

thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade, in such a way as to provide a particular advantage for national production or for the domestic market of the State in question.

This is clearly not the case with rules which are part of economic and social policy and apply by virtue of objective criteria to all the undertakings in a particular industry which are established within the national territory,

without leading to any difference in treatment whatsoever on the ground of the nationality of traders and without distinguishing between the domestic trade of the State in question and the export trade.

3. Articles 30 and 34 of the EEC Treaty do not apply to national rules which prohibit the production of ordinary and fine baker's wares and also their transport and delivery to individual consumers and retail outlets during the night up to a certain hour.

In Case 155/80

REFERENCE to the Court under Article 177 of the EEC Treaty by the Amtsgericht [Local Court] Wiesbaden for a preliminary ruling in summary proceedings pending before that court against

SERGIUS OEBEL,

on the interpretation of Articles 7, 30 and 34 of the EEC Treaty,

THE COURT

composed of: J. Mertens de Wilmars, President, Lord Mackenzie Stuart and T. Koopmans (Presidents of Chambers), A. O'Keefe, G. Bosco, A. Touffait, O. Due, U. Everling and A. Chloros, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. In the main proceedings concerning a contravention (“Ordnungswidrigkeit”) Sergius Oebel, a business manager, is charged with infringing Article 5 of the Law on working hours in bakeries (Gesetz über die Arbeitszeit in Bäckereien und Konditoreien). The defendant is alleged to have permitted 15 workers to be engaged in the production of baker’s wares at about 2.00 a.m. on 21 July 1978 on the business premises of the undertaking Bockenheimer Brot GmbH in Wiesbaden.

Article 5 of the Law on working hours in bakeries in the version of 23 July 1969 (Bundesgesetzblatt I, p. 937), is worded as follows:

“Article 5

Prohibition of baking and delivering at night

1. On working days no person shall be permitted to work on premises used for the making of ordinary or fine bakers’ wares at the following times of night:

- (1) Mondays to Fridays between midnight and 4 a.m. and between 10 p.m. and midnight;
- (2) On Saturdays between 10 p.m. and midnight.

2. Notwithstanding paragraph 1 (1) above it shall be permissible to work

on one of those working days between midnight and 4 a.m. if instead no work is done on Saturday between midnight and 4 a.m. and such arrangement, specifying the working day in question, is notified in writing to the competent authority under regional law. This working day may be changed for another after one calendar year at the earliest in each case; as regards notification the first sentence of this paragraph shall apply accordingly.

3. If a statutory holiday falls on a working day, notwithstanding paragraph 1 (1) above it shall be permissible to work on the working day prior or subsequent to the statutory holiday between midnight and 4 a.m. An employer wishing to work on the working day subsequent to the statutory holiday must give at least one month’s written notification to the competent authority under regional law.

4. Notwithstanding paragraph 1 above, on the days when work is permitted from 4 a.m. preliminary work may be commenced from 3 a.m. by one person over 18 years of age in undertakings having up to 10 persons directly engaged in production, by two persons over 18 years of age in undertakings having up to 20 persons directly engaged in production, and by three persons over 18 years of age in undertakings having more than 20 persons directly engaged in production. Preliminary work is that work upon which, owing to the nature of the work, the resumption of full production after 4 a.m. is dependent. Preliminary work shall also include preparation of the dough.

5. Between the hours of 10 p.m. and 5.45 a.m. it shall not be permitted for any person to sell, take out or deliver ordinary or fine baker's wares to consumers or retail shops. This provision shall be without prejudice to the provisions on sales in retail outlets contained in the Gesetz über Ladenschluß [Law on the closing of shops] of 20 November 1956 (Bundesgesetzblatt I, p. 875), as last amended by the Einführungsgesetz zum Gesetz über Ordnungswidrigkeiten [Law on the introduction of the law on contraventions] of 24 May 1968 (Bundesgesetzblatt I, p. 503)."

