OPINION OF ADVOCATE GENERAL TESAURO

delivered on 27 October 1992 *

Mr President,
Members of the Court,

1. Mr Levy, the director of a French undertaking which specializes in the manufacture of prepared meat products, was the subject of criminal proceedings before the Tribunal de Police (local criminal court), Metz, for having employed women for night-work on 22 March 1990; that constitutes an infringement of Article L 213-1 of the Code du Travail which lays down the principle prohibiting female workers from being employed in night work in plants, factories, mines or quarries, sites, workshops and attached premises of any kind whatsoever.

Since the national court has doubts as to whether that national legislation is in conformity with Community law, it asks the Court whether 'Articles 1 to 5 of Council Directive 76/207/EEC of 9 February 1976 [1] [should] be interpreted as meaning that national legislation prohibiting night work solely for women amounts to discrimination, having regard *inter alia* to Article 3 of Convention No 89 of the International Labour Organization prohibiting night work for women, to which France is a signatory.'

2. In fact, that question is answered in part by the recent judgment in *Stoeckel* [2] where the Court, in reply to a question submitted by a French court, held that Article 5 of Directive 76/207 'is sufficiently precise to impose on the Member States the obligation not to lay down by legislation the principle that night work by women is prohibited, even if that is subject to exceptions, where night work by men is not prohibited.'

I do not consider it necessary to review that interpretation of the Community rule in question, which, moreover, I fully share, as may be seen from my Opinion in that case, since the parties have not put forward any argument seeking to call in question the interpretation given by the Court in that case. [3]

3. None the less, the question referred to the Court for a preliminary ruling seems to me on this occasion expressly to raise the problem of the relationship between the application of Community law and the observance of the obligations arising from an agreement concluded prior to the entry into force of the EEC Treaty. The national court emphasizes that the national rules which it is called upon to apply were adopted in compliance with Convention No 89 of July 1948 which prohibits night work for women employed in industry, and which was ratified by France

* Original language: Italian.

1 — On the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

2 — Judgment in Case C 345/89 *Stoeckel* [1991] ECR I 4047.

3 — It is of interest to note that in its judgment of 28 January 1992 the German Constitutional court also considered the prohibition on night work provided for by the German legislature to be contrary to Paragraph 3(1) and (3) of the German Constitution.

by Law No 53-604 of 7 July 1953, that is, before the entry into force of the EEC Treaty.

In other words, in its question the national court asks the Court whether Article 234 of the Treaty should be interpreted as meaning that a national rule implementing the provisions of an agreement prior to the EEC Treaty and binding, at the material time, upon the French Republic may be valid as against Article 5 of Directive 76/207.

For the sake of ease of reading, I recall the wording of Article 234:

'The rights and obligations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the other hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established (...)'.

4. As we know, the aim of the first paragraph of the above provision is to state, in conformity with an established principle of international law which is also enshrined in Article 30 of the Vienna Convention on the Law of Treaties, that the application of the EEC Treaty does not affect the undertaking given by the Member State concerned to respect the rights of non-member countries arising from a prior agreement and to observe the corresponding obligations.

Furthermore, the case-law of the Court has rightly made it clear that the reference in Article 234 to the rights and obligations arising from prior agreements concerns exclusively the rights of non-member countries and the *obligations of Member States* towards them; as regards the rights of Member States, on the other hand, it is quite clear that they gave up any claim to assert them at the very moment when they undertook commitments incompatible therewith. [4]

Following the same line of argument, the Court went on to hold that where the rights of non-member countries are not involved, a Member State cannot rely on the provisions of a pre-existing Convention of that kind in order to justify restrictions on the marketing of products from another Member State where the marketing thereof is lawful by virtue of the free movement of goods provided for by the Treaty. [5]

5. In the light of the abovementioned case-law, it is necessary to ascertain whether a Member State which is a signatory to ILO Convention No 89 may possibly allow within its territory women to work at night in industry, or whether such conduct would necessarily infringe the rights which non-member countries may assert by virtue of that Convention.

4 — Judgment in Case 10/61 *Commission* v *Italy* [1962] ECR 1.

5 — Judgment in Case 286/86 *Deserbais* [1988] ECR 4907, paragraph 18; Case 121/85 *Conegate* [1986] ECR 1007, paragraph 25.

To that end, it must be explained that ILO Convention No 89, as more generally holds true for the agreements adopted in the context of that organization, has as its objective to facilitate the adoption of measures intended to improve conditions for workers: the contracting parties reciprocally undertake to respect the same rules so that no one may gain an unjustified competitive advantage as a result of reduced protection of workers' rights.

It follows that, with regard to the Convention at issue, the rights of the contracting States undeniably consist in ensuring that night work for women in industry is prohibited, in principle and irrespective of nationality, in the territory of all the States which have ratified that Convention.

6. Moreover, it is true that, as I stated in my Opinion in the *Stoeckel* case, in the present case there does not necessarily exist a contradiction between the prohibition of night work for women imposed by the Convention and the duty of non-discrimination between the sexes, so far as concerns working conditions, laid down in Directive 76/207, since the Member State concerned could in any event fulfil the obligations laid down by Community law without contravening the ILO Convention by establishing for both sexes, with the necessary exceptions, the principle prohibiting night work in industry.

It is also true that, if a Member State which is a signatory to ILO Convention No 89 should consider such a possibility to be unacceptable, it would be obliged, by virtue of the second paragraph of Article 234 of the Treaty, to take all the necessary steps to bring an end to the incompatibility, to the extent of repudiating the Convention, which the French Government has done, moreover, albeit after the events material to this case. [6]

Furthermore, the foregoing is more significant at the level of the obligations imposed on the State by the Treaty and the possible consequences of an infringement, for example, in the context of proceedings for failure to fulfil its obligations.

7. On the other hand, in the present case, the choice made by the French legislature, whether or not it was lawful, constitutes a premiss which cannot modify either the rights of non-member countries, which are the subject of Article 234, or the operation of that provision so far as concerns the choice of applicable law which the national court must make.

On the first point, it is undeniable that non-member countries which are signatories to ILO Convention No 89 in any event retain intact the right to have the obligations arising from the Convention itself observed, until a possible abrogation of the Convention has taken effect, since for them the EEC

6 — The French Government has informed the Court that it repudiated ILO Convention No 89 on 26 February 1992. According to the information provided by the Commission during the hearing, the Member States which were still bound by the abovementioned Convention, that is to say, Belgium, Greece, Italy, Spain and Portugal, have also taken similar action. The abrogation of ILO Convention No 89 by the French Government may have repercussions upon the proceedings pending before the national court, but that aspect of the problem lies outwith the competence of the Court.

Treaty and the national legislation to which it gives rise remains *res inter alios acta*.

On the second point, while the nature of Article 234 as a veritable rule of conflict must be emphasized, it is quite clear that in replying to the question concerning the law to be applied in the present case, I cannot but take note of the specific choice made by the French legislature.

In other words, a clear distinction should be made between the obligations which Article 234 imposes upon the Member States in the second paragraph, and the criterion indicated in the first paragraph in order to resolve any conflicts which, irrespective of the lawfulness of the Member States' conduct, could arise and subsist between a Community rule and an earlier contractual provision. Only the latter aspect is significant in this dispute and in particular in the proceedings before the Court, since the national court is faced with a normal choice of applicable law: either it does not apply the national provision in order to observe Community law, or it applies the national rule in so far as Article 234 permits.

8. Admittedly, it could be observed that, since the State in question has not taken all the necessary steps to ensure that Community law has been observed and has in fact applied the abovementioned ILO Convention in such a way as to create (avoidable) discrimination, the national court should give precedence to Community law and the State should bear the consequences of its conduct by risking an infringement of the Convention and consequently committing an unlawful act at international level.

Such an approach, however, scarcely conforms to the letter and, still less, to the spirit of Article 234 of the Treaty or, more generally, to the principles of international law. On consideration, this would lead to penalization not only and not so much of the Member State concerned, but precisely of those non-member countries whose rights Article 234 is intended to protect. In other words, it would be tantamount to removing Article 234 from the Treaty or at least depriving it of any useful purpose.

9. Nor, to conclude, do I attach decisive importance to the Commission's observation to the effect that there exists also in international law a progressive tendency to give precedence to the principle of non-discrimination between the sexes, viewed in the broad sense, over the traditional concern to ensure greater protection for female workers.

It is true that various Member States, including France, have ratified the New York Convention of 18 December 1979, which is intended to eliminate all forms of discrimination against women, and that, within the ILO as well, there is a growing tendency to relax the prohibition on night work for women. None the less, that finding, which the national court may make use of as appropriate, for example when imposing the penalty, cannot eliminate a factual element which has not been and cannot be disputed: at the material time ILO Convention No 89 had binding force and hence Article 234 of the Treaty was and is applicable to it.

10. In the light of the foregoing considerations, therefore, I propose that the Court give the following answer to the question submitted by the Tribunal de Police, Metz:

Article 5 of Council Directive 76/207/EEC is sufficiently precise to impose on the Member States the obligation not to lay down by legislation the principle that night work by women is prohibited, even if that is subject to exceptions, where night work by men is not prohibited. None the less, under the first paragraph of Article 234 of the Treaty, the national court may refrain from applying Article 5 of the directive in so far as its application infringes the rights of non-member countries under ILO Convention No 89, which was ratified prior to the entry into force of the EEC Treaty.