OPINION OF ADVOCATE GENERAL LENZ
delivered on 4 October 1994 *

A — Introduction

1. The present case raises the question whether the Treaty provisions on the free movement of goods (Article 30 et seq. of the EC Treaty) apply to trade in heroin (and other narcotic drugs).

2. Diamorphine (heroin) is an opium derivative obtained from the processing of morphine. Its use is prohibited in most countries because of the danger of abuse. In the United Kingdom, however, it is the preferred treatment for the relief of pain in the terminally or seriously ill. According to the information supplied by the national court making the reference, 238 kg of the 241 kg of heroin used for medical purposes world-wide in 1990 were employed in the United Kingdom.

3. Diamorphine is a narcotic drug within the meaning of the Single Convention on Narcotic Drugs concluded in New York on 30 March 1961 ('the Convention'). [1] The Convention terminates and replaces a number of hitherto existing agreements in this area (beginning with the International Opium Convention of 1912).

4. The preamble to the Convention recognizes 'that the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes'. [2] At the same time, it states that addiction to narcotic drugs constitutes an evil which the Contracting Parties are under a duty to combat. [3] In the view of the Contracting Parties, measures against abuse of narcotic drugs can be effective only if they are coordinated and universal. Such universal measures, in their opinion, require international cooperation 'guided by the same principles and aimed at common objectives'. [4]

5. Article 2(1) provides that all the measures of control provided for under the Convention apply to the narcotic drugs listed in Schedule I. Under Article 19 of the Conven-

* Original language: German.

1 — 520 UNTS 204. A German translation of the Convention, as amended by the Protocol of 25 March 1972, is printed in the Bundesgesetzblatt (Federal Official Journal) 1977 II, p. 111.

2 — Second recital in the preamble to the Convention.

3 — Third and fourth recitals in the preamble.

4 — See the fifth and sixth recitals in the preamble.

tion these measures of control include, in the first instance, the duty of the Contracting Parties to furnish to the International Narcotics Control Board in Vienna annual estimates 'for each of their territories'. Those estimates must include the quantities of drugs to be consumed the following year for medical or scientific purposes or utilized for the manufacture of other drugs or preparations. Stocks of drugs to be held as at 31 December of the year to which the estimates relate must also be indicated.

Diamorphine is listed in both Schedule I and Schedule IV to the Convention.

6. Article 21(1) of the Convention provides as follows:

'The total of the quantities of each drug manufactured and imported by any country or territory in any one year shall not exceed the sum of the following:

(a) The quantity consumed, within the limit of the relevant estimate, for medical and scientific purposes;

(b) The quantity used, within the limit of the relevant estimate, for the manufacture of other drugs, of preparations in Schedule III, and of substances not covered by this Convention;

(c) The quantity exported;

(d) The quantity added to the stock for the purpose of bringing that stock up to the level specified in the relevant estimate; and

(e) The quantity acquired within the limit of the relevant estimate for special purposes.'

7. Articles 29 to 31 of the Convention require the Contracting Parties to make the manufacture, trade, distribution, import and export of drugs 'to any country or territory' subject to a licence.

8. Article 43(2) should be mentioned in this connection. Under that provision, two or more Contracting Parties may notify the Secretary-General of the United Nations that 'as the result of the establishment of a customs union between them, those Parties

constitute a single territory for the purposes of Articles 19, 20, 21 and 31.'

9. Article 2(5) of the Convention provides the following additional measures of control for the particularly dangerous drugs listed in Schedule IV:

'(a)A Party shall adopt any special measures of control which in its opinion are necessary having regard to the particularly dangerous properties of a drug so included; and

(b) A Party shall, if in its opinion the prevailing conditions in its country render it the most appropriate means of protecting the public health and welfare, prohibit the production, manufacture, export and import of, trade in, possession or use of any such drug except for amounts which may be necessary for medical and scientific research only, including clinical trials therewith to be conducted under or subject to the direct supervision and control of the Party.'

10. The Contracting Parties, which number more than 130, include all the Member States of the Communities. The United Kingdom ratified the Convention on 2 September 1964 (thus prior to its accession to the European Communities).

11. In the United Kingdom the Secretary of State for the Home Department ('the Secretary of State') has primary responsibility for complying with the duties arising under the Convention. The Misuse of Drugs Act 1971 prohibits the importation of diamorphine unless permitted by the Secretary of State.

12. Until August 1992 the United Kingdom did not permit any imports of narcotic drugs that were manufactured in that country and readily available there. This policy, which had been followed for a long time, was justified by reference to the requirements arising under the Convention and — particularly in the case of diamorphine — to the need to counter the danger of the substance being diverted into unlawful trade and to guarantee reliability of supplies. A similar policy has been and continues to be followed in a number of other Member States.

13. Until 1992 requirements for diamorphine in the United Kingdom were met

exclusively by Evans Medical Limited ('Evans'). Evans continues to be the principal manufacturer of the finished product for the United Kingdom and world markets.

Macfarlan Smith Limited ('MSL') is at present the only licensed manufacturer in the United Kingdom of raw diamorphine in powder form, which forms the basis for the manufacture of the finished product. As the product is used in only a limited number of other countries, MSL is also the principal manufacturer world-wide. Evans is MSL's most important customer for this product.

14. In two letters of 17 August 1992 the Secretary of State informed the solicitors of MSL and Evans that after thorough consideration he had concluded that there were no proper grounds on which he could refuse an application by Generics (UK) Limited ('Generics') to import a consignment of diamorphine from the Netherlands. Generics specializes in the manufacture and marketing of generic pharmaceutical preparations and has subsidiaries in a number of European countries, including the Netherlands.

The Secretary of State explained in those letters that he had taken account both of the need to guarantee continuity of supplies and the need to prevent the products being diverted to unlawful trade. The application by Generics had, he stated, been examined in the light of national law, Community law and international law. In that connection, the Secretary of State wrote *inter alia* that:

'It is considered that there is no incompatibility between the ... Convention ... and Articles 30 and 36 of the Treaty of Rome. Article 2(5) of the 1961 Convention permits, but does not require, Parties to restrict imports. Parties are given powers under Article 2(5) to prohibit importation where in their opinion the prevailing conditions in their countries render it the most appropriate means of protecting the public health and welfare. Article 36 [of the EC Treaty] provides that prohibition or restrictions on imports may be justified on grounds of the protection of health and life of humans. ...

The issue of security in transit has accordingly been carefully considered ...

On the question of reliability of supply, Ministers are, of course, very concerned to ensure that diamorphine remains readily available for medical use in the future. However, they are satisfied that the proper means of ensuring supply is through a tendering scheme ... Our Department of Health colleagues have informed us that the [National Health Service Supplies Authority] are looking into the feasibility of a new tendering

scheme for diamorphine to operate from early 1993.' [5]

15. Evans and MSL thereupon brought an action before the Queen's Bench Division of the High Court in which they contested both the import licence granted to Generics and the general decision expressed by that licence to reverse the policy previously followed with regard to imports of narcotic drugs. The applicants argued that the Secretary of State had, in his decision, incorrectly proceeded on the assumption that the previous policy had been in breach of Community law and in particular that the import ban had been unlawful under Article 30 of the EC Treaty and could not be justified under Article 36. They take the view that, pursuant to Article 234 of the EC Treaty, Article 30 does not apply to trade in narcotic drugs within the meaning of the Convention. Even if the Secretary of State had none the less been correct to base his decision on the view that Articles 30 and 36 of the EC Treaty were applicable, they argue, he should not have taken that decision without first determining whether the proposed tendering scheme was feasible and compatible with the Convention, as well as whether and, if so, how that scheme could ensure that the health authorities would have regular supplies of diamorphine.

5 — The quotations are from the Secretary of State's letter to the solicitors of Evans. The wording of the letter sent to the solicitors of MSL differs in a number of slight (and substantively insignificant) respects.