In the belief that the above Article 5 of the Law on working hours in bakeries and confectionery shops might be incompatible with Articles 7, 30 and 34 of the EEC Treaty because it creates distortion in competition within the Community owing to the fact that the Federal Republic of Germany is the only Member State of the Community which maintains the prohibition on nightwork in the sector under consideration, and as that law in practice excludes the delivery of fresh products in other Member States adjacent to Germany in time for them to be sold early in the morning, the Amtsgericht Wiesbaden stayed the proceedings and referred the following questions to the Court of Justice pursuant to Article 177 of the EEC Treaty:

- "1. Must Article 7 of the EEC Treaty be interpreted as meaning that there is a breach of the prohibition of discrimination if by means of a statutory provision a Member State of the Community creates a situation which considerably impairs the competitiveness of its own nationals in relation to comparable nationals of other Member States?
2. Must Articles 30 and 34 of the EEC Treaty be interpreted as meaning that the effects of Article 5 of the Gesetz über die Arbeitszeit in Bäcker-

reien [Law on working hours in bakeries] in regard to the export and import of fresh baker's wares are to be regarded as measures equivalent to quantitative restrictions on imports or quantitative restrictions on exports?"

2. The order for reference was registered at the Court Registry on 2 July 1980.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by Sergius Oebel, represented for that purpose by Gleiss, Lutz, Hootz, Hirsch and Associates of the Stuttgart Bar, by the German Government represented by Martin Seidel, Ministerialrat at the Federal Ministry for Economic Affairs, and Arved Deringer, of the Cologne Bar, by the French Government, represented by Thierry Le Roy acting in the name of the Secretary-General of the Comité Interministériel pour les Questions de Coopération Économique Européenne [Inter-departmental Committee on Matters of European Economic Cooperation] and by the Commission of the European Communities, represented by its Legal Adviser, Rolf Wägenbaur.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations

The facts and the role of the German legislation

(a) The defendant in the main proceedings, *Sergius Oebel*, first of all points out that the prohibition on nightwork applies only to commercial bakeries and does not exist in the other countries of the Community.

According to Mr Oebel, who submits in furtherance of his argument an ergonomic report by an expert, an industrial doctor, the rules in question, contrary to the grounds given by the German legislature, are not justified by the protection of the health of the workers employed in the bakery industry for the following reasons:

The prohibition on nightwork compels work to be done at a time of day which is unsuitable from the physiological point of view. The health needs of workers in the bread industry would in fact be better served by regular work at night than by this prohibition which makes it necessary for them to get up between 2 and 3 o'clock and to travel at night to their place of work in order to start work at 4 o'clock. Furthermore, from the point of view of industrial medicine, there is no reason to impose more stringent requirements, as regards prohibiting nightwork, in the case of workers in the bread industry than in the case of those in other industrial sectors.

As regards the practical effects of the legislation in question, Mr Oebel argues by means of examples and statistical data that the prohibition on nightwork hampers German manufacturers of bakery products and puts them at a disadvantage compared to all their European competitors.

As regards fresh bakery products, the effect of the German legislation is, first, to cut down exports to other countries of the Community, especially in the border areas. Mr Oebel here makes the point that, faced with the consumer's desire to have fresh produce in the morning, a retailer is compelled to require deliveries between 6 and 7.30 a.m. and to choose his suppliers accordingly. Secondly, owing to the existence of the prohibition

on nightwork, German bakeries are subject to pressure from imports on to the domestic market which make the production of many fresh products, such as baguettes, croissants and fresh white bread, uncompetitive to the point where the manufacture of those products ceases.

As regards less perishable bakery products, the prohibition on nightwork also leads to obstacles to exports. Under the German rules less perishable bakery products escape the prohibition on nightwork only in fact when they are made on premises used solely for the purpose of making such products, whereas large-scale German bakeries generally make fresh bakery products and less perishable bakery products on the same premises. As a result, even in the case of less perishable bakery products, the majority of German manufacturers are not or are barely competitive on the national markets of their foreign competitors.

That distortion of competition is even more marked by the fact that the prohibition on nightwork prevents the makers of German bakery products from arranging their work in three shifts and thereby rules out the optimal, and even a merely economically rational, use of their production plant. As a result, the level of production of German manufacturers must necessarily remain lower than that of foreign competitors who may keep their plant in production without interruption for three shifts thereby achieving a higher level of productivity and utilization of plant and thus lower production costs and selling prices.

In support of his case, Mr Oebel draws attention to two decisions of the Bundesverfassungsgericht [Federal Constitutional Court] of 23 January 1968 and 25 February 1976 which, while conclud-

ing that the rules in question are, in the circumstances, compatible with the German Basic Law, nevertheless acknowledged, in the later decision, that owing to the prohibition on nightwork "some undertakings in border areas will perhaps be in a difficult competitive position".

