OPINION OF ADVOCATE GENERAL VAN GERVEN

delivered on 15 September 1993 *

Mr President,
Members of the Court,

1. In this case the Manchester Crown Court has asked the Court to give a preliminary ruling on the interpretation of, in particular, Article 7(1) and (2) of Council Regulation (EEC) No 3820/85 of 20 December 1985 on the harmonization of certain social legislation relating to transport. [1]

Factual and legal background

2. The main proceedings concern an appeal by three appellants, Mr Charlton, Mr Huyton and Mr Wilson, against their conviction by the Heywood Magistrates for driving or allowing employees to drive for more than four-and-a-half hours without a break, contrary to Article 7(1) and (2) of Regulation No 3820/85 and the United Kingdom legislation implementing that provision. [2] Since the appellants and the Crown Prosecution Service differed in their interpretation of Article 7(1) and (2), the Manchester Crown Court decided to refer a question on interpretation to the Court.

3. Regulation No 3820/85 contains harmonizing rules concerning the age of drivers engaged in the carriage of goods (Article 5), maximum driving periods (Article 6), the length and frequency of breaks and rest periods (Articles 7 and 8) and the prohibition of certain types of payment which constitute an inducement to infringe those rules (Article 10).

With respect to *driving periods* Article 6 provides:

'1. The driving period between any two daily rest periods or between a daily rest period and a weekly rest period, hereinafter called "daily driving period", shall not exceed nine hours. It may be extended twice in any one week to 10 hours (...)

2. The total period of driving in any one fortnight shall not exceed 90 hours.'

* Original language: Dutch

1 OJ 1985 L 372, p 1.

2 The Transport Act 1968, as amended, and the Drivers' Hours (Harmonization with Community Rules) Regulations 1986 (S I 1986/1458). One of the three appellants, Mr Charlton, was also convicted of allowing an employee to exceed the maximum daily driving period as laid down in Article 6(1) of Regulation No 3820/85 and of allowing him to disregard the daily rest period laid down in Article 8(1).

As regards *breaks* Article 7 provides:

'1. After four-and-a-half hours' driving, the driver shall observe a break of at least 45 minutes, unless he begins a rest period.

2. This break may be replaced by breaks of at least 15 minutes each distributed over the driving period or immediately after this period in such a way as to comply with the provisions of paragraph 1.

(...)

5. The breaks observed under this article may not be regarded as daily rest periods.'

With respect to (daily and weekly) *rest periods* Article 8 provides:

'1. In each period of 24 hours, the driver shall have a daily rest period of at least 11 consecutive hours, which may be reduced to a minimum of nine consecutive hours not more than three times in any one week, on condition that an equivalent period of rest be granted as compensation before the end of the following week.

(...)

3. In the course of each week, one of the rest periods referred to in paragraphs 1 and 2 shall be extended, by way of weekly rest, to a total of 45 consecutive hours.

(...)'

Article 1(5) defines 'rest' as 'any uninterrupted period of at least one hour during which the driver may freely dispose of his time'.

The preliminary questions

4. The Manchester Crown Court referred the following three questions to the Court:

'1. Upon a proper interpretation of Article 7(1) and (2): Does the Regulation create separate periods of four-and-a-half hours' driving in the aggregate after or during which breaks totalling 45 minutes or more must be taken if the driver does not immediately commence a daily rest period or a weekly rest period?

2. In relation to a daily driving period: at what point does the calculation of four-and-a-half hours commence?

3. Does it end and a fresh four-and-a-half-hour period commence:

(a) upon completion of the aggregate of 45 minutes' rest

or

(b) at the end of four-and-a-half hours' aggregated driving

or

(c) on a rolling basis at any time when the driver has been driving for four-and-a-half hours in the aggregate and has not during that period taken at least 45 minutes' break?'

In its order for reference the national court states that within those three questions is encompassed a central question, namely 'whether each four-and-a-half-hour driving period is to be considered in the context of Article 7 as a separate entity or whether it is to be considered as a rolling period'.

5. The appellants had proposed that 10 further questions be referred to the Court, concerning in particular the interpretation of Articles 6 and 8 of Regulation No 3820/85. [3] From the order for reference it appears that the national court considered that it was not necessary to refer those other questions to the Court, except for the following fourth question: 'Should the answer to the first question be interpreted in the context of the overall provisions of Articles 6 and 8 of the Regulation?'

