OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 6 June 1990 *

Mr President,
Members of the Court,

1. The national court making the present preliminary reference has submitted to the Court of Justice two questions concerning the compatibility with Article 34 of the EEC Treaty of the Netherlands law which implements Council Directive 68/414/EEC of 20 December 1968. [1]

It should be pointed out that the case concerns a dispute of some complexity both with regard to the facts and to the scope of the relevant national legislation. It therefore appears to me appropriate to provide some details at the outset and to refer for further information to the Report for the Hearing.

2. Member States are required under Directive 68/414 to establish stocks of petroleum products with a view to coping with potential interruptions to fuel supplies. Stocks, which are obviously proportionate to the volume of domestic requirements, must, under the terms of Article 1, be maintained at a level corresponding to at least 65 days' (subsequently increased to 90 days') average daily internal consumption in the preceding calendar year.

In ordering the attainment of this result, the directive leaves Member States with a wide choice as to the laws, regulations or administrative provisions to be adopted for that purpose. In particular, no indication is given as to whether stocks must be established and managed on a centralized basis by a public authority designated for that purpose, or whether they may be constituted on a decentralized basis, as it were, within the premises of undertakings operating in the sector concerned. Moreover, no information is provided as to the details or form of the financial arrangements for stocks.

The Netherlands Government implemented the directive by means of the Wet Voorraadvorming Aardolieprodukten of 21 October 1976 (Law on the Stockpiling of Petroleum Products, hereinafter referred to as 'WVA').

The WVA creates an obligation to maintain stocks which it imposes on persons who produce or import petroleum products in the Netherlands. Stocks must be maintained at a level corresponding to a percentage (90 divided by 365) of the products placed on the domestic market in the Netherlands during the preceding year. For the purpose of establishing reserves, however, no account is taken of quantities exported to other countries.

The WVA also provides that, subject to conditions determined from time to time by the Minister for Economic Affairs, the obligations here in question may be assumed by a third party, wholly or in part, and that this has the effect of releasing the original party from his obligations.

* Original language: Italian.

1 — OJ, English Special Edition, 1968 (II), p. 586.

For this purpose, the Stichting Interim Centraal Orgaan Voorraadvorming Aardolieprodukten (Provisional Central Board for the Stockpiling of Petroleum Products, hereinafter referred to as 'Icova') was set up on 7 September 1978. This body, which interested undertakings were free to join, was designed precisely to take over the obligation to maintain stocks, in return for the payment of a contribution. Since, as I have already pointed out, there was no obligation in respect of exported products, it is obvious that no contribution was owed with regard to such products.

It is clear that Icova was under public control: the members of the Executive Council were ministerial nominees; the majority of the members of the Council were appointed directly by the competent ministers (the Minister for Economic Affairs and the Minister for Finance), while the remainder were selected from a group representing the economic sectors concerned; acts of the body were subject to approval by the Minister for Economic Affairs, who also had the power to direct, supervise and, if necessary, to take decisions.

It should, however, be pointed out that while Icova, in the intentions of the legislature, represented the first step towards a permanent and centralized structure for the management of stocks, the situation was characterized for a number of years by a high degree of fluidity. Other bodies assisted Icova in assuming the obligation to maintain stocks. A number of undertakings made their own arrangements. Ministerial authorization to transfer such an obligation to Icova was initially granted to six undertakings, and then only partially; it was not until later that a further 17 undertakings received authorization. Some members withdrew from Icova and resumed the maintenance of stocks on their account.

A new and definitive order in these arrangements was not achieved until an amendment to the WVA was adopted on 24 December 1986 and entered into force on 1 January 1987. Under that amendment, Icova was replaced by a permanent body called COVA, to which was assigned the task of managing, at reduced cost, the stocks of petroleum products in the Netherlands. It should be pointed out that, under the new system, the stockpiling is financed by a levy, similar to a tax, imposed on all petroleum products which are subject to excise duty on mineral oils. This levy is refunded if the product is exported.

3. With those initial remarks, I shall now go on to examine the case as brought before the national court, bearing in mind that the facts occurred prior to the amendment of 1986.

