OPINION OF ADVOCATE GENERAL JACOBS

delivered on 28 January 1993 *

My Lords,

1. In this case the Netherlands College van Beroep voor het bedrijfsleven (Administrative Court of Last Instance in matters of trade and industry) requests a preliminary ruling on the interpretation and effect of Council Directive 74/561/EEC of 12 November 1974 on admission to the occupation of road haulage operator in national and international transport operations (OJ 1974 L 308, p. 18; hereafter 'the directive'). The directive was amended by Council Directive 80/1178/EEC of 4 December 1980 (OJ 1980 L 350, p. 41) and by Council Directive 85/578/EEC of 20 December 1985 (OJ 1985 L 372, p. 34) in order to take into account the accessions, respectively, of Greece and of Spain and Portugal, and was further amended by Council Directive 89/438/EEC of 21 June 1989 (OJ 1989 L 212, p. 101). Most recently, the directive was amended by Council Regulation (EEC) No 3572/90 of 4 December 1990 amending, as a result of German unification, certain Directives, Decisions and Regulations relating to transport by road, rail and inland waterway (OJ 1990 L 353, p. 12). Those amendments are however not directly relevant to the circumstances of the present case.

2. The College van Beroep has referred the following question:

'Must Article 5(1) of Directive 74/561/EEC, in conjunction with Article 5(2) thereof, be interpreted as meaning that the natural person continuously and effectively managing the transport operations of an undertaking which, if the directive had been correctly implemented, would have fallen within the terms of the transitional provision is entitled, on the continuation of the undertaking as a one-man business after termination of the partnership which carried on the undertaking, to the application of the provisions of that article, even if effect has not been given thereto by the national legislature?'

The Community provisions

3. The directive provides for the introduction of common rules for admission to the occupation of road haulage operator 'in order to ensure that road haulage operators are better qualified' (see the third recital to the directive). The directive also provides for transitional measures to be introduced 'to enable Member States to adapt their national rules to those of the Community' (see the sixth recital).

4. By Article 3(1) of the directive, first subparagraph, natural persons or undertakings wishing to engage in the occupation of road haulage operator must (a) be of good repute, (b) be of appropriate financial standing, and (c) satisfy the condition as to professional

* Original language: English.

competence specified in Article 3(4). The second and third subparagraphs of Article 3(1) provide as follows:

'Where the applicant is a natural person and does not satisfy provision (c), the competent authorities may nevertheless permit him to engage in the occupation of road haulage operator provided that he designates to the said authorities another person, satisfying provisions (a) and (c) above, who shall continuously and effectively manage the transport operations of the undertaking.

Where the applicant is an undertaking, provisions (a) and (c) above must be satisfied by one of the natural persons who will continuously and effectively manage the transport operations of the undertaking. ...'

5. By Article 7, Member States were required to implement the directive before 1 January 1977 and to ensure that a procedure for the verification of the skills specified in Article 3(4) became operative before 1 January 1978; in what follows I shall refer to that procedure as the 'assessment procedure'. Thus a Member State is required to ensure that a natural person or an undertaking which is not yet authorized to engage in the occupation of road haulage operator is able to apply for a certificate attesting to the possession of the appropriate skills, and the procedure for the assessment of those skills was required to be in place by 1 January 1978.

6. Article 5 of the directive makes transitional provision for those already authorized as road haulage operators under national law before 1 January 1978. By Article 5(1):

'Natural persons and undertakings furnishing proof that, before 1 January 1978, they were authorized under national regulations in a Member State to engage in the occupation of road haulage operator in national and/or international road transport operations shall be exempt from the requirement to furnish proof that they satisfy the provisions laid down in Article 3.'

Accordingly such operators are exempt, in particular, from the requirement to satisfy the condition as to professional competence specified by Article 3(4). By Article 5(2), however:

'... those natural persons who, after 31 December 1974 and before 1 January 1978, were:

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

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

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

The same requirement shall apply in the case referred to in the third subparagraph of Article 3(1) [i. e. in the case where the applicant is an undertaking] .'

