**The quantities of petroleum products covered by such a system must not exceed the minimum supply requirements 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.**

Mackenzie Stuart Koopmans Bahlmann Galmot

Pescatore O'Keeffe Bosco Due Everling

Delivered in open court in Luxembourg on 10 July 1984.

D. Louterman
Administrator

A. J. Mackenzie Stuart
President

## OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 10 APRIL 1984

*My Lords,*

On 1 September 1982 Campus Oil Limited and five other companies trading in refined oil products in Ireland, brought proceedings in the High Court in Ireland against the Minister for Industry and Energy, Ireland, the Attorney General and the Irish National Petroleum Corporation Limited for a declaration that the Fuels (Control of Supplies) Order 1982 (SI No 280 of 1982) was incompatible with Articles 30 and 31 of the EEC Treaty and therefore invalid. They also sought an interlocutory injunction to restrain the defendants from implementing the Order until the proceedings were determined.

The court on 9 December 1982, despite opposition from the defendants on the basis that a reference under Article 177

of the Treaty to the Court of Justice was premature until the facts had been found, decided that it was necessary for two questions to be answered in order to enable a judgment to be given in the proceedings. The parties had agreed a limited number of facts set out in a Statement and the court ordered that these facts and other specified documents should be incorporated in the reference. This was done in the reference sent to the Court on 31 March 1983, the delay being due apparently to an appeal against the judge's order which failed. The reference records that the evidence and arguments on the issues arising in the proceedings has not yet been heard.

The questions are these:

"1. Are Articles 30 and 31 of the above Treaty to be interpreted as applying to a system, such as that established by the Fuels (Control of Supplies) Order 1982 (hereinafter referred to as 'the 1982 Order') in so far as that system requires importers of oil products into a Member State of the European Economic Community (in this case Ireland) to purchase from a State-owned oil refinery up to 35% of their requirements of petroleum oils?

2. If the answer to the foregoing question is in the affirmative, are the concepts of 'public policy' or 'public security' in Article 36 of the Treaty aforesaid to be interpreted in relation to a system such as that established by the 1982 Order so that:

(a) Such system as above recited is exempt by Article 36 of the Treaty from the provisions of Articles 30 to 34 thereof, or

(b) Such scheme is capable of being so exempt in any circumstances and, if so, in what circumstances?"

The 1982 Order, made by the Minister on 25 August 1982, and replaced by another Order made on 1 January 1983 which has been continued in force, was made under Section 3 of the Fuels (Control of Supplies) Acts 1971 and 1982. Section 3 of the Act as amended empowers the Minister to provide for the regulation or control of the acquisition, supply, distribution or marketing of fuels and the control, regulation, restriction or prohibition of their import or export where the Government by an Order made under Section 2 of the Act declares that the exigencies of the common good necessitate control by the Minister on behalf of the State. The Section 2 Order is limited in time, initially it was for six months but under the 1982 Act it may be for 12 months, and can be continued in force by a "continuance order". Orders under Section 2 have been in force since 1979.

The Orders of 1982 and 1983 made under Section 3 of the Act are broadly to the same effect. They require all persons who import into Ireland certain specified petroleum oils to purchase a percentage of their requirements from the Irish National Petroleum Corporation Limited

("INPC"), a State-owned company which operates the only oil refinery in Ireland, at Whitegate in County Cork. The percentage of requirements which must be purchased from INPC is defined as being equal to the percentage of the person concerned's total requirements in a given quarter which the output of the Whitegate refinery bears to the total requirements for that quarter of all persons to whom the order applies, save that the quantity which must be purchased in a given quarter cannot exceed 35% of a person's total requirements of all types of petroleum oil and 40% of total requirements of a particular type. The price of the oil to be purchased is fixed by the Minister and must take into account the costs incurred by INPC in relation to the acquisition of crude oil, shipment, storage, processing and the operation of the refinery, including gains or losses incurred in the sale of petroleum products by reason of movements in exchange rates. According to the order for reference, the extra costs incurred by persons affected by the purchasing obligation may be recovered by increasing their selling prices; in the case of companies subject to price control legislation, provision for this is made by means of orders issued from time to time by the Minister for Trade, Commerce and Tourism. The customer must thus bear the extra costs.

