

OPINION OF ADVOCATE GENERAL
LÉGER

delivered on 14 September 1995 *

1. The Crown Court, Bolton (United Kingdom), in the context of proceedings pending before it relating to the prosecution of a driver of a goods vehicle, has referred to the Court for a preliminary ruling a question on the interpretation of a derogating provision (Article 12) of Council Regulation (EEC) No 3820/85 of 20 December 1985 on the harmonization of certain social legislation relating to road transport ¹ ('the regulation').

departing from its aims. ³ That legislation, which concerns an economic activity of major importance in the Member States, was established with the threefold objectives of *road safety*, harmonization of conditions of *competition* and *social progress*. ⁴

The relevant provisions

2. That regulation, adopted pursuant to Article 75 of the EEC Treaty, pursues, in the field of road transport, the common policy initiated in 1969 with Regulation (EEC) No 543/69 ² ('the 1969 regulation'), which it replaces and amends without, however,

3. Regulation No 3820/85 contains, essentially, very detailed provisions concerning *driving and rest periods* (Sections IV and V) — which apply to carriage by road falling within its scope (Section II), carried out by drivers having the minimum age required (Section III), in respect of whom certain types of payment is prohibited (Section VI) — to which there can be exceptions only in certain limited instances (Section VII), subject to the control procedures and penalties set up (Section VIII).

* Original language: French.

1 — OJ 1985 L 370, p. 1.

2 — Regulation (EEC) No 543/69 of the Council of 25 March 1969 on the harmonization of certain social legislation relating to road transport (OJ, English Special Edition 1969 (I), p. 170). That regulation was amended by Regulations (EEC) No 514/72 (OJ, English Special Edition 1972 (I), p. 124), (EEC) No 515/72 (OJ, English Special Edition 1972 (I), p. 134), (EEC) No 2827/77 (OJ 1977 L 334, p. 1) and (EEC) No 2829/77 (OJ 1977 L 334, p. 11).

3 — See the first recital in the preamble to Regulation No 3820/85. In so far as both regulations relate to the same field and pursue the same objectives, I shall refer in the arguments below to the case-law of the Court concerning both the 1969 regulation and Regulation No 3820/85.

4 — See the first recital in the preamble to Regulation No 3820/85.

4. In respect of maximum driving periods, Article 6(1) limits the *daily driving* period as follows:

imum of nine consecutive hours not more than three times in any one week, on condition that an equivalent period of rest be granted as compensation before the end of the following week.'

'The driving period between any two daily rest periods or between a daily rest period and a weekly rest period, hereinafter called "daily driving period", shall not exceed nine hours. It may be extended twice in any one week to 10 hours.'

5. Article 7(1), on the *continuous driving* period provides:

'After four-and-a-half hours' driving, the driver shall observe a break of at least 45 minutes, unless he begins a rest period.'

6. Finally, Article 8 regulates the *daily rest* period:

'In each period of 24 hours, the driver shall have a daily rest period of at least 11 consecutive hours, which may be reduced to a min-

7. Section VII of the regulation authorizes only three types of exceptions. Two of them are at the discretion of the *Member States*: Article 11 authorizes them to apply stricter rules on their territory and Article 13 allows national exceptions to be granted for certain vehicles (paragraph 1) or for transport operations carried out in exceptional circumstances, with the authorization of the Commission (paragraph 2). On the other hand, the *driver* is authorized to exceed the maximum driving periods only in the light of particular circumstances. The last-mentioned exception forms the subject-matter of Article 12, which provides that:

'Provided that road safety is not thereby jeopardized and to enable him to reach a suitable stopping place, the driver may depart from the provisions of the regulation to the extent necessary to ensure the safety of persons, of the vehicle or of its load. The driver shall indicate the nature of and reason for his departure from those provisions on the record sheet of the recording equipment or in his duty roster.'

8. The national court has asked the Court to interpret that provision in the context of an action in which the facts and procedural background are as follows.

that the driving period had not been exceeded purely by chance, but, on the contrary, had been consciously planned before the journeys began.

Factual and legal background

9. By a judgment of 21 April 1994, Rochdale Magistrates' Court convicted Mr Bird, a goods vehicle driver ('the appellant in the main proceedings'), of two offences involving infringements of Regulation No 3820/85.⁵

10. As a result of an inspection it was found, first, that on 13 October 1992 Mr Bird had driven his vehicle for 10 hours and 40 minutes, contrary to Article 6 of the regulation, and, secondly, that on 6 November 1992 he had not observed the breaks provided for in Article 7 by having driven continuously for 5 hours and 15 minutes.⁶

11. In each case, the appellant in the main proceedings and his employer acknowledged

12. The nature of the load on both journeys was similar and consisted, according to the appellant in the main proceedings, of goods with a high customs value.

