OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 15 FEBRUARY 1979 [1]

Mr President,
Members of the Court,

Introduction

In its judgment of 29 November 1978 in Case 21/78, *Delkvist,* a reference for a preliminary ruling by Københavens Byret (Copenhagen City Court), the Court ruled on the interpretation of certain provisions of Council Directive No 74/562/EEC of 12 November 1974 on admission to the occupation of road passenger transport operator in national and international transport operations. The provisions at issue in that case concerned the condition relating to good repute to be satisfied by transport operators.

These two references to the Court for a preliminary ruling from the Netherlands Raad van State, Afdeling Rechtspraak (Council of State, Administrative Appeals Section) concern the interpretation of Council Directive No 74/561/EEC on admission to the occupation of road *haulage operator* in national and international transport operations.

As in the directive on passenger transport operations, three conditions are laid down for admission to the occupation (Article 3):

(a) good repute,

(b) appropriate financial standing,

(c) *professional competence.*

The Court's ruling is sought on the interpretation of the provisions concerning the third of those conditions.

First, it should be pointed out that under Article 3 (4) of Directive No 74/561 the concept of professional competence consists in the possession of skills listed in the Annex to the directive and recognized by the authority or body designated for that purpose by each Member State. The necessary knowledge can be acquired by attending courses, by practical experience in a transport undertaking or by a combination of both.

These are the principles which are to be implemented by the Member States.

However, the directive also comprises transitional provisions for the purpose of allowing the national authorities to adjust their internal legislation to the Community system.

These provisions, which I shall come back to, are laid down in Articles 4 and 5.

I shall examine each of the two cases in turn, beginning with a brief statement of the facts which gave rise to the actions before the national court.

I — In the first action, the appellant is Arianus Petrus Augustijn, born in 1927. It is not disputed that he has worked for more than 30 years as a road haulage operator, first in a family undertaking set up by his father then, as from 1948, in a partnership known as "Gebroeders Augustijn" (Augustijn Brothers). Originally consisting of four partners, namely

1 — Translated from the French.

the appellant and his three brothers, that partnership obtained authorization in 1956 to undertake the transport of goods to no fixed schedules for a total payload subsequently increased to 52 tonnes.

One of the partners died in 1969, another retired in 1975, and in the course of time the undertaking continued with only two partners, the appellant and his brother Martinus, who had obtained a personal exemption from the condition as to professional competence under Article 56 of the Netherlands Wet Autovervoer Goederen (Law on the carriage of goods by motor vehicle, hereinafter referred to as the WAG).

According to the appellant, each of the partners had his own vehicles and his personal clients.

Owing to financial difficulties, in 1976 the two brothers decided to separate and consequently to dissolve the partnership, each intending to continue operating on his own account.

Only then did Arianus Petrus Augustijn apply for an exemption by a letter of 23 December 1976 to the Staatssecretaris van Verkeer en Waterstaat (Secretary of State for Transport, Water Control and Construction).

By a decision of 4 July 1977 the latter dismissed that application on the basis both of Article 56 of the applicable national Law and of Article 4 (2) of Council Directive No 74/561, under which the competent authorities in the Member States may, by way of exception and in certain special cases, definitively authorize a person not fulfilling the condition of professional competence referred to in Article 3 (1) (c) to operate the transport undertaking provided that such person possesses at least three years' *practical experience* in the day-to-day management of the undertaking.

The appellant then brought an appeal before the Raad van State, Afdeling Rechtspraak, seeking annulment of the ministerial decision.

By an interlocutory judgment of 7 June 1978, that court referred the following question to the Court of Justice for a preliminary ruling:

"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 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?"

In the appellant's submission, the provisions of the directive are inapplicable to his personal case simply because his application for an exemption was lodged on 22 December 1976, that is prior to the entry into force of the directive, which therefore could not affect the decision which the Staatssecretaris should have taken on the basis only of the internal provisions then applicable.

In my view this first argument lacks any merit. No decision of exemption from the requirement of professional competence adopted after 1 January 1977 on the basis of the concept of the operation of an undertaking within the meaning of Article 4 (2) of the Directive could be validly adopted unless the provisions of the directive were taken into consideration, even if such a decision concerned an application for exemption lodged prior to the date of its entry into force.

Moreover, this is the tenor of the written observations of the Netherlands Government, and it was on the same legal basis that the Raad van State, Afdeling Rechtspraak, held that it had to refer to this Court the preliminary question upon which it considered a decision necessary in order to give its judgment.

