OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 24 January 1991 *

Mr President,
Members of the Court,

1. Mr Stoeckel, who is being prosecuted by the Ministère Public (Public Prosecutor's Office) for infringement of Article L 213-1 of the French Code du Travail (Labour Code), which prohibits, subject to certain exceptions, nightwork by women, contended before the Tribunal de Police (local criminal court), Illkirch, that that provision was contrary to Article 5 of Directive 76/207/EEC of 9 February 1976 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 [1] (hereinafter referred to as 'the Directive').

By order of 4 October 1989, the Tribunal de Police stayed the proceedings and asked the Court of Justice whether Article 5 of the Directive was sufficiently precise to impose on the Member States the obligation not to lay down by legislation the principle that nightwork by women is prohibited, as in Article L 213-1 of the Code de Travail.

2. As we know, and as is apparent from the very title of the measure, the Directive is intended to give effect in the Member States to the principle of equal treatment for men and women regarding access to employment, including promotion, vocational training and working conditions (Article 1). Pursuant to Article 2(1), that principle means that there is to be no discrimination on grounds of sex either directly or indirectly by reference in particular to marital or family status. Among the exceptions provided for in the following paragraphs of that article, it is appropriate to mention the fact that paragraph 3 provides that the Directive is to be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

Pursuant to Article 5(1), application of the principle of equal treatment with regard to working conditions means that men and women are to be guaranteed the same conditions without discrimination on grounds of sex. To that end, the Member States are required, by virtue of paragraph 2, to take the necessary measures to ensure that any provisions contrary to the principle of equal treatment are abolished (Article 5(2)(a)) and to review any provisions contrary to that principle originally inspired by a concern for protection which is no longer well founded (Article 5(2)(c)).

The period prescribed for the adoption of such measures by the Member States is fixed by Article 9(1) as 30 months as from notification of the Directive. However, with regard in particular to Article 5(2)(c), the national authorities are required to carry out a first examination and if necessary a first revision of the provisions concerned within a period of four years.

* Original language: Italian.

1 — OJ 1976 L 39, p. 40.

3. In the French legislation, Article L 213-1 of the Code du Travail lays down the principle whereby nightwork by women is prohibited, providing in particular that 'Women may not be employed on any nightwork in plants, factories, mines or quarries, sites, workshops and appurtenances thereof, of any kind whatsoever, whether public or private, secular or religious, even where such establishments are for vocational teaching or pursue charitable objects, or in public or ministerial offices, establishments associated with the liberal professions, non-commercial undertakings, trade unions or organizations or associations of any kind whatsoever'. The following paragraph provides for a number of exceptions for women holding management posts or executive technical posts and for women employed in health and welfare services who do not normally undertake manual work. The third paragraph makes an exception to the prohibition, *inter alia* in cases where such an exception is in the national interest, and for shiftwork. In the latter case an order is necessary as to the applicability of a collective agreement or a branch or company agreement, with the authorization of the Inspecteur du Travail (Labour Inspector). Failure to comply with these requirements is penalized by fines.

The French legislation was adopted in order to give effect to International Labour Organization ('ILO') Convention No 89 of 9 July 1948, which was ratified in France by Law No 53-603 of 7 July 1953, which, subject to exceptions, prohibits nightwork by women.

4. I will describe, albeit briefly, the origins of legislation of this kind.[2] The prohibition of nightwork by women in the past represented a victory for the working classes, forming part of legislation intended to protect in particular women and children, in other words those who were regarded as the weakest members of society, exposed to the most risks.

A prohibition of that kind was laid down by the British legislature half-way through last century (1844). Switzerland then adopted similar legislation in 1877, being emulated subsequently by other countries such as Austria (1885), the Netherlands (1889) and, as the century drew to a close, France (1892).

In view of the fact that at that time women were employed predominantly in factories, the legislation applied first to the industrial sector and was then gradually extended, in accordance with varying requirements, to other sectors.

The first International Congress on Worker Protection, held in Berlin in 1890, passed a resolution condemning nightwork by women in industry. In 1906, 13 States signed the Bern Convention, which reiterated the prohibition but only for industrial undertakings employing more than 10 workers. These provisions were the precursor of the prohibition laid down in 1919 by the ILO; in fact, one of the first ILO Conventions, No 4, prohibited the

2 — See Report V, 1, on Night Work, published by the International Labour Conference, 76th Session, International Labour Office, Geneva, and Petiti, Le travail de nuit des femmes. Aspects nationaux et internationaux, *Droit Social*, 1988, p. 302.

employment of women in industrial premises during the night, except in family businesses.

