JUDGMENT OF THE COURT (Fifth Chamber)
29 January 1985 *

In Case 231/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal de Commerce [Commercial Court], Toulouse, for a preliminary ruling in the proceedings pending before that court between

Henri Cullet, a service-station operator at Toulouse,
Chambre syndicale des réparateurs automobiles et détaillants de produits pétroliers [Association of Motor-Car Repairs and Retailers of Petroleum Products], Toulouse,

and

Centre Leclerc Toulouse (SA Sodinord),
Centre Leclerc Saint-Orens-de-Gameville (SA Sodirev),

on the interpretation of Articles 3 (f) and 5 of the EEC Treaty,

THE COURT (Fifth Chamber)

composed of: O. Due, President of Chamber, C. Kakouris, U. Everling, Y. Galmot and R. Joliet, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: D. Louterman, Administrator

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gives the following

* Language of the Case: French

** After considering the observations submitted on behalf of:

Centre Leclerc Toulouse and Centre Leclerc Saint-Orens-de-Gameville represented in the written procedure by Maître Farme and Maître Amadio, and at the hearing by Maître Simon,

the Government of the French Republic respresented in the written procedure by Jean-Paul Costes and at the hearing by G. Guillaume, Director of Legal Affairs at the Ministry of Foreign Affairs,

the Government of the Italian Republic, represented by Arnaldo Squillante, Head of the Department of Contentious Diplomatic Affairs, Treaties and Legislative Matters, assisted by Ivo M. Braguglia, Avvocato dello Stato,

the Government of the Hellenic Republic, represented at the hearing by P. Spathopoulos,

the Commission of the European Communities, represented by its Legal Advisers, René-Christian Béraud and Giuliano Marenco, assisted by Nicole Coutrelis,

after hearing the Opinion of the Advocate General delivered at the sitting on 23 October 1984,

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced).

Decision

1 By an interlocutory order dated 1 August 1983 which was received at the Court on 11 October 1983, the President of the Tribunal de Commerce [Commercial Court], Toulouse, referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty a question concerning the interpretation of various provisions of Community law, in particular Articles 3 (f) and 5 of the EEC Treaty, in order to enable it to assess the compatibility with Community law of national rules imposing a minimum price on the sale of fuel to consumers.

2 The question was raised in proceedings between Henri Cullet, a service-station operator at Toulouse, and the Chambre syndicale des réparateurs automobiles et détaillants de produits pétroliers [Association of Motor-Car Repairs and Retailers of Petroleum Products], Toulouse, on the one hand, and Sodinord SA and Sodirev SA, which operate at Toulouse and at Saint-Orens-de-Gameville supermarkets incorporating petrol stations and named 'Centre Leclerc' after the group of which they form part, on the other. The dispute concerns compliance with the minimum price fixed by the French authorities for the sale of fuel ('regular' and 'super' petrol and diesel oil) to the consumer.

3 In France the distribution of petroleum products is governed by the Law of 30 March 1928 regulating oil imports, and wholesale and consumer prices are fixed by means of the rules introduced by 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.

4 Under the distribution system as adjusted with the Commission's approval pursuant to Article 37 of the EEC Treaty, the importation and purchase from French refineries of petroleum products for release for consumption require special State authorization, known as an A 3 authorization. A holder of an A 3 authorization must procure 80% of his supplies on the French market or within the EEC under medium-term contracts with French or Community refineries; he is at liberty to obtain the remaining 20% where he sees fit and, in particular, may buy on the spot market.

5 The selling price of petroleum products at the wholesale stage, known as the 'ex-refinery price', is in principle freely determined by each refinery or importer holding an A 3 authorization, which at least once a month must submit to the competent authorities a table of its ex-refinery prices, on which discounts may be given. The ex-refinery price may not, however, exceed a 'ceiling price' fixed on a monthly basis by the competent authorities. In practice the tables of ex-refinery prices are generally the same as the ceiling price. The authorities fix the ceiling price by taking into account, on the one hand, the cost price of French refineries, calculated on the basis of crude oil prices, the rate of the dollar, and maritime freight and refining costs assessed at a flat rate on the basis of statistical data, and on the other hand, the rates recorded on the European markets. The rules provide that the European rates are to determine the ceiling price in so far as they are no more than 8% above or below the French refineries' cost price; if, on the other hand, the European rates move outside the so-called 'tunnel' constituted by the divergence of 8% from the French refineries' cost price, it is that price which is to determine the ceiling price.