According to the Netherlands Government the relevant provision of the directive implies that the exemption can relate only to the same undertaking in which the condition of professional competence has ceased to be fulfilled and to experience actually gained in that undertaking.

As to the concept of operation of the undertaking, a distinction must be drawn.

Where the activities are in fact continued and only the legal structure of the undertaking is altered, for example where a partnership is transformed into a limited liability company with restrictions on share transfers (besloten vennootschap), the continuation of the same activities under a new structure may be regarded as the operation of the former undertaking.

On the other hand, where the undertaking ceases to exist and is replaced by two new, individual undertakings, the concept of the operation of the former undertaking cannot be accepted, because the activity of the latter is then divided into two separate branches.

The Commission expressed the opposite view.

Taking the view that Article 4 (2) of the Directive makes an exceptional but permanent derogation from the requirement of professional competence, the Commission considers that it is immaterial if after dissolution of the original undertaking its activities are continued in part by two separate undertakings. The decisive fact is that those responsible for the new undertakings have actually gained in the pre-existing undertaking the practical experience required by the relevant provision of the directive.

For my part, I cannot agree with that broad interpretation.

It must be pointed out, first, that under the second subparagraph of Article 1 (2) of the Directive the concept "undertaking" is defined *inter alia* as "any association or group of persons with or without legal personality, whether profit-making or not".

Secondly, Article 4 as a whole comprises two derogations from the principle of the obligation upon natural persons managing a road haulage undertaking to satisfy the condition of professional competence laid down by the directive itself.

The first derogation (Article 4 (1)) concerns the case of the temporary operation of an undertaking for a maximum period of one year, with extension for a maximum period of six months, in duly justified special cases in the event of the death or physical or legal incapacity of the natural person who *inter alia* satisfies the condition as to professional competence required, in principle, by Article 3 (1) (c).

To this first derogation, Article 4 (2) adds a second — by way of exception and concerning only certain special cases — allowing the competent authorities in the Member States definitively to authorize a person not fulfilling the condition of professional competence to operate *the undertaking in question* provided that such person possesses at

least three years' practical experience in the day-to-day management of *that* undertaking.

This second derogation can only be given a very strict interpretation, having regard to the conditions which the Council imposed for its applicability:

(1) It concerns only an exceptional situation, assessment of which is left to the national authorities in each case.

(2) It implies operation of the undertaking concerned itself, that is to say if reference is made to the definition given in Article 1 (2) a particular association or group of persons.

Even if it is accepted that the operation can continue in a new legal form, in my opinion the derogation cannot apply where the undertaking concerned is dissolved and its activities are continued in part by two individual transport operators, even where they have gained sufficient practical experience in the undertaking which has thenceforward ceased to exist as such.

I therefore come to the following answer to the question raised: The discretionary exemption from the condition of professional competence in a special case within the meaning of Article 4 (2) of Directive No 74/561 cannot be granted where the undertaking concerned is dissolved and parts of it are operated by individual operators.

II — As to Case 146/78 *(Wattenberg)*, it should be noted as a preliminary point that under the WAG and the decision adopted to implement it professional transport operators must be in possession of a technical diploma issued by the Stichting Bureau Examens voor het Beroepsgoederenvervoer over de weg (Examining body for road haulage operators) of Rijswijk and in addition have obtained from the Rijksinspecteur van het Verkeer (National Traffic Inspector) a declaration certifying two years' practical experience in paid employment with an undertaking engaged in the carriage of goods.

Mr Wattenberg, who does not fulfil these conditions as to professional competence, none the less works as a road haulage operator on his own account.

He had applied for exemption from the condition of professional competence under Article 56 of the WAG for the first time in 1967. He received a decision refusing his application, and the objection which he lodged against that decision was dismissed as unfounded by a Royal Decree of 11 June 1969.

Having regard no doubt to the entry into force on 1 January 1977 of Council Directive No 74/561, on 1 February 1977 Mr Wattenberg submitted to the Staatssecretaris van Verkeer en Waterstaat a fresh application for exemption from the condition of professional competence.

By a decision of 4 May 1977 the exemption applied for was granted, but only until 1 January 1980.

