JUDGMENT OF THE COURT
7 February 1985 [1]

In Case 173/83

Commission of the European Communities, represented by its Legal Adviser, Michel van Ackere, acting as Agent, assisted by Daniel Jacob of the Brussels Bar, with an address for service in Luxembourg at the office of Oreste Montalto, Jean Monnet Building, Kirchberg,

applicant,

v

French Republic, represented by Gilbert Guillaume, acting as Agent, assisted by Gérard Boivineau, Deputy Agent, with an address for service in Luxembourg at the French Embassy, 2 Rue Bertholet,

defendant,

APPLICATION for a declaration that the French Republic has failed to fulfil its obligations under Article 34 of the EEC Treaty by establishing under Decree No 79-981 of 21 November 1979 and the two orders implementing it of the same date a scheme for the collection and disposal of waste oils which excludes the export of such oils to other Member States,

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco and C. Kakouris, Presidents of Chambers, T. Koopmans, U. Everling, Y. Galmot and R. Joliet, Judges,

Advocate General: C. O. Lenz
Registrar: H. A. Rühl, Principal Administrator

gives the following

1 — Language of the Case: French.

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

1. Facts and procedure

1.1. The disposal of waste oils is dealt with by Council Directive No 75/439/EEC of 16 June 1975 (Official Journal 1975, L 194, p. 23).

The directive provides that Member States shall take the necessary measures to ensure the safe collection and disposal, preferably by recycling, of waste oils (Articles 2 to 4). Article 5 of the directive provides as follows:

'Where the aims defined in Articles 2, 3 and 4 cannot otherwise be achieved, Member States shall take the necessary measures to ensure that one or more undertakings carry out the collection and/or disposal of the products offered to them by holders, where appropriate in the zone assigned to them by the competent authorities.'

1.2. The French Republic incorporated the directive into French law by adopting Decree No 79-981 of 21 November 1979 'laying down rules for the recovery of waste oils' (Journal Officiel de la République Française of 23 November 1979, p. 2900), and two orders of 21 November 1979, one concerning the conditions for the collection of waste oils in pursuance of that decree (ibid., p. 2901) and the other the conditions for the disposal of waste oils in pursuance of the decree (ibid., p. 2903).

That legislation provides as follows:

Holders who accumulate stocks of waste oils as a result of their business activities must either hand over their waste oils to authorized collectors or dispose themselves of the waste oils they produce provided that they hold a licence issued by the Ministry of the Environment, or they must themselves deliver the oils to an approved disposal undertaking;

In order to ensure that all waste oils are collected, the whole of France is divided into geographic zones (which generally correspond to the départements), in each of which the Minister for the Environment has designated an authorized collector on the basis of a public invitation to tender and the opinion of an inter-departmental committee of approval.

The authorized collector is responsible for collecting all waste oils produced in the zone for which authorization has been granted;

The disposal of waste oils also requires an approval issued by the Minister for the Environment.

1.3. The Commission took the view that the French legislation was contrary to Article 34 of the Treaty because it did not provide for any exemption for the delivery

or resale of waste oils to approved undertakings in other Member States, and that it therefore constituted an implicit prohibition on exports. It therefore sent a letter dated 23 December 1982 to the French Government requesting it to submit its observations within two weeks.

After receiving no reply to that letter, the Commission delivered a reasoned opinion to the French Government on 25 May 1983 pursuant to the first paragraph of Article 169 of the Treaty and gave it one month in order to comply with the opinion.

The Commission's application, dated 5 August 1983, was lodged at the Court Registry on 10 August 1983.

In the meantime, on 21 July 1983, the Commission had received the French Government's reply to its reasoned opinion, although it did not reach the department in charge until after the application had been drafted. In its reply the French Government contended that the aim of its national legislation was not to prohibit the export of waste oils, and it asked the Commission to reconsider its position.

1.4. Upon hearing the report of the Judge Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

2. Conclusions of the parties

The *Commission* claims that the Court should:

'(1) Declare that by establishing under Decree No 79-981 of 21 November 1979 and two implementing orders of the same date a system for the collection and disposal of waste oils which excludes the export of such oils, even if they are to be delivered to undertakings in other Member States having a permit or authority to collect, dispose of or regenerate waste oils, the French Republic has failed to fulfil its obligations under Article 34 of the EEC Treaty.

(2) Order the French Republic to pay the costs.'

