JUDGMENT OF THE COURT (FIRST CHAMBER)
OF 22 MARCH 1979 [1]

# A. P. Augustijn
# v Staatssecretaris van Verkeer en Waterstaat
# (preliminary ruling requested by the Raad van State)

"Road transport of goods"

**Case 145/78**

*Transport — Common policy — Road haulage operator — Admission to the occupation — Condition of professional competence — Definitive exemption — Discretionary power of the Member States*
*(Council Directive No 74/561, Art. 4 (2))*

Article 4 (2) of Council Directive No 74/561 which by way of exception and in certain duly justified special cases authorizes the Member States to grant definitive exemption from the condition of professional competence for the operation of a transport undertaking only to such persons as possess at least three years' practical experience in the day-to-day management of the said undertaking, does not cover the case of a person who does not have the intention of continuing to operate the same undertaking. However, that provision must not be understood to mean that it does not allow the competent authorities in the Member States to take the view that a definitive exemption from the condition of professional competence may be granted in the case of two partners who, having both acquired at least three years' practical experience in the day-to-day management of the same undertaking, decide to carry it on in the form of two new undertakings.

In Case 145/78

REFERENCE to the Court under Article 177 of the EEC Treaty by the Raad van State, Afdeling Rechtspraak (Council of State, Administrative Appeals Section) for a preliminary ruling in the proceedings pending before that court between

1 — Language of the Case: Dutch.

A. P. AUGUSTIJN

and

STAATSSECRETARIS VAN VERKEER EN WATERSTAAT (Secretary of State for Transport, Water Control and Construction)

on the interpretation of Council Directive No 74/561/EEC of 12 November 1974 on admission to the occupation of road haulage operator in national and international transport operations (Official Journal L 308, p. 18),

THE COURT (First Chamber)

composed of: J. Mertens de Wilmars, President of the First Chamber, A. M. Donner and A. O'Keeffe, Judges,

Advocate General: H. Mayras
Registrar: A. Van Houtte

gives the following

# JUDGMENT

## Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

*A — The Council Directive*

In order to harmonize the Member States' transport legislation, the Council adopted on 12 November 1974 Directive No 74/561/EEC on admission to the occupation of road haulage operator in national and international transport operations.

Article 3 (1) of the Council Directive provides that natural persons or undertakings wishing to engage in the occupation of road haulage operator shall *inter alia* satisfy the condition as to professional competence.

The knowledge required to satisfy that condition is specified in the Annex to the Directive; the way in which that knowledge is to be acquired is laid down in Article 3 (4):

"... by attending courses, by practical experience in a transport undertaking or by a combination of both".

According to Article 4 (2), exemption from the condition of professional competence may, "by way of exception and in certain special cases", be definitively granted by the competent authorities in the Member States to a person wishing to operate a transport undertaking if such person possesses "at least three years' practical experience in the day-to-day management of the undertaking".

*B — The national legislation applicable*

Article 56 (1) of the Wet Autovervoer Goederen (Law on the carriage of goods by motor vehicle, hereinafter referred to as the WAG) provides that authorization to engage in the occupation of transport operator shall be granted only if *inter alia* the condition of professional competence is satisfied, but that in special cases the minister is empowered to grant exemptions. Article 128 of the Decision implementing the WAG provides that in order to satisfy that condition operators must be in possession of a technical diploma recognized by the minister and submit a declaration by the Rijksinspecteur van het Verkeer (National Traffic Inspector) certifying two years' paid employment with an undertaking engaged in the carriage of goods.

*C — The facts*

A. P. Augustijn is a partner with his brother in the partnership known as "Gebroeders Augustijn", which has an authorization to undertake transport by lorry to no fixed schedules. The two brothers intend to dissolve the partnership and continue their activities in the form of two separate undertakings to be set up.

In order to be able to act as operator of his new undertaking, A. P. Augustijn by a letter of 23 December 1976 applied for exemption from the condition of professional competence laid down in the last sentence of Article 56 (1) of the WAG.

