JUDGMENT OF THE COURT
OF 6 DECEMBER 1979 [1]

Städtereinigung K. Nehlsen KG v Freie Hansestadt Bremen (preliminary ruling requested by the Oberverwaltungsgericht Bremen)

"Road safety"

Case 47/79

Transport — Common policy — Social provisions — Regulation No 543/69 of the Council — Material scope — Vehicles of public authorities — Exclusion — Vehicles of a private undertaking used to perform a public service — Inclusion

(Regulation No 543/69 of the Council, Art. 4 (4), as amended by Regulation No 2827/77)

Pursuant to Article 4 (4) of Regulation No 543/69 of the Council on the harmonization of certain social legislation relating to road transport, as amended by Regulation No 2827/77, that regulation does not apply to carriage by "... vehicles which are used by other public authorities for public services." That expression must be understood as covering only vehicles which are owned by or under the control of the public authority and does not extend to vehicles belonging to a private undertaking and used by the latter to perform a public service or a service in the public interest which it has undertaken to provide under a contract governed by private law.

In Case 47/79

REFERENCE to the Court under Article 177 of the EEC Treaty by the Oberverwaltungsgericht [Higher Administrative Court] Bremen, for a preliminary ruling in the proceedings pending before that court between

STÄDTEREINIGUNG K. NEHLSEN KG, Bremen,

1 — Language of the Case: German.

and

FREIE HANSESTADT BREMEN [Free Hanseatic City of Bremen]

on the interpretation of Article 4 (4) of 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) as amended by Council Regulation (EEC) No 2827/77 of 12 December 1977 (Official Journal, L 334, 1977, p. 1),

THE COURT,

composed of: A. O'Keeffe, President of the First Chamber, Acting as President, A. Touffait (President of the Second Chamber), J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, G. Bosco and T. Koopmans, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

I — Facts and procedure

1. Städtereinigung K. Nehlsen KG, Bremen, (hereinafter referred to as "Nehlsen") is a private undertaking which concluded with the competent public authorities for the City of Bremen and the surrounding district a contract for the removal of refuse in that area as a public service. It was provided that the long-term contract could be extended indefinitely subject to written notice within a specified period.

The competent departments of the Industrial Inspectorate found that

Nehlsen was failing to comply in its operations with the provisions of Regulation (EEC) No 543/69 of the Council of 25 March 1969 (Official Journal, English Special Edition 1969 (I), p. 170) concerning *length of working periods.* They threatened Nehlsen with penalties for any infringement of the provisions of Regulation No 543/69.

Nehlsen was unsuccessful in challenging that decision and lodged an application with the Verwaltungsgericht [Administrative Court] Bremen against the City of Bremen. That court dismissed its application in a judgment of 12 July 1978. Nehlsen then appealed against that judgment to the Oberverwaltungsgericht Bremen.

In its appeal Nehlsen maintains that since the service which it performs is covered by public law, the vehicles which it employs to perform that service must be considered as "vehicles which are used by other public authorities for public services" within the meaning of Article 4 (4) of Regulation No 543/69 as amended by Article 1 (1) of Council Regulation (EEC) No 2827/77 of 12 December 1977 (Official Journal L 334, 1977, p. 1). It thus concludes that under that article the provisions of Regulation No 543/69, including those on length of working periods, do not apply to it.

Article 4 (4) of Regulation No 543/69 of the Council, as amended by Regulation No 2827/77 provides that:

"This regulation shall not apply to carriage by:

...

(4) Vehicles used by the police, gendarmerie, armed forces, fire-brigades, civil defence, drainage or flood-prevention authorities, water, gas or electricity services, highway authorities and refuse collection, telegraph or telephone service, by the postal authorities for the carriage of mail, by radio or television services or for the detection of radio or television transmitters or receivers, or vehicles which are used by other public authorities for public services and which are not in competition with professional road hauliers."

2. The Oberverwaltungsgericht Bremen observed that Article 4 (4) is based, with regard to the last part of the sentence, on two points:

— The vehicles in question must be those used by public services.

— There must be no competition between the persons using these vehicles and "professional" road hauliers.

The Oberverwaltungsgericht considers that, whilst the derogative provisions contained in the last phrase of Article 4 (4) of Regulation No 543/69 undoubtedly do not exclude vehicles used directly by agencies required to collect and take away refuse, on the other hand doubt arises where the agencies, under a contract concluded with a private undertaking, use the latter's vehicles to remove the refuse instead of employing their own vehicles.

