OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 19 February 1991 *

Mr President,
Members of the Court,

1. Like Case C-326/88,[1] this case basically concerns the rights and obligations of the Member States as regards penalties relating to the provisions of Community law in the field of road transport.

Whereas Case C-326/88 concerned the interpretation of Regulation (EEC) No 543/69,[2] this case concerns the regulation which replaced it, namely Council Regulation (EEC) No 3820/85,[3] (hereinafter referred to as 'the regulation'). However, as regards the questions of interpretation now referred to the Court, the latter regulation contains no important alterations, which means that the Court's judgment in Case C-326/88, already cited, will to a large extent determine the answers to be given to those questions.

The facts

2. Article 17(1) of the regulation requires the Member States to adopt the provisions necessary for the implementation of the regulation; such measures must cover *inter alia* the penalties to be imposed in case of breach. As appears from the order for reference, these penalties are laid down in Belgium in the Law of 18 February 1969[4] and, by Royal Decree of 13 May 1987,[5] were declared applicable to the breaches referred to in the regulation.

3. On 26 October 1988, Mr Vandevenne was subjected to a roadside check in the Netherlands whilst driving a lorry belonging to NV Wilms Transport. During the check it was ascertained that he had not observed the rest periods required by Articles 6 and 8 of the regulation. The order for reference states that Vandevenne 'did not seriously deny these matters'.

These facts led the Belgian Openbaar Ministerie (Public Prosecutor's Office) to bring a prosecution against Vandevenne on which the court of reference, namely the Politierechtbank te Hasselt (Local Criminal Court, Hasselt), is asked to give judgment. Mr Wilms, the managing director, and Mr Mesotten an employee, of Wilms Transport, were also prosecuted on a charge of failing to take the necessary steps to

* Original language: Dutch.

1 — [1990] ECR I-2911.

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).

3 — Council Regulation (EEC) No 3820/85 of 20 December 1985 on the harmonization of certain social legislation relating to road transport (OJ 1985 L 370, p. 1).

4 — Law on provisions for the implementation of international conventions and decisions in connection with transport by road, rail and inland waterway (*Moniteur belge* of 4 April 1969).

5 — *Moniteur belge* of 4 June 1987.

ensure that Vandevenne observed the rest periods required by Articles 6 to 8 of the regulation. Wilms Transport was summoned as being the party responsible at civil law for any fines imposed on Wilms and Mesotten.

4. Apparently, the Openbaar Ministerie is charging Wilms and Mesotten with a breach of Article 15 of the regulation, which reads as follows:

'1. The transport undertaking shall organize drivers' work in such a way that drivers are able to comply with the relevant provisions of this Regulation and of Regulation (EEC) No 3821/85.

2. The undertaking shall make periodic checks to ensure that the provisions of these two Regulations have been complied with. If breaches are found to have occurred, the undertaking shall take appropriate steps to prevent their repetition.'

During the proceedings before the Politierechtbank a discussion took place as to the nature of the offences alleged against Wilms and Mesotten. In that connection, the court of reference thought it appropriate to refer three questions to the Court for a preliminary ruling.

The concept of 'undertaking'

5. In the first place, the court of reference enquires as to the exact meaning of the expression 'undertaking' appearing in Article 15 of the regulation, set out above.

As regards the definition of the concept of 'undertaking' in general, the Commission and the German Government refer to the definition given by the Court in the *Klöckner-Werke and Hoesch* [6] and *Mannesmann* [7] judgments, namely 'a single organization of personal, tangible and intangible elements attached to an autonomous legal entity and pursuing a given long-term economic aim'. In a recent notice on the application of the regulation on the control of concentrations between undertakings [8] the Commission defined an undertaking in very similar terms, namely: 'An organized assembly of human and material resources, intended to pursue a defined economic purpose on a long-term basis'. [9]

In defining the concept of 'undertaking' in accordance with the Court's case-law, the Commission and the German Government are working on the assumption that this concept is a matter of Community law, so that its content cannot depend on definitions existing in the various Member States. I agree. I can also accept the definition proposed. Although it is true that it was elaborated within the framework first of the ECSC system of equalization of ferrous scrap and secondly of the

6 — Joined Cases 17 'and 20/61 *Klöckner-Werke AG and Hoesch AG* v *High Authority of the ECSC* [1962] ECR 325.

7 — Case 19/61 *Mannesmann AG* v *High Authority of the ECSC* [1962] ECR 357.

8 — Notice regarding the concentrative and cooperative operations under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1990 C 203, p. 10).

