Campus Oil Limited and Others v. Minister for Industry and Energy and Others [FN1] (Case 72/83)

FN1 Plaintiffs: Campus Oil Ltd., Estuary Fuel Ltd., McMullan Bros. Ltd., Ola Teoranta, P.M.P.A. Oil Co. Ltd. and Tedcastle McCormick & Co. Ltd. Defendants: Minister for Industry and Energy, the Attorney-General and Irish National Petroleum Corp. Ltd.

Before the Court of Justice of the European Communities

ECJ

(Presiding, Lord Mackenzie Stuart C.J.; Koopmans, Bahlmann and Galmot PP.C.; Pescatore, O'Keeffe, Bosco, Due and Everling JJ.) Sir Gordon Slynn Advocate General.

10 July 1984

Reference from Ireland by the High Court under Article 177 EEC.

National courts. Reference under Article 177. Discretion.

It is for the national court, in the framework of close co-operation established by **Article 177** EEC between the national courts and the European Court of Justice based on the assignment to each of different functions, to decide at what stage in the national proceedings it is appropriate to refer a question to the European Court for a preliminary ruling. It is also for the national courts to appraise the facts of the case and the arguments of the parties, of which it alone has a direct knowledge, with a view to defining the legal context in which the interpretation requested should be placed. [10]

Imports. Quantitative restrictions.

Article 30 EEC, in prohibiting all measures having equivalent effect to quantitative restrictions on imports, covers any measure which is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade. [14]

Imports. Inter-State trade.

The obligation placed on all importers into a member-State to purchase a certain proportion of their supplies of a given product (*in casu*, refined oil) from a national supplier limits to that extent the possibility of importing the same product from other member-States. It thus has a protective effect by favouring national production and, by the same token, works to the detriment of producers in other member-States, regardless of whether or not the raw materials (*in casu*, crude oil) used in the national production must themselves be imported. [16]

Imports. Quantitative restrictions. National interest.

*545 The EEC Treaty applies the principle of free movement to all goods, subject only to the exceptions expressly provided for in the Treaty itself. Goods cannot, therefore, be considered exempt from the application of that fundamental principle merely because they are of particular importance for the life of the economy of a member-State, not even when their aim is to preserve energy supplies (petroleum). [17]

Imports. Quantitative restrictions. Public enterprises.

Article 90(1) EEC provides that in the case of public undertakings and undertakings to which member-States grant special or exclusive rights, member-States are neither to enact nor to maintain in force any measure contrary to the rules in the Treaty. Article 90(2) is intended to define more precisely the limits within which, *inter alia*, undertakings entrusted with the operation of services of general economic interest are to be subject to the rules of the Treaty. It does not, however, exempt a member-State which has entrusted such an operation to an undertaking from the prohibition on adopting, in favour of that undertaking and with a view to protecting its activity, measures which restrict imports from other member-States contrary to **Article 30** EEC. [19]

Imports. Quantitative restrictions. Exemptions.

Recourse to Article 36 EEC is no longer justified if Community rules provide for the necessary measures to ensure protection of the interests set out in that **Article.** [27]

Imports. National interest. Energy supplies. Community measures.

The existing Community rules give a member-State whose supplies of petroleum products depend almost totally on deliveries from other countries certain

guarantees that deliveries from other member-States will be maintained in the event of a serious shortfall in proportions which match those of supplies to the market of the supplying State. But there is no unconditional assurance that supplies will in all events be maintained at a level sufficient to meet minimum needs. Consequently, **Article 36** EEC is not excluded even though there exist Community rules on the matter. [31]

Imports. Quantitative restrictions. Exemptions.

The purpose of **Article 36** EEC is not to reserve certain matters to the exclusive jurisdiction of the member-States. It merely allows national law to derogate from the principle of free movement of goods to the extent to which that is, and remains, justified in order to achieve the objectives set out in that **Article.** [32]

Imports. Quantitative restrictions. 'Public security'. Energy supplies.

Petroleum products, because of their exceptional *546 importance as an energy source in the modern economy, are of fundamental importance for a country's existence since not only its economy but even more its institutions, its essential public services and even the survival of its inhabitants depend upon them. An interruption of supplies of petroleum products, with the resultant dangers for the country's existence, could therefore seriously affect the public security that **Article 36** EEC allows States to protect. The aim of ensuring a minimum supply of petroleum products at all times is to be regarded as transcending purely economic considerations (which in themselves are excluded from **Article 36**) and thus as capable of constituting an objective covered by the concept of 'public security'. [34]-[35]

Imports. 'Public security'. Pith and substance.

So long as national rules are justified by objective circumstances corresponding to the needs of public security, the fact that it is possible to use them to achieve, in addition to the public security objectives, other objectives which are of an economic nature, does not necessarily exclude the application of **Article 36** EEC. [36]

Imports. Quantitative restrictions. Exemptions.

Article 36 EEC, as an exception to a fundamental principle of the Treaty, must be interpreted in such a way that its scope is not extended any further than is necessary for the protection of the interests which it is intended to secure and the measures taken under that **Article** must not create obstacles to imports which are disproportionate to those objectives. **Article 36** measures can, therefore, be justified only if they are such as to serve the interest which that **Article** protects and if they do not restrict intra-Community trade more than is absolutely necessary. [37] & [44]

Imports. Public security. Energy supplies.