In giving his reasons for restricting the validity of the exemption the Staatssecretaris relied in particular upon the provision laid down in Article 5 (2) of the Community Directive, according to which those natural persons who, after 31 December 1974 and before 1 January 1978, were *inter alia* authorized to engage in the occupation of road haulage operator without having furnished proof, under national regu-

lations, of their professional competence, must satisfy, before 1 January 1980, the condition of professional competence referred to in Article 3 (4) of the Directive.

However the Staatssecretaris considered that he also had to mention the provision appearing in the same directive, namely Article 4 (2), according to which by way of exception and in certain special cases a person not fulfilling the condition of professional competence may be authorized *definitively* to operate a transport undertaking provided that such person possesses a certain number of years' practical experience in the management of the undertaking.

Mr Wattenberg appealed to the Raad van State, Afdeling Rechtspraak, against the decision of the Staatssecretaris in as much as that decision had restricted the validity of the exemption to 1 January 1980, and expressly claimed an exemption of unrestricted duration.

The Raad van State, Afdeling Rechtspraak, held that an answer to the question whether the respondent national authority had interpreted Article 4 (2) of the Directive correctly by restricting the period of validity of the exemption granted pursuant to the provisions of Article 5 (2) was essential to its judgment.

It also held that it was not clear from the wording of Article 4 to what extent it was possible to grant an exemption within the meaning of Article 4 (2) (thus a definitive exemption) apart from the cases referred to in Article 4 (1).

Finally, the Raad van State, Afdeling Rechtspraak, refers four questions to the Court of Justice for a preliminary ruling.

(1) Consideration of the first of these questions will not take up much op my time. It is in the following terms:

"Under Article 3 (4) of the Directive are the Member States at liberty to adopt rules whereby apart from the acquisition of a technical diploma the condition as to professional competence is also satisfied if the competent authority or body determines the professional competence on the basis of thorough and extensive practical experience of at least six years in a senior managerial position in an undertaking engaged in the carriage of goods?"

In my view, merely reading Article 3 (4) suffices to settle the question.

It emerges from that provision, first, that the condition of professional competence consists in the possession of certain skills in the subjects listed in the Annex to the directive. The necessary knowledge is to be acquired by attending courses, by practical experience in a transport undertaking or by a combination of both.

It is for the authority or body designated for that purpose by each Member State to assess possession of the skills required.

In plain language this means that as regards the areas of knowledge listed in the Annex to the directive the Member States are free to organize any system of verification of that knowledge either by examination or by practical experience or by a system combining both.

The system existing in the Netherlands is of the last-mentioned kind, since under Article 128 of the Decision implementing the WAG those concerned must obtain the technical diploma issued by a national examination centre and recognized by the competent minister, and in addition submit a declaration by the traffic inspectorate certifying at least two years' practical experience in a road haulage undertaking.

I propose therefore that the question raised should be answered in the affirmative, with the reservation that the period of the appropriate practical experience is a matter to be determined by each Member State. Indeed no provision of the directive stipulates that such experience cannot be acquired in less than six years.

(2) The second and third questions raised by the Raad van State call in question the combined interpretation of Articles 4 and 5 of Directive No 74/561.

It has already been stated that in special cases the competent authorities in the Member States may, by way of exception, definitively authorize a person not fulfilling the condition of professional competence to operate the transport undertaking, provided that such person possesses at least three years' practical experience in the day-to-day management of the undertaking. This is the purport of Article 4 (2).

However, that provision cannot be separated from Article 4 (1), according to which:

"Member States shall determine the circumstances in which a road haulage undertaking may, by way of derogation from Article 3 (1), be operated on a temporary basis for a maximum period of one year, with extension for a maximum period of six months, in duly justified special cases in the event of the death or physical or legal incapacity of the natural person engaged in the occupation of transport operator or of the natural person who satisfies the provisions of Article 3 (1) (a) and (c)",

that is to say the conditions relating to good repute and to professional competence.

The third question of the Raad van State, which I shall deal with first, asks whether the provision in Article 4 (2) allowing a person possessing only three years' practical experience in the management of a particular undertaking to be definitively authorized by way of exception to operate that undertaking is applicable only in the case referred to in the first paragraph of that article, or whether that exceptional power may also be applicable in other cases.

My own view is that Article 4 (2) can only be interpreted restrictively and can be applied only in the case envisaged by Article 4 (1), in special cases left to the discretion of the competent authorities in the Member States.

