JUDGMENT OF THE COURT (Sixth Chamber)
12 December 1990 *

In Case C-302/88,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Gerechtshof (Regional Court of Appeal), The Hague (Netherlands), for a preliminary ruling in the proceedings pending before that court between

Hennen Olie BV

and

Stichting Interim Centraal Orgaan Voorraadvorming Aardolieprodukten and **State of the Netherlands,**

on the interpretation of Article 34 of the EEC Treaty,

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of Chamber, T. F. O'Higgins and C. N. Kakouris, Judges,

Advocate General: G. Tesauro
Registrar: D. Louterman, Principal Administrator,

After considering the observations submitted on behalf of

Hennen Olie BV, by T. R. Ottervanger, of the Brussels Bar,

the Government of the Netherlands, by H. J. Heinemann, Acting General Secretary to the Minister for Foreign Affairs, acting as Agent,

* Language of the case: Dutch.

the Stichting Interim Centraal Orgaan Voorraadvorming Aardolieprodukten, by A. J. Braakman and P. Glazener, of the Rotterdam Bar,

the Commission of the European Communities, by R. Barents, a member of its Legal Department, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral argument presented by the Government of the Netherlands, represented by M. A. Fierstra, acting as Agent, by Hennen Olie BV, by the Stichting Interim Centraal Orgaan Voorraadvorming Aardolieprodukten and by the Commission at the hearing on 8 November 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 6 June 1990,

gives the following

Judgment

1 By order of 6 October 1988, which was received at the Court Registry on 14 October 1988, the Gerechtshof, The Hague, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of Article 34 of the EEC Treaty, in order to determine the compatibility with that provision of national legislation implementing Council Directive 68/414/EEC of 20 December 1968 imposing an obligation on Member States of the EEC to maintain minimum stocks of crude oil and/or petroleum products (Official Journal, English Special Edition, 1968 (II), p. 586, hereinafter referred to as 'the directive').

2 Those questions arose in proceedings between Hennen Olie BV, a trader in petroleum products established in the Netherlands, and the Stichting Interim Centraal Orgaan Voorraadvorming Aardolieprodukten (Provisional Central Board for the Stockpiling of Petroleum Products, hereinafter referred to as 'Icova').

3 The Kingdom of the Netherlands implemented Directive 68/414 by way of the Wet Voorraadvorming Aardolieprodukten (Law on the Stockpiling of Petroleum Products; *Staatsblad* 1976, p. 569, hereinafter referred to as 'the Law'). The Law imposes on undertakings which market petroleum products within the Netherlands an obligation to establish stocks. Such stocks must correspond to a given percentage of petroleum products placed on the domestic Netherlands market during the preceding year. However, quantities exported to other countries are not taken into consideration for the purpose of establishing stocks.

4 The Law provides that, subject to conditions determined by the Minister for Economic Affairs, the obligation to maintain stocks 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. To this end, Icova was set up on 7 September 1978 with the purpose of discharging on behalf of its members their obligation to maintain stocks. Undertakings subject to the obligation to maintain stocks were authorized, with effect from 1 October 1980, to have that obligation discharged by Icova on their behalf.

5 Undertakings which are members of Icova defray the costs incurred by it in the maintenance of stocks through payment of a charge known as a VVA contribution, the amount of which is calculated in accordance with the quantity of petroleum products which such undertakings release on to the domestic market. Since no account is taken of exported petroleum products for the purpose of determining the scope of the obligation to maintain stocks, member undertakings are not required to pay the contribution in respect of products which they export on their own account.

6 It appears from the documents before the Court that this contribution is in practice passed on to customers by undertakings belonging to Icova, which include that charge in the selling price, even though there is no obligation imposed by statute in this regard.

7 It appears from the grounds of the order making the reference that traders in petroleum products established in the Netherlands who purchased products placed on the Netherlands market by undertakings belonging to Icova at a price which

included the cost of storage found themselves, from 1 October 1980, at a competitive disadvantage, when exporting such products, *vis-à-vis* undertakings which were members of Icova. From that date, the latter were not subject to any charge in respect of products which they directly exported. According to the order making the reference, this disadvantage may have represented for the traders concerned a restriction on exports.

8 Exporters who are not members of Icova have been able since 1 January 1981 to recover the contribution in question, provided that a number of conditions are satisfied. Following an amendment to the Law, Icova was replaced on 1 January 1987 by a permanent body known as COVA, with the result that differences in treatment between undertakings which are members of Icova and those which are not have been eliminated. Under the new system, the costs of stockpiling are met by a stockpile levy collected by the national tax authorities. The stockpile levy is reimbursed if the product is exported.

9 Hennen Olie does not supply any petroleum products to the Netherlands market and is for that reason not subject to the obligation to maintain stocks. Since it was not a member of Icova, it was unable prior to 1 January 1981, when purchasing petroleum products placed on the Netherlands market by undertakings belonging to Icova with a view to their export, to obtain a refund of the contribution contained in the price paid for the products. It was subsequently enabled to do so up to 31 December 1986, although subject to a number of conditions.

