

OPINION OF MR ADVOCATE GENERAL REISCHL
DELIVERED ON 30 NOVEMBER 1982 ¹

*Mr President,
Members of the Court,*

The main action, in connection with which the present reference for a preliminary ruling is made, relates to the question whether national measures regarding load capacity for the purposes of international carriage of goods by road are compatible with Community law. The facts may be summarized as follows:

The plaintiff in the main action, D. J. Smit Transport BV, whose registered office is in The Hague (hereinafter referred to as "Smit") is a transport undertaking specializing mainly in international removals. According to the Netherlands Wet Autovervoer Goederen [Law governing the carriage of goods by motor vehicle] of 4 August 1951 (Staatsblad 342) and the administrative regulations adopted for implementation thereof, a permit for international carriage of goods is required for transport operations of that kind. In order to obtain such a permit the undertaking in question must already possess a transport permit for national carriage of goods. The purpose of both provisions is to ensure control over the load capacity used for the carriage of goods and therefore a total capacity, expressed in tonnes is prescribed for each undertaking, at a level which takes into account, *inter alia*, the need for the capacity and the use to which it is to be put. There is therefore a connection

between the capacity assigned to national transport and that assigned to international transport, in so far as the latter is deducted from the former.

Smit, whose fleet of vehicles has a total load capacity of 30.1 tonnes, has a permit for national transport limited to a total capacity of 50.1 tonnes which is valid until 1990. For transport to and from all European countries it received a permit limited to 18 tonnes which was valid until 3 June 1981.

On 3 April 1979 Smit applied to have that capacity increased to 36.29 tonnes — its total capacity at that time — so as to be able to use its whole fleet of vehicles for transport purposes at the same time. However the Commissie Grensoverschrijdend Beroepsgoederenvervoer van de Stichting Nederlandsche Internationale Wegvervoer Organisatie rejected that application by a decision dated 13 September 1979 on the ground, *inter alia*, that it was not in the general interests of transport to increase capacity when there was no actual demand for it. Investigations had shown that the applicant was not using its authorized transport capacity to the full. That decision was challenged by Smit on 10 December 1979 by means of an application to the Crown in which it argued that the limitation on its load capacity was contrary to the First Council Directive of 23 July 1962 on the establishment of certain common rules for international transport (carriage of

¹ — Translated from the German

goods by road for hire or reward) (Official Journal, English Special Edition, 1959-62, p. 267), especially Articles 1 (3) and 3 thereof.

Article 1 of that directive provides as follows:

“Each Member State shall, by the end of 1962 at the latest and in the manner laid down in paragraphs (2) and (3) of this article, liberalize the types of international carriage of goods by road for hire or reward involving other Member States listed in Annexes I and II to this directive, where such carriage is performed to or from the territory of that Member State or passing in transit across the territory of that Member State.”

Paragraph (3) of that article provides that the types of carriage listed in Annex II, item (5) of which includes the activities carried out by the plaintiff in the main proceedings, are no longer to be “subject to a quota system”. For those types of carriage it may, however, be necessary to obtain further authorization “provided no quantitative restriction is involved”, which is not the case with respect to the types of carriage referred to in Annex I.

Finally, Article 3 of the directive provides as follows:

“This directive shall not affect the conditions under which any Member State authorizes its own nationals to engage in the activities mentioned in this directive.”

The Raad van State, Afdeling voor de Geschillen van de Bestuur, ordered the proceedings to be stayed and on 6 April 1982 referred the following questions to the Court for a preliminary ruling

pursuant to Article 177 of the EEC Treaty:

- “1. Is it the responsibility of a national court or tribunal to examine national legislation in the light of Articles 1 (3) and 3 of the first Council Directive of 23 July 1962 (Official Journal, English Special Edition 1959-1962, p. 267), on the establishment of certain common rules for certain types of carriage of goods by road between Member States (as last amended by Council Directive 78/175/EEC of 20 February 1978 (Official Journal L 54, p. 18)) if an appellant relies on those provisions to support his case?
2. If so, may those provisions be construed as allowing the competent authorities of a Member State the freedom to apply a system of authorizations for the types of international carriage of goods by road for hire or reward mentioned in Annex II to the directive to undertakings established in that Member State if the aim of such a system is to restrict the load capacity to be used by them in the carriage of goods abroad, even if those undertakings satisfy the relevant requirements of creditworthiness and technical aptitude laid down by national legislation as regards the carriage of goods abroad and inland and if, pursuant to the national licensing system for the carriage of goods inland, they possess load capacity which has been approved as being perfectly satisfactory?
3. If the answer to Question 2 is in the affirmative, does the prohibition of discrimination on grounds of nationality laid down in Article 7 of the EEC Treaty, properly construed, mean that a statutory licensing system whereby transport under-

takings established in one Member State are subject to quantitative restrictions as regards the load capacity to be employed in the carriage of goods between Member States may be operated if transport undertakings established in other Member States are not or may not be subject to such restrictions by that Member State under Community law?"