Even if in the latter case the vehicles in question were to be considered as "vehicles which are used by other public authorities for public services" within the meaning of the said Article 4 (4) it would still be necessary, according to the Oberverwaltungsgericht, to inquire on what conditions it must be considered that the said vehicles are not to be in competition with professional road hauliers. More particularly, it is relevant

to establish whether such competition must be considered to exist where the public authority remains free to terminate the contract with the undertaking in question if another private undertaking offers the use of its vehicles on more favourable terms.

In view of these doubts the Oberverwaltungsgericht decided, by an order of 21 March 1979, to stay the proceedings and in pursuance of Article 177 of the EEC Treaty to refer the following questions to the Court of Justice:

"(a) (aa) Do the words 'vehicles which are used by other public authorities for public services' for the purposes of the provisions referred to in 2 above cover only vehicles which are owned by or in the control of the public authority; or

(bb) do they also cover the vehicles of private persons or undertakings which are used by them for public services on behalf of public authorities under an agreement governed by private law ('Werkvertrag' [contract for services])?

(b) If the answer to Question (a) (bb) is in the affirmative:

Are the vehicles of a private undertaking to which a public authority has transferred exclusively the operations for public services within the meaning of the provisions listed in 2 above to be considered as 'in competition with "professional" road hauliers' on the ground that the public authority can terminate the agreement concluded with the appointed private undertaking if another undertaking offers the use of its vehicles on more favourable terms?"

3. The order of the Oberverwaltungsgericht was received at the Court Registry on 26 March 1979.

In pursuance of Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged by the Freie Hansestadt Bremen, represented by its Agent, Mr Rumler, by the Government of the Federal Republic of Germany, represented by its Agent, Mr Seidel, by the Council of the European Communities, represented by its Legal Adviser, Mr Sacchettini, acting as Agent, and by the Commission of the European Communities, represented by its Legal Advisers Mr Bebr and Mr Lasnet, acting as Agents.

The Court, after hearing the report of the Judge-Rapporteur and the views of the Advocate General, decided to open the oral procedure without any preliminary inquiry.

II — Written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

The *Council of the European Communities* first notes that the order making the reference refers on two occasions to the validity of Regulation (EEC) No 543/69, and, in a brief statement, reserves the right to submit observations intended to uphold the validity of the measure should it be questioned during the course of the proceedings.

However, the question of the validity of Regulation (EEC) No 543/69 has not been raised in any of the statements lodged with the Court.

The *Government of the Federal Republic of Germany,* whose views are shared without reservation by the *Freie Hansestadt Bremen,* considers that the reply to the *first question* should be that the words "vehicles which are used by other public authorities for public services" can refer only to vehicles which are owned by or under the control of the public authorities.

In its view Article 4 (4) of Regulation (EEC) No 543/69 as supplemented by Regulation (EEC) No 2827/77 in fact constitutes a derogative provision and must accordingly be interpreted narrowly. Regulation (EEC) No 543/69 is intended to implement the social provisions of Decision No 65/271/EEC of the Council of 13 May 1965 "on the harmonization of certain provisions affecting competition in transport by rail, road and inland waterway". Its objective is accordingly to eliminate, both between the various forms of transport and within each of those forms, differences which might distort conditions of competition to a significant extent and not, at any rate initially, to enact general measures of social policy as such. In the light of that objective the derogative provisions embodied in the said Article 4 are justified by reason of the fact that the fields to which they relate do not include competition. The exception is, nevertheless, to be interpreted as narrowly as possible since only the "public authority" as such is not in competition with the private sector.

Even if Regulation No 543/69 is viewed from the standpoint of social policy it none the less remains true that the exception laid down by Article 4 (4) cannot apply to vehicles belonging to private undertakings. It is in fact acceptable that the regulation should not apply to vehicles owned by a public authority since such authority is regarded as able itself to guarantee that social provisions will be observed in the use of its vehicles. On the other hand there is no such guarantee where public duties are performed by private undertakings on the basis of a contract since the means whereby such work is carried out by those undertakings does not come within the responsibility of the public authority but remains under the control of the private undertaking.

The entrusting of certain public tasks to private undertakings which do not form part of the public sector thus falls entirely under the rules on competition and there is thus no exemption from Community measures intended to create uniform conditions of competition within the framework of the common transport policy.

Finally, it must in addition be emphasized that a private undertaking carrying out work on the basis of a contract governed by private law in order to attain public objectives is certainly not a "public service licensee" exercising the powers of a public authority. It is thus possible to disregard the question whether the operations of a "public service licensee" may fall within the exception provided for by Article 4 (4) of Regulation No 543/69.