7. The purpose of those transitional provisions is in my view clear. If an operator is already authorized under national law before the assessment procedure introduced by the directive is in place, the operator is not to lose that authorization as a result of the new requirements of the directive: see Article 5(1). Thus, rights previously acquired under national law are preserved by the directive. It is to be noted that in the case of the directives, cited above in paragraph 1, which amend Article 5 in order to take into account the accessions of Greece, Spain and Portugal, the recitals to the directives refer expressly to the need to safeguard 'acquired' or 'existing' rights. Similarly the regulation, also cited above in paragraph 1, which amends Article 5 as a result of German unification refers in its seventh recital to 'established rights'.

8. However, where authorization under national law is acquired subsequent to the adoption of the directive, albeit before the date by which the assessment procedure is to become operative, the rights acquired may not be preserved indefinitely. In that case the persons concerned are granted a further two years in which to satisfy the condition of professional competence: see Article 5(2). But that requirement does not apply where the person concerned has already furnished proof of professional competence under national law and was not the designated manager of the undertaking.

9. It appears that, in the present case, the applicable transitional provisions are those of Article 5(1) rather than Article 5(2), since no authorization under national law is relied upon which was granted prior to 1 January 1978 but subsequent to 31 December 1974.

Consideration of the question referred

10. It appears from the Order for Reference that Mr van Doesselaar, the applicant in the main proceedings, had at the time of his application pursued the occupation of road haulage operator for some 27 years. In 1960 the applicant entered into a partnership for that purpose with Mr van Esbroek. Mr van Esbroek held the certificate of professional competence required under Netherlands law; the applicant however held no such certificate. None the less, it appears that from 1962 onwards the applicant acted as the effective manager of the partnership, and from 1977 had sole executive responsibility for the business of the partnership. Following Mr van Esbroek's death on 23 April 1987 the partnership came to an end. The applicant wished however to continue the business as a sole trader, and applied to the defendant Minister for an exemption from the requirement to hold a certificate of professional competence. That request was refused by a decision of 24 December 1987, and the applicant appealed to the College van Beroep.

11. It is not entirely clear whether the applicant was at any time permitted by national law to have sole managerial responsibility for a road haulage undertaking. In its written

observations the Netherlands Government suggests that he enjoyed no such rights. It appears that, at the relevant time, Netherlands law permitted a person without a certificate of professional competence to participate in the management of a road haulage undertaking, but only if he did so jointly with a holder of such a certificate. The Netherlands Government suggests that the applicant did not satisfy that condition, since although Mr van Esbroek was a partner in the business and held the appropriate certificate, the actual management had for some time been carried on solely by the applicant.

12. It is of course for the national court to decide whether, prior to the date upon which the directive was to come into effect, Netherlands law permitted the applicant's undertaking to be under the sole management of the applicant. If that was precluded by the applicable national provisions, so that neither the undertaking nor the applicant himself was lawfully engaging in the occupation of road haulage operator, it is clear that no rights subsisted at the time of adoption of the directive which could be preserved by Article 5(1) and relied upon by the applicant. The applicant would have enjoyed no such right, given that he was solely responsible for the management of the undertaking without holding the appropriate certificate of competence; and similarly the undertaking could not rely upon any such right, given that it was under the sole management of the applicant. For the purposes of the following discussion, therefore, I shall proceed upon the assumption that, both before 1 January 1978 and before 1 January 1975, either the applicant or the undertaking enjoyed a right under national law to carry on the existing business of the undertaking, and that there were accordingly rights under national law which could be preserved by Article 5(1). If any such rights did exist, it appears that they were dependent on the fact that Mr van Esbroek held the appropriate certificate of professional competence and was a partner in the undertaking managed by the applicant.

13. As the Commission points out, even if Article 5(1) has not been correctly implemented in national law, a person or undertaking satisfying the conditions laid down in Article 5(1) will be able to rely upon the direct effect of that provision in order to prevent the withdrawal of rights preserved by the provision. The Commission suggests that a natural person who has continuously and effectively managed a road haulage undertaking, and who satisfies the conditions laid down in Article 5(1), may still rely upon that provision even if there is a subsequent change in the legal form of the undertaking. According to the Commission it would not be appropriate, in view of the purpose of Article 5(1), to deny the application of that provision merely because of a change in the legal form of the undertaking concerned. It appears therefore that the Commission takes the view that if a partnership has been able to rely upon Article 5(1) to preserve rights previously acquired under national law, the position should not be affected by the subsequent termination of the partnership, as long as the same business activity continues to be carried on by the person who was previously managing the business of the partnership.

