OPINION OF ADVOCATE GENERAL COSMAS

delivered on 28 September 1995 *

1. In this case, a reference from the Tribunal Superior de Justicia de Canarias, Sala de lo Contencioso-Administrativo de Las Palmas, the Court is asked to give a preliminary ruling on Articles 3(c), 5, 6, 30, 36, 52, 53, 56, 85 and 102(1) of the EC Treaty in connection with national legislation applicable in the Canary Islands to trade in petroleum products. It should be noted at the outset that both the treaties and the acts of the institutions of the European Communities are applicable in the Canary Islands by virtue of Article 25 of the Act of Accession of Spain, with the exceptions mentioned in that article, in Article 155 and in Protocol No 2 annexed to the Act. It should also be noted that the Canary Islands were incorporated into the Community customs territory by Council Regulation (EEC) No 1911/91 of 26 June 1991, [1] providing for a progressive adaptation in that respect.

I — The dispute

2. The questions arose in the course of an action brought on 14 July 1992 by Esso Española SA, the plaintiff in the main proceedings pending before the court of reference ('the plaintiff'). The action seeks the annulment of Decree 54/1992, which was adopted on 23 April 1992 by the Consejería de Industria, Comercio y Consumo (Industry, Trade and Consumer Affairs Council) of the Government of the Canary Islands. [2] The contested decree amended Decree 36/1991 of 14 March 1991, which had been adopted by the Consejería de Industria y Energía (Industry and Energy Council) of the abovementioned government. [3]

3. The lastmentioned decree amended earlier rules dating from 1986, and introduced new rules governing the activities of wholesale suppliers of petroleum products in the Canaries Archipelago. The order containing the reference indicates that the new rules introduced by the 1991 decree seek, as stated therein, 'to provide sufficient guarantees for the energy supply of the Community [of the Canary Islands] in the field of petroleum products, in particular as regards minimum safety requirements and minimum technical and financial standards for operators', and at the same time to remove certain requirements 'which, not being indispensable to achieve the aims set out above, may entail restrictions on freedom of competition in this sector'. Article 14(2) of the 1991 decree

* Original language: Greek.

1 — OJ 1991 L 171, p. 1.

2 — *Boletín Oficial de Canarias* of 27 May 1992.

3 — *Boletín Oficial de Canarias* of 17 May 1991.

provided that 'suppliers (of petroleum products) must supply at least five islands in the archipelago'. Decree 54/1992 (the contested decree), which amended Decree 36/1991, relaxes somewhat the requirement set out in Article 14(2) by providing that 'all traders must supply at least four islands in the Canaries Archipelago'.

4. The applicant, who, it should be noted, has its registered office in Madrid and, as is indicated in the case-file, states that it has been registered as a wholesale petroleum product supplier in the Canary Islands since 23 July 1987, in accordance with Decree 187/86 of 19 December 1986, seeks the annulment of Decree 54/1992, relying on arguments based on the Spanish legislation and the Community rules. The Comunidad Autónoma de Canarias (Autonomous Community of the Canaries), for its part, asks that the action be dismissed and that the validity of the contested decree be confirmed. The court which has made the reference therefore decided to stay the proceedings in the case before it and to refer a number of questions to the Court of Justice for a preliminary ruling in accordance with Article 177 of the EC Treaty.

5. It should be noted that the order containing the reference is reticent as regards the facts of the case, in particular as regards the local market in petroleum products. In its observations the Commission remarks that at present nine companies trade in petroleum products in the Canary Islands, of whom five are controlled by foreign capital (BP Oil, Esso, Mobil Oil, Shell and Texaco), whereas the other four are Spanish companies (Dipsa, Cepsa, Ducar and Repsol). Most of those companies supply more than four islands in the archipelago, but BP Oil, Ducar and the applicant operate only in the two largest islands.

II — The questions

6. In the context of that dispute the Chamber for Contentious Administrative Affairs of the Tribunal Superior de Justicia de Canarias of Las Palmas de Gran Canaria, [4] by order of 4 January 1994, has asked the Court of Justice to give a preliminary ruling on the following questions:

'1. Does the requirement imposed by a Member State that petroleum product wholesalers wishing to establish themselves in its territory must supply a specific number of places in order to ensure supplies or cover throughout the national territory, taking into account the problems of insular regions in certain Member States:

4 — OJ 1994 C 202, p. 6.