16. The High Court has stayed the proceedings before it and referred the following questions to the Court for a preliminary ruling:

'1. Upon the true construction of Articles 30, 36 and 234 of the EEC Treaty, is a Member State entitled to refuse to issue a licence, required by the law of that Member State, to import from another Member State narcotic drugs either originating in or in free circulation in the second Member State on the ground that

(a) the provisions of Articles 30 to 36 are inapplicable to trade in narcotic drugs within the meaning or ambit of the Single Convention on Narcotic Drugs concluded at New York on 30 March 1961;

and/or

(b) compliance with the Convention would in practice require the arbitrary allocation of quotas between imports and local manufacturers; and/or that the system of controls laid down by the Convention would otherwise be less effective;

and/or

(c) (in the circumstances that the Community has failed to adopt any directive or other regime on trade in narcotic drugs such as would enable

it to declare itself a "single territory" under Article 43 of the Single Convention and several Member States that manufacture narcotic drugs prohibit their importation) the importation of narcotic drugs from another Member State would threaten the viability of a sole licensed manufacturer of those drugs in the Member State, and that the reliability of supply of those drugs for essential medical purposes in that Member State would be jeopardized?

2. On the proper interpretation of Council Directive 77/62 of 21 December 1976, OJ 1977 L 13, p. 1, as amended, is a public authority, when charged with the task of purchasing essential pain-relieving drugs for medical use, entitled to take into account the need for reliability and continuity of supply when awarding contracts for the supply of such drugs?'

ground that those questions are 'hypothetical'. It points out that, in its Questions 1(a) to 1(c), the national court seeks to ascertain whether a Member State is entitled generally or in specific circumstances to refuse a licence to import narcotic drugs from other Member States. However, as the Commission points out, the issue in the proceedings before the High Court relates to the *grant* of a licence, not to its *refusal*. So far as the Commission is concerned, it is established that under Article 36 restrictions are permissible in intra-Community trade in narcotic drugs and that there may in certain circumstances even be justification for refusing import or export licences. However, in view of the variety of the circumstances in question and the importance of the interests involved, the Commission argues that it is undesirable that the Court should express a view on the problem in the present case. Question 2 in the reference, it goes on to submit, is even more hypothetical since it concerns the purchase of diamorphine by the competent health authorities, whereas the actual case relates to a decision by the Secretary of State to allow the importation of that narcotic substance. For that reason, the Commission argues, the Court should also not reply to that question.

B — Opinion

Admissibility of the request for a preliminary ruling

17. The Commission takes the view that the Court of Justice ought not to reply to the questions referred by the High Court on the

Generics also takes the view that Questions 1(b), 1(c) and 2 — but not Question 1(a) — are hypothetical since they relate to assumptions which have not yet been proved. Counsel for Generics, however, submitted at the hearing that the Court ought none the less to reply to those questions.

18. The Court of Justice has consistently held that the procedure for preliminary rulings under Article 177 of the EC Treaty is an instrument for cooperation between the Court of Justice and national courts. In the context of this cooperation, it is for the national court to decide whether it requires a preliminary ruling by the Court of Justice in order to reach its own decision. If the national court decides to make a reference and the questions submitted concern the interpretation of Community law, the Court is, in principle, bound to give a ruling. However, the task assigned to the Court in the context of this procedure — as the Commission has also pointed out in its observations — is not that of 'delivering opinions on general or hypothetical questions'. [6]

19. In Question 1(a) of its reference the national court wishes to determine whether Articles 30 to 36 of the EC Treaty are applicable to trade in narcotic drugs. As has been pointed out by MSL in its observations and as is also apparent from the order for reference of the High Court, MSL and Evans are relying in the main proceedings on the argument that they are entitled under national law to ensure that the Secretary of State should take his decision regarding the application by Generics on a proper legal and factual basis. In taking his decision, the Secretary of State proceeded on the basis that Articles 30 to 36 of the EC Treaty are applicable in the present case. If this assumption is incorrect, his decision will have been taken on an incorrect legal basis and may, if necessary, be set aside by the national court. For the purposes of the decision to be taken by the High Court, therefore, direct significance attaches to the answer to the first question in the reference. In my opinion, there are for that reason no grounds on which to argue that this question is hypothetical in nature.

20. It is, moreover, worth noting that the Commission also proposes to the Court replies to the High Court's questions even though it takes the view that those questions are hypothetical and for that reason need not be answered. The Commission proposes that the Court's reply to the questions should be that neither Articles 30 to 36 of the EC Treaty nor Article 234 prevent a national authority from authorizing imports of narcotic drugs from another Member State. Counsel for MSL correctly pointed out at the hearing that this neither answers the question submitted nor enables the national court to answer it. Counsel for the United Kingdom expressed the same view very succinctly when he stated that the Commission was proposing that the Court be of assistance to the national court by replying to a question which no-one had asked with an answer to which no-one could take exception.

21. The Commission is, admittedly, correct to point out that the legal assessment of intra-Community trade in narcotic drugs raises very difficult problems. The Community legislature has clearly not yet found any satisfactory solution for these problems. Such difficulties, however, should not prevent the Court from performing the duty imposed on it by Article 177 of the EC

6 — Judgment in Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraphs 22 to 25.

Treaty to support national courts in the resolution of legal proceedings pending before them by interpreting provisions of Community law. These difficulties consequently do not affect the duty of the Court to reply to the questions submitted *to the extent to which* it is possible for it to do so and cannot also affect the admissibility of the particular question submitted.

22. As the High Court explains in its order for reference, Questions 1(b) and 1(c) contain assumptions of fact by MSL and Evans that are as yet unsubstantiated. Those questions do not, however, request the Court to rule on the existence of the facts assumed. As counsel for MSL has pointed out, the High Court is, on the contrary, seeking in this regard an answer to the question whether the legal aspects contained in those questions are at all relevant from the perspective of Community law. Counsel for the United Kingdom expressed a similar view. If the two questions were to be answered in the negative, it would not be necessary for the High Court to examine in any further detail the assumptions of fact set out in them. If, on the other hand, the Court were to decide that a Member State is in certain cases entitled to prohibit imports of narcotic drugs from other Member States, the High Court would have to examine whether that was the position in the proceedings before it.

23. There is, in my view, little in principle to object to in the course adopted by the High Court. It serves the interests of procedural economy to postpone the taking of evidence so long as it is not clear whether the subject-matter of that evidence is material to the proceedings. Given the significance of the fundamental question raised in Question 1(a) regarding the applicability of Articles 30 to 36 to the lawful trade in narcotic drugs, an issue on which the Court of Justice has not hitherto had occasion to rule, the decision of the High Court to seek a preliminary ruling from the Court of Justice at what is still an early stage in the proceedings is also perfectly understandable. As the Court has recognized, it is for the national court to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. [7] On those grounds I take the view that Question 1(c) is admissible even if the assumptions of fact on which it is based (that the granting of an import licence would threaten the viability of the domestic manufacturer and thereby jeopardize security of supplies) are not yet substantiated.

The same, however, does not in my view apply to Question 1(b), which consists of two parts. In the first place it asks whether a Member State can prohibit the importation of narcotic drugs from another Member State if compliance with the Convention would result in the arbitrary allocation of quotas between importers and domestic manufacturers. Secondly, the question asks

7 — See in particular the judgment in Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 10.

whether the prohibition of imports is permissible if the system of controls laid down by the Convention would otherwise be less effective. Question 1(b) thus raises the issue of the (practical) compatibility of the application of Articles 30 to 36 of the EC Treaty with the provisions of the Convention. In my opinion this question should be considered together with Question 1(a) given their close connection. In view of the solution which I propose for the reply to this question it does not appear to me necessary that the Court should give a separate answer to Question 1(b).

