OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 5 February 1991 *

Mr President,
Members of the Court,

A — The facts

1. The reference from the Belgian Hof van Cassatie which is before us today concerns in itself only a regulation of a somewhat technical nature, Council Regulation No 3820/85 on the harmonization of certain social legislation relating to road transport,[1] but on closer examination it proves to relate to important questions of a general nature on the relationship between secondary Community legislation and national law.

2. The factual background is quite simple. The defendant in the main proceedings, a motor vehicle driver, is charged with breaching the provisions of Community law on driving and rest periods. The breaches in question are alleged to have taken place on 3 and 4 November 1986. At that time the regulation applicable, already mentioned, was Regulation No 3820/85, Articles 18(1) and 19 of which replaced as from 29 September 1986 — apart from certain temporary exceptions — Regulation (EEC) No 543/69 on the harmonization of certain social legislation relating to road transport.[2] Both Regulation No 543/69[3] and Regulation No 3820/85[4] provide for the adoption by Member States of provisions covering, *inter alia*, 'the penalties to be imposed in case of breach'.

3. The penalties for breaches of Regulation No 543/69 were laid down in Belgium by a Royal Decree of 23 March 1970,[5] in which the substance of the breaches to which the penalties related was described comprehensively by the words 'en cas d'infraction aux dispositions du règlement précité'.[6] That Royal Decree was later replaced by the Royal Decree of 13 May 1987,[7] which laid down, for breaches of Regulation No 3820/85, provisions identical to those of the Royal Decree of 23 March 1970;[8] it had no retroactive effect. From a comparison of these facts it may be seen that at the time of the alleged breaches (3 and 4 November 1986), when Regulation No 3820/85 had already replaced Regulation No 543/69, the wording of the Belgian penal provisions related only to Regulation No 543/69, which had been repealed, and not to the new Regulation No 3820/85 which had allegedly been infringed.

* Original language: German.

1 — Of 20 December 1985 (OJ 1985 L 370, p. 1).

2 — Of the Council of 25 March 1969 (OJ, English Special Edition 1969 (I), p. 170).

3 — Second subparagraph of Article 18(1).

4 — Second subparagraph of Article 17(1).

5 — *Moniteur belge* of 1 April 1970, p. 3136; see Article 3(1) of that decree.

6 — This reference relates to Regulation No 543/69.

7 — *Moniteur belge* of 4 June 1987, p. 8640; see Article 6(1) as regards the repeal of the Royal Decree of 23 March 1970.

8 — See Article 3(1).

4. The Correctionele Rechtbank te Turnhout acquitted the defendant on the ground that there was no statutory basis for the penalty, but the Arbeidsauditeur appealed in cassation to the Hof van Cassatie, which queried whether the reference in the Royal Decree of 23 March 1970 to Regulation No 543/69 should be interpreted as a reference to Regulation No 3820/85. That view is based on Article 18(2) of Regulation No 3820/85, which is worded as follows:

'References to the Regulation repealed under paragraph (1)[9] shall be construed as references to this Regulation.'

5. In these circumstances the Hof van Cassatie referred the following question to the Court for a preliminary ruling:

'Is Article 18(2) of Council Regulation (EEC) No 3820/85 of 20 December 1985 on the harmonization of certain social legislation relating to road transport to be interpreted as meaning that references, in provisions of national law adopting implementing measures, to Regulation No 543/69 are also to be construed as references within the meaning of the said Article 18(2)?'

9 — That is, Regulation No 543/69.

B — Opinion

6. Only the Commission and the United Kingdom submitted observations. In their view, the question should be answered in the negative. I share that view.

7. *1.* To begin with, I think the Commission is right in stating that there are two possible approaches to the interpretation requested in this case. The first of these is based on the fact that regulations are directly applicable in national law. Under this approach Article 18(2) of Regulation No 3820/85 should be applied not only to Community law but to national law as well. The second approach relates to the purpose of the provision, which is to govern the interpretation of references in Community law to Regulation No 543/69, so that it does not concern the provisions of national law. The Commission thinks that the second approach should be followed here. That can be accepted subject to the reservation that it is not a question of two different 'approaches'. The real question is, what is the subject of the relevant provision of the regulation and to whom is it addressed. Of course, regulations, as may be seen from the second paragraph of Article 189 of the EEC Treaty, may contain provisions about legal relationships directly involving Community citizens — as the persons to whom they are addressed — and in this way in particular grant them rights and impose on them duties[10] (in this case the duty to submit to certain penalties). However, there is no principle under which, in the event of doubts whether a provision of a regulation governs a given legal relationship directly involving the Community citizen, there is a presumption in favour of such a rule.

