REPORT FOR THE HEARING
in Case C-116/91 *

I — Facts and procedure

1. *Community legislation*

Council Regulation No 3820/85 of 20 December 1985 on the harmonization of certain social legislation relating to road transport is designed to remove disparities likely to distort competition in the road transport sector and to improve working conditions and road safety. With that end in view, it lays down rules concerning *inter alia* the minimum age for drivers, driving time, breaks in driving, rest periods and the method of remuneration for drivers.

According to Article 2 of Regulation No 3820/85, those rules are applicable to carriage by road within the Community. The expression 'carriage by road' means 'any journey made on roads open to the public of a vehicle, whether laden or not, used for the carriage of passengers or goods' (Article 1(1) of Regulation No 3820/85). However, according to Article 4 of Regulation No 3820/85, carriage by certain vehicles is excluded from the scope of the regulation. Hence Regulation No 3820/85 does not apply to carriage by vehicles used for the carriage of goods where the maximum permissible weight does not exceed 3.5 tonnes (Article 4(1) of Regulation No 3820/85).

Nor, according to Article 4(6), does the regulation apply to carriage by

'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 telephone broadcasting and the detection of radio or television transmitters or receivers.'

In order to enable compliance with certain provisions of Regulation No 3820/85 to be effectively supervised, Council Regulation No 3821/85 of 20 December 1985 on recording equipment in road transport provides for the compulsory installation of an instrument known as a 'tachograph' in vehicles used for the transport by road of passengers or goods and registered in a Member State. A tachograph is an instrument which records on a sheet the distance travelled by the vehicle, the speed of the vehicle, the driving time, other periods of work or of availability, breaks from work and daily rest periods, as well as the opening of the case containing the

* Language of the case: English.

record sheet (Annex I to Regulation No 3821/85).

According to Article 3(1) of Regulation No 3821/85, the installation of a tachograph in the vehicles referred to in Article 4 of Regulation No 3820/85 — to which the latter regulation does not apply — is not required by Regulation No 3821/85.

2. *The dispute in the main proceedings and the questions submitted for a preliminary ruling*

British Gas plc ('British Gas'), the only public gas supplier authorized under section 7 of the Gas Act 1986, has an exclusive right to supply gas through pipes to certain premises. Other undertakings supply gas to premises falling outside the scope of the exclusive right conferred on British Gas, using the British Gas network for that purpose.

In addition, British Gas supplies and sells gas appliances such as wall heaters and cookers. It does so in competition with other undertakings, even though in that area British Gas enjoys certain powers and is subject to individual supervision.

The activities of British Gas are carried out by two separate departments, namely the engineering department and the marketing department, which are organized largely on a regional basis. The engineering department is responsible for all aspects of gas distribution, including the construction and maintenance of gas mains and the maintenance of pressure regulation equipment. The marketing department is composed of a sales department, which is responsible for promoting the sale of gas and gas appliances to the public, and a customer service department which is responsible for the installation and servicing of gas appliances.

At the material time, British Gas was operating 2 244 vehicles in the connection with its activities. Most of those vehicles (1 601) were employed by the engineering department to carry the materials and parts needed for its activities (hereinafter 'engineering products'), whilst 372 vehicles were employed exclusively for the purposes of the marketing department for the carriage of gas appliances (hereinafter 'commercial products') between British Gas showrooms and depots and customers' homes. The other vehicles (271) were used by both departments for the carriage of engineering products or marketing products, or both, according to the needs of the service.

Typical journeys undertaken by those vehicles tend to be very short. The longest daily journey undertaken in Southern Region (where the material events occurred) is over a distance of 184 miles. On average, the distance covered by vehicles in the Southern Region fleet is just over 15 000 miles per annum per vehicle.

On 8 June 1990 a vehicle belonging to British Gas was stopped when it was carrying scrap cookers, a new cooker, scrap boilers, scrap gas supply meters, gas cylinders and boxes of rubbish. During the months of May and June 1990, the same vehicle carried both marketing and engineering products. It was not fitted with a tachograph.

British Gas was prosecuted by the Licensing Authority South Eastern Traffic Area (S. E. T. A.) for using for the carriage of goods by road a vehicle not fitted with the tachograph provided for by Regulation No 3821/85, which constitutes an offence contrary to section 97(1) of the Transport Act 1968.

Summoned to appear before Petersfield Magistrates' Court, British Gas contended that the vehicle in question was exempted from the requirement that it had to be fitted with a tachograph by Article 3(1) of Regulation No 3821/85 in conjunction with Article 4(6) of Regulation No 3820/85. In its view, that exemption extends to every vehicle used at the relevant time in connection with the gas service provided by British Gas, irrespective of the nature of its load. S. E. T. A., on the other hand, submitted before the national court that the exemption is limited exclusively to vehicles used in connection with the supply of gas and does not extend to those used for the carriage of gas appliances. In S. E. T. A.'s view, the interpretation of the provisions in question which is advocated by British Gas would jeopardize the objectives of Regulation No 3820/85.