In their written observations the appellants request that the Court none the less reply to the other 10 questions. The Court has however consistently held 'that, in view of the division of jurisdiction laid down by Article 177 of the Treaty, it is for the national court alone to determine the subject-matter of the questions which it wishes to refer to the Court. The Court cannot therefore, at the request of a party to the main proceedings, examine questions which have not been referred to it by the national court'. [4]

The interpretation of Articles 7(1) and (2)

6. *Two possible interpretations.* As already stated, the central question in this case is 'whether each four-and-a-half-hour driving period is to be considered in the context of Article 7 as a separate entity or whether it is to be considered as a rolling period'. [5] There is thus a choice between two possible interpretations of Article 7. According to one interpretation, the four-and-a-half-hour driving period should be seen as prohibiting continuous driving for longer than four-and-a-half hours within the daily driving period, which normally may not be more than 9 hours (see Article 6(1), cited at point 3 above). On this view the driving period is to be seen as a rolling period (the so-called

3 — As mentioned in footnote 2, one of the three applicants was also convicted of infringements concerning those articles

4 — Case C 377/88 *Safa* [1990] ECR I 1, paragraph 20

5 — In its observations the Commission refers to these interpretations as the 'wipe the slate clean interpretation' and the 'rolling period interpretation' The United Kingdom Government, for its part, refers to the 'clean slate approach' and the 'rolling period interpretation'

'rolling period interpretation'), that is to say, as a period which can commence at any moment of the daily driving period and ends as soon as the driver has completed four-and-a-half hours' continuous driving.

According to the other interpretation, Article 7 is not to be understood as imposing an absolute prohibition on four-and-a-half hours' continuous driving. The daily driving period is said to comprise separate periods of which no individual period may *of itself* consist of more than four-and-a-half hours' continuous driving (the so-called 'separate periods interpretation'), there being no guarantee that a driver should never complete more than four-and-a-half hours' continuous driving within the daily driving period. On this interpretation no such guarantee can be given since the breaks in the first driving period may be at the beginning of that period and the driving period following that first period may for example run through to the rest period at the end of the daily driving period.

7. The difference between the two interpretations may best be explained by an example taken from the observations of the United Kingdom Government. A driver begins driving at 08.00. At 08.15 he takes a 15-minute break and after a further 15 minutes' driving takes a 30 minutes break at 08.45. After re-commencing driving at 09.15 he drives continuously through to 17.45, whereupon he begins his daily rest period.

Time	Activity	Period of driving since last break
08.00	Journey commences	
08.15	15-minute break	15 minutes
08.30	Driving re-commences	
08.45	30 minutes break	30 minutues
09.15	Driving re-commences	
17.45	Rest period	eight-and-a-half hours

According to the 'separate periods' interpretation the driver in this example complies with the rule laid down by Article 7(1) and (2). By taking 15 minutes' break at 08.15 and a 30-minute break at 08.45 he uses the possibility offered by paragraph 2 of distributing the 45-minute break over the four-and-a-half-hour driving period. That first period, which includes in total 45 minutes' break, ends at 13.15. The second driving period of

four-and-a-half hours, seen as a separate entity, begins at 13.15 and ends at 17.45; in accordance with the final words of paragraph 1, it is followed by a rest period.

According to the interpretation which views the four-and-a-half-hour driving period as a 'rolling period', on the other hand, the driver in the example would not comply with the rule laid down by Article 7(1) and (2). Between 09.15, the time at which the rolling driving period begins, and 17.45, he drives for eight-and-a-half hours without any break. In order to avoid exceeding the driving period the driver would have had to take a break from driving at 13.45 at the latest since he would then have driven continuously for four-and-a-half hours.

8. It is clear from the example that the choice between the two possible interpretations can make a considerable difference. The appellants in the main proceedings have argued in favour of the 'separate periods' interpretation before both the national court and this Court. They rely on two forms of argument concerning, respectively, the principle that rules should be interpreted in favour of the defendant in criminal proceedings and the wording of Article 7 of Regulation No 3820/85. The French Government, which has submitted observations to the Court, also expressly supports that interpretation, putting forward an argument of a practical nature relating to the aims of the regulation. [6]

6 — For a systematic summary of the arguments of the parties I refer to the Report for the Hearing.