A member-State which is almost totally dependent on imports for its supplies of petroleum products may rely on grounds of 'public security' under **Article 36** EEC to require importers to cover a certain proportion of their needs by purchases from an oil refinery situated in its territory at prices fixed by the relevant minister on the basis of the costs incurred in the operation of the refinery, if the production of the refinery cannot otherwise be freely disposed of at competitive prices on the market concerned. 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 would be affected nor exceed 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 *547 crude oil for the supply of which the State has entered into long-term contracts. [51]
The Court *interpreted* **Articles 30** and **36** EEC *in the context of* Irish laws requiring importers of petroleum products into Ireland to purchase 35 per cent. of their total requirements from a state-owned oil refinery in Ireland at prices fixed by the Irish Government *to the effect that* such a situation was caught by **Article 30,** there being no 'rule of reason' saving restrictions imposed for reasons of overriding national interest, *that* **Article 36** did not apply if the need was met by Community measures, *that* the EEC measures for ensuring a supply of energy in the case of a world oil shortage did not provide complete security, *that* the seriousness of the need for guaranteed oil supplies for the life of the nation justified recourse to the 'public security' exemption in **Article 36,** *that* the Irish measures in issue were in principle validly justified under that exemption in view of the potential danger to supplies of both crude oil (solved by means of long-term contracts) and refined oil (solved by maintaining a state refinery to avoid complete reliance on commercial supplies from the multinational oil companies), *but that* it was for the Irish courts to determine whether the Irish measures were no more than was necessary to attain the ends sought.

Representation

Eoghan P. Fitsimons S.C., with him Richard Nesbitt, of the Irish Bar, instructed by A. & L. Goodbody, for the plaintiffs.
Nigel Fennelly S.C., with him Daniel Burn, of the Irish Bar, instructed by the Chief State Solicitor, for the defendant Minister and Attorney-General.
John Blayney S.C., with him Daniel O'Keeffe, of the Irish Bar, instructed by Arthur Cox & Co., for the defendant Irish National Petroleum Corporation.
Francis Jacobs, of the English Bar, instructed by the treasury solicitor for the United Kingdom Government as *amicus curiae*.
F. Spathopoulos for the Greek Government as *amicus curiae*.
Richard Wainwright and Julian Currall, of the Commission's Legal Service, for the E.C. Commission as *amicus curiae*.

The following cases were referred to by the Court in its judgment:
1. The Irish Creamery Milk Suppliers Association v. Government of Ireland (36/80 & 71/80), 10 March 1981: [1981] E.C.R. 735, [1981] 2 C.M.L.R. 455.
2. Re Health Control on Imported Meat: E.C. Commission v. Germany (153/78), 12 July 1979: [1979] E.C.R. 2555, [1980] 1 C.M.L.R. 198.
3. E.C. Commission v. Italy (95/81), 9 June 1982: [1982] E.C.R. 2187.
4. FA Joh. Eggers Sohn & Co. v. Freie Hansestadt Bremen (13/78), 12 October 1978: [1978] E.C.R. 1935, [1979] 1 C.M.L.R. 562.
*548 5. Re Italian Table Wines: E.C. Commission v. France (42/82), 22 March 1983: [1983] E.C.R. 1013, [1984] 1 C.M.L.R. 160.

The following further cases were referred to by the Advocate General:
6. Procureur du Roi v. Dassonville (8/74), 11 July 1974: [1974] E.C.R. 837, [1974] 2 C.M.L.R. 436.
7. Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (120/78), 20 February 1979: [1979] E.C.R. 649, [1979] 3 C.M.L.R. 494.
8. Prantl (16/83), 13 March 1984: not yet reported.
9. Re Quantitative Restrictions on Imports of Pork Products into Italy: EEC Commission v. Italy (7/61), 19 December 1961: [1961] E.C.R. 317, [1962] C.M.L.R. 39.
10. Salgoil SpA v. Ministero per il Commercio Con L'estero (13/68), 19 December 1968: [1968] E.C.R. 453, [1969] C.M.L.R. 181.
11. Duphar BV v. Minister Van Volksgezondheid en Milieuhygiëne (238/82), 7 February 1984: not yet reported.
12. Regina v. Thompson (7/78), 23 November 1978: [1978] E.C.R. 2247, [1979] 1 C.M.L.R. 47.
13. Benzine en Petroleum Handelsmaatschappij BV v. E.C. Commission (77/77), 29 June 1978: [1978] E.C.R. 1513, [1978] 3 C.M.L.R. 174.
14. Tedeschi v. Denkavit Commerciale Srl (5/77), 5 October 1977: [1977] E.C.R. 1555, [1978] 1 C.M.L.R. 1.
15. Simmenthal SpA v. Ministero delle Finanze (No. 1) (35/76), 15 December 1976: [1976] E.C.R. 1871, [1977] 2 C.M.L.R. 1.
16. Richardson v. Mellish: (1824) 2 Bing. 229.

The following additional cases were referred to in argument:
17. Officier Van Justitie v. de Peijper (104/75), 20 May 1976: [1976] E.C.R. 613, [1976] 2 C.M.L.R. 271.
18. Van Duyn v. Home Office (41/74), 4 December 1974: [1974] E.C.R. 1337, [1975] 1 C.M.L.R. 1.
19. Regina v. Bouchereau (30/77), 27 October 1977: [1977] E.C.R. 1999, [1977] 2 C.M.L.R. 800.
20. Italian State v. Gilli (788/79), 26 June 1980: [1980] E.C.R. 2071, [1981] 1 C.M.L.R. 146.
21. Fabriek voor Hoogwaardige Voedingsprodukten Kelderman BV (130/80), 19

February 1981: [1981] E.C.R. 527.