In those circumstances the national court decided on 10 January 1991 to stay the proceedings and to request the Court to give a preliminary ruling on the following questions:

'1. Whether the exemption provisions contained in Article 3 of Regulation (EEC) No 3821/85 and Article 4(6) of Regulation (EEC) No 3820/85 in so far as they apply to vehicles used in connection with the gas service, apply to all goods vehicles over the defined weight irrespective of the nature of the load they may be carrying at the relevant time, so long as they are being used by an undertaking which has as one of its activities the provision or operation of a fixed network intended to provide a service to the public in connection with the production, transport and distribution of gas and are being used in connection with that service, including transport of the means of construction, repair, maintenance, installation or consumption of the service so provided including the provision and installation of gas-consuming appliances?

2. Is the existence of those exemption provisions dependent upon the nature of the load being carried by the vehicle as referred to in Question 1 at the relevant time and if so does the exemption extend to cover:

(a) vehicles used exclusively for the transport of marketing products;

(b) vehicles used for the transport of both marketing products and engineering products, and does it make any difference whether those are carried out simultaneously or consecutively;

(c) vehicles used exclusively for the transport of engineering products only?'

3. *Procedure before the Court*

The order for reference from Petersfield Magistrates' Court was received at the Court Registry on 23 April 1991.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community, written observations were submitted by British Gas plc, represented by David Vaughan QC, Andrew Geddes, Barrister-at-law, and C. E. H. Twiss, Solicitor; by the United Kingdom, represented by John E. Collins, Assistant Treasury Solicitor, acting as Agent; and by the Commission of the European Communities, represented by Xavier Lewis and Lucio Gussetti, members of its Legal Department, acting as Agents.

On hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. By decision of 5 February 1992, the Court assigned the case to the Second Chamber pursuant to Article 95(1) and (2) of the Rules of Procedure.

II — Written observations submitted to the Court

In their written observations, British Gas, the United Kingdom and the Commission dealt with the two questions from the national court at the same time.

British Gas points out that different criteria are laid down by Article 4 of Regulation No 3820/85 to characterize the transport operations to which the provisions of that regulation do not apply. Those criteria relate *inter alia* to the use of the vehicle for or in connection with particular services, the physical characteristics of the vehicle, the actual use to which the vehicle is being put at the relevant time, or the nature of the load carried. British Gas submits that the actual scope of any of the exemptions provided for in Article 4 of Regulation No 3820/85 must be determined by taking into consideration only the criteria laid down by Article 4 for identifying the vehicle enjoying exemption. Thus, in the case of the exemption provided for by Article 4(6) of Regulation No 3820/85, the criterion selected to characterize the group of exempt vehicles is the nature of the service which those vehicles provide. The nature of the load carried by the vehicle, which is a relevant consideration in the case of other exemptions provided for in Regulation No 3820/85 (for example Article 4(12) and (13)), is not relevant in connection with Article 4(6).

According to British Gas, in the case of the gas service, the transport operations covered by Article 4(6) of Regulation No 3820/85 are those carried out by an undertaking whose principal activity is the provision or operation of a fixed network intended to provide a service for the public in connection with the production, transport or distribution of gas or the supply of gas to that network. The carriage of gas appliances by such an undertaking comes within the exemption provided for in Article 4(6) of Regulation No 3820/85 on the ground that the sale and, consequently, the carriage of those appliances form part of the normal business activities of that undertaking and that, since those appliances are necessary for the consumption of gas and are physically and permanently connected to the fixed network operated by the undertaking in question, their sale is connected with the gas service.

Furthermore, British Gas points out that Article 4(6) in its present form does not require the services in question to be performed by a public body. Nor is there any requirement that the vehicle in question should be a service vehicle, or that it should be used exclusively in connection with the gas service. It is sufficient for the vehicle to be used substantially or predominantly in connection with that service. In that regard British Gas points out that the provision in question has frequently been amended, with the result that its scope has gradually been extended.

British Gas submits that any interpretation confining the scope of Article 4(6) of Regulation No 3820/85 to vehicles which at all times carry exclusively engineering products would give rise to administrative difficulties, legal uncertainty and an increase in costs to the consumer.

In its view, it would create administrative difficulties because every vehicle currently used for the carriage of both engineering and marketing products would have to be fitted with a tachograph or, alternatively, additional vehicles would have to be purchased for the carriage of a single category of products.