The *German Government* retraces the history of the legislation in issue and states that the purpose of the legislation is primarily to protect workers in the bread and pastry industry against permanent work at night likely to harm their health. Ergonomic studies have apparently shown that the period between midnight and 3 a.m. (nocturnal energy decline) is particularly unfavourable for working, and that the performance of work during that period is more demanding and takes a great toll on a person's reserves of energy. Similarly, working between 8 p.m. and 3 a.m. is more demanding and involves more risk than working only from about 4 a.m. The prohibition on nightwork in bakeries should consequently be viewed as a preventive measure against health risks which is a step towards a wider humanization of work.

The prohibition on working at night is further designed to afford equal conditions of competition and helps to protect medium and small-scale businesses; without it the existence of many small, family businesses might be jeopardized by competition from bread factories which could use their production plant without interruption and could thereby produce their products at a much lower cost than small, family businesses working one shift a day. Thus the maintenance, in large undertakings, too, of the prohibition on nightwork indirectly helps to protect workers in small businesses.

Like Mr Oebel, the German Government draws attention to the two decisions of the Bundesverfassungsgericht of 23 January 1968 and 25 February 1976. In those decisions the Bundesverfassungsgericht admittedly described the prohibition on nightwork in bakeries as a serious curtailment of occupational freedom and of the scope for the economic development of large bakeries and undertakings in the bread and pastry industry but it nevertheless held, in particular on grounds of social policy, that such regulation of the pursuance of an occupation may be justified by overriding grounds of public interest. The Bundesverfassungsgericht held that the German legislature has the right to maintain the prohibition even in respect of undertakings in which the objective of social policy might be achieved by less drastic means, for example, by compulsory changes of shifts, arguing that those undertakings would otherwise obtain a considerable competitive advantage over small and medium-sized bakeries.

The German Government also stresses that, contrary to the impression of the court making the reference, rules similar or analogous to those in issue exist in all the other Member States of the Community, except in Denmark and the Netherlands. At the international level, the idea of protecting persons employed in businesses making bread and pastries is expressed in Convention No 20 of the International Labour Organization at Geneva concerning nightwork in bakeries.

(b) The *Commission of the European Communities* in substance states that the German law in question, whilst regarded

as a "cornerstone of social protection" in the occupation concerned, is highly controversial in the Federal Republic of Germany. The views of industry and of small bakery businesses clash over it.

The compatibility of the German legislation with Community law

1. Interpretation of Article 7 of the EEC Treaty

(a) Mr *Oebel* lays importance on the interpretation to be given to Articles 30 and 34 of the EEC Treaty. As regards the question whether Article 7 of the EEC Treaty must be construed to mean that the prohibition on nightwork and the prohibition on delivering at night contravenes the rule which it lays down, he leaves that to the Court to decide.

(b) The *German Government* contends that neither the prohibition on nightwork nor the prohibition on delivering at night constitutes discrimination on grounds of nationality within the meaning of Article 7 of the EEC Treaty. Although the Court of Justice has admittedly decided in some cases that even measures appearing to be neutral and applying equally to nationals of a State and those of other Member States may constitute unlawful discrimination under Article 7 of the EEC Treaty — if they produce different effects according to different factual circumstances — that applies only to discrimination against nationals of other Member States on the ground of their nationality. On the other hand, according to the Court's case-law, there is no discrimination if national rules place the nationals of the Member State under consideration at a disadvantage in relation to those of other Member States,

provided that they are applied uniformly to all the nationals of that Member State and that they apply to products marketed domestically and exported products alike.

The German Government consequently proposes the following answer to the first question put by the court making the reference:

"There is no breach of the prohibition on discrimination contained in Article 7 of the EEC Treaty if a Member State of the Community by a legal provision creates a situation which to a considerable extent affects the competitiveness of its own nationals compared to the nationals of other Member States in the same occupation".

(c) The *French Government* states that Article 7 of the Treaty cannot be usefully invoked in the action brought before the court which has made the reference. The object of that provision is to specify national treatment for all the nationals of the Member States of the Community who enjoy freedom of movement or of establishment. But that rule of non-discrimination is operative only within the territory of each Member State taken separately. It does not however mean that a German or French undertaking established in the Federal Republic of Germany may allege discrimination on the ground that the German legislation proves to be more stringent for it and more favourable to workers than legislation of other Member States in the sector under consideration. In any event it is not certain whether the principle of non-discrimination may be invoked by the nationals of the Member States themselves; that is a question which does not appear to have been resolved by the case-law of the Court of Justice.

