implementing measures; nor may they introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings.

2. Articles 3 (f), 5, 85 and 86 of the EEC Treaty do not prohibit national rules providing for a minimum price to be fixed by the national authorities for the retail sale of fuel.

3. Systems of price control which apply to domestic products and imported products alike do not in themselves constitute measures having an effect equivalent to a quantitative restriction but may have such an effect when the prices are fixed at a level such that imported products are placed at a disadvantage compared to identical domestic products, either because they cannot profitably be marketed on the conditions laid down or because the competitive advantage conferred by lower cost prices is cancelled out.

4. Article 30 of the EEC Treaty prohibits national rules providing for a minimum price to be fixed by the national authorities for the retail sale of fuel, where the minimum price is fixed on the basis solely of the ex-refinery prices of the national refineries and where those ex-refinery prices are in turn linked to the ceiling price which is calculated on the basis solely of the cost prices of national refineries when the European fuel rates are more than 8% above or below those prices.

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT delivered on 23 October 1984 *

Mr President,
Members of the Court,

1. The preliminary question

By order of 1 August 1983 the President of the Tribunal de Commerce [Commercial Court], Toulouse, submitted to the Court the following question:

'Must Articles 3 (f) and 5 of the Treaty of 25 March 1957 establishing the EEC be interpreted as prohibiting the fixing in a Member State by law or by regulation of minimum prices for the sale to consumers, at the pump, of "regular" and "super" petrol and diesel oil, a system which compels any retailer who is a national of a Member State to conform to the fixed minimum prices?'

At first sight, that question displays a strong resemblance to the question on which Mr Advocate General Darmon delivered his opinion on 3 October 1984 in Case 229/83, *Leclerc and Others* v *Sàrl 'Au blé vert' and Others*. It will nevertheless be apparent from my examination of the facts, and especially

* Translated from the Dutch.

from the relevant French and Community rules, that there are fundamental differences between this case and that French case on books.

2. The relevant facts and French legislation and the effects of that legislation on imports

2.1. *The relevant facts*

Of the facts on which the main action is founded, it is important here only to state that the plaintiffs in that action sought an interim order prohibiting the two Centres Leclerc from selling the fuels in question at prices below the minimum prices fixed by Decree No 82-13/A of 29 April 1982 and the implementing provisions adopted pursuant to it.

2.2. *The relevant French legislation*

The relatively complicated French rules on prices are analysed in the pleadings of the defendant in the main action, the French Government and the Commission, and their analyses are summarized in the Report for the Hearing. I regard the following features of the system as essential to my argument.

A minimum retail price for each of the products concerned is fixed for each geographical price area. The minimum price consists of a fixed maximum discount on the average maximum selling price to the public. The maximum price is derived from the ex-refinery prices increased by amounts fixed by law, on which the maximum prices for sales by importers also depend. The ex-refinery prices are generally equal to the maximum price applicable to refineries. That maximum price is in principle determined on the basis of the average prices on the free market within the Community, calculated according to a fixed method. However, that applies only in so far as those prices on the free market are no more than 8% above or below the French refineries' cost price.

There are no minimum retail import and purchase prices. Retailers can therefore take advantage of the lowest prices at which the fuel in question is offered within the Community. However, in certain circumstances the aforesaid minimum retail price prevents them from passing on low purchase prices to the consumer.

2.3. *Effects of the French rules*

The question whether the minimum retail selling prices prescribed as I have indicated may restrict imports has naturally played an important role in the written and oral observations. Although questions have also been raised during the proceedings concerning the compatibility with the Treaty of the method of determining maximum prices, these need not be considered here. The national court has not in fact asked any questions concerning them. The same applies in relation to the indirect effect which the importers' obligation to obtain 80% of their supplies from medium-term contracts may have on price levels and the quantity of imports. The rules governing imports can also be disregarded, since no questions have been asked concerning them.