13. Mr Bird appealed against both convictions to the Crown Court, relying on Article 12 of the regulation which, in his view, permits a driver to plan a derogation from the other provisions in order, in particular, to ensure the safety of his load, as was necessary in the present case.

14. That court took the view that, in each case, road safety had not been jeopardized, but considered that the case depended on the interpretation of Article 12 of the regulation, of which 'the wording ... is ambiguous, unclear and requires clarification'.⁷ Conscious that 'the matter is of very considerable importance one imagines to hauliers throughout the country, throughout the Community ...',⁸ it consequently referred to

5 — The national legislation implementing that regulation is the Transport Act 1968.

6 — Section 96(11A) of the Transport Act 1968 corresponds to those provisions.

7 — Order for reference, page 5.

8 — *Ibidem*, p. 7.

the Court for a preliminary ruling the following question:

not comply with the other provisions of that regulation.

‘Upon a proper interpretation of Article 12 of Council Regulation (EEC) No 3820/85 on the harmonization of certain social legislation relating to road transport:

16. I would emphasize the practical importance of the reply to be given: it concerns the extension or, conversely, the restriction of the leeway available to drivers and transport undertakings in organizing their journeys.

where in criminal proceedings alleging a departure from the restrictions upon driving time contained in Articles 6, 7 and 8 of that regulation, a driver has satisfied all the pre-conditions contained in Article 12 thereof and the court is satisfied that road safety is not thereby jeopardized, and bearing in mind the obligation placed upon a transport undertaking by Article 15;

17. Article 12 may be read in two different ways.

is the driver entitled to the benefit of the flexibility provided by Article 12 if the need to depart from the provisions of Articles 6, 7 or 8 was known before the journey in question was commenced?’

18. Under a broad interpretation, put forward by the appellant in the main proceedings, that derogating provision is freely available, so to speak, to transport undertakings which thus enjoy greater latitude when organizing their journeys, recourse thereto being limited only by the requirement that road safety must not be jeopardized. That interpretation is in keeping, he claims, with the objective, pursued by the 1985 amendment, of making the previous rules more flexible.⁹

Opinion

15. The question referred to the Court concerns essentially whether Article 12 of Regulation No 3820/85 permits a driver to plan, before the journey commences, that he will

19. According to another interpretation, the possibility of resorting to Article 12 is lim-

⁹ — See the first recital in the preamble to Regulation No 3820/85.

ited solely to cases where the impossibility of complying with the obligations laid down in the regulation supervenes in the course of the journey as a result of unforeseen and exceptional circumstances.

(‘... road safety is not thereby jeopardized ...’, ‘to reach a suitable stopping place’ ... ‘to the extent necessary to ensure ... safety ...’). Finally, a further significant requirement is that placed on the driver to indicate ‘the nature of and reason for his departure from those provisions’ on the record sheet of the recording equipment or in his duty roster.

20. It seems to me that only the latter interpretation should be inferred from the *scope* of that provision, determined, according to the case-law of the Court, by taking into account its *objectives* and the *legal context* in which it is situated.¹⁰

The purpose of Article 12

21. I would observe that Article 12 is presented as a provision *derogating* from the general scheme established by Regulation No 3820/85. It appears in Section VII, entitled ‘Exceptions’. Moreover, a number of factors underscore the exceptional nature of that provision. Thus, although the concern of the legislature was to provide a very strict and systematic framework for driving and rest periods (continuous, daily and two-weekly driving periods), Article 12 allows a departure from those restrictive provisions. Furthermore, the exceptional nature of the measure is emphasized by the strict conditions to which its implementation is subject

22. Since I have already referred to the *raison d’être* of the general scheme of Community legislation relating to road transport (road safety, social progress and fair competition), let me consider the *specific purpose* which justified, in the legislature’s intention, the introduction of a provision granting an exception to that stringent general scheme.