Besides, cases of distortion in conditions of competition owing to disparities found to exist between national laws cannot be resolved by the mere direct application of Article 7 but come under the harmonization procedures provided for this purpose by Article 101.

What is more, in the sphere of social policy, including the regulation of working hours, such harmonization is subject to special principles and rules. For example, the preamble to the Treaty envisages "the constant improvement of the living and working conditions" of the peoples of the Member States (third recital), and Article 117 states that "Member States agree upon the need 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". Article 118 expressly includes the regulation of working conditions among the fields in which cooperation between Member States should be promoted (see the Council's resolution of 18 December 1979 on the adaptation of working hours). In the opinion of the French Government, the German legislation in question, far from offending against the principles and rules of the Treaty, on the contrary helps to achieve the very objectives of the Treaty.

(d) In the opinion of the *Commission of the European Communities* the German rules in question do not offend against the prohibition on discrimination enunciated in Article 7 of the EEC Treaty. They are objective in character and in particular not related to the nationality of the occupational groups concerned. In the absence of Community legislation in this field Member States are free to

adopt national provisions on condition that they must not be contrary to the mandatory provisions of the Treaty. There is therefore no breach of the prohibition on discrimination as a result of a Member State's using its right to subject a precise situation to objective rules. Nor is there any breach of that prohibition as a result of national rules' having a different content from that of rules applying in the other Member States, even if some distortion of competition necessarily arises from them. Where difficulties occur it is more appropriate to ask whether harmonization is needed. According to the case-law of the court, in particular in its judgment of 30 November 1978 (Case 31/78 *Bussone* [1978] ECR 2429), Article 7 of the EEC Treaty does not concern "national rules which are not applicable on the basis of the nationality of the traders concerned and which take into consideration solely the location of the commercial activities".

The Commission consequently proposes that the answer to the first question should be that Article 7 of the EEC Treaty must be construed to mean that there is no infringement of that provision where a Member State adopts on its territory generally binding rules on working hours in respect of the manufacture and distribution of bread and pastry products.

2. Interpretation of Articles 30 and 34 of the EEC Treaty

(a) *Mr Oebel* believes that both the prohibition on nightwork and the prohibition on delivering at night — the latter at least to the extent to which it is

taken to mean that bread products may not be delivered to customers or to retail shops before 5.45 a.m. — constitute measures having an effect equivalent to a quantitative restriction prohibited by Article 34 of the EEC Treaty as they meet the double criterion defined by the case-law of the Court of Justice, namely that they represent measures emanating from the State and are likely to impede trade.

It is solely owing to those national rules, applying at the production stage, that German manufacturers of bakery products cannot export their products or can do so only to a limited extent. The definition of a measure having an equivalent effect given by the Court covers all national measures which act as an obstacle to trade. It therefore also covers rules applying at the production stage. That was moreover expressly confirmed in the judgment of 30 October 1974 (Case 190/73 *van Haaster* [1974] ECR 1123) in which the Court declared that a national measure restricting production affects "or is at any rate capable of affecting" trade and must therefore be considered a measure having an equivalent effect.

The judgment of the Court of 8 November 1979 (Case 15/79 *Groenveld* [1979] ECR 3409) does not conflict with that evaluation as it concerns only the rare and exceptional case of a very wide prohibition on production, different from that in this case. The present case is not one of a general prohibition on the manufacture of a given product but on the export of a product widely available on the national market, which is rendered impossible in practice.

Neither the prohibition on nightwork nor that on delivering at night can be

justified by Article 36 of the EEC Treaty; that provision is an exception clause, to be interpreted restrictively, which permits derogations from the basic rules of Articles 30 and 34 of the EEC Treaty only on certain well-defined conditions. Under well-established case-law of the Court restrictions derogating from the basic principle of the free movement of goods are however compatible with the Treaty only to the extent to which they are justified, that is to say to the extent to which they are needed in particular, in order to guarantee the protection of health and life of humans. The exception contained in Article 36 of the EEC Treaty does not operate however if the health of humans may be protected just as effectively by measures less restrictive to intra-Community trade.

Furthermore, under the Court's case-law, aims of economic policy cannot justify an obstacle to trade between Member States.