In order to avoid the problems of too wide-ranging a prohibition, a second convention, No 41, was adopted by the ILO in 1934. It excluded from its scope, in particular, women holding management posts or executive technical posts.

The third instrument, adopted in 1948 in order to allow for further exceptions, is Convention No 89 on which, as indicated earlier, the present French legislation on this subject was based.

5. The main arguments supporting legislation of that kind, when it was adopted, were medical, social, political and economic. It was contended that since women were denied civil and political rights, such as the right to vote, they were exposed to greater risk in the absence of statutory protection. Female workers were then regarded as physically weaker and thus more vulnerable to certain consequences of nightwork, such as the possibility of physical or mental problems. In addition, concern was expressed about the risks to which women might be exposed when going to their place of work at night and it was also regarded as somewhat 'inappropriate' that women should undertake nightwork in the company of workers of the opposite sex.

An additional factor in the aversion to nightwork by female workers derived from deeply held convictions as to the social role of the woman as a mother and focal point of the family unit: the woman should preferably be at home, looking after the family. Nightwork was thus regarded as particularly disruptive to family life and harmful to society.

6. It is apparent from what I have said that the present case is concerned with provisions which are intended by the legislature to protect women in their role as workers. When considering such legislation is it therefore necessary first to decide whether or not it falls within the derogation contained in Article 2(3) of the Directive laying down provisions for the protection of women.

It must be stressed, however, that any derogation from a principle of such fundamental importance to human beings as that of equal treatment must be examined on the basis of restrictive criteria. [3]

In fact, the Court, having expressly confirmed that the provision at issue is to be interpreted strictly, added that it was clear from the express reference to pregnancy and maternity that the Directive was intended to protect a woman's biological condition and the special relationship which exists between a woman and her child; that provision of the Directive did not therefore allow

3 — See the judgment in Joined Cases 75 and 117/82 *Razzouk* [1984] ECR 1509, paragraph 16, and the judgment in Case 149/77 *Defrenne* [1978] ECR 1365, paragraphs 26 and 27.

women to be excluded from a certain type of employment on the ground that public opinion demanded that women be given greater protection than men against risks which affected men and women in the same way and which are distinct from women's specific needs of protection, such as those expressly mentioned. [4]

It must also be pointed out that, as is apparent in particular from the *Hofmann* judgment, the provision is not intended to protect the special relationship between a mother and her child in abstract and general terms, encouraging or preserving a particular traditional role for women within the family structure but rather, in a more limited way, to protect the special relationship between mother and child during pregnancy and in the period immediately following the birth. [5]

7. If, therefore, it follows from the foregoing that legislation intended to protect women must, in order to fall within the derogation under Article 2(3), protect female workers in relation to characteristics that are specific to women, [6] it is necessary to establish whether nightwork actually involves greater risks for the female population.

It appears from the 1989 International Labour Conference report on nightwork to which I referred earlier that, from the medical point of view, nightwork may cause, *inter alia*, disturbances affecting sleep and the digestive system, problems which may be aggravated by the tendency to consume an excess of stimulants such as coffee and tobacco during the night and sleeping pills to facilitate rest during the day. The effects of nightwork on the health may thus vary considerably according to the age and family and financial situation of the workers concerned.

Whilst there are no detailed pathological studies relating to female workers, the existing research appears to show that, apart from the need for special protection during pregnancy in view of the risks to which the unborn child might be exposed, there are no additional real and specific reasons for which women should not undertake nightwork.

In other words, whilst it is true that nightwork is liable to have harmful effects on the physical and mental well-being of workers and should therefore be limited to what is strictly necessary and in any case be subject to regulations, it is also true that there is no significant information such as to raise fears of substantial harm specifically affecting the female to a greater extent than the male population.

8. The objection relating to the increased risk of attack to which women are allegedly exposed at night likewise does not seem to me to provide justification for limiting the scope of an essential right such as that of equal treatment regarding working conditions.

That risk might be perhaps be eliminated by the taking of appropriate measures such as,

4 — See the judgment in Case 222/84 *Johnson* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 44.

5 — See the judgment in Case 184/83 *Hofmann* [1984] ECR 3047, paragraph 25, and the judgment in Case 163/82 *Commission* v *Italy* [1983] ECR 3273, paragraph 16.

6 — See the judgment in Case 312/86 *Commission* v *France* [1988] ECR 6315, paragraph 14.

for example, the provision of appropriate transport facilities; and in any case the principle imposed by the French legislature whereby nightwork by women is prohibited is subject to so many exceptions of various kinds that it is very difficult to believe that it is justified by objective considerations and is not in fact the historical survivor of what in the past was a measure for the protection of (what was regarded then as) the more vulnerable part of the working class.