In relation to the minimum price, the French Government has essentially argued that the import and sales potential for a (relatively homogeneous) product such as petrol depends exclusively upon the wholesale price. If the wholesale price for imported petrol is lower than that for French petrol, the retailer will always prefer imported petrol even if he cannot always pass on to the consumer the lower cost price, to which his costs and profit margin

are added, in full. However, he then in fact makes a greater profit. The French Government argued at the hearing that the fixed minimum price can therefore never lead to the restriction of imports, because of the profit which the retailer thus always obtains by purchasing cheaper imported petrol. According to the French Government, the accuracy of that statement is confirmed by the import statistics submitted at the Court's request. According to those statistics, although the total consumption of petrol in France rose only slightly between 1981 and 1983, imports of petrol from other Member States increased by 139%. However, such an increase in imports in no way excludes the possibility that considerable obstacles to trade between States still exist. Thus the fact that the volume of trade between States grew enormously in the 1960s as a result of the abolition of customs duties and quota restrictions does not alter the generally recognized fact that trade between States is still hindered by innumerable restrictions. According to the judgments of this Court, too, even a large increase in the volume of trade between Member States cannot be accepted as adequate proof that the trade between States cannot be adversely affected by a certain measure (see judgment of the Court in Joined Cases 56 and 58/64, *Consten and Grundig* v *Commission*, [1966] ECR 299, at p. 341, last para.).

Moreover, in answer to the arguments of the French Government on the actual influence of the minimum prices on imports, the Commission rightly contended at the hearing that in some circumstances those minimum prices could prevent the retailers concerned from increasing their share of the market in respect of cheap imports of petrol. The possibility of increasing the share of the import market is thereby inevitably restricted.

3. Relevance of Articles 3 (f) and 5 of the Treaty

On a strict construction, the question asked by the Tribunal de Commerce can only be answered in the negative, because Articles 3 (f) and 5 of the Treaty, separately or even in conjunction with one another, do not contain any directly applicable prohibitions which must be applied by the national courts in this case.

Article 3 (f) sets out a programme and as such, according to the judgments of the Court, can be relevant only in determining the objectives of other provisions of the Treaty. Thus in particular it may play a part in the interpretation of Articles 85 to 102 of the Treaty.

Moreover, in view of the remaining objectives of the Treaty, it is impossible to read into Article 3 (f) any indication that any measures adopted by the Community or the Member States restricting competition are in principle incompatible with the objectives of the Treaty. Consequently, a prohibition of such measures equally cannot be inferred from Article 5 in conjunction with Article 3 (f) of the Treaty .[1]

1 — Those two conclusions naturally do not alter the fact that it is in any case apparent from the fourth paragraph of the Preamble to the EEC Treaty that the four freedoms provided for in the Treaty are also intended to guarantee fair competition. However, the Treaty provisions concerned employ different criteria, simpler to apply, on this point than Articles 85 to 92. Conversely, it was apparent during the preparation and application of Regulation No 17 that the most persuasive argument for the acceptance of the relatively strict rules of Article 85 in conjunction with Regulation No 17, particularly in Member States in which no general prohibition was applied at national level in relation to agreements restricting competition, was always the consideration the traders could not be permitted to set up obstacles to trade between States which restricted competition and which the Member States themselves were not allowed to apply. As long as the market is less united than in the United States, for example, the objective of the 'removal of existing obstacles' will therefore also continue to have a certain priority over efforts to eliminate other forms of restriction of competition in the application of Article 85. Judgments of the Court confirm this. That the second conclusion is of limited real significance in the present case will be apparent from the remainder of this opinion.