Finally, there is, again according to the case-law of the Court, a presumption that a measure is not necessary to protect the legal values set forth in Article 36 when, as in this case, no comparable rules exist in the other Member States. That may be inferred from the fundamental considerations which the Court enunciated in the "Cassis de Dijon" and "meat preparations" judgments (Cases 120/78 [1979] ECR 649 and 153/78 [1979] ECR 2555).

According to those principles the prohibition in issue on nightwork cannot be justified on the basis of Article 36 of

the EEC Treaty. It emerges from the ergonomic report placed on the file that the prohibition is not of a kind such as to protect the health of the workers engaged in the bakery sector. Work in bakeries is to be regarded as easy and moderately arduous so that from the point of view of industrial medicine and ergonomics there is no justification for subjecting workers in this sector to special rules. On the other hand, effective protection of workers' health might be better achieved by means of a regular rotating night shift.

In any event, even if the regulations in issue may be considered appropriate and necessary means for the protection of the health of workers in small bakeries, that argument does not justify their application to all workers in general, including those engaged in undertakings capable of working in shifts. Extension of the rule in that way offends against the principles of necessity and proportionality recognized in a well-established body of case-law of the Court. There is also a breach of the general principle of equality, a fundamental principle of Community law, as the equal treatment on an abstract and formal basis of all bakery businesses amounts to material discrimination against undertakings capable of working by shifts and thus produces distortion in the competitiveness of large-scale commercial bakeries.

(b) The *German Government* believes that neither the prohibition on nightwork nor the prohibition on delivery at night constitutes an obstacle to imports within the meaning of Article 30 of the EEC Treaty.

The prohibition on nightwork does not hinder imports since it applies only to bakeries established on the territory of the Federal Republic of Germany.

As regards the prohibition on delivery, the German Government distinguishes

between less perishable products and breads and pastries ordinarily consumed at breakfast. In the case of less perishable products there is no obstacle to importation because they do not necessarily have to be delivered to their destination on the same night. On the other hand, in the case of breads and pastries ordinarily consumed at breakfast, a baker established in one of the Member States in which the prohibition on delivery does not exist or is less stringent is not placed by German law in a less favourable situation than German bakers since the legislation in question allows him, as well as German bakers, to deliver his bread and confectionery products in the Federal Republic of Germany and to transport them for delivery to consumers or to retailers from 5.45 a. m.

According to the German Government the prohibition on nightwork and on delivery at night does not constitute an obstacle to exports within the meaning of Article 34 of the EEC Treaty either.

As far as control at the production level is concerned, German bakeries can manufacture products in sufficient quantity and quality for export during the periods of production. Less perishable products do not require work during the night hours immediately preceding the day of sale but may be made at times other than those covered by the prohibition on nightwork. So the prohibition on producing bread at night affects costs at most to the extent to which competing businesses in the other Member States are able to utilize their modern, capital-intensive plant 24 hours a day without interruption, which bakeries in the Federal Republic of Germany cannot do. As regards breads and pastries ordinarily consumed at breakfast — which, as they soon become stale and consequently cannot be kept for long, have to be made a relatively short time before consumption — the German

Government points out that the times fixed for the start of production (4 a.m.) and for preparatory work (3 a.m.) enable the businesses concerned to make fresh products in time and in sufficient quantities.

As far as the prohibition on delivery is concerned, it does not constitute an obstacle to exports within the meaning of Article 34 because, first, less perishable products are not delivered "oven-fresh" anyway, and, secondly, because breads and pastries consumed at breakfast which the consumer wishes to have "oven-fresh" on his table can for that reason only be delivered short distances in any case. However, even on the assumption that the prohibition on delivery at night prevents German bakeries in the areas bordering neighbouring States from competing with bakeries in those countries, that situation does not come under the prohibition contained in Article 34 which, according to the judgment of the Court of Justice of 8 November 1979 (Case 15/79 *Groenveld* [1979] ECR 3409), concerns only "national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade ... at the expense of the production or of the trade of other Member States". It follows therefrom that Article 34 is not directed against export restrictions which put nationals only at a disadvantage.

The German Government adds that the rules in issue are in any event justified by overriding grounds of social and health policy as they are calculated to protect the health of bakers working in small, family bakeries. They are necessary and proportionate to the intended aim, to the extent, too, that they apply to bread and pastry factories, since without them those

factories would receive a marked competitive advantage over small, family bakeries. Under such circumstances observance of the prohibition on night-work would no longer be guaranteed in small, family bakeries because the increasing pressure of competition would compel those small bakeries to work more at night.