The Crown Prosecution Service, on the other hand, supported the 'rolling period' interpretation before the national court. [7] Before the Court that view is supported by three of the parties which have submitted observations, namely the Commission and the United Kingdom and Netherlands Governments. For the reasons given below I concur with that interpretation and with the arguments put forward in support thereof.

9. *The textual arguments are inconclusive.* A first point to note concerning the interpretation of Article 7(1) and (2) of Regulation No 3820/85 is that the wording of those provisions is not clear in itself, or at least does not make it possible to choose between the two possible interpretations that I have set out above. That conclusion, which led the Manchester Crown Court to make the reference to the Court, seems to be shared at least implicitly by all the parties before the Court.

No solution can be found purely by reference to textual arguments. The appellants argue that, if the Community legislature had intended the driving period to be a rolling period, it would have formulated the text of Article 7(1) as follows: 'At any time during a daily driving period when a driver shall have driven in the aggregate for four-and-a-half hours the driver shall observe a break (...)'. They take the view further that the expression 'distributed over the driving period or immediately after this period' in paragraph 2 indicates that the driving period constitutes

7 — The national court also sent to the Court two decisions, one by the Wolverhampton Crown Court in 1985 (*Peter Wright v West Midlands Police*) and one by the High Court in 1989 (*Lancashire Police v Mayfield Chicks Ltd*) in which that interpretation was chosen. The United Kingdom states in its observations that hundreds of similar cases are pending in the United Kingdom alone.

a separate entity with a fixed beginning and end. [8] On the other hand, the United Kingdom Government observes — at least equally convincingly in my view — that the opening words of paragraph 1, namely 'After four-and-a-half hours' driving', support the view that the driving period is a rolling period. Those opposing arguments merely serve to confirm the ambiguity of the provision.

10. *The legislative history supports the 'rolling period' interpretation.* Where the words of a Community provision are ambiguous, reference should be made to 'the context in which it occurs and the objects of the rules of which it is part'. [9] With reference to the observations of the Netherlands Government and above all those of the United Kingdom Government I shall begin by examining the *legislative history* of Regulation No 3820/85, in particular Article 7(1) and (2).

Regulation No 3820/85 was adopted in order to amend and replace Council Regulation (EEC) No 543/69 of 25 March 1969 on the harmonization of certain social legislation relating to road transport. [10] The latter regulation had already been amended four times between 1972 and 1977, and Regulation No 3820/85 was thus a formal consolidation of all those amendments. [11]

Both the *travaux préparatoires* of Regulation No 3820/85 and the text of the regulation itself indicate that the legislature did not intend to depart from the main concepts and aims of the 1969 Regulation. At point 10 of the explanatory memorandum accompanying its proposal for Regulation No 3820/85 the Commission stated: [12]

'The proposed revision should not and must not change the basic concepts of Regulation (EEC) No 543/69. These are and remain an important instrument of the common transport policy, which is based on and has as its aims the objectives contained in the so-called harmonization decision of 1965. The provisions are therefore unchanged in their objectives.'

The same is clear from the first recital in the preamble to Regulation No 3820/85:

'Whereas in the field of road transport, Community social legislation is set out in Regulation (EEC) No 543/69 (...); whereas progress made in these fields must be safeguarded and extended; whereas, however, it is necessary to make the provisions of the said Regulation more flexible without undermining their objectives'.

8 — The appellants also seek to base an argument on the words 'in such a way as to comply with the provisions of paragraph 1' in paragraph 2. According to the appellants those words refer to the final words of paragraph 1, namely 'unless he begins a rest period'. As the United Kingdom Government observes in its observations before the Court, that reading cannot be accepted since the final words of paragraph 1 do not lay down an obligation but merely provide that the obligation laid down in the preceding part of paragraph 1 need not strictly be respected if the break is subsumed within a (longer) rest period.

9 — See *inter alia* the judgment in Case 292/82 *Merck* v *Hauptzollamt Hamburg-Jonas* [1983] ECR 3781, at paragraph 12.