25. Suffice it to mention that the questions submitted refer in general to 'narcotic drugs' (within the meaning of the Convention), whereas the present case concerns only one single narcotic drug, namely diamorphine. The Court's answers to the questions submitted by the High Court will, however, naturally be of significance not only for that product but also generally for the drugs covered by the Convention. For that reason I too shall speak in what follows of narcotic drugs in general, in so far as the discussion does not centre on the special Convention provisions applicable to diamorphine (and other particularly dangerous drugs).

Applicability of Articles 30 to 36

24. Question 2 in the reference concerns the interpretation of Community-law provisions on the award of public-supply contracts. It is evident that this has its basis in the view expressed by the Secretary of State in his letters of 17 August 1992, to the effect that the importance of ensuring that the United Kingdom would have secure supplies of diamorphine could be taken into account in the context of an invitation to tender. However, it is common ground that this invitation to tender ultimately proved not to be feasible. It may for that reason be quite properly asked what purpose Question 2 serves. The High Court has provided no clarification on this point in its order for reference. Moreover, no further information is to be gleaned from the statements of the parties involved in the procedure before the Court. In those circumstances I share the Commission's view that the Court should not examine *this* question. In case the Court might decide otherwise, however, I shall of course also examine the problem raised by this question.

General

26. It is appropriate at the outset of this examination to bear in mind that the question of the applicability of Articles 30 to 36 of the EC Treaty concerns only the *lawful* trade in narcotic drugs, that is to say trade in products derived from those substances which are intended for medical and scientific use. There can be no doubt as to the need to

combat *unlawful* trade in narcotic drugs and the associated dangers. This applies both to the Member States and to the Community. [8]

27. The Court has not hitherto been called on to decide whether Articles 30 to 36 are applicable to the lawful trade in narcotic drugs within the meaning of the Convention. However, it has already on several occasions been faced with the question whether customs duties [9] or import turnover tax [10] may be levied in respect of the illegal importation of such substances and whether illegal trade in those substances is subject to value added tax. [11] In each case the Court replied to those questions in the negative.

28. Of particular interest to the present case are those decisions involving the question whether duty could be levied on illegal imports of narcotic drugs. In its 1982 judgments in *Wolf* and *Einberger*, the Court pointed out that the import and sale of the drugs in question (heroin and cocaine in the first case, morphine in the second) are prohibited in all the Member States, 'except in trade which is strictly controlled and limited to authorized use for pharmaceutical and medical purposes.' [12] The Court stated that this legal position is in conformity with the provisions of the Convention. [13] The Court accordingly reached the conclusion that no customs debt could arise upon the importation of drugs 'otherwise than through economic channels strictly controlled by the competent authorities for use for medical and scientific purposes.' [14]

It follows from these decisions that duty is payable on *lawful* imports of narcotic drugs. As the Court was called on in those cases to interpret Articles 9 and 12 to 29 of the EC Treaty, that is to say, provisions of Title I on the free movement of goods, there can scarcely be any doubt in my opinion (contrary to the view expressed by MSL) that the same also applies with regard to the interpretation of Articles 30 to 36, which also belong to Title I. Lawful trade in narcotic drugs, within the meaning of the Convention, therefore comes within the scope of those provisions.

Article 234 and the Convention

29. However, it is still necessary to consider what consequences for the application of Articles 30 to 36 follow from the first paragraph of Article 234 of the EC Treaty. That paragraph provides that the 'rights and obli-

8 — See, for instance, Article K.1(9) of the Treaty on European Union, which declares police cooperation for the purposes of preventing and combatting unlawful drug trafficking to be a matter 'of common interest'.

9 — Judgments in Case 50/80 *Horvath* [1981] ECR 385, Case 221/81 *Wolf* [1982] ECR 3681 and Case 240/81 *Einberger* [1982] ECR 3699.

10 — Judgment in Case 294/82 *Einberger* [1984] ECR 1177.

11 — Judgments in Case 269/86 *Mol* [1988] ECR 3627 and Case 289/86 *Happy Family* [1988] ECR 3655.

12 — Paragraph 8 of each judgment (cited above in footnote 9).

13 — Paragraph 9 of each judgment (cited above in footnote 9).

14 — Paragraph 16 of each judgment (cited above in footnote 9).

gations arising from agreements concluded before the entry into force of this Treaty between one or more Member States on the one hand, and one or more third countries on the other' are not to be affected by the provisions of the Treaty. Article 5 of the Act concerning the Accession of Denmark, Ireland and the United Kingdom provides that Article 234 of the EC Treaty applies for those Member States to agreements or conventions concluded before accession. [15] So far as the United Kingdom is concerned, therefore, the 1961 Single Convention on Narcotic Drugs, which it ratified in 1964, is an agreement within the meaning of Article 234. [16]

30. As the Court has already held on several occasions, the purpose of the first paragraph of Article 234 is to lay down, in accordance with the principles of international law, [17] that the application of the Treaty does not affect the duty of the Member State concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder. [18] Applied to the present case, this means that the United Kingdom is entitled to meet its obligations towards non-member countries arising under the Convention and to respect the rights which the Convention confers on non-member countries. In so far as the application of Articles 30 to 36 would make it impossible for the United Kingdom to do so, those provisions would have to give way.

However, it must be borne in mind that under the second paragraph of Article 234 the United Kingdom would in that case have to take 'all appropriate steps' to eliminate the incompatibility between the Convention and the EC Treaty. The United Kingdom might even be under an obligation to denounce the Convention. Of course, this question has no bearing on the outcome of the present case and for that reason I need not examine it any further.

31. Generics, however, argues that Article 234 is immaterial to this case since only trade between two Member States is affected. The case concerns importation of diamorphine from the Netherlands into the United Kingdom; non-member countries are not affected by this transaction. Ireland has expressed similar views. The French Government, too, argues in its observations that the first paragraph of Article 234 does not allow a Member State to depart from the provisions of the EC Treaty in intra-Community trade. The existence of the Convention, so the argument runs, thus does not stand in the way of the application of Articles 30 to 36.

32. In this regard, both Generics and the French Government rely on the judgment of

15 — Corresponding provisions are to be found in Article 5 of the Act concerning the Accession of Greece and in Article 5 of the Act concerning the Accession of Spain and Portugal.

16 — The same applies to Denmark, Greece, Portugal and Spain, which also ratified the Convention prior to their accession to the Communities.

17 — See Article 30 of the Vienna Convention on the Law of Treaties.

18 — Judgment in Case 10/61 *Commission* v *Italy* [1962] ECR 1, at page 11; judgment in Case 812/79 *Burgoa* [1980] ECR 2787, paragraph 8.

the Court of Justice in the *Conegate* case. [19] Indeed, the Court there held that 'agreements concluded prior to the entry into force of the Treaty may not ... be relied upon in relations between Member States in order to justify restrictions on trade within the Community.' [20]

However, MSL correctly points out that this applies only if the rights of non-member countries are not affected. That point is confirmed by the case-law of the Court. Thus, in a decision delivered in 1988, the precedence of the EC Treaty over an agreement concluded prior to its entry into force was made subject to the proviso that, 'as in the present case, the rights of non-member countries are not involved'. [21] As early as its first decision on Article 234 the Court stated that the manner in which customs duties were regulated between the Member States could not be criticized by third countries if this 'does not interfere with the rights held by third countries under agreements still in force.' [22] No particular significance should therefore be attached to the absence of a corresponding proviso in the *Conegate* judgment; this may well be explicable on the ground that the Court was satisfied in that case that the relevant conventions did not confer on non-member countries any rights which could have been infringed through the application of Community law in relations between the Member States. [23]

The United Kingdom has also correctly pointed out that the view expressed by Generics runs contrary to the principle laid down in Article 41 of the Vienna Convention on the Law of Treaties. [24]

33. It is thus first necessary to consider whether the Convention forms the basis of obligations imposed on the Member States *vis-à-vis* non-member countries or creates rights which non-member countries may enforce against Member States. To put it another way, the question is whether the Convention merely creates bilateral obligations as between the particular Contracting Parties or multilateral obligations between all Parties which are signatories to it. [25] This, of course, requires an interpretation of the Convention, which — as I shall explain in greater detail — is a matter for the national court making the reference. However, I believe that the Court of Justice can itself

19 — Judgment in Case 121/85 *Conegate* [1986] ECR 1007.

