OPINION OF ADVOCATE GENERAL LENZ

delivered on 2 March 1993 *

Mr President,
Members of the Court,

A — Introduction

1. This reference for a preliminary ruling from the Cour d'Appel, Douai (France), concerns the application of Community law in the field of the disposal of waste oil, more specifically, the application of the provisions on the free movement of goods and the Council directive on the disposal of waste oils. [1] The accused in the main proceedings, Belgian nationals, are charged with disposing of waste, more specifically with 'collecting and transporting' waste oil, in France in 1985 without the necessary approval. [2]

2. As appears from the legislation which the Cour d'Appel cites to explain this charge [3] and the French Government has produced to the Court, [4] the necessary approval is an authorization for the 'collection' ('ramassage') of waste oil, that is to say, gathering, collecting and transporting quantities of waste oil *which originate from more than one holder.* [5] This approval is granted on the basis of an invitation for tenders from applicants who prove that they fulfil the prescribed conditions, in particular as regards the means used, namely applicants whose tender guarantees the best conditions of collection with regard to protection of the environment. [6] Approval was valid for a period of four years. [7]

3. It also appears from the relevant provisions that the system of approval for collection has been specified and supplemented by various detailed rules. Under Article 4 of Decree No 79-981 each approval is limited to one of the geographical zones into which the whole of France is divided. In the relevant zone the holder of the approval (the 'approved collection undertaking' — 'ramasseur agréé') has an obligation, under Article 6(a) of Decree No 79-981, as amended by Decree No 85-387, to collect waste oil. Article 8 of the Annex to the Order of 29 March 1985 sets out the details of this obligation in that the approved collection undertaking must remove within 14 days any quantity in excess of 200 litres of waste oil which is offered to it.

* Original language: German.

1 — Directive 75/439 of 16 June 1975 on the disposal of waste oils, OJ 1975 L 194, p. 31.

2 — See p. 2 of the order for reference.

3 — Article 24(5) of the Law of 15 July 1975; Decree of 21 November 1979; Order of 29 March 1985; Prefectoral Order of 30 August 1985.

4 — Annexes 1 to 4 of the French Government's reply to the Court's questions.

5 — See Article 1 of the Order of 29 March 1985 concerning the collection of waste oil.

6 — Article 5 of the Annex to the abovementioned Order of 29 March 1985.

7 — Article 5(2) of Decree No 79-981, as amended by Decree No 85-387.

4. In accordance with the provisions in force at the material time, [8] approved undertakings carried out their collection operations on the basis of a monopoly within the zone allocated to them as mentioned above. This emerges from the wording of Article 4 of Decree No 79-981, but it is expressly confirmed by Article 6 of the Annex to the Order of 29 March 1985 concerning the collection of waste oil, which provides as follows:

'Approval may be granted to only one natural or legal person.

However, it may be granted jointly to one or more natural or legal persons. In this case the agreement will be submitted to the Commissaire de la République when concluded.'

5. As the judgments in *Inter-Huiles*, [9] *Rhône-Alpes Huiles*, [10] *ADBHU*, [11] and *Commission* v *France* [12] show, this provision was adopted on the basis of Article 5 of Council Directive 75/439. That article refers to Articles 2, 3 and 4 of the directive, which are to the effect that the Member States must take the necessary measures to ensure the safe collection and disposal of waste oil, as far as possible by recycling, and adds:

'Where the aims defined in Articles 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.'

6. For the sake of completeness, it may be mentioned here that the French system for the disposal of waste oil originally included a complete prohibition on the export of waste oil. In the abovementioned judgments, particularly Case 173/83 *Commission* v *France*, this was held by the Court to be incompatible with Directive 75/439 and Article 34 of the Treaty. During the period to which the present proceedings relate, Articles 3 and 6 of Decree No 79-981 applied in the version of Decree No 85-387, according to which holders and collection undertakings were entitled to deliver the oil to disposal undertakings in other Member States which possessed a disposal permit within the meaning of Article 6 of the directive.