A study carried out in 1984 by the Research Department of the French Ministry of Social Affairs and Employment shows that between 1978 and 1984 there was a considerable increase in the number of women working at night; in 1984 in particular, the more than one million people regularly undertaking nightwork included about 170 000 women.[7]

Furthermore, if it is borne in mind on the one hand that, according to a circular dated 30 June 1987 from the French Ministry of Social Affairs and Employment, it is not unlawful to employ women at night in industrial premises to carry out work of a non-industrial nature, as in the case of data-processing operatives and supervisors, and, on the other, that certain collective agreements for particular industries provide for the possibility of nightwork for women working shifts, it becomes even more difficult to accept such an explanation, it not being apparent why someone employed in information technology or in the steel industry should be less likely to be assaulted than, say, someone working in the chemical industry.

Finally, the fact cannot be overlooked that the inclusion in the French legislation of a general prohibition of nightwork by women, which is subject to so many exceptions that it is even possible to apply different conditions to women engaged in similar tasks, is liable to create further unjustified discrimination between those women.

9. In my opinion legislation of that kind could not be justified under Article 5(2)(c) of the Directive, pursuant to which, as has been pointed out, the Member States are required to take the measures necessary to ensure that a review is carried out of those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded.

The Court has made it clear that the scope of Article 3(2)(c), which concerns the conditions for access to employment but is worded in exactly the same way as Article 5(2)(c), is determined by Article 2(3).[8]

Therefore, even if in the past the measures at issue were justified by, for example, the actual role of the woman in the family, they are today prohibited by the Directive since, as has been seen, they do not fall within the derogations envisaged in Article 2(3). As the Commission correctly observed, the prohibition imposed by the French legislature does not in fact seem to be a response

7 — See Pettiti, above, p. 303.

8 — *Johnson*, above, paragraph 44.

to a concern for specific protection of women's biological condition but appears rather to be based on considerations of a social nature which are largely outmoded and are also liable to have adverse repercussions for the employment of women.

10. The issue of the direct effect of Article 5 seems to me already to have been resolved affirmatively by the case-law of the Court, according to which Article 5 does not confer on the Member States any right to impose conditions on or restrict the application of the principle of equal treatment in the area appropriate to it. Furthermore, the provision is sufficiently precise and unconditional to be relied on by individuals before the national courts in order to secure the disapplication of any national provision which is not in conformity with Article 5(1).[9]

The obligation not to discriminate laid down in Article 5(1) is not therefore affected by the other specific obligation to adopt measures, imposed on the Member States by paragraph 2 of the same article.

11. Finally, I likewise reject the view that the fact that France is a party to ILO Convention No 89 can in any way detract from the conclusion that I have reached.

Whilst it is true that pursuant to Article 234 of the EEC Treaty, the provisions of that Treaty are not to affect the rights and obligations deriving from conventions entered into between one or Member States, on the one hand, and one or more non-member countries, on the other, before it came into operation, it is also true that the content of the Directive is not in itself liable to make compliance with it incompatible with the obligations deriving from the convention. The Community measure does not necessarily require the Member States to permit nightwork for women, which would be incompatible with the convention, but merely imposes the obligation of non-discrimination between the sexes regarding working conditions.

In other words, a Member State may not, in circumstances such as those of the present case, invoke Article 234 in order to evade the duty of non-discrimination laid down by Directive 76/207, since it could in any case fulfil its obligations under Community law without contravening the convention, for example by extending the prohibition of nightwork to people of both sexes.

It is also clear that if difficulties of a practical nature were to make it difficult to follow that course of action, the State concerned would be required to denounce the convention and thus cease to be bound by it.

It is significant in that connection that a number of Member States which were signatories to the convention, such as the Netherlands, Ireland and Luxembourg, have already denounced it[10] and that the Italian Constitutional Court declared the law that implemented it to be partially unlawful.[11]

9 — See the judgment in Case 152/84 *Marshall* [1986] ECR 723, paragraph 55, and the judgment in Case 188/89 *Foster* [1990] ECR I-3313, paragraph 21.

10 — See Annex 1 to the Commission's observations. Under Article 15 of Convention No 89, it can be denounced, by one year's notice, every ten years as from 27 February 1961, in the following twelve months.

11 — Judgment No 210 of 9 July 1986, *Gazzetta Ufficiale della Repubblica Italiana*, No 38 of 1 August 1986, p. 17.

12. In the light of the foregoing considerations, I propose that the question submitted by the Tribunal de Police, Illkirch, be answered as follows:

'By virtue of Article 5 of Directive 76/207, it is unlawful for a national provision to impose, by way of legislative principle, a prohibition of nightwork which applies only to women.'