10 Hennen Olie brought an action for compensation against Icova before the Arrondissementsrechtbank (District Court), Rotterdam, before which it argued that the discriminatory treatment which it had suffered as a non-member of Icova was in breach of, *inter alia*, Article 34 of the EEC Treaty. That action was dismissed. The Gerechtshof (Regional Court of Appeal), The Hague, before which the matter was brought on appeal, decided to stay the proceedings until the Court of Justice had given a preliminary ruling on the following questions:

(1) Is a rule of national law, as described above, incompatible with Article 34 of the EEC Treaty, properly construed?

(2) Does it matter for the purposes of the answer to be given to Question 1 whether the aforementioned difference between traders as regards their competitive position is entirely or partially offset by rules which concern the reimbursement of the aforementioned VVA contributions and which have not been adopted by the Member State concerned itself?

11 Reference is made to the Report for the Hearing for a fuller account of the facts in the main proceedings, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

12 In its questions, the national court seeks in substance to ascertain whether it is contrary to Article 34 for traders who are not members of Icova and who wish to export petroleum products purchased on the national market to be denied any possibility of obtaining a refund of contributions paid to that body or to be granted such a refund subject to a number of conditions, since there is no difference in treatment between products intended for export and products placed on the domestic market of the Member State in question.

13 It should be noted at the outset that the present case raises the question of whether measures adopted by a body such as Icova can come within the prohibition contained in Article 34.

14 It should be pointed out in this regard that Icova, during the period in question, was the only body entitled to act as a third party within the meaning of the aforementioned Netherlands Law and was established in order to carry out the tasks conferred on it by that Law, namely to maintain stocks of petroleum products on behalf of its members. It therefore had a significant role in the management of Netherlands petroleum reserves and thereby met to a large degree the obligation imposed on the Netherlands by the directive.

15 It appears from the documents before the Court that Icova was controlled and directed by public authorities, even though it was not formally a part of State administration: members of the Executive Council were appointed by the Minister

for Economic Affairs. The latter also had the power to issue binding instructions to Icova, to decide on the dissolution of that body and to approve its draft budget and annual accounts.

16 It must be held that the acts of a body subject to such State control may, irrespective of its legal form, constitute 'measures' within the meaning of Article 34 of the Treaty if they are capable of affecting trade between Member States.

17 It should next be borne in mind that the Court has held on several occasions (see, in particular, the judgment in Case 237/83 *Jongeneel Kaas* v *Netherlands* [1984] ECR 483) that Article 34 concerns 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. In the present case, the discrimination alleged by Hennen Olie relates only to exports made by undertakings which are members of Icova, on the one hand, and, on the other, by undertakings which are not. Such a difference in treatment between two categories of exporters cannot be contrary to Article 34 since it relates to special charges connected with the stockpiling of crude oil and/or petroleum products.

18 Accordingly, the answer to the questions submitted must be that Article 34 of the EEC Treaty is to be interpreted as meaning that it does not preclude traders who are not affiliated to an organization established for the purpose of performing the legal obligations imposed on its members under the Law implementing Directive 68/414 and who wish to export products purchased on the domestic market from being denied the possibility of obtaining the refund of contributions made to that body or from being enabled to obtain such refund only under certain conditions, provided that there is no difference in treatment between products intended for export and products placed on the domestic market of the Member State concerned.

19 Furthermore, the Commission argued that Article 95 of the Treaty may apply to charges which, although not discriminatory, are none the less capable of hindering intra-Community trade.

20 It should be pointed out in this regard that the national court has not referred any questions relating to the applicability of Article 95 of the Treaty and that it appears neither from the facts of the case nor from the arguments submitted by the parties during the procedure that the non-refunding or the conditional refunding of the contribution in the present case can be regarded as a form of taxation within the meaning of Article 95. The Court therefore does not consider it necessary to examine this point of principle raised by the Commission.

Costs

21 The costs incurred by the Commission and the Netherlands Government, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions submitted to it by the Gerechtshof, The Hague, by an order of 6 October 1988, hereby rules:

Article 34 of the EEC Treaty must be interpreted as meaning that it does not preclude traders who are not affiliated to an organization established for the purpose of performing the legal obligations imposed on its members under the Law implementing Council Directive 68/414/EEC of 20 December 1968 and who wish to export products purchased on the domestic market from being denied the possibility of obtaining the refund of contributions made to that body or enabled to

obtain such refund only under certain conditions, provided that there is no difference in treatment between products intended for export and products placed on the domestic market of the Member State concerned.

Mancini O'Higgins Kakouris

Delivered in open court in Luxembourg on 12 December 1990.

J.-G. Giraud
Registrar

G. F. Mancini
President of the Sixth Chamber