8 — The combined effect of Articles 4(1) and 5(2) of Decree No 79-981, as amended by Decree No 89-648, in conjunction with Article 3 of the Order of 21 November 1979 and Article 5 of Annex 2 of the Circular of 5 December 1989, is that the monopoly principle has in the meantime been replaced by the principle that the number of approved undertakings in each area is not limited, although this is admittedly weakened by exceptions.

9 — *Syndicat National des Fabricants Raffineurs d'Huile de Graissage* v *Inter-Huiles* [1983] ECR 555.

10 — *Rhône-Alpes Huiles GIE* v *Syndicat National des Fabricants Raffineurs d'Huile et de Graissage* [1984] ECR 575.

11 — *Procureur de la République* v *ADBHU* [1985] ECR 531.

12 — *Commission* v *France* [1985] ECR 491.

7. Unlike the previous cases to which the French system has given rise, the issue here is not the export rules laid down by that system in the form of delivery or disposal obligations on holders and collection and disposal undertakings. The question which the national court now asks is as follows:

'May the French legislation establishing within France a system of collection and disposal of waste oil operated by undertakings to which the administrative authorities grant approval for exclusive zones be interpreted, in the light of Articles 30 to 36 of the EEC Treaty and the directive of the Council of the Communities, as in fact allowing approval to be granted only to national undertakings, and must it accordingly be regarded as consistent or inconsistent with the abovementioned European provisions?'

8. It will be necessary to consider the scope of this question in great detail since the question provides the only information in the actual order for reference which defines the problem which the Court is called upon to resolve. Otherwise, the order contains only a brief account of the facts, the procedure and a reference to the relevant provisions of national law.

B — Opinion

I — *Interpretation and scope of the question referred*

9. *1.* According to the wording of the question, the national court seeks guidance on an 'interpretation' of national law, which the Court, under Article 177 of the EEC Treaty, cannot of course provide.

10. In my view, however, the question cannot be regarded as inadmissible for that reason. The request for 'interpretation' means in reality that the Court is being asked to assess the French legislation by reference to a criterion which the national court considers decisive as regards its compatibility with Article 30 et seq. of the Treaty and with the directive. In the opinion of the Cour d'Appel, the legislation contravenes Community law if it '*de facto* allows approval to be issued only to domestic undertakings'.

11. On this view, the Court is being asked, not to interpret the French provisions, but to determine whether they are compatible with Community law from the point of view of any *de facto* exclusion of undertakings from other Member States.

12. *2.* The question must also be construed in so far as, according to its wording, it seeks guidance concerning the consistency of national provisions with Community law.

According to settled case-law, in response to such a question the Court of Justice will give the national court the guidance which will allow it itself to decide the question of the conformity of the applicable provisions with Community law.

13. *3.* The next problem is which specific aspects of the French legislation are intended to be the subject of the question. The actual wording of the question is of very little assistance in this respect.

14. However, two elements can be identified straight away:

— first, the French provisions are described as 'establishing a system of collection and disposal of waste oil operated by undertakings to which the administrative authorities grant approval for exclusive zones'.

— Secondly, as already explained, these provisions could, in the opinion of the Cour d'Appel, be interpreted as *de facto* 'allowing approval to be issued only to domestic undertakings'.

15. *(a)* In view of those factors, it may be concluded that there are two other aspects of the French legislation which were clearly not intended to be covered by the national court's question. It does not question the requirement for approval or the fact that the approved collection undertaking has an obligation to collect waste oil in the manner described above. [13]

16. *(b)* Otherwise the subject-matter of the question is not immediately apparent. The two factors mentioned above are open to several interpretations. The first factor relates to the monopoly which approved collection undertakings have in the zone allocated to them. Consequently, this relates to a circumstance which makes it impossible for both national enterprises and those from other Member States to collect waste oil alongside approved undertakings.

17. The second factor raised by the national court, that is to say, the nature of the French legislation as a measure which *de facto* allows approval to be granted only to national undertakings, appears to be directed at a less favourable situation for foreign enterprises, and therefore differs in this respect from the first factor.