The order for reference states that INPC was set up in July 1979 in order to improve the security of oil supplies to Ireland. To this end it has concluded term contracts for the supply of crude oil with various State oil companies and in 1981 it provided about 10% of Ireland's oil supplies. Crude oil purchased by it was refined in the Whitegate refinery in Ireland or at refineries located in the United Kingdom.

The Whitegate refinery, set up just over 20 years ago, was originally owned and operated by the Irish Refinery Company Limited, the sole shareholders in which were four major oil companies. The refinery initially processed almost all the State's requirements but with increased demand the percentage supplied fell to 50% of total requirements. In 1981 the four oil companies which owned Irish Refinery Company Limited told the Minister for Industry and Energy that they intended to cease refining at Whitegate. It seems that the Irish Government sought to persuade those companies to continue to operate Whitegate. Having failed and in order to keep the refinery open to secure supplies, the Irish Government, acting through INPC, bought all the shares in the Irish Refinery Company Limited. It is agreed that if the Government had not done so, the refinery would have closed and all supplies would have had to come from outside Ireland. Having also sought and failed to reach agreement as to an acceptable basis on which the refinery products should be sold to the oil marketing companies (who apparently did not really want to buy from that refinery) the Minister made the Orders

in question to ensure that the Whitegate refinery could be operated and could dispose of its products.

The plaintiffs in the proceedings before the referring court are bodies corporate established in Ireland who together represent the membership of a trade association formed to protect the interests of traders in oil products who are Irish-owned and who trade either exclusively or predominantly on the Irish market. According to the order for reference, they supply approximately 14% of the gasoline market in Ireland and a somewhat higher percentage of other petroleum products. The rest of the Irish market is supplied almost exclusively by companies which are part of multinational groups. Compared with the latter, the plaintiffs are relatively small companies.

The effect of this Order is thus that petroleum traders must buy a percentage of their requirements fixed by the Irish authorities, though subject to maxima, and they must pay the price fixed even if that is above the current free market price.

It is suggested by the Irish Government that Article 30 is directed to preventing discrimination aimed at the protection of domestic products over imports; and since there is no domestic source of crude oil in Ireland the most that happens here is that some oil, which might have been imported in a refined state, must come in as crude oil and be purchased after refinement in Ireland.

This argument limits Article 30 too restrictively. In Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837 para. 5 the Court's definition of measures having equivalent effect is not limited to what is discriminatory or protectionist. What matters is whether the measure is capable of hindering intra-Community trade. On the face of it the Irish Order clearly is capable of hindering intra-Community trade. It is in any event discriminatory to the extent that it compels traders to buy a percentage of their requirements from a domestic refinery at a price fixed by the authorities.

Reliance, however, is also placed on that part of the Court's decision in Case 120/78 *Rewe* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 which recognized that:

"Obstacles to movement within the Community 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 mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer."

It is said by the Irish Government that the Court has thus recognized that there are exceptions to Article 30 quite apart from those found in Article 36. The preservation of a national oil refining capacity, "the lifeblood of the country" whose maintenance is a requirement over and above all ordinary economic factors, is equally capable of being an exception.

That part of the Court's judgment, however, appears in a paragraph dealing

with a situation where there are no common rules dealing with the production and marketing of the product in question and where the obstacles "result from" disparities between national laws. These qualifications are again set out clearly in paragraph 25 of the Court's judgment in Case 16/83 *Prantl* [1984] ECR 1327. Here the position is different. There is an extensive body of Directives and Decisions made by the Community in respect of oil supply [1] and the obstacles in question do not simply result from disparities between national laws. I do not consider in any event that a direct limitation on sources of supply and an obligation relating to price, albeit in respect of a product as important as oil, should be added to the list of mandatory requirements particularized in that part of the judgment, even accepting that that list is not exclusive.