Finally, it must be borne in mind that the prohibition on nightwork and on delivery is of disadvantage at most to a limited number of bakeries in competition with bakeries located in the border areas of neighbouring Member States, whereas its abolition would leave unprotected some 200 000 persons employed in some 30 000 family businesses producing bread and pastries in the Federal Republic of Germany.

The German Government consequently proposes the following reply to the second question referred to the Court:

"The effects of Article 5 of the German Law on working hours in bakeries as regards the export and import of freshly-baked products are not to be regarded as measures equivalent to a quantitative restriction on imports or exports within the meaning of Articles 30 and 34 of the EEC Treaty".

(c) According to the *French Government*, Article 30 of the EEC Treaty clearly cannot be invoked as, even in the situation which the German undertakings concerned claim to be in, the legislation in question would have the effect of helping and not restricting imports, especially in the border regions.

Article 34 cannot be invoked either because the very concept of measures hav-

ing an effect equivalent to a quantitative restriction cannot in any event encompass legislative provisions on conditions of production and work since they are not measures but a situation arising from the disparity between national laws which, moreover, have only a very diffuse and indirect effect on intra-Community trade. That kind of situation comes under the harmonization of laws on the conditions laid down by the chapters of the Treaty devoted to social policy. The rules on the free movement of goods cannot have the effect of directly or indirectly jeopardizing the attainment of the social objectives of the Treaty which would be the case if rules on work protecting employees could be declared inapplicable by virtue of the provisions of Article 30 et seq. of the Treaty.

(d) The *Commission of the European Communities* also believes that rules such as those contained in the German law in question do not offend against Articles 30 and 34 of the EEC Treaty.

As regards Article 30, the Commission observes that, far from constituting an obstacle to imports, the prohibition on nightwork as such may even promote them.

However, it is possible to ask whether the rules in question might not have effects equivalent to a quantitative restriction on imports where distribution is concerned. The prohibition on transporting bread and pastries at night between 10 p.m. and 5.45 a.m. constitutes an

obstacle not only to the marketing of domestic produce, but also to the importation of produce from other Member States of the EEC. The prohibition on passing the frontier before 5.45 a.m. might have the effect of limiting the sphere of activity of foreign bakeries in the Federal Republic of Germany. However, it must always be borne in mind that in the last resort any control of working hours restricts or is likely to restrict economic activity. As the Commission contended in its Directive 70/50 of 22 December 1969 (Official Journal, English Special Edition 1970 (I), p. 17), measures applying equally to domestic and imported products are to be regarded as measures having equivalent effect only if they "may have a restrictive effect on the free movement of goods over and above that which is intrinsic to such rules" (ninth recital). In the present case the rules on working hours as regards the delivery of certain products, which apply equally to domestic and imported products alike, do not have an effect exceeding that which is "intrinsic" to such rules.

As regards the interpretation of Article 34, the Commission points out that the rules on working hours contained in the German legislation have effects similar to those of rules on production since products which must be sold as soon as possible after emerging from the oven can be sold early in the morning only if it was possible to make them the night before. The Commission however concludes, on the basis of the judgment of 8 November 1979 cited above, that the legislation in question is not to be regarded as incompatible with Article 34 because it is objective in character and does not have the object or the effect of specifically restricting patterns of exports and does not establish any difference in

treatment between the domestic trade of a Member State and its export trade.

In view of the conclusions which it reached from its construction of Articles 30 and 34 the Commission does not consider it necessary to embark upon an examination of factors which may possibly afford justification under Article 36 of the EEC Treaty. It does, however, reserve the right to do so at a later stage of the proceedings on the basis of the observations to be presented by the German Government to justify the legislation in question.

To sum up, the Commission proposes that the Court should answer the second question put by the court making the reference in the same way as the first:

“Articles ... 30 and 34 of the EEC Treaty must be construed to mean that

there is no infringement of those provisions where a Member State adopts on its territory generally binding rules on working hours in respect of the manufacture and distribution of bread and pastry products”.

III — Oral procedure

Mr Oebel, the accused in the main proceedings, represented by Rainer Bechtold and Christoph Moench, Rechtsanwälte of Stuttgart, the German Government, represented by Arved Deringer, Rechtsanwalt of Cologne, and the Commission, represented by its Legal Adviser, Rolf Wägenbaur, presented oral argument and replied to questions put by the Court at the sitting on 18 March 1981.