18. Different conclusions can be drawn from looking at the question in this way:

— either the Court may consider the question as being limited to the effects of the monopoly, namely the fact that, once an

13 — Section 3, above.

undertaking has obtained approval for collection, others cannot do so. This would follow if the *de facto* exclusion of undertakings from other Member States were to be regarded only as an incomplete description of the abovementioned effect of the monopoly;

— or it may be assumed that the mention of the monopoly is only intended to demarcate the general limits set by the national rules to the dispute. If this is so, the question may be construed as seeking guidance on the legality of certain detailed rules of the French system which make it more difficult specifically for undertakings from other Member States to obtain monopolistic approval in competition with domestic undertakings;

— or the question may be construed as asking the Court to deal with both these issues.

19. In my opinion, the Court should in any case examine the establishment of monopoly zones from the viewpoint of its compatibility with Community law.

20. The question refers precisely to this aspect in order objectively to characterize the French provisions.

21. The course of the procedure, to which the national court expressly refers, confirms that this is the correct interpretation of the question. Consequently, it is necessary to begin with the judgment of the first-instance court in this action, the Tribunal Correctionnel (Criminal Court), Laon, which prompted the Cour d'Appel, according to its own statement, to seek a ruling from the Court of Justice. [14]

22. This first-instance judgment, which is in the file of the main action, contains the following passage:

'(...) in order to claim that they should be acquitted, the accused, after proving that they are holders of permits in Belgium, submit that the French legislation is contrary to the provisions of the Treaty of Rome in so far as, by granting exclusive approval to one undertaking for each *Département* to collect waste oil and thereby implicitly excluding foreign undertakings which have approval for such work, the French legislation infringes the principle of the free movement of goods in the European Community (...)'. [15]

14 — The order making the reference states as follows (p. 3): 'Having regard to the judgment of the Tribunal Correctionnel, this court finds that there are sufficient grounds in the facts submitted to it for seeking a preliminary ruling from the Court of Justice of the European Communities on the question set out below in the operative part hereof, before ruling on the substance of the case.'

15 — Judgment, p. 3, last paragraph.

23. In making its determination, the Tribunal Correctionnel held as follows:

'(...) the corollary of the exclusive approval granted to one French undertaking for each *Département* for the collection of waste oil is that any foreign undertaking, whether approved or not, is debarred from collecting oil on French territory although, if they have obtained approval, which in principle is granted on conditions and subject to safeguards conforming to the recommendations of the EEC [Directive] [16] of 16 June 1975, those undertakings meet every guarantee for collecting waste oil in such a way as to ensure the protection of nature and the environment.

(...) it follows that the system of approval which gives one French undertaking for each *Département* a monopoly over the collection of waste oil cannot be justified by interests superior in rank to the free movement of goods enshrined in Article 36 of the Treaty of Rome, and that this system is therefore contrary to Article 34 of that Treaty.' [17]

24. This decision, which acquitted the defendants, was upheld by the Cour d'Appel, Amiens, by judgment of 30 January 1989.

25. However, the judgment was quashed by the Cour de Cassation (on application by the civil party, as against whom the judgment of the Cour d'Appel had not become final) on 7 November 1990. Referring to the reasoning of the Tribunal Correctionnel, the Cour de Cassation stated as follows:

'(...) on the one hand, Article 5 of Directive 75/439 of the Council of the European Communities on the disposal of waste oils lays down that the Member States may provide for zones to be assigned to one or more undertakings which, under Article 6, must obtain a permit from the competent authorities.

(...) on the other, it is clear from the directive and from the judgments of the Court of Justice of the European Communities that the only limit imposed on legislation of the Member States is the prohibition of any measure which may restrict Community trade.

(...) in ruling as it did, although the French legislation on the collection and disposal of waste oil does not rule out the possibility that the prescribed approval may be obtained by any natural or legal person belonging to the European Economic Community, the appeal court misconstrued the meaning and the scope of the abovementioned provisions and principles'. [18]

26. The request for a preliminary ruling is shown here to be the final stage of a process in which the specific question of the justification for the monopoly — as an obstacle to the grant of more than one approval for each

16 — The court refers in error to a 'circular'.

17 — Judgment, p. 4, last two paragraphs.

18 — Judgment of the Cour de Cassation, p. 4.

zone — has gradually overlaid a more general question, which was also raised initially, as to whether collection undertakings authorized abroad require an (additional) authorization in France.