The *French Republic* contends that the Court should dismiss the Commission's application and order the applicant to pay the costs.

3. Submissions and arguments of the parties

3.1. In its *application to the Court* the Commission asserts that Decree No 79-981 of 21 November 1979 and its two implementing orders of the same date contravene Article 34 of the EEC Treaty because they establish a system under which holders of waste oils are required to deliver them to authorized French collectors or disposal undertakings, collectors of waste oils are obliged to hand them over to authorized French disposal undertakings and those undertakings must process the oil in their plant. The relevant French legislation therefore has the effect of implicitly prohibiting any exports of waste oils abroad and in particular to other Member States.

The inspections carried out by the French customs authorities and the existence of a circular dated 26 October 1982 issued by the Ministry of Economic Affairs and the Budget, requiring strict checks to be carried out at the frontiers to prevent any waste oils from being exported, only serves to confirm the Commission's interpretation of the French legislation.

The French prohibition cannot be justified by Article 5 of Directive 75/439, which permits, where appropriate, the collection and/or disposal of waste oils within a zone assigned to approved undertakings, or by the inadequate profitability of that type of activity or on the grounds set forth in Article 36 of the EEC Treaty. Indeed, those arguments have been rejected by the Court in the judgment of 10 March 1983 in the *Inter-Huiles* case (Case 172/72, [1983] ECR 555).

3.2. The *French Government* disputes the Commission's argument; in its view, it is refuted both by the facts and by the legislation in question viewed as a whole.

The French Government first observes that, whilst it is true that the legislation at issue contains no exemption for the delivery or resale of waste oils to undertakings in other Member States, it is no less true that such an exemption was unnecessary because it is a general principle of French law that anything which is not prohibited is permitted. In this particular case, no provision of the legislation at issue prohibits the export of waste oils.

It is, however, true that the control system introduced by the French authorities has the effect of preventing waste oils from being exported to non-member countries, but it has to be appreciated that in such a case exportation is prohibited not as a commercial operation but as a means of escaping the constraints which the aims of Directive No 75/439 necessarily entail.

On the other hand, that justification cannot apply to exports to other Member States, since by virtue of Directive No 75/439 itself, to which the disputed decree expressly refers in its preamble, the business of disposing of or regenerating waste oils may not be carried on in any part of the Community except on conditions which ensure that the aims of the directive are observed.

Turning to the facts, the French Government then points out that the statistics on the volume of intra-Community trade in waste oils supplied by the Commission at the Court's request in Case 172/82 establish that large quantities of waste oils are exported from France to other Member States. Indeed, France is the Community's leading exporter of waste oils to other Member States.

As regards the circular of 26 October 1982 to which the Commission refers, the French Government maintains that its purpose is to define the conditions on which waste oils may be exported. In particular it is designed to ensure that the French provisions governing the recovery of waste oils are observed and that exports are limited to disposal undertakings which have been approved as provided for in Article 6 of Directive No 75/439. The arrangements laid down in the circular of 26 October 1982 are therefore in accordance with the judgment of 10 March 1983 in Case 172/82.

As regards the points of Decree No 79/981 to which the Commission objects in its application, the French Government states that in order to remove any uncertainty for good it is prepared to amend the contested decree in order to make it clear that the holders and authorized collectors of waste oils may hand them over to any disposal undertaking which has obtained the permit provided for in Article 6 of Directive No 75/439.

The French Government again emphasizes that such a textual amendment will not alter current practice under which the export of waste oils to other Member States is already permitted provided that the conditions laid

down in the Decree of 21 November 1979 or Directive No 75/439 are observed. It would merely elevate to the rank of a decree provisions which are at present contained in a circular.

At present any holder of waste oils, as defined in the third paragraph of Article 1 of the Decree of 21 November 1979, or any authorized collector as referred to in the fourth paragraph of Article 1 and in Articles 4 and 6 may, if he so wishes, export used oils to another Member State; the only requirement in accordance with Article 6 of Directive No 75/439 is that the ultimate recipient of the goods must be a disposal or regenerating undertaking authorized by the competent authorities of a Member State.

3.3. To those arguments the Commission *replies*, that the fact that waste oils are exported from France to other Member States does not prove that a piece of legislation is not — actually or potentially — obstructing exports and secondly that the circular of 26 October 1982, which in certain cases liberalizes the export of the products in question, does not cure the infringement of Article 34 of the EEC Treaty. The maintenance of Decree No 79-981 and of the orders adopted to implement it is a source of legal uncertainty which may in itself obstruct exports. Furthermore, the circular contains various export restrictions which are not justified in Community law.