With regard to the *second question* the Government of the Federal Republic of Germany observes first of all that it is only submitted in case, contrary to its view, the reply to the first question is given in terms of the second paragraph thereof. It nevertheless wishes, in order to make provision for all eventualities, to give its view on the second question to which it suggests an affirmative reply should be given.

In order to establish whether persons providing public services compete with "professional road hauliers" the point at issue is whether the competition in question is *for* the provision of a public service and not competition *during* the provision of that service. It is in fact clear that during the duration of the contract concluded with the public administration there is no competition since the performance of public duties is in principle entrusted to one private undertaking alone for a particular field. On the other hand such competition revives when the contract is to be concluded since at that point the public authority has the opportunity of choosing the most advantageous of the various offers submitted by the private undertakings. Competition would be distorted if a particular tenderer were enabled at that point to enjoy a competitive advantage simply because he provided less favourable working conditions for his employees. It is thus indispensable in order to maintain equal conditions of competition on the common market in transport to have regard only to competition *for* "use" by the public authority. Any other interpretation — in particular with regard to the wide interpretation of the word "use" which is assumed for this argument — would jeopardize the common policy in a considerable part of the transport sector.

The *Commission of the European Communities* first of all sets out certain general considerations concerning the objectives and characteristics of Regulation (EEC) No 543/69. It remarks that the aims pursued by that regulation are: (I) the social protection of drivers; (II) an improvement in road safety; (III) the elimination of disparities which are capable of bringing about considerable distortions in the conditions of competition in transport. The provisions of the regulation concerning driving periods in fact ensure the simultaneous attainment of these three objectives.

The above-mentioned regulation made provision for a number of exceptions, including those relating to vehicles used for performing a public service. Since an exhaustive list of exceptions proved too inflexible in view of the different ways in which the public services are organized in the Member States, Regulation (EEC) No 2827/77 supplemented that list by a general provision referring to "vehicles which are used by other public authorities for public services and which are not in competition with professional road hauliers". That general provision is not a supplementary exception but rather a clause including all vehicles other than those expressly indicated in the preceding list, which, by reason of their use, are excluded from the scope of Regulation No 543/69.

The exception provided for in the said Article 4 (4) is based on two criteria: (a) the use of the vehicles for a purpose in the general public interest and (b) the absence of any competition with professional road hauliers.

With regard to the first criterion an activity in the public interest (in this case the removal of refuse), certainly does not cease to be so by reason of the fact that it is not affected directly by the public authority. The vehicles used in connexion with that activity are thus "used by the public authority for public purposes" even though they belong to private undertakings with which the

administration has concluded a contract for the hire of services. This is borne out by the fact that a restrictive provision ("*service* vehicles") which appeared in the Commission's proposal was not included in the final wording of Regulation No 2827/77 adopted by the Council.

The absence of competition with professional road hauliers must then be considered. It is common ground that *during the validity of the contract* the undertaking carrying out an operation in the public interest is not in any way in competition with other professional road hauliers. The question, however, remains whether Article 4 (4) refers solely to the absence of actual competition or whether it requires in addition the absence of potential competition, that is to say of competition which revives each time the contract with the private undertaking is to be extended or terminated.

Which of those two factors must thus be considered as taking precedence: the possibility of potential competition or the temporary exclusion of actual competition?

According to the Commission a private undertaking cannot rely on the derogative provision in Article 4 (4) unless the contract, by excluding actual competition in a specified field, also prevents all potential competition from other professional road hauliers during the period of validity of the contract.

The Commission emphasizes finally that, as the file makes clear, the Industrial Inspectorate and the Verwaltungsgericht Bremen applied the original version of Article 4 (4) since the new version entered into force only on 1 January 1978. It thus follows that at the time in question, persuant to the narrower definition appearing in that article, vehicles used by a private undertaking for the removal of refuse were covered by Regulation No 543/69.

In conclusion the Commission suggests that the following reply be given to the question submitted by the Oberverwaltungsgericht Bremen:

"1. The last phrase of the derogative provision contained in Article 4 (4) of Regulation No 543/69 as amended by Regulation No 2827/77 excludes from the scope of the said regulation all vehicles used for public services in the general interest regardless of the means by which such services are administered, whether by the public authority itself or by a private undertaking under contract.

2. A private undertaking can rely on that derogation only if it is established that, pursuant to the powers conferred upon it, such undertaking, using vehicles employed for such public services within the area covered by the contract, excludes actual competition in such a way that all potential competition remains ineffective during the period of the validity of the contract".