In the order making the reference, the national court points out that undertakings which were members of Icova normally passed on the contribution for the maintenance of stocks in the selling price on the domestic market. Traders who purchased from those undertakings were faced with this additional price component both in respect of products which were then resold on the domestic market and in respect of those products which were subsequently re-exported elsewhere. Such traders, when exporting, consequently found themselves in a *de facto* unfavourable position *vis-à-vis* selling undertakings which were members of

Icova: while the latter — as I have already stated — did not incur any charge in respect of exported products, non-member traders bore the charge, in the case of those products too, of the price supplement resulting from the passing-on by their suppliers of the contribution already paid to Icova. According to the national court, this disadvantage was such as to lead some traders, including the plaintiff, to suspend their own exports.

I should stress that the order making the reference limits itself to considering the divergent positions, with regard to exports, of members of Icova on the one hand, and of their customers on the other. However, this subject covers a wider scope, as has become clear also from the observations submitted to the Court, because it also covers the case of any Netherlands trader who obtained petroleum products from an undertaking, whether or not belonging to Icova, which was required by law to maintain stocks and consequently to bear an additional cost component which was then passed on to some degree in its own selling prices.

Thus, the situation to which the national court appears to be referring is that in which a disparity in competitive position arises within the same State between two categories of traders operating at different levels of marketing. Such a disparity, in turn, subsequently affects the export prospects of one of the two categories *vis-à-vis* the other.

The question referred to the Court is whether a situation of this kind involves an infringement of Article 34 and whether such an infringement would cease to exist if provision were made for refunding in favour of the category that considers itself to be placed at a disadvantage.

4. In that regard, it should first be borne in mind that while the directive in question, which is based on Article 103, provides that Member States are to be required to establish fuel stocks of a determined capacity, it provides no details concerning the procedures whereby such stocks are to be established, managed and financed; there is, for instance, nothing to prevent a State from entrusting maintenance of stocks to a public body and subsidizing the associated costs by means of an allocation from the central budget (which is, moreover, the position at least in Germany and Italy in respect of a part of national stocks, as transpires from the material supplied by the Commission at the Court's request). In particular, it should be noted that the directive does not make any provision concerning the method whereby the costs of stockpiling, imposed on specific categories of undertakings, may or can be passed on in the selling prices on the domestic market or in the event of export.

Of course, even in this context, in which there is a wide margin of discretion, Member States are obliged to comply with the rule laid down in Article 34 of the Treaty. As interpreted by the Court, however, that provision precludes only 'national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade, in such a way as to provide a special advantage for national production or for the domestic market of the State in question'. [2]

2 — Judgment in Case 237/82 *Jongeneel Kaas* v *Netherlands* [1984] ECR 483.

5. It does not seem to me that the Netherlands provisions can be regarded as inconsistent with that principle. Just as is the case in the majority of the other Member States, a specific category of undertakings in the Netherlands dealing in petroleum products is required by law to maintain stocks in proportion to the amounts which they sell on the domestic market. The management of such stocks, in the Netherlands as elsewhere, obviously involves a charge which, as the Commission has correctly pointed out, is included in the total operating costs of the undertakings. Of course, the situation in the Netherlands, like that in some other Member States, is characterized by the fact that the undertakings placed under this obligation may choose to transfer it to a body operating under State control. In such a case, the management of the stocks is financed by a payment (calculated, on the basis of a fixed percentage rate, according to sales on the domestic market). Such a payment, however, is in practice always incorporated as an element in the costs of the undertaking. Therefore, irrespective of the arrangement selected — membership of Icova, management of stocks on one's own account or transfer of the obligation to a third party other than Icova — there is no reason to hold that the application of the legislation here in question entails a specific restriction on patterns of exports. The costs of stockpiling which are directly or indirectly incurred by the undertakings will be passed on in the domestic and export selling prices solely on the basis of considerations of a commercial nature. Indeed, inasmuch as from the order making the reference it would seem to be the case that at least undertakings which are members of Icova tend (without, however, being bound to do so by any rule) to pass the cost of stockpiling exclusively or predominantly on to domestic sales, which alone are taken into account for the purpose of fixing the level of stocks, it should be concluded that such sales are in fact burdened by the stockpiling costs to a greater extent than are exports. There is therefore no reason to fear any substantial distortion in this regard of patterns of trade for the purposes of Article 34 of the EEC Treaty.