10 — OJ, English Special Edition 1969 (I), p. 170.

11 — In 1979 a codified version of Regulation No 543/69 had already been published in OJ 1979 L 73, p. 1.

12 — Document COM(84) 147 fin./2.

11. Let us examine the terms used in Regulation No 543/69 in the light of that continuity in the basic concepts. Article 7(1) of the Regulation provided that:

'No period of continuous driving shall exceed four hours.'

Article 8(2) specifies further the general rule:

'... driving shall be interrupted for a period of not less than 30 consecutive minutes at the end of the period referred to in the first subparagraph of Article 7(1).

This break may be replaced by two breaks of not less than 20 minutes each or by three breaks of not less than 15 minutes each, which may all be spaced out over the driving period referred to in the first subparagraph of Article 7(1) or may in part fall within that period and in part immediately follow it.'

That text made it perfectly clear that continuous driving for more than four hours was contemplated and was prohibited. Under Regulation No 543/69 the driving period was thus clearly seen as a rolling period. The question arises whether there is any indication that the Community legislature, in adopting Regulation No 3820/85, intended to amend the position.

12. In its first proposal for Regulation No 3820/85 the Commission proposed various amendments concerning driving and rest periods. [13] The proposed new text of Article 7(1) read as follows:

'On any day when a crew member is driving, no period of continuous work shall exceed four-and-a-half hours, excluding waiting time.'

The proposal thus replaced 'continuous driving' by 'continuous work', which also covered *inter alia* loading and unloading. The proposal provided at the same time for a lengthening of the permitted driving or working period from four to four-and-a-half hours, but this was offset in the newly proposed Article 8 by a lengthening of the required rest periods. In all respects the proposal contained an unambiguous restriction on *continuous* driving or working.

13. In its Resolution [14] the European Parliament amended the proposed Article 7 by again replacing the word 'work' by 'driving' because of the absence of uniform rules on work and reliable methods of control. More-

13 — Proposal for a Council Regulation amending Regulation (EEC) No 543/69 on the harmonization of certain social legislation relating to road transport and Regulation (EEC) No 1463/70 on the introduction of recording equipment in road transport, COM(84) 147 def., OJ 1984 C 100, p. 3.

14 — OJ 1985 C 122, p. 161.

over, the Parliament suggested that Article 8(1) should be reformulated as follows:

'1. On any day when a crew member is driving there shall be a break of at least one hour after a period of driving of not more than four-and-a-half hours.

This break may be replaced by four breaks of at least 15 minutes each to be taken at such times during the daily driving time that the period of four-and-a-half hours is not exceeded'.

14. In response to the Parliament's Resolution the Commission amended its original proposal, seeking, on the one hand, to retain its proposal to include work other than driving in the driving period and, on the other, to accommodate the amendments proposed by the Parliament to Article 8. The result was that the provisions of Article 7(1) and Article 8 were combined in a new Article 7(1) and (2):

'1. There shall be no more than four-and-a-half. hours of driving, loading, unloading and other activities carried out in connection with the operation of the vehicle, before a break of at least one hour is taken.

2. This break may be replaced by three periods of 20 minutes or, in the case of regular passenger services, four periods of 15 minutes, spaced out over/or partly within and partly immediately following the period referred to in paragraph 1 in such a way that the provision therein on the minimum break is complied with.' [15]

It is true that in that provision the prohibition on continuous driving or working for more than four-and-a-half hours is no longer to be found. There is however no indication that any material change was intended. That omission appears, on the contrary, to be an unintended byproduct of other amendments which all remain within the aim of the original Regulation, No 543/69. The result was that the clause 'there shall be no more than four-and-a-half hours of driving (...)' was replaced in the final text of Article 7(1) by: 'After four-and-a-half hours' driving, the driver shall observe a break (...)'. It is significant that the restriction on 'continuous' driving was not deleted from the 14th recital, which concerns Article 7:

'Whereas, with regard to driving periods, it is desirable to set limits on *continuous* driving time and on daily driving time, but without prejudice to any national rules whereby drivers are prohibited from driving for longer than they can with complete safety' (my emphasis).