(a) involve, in the light of Articles 3(c), 52 and 53 of the Treaty, a restriction incompatible with Community law in that it renders ineffective its provisions relating to the right of establishment and is not "objectively necessary" to secure the objective pursued?

(b) involve, in the light of the provisions of the Treaty relating to the protection of free competition, a restriction on that Community freedom, which may affect trade between Member States and prejudice the achievement of the objectives laid down in the Treaty concerning internal trade, and consequently fall within the scope of the prohibition in Article 85, read in conjunction with Articles 5 and 6 of the Treaty, thereby infringing Article 102(1)?

(c) constitute a measure having equivalent effect, within the meaning of Article 30 of the Treaty, which affects intra-Community trade?

2. If the requirement set out at the beginning of the first question is considered to be a restriction on the right of free establishment, does Article 56 of the Treaty or the concept of "public interest" apply, and if so in what conditions, in circumstances concerning the principle of equivalence of the conditions for taking up and pursuing activities as self-employed persons, and does the margin of discretion conferred on the Member States fall to be reviewed therefore by the Community judicature or by the national courts, and in the latter case on what criteria of interpretation?

3. If the requirement set out at the beginning of the first question is considered to be a measure of equivalent effect, is it incompatible with the free movement of goods or can it be considered to be a restriction which is lawful by virtue of Article 36 of the Treaty or the case-law of the Court of Justice concerning the "rule of reason"?'

The questions concern the interpretation of Articles 3(c), 5, 6, 30, 36, 52, 53, 56, 85 and 102(1) of the Treaty. For the replies I shall consider those articles in numerical order. However, some preliminary remarks fall to be made as regards the admissibility of the questions.

III — Admissibility of the questions

7. In its observations the Commission raises the issue of the admissibility of the questions, in so far as Decree 54/1992, the contested decree, has been annulled by another decision of the courts which has the force of *res judicata*. The national court informed the Court of Justice by letter of 15 June 1994 that both Decree 54/1992 and Decree 36/1991 had been annulled by decision of the Chamber for Contentious Administrative Affairs of the Tribunal Superior de Justicia de Canarias of Santa Cruz de Tenerife of 21 January 1994. Since the action in the course of which the questions referred for a preliminary ruling in this case arose sought precisely the annulment of Decree 54/1992, the plaintiff in the main action, referring to the decision of annulment of 21 January 1994, pointed out in a letter sent by it to the court of reference on 8 June 1991 that there was no longer any reason to refer the matter to the Court of Justice, and it requested that the reference for a preliminary ruling be withdrawn. One may therefore ask whether the main proceedings have not been deprived of their purpose, and therefore whether it is still necessary to obtain a preliminary ruling in the context of the actual dispute.

8. In response to questions put to it by the Court of Justice in that regard the national court indicated in letters dated 8 July 1994 and 7 March 1995 that it wished to maintain its request for a preliminary ruling. It explained, in the first letter, that that was because the preliminary ruling requested was of major significance not only for the Canary Islands but for the whole of the national territory. In the second letter, it expressly confirmed that the dispute had not been deprived of its subject-matter. It argued in particular that the annulment was the subject of an appeal pending before the Spanish Tribunal Supremo and that the annulment was based on grounds of national law, and not the rules of Community law with which the question referred for a preliminary ruling is concerned. It added that where judgments conflict an action to harmonize them could be brought before the Tribunal Supremo.

9. The considerations which led the national court to maintain its reference have not attenuated the doubts expressed above, and they lead me to express certain reservations as to the jurisdiction of the Court of Justice in this matter. It has been consistently held that Article 177 of the Treaty lays down the framework for close cooperation between national courts and the Court of Justice based on a division of functions, whereby the Court supplies the national court with the elements of interpretation of Community law which are necessary for it in order to decide the dispute before it. [5] Consequently, it should be stressed that according to the case-law 'it is for the national courts alone, before which the proceedings are pending and which must assume responsibility for

5 — See, *inter alia*, Case 338/85 *Pardini* [1988] ECR 2041, paragraph 8, and Case 126/80 *Salonia* [1981] ECR 1563, paragraph 6.

the judgments to be given, to determine, having regard to the particular features of each case, both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they refer to the Court'. [6]

