Case 173/83

Commission of the European Communities
v
French Republic

'Failure of a Member State to fulfil its obligations — Free movement of goods — Waste oils'

Summary

Free movement of goods — Quantitative restrictions on exports — Measures having equivalent effect — Legislation leaving doubt as to whether exports are permitted — Prohibited (EEC Treaty, Art. 34)

Where national legislation leaves some doubt as to whether or not it contains a prohibition on exports it must be regarded as having an inhibitory effect on export trade and may therefore constitute an obstacle to trade between Member States which is prohibited by Article 34 of the EEC Treaty.

OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 22 November 1984 [1]

Mr President,
Members of the Court,

A. The case to be dealt with today concerns measures taken by the French Government to implement the Council Directive of 16 June 1975 on the disposal of waste oils (Official Journal 1975 L 194, p. 23) which was adopted as part of the Community's programme for environmental protection.

That directive and French Decree No 79-981 of 21 November 1979 adopted to implement it as well as the orders adopted on the same day for the implementation of

1 — Translated from the German.

the decree figured in Cases 172/82 [2] and 285/82. [3] I can therefore begin by referring to what was stated in those cases. The only point to be borne in mind is that on 10 March 1983 the Court ruled in Case 172/82 that the Community rules on the free movement of goods and Directive No 75/439 'do not allow a Member State to organize a system for the collection and disposal of waste oils within its territory in such a way as to prohibit exports to an authorized disposal or regenerating undertaking in another Member State' ([1983] ECR 555 at pp. 567 and 568 [2]). It was also held in a judgment of 9 February 1984 [3] delivered in the second case that the aims of the aforesaid directive and the rules laid down by the EEC Treaty on the free movement of goods 'require that waste oils may be delivered by either a holder or an approved collector to a disposal undertaking in another Member State which has obtained a permit as provided for in Article 6 of the directive in that State.'

In accordance with the view which it had taken in the first of these two cases, namely that the French legislation was not in accord with the directive or with Article 34 of the EEC Treaty, the Commission, by a letter of 23 December 1982, began proceedings under Article 169 of the EEC Treaty against the French Republic. In that letter it was submitted that Articles 3, 4 and 6 of Decree No 79-981 as well as Articles 10 and 15 of the annex to the implementing order concerning the collection of waste oil suggested that holders of waste oil were prohibited from delivering it to authorized collectors in other Member States and that holders and collectors were prohibited from delivering it to approved disposal undertakings in other Member States. It was observed that the aims pursued by the directive might also be attained if deliveries were permitted to collectors or disposal undertakings in other Member States and that the infringement of Article 34 of the EEC Treaty evident in the French legislation could not be justified under Article 36 of the Treaty.

Since the French Government failed to reply in the time allowed, a reasoned opinion was delivered on 25 May 1983 pursuant to Article 169 of the EEC Treaty. The opinion reiterated the view that the French legislation contained a prohibition on exports which was not permitted under the Treaty. This was clear from the nature of the obligations imposed on holders of waste oil and on approved collectors and disposal undertakings and from the fact that the French legislation did not provide for any exception for deliveries to approved disposal undertakings in other Member States. This situation was accentuated by inspections prescribed in a circular of 26 October 1982 (to which I shall return). The opinion went on to state that no justification could be found in Article 5 of the directive which reads 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

2 — Judgment of 10 March 1983 in Case 172/82, *Syndicat national des fabricants raffineurs d'huile de graissage and Others* v *Groupement d'intérêt économique 'Inter-Huiles' and Others*, [1983] ECR 555.

3 — Judgment of 9 February 1984 in Case 295/82, *Groupement d'intérêt économique Rhône-Alpes Huiles and Others* v *Syndicat national des fabricants raffineurs d'huiles de graissage and Others*, [1984] ECR 575.

products offered to them by holders, where appropriate in the zone assigned to them by the competent authorities.'

It was also emphasized that there was no economic necessity for such provisions, since as compensation for the obligations imposed on collection and/or disposal undertakings Articles 13 and 14 of the directive allow such undertakings to be granted indemnities. Finally, the Commission again requested the French Republic to adopt the measures needed to give effect to the opinion within one month of its service.