15 — Amended proposal for a Council Regulation (EEC) amending Regulation (EEC) No 543/69 on the harmonization of certain social legislation relating to road transport and Regulation (EEC) No 1463/70 on the introduction of recording equipment in road transport, COM(85) 458 def., OJ 1985 C 223, p. 5.

15. *The aims of the Regulation also support the 'rolling period' interpretation.* Support for the interpretation whereby Article 7(1) and (2) of Regulation No 3820/85 lay down a prohibition on continuous driving for more than four-and-a-half hours is also to be found in the *aims* of the Regulation.

According to the first recital in the preamble to Regulation No 3820/85, [16] the provisions of the Regulation aim 'at the harmonization of conditions of competition between methods of inland transport, especially with regard to the road sector and the improvement of working conditions and road safety'. Further to that the 14th recital states that 'it is desirable to set limits on *continuous* driving time and on daily driving time' (my emphasis).

From the example given above (point 7) it is clear that an interpretation of Article 7 which has the result of prohibiting continuous driving for more than four-and-a-half hours is more in keeping with the aim of improving road safety than an interpretation which does not have that result. In the example given the latter interpretation leads to the result that a driver can drive for eight-and-a-half hours without a break and, as the Netherlands Government observes, it can theoretically allow the continuous driving period to extend to nearly nine hours. It is difficult to see how continuous driving for eight to nine hours can be consistent with road safety.

16 - Partly quoted above at point 10, with the omission of the passage cited above

16. The concern to give precedence to interpretations which best serve the aim of improving road safety is clearly discernible in the case-law of the Court concerning the interpretation of Regulation No 3820/85 and its predecessor, Regulation No 543/69. This is apparent first of all from the judgment in *Cagnon and Taquet* in which the Court gave those reasons for choosing a particular interpretation of the rules concerning rest periods. [17] That line was continued in later judgments, [18] including the recent judgment of 25 June 1992 in *British Gas*. [19]

17. *Discussion of certain counterarguments.* I shall consider briefly two arguments put forward by the French Government and the appellants in the main proceedings respectively in support of the 'separate periods' interpretation of Article 7(1) and (2) of Regulation No 3820/85.

The French Government observes that one of the aims of Regulation No 3820/85 was to make more flexible and simplify the rules concerning driving and rest periods. [20] The 'separate periods' interpretation is said to have the advantage of being simpler for the driver when he is organizing his driving times.

17 - Case 69/74 *Cagnon and Taquet* [1975] ECR 171, paragraphs 6 and 7

18 - Case 65/76 *Derycke* [1977] ECR 29, paragraphs 13 to 15, Case 47/79 *Nehlsen* [1979] ECR 3639, paragraphs 6 and 7; Case 133/83 *Scott* [1984] ECR 2863, paragraph 18.

19 - Case C 116/91 *British Gas* [1991] ECR I 4071, paragraph 20.

20 - Indications to that effect are to be found in the first, 15th, 16th, 18th and 19th recitals in the preamble to the Regulation.

It is true that the Community legislature was also concerned in 1985 that the rules concerning driving and rest periods should be capable of smooth application. In the first recital in the preamble to Regulation No 3820/85 it is stated that 'it is necessary to make the provisions of (Regulation No 543/69) more flexible'; however this was to be done 'without undermining their objectives', including the improvement of road safety. As I have already argued (point 15) the 'separate periods' interpretation of Article 7(1) and (2) of Regulation No 3820/85 is decidedly less conducive to the achievement of that aim. Moreover, it is not at all clear to me that it actually would lead to a smoother application of the rules, since a driver would still have to plan his driving periods carefully. [21] Finally, in the legislative history of Article 7 of Regulation No 3820/85 as analysed above I find no indication that the Community legislature intended to dispense with the prohibition of more than four-and-a-half hours' continuous driving with a view to making the rules more flexible or simple.

18. For their part the appellants in the main proceedings stress the importance of the principle of interpreting provisions in favour of the defendant in criminal proceedings. In his submissions before the Manchester Crown Court, which are reproduced in his observations for the Court, the Solicitor for the appellant states:

'I believe that in English Courts if Legislators use words which can be read in more than one way and one is dealing with a Criminal offence then that interpretation which is most favourable to the defendant ought to be given to the words used.'