The Advocate General delivered his opinion at the sitting on 27 May 1981.

Decision

- 1 By an order of 22 April 1980, which was received at the Court on 2 July 1980, the Amtsgericht [Local Court] Wiesbaden referred to the Court under Article 177 of the EEC Treaty two questions for a preliminary ruling concerning the interpretation of Articles 7, 30 and 34 of the Treaty, in order to determine the conformity with Community law of national rules on night-work in bakeries.
- 2 These questions were raised in the course of a prosecution for a contravention of Article 5 of the German Law on working hours in bakeries (Gesetz über die Arbeitszeit in Bäckereien und Konditoreien), as amended on 23 July 1969.
- 3 Article 5 (1) of the above-mentioned Law provides in substance that on working days, subject to certain exceptions, no person shall be permitted to work on the making of ordinary or fine baker's wares at night between the hours of 10 p.m. and 4 a.m. Article 5 (5) prohibits the transport of ordinary

or fine baker's wares for delivery to consumers or retail outlets between the hours of 10 p.m. and 5.45 a.m. According to the German Government, that prohibition does not affect transport and delivery to wholesalers, intermediaries such as bread salesmen, distributors of ordinary and fine baker's wares or to warehouses belonging to the undertaking.

- 4 According to the observations of the parties to the case, and in particular those of the German Government, the legislation in issue is designed mainly to protect workers in small and medium-sized bakeries, which do not have enough staff to be able to arrange work in shifts, against permanent night-work likely to damage their health. The purpose of extending the prohibition to the large undertakings in the industry which are able to organize work in shifts is to protect the small family businesses against commercial competition.

- 5 Believing that this legislation might be incompatible with Community law inasmuch as it prevents the delivery in time of fresh ordinary and fine baker's wares to the Member States bordering the Federal Republic of Germany and so creates distortion in competition within the Community, the Amtsgericht Wiesbaden submitted the following questions:

- “1. Must Article 7 of the EEC Treaty be interpreted as meaning that there is a breach of the prohibition on discrimination if by means of a statutory provision a Member State of the Community creates a situation which considerably impairs the competitiveness of its own nationals in relation to comparable nationals of other Member States?

2. Must Articles 30 and 34 of the EEC Treaty be interpreted as meaning that the effects of Article 5 of the Gesetz über die Arbeitszeit in Bäckereien [Law on working hours in bakeries] in regard to the export and import of fresh baker's wares are to be regarded as measures equivalent to quantitative restrictions on imports or quantitative restrictions on exports?”

First question

- 6 It is clear from the grounds set out in the order making the reference that the purpose of the first question is to ascertain whether rules of one Member State which, in certain areas bordering other Member States in which there are no such rules, lead to distortion of competition to the detriment of traders established in the territory of the first State, are to be considered as discriminatory under Article 7 of the Treaty.
- 7 As the Court has repeatedly stated, most recently in its judgment of 30 November 1978 (Case 31/78 *Bussone* [1978] ECR 2429, at p. 2446), the principle of non-discrimination contained in Article 7 is not infringed by rules which are applicable not on the basis of the nationality of traders, but on the basis of their location.
- 8 It follows that national rules which make no distinction, directly or indirectly, on the ground of the nationality of those subject to such rules, do not infringe Article 7, even if they affect the competitiveness of the traders covered by them.
- 9 Furthermore, as the Court stated in its judgment of 3 July 1979 (Joined Cases 185 to 204/78 *van Dam* [1979] ECR 2345, at p. 2361), it cannot be held contrary to the principle of non-discrimination to apply national legislation merely because other Member States allegedly apply less strict rules.
- 10 The answer to the first question must therefore be that Article 7 of the EEC Treaty must be construed as prohibiting only discrimination on the ground of the nationality of traders. There is, therefore, no infringement of Article 7 even if by means of a statutory provision which makes no distinction directly or indirectly on grounds of nationality, a Member State creates a situation affecting the competitiveness of traders established on its territory compared with traders established in other Member States.

Second question

- 11 By the second question the national court asks whether the effects of domestic legislation on working hours in bakeries, such as the German Law in issue, in regard to the export and import of fresh baker's wares are to be regarded as measures having an effect equivalent to quantitative restrictions on imports or exports within the meaning of Articles 30 and 34 of the Treaty.