The French Government responded on 21 July 1983 by sending a telex message to the Directorate-General for the Environment. It referred first to the circular of 26 October 1982 addressed to the subordinate departments of the French Ministry of Economic Affairs and asked the Commission to reconsider its position. It claimed that the circular made it clear that exports are quite permissible if the exporter submits an attestation showing that the ultimate recipient is an approved disposal undertaking and that the controls criticized by the Commission are merely to check whether the exporter is a holder of waste oil or an approved waste-oil collector and whether the recipient is authorized under the relevant national legislation to acquire waste oil.

Since the telex message was apparently late in reaching the competent department of the Commission (as we shall soon see, it would not in any case have influenced the Commission's point of view), an application was lodged with the Court on 10 August 1983 for a declaration that by establishing pursuant to 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 authorized collectors and disposal undertakings in other Member States, the French Republic has infringed Article 34 of the EEC Treaty.

B. That application, which in the French Government's opinion should be dismissed as unfounded, calls for the following observations to be made.

1. If one looks only at the wording of the French decree and its implementing orders, the conclusion must indeed be drawn from the nature of the obligations imposed on the holders of waste oil (that is to say, persons who accumulate waste oil in the course of their business), on approved collectors and on approved disposal undertakings that exports to approved collectors and disposal undertakings in other Member States (and only they are regarded by the Commission as participating in trade between Member States) are not possible.

That is certainly how Article 3 of the decree must be understood, which specifies the persons to whom the holders of waste oil (if they do not themselves hold a disposal permit) must deliver the oil, namely the collection undertakings approved under Article 4 of the decree (which, in France, are undertakings granted a permit for a given zone), or disposal undertakings holding a permit under Article 8 of the decree (which is also limited to France). That is also how Article 6 of the decree must be understood; it provides that approved collectors must deliver to disposal undertakings approved under Article 8 of the decree (which is also clear from Articles 10 and 15 of the Annex to the implementing order on the collection of waste oil). It is also how Article 2 of the implementing

order on the disposal of waste oil must be understood, since it refers to the disposal of waste oils in the disposal undertakings approved under Article 7 of the decree (which can only mean the authorized undertakings in France).

In this regard I can also refer to the assessment in the judgment in Case 172/82 [2] (even though it may be regarded only as a kind of *obiter dictum* since in such proceedings the Court is not required to interpret national law). The Court held in fact that 'it is established that the French legislation prohibits, by implication, the export of waste oils to foreign countries, including other Member States of the Community' and that '... no provision is made for a derogation permitting resale to disposal undertakings of other Member States who have obtained the authorization envisaged by Article 6 of Directive 75/439/EEC.' I can further refer to the conclusion arrived at by the Cour d'Appel, Lyons, and reproduced in the judgment in Case 295/82 [3] that the French legislation prohibits, by implication, both authorized collectors and the holders of waste oils from exporting waste oils to other countries, including other Member States of the Community. It is also interesting to note that in Case 172/82 [2] the French Government itself gave the following answers in reply to questions put by the Court on these points:

(1) As regards the collection of waste oils, the holders, if they choose to transport their used oils themselves, as the approved collectors are required to deliver those oils to approved (French) disposal undertakings in accordance with the procedure laid down in Article 8 of the Decree of 21 November 1979.

(2) As regards disposal, disposal undertakings which are approved within the meaning of the Decree of 21 November 1979 are *required* to treat waste oils in their facilities.

Consequently, if one looks only at the texts quoted above and the sufficiently well-known definition of measures which restrict exports, as repeatedly used in the judgments of the Court (see for instance Case 172/82 [2]), the only possible conclusion is indeed that French law is not compatible with the principle of the free movement of goods as it applies to exports.

2. If one then examines the defence submissions made by the defendant government, two points may be swiftly eliminated as irrelevant. By those I mean the point that in its preamble the decree refers to the directive in which it is stated, in the seventh recital of its preamble, that barriers to intra-Community trade must not be created; I also mean the allied view that because it is a general legal principle in France that everything which is not prohibited must be regarded as permitted and because there is no provision in the French legislation expressly prohibiting exports, it was entirely unnecessary to have an exception for them.