That application was dismissed by a decision of the Staatssecretaris van Verkeer en Waterstaat of 4 July 1977 on the ground that, although the appellant possesses sufficient experience in the field of the carriage of goods, he did not gain that experience in the undertaking to be operated. The decision is based on Article 56 of the WAG as well as on the provisions of the aforesaid Council directive.

*D — The question referred for a preliminary ruling*

By an interlocutory judgment of 7 June 1978 the Raad van State (Council of State) decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling pursuant to Article 177 of the EEC Treaty:

"Can the exemption from the condition of professional competence in a special case within the meaning of Article 4 (2) of Council Directive No 74/561/EEC of 12 November 1974 on admission to the occupation of road haulage operator in national and international transport operations be granted only if the practical experience was gained in an undertaking which is being operated in

its entirety in the same legal form or can operation of the undertaking within the meaning of the aforesaid provision also be understood to include operation of one or more self-contained parts of the undertaking?".

The Raad van State holds that an answer to the question whether the respondent correctly interpreted Article 4 (2) of the Directive by ruling that operation of the undertaking should not be understood to include a part of the activities carried out in the original undertaking, in this case under a different name and in another legal form, is essential to its judgment. The judgment of the Raad van State was received at the Court on 19 June 1978.

Upon 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 and to assign the case to the First Chamber if the Netherlands Government, which submitted written observations, had no objection. The Netherlands Government gave its agreement to such assignment.

## II — Summary of the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

### *A — Observations submitted by Mr Augustijn*

On the facts, Mr Augustijn points out that he has worked for more than 30 years as a partner in the transport undertaking originally managed by his father, and that when the Netherlands law laid down conditions as to professional competence his brother obtained an exemption because he was the elder and had applied for it.

The pleadings before the Raad van State, which Mr Augustijn also sent to the Court, set out the following arguments on the law:

— An application for exemption made on 22 December 1976 should not be examined by reference to a Council directive which entered into force on 1 January 1977;

— Even assuming that the Directive is applicable, the matter in fact concerns the continuance of an undertaking, as the two partners are each taking a section of the former partnership: only the legal nature of the undertaking is changing;

— At all events, the present case does indeed concern a "special case" within the meaning both of the WAG and of the Directive.

### *B — Observations submitted by the Netherlands Government*

According to the Netherlands Government Article 4 (2) of the Council Directive implies that the exemption can relate only to the undertaking in which the professional competence has come to be lacking and to experience gained in that undertaking.

A distinction must be drawn between two cases:

— Where the legal structure of an undertaking is altered whilst the activities are in fact continued, the pursuit of the activities under the new structure may be regarded as the operation of the former undertaking;

— On the other hand where, as here, the undertaking ceases to exist and two new undertakings are set up whilst operation of the former one is terminated, it is not possible to speak of the operation of two branches of the activity of that undertaking.

C — *Observations submitted by the Commission of the European Communities*

According to the Commission, the essential requirement in the present case is proof of practical experience in a transport undertaking corresponding to effective knowledge of matters. The designation or legal structure of the undertaking which carries on in whole or in part the activities pursued by the existing undertaking in which the practical experience was acquired is not decisive in itself.

Thus the Commission believes that exceptional exemption from the condition of professional competence laid down in the directive may be authorized in a special case where the undertaking is not operated in its entirety or in the same legal form.

The Commission of the European Communities, represented by its Legal Adviser Raymond Baeyens, acting as Agent, presented oral argument at the hearing on 18 January 1979.

The Advocate General delivered his opinion at the hearing on 15 February 1979.

## Decision

1 By an interlocutory judgment of 7 June 1978 which was received at the Court on 19 June 1978, the Raad van State, Afdeling Rechtspraak (Council of State, Administrative Appeals Section), referred a question to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty on the interpretation of Council Directive No 74/561/EEC of 12 November 1974 on admission to the occupation of road haulage operator in national and international transport operations (Official Journal 1974, L 308, p. 18).