The restriction on production

- 12 It cannot be disputed that the prohibition in the bread and confectionery industry on working before 4 a.m. in itself constitutes a legitimate element of economic and social policy, consistent with the objectives of public interest pursued by the Treaty. Indeed, this prohibition is designed to improve working conditions in a manifestly sensitive industry, in which the production process exhibits particular characteristics resulting from both the nature of the product and the habits of consumers.
- 13 For these reasons, several Member States of the Community as well as a number of non-member States have introduced similar rules concerning nightwork in this industry. In this regard it is appropriate to mention Convention No 20 of the International Labour Organization of 8 June 1925 concerning nightwork in bakeries which, subject to certain exceptions, prohibits the production of bread, pastries or similar products during the night.
- 14 The accused maintains that the prohibition on the production of ordinary and fine baker's wares before 4 a.m. constitutes an export barrier prohibited by Article 34 of the Treaty. This is alleged to be the case particularly with regard to products which have to be delivered fresh in time for breakfast and which must therefore be produced during the night before the day on which they are offered for sale.

- 15 However, as the Court has already declared in its judgment of 8 November 1979 (Case 15/79 *Groenveld* [1979] ECR 3409), Article 34 concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade, in such a way as to provide a particular advantage for national production or for the domestic market of the State in question.
- 16 This is clearly not the case with rules such as those in issue, which are part of economic and social policy and apply by virtue of objective criteria to all the undertakings in a particular industry which are established within the national territory, without leading to any difference in treatment whatsoever on the ground of the nationality of traders and without distinguishing between the domestic trade of the State in question and the export trade.

The restrictions on transport and delivery

- 17 The accused also challenges the prohibition, included in the rules on night-work at issue before the national court, on the transport and delivery of ordinary and fine baker's wares to consumers or retail shops before 5.45 a.m. He submits that this prohibition constitutes a measure having an effect equivalent to restrictions on both imports and exports, because, on the one hand, it prevents producers established in other Member States from delivering their wares in time to consumers and retail shops in the Federal Republic of Germany, whilst, on the other hand, producers established in the Federal Republic of Germany are prevented from delivering in time to the other Member States.
- 18 According to the German Government, the sole purpose of the prohibition on transport and delivery before 5.45 a.m. is to ensure compliance with the prohibition on production at night, which might otherwise escape effective control on the part of the authorities. It is alleged to be essential to extend the prohibition to cover products coming from other Member States because otherwise producers established in Germany would be at a disadvantage in relation to competition from abroad, which would be contrary to the prin-

principle of equality. Therefore, if products from other Member States were to be exempt from such a prohibition, it would be impossible not only to maintain the prohibition for domestic products, but also to maintain the restrictions on production times.

- 19 In this regard, it must be noted that the restrictive effect of the rules controlling the times for the transport and delivery of ordinary and fine baker's wares, in connection with the control of the hours when those products may be manufactured, must be evaluated in the light of their scope.
- 20 If such rules are confined to transport for delivery to individual consumers and retail outlets only, without affecting transport and delivery to warehouses or intermediaries, they cannot have the effect of restricting imports or exports between Member States. In this case, indeed, trade within the Community remains possible at all times, subject to the single exception that delivery to consumers and retailers is restricted to the same extent for all producers, wherever they are established. Under these circumstances, such rules are not contrary to Articles 30 and 34 of the Treaty.
- 21 The reply to the second question must therefore be that Articles 30 and 34 of the EEC Treaty do not apply to national rules which prohibit the production of ordinary and fine baker's wares and also their transport and delivery to individual consumers and retail outlets during the night up to a certain hour.

Costs

- 22 The costs incurred by the German Government, the French Government 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 proceedings are concerned, a step in the prosecution 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 Amtsgericht Wiesbaden by order of 22 April 1980, hereby rules:

1. Article 7 of the EEC Treaty must be construed as prohibiting only discrimination on the ground of the nationality of traders. There is, therefore, no infringement of Article 7, even if, by means of a statutory provision which makes no distinction directly or indirectly on grounds of nationality, a Member State creates a situation affecting the competitiveness of traders established on its territory compared with traders established in other Member States.
2. Articles 30 and 34 of the EEC Treaty do not apply to national rules which prohibit the production of ordinary and fine baker's wares and also their transport and delivery to individual consumers and retail outlets during the night up to a certain hour.

Mertens de Wilmars Mackenzie Stuart Koopmans O'Keeffe Bosco
Touffait Due Everling Chloros

Delivered in open court in Luxembourg on 14 July 1981.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President