9 — See point 8 of the notice.

application of the rules of competition to joint undertakings, I nevertheless think that there is no objection to using this (general) definition in the framework also of the regulation in question. It follows directly that the legal form of an undertaking (one-man business, company or institution) is irrelevant.

6. However, this definition, formulated in general terms, should be focused on the specific role of the concept of undertaking in the context of the regulation at issue and more particularly of Article 15. That provision aims at ensuring that the employer of a driver will enable and encourage him to comply with the rules of the regulation. That was accepted by the Court in the 1975 judgment in *Cagnon and Taquet*,[10] in which the Court stated that Regulation No 543/69, which preceded Regulation No 3820/85, requires 'the employer running a road transport undertaking' to take the necessary measures to permit the crew members to have the daily rest period laid down.[11] Article 15 of the regulation (which, as the Commission observes, 'codifies' the *Cagnon and Taquet* judgment) does not refer to 'the employer running a road transport undertaking', but uses the broader concept of 'undertaking'. This is more than just a difference in vocabulary. In my view, the concept of 'undertaking' in Article 15 means any person (natural or legal) acting as employer of the driver, whether or not he is his employer within the meaning of labour law. The *Dufour* judgment of 1977[12] takes the same line. There the Court decided that the 'undertaking' on which Regulation No 543/69 imposes a number of duties[13] is the transport undertaking and not the (temporary employment) undertaking which puts crew members at the disposal of the former, (although the latter undertaking may, according to the applicable national law, be regarded as the 'employer' of the crew members). In fact, the Court took the view that it is the transport undertaking which determines the vehicle to be driven, the route to be followed and the destination, as well as the driving and rest periods,[14] and I conclude that it therefore has the authority and consequently the responsibility to ensure that the requirements laid down by Regulation No 543/69 are met.[15]

I therefore conclude that the addressee of the duties set out in Article 15 is the undertaking performing the transport operation since it has the power to organize and control the crew members' work. The nature of the legal relationship between that undertaking and the crew members plays no part in that respect: it is irrelevant whether the transport undertaking employs crew members who are its own employees or crew members made available to it by a temporary employment undertaking or again independent crew members using equipment belonging to the transport undertaking (or even their own equipment) according to the instructions of the transport undertaking.

10 — Case 69/74 *Auditeur du Travail* v *Jean-Pierre Cagnon and Jean-Paul Taquet* [1975] ECR 171.

11 — See paragraph 10 of the judgment.

12 — Case 76/77 *Auditeur du Travail* v *Bernard Dufour* [1977] ECR 2485.

13 — In the *Dufour* judgment it was a question of the obligation imposed by Article 14 of Regulation No 543/69 to issue to crew members an 'individual control book' (the forerunner of the present tachograph).

14 — See the *Dufour* judgment, paragraph 15.

15 — As the Court stated in the *Dufour* judgment, that does not prevent the specific requirement at issue in that judgment, to issue 'personal control books', from being by way of exception a matter for the temporary employment undertaking if national legislation expressly provides to that effect (see paragraph 16 of the judgment).

Strict criminal liability of legal persons

7. Although, as I have said, Article 15 imposes a number of obligations on the 'undertaking', and the Openbaar Ministerie takes the view that in this case it is a question of failure to fulfil these duties, the prosecution was not against the undertaking, Wilms Transport, but against Wilms and Mesotten, managing director and employee respectively of the undertaking. That is in accordance with the principle *corpora delinquere non possunt*, which applies in Belgium. According to that principle, a legal person cannot itself be subjected to criminal penalties; punishable acts which may be charged to a legal person can be prosecuted only through the natural persons who, as regards these acts, bear the actual responsibility for the activity of the undertaking. In this connection, the court of reference asks whether the regulation has the effect of introducing into Member States' national law the principle of criminal liability of legal persons, in other words whether it requires Member States always to impose on the 'undertaking', even where it is a legal person, the penalties adopted in implementation of Article 17 of the regulation.

8. I agree with the Italian and United Kingdom Governments that the answer to that question was largely provided in the judgment in Case C-326/88,[16] already cited. In that judgment the Court confirmed that, as regards penalties for infringements of the regulation, the Member States have a discretion which, it is true, is subject to two conditions under Article 5 of the EEC Treaty: first they must ensure that the penalties are effective, proportionate and dissuasive;[17] secondly the Member States must penalize infringements of provisions of Community law in the same manner as infringements of national law of a similar nature and importance.[18] Community law leaves the Member States free to choose the means for achieving these aims. They may choose between criminal, administrative or purely civil penalties. They may decide to impose these penalties always on the 'undertaking', or in certain cases on the representatives or members of staff of the undertaking who, with regard to the specific infringement, bear the actual responsibility for the operations of the undertaking concerned. As long as national rules on penalties comply with the conditions mentioned, neither Article 17 of the regulation nor Article 5 of the EEC Treaty thus in any way requires the Member States to make the legal persons to whom an infringement of the obligations laid down by Article 15 of the regulation may be ascribed themselves criminally liable.