Regardless of the argument, based on the wording of Article 4 (2), that it may be inferred from the use of the adverb "however" at the beginning of the paragraph that it constitutes a derogation from the conditions *inter alia* as to the time during which the undertaking may be operated, it seems to me that the Council had only a single aim in view in the whole of Article 4: to obviate the necessity for an undertaking to suspend its activities where it has been deprived, by death or physical or legal incapacity,

of the natural person who himself engaged in the occupation of transport operator or who within the undertaking fulfilled *inter alia* the condition of professional competence laid down in Article 3 (1) (c).

Article 4 (1) restricts the power of operating the undertaking to a relatively short period — one year or a maximum of 18 months if an extension is granted. By way of an exceptional derogation from what is in itself a derogation from the permanent provisions on professional competence, Article 4 (2) allows the possibility of definitive operation of the undertaking where there is in the undertaking concerned a natural person who, although not fulfilling the condition of professional competence defined in Article 3 (4), at least has sufficient practical experience in the day-to-day management of that undertaking.

These remarks allow me now to answer the second preliminary question, which asks whether "an authorization granted after 31 December 1974 and before 1 January 1978 by the competent authorities of a Member State to a natural person to engage in the occupation of road haulage operator without having furnished proof of his professional competence under national regulations ceases to be valid if, pursuant to Article 5 (2) of the Directive that person does not fulfil the condition of professional competence referred to in Article 3 (4) *before 1 January 1980* even if the aforesaid authorities gave such authorization because they held that there existed a special case within the meaning of Article 4 (2)".

In my opinion, there is no doubt about the answer to this question. Articles 4 and 5 are directed at completely different situations. The former relates only to the case of the operation of an undertaking which, either by death or by physical or legal incapacity, has been deprived *inter alia* of the natural person who fulfilled the condition of professional competence within the meaning of the directive.

Article 5 concerns a completely different matter. That provision relates to undertakings and natural persons who, before 1 January 1978, were authorized in a Member State to engage in the occupation of road haulage operator. According to Article 5 (1), such undertakings and persons are exempt from the requirement to furnish proof that they satisfy, where necessary, the provisions laid down in Article 3 of the Directive: good repute, appropriate financial standing and professional competence. In the present case I am concerned only with the third condition, which can refer only to natural persons, whether they work on their own account or for an undertaking.

However, Article 5 (2) places a restriction upon that rule by imposing upon those natural persons who, after 31 December 1974 and before 1 January 1978, were

— authorized to engage in the occupation in question without having furnished proof, under national regulations, of their professional competence, or

— designated continuously and effectively to manage the transport operations of an undertaking,

an obligation to satisfy, before 1 January 1980, the condition of professional competence within the meaning of the directive (Article 3 (4)).

In my opinion this restriction in time may not be invoked against natural persons who, under Article 4 (2) and hence in the case of continuation of the activity of a particular undertaking, have been granted definitive exemption from the condition of professional competence on the ground that they furnished proof of at least three years' practical experience in the day-to-day management of the undertaking.

To adopt the opposite solution would amount to rendering the exceptional power conferred upon the competent authorities in the Member States by Article 4 (2) nugatory.

(3) There remains the fourth and last question, in which the Raad van State seeks to ascertain whether the expression "physical incapacity" used in Article 4 (1) of the Directive should also be understood as including the attainment of an age at which a person is deemed no longer to be capable of working.

I have no hesitation in answering this question in the negative, and my reasons are the following:

In concerning itself in Article 4 of the Directive with the conditions subject to which a road haulage undertaking may be operated, the Community legislature favoured only those cases in which there occurs an unforeseeable event which has the effect of depriving that undertaking of the natural person authorized himself to engage in the occupation of transport operator or of the person who satisfies the conditions laid down in Article 3 (1) (a) and (c) (good repute and professional competence).

Article 4 (1) is directed at unforeseeable events: death or physical or legal incapacity.

On the other hand, no age-limit is mentioned, precisely because attainment of a previously-determined age is a foreseeable event and because in such a case the operation of the undertaking could be organized in advance without any need to have recourse to the transitional provisions in Article 4.

Moreover, the attainment of an advanced age does not have the same consequences for everyone. Ageing is a very differential phenomenon, and physiological age varies from one individual to another. It does not necessarily coincide with the age recorded in public records.

Accordingly I consider it impossible to treat the attainment of a particular age as amounting to physical incapacity within the meaning of Article 4 (1) of the Directive.

My view is that the Court should answer the questions raised in the manner indicated in this opinion.