20 — Judgment in *Conegate* (cited above in footnote 19), paragraph 25.

21 — Judgment in Case 286/86 *Deserbais* [1988] ECR 4907, paragraph 18.

22 — Judgment in Case 10/61 *Commission* v *Italy*, cited above in footnote 18, at page 11.

23 — The relevant conventions in that case were the Geneva Convention of 1923 for the Suppression of Traffic in Obscene Publications and the Universal Postal Conventions, which the Court had already considered in its judgment in Case 34/79 *Henn and Darby* [1979] ECR 3795. The Court had ruled in that case that the application of Article 30 et seq. was compatible with those conventions (paragraph 26).

24 — Under that provision two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone. However, one of the conditions for this is that such modification 'does not affect the enjoyment by the other parties of their rights under the treaty'.

25 — See, with regard to this distinction, the Opinion of Advocate General Warner in Case 34/79 *Henn and Darby*, cited above, at page 3833.

decide *this* question without further ado. In the first place, it has already carried out such an examination in previous cases. [26] Secondly, there can be no reasonable doubt that the fulfilment of the obligations which the Convention imposes on the Contracting Parties is a duty resting on *all* Contracting Parties, as the Portuguese Government and MSL have correctly pointed out.

The preamble itself, which speaks of the need for coordinated and universal measures against the abuse of narcotic drugs, indicates that this interpretation alone has regard to the objectives of the Convention. The view that the duties to monitor the trade in narcotic drugs laid down by the Convention are intended not only to protect the Contracting Parties directly concerned is confirmed also by the simple consideration that the dangers resulting from breach of the Convention may affect all Contracting Parties: for instance, if a consignment of narcotics from the territory of one Contracting State intended for a recipient in another Contracting State ends up in illegal trade because both Contracting Parties have omitted to apply the control measures imposed by the Convention on trade with each other, this will jeopardize not only people living in each of those States but also the other Contracting Parties. Finally, it should be pointed out that Article 43(2) of the Convention makes it possible for members of a customs union to reduce the inconveniences and obstacles to international trade associated with the application of the Convention's control system by submitting the notification provided for in that provision. [27] This provision would make no sense if the question of compliance with the provisions of the Convention in the mutual relations between two Contracting Parties did not affect the interests of the other Contracting Parties.

34. The first paragraph of Article 234, however, will be relevant only if there is an inconsistency between such an agreement with non-member countries and Community law. The agreement in question must therefore require a particular course of action which Community law prohibits or prohibit a course of action which Community law requires to be taken. If one wishes to ascertain whether there is such a conflict, it will first be necessary to determine the content of the particular convention, on the one hand, and that of Community law, on the other.

35. The Court is of course in a position to interpret the relevant provisions of Community law and determine their content. On the other hand, however, it is unclear whether the Court is empowered, in the context of a reference for a preliminary ruling, to interpret an international convention such as that in the present case.

26 — See in particular the judgment in the *Deserbais* case (cited above in footnote 21), in the passage referred to.

27 — The International Narcotics Control Board in Vienna expressed this in the following terms in a letter of 11 August 1981 to the United Kingdom which has been submitted by MSL: 'If, for economic reasons, States wish to reduce the inconveniences and obstacles which a control system, applied in conformity with the universal treaties, causes in international trade, they might seek to unify their systems. The universal treaties themselves point in this direction since Article 43 of the 1961 Single Convention envisages the case of a customs union ...'.

36. In its judgment in *Henn and Darby*, [28] the Court appears by implication to have answered that question in the affirmative. That case, which was also a request for a preliminary ruling under Article 177, involved the question whether a Member State can prohibit the importation of goods (in that case, pornographic films and magazines) from another Member State in order to comply with its obligations under an international convention. The Court ruled:

'It appears from a comparison of the foregoing considerations with the provisions of the Conventions to which the House of Lords refers that the observance by the United Kingdom of those international Conventions is not likely to result in a conflict with the provisions relating to the free movement of goods if account is taken of the exception made by Article 36 in regard to any prohibitions on imports based on grounds of public morality.' [29]

37. The German version of this passage ('daß ... keine Widersprüche ... entstehen *können*') would suggest that the Court had conclusively decided that the obligations arising under the conventions in question were compatible with Community law. However, if one considers the version of the passage in English, which was the language of the case, [30] this is shown to be far from certain. Rather, the impression is that the Court subjected the conventions in question to a merely cursory examination and concluded that this brief examination indicated nothing to suggest a potential conflict between those conventions and Articles 30 to 36 of the Treaty. However, the possibility thereby remained that the national court, on closer examination of the conventions, might reach the conclusion that compliance with the obligations arising under those conventions was in one or more respects incompatible with the application of Article 30 et seq.

This interpretation strikes me as the most appropriate to fit the conclusion drawn by the Court from the above paragraph of this judgment. The Court held that 'in so far as a Member State avails itself of the reservation relating to the protection of public morality provided for in Article 36 of the Treaty', [31] the provisions of Article 234 did not preclude a Member State from fulfilling the obligations arising from the relevant international agreements. During the oral procedure before the Court, counsel for MSL not inappropriately compared this passage to an oracular utterance ('a thoroughly Delphic ruling'). Since the first paragraph of Article 234 itself allows a Member State to fulfil its obligations under an earlier convention, this statement by the Court would seem to make no proper sense. The apparent contradiction disappears if one applies the interpretation

28 — See footnote 23 above.

29 — Judgment in *Henn and Darby* (cited above in footnote 23), paragraph 26.

30 — 'It appears ... that the observance ... of those international Conventions is not *likely* to result in a conflict ...'. See also the French version, according to which the observance of the international conventions 'n'est pas *susceptible* de créer un conflit ...' (emphasis added in each case).

31 — Judgment in *Henn and Darby* (cited above in footnote 23), paragraph 27.

which I have developed: according to that interpretation, the passage states merely that there will be no contradiction between international agreements and Community law if the obligations under those agreements can be reconciled with the Treaty by means of the derogation provided for under Article 36. Where this is not possible, one might add, the first paragraph of Article 234 will apply if appropriate.

38. The Court has expressed itself with considerably more clarity in a number of recent decisions on the question of competence regarding the interpretation of such agreements. The *Levy* [32] and *Minne* [33] cases both involved the question whether specific national provisions governing night-work for women were contrary to the principle of equal treatment of men and women laid down in Article 5 of Directive 76/207/EEC. The question arose in both cases as to whether the national provisions could be justified on the ground that they had been adopted in order to comply with obligations imposed on the Member States under an agreement within the meaning of the first paragraph of Article 234 (a convention of the International Labour Organization). The Court first held that courts of the Member States were not entitled to apply national law at variance with Community law in so far as the application of that law was not necessary under the first paragraph of Article 234 in order to ensure compliance with obligations arising under a convention concluded with non-member countries prior to the entry into force of the EC Treaty. In its judgment in the *Minne* case, the Court continued as follows:

'However, it falls to the national court, and not to the Court of Justice in the context of a preliminary ruling, to ascertain, with a view to determining the extent to which those obligations constitute an obstacle to the application of Article 5 of the directive, what are the obligations thus imposed on the Member States concerned by an earlier international agreement and whether the national provisions in question are designed to implement those obligations.' [34]

The Court expressed itself in similar terms in its judgment in the *Levy* case. [35]

39. It follows clearly from these decisions that in the view of the Court of Justice the interpretation of international agreements at

32 — Judgment in Case C-158/91 *Levy* [1993] ECR I-4287.

33 — Judgment in Case C-13/93 *Minne* [1994] ECR I-371.

34 — Paragraph 18 of the judgment in *Minne*, cited above in footnote 33.

