On those grounds,

THE COURT (First Chamber),

in answer to the question refered to it by the Oberlandesgericht Düsseldorf by an order of 6 March 1978, hereby rules:

Consideration of the question raised has disclosed no factor of such a kind as to affect the validity of Regulation (EEC) No 543/69 of the Council of 25 March 1969 on the harmonization of certain social legislation relating to road transport.

Mertens de Wilmars O'Keeffe Bosco

Delivered in open court in Luxembourg on 28 November 1978.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 9 NOVEMBER 1978

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Oberlandesgericht of Düsseldorf. It concerns the validity of Council Regulation (EEC) No 543/69 of 25 March 1969 "on the harmonization of certain social legislation relating to road transport" (OJ L 77/49 of 29. 3. 1969).

The Court has had occasion to consider that Regulation in a number of cases: Case 20/70 *Commission* v *Council* [1971] ECR 263, the *"ERTA* case"; Case 69/74 *Auditeur du Travail* v *Cagnon* [1975] 1 ECR 171; Case 65/76 *Derycke's* case [1977] ECR 29; and Case 76/77 *Auditeur du Travail* v *Dufour* [1977] ECR 2485. Never before, however, has the validity of the Regulation been directly in question. None the less, certain views expressed by the Court in the cases I have mentioned have, as I shall show, a bearing here.

As Your Lordships know, the Regulation contains *inter alia* provisions about working conditions of road transport

drivers, in particular manning, driving time and rest periods. Article 18 of the Regulation requires the Member States to take any measures necessary for its implementation including the imposition of penalties in case of breach. In the Federal Republic of Germany such penalties are now provided for by Section 7a of the Fahrpersonalgesetz of 27 October 1976, which, as a consolidating measure, was applied in the present case, although the relevant events took place before its enactment.

The proceedings before the Oberlandesgericht have their origin in the prosecution of Mr Fritz Schumalla, a long-distance lorry driver employed by the firm of Theo Convent of Emmerich. Between 18 July 1976 and 8 September 1976 he committed a series of infringements of Regulation No 543/69, which consisted variously in exceeding the limit of four hours continuous driving prescribed by Article 7 (1) exceeding the daily driving period of eight hours prescribed by Article 7 (2) and failing to take the daily rest period of not less than eleven consecutive hours prescribed by Article 11 (1). The facts relevant to those infringements were established by the individual control book that a driver is required to keep in accordance with Article 14 of the Regulation; and, indeed, they were not contested by Mr Schumalla. He was, accordingly, convicted by the Amtsgericht of Krefeld under Section 7a (1) 1 (c) and (d) of the Fahrpersonalgesetz which create offences relating to the infringement of, respectively, Articles 7 or 8 and Articles 11 or 12 of the Regulation. He was sentenced to fines totalling 3 350 DM and ordered to pay costs.

The Amtsgericht had been asked by Counsel for Mr Schumalla to seek a preliminary ruling from this Court, but declined to do so, on the ground that the case concerned exclusively the application of German law. However, on appeal, the Oberlandesgericht of Düsseldorf took the view that, as a court against whose decision in the circumstances no further appeal would lie, it ought to stay the proceedings and refer to this Court the question whether Regulation No 543/69 "is authorized by the EEC Treaty and therefore valid".

The Oberlandesgericht explains in its Order for Reference that in many cases that have come before it in the exercise of its criminal jurisdiction the defence has argued that Regulation No 543/69 is invalid because it is concerned with promoting the safety of general road traffic and that objective is *ultra vires* the Council. The Order has annexed to it an opinion dated 15 December 1976 of Professor Dr R. Knöpfle in which he argues much more generally that there is no power under the Treaty to pursue the objectives of Regulation No 543/69. It is, I think, in the light of this broader challenge to the validity of the Regulation that the question put by the Oberlandesgericht should be approached.

Regulation No 543/69 (which has been amended several times, but not in ways pertinent to this case) was adopted under Article 75 of the Treaty.

That Article is to be found in Title IV of Part Two of the Treaty. Part Two, Your Lordships remember, is headed "Foundations of the Community" and comprises four Titles, namely I "Free Movement of Goods", II "Agriculture", III "Free Movement of Persons, Services and Capital" and IV "Transport". Title IV is introduced by Article 74, which reads:

"The objectives of this Treaty shall, in matters governed by this Title, be pursued by Member States within the framework of a common transport policy."

I mention all that in order to emphasize that the common transport policy is itself one of the foundations of the Community and is not, as suggested in the Opinion of Professor Knöpfle, merely something ancillary to the free

movement of goods within the common market. I should, I think, also recall that, in Case 167/73 *Commission* v *French Republic* [1974] 1 ECR 359 at p. 370, the Court expressly held that "When Article 74 refers to the objectives of the Treaty, it means the provisions of Articles 2 and 3"; and they of course are to be interpreted in the light of the preamble to the Treaty.