27. This confirms the interpretation which I gave above of the question referred to the Court. [19]

28. It could then be considered whether the national court seeks *in addition* guidance concerning the legality of rules which make it more difficult specifically for undertakings from other Member States to obtain approval for collecting waste oil in competition with French undertakings.

29. In my view, it is unnecessary for the Court to give a final answer on this point. The national court does not state which of the rules of the French system are to be examined. This is no doubt why the French Government and the Commission have considered quite different points in this connection.

30. In addition to certain aspects to which no objection can be raised, [20] the French Government referred to the requirement — which, in its opinion, is the only problematic one — that an applicant must have a specific storage capacity in the zone concerned.

31. In contrast, the Commission, after making a general complaint in the written procedure that, under the French rules, collection undertakings authorized in other Member States had to obtain an additional approval, submitted at the hearing that the conditions for the grant of a French approval should be simplified to take account of the safeguards afforded by the authorization granted by the other Member State.

32. In these circumstances I do not consider it appropriate to examine the (potential) aspect of the question considered here. In this connection I refer to the requirements laid down by the Court in the judgment in *Telemarsicabruzzo* [21] with regard to the admissibility of questions for a preliminary ruling. According to that judgment, [22] the necessity to provide an interpretation of Community law which will be of use the national court makes it necessary that the national court define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based.

33. In this case the national court has not stated the relevant elements of the French legislation or given the necessary factual information. We do not know whether the defendants in the main proceedings submitted an application for approval pursuant to

19 — Section 19, above.

20 — The preference to be given to undertakings which guarantee the greatest possible protection of the environment; the obligation to carry out collection; the obligation to take two samples when collecting waste oil; the requirement that applications must be supported by particulars of the applicant's experience.

21 — See Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo* v *Circostel and Others* [1993] ECR I-393.

22 — Paragraph 6.

an invitation to tender and, if so, in what way they may have been at a disadvantage as against French applicants.

34. *4.* For these reasons the question, in so far as the Court can take account of it, could be worded as follows:

'Is it compatible with Articles 30 to 36 and Directive 75/439 where, under national legislation concerning the collection of waste oil which makes the collection of oil in each of the zones specified by that legislation subject to approval granted for that zone and only one approval for collection can be granted for a zone at any one time, so that other collection undertakings, including those from other Member States, cannot obtain approval for that zone before the expiry of an existing approval?'

II — *The provisions of Community law to be applied*

35. In replying to the question as I have reformated it, the Court need not, according to settled case-law, confine itself to examining Articles 30 to 36 and the directive, which are referred to by the national court in its question, but may also consider other appropriate provisions. [23]

36. Accordingly, as I shall shortly be explaining, it is appropriate to consider Article 59 of the Treaty also.

37. With regard to the application of Article 90(1), it should be observed that this does not provide an independent criterion of assessment in relation to the creation of exclusive rights. The Court has held [24] that

'even though that article presupposes the existence of undertakings which have certain special or exclusive rights, it does not follow that all the special or exclusive rights are necessarily compatible with the Treaty.'

38. The Court continued as follows:

'That depends on different rules, to which Article 90(1) refers.'

39. Likewise Article 90(2) does not fall to be considered in the present context. Admittedly, as Advocate General Rozès pointed out, approved collection undertakings could be regarded as undertakings entrusted with the operation of services of general economic

23 — For the purposes of the present case, see in particular Case C-260/89 *Elliniki Radiophonia Tileorassi AE* v *Dimotiki Etairia Pliroforissis* [1991] ECR I-2925, paragraph 7); see also Case C-187/91 *Belgian State* v *Belovo* [1992] ECR I-4937, paragraph 12, and Case C-114/91 *Claeys* [1992] ECR I-6559, paragraphs 10 and 11.

24 — Case C-202/88 *France* v *Commission* [1991] ECR I 1223, paragraph 22.

interest on the basis of their obligation to collect waste oil. [25]

40. However, save in the case of State measures covered by Article 90(1) (that is to say, measures adopted *after* the creation of the exclusive rights referred to therein), Article 90(2) presupposes conduct by an *undertaking* [26] (with the consequence of course that, under Article 5, the Member States must refrain from any measures likely to promote, encourage or reinforce conduct which is shown to be anti-competitive, even making allowance for Article 90(2)).