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*549 **Facts**

Under section 2 of the Irish Fuels (Control of Supplies) Act 1971 (hereinafter referred to as 'the 1971 Act'), as amended in 1982, the Irish Government may by order declare that the exigencies of the common good necessitate the control by the appropriate Minister on behalf of the State of the purchase, supply and distribution of fuels. The order remains in force for a given period which, under the Fuels (Control of Supplies) Act 1982 (hereinafter referred to as 'the 1982 Act'), cannot exceed 12 months from the date on which it was made, without prejudice to the Government's power to make a further order extending the validity of the original order. On 11 April 1979 the Irish Government made an order declaring that the exigencies of the common good necessitated the control of the supply and distribution of fuels; that order was subsequently extended from time to time.

Section 3 of the 1971 Act, as inserted by the 1982 Act, provides that where such an order is in force, the Minister may by order provide for the regulation or control of the acquisition, supply, distribution or marketing of the type or types of fuel to which the order relates for the maintenance and provision of supplies of that type or those types of fuel and provide for the control, regulation, restriction or prohibition of the import or the export of the type or types of fuel in question.

Ireland has no domestic supply of crude oil. Until 1979 the supply of the major proportion of refined petroleum products to the Irish market was in the hands of a small number of international oil companies which had no necessary or permanent commitment to the Irish market.

In July 1979, in order to improve the security of oil supplies within the State, the Irish Government set up a state-owned oil company known as the Irish National Petroleum Corporation Ltd. (hereinafter referred to as 'the INPC') whose objectives include providing for the supply of a significant part of the oil requirements of the Irish market, operating within the Irish oil industry and oil market with a view to promoting orderly development and developing and maintaining economic activity which contributes to the efficiency of the oil industry in Ireland.

The INPC has concluded term contracts with foreign suppliers for the supply of crude oil. In 1981 the INPC provided approximately *550 10 per cent. of Ireland's oil supplies. Crude oil purchased by the INPC was refined for it either in Ireland's only oil refinery at Whitegate in County Cork or at refineries in the United Kingdom.

The Whitegate refinery was owned by the Irish Refining Company Ltd., itself owned jointly by four major oil companies, namely Irish Shell Ltd., Esso Petroleum Company Ltd., Texaco International Trader Inc. and BP (Ireland) Ltd. In August 1981 the four companies which owned the refinery informed the

Ministry for Industry and Energy that it was their intention that refining should cease permanently at the refinery. Following unsuccessful negotiations with those companies with a view to the continuance by them of the operation of the refinery, the Irish Government was faced with the option of either acquiring the refinery on behalf of the State or allowing it to close. In the event of the refinery's closure, all suppliers of refined petroleum products on the Irish market would have been obliged to obtain their supplies from abroad, principally from the United Kingdom which accounts for approximately 80 per cent. of supplies. Having determined that the retention of the refinery was necessary in the interests of security of supplies and following consultation of the Commission of the European Communities, the Irish Government acquired through the INPC the entire issued share capital of the Irish Refining Company Limited, which owned the Whitegate refinery.
Since the Minister for Industry and Energy and the oil-marketing companies could not agree on the basis on which the products of the Whitegate refinery would be sold, on 25 August 1982 the Minister, in the exercise of the powers conferred upon him by section 3 of the 1971 Act, as amended by the 1982 Act, made the Fuels (Control of Supplies) Order 1982 [FN2] (hereinafter referred to as 'the 1982 Order') in order to maintain the Whitegate refinery in operation.

FN2 S.I. No. 280 of 1982.

The 1982 Order applies to all persons who import into Ireland any of the wide range of petroleum oils to which it refers. It requires those importers to purchase from the INPC that proportion of their requirements of each type of petroleum product during certain specified periods which the Whitegate refinery's output represents of the total requirements of that type of petroleum product of all importers for the same period.
Importers are obliged to provide the Minister with all the necessary information. Their purchasing obligation is limited to 35 per cent. of their total petroleum oil requirements or to tax of 40 per cent. of their requirements of any particular type of petroleum oil.
The price at which those products are to be purchased is determined by the Minister for Industry and Energy, having regard *551 to the costs incurred by the INPC or by the Irish Refining Company Ltd. in relation to capital costs, financing costs and overhead costs of acquiring crude oil, shipment, storage, processing and any other costs incurred in, or arising from, the operation of the refinery. The persons affected by the 1982 Order are entitled to recover any additional costs thus incurred by raising their selling prices.
Campus Oil Ltd., Estuary Fuel Ltd., McMullan Bros. Ltd., Ola Teoranta, P.M.P.A. Oil Company Ltd. and Tedcastle McCormick & Co. Ltd. are traders in petroleum products established in Ireland. They are all members of the Irish Independent Petroleum Association, a trade association formed to protect the interests of Irish-owned traders in petroleum products who trade either exclusively or predominantly on the Irish market. They are engaged in the importation and sale of fuel oils, particularly gas oils, gasolene and other fuel oils of various grades.