It is true that the principles *nullum crimen sine lege*, *nulla poena sine lege* and *nulla poena sine culpa* form part of the Community legal order; these are fundamental rights which are common to the constitutional traditions of the Member States, the first two of which are now embodied in Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. [22] Consequently, according to established case-law they constitute an integral part of the general principles of law whose observance is ensured by the Court of Justice. [23] Those principles apply however only to the interpretation of criminal provisions. It is clear that Article 7 of Regulation No 3820/85 in question here is not in the nature of a criminal law any more than the other provisions of that regulation. The Regulation nowhere lays down specific penalties but obliges the Member States in Article 17(1) to adopt such laws, regulations or administrative provisions as may be necessary for the implementation of the Regu-

21 — This is also apparent from the example which I gave at point 7.

22 — Article 11(2) of the Universal Declaration of Human Rights also provides that no-one is to be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law at the time when it was committed.

23 — See *inter alia* the judgment in Case 4/73 *Nold* [1974] ECR 491, paragraph 13; Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41. In the judgments in *Kirk* and *Fedesa* the Court in fact expressly held that the principle that criminal provisions cannot have retroactive effect — that principle is a part of the principle *nullum crimen sine lege* embodied in Article 7 of the European Human Rights Convention — is 'among the general principles of law whose observance is ensured by the Court of Justice': Case 63/83 *Kirk* [1984] ECR 2689, paragraph 22; Case C-331/90 *Fedesa* [1990] ECR I-4023, paragraph 32. The Court has in my view accepted this, at least implicitly, also with respect to the principle *nulla poena sine culpa*: Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749, paragraph 29; Case 83/83 *Estel* v *Commission* [1984] ECR 2195, paragraphs 38 to 43.

lation, including provisions concerning 'the penalties to be imposed in case of breach'. In *Vandevenne* the Court once again confirmed, with respect to the latter provision, its established case-law to the effect that

'when a Community regulation does not provide any specific penalty in case of breach but refers on this matter to national provisions, the Member States retain a discretion as to the choice of penalties.' [24]

Even if Article 7 of the Regulation were of a penal nature, I am of the opinion that the principle *nulla poena sine culpa* is inapplicable here. It is true that the wording of Article 7, as already stated (at point 9), is not clear in itself; however the legislative history and the aims of the Regulation speak in my view sufficiently clearly for the 'rolling period' interpretation. In other words, the ambiguity of Article 7 is purely textual and cannot therefore, on the basis of the principle *nulla poena sine culpa*, provide the basis for an excusable error on the part of the appellants. [25]

Replies to the preliminary questions

19. In the light of the foregoing I propose that the Court give the following replies to the Manchester Crown Court.

With respect to the *first* question (see point 4), which is the central question, I propose the following answer:

Article 7(1) and (2) of Regulation (EEC) No 3820/85 of 20 December 1985 on the harmonization of certain social legislation relating to road transport prohibits drivers of vehicles within the scope of the Regulation from at any time driving for more than four-and-a-half hours continuously, without taking a break or breaks of a total of at least 45 minutes and/or beginning a rest period.

24 — Case C-7/90 *Vandevenne* [1991] ECR I-4371, paragraph 11. The Court set out the well-known conditions flowing from Article 5 of the EEC Treaty, namely that infringements of a Community regulation 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 that the penalties must in any event be effective, proportionate and dissuasive.

25 — It appears from the judgment in *Estel* v *Commission*, cited in footnote 23 (paragraphs 41 and 43), that the Court also applies the criterion of the 'excusable mistake' in examining whether the principle *nulla poena sine culpa* is infringed.

In the light of the answer to the first question, I propose that the Court answer the *second* question as follows:

The driving period of four-and-a-half hours mentioned in Article 7(1) and (2) may begin at any moment at which the driver begins to drive and, on a rolling basis, at any moment during driving.

In the light of the proposed answer to the two preceding questions, it seems to me that it is unnecessary to give a separate answer to the third question. Finally, I propose that the *fourth* question (point 5 above) should be answered as follows:

Article 7(1) and (2) of the Regulation lay down an independent obligation in addition to the other obligations laid down *inter alia* by Articles 6 and 8. Like all provisions of the Regulation they must be interpreted in the light of their wording and the context and aims of the rules concerned.