10. Although the need for and the relevance of the questions referred for a preliminary ruling are very largely a matter for the national court, the Court of Justice 'must be in a position to make any assessment inherent in the performance of its own duties in particular in order to determine, as all courts must, whether it has jurisdiction'. [7] Although under Article 177 of the Treaty it is for the national court to ascertain the need for a preliminary ruling, 'it is nevertheless for the Court of Justice, in order to confirm its own jurisdiction, to examine, where necessary, the conditions in which the case has been referred to it by the national court'. [8] In order to enable the Court to rule on its own jurisdiction and thus fulfil its task in accordance with the Treaty, it is essential for the national court to state and explain its reasons for considering that a ruling on the questions is necessary to enable it to give judgment. [9] It should also be emphasized that, as stated in the case-law, the Court of Justice has no jurisdiction to give a preliminary ruling when the proceedings before the national court have already been terminated or annulled or have lost their purpose. [10]

11. In the light of that case-law and in view of the fact that, first, the contested decree was annulled by another court decision and, second, that following that decision the plaintiff requested the national court to withdraw the preliminary question, the replies given by that court in the letters referred to above do not provide the Court of Justice with all the information necessary in order to enable it to verify its own jurisdiction. In particular, the replies given by the national court do not make it absolutely clear what precisely is the purpose to be served, in the context of the main proceedings, by obtaining a preliminary ruling. As regards the first reason given by the national court for maintaining the preliminary reference, it is sufficient to note that it is settled case-law that Article 177 of the Treaty does not make it the task of the Court of Justice to give advisory opinions on general or hypothetical questions, but restricts its jurisdiction to answering questions objectively necessary

6 — Case C-67/91 *Asociación Española de Banca Privada and Others* [1992] ECR I-4785, paragraphs 25 and 26; Case C-332/92, C-333/92 and C-335/92 *Eurico Italia and Others* [1994] ECR I-711, paragraph 17; C-369/89 *Piageme and Others* [1991] ECR I-2971, paragraph 10; C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003, paragraph 19; C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraph 15; C-62/93 *BP Supergas* [1995] ECR I-1883, paragraph 10; and C-422/93, C-423/93 and C-424/93 *Zabala Erasun and Others* [1995] ECR I-1567, paragraph 14.

7 — See *Zabala Erasun*, cited above (paragraph 16), and Case 244/80 *Foglia* [1981] ECR 3045, paragraph 19.

8 — See *Zabala Erasun* (paragraph 17) and *Foglia* (paragraph 21), cited above.

9 — See *Foglia* (paragraph 17) and *Lourenço Dias* (paragraph 19). See also the judgment in Joined Cases 98/85, 162/85 and 258/85 *Bertini* [1986] ECR 1885, paragraph 6.

10 — See *Pardini* (paragraph 11) and *Zabala Erasun* (paragraph 30). See also Case C-3/90 *Bernini* [1992] ECR I-1071, paragraph 11.

for the effective resolution of an actual dispute. [11]

12. As regards the other grounds it should be noted that the letters received from the national court do not indicate the consequences for third parties of the annulment of a decree by the courts, nor whether the appeal against the judgment of the Tribunal Superior de Justicia de Santa Cruz was in fact brought within the appropriate time-limits. It is also difficult to see what significance should be attached, as regards the dispute in question, to the fact that the reasons for which the contested decree was annulled have nothing to do with the questions of Community law raised in the context of these proceedings, and of the possibility of bringing an action before the Tribunal Supremo for harmonization of judgments and the removal of any conflict between the two decisions.

13. Despite those doubts, and bearing in mind, first, the fact that the main proceedings are manifestly still pending since there is nothing to indicate that the plaintiff has abandoned its action, secondly, the fact that the national court expressly confirms that the case pending before it has not been deprived of its purpose, [12] and thirdly that, as the case-law shows, Article 177 of the Treaty does not permit the grounds given in an order containing a reference to be criticized, [13] I would propose that the Court reply to the substance of the questions.

IV — Substance

Articles 30 and 36 of the Treaty

14. In Questions 1(c) and 3, the national court asks whether the national provision at issue is compatible with the Treaty provisions on free movement of goods, in particular those of Article 30 of the Treaty. That article prohibits, as between Member States, quantitative restrictions on imports and all measures having an equivalent effect.