They supply approximately 14 per cent. of the gasolene market in Ireland and a somewhat higher percentage of other petroleum products. The remainder of the market is supplied by multinational companies.
The above-mentioned companies have objected to being obliged to purchase supplies from the INPC and have submitted a complaint to the Commission on the matter.
By letter of 1 February 1983 the Commission initiated the procedure under Article 169 of the EEC Treaty against Ireland for the infringement of Articles 30, 36, 85, 86 and 90 of the EEC Treaty. The Irish Government submitted its observations on the alleged infringement by letter of 26 April 1983.
In order to challenge the purchasing requirement under the 1982 Order, the above-mentioned companies also initiated proceedings before the High Court of Ireland for a declaration that the 1982 Order is inconsistent with the provisions of the EEC Treaty and, in particular, with Articles 30, 31, 36, 85, 86, 90, 92 and 93 thereof.
In the proceedings before the High Court, the plaintiffs in the main action contend that the requirement in the 1982 Order that they should purchase up to 35 per cent. of their requirements of petroleum products from the INPC constitutes a measure having an effect equivalent to a quantitative restriction on imports. The defendants in the main action maintain that the purchasing requirement does not constitute such a restriction and that, if it does, the restriction is justified on grounds of public policy and public security and is accordingly covered by **Article 36** of the EEC Treaty.
The High Court of Ireland took the view that, before hearing the submissions and arguments of the parties relating to the precise effects of the contested system on trade and to the reasons for the purchase of the Whitegate refinery by the State and for the introduction of that system on grounds of public policy and public *552 security, it was necessary to refer to the Court of Justice certain questions on the interpretation of Community law. Accordingly, by Order of 9 December 1982, the High Court referred to the Court of Justice under Article 177 of the EEC Treaty the following questions for a preliminary ruling:
1. Are **Articles 30** and **31** of the EEC Treaty to be interpreted as applying to a system such as that established by the Fuels (Control of Supplies) Order 1982 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 per cent. 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 a 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?
Upon 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. However, it asked the Commission to reply to a question concerning the provisions in force governing the supply of petroleum products and their distribution at national level in other member-States, at Community level and at international level and to produce certain documents. The Commission replied to that question before the sitting.
In response to a request made by the Court at the sitting on 29 February 1984, the Commission submitted a series of documents concerning the rules applicable within the framework of the International Energy Agency set up by the Organisation for Economic Co-operation and Development.

Opinion of the Advocate General (Sir Gordon Slynn)

On 1 September 1982 Campus Oil Ltd. 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 Ltd. for a declaration that the Fuels (Control of Supplies) Order 1982 [FN3] 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.

FN3 S.I. No. 280 of 1982.

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 *553 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 Advocate General repeated the questions, and continued:*]
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 Ltd. ('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 per cent. of a person's total requirements of all types of petroleum oil and 40 per cent. 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 *554 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 per cent. 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 Ltd., 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 per cent. of total requirements. In 1981 the four oil companies which owned Irish Refinery Company Ltd. 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 Ltd. 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 per cent. 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 *555 products over imports; and since there is no domestice 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 [FN4] 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.

FN4 [1974] E.C.R. 837, [1974] 2 C.M.L.R. 436 At Para. [5].

Reliance, however, is also placed on that part of the Court's decision in Case 120/78 Rewe v. Bundesmonopolverwaltung für Branntwein [FN5] which recognised 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 recognised 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.'

FN5 [1979] E.C.R. 649, [1979] 3 C.M.L.R. 494.

It is said by the Irish Government that the Court has thus recognised 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. [FN6] Here the position is different. There is an extensive body of directives and decisions made by the Community in respect of oil supply [FN7] 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, *556 albeit in respect of a product as important as oil, should be added to the list of mandatory requirements particularised in that part of the judgment, even accepting that that list is not exclusive.

FN6 Not yet reported.

FN7 Directives 68/414 of 20 December 1968 [1966-1969] O.J.Spec.Ed. 586, 72/425 of 19 December 1972 [1972] O.J.Spec.Ed. 69 and 73/238 of 24 July 1973 [1973] O.J. L228/1; and Decisions 68/416 of 20 December 1968 [1966- 1969] O.J.Spec.Ed. 591, 77/186 of 14 February 1977 [1977] O.J. L61/23, as amended by Decision 79/879 of 22 October 1979 [1979] O.J. L270/58, 77/706 of 7 November 1977 [1977] O.J. L292/9, 78/890 of 28 September 1978 [1978] O.J. L311/13, and 79/639 of 15 June 1979 [1979] O.J. L183/1.

Article 31, the second **Article** mentioned in the reference, seems no longer a relevant provision for present purposes. As explained in Case 7/61 E.C. Commission v. Italy [FN8] and in Case 13/68 Salgoil v. Italy, [FN9] 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.

FN8 [1961] E.C.R. 317, [1962] C.M.L.R. 39.

FN9 [1968] E.C.R. 453, [1969] C.M.L.R. 181.

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.

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 *557 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 emphasised 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 *558 second sentence of **Article 36** but is emphasised 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. Netherlands [FN10] a 'primarily budgetary objective' cannot be justified under **Article 36.**

FN10 Not yet reported.

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. [FN11]

FN11 [1963-1964] O.J.Spec.Ed. 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 wellbeing 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, [FN12] the protection of the right to mint coinage.

FN12 [1978] E.C.R. 2247, [1979] 1 C.M.L.R. 47.

'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, *559 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 *560 Community' (Case 77/77 BP v. E.C. Commission [FN13]) and to general provisions of the Treaty, but to the specific directives and decisions to which I have previously referred.

FN13 [1978] E.C.R. 1513, [1978] 3 C.M.L.R. 174 At Para. [15].

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 co- ordination 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 [FN14] and Case 5/77 Tedeschi [FN15]). 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.

FN14 [1976] E.C.R. 1871, [1977] 2 C.M.L.R. 1.

FN15 [1977] E.C.R. 1555, [1978] 1 C.M.L.R. 1.

If 90-day stocks are not considered sufficient and these arrangements not accepted as an adequate guaranteee, 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 *561 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 per cent. 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 per cent. 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 per cent. upper limit roughly matched the minimum operating level of the refinery and, representing about 35 per cent. of the Irish market, 'will minimise 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 have been reduced, following a fall in demand, though the 35 per cent. 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 *562 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 [FN16] 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.