It would create legal uncertainty because of the difficulty involved in a precise delimitation of the scope of the expressions 'engineering products' and 'marketing products', and consequently of the scope of the obligation to provide vehicles with a tachograph. It is difficult to determine whether articles such as gas supply meters or old gas appliances are to be regarded as 'engineering products' or as 'marketing products'.

Finally, an interpretation limiting the scope of the exemption provided for in Article 4(6) of Regulation No 3820/85 to vehicles which at all times carry exclusively engineering products would oblige British Gas to install a tachograph in all of the other vehicles which it operates and to purchase some additional vehicles so as to allow for down time when maintenance is required for tachograph equipment. The only alternative would be to use the vehicles only for the carriage of a single category of products, which would oblige British Gas to purchase a substantial number of additional vehicles and prevent it from making the most efficient use of the vehicles it has. Accordingly, that interpretation would in any event give rise to an increase in costs

to British Gas and, therefore, to the consumer.

Furthermore, British Gas submits that — as it is in keeping with the principles laid down by Regulation No 3820/85 (see, in particular, the first recital in the preamble to the regulation) and is referred to by the Court particularly in its judgments of 6 December 1979 in Case 47/79 (*Nehlsen* v *Bremen* [1979] ECR 3639) and of 11 July 1984 in Case 133/83 (*R* v *Scott* [1984] ECR 2863) — the interpretation which it suggests should be given to Article 4(6) of Regulation No 3820/85 does not jeopardize the attainment of the objectives of the regulation, in view of the factual and legal context in which British Gas operates.

So far as the legal context is concerned, British Gas points out that the national measures applicable to the driving of vehicles other than those to which the Community rules apply, by drivers who spend all or the greater part of their working day driving such vehicles, [1] limit the driving time to a period very similar to that provided for by Regulation No 3820/85. So far as concerns the factual context in which it operates, British Gas emphasizes that the substantial number of depots it owns eliminates any likelihood of long journey times or excessive driver hours. Having regard to that factual and legal context, British Gas considers that those factors prevent it from obtaining any competitive advantage over other undertakings, apart from the avoidance of the cost of installing and servicing tachographs.

British Gas therefore suggests that the Court should answer Question 1 in the affirmative. It suggests that the Court should answer Question 2 in the negative and state that the exemptions provided for are not dependent upon the nature of the load being carried at the relevant time; if they are, however, then the answer to each of parts (a), (b) and (c) of Question 2 should be in the affirmative.

To begin with, the *United Kingdom* submits that since Article 4(6) of Regulation No 3820/85 contains an exemption from the provisions of that regulation and from Regulation No 3821/85, it must be strictly construed having regard to the objectives pursued by those regulations.

In its view, the exemption provided for in Article 4(6) of Regulation No 3820/85 applies exclusively to carriage by a vehicle which at the time of its journey is being used exclusively in connection with the supply of gas to consumers. It does not apply to carriage by a vehicle which at the time of its journey is being used exclusively or partially in connection with the sale of gas appliances. The United Kingdom puts forward three arguments in support of that interpretation.

1 — Namely sections 95 and 96 of the Transport Act 1968, as amended by the Drivers' Hours (Goods Vehicles) (Modifications) Order 1986 S. I. 1459 and the Drivers' Hours (Harmonization with Community Rules) Regulations 1986 S. I. 1458.

First, it is clear from the wording of Article 4(6) of Regulation No 3820/85 that it is intended to cover carriage by vehicles used in connection with the provision of major services to the public or the accomplishment of essential public functions, and not carriage by vehicles used in connection with retail activities.

Secondly, a wide interpretation of that provision would have the effect of excluding from the scope of Regulations No 3820/85 and No 3821/85 carriage by vehicles used in a wide range of public and private undertakings (and in particular vehicles used in connection with the marketing of gas and electricity appliances, telephones and television sets). It follows that such an interpretation would jeopardize road safety and, therefore, one of the objectives of Regulations No 3820/85 and No 3821/85.

Thirdly, the sale of gas appliances is an activity which organizations such as British Gas carry on in competition with other undertakings. In addition, the installation of a tachograph in a vehicle costs between £300 and £550. Accordingly, if the exemption provided for in Article 4(6) of Regulation No 3820/85 applied to the carriage of gas appliances sold by organizations such as British Gas, in circumstances where the vehicle was at the time of its journey also being used in connection with the supply of gas, it would give such organizations a competitive advantage over other undertakings which also sell gas appliances but do not supply gas. That would be contrary to another objective pursued by the harmonization of certain social legislation relating to road transport, namely equality of competition between transport undertakings (see the Court's judgment of 28 November 1978 in Case 97/78 *Schumalla* [1978] ECR 2311, at paragraph 3).

