

Opinion of advocate general Alber delivered on 10 October 2002 [\(1\)](#)

1. Libor Cipra
2. Vlastimil Kvasnicka v Bezirkshauptmannschaft Mistelbach

Reference for a preliminary ruling from the Unabhängiger Verwaltungssenat im Land Niederösterreich

Transport – Road transport – Social legislation – Regulation (EEC) No 3820/85 – Rest periods under Article 8 – Jurisdiction of the Court of Justice to interpret the AETR Agreement

Case C-439/01

I – Introduction

1. The request for a preliminary ruling relates to the rest periods to be taken by lorry drivers and asks questions relating to both the interpretation and the validity of Article 8 of Council Regulation (EEC) No 3820/85 on the harmonisation of certain social legislation relating to road transport. On the one hand, the Court making the reference wishes to know how subparagraphs 1 and 2 of Article 8, which each provide for different rest periods, interrelate. At the same time, however, it questions whether these provisions are in fact invalid on the ground that they fail to comply with the principles of legal certainty and precision.

II – Legal framework

A – Council Regulation (EEC) No 3820/85 on the harmonisation of certain social legislation relating to road transport

2 OJ 1985 L 370, p. 1. (Regulation No 3820/85)Article 2

(1) This Regulation applies to carriage by road, ..., within the Community. This Regulation applies to carriage by road, ..., within the Community.

(2) The European Agreement concerning the Work of Crews of Vehicles engaged in International Road Transport (AETR) shall apply instead of the present rules to international road transport operations. The European Agreement concerning the Work of Crews of Vehicles engaged in International Road Transport (AETR) shall apply instead of the present rules to international road transport operations

– to and/or from third countries which are Contracting Parties to the Agreement, or in transit through such countries for the whole of the journey where such operations are carried out by vehicles registered in a Member State or in one of the said third countries;

to and/or from third countries which are Contracting Parties to the Agreement, or in transit through such countries for the whole of the journey where such operations are carried out by vehicles registered in a Member State or in one of the said third countries;

– to and/or from a third country which is not a Contracting Party to the Agreement in the case of any journey made within the Community where such operations are carried out by vehicles registered in one of those countries.

to and/or from a third country which is not a Contracting Party to the Agreement in the case of any journey made within the Community where such operations are carried out by vehicles registered in one of those countries. Article 8

(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. On days when the rest is not reduced in accordance with the first subparagraph, it may be taken in two or three separate periods during the 24-hour period, one of which must be of at least eight consecutive hours. In this case the minimum length of the rest shall be increased to 12 hours. 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. On days when the rest is not reduced in accordance with the first subparagraph, it may be taken in two or three separate periods during the 24-hour period, one of which must be of at least eight consecutive hours. In this case the minimum length of the rest shall be increased to 12 hours.

(2) During each period of 30 hours when a vehicle is manned by at least two drivers, each driver shall have a rest period of not less than eight consecutive hours. During each period of 30 hours when a vehicle is manned by at least two drivers, each driver shall have a rest period of not less than eight consecutive hours.

(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. This rest period may be reduced to a minimum of 36 consecutive hours if taken at the place where the vehicle is normally based or where the driver is based, or to a minimum of 24 consecutive hours if taken elsewhere. Each reduction shall be compensated by an equivalent rest taken en bloc before the end of the third week following the week in question. 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. This rest period may be reduced to a minimum of 36 consecutive hours if taken at the place where the vehicle is normally based or where the driver is based, or to a minimum of 24 consecutive hours if taken elsewhere. Each reduction shall be compensated by an equivalent rest taken en bloc before the end of the third week following the week in question.

(4) 2. The relevant rules of Regulation No 3820/85 provide:

B – AETR Agreement

3. The wording of Article 8 of the European Agreement concerning the Work of Crews of Vehicles engaged in International Road Transport (AETR) is identical to that of Article 8 of Regulation No 3820/85.

III – Facts

4. On 24 October 2000 Libor Cipra and Vlastimil Kvasnicka were together driving a heavy goods vehicle with Czech registration to the border point at Drasenhofen (Austria). Having checked the tachograph record sheets of the two drivers for the period from 22 to 24 October 2000, the police suspected that they had not complied with the daily rest periods prescribed in Article 8 of Regulation No 3820/85 and collected a provisional security of ATS 1 000 from each of them.

5. Analysis of the tachograph record sheets revealed that whilst both drivers, with a continuous rest period of 8 hours and 5 minutes over a period of 30 hours, had complied with the requirements of Article 8(2) of Regulation No 3820/85, they had not complied with the requirements of Article 8(1) of the Regulation.