Unlike Article 3 (f), however, Article 5 does more than merely set out a programme which is relevant solely in the determination of the objectives of the other provisions of the Treaty. On the contrary, Article 5 contains two general duties and one general prohibition, the actual substance of which none the less depends, as regards the first sentence, on obligations and prohibitions laid down elsewhere in the Treaty or arising out of measures adopted by Community institutions — whether or not they are directly applicable. However, as is confirmed *inter alia* in the judgments of the Court in Cases 78/70 (*Deutsche Grammophon* v *Metro*, [1971] ECR 487, at p. 499, para. 5), 13/77 (*Inno* v *ATAB*, [1977] ECR 2115, at pp. 2144 and 2145, paras. 30, 31, 36 and 37) and 141/78 (*French Republic* v *United Kingdom*, [1979] ECR 2923, at p. 2942, para. 8), the wording of the second and third sentences of Article 5 indicates that the duties of cooperation imposed on the Member States by that article may under certain circumstances transcend specific legally binding duties laid down elsewhere. Accordingly, it must be possible to deduce from the general scheme of the Treaty or from other relevant sources a definition of the general duties laid down in Article 5. In so far as measures adopted by national authorities are at issue which directly or indirectly restrict, or under certain conditions may restrict, trade between States, however, Article 5 will usually add little to Articles 30 to 36 and other specific provisions of the Treaty. Those specific Treaty provisions may thus be regarded as merely further elaborations of Article 5, without which Article 5 would not constitute a source of directly applicable duties or prohibitions in those cases.

In the present case, only the Italian Government in its written observations infers from the fact that Articles 3 (f) and 5, either separately or in conjunction with one another, do not contain any directly applicable prohibition which must be applied by the national courts that the question put to the Court must be answered in the negative. In the other written and oral observations submitted to the Court, the question is additionally, or even exclusively, considered in the light of Articles 85 and 86 (on the basis of the judgment of the Court in *Inno* v *ATAB*, cited above) and Articles 30 and 36 of the Treaty.

4. Relevance of Articles 85, 86, 30 and 36 of the Treaty

4.1. With regard to the applicability of Article 5 in conjunction with Articles 85 and 86 of the Treaty, I agree with the view expressed by Mr Advocate General Darmon in his recent Opinion in Case 229/83 on books, *Leclerc*, referred to above, that the decisive factor is whether the rules in question are 'mixed' or 'semi-public', or are instead governed solely by public law. Semi-public rules are *inter alia* rules laid down by the authorities which admit, or even (as was partly the case in *Leclerc*) prescribe, commercial practices governed by private law which distort competition and therefore are prohibited by Articles 85 and 86. If the authorities require publishers and importers to employ a system of vertical price maintenance for books (or, as amounts to the same thing, declare a private system of vertical price maintenance, not generally applied, to be universally binding), the practical effects of the rules are determined primarily by the content of the system of vertical price maintenance applied by individual undertakings and upheld by the public authority. The fact that the rules laid down by the public authority also provide that a discount of 5% must be permitted on the retail prices thus privately determined

does not alter that position. If the system results in certain importers' obtaining an import monopoly for categories of imported books, there is at the same time a possibility that they will abuse that dominant economic position. I agree with Mr Advocate General Darmon that the logical consequence of the Court's judgment in *Inno* v *ATAB*, cited above, is that in a case of that kind the second paragraph of Article 5 may be applied in conjunction with Articles 85 and 86. That approach concentrates on the restrictive effect on competition of the rules, rather than their restriction of imports.

4.2. In the case of the rules on minimum prices for the retail sale of petroleum products which are concerned here, there is, however, no question of such a mixed or semi-public system. The content of the rules on minimum prices and thus their direct and indirect consequences as regards *inter alia* imports are determined exclusively by the rules laid down by the public authorities. In such a case, the principle laid down in *Inno* v *ATAB* cannot be applied and the rules should be examined solely in the light of Article 30 and 36 of the Treaty (where appropriate, in conjunction with the first and third sentences of Article 5, or conversely Article 5 in conjunction with Articles 30 and 36). That is also the point of view put forward by the Commission and the French Government in these proceedings.