Article 31, the second Article mentioned in the reference, seems no longer a relevant provision for present purposes. As explained in Case 7/61 *Commission* v *Italy* [1961] ECR 317 and in Case 13/68 *Salgoil* v *Italy* [1968] ECR 453, it is a standstill provision on a transitional basis. As from 1 January 1975, by which date at the latest by virtue of Section 42 of the Act of Accession concerning Ireland, all measures having equivalent effect had to be abolished, the general prohibition in Article 30 took effect.

Accordingly in my view, the answer to the first question, in relation to Article 30, taking Article 30 without reference to Article 36, is yes.

Counsel for the Government of Ireland and the INPC submit that the Court should not answer the second question referred, largely because the facts have not yet been found. I do not accept that submission. The first part of the question is directed to ascertaining whether the system adopted is *per se* justified on the basis of "public policy" or "public security" within the meaning of Article 36; the second, if the first part is answered in the negative, to ascertaining those considerations which the national court must take into account in deciding whether the system as laid down and applied is in fact justified on the basis of public policy or public security. The absence of findings of fact limits the precision with which the Court can answer the question, but there is, in this case, a clear statement of a sufficient basis of agreed fact to enable the Court to give guidance in answering the questions posed. In my view the learned judge was entitled to refer the second question in the way and at the stage he did.

On this second question, the Irish Government and INPC on the one hand, the plaintiffs in the main action and the Commission on the other firmly take up strongly opposed positions.

1 — Directives 68/414 of 20. 12. 1968 (OJ 1968, L 308, p. 14, English Special Edition 1966-1969, p. 586), 72/425 of 19. 12. 1972 (OJ 1972, L 291, p. 154, English Special Edition 1972, p. 69) and 73/238 of 24. 7. 1973 (OJ 1973, L 228, p. 1) and Decisions 68/416 of 20. 12. 1968 (OJ 1968, L 308, p. 19, English Special Edition 1966-1969, p. 591), 77/186 of 14. 2. 1977 (OJ 1977, L 61, p. 23, as amended by Decision 79/879 of 22. 10. 1979, OJ 1979, L 270, p. 58), 77/706 of 7. 11. 1977 (OJ 1977, L 292, p. 9), 78/890 of 28. 9. 1978 (OJ 1978, L 311, p. 13) and 79/639 of 15. 6. 1979 (OJ 1979, L 183, p. 1).

The former say that this obligation to buy at prices fixed to cover the costs of INPC is plainly justified on the grounds of public policy or public security, which they say is entirely a matter for the national governments. The obligation is justified as part of the vital process of maintaining the security of oil supplies. In this regard Ireland is in a vulnerable position especially at a time of acute crude oil shortage or in a potential war crisis since it is non-aligned and in particular is not a member of NATO; it is heavily dependent on oil as a source of energy yet it has no domestic crude oil; it is also dependent very largely on the United Kingdom and the major oil companies situated there; it has had difficulties in maintaining stocks of oil and unless it had rescued the Whitegate refinery, there would have been no refinery in Ireland; the major oil companies would not buy petroleum from Whitegate after 1981 unless they were obliged to do so under a scheme which was equitable as between all the companies. What was done was in no sense of an economic nature and is in any event a temporary arrangement which will be changed as soon as other arrangements can be made.

