas service can rely on the exemption under Article 4(6) of Regulation No 3820/85 only where its vehicles are engaged *exclusively* in the transport of technical material connected with the maintenance of the network, such as gas meters.

32. In such circumstances a strict interpretation is called for where the vehicles are fitted out in such a way that they can also be used for commercial purposes. It is therefore the nature of the use to which they are being put and of the products they are carrying which serves to distinguish cases where the tachograph exemption applies from those where it does not. The exemption may be granted only where the vehicles are carrying *exclusively* so-called 'engineering products'.

33. Any resulting inconvenience for the gas service undertaking such as having to fit a tachograph to all vehicles which are not *exclusively* used for carrying 'engineering products' and the obligation to switch it on whenever the vehicle is carrying 'marketing products' seems to me negligible compared with the importance of the objectives of the Community rules. And any such inconvenience cannot suffice to cause those rules to be left unapplied.

23 — Judgment in *Nehlsen v Bremen*, cited above, paragraph 7.

34. Is it necessary, in order to reply to one of the arguments put forward by British Gas, moreover, to point out that a gas service undertaking cannot invoke the stringency of its national legislation in order to claim — even supposing that the provisions of that legislation are as strict as the Community rules — that the exemption from the tachograph requirement would not give it any advantage over its competitors.²⁴ It is plain that the scope of a regulation cannot depend on the content of national legislation.

35. Moreover, the fact that its vehicles used in connection with the gas services carry out only short journeys cannot justify, as regards the carriage of marketing products, an

exemption from the tachograph requirement not available to its competitors in similar circumstances.²⁵

36. It should be noted, finally, that Regulation No 3820/85 refers to Council Decision 65/271/EEC of 13 May 1965 on the harmonization of certain provisions affecting competition in transport²⁶ which mentions measures '*to approximate provisions relating specifically to working conditions in transport so as to improve such provisions*'.²⁷ A broad interpretation of the exemptions under Article 4 of Regulation No 3820/85 could but represent, in relation to that objective, a retrograde step which the Court has always refused to countenance.²⁸

37. I therefore suggest that the Court should rule that:

- (1) Council Regulations (EEC) Nos 3820/85 and 3821/85 apply to all vehicles used for transport which is not wholly and exclusively related to the production and distribution of gas and the maintenance of the installations required for that purpose;
- (2) The exemption under Article 4(6) of Regulation (EEC) No 3820/85 and under Article 3(1) of Regulation (EEC) No 3821/85 relates to vehicles used for transport which is exclusively related to the production and distribution of gas and the maintenance of the installations required for that purpose.

25 — *Ibid.*, point 3.26.

26 — OJ, English Special Edition 1965-1966, p. 67.

27 — Third recital in the preamble to the aforesaid decision, emphasis added.

28 — See in this respect the Opinion of Advocate General Reischl in the case of *Cagnon and Taquet*, cited above.

24 — See points 3.25 and 4.3 of British Gas plc's observations.