III — Oral procedure

At the sitting on 26 September 1979 the Freie Hansestadt Bremen, represented by Fritz Rumler, acting as Agent, the Government of the Federal Republic of Germany, represented by Martin Seidel, acting as Agent, and the Commission of the European Communities, represented

by its Legal Advisers, Gerhard Bebr and Etienne Lasnet, acting as Agents, presented oral argument. The Council, represented by its Legal Adviser, Antonio Sacchettini, acting as Agent, was also present.

The Commission of the European Communities subsequently clarified its suggestions with regard to the second question to which it now suggests that the reply should be that a private undertaking cannot rely on the derogation in Article 4 (4) of Regulation No 543/69 as amended by Regulation No 2827/77 unless it is established that, under the contract empowering it to perform the public service, the continuity of the public service is ensured and the use of its vehicles in the public service excludes competition within the area covered.

The Advocate General delivered his opinion at the hearing on 6 November 1979.

Decision

1 By an order of 21 March 1979 which was received at the Court on 26 March 1979 the Oberverwaltungsgericht Bremen submitted to the Court pursuant to Article 177 of the EEC Treaty questions concerning the interpretation of 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) as amended by Council Regulation (EEC) No 2827/77 of 12 December 1977 (Official Journal L 334, 1977, p. 1).

2. Those questions were raised in the course of an action between an undertaking entrusted, pursuant to a contract governed by private law concluded with the competent authorities of the City of Bremen and the surrounding district, with the removal of refuse with its own vehicles in those territories and the officers of the Industrial Inspectorate of the City of Bremen who found in June 1976 that the undertaking was failing to comply with certain provisions of Regulation No 543/69, in particular those of Article 7 concerning driving periods and of Article 14 concerning the requirement that crew members of a vehicle must be in possession of an individual control book, and therefore required the undertaking, by a decision of 29 March 1977, to comply with those provisions, failing which penalties would be imposed. The undertaking concerned contested that decision claiming that since the service which it provided was covered by public law the vehicles

which it used to provide that service must be considered as vehicles used for carriage within the meaning of Article 4 (4) of Regulation No 543/69 and thereby outside the scope of the regulation.

3 The objection was dismissed and the undertaking instituted proceedings before the Verwaltungsgericht Bremen. In the course of these proceedings Council Regulation No 2827/77 of 12 December 1977 entered into force. Article 1 of the new regulation amended Article 4 (4) of Regulation No 543/69. The Verwaltungsgericht Bremen considered that, since the contested decision had continuing effect, its validity must be appraised with reference to the amended wording of Article 4 (4) of Regulation No 543/69. It further decided that that provision as amended did not exempt the applicant undertaking from the provisions of Regulation No 543/69. An appeal was lodged with the Oberverwaltungsgericht Bremen which considered that in order to settle the dispute it was necessary to obtain an interpretation of the second part of Article 4 (4) of Regulation No 543/69 as amended by Regulation No 2827/77 and submitted the following questions to the Court of Justice:

"(a) (aa) Do the words 'vehicles which are used by other public authorities for public services' for the purposes of the provisions referred to above cover only vehicles which are owned by or in the control of the public authority; or

(bb) do they also cover the vehicles of private persons or undertakings which are used by them for public services on behalf of public authorities under an agreement governed by private law ('Werkvertrag' [contract for services])?

(b) If the answer to Question (a) (bb) is in the affirmative:

Are the vehicles of a private undertaking to which a public authority has transferred exclusively the operations for public services within the meaning of the provisions listed above to be considered as 'in competition with "professional" road hauliers' on the ground that the public authority can terminate the agreement concluded with the appointed private undertaking if another undertaking offers the use of its vehicles on more favourable terms?"

4 Article 4 of Regulation No 543/69 of the Council as amended by Regulation No 2827/77 of the Council provides:

"This regulation shall not apply to carriage by:

...

(4) vehicles used by the police, gendarmerie, armed forces, fire-brigades, civil defence, drainage or flood-prevention authorities, water, gas or electricity services, highway authorities and refuse collection, telegraph or telephone services, by postal authorities for the carriage of mail, by radio or television services or for the detection of radio or television transmitters or receivers, or vehicles which are used by other public authorities for public services and which are not in competition services and which are not in competition with professional road hauliers.

..."

Since the provision in question creates an exception to the general arrangements established by Regulation No 543/69 of the Council relating to road transport its scope must be determined with regard to the objectives of that regulation and to the legal context in which it is situated.