My views on the questions submitted are as follows:

1. First question

In submitting this question the court making the reference seeks clarification as to whether the First Council Directive on the establishment of certain common rules for international transport has direct effect in the sense that individuals may rely on it before the courts of the Member States with the result that any national provision which is incompatible with it may not be given effect. The Court of Justice has consistently held in numerous cases¹ that directives have such an effect and at the same time has stressed that individuals are able to rely on the relevant provision as against provisions of national law which are incompatible with it, if the period prescribed for the incorporation of the directive into national law has expired and the provision is *unconditional and sufficiently precise* as regards its subject-matter.

As has been rightly emphasized by the Governments of the Kingdom of

Belgium, the Federal Republic of Germany, the French Republic and the Kingdom of the Netherlands and also by the Commission, which have submitted observations, those requirements are satisfied in this case. Article 1 of the directive imposes in that regard a precise and unequivocal obligation, which allows no margin of discretion, whereby the Member States are required to liberalize the types of carriage referred to in the directive by the end of 1962 at the latest and to abandon any form of quota system, while Article 3 lays down the scope of application of the directive. It follows that the directive has direct effect in the sense that the persons to whom it applies may rely upon it directly, and in particular upon the obligation imposed by Article 1 (3), in order to contest before the courts of the Member States national legislation which is incompatible with it.

2. Second question

This question is concerned with the interpretation of Articles 1 (3) and 3 of the directive and its purpose is to enable the court making the reference to decide whether the Netherlands measures limiting load capacity are in conformity with the provisions of those articles. In this connection the first problem to be considered is whether such a restriction on the permitted total capacity of international transport undertakings established in the Netherlands in fact falls within the scope of the directive.

(a) As the Netherlands Government has stated, a distinction must be made in this context between the three different types of restrictions on load capacity (laadvermogen) laid down in the Netherlands legislation. The first type is a restriction imposed for technical

¹ — See the judgment of 17 December 1970 in Case 35/70 *SACE SpA v. Ministry for Finance of the Italian Republic* [1970] ECR 1213, the judgment of 19 January 1982 in Case 8/81 *Umba Becker v. Finanzamt Münster-Landstadt* [1982] ECR 53, and the judgment of 10 June 1982 in Case 255/81 *R.A. Gredat v. Finanzamt für den Kreisgebiet Hamburg* [1982] ECR 2301.

construction reasons whereby a maximum load capacity is prescribed for the vehicle in question. This must be distinguished from the maximum payload of a vehicle to which the Federal German Government in particular refers to in its observations and which must primarily take account of varying road conditions. Finally, those restrictions, which relate to *individual vehicles*, must be distinguished from the *total capacity* granted to individual undertakings whereby they are empowered to decide for themselves which vehicles are to be used according to their specific requirements. A rule regarding capacity, of the type at issue in this case, on the one hand serves the purpose of facilitating control of the market, which is necessary for various reasons, and on the other hand gives the public authorities the instruments needed to ensure stable market conditions and to enable Netherlands undertakings in the transport sector to operate profitably.

The Governments of France and the Netherlands express the view, in essence, that such a rule is expressly exempted from the operation of the directive by virtue of Article 3 thereof. On the other hand in the view of the plaintiff in the main proceedings and in that of the Commission the Netherlands rule is to be regarded as constituting a quota system prohibited by Article 1 (3).

Accordingly, the essential question is whether such a rule falls within the "conditions under which any Member State authorizes its own nationals to engage in the activities mentioned in [the] directive" which, according to Article 3 thereof, are not to be affected

or whether, as the Commission in particular believes, the directive excludes from its operation only matters connected with the character of the entrepreneur such as personal reliability, solvency and technical aptitude.