41. In the present case, however, the creation of the monopoly zones by the State cannot be connected with the behaviour of an undertaking.

42. Under these circumstances, I shall go on to consider the problem before the Court from the viewpoint of the free movement of goods and the freedom to provide services in the sequence set out by Article 60.

III — *Compatibility of the contested provisions with Community law*

43. *(1)* Regarding the free movement of goods within the meaning of Article 30 et seq., it must be observed first of all that waste oil undoubtedly constitutes 'goods' for the purposes of the Treaty [27] and that, in the context of those provisions, it is not Article 30 but only Article 34 which falls to be considered as the *sedes materiae*. The contested monopoly certainly does not constitute a restriction on imports.

44. In my opinion, however, the last-mentioned provision is not applicable either because the contested acts — although waste oil does constitute goods — do not fall within the ambit of the protection conferred by the provisions concerning the free movement of goods at all. The obstacle created by the monopoly is in fact aimed at services which could be supplied by undertakings other than the approved undertakings, with the result that, in view of the facts of the case, Article 59 et seq. provide the proper framework for this discussion. I should like to give the following explanations in this connection.

45. There is no doubt that the rules governing the monopoly system are not directly aimed at exports of waste oil. [28]

46. They have instead the effect that no undertakings other than the one which already has approval will receive approval,

25 — See her Opinion in Case 172/82 *Inter-Huiles* [1983] ECR 568, at 581, right-hand column.

26 — See the Opinion of Advocate General Tesauro in Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 14.

27 — The judgments cited in footnotes 9 to 12 proceeded from this assumption. This was later expressly confirmed by the judgment in Case C-2/90 *Commission* v *Belgium* [1992] ECR I-4431, paragraph 26.

28 — On this point, see the Court's reasoning, with reference to Article 30, concerning provisions aimed directly at *imports of waste*, in the judgment in Case C-2/90 *Commission* v *Belgium*, cited in the previous footnote, at paragraph 26.

and that therefore no other undertakings may obtain waste oil in the course of collection activity. However, the collection of waste oil is a service, that is to say, a transaction of which the removal of the waste oil by the collection undertaking (as the potential preliminary step towards subsequent trade in goods) forms an inseparable part.

47. In this connection it must be observed that, pursuant to Articles 2 to 4 of the directive, the Member States must take the necessary measures for the safe collection and disposal of waste oil and prohibit specific methods of disposal which are particularly harmful. Under Article 6 of the directive, in order to ensure compliance with those prohibitions, any undertaking which disposes of waste oil must obtain a permit.

48. This system creates particular problems for holders of waste oil, especially if they have small quantities, if they do not dispose of it themselves and if they cannot transport it to an approved disposal undertaking. To cope with this specific situation, the French provisions lay down two obligations: the holder of waste oil must hand it over to an approved collection undertaking [29] and the latter must take delivery of it. [30]

49. The collection activity serves to fulfil both these obligations. Consequently, its essential economic importance does not consist in procuring waste oil for collection undertakings for the purpose of subsequent sale, but in fulfilling obligations which have been laid down in the interest of protection of the environment.

50. Completely consistently with this approach, Article 13 of the directive provides as follows:

'As a reciprocal concession for the obligations imposed on them by the Member States pursuant to Article 5, indemnities may be granted to collection or disposal undertakings for the service rendered.'

51. In *ADBHU* [31] the Court found that the indemnities granted under this provision were

'not aid within the meaning of Article 92 et seq. of the EEC Treaty, but rather consideration for the services performed by the collection or disposal undertakings.'

52. Consequently a provision which creates a monopoly for collection undertakings yet to be designated, while excluding other competitors, is directed against the freedom to provide services, not the free movement of goods, and therefore Article 34 of the Treaty is not relevant.

53. This conclusion is not affected by the fact that the French system prevents collection undertakings from other Member States

29 — Article 3 of Decree No 79-981.

30 — Section 3, above.