The Commission and the plaintiffs say that, on the contrary, this is nothing but a restriction of an economic nature imposed for economic reasons. It has nothing to do with public policy or public security. It is unequivocally a plan to ensure that crude oil brought into Ireland to be refined (which the Government is perfectly entitled to do) shall be disposed of without financial loss by imposing a purchasing obligation (which the Government is not entitled to do consonant with its Treaty obligations). Even if public policy and public security can ever be relied on to justify restrictions on the imports of petroleum products, the Irish Government has failed to show that there is any threat to public security from products not going through Whitegate in this case. Moreover, the Commission stresses that this purchasing obligation could not be effective to avoid or deal with a threatened shortage of fuel supplies. What causes the crisis is the shortage of crude oil and merely having a refinery is of no help particularly as there is excess refining capacity in the Community. The real solution is to hold adequate stocks in accordance with obligations under Community Directives supplemented by long term contracts for the supply of crude oil which can perfectly well be refined in other parts of the common market.

Counsel for the United Kingdom Government, which intervened, submits that although the derogations from the principle of the free movement of goods must be construed strictly, they must not be so construed that they have no effect. A balance must be struck between promoting the free movement of goods and protecting the legitimate and fundamental interests of the State. Even though economic interests can be protected under Article 36 they must not

involve discrimination or amount to a disguised restriction on trade. Public security is wide enough to cover the maintenance of the essential public services, or to enable the life of the State to function safely and effectively.

In my opinion, the issues raised in this case, perhaps more than in any other, illustrate the importance of three principles long since emphasized by the Court; that the prohibition of quantitative restrictions, and measures having equivalent effect, lies at the heart of what the Community is seeking to achieve; that the derogations in Article 36 must not be given in any sense an extended meaning; and that these derogations are not to be relied on to justify restrictions of an economic kind, but must find some other justification. This last it seems to me arises independently of the second sentence of Article 36 but is emphasized by it. Thus in no way may a Member State justify under the head of public policy or public security what is on analysis the protection of an essentially economic interest. As it was put in Case 238/82 *Duphar* v *The Netherlands* (Judgment of 7. 2. 1984 [1984] ECR 523) a "primarily budgetary objective" cannot be justified under Article 36.

Yet the restrictions on imports, which by Article 36 are exempted from the prohibition contained in Article 30, inevitably arise in an economic context, otherwise they would not fall within Article 30 in the first place. The inclusion in Article 36 of measures justified for the protection of industrial and commercial property, is the most obvious example. Protecting such property is of great economic importance yet it may be justified on non-economic grounds such as the advantage of fostering inventions, avoiding confusion between goods and preventing the plagiarism of intellectual effort. That, however, is not an isolated example. The other exceptions can equally exist and be relied on so long as they are not "invoked to service economic ends", to adopt what seems a felicitous phrase in Article 2 (2) of Council Directive 64/221 of 25 February 1964 (Official Journal 1964, p. 850, English Special Edition 1963-1964, p. 117).

The obligation to purchase a percentage of oil requirements and at a fixed price plainly has effects of an economic nature and is a measure equivalent to a quantitative restriction. If it was in truth adopted "to serve economic ends", for protectionist reasons, it would clearly not fall within Article 36 and would be prohibited.

Yet, at the present day, the provision of adequate oil supplies has to be accepted as being crucial to the well-being of the State, for the maintenance of essential services and supplies. It is a fundamental and, by proper means, legitimate interest of the State to protect the supply of oil, which for some purposes has no substitute and for that reason may be different from other products which have been referred to.

There has been much debate in this case as to whether measures taken by the

State to protect its oil supply could fall under "public policy" or "public security". Of the two, "public policy" seems to be more general, involving fundamental interests of the State, wide enough to cover, as in Case 7/78 *R* v *Thompson* [1978] ECR 2247, the protection of the right to mint coinage.

"Public security" is clearly not limited to external military security which largely falls to be dealt with under Articles 223 to 225 of the Treaty and which are not relied on here. Nor in my view is it limited to internal security, in the sense of the maintenance of law and order, falling short of "serious internal disturbances affecting the maintenance of law and order" which is covered by Article 224, though it may include this. The maintenance of essential oil supplies is in my view capable of falling within "public security" in that it is vital to the stability and cohesion of the life of the modern State. If I had not come to this view, I would have concluded that it was capable of falling within "public policy".