In particular, the second indent of paragraph 3 (b) in Part B of the circular does not permit exports unless the recipient of the product is an approved disposal or regenerating undertaking, to the exclusion of approved collectors established in other Member States, whilst the second indent of paragraph 2 (b) and the second indent of paragraph 3 (b) of Part B prohibit all exports if the exporter is a collector who is not approved by the French authorities or if he is unable to produce an attestation showing that the ultimate recipient of the product is a disposal undertaking approved by the competent authorities in the country of destination.

The Commission takes the view that the inspection powers conferred on the State in which the product originated relate solely to the observance of the national legislation incorporating Directive No 75/439 into national law.

However, the customs authorities of that State may not obstruct the export of the product concerned on any pretext.

3.4. In its *rejoinder*, the French Government reiterates its view that the whole legislation at issue, including the circular of 26 October 1982 should be considered, and draws a distinction between the activities of the authorized disposal or regenerating undertakings and those of the collectors.

With regard to the former undertakings, the French Government contends that if it is not established that the recipient is a disposal or regenerating undertaking authorized by another Member State, the prohibition of exports is in accordance with Directive No 75/439, and in particular with the first paragraph of Article 6 and the third recital of the preamble.

As regards collectors and the French system of exclusive zones for which licences are granted, the French Government argues that it does not constitute an obstacle to exports and is moreover allowed by Directive No 75/439, in particular by Article 5 thereof.

The Commission's submission that the French Government has not furnished

evidence that the introduction of the system of exclusive collection zones in accordance with Article 5 of the directive was necessary because the aims of Articles 2, 3 and 4 of the directive could not have been otherwise achieved is a new submission since it was first put forward in the reply and is therefore inadmissible.

In case the Court none the less considers the submission admissible, the French Government challenges the interpretation of Article 5 of Directive No 75/439 proposed by the Commission.

The opening phrase 'Where the aims . . .' applies to the article in its entirety; it means in fact that it is the Member States which are responsible for adopting the measures needed for the attainment of the aims of the directive. Article 5 therefore obliges Member States to achieve a certain result but leaves it to the discretion of the Member States to choose the method of discharging that obligation. Clearly, the choice of methods is limited by the duty not to obstruct Community trade, but the French Government takes the view that the French legislation at issue in this case is in keeping with that duty.

4. Oral procedure

The Commission, represented by Daniel Jacob, and the Government of the French Republic, represented by Gérard Boivineau, presented oral argument at the sitting on 22 November 1984.

The Advocate General delivered his Opinion at the sitting on 22 November 1984.

Decision

1 By an application lodged at the Court Registry on 10 August 1983, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that the French Republic has failed to fulfil its obligations under Article 34 of that Treaty by establishing under Decree No 79-981 of 21 November 1979 and its two implementing orders of the same date a system for the collection and disposal of waste oils which excludes the export of such oils, even if they are to be delivered to undertakings in other Member States having authority to collect, dispose of and regenerate waste oils.

2 The decree and implementing orders were adopted by the French Government in order to implement Council Directive No 75/439/EEC of 16 June 1975 on the disposal of waste oils (Official Journal 1975, L 194, p. 23), enacted in particular on

the basis of Articles 100 and 235 of the Treaty with the aim of protecting the environment against the detrimental effects of the discharging, depositing or processing of such oils.

3 Articles 2 to 4 of the directive provide that Member States are to take the necessary measures to ensure the safe collection and disposal — preferably by recycling — of waste oils. Article 5 of the directive provides as follows: 'Where the aims defined in Articles 2, 3 and 4 cannot otherwise be achieved, Member States shall take the necessary measures to ensure that one or more undertakings carry out the collection and/or disposal of the products offered to them by holders, where appropriate in the zone assigned to them by the competent authorities.' The first paragraph of Article 6 also provides that '. . . any undertaking which disposes of waste oils must obtain a permit.'