Apart from the fact that those points are hard to reconcile with the viewpoint of the

2 — Judgment of 10 March 1983 in Case 172/82, *Syndicat national des fabricants raffineurs d'huile de graissage and Others* v *Groupement d'intérêt économique 'Inter-Huiles' and Others*, [1983] ECR 555.

3 — Judgment of 9 February 1984 in Case 295/82, *Groupement d'intérêt économique Rhône-Alpes Huiles and Others* v *Syndicat national des fabricants raffineurs d'huiles de graissage and Others*, [1984] ECR 575.

French Government disclosed by the answers to the questions put by the Court in Case 172/82, [2] it must be said that almost the only possible interpretation of the French provisions regarding export possibilities creates at the least *uncertainty and obscurity*. But that too may obstruct exports and Article 34 requires no more than that. Furthermore, it is quite clear that such obscurity and uncertainty are not adequately dispelled by the fact that the decree is prefaced by a general reference to the directive, which contains some statement about the requirements of trade between Member States only in its preamble.

3. The defendant also points out that, as a result of the strict French provisions on the disposal and regeneration of waste oil, prices are lower than in other Member States, which positively *encourages* exports. It contends that waste oil is exported from France and (as the statistics submitted in Case 172/82 [2] show) that it has a very large share (about 36 000 tonnes) of the total trade in waste oil within the Community (which amounts to about 40 000 tonnes). I cannot agree with that view either.

Reference may first be made in this regard to the judgment in Case 295/82 [3] (paragraph 11 of the decision), in which the Court stated that the mere fact that the great majority of exports within the Community came from within 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 of waste oil. Secondly, it is interesting to note what was said about the total volume of waste oil produced annually in France (about half a million tonnes, compared with which the export figures cited above appear very small). It is also quite clear that in view of the price difference exports could reach a much higher level if unimpeded.

4. The French Government attaches particular importance to the argument that it may clearly be seen from the relevant *legislation as a whole* that there is no prohibition on exports; in advancing this argument it has in mind a circular supplementing the decree and the implementing order, which deals with supervision of compliance with the rules on collection and disposal of waste oil and which the French Ministry of Economic Affairs sent to the competent authorities on 26 October 1982.

Let me say straight away that, after mentioning the development of export routes designed to circumvent the statutory obligations governing the collection and disposal of waste oil. the circular states that exports must be strictly controlled and that exports to *non-member* countries are not permitted. It does, however, provide that holders of waste oil and collectors approved by the French authorities may export to other Member States, but subject to the restriction that only *disposal* undertakings authorized in other Member States (which must be proved by attestation) may be the recipients of such exports.

2 — Judgment of 10 March 1983 in Case 172/82, *Syndicat national des fabricants raffineurs d'huile de graissage and Others* v *Groupement d'intérêt économique 'Inter-Huiles' and Others*, [1983] ECR 555.

3 — Judgment of 9 February 1984 in Case 295/82, *Groupement d'intérêt économique Rhône-Alpes Huiles and Others* v *Syndicat national des fabricants raffineurs d'huiles de graissage and Others*, [1984] ECR 575.

As members of the Court are aware, the Commission does not consider this adequate either in form or as regards the substance of the legislation.

(a) In my opinion, the Commission is right as far as the first point is concerned.

The important thing is that the circular does not have the same status as the decree and the implementing orders. In view of the obvious interpretation of the decree and the orders, this may create doubt and uncertainty about whether exports are possible, which may have an inhibiting effect on exports, especially when one considers that it is stated at the end of the circular that:

'Il va de soi que ces mesures transitoires — qui pourraient être réexaminées à la lumière des constations faites par le service — sont sans préjudice de la position du Gouvernement sur la licéité des exportations en cause au regard du droit communautaire.'

Another important point is that the *circular was not published,* so that it is not certain whether all interested parties were informed about it and could take advantage of it.