In the familiar words of the Court in *Dassonville*, all 'trading rules enacted by Member States which are capable of hindering,

11 — See *Foglia* (paragraph 18) and *Zabala Erasun* (paragraph 29).

12 — See, *a contrario*, *Zabala Erasun*, cited above, in which the Court declared that it had no jurisdiction to rule on preliminary references in cases where the national court has not ascertained whether the dispute pending before it has been annulled or not.

13 — See *Salonia*, cited above (paragraph 6).

directly or indirectly, actually or potentially, intra-Community trade' [14] are to be regarded as measures having an effect equivalent to quantitative restrictions.

15. However, the Court held in that case and in the 'Cassis de Dijon' case [15] that the legislation of an importing Member State may, even in the absence of discrimination based on the origin of the goods, be incompatible with Article 30 if it inhibits intra-Community trade without being justified by overriding considerations of public interest. In *Keck and Mithouard* [16] the Court went on to restrict the application of that case-law by drawing a distinction between

— national restrictions concerning the requirements (as to designation, form, size, weight, composition and so on) to be met by goods coming from other Member States in which they have been lawfully manufactured and marketed, and

— national rules prohibiting or restricting certain selling arrangements and which are not liable to affect intra-Community trade since they are not directed at trade within the Community.

16. As regards the first category of national provisions, the Court, referring expressly to the judgment in the 'Cassis de Dijon' case, cited above, stated that such provisions constituted measures having an equivalent effect unless they were justified by requirements of public interest. [17] As regards the second category, the Court considered that their application 'is not such as to hinder directly or indirectly, actually or potentially, trade between Member States', provided that they (a) applied to all the traders concerned operating within the national territory and (b) affected in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. [18] The Court concluded that 'provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the

14 — Case 8/74 *Procureur du Roi* v *Benoît and Gustave Dassonville* [1974] ECR 837, paragraph 5.

15 — Case 120/78 *Rewe-Zentral* [1979] ECR 649, known as 'Cassis de Dijon'.

16 — Joined Cases C-267/91 and C-268/91 [1993] ECR I-6097.

17 — Paragraph 15 of *Keck and Mithouard*, cited above.

18 — Paragraph 16 of *Keck and Mithouard*.

market or to impede access any more than it impedes the access of domestic products'. [19]

17. This case concerns national rules which merely lay down a condition for pursuing wholesale trading in a region of a Member State. As the Commission has indicated in its observations the national provision cannot, therefore, be regarded as falling within the category of national provisions which restrict selling arrangements, although it has something in common with that category in so far as it is not directed against intra-Community trade as such. Nor does it belong to the category of national provisions governing the requirements to be filled by products. In other words, the contested provision falls into neither of the two categories distinguished in *Keck and Mithouard*. In short, this case concerns neither the application of different rules depending on the origin of products nor the absence of harmonization of national laws governing the requirements applicable to the production and presentation of products. Nevertheless, the contested provision introduces a rule which might fall within the concept of a measure having equivalent effect as defined in *Dassonville*, cited above. It must therefore be ascertained whether such a national provision is such as to affect intra-Community trade.

19 — Paragraph 17 of *Keck and Mithouard*.

18. The case-law of the Court contains numerous examples of measures which the Court has judged to fall outside the provision laid down in Article 30 of the Treaty since they display no link with imports. [20] For instance, the Court conceded in *Kranz* [21] that Article 30 of the Treaty did not preclude national legislation permitting the confiscation by the State of goods sold on instalment terms with reservation of title, even if those moveable goods came from a supplier established in another Member State, to whom they belonged. In that judgment, the Court held, first, that the national rule at issue 'applies without distinction to both domestic and imported goods, and does not seek to control trade with other Member States' and went on to remark that 'the possibility that nationals of other Member States would hesitate to sell goods on instalment terms to purchasers in the Member State concerned because such goods would be liable to seizure by the collector of taxes if the purchasers failed to discharge their Netherlands tax debts is too uncertain and indirect to warrant the conclusion that a national provision authorizing such seizure is liable to hinder trade between Member States'. [22]

19. The order for reference does not discuss whether the contested provision in Decree 54/1992 affects or is capable of affecting

20 — See, *inter alia*, Case 155/80 *Oebel* [1981] ECR 1993; Case 75/81 *Blesgen* [1982] ECR 1211; Case C-23/89 *Quietlynn and Richards* [1990] ECR I-3059; and Case C-350/89 *Sheptonhurst* [1991] ECR I-2387.