4 To implement the directive the French Government adopted on 21 November 1979 Decree No 79-981, on the recovery of waste oils, and on the same day two implementing orders (Journal Officiel de la République Française of 23 November 1979, p. 2900). Those provisions divided French territory into zones and introduced a licensing system for both waste oil collectors and undertakings responsible for disposing of such oils. Under Article 3 of the decree, holders of waste oils are required to hand them over to the collectors approved in accordance with Article 4 of the decree or to place them at the disposal of a disposal undertaking holding the permit for which Article 8 of the decree provides, or to dispose of the oils themselves if they hold the appropriate permit. Article 6 of the decree requires collectors to deliver the collected oil to the authorized disposal undertakings. Finally, Articles 2 and 9 of the implementing order dealing with the disposal of waste oils require the authorized disposal undertakings to process the waste oils in their own plant under penalty of losing their permit.

5 In the Commission's view, the above-mentioned legislation contains an implicit but clear prohibition against exporting waste oils to other Member States because it makes no provision for any exemption regarding the delivery and resale of waste oils to undertakings in other Member States which have obtained the permits or licences referred to in Articles 5 and 6 of Directive No 75/439 and which carry on the business of collecting or disposing of waste oils; such prohibition is contrary to Article 34 of the EEC Treaty. The Commission believes that its view is confirmed by the information it has received to the effect, that the French customs authorities carry out strict checks at the frontiers on the transport of waste oils to other Member States.

6 The French Government contends that an express exemption for exports is unnecessary because no provision in the French legislation explicitly prohibits exports and because it is a general principle of French law that anything which is not prohibited is permitted.

7 Such an argument cannot be accepted. In view of the above provisions, the French legislation contains an implicit prohibition against exporting waste oils to other countries, including the other Member States of the Community, by not providing for any exemption for the resale of waste oils to collectors or disposal undertakings which have obtained in those States the permit provided for in Article 6 of Directive No 75/439. The principle pleaded by the French Government cannot apply in this case, which involves legal provisions containing an implicit yet clear prohibition. Furthermore, even if such a principle were applicable in this case, it would still leave some doubts about the legal position. The French legislation would therefore in any case have an inhibitory effect on export trade.

8 According to consistent case-law, such a situation may constitute an obstacle to trade between Member States, forbidden by Article 34 of the EEC Treaty.

9 The French Government also contends that the national legislation must be considered as a whole. Besides the decree and the two implementing orders of 21 November 1979 it also comprises a circular dated 26 October 1982 which expressly provides for the possibility of exporting waste oils to disposal undertakings in other Member States on the sole condition that a certificate showing that such undertakings are authorized under national law is produced.

10 It must be noted in this regard that the circular in question, which moreover provides only for the possibility of exporting waste oils to authorized disposal undertakings in other Member States and not to collectors, is stated to be no more than an internal 'memorandum' addressed to the competent authorities. As is clear from the documents before the Court, traders and manufacturers are not likely to know of its existence, nor can it confer rights upon them. It cannot therefore replace the legislative texts such as the decree and the orders in question.

11 Consequently, this argument must be rejected.

12 The French Government further argues that France is the largest exporter of waste oils to other Member States.

13 Although the truth of that assertion is not disputed, it must none the less be pointed out that in its judgment of 9 February 1984 in Case 295/82, *Rhône-Alpes Huiles* v *Fabricants Raffineurs d'Huiles de Graissage*, [1984] ECR 575 the Court held that the mere fact that the great majority of exports within the Community come from a single Member State did not justify the inference that the legislation of that Member State permitted exports to other Member States by collectors and holders.

14 Finally, the French Government contends that if exports are impeded it is only in order to ensure that the aims of Directive No 75/439 are observed.

15 That argument must be rejected since the aim of Directive No 75/439, as indeed is clear from the seventh recital of its preamble, is the application of a system of treatment for waste oils 'which will neither create barriers to intra-Community trade nor affect competition'.

16 It follows from the foregoing that by precluding the exportation of waste oils to other Member States under the system for the collection and disposal of such oils set up under Decree No 79-981 of 21 November 1979 and its two implementing orders of the same date, the French Republic has failed to fulfil its obligations under Article 34 of the EEC Treaty.

Costs

17 Under Articles 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the defendant has failed in its submissions it should be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Declares that by precluding the exportation of waste oils to other Member States under the system for the collection and disposal of such oils set up under Decree No 79-981 of 21 November 1979 and its two implementing orders of the same date, the French Republic has failed to fulfil its obligations under Article 34 of the EEC Treaty.

(2) Orders the French Republic to pay the costs.

Mackenzie Stuart Bosco Kakouris

Koopmans Everling Galmot Joliet

Delivered in open court in Luxembourg on 7 February 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President