5. Examination of the minimum retail selling prices for petroleum products here at issue in the light of Articles 30 and 36 of the Treaty

5.1. *Observations submitted to the Court*

For a complete review of the written observations made by the defendants in the main proceedings, the French and Italian Governments and the Commission, I refer to the Report for the Hearing. During the oral procedure, not only did the Greek Government add its observations but at the same time the most important written observations were further clarified. I would point out that the representative of the Greek Government, like the representative of the French Government, concluded that Articles 3 (f) and 5, in conjunction with Articles 30 *et seq.* and 85 *et seq.* of the Treaty, were not opposed to minimum price rules such as those concerned here. I shall later return so far as is necessary to some of the arguments which were advanced.

5.2. *Article 30*

Since the judgment of this Court in Case 8/74 in *Procureur du Roi* v *Dassonville*, ([1974] ECR 837) it is firmly established case-law that 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade' must be regarded as measures having an effect equivalent to quantitative restrictions on imports.

In relation to rules laying down minimum prices, that rule was defined in greater detail in the judgment of the Court in Case 82/77, *Openbaar Ministerie of the Netherlands* v *van Tiggele*, [1978] ECR 25 (however, as regards the assessment of minimum retail selling prices for tobacco products on the basis of Article 30, see also the judgments in *Inno* v *ATAB*, cited above, in Case 90/82, *Commission* v *France*, [1983] ECR 2011, and Joined Cases 177 and 178/82, *van de Haar and Kaveka de Meern*, [1984] ECR 1797). *Van Tiggele* concerned minimum retail selling prices for certain spirits (in particular, 'vieux' and new holland's gin). After repeating in paragraph 12 of its decision the principle laid down in *Dassonville*, the Court stated in paragraph 13 that 'whilst national price-control rules applicable without distinction to domestic products and imported products cannot in general produce such an effect they may do so in certain specific cases'. The general

principle is then set out more precisely in paragraphs 16 and 17. On the other hand, the exceptions to that general principle are, in so far as is of interest in the present case, set out in paragraphs 14 and 18. In paragraph 14 the Court states: 'Thus imports may be impeded in particular when a national authority fixes prices or profit margins at such a level that imported products are placed at a disadvantage in relation to identical domestic products either because they cannot profitably be marketed in the conditions laid down or because the competitive advantage conferred by lower cost prices is cancelled out'. It adds in paragraph 18 that the general principle does not apply 'in the case of a minimum price fixed at a specific amount which, although applicable without distinction to domestic products and imported products, is capable of having an adverse effect on the marketing of the latter in so far as it prevents their lower cost price from being reflected in the retail selling price'.

It is already clear from my discussion of the *de facto* consequences of the price-control rules at issue here why, in my view, the French Government's argument that Article 30 is not applicable in this case must be rejected. In that part of my Opinion (at the end of Section 2), I reached the conclusion that the French minimum prices for the sale of petroleum products at the pump may prevent the retailers concerned from increasing their share of the market (and hence the actual volume of imports of cheap petrol from other Member States). It is thus established that the rules fixing minimum prices concerned here are also 'capable of hindering, directly or indirectly, actually or potentially, intra-Community trade', to cite the definition in *Dassonville* once again. It is also thereby established that the competitive advantage conferred by the lower cost price is cancelled out inasmuch as enlargement of the market share is prevented. As that is one of the aims of competition, the criterion set out in paragraph 14 of the judgment in *van Tiggele* (and also, for similar reasons, that set out in paragraph 18) is met. That means likewise that rules fixing minimum prices such as those concerned here also fall in principle within the ambit of the prohibition in Article 30. In particular, there is an indirect and potential (that is, dependent on market circumstances) restriction of imports. Such a restriction may become apparent in particular if the prices quoted on the free market (the spot market) in the Netherlands or on the markets of the other Member States in general fall more than 8% below the cost prices of the French refineries. Contrary to the view expressed by the French Government in its observations, that conclusion is not weakened but strengthened by the fact that in the purchase of petrol, unlike the gin concerned in *van Tiggele*, price is virtually the only relevant competitive factor, and quality and inter-brand competition can be more or less disregarded on account of the homogeneous nature of the various fuels in question.