FN16 (1824) 2 Bing. 229 At 252.

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 per cent. 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.

JUDGMENT

[1] By order of 9 December 1982, which was received at the Court on 28 April 1983, the High Court of Ireland referred to the *563 Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Articles 30, 31 and 36 of the Treaty in order to enable it to decide whether Irish rules requiring importers of petroleum products to purchase a certain proportion of their requirements at prices fixed by the competent Minister from a State-owned company which operates a refinery in Ireland are compatible with the Treaty.
[2] Those questions arose in proceedings instituted by six Irish undertakings trading in petroleum products either exclusively or predominantly in Ireland, which supply approximately 14 per cent. of the motor spirit market in Ireland and a somewhat higher percentage of other petroleum products, against Ireland and the Irish National Petroleum Corporation (hereinafter referred to as 'the INPC'). In the main action, the six plaintiff undertakings are seeking a declaration in the High Court that the Fuels (Control of Supplies) Order 1982 (hereinafter referred to as 'the 1982 Order') is incompatible with the EEC Treaty.
[3] The 1982 Order was made by the Irish Minister for Industry and Energy under powers conferred on him by the Fuels (Control of Supplies) Act 1971, as amended in 1982, for the maintenance and provision of supplies of fuels. The

1982 Order requires any person who imports any of the various petroleum products to which it applies to purchase a certain proportion of their requirements of petroleum products from the INPC at a price to be determined by the Minister taking into account the costs incurred by the INPC.
[4] The INPC, whose share capital is owned by the Irish State and whose function is to improve the security of supply of oil within Ireland, purchased, in 1982, the share capital of the Irish Refining Company Ltd., owner of the only refinery in Ireland, which is situated at Whitegate, County Cork. The share capital of the Irish Refining Company Ltd., which is capable of supplying from the Whitegate refinery some 35 per cent. of the requirements of the Irish market in refined petroleum products, had until then been owned by four major oil companies which supply the greater part of the Irish market in refined petroleum products. The decision to acquire the Whitegate Refinery by means of the purchase of the capital of the Irish Refining Company Ltd. was taken after the four major international oil companies announced their intention to close the refinery.
[5] The reason given by the Irish Government for acquiring the Irish Refining Company Ltd. was the need to guarantee, by keeping refining capacity in operation in Ireland, the provision of supplies of petroleum products in Ireland, in view of the fact that if the refinery had closed, all suppliers of refined petroleum products on the Irish market would have been obliged to obtain their *564 supplies from abroad. Approximately 80 per cent. of those supplies come from a single source, namely the United Kingdom.
[6] The obligation to purchase from the INPC, provided for by the 1982 Order, is intended to ensure that the Whitegate refinery can dispose of its products. For each person to whom the 1982 Order applies the proportion of requirements covered by the purchasing obligation is equal, for each type of petroleum product, to the proportion which the Whitegate refinery's output for a certain period represents of the total requirements for that type of petroleum product during the same period of all the persons to whom the 1982 Order applies. However, each importer is only required to purchase up to a maximum of 35 per cent. of its total requirements of petroleum products and 40 per cent. of its requirements of each type of petroleum product.
[7] The plaintiff undertakings contend, in support of their application in the main action, that the 1982 Order is contrary to Community law and in particular to the prohibition, as between member-States, of quantitative restrictions on imports and all measures having equivalent effect, laid down in **Article 30** of the Treaty. The Irish Government and the INPC dispute that the 1982 Order is a measure which comes within the scope of that prohibition and contend that in any event it is justified, under Article 36 of the EEC Treaty, on grounds of public policy and public security inasmuch as it is intended to guarantee the operation of Ireland's only refinery, which is necessary to maintain the country's supplies of petroleum products.
[8] In the main action, the detailed circumstances and reasons which led the Irish Minister for Industry and Energy to make the 1982 Order are disputed between the parties. The High Court took the view that before proceeding to inquire into

the disputed facts, it was necessary to ask the Court of Justice to rule on the scope of the rules in the EEC Treaty on the free movement of goods as applied to a scheme such as the one at issue in the case. It therefore referred the following questions to the Court:
1. 'Are **Articles 30** and **31** of the EEC Treaty to be interpreted as applying to a system such as that established by the Fuels (Control of Supplies) Order 1982 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 per cent. 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?'

*565 [9] The Irish Government and the INPC consider that the referral to the Court is premature since the facts of the main action have not yet been established before the national court. They submit that to rule on the questions raised, and in particular on the first part of the second question, would have the effect of definitively depriving the defendants in the main action of the opportunity of defending their case before the national court and of producing all the relevant evidence, concerning in particular the reasons justifying the 1982 Order.
[10] As the Court has held in a number of cases (see in particular the judgment of 10 March 1981, Joined Cases 36 and 71/80 Irish Creamery Milk Suppliers Association [FN17]) it is for the national court, in the framework of close co-operation established by **Article 177** of the Treaty between the national courts and the Court of Justice based on the assignment to each of different functions, to decide at what stage in the proceedings it it appropriate to refer a question to the Court of Justice for a preliminary ruling. It is also for the national court to appraise the facts of the case and the arguments of the parties, of which it alone has a direct knowledge, with a view to defining the legal context in which the interpretation requested should be placed. The decision as to when to make a reference under **Article 177** in this case was thus dictated by considerations of procedural organisation and efficiency which are not to be weighed by the Court of Justice, but solely by the national court.