6. By decisions of 9 January 2001, the Bezirkshauptmannschaft Mistelbach declared the provisional security forfeited. The drivers appealed to the Court making the reference, claiming that they had observed the statutory rest periods.

IV – The questions referred

7. The referring court considers it legally conceivable to apply Article 8(1) and (2) of Regulation No 3820/85 either cumulatively or alternatively to a situation where there are two drivers. In the court's view, in particular, the wording of the provisions and their schematic link with Articles 6 and 7, which regulate the daily rest periods and the maximum permissible driving periods, would favour cumulative interpretation.

8. Article 8(1) designates the addressee of the rule with the definite article the driver, whilst Article 8(2) designates the addressee with the numeral two. The preceding rules under Articles 6 and 7 preclude interpretation of the in the sense of one driver. All these provisions apply irrespective of the actual number of crew on the vehicle.

9. The referring court acknowledges, however, that if the spirit and purpose of Article 8(2) were to be to lessen the obligation in relation to rest periods where there is more than one driver, that could lead to both subparagraphs being interpreted in such a way that Article 8(2) is considered as a *lex specialis* in relation to Article 8(1).

10. Those doubts regarding the interpretation of Article 8 of Regulation No 3820/85 have caused the Verwaltungssenat to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Do drivers falling within the scope of Council Regulation (EEC) No 3820/85 of 20 December 1985 on the harmonisation of certain social legislation relating to road transport have to satisfy the requirements set out in Article 8(1) and (2) of that regulation cumulatively where there are two drivers or is Article 8(2) a special rule that prevails over Article 8(1)?

(2) Where there are two drivers falling within the scope of Council Regulation (EEC) No 3820/85 of 20 December 1985 on the harmonisation of certain social legislation relating to road transport, is Article 8(1) of that regulation, or are possibly Article 8(1) and (2), inapplicable because of incompatibility with superior Community law?

V – Arguments of the parties

A – The admissibility of the request for a preliminary ruling

11. The Austrian Government considers the request for a preliminary ruling to be inadmissible. It submits that according to the documents at its disposal, the heavy goods vehicle had been used in cross-border carriage between Austria and the Czech Republic. As a result this does not constitute carriage within the Community, so that Regulation No 3820/85 is not applicable to this case. In its view the AETR Agreement, which has been ratified by both States, is applicable in its place.

12. The Commission also considers the AETR Agreement rather than Regulation No 3820/85 to be applicable, although it expresses the view that the reference is admissible since the AETR Agreement is an international law agreement and can therefore be examined by the Court of Justice as an act of the institutions of the Community within the meaning of Article 234(b) EC. (3) According to Regulation No 3820/85 the subject-matter dealt with in the AETR falls within the scope of the regulation. The Commission therefore regards the Agreement as a constituent of Community law, interpretation of which falls within the jurisdiction of the Court of Justice.

13. In the view of the Swedish Government it is the responsibility of the national court to determine the applicable law.

B – The first question

14. On the first question referred, it is the view of all the parties submitting observations that Article 8(2) constitutes a *lex specialis* in relation to Article 8(1), with the consequence that Article 8(1) can no longer apply where the prerequisites of Article 8(2) are met.

15. It is the view of the French Government and the Commission, based on the wording and scheme of the provisions, that Article 8(1) is not applicable in the case of carriage involving more than one driver. Where Article 8(1) refers to the driver, this is not intended to refer to every driver, but simply the single driver. This provision is not applicable where the vehicle is manned by two drivers. Article 8(2) on the other hand presupposes that at least two drivers are present in the vehicle.

16. The Swedish Government also considers Article 8(2) to be a *lex specialis* in relation to Article 8(1). The inapplicability of Article 8(2) to a single driver follows from the wording of the subparagraph itself (when a vehicle is manned by at least two drivers).

17. The Swedish Government and the Commission further substantiate their view by pointing out that different periods are specified during which rest periods are to be taken, namely 24 hours and 30 hours respectively, thereby excluding the possibility of cumulative application of the two provisions.

18. The Netherlands and Swedish Governments and the Commission additionally submit that Article 8(2) would be absolutely meaningless if both rules had to be complied with cumulatively, since if the stricter provisions of Article 8(1) were adhered to, then those of Article 8(2) would be complied with at all times.

19. The Netherlands Government and the Commission further refer to the wording of Article 8(3), according to which one of the rest periods referred to in paragraphs 1 and 2 is to be taken. On that basis, they conclude that the two provisions cannot be applicable cumulatively.