That conclusion also implies that rules fixing minimum prices such as those at issue here cannot in fact be regarded as price-control rules which have the same effects on imported products as on domestic products. I subscribe to the view of the Commission that there is also a failure to comply with the conditions which have been developed over the years in the judgments of this Court in relation to the so-called 'rule of reason', which appears for the first time in

paragraphs 6 and 7 of the judgment in *Dassonville*. In particular, it is laid down in the judgments of the Court in Case 120/78, *Rewe-Zentrale* v *Bundesmonopolverwaltung für Branntwein* ([1979] ECR 649), and in Case 113/80, *Commission* v *Ireland* ([1981] ECR 1625, particularly paragraph 10), that the imperative requirements of general interest to which the 'rule of reason' refers can render the basic principle in *Dassonville*, and thus Article 30 itself, inapplicable solely in the case of measures which apply without distinction to both domestic and imported products or, in the words of paragraph 7 of the judgment in *Dassonville*, measures which do not constitute in practice a disguised (indirect) restriction on trade between Member States. The arguments put forward by the French Government by way of justification of the rules must in the circumstances be assessed not on the basis of the 'rule of reason' but by reference to Article 36 of the Treaty. Indeed, that is also the basis on which the French Government has sought to justify the rules in an alternative argument.

5.3. *Examination of the arguments put forward to justify the rules in the light of Article 36 of the EEC Treaty*

In order to justify the rules at issue, the French Government has, in its written and oral observations, put forward the following grounds in particular: (1) the attempt to limit the use of petroleum products; (2) the desire to guarantee the availability of distribution points throughout the entire French territory; (3) the protection of public policy and public security. My opinion on those grounds can be relatively brief. The first two grounds are clearly of an economic nature; it is quite impossible, moreover, to classify them under any of the grounds set out in Article 36. For those two reasons alone, they must be rejected on the basis of the established case-law of the Court on Article 36. In that connection, I refer *inter alia* to the judgment of the Court in Case 95/81, *Commission* v *Italy* ([1982] ECR 2187). The reference to public policy and public security is elucidated solely by reference to the social unrest, and even blockades and violence, to which the price war unleashed by the Centre Leclerc has given rise. However, there is no support in the judgments of the Court for such a wide interpretation of the concept of public policy. In that connection the Commission refers especially to the Court's judgment in Case 7/78, *Regina* v *Thompson and Others* ([1978] ECR 2247, especially paragraph 34). However, I would add that the acceptance of civil disturbances as justification for encroachments upon the free movement of goods would, as is apparent from experiences of the last year (and before, during the Franco-Italian 'wine war') have unacceptably drastic consequences. If road-blocks and other effective weapons of interest groups which feel threatened by the importation and sale at competitive prices of certain cheap products or services, or by immigrant workers or foreign businesses, were accepted as justification, the existence of the four fundamental freedoms of the Treaty could no longer be relied upon. Private interest groups would then, in the place of the Treaty and Community (and, within the limits laid down in the Treaty, national) institutions, determine the scope of those freedoms. In such cases, the concept of public policy requires, rather, effective action on the part of the authorities to deal with such disturbances. Somewhat superfluously, the Commission further points out that even if one of those grounds were accepted as justification in principle, the second sentence of Article 36 would prevent their ultimate acceptance. In fact it also

follows from its analysis, which I accept, of the *de facto* effects of the French rules in question that they constitute a disguised protection of French refineries and thus a disguised restriction on trade between Member States.