31 — See footnote 11.

from carrying out collection operations by way of occasional trade in waste oil. The actual obstacle to this is not the monopoly with which the present case is concerned, but the obligation of the collection undertaking to collect the quantities of waste oil offered to it — an issue not raised by the national court. This obligation alone is sufficient to prevent collection from being undertaken for purely commercial purposes and to have the result that the undertaking concerned must set out to provide a service in order to obtain waste oil by this means. No doubt the monopoly intensifies the potentially inhibitory effect on trade of such an arrangement. In the final analysis, however, this is due to the fact that the system prevents services from being provided for which the consideration is, *inter alia*, the handing-over of goods. [32] In these circumstances, it would not be appropriate to examine the monopoly separately from the viewpoint of Article 34. [33]

54. To conclude this point, it must be said for the sake of completeness that any infringement of Article 34 is very unlikely even if the collection operation is regarded as a mere preliminary step towards a commercial transaction and is therefore brought under Article 30 et seq. The Court has consistently held that a contravention of Article 34 presupposes that the measures in question

'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.' [34]

55. However, the activities of additional collection undertakings, wherever they originate from, would not affect the relationship between internal trade and export trade. [35] This depends on the prices offered in the different markets for waste oil, so long as no *other* obstacles to exports are created.

56. I propose therefore that the Court should examine the problem before it from the viewpoint of freedom to provide services, and not from that of Article 34. This I shall do in the next section.

57. *(2)* Likewise it cannot be denied that the activity of collection undertakings falls within the ambit of Article 59 et seq. It is an activity of an industrial and/or commercial character within the meaning of the second paragraph of Article 60. In this connection, I would point out generally that, in applying the Treaty to activities organized by the State, care must always be taken to ensure that the *economic* rules of the Treaty are applied only within the limits imposed upon it. To be more precise, they must not be applied to activities which are reserved for the Member States by the Treaty because they are not of an economic nature. Thus the economic entities to which Article 85 et seq.

32 — See Section 60, below.

33 — See my Opinion in Case 173/83 *Commission* v *France* [1985] ECR 491, at 497.

34 — See, for example, Case C-47/90 *Delhaize* v *Promalvin* [1992] ECR I-3669, paragraph 12.

35 — The judgment in *ADBHU* (footnote 11), paragraph 14 et seq. is to the same effect.

apply must be 'undertakings', which is true of employment agencies (including public employment agencies), [36] but not of social insurance institutions such as those which were the subject of the judgment in *Poucet*. [37]

58. With regard to Article 59 et seq., the *Humbel* [38] judgment shows that courses of study provided as part of a national education system do not constitute a service which is normally provided for remuneration because there is no service provided for consideration, which is characteristic of activities falling within the scope of the second paragraph of Article 60. [39]

59. The activity in the present case is carried out by private undertakings for the purpose of gaining income, with the State acting only as an arbitrator in respect of competition, which it restricts in the manner described. Such intervention by the State cannot, of course, alter the fact that the activity falls within the terms of the second paragraph of Article 60.

60. With regard more particularly to the remuneration that such an activity implies, in the case of collection undertakings it consists of benefits of various kinds, depending on the circumstances. First, the collection undertaking becomes the owner of the oil which it collects. As emerged at the hearing, this product normally has a commercial value which is likely to vary according to decree to which it is contaminated. Therefore it must be regarded entirely or partly as consideration moving from the holder of the waste oil. However, he may perhaps also have to give pecuniary consideration for the collection service, depending on the type and condition of the oil. Finally, the State may, under Article 13 of the directive, pay indemnities which, as I have already said, are in the nature of remuneration. Consequently, in so far as benefits from different persons may together constitute the remuneration, this does not affect the application of Article 60. Article 60 does not require the service to be paid for by those for whom it is performed. [40]

61. A service as defined above can certainly be supplied by an establishment within the meaning of Article 52 (see the third paragraph of Article 60), but it does not have to be. The activity of collection does not by definition require the service-provider to have a permanent presence in the host State. [41]

62. Thus undertakings in frontier areas which have storage facilities available to them at a suitable location in their State of establishment can unquestionably operate in neighbouring States, as has obviously happened in the present case. The fact that

36 — Case C-41/90 *Hofner and Elser* v *Macrotron* [1991] ECR I-2017.