Scope of the obligations imposed by Article 15

9. Finally, the court of reference also asks whether the obligations imposed by Article 15 create a duty to use best endeavours or a duty as to the result to be achieved. The expression 'duty as to the result to be achieved' is used to mean that an undertaking could be penalized *for the sole reason*

16 — See note 1.

17 — See paragraph 17 of the judgment, with its reference to the judgment in Case 68/88 *Commission* v *Greece* [1989] ECR 2965.

18 — See paragraphs 17 and 18 of the judgment.

that a driver infringes one of the provisions of the regulation, in other words without any need to prove any intention or negligence on the part of the undertaking. In the Member States which have opted for a criminal penalty for breach of the obligations laid down in Article 15, such an interpretation of the article would lead to a system of strict criminal liability of an undertaking.

The observations submitted to the Court are in agreement on this point: Article 15 does not extend to imposing such a far-reaching duty on an undertaking. I agree. Article 15(1) requires the undertaking to organize its drivers' work in such a way that they are *able* to comply with the provisions of the regulation and of Regulation No 3821/85. Under paragraph (2) the undertaking is to make periodic *checks* to ensure that the provisions of the two regulations have been complied with; if breaches are found to have occurred, the undertaking is to *take appropriate steps* to prevent their repetition. The wording of these provisions indicates that this is a duty to take all steps to avoid drivers committing infringements (in other words, it is a 'duty to use best endeavours') and not a duty which the undertaking is deemed to have neglected as soon as a driver is found to have infringed a provision of the regulation.

10. In this connection, however, it is appropriate to bear in mind the distinction between, on the one hand, the obligation imposed at Community level and, on the other hand, the power of the Member States to impose a penalty to ensure that the obligation is discharged. That distinction is important in view of the fact that the Member States' powers as to the choice of evidence and penalties may have a not unimportant influence on the way in which observance of the obligations imposed by the regulation may in practice be ensured.

Thus it was stated in the judgment in Case C-326/88 [19] that a system of 'strict criminal liability' applicable in Denmark (under which a penalty may be imposed on the employer of a driver who infringes the provisions with regard to driving and rest periods) does not *in itself* extend the field of application of (the predecessor of) Regulation No 3820/85 and that such a system of criminal liability is not incompatible with Article 15 of the regulation [20] or with the general principles of Community law. [21] It goes without saying that such a 'quasi-automatic' criminal liability of the employer is an effective encouragement to him to ensure at all times that his employees observe the provisions of the regulation and to pursue an active policy of preventing infringements. In a number of other Member States, on the other hand, a criminal, administrative or even civil penalty may be imposed only on condition that there is some indication at least of negligence or that the infringement may be attributed to the person to be penalized, or both. The choice between the various methods of imposing penalties is a matter for the Member States, since they have the power to adopt penalties for breach of the regulation. It is, of course, not impossible that such disparities between the national methods of imposing penalties for breach of the obligations imposed by Article 15 may in practice mean that they are more strictly observed and enforced in some countries than in others. But that is an unavoidable consequence of the lack of harmonization at Community level of the penalties to be imposed in the event of infringement of the regulation.

19 — Previously referred to in footnote 1.

20 — See paragraphs 9 to 12 of the judgment.

21 — See paragraphs 13 to 19 of the judgment.

Conclusion

11. Having regard to the foregoing considerations, I suggest that the questions referred to the court by the Politierechtbank te Hasselt for a preliminary ruling should be answered as follows:

'1. The expression "undertaking" appearing in Article 15 of Regulation (EEC) No 3820/85 of 20 December 1985 refers to an autonomous natural or legal person, irrespective of legal form, regularly carrying on a transport business of the kind referred to in the regulation, using human and material resources and having the power to organize and control the work of drivers and crew members, whatever the nature of the legal relationship between the undertaking and the drivers or crew members.

2. Neither Article 17 of Regulation No 3820/85 nor Article 5 of the EEC Treaty requires a legal person which is required to comply with the obligations set out in Article 15 of Regulation No 3820/85 to be made itself criminally liable for the failure to discharge such obligations.

3. Regulation (EEC) No 3820/85 neither requires Member States to introduce a system of strict liability for the purpose of ensuring compliance with the obligations imposed on the undertaking by Article 15 of the regulation nor precludes their doing so.'