REPORT FOR THE HEARING
in Case C-8/90 *

I — Facts and procedure

1. *Legal background*

Regulation (EEC) No 543/69 of the Council of 25 March 1969 on the harmonization of certain social legislation relating to road transport (Official Journal, English Special Edition 1969 (I), p. 170) contains provisions relating to the composition of crews of vehicles and laying down driving and rest periods. Under Article 18(1) Member States are required to adopt in due time the laws, regulations and administrative provisions necessary for the implementation of the regulation. Such provisions must in addition cover the penalties to be imposed in case of breach of the regulation. Regulation No 543/69 entered into force on 1 April 1969.

Council Regulation (EEC) No 3820/85 of 20 December 1985 on the harmonization of certain social legislation relating to road transport made certain provisions of Regulation No 543/69 more flexible. The Council decided that it was appropriate to combine in a single text all the provisions relating to this subject and Regulation No 543/69 was therefore repealed by Article 18(1) of Regulation No 3820/85. Article 18(2) provides as follows:

'References to the Regulation repealed under paragraph (1) shall be construed as references to this Regulation.'

The wording of Article 17(1) of Regulation No 3820/85 is identical to that of Article 18(1) of the old regulation. Regulation No 3820/85 entered into force on 29 September 1986.

The provisions for the implementation of Regulation No 543/69 were adopted in Belgium by Royal Decree of 23 March 1970. As regards penalties, the decree referred to Article 2 of the Law of 18 February 1969 on measures for the implementation of international conventions and decisions relating to transport by road, rail or inland waterway.

The provisions for implementing Regulation No 3820/85 were adopted in Belgium only by Royal Decree of 13 May 1987, which has no retroactive effect.

On 3 and 4 November 1986, that is, after the entry into force of Regulation No 3820/85 but before the adoption by Belgium of measures for implementing it,

* Language of the case: Dutch.

Mr Kennes, a driver employed by Verkooyen, a limited partnership, was charged with infringing Articles 6(1), 7(1) and 8(1) of Regulation No 3820/85 (provisions concerning driving and rest periods).

The Correctionele Rechtbank te Turnhout (Criminal Court, Turnhout) acquitted the first defendant and dismissed the charge against the defendant partnership on the ground that at the material time there was no legal basis for the imposition of a penalty: on the one hand Regulation No 3820/85 did not lay down any penalty but left the Member States to adopt the necessary provisions and, on the other hand, the Royal Decree of 23 March 1970 adopted in implementation of Regulation No 543/69 was no longer applicable.

The Arbeidsauditeur bij de Arbeidsrechtbank (officer representing the public interest in labour matters) appealed in cassation to the Hof van Cassatie (Court of Cassation) against that judgment, claiming that the Correctionele Rechtbank had failed to take account of the direct applicability of Council regulations as provided by Article 189 of the EEC Treaty, that Regulation No 3820/85 had been binding in its entirety as from 29 September 1986, the date of its entry into force, and that its direct applicability could not be made conditional upon the adoption of national measures for its implementation.

The Hof van Cassatie confirmed that the Royal Decree of 13 May 1987 was not applicable to the facts alleged against the defendant, but queried whether Article 18(2) of Regulation No 3820/85 was applicable to the Belgian Royal Decree of 23 March 1970 and whether the reference made therein to Regulation No 543/69 must therefore be understood as applying to any provision replacing it.

The Hof van Cassatie therefore decided, by order of 9 January 1990, to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 18(2) of Council Regulation (EEC) No 3820/85 on the harmonization of certain social legislation relating to road transport to be interpreted as meaning that references to Regulation (EEC) No 543/69 in national provisions laying down measures to implement that regulation are also to be construed as references within the meaning of the said Article 18(2)?'

2. *Procedure before the Court*

The order for reference was received at the Court Registry on 12 January 1990.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 2 May 1990 by the United Kingdom, represented by Rosemary Caudwell, acting as Agent, and on 11 April 1990 by the Commission of the European

Communities, represented by Thomas Van Rijn, a member of its Legal Service, acting as Agent.

Upon hearing the report of the Judge Rapporteur and the views of the Advocate General, the Court decided on 7 November 1990 to assign the case to the First Chamber and to open the oral procedure without any preparatory inquiry.

II — Summary of the written observations

According to the *United Kingdom*, Article 18(2) of Regulation No 3820/85 applies only to Community law: its purpose was to ensure that the reference to Article 5 of Regulation No 543/69 appearing in Council Directive 80/1263/EEC of 4 December 1980 on the introduction of a Community driving licence (Official Journal 1980 L 375, p. 1) should be interpreted as a reference to Article 5 of Regulation No 3820/85. The Council's intention was not that Article 18(2) should be regarded as relating to references to Regulation No 543/69 in national implementing measures. Such an intention would be an encroachment on national legislative powers.

It is for the Member States to define the penalties for infringements of Community regulations. Such penalties must, according to the case-law of the Court, be effective, proportionate and dissuasive and must be analogous to those applicable to infringements of national law of a similar nature.

The question whether the Royal Decree of 27 March 1970 may still have effect when the Council Regulation which it implements has been repealed is, in the opinion of the United Kingdom, exclusively a matter of Belgian law. The United Kingdom accordingly suggests that the answer to be given to the question raised by the Hof van Cassatie should be in the negative.

The *Commission* takes the view that there are two possible approaches to the question raised. The first is based on the fact that a regulation, by reason of its direct applicability, forms an integral part of the domestic legal system of the Member States. From that point of view a reference provision such as Article 18(2) of Regulation No 3820/85 concerns both references contained in provisions of national law and references contained in provisions of Community law.

Under the second approach reference provisions are regarded as an application of the principles for the interpretation of Community measures. The purpose is to make it clear that references contained in other Community measures to the measure repealed must be interpreted as references to the new legislation.

In the Commission's view the second approach is the appropriate one in this case and a negative answer should therefore be given to the question raised. The Commission states that the power to impose

penalties is exclusively a matter for the Member States. The regulation imposes the requirement to provide for penalties but the nature of the penalties is a matter falling within the powers of the national authorities. That distinction emerges clearly from the fact that the Council and the representatives of the governments of the Member States, meeting within the Council, adopted, at the same time as Regulation No 3820/85, a resolution to improve the implementation of the social regulations in road transport (Official Journal 1985 C 348, p. 1). It would not be in keeping with the national character of powers in this matter if a general reference provision in a Council regulation were to apply to national legislation.

The Commission nevertheless draws attention to the requirement under Article 5 of the EEC Treaty for Member States to ensure that penalties for infringements of provisions of Community law are effective. A national court must therefore use any power of interpretation available to it under national law in such a way as to discourage by effective penalties any infringements of the rules of Community law.

Gordon Slynn
Judge-Rapporteur