21 — Case C-69/88 [1990] ECR I-583.

22 — *Krantz*, cited above (paragraph 11).

intra-Community trade. As has been said, it is apparent from the wording of the contested provision that it does not create discrimination either as regards traders pursuing their activities in national law or as regards the nature or origin of the products themselves. Likewise, the wording indicates that it is not intended to regulate intra-Community trade. As regards the restrictive effects such a measure may have in practice on the free movement of goods, there is nothing in the case-file to support the inference that there is a foreseeable and logical link between the measure at issue and trends in intra-Community trade.

20. The restrictions such a measure might entail are wholly uncertain and indirect. As I have said, the contested provision imposes a requirement linked to the pursuit of the business of distributing the product within the national territory. The effect of the requirement is to restrict the number of traders who may pursue their business in practice in the Canary Islands region. One might therefore conclude that restricting the number of traders would be liable to reduce imports to some extent. However, the causal link between restricting the number of traders and the reduction of imports is, if not hypothetical, at least wholly indirect and uncertain inasmuch as it not a necessary consequence thereof and, therefore, cannot be assumed. A national measure such as that at issue is thus not actually directed against imports of the products concerned and does not therefore appear to be liable to create obstacles to intra-Community trade.

21. Consequently, the approach to be adopted in this case should be that taken by the Court in *Peralta*, in which the Court held that Article 30 of the Treaty did not preclude the legislation of a Member State from prohibiting all vessels, regardless of the flag which they flew, from discharging harmful substances into its territorial waters or from imposing the same prohibition on the high seas only on vessels flying the national flag, and in the event of infringement from penalizing masters of vessels who were nationals of the State by suspending their professional qualification. [23] The Court acknowledged in that judgment that '... it is sufficient to observe that legislation like the legislation in question makes no distinction according to the origin of the substances transported, that its purpose is not to regulate trade in goods with other Member States and that the restrictive effects which it might have on the free movement of goods are too uncertain and indirect for the obligation which it lays down to be regarded as being of a nature to hinder trade between Member States'. [24]

23 — Case C-379/92 *Peralta* [1994] ECR I-3453.

24 — Paragraph 24 of *Peralta*. See also Case C-93/92 *CMC Motorradcenter* [1993] ECR I-5009, paragraph 12.

22. Another issue raised by the question referred for a preliminary ruling is whether the contested provision may, if it is to be described as a measure having an equivalent effect to a quantitative restriction, be regarded as a lawful restriction either under Article 36 of the Treaty or in accordance with the line of judgments handed down by the Court since the 'Cassis de Dijon' case, cited above, which permits restrictions justified by overriding considerations of public interest. In view of the conclusion I have drawn from the considerations set out above it is not necessary to address that issue.

23. In any event, if the contested national provision were to be regarded as falling within the scope of Article 30 of the Treaty, the requirement that at least four islands in the Canaries Archipelago be supplied may be justified on grounds of public security. The provision, which includes that requirement among the rules regulating the distribution of petroleum products, serves a real need to ensure regular supplies of petroleum products to all the islands in the archipelago, in particular the smaller ones, as is apparent from both the order containing the reference and the Commission's observations. The Court has acknowledged that ensuring adequate supplies of petroleum products in a Member State which does not have its own oil may justify the adoption of restrictions. In *Campus Oil and Others*, [25] the Court held that 'a Member State which is totally or almost totally dependent on imports for its supplies of petroleum products may rely on grounds of public security within the meaning of Article 36 of the Treaty for the purpose of requiring importers to cover a certain proportion of their needs by purchases from a refinery situated in its territory at prices fixed by the competent minister on the basis of the costs incurred in the operation of that refinery, if the production of the refinery cannot be freely disposed of at competitive prices on the market concerned'. It has also held that a country's special geopolitical situation might make it 'essential to adopt measures designed to ensure that the country has a regular supply of crude oil and petroleum products'. [26] Consequently, the requirement imposed by the contested provision may be justified on grounds of public interest, and even by reasons connected with public security.