35 — Paragraph 21 of the judgment in Case C-158/91 *Levy* (cited above in footnote 32): 'However, it is not for the Court of Justice in the context of a preliminary ruling to determine the obligations imposed on the Member State in question by an earlier international agreement and to specify its parameters in such a way as to determine the extent to which those obligations constitute an obstacle to the application of Article 5 of the directive.'

issue in preliminary ruling proceedings under Article 177 is a matter for national courts. This is also in accordance with the Treaty, since Article 177 empowers the Court to interpret only *Community law*. Article 177 does not confer any power to interpret international-law agreements which Member States concluded with non-member countries before the entry into force of the Treaty or prior to their own accession.

40. In its written observations, MSL argues that the need to ensure the uniform application of Community law makes it necessary that the Court should interpret the Convention. That argument should not be accepted. Admittedly, the Court has already decided on the basis of a similar argument that it is empowered, in the context of Article 177 proceedings, to interpret the GATT — an agreement concluded by the Member States with non-member countries prior to the entry into force of the EC Treaty. [36] Apart from the fact that this judgment has been the subject of criticism [37] — in my opinion, justifiably so — it should be pointed out that the legal principles of that case are not applicable by analogy to the present case. It is common knowledge that the Community has taken *the place of the Member States* for the purpose of fulfilling obligations under the GATT. That assertion cannot be made with regard to the convention under consideration in the present case. True, MSL correctly points out that the Community and all the Member States have signed the United Nations Convention against Illicit Trade in Narcotic Drugs and Psychotropic Substances which was concluded on 19 December 1988. [38] In the thirteenth recital in the preamble to this Convention the Contracting Parties recognize the need to reinforce and supplement the measures provided in the 1961 Convention. MSL and Ireland are therefore certainly correct in arguing that, by acceding to the 1988 Convention, the Community has recognized the objectives and system of control of the 1961 Convention. The duty to comply with the obligations under that Convention, however, continues, as before, to rest with the Member States.

41. MSL also suggests in its written observations that it may now be possible to treat the Convention as part of Community law and thus capable of interpretation by the Court. During the oral procedure before the Court, however, counsel for MSL modified this suggestion. In my opinion, this argument need not be considered any further. While it has acceded to the 1988 Convention, the Community has not done so with regard to the 1961 Convention, which is the one under consideration here. The fact that the Community accepts and supports the objectives of that Convention does not in itself make that Convention part of Community law and therefore does not empower the Court to interpret it in the context of Article 177 proceedings.

36 — Judgment in Joined Cases 267 to 269/81 *SPI and SAMI* [1983] ECR 801, paragraphs 14 to 19.

37 — See, for example, T. C. Hartley, *The Foundations of European Community Law*, 2nd edition, 1988, p. 252 et seq.

38 — See Council Decision 90/611/EEC of 22 October 1990 concerning the conclusion of this Convention (OJ 1990 L 326, p. 56).

42. It probably goes without saying that jurisdiction for the Court to interpret the Convention in the context of Article 177 proceedings also cannot be established by taking the view that the Court is here required to interpret Article 234, which is a provision of Community law; since the Court is undoubtedly entitled to carry out *that* interpretation, so the argument goes, the interpretation of the Convention is no more than a preliminary issue which the Court is entitled to discuss. Advocate General Capotorti, it is true, once expressed a similar line of reasoning. [39] In that case, however, he was considering whether a Community-law regulation might possibly have infringed Article 234. The Court would in such a case indeed have to interpret the international-law agreement itself since it alone can determine the invalidity of the rule of Community law at issue. The present case, however, is not of such a kind. [40]

The reference by counsel for the United Kingdom to the Court's judgment in *Hurd* v *Jones* [41] does not affect this. That case involved the interpretation of a rule of Community law which referred to specific international agreements.

43. In my opinion, however, there might possibly be a case for the Court to assess such an agreement if its contents were beyond dispute. If all the parties and the national court making the reference are in accord as to the substantive obligations arising under the particular agreement, the Court will of course be able to examine whether the application of Community law constitutes an obstacle to compliance with those obligations. It may be that the explanation for the fact that the Court, in the *Henn and Darby* case, itself undertook an examination of the relevant international conventions is to be sought in this consideration.

In the present case, in my opinion, there can scarcely be any doubt that compliance with the obligations imposed on Member States under the Convention *cannot* result in a conflict with Community law. I shall set this out in detail below in an alternative submission. However, it should be pointed out that there is no full agreement between the parties involved in this case as to the interpretation of the Convention. MSL contends that it follows from Article 21(1) of the Convention that a Member State may not allow imports if requirements can be met by domestic manufacturers. The Portuguese Government takes a similar view. Generics, along with Ireland and the United Kingdom, does not accept that argument. In its order for reference the High Court has not set out clearly its own interpretation of the Convention, with the result that it cannot be ruled out that it may go along with the stance taken by Portugal and MSL. In the light of this the view should stand that, in the context of Article 177 proceedings, the interpretation of the Convention is a matter for the national court.

39 — Opinion in Case 812/79 *Burgoa*, cited above in footnote 18, at p. 2817.

40 — An example of such a situation is, however, provided by the facts which gave rise to the judgment in Case 181/80 *Arbelaiz-Emazabel* [1981] ECR 2961 (see paragraph 11 of the judgment).

41 — Judgment in Case 44/84 *Hurd* v *Jones* [1986] ECR 29.

44. It should be stressed that this is not likely to give rise to any serious dangers for the preservation of the uniform interpretation of Community law. The fear expressed by MSL that the granting of an import licence by the United Kingdom could have serious consequences for the company if other Member States continue to insist on restricting or prohibiting imports from other Member States is perfectly understandable. It ought none the less to be pointed out that although the Court cannot, in the context of Article 177 proceedings, give a ruling on the interpretation of agreements entered into by the Member States with non-member countries, it does, of course, have the task of interpreting Community law. National courts may for that reason request the Court of Justice, under Article 177, to give a ruling on whether compliance by a Member State with obligations which those national courts have found to exist under a particular agreement constitutes an obstacle to the application of Community law.

Moreover, Treaty-infringement proceedings can be brought under Article 169 or Article 170 in cases where a Member State fails to comply with Community law without being entitled to do so by the first paragraph of Article 234. In proceedings *of this kind*, the Court would have to consider whether the conduct of the Member State is justified under Article 234 and, if necessary, to determine whether the Member State's interpretation of the particular agreement in question is correct. It was thus scarcely coincidental that the Court of Justice, in its judgments in the *Levy* and *Minne* cases, discussed above, stated that it is not its function to interpret international agreements 'in the context of a preliminary ruling'.

45. I therefore propose that the Court reply as follows to Question 1(a) of the High Court: Articles 30 to 36 of the EC Treaty apply to lawful trade in narcotic drugs within the meaning of the 1961 Single Convention on Narcotic Drugs. However, in so far as this would make it impossible for the Member State concerned, even in the light of the possibilities opened up under Article 36 of the EC Treaty, to comply with the obligations imposed on it by the Single Convention, the first paragraph of Article 234 allows that Member State to comply with its obligations under that Convention if it acceded to the Convention before the entry into force of the EC Treaty or prior to its own accession to the Community.

46. This also represents an appropriate answer to Question 1(b) in the reference. So far as the question of the effectiveness of the system of control established by the Convention is concerned, it should be pointed out that, in my view, this cannot be a case in which a State has any great leeway: the Member State in question is obliged to implement the measures of control prescribed by the Convention. If that is made impossible by the application of Articles 30 to 36 of the EC Treaty, those articles would have to give way to that extent. If this is not the case, the Community provisions will be applicable.

I take the view that the same must apply with regard to the other assumption set out in this question, according to which compliance with the Convention would in practice require the arbitrary allocation of quotas between importers and domestic manufacturers. The High Court will be required to examine whether such an obligation follows from the Convention and whether compliance with that obligation would be rendered impossible through the application of Articles 30 to 36. The Community provisions will be required to give way *only* if this proves to be the case.