6. If we turn now to the particular situation of those traders who purchased petroleum products from undertakings required to maintain stocks, the situation described by the national court concerning the market in the Netherlands appears to be similar in every respect to that which exists in the other Member States. Such traders, as the Commission pointed out, normally find included in the purchase price that portion of the stockpiling costs which their sellers have been obliged to incur and, in so far as market conditions permit, have then sought to pass on.

We are dealing here, however, with something that is a matter of obvious economic logic; the cost of stockpiling is passed on in the selling prices in just the same way as other charges which also derive from statutory provisions, such as, for instance, social welfare charges or those arising from compliance with environmental rules. What is more important, however, is the fact that such is the result quite regardless of the subsequent destination of the products. In other words, whatever the purchase price which they have paid, traders find themselves in the same position whether they decide to resell on the domestic market or to export. Once again, therefore, it seems to me that no specific disadvantage for exports can be envisaged, even indirectly.

7. Of course, with regard to exports, traders are in a different position to that of their suppliers, particularly if the latter tend to pass on stockpiling costs mainly in their domestic sales (which, after all, are those which determine the amount of those costs). This difference in position, however, results, not from the legal framework introduced by the Netherlands legislature, but rather from the free choices made by the undertakings concerned; that, moreover, would appear to be the normal consequence of the fact that the traders here in question occupy various positions in the marketing chain. Confirmation of this may be found in the fact that the situation described by the national court is, as I have already stated, analogous in all respects to that which has arisen in the other Member States where traders further down the commercial chain are similarly faced with an increase in price resulting from the fuel charges borne by their suppliers, and have no possibility of obtaining a refund when those products are re-exported.

Of course, that does not mean that no provision can be made for such a refund. That is what happened in the Netherlands in the reforming legislation which came into force in 1987. The new system, however, departs radically from its predecessor, inasmuch as it envisages a centralized system of management for national stocks and because it provides for financing by means of a levy in the nature of a tax which is added to the excise already burdening petroleum products and reimbursed in the event that the latter are exported, no matter by whom. The system thus specifically regulates the passing-on of the stockpiling charge and at the same time ensures that the charge is fully 'neutralized' in respect of exports.

The new system is without doubt intended to safeguard the commercial position of exporters and, in particular, traders further down the commercial chain. Moreover, what we have here is a measure which has been adopted only in the Netherlands and it may readily be understood in view of the export-oriented character of the petroleum industry in that State. In other words, it represents a direct intervention to promote all levels of exports. However, we cannot conclude from this that the absence of such a mechanism results in a situation which is incompatible with Article 34 of the Treaty. That provision does not give rise to an obligation to guarantee to every trader optimum export prospects, still less opportunities identical to those of a trader operating at a different marketing level, but merely the obligation to ensure that exports as a whole are not placed at a specific disadvantage *vis-à-vis* the domestic market.

To sum up, it appears to me that, in implementing the directive and in view of the wide discretion provided for therein, Member States are obliged under Article 34 only to refrain from introducing a system for establishing fuel stocks, the associated charges for which fall principally on exports and on that account discriminate against them. On the other hand, Article 34 does not impose any obligation to provide that exports should be exempted from every charge connected with stockpiling; legislation along those lines, such as that in force in the Netherlands since 1987, while it is inspired by a clear intention to promote exports, is not for that reason legally necessary. I do not believe, therefore, that the different legislation in force in the Netherlands prior to that date could be

considered to be incompatible with the aforementioned article of the Treaty.

8. *In limine*, one final observation. The Commission, particularly in its written observations, has asked whether the national rules in question (that is to say, those prior to the amendment of 1986) might not possibly be examined from the standpoint of Article 95 of the Treaty.

I must point out, however, that such an aspect, which in any case was not raised by the national court, does not appear relevant to the appraisal of the present case. As was noted by all the other parties, the national legislation at the material time in this case did no more than impose an obligation to establish stocks on those undertakings which marketed petroleum products. Whether stockpiling was carried out by a particular undertaking on its own account or was transferred to a third party (possibly Icova), the associated costs did not take on either the structural characteristics or the function of a fiscal levy. For that reason, I do not believe that Article 95 is applicable.

9. In conclusion, I propose that the Court of Justice should give the following reply to the national court:

'Article 34 of the Treaty does not preclude the application of the Netherlands legislation in force up to 1 January 1987, which implemented Council Directive 68/414/EEC.'