Moreover it has been made clear in judgments of the Court that such considerations are relevant in appraising the way in which Member States apply the Treaty. I am thinking for example of the judgment in Case 167/73 [4] ([1974] ECR 359, paragraphs 41 and 42 at p. 372). As the Court is aware, in that judgment it was held that the maintenance of the French Code du Travail Maritime in an unamended form was objectionable — because it contravened the prohibition of discrimination laid down in the Treaty — in spite of the fact that the relevant Community law (Article 48 of the Treaty and Regulation No 1612/68) had direct effect and overrode French law, precisely because it allowed doubt and uncertainty to persist which could not be eliminated by purely administrative directions of an internal and oral nature. The same argument must undoubtedly apply in a case such as the present one, involving unpublished administrative instructions which *may be revoked at any time.*

Indeed, even the French Government does not seem to ignore this. The Court has been told that the decree and orders implementing it (which were described as *incomplete* in this regard) are to be amended by the incorporation of the provisions contained in the circular (which has not happened yet but is to be done by the end of the year).

(b) In view of those findings, which are basically sufficient to support a charge of infringement of the Treaty, no *substantive examination of the circular* is really required. However, I would like to say a few words about it precisely because the French Government intends to incorporate the provisions of the circular into its decree, and, once that is done, the question will certainly arise whether everything which is necessary to comply with Article 34 of the EEC Treaty has thus been done.

The Commission considers the circular insufficient in several respects: first, because it provides for exports only to the holders of waste oil and collectors approved in France and not by French disposal undertakings and non-approved collectors; secondly, because it allows waste oil to be exported only to approved disposal undertakings in

4 — Judgment of 4 April 1974 in Case 167/73, *Commission of the European Communities* v *French Republic,* [1974] ECR 359.

other Member States and thus not to collectors; and lastly because it requires the production of an attestation showing that the recipient is authorized to dispose of waste oil.

(aa) Turning first to *undertakings permitted to export*, I would say that at the very least the fact that disposal undertakings are not mentioned (and therefore excluded) is objectionable. It is objectionable even though it may rightly be asked whether it is economically worth reselling waste oil, since presumably it is generally in the interests of undertakings to make use themselves of all the oil delivered to them in order to utilize their plant to best effect. But because the possibility cannot be completely ruled out that in certain cases it may be worth reselling oil to undertakings in other Member States, the categorical exclusion of such undertakings from export activities is hard to justify.

On the other hand, I see no grounds for criticizing the exclusion of exports by *unauthorized collectors*. That exclusion must be considered in connection with the French legislation whereby, in accordance with Article 5 of the directive, France is divided into collecting zones and in each zone an undertaking has been granted an exclusive right to collect waste oil. That must necessarily mean that unauthorized collectors may not do business in the zones in question and also that they may not carry on such business for export purposes since otherwise the legislation would not achieve its purpose. In its second set of written submissions the Commission has indeed raised the question whether proper use was made in France of the possibility afforded by Article 5 since, referring to the phrase contained in Article 5 — 'Where the aims defined in Articles 2, 3 and 4 cannot otherwise be achieved . . .' — it took the view that it had not been shown that the division of France into zones and the grant of exclusive collecting rights were *necessary* for the purposes of the phrase quoted. However, the French Government rightly objected that that point had not been raised by the Commission in the administrative procedure or in the application, so that, since it was raised only in the reply, it must be treated as inadmissible. The Commission was clearly not deaf to those arguments because it expressly stated at the hearing that the French provisions on the establishment of zones and the grant of exclusive collection rights should not be called in question (which is apparently what Mr Narjes, a Member of the Commission, stated in reply to a question). Accordingly, in my opinion the right of unauthorized collectors to export really admits of no other view than that expressed above.

(bb) As regards the question whether exports are rightly restricted to deliveries to approved disposal undertakings in other Member States (thus excluding authorized collectors in other Member States), no conclusive answer is to be found in the judgment in Case 172/82.[2] The fact that the judgment in that case deals with authorized disposal or regenerating undertakings in another Member State is simply explained by the limited scope of the questions submitted to the Court which referred only to the impossibility of delivering oil to a disposal or regenerating undertaking in a

2 — Judgment of 10 March 1983 in Case 172/82, *Syndicat national des fabricants raffineurs d'huile de graissage and Others* v *Groupement d'intérêt économique 'Inter-Huiles' and Others*, [1983] ECR 555.

Member State of the EEC (see [1983] ECR 555, at page 558). [2]

Nor can any decisive conclusion be drawn from the French legislation on exclusive collection franchises in certain zones or from Article 7 of the directive, which provides that:

'A person holding waste oils must, if he is unable to comply with the measures taken pursuant to Article 4, place them at the disposal of the undertaking or undertakings referred to in Article 5.'

