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.

3. A measure caught by the prohibition provided for by Article 30 of the EEC Treaty does not escape that prohibition simply because the competent authority is empowered to grant exemptions, even if that power is freely applied to imported products. Freedom of movement is a right whose enjoyment may not be dependent upon a discretionary power or on a concession granted by the national administration.

In Case 130/80

REFERENCE to the Court under Article 177 of the EEC Treaty by the Economische Politierechter [Magistrate in Economic Matters] of the Arrondissementsrechtbank [District Court], Amsterdam, for a preliminary ruling in the criminal proceedings before that court against

FABRIEK VOOR HOOGWAARDIGE VOEDINGSPRODUKTEN KELDERMAN BV

on the interpretation of the concept of a measure having an effect equivalent to quantitative restrictions on imports contained in Article 30 of the EEC Treaty,

THE COURT (Second Chamber)

composed of: P. Pescatore, President of Chamber, A. Touffait and O. Due, Judges,

Advocate General: F. Capotorti
Registrar: J. A. Pompe, Deputy Registrar

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 procedure

Fabriek voor Hoogwaardige Voedingsprodukten Kelderman BV, a company having its place of business at Naarden (Netherlands) and specializing in the importation of bread, imports from France amongst other things "brioches" which it markets in the Netherlands under the name of "eierbrood" [bread made with eggs]. That "bread" has a minimum weight of 400 grammes of which about 300 grammes is dry matter).

The Netherlands rules are very strict as to the dry-matter content of bread. Thus pursuant to Articles 14 and 15 of the Law of 19 September 1919 (Staatsblad 793) called the Warenwet [Law on Goods], laying down requirements as to the quality and the description of goods, the Order of 21 December 1925 (Staatsblad 478) called the Broodbesluit [Bread Order] stipulates in Article 10 that the quantity of dry-matter content of bread must fall within very precise limits.

The effect of that provision is that a weight of about 300 grammes of dry matter does not come within any of the limits laid down so that the bread made with eggs imported by Kelderman does not meet the requirements imposed in the Netherlands.

In those circumstances a summons was served on that company to appear in criminal proceedings before the Economische Politierechter of the Arrondissementsrechtbank, Amsterdam. Before that court the accused admitted the charge made against it but claimed that "the offence is not punishable since Article 10 of the Broodbesluit has no binding force" on the ground that it is contrary to Article 30 of the EEC Treaty.

Consequently the court making the reference stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

"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?"

The order making the reference was registered at the Court on 29 May 1980. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged on 22 July 1980 by the Commission, represented for that purpose by Rolf Wägenbaur and Auke

Haagsma, acting as Agents, on 14 August 1980 by the Government of the Netherlands, represented for that purpose by the Secretary-General of the Ministry for Foreign Affairs, Mr Italianer, acting as Agent.

On 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.

By order of 1 October 1980 the Court decided to assign the case to the Second Chamber pursuant to Article 95 (1) of the Rules of Procedure.

II — Observations lodged pursuant to Article 20 of the Statute of the Court of Justice

A — Observations of the Government of the Netherlands

The *Netherlands Government* confines itself to presenting clarifications to the Court on the Broodbesluit. It states that the aim of that order was to lay down certain requirements in regard to the composition and the description of bread in the interests of public health and fair trading. With those objectives in mind the Netherlands Government wished to:

"1. Introduce a clear delimitation for the consumer between the various weights of bread,

2. Make sure that the population received sufficient nutritive matter".

Since bread represents a substantial proportion of available foods it is necessary to prevent consumers from being misled as to the quantity of bread they are being offered. Because most bread is regularly sold unpackaged a classification by weight is thought to be of crucial importance.

Having furnished that explanation the Netherlands Government further points out that the combined provisions of the fourth paragraph of Article 14 and the third paragraph of Article 16 of the Warenwet empower the Minister to grant "exemption from the requirements laid down by implementing orders".