6 There are upper and lower limits on prices for sales to the consumer. The upper limit is represented by the 'maximum retail selling price', which varies for each retailer according to the ex-refinery price of his supplier. It is based on the sum of the ex-refinery price and the commercial costs and margin provided for, together with taxes and dues. The lower limit is represented by the 'minimum price', fixed on a monthly basis for each canton by deducting from the maximum selling price, based on the average scales of ex-refinery prices of French refineries in the preceding month, an amount which at the material time was 9 centimes per litre for 'regular' petrol and 10 centimes per litre for 'super' petrol. Where the maximum selling price thus calculated for a distributor is below the minimum price, the maximum selling price is fixed at the level of the minimum price.

7 It appears from the documents before the Court that the Leclerc group to which Sodinord and Sodirev belong is the holder of an A 3 authorization. The group has the reputation of pursuing in its 'Centre Leclerc' shops a commercial policy of low prices for various types of goods. In 1963 it decided to extend that policy to the retail sale of motor fuel. Along with other Centres Leclerc, Sodinord and Sodirev therefore sold motor fuel at prices lower than the minimum prices fixed by the competent authorities in accordance with the rules set out above.

8 Proceedings against Sodinord and Sodirev were then instituted before the President of the Tribunal de Commerce, Toulouse, by a competitor who claimed

that the practice of offering fuel at prices below the minimum price was unlawful and unfair and caused him damage, and who therefore sought an order prohibiting that practice, failure to comply with which would render them liable to a periodic penalty payment. In their defence Sodinord and Sodirev contended that the rules on the selling price of fuel were contrary to Articles 3 (f), 85 and 86 of the Treaty and could not be justified under Articles 30 and 36 of the Treaty.

9 The President of the Tribunal de Commerce, Toulouse, considered it necessary, in order to enable him to give judgment, to refer to the Court of Justice for a preliminary ruling the following question:

Must Articles 3 (f) and 5 of the Treaty of 25 March 1957 establishing the EEC be interpreted as prohibiting the fixing in a Member State by law or by regulation of minimum prices for the sale to consumers, at the pump, of 'regular' and 'super' petrol and diesel oil, a system which compels any retailer who is a national of a Member State to conform to the fixed minimum prices?

10 Article 3 (f) of the EEC Treaty, to which the question refers, sets out one of the general principles of the common market, which are applied in conjunction with the relevant chapters of the Treaty devoted to their implementation. It envisages 'the institution of a system ensuring that competition in the common market is not distorted', a general objective which is enlarged on by, *inter alia*, the rules on competition set forth in Part 3, Title I, Chapter I of the Treaty. The second paragraph of Article 5 of the Treaty requires Member States to 'abstain from any measure which could jeopardize the attainment of the objectives' of the Treaty. Thus the question referred by the national court, concerning the compatibility of the legislation of the type described above with Articles 3 (f) and the second paragraph of Article 5, seeks to establish whether that legislation accords with the principles and objectives of the Treaty and with those provisions of the Treaty concerned with their detailed implementation.

11 Articles 2 and 3 of the Treaty set out to establish a market characterized by the free movement of goods where the terms of competition are not disturbed. That objective is secured *inter alia* by Article 30 *et seq.* prohibiting restrictions on intra-Community trade and by Article 85 *et seq.* on the rules on competition, which it is appropriate to consider first.

The application of Articles 3 (f), 5 and 85 of the EEC Treaty

12 Sodinord and Sodirev contend that, by virtue of Articles 3 (f) and 5 of the EEC Treaty, the principles of Articles 85 and 86 are applicable to State rules such as those concerned here. Article 85 prohibits practices which directly or indirectly fix selling prices or any other trading conditions, and it is not permitted to deprive the rules of Community law which are intended to ensure that competition is not distorted within the common market of their effectiveness.

13 The French, Italian and Greek Governments contend that Articles 3 (f) and 5 of the Treaty are part of the general principles of the Treaty and must be considered in conjunction with other provisions of the Treaty which define the conditions and the detailed rules for their application. In that regard, Articles 85 and 86 cannot be taken into consideration in an assessment of State rules on prices, as they concern only the behaviour of undertakings.

14 The Commission considers that State measures can only in exceptional circumstances be regarded as incompatible with the obligation arising out of Article 5 of the Treaty not to deprive the rules on competition laid down by Articles 85 and 86 of their effectiveness. That would be the case if State rules encouraged or facilitated unlawful conduct on the part of undertakings or were specifically designed to enable undertakings to circumvent the rules on competition. However, according to the Commission, that is not the case here.

15 In accordance with the aim laid down in Article 3 (f) of the Treaty, the following are incompatible with the common market and prohibited by virtue of Article 85 (1) of the EEC Treaty: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions. Thus, Article 85 (1) covers agreements, decisions and concerted practices in restraint of competition between undertakings, subject to exemptions granted by the Commission under Articles 85 (3) of the EEC Treaty.