In my opinion however neither the *wording* of this provision nor its *place in the general scheme* of the directive provides any convincing support for one view or the other. In any event the binding wording of this provision in all the official languages does not exclude the possibility that the scope of application of the directive was to be restricted, in so far as it was to be left to the Member States to establish criteria, both qualitative and quantitative, to be applied to their own nationals for authorization to engage in international carriage of goods. An indication of the fact that Article 3 is not intended to exclude from the scope of the directive only the question of *admission to the occupation* of road-haulage operator for a State's own nationals is however given by the Dutch version of the directive which states that the directive is not to affect the conditions under which any Member State may permit ("toelaat") its own nationals to engage in the activities mentioned in the directive.

The narrow interpretation of Article 3 suggested by the Commission does not seem convincing from the systematic point of view. Of great importance in this connection is the fact that the directive only abolishes quota systems for the types of carriage listed and precisely defined in Annexes I and II; therefore, by implication, the directive allows such quantitative restrictions to be maintained in relation to other types of international

carriage. If, as the Commission suggests, Article 3 of the directive were intended merely to make it clear that Member States are still entitled to regulate the admission of their own nationals to the occupation of road-haulage operator, then it would not have been necessary to make express reference in the directive to the various types of activity.

Finally it is also apparent from the history of the formulation of this provision that Article 3 was intended to exempt from the operation of the directive all existing restrictions imposed by the Member States regarding authorization to engage in the types of carriage listed in the directive. It was included in the directive on the initiative of the Economic and Social Committee which, as Document No CES 104/62 shows, took the view that the Commission ought to state clearly in the directive that existing provisions in the Member States on the admission of their own nationals to the occupation of international road-haulage operator were not affected by that directive.

Furthermore, it would appear to be clear that until now the Commission too has adopted the position that the conditions which regulate admission to certain activities are to be understood as referring generally to *admission to the market* and not only to admission to the occupation of road-haulage operator. This is apparent from the draft regulation submitted to the Council by the Commission on 15 June 1967 concerning the introduction of common rules for admission to the occupation of road-haulage operator in national and international traffic and load capacity rules for domestic traffic (ABl. L 254 of 20. 10. 1967, p. 3). In the second recital in the preamble to the draft regulation it is stated, *inter alia*, that, in order to avoid

disturbances arising from an imbalance between supply and demand in the transport sector, the market organization must, above all else, contain a rule on *admission to the market*. In the third recital it is further stated that the object of such a rule is to promote healthy competition and to ensure that *capacity increases in accordance with the requirements of the market*. As a logical consequence, Council Directive 74/561/EEC of 12 November 1974 (Official Journal, L 308, 19. 11. 1974, p. 18), which was aimed at coordination of the conditions regarding personal qualifications considered necessary by the Member States, refers only to *admission to the occupation of road-haulage operator*.

Finally in this connection it should also be noted that the Netherlands Government, as it has assured the Court, has always sought, in harmonizing the Netherlands legal provisions with the directive and the amendments thereto, to ensure that measures designed to regulate the load capacity of transport undertakings established in the Netherlands are consistent with the directive and that the Commission has made no objection in that regard. If the Commission had felt that those measures were not compatible with the directive the obvious step to have taken would have been to commence proceedings under Article 169 et seq. of the EEC Treaty.

However, the scope of application of the directive as defined by Article 3 may be clarified in the final analysis by consideration of the *meaning and purpose* of that provision. It must not be overlooked in this connection that the regulation, which was adopted by virtue of Article 75 (1) of the EEC Treaty, dates back to 1962. Article 75 (1) (a)

provides that, for the purpose of implementing Article 74, that is to say for the creation of a common transport policy, the Council is to lay down common rules for international transport to or from the territory of the Member State or passing across the territory of one or more Member States, in accordance with the conditions more particularly described therein. As is well known, it has unfortunately not yet been possible to introduce a common transport policy. Thus at the time in question it was possible to take only a tentative step towards achievement of the objective specified in Article 3 (e) of the EEC Treaty. Furthermore, that fact was made clear by the Council in the heading of the directive which refers only to "certain common rules for international transport". In the first recital in the preamble to that directive it may indeed state that a common transport policy involves, *inter alia*, laying down common rules for the international carriage of goods by road but, as the second recital indicates, such common rules may be established only progressively. Consequently the directive aims only at the prohibition of quotas in respect of the particular types of carriage defined therein.