The United Kingdom therefore proposes that the questions submitted by the national court should be answered as follows:

'The exemption in Article 4(6) of Regulation No 3820/85 (applied in Article 3 of Regulation No 3821/85) where it refers to "... carriage by vehicles used in connection with ... gas ... services" must be interpreted as meaning that it only applies to carriage by a vehicle (over the defined weight) which at the relevant time is being used exclusively in connection with the supply of gas to customers and not to carriage by a vehicle which at the relevant time is being used exclusively or partially in connection with the sale of gas-burning appliances to customers. Accordingly, the exemption does not apply where an organization such as British Gas plc, which is authorized to supply gas through pipes to any premises in Great Britain, is at the relevant time using a vehicle, exclusively or partially, in connection with activities which are essentially retail in nature. In order to determine whether the exception applies it is necessary to have regard to the nature of the load being carried at the relevant time by the vehicle in question.'

The *Commission* points out, to begin with, that Regulations No 3820/85 and No 3821/85 have as their aims the social protection of drivers, the improvement of road

safety and the elimination of disparities liable to cause distortion in competition in the road transport sector.

With reference to the Court's judgments of 6 December 1979 in *Nehlsen* v *Bremen* and of 11 July 1984 in *R* v *Scott*, both cited above, the Commission submits that the scope of the exemptions from those regulations must be determined with regard to the objectives of those regulations and to the legal context of those exemptions. Since Regulation No 3820/85 is designed to make the provisions previously in force more flexible without undermining their objectives (as is clear from the first recital in the preamble to Regulation No 3820/85), the exemptions provided for by that regulation should, according to the Commission, be narrowly construed so as not to undermine the objectives of the social regulations in question. That principle is confirmed by the Court's judgments of 6 December 1979 in *Nehlsen* v *Bremen* and of 11 July 1984 in *R* v *Scott*, both cited above. In that regard, and with reference to the said judgment in *R* v *Scott*, the Commission considers that a narrow construction is justified by the fact that the vehicles used in connection with the carriage of engineering and marketing products do not display any permanent characteristics which ensure that they are used exclusively in connection with the transport operations covered by the exemptions provided for in Article 4 of Regulation No 3820/85.

Next, the Commission submits that when vehicles used for the carriage of engineering and marketing products are carrying marketing products, they are engaged in an activity in which British Gas is in competition with other undertakings.

The Commission also points out that the exemption provided for in Article 4(6) of Regulation No 3820/85 attaches not to the nature of the activity or business of the owner or operator of the vehicle but to its actual use. In its view, that exemption covers vehicles which are used in connection with activities in which no element of competition is involved, with a view to providing a particular service or amenity to the public. It points out that the other exemptions provided for in Article 4, and in particular those in paragraphs (5), (7), (8), (11) and (12), are based on the same notion. Furthermore, in its aforesaid judgment in *Nehlsen* v *Bremen*, the Court interpreted the exemption provided for by the Community rules in force at the time [2] in respect of 'vehicles used by other public authorities for public services' as applying exclusively to situations where no element of competition could exist.

In the light of the foregoing, the Commission considers that the exemption provided for in Article 4(6) of Regulation No 3820/85 covers exclusively vehicles used in connection with activities relating to the production of gas, its transmission (that is to say the transport of gas through a high pressure pipeline) or its distribution (that is to say the

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), as amended by Council Regulation (EEC) No 2827/77 of 12 December 1977 (OJ 1977 L 334, p. 1).

transport of gas on a local or regional pipeline with a view to its delivery to customers) and to the maintenance of the installations needed for those purposes. On the other hand, the use of a vehicle in connection with activities in which the undertaking is in competition with other undertakings which are not involved in the production, transmission or distribution of gas is excluded from the scope of that exemption. In the present case, this means that vehicles used for carrying engineering and commercial products should be fitted with tachographs and that those devices should be used when the load carried includes marketing products.

Accordingly, the Commission suggests that the questions submitted by the national court should be answered as follows:

'1. Council Regulations (EEC) No 3820/85 and (EEC) No 3821/85 of 20 December 1985 on the harmonization of certain social legislation relating to road transport and on recording equipment in road transport respectively, apply to all vehicles used for a journey which is not made wholly and exclusively in connection with the production, transmission or distribution of gas and with the maintenance of installations therefor, whether or not the owner or operator of the vehicles is primarily engaged in such activities.

2. The exemption provided for in Article 4(6) of Regulation No 3820/85 and in Article 3 of Regulation No 3821/85 relates to vehicles used for a journey which is wholly and exclusively connected with the production, transmission or distribution of gas and with the maintenance of installations therefor.'

J. L. Murray
Judge-Rapporteur