37 — Joined Cases 159/91 and 160/91 *Poucet* v *AGF* [1993] ECR I-637.

38 — Case C-263/86 *Belgian State* v *Humbel* [1988] ECR 5365, paragraphs 15 to 18.

39 — See also Case C-159/90 *Society for the Protection of Unborn Children Ireland* v *Grogan and Others* [1991] ECR I 4685, paragraph 18.

40 — Case 352/85 *Bond van Adverteerders* [1988] ECR 2085, paragraph 16.

41 — Case 205/84 *Commission* v *Germany* [1986] ECR 3755.

approval is necessary does not lead to the application of Article 52 either. Such approval fulfils only one of the requirements for presence but otherwise has no bearing on its permanence or frequency.

63. Does the grant of the monopoly infringe Article 59 on the ground that it impedes collection activity in so far as it could be offered as a service by undertakings from other Member States?

64. The establishment of a monopoly of the kind in question here is — as such — a non-discriminatory restriction of such a service. Restrictions of this kind are also covered by Article 59 of the Treaty, as has been accepted since the *Säger* judgment. [42] The judgment in *Commission* v *Netherlands* [43] of the same date shows that this also applies where exclusive rights [44] are created. [45]

65. In these circumstances, in order to comply with Article 59 of the EEC Treaty, the establishment of the monopoly would have to be justified by a mandatory requirement in the general interest. In this connection, it must be observed that the Court has previously held that protection of the environment is a mandatory requirement of that kind which may justify certain restrictions on the principle of the free movement of goods. [46] However, the same must apply to freedom to provide services. Reference should be made on this point to the judgment in *ADBHU*, [47] in which protection of the environment was recognized — in the sphere of the disposal of waste oil — to be a ground capable of justifying restrictions on free trade described as a fundamental right. [48] [49]

66. On this point I would not wish to deny that the system of territorial monopolies may promote protection of the environment, as already appears from Article 5 in conjunction with the third and seventh recitals in the preamble to the directive. The object of such an arrangement is by its nature to enable the chosen undertakings to trade at a profit in spite of their obligation to effect collections, which sometimes relates to quantities of waste oil which are economically unattractive. Consequently, this arrangement promotes the interest of suitable undertakings in seeking to obtain an approval which is combined with an obligation to effect collections. It may therefore contribute to the complete collection of waste oil pursuant to Articles 2, 3 and 4 of the directive (in so far as it cannot be properly disposed of otherwise).

67. However, the measure is justified from this viewpoint only if it complies with the

42 — Case C-76/90 *Säger* v *Dennemeyer* [1991] ECR I-4221, paragraph 12.

43 — Case C-353/90 *Commission* v *Netherlands* [1991] ECR I-4069.

44 — Unlike most exclusive rights created by law, the present measure does not exclude competition completely, but restricts it to the time of the grant of the (monopoly) approval. However, this has no bearing on the application of the abovementioned principles.

45 — Case C-353/90 *Commission* v *Netherlands*, paragraphs 22, 23 and 24 and the first sentence of paragraph 25. Here also the Court repeated that Article 90(1) as such does not provide a criterion for assessing the compatibility of exclusive rights with the Treaty (paragraph 33 et seq.).

46 — Case 302/86 *Commission* v *Denmark* [1988] ECR I-4607, paragraph 8 et seq.

47 — [1985] ECR 531.

48 — Paragraph 9, at 548.

49 — Paragraph 13, at 549, and Opinion, at 534, right-hand column.

principle of proportionality, that is to say it must, *inter alia*, be *necessary* in order to attain the said objective. [50] Article 5 of the directive takes this factor into account by stating that the introduction of a system of zones is subject to the proviso that the aims defined in Articles 2, 3 and 4 cannot otherwise be achieved.