23. In that respect, I believe an examination of the *history* of that article is enlightening.

24. Originally, there is no trace in Regulation No 543/69 of a derogating provision of the type provided for by Article 12 of Regulation No 3820/85. Under the excep-

¹⁰ — See, for example, Case 47/79 *Nehlsen* [1979] ECR 3639, paragraph 4; Case 133/83 *Scott* [1984] ECR 2863, paragraph 15; Case C-116/91 *British Gas* [1992] ECR I-4071, paragraph 12; and Case C-116/92 *Charlton and Others* [1993] ECR I-6755, paragraph 14.

tions provided for by Section VI of the former regulation there appeared a single article, Article 13, which enabled the Member States to provide for more restrictive provisions within their territory (essentially the present Article 11).

down, and to the extent necessary to ensure the safety of persons, of the vehicle or of its load, and to enable him to reach a suitable stopping place or, according to circumstances, the end of his journey, depart from the provisions of Articles 6, 7(2) and (4), and 11. The driver shall indicate the nature and reasons for such departure in the individual control book, or on the record sheet of the recording equipment.'

25. On the other hand, when the first amendment was made to the 1969 regulation, a new provision was introduced which may be read as the first draft of the present Article 12: Article 3 of Regulation No 514/72 amending Regulation No 543/69,¹¹ which reads as follows:

26. That derogating provision has therefore formed an integral part of Regulation No 543/69 since 1972.

'Article 13A

Provided that road safety is not thereby jeopardized, the driver may, in case of danger, in circumstances outside his control, to render assistance, or as a result of a break-

27. Next, during the work on the drafting of Regulation No 3820/85, the Commission proposed a very slight modification,¹² providing for the possibility of extending the derogation to all the provisions of the regulation, without restricting itself solely to Articles 6 (duty to relieve the driver beyond a certain distance covered), 7(2) to (4) (daily, weekly and two-weekly driving periods) and 11 (rest period), as provided for by the

11 — That amendment was introduced with the purpose of eliminating certain disparities which existed between the 1969 regulation and the European Agreement concerning the Work of Crews of Vehicles Engaged in International Road Transport (ERIA), done at Geneva on 1 July 1970 under the auspices of the Economic Commission for Europe, as regards carriage from or to a third country by any vehicle registered in a third country which is a party to that agreement, in order to permit the agreement to be concluded.

12 — Proposal for a Council Regulation amending Regulation (EEC) No 543/69 on the harmonization of certain social legislation relating to road transport and Regulation (EEC) No 1463/70 on the introduction of recording equipment in road transport, submitted to the Council on 20 March 1984 (OJ 1984 C 100, p. 3). See also the amended proposal, unchanged as regards the text which concerns this Opinion, submitted by the Commission to the Council on 13 August 1985 (OJ 1985 C 223, p. 5).

amended 1969 regulation. Article 1(14) of that preparatory act proposes the following:

'Article 13a becomes Article 13 and is replaced by the following text:

"Article 13

Provided that there is no detriment to road safety, the driver may *depart from the provisions of this Regulation* in case of danger, in circumstances outside his control, to render aid, or as a result of a breakdown, and to the extent necessary to ensure ... safety ...".¹³

28. Finally, Article 13a of Regulation No 543/69, which it had been proposed to replace and amend by means of the above-mentioned Article 13, became Article 12 of Regulation No 3820/85, whose present wording it is worth recalling:

'Provided that road safety is not thereby jeopardized and to enable him to reach a

suitable stopping place, the driver may depart from the provisions of the regulation to the extent necessary to ensure the safety of persons, of the vehicle or of its load. The driver shall indicate the nature of and reason for his departure from those provisions on the record sheet of the recording equipment or in his duty roster.'

29. As may be seen, that wording is largely inspired by that adopted for Article 13a of the 1969 regulation, as amended. It is true that the wording finally adopted differs slightly from the last-mentioned regulation and from that proposed by the Commission. Drafted in more general terms, it is probably the result of a consensus arrived at during the preparatory work. One cannot however read into that new wording a deliberate intention to depart fundamentally from the earlier texts, particularly since there is nothing which reveals, in the drafting documents subsequent to the Commission's proposal, any intention whatsoever to depart from the purpose and aim of the wording initially proposed.¹⁴ On the contrary, it is in the light of the former Article 13a and the proposed new Article 13, which underline the exceptional and circumstantial nature of that exception, that Article 12 should be read.

30. Those provisions reveal the intention of the legislature to reserve the possibility of

¹³ — Emphasis added. The remainder of the article remains unchanged by comparison with the former Article 13a.

