disposal of waste oils within its territory in such a way as to prohibit exports to an authorized disposal or regenerating undertaking in another Member State.

Everling Mackenzie Stuart Galmot

Delivered in open court in Luxembourg on 10 March 1983.

For the Registrar

H. A. Rühl

Principal Administrator

U. Everling

President of the Third Chamber

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 10 FEBRUARY 1983 [1]

Mr President,
Members of the Court,

The Court has received a reference from the Tribunal de Grande Instance [Regional Court], Versailles, for a preliminary ruling on the interpretation of Articles 34 and 36 of the EEC Treaty so as to enable that court to assess the compatibility with Community law of the French legislation on the recovery of waste oils.

I — The legislation consists of a decree of 21 November 1979 and orders of the same day, adopted in accordance with the French Law of 15 July 1975 on the disposal of waste and the recovery of materials and with the Council Directive of 16 June 1975 on the disposal of waste oils.

The decree provided in particular for the granting of an approval which would give to collectors, whether legal or natural persons, the exclusive right to operate within a specified geographical zone.

The Syndicat National des Fabricants Raffineurs d'Huiles de Graissage and other undertakings, who had been granted such an approval, brought an action before the Tribunal de Grande Instance, Versailles, against the Groupement d'Intérêt Économique "Inter-Huiles" and 12 of its members,

1 — Translated from the French.

who had not received approval. The plaintiffs claim that the defendants are in reality unauthorized *collectors*. The latter contest that allegation. They consider themselves to be in the category of *"holders"* of oils, who "transport their waste oils themselves, in order to deliver them directly to a disposal undertaking" which has been approved in accordance with Article 3 of the decree; they have formed a Groupement d'Intérêt Économique [a form of joint venture in France equivalent to but not identical with a consortium], an association which is recognized by the French courts.

However, the Syndicat National maintains that Inter-Huiles sets aside a considerable part of the oils which it collects for export both to Belgium and to the Federal Republic of Germany, and thereby makes very substantial profits to the direct detriment of the domestic industry. In its defence, Inter-Huiles questioned the compatibility of the French legislation with the provisions of the Treaty concerning the free movement of goods, on the ground that it restricted intra-Community trade in waste oils and was not covered by Article 36 of the Treaty.

In the circumstances the Tribunal de Grande Instance, Versailles, (First Chamber) stayed the proceedings by judgment of 9 June 1982 and referred the following question to the Court for a preliminary ruling under Article 177 of the Treaty:

"Is the fact that collectors of waste oils may not lawfully deliver them to a disposal or regenerating undertaking of a Member State of the EEC because of the restrictions imposed on them by Decree No 79-981 of 21 November 1979 compatible with the provisions of Articles 30 and 34 of the Treaty establishing the European Communities, which prohibit quantitative restrictions on exports and all measures having an equivalent effect?"

I shall first consider the admissibility of that question, and then its exact wording, before examining the substance.

II — 1. Admissibility

In its written observations the Syndicat National, while it expresses due deference to the Court's discretion and does not in fact request the Court to declare the question inadmissible, asks whether it might be inadmissible on the ground that it concerns the conformity of national legislation with Community law and that, as a result, it "has the same purpose (as the defendants desire) as an action against the Commission for failure to act in refusing to initiate a procedure against a Member State under Article 169".

In reply to that, it is sufficient to recall the consistent line of decisions of this Court to the effect that "although, in the context of proceedings under Article 177 of the Treaty, it is not for the Court to rule on the compatibility of the provisions of a national law with the Treaty, it does ... have jurisdiction to provide the national court with all the criteria of interpretation relating to Community law which may enable it to judge such compatibility".[1] In view of the nature of the plaintiff's observations, it may be useful to repeat the following extracts from the judgment in *Van Gend*

1 — For example, judgment of 17 February 1976 in Case 45/75 *REWE* v *Hauptzollamt Landau* (REWE-Zentrale V), [1976] ECR 181, at p. 194, para. 11 of the decision.

& Loos of 5 February 1963: "A restriction of the guarantees against an infringement of Article 12 by Member States to the procedures under Articles 169 and 170 would remove all direct legal protection of the individual rights of their nationals" [1] and "the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States".[1]

It would therefore seem reasonable for the validity of provisions *vis-à-vis* Community law to be questioned by those subject to them and for a national court to refer to the Court of Justice for a preliminary ruling so as to enable it to decide the matter.