68. In these circumstances, it might be considered giving a reply to that effect to the national court and leaving it to that court itself to determine whether the system of territorial monopolies is necessary. However, I doubt whether the premises set out in Article 5 as regards where such a system *may* be necessary are satisfied. This was not questioned by the Court in *ADBHU*, where it examined the validity of Article 5 from the viewpoint of free trade. In that case, there was no reason to do so because this issue had not been raised. Furthermore, at that time the Court had not yet accepted, in the clear terms of the *Säger* judgment, that Article 59 is also applicable to non-discriminatory restrictions. Against this background, it seemed justified to exercise restraint with regard to the possibility that Article 5 of the directive might be declared void on the ground that it infringed the principle of free trade. [51]

69. As such reservations no longer appear justified in view of later developments, the abovementioned question ought to be examined here. In this respect, the Court should abide by its findings in the *Inter-Huiles* and *Rhône-Alpes Huiles* judgments concerning the prohibitions of exports at issue there. Just like the system of territorial monopolies in the present case, those export prohibitions served to ensure the viability of certain — in that case, disposal — undertakings. On this point the Court held as follows:

'It has also been suggested that the disputed legislation satisfies an economic requirement, since only the collection of *all* waste oils is sufficient to ensure the profitability of *undertakings* approved for the *disposal* of waste oils and, therefore, the achievement of the aims of the directive. That argument cannot be accepted. Articles 13 and 14 of the directive provide that, by way of compensation for the obligations imposed on the undertakings for the implementation of Article 5, Member States may, without placing restrictions on exports, grant to such undertakings "indemnities" financed in accordance with the principle of "polluter pays".' [52]

70. The Court followed this precedent in connection with the disposal of waste offal products, [53] although not in such clear terms. [54]

71. However, the same considerations must apply with regard to ensuring the profitabil-

50 — *Säger*, paragraph 15; *Commission* v *Netherlands*, paragraph 31; and *ADBHU*, paragraphs 13 and 15, see footnote 46.

51 — At the time I used the phrase 'the fundamental freedom to engage in commerce or pursue a professional or trade activity': [1985] ECR 532, at 534.

52 — See *Inter-Huiles*, paragraph 13, my emphasis.

53 — Case 118/86 *Openbaar Ministerie* v *Nertsvoederfabriek Nederland* [1987] ECR 1-3883, paragraph 16.

54 — Advocate General Da Cruz Vilaça was more explicit ([1987] ECR 3894, at 3901, section 62 where reference is made to the *Inter-Huiles* judgment).

ity of *collection undertakings*. The case-law previously mentioned appears to be based on the general consideration that the State is entitled to restrict the basic freedoms of the Treaty by measures designed to ensure profitability, only under strict conditions. [55] In particular, the State cannot finance services which the market does not offer, without State assistance, solely on grounds of profitability, [56] by excluding the competition intended by the Treaty in the interest of the basic freedoms, but must, if necessary, pay for those services itself. [57] As Article 14 of the directive shows, the State can, and must, pass on those burdens in accordance with the 'polluter pays' principle.

72. From this point of view it does not appear necessary, for the purposes of protection of the environment, to combine the obligation to collect waste oil with the grant of a monopoly to the approved undertaking. Therefore the grant of such a monopoly is incompatible with Article 59.

C — Conclusion

73. For the whole of the aforementioned reasons, I propose that the Court give the following reply to the question from the Cour d'Appel, Douai:

Article 59 of the Treaty precludes national rules which, where the collection of waste oil is made conditional on an approval which relates to one of the zones into which the territory of the State is divided for this purpose and includes an obligation to collect the quantities of waste oil offered there, lay down that only one collection approval can be issued at one and the same time for each of the collection zones.

55 — Case 72/83 *Campus Oil* v *Minister for Industry and Energy* [1984] ECR I-2727, at paragraph 44 et seq. is into like effect. That judgment is based on the special feature of the petroleum market in that it is very dependent on oil-producing non-member countries (see paragraphs 28 to 31 and 38 to 41). A special situation of that kind does not arise here. See also Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, paragraphs 47, 48 and 49.

56 — It is necessary to distinguish cases where non-economic grounds may justify the establishment of a monopoly, e. g. grounds of public security and cultural or social grounds. The Court has taken up this point in the past when considering the competition provisions of the Treaty; see the detailed analysis by Advocate General Tesauro in the *Corbeau* case, loc. cit.

57 — See *Campus Oil*, paragraph 46.