¹⁴ — See the opinion of the Parliament (OJ 1985 C 122, p. 168) and the opinion of the Economic and Social Committee (OJ 1985 C 104, p. 4 and OJ 1985 C 303, p. 29).

derogating from the provisions of the regulation only ‘... in case of danger, in circumstances outside [the driver’s] control, to render assistance or as a result of a breakdown ...’. More generally, it is a question of taking into consideration the practical difficulties likely to affect the course of a journey, in order not to render the implementation of the regulation too onerous or unrealistic.¹⁵

31. That measure was, in short, designed to enable drivers to deal with cases of *force majeure*.¹⁶ It coincides with the definition that the Court has consistently given of that last-mentioned concept:

‘... apart from the special features of the specific areas in which it is used, the concept of *force majeure* essentially covers unusual circumstances which make it impossible for the relevant action to be carried out. Even though it does not presuppose absolute impossibility, it nevertheless requires abnor-

mal difficulties, independent of the will of the person concerned and apparently inevitable, even if all due care is taken.’¹⁷

32. Article 12 of Regulation No 3820/85 is therefore intended to enable the driver, without running the risk of infringing the regulation, to deal with events (such as breakdown, accident etc.) which are by nature *unforeseeable*, *external* to the driver and *unpreventable* by him. Such events may, by definition, only occur unexpectedly during a journey, and may not be ‘anticipated’.

33. Now that the purpose of Article 12 of Regulation 3820/85 has been clarified, the *legal context* in which the provision appears must be considered.

The legal context

34. I observed that the new rules adopted in 1985 pursue the *general objective* of render-

15 — This is, moreover, a constant concern of the legislature, as may be seen by the first recital of the second amendment to Regulation No 543/69 by Regulation No 515/72 ‘the operation of Regulation (EEC) No 543/69 since 1 October 1969 has revealed certain practical difficulties, which can be remedied without jeopardizing the aims of social progress and road safety pursued in relation to road transport’.

16 — See, in that respect, the observations of the United Kingdom, paragraph 40.

17 — Cases 284/82 *Busseni v Commission* [1984] ECR 557, paragraph 11, and 209/83 *Valsabbia v Commission* [1984] ECR 3089, paragraph 21. See also, for example, Case 145/85 *Denkavit* [1987] ECR 565, paragraph 11, Case C-338/89 *Organisationen Danske Slagterier* [1991] ECR I-2315, paragraph 25, and Case C-136/93 *Transáfrica* [1994] ECR I-5757, paragraphs 14 to 18.

ing the earlier provisions *more flexible*.¹⁸ In my view, the removal from the present Article 12 of the reference to '... in case of danger, in circumstances outside [the driver's] control, to render assistance or as a result of a breakdown ...' should be viewed precisely in the light of that consideration. By removing that list which might have appeared exhaustive, the new wording seeks to be more flexible. The cases in which recourse may be had to the exception provided for in Article 12 are more open and it may be thought that they now cover cases of *force majeure* which had not been envisaged initially, such as bad weather, a herd of animals straying onto the road out of control or — why not? — a spontaneous and perhaps disorderly demonstration. More generally, it must be acknowledged that Article 12 applies to any event which could not reasonably have been foreseen and which forces the driver to extend the driving period.

36. Such an interpretation is, first of all, difficult to reconcile with the actual wording of Article 12, recourse to which is reserved solely to the *driver*: 'Provided that ... the *driver* may depart from the provisions of the regulation ...' If the contention of the appellant in the main proceedings were accepted, it would be the *employer*, alone or in agreement with the driver, who would make use of the exception provided for. The planning of the journey is the responsibility solely of the undertaking. It is difficult to imagine that each driver plans in his own way the itinerary and the driving periods for the journey to be carried out without the supervision of the employer on whose behalf he carries it out. Article 15(1) of Regulation No 3820/85, moreover, serves but to emphasize that fact, providing that:

*'The transport undertaking shall organize drivers' work in such a way that drivers are able to comply with the relevant provision of this Regulation and of Regulation (EEC) No 3821/85.'*²⁰

35. In my view, that is the only aspect of flexibility which is relevant to the instant case, introduced by the 'new' Article 12 and it seems to me to be dangerous to consider, as the appellant in the main proceedings suggests,¹⁹ that one of the purposes of the revision in 1985 was to give drivers and their employers greater freedom as regards the planning of the driving and rest periods, which would be tantamount to a regular infringement of the provisions of the regulation.

37. However, above all, such an interpretation would run counter to the *general objectives* which Community rules in the field as a whole have always pursued.²¹

38. First, the objective of *road safety* would be jeopardized. The 14th recital in the pre-

18 — See paragraph 18 above, *in fine*.

19 — Third paragraph, page 3 of the observations of the appellant.

20 — Emphasis added.