20. The Netherlands and Austrian Governments and the Commission further point to the spirit and purpose of Article 8(2), which is to permit shorter rest periods when a vehicle is manned by two drivers. It may be concluded that the two provisions cannot be applied cumulatively, since otherwise longer breaks would have to be taken when a vehicle is manned by two drivers than when it is manned by one driver. As a result the haulage contractor would have no further incentive to use its vehicles over a longer continuous period, by employing driver crews, in order to transport goods more quickly. They point out that driver crews contribute to road safety, since the driver who is not driving at any particular time is able to rest during the trip. Increasing road safety is a fundamental concern of the regulation.

21. The Netherlands Government also refers to the proposed regulation on the harmonisation of certain social legislation relating to road transport, which is intended to replace Regulation No 3280/85. (4) Article 8(2) of the proposed regulation provides that a driver shall complete a new daily rest period not later than 24 hours after the end of the previous daily rest period or weekly rest period and subparagraph 4 states: *By way of derogation from paragraph 2*, within 30 hours after the end of a daily rest period, a driver engaged in multi-manning shall complete a new daily rest period (emphasis added). Article 8(4) is clearly identified in this ruling as an exception to subparagraph 2. The statement of grounds for the proposed regulation states that it is intended solely to clarify the rules currently in force.

C – The second question

22. In the light of their arguments concerning the first question, the French, Netherlands, Austrian and Swedish Governments and the Commission see no cause for concern that the provisions of Article 8(1) and (2) of the regulation fail to satisfy the requirements of legal certainty and legal clarity.

23. The French Government and the Council consider the judgment in the case of *Commission v Italy*, (5) cited by the referring court, to be irrelevant, since it relates to the national provisions governing implementation of a directive and not, as in this case, the provisions of a regulation.

24. The Council, which gives an express opinion only on the second question, but whose position on the first question is similar to that of the other parties submitting observations, argues that Articles 8(1) and (2) should be interpreted in the light of their purpose and context. The objective of Regulation No 3820/85 is road safety. Article 8(1) therefore lays down a general rule on the driver's rest over a 24-hour period, which may be reduced under specific conditions specified in the rule. Subparagraph 2 permits further reduction where the crew comprises at least two drivers. That teleological and schematic interpretation is confirmed by the wording of the provisions, so that the Council considers Article 8(1) and (2) to be sufficiently precise.

VI – Assessment

A – The admissibility of the request for a preliminary ruling

25. It is settled case-law that, in the context of the cooperation between the Court of Justice and the national courts required under Article 234 EC (formerly Article 177), it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling. (6)

26. The referring court clearly states that it considers an interpretation of Article 8 of Regulation No 3820/85 to be necessary for its decision as to whether the ordered forfeiture of the security provisionally paid by the two plaintiffs in the original proceedings is legal.

27. The Court may not decline to give a ruling on a question referred to it by a national court unless it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (7)

28. There may in fact be doubts in the case in question with respect to the applicability of Regulation No 3820/85 to the circumstances described by the referring court. It is highly questionable whether the act for which the fine was imposed was undertaken within the context of carriage within the Community within the meaning of Article 2 of the regulation.

29. It is evident from the reference and the opinions of the parties submitting observations that the act for which the fine was imposed was committed by two Czech drivers who were en route to the border point between Austria and the Czech Republic at Drasenhofen in a heavy goods vehicle with Czech registration plates. The decision to make a reference does not however include any details of the departure and destination points of the carriage operation. If therefore this was a carriage operation from or to the Czech Republic, as is suggested by the fact that the vehicle was checked at the border, then it is doubtful, in view of the fact that the Czech Republic is not yet a Member State of the Community, to what extent this can be considered to be carriage within the Community. As the Swedish Government correctly points out, however, it is the duty of the referring court to clarify the question of the applicability of Regulation No 3820/85 to the circumstances on which it is required to give a judgment.

30. The doubts regarding the applicability of Regulation No 3820/85 do not therefore justify the assumption that the interpretation of Community law which the referring court is requesting obviously bears no relation to the actual facts of the main action or its purpose, or that the problem is hypothetical. Should the referring court conclude, applying Article 2 of the regulation, that this is not carriage within the Community but rather cross-border carriage, so that as a result Article 2(2) of the provisions of the AETR Agreement are applicable, then we are confronted with precisely the same question of interpretation that would arise if the regulation were applicable, due to the identical wording of the provisions in question.