On the first point it must simply be remarked that it is not a matter of interfering in the business of collecting waste oil (which is not in fact a cross-frontier matter) but of the possibility, in particular for the holders of waste oil, of exporting such oil. If, however, holders of waste oil may deliver oil to collectors outside their zone without infringing the aforesaid exclusive right, it is hard to see why some other arrangement should apply to exports which, as is clearly stated in the preamble to the directive, may not be impeded, and which therefore certainly overrides the exclusive collection right. As regards the second point, the defendant government cannot deny that the only obligation arising under Article 7 is to place waste oil at the disposal of undertakings having a permit to collect it, but that no inference may be drawn from it, when read with Article 5, regarding the place where those undertakings must be established.

In this connection the defendant argues on the basis of having effective control of the disposal of waste oil, to which the preamble to the directive indeed refers. The defendant also argues that it is simpler and more efficient to check a small number of disposal undertakings. Reservations about having too many intermediate stages were also expressed by the Italian Government in Case 240/83. [5] Lastly, as may be seen from studies conducted in 1980 and 1983, negligence in the implementation of the directive has been found in other Member States as a result of which a considerable proportion of the waste oil produced — 40% — was not disposed of properly and was perhaps burnt. To that argument it may be replied in particular that improper implementation of the directive by other Member States can certainly not justify conduct on the part of the defendant which is contrary to the Treaty with regard to exports. It is a matter for the Commission, exercising its supervisory duties, to bring it to an end. It is also unclear why the involvement of foreign collectors, for whose proper conduct the relevant Member State is responsible, should jeopardize the attainment of the aims of the directive.

Consequently, there is no justification for exports of waste oil being limited to deliveries to approved disposal undertakings in other Member States.

(cc) Finally, the circular requires the exporter to present an attestation showing that the recipient is authorized to dispose of waste oil. Assuming that the freedom to export should be extended to cover deliveries to foreign waste oil *collectors*, that requirement must clearly apply to them as well. Of course such attestations give no indication of the actual whereabouts of the waste oil. Therefore its efficacity as a means of control may be doubtful and it may be argued that it is sufficient for the name and

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5 — Reference for a preliminary ruling from the Tribunal de grande instance, Créteil, in Case 240/83: *Procureur de la République* v *Association de défense des brûleurs d'huiles usagées*.

address of the recipient to be stated, since this enables the necessary checks on the whereabouts of the oil to be carried out in the State to which the oil is to be sent and which is responsible for it as soon as it crosses the frontier.

On the other hand, the Commission itself gave an affirmative answer to the question whether it is permissible, in the interests of implementing the directive effectively, to prohibit exports to undertakings having no permit to collect or dispose of waste oil. However, if such a distinction can be made when waste oil leaves a Member State, then it must, of course, also be possible at that moment to ascertain whether the authorization requirement is fulfilled, and in that regard it is not sufficient for administrative assistance to be provided afterwards, on the basis of the information provided to the customs authorities. Furthermore, it may also be readily assumed — and the French Government is indeed right on this point — that such attestations can be procured without any particular difficulties or costs which might hinder exports. That at any rate will be the case if a contract of sale has already been concluded with a foreign purchaser prior to delivery, which should be a feature of any serious export transaction, or if there is a long-standing business relationship.

I therefore consider that the requirement in question is justified having regard to the proper implementation of the directive and that it is not a factor which makes exports more difficult or hinders them and against which an objection ought to be raised under Article 34 of the Treaty.

5. In conclusion, I consider that the French provisions enacted to implement the directive, which are the only provisions requiring consideration in these proceedings (the decree and implementing orders of 1979), lead to the inescapable conclusion that deliveries of waste oil by French holders, collectors and disposal undertakings to authorized collectors or disposal undertakings in other Member States are excluded, which is not justified under the directive and not compatible with Article 34 of the EEC Treaty.

C. In accordance with the application, it should therefore be declared that the defendant is in breach of its obligations under the Treaty as long as it has not made the appropriate amendments of the aforesaid legislative provisions, taking into account the requirements of Article 34. In view of that appraisal of the legal position the defendant must also be ordered to pay the costs.