2. On the other hand, the wording of the question calls for several observations.

(a) In the first place it is clear from the file that the point at issue in this case is the possibility of exporting from France to other Member States of the Community and not the possibility of importing from other Member States into France. It is therefore only relevant to refer to Article 34 of the Treaty, and not to Article 30 thereof. In addition, any review of the compatibility of national provisions with Community law must include consideration of the derogations in Article 36, and that article must therefore be included in the question referred to the Court. Moreover, an examination of the grounds of the judgment making the reference shows that the penultimate paragraph appears to include a request for the interpretation of Article 36.

(b) The defendants' observation on the status which the national court attributed to it in the reference for a preliminary ruling raises a more difficult point. Inter-Huiles states that it operates not as a "collector" of waste oils but as a *"holder"* delivering its oils directly to approved disposal undertakings. It therefore seems that the question submitted by the Tribunal should be taken to refer to the position of both "holders" and "collectors". Clearly it is for that court to determine whether the defendants are in fact holders or collectors because it alone "has a direct knowledge of the facts of the case and of the arguments put forward by the parties, and [because it] will have to give judgment in the case".[2]

Let us therefore consider both cases. Several arguments support that approach, and I shall refer to them in the order of the importance which I attach to them, beginning with the least important. In the first place, the Syndicat National, like its opponent, supports that wider interpretation of the question. Secondly, the Court has received a request from the Cour d'Appel, Lyons, in a case which is based on the same facts and the same questions of law [3] and the question submitted by that court covers both holders and collectors. Finally, and most importantly, in view of the content of the French provisions the question

1 — Case 26/62 *Van Gend & Loos* v *Nederlandse Administratie der Belastingen* [1963] ECR 1, at p. 13.

2 — Judgment of 29 November 1978, Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347 at p. 2366, para. 25 of the decision.

3 — Case 295/82, *Groupement d'Intérêt Économique "Inter-Huiles" and Others* v *Syndicat National des Fabricants Raffineurs d'Huile de Graissage and Others.*

raised by the Tribunal de Versailles as to whether it is possible to export is equally applicable to both holders and collectors.

3. However, the most important problem raised by the wording of the question is whether, in view of the existence of a directive on the disposal of waste oils, the prohibition on exports in question should be considered solely in the context of the provisions of that directive to the exclusion of those of the Treaty. That is the view favoured by the French Government and the Syndicat National, who maintain that Articles 34 and 36 are somehow excluded from consideration by the adoption of the directive.

(a) It is well established that the disputed French legislation was adopted mainly to give effect in French law to Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils, and that the said directive provides for the harmonization of measures necessary to ensure, *inter alia*, the protection of the environment and establishes Community procedures for ensuring compliance therewith. It follows that, as the Court has stated, "recourse to Article 36 ceases to be justified, and the appropriate controls must henceforth be carried out and the protective measures taken in accordance with the scheme laid down by the harmonizing directive".[1]

In the view of the Syndicat National and the French Government, that principle should be extended to Article 34. The Syndicat National points out that the derogations in Article 36 may not be separated from the general rule contained in Article 34. Both the Syndicat and the French Government also rely in support of that proposition on the following quotation from the Opinion of Mr Advocate General Capotorti in the case known as "Cassis de Dijon": "It is clear that when the approximation of laws is undertaken, Article 30 is rendered inoperative simply on the ground that directives adopted pursuant to Articles 100 and 101 must be presumed to be in conformity with the Treaty (including Article 30)".[2]

(b) In my view, the adoption of a directive does not mean that reference need no longer be made to the Treaty when it is necessary to assess the validity of a national provision in relation to Community law. The reason is simple, perhaps obvious. As Mr Advocate General Capotorti also observed, the principles laid down in the Treaty, in particular the prohibition on quantitative restrictions and measures having an equivalent effect in trade within the Community, "no doubt ... bind the Community institutions in the adoption of measures which have repercussions on trade".[3] I consider that the principle that the rules laid down in the Treaty take precedence over directives applies as much to Article 36 as it does to Article 34. Recourse to Article 36 ceases to be justified in the sphere covered by a directive only in so far as the provisions of the directive adhere to the criteria

1 — Judgment of 5 October 1977 in Case 5/77 *Tedeschi* v *Denkavit* [1977] ECR 1555, at p. 1576, para. 35 of the decision; judgment of 5 April 1979 in Case 148/78, *Ratti* [1979] ECR 1629, at p. 1644, para. 36 of the decision.