31. The Court of Justice also has jurisdiction to interpret the provisions of the AETR Agreement, even though the Community was not a signatory of the Agreement and the Commission's reference to the judgment in *Kupferberg* does not appear capable of justifying the jurisdiction of the Court. That case concerned a free trade agreement concluded by the Community. (8)

32. The Commission's argument that the AETR Agreement has become part of Community law also seems contrived. The Court of Justice has made such a finding only in relation to agreements which have been ratified by the Community, (9) which specifically does not apply in the case of the AETR Agreement.

33. The Court of Justice has however accepted that it has jurisdiction to interpret rules in international law agreements which have not been ratified by the Community if and in so far as the Community has accepted the powers formerly exercised by the Member States within the sphere of application of such agreement, under the terms of the EC Treaty, so that it is bound by the provisions of such an agreement. (10)

34. The Community implemented the AETR in Community law by Council Regulation (EEC) No 2829/77 of 12 December 1977. (11) As is evident from the fourth recital of that regulation, since the subject-matter of the AETR Agreement falls within the scope of Regulation (EEC) No 543/69, (12) from the date of entry into force of that regulation the power to negotiate and conclude the Agreement has lain with the Community. The particular circumstances in which the AETR negotiations took place warranted, by way of exception, a procedure whereby the Member States of the Community individually deposited the instruments of ratification or accession in a concerted action but none the less acted in the interest and on behalf of the Community. The negotiations in relation to the AETR were characterised by the fact that the timing of their instigation and of a considerable proportion of the work involved by the United Nations Economic Commission for Europe was prior to the transfer of competence to the Community which was brought about by Regulation No 543/69. (13) The seventh recital of Regulation No 3820/85 also refers to those particular circumstances.

35. The previous paragraph demonstrates that since the adoption of Regulation No 543/69, under the terms of the EC Treaty the Community now discharges the powers formerly exercised by the Member States in those matters regulated under the AETR Agreement, as a result of which the Court of Justice has jurisdiction under the cited case-law to interpret the AETR Agreement.

36. The request for a preliminary ruling is therefore admissible.

B – The first question

37. By its first question, the referring court essentially asks whether the conditions concerning the rest periods to be complied with set out in Article 8(1) and (2) of Regulation No 3820/85 have to be satisfied cumulatively in the event of carriage involving two drivers, or whether Article 8(2) constitutes a *lex specialis* in relation to Article 8(1).

38. According to the wording of Article 8(1) the driver is obliged to adhere to a daily rest period of at least 11 hours. Article 8(2) applies only where a vehicle is manned by at least two drivers. Viewed in isolation and purely on the basis of its wording, the wording of Article 8(2) does not exclude the possibility of applying the term the driver in Article 8(1) to all drivers falling within the scope of Article 8(2). The different number of drivers indicates however that the two subparagraphs regulate different circumstances and cannot therefore be applied cumulatively. Article 8(2) talks of the vehicle being manned by two drivers. The driver alternates in that case, so that only one of them can be driving whilst the other is a passenger and does not need to concentrate on the traffic as the driver does. Article 8(1), however, applies to a single driver in the heavy goods vehicle, who accordingly remains the driver of the vehicle at all times.

39. An analysis of the content of the rules laid down in these subparagraphs supports the view that the provisions should not be applied cumulatively. On the one hand the two subparagraphs are based on periods of differing lengths during which breaks are to be taken. Article 8(1) mentions a period of 24 hours, whilst Article 8(2) calculates the rest period within a 30-hour period. On the other hand, the length of the rest period in each case differs. Article 8(1) requires a rest period of 11 hours within a 24-hour period, whilst a rest period of 8 hours within a 30-hour period suffices under Article 8(2). The ordering of the reduced rest period in Article 8(2) in relation to that in Article 8(1) only makes sense if the provision under Article 8(1) is inapplicable where the vehicle is manned by at least two drivers. For,

if a rest period of at least 11 hours within a 24-hour period is taken, then logic dictates that this period always includes a rest period of 8 hours within a 30-hour period.

40. The Commission points out that the reasoning behind this rule is the fact that road safety is better guaranteed if a vehicle is manned by several drivers. The minimum rest period can be reduced accordingly. This benefits the haulage company in that it is able to offset the additional financial burden imposed through the use of several drivers by the fact that its vehicle can remain on the road for longer periods. The purpose of that provision in Article 8(2) would be thwarted if the legality of transport involving at least two drivers in the vehicle were to be made subject to compliance with the requirements of Article 8(1).

41. The interpretation based on the wording and spirit of the rules is confirmed by the rule contained in Article 8(3), which provides that, in the course of each week, one of the rest periods referred to in paragraphs 1 and 2 must be extended to 45 hours. That confirms that Article 8(1) and (2) are applicable alternatively and not cumulatively.