FN17 [1981] E.C.R. 735, [1981] 2 C.M.L.R. 455.

[11] Since it is for the national court to give judgment in the main action on the basis of the interpretation of Community law provided by the Court of Justice, the parties have the opportunity in the main proceedings to bring forward any

evidence they wish, particularly with regard to the reasons for the 1982 Order.

The first question on the interpretation of Article 30 of the Treaty

[12] The High Court's first question is whether **Article 30** of the Treaty is to be interpreted as meaning that rules of the type laid down by the 1982 Order constitute a measure equivalent to a quantitative restriction on imports.
[13] In the view of the plaintiffs in the main action and also of the Commission, it is undeniable that such measures, under which importers are obliged to purchase part of their supplies within the member-State, have a restrictive effect on imports within the meaning of **Article 30.**
[14] The Irish Government, however, contends that such is not the case. First, the measure in question in no way restricts imports inasmuch as, in any event, all oil, whether crude or refined, used in Ireland, has to be imported. Secondly, it is possible to interpret *566 **Article 30** as containing an unwritten derogation for products such as oil which are of vital national importance.
[15] In this connection, it must first be borne in mind that, according to the settled case law of the Court, **Article 30** of the Treaty, in prohibiting all measures having equivalent effect to quantitative restrictions on imports, covers any measure which is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.
[16] The obligation placed on all importers to purchase a certain proportion of their supplies of a given product from a national supplier limits to that extent the possibility of importing the same product. It thus has a protective effect by favouring national production and, by the same token, works to the detriment of producers in other member-States, regardless of whether or not the raw materials used in the national production in question must themselves be imported.
[17] As regards the Irish Government's argument regarding the importance of oil for the life of the country, it is sufficient to note that the Treaty applies the principle of free movement to all goods, subject only to the exceptions expressly provided for in the Treaty itself. Goods cannot therefore be considered exempt from the application of that fundamental principle merely because they are of particular importance for the life or the economy of a member-State.
[18] The Greek Government refers in this context to Article 90(2) of the Treaty, contending that a refinery is an undertaking of general economic interest and that a State refinery could not, without special measures in its favour, compete with the major oil companies.
[19] It should be noted in that regard that Article 90(1) provides that in the case of public undertakings and undertakings to which member-States grant special or exclusive rights, member-States are neither to enact nor to maintain in force any measure contrary to the rules contained in the Treaty. **Article 90(2)** is intended to define more precisely the limits within which, in particular, undertakings entrusted with the operation of services of general economic interest are to be subject to the rules contained in the Treaty. **Article 90(2)** does not, however, exempt a member-State which has entrusted such an operation to an undertaking from the

prohibition on adopting, in favour of that undertaking and with a view to protecting its activity, measures that restrict imports from other member-States contrary to **Article 30** of the Treaty.
[20] The answer to the High Court's first question is therefore that Article 30 of the EEC Treaty must be interpreted as meaning that national rules which require all importers to purchase a certain proportion of their requirements of petroleum products from a *567 refinery situated in the national territory constitute a measure having equivalent effect to a quantitative restriction on imports.

The second question on the interpretation of Article 36 of the Treaty

[21] The second question asks whether **Article 36** of the Treaty and, in particular, the concepts of 'public policy' and of 'public security' contained therein are to be interpreted as meaning that a system such as the one at issue in this case, established by a member-State which is totally dependent on imports for its supplies of petroleum products, can be exempt from the prohibition laid down in **Article 30** of the Treaty.
[22] The Irish Government and the INPC point out that it is for the member-States to determine, for the purposes of **Article 36,** and in particular with regard to the concept of public security, their interests that are to be protected and the measures to be taken to that end. They contend that Ireland's heavy dependence for its oil supplies on imports from other countries and the importance of oil for the life of the country make it indispensable to maintain refining capacity on the national territory, thereby enabling the national authorities to enter into long-term delivery contracts with the countries producing crude oil. Since the system at issue is the only means of ensuring that the Whitegate refinery's products can be marketed, they consider it to be justified by considerations of public security as a temporary measure until another solution can be found to safeguard the continued operation of the Whitegate refinery.
[23] In the United Kingdom's view, the term 'public security' in **Article 36** of the Treaty covers the fundamental interests of the State such as the maintenance of essential public services or the safe and effective functioning of the life of the State. The exceptions provided for in that **Article** cannot be relied upon if the measures in question are designed predominantly to attain economic objectives. Those measures must not go beyond what is necessary to attain the objective protected by **Article 36.**
[24] The plaintiffs in the main action point out that the problem is not whether or not refining capacity needs to be maintained in Ireland, but rather whether the system chosen to enable that refinery to function can be justified on the basis of **Article 36.** The real purpose of the rules at issue is to ensure that the refinery does not operate at a loss. It is thus, in the plaintiffs' view, an essentially economic measure which cannot be covered by the concepts of public security or public policy.
[25] The Commission considers that national rules of the type laid down by the 1982 Order are not justified under **Article 36** because the Community, in accordance with its responsibility in this area, has adopted the necessary rules to

ensure supplies of petroleum products in the event of a crisis. Furthermore, the Irish *568 Government, by means of the system at issue, has pursued an economic interest which cannot be taken into consideration within the framework of **Article 36.** In any event, according to the Commission, the 1982 Order is inadequate and ineffective for the purpose of securing supplies to the Irish market, and it is disproportionate inasmuch as it requires all importers to buy at prices determined by the competent minister.
[26] Having regard to those arguments, it is appropriate to examine:
First, whether rules of the type laid down by the 1982 Order are justified in the light of the Community rules on the matter;
Secondly, whether, having regard to the scope of the exemptions on the grounds of public policy and public security, **Article 36** can cover rules of the type laid down by the 1982 Order;
Thirdly, whether the system at issue is such as to enable the objective of ensuring supplies of petroleum products to be attained and whether it complies with the principle of proportionality.