B — Observations of the Government of the Federal Republic of Germany

The *Government of the Federal Republic of Germany* first reminds the Court as a preliminary point that the procedure under Article 177 of the EEC Treaty empowers the Court of Justice to rule on questions concerning the interpretation and validity of Community law but not on the validity of provisions of national law; it then concludes that whether the provisions of the Treaty on the free movement of goods permit national rules of the type contained in the Netherlands order in question has in this case to be determined "in the abstract".

The Government of the Federal Republic of Germany takes the view that such rules are justified under the first sentence of Article 36 of the Treaty provided that they are necessary to protect the consumer against deception. But admittedly such protection of the consumer against deception is not a principle which is expressly set forth in Article 36. But the Federal Government submits that such protection is a necessary part of the public policy referred to in Article 36

and that the Court has accepted and held that such consumer protection should form part of the interests which are legally protected (see the judgment of 20 February 1975 in Case 12/74 *Commission* v *Germany* [1975] ECR 181 and the judgment of 26 June 1980 in Case 788/79 *Gilli and Andres* [1980] ECR 2071).

But national rules on the protection of consumers against deception which are adopted under Article 36 of the Treaty are justified only in so far as they do not exceed what is necessary to secure that protection. The Federal Government believes that the protection of consumers might require prohibitions on sale, rules on description, or provisions as to the marking of products.

Using examples drawn from both German and Community regulations the Federal Government demonstrates how a prohibition on sale may be absolutely necessary if the justified expectations of the consumer cannot be adequately protected by less stringent measures. On the other hand provisions as to the description of products may be sufficient to prevent the consumer from being misled if such provisions are based on "the fact that consumers have a clear idea of what they may expect from given descriptions", while marking is sufficient if it enables the consumer to get an idea, "mainly from the relevant details on the packaging, of the composition and the nature of the food product and to identify and to assess without difficulty any deviations from the usual characteristics."

In conclusion of that line of argument the Federal Government submits that, in the absence of any rules in Community law, the provisions which a Member State wishes to introduce in the area in question must be framed on the basis of the need to protect the consumer and take into account the principle of proportionality. Indeed for that last-mentioned reason the measures contemplated may often be restricted to rules about marking and description. But "the Federal Government nevertheless believes that the protection of the consumer may in certain cases require more stringent rules taking the form of a prohibition on the sale of food products on the ground that a mere indication of the actual composition of the product would be of no use to the consumer if he were not in a position to understand it".

The Government of the Federal Republic of Germany accordingly submits that the Court of Justice should answer the question referred to it as follows:

"Rules of national law which lay down a specific composition or particular characteristics for food products and which bar the sale of food products not meeting those requirements are compatible with the provisions of the Treaty on the free movement of goods in so far as those rules are necessary in the circumstances of each case to secure reasonable protection of the consumer against deception".

C — *Observations of the Commission*

The *Commission* first points out that the "Minutes of the Hearing" sent by the court making the reference do not contain any information as to the facts. Then, having examined the relevant provisions of national law, it goes on to state that there does not exist at the Community level any measure or even any proposal for a measure for harmonizing the laws of the Member States on bread as the only proposal for

a directive submitted by the Commission to the Council in January 1973 has never been discussed in the Council.

Like the Federal Government of Germany the Commission believes that it is not possible to give an answer to the question as framed by the court making the reference; however, the interpretation of Community law does make it possible to furnish the national court with information which would assist that court to decide the case before it.

Having too little information on the facts of the instant case, the Commission considers that it cannot get an exact idea of the nature of the provisions of the Broodbesluit and that it is therefore "not at all certain whether the issue is the total prohibition of the sale of the 'brioche' in question or the prohibition of its sale under a description in which the word 'bread' appears".