24. To conclude, I consider that the requirement that traders in petroleum products in the Canary Islands must supply at least four islands in the archipelago does not constitute a breach of Article 30 of the Treaty, in the first place inasmuch as it has no foreseeable restrictive effect on intra-Community trade and in the second place inasmuch as, even if such effects existed, the provision is justified because it is necessary to ensure supplies of petroleum products in that region.

25 — Case 72/83 [1984] ECR 2727, paragraph 51.

26 — Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, paragraph 47.

Articles 3(c), 52, 53 and 56 of the Treaty

25. The national court also asks whether the requirement that a minimum number of islands be supplied is compatible with Articles 3(c), 52 and 53 of the Treaty. As to that, it should be noted in the first place that Articles 52 and 53 implement the fundamental principle laid down in Article 3(c) of the Treaty, which provides that the activities of the Community, within the meaning of Article 2, are to include the abolition of obstacles to freedom of movement for persons. [27] It also notes that Articles 52 and 53 represent two aspects of the rule concerning the prohibition of restrictions on the right of establishment of nationals of a Member State in the territory of another Member State. The difference between those articles lies solely in the fact that the first requires the abolition of existing restrictions, whereas Article 53 prohibits the introduction of new ones. That distinction between the two articles is irrelevant for the purposes of answering the question referred for a preliminary ruling.

26. According to the case-law, 'the rules of the EEC Treaty on freedom of establishment and the provisions of secondary legislation (...) may be relied on only by a national of a Member State of the Community who seeks to establish himself in the territory of another Member State or by a national of the Member State in question who finds himself in a situation which is connected with any of the situations contemplated by Community law'. [28] As the Court stated in *Bekaert*, [29] 'the absence of any element going beyond a purely national setting in a given case therefore means, in matters of freedom of establishment, that the provisions of Community law are not applicable to such a situation'. It follows that the Treaty provisions on the freedom of establishment and, more generally, on the free movement of persons cannot be applied to situations which are wholly internal to a Member State, that is to say, where all aspects of the activity concerned have to do with a single Member State. [30]

27. That also applies in this case, which is confined to the territory of a single Member State. There is nothing in the case-file to indicate any link whatsoever with facts liable to justify the application of Community law. It is also indicated in the file that the plaintiff was incorporated under Spanish law and that

27 — See Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 8; Case C-370/90 *Singh* [1992] ECR I-4265, paragraph 15, and Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 29.

28 — Case C-147/91 *Ferrer Laderer* [1992] ECR I-4097, paragraph 7. See also Case 115/78 *Knoors* [1979] ECR 399, paragraph 24; Case C-61/89 *Bouchoucha* [1990] ECR I-3551, paragraph 13; and *Kraus*, cited above (paragraph 15).

29 — Case 204/87 [1988] ECR 2029, paragraph 12. See also Joined Cases C-54/88, C-91/88 and C-14/89 *Nino and Others* [1990] ECR I-3537, paragraph 11.

30 — See the case-law on Article 48, for instance Joined Cases 35/82 and 36/82 *Morson and Jhanjan* [1982] ECR 3723, paragraph 16; Case 332/90 *Steen* [1992] ECR I-341, paragraphs 5, 9 and 10; Case 44/84 *Hurd* [1986] ECR 29, paragraphs 55 and 56; and the abovementioned judgments in *Kraus* (paragraphs 15 and 16) and *Peralta* (paragraph 27). See also Case 175/78 *Saunders* [1979] ECR 1129, paragraph 12.

it has its registered office in Spain (Madrid). [31] It also pursues its business in that country. Moreover, as is indicated in the order for reference, it alleges in its action not that the contested provision affects its right of establishment in another Member State, but that the requirement to supply at least four islands in the Canaries Archipelago prevents it from pursuing its business in another region of the Member State to which it belongs. Consequently, its situation is entirely regulated by domestic law and it cannot rely on Articles 52 and 53, which are not applicable in the circumstances.

