OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 14 May 1985

My Lords,

In this case, in criminal proceedings brought against Mr Michel Leclerc for a number of offences including one of selling, at petrol stations in Asnières, petrol at prices below the minimum fixed by French legislation, the Tribunal de grande instance of Nanterre asks, pursuant to Article 177 of the EEC Treaty:

'(1) Must Article 3 (f) of the EEC Treaty, which provides for "the institution of a system ensuring that competition in the common market is not distorted", and the second paragraph of Article 5 of the Treaty, which provides that Member States "shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty", be interpreted as rendering inapplicable rules of a Member State, laid down by law or regulation, fixing minimum prices or, more particularly, maximum discounts?'

(2) If the first question is answered in the affirmative, must it be held that such national rules may, as applied to petroleum products, be covered by Article 36 of the EEC Treaty as meeting an essential requirement of public policy?'

Although the first question does not specify Article 85 of the Treaty, it is clear that the question must be read as involving a reference to that article. It does not have to be read as involving Article 30 since that article operates directly on measures taken by Member States so that reference to Articles 3 (f) and 5 is supererogatory. Although the second question does not refer to Article 30, it must be read as involving a reference to that article since clearly Article 36 is of no relevance unless the measures in question would, but for that article, fall within Article 30, which itself prohibits measures having an equivalent effect to quantitative restrictions on imports.

The questions in this case are thus substantially the same as those raised in Case 231/83 *Cullet* v *Centre Leclerc* [1985] ECR 315 where the Court held:

(a) that Articles 3 (f), 5, 85 and 86 of the Treaty do not prohibit national rules providing for a minimum price to be fixed by the national authorities for the retail sale of fuel; and

(b) that Article 30 prohibits such rules where the minimum price is fixed solely on the basis of the ex-refinery prices of national refineries and where those ex-refinery prices are in turn linked to the ceiling price, calculated solely on the basis of the cost price of national refineries when the European fuel rates are more than 8% above or below those prices.

That case, however, involved Order No 45-1483 of 30 June 1945 and Decrees Nos 82-10/A, 82-11/A, 82-12/A and 82-13/A of 29 April 1982. The instant case involves

the same order but other decrees, namely Article 3 of Decree No 78-101/P of 5 October 1978 and Article 1 of Decree No 78-123/P of 29 December 1978, since the events in question occurred in 1980. One main issue in this case is thus whether the reasoning in the *Cullet* decision applies to the earlier legislation.

The effect of the 1982 Decrees is conveniently summarized in the order for reference in Case 149/84 *Binet* where the national court said that under those provisions 'a maximum selling price, or ceiling price, is fixed, which is determined in particular with reference to an ex-refinery price equal to the value of the product exclusive of tax at the refinery gate and to the rates recorded in the nine other Member States of the Community; that ex-refinery ceiling price is calculated on the basis of European rates if the latter correspond, within a margin of 8%, to the cost price of French refineries; where this is not the case, European rates are relevant only as factors of calculation, and the production costs of French refineries become the determinant factor; it follows that any fall in supply prices on the markets of the other Member States of the EEC can be passed on in retail prices only to the extent to which this is allowed by the minimum authorized retail price, arrived at by subtracting a discount of 9 or 10 centimes per litre of super-grade or regular petrol from the maximum selling price'.

In the present case the basic law relating to the importation of petrol into France (which includes purchases from refineries in France) is to be found, as it was in the earlier case, in the law of 30 March 1928 (JORF of 31 March 1928 p. 3675) as amended by Decree No 79-1137 of 28 December 1979 (JORF 29 December 1979 p. 3291). This provides that only those having a special authorization ('A3') may import petrol into France. Such importers are required to purchase by medium-term contracts 80% of their requirements from refineries in France or in other Member States of the Community. The rest can be bought 'spot'. No objections are taken to these rules as amended in 1979 on the initiative of the Commission.

The maximum retail sale price of petrol sold to the consumer, however, was fixed by public authorities in the light of factors specified in Article 1 of Decree No 78-123/P. The maximum retail price was fixed having regard to the authorized wholesale price at the refinery, plus expenses, taxes and profit margins. Precisely how the wholesale price ('prix autorisé pour la reprise en raffinerie') was fixed is not spelled out in the order, though the Commission has set out in its observations what it understands to be the factors involved in calculating the cost price and the receipts of the refinery. The maximum retail price fixed from time to time on the basis of these factors varies from region to region.

In this respect the two methods of calculating the maximum retail price ('prix limite de vente en vrac au consommateur') are different. On the other hand, although no obligatory method of calculating this maximum retail price is set out, it seems clear that the maximum retail price is based exclusively on prices at the French refineries. The minimum price both at the time relevant to this case and to the *Cullet* case was fixed by establishing the maximum

amount of discount which can be given, i.e. 9 centimes a litre for 'regular' petrol, 10 centimes a litre for 'super'. At the relevant time this was fixed by Article 3 of Decree No 78-101/P.

It is apparent that the French independent distributor could buy and would have an incentive to buy 80% of his petrol from other Community sources if, as happened from October 1980, prices elsewhere were lower. He would benefit in theory by doing so in that he increased his potential profit margins, but this benefit could not be passed on to the retail customer since that petrol, bought elsewhere, could not be sold at less than 9 or 10 centimes lower than the maximum price fixed for retail sale of French-refined petrol. In the result, he clearly could not take any competitive advantage of the lower prices which buying outside France gave him.

This factor, the Commission submits, I think rightly, clearly went to protect the French refineries even in respect of sales to independent distributors since the latter could not compete on price at the retail stage.

On this basis, so far as concerns the first question, involving Articles 3 (f), 5, 85 and 86 of the Treaty, I can see no reason to distinguish this case from *Cullet*. The answer must be the same: that those articles do not prohibit national rules providing for a minimum price to be fixed by the national authorities for the retail sale of petrol.

As to the second question, it is clear on the basis of the Court's decision in Case 82/77 *Van Tiggele* [1978] ECR 25 that rules fixing a minimum price may constitute a measure having equivalent effect if they prevent a price advantage enjoyed by imported goods from being passed on to the consumer, even if the rules are indistinctly applicable to domestic and imported goods.

As I read it, the basic reason underlying the Court's decision in *Cullet* is that a national measure fixing minimum retail prices for a product constitutes a measure having an effect equivalent to a quantitative restriction on imports, contrary to Article 30 of the EEC Treaty, where it ties the minimum retail prices to national producer prices in such a way as to cancel out the competitive advantage which would otherwise be enjoyed by cheaper imports of the product from another Member State, by preventing their lower cost price from being passed on in the retail price (paragraphs 26-29 of the decision). Although the operative part of the decision in *Cullet* is phrased in terms of the detailed rules laid down for fixing the minimum prices of petrol by the French legislation of 1982, the above reasoning is of general application. It follows that a national court may find national price-fixing measures contrary to Article 30 of the EEC Treaty, regardless of the exact method used to fix the minimum prices, wherever it is established that their effect is or may be to tie retail prices to the national producer prices in such a way as to cancel out the competitive advantage which would otherwise be enjoyed by cheaper imports of the product from another Member State.

As to the applicability of Article 36 of the Treaty, it is to be noted that in paragraphs 32 and 33 of its judgment in *Cullet*, the Court held that it was sufficient to state that the French Government had not shown that it would be unable, using the means at its disposal, to deal with the consequences which an amendment of the rules in question in accordance with the principle set out in the judgment would have upon public order and public security. I do not see that it has been shown here either that the French Government could not deal with the consequences referred to.

Nor can I see that anything said by the Court in Case 72/83 *Campus Oil Ltd* v *Minister for Industry and Energy* [1984] ECR 2727 justifies the conclusion that the maintenance of French refineries or the ensuring of an adequate distribution system supports the case that these rules as to price were justified by considerations of public order or public security.

I conclude accordingly that the questions posed should be answered on the lines that:

(1) Articles 3 (f) and 5 of the EEC Treaty do not render inapplicable rules of a Member State providing for minimum prices (or maximum discounts) to be fixed by the national authorities for the retail sale of fuel.

(2) Article 30 of the Treaty prohibits such rules where the minimum price is fixed on the basis only of the national producer prices and costs and where the price advantage which would otherwise be enjoyed by cheaper imported products is eliminated at the retail stage.

(3) None of the provisions of Article 36 of the EEC Treaty has been shown to apply so as to relieve such rules from the prohibition contained in Article 30 thereof.

The costs of the parties to the proceedings before the national court fall to be dealt with by that court. No order should be made as to the costs of the Commission or the French Republic.