10 — See the judgment in Case 43/71 *Politi* v *Italy* [1971] ECR 1039, paragraph 9.

Instead, the subject and addressee of each individual provision should rather be determined according to its wording, construction and context as well as of its object and function. [11]

8. 2. Even though in this case the wording of Article 18(2) gives no clue to the correct interpretation, all the remaining evidence favours the solution proposed here. A distinction must be made in this connection between two types of argument.

9. (a) First of all, it may, in my view, be seen from the regulation that even if it is assumed that there is no doubt about the legal validity of such a rule, it was clearly not the intention to cover, in Article 18(2), references to domestic law.

10. (aa) A first indication of this results from the function of the provision in the regulation in question. In Community legislation introducing fresh provisions on subjects already covered by regulations, final provisions such as Article 18 have the purpose of making such amendments to Community law as arise from the introduction of the new provisions. That involves two aspects. On the one hand, the provisions which are to be replaced by the new provisions are to be repealed. In this regulation, that is the purpose of Article 18(1). On the other hand, references in other measures to the former provisions must be 're-routed' to the new text. That is what Article 18(2) of the regulation in question does. This makes Community law complete in itself. There is therefore no need to interfere in national implementing legislation.

11. Conversely, it may be said that if the intention had been to amend national law as well, the provision would have had to go much further. Thus, it would for example have had to state what was to be done as regards the legislation of the Member States on the issue and inspection of control books; following the repeal of Regulation No 543/69 (see Article 14(9) thereof), these provisions have lost their purpose. [12]

12. It is therefore apparent in this case on the one hand that an amendment of Community law pre-supposed no interference with national law and on the other hand that the amendment of national law, were Article 18(2) to be applied also to the provisions thereof, would nevertheless be incomplete. That militates against inter-

11 — Thus, for example, within Regulation No 3820/85, Article 5(5), the fifth subparagraph of Article 6(1), the first sentence of Article 11(1) and Articles 13 and 17 are directly addressed only to the Member States, whereas Article 16 is addressed to the Community institutions and the Member States.

12 — It is true that under Article 4 of Regulation (EEC) No 1463/70 of the Council (OJ English Special Edition 1970 (II), p. 482) the installation of recording equipment has, since 1 January 1978, been compulsory for all vehicles to which the regulation applies, and vehicles fitted with such equipment have been exempted by Article 5 thereof from the application of Article 14 of Regulation No 543/69. The latter provision was, however, formally repealed only by Regulation No 3820/85 (first sentence of Article 18(1)).

preting Article 18(2) as a provision affecting national law.

13. (bb) I agree with the Commission and the United Kingdom that the context of Regulation No 3820/85 provides a second argument along these lines. As I have already said, there is a series of provisions allowing or requiring the Member States to adopt certain supplementary measures, amongst them Article 17 of Regulation No 3820/85, which I mentioned at the beginning and which is identical with Article 18 of Regulation No 543/69. According to the first subparagraph of paragraph (1) of both articles, the laws, regulations and administrative provisions necessary for the implementation of each regulation cover 'the penalties to be imposed in case of breach'. It may therefore be concluded, in accordance with the terms of the judgment in *Hansen*,[13] that it is left to the Member States to determine the nature and severity of the penalties to be imposed in case of breach. According to the Court's case-law,[14] which it confirmed in the said judgment[15] in relation to Article 18 of Regulation No 543/69, Community law sets only certain limits to the discretion thus left to the Member States: infringements of Community law must be penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.

14. In view of this legal situation, an interpretation of Article 18(2) which included references in national law would introduce an inconsistency into Regulation No 3820/85, because with such an interpretation Article 18(2) would be interfering in that very sphere which, under Article 17, the Member States were to be left free to arrange — apart from the limits already mentioned. And it would not then be altogether clear why the Community legislature should have incorporated this restriction of the Member States' freedom of action in Article 18 (paragraph (1) of which, as I have said, is concerned only to amend Community law) rather than in Article 17 (or in the other provisions envisaging supplementary measures by the Member States). All this militates against the interpretation suggested.