28. In any event, and according to the findings of the national court itself in the order, the contested requirement to supply at least four islands in the archipelago in order to be allowed to trade in wholesale petroleum products in the Canary Islands is compatible with those articles inasmuch as it does not create discrimination on grounds of nationality, since it affects both Spanish and other nationals under the same conditions. As we know, 'Article 52 is intended to ensure that all nationals of Member States who establish themselves in another Member State, even if that establishment is only secondary, for the purpose of pursuing activities there as a self-employed person receive the same treatment as nationals of that State and it prohibits, as a restriction on freedom of establishment, any discrimination on grounds of nationality'. [32] Consequently, as has been acknowledged in the judgments of the Court, Member States are at liberty, provided that they observe the principle of equal treatment, 'in the case of commercial activities in the distribution sector, for which there are no common rules ... to adopt rules governing wholesale trade or retail trade'. [33]

29. Of course, the Court has recently acknowledged that even a measure applicable without discrimination on grounds of nationality may be incompatible with Articles 48 and 52 if it hampers or renders less attractive the exercise by Community nationals of the fundamental freedoms guaranteed by the Treaty. [34] Such restrictions cannot be regarded as compatible with the free movement of persons unless they pursue an aim compatible with the Treaty and are justified by overriding considerations of public interest; it is also necessary, however, for that consideration to be one which is not already guaranteed by the rules in force in the Member State in which the Community national is established and that the same result cannot be achieved by means of less restrictive rules. [35]

30. Thus, even if the contested provision creates difficulties regarding freedom of

31 — On the criteria laid down in Article 58 of the Treaty the plaintiff is accordingly to be regarded as a Spanish company.

32 — *Bekaert*, paragraph 11. See also Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 14; Case 221/85 *Commission* v *Belgium* [1987] ECR 719, paragraph 10; and Case 198/86 *Conradi and Others* [1987] ECR 4469, paragraph 9.

33 — *Conradi*, paragraph 10.

34 — *Kraus*, paragraph 32.

35 — *Kraus*, paragraph 32. See also Case C-106/91 *Ramrath* [1992] ECR I-3351, paragraphs 29 to 32.

establishment in the Canary Islands for undertakings of other Member States in the petroleum products business, it cannot be regarded as incompatible with Article 52 in the light of the considerations set out above. The provision is justified, in substance, on grounds of public security, in particular by the fact that it is necessary to ensure adequate supplies of petroleum products in the region concerned.

Articles 5 and 85 of the Treaty

31. Question 1(b) asks in essence whether a national provision such as that at issue is compatible with the obligations imposed on Member States by the combined provisions of Articles 5 and 85 of the Treaty. The first observation that calls for is that the order for reference provides no indication whatsoever of the circumstances of fact in which that question arose, which gives rise to doubts as to the admissibility of the question over and above those which I have already described. It should be remembered that the Court has emphasized in its decisions that an interpretation of Community law which is of use to the national court can only be reached on the basis of a description of the facts relevant to the questions asked by the national court. It has also pointed out that those requirements apply especially in the field of competition, where the circumstances of fact and of law are frequently complex. [36]

32. Next, it should be noted that Article 85 of the Treaty concerns solely the conduct of undertakings and not legislation or regulations adopted by the Member States. The conduct of the latter can fall within the scope of the Treaty provisions on competition only in clearly defined cases. Those cases are described in Articles 90 and 92 of the Treaty, the requirements for the application of which are manifestly not met in this instance. However, as the Court has acknowledged in its decisions, Articles 85 and 86, read in conjunction with Article 5, require the Member States to refrain from adopting or maintaining in force measures capable of depriving the competition rules applicable to undertakings of their effectiveness. [37]

33. According to those decisions, that may be the case where a Member State either requires or favours the adoption of agreements, decisions or concerted practices con-

36 — See Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraphs 6 and 7, and the orders in Case C-157/92 *Banchero* [1993] ECR I-1085, paragraphs 5 and 6, and Case C-386/92 *Monin Automobiles* [1993] ECR I-2049, paragraphs 7 and 8.

37 — See, *inter alia*, the three judgments of 17 November 1993 in Case C-2/91 *Meng* [1993] ECR I-5751, paragraph 14, Case C-185/91 *Reiff* [1993] ECR I-5801, paragraph 14, and Case C-245/91 *Ohra Schadeverzekeringen* [1993] ECR I-5851, paragraph 10. See also the judgments in Case 13/77 *GB-Inno-BM* [1977] ECR 2115, paragraphs 32, 33 and 42; Case 267/86 *Van Eycke* [1988] ECR 4769, paragraph 16; Case C-41/90 *Hofner and Elser* [1991] ECR I-1979, paragraphs 26 and 27; Case C-60/91 *Batista Morais* [1992] ECR I-2085, paragraph 11, and the judgment in *Peralta*, cited above.

trary to Article 85 or reinforces their effects or deprives its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere. [38] What emerges from those decisions is that for the combined provisions of Article 85 and 5 to be applicable in the Member States, it is necessary for there to be:

(a) an agreement, decision or concerted practice contrary to Article 85(1),

(b) a national provision which requires, favours or encourages the adoption of such agreements.