2 This question was raised in the context of a dispute over the dismissal by the Staatssecretaris van Verkeer en Waterstaat (Secretary of State for Transport, Water Control and Construction) of the appellant's application of 23 December 1976 for exemption from the condition of professional competence referred to in the last sentence of Article 56 (1) of the Wet Autovervoer Goederen (Law on the carriage of goods by motor vehicle). The ground for that refusal was that, although the applicant possessed sufficient experience in the field of the carriage of goods, he had not gained that experience in the undertaking to be operated.

3 It appears from the case file that the appellant in the main action and his brother, who are both partners in a partnership authorized to undertake transport by lorry to no fixed schedules, intended to dissolve that partnership and continue their activities in the form of two separate undertaking to be set up.

4 The Staatssecretaris applied Article 56 (1) of the Wet Autovervoer Goederen, according to which authorization to engage in the occupation of transport operator shall be granted only if *inter alia* the condition of professional competence is satisfied, although the minister is empowered to grant exemptions in special cases. The Decision implementing that law provides that in order to satisfy the condition of professional competence it is necessary to be in possession of a technical diploma recognized by the minister and in addition submit a declaration by the competent inspector certifying two years' paid employment with an undertaking engaged in the carriage of goods.

5 Article 3 (1) of Council Directive No 74/561/EEC provides that natural persons or undertakings wishing to engage in the occupation of road haulage operator shall *inter alia* satisfy the condition as to professional competence. The knowledge required to satisfy that condition is specified in the Annex to the directive. As provided in Article 3 (4), that knowledge is acquired by attending courses, by practical experience in a transport undertaking or by a combination of both. According to Article 4 (2) of the Directive the authorities in the Member States may, by way of exception, definitively authorize a person not fulfilling the conditions of professional competence to operate a transport undertaking where such person possesses "at least three years' practical experience in the day-to-day management of the undertaking".

6 The Raad van State asked the following question:

"Can the exemption from the condition of professional competence in a special case within the meaning of Article 4 (2) of Council Directive No 74/561/EEC of 12 November 1974 on admission to the occupation of road haulage operator in national and international transport operations be granted only if the practical experience was gained in an undertaking which is being operated in its entirety in the same legal form or can operation of the undertaking within the meaning of the aforesaid provision also be understood to include operation of one or more self-contained parts of the undertaking?"

7 Article 4 (1) concerns the conditions which must be fulfilled in order for a person not satisfying the condition of professional competence to be authorized to operate a transport undertaking on a temporary basis and for a limited period in the event of the death or incapacity of the person who satisfied the conditions of professional competence laid down in Article 3.

8 Article 4 (2) concerns the condition subject to which a person not satisfying the condition of professional competence may be authorized definitively to operate a transport undertaking when the same situation arises, namely at least three years' practical experience in the day-to-day management of the undertaking concerned. Article 4 (2), which by way of exception and in certain duly justified special cases authorizes the Member States to grant definitive exemption from the condition of professional competence for the operation of a transport undertaking only to such persons as possess at least three years' practical experience in the day-to-day management of the said undertaking, does not cover the case of a person who does not have the intention of continuing to operate the same undertaking.

9 However, that provision must not be understood to mean that it does not allow the competent authorities in the Member States to take the view that a definitive exemption from the condition of professional competence may be granted in the case of two partners who, having both acquired at least three

years' practical experience in the day-to-day management of the same undertaking, decide to carry it on in the form of two new undertakings.

## Costs

10 The costs incurred by the Netherlands Government and by the Commission of the European Communities, which submitted observations to the Court, are not recoverable, and as these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber)

in answer to the question referred to it by the Raad van State by an interlocutory judgment of 7 June 1978, hereby rules:

**Article 4 (2) of Council Directive No 74/561/EEC must not be understood to mean that it does not allow the competent authorities in the Member States to take the view that a definitive exemption from the condition of professional competence may be granted in the case of two partners who, having both acquired at least three years' practical experience in the day-to-day management of the same undertaking, decide to carry it on in the form of two new undertakings.**

Mertens de Wilmars Donner O'Keeffe

Delivered in open court in Luxembourg on 22 March 1979.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber