On those grounds,

THE COURT (Second Chamber),

in answer to the question submitted to it by the Economische Politierechter, Amsterdam, by judgment of 28 March 1980, hereby rules:

The concept of "measure having an effect equivalent to quantitative restrictions on imports" appearing in Article 30 of the Treaty must be understood as meaning that rules laid down by law in a Member State which require the quantity of dry matter in bread to fall within specified sets of limits are covered by that article where they apply to the importation of bread lawfully produced and marketed in another Member State.

Pescatore Touffait Due

Delivered in open court in Luxembourg on 19 February 1981.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 18 DECEMBER 1980 [1]

Mr President,
Members of the Court,

1. Once again Article 30 of the EEC Treaty forms the subject-matter of a request for interpretation submitted under Article 177 of that Treaty. The facts are very simple. A company, Kelderman, has been charged with contravening the Netherlands Broodbesluit [Bread Order] of 21 December 1925 by placing on the market in the Netherlands "brioches" imported from France whose dry-matter content does

1 — Translated from the Italian.

not conform with the levels prescribed by Article 10 of that order. Before the Economische Politierechter [Magistrate in Economic Matters] at the Arrondissementsrechtbank [District Court] Amsterdam, the accused contended that the said provision was no longer of any legal effect since it was incompatible with Article 30 of the EEC Treaty. The magistrate was accordingly led to submit the following question to the Court:

"Must the concept of 'measures having an effect equivalent to quantitative restrictions on imports' in Article 30 of the EEC Treaty be interpreted as extending to the requirement laid down in Article 10 of the Broodbesluit [Bread Order] (Warenwet [Law on Goods]) that the quantity of dry matter in a loaf must fall within certain limits, with the result that traditional products from other Member States, the dry-matter content of which exceeds the limits laid down, may not be marketed in the Netherlands?"

2. The Netherlands provisions under which the criminal proceedings against Kelderman were brought call for some clarification. The Broodbesluit was issued pursuant to Articles 14 and 15 of the Warenwet of 19 September 1919, which allows rules on the description, varieties and composition of certain products to be made for the purposes of protecting public health and furthering fair trading. Article 10 of the Broodbesluit provides in substance that the weight of the dry matter of a loaf must be less than 22 grams or fall within one of the brackets thereinafter listed (30-36g, 60-70g, 120-140g, 240-265g, 480-530g, etc.). Exceptions are provided for in the cases of bread containing raisins or sugar, and biscuits.

It may appear surprising that in its order the Netherlands authorities preferred to adopt a system of brackets instead of prescribing specific minimum and maximum percentages of dry-matter content. There is, however, no difficulty in understanding that that system is linked to the existence of a number of traditional sizes of loaves and it appears that the order was also concerned to ensure the continuance of that range of sizes (bread-rolls of 50g and 100g; loaves of 200g, 400g and 800g etc.). It should also be noted that, whilst the minimum dry-matter content is consistently equivalent to 60%, the maximum values are fixed in accordance with a reducing scale. In the present case the "brioches" imported and sold by Kelderman weighed 400g — and thus corresponded to one of the customary sizes employed in the Netherlands — but they had a dry-matter content of 301g which thus exceeded by 36g the maximum provided for in the bracket for loaves of 400g. I would observe in this connexion that, curiously, the Netherlands administrative authority which instituted the criminal proceedings against Kelderman referred to the bracket for a loaf of 800g and proceeded on the assumption that the dry-matter content of the "brioches" in question was too low. This factual detail, however, clearly has no effect on the general terms of the problem.

There is another aspect of this case which is puzzling, namely that the "brioches" have been treated as equivalent to bread. In fact, as the Commission has observed, for the purposes of the Common Customs Tariff ordinary bread is distinguished from bread containing eggs; furthermore there

is no doubt that also from the point of view of the consumer the two products differ appreciably. On the other hand however, it is true that "brioches" are not amongst the kinds of bread expressly excepted by the Netherlands order in question, so that the national courts are probably unable to classify them as anything other than a variety of ordinary bread. At all events, the matter is purely one for the court dealing with the main case.

3. There is no doubt that rules of the kind described above are capable of hindering, at least indirectly, intra-Community trade. In fact, if minimum and maximum limits to dry-matter content are laid down with implied reference to a specified scale of sizes of bread not only are conditions imposed which are more stringent than a requirement relating to a minimum percentage of dry-matter (or of a maximum percentage of water) such as is found in several legal systems, but strict adherence to a scale of sizes (or forms) which reflect a local tradition is also presupposed. It is thus sufficient that in another Member State different traditions prevail, or that (as in this case) it is not considered necessary to restrict the maximum dry-matter content, for the sale of bread products imported from that State to be hindered.

In the foregoing it is not my intention to deny that the Member States are nevertheless free to regulate the production, distribution and consumption of bread on their respective territories. In fact Community rules in this sphere have not yet been enacted although they were envisaged as part of the third stage of the programme of actions intended to eliminate technical obstacles to the trade in foodstuffs adopted by the Council on 28 May 1969 (and published in the Journal Officiel, C 76 on 17 June 1969). On 4 January 1973 the Commission submitted to the Council a proposal on the approximation of the laws concerning bread; that proposal was not, however, considered by the Council and the Commission ultimately withdrew it in 1976. Nevertheless, it is clear that Member States' powers in this field must remain within the limits set out by Article 30 of the EEC Treaty. That was confirmed by the Court of Justice in its judgment of 26 June 1980 in Case 788/79 *Gilli and Andres* [1980] ECR 2071 in which it stated (at paragraph 5 of the decision) that "in the absence of common rules relating to the production and marketing of the product in question it is for the Member States to regulate all matters relating to its production, distribution and consumption on their own territory subject, however, to the condition that those rules do not present an obstacle, directly or indirectly, actually or potentially, to intra-Community trade".

That said, in order to escape the prohibition laid down in the said Article 30 national provisions of the kind described above must either come within the scope of Article 36 — in particular under the head of the protection of the health of humans — or meet one of the other imperative requirements which decisions of the Court of Justice have

held may prevail over the above-mentioned prohibition, namely fair trading and consumer protection (I refer in this connexion to the judgment of 20 February 1979 in Case 120/78, *REWE* [1979] ECR 649 and the aforementioned judgment of 26 June 1980 in Case 788/79 *Gilli and Andres,* at paragraphs 8 and 6 respectively of the decisions). It is therefore a question of establishing whether one of those exceptions applies in this case.

4. The objective of protecting public health certainly provides justification in principle for a national measure laying down a certain minimum dry-matter content for bread: it is clear that such a measure is concerned to ensure that bread is nourishing and that the quantity of water contained in it is not excessive. On the other hand I would deny that the fixing of a maximum dry-matter content may be justified on the same basis; it appears to me difficult to maintain that bread having a lesser degree of humidity is injurious to health. However, what is first and foremost at issue here is the system of fixing dry-matter content within brackets, which is strictly linked, as we have seen, to the manufacture of bread in specified sizes. That system, which is not related in any way to the protection of health, results in hampering the importation of bread which is made in different sizes in other Member States, a situation which is clearly contrary to Article 30.

Recognizing that the system of fixing dry-matter content within brackets entails an obligation to produce bread in specified sizes, the Netherlands Government has argued that this promotes fair trading and consumer protection. In its view, since bread is usually sold without packaging, the standard sizes of the various loaves assure the consumer as to the weight. However, even if it is accepted that that requirement ought to be met it remains to be seen why the sale of bread otherwise than in the customary sizes may not be permitted subject to the condition that a wrapper be provided on which the weight is indicated (in the present case the "brioches" in question were marketed in precisely that state).

It should be recalled that Article 3 of Commission Directive 70/50/EEC of 22 December 1969, based on the provisions of Article 33 (7) of the EEC Treaty, on the abolition of measures which have an effect equivalent to quantitative restrictions, considered as coming within that category "measures governing the marketing of products which deal, in particular, with shape, size, weight, composition, presentation, identification or putting up and which are equally applicable to domestic and imported products, where the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules". It was stated in the second paragraph of that provision that that is the case, in particular, where the restrictive effects on the free movement of goods are out of proportion to their purpose and where the same objective can be attained by other means which are less of a hindrance to trade. It appears to me beyond doubt that national arrangements cast in the form of Article 10 of the Netherlands Brood-

besluit constitute a hindrance to the free movement of goods which is out of proportion to the objectives in view, which may be attained by other means. If it is desired to assure consumers as to the nature and weight of the product which is offered for sale otherwise than in traditional sizes, requiring traders to provide the necessary information on a label would constitute a sufficient means in relation to the intended objective.

Finally, I must comment on the contention of the Netherlands Government that the Warenwet empowers the competent minister to grant exemptions from the conditions laid down in the Broodbesluit. I shall merely recall what the Court said in its judgment of 24 January 1978 in Case 82/77 *van Tiggele* [1978] ECR 25 (paragraph 19 of the decision), namely, that a measure which falls under the prohibition laid down in Article 30 of the Treaty does not escape the prohibition merely because the competent authority is empowered to grant exemptions, even if that power is freely applied to imported products.

5. In conclusion I consider that the Court should reply to the request for a preliminary ruling submitted to it by the Economische Politierechter at the Arrondissementsrechtbank, Amsterdam, by order lodged at the Court Registry on 29 May 1980, with the following ruling:

"The prohibition on measures having an effect equivalent to quantitative restrictions on imports laid down in Article 30 of the EEC Treaty must be understood as embracing provisions of a Member State determining the minimum and maximum limits of dry matter in bread and similar products if those provisions are framed in such a way as to preclude the importation of products of that kind which have been duly manufactured and placed on the market in other Member States, which are not injurious to the health of humans and which are offered to the consumer with sufficient information as to their nature and weight".