Paragraphs 1 and 2 of Article 75 read as follows:

"1. For the purpose of implementing Article 74, and taking into account the distinctive features of transport, the Council shall, acting unanimously until the end of the second stage and by a qualified majority thereafter, lay down, on a proposal from the Commission and after consulting the Economic and Social Committee and the Assembly:

(a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States;

(b) the conditions under which non-resident carriers may operate transport services within a Member State;

(c) any other appropriate provisions.

2. The provisions referred to in (a) and (b) of paragraph 1 shall be laid down during the transitional period."

Paragraph 3 is not material for present purposes.

Thus Article 75 not only empowers but also requires the Council to do two things:

(1) During the transitional period to lay down the provisions necessary for the limited purposes described in (a) and (b) of paragraph 1; and

(2) Both during and after the transitional period to lay down "any other appropriate provisions".

To the question "'appropriate' for what?" the answer, having regard to the opening words of the Article, can only be: appropriate for the purpose of implementing Article 74, i.e. for pursuing the objectives of the Treaty in matters of transport within the framework of a common transport policy, taking into account the distinctive features of transport. Since the objectives of the Treaty include, by virtue of Article 3 (e), "the adoption of a common policy in the sphere of transport", the net effect is to confer on the Council an extremely wide power indeed.

So far as relevant for present purposes the Council first exercised that power (in conjunction with the powers relating to taxation conferred on it by Article 99 of the Treaty) when, on 13 May 1965, it adopted Decision No 65/271/EEC "on the harmonization of certain provisions affecting competition in transport by rail, road and inland waterway" (OJ 1500/65 of 24. 5. 65). The preamble to that Decision recited that "one of the objectives of the common transport policy must be to eliminate disparities liable to cause substantial distortion in competition in the transport sector" and that "it is accordingly necessary to take measures to harmonize or approximate certain laws, regulations and administrative provisions relating specifically to transport". The Decision identified three realms where it was particularly necessary that such measures should be taken, namely:

(1) taxation;

(2) State intervention, e.g. the imposition of public service obligations and the provision of aids; and

(3) social legislation.

Regulation No 543/69 was adopted in order to give effect to the Decision in so far as it related to social legislation affecting road transport. If one sought to ascertain the purpose of the Regulation by reference only to its genesis in the

Decision, one might conclude that that purpose was to harmonize the social legislation of Member States relating to road transport with a view to eliminating distortion in competition in that sector. It is clear however from the Judgments of the Court to which I referred at the outset that the purpose must be taken to be more complex than that. On that question those Judgments are in my opinion none the less authoritative because they were concerned with the interpretation of various provisions contained in the Regulation, rather than with its validity.

The fullest statement is to be found in the *Derycke* case where the question before the Court was, in substance, whether the Regulation was applicable to a driver who was an independent trader as well as to one who was an employee. The affirmative answer (given by the Second Chamber) was based on the wording and structure of the Regulation, and on its objectives, which were described in the following terms:

"The first objective of the Regulation is of a social nature consisting in protecting drivers and the crews of vehicles used for trade purposes against the harmful effects of excessive and badly distributed driving periods.

In addition, as shown by the second paragraph of the preamble, the objective of the Regulation is to eliminate disparities liable to cause substantial distortion in competition in the transport sector by ending working practices based on an improper exploitation of the human factor.

Finally, as appears from various references in the preamble and from several of the provisions of the Regulation, the latter is also intended to contribute to road safety on the public highway." (See [1977] ECR at p. 35.)

Similarly, in the *Dufour* case the full Court said of Regulation No 543/69 that it "pursues, as part of the harmonization of national laws, a group of objectives which are concerned with the social protection of the driver, road safety and equality of competition between transport undertakings" (see [1977] ECR at p. 2492). In the earlier *Cagnon* case the Court referred to the improvement of road safety as being one "among other objectives of the Regulation" (see [1975] 1 ECR at p. 175).

The Court has, thus, identified three distinct albeit inter-linked objectives of Regulation No 543/69: the welfare of vehicle crews; the removal of a possible source of distortion of competition in the transport sector; and the furtherance of road safety. I should mention that I do not agree with the submission of the Council that the list of objectives set out in the Judgment in the *Derycke* case represents an order of priority. The same three objectives were mentioned in a different order by Mr Advocate General Mayras in his Opinion in that case, and in a different order again by the Court itself in the *Dufour* case.