According to the Commission there could be three possible reasons for the prohibition on the sale of "brioche":

(a) First, "brioche" might not meet the Netherlands requirements as to its composition; but the Commission itself believes that it appears clear from the notes of the pleadings of Kelderman's Counsel that it is not the composition of "brioche" which has caused problems;

(b) The description "eierbrood" [bread made with eggs] might also be contrary to the provisions of the Netherlands Broodbesluit but there again the Commission takes the view that such a description "does not seem to be contrary to it" adding that "if that were the case there would be no incompatibility with Article 30 provided that such description had been used by Kelderman only at a later stage, that is to say, after the product had been manufactured and marketed in France in accordance with the legal provisions of that country";

(c) Finally, the prohibition on the sale of "brioche" in the Netherlands might derive solely from the fact that its dry-matter content does not fall within the relevant weight limits contained in the Broodbesluit (Article 10). The Commission is of the opinion that the "object of the provisions" contained in Article 10 is not perfectly clear and that there are two possible interpretations:

1. Article 10 has effect only where a specific product is sold as bread; accordingly "the impossibility of selling 'brioche' in the Netherlands is attributable to the fact that it is offered for sale under the name of 'eierbrood'." However, that prohibition might then be easily evaded by an importer by selling "brioche" under another name. If that interpretation is correct the Broodbesluit constitutes a measure having an effect equivalent to a quantitative restriction on imports since "it prohibits the marketing in the Netherlands of bread or of a similar product produced in another Member State in accordance with the requirements in force in that State and marketed under a specific description whilst that description has to be viewed in the Netherlands as sufficiently clear and precise to describe that product";

2. Another construction of the Broodbesluit might be based on the text of Article 3 thereof which evinces that the Broodbesluit applies to all kinds of bread and

to products similar to bread which may be substituted for it. Consequently the "brioche" in question may be marketed only when the provisions of the Broodbesluit and particularly those contained in Article 10 thereof are observed. In that case the marketing in the Netherlands of products manufactured and marketed in any given Member State in accordance with the requirements in force in that State would be made impossible and Article 10 of that order would have to be treated as a measure having an effect equivalent to a quantitative restriction on imports prohibited by Article 30 of the EEC Treaty. Nevertheless it is necessary to examine whether that provision might be justified on the ground of Article 36 of the Treaty. Admittedly the Broodbesluit was enacted in the interests of public health and fair trading but the Commission believes that the order does not constitute an indispensable safeguard in the pursuit of those two objectives. First of all as regards the safeguarding of public health "Article 10 is not concerned with the composition of bread as such since the weight of dry matter is not fixed by reference to the total weight of the bread". As for fair trading that may be ensured by other means entailing fewer obstacles to trade between the Member States: "there would be need in particular to consider providing buyers with the necessary information, for example, in the form of labelling requirements".

In conclusion the Commission proposes that the question referred to the Court should be answered as follows:

"The expression 'measures having an effect equivalent to quantitative restrictions on imports' used in Article 30 of the Treaty must be understood as meaning that the prohibition set forth in that article also covers a condition laid down by regulation of a Member State requiring that the quantity of dry matter in bread must fall within specific limits in cases where bread has been lawfully produced and marketed in another Member State".

III — Oral procedure

Kelderman BV, the accused in the main proceedings, represented by Mr van Ewijk, the Government of the Netherlands, represented by Mr Bos, assisted by Mr De Koe, a public health inspector, and the Commission, represented by Mr van Rijn, assisted by Mr Wagenbaur, submitted oral argument and answered questions from the Court at the sitting on 27 November 1980.

The Advocate General delivered his opinion at the sitting on 18 December 1980.

Decision

1 By judgment dated 28 March 1980, which was received at the Court on 29 May 1980, the Economische Politierechter [Magistrate in Economic Matters], Amsterdam, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question as to the interpretation of Article 30 of the Treaty. That reference was made with a view to defining the concept of a measure having an effect equivalent to a quantitative restriction in regard to Article 10 of the Netherlands Broodbesluit [Bread Order] inasmuch as that article provides that the quantity of dry matter in a loaf of bread must fall within specified sets of limits.

2 The question has been submitted in the course of criminal proceedings against an importer who is charged with having sold on the Netherlands market "brioches" from the French Republic which contained 300 grams of dry matter per 400 grams of fresh product. The Netherlands administrative authorities treated the brioches as bread and found that the dry-matter content did not come within any of the sets of limits laid down by the Broodbesluit.