In the light of these considerations, the meaning and purpose of the directive at that time could only have been to eliminate existing discrimination against transport undertakings established in other Member States and not to abolish load capacity rules applicable to a State's own nationals in the relevant transport sector. This view may also be inferred from the "standstill clause" contained in Article 76 of the EEC Treaty, whereby, until the provisions referred to in Article 75 (1) have been laid down, that is to say until the creation of a common transport policy, "no Member State may . . . make the various provisions governing the

subject when this Treaty enters into force less favourable in their direct or indirect effect on carriers of other Member States as compared with carriers who are nationals of that State".

(b) The foregoing considerations give rise to the final question, to which the Commission and the Netherlands Government, in particular, have addressed themselves, namely whether the directive may be given a *dynamic interpretation*, leading to a different conclusion, once the transitional period laid down by the Treaty has expired.

In this connection the governments which have taken part in these proceedings and the Commission have rightly pointed out that, once the principle of freedom of establishment has been given effect, the expression "own nationals" may be understood only to refer to all the undertakings established in the territory of the Member State in question.

On the other hand it is my opinion that Article 3 of the directive is not open to a restrictive interpretation to the effect that Member States are no longer competent to make such load capacity rules for road-haulage undertakings in their territory, for the following reason: the road-haulage market exhibits a number of special features, especially of a structural nature, which may lead to an imbalance between supply and demand in the trade and therefore to unhealthy developments as regards competition. In order to ensure the stability of the market and thus an adequate standard of living for employers and employees in

the transport sector, it is therefore necessary that appropriate measures for the regulation of load capacity be taken, not least in the general interest. Such measures should also secure a fair distribution amongst the individual undertakings of the bilateral quotas for international carriage of goods negotiated between the individual States. As there is no common transport policy to date and consequently no common rules exist regarding admission to the national and international road-haulage market, such regulation of the market in the general interest may be undertaken by the Member States only in respect of the transport undertakings established in their sovereign territory. Therefore the correct view is that the expiry of the transitional period provided for in the Treaty can have no effect on the suggested interpretation of Article 3 of the directive in question.

3. Third question

If it is found that the directive in question does not disallow national rules regulating load capacity of the type at issue applicable to undertakings established in the Member State in question, the court making the reference

wishes to know whether such rules are prohibited by Article 7 of the EEC Treaty if a Member State subjects its own transport undertakings to stricter requirements than those which apply under Community law to undertakings established in other Member States.

As the governments which have taken part in these proceedings and the Commission have rightly pointed out, this question, which deals with the problem of so-called "reverse discrimination", should be answered in the negative. In this context it is sufficient to refer to the long-standing case-law of the Court of Justice,¹ according to which the principle of non-discrimination embodied in Article 7 does not prohibit different treatment for nationals of different Member States provided that the distinction arises from the differing rules of the individual Member States which have not yet been harmonized by Community law. The important point is simply that the national rules may not, directly or indirectly, make a distinction on the ground of the nationality of the traders. Consequently, as the Court of Justice stated expressly in the *Oebel* case,¹ Article 7 is not infringed by national rules which are applicable not on the basis of the nationality of traders, but simply on the basis of their location.

4. In conclusion, therefore, I propose that the Court should answer the questions submitted by the Netherlands Raad van State as follows:

- (a) It is for the national courts to decide whether or not the national rules in question conform to the provisions of the First Council Directive of

¹ — See the judgment of 13 February 1969 in Case 14/68 *Walt Wilhelm and Others v Bundeskartellamt* [1969] ECR I, the judgment of 14 July 1981 in Case 155/80 Summary proceedings against *Sergius Oebel* [1981] ECR 1993, and the judgment of 27 October 1982 in Joined Cases 35 and 36/82 *Elestina Esselina Christina Morson and Others v State of the Netherlands and Others* [1982] ECR 2723.

23 July 1962 on the establishment of certain common rules on international transport (carriage of goods by road for hire or reward) (Official Journal, English Special Edition 1959-1962, p. 267).

- (b) Articles 1 (3) and 3 of that directive are to be interpreted as meaning that the directive does not apply to national rules on load capacity for the international carriage of goods, which apply only to undertakings established in the territory of the State in question.
- (c) Article 7 of the EEC Treaty is to be interpreted as meaning that only discrimination on the ground of the nationality of traders is prohibited. As Community law stands at present, that principle is not infringed where a Member State lays down rules on load capacity for the international carriage of goods which apply only to undertakings established in its territory, whilst undertakings established in other Member States are not subjected to such restrictions by that Member State under Community law.