Alternative submission with regard to Question 1

47. If the Court should, however, conclude that it can itself address the question in the present case as to whether compliance with obligations under the Convention is compatible with the application of Articles 30 to 36 of the EC Treaty, the following considerations, which I add here in the form of an *alternative submission*, ought in my view to be taken into account.

48. The Convention makes lawful trade in narcotic drugs subject to strict controls. Contracting Parties are required to submit annual estimates of their consumption of narcotic drugs (Article 19 of the Convention). In simple terms, quantities manufactured and imported may not exceed the amount consumed in the particular State or territory or exported therefrom (Article 21). The manufacture, export and import of narcotic drugs require official licences (Articles 29 to 31). Article 2(5) provides that additional measures, including a general ban, may be adopted with regard to particularly dangerous drugs. MSL is not entirely wrong when it speaks of 'a planned economy on a world scale' having been created by the Convention. It will be immediately evident that this system is at variance with Article 30 of the EC Treaty, which seeks to remove all quantitative restrictions on imports and barriers having equivalent effect in trade between Member States.

49. It would, however, be a mistake to focus exclusively on Article 30 in the examination to be carried out here. That provision is inseparably linked to Article 36, which permits certain derogations from the prohibition under Article 30. In its judgment in *Henn and Darby*, [42] the Court made it clear that an *overall view* is here required: as mentioned above, the Court held in that judgment that there was not likely to be any conflict between the relevant international conventions and the provisions relating to the free movement of goods 'if account is taken of the exception made by Article 36 in regard to any prohibitions on imports based on grounds of public morality.' [43] Thus, if the restrictions or prohibitions of imports resulting from the Convention in the present case could also be justified on the basis of Article 36, there would be no inconsistency

42 — Cited above in footnote 23.
43 — See the quotation in point 36 above.

between the Convention and Articles 30 to 36.

50. The systematic or, rather, dogmatic objections of MSL to this approach are unconvincing. Admittedly, derogations under Article 36 must indeed be justified. This means that measures to secure the objectives there set out must be appropriate and proportionate in order to be covered by Article 36. [44] It is also true that Article 36, as a derogating provision, must be interpreted strictly. [45] However, the argument of MSL, to the effect that the rights of non-member countries cannot be made subject to justification under Article 36, misses the point of the problem. The decisive factor is that the Member State is in a position to comply with the obligations imposed on it by the Convention. From the point of view of the non-member countries affected, it is immaterial whether this is possible by virtue of that State's own sovereignty or is permitted by Article 36.

51. Under Article 36 of the EC Treaty restrictions and bans on imports can be justified on grounds of, *inter alia*, the protection of health. With the exception of MSL, all the parties involved in the proceedings before the Court take the view that the measures required under the Convention can also be based on Article 36 of the EC Treaty.

That is a view which I share. The measures for control of the lawful trade in narcotic drugs provided for in Articles 19, 21 and 29 to 31 of the Convention appear appropriate to prevent (or to minimize) the dangers to health which abuse of these substances may occasion. In view of the danger posed by these products, there is no obvious alternative method for attaining this object which is less restrictive of the free movement of goods.

52. It should be borne in mind in this connection that the Community adopted the objectives of the Convention here under examination at the latest when it acceded to the 1988 Convention. [46] Both the EC Treaty and the Convention attach particular importance to the protection of health. It would for that reason be remarkable if measures dictated by the Convention for the purpose of attaining that objective were to encounter the disapproval of the EC Treaty.

53. In any event, a contradiction could arise only where the limits set in Article 36 are exceeded. It is common knowledge that under the second sentence of Article 36 prohibitions of trade are not permitted if they constitute a 'means of arbitrary discrimination' or a 'disguised restriction' on trade between Member States. In my opinion, however, such a situation cannot arise in the present case.

44 — See, for instance, the judgment of the Court in Case 382/87 *Buet* [1989] ECR 1235, paragraphs 10 and 11.

45 — Judgment of the Court in Case 103/84 *Commission* v *Italy* [1986] ECR 1759, paragraph 22.

46 — See point 40 above.

54. As the United Kingdom, for instance, has correctly pointed out, the Convention in no way compels the Contracting Parties to ban imports of narcotic drugs. The Commentary on the Convention published by the United Nations ('the Commentary') [47] does admittedly state that imports of narcotic drugs (and the international trade as such) have to be considered to constitute particularly dangerous situations in which drugs can be diverted into illicit channels. [48] However, the Convention contains numerous references to international trade which make clear that it is none the less based on the fundamental premiss that imports are permissible. Suffice it at this point to bear in mind the wording of Article 21(1), which provides that the total quantity of each drug 'manufactured and imported' in any one year may not exceed specified amounts.

55. MSL and the Portuguese Government argue that it follows from Article 21(1) of the Convention that a State is obliged to prohibit imports if the output of domestic manufacturers is sufficient to meet requirements. To my way of thinking, such an obligation can no longer be based on Article 36 of the EC Treaty, with the result that a conflict would arise in that regard between the Convention and the provisions of Community law. The question, however, is academic, since in my opinion the Convention does *not* impose any such duty. Article 21(1) refers to both domestic production and imports, without requiring any preference to be shown for the former. An obligation to ban imports also does not arise from any actual necessity, [49] since domestic production and imports must both be authorized by licence. So far as I can ascertain, the only clue in this direction is to be found in a decision adopted by the Consultative Committee of the League of Nations in 1934 [50] which recommended to producer countries that they should not grant any further licences for manufacture if existing production capacity in the countries in question was sufficient to meet requirements. The Convention here under examination, however, does not contain any provision to that effect or any provision which in such a case would require a ban on imports.

56. MSL takes the view that the grant of a licence for imports would have the result that specific quotas would have to be allocated to domestic manufacturers and importers. Such a quota system, it argues, would, however, be incompatible with Articles 30 to 36, particularly since it would lead to an arbitrary allocation of the quantities in question.

It would indeed be very difficult, if not completely impossible, for a State to keep within the maxima laid down in Article 21 and not

47 — United Nations (Publisher), *Commentary on the Single Convention on Narcotic Drugs, 1961*, New York, 1973.

48 — Note 2 on Article 1(1)(y) in the Commentary (cited above in footnote 47).

49 — In the following sense: if one assumes that there is domestic production, the quantity of imports which might be authorized will at most amount to the difference between consumption (plus exports) and domestic production. If no such difference exists (because of a correspondingly high domestic production), no imports will be authorized.

50 — Cited in the Commentary (see footnote 47), Note 10 on Article 29(1).

to exceed the estimates requiring to be made under Article 19 unless it were to allocate specific quotas of required total needs to the commercial operators concerned. For that reason the Contracting Parties are recommended in the Commentary to grant quotas to 'manufacturers or importers, or both'. [51] However, in my view such a procedure may also be justified under Article 36 of the EC Treaty. Ireland has very properly pointed out that a ban on imports in the present case would have the result of consolidating one company's monopoly on the United Kingdom market. Such a position would be much less compatible with the free movement of goods than would the allocation of quotas to domestic manufacturers and importers.

Furthermore, such allocation of quotas need not — contrary to MSL's contention — take place in a manner which is arbitrary and for that reason contrary to Article 36. There is nothing to argue against the application, when these quotas are being allocated, of objective criteria relating to factors such as price or guarantee of regular supplies by the company in question.

57. Nor will the effectiveness of the Convention's system of control be jeopardized through the granting of a licence for imports. Admittedly, the Commentary does mention that it may be advisable or even essential for the purposes of effective control to keep to a minimum the number of licences issued to manufacturers and international traders (importers as well as exporters). [52] It should nevertheless be noted in this regard that the Commentary is a means for interpreting the Convention but cannot form the basis for any obligation not already set out in the Convention itself. The Convention, however, does not prescribe that Contracting Parties must ban imports. This is implicitly confirmed by the passage in the Commentary just referred to. If the granting of an import licence in an individual case thus does not breach the Convention, the argument (discussed in connection with Question 1(b)) that conferring on one single domestic producer the right to supply is particularly conducive to safety will be unable to stand in the way of the application of Articles 30 to 36 of the EC Treaty.

