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North Sea Oil and EEC Law

Introduction

While, as the European Commission acknowledges, Member States retain sovereignty over natural resources such as hydrocarbons, they must still respect the fundamental rules of the EEC Treaty.[1] Indeed, the common oil policy advocated by the Community institutions assumes that a solution to the Community's oil problems should be sought within the framework of these rules.[2] However, application of these rules raises several complex issues for the United Kingdom.

Licensing

The Treaty of Accession tackled only one such issue. At that time Regulation 4 of the Petroleum (Production) Regulations 1964[3] required that applicants for a North Sea exploration or production license be United Kingdom citizens or companies incorporated in the United Kingdom. This requirement was incompatible with Articles 52–63 of the EEC Treaty, which deal with freedom of establishment and freedom to provide services, and, more particularly, with Directives 64/428[4] and 69/82,[5] which require equality of treatment for companies wishing to explore for or extract oil as licence-holders in a Member State other than their own or to carry on such activity on behalf of licence-holders. Accordingly, the Treaty of Accession[6] stipulated that the discriminatory clause in the Petroleum (Production) Regulations be abolished. This was eventually effected by Regulation 4 of

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[1]Commission Replies to Written Question 489/73 by Lord O'Hagen (O.J. 1974, C74/3), Oral Questions by Mr. Premoli (E.P. Debs No. 189, 129, 9 April 1975) and Written Question 723/78 by Mrs. Ewing (O.J. 1979, C185/1).

[2]*See, e.g.*, Council Resolution of December, 1974 (J.O. 1975, C153/2).

[3]S.I. 1964, No. 78.

[4]O.J. 1965, 1871.

[5]O.J. 1969, L68/4.

[6]Annex I (III)B.3.

the Petroleum (Production) Regulations 1976,[7] which states that any person may apply for a licence.

On the other hand, the right of the Secretary of State to revoke a licence where the company concerned ceases to have its central management and control in the United Kingdom has been retained in the new Regulations.[8] The European Commission did contact the government about this provision for revocation, but the latter replied that no discrimination on grounds of nationality was involved and that the provision was necessary for taxation purposes and to ensure that staff in the company's United Kingdom office would be able to take authoritative decisions, especially in emergencies.[9] Since then, the Commission has apparently not pressed the matter.

Moreover, the discretion enjoyed by the government as regards the grant of licences provides opportunities for discrimination. For example, one of the factors taken into account by the government in the exercise of its discretion is the extent of the contribution which the applicant has made or is planning to make to the economy of the United Kingdom.[10] Presumably, a British company would be able to satisfy this test more easily than a company from another Member State. As early as 1968, the Commission recognised the existence of such problems in connexion with licences granted in the Six and advocated the introduction of objective criteria for the grant of such licences.[11] However, no concrete proposal for an appropriate Community enactment has been presented to the Council of Ministers.

Nevertheless, the case law of the European Court may have important implications in this area. In *Van Haaster*[12] in 1974 the Court was concerned with the legality of a requirement in Dutch legislation that hyacinth growers must possess a licence. In the view of the Court, while this legislation was directed towards the production of hyacinths, it might still have effects on their marketing and thus be incompatible with the principle of the free movement of goods. However, assessment of the legality of these effects depended on the common organisation in hyacinths established by Regulation 234/68.[13] Since the production licensing system was incompatible with this organisation, it was prohibited.[14] It appeared, then, that it was only because of this Regulation and thus the existence of a common organisation in the sector concerned that the system was prohibited.

However, the decisive significance of a common organisation was less clear in *Kramer*[15] two years later. This ruling was concerned with national

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[7]S.I. 1976, No. 1129.
[8]Sch. 5, cl. 40(2)(g) and Sch. 7, cl. 21(f).
[9]Dept. of Energy Press Notice, 14 March, 1979.
[10]Dept. of Energy Press Notice, 2 August, 1978.
[11]First Guidelines for a Community Energy Policy, Bull. E.C. 1968, Supp. 12.
[12]Case 190/73 (1974) E.C.R. 1123.
[13]O.J. 1968, L55/1.
[14](1974) E.C.R. 1123, 1133.
[15]Cases 3, 4 and 6/76 (1976) E.C.R. 1279.

quotas on fish catches. According to the Court, the question whether a measure limiting agricultural production was prohibited or not depended on the global system established by the basic community rules in the particular sector and on the objectives of these rules. Since the quotas were found to be compatible with the objectives of the Community fishery policy, they were not prohibited.[16] This ruling did not explain what significance was attached to the existence of a common organisation. However, the remarks of Advocate-General Trabucchi are notable. He maintained that the national measures concerned would be permissible if they were taken with a view to attainment of an objective of the Community policy. Apparently, then, the existence of these objectives was, in his view, decisive as the ground for the measures in question being found permissible.[17] His reasoning, therefore, suggests that, in the absence of a common organisation, the production quotas might have been prohibited by Article 34 of the Treaty, which covers measures having equivalent effect to quantitative restrictions on exports to other Member States.

Partial confirmation of this view was supplied in *Sergius Oebel*[18] in July, 1981. In this case the Court was concerned with Germany which prohibited work being carried out in bakeries between 10:00 P.M. and 5:45 A.M. and thus might restrict production. The Court ruled that national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production were prohibited by Article 34. Therefore, insofar as the United Kingdom licensing system is employed to favour companies which will refine their North Sea production in the United Kingdom or at least market their crude oil in this country, there will be an infringement of Article 34. However, it does not appear that the Commission has yet raised this question with the government.

On the other hand, the Commission has apparently made representations regarding the compatibility of another aspect of the licensing system with Article 34. Clause 28 (1) of the Model Clauses for North Sea licences annexed to the Petroleum (Production) Regulations 1976 requires that all oil extracted from the United Kingdom Continental Shelf be landed in the United Kingdom. This requirement is said to be designed to ensure that domestic oil needs are as far as possible met from North Sea reserves and that the United Kingdom gains the greatest possible balance of payments benefit from the exploitation of these reserves. Most commentators feel that, inasmuch as this requirement makes the export of North Sea oil to another Member State less practicable and more expensive, it does constitute an infringement of Article 34.[19] Accordingly, the Commission has con-

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[16] *Id.* 1313.
[17] *Id.* 1325.
[18] Case 17/81 (not yet reported).
[19] *See, e.g.*, K. CHAPMAN, NORTH SEA OIL AND GAS (London, 1976), at 212.

tacted the government on this issue.[20] It is possible that as a result of such informal representations from the Commission, the government has become more willing to grant a waiver from this requirement as permitted by Clause 28 (2). Certainly, in April, 1978 such a waiver was granted to the West German company, Deminex, so that it could export half of its share of crude oil extracted from the Thistle Field directly to the Federal Republic. Nevertheless, oil companies, aware of the government's preference for North Sea oil to be landed in the United