That, however, is only the beginning of the problem. If it is possible that restrictions relating to the import of oil can be justified for the protection of public security or public policy, as I think, are these particular restrictions so justified? To answer that question involves considering the grounds for, the necessity for and the effect of the quantitative and price restrictions imposed. For that reason alone it is impossible to answer Question 2 (a) in the affirmative merely by looking at the text of the Order. If the question had to be answered on the basis of the Order and the agreed facts, I would not for my part be satisfied that the restrictions in question here had been shown to be justified. It would, however, in my view be wrong at this stage to answer the question on the basis of those facts alone. The judge made it clear that he had neither heard evidence nor full argument, and it seems to me that the defendants are entitled to have the matter fully investigated before a final decision is taken.

What I understand the judge to want (if Question 2 (a) cannot be answered without more) is guidance as to the considerations to be taken into account.

In the first place it is clear that it is for the Member State to prove that the particular restrictions were justified on the basis of the three principles to which I have referred, and that burden is not a light one. Contrary to what counsel for the Irish Government's submission appeared to be, justification is not established by the mere fact that the Government in its discretion decided to adopt these particular measures.

In deciding this question there must be left out of account any economic advantages accruing, however desirable in themselves they may be. Thus the protection of employment, any improvement in the balance of payments,

the financial return, the desirability of keeping in operation a domestic industry and, for commercial reasons, of avoiding purchasing from suppliers outside the State, do not go to establish that the measures are justified.

Secondly, the measures adopted will not in my view be justified if other arrangements which do not involve a restriction on the right to buy imports from other Member States exist or can reasonably be adopted. In this context it is necessary to have regard not merely to contracts which could be made with other oil companies, but to the rights and obligations which exist under Community arrangements. I refer here not merely to "the principle of Community solidarity which is one of the foundations of the Community" (Case 77/77 *BP* v *Commission* [1978] ECR 1513 at para. 15) and to general provisions of the Treaty, but to the specific Directives and Decisions to which I have previously referred.

For example under Directive 72/425 each Member State is required to maintain minimum stocks of petroleum products equivalent to at least 90 days average consumption — such stocks to be kept either in the Member State in question or, by agreement with the Government in another Member State, which is obliged not to interfere with their transfer to the Member State on whose behalf they are held. If difficulties arise with regard to Community oil supplies, provision is made for consultation between Member States and the coordination of measures to be taken by them. The Commission is empowered, where difficulties arise in the supply of crude oil or petroleum products, to subject intra-Community trade to a system of export licences. The principle is expressed in the preamble to Decision 77/186 *viz* "in conformity with the principle of solidarity and non-discrimination, the burden of deficits in supplies of oil and petroleum products must be fairly distributed among the Member States". Provisions also exist to permit or require restrictions on consumption and the giving of priority to supplies of petroleum products to particular groups of users.

These arrangements go a long way to ensuring that oil shortages in the Community are dealt with on a Community basis. If they provide sufficient guarantees to a Member State in respect of its likely needs in an emergency, then further measures may not in my view be justified under Article 36 of the Treaty (see Case 35/76 *Simmenthal* v *Ministero delle Finanze* [1976] ECR 1871 and Case 5/77 *Tedeschi* [1977] ECR 1555). If it be the fact that Ireland has not maintained these stocks, unless for reasons wholly beyond its control, the conclusion is the same since clearly it should have done so.

If 90-day stocks are not considered sufficient and these arrangements not accepted as an adequate guarantee, it must be asked why larger stocks could not be held to ensure an adequate reserve.

Moreover Ireland participates in the International Energy Agency established by a Decision of the Council of the Organisation for Economic Cooperation and Development. The International Energy Programme established by that body provides for measures to be taken to ensure sufficiency of supplies, and for emergency measures to be taken where one participating country sustains or can reasonably be expected to sustain a reduction in oil supplies.