15. (b) A second group of arguments which might also be quoted in favour of this result is based on the reflection that the legislature will not unnecessarily draw up provisions whose compatibility with Community law is doubtful.

16. (aa) In this connection, first, the United Kingdom has made an apposite observation based on the legal nature of the national rules in question. Since in any event the Belgian penal provisions enacted under Article 18 of Regulation No 543/69[16] are, in accordance also with the regulation

13 — Case C-326/88 *Anklagemyndigheden* v *Hansen & Søn* [1990] ECR I-2911, at end of paragraph 14.

14 — Case 68/88 *Commission* v *Greece* [1989] ECR 2969, paragraph 24 of the judgment.

15 — *Loc. cit.*, paragraph 17.

16 — See Article 2 of the Belgian Law of 18 February 1969, *Moniteur belge* of 4 April 1969, p. 2988.

itself,[17] a matter of criminal law, Article 18(2) of Regulation No 3820/85 as a rule of interpretation in relation to provisions referring to domestic criminal law is to that extent itself to be regarded as a matter of criminal law. It is true that Article 75 of the EEC Treaty, which is cited as the legal basis for Regulation No 3820/85, provides that the Council may lay down 'any other appropriate provisions', which might also cover penal provisions. In any event, the Court, in its judgment in *Casati*,[18] decided that 'in principle criminal legislation and the rules of criminal procedure are matters for which the Member States are still responsible'.[19] In his Opinion in *Drexl*,[20] Mr Advocate General Darmon stated, with regard to the provisions of Community law in the field of taxation, that Community law affects criminal law (only) in so far as, where a rule imposing a prohibition is incompatible with Community law, the legal basis for the offence is removed and, with regard to penalties, Community law lays down limits to prevent their severity from constituting an obstacle to the exercise of the freedoms enshrined in the EEC Treaty.

17. It is unnecessary to go into the extent of these statements of the law, but it may be stated that the draftsmen of the regulation would have exposed the validity of the provision in question to obvious and serious doubts if it were to be understood as a provision applying to references in national law. Since there is no apparent reason why they should follow such a course, it cannot be assumed that that was their intention.

18. (bb) Furthermore, if the provision were to be interpreted in the manner I regard as incorrect, it would not be possible to exclude such doubts from the outset in view of Article 189 of the EEC Treaty, which envisages two possible ways in which the Community legislature may affect national law. One is to call upon the national legislature to adopt provisions in a given sense. Such a requirement may take the legal form of a decision or a directive but may also, as Article 17 of Regulation No 3820/85 shows, be contained in a regulation. The other possibility for the Community is to adopt measures itself — namely in the form of the provisions of a regulation — which then, as we know, takes precedence over divergent national law. It is hard to see how a provision on the interpretation of given rules of national law, if Article 18(2) is interpreted in that sense, could fit into this system. Nor is there any indication here either that the legislature intended to encumber the provision with such legal doubts.

19. *3.* For the sake of completeness it should be mentioned that the reference for a preliminary ruling relates only to the interpretation of Article 18(2) of Regulation No 3820/85. That is to be distinguished from the problem of the conclusions to be drawn from the EEC Treaty, particularly Article 5, for the interpretation of the provisions of national law in question. But that problem was not the subject of the question referred to the Court by the Hof van Cassatie.

17 — The Member States may determine the legal nature of the penalties (cf. the *Hansen* judgment, *loc. cit.*, paragraph 14), which includes the possibility of penalties of a criminal nature (cf. the judgment in Case 50/76 *Amsterdam Bulb* v *Produktschaap voor Siergewassen* [1977] ECR 137, at paragraph 32).

18 — Case 203/80 *Criminal proceedings against Casati* [1981] ECR 2595.

19 — Paragraph 27 of the judgment.

20 — Opinion of 8 December 1987 in Case 299/86 [1988] ECR 1222 and 1223.

20. For all those reasons I propose that the answer to be given to the question from the Hof van Cassatie should be as follows:

'Article 18(2) of Regulation (EEC) No 3820/85 is to be interpreted as meaning that references to Regulation (EEC) No 543/69 in provisions of national law adopted for the implementation of that regulation are not references within the meaning of the said Article 18(2).'