42. The answer to the first question must therefore be that within the scope of Council Regulation No 3820/85 of 20 December 1985 on the harmonisation of certain social legislation relating to road transport, where a vehicle is manned by two drivers, the drivers are required only to fulfil the requirements of Article 8(2), which takes precedence over Article 8(1) as a *lex specialis* in relation to that provision.

C – The second question

43. In its second question, the referring court wishes to know whether the doubts relating to the interpretation of Article 8(1) and (2) result in the rules being void on the ground that they fail to comply with the requirement of legal certainty and precision.

44. According to case-law, the principle of legal certainty demands that every measure adopted by the competent bodies of the Community which have legal effect must be clear and precise, and must be brought to the knowledge of the person affected in such a way that he is able to know without ambiguity the point in time from which the measure concerned applies and from which its legal effects commence. [\(14\)](#) That case-law also applies to regulations. [\(15\)](#)

45. During examination of the first question the relationship between the two rules was clarified by applying traditional methods of legal interpretation. The fact that Article 8(2) constitutes a *lex specialis* in relation to Article 8(1), and that only the requirements of Article 8(2) have to be complied with where a vehicle is manned by two drivers, was derived from their wording, their schematic link with Article 8(3) and their spirit and purpose. The various methods of interpretation applied all led to the same conclusion. I cannot therefore conclude that this rule is of uncertain interpretation or insufficiently precise.

46. The answer to the second question must therefore be that examination of Article 8(1) and (2) of Regulation No 3820/85 has disclosed no factors of such a kind as to impair their validity.

VII – Conclusion

47. On the basis of the foregoing, I propose that the answers to the questions referred should be as follows:

(1) Within the scope of Council Regulation (EEC) No 3820/85 of 20 December 1985 on the harmonisation of certain social legislation relating to road transport, where a vehicle is manned by two drivers, those drivers are required only to meet the prerequisites of Article 8(2), which constitutes a *lex specialis* in relation to Article 8(1).

(2) Examination of Article 8(1) and (2) of Council Regulation No 3820/85 of 20 December 1985 on the harmonisation of certain social legislation relating to road transport has disclosed no factors of such a kind as to impair the validity of those provisions.

[1](#) – Original language: German.

[2](#) – OJ 1985 L 370, p. 1.

[3](#) – The Commission refers in this context to the judgment of 26 October 1982 in Case 104/81 *Kupferberg* [1982] ECR 3641, paragraph 14.

[4](#) – COM (2001) 573 final of 12 October 2001, OJ 2002 C 51 E, p. 234.

[5](#) – Case C-159/99 [2002] ECR I-4007, paragraph 32.

[6](#) – Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; Joines Cases C-223/99 and C-260/99 *Agorà and Excelsior* [2001] ECR I-3605, paragraph 18.

[7](#) – *Bosman*, paragraph 61; *Agorà*, paragraph 20.

[8](#) – *Kupferberg*, paragraph 12.

[9](#) – Case 181/73 *Haegeman* [1974] ECR 449, paragraphs 2 to 6; Case T-115/94 *Opel Austria v Council* [1997] ECR II-39, paragraph 101.

[10](#) – Joined Cases 21/72, 22/72, 23/72 and 24/72 *International Fruit Company and Others* [1972] ECR 1219, paragraph 18; Case C-372/92 *Peralta* [1994] ECR I-3453, paragraph 16.

[11](#) – Council Regulation (EEC) No 2829/77 of 12 December 1977 on the bringing into force of the European Agreement concerning the work of crews of vehicles engaged in international road transport (AETR) (OJ 1977 L 334, p. 11).

© European Communities, <http://eur-lex.europa.eu/>. Only European Union legislation printed in the paper edition of the *Official Journal of the European Union* is deemed authentic

[12](#) – Council Regulation (EEC) No 543/69 of 25 March 1969 on the harmonisation of certain social legislation relating to road transport (OJ, English Special Edition 1969 (I), p. 170).

[13](#) – See the observations in Case 22/70 *Commission v Council* [1971] ECR 263, paragraphs 81 to 90.

[14](#) – Case 169/80 *Gondrand Frères and Garancini* [1981] ECR 1931, paragraph 17; Case 70/83 *Kloppenborg* [1984] ECR 1075, paragraph 11; Case 325/85 *Ireland v Commission* [1987] ECR 5041, paragraph 18; and Joined Cases T-18/89 and T-24/89 *Tagaras v Court of Justice* [1991] ECR II-53, paragraph 40.

[15](#) – Case T-115/94 *Opel Austria v Council* [1997] ECR II-39, paragraph 124.