Thirdly the measures will not be justified unless they will achieve the public security objective. As the Commission submits it may be doubtful whether even the presence of a refinery will necessarily achieve this. The critical situations arise when there is a shortage of crude oil. If one country cuts off supplies of crude oil, to have a refinery does not help. At times when there is ample crude oil, there is, it is said, excess refining capacity in the Community in any event, so that refined petroleum can be obtained. Even, therefore, if it is essential, in order to keep the refinery going, to prevent traders buying up to 35 % of their supplies from sources other than Whitegate, it does not follow that in an emergency Whitegate will be able to supply; indeed suppliers of refined petroleum may not be able or willing to assist when the volume of their imports has been reduced.

The question also arises as to whether it is necessary to compel traders to buy from INPC at all. The Government has advanced reasons why it is, which will have to be investigated, in particular whether the oil companies would not buy unless compelled to do so or at any event what proportion of Whitegate's production would be taken voluntarily by not only the major but also the smaller companies.

Fourthly the measures taken must be proportional to the end sought. This requires, *inter alia*, that the figure of 35 % be examined. That on the face of it does not sound an exaggerated percentage but one matter calls for investigation. In the debate on the bill on 13 July 1982, the Minister said that the 35 % upper limit roughly matched the minimum operating level of the refinery and, representing about 35 % of the Irish market, "will minimize the burden on the economy generally and on the oil companies whilst any diseconomy exists". On the other hand, it was said that "such a limit was desirable as indicative of the minimum strategic national requirements in an acute emergency situation". In view of the Community obligation to maintain stocks, it seems to me difficult in fact to justify a restriction on trade in order to maintain minimum strategic national requirements. At the hearing counsel made clear, as the Minister seems to indicate, that what is really desired is to sell that quantity which equals the minimum effective operating capacity of the refinery. It must be kept going so that in an emergency the output could be increased. Apparently, however, the output and the minimum operating capacity has been reduced, following a fall in demand, though the 35 %

remains. What quantity is the minimum amount required to keep the plant in operating order?

The question of the price charged requires particular attention in the light of, for example, the *Duphar* case. I find it difficult to see how this price, based on the costs and expenses of INPC, could be justified on the arguments so far advanced, but it is for the national court to investigate against the background of the provisions of Article 92 of the Treaty which might, if applicable, enable products to be sold at competitive prices and thereby encourage traders to buy from Whitegate, again not just the major but also the smaller companies.

It is also relevant to inquire whether, even if this restriction was justified when it was introduced, it can still be justified when apparently quality has improved and costs, and therefore prices, have been reduced, and when other arrangements for supply might possibly have been made.

Such a restriction can furthermore, in my view, only be justified to the extent that it protects oil and petroleum requirements for essential services and supplies.

Finally it must be asked whether these measures constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

As already made clear all these matters are for the national court to decide. It is, however, only if these criteria are satisfied that this restriction on imports is capable of being justified on grounds of public security, or public policy. If less rigorous standards are adopted, it will be all too easy for "public policy" and "public security" to be used in such a way as to diminish the basic concept of a common market between Member States. As Burrough J. put it in *Richardson* v *Mellish* (1824) (2 Bing 229 at p. 252) public policy "is a very unruly horse and when once you get astride of it, you never know where it will carry you". The ambit of "public security" may equally need cautious attention.

For these reasons it is my opinion that the questions referred should be answered on the following lines:

1. National legislation which requires importers of oil products into a Member State to purchase from the State-owned oil refinery up to 35 % of their requirements of petroleum oils is prohibited by Article 30 of the Treaty.

2. Such legislation will be justified under Article 36 on the grounds of public security, and thereby not precluded by Article 30, if it is necessary, other

than on economic grounds, to maintain essential services and supplies. It will not be necessary for this purpose where the requisite oil supplies can be ensured by other means which are less restrictive of imports, such as the keeping of stocks.

The costs of the reference of the parties to the action fall to be dealt with in those proceedings. No order should be made as to the costs of the Commission and the United Kingdom Government.