The justification of the measures at issue in the light of Community rules on the matter

[27] Recourse to **Article 36** is no longer justified if Community rules provide for the necessary measures to ensure protection of the interests set out in that **Article.** National measures such as those provided for in the 1982 Order cannot therefore be justified unless supplies of petroleum products to the member-State concerned are not sufficiently guaranteed by the measures taken for that purpose by the Community institutions.
[28] Certain precautionary measures have indeed been taken at Community level to deal with difficulties in supplies of crude oil and petroleum products. Council Directives 68/414 of 20 December 1968 [FN18] and 73/238 of 24 July 1973 [FN19] require member-States to maintain minimum stocks and to co-ordinate to a certain extent the national measures adopted for the purpose of drawing on those stocks, of imposing specific restrictions on consumption and of regulating prices. Council Decision 77/706/EEC of 7 November 1977 [FN20] provides for the setting of a Community target for a reduction in consumption in the event of difficulties in supply and for the sharing out between the member-States of the quantities saved. Finally, Council Decision 77/186 of 14 February 1977 [FN21] establishes a system of export licences, granted automatically, to allow the monitoring of intra-Community trade.

FN18 [1968] O.J.Spec.Ed. 586.

FN19 [1973] O.J. L228/1.

FN20 [1977] O.J. L292/9.

FN21 [1977] O.J. L61/23.

*569 [29] Measures have also been taken within the context of the International Energy Agency, set up within the framework of the Organisation for Economic Cooperation and Development (OECD), of which most Community States are members and in whose work the Community, represented by the Commission, takes part as an observer. Those measures are designed to establish solidarity between the participating countries in the event of an oil shortage transcending the Communities.
[30] Even though those precautions against a shortage of petroleum products reduce the risk of member-States being left without essential supplies, there would none the less still be real danger in the event of a crisis. According to Article 3 of Council Decision 77/186, the Commission may, as a precautionary measure, authorise a member-State, subject to certain conditions, to suspend the issue of export licences. That authorisation is to be granted subject only to the condition that traditional trade patterns are maintained ' as far as possible'. The Council, by a qualified majority, may revoke that authorisation and that power is not subject to any express reference to traditional trade patterns. According to Article 4, in the event of a sudden crisis, a member-State may, subject to certain conditions, suspend the issue of export licences for a period of ten days. In that case, the Council, by a qualified majority, may adopt the appropriate measures.
[31] Consequently, the existing Community rules give a member-State whose supplies of petroleum products depend totally or almost totally on deliveries from other countries certain guarantees that deliveries from other member-States will be maintained in the event of a serious shortfall in proportions which match those of supplies to the market of the supplying State. However, this does not mean that the member-State concerned has an unconditional assurance that supplies will in any event be maintained at least as a level sufficient to meet its minimum needs. In those circumstances, the possibility for a member-State to rely on **Article 36** to justify appropriate complementary measures at national level cannot be excluded, even where there exist Community rules on the matter.

The scope of the public policy and public security exceptions

[32] As the Court has stated on several occasions (see judgment of 12 July 1979, Case 153/78 E.C. Commission v. Germany, [FN22] and the other judgments referred to therein), the purpose of **Article 36** of the Treaty is not to reserve certain matters to the exclusive jurisdiction of the member-States; it merely allows national legislation to derogate from the principle of the free movement of goods to the extent to which this is and remains justified in order to achieve the objectives set out in the **Article.**

FN22 [1979] E.C.R. 2555, [1980] 1 C.M.L.R. 198 *570 .

[33] It is in the light of those statements that it must be decided whether the concept of public security, on which the Irish Government places particular

reliance and which is the only one relevant in this case, since the concept of public policy is not pertinent, covers reasons such as those referred to in the question raised by the national court.
[34] It should be stated in this connection that petroleum products, because of their exceptional importance as an energy source in the modern economy, are of fundamental importance for a country's existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them. An interruption of supplies of petroleum products, with the resultant dangers for the country's existence, could therefore seriously affect the public security that **Article 36** allows States to protect.
[35] It is true that, as the Court has held on a number of occasions, most recently in its judgment of 9 June 1982 (Case 95/81 E.C. Commission v. Italy [FN23]), **Article 36** refers to matters of a non-economic nature. A member-State cannot be allowed to avoid the effects of measures provided for in the Treaty by pleading the economic difficulties caused by the elimination of barriers to intra-Community trade. However, in the light of the seriousness of the consequences that an interruption in supplies of petroleum products may have for a country's existence, the aim of ensuring a minimum supply of petroleum products at all times is to be regarded as transcending purely economic considerations and thus as capable of constituting an objective covered by the concept of public security.

FN23 [1982] E.C.R. 2187.