16 It is true that the rules on competition are concerned with the conduct of undertakings and not with the national legislation of Member States. However, as the

Court has recently ruled in its judgment of 10 January 1985 in Case 229/83, (*Leclerc*, [1985] ECR 1), Member States are none the less obliged under the second paragraph of Article 5 of the Treaty not to detract, by means of national legislation, from the full and uniform application of Community law or from the effectiveness of its implementing measures; nor may they introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings (see also the judgment of 13 February 1969 in Case 14/68, *Wilhelm* v *Bundeskartellamt*, [1969] ECR 1, and the judgment of 16 November 1977 in Case 13/77, *Inno* v *ATAB*, [1977] ECR 2115).

17 However, rules such as those concerned in this case are not intended to compel suppliers and retailers to conclude agreements or to take any other action of the kind referred to in Article 85 (1) of the Treaty. On the contrary, they entrust responsibility for fixing prices to the public authorities, which for that purpose consider various factors of a different kind. The mere fact that the ex-refinery price fixed by the supplier — which, moreover, may not exceed the ceiling price fixed by the competent authorities — is one of the factors taken into account in fixing the retail selling price does not prevent rules such as those concerned here from being State rules and is not capable of depriving the rules on competition applicable to undertakings of their effectiveness.

18 It follows that Article 5, in conjunction with Articles 3 (f) and 85 of the Treaty, does not prohibit the Member States from regulating, in the manner laid down by the rules contested in the main proceedings, the fixing of the retail selling price of goods. Those rules must now be assessed in the light of the provisions of the Treaty on the free movement of goods.

The application of Articles 30 and 36 of the Treaty

19 Sodinord and Sodirev consider that the method of fixing minimum prices prescribed by the contested rules has the effect of excluding competition by goods originating in other Member States when their cost prices are more than 8% below those of French refineries, by cancelling out the competitive advantage conferred by the importers' lower costs. They therefore create an obstacle to imports prohibited by Article 30 of the Treaty.

20 Moreover, the contested system of fixed prices permits the national authorities to manipulate prices by artificially lowering cost prices and thus preventing importers

from entering a market which traditionally belongs to the French refiners, by making it impossible for them, should they wish to do so, to market their products at economic prices. Its effect is further strengthened by the obligation imposed on holders of A 3 authorizations to obtain 80% of their supplies by means of medium-term contracts. Thus the effect of such a system is to partition off the national market, in breach of Article 30.

21 The French Government, supported by the Italian and Greek Governments, considers that rules on prices such as those concerned in this case have no effect on imports from other Member States. They are intended to harmonize the distribution of fuel supplies throughout national territory by ensuring sufficient commercial margins for all retail outlets. As prices on importation are not regulated, a foreign operator with more advantageous cost prices than the prices applicable in France would find it easier to penetrate the market, for he would be at liberty to pass that advantage on to retailers. Thus imports of petroleum products into France have increased under this system. Consequently, Article 30 cannot be interpreted as prohibiting a system of fixed prices of this kind.

22 The Commission observes that rules fixing a minimum price are capable of having an adverse effect on the marketing of imported products in so far as such a fixed minimum price prevents the lower cost price of imported products from being reflected in the retail selling price. Rules such as those contested here thus constitute a measure having an effect equivalent to a quantitative restriction on imports in so far as they fix the price of products solely on the basis of the cost price of domestic products, thus cancelling out any competitive advantage for imported products.

23 It should be noted in the first place that, as the Court has consistently held, the prohibition laid down in Article 30 of measures having an effect equivalent to a quantitative restriction covers any measures which are capable of hindering, directly or indirectly, actually or potentially, imports between Member States. As regards the application of those principles to State systems of price control, the Court has repeatedly stated that such systems, if applicable to domestic products and imported products alike, do not in themselves constitute measures having an effect equivalent to a quantitative restriction but may have such an effect when the prices are fixed at a level such that imported products are placed at a disadvantage compared to identical domestic products, either because they cannot profitably be

marketed on the conditions laid down or because the competitive advantage conferred by lower cost prices is cancelled out (see the judgments of 26 November 1976 in Case 65/75, *Tasca*, [1976] ECR 291; 24 January 1978 in Case 82/77, *van Tiggele*, [1978] ECR 25; 6 November 1979 in Joined Cases 16 to 20/79, *Danis*, [1979] ECR 3327; and 29 November 1983 in Case 181/82, *Roussel Laboratoria*, [1983] ECR 3849).

24 The argument put forward by Sodinord and Sodirev to the effect that the method whereby the maximum retail selling price is fixed, because it artificially lowers that price, results in the partitioning of the market by preventing foreign refiners from distributing their products at economic prices, cannot be examined in these proceedings. The fixing of a maximum retail selling price, as well as the supply restrictions imposed on holders of A 3 authorizations, were not referred to by the Tribunal de Commerce, Toulouse, as the dispute in the main proceedings relates only to the failure to comply with the minimum price for the retail sale of fuel.