In my view it is not necessary to examine in any greater detail the question whether the granting of an import licence makes it difficult for a Contracting Party to furnish accurate estimates under Article 19. Suffice it to note that the Convention does not prohibit imports. If such imports did in fact make the submission of estimates more difficult, those difficulties would result from the Convention itself.

51 — Commentary (cited in footnote 47), General Comment 3 on Article 21.

52 — Commentary (cited in footnote 47), General Comment 4 on Article 21; Note 4 on Article 31(3).

58. Compliance with the obligations arising under Article 2(5) of the Convention can also be reconciled with the application of the rules on the free movement of goods. Under Article 2(5) each Contracting Party must adopt any special measures of control for drugs listed in Schedule IV to the Convention which in its opinion are 'necessary' (Article 2(5)(a)) and may ban a drug outright if it considers this to be the 'most appropriate means' of protecting the public health and welfare (Article 2(5)(b)). This presents Contracting Parties with a *possible* course of action. A *duty* to act arises only where a Contracting Party considers special measures to be *appropriate*. In this connection, however, it must be borne in mind that the Contracting Parties are required to act 'in good faith' when interpreting these provisions. [53] Thus, although the Convention does not require Contracting Parties to adopt special measures if they do not consider such measures to be necessary, *if* a Contracting Party forms the opinion that special measures of control are 'necessary' or that prohibition of the drug in question represents 'the most appropriate means' of countering the dangers to which that drug gives rise, it *must* also act. This interpretation is consonant with the wording of the provision as well as with the meaning and purpose of the Convention.

59. As the matter is thus one for the assessment of individual Contracting Parties, differences may naturally arise as between individual Member States with regard to the application of this provision. The present case is a clear example of this, since according to the available information the use of diamorphine is permitted only in the United Kingdom and is banned in all the other Member States.

In any event, it is scarcely surprising that there should be such differences in an area as sensitive as that of lawful trade in narcotic drugs. As several of the parties involved in these proceedings have correctly pointed out, trade in narcotic drugs not only creates dangers for health but can also adversely affect other legal rights. Restrictions on intra-Community trade in these goods may thus also be justified on grounds of public policy or public security, which are also mentioned in Article 36.

60. As the French Government has correctly argued, such differences are also compatible with Community law so long as there has not been any harmonization at Community level of protective provisions in this area. It should, however, be pointed out that Community law imposes limits on such national measures. Those limits are set out in the second sentence of Article 36. The views expressed by the Portuguese and French Governments fail, in my view, to take sufficient account of that fact.

A case of disguised discrimination (and thus no longer covered by Article 36) would, for instance, exist where a Member State allowed domestic operators to manufacture or trade in a drug listed in Schedule IV to the Con-

53 — Commentary (cited above in footnote 47), Note 4 on Article 2(5). This is a general principle for the interpretation of international agreements (see Article 31 of the Vienna Convention on the Law of Treaties), the binding nature of which has also been recognized by the Court of Justice (see, for example, the judgment in Case C-312/91 *Metalsa* [1993] ECR I-3751, paragraph 12).

vention but imposed a general ban on imports from other Member States. Such a course of action is also not prescribed under Article 2(5) of the Convention. That provision does not require Contracting Parties to treat domestic producers more favourably than importers. *A fortiori*, it does not force Contracting Parties to maintain in place national monopolies. Ireland makes the point succinctly: Article 2(5) permits a total ban on the production, manufacture, export, import, possession and use of such a drug. This can be reconciled with Article 36 of the EC Treaty. However, if a Contracting Party does not impose a general ban but introduces only specific restrictions, the Convention does not oblige it to treat importers less favourably than domestic producers.

To that extent also there is no contradiction between the provisions of the Convention and the rules on the free movement of goods.

61. MSL has argued that the granting of an import licence infringes the general obligations of the Contracting Parties, set out in Article 4 of the Convention, to give effect to the Convention and, in accordance with its terms, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs. MSL has, however, failed to demonstrate what actually constitutes this infringement.

62. It seems to me that considerably more weight attaches to the argument that the Treaty rules on the free movement of goods will not be able to apply — at least with regard to the United Kingdom — so long as the Member States have not made the notification provided for under Article 43(2) of the Convention.

It is clearly the object of Article 43(2) to provide members of a customs union (as represented by the Community) with the means to reduce the inconveniences and obstacles to international trade occasioned by the application of the system of controls. [54] Since no such notification for the Member States of the Community has as yet been made, they cannot be treated as a single 'territory' within the meaning of Articles 19, 20, 21 and 31 and therefore cannot benefit from the resulting facilities. [55] This means, for instance, that the importation into one Member State of narcotic drugs from another Member State continues to require a licence under Article 31.

63. The present case, however, concerns a separate question, namely whether the provisions of the Convention are compatible with the application of the Treaty rules on the free movement of goods. In the light of the above examination, this question ought to be

54 — See point 33 above and the letter quoted from in footnote 27.

55 — The Commentary makes it clear that, despite the wording ('may'), notification is necessary under Article 43(2) in order to secure the desired results (Commentary (cited above in footnote 47), Note 13 on Article 1(1)(y)).

answered in the affirmative. It is for that reason immaterial that submission of the notification provided for under Article 43(2) would provide additional facilities. If the Convention and the Treaty are mutually compatible without its being necessary to submit that notification, absence of such notification cannot release the Member States from their obligations under Articles 30 to 36 of the EC Treaty.

64. If the Court should go along with the views outlined in this alternative submission, Questions 1(a) and 1(b) should in my opinion be answered as follows: Articles 30 to 36 of the EC Treaty apply to lawful trade in narcotic drugs within the meaning of the 1961 Single Convention on Narcotic Drugs.

Question 1(c)

65. In Question 1(c) of its reference the High Court seeks to ascertain whether a Member State can refuse to issue a licence for the importation of narcotic drugs from another Member State if such importation would threaten the viability of the sole licensed manufacturer in the Member State concerned and jeopardize the reliability of supplies of those drugs for essential medical purposes in that Member State. By that question the High Court appears to be seeking an interpretation of Article 36 and thus proceeding on the assumption that Articles 30 to 36 are applicable. It is on this basis that the question should also be answered.

66. The question is founded on the claim by the applicants in the main proceedings that the grant of an import licence would threaten the viability of the British manufacturer and consequently security of supplies in the United Kingdom. Although this claim has not yet been proved, it may be assumed to be correct for the purpose of answering the question submitted.

67. The other circumstances mentioned in the question are irrelevant. The fact that other Member States which manufacture narcotic drugs prohibit their importation has no bearing on the interpretation of Community law. Likewise, the fact that the Member States have not as yet submitted the notification provided for under Article 43(2) of the Convention is immaterial for the purposes of interpreting Article 36 of the EC Treaty. [56]

68. There can in my view be no question but that the continuity of supplies of drugs essential for medical purposes is a matter of great importance. A Member State is for that reason entitled to take account of that point when deciding whether to grant a licence for the importation of narcotic drugs. It cannot

56 — See points 62 and 63 above.

be ruled out that this consideration may exceptionally allow a Member State, within the context of Article 36, to accord domestic production a certain degree of preference over imports from other Member States. This, in my view, follows from the judgment of the Court in the *Campus Oil* case. [57] The Court there held that a Member State which is dependent on imports of petroleum products can require importers to cover a certain proportion of their needs by purchases from a domestic refinery, if the production of that refinery cannot otherwise be disposed of competitively on the market. [58] Article 36 will also not be rendered inapplicable in such cases on the ground that the measure in question also serves purely economic ends. [59] Generic's objection in that regard cannot therefore be accepted.