14. It is true that a mere change in the legal form of an undertaking should not in itself affect the application of Article 5(1) of the directive. Thus, where an undertaking previously enjoyed rights under national law which did not depend upon it maintaining a particular legal form (or, where the undertaking is a partnership, upon it retaining a particular composition of partners), the preservation of those rights under Article 5(1) should not depend upon such a condition. Similarly, if the right to manage a road haulage undertaking previously enjoyed by a natural person was not conditional upon the undertaking maintaining a particular legal form, or upon the manager remaining in partnership with the holder of a particular qualification, then the preservation of that right under Article 5(1) will be independent of any such condition.

15. The extent of the rights preserved by Article 5(1) can however only be determined in the light of the national law applicable before 1 January 1978. In my view, therefore, the Commission goes too far if it means to assert that a change in the legal form of an undertaking, or a change in the composition of a partnership, can never affect an authorization which has previously been acquired under national law. For it is clear that that provision is intended to preserve rights which have previously been acquired, and not to enlarge such rights. As we have seen, the directive has the aim of ensuring that those authorized as road haulage operators are 'better qualified'. Although the directive also makes provision for transitional measures enabling Member States to adapt their existing rules to the scheme laid down by the directive, those measures cannot have the effect of permitting a person or undertaking to obtain authorization in circumstances where authorization would not have been enjoyed under national law.

16. It will be recalled that the applicant was never authorized in his own right to engage in the occupation of road haulage operator. Any right he enjoyed was, it appears, conditional upon his remaining in partnership with a person who held an appropriate certificate of competence. The applicant requires an exemption from the requirement to hold a certificate of competence because that condition ceased to be fulfilled. In those circumstances, I do not see how he can rely upon Article 5(1) of the directive to obtain such an exemption: if he could do so, Article 5(1) would have enabled him to acquire rights which he would never have enjoyed under national law.

17. That is not to say, however, that the applicant has no way of obtaining authorization under the scheme laid down by the directive. Article 3(4) of the directive permits a Member State to issue a certificate of professional competence on the basis, in particular, of knowledge acquired 'by practical experience in a transport undertaking'. Similarly, although the new version of Article 3(4) introduced by Article 1(6) of Directive 89/438/EEC (cited above in paragraph 1)

provides that the condition relating to professional competence 'shall consist in the possession of skills demonstrated by passing a written examination', it also provides that:

'Member States may exempt from examination applicant transport operators who provide proof of at least five years' practical experience in a transport undertaking at management level.'

Although the award of a certificate of professional competence is a matter for the appropriate authority of the Member State concerned, it is difficult to see how nearly 27 years of practical experience in managing a transport undertaking could not have led to the acquisition of the necessary skills. The award of a certificate of professional competence under Article 3(4) is however an entirely distinct matter from the preservation of existing rights under Article 5(1).

18. Finally, it is to be noted that Article 4 of the directive permits Member States to grant an undertaking a temporary exemption from the requirements of Article 3(1) (and in exceptional circumstances to grant a definitive exemption) '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)'. From the written observations of the Netherlands Government, it appears that Mr van Doesselaar's original application for exemption was made pursuant to that provision rather than to Article 5. It is clear however that Article 4 is not intended to cover the case of the death or incapacity of a partner in an undertaking who has had no recent managerial responsibility for the business of the undertaking.

Conclusion

19. I am accordingly of the opinion that the question referred by the College van Beroep should be answered as follows:

Article 5(1) of Council Directive 74/561/EEC must be interpreted as meaning that a natural person or an undertaking authorized under national law before 1 January 1978 to engage in the occupation of road haulage operator is exempt from the requirements of Article 3 of the directive only if all the conditions to which that authorization was subject continue to be fulfilled.