5 As may be seen from the preamble, Regulation No 543/69 of the Council has as its essential objective the implementation of the provisions of Council Decision No 65/271/EEC of 13 May 1965 on the harmonization of certain provisions affecting competition in transport by rail, road and inland waterway (Official Journal, English Special Edition 1965-1966, p. 67) in particular Section III thereof concerning social provisions, which provides in —Article 10 that "... laws, regulations and administrative provisions relating specifically to working conditions in transport by rail, road and inland waterway shall ... be approximated ...". It was in fact with regard to the implementation of Articles 11 and 12 of that section that it was stated in the preamble to Regulation No 543/69 that priority should be given to necessary measures dealing with manning, driving-time and rest-periods and that provision was made for establishing a system — control book or suitable

mechanical recording equipment [Art. 14] — permitting compliance in individual cases with the provisions on time at work to be checked. In pursuit of these objectives, in the context of approximation of national legislation, the regulation in question falls within the framework of a common transport policy for the purposes of Article 74 of the Treaty and at the same time corresponds to the requirements of a Community social policy which, pursuant to Article 117 of the Treaty, is intended to "promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained".

6 Furthermore regard should be had to the fact that the provisions in question, as is shown by the said Council decision of 1965, have amongst their objectives the elimination of disparities liable to cause distortion in competition in the transport sector by abolishing trade practices based on the improper use of manpower.

7 The scope of Article 4 (4) of Regulation No 543/69 as amended by Regulation No 2827/77 must thus be established in the light of those objectives. The above-mentioned subparagraph (4), by exempting certain categories of transport from the scope of the general arrangements, covers only the service vehicles mentioned in the first part thereof, and refers with regard to "vehicles which are used by other public authorities for public services" exclusively to situations where no element of competition can exist. In fact in such cases it is possible to ensure compliance with the requirements of social protection and road-safety by national rules governing the public service in question regard being had to the specific requirements of such service.

8 The above-mentioned Article 4 (4) does not state clearly and explicitly that the exception which it creates from the scope of the general arrangements extends to carriage by vehicles belonging to private undertakings which have competed for a contract to provide a public service, such as the removal of refuse, on behalf of the public authorities. Although the wording of that provision leaves no doubt as to its application to vehicles owned by or under the control of the public authority it is however insufficiently clear and precise to be understood as referring also to vehicles belonging to a private

undertaking and used by the latter to perform a public service or a service in the public interest which it has undertaken to provide under a contract governed by private law.

9 For these reasons the reply to be given to the first question at (aa) should be that the words "vehicles which are used by other public authorities for public services" for the purposes of Article 4 (4) of Regulation No 543/69 of the Council of 25 March 1969 as amended by Regulation No 2827/77 of the Council of 12 December 1977 must be understood as covering only vehicles which are owned by or under the control of the public authority.

10 In view of the reply given to that question consideration of the other questions submitted by the national court is no longer required.

Costs

11 The costs incurred by the Government of the Federal Republic of Germany, the Council of European Communities and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. 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, costs are a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Oberverwaltungsgericht Bremen by an order of 21 March 1979, hereby rules:

The words "vehicles which are used by other public authorities for public services" for the purposes of Article 4 (4) of Regulation No 543/69 of the Council of 25 March 1969 as amended by Regulation No 2827/77 of

the Council of 12 December 1977 must be understood as covering only vehicles which are owned by or under the control of the public authority.

O'Keeffe Touffait Mertens de Wilmars

Pescatore Mackenzie Stuart Bosco Koopmans

Delivered in open court in Luxembourg on 6 December 1979.

A. Van Houtte
Registrar

A. O'Keeffe
President of the First Chamber, Acting as President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 6 NOVEMBER 1979

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Oberverwaltungsgericht of Bremen. The Order for Reference raises questions of interpretation of Council Regulation (EEC) No 543/69 of 25 March 1969 "on the harmonization of certain social legislation relating to road transport". The Court has had occasion to consider that Regulation in a number of Cases, the latest being, I think, Case 97/78 *Schumalla's* case [1978] ECR 2311, where I collected the earlier cases in my Opinion. The questions raised by the Oberverwaltungsgericht of Bremen are however novel.

The Appellant before that Court is the Firma Städtereinigung K. Nehlsen KG, which I shall call "Nehlsen". The Respondent is the City of Bremen.

Nehlsen is a privately-owned commercial undertaking which has contracts with local authorities in Bremen under which it carries out refuse collection in the areas for which those authorities are responsible.