I turn to the question whether Article 75 of the Treaty authorizes the Council to pursue any of those objectives. I say "any", because it seems to me clear that a Community measure that has been adopted for a purpose authorized by the Treaty does not lose its validity merely because, at the same time, it serves some other useful purpose (consider Cases 2/57 and 15/57 *Compagnie des Hauts Fourneaux de Chasse* v *High Authority*, Rec. 1958 pp. 128 and 155; Case 9/75 *Chambre Syndicale de la Sidérugie Française* v *High Authority*, Rec. 1958 p. 362 at p. 393-394). It would accordingly, in my opinion, be sufficient to rebut the challenge that has been made to the validity of Regulation No 543/69 if any of the three objectives I have mentioned were authorized by Article 75. I will say at once, however, that, in my view, all three objectives fall within the scope of that Article.

First, there can be no doubt that the furtherance of social welfare, although not listed in Article 3 among the activities of the Community, falls within the purview of the Treaty. So much is apparent not only from the prominence that is given in the Preamble to the objective of improving living and working conditions but also from the provisions of Title III of Part Three of the Treaty devoted to "Social Policy". The first Article of that Title is Article 117 which reads:

"Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained.

They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonization of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action."

I see no reason to attribute to the authors of the Treaty an intention to exclude from the "procedures" there referred to those available under Article 75, particularly bearing in mind that social legislation in the transport sector must needs be specifically adapted to the particular characteristics of that industry, so that it is appropriate that the harmonization of such legislation should be effected within the framework of a common transport policy. Professor Knöpfle refers also to Article 118 and points out that it calls only for cooperation between the Member States in the social field, promoted by the Commission. That is so, but Article 118 opens with the words "Without prejudice to the other provisions of this Treaty . . .", so that it cannot be interpreted as restricting the activities of the Community in that field to such cooperation.

Secondly disparities between the social legislations of Member States in the domain of transport are liable to distort competition within the common market by placing at a disadvantage those undertakings operating in Member States where the legislation is more stringent. This was of course the major preoccupation of the Council Decision of 13 May 1965. By virtue of Article 3 (f) of the Treaty the objectives of the Community include "the institution of a system ensuring that competition in the common market is not distorted". This is itself an aspect of the wider objective prescribed by Article 2 of promoting "throughout the Community a harmonious development of economic activities". Professor Knöpfle interprets Article 3 (f) as a kind a advanced summary of the provisions of the Treaty dealing expressly with competition, viz. Article 79 and Articles 85 to 94. It is however noteworthy that Article 79, which, of those singled out by Professor Knöpfle, is the only one dealing specifically with transport, provides expressly (by paragraph 2) that its provisions "shall not prevent the Council from adopting other measures in pursuance of Article 75 (1)". For my part I see no reason for excluding the promotion of fair competition from the objectives to be pursued under Article 75.

Thirdly, as to road safety, Professor Knöpfle points out that it is nowhere mentioned in the Treaty. From that he deduces that it is outside the scope of the Treaty. I find it impossible to leap from that premise to that conclusion. Rather do I think that a transport policy, common or otherwise, that left out of account considerations of safety, would be gravely defective. That goes not only for road transport but also for transport by rail and by inland waterway to all three of which, by virtue of Article 84 (1) of the Treaty, the common transport policy directly applies, and for sea and air transport, to which, by virtue of

Article 84 (2), that policy may be extended. Professor Knöpfle says that, on that view, there would be nothing to stop the Council from concerning itself with the state of the roads or with road signs, which, he suggests, would be absurd. With all respect to him, it does not seem to me that that would be absurd at all. The quality of communications within the Community is an obvious matter for Community concern and must be within the permissible scope of the common transport policy; nor is the standardization of road signs a novel concept. The Council points out that, if the pursuit of safety in the transport sector is outside the powers conferred on it by Article 75, there are other measures than Regulation No 543/69 whose validity could be called in question, e.g. Council Directive No 76/135/EEC of 20 January 1976 on reciprocal recognition of navigability licences for inland waterway vessels (OJ L 21/10 of 29. 1. 1976) and Council Directive No 77/143/EEC of 29 December 1976 on the approximation of the laws of the Member States relating to road-worthiness tests for motor vehicles and their trailers (OJ L 47/47 of 18. 2. 1977). Whilst this is not a consideration that can directly affect the interpretation of the Treaty, it does illustrate the nature of the consequences that could flow from the adoption of Professor Knöpfle's view.

I conclude that the objectives of Regulation No 543/69 fall fairly and squarely within the scope of Article 75.

In the result I am of the opinion that Your Lordships should rule that consideration of the question referred to the Court by the Oberlandesgericht of Düsseldorf has disclosed no factor of such a kind as to affect the validity of Regulation No 543/769.