69. It cannot be ruled out that a Member State may even be entitled on the basis of the above consideration to prohibit the importation of a narcotic drug in individual cases. However, the United Kingdom correctly points out that such cases will be very much the exception. Article 36 allows restrictions on trade only if there are no other less restrictive ways in which to secure the desired objective. For that reason it is necessary to point to these limits when answering the questions submitted in the reference. In this regard, it goes without saying that Article 36 merely *allows* a Member State to impose restrictions on the free movement of goods but does not *oblige* it to do so.

70. I therefore propose the following answer to Question 1(c): Article 36 of the EC Treaty allows a Member State exceptionally to give preference to domestic production over imports from other Member States if that is the only way in which reliable supplies of narcotic drugs for essential medical purposes can be guaranteed in that Member State.

Question 2

71. By its final question the High Court seeks to ascertain whether the public authority responsible for purchasing essential pain-relieving drugs for medical use is entitled to take into account the need for reliability and continuity of supply when awarding the corresponding contracts within the framework of a tendering procedure for public-supply contracts. The order for reference mentions in this connection Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, [60] 'as amended'. This directive (which was amended on several occasions) was repealed by Article 33 of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply

57 — Judgment in Case 72/83 *Campus Oil Limited and Others* v *Minister for Industry and Energy and Others* [1984] ECR 2727.

58 — Judgment in *Campus Oil*, cited above in footnote 57, paragraph 51.

59 — See, for instance, the judgment in Case 118/86 *Openbaar Ministerie* v *Nertsvoederfabriek Nederland* [1987] ECR 3883, paragraph 15.

60 — OJ 1977 L 13, p. 1.

contracts [61] and was replaced by Directive 93/36. This directive was adopted after the issue by the High Court of its order for reference. If it were necessary to reply to the question of the High Court, that answer would therefore have to take account of the present legal position. However, as I have already pointed out, it is not necessary for the Court to consider this question. [62] In what follows I shall discuss it only in case the Court should form a different opinion.

72. With the exception of MSL and the French Government, all the parties involved in the present proceedings take the view that the criterion of reliability and continuity of supply may be considered within the context of Directive 77/62. According to MSL, this is not one of the criteria for the award of contracts within the meaning of Article 25 of the directive. That provision applies to all 'open' and 'restricted' procedures within the meaning of Article 4(1) and (2) of the directive. It is for that reason first necessary to consider whether those procedures may be applicable in the present case.

73. The Portuguese Government has its doubts on this point and refers to Article 6(1)(b) of Directive 77/62. [63] This provision states that the procedures referred to in Article 4(1) and (2) need not be applied 'when, for technical or artistic reasons, or for reasons connected with protection of exclusive rights, the goods supplied may be manufactured or delivered only by a particular supplier'.

In contrast to the view taken by the Portuguese Government, however, it seems to me beyond doubt that the supply of narcotic drugs is not covered by that provision. The facts of this case demonstrate that the manufacture of diamorphine is not the subject of exclusive rights.

74. The French Government argues that the supply of narcotic drugs need not be made the subject of a tendering procedure by reason of Article 6(1)(g) of Directive 77/62. Article 6(1)(g) provides that the procedures referred to in Article 4(1) and (2) need not be applied if the supplies in question 'are declared secret or when their delivery must be accompanied by special security measures in accordance with the provisions laid down by law, regulation or administrative action in force in the Member State concerned, or when the protection of the basic interests of that State's security so requires'. As the result of a subsequent amendment [64] to

61 — OJ 1993 L 199, p. 1.

62 — See point 24 above.

63 — This provision corresponds to Article 6(3)(c) of Directive 93/36.

64 — See Council Directive 88/295/EEC of 22 March 1988 (OJ 1988 L 127, p. 1).

Directive 77/62, this passage became Article 2(2)(c), which provides that the directive does not apply to such cases. [65]

The possibility cannot be ruled out that the supply of narcotic drugs is covered by this provision. Although the exceptional cases, in which the tendering procedures set out in Directives 77/62 or 93/36 are not applicable, must in those directives be 'expressly limited', [66] [67] the fact that the supply of narcotic drugs must be accompanied by special security measures suggests that such supply might come within the scope of this derogating provision. If this were so, the problem addressed by Question 2 would, of course, not arise.

75. If, on the other hand, it is assumed that the directive is applicable, the question will arise as to whether the criterion of reliability and continuity of supplies can be taken into consideration under Article 25 of Directive 77/62. As MSL correctly points out, the directive draws a distinction between the requirements as to technical suitability of relevant operators (Articles 21 to 24) and the criteria for the award of contracts (Article 25). This is already clear from Article 17(1) of Directive 77/62.

76. According to Article 25(1) of Directive 77/62 [68] the contracting authority, when awarding contracts, must apply either the criterion of the lowest price only (Article 25(1)(a)) 'or, when the award is made to the most economically advantageous tender, various criteria according to the contract in question: e.g. price, delivery date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance' (Article 25(1)(b)).

As the Court has already held with regard to a similar provision in Directive 71/305/EEC, this means that the permissible criteria must be confined to identifying 'the offer which is economically the most advantageous'. [69] From this MSL infers that the criterion of reliability and continuity of supplies cannot be applied under Article 25(1)(b) of Directive 77/62 on the ground that it is a consideration which is general in nature.

77. That argument cannot be accepted. Admittedly, it seems to me doubtful whether one can claim that this criterion is actually contained within one of the criteria expressly mentioned in Article 25, as has been argued by the United Kingdom (which takes the

65 — According to the similar provision in Article 2(1)(b) of Directive 93/36, the directive does not apply in such cases.

66 — Ninth recital in the preamble to Directive 77/62.

67 — Eleventh recital in the preamble to Directive 93/36.

68 — See also Article 26(1) of Directive 93/36 to the same effect.

69 — Judgment in Case 31/87 *Beentjes* [1988] ECR 4635, paragraph 19.

view that this criterion is contained in 'technical merit') and by Ireland (which considers that the criterion in question may be included under the notions of 'delivery date' or 'quality'). In any event, this criterion also determines the 'most economically advantageous tender', since even an apparently attractive offer will ultimately not be advantageous if future supplies cannot be guaranteed. Even though this is an approach which also takes into account the future consequences of the award of a contract for a specific offer, the fact that such an approach is not alien to the directive is demonstrated, in my opinion, by the inclusion of the criteria 'running costs' and 'after-sales service'. The Commission has also expressed a similar view.

Generics, Ireland and the United Kingdom have also correctly pointed out that the enumeration given in Article 25(1)(b) is not exhaustive, as the wording itself indicates. It is, of course, necessary that the criterion be specified in the invitation to tender.

78. Finally, it should be pointed out that the criterion of security of supply is a legitimate consideration which may be taken into account within the context of Article 36. The United Kingdom is right to point out that a directive must not be interpreted in such a way that it prohibits something which Article 36 allows. The French Government also refers in this connection to the fifth recital in the preamble to Directive 77/62, which states that the directive does not prevent the application of Article 36.

C — Conclusion

79. I accordingly propose that the questions submitted by the High Court should be answered as follows:

1. Articles 30 to 36 of the EC Treaty apply to lawful trade in narcotic drugs within the meaning of the 1961 Single Convention on Narcotic Drugs. However, in so far as this would make it impossible for the Member State concerned, even in the light of the possibilities opened up by Article 36 of the EC Treaty, to comply with the obligations imposed on it by the Single Convention, the first paragraph of Article 234 of the EC Treaty allows that Member State to comply with its obligations under that Convention if it acceded to the

Convention before the entry into force of the EC Treaty or prior to its own accession to the Community.

2. Article 36 of the EC Treaty allows a Member State exceptionally to give preference to domestic production over imports from other Member States if that is the only way in which reliable supplies of narcotic drugs for essential medical purposes can be guaranteed in that Member State.