[36] It should be added that to come within the ambit of **Article 36,** the rules in question must be justified by objective circumstances corresponding to the needs of public security. Once that justification has been established, the fact that the rules are of such a nature as to make it possible to achieve, in addition to the objectives covered by the concept of public security, other objectives of an economic nature which the member-State may also seek to achieve, does not exclude the application of **Article 36.**

The question whether the measures are capable of ensuring supplies and the principle of proportionality

[37] As the Court has previously stated (see judgments of 12 October 1978, Case 13/78 Eggers, [FN24] and of 22 March 1983, Case 42/82 E.C. Commission v. France [FN25]), **Article 36,** as an exception to a fundamental principle of the Treaty, must be interpreted in such a way that its scope is not extended any further than is necessary for the protection of the interests which it is intended to secure and *571 the measures taken pursuant to that **Article** must not create obstacles to imports which are disproportionate to those objectives. Measures adopted on the basis of **Article 36** can therefore be justified only if they are such as to serve the interest which that **Article** protects and if they do not restrict intra-Community trade more than is absolutely necessary.

FN24 [1978] E.C.R. 1935, [1979] 1 C.M.L.R. 562.

FN25 [1983] E.C.R. 1013, [1984] 1 C.M.L.R. 160.

[38] In that connection, the plaintiffs in the main action and the Commission cast doubt, in the first place, on whether the installation of a refinery can ensure supplies of petroleum products in the event of a crisis, since a crisis gives rise above all to a shortage of crude oil, so that the refinery would be unable to operate in such circumstances.
[39] It is true that as the world oil market now stands, the immediate effect of a crisis would probably be an interruption or a severe reduction in deliveries of crude oil. It should, however, be pointed out that the fact of having refining capacity on its territory enables the State concerned to enter into long-term contracts with the oil-producing countries for the supply of crude oil to its refinery which offer a better guarantee of supplies in the event of a crisis. It is thus less at risk than a State which has no refining capacity of its own and which has no means of covering its needs other than by purchases on the free market.
[40] Furthermore, the existence of a national refinery constitutes a guarantee against the additional risk of an interruption in deliveries of refined products to which a State with no refining capacity of its own is exposed. Such a State would be dependent on the major oil companies which control refineries in other countries and on those companies' commercial policy.
[41] It may, therefore, be concluded that the presence of a refinery on the national territory, by reducing both of those types of risks, can effectively contribute to improving the security of supply of petroleum products to a State which does not have crude oil resources of its own.
[42] The plaintiffs in the main action and the Commission consider, however, that even if the operation of a refinery is justified in the interest of public security, it is not necessary in order to achieve that objective, and, in any event, it is disproportionate in relation to that objective, to oblige importers to satisfy a certain proportion of their requirements by purchases from the national refinery at a price fixed by the competent Minister.
[43] The Irish Government contends, on the other hand, that the purchasing obligation is the only possible way of keeping the Whitegate refinery in operation. That requires a certain degree of use of the plant's capacity since the major international oil companies, on which the Irish market depended for 80 per cent. of its supplies in 1981, have clearly stated that they are not prepared *572 to buy any petroleum products at all from the Whitegate refinery, because they prefer to market the products from their own refineries in the United Kingdom. The fixing of the selling price by the Minister of the basis of the refinery's costs is necessary in order to avoid financial losses.
[44] It must be pointed out in this connection that a member-State may have recourse to **Article 36** to justify a measure having equivalent effect to a quantitative restriction on imports only if no other measure, less restrictive from the point of view of the free movement of goods, is capable of achieving the same objective.
[45] In the present case, therefore, it is necessary to consider whether the

obligation placed on importers of petroleum products to purchase at prices determined on the basis of the costs incurred by the refinery in question is necessary, albeit only temporarily, for the purpose of ensuring that enough of the refinery's production can be marketed so as to guarantee, in the interest of public security, a minimum supply of petroleum products to the State concerned in the event of a supply crisis.

[46] That obligation could be necessary if the distributors that hold the major share of the market concerned refuse, as the Irish Government contends, to purchase supplies from the refinery in question. It is on the assumption that the refinery charges prices which are competitive on the market concerned that it must be determined whether the refinery's products could be freely marketed. If it is not possible by means of industrial and commercial measures to avoid any financial losses resulting from such prices, those losses must be borne by the member-State concerned, subject to the application of Articles 92 and 93 of the Treaty.

[47] As regards, in the next place, the quantities of petroleum products which may, as the case may be, be covered by such a system of purchasing obligations, it should be stressed that they must in no case exceed the minimum supply requirements of the State concerned without which its public security, as defined above, and in particular the operation of its essential public services and the survival of its inhabitants, would be affected.

[48] Furthermore, the quantities of petroleum products whose marketing can be ensured under such a system must not exceed the quantities which are necessary, so far as production is concerned, on the one hand, for technical reasons in order that the refinery may operate currently at a sufficient level of its production capacity to ensure that its plant will be available in the event of a crisis and, on the other hand, in order that it may continue to refine at all times the crude oil covered by the long-term contracts which the State concerned has entered into so that it may be assured of regular supplies.

[49] The proportion of the total needs of importers of petroleum products that may be made subject to a purchasing obligation must *573 not, therefore, exceed the proportion which the quantities set out above represent of the current total consumption of petroleum products in the member-State concerned.

[50] It is for the national court to decide whether the system established by the 1982 Order complies with those limits.

[51] The answer to the second question should therefore be 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. 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 concerned has entered into long-term contracts.

Costs

[52] The costs incurred by the Greek Government, the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter for that court.

Order

On those grounds, THE COURT, in answer to the questions referred to it by the High Court of Ireland, by order of 9 December 1982,
HEREBY RULES:
1. Article 30 of the EEC Treaty must be interpreted as meaning that national rules that require all importers to purchase a certain proportion of their requirements of petroleum products from a refinery situated in the national territory constitute a measure having equivalent effect to a quantitative restriction on imports.
2. 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 *574 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 in question. 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.

[1984] 3 C.M.L.R. 544

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