25 As regards the fixed minimum price, it should be noted that the Court stated in its judgment of 24 January 1978 in *van Tiggele*, cited above, that a national provision which fixes a minimum profit margin and which is applicable without distinction to domestic and imported products, cannot have an adverse effect on the marketing of imported products alone. On the other hand, that is not so in the case of a minimum price fixed at a specific amount which, although applicable without distinction to domestic and imported products, is capable of having an adverse effect on the marketing of the latter in so far as it prevents their lower cost price from being reflected in the retail selling price.

26 As is clear from the explanations set out above, the minimum retail selling price is in practice determined, under the rules at issue in this case, on the basis of the ex-refinery price which must not exceed the ceiling price fixed by the national authorities. Even though importers are at liberty to fix their ex-refinery prices at a lower level than the ceiling price, the fact that the minimum price is calculated on the basis of the average of the ex-refinery prices of national refineries prevents importers from benefiting from a competitive position which may be more favourable as a result of a lower ex-refinery price. It is true that a Member State cannot be criticized for using general criteria in order to fix the price of a uniform product, the origin of which is difficult to identify once it appears on the market. However, in order to avoid any disadvantageous effect on the distribution of

imported products on the market, those criteria must take due account of the ex-refinery prices of all traders, regardless of the origin of the goods.

27 The disadvantageous effect which a system such as that in dispute in this case has on imported products is further reinforced by the method of calculating the ceiling price which imposes an upper limit on the ex-refinery price and which, according to the explanations supplied to the Court, is normally adopted by national refineries as the ex-refinery price. Although in general the ceiling price is calculated on the basis of the rates recorded for fuel on the European market as well as the ex-refinery prices of French refineries, the latter constitutes the only decisive element where the European rates fall more than 8% below those prices. Consequently, whenever the competitive advantage of imported products exceeds that threshold, their more advantageous ex-refinery price is no longer taken into account in fixing the ceiling price. Such a method further discourages the distribution of imported products by depriving them of their competitive advantage with the consumer whenever the threshold of 8% is exceeded.

28 The disadvantageous effect of a minimum price on the distribution of imported products with an ex-refinery price lower than that of the national product cannot be disclaimed on the basis that the prices of imports are not regulated and that importers may therefore grant retailers a higher profit margin in order to encourage them to purchase imported fuel. In that context, it should be pointed out that the structure of the distribution network prevents imported fuels from benefiting fully from such an advantage as a large number of retailers are unable to change their supplier at will. In such circumstances the retail selling price is the essential element of competition for uniform products such as fuel. A minimum price such as that at issue in this case may therefore prevent imported products from increasing their penetration of the national market where their ex-refinery price is more advantageous. Under those circumstances the fact that imports may have risen while such a system was in force, as the French Government maintained, cannot suffice to show that a minimum price does not have a disadvantageous effect on the distribution of imported products.

29 It follows from the considerations set out above that a national system of fixing a minimum retail selling price for fuel whereby that price is determined on the basis solely of the ex-refinery prices of national refineries and those ex-refinery prices are in turn linked to the ceiling price which is calculated on the basis solely of the

cost prices of the national refineries where the European rates for fuel differ from those prices by more than 8%, places imported products at a disadvantage by depriving them of the opportunity of enjoying, as the result of a lower cost price, competitive advantages in sales to the consumer.

30 In order to justify the rules at issue in the main proceedings, the French Government has also relied on the imperative requirements of the protection of the interests of consumers. In its opinion, destructive competition over the price of fuel could lead to the disappearance of a large number of service-stations and therefore to an inadequate supply network throughout the national territory.

31 On that point it should be noted that national rules compelling retailers to observe fixed retail selling prices, which make it more difficult to distribute imported products on the market, can be justified only on the grounds set out in Article 36 of the Treaty.

32 As regards the application of Article 36 the French Government referred to the threat to public order and security represented by the violent reactions which would have to be anticipated on the part of retailers affected by unrestricted competition.

33 In that regard, it is sufficient to state that the French Government has 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 principles set out above would have upon public order and security.

34 The answer to the question submitted by the Tribunal de Commerce, Toulouse, should therefore be as follows:

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

Article 90 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 which is calculated solely on the basis of the cost prices of national refineries when the European fuel rates are more than 8% above or below those prices.

Costs

35 The costs incurred by the French, Italian and Greek Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber)

in answer to the question referred to it by the President of the Tribunal de Commerce, Toulouse, by order of 1 August 1983, hereby rules:

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

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

Due Kakouris

Everling Galmot Joliet

Delivered in open court in Luxembourg on 29 January 1985.

P. Heim
Registrar

O. Due
President of the Fifth Chamber