For the sake of completeness, however, I wish in conclusion to devote some attention to the judgment of the Court of 10 July 1984 in Case 72/83, *Campus Oil Limited and Others* v *Minister for Industry and Energy and Others* [1984] ECR 2727. At the time of the oral procedure that judgment had not yet been pronounced, and therefore could naturally not be considered on that occasion. In proceedings for obtaining a preliminary ruling, however, such a circumstance obviously does not prevent the Court from devoting attention to that judgment of its own motion. It will be remembered that the Court decided in that case that a Member State which is totally or almost totally dependent on imports for its supplies of petroleum products 'may rely on grounds of public security within the meaning of Article 36 of the Treaty for the purpose of requiring importers to cover a certain proportion of their needs by purchases from a refinery situated in its territory at prices fixed by the competent minister on the basis of the costs incurred in the operation of that refinery, if the production of the refinery cannot be freely disposed of at competitive prices on the market concerned.' However, the Court then added that 'the quantities of petroleum products covered by such a system must not exceed the minimum supply requirement without which the public security of the State concerned would be affected or the level of production necessary to keep the refinery's production capacity available in the event of a crisis and to enable it to continue to refine at all times the crude oil for the supply of which the State has entered into long-term contracts.'

I do not need to consider here the significance of that judgment in relation to the interpretation of Article 36 as a whole. In any case, I think certain crucial differences of fact militate against applying that judgment by analogy in the present case. First, in periods in which there is a shortage of oil supplies a country such as France can, as a result of its geographical location, make use of the emergency arrangements for mutual assistance adopted within the Community and at international level more easily than a Member State such as Ireland, which is surrounded by sea. Secondly, it is apparent from the statistical data submitted in the course of the procedure that the proportion of the French needs which is supplied by the French refineries is approximately double the share of the domestic market guaranteed to the Irish refineries as a result of the Irish rules which were at issue. Thirdly, it is apparent from paragraphs 34 and 47 of the judgment in *Campus Oil* that reliance upon public security can be justified only in so far as the production capacity in question is necessary for the proper functioning of Irish public institutions and essential public services and even the survival of its inhabitants. In addition to public utilities and a limited number of genuine public services, this will also include hospitals. On the other hand, it is clear from the facts and arguments raised during these proceedings that the French Government is motivated by the need to guarantee an optimum geographical spread of supplies of purely individual needs. From paragraph 35 of the judgment in *Campus Oil* it is apparent that such interests are regarded as purely economic and cannot justify reliance upon Article 36, to which the Court also referred in the judgment in Case 95/81, cited above. Fourthly, the Irish rules were intended solely to provide a better guarantee of adequate supplies of crude oil. On that point I refer to paragraphs 39 and 40 of the judgment. There has been no indication in these proceedings that the

French rules pursue an object of that kind. They relate solely to petrol and in no way provide a better guarantee of supplies of crude oil in periods of crisis.

The judgment in *Campus Oil* therefore gives me no cause to revise my previous conclusions on the applicability of Article 36 in this case.

5.4. *Conclusion*

In conclusion I propose that the Court should give the following reply to the question submitted to it in this case:

'Article 5 in conjunction with Articles 30 and 36 of the EEC Treaty must be interpreted as meaning that the fixing by a Member State of a minimum price for sale to the public at a level and according to rules such as those laid down by the legislation at issue constitutes a prohibited measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 30 of the Treaty and is not justified under Article 36 of the Treaty, where the minimum price is calculated by adjusting prices of imports from other Member States, under certain market conditions and up to a fixed level, to the prices or cost prices of producers of comparable domestic products. However, Articles 3 (f) and 5 of the Treaty, considered separately or in conjunction with one another, do not contain any directly applicable provisions which could be material to the settlement of the dispute in the main proceedings.'

The Court will notice that, in drafting my proposed reply to the question put to the Court, I have as far as possible taken account of the formulation of the question itself. However, it would also naturally be possible, following a duly reasoned re-drafting of the question, to base a reply solely on Articles 30 and 36 of the EEC Treaty. In addition, I have in drafting my proposal attempted toavoid any of the misunderstandings to which the reply proposed by the Commission could give rise. The Court will recall that one of those potential misunderstandings was resolved by the Commission at the end of the oral procedure.