34. Those conditions are not met in this case. There is nothing in the order for reference to indicate the existence of agreements, decisions or concerted practices in the sector in question prior to the entry into force of the contested legislation. Furthermore, neither that order nor the observations submitted to the Court show that the contested provision sought to require or favour the conclusion of agreements or the implementation of new practices. On the contrary, the contested provision is justified on grounds of public security. As the Commission pointed out in its observations, there has been no evidence of conduct incompatible with the Community rules on competition. Consequently, the combined provisions of Articles 85 and 5 of the Treaty do not preclude national provisions such as that at issue, which does not reinforce the effects of an existing agreement and neither requires nor favours conduct restrictive of competition.

35. The contested provision might be considered to hinder competition because it restricts the number of wholesale traders in petroleum products in the Canary Islands by excluding those who are not technically or financially in a position to supply at least four islands. However, apart from the fact that, as I have said, the provision is justified on grounds concerning the need to guarantee energy supplies for the archipelago, the provision in Article 85(1) of the Treaty can only apply if the restrictive practices resulting from a national provision are capable of affecting trade between Member States. [39] There is nothing in the case-file to indicate that trade between Member States has been prejudiced in this instance.

36. Consequently, the reply to the question should be that a national provision such as that at issue, which requires petroleum product suppliers in an island region to supply a minimum number of islands, is compatible

38 — See the judgments cited in the preceding footnote.

39 — See *Batista Morais*, cited above, paragraph 12.

with the obligations imposed on the Member States by the combined provisions of Articles 5 and 85 of the EC Treaty.

Article 102(1) of the Treaty

37. Article 102(1) provides that 'where there is a reason to fear that the adoption or amendment of a provision laid down by law, regulation or administrative action may cause distortion within the meaning of Article 101, a Member State desiring to proceed therewith shall consult the Commission. After consulting the Member States, the Commission shall recommend to the States concerned such measures as may be appropriate to avoid the distortion in question.' That provision, which appears in the chapter on the approximation of laws, complements the provisions for adjustment contained in Article 101 of the Treaty by a preventive procedure designed to ensure that differences between national laws are not exacerbated, in order to prevent distortion of competition within the common market.

The procedure laid down by that provision requires the Member State concerned to consult the Commission. It is for the Member State seeking to adopt a measure to initiate such consultation and failure to do so may be regarded as a breach of the Treaty under Article 169. Accordingly, the national courts will not have jurisdiction to examine a national provision in the light of that article.

38. It should also be noted, in this context, that in the famous judgment in *Costa* v *ENEL* [40] the Court confirmed that Article 102 was not directly applicable because it did not contain provisions capable of giving rise to rights for individuals which the national courts must protect. More particularly, the Court held in that judgment that 'by virtue of this provision, Member States have limited their freedom of initiative by agreeing to submit to an appropriate procedure of consultation. By binding themselves unambiguously to prior consultation with the Commission in all those cases where their projected legislation might create a risk, however slight, of a possible distortion, the States have undertaken an obligation to the Community which binds them as States, but which does not create individual rights which national courts must protect. For its part, the Commission is bound to ensure respect for the provisions of this article, but this obligation does not give individuals the right to allege, within the framework of Community law and by means of Article 177, either failure by the State concerned to fulfil any of its obligations or breach of duty on the part of the Commission.'

I would also point out, should that still be necessary, that there is nothing in the case-file to show that the contested provision is

40 — Case 6/64 *Costa* v *ENEL* [1964] ECR 585.

capable of distorting competition within the common market. On the contrary, the Commission notes in its observations that the information available to it does not show that the provision has given rise to distortion.

V — Conclusion

39. In the light of the above, I propose that the Court reply to the question referred by the Tribunal Superior de Justicia de Canarias as follows:

Articles 3(c), 30, 52, 53 and 85 of the EC Treaty, read in conjunction with Articles 5 and 102(1), do not preclude a Member State from imposing a statutory requirement that suppliers of petroleum products to island regions of that Member State supply a minimum number of islands.