21 — In this regard, see the observations of the Commission, paragraph 11 *et seq.*

amble to Regulation No 3820/85 points out that it is precisely in view of that aim in particular that strict limits on driving time were laid down. To accept that exceptions to those limits could be planned from the very commencement of a journey would run counter to that objective. Even if in the present case the national court assures us that road safety was not jeopardized, it cannot generally be considered that Article 12 permits 'planned' derogations from the regulation. It cannot be left solely to the driver's or his employer's discretion that a few more hours' driving would not jeopardize road safety. In any event, the strictness of the limits provided for in that regulation makes it clear that any driving time extended beyond the authorized limits constitutes, potentially and of itself, a danger to road safety.

break governed by Article 7(1) and (2). If an extension of the driving periods were accepted on the basis of the interpretation of Article 12 advocated by the appellant in the main proceedings, there would be nothing in the regulation to guarantee compensation for the drivers. Conversely, if it is considered that that provision permits exceptions only in the case of *force majeure*, the instances would be sufficiently rare not to jeopardize the objective of social progress.

40. Lastly, if the objective of *eliminating distortions of competition* is to be achieved, that assumes that all undertakings scrupulously respect all the obligations imposed upon them by the regulation. To accept that those concerned about the safety of loads or of persons may regularly plan to exceed driving time would seriously damage the objective pursued by jeopardizing the whole system of limiting driving time.

39. Secondly, the objective of *social progress* might also be threatened by such an interpretation. The 15th and 19th recitals in the preamble to Regulation No 3820/85 emphasise that it is beneficial to social progress to permit longer driving periods, or shorter rest periods *on condition*, however, that, in return, a system of compensation for the driver is implemented. Accordingly, the Community legislature lengthened, for example, the driving periods provided for in Articles 6(1) and 7(1) of the regulation, but, on the other hand, extended the length of the

The scope of Article 12

41. It seems to me that, in the light of the purpose of Article 12 of Regulation No 3820/85 and of the objectives pursued by

Community legislation relating to road transport, that provision should be interpreted narrowly. My belief is moreover borne out by the case-law of the Court, which has always refused to interpret widely the derogating provisions of Regulation No 543/69 and of Regulation No 3820/85.²²

be disregarded and if the objectives pursued by the regulation are to be complied with.

42. Finally, I would observe that, in accordance with the case-law of the Court, a provision providing for an exception to the general scheme set up by Regulation No 3820/85, such as Article 12, '... cannot be interpreted in such a way as to extend its effects beyond what is necessary in order to ensure the safeguarding of the interests it is intended to guarantee ...' and that '... the possibility of derogating from Community rules cannot undermine the objectives pursued in that field'.²³ The possibility of making use of the exception provided for by Article 12 should therefore be restricted to cases of *force majeure*, without allowing it to be extended to cases of 'planned derogations' if the *raison d'être* of that provision is not to

43. Lastly, in agreement with the United Kingdom,²⁴ I would make one more observation. The interpretation which I advocate will not be difficult for transport undertakings and their drivers to apply. They will still have the freedom to plan long journeys, ensuring optimum safety conditions, in compliance with Community rules. Thus, for such journeys, it may be imagined that there should be two drivers in the vehicle to relieve each other and thereby reduce the number of breaks in the journey. I would also note that a certain degree of planned flexibility is authorized by some of the provisions of the regulation and could be used to advantage by the employer: the first paragraph of Article 6(1) allows, for example, the daily driving period to be extended from nine to ten hours twice in any week; Article 8(1) authorizes the reduction of the daily rest period to nine consecutive hours three times in any one week, instead of the 11 hours provided for in principle; Article 8(7) authorizes, subject to certain conditions, the daily rest period to be taken in a vehicle, etc.

22 — See for example, concerning Article 4(4) of Regulation No 543/69, the judgment in *Nebtten*, cited above paragraph 9; concerning Article 4(6) of Regulation No 3820/85, the judgment in *British Gas*, cited above paragraph 21.

23 — *British Gas*, cited above, paragraph 12.

24 — Paragraph 41 of its observations.

44. On the grounds set out above, I therefore propose that the Court give the following answer to the question submitted by the Crown Court:

Article 12 of Council Regulation (EEC) No 3820/85 of 20 December 1985 on the harmonization of certain social legislation relating to road transport allows a driver to depart from the provisions of that regulation only in cases of *force majeure*, and does not therefore allow a driver to rely upon it where he has planned to depart from the provisions of Articles 6, 7 or 8 of the regulation prior to the commencement of the journey.