3 In its present form, the Broodbesluit was enacted in the Netherlands on 21 December 1925 pursuant to Articles 14 and 15 of the Warenwet [Law on Goods] of 19 September 1919. Those articles provide amongst other things that, in order to protect public health and to further fair trading, general administrative regulations may lay down certain requirements as to the composition and description of goods.

4 When the importer was summoned before the Economische Politierechter Amsterdam pursuant to those provisions he contended that those rules were incompatible with Article 30 of the EEC Treaty whereby quantitative restrictions on imports and all measures having equivalent effect are prohibited in intra-Community trade. The national court considered it necessary to submit the following question to the Court before giving judgment:

"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?"

5 It should be observed first of all that in the absence of common or harmonized rules on the making and marketing of bread it is for Member States to regulate all matters relating to the composition, making and marketing of that foodstuff on their own territory.

6 As the Court stated in its judgments of 20 February 1979 in Case 120/78 *REWE* [1979] ECR 649 and of 26 June 1980 in Case 788/79 *Gilli* [1980] ECR 2071, obstacles to intra-Community trade resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy imperative requirements relating in particular to the protection of public health, fair trading and consumer protection.

7 The extension to imported products of a requirement that they contain a specific amount of dry matter may prevent bread originating in other Member States from being marketed in the State concerned. It may make it necessary to vary the method of manufacture according to the place where the bread is to be sold and thus impede the movement of bread lawfully produced in the Member State of origin if identical manufacturing standards are not prescribed in that State.

8 In view of the existence of an obstacle which may impede trade between Member States it is necessary to consider whether that obstacle may be justified in the public interest, which in this case is concerned with the safe-

guarding of public health and with the protection of consumers. The observations of the Netherlands Government state that, in accordance with the Warenwet, it is those grounds which form the basis of the Broodbesluit.

9 So far as the safeguarding of public health is concerned, the Government of the Kingdom of the Netherlands, which has intervened in the proceedings, has explained that through the adoption of the measures in question it sought to ensure that the population should receive sufficient nutritive matter.

10 It should be noted in this regard that the sets of limits laid down in the Broodbesluit in regard to dry-matter content are related to the making of bread in specified sizes and thus bring into play a criterion which has no connexion with the protection of health. What is more, during the oral argument the Netherlands Government acknowledged that that was not at stake. Therefore that argument cannot be accepted.

11 So far as the protection of consumers is concerned, it is claimed that the Broodbesluit introduced a clear delimitation between the various shapes and weights of bread and thus helps to prevent consumers from being misled as to the actual quantity of bread which is being offered to them.

12 However, it must be observed in this connexion that the provision of suitable information for consumers may easily be ensured by appropriate means, such as requiring labelling showing, for example, the weight and specific composition of an imported product. That has also been stated in regard to the facts of the dispute submitted to the national court.

13 Finally, in its observations the Netherlands Government points to the fact that the Netherlands rules give the competent minister wide powers to grant exemptions from the requirement of satisfying the conditions imposed by the Broodbesluit.

14 On that matter it is necessary to bear in mind well-established case-law (judgment of 24 January 1978 in Case 82/77 *Van Tiggele* [1978] ECR 25; judgment of 16 December 1980 in Case 27/80 *Fietje* [1980] ECR 3839 to the effect that a measure caught by the prohibition provided for by Article 30 of the Treaty does not escape that prohibition simply because the competent authority is empowered to grant exemptions, even if that power is freely applied to imported products. Freedom of movement is a right whose enjoyment may not be dependent upon a discretionary power or on a concession granted by the national administration.

15 It is apparent from the foregoing that the obstacle preventing the marketing in the Netherlands of bread lawfully produced and marketed in another Member State is not justified on any ground of public interest and that therefore the application of the relevant national legislation to imported bread constitutes a measure having an effect equivalent to a quantitative restriction which is prohibited by Article 30 of the Treaty.

16 The answer to the question raised should therefore be that the concept of measures 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.

Costs

17 The costs incurred by the Commission of the European Communities, the Government of the Federal Republic of Germany and the Government of the Kingdom of the Netherlands, 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, in the nautre of a step in the proceedings before the national court, the decision on costs is a matter for that court.

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.