2 — Opinion in Case 120/78 *REWE* v *Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649, at p. 671.

3 — Opinion in Case 34/78 *Yoshida* v *Kramer van Koophandel en Fabrieken voor Friesland*, [1979] ECR 115, at pp. 147 and 148.

imposed by the article, in particular by the second sentence thereof.

The same may be said of Article 34, subject to any overriding considerations which may qualify the prohibitions imposed, for example those which have been recognized by the Court for the purposes of the interpretation of Article 30.

(c) I am therefore of the opinion that the compatibility of the national legislation in question must be considered primarily in the light of the directive, in so far as it may be presumed to be in conformity with the Treaty. Any direct comparison with the Treaty without looking first at the directive would appear to be incompatible with the Court's decisions in *Tedeschi* and *Ratti*. The provisions of the Treaty need be referred to only in so far as an interpretation of the directive is necessary in order to assess the validity of the national provision and, in particular, where one of the interpretations suggested appears to be contrary to the Treaty, while others appear to be compatible with it. In such a case, I consider that the interpretation which conforms to the Treaty must be adopted.

Finally, I propose that the question referred to the Court by the Tribunal de Grande Instance, Versailles, be understood as seeking to establish whether Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils, interpreted if necessary in the light of Articles 34 and 36 of the Treaty, may be construed as permitting national provisions adopted in order to implement that directive which have the effect of prohibiting the export of waste oils to other Member States.

III — As the French legislation referred to in the question is intended to implement in French law the directive on the disposal of waste oils, I shall examine the Community text before considering the national provisions.

1. As I have said, Directive 75/439 was adopted on the basis of Articles 100 and 235 of the Treaty.

(a) The twin foundation in law is explained by the objectives of the directive, which are set out in the preamble. The first recital in the preamble explains the reference to Article 100 of the Treaty: an approximation of the laws of Member States regarding the disposal of waste oils appeared necessary because of the disparity of such provisions, which was likely to "create unequal conditions of competition and thus directly affect the functioning of the common market". The second and third recitals explain the relevance of Article 235: the directive is also an element in the Community policy on the protection of the environment, the necessary powers for the implementation of which were not provided for by the Treaty. The fourth recital in the preamble states that "the recycling of waste oils may be conducive to a fuel supply policy". The directive may therefore help to economize energy. I also quote *in extenso* part of the seventh recital in view of its importance in these proceedings: "An efficient and coherent system of treatment for waste oils, which will neither create barriers to intra-Community trade nor affect competition, should apply to all such

products ...". Hence, in addition to giving the directive a wide scope *ratione materiae,* that paragraph makes the rules regarding free movement and normal conditions of competition applicable to the products to which it refers.

(b) In the provisions of the directive, it is possible to distinguish between the obligations which it imposes on States and those which the States must impose on undertakings.

The former include positive obligations (Article 2 and 3) and negative obligations (Article 4).

Member States must take the necessary measures to ensure the safe collection and disposal of waste oils (Article 2). "As far as possible, the disposal of waste oils" must be "carried out by recycling": in other words, by regeneration, or combustion other than for destruction, or both (Article 3).

Article 4 prohibits discharges of waste oils which are harmful to the various elements of the environment: water, soil and air.

Those provisions are supplemented by Article 5, which is the crux of the present proceedings and which, for that reason, I shall quote in its entirety: "Where the aims defined in Article 2, 3 and 4 cannot otherwise be achieved, Member States shall take the necessary measures to ensure that one or more undertakings carry out the collection and/or disposal of the products offered to them by holders, where appropriate in the zone assigned to them by the competent authorities."

That provision must be considered in the light of Articles 13 and 14, which govern the conditions under which Member States applying Article 5 may grant compensation to the collection and disposal undertakings concerned for the services rendered.

Undertakings which hold, collect or dispose of waste oils are also subject to certain obligations under the directive (Articles 6 to 12). I shall quote only the provisions which have been expressly referred to in the present proceedings. Article 6 provides that "any undertaking which disposes of waste oils must obtain a permit". Article 7 refers to holders who are unable to comply with the measures taken pursuant to Article 4, and who must place the waste oils at the disposal of the undertaking or undertakings referred to in Article 5.

2. In France the directive was implemented by Decree No 79-981 of 21 November 1979 laying down rules for the recovery of waste oils. Two orders of the same day supplemented the decree, one relating to the conditions for the collection of oils and the other relating to the conditions for the disposal of them.

(a) The waste oils which fall within the scope of the legislation are "mineral or synthetic oils which after use are unsuitable for the purpose for which they were intended when new, and which may be put to fresh use either as a raw material for recycling or regeneration, or as industrial fuel. The discharge of such oils in the environment is prohibited pursuant to the provisions of Decree No 77-254 of 8 March 1977."[1] The French Government stated in its observations

1 — The second paragraph of Article 1 of the decree.

that "the scope of the legislation includes therefore both lubricants which can be regenerated (black oils and clear oils) and lubricants which cannot be regenerated". On the other hand, in the course of the oral hearing, the Syndicat National pointed out that this case concerned only *black* waste oils, to the exclusion of all other types of oils, because the bar on exporting affects only that category of waste oils. It is not for this Court to examine the apparent conflict as to the interpretation of the national legislation in question. Moreover, it is not necessary to do so: as the question submitted by the Tribunal de Versailles concerns the possibility of exporting waste oils to other Member States, the reply which I shall propose concerns *ipso facto* all the products covered by the decree which may not be exported.

(b) The French legislation envisaged different procedures for supervising the recovery of waste oils at the different stages in the process.

Holders who "collect waste oils as a result of their business activities" [1] must collect and stock their oils in satisfactory conditions, in particular avoiding mixtures with water or other oily wastes.[2] They "must either deliver their waste oils to approved collectors in accordance with Article 4 of the decree, or transport the waste oils themselves so as to convey them directly to a disposal undertaking which has obtained the approval provided for in Article 8 of the decree or carry out themselves the disposal of the waste oils which they produce", provided that they have the required authorization.[3] Certain holders, such as the defendants in the main action, joined together in a Groupement d'Intérêt Economique with a view to creating the best conditions for selling the oils which they hold.

(c) In order to ensure that all waste oils are collected, the entire French territory was divided into geographical zones, generally by *département.* For each of those zones the Minister for the Environment appointed an approved collector [4] following an invitation to tender [5] and on the recommendation of an inter-departmental committee of approval. [6] The approval thus granted confers an exclusive right valid for a period of three years. On the expiry of that period new tenders are called for.

The same undertaking may obtain approval for collection in several *départements.* Several small undertakings may join together to obtain jointly such an approval. It is permitted to sub-contract up to 30% of the activities within the zone.

Approved collectors are responsible for the collection of all the waste oils produced in their zone. Strict compliance with the clauses and conditions is required, and they must remove any consignment of oils in excess of 200 litres within a period of 15 days. They are required to deliver the waste oils

1 — Third paragraph of Article 1 of the decree.

2 — First paragraph of Article 2 of the decree.

3 — Article 3 of the decree.

4 — Article 4 of the decree.

5 — Article 2 of the order on the conditions for collection.

6 — Article 3 of the same order.

collected, at prices specified in the terms of the invitation to tender, to approved disposal undertakings in accordance with the procedure provided for in Article 8 of the decree.[1]

(d) The disposal of waste oils is likewise made conditional on the granting of a ministerial approval.[2] That approval is issued by the Minister for the Environment for a period of seven years, after the technical and financial capacity of the undertaking has been assessed and on the recommendation of an inter-departmental committee.[3] The holder of the approval is required to conform to conditions and specifications which stipulate in particular that undertakings must accept all waste oils within the limit of their capacity for treating them.[4]

The approval does not give the right to operate exclusively in a particular area, but the administration divides up the quantities accumulated by the collectors between the disposal undertakings.

On the question whether the disposal undertakings may export the waste oils which they receive, the French Government has replied that Articles 8 and 9 of the decree and Articles 2 and 9 of the order on the conditions for disposal require them to treat the waste oils in their facilities, because the approval relates primarily to those facilities and therefore the requirement is a substantive one. Failure to treat waste oils, except when that failure is due to a temporary technical incapacity, leads to the withdrawal of the approval, as its purpose has ceased to exist.

(e) It is not disputed that as a result of the system it has been made impossible to export waste oils from France to other Member States.

The Court was informed at the hearing that the legal obstacles had recently been reinforced by the distribution to all French customs posts of a circular of 26 October 1982, issued by the Ministry of the Economy and of the Budget, requiring strict checks to be carried out at frontiers to prevent any export of waste oils.

Finally, the Court also learnt at the hearing that the Commission had decided to initiate a procedure against France under Article 169 of the Treaty and that there was a possibility that the procedure would be accelerated owing to the distribution of the circular.

IV — In the light of those considerations, I may now examine the question referred to the Court by the Tribunal de Versailles on the compatibility of the French legislation with Community law, and above all with the directive on the disposal of waste oils.

1. A few preliminary observations are necessary in order to define the scope of the action clearly.

(a) In view of the wording of the question, the only issue to be resolved by the Court is whether the provisions of the French legislation are compatible with Community law or not, inasmuch as they have the effect, even if that is not their purpose, of prohibiting exports of waste oils to other Member States. It is not suggested that the fact that the

1 — Article 6 of the decree, supplemented by the order on the conditions for collection.

2 — Article 8 of the decree.

3 — Article 5 of the order on the conditions for disposal.

4 — Article 9 of the decree.

French legislation grants concessions for particular zones to approved collectors, in accordance with Article 5 of the directive, is *in itself* contrary to Community law. As the Commission stated in the reply given by Mr Narjes on behalf of that institution to written question No 315/81 from Mr Galland, there is no question of its being contrary to Community law. In other words, the right of Member States to rely on Article 5 of the directive is in no way disputed; only the lawfulness of the prohibition on exports is at issue.

(b) The Syndicat National disputes the right of Inter-Huiles to plead the existence, harmful to its interests, of a measure having an effect equivalent to quantitative restrictions, relying on the case-law of the Court to the effect that such measures be cited only in respect of products manufactured and marketed *lawfully* in the Member State of origin.[1]

Quite apart from the fact that the case-law cited was developed principally in respect of measures concerning imports, that argument cannot be accepted. In the first place, the question of the lawfulness of the activities of Inter-Huiles *vis-à-vis* French law is clearly a question which falls exclusively within the jurisdiction of the French courts. Secondly, even if the proposition is correct in principle, it is necessary to clarify one point: the requirement that goods be manufactured and marketed lawfully as regards the national legislation does not apply if such legislation conflicts with Community law.

(c) Finally, it should be noted at the outset that since the French legislation effectively prohibits exports, it may be held to be compatible with Community law only if other considerations justify the partitioning of national markets which that prohibition entails. Such considerations might include the protection of public health referred to in Article 36 of the Treaty or, more appropriately, the protection of the environment or the need to conserve energy, which may be regarded as qualifying the prohibition contained in Article 34 in the same way that the judgment in *Dassonville*[2] qualified (by the so-called "rule of reason") the interpretation of Article 30. Nevertheless, according to the decisions of this Court[3], such additional grounds for relaxing the general rule may be relied on only in respect of measures which are applicable to domestic and imported products without distinction. The same restriction must apply equally where exports are concerned. In the present case, the French legislation specifically refers solely to French waste oils. It is therefore doubtful that such grounds may be taken into consideration here. Howsoever that may be, the Court's decisions in *Tedeschi* and *Ratti* indicate that such issues must be considered in the context of the provisions of Directive 75/439.

There is no provision in the directive which *expressly* justifies the prohibition of exports. The only provision relied on to that effect is Article 5, to which I have already referred. National legislation adopted pursuant to Article 5 which prohibits exports may be considered to

1 — In particular, judgment of 20 February 1979 in Case 120/78, *REWE* v *Bundesmonopolverwaltung für Branntwein*, known as the "Cassis de Dijon" case, [1979] ECR 649, at p. 664, para. 14 of the decision.

2 — Judgment of 11 July 1974 in Case 8/74, *Procureur du Roi* v *Dassonville* [1974] ECR 837.

3 — In particular, judgment of 17 June 1981 in Case 113/80, *Commission* v *Ireland* [1981] ECR 1625, at p. 1639, paras 10 and 11 of the decision.

be compatible with Community law, therefore, if that article is capable of being interpreted as justifying such a prohibition on exports.

2. The theory shared by the French and Italian Governments and the Syndicat National appears to go further. They maintain that application of Article 5 necessarily entails a prohibition on exports. Thus if a Member State concludes that recourse to Article 5 is indispensable in order to achieve the aims of Articles 2 to 4, it must organize a system of exclusive concessions which restricts, or even eliminates, the free movement of waste oils.

(a) To support that view, several different arguments have been put forward:

(1) Thus attention has been drawn to the fact that the directive is based on Article 235 of the Treaty, which applies when the Treaty has not provided the powers necessary to carry out a Community measure which is thought to be required. On the basis of that it is argued that if the purpose of the directive were solely to confirm a principle which appears in the Treaty and is of direct application (such as the free movement of goods), the reference to Article 235 would be pointless.

(2) It is said that it is necessary to grant undertakings an absolute right to exploit a particular area and therefore to prohibit exports as a reciprocal concession for their acceptance of the obligation imposed on them to effect the collection and disposal of all waste oils at prices fixed by the public authorities.

The Syndicat National points out that the exclusive right to collect all oils is as necessary for approved collection undertakings as it is for holders and disposal undertakings. It enables the collectors to compensate for the unprofitable activities which they are required to perform under the terms and conditions of the tender by profitable ones which, if carried out in isolation, would be directed towards the export market, thereby creating distortion of competition and artificial trade patterns.

In addition, it provides holders who are not in a position to comply with the measures adopted pursuant to Article 4 with the guarantee that a collector will collect the oils which they are required, under Article 7, to deliver to one of the undertakings referred to in Article 5. Only an administrative system of approval for collectors which includes the obligation to ensure comprehensive collection will guarantee that all the oils are collected. In other words, the implementation of Article 5 together with the prohibition on exports is necessary for the implementation of Article 7, which is in turn indispensable for the achievement of the aims of Article 4.

Finally, it is said that approved disposal undertakings, especially regenerating undertakings, must have an exhaustive right to collect waste oils in order to provide them with quantities of oils for regeneration sufficient to ensure that their facilities are profitable. Only that will enable approved regenerating undertakings to accomplish the task which the authorities have entrusted to them, a task which assists both the protection of the environment and the conservation of energy, as the Syndicat National emphasizes.

(3) The suggestion that Article 5 may be interpreted as excluding exports said

to be confirmed by the general scheme of the directive, which shows that the requirement of not restricting intra-Community trade is a secondary aim in relation to the protection of the environment and the conservation of energy. It is maintained that the last-named objective is particularly important in view of the fact that in his reply to written question No 452/81 by Mr Müller-Hermann on the recovery of used oils Mr Narjes, representing the Commission, acknowledged the importance of waste oils in view of the critical situation in the Community with regard to energy and raw materials.

The protection of the environment is referred to in the second and third recitals in the preamble to the directive and a fuel supply policy in the fourth recital, whereas the free movement of oils is mentioned only in the seventh. In addition, the last-mentioned objective is not implemented in any of the articles of the directive, in contrast to the other aims.

(b) I may say immediately that in my opinion each of those arguments may be refuted.

(1) As far as the reference to Article 235 of the Treaty is concerned, I think that a very clear explanation is provided in the second recital of the preamble to the directive. The reason for it is simply that a Community policy for the environment was considered necessary in order to achieve the objectives of the Community only after the signature of the Treaty in 1957, which did not, therefore, include specific provisions on the subject.

(2) As to the requirement of comprehensive collection, that is unquestionably a requirement of public service which Member States may lawfully impose on collectors and approved disposal undertakings when implementing Article 5. However, I consider that the directive itself envisages a way of compensating for that burden without restricting exports. Article 13 provides that "as a reciprocal concession for the obligations imposed on them by the Member States pursuant to Article 5, indemnities may be granted to collection and/or disposal undertakings for the service rendered". Article 13 makes the granting of those indemnities conditional on the observance of various conditions so as to ensure that they do not give rise to significant distortion of competition and artificial trade patterns. Article 14 provides, in particular, that the financing of the indemnities "must be in accordance with the 'polluter pays' principle". Those conditions would seem sufficient to meet the objections raised by the Syndicat National, in particular.

(3) Finally, there are a number of reasons for not interpreting the directive as permitting the free movement of waste oils to be sacrificed for the protection of the environment and the conservation of energy, however laudable such aims may be.

In the first place, I find that justification contrary to the wording of Article 5. First, it is not disputed that the latter provides Member States with what amounts to a solution which represents, as its first words ("where the aims ... cannot otherwise be achieved") show, the lesser evil, and it should therefore be given a restrictive interpretation. Secondly, if that provision permits concessions to be granted for particular

zones and even, if necessary, exclusive concessions ("one or more undertakings ..., where appropriate in the zone assigned to them"), nothing in the wording thereof permits the conclusion that it sanctions a system of exclusive concessions by zone granted in conjunction with an absolute right to exploit the area concerned, as exists under the French scheme. The difference between a relative exclusive concession and an absolute exclusive concession is that, in the first case, the holder of the exclusive concession cannot object to the sale of goods to the holder of another exclusive concession outside its zone, whereas in the second case the partitioning of zones is absolute.

That interpretation would also seem difficult to reconcile with the nature of the directive, which is a harmonizing directive based on Article 100 of the Treaty. The purpose of the directive is to approximate the laws of the Member States, the disparity of which may, remember, "create unequal conditions of competition and thus directly affect the functioning of the common market" (first recital of the preamble). Therefore, a national provision which makes it impossible to export and thus removes any suggestion of a *common market* in the sector concerned would appear to be directly contrary to the aims of the directive as set out in the first recital of the preamble thereto.

Finally, if the proposed interpretation were to be accepted the result, I think, would be that Article 5 of the directive must be void for breach of Article 34 of the Treaty, the requirements of which can certainly not, in my opinion, have been overlooked by the authors of the directive. Note that the wording of the seventh recital of the preamble on the subject is imperative: "system ... which will (not) create barriers to intra-Community trade". Moreover, the fact that the requirement of free movement is mentioned only in the seventh recital does not mean that it amounts to a secondary objective. On the contrary, by including it, the authors of the directive surely intended that *each* of the provisions of the directive should be interpreted in such a way that its implementation would not restrict trade within the Community. In any case, it is not correct to say that the requirement does not appear in the main body of the directive. As I have already said, the second paragraph of Article 13 provides that the indemnities granted to undertakings which are required to fulfil public service obligations under Article 5 "must be such as not ... to give rise to artificial patters of trade in the products". The *artificial* nature of the trade is, in my opinion, the only restriction actually imposed by the directive on the principle of the free movement of waste oils.

Consequently, even if a Member State considers it necessary for the achievement of the objectives of Articles 2 to 4, it may not implement Article 5 in a manner which is incompatible with the free circulation of waste oils. Nothing in the rules established by the directive justifies sacrificing the principle of free circulation in favour of the protection of the environment or the conservation of energy. All those objectives must be attained concurrently. Article 5 cannot be interpreted as empowering Member States to be the sole judge of what they must do to protect the environment and ensure the conservation of energy within

the Community while there exists, in the directive, a harmonized system. The only measures which Member States may adopt to ensure that the aims of the directive are achieved are those fixed by the directive itself. It is only within the framework of the directive that States may take action if they wish to remain in conformity with Community law. That task should be made easier for them by the discretion which Member States enjoy as regards the choice of means to achieve the results which the directive requires.

(c) Finally, according to information provided by the Commission, which was not disputed by the Syndicat National, the existence in other Member States of legislation adopted in application of the directive and in conformity with it, which is not aimed at and does not have the effect of restricting intra-Community trade, confirms that it is possible to protect the environment and to conserve energy without having to prohibit exports of waste oils. The Luxembourg and Netherlands legislation may be cited as examples of national legislation adopted specifically in order to implement the directive.[1] According to the Grand Ducal Regulation of 26 June 1980 on the disposal of waste oils, the fact that more than one approved collector works within the same specified area does not constitute grounds for refusing the approval. Any holder of an approval may obtain, at its request, the status of approved exporter. The Netherlands Law of 11 February 1976 laying down rules on chemical waste and waste oils[2] authorizes the export of waste oils.

3. It remains to be considered whether the provisional conclusion which I have reached is compatible with Article 90 of the Treaty.

(a) In the view of the Syndicat National and the French Government, the impossibility of exporting is the result of special and exclusive rights within the meaning of Article 90 (1), granted to approved French undertakings pursuant to Article 5. As the Commission stated, in the reply given on its behalf by Mr Narjes to the written question submitted by Mr Galland to which I have already referred, that the granting of such rights was compatible with Community law, the prevention of exports must also be compatible therewith.

Moreover, the Syndicat National considers that the undertakings approved for the collection and disposal of waste oils may also be regarded as undertakings entrusted with the operation of a service of general economic interest and are therefore exempt from compliance with the rules of the Treaty by Article 90 (2) subject to certain conditions which, on the facts, are satisfied. Prohibiting exports is in fact indispensable if the undertakings are to accomplish the task which has been entrusted to them, and the development of trade is not affected to an extent which is contrary to the interests of the Community.

(b) In my view, Article 90 does not have to be applied in this case.

1 — Even disregarding the case of the Federal Republic of Germany, which is not accepted by the Syndicat National because of the subsidies awarded to approved disposal undertakings which, in its opinion, distort competition. That is a question which the Court does not have to consider in the context of the present procedure.

2 — Wet houdende regels inzake chemische afvalstoffen en afgewerkte olie.

(1) In the first place, the reply to the written question submitted by Mr Galland does not seem to me to be decisive. In that reply, the Commission considered that Article 4 of the Decree of 21 November 1979, one of the provisions in that instrument from which the prohibition on exports results, was compatible with Community law in so far as "the authorization in question could be construed as being the granting of an exclusive right within the meaning of Article 90 of the EEC Treaty. . . . this would not be incompatible as such with the provisions of the Treaty, and in particular those relating to competition rules". It also declared that "this arrangement does not clash with Directive 75/439/EEC and in particular Article 5 thereof".

It is clear from the wording of that reply, therefore, that it does not make any express statement on the question of exports. The content of a reply to a written question submitted by a Member of the European Parliament clearly depends on the wording of the question. In this case, the question concerned the compatibility of French legislation with Community *competititon law.* The question should therefore be viewed in that context, as its wording indicates.

Nevertheless, in so far as the reply states in general terms that Article 4 of the decree is compatible with Article 5 of the directive and the provisions of the Treaty, including therefore Article 34 thereof, I consider it to be incorrect for the reasons which I have already indicated. It is hardly necessary to observe that the legal status of a reply to a written question submitted by a Member of Parliament is not the same as that of a positive disposition of law, even less that of a decision of the Court of Justice, which assumes the authority of *res judicata.* Such replies are certainly not without value as regards the interpretation of a text, but the interpretation is given, expressly or impliedly, subject to review by the Court of Justice whose view is final. In that respect the partial use of the conditional mode is significant.

(2) Now, can Article 90 (1) be used to justify a breach of Article 34? The wording of Article 90 (1) is sufficient to show that the answer must be that it cannot: "In the case of . . . undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 7 and Articles 85 to 94."

(3) The same may be said of Article 90 (2).

I think that it is entirely possible, on the basis of the case-law of the Court,[1] to regard French undertakings approved for the collection and disposal of waste oils as undertakings "entrusted with the operation of services of general economic interest" within the meaning of Article 90 (2).

However, I do not consider that the prohibition on exports is essential to enable such undertakings to accomplish the task of collecting and disposing of all waste oils without compromising their profitability. As we have seen, by allowing for subsidies, which must not give rise to artificial trade patterns, for collection and disposal undertakings as a reciprocal concession for the obligations which Member States impose on them under Article 5, the directive itself provides a solution to the problem which safeguards the free movement of waste oils in intra-Community trade.

1 — Judgment of 27 March 1974 in case 127/73, *BRT and Others* v *SABAM and Others,* [1974] ECR 313 at p. 318, paras. 19 to 21 of the decision and Judgment of 14 July 1981 in Case 172/80, *Züchner* v *Bayerische Vereinsbank,* [1981] ECR 2021 at p. 2030, para. 7 of the decision.

Those considerations lead me to propose that, in reply to the question put by the Tribunal de Grande Instance, Versailles, the Court declare that:

Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils may not be interpreted as sanctioning a national provision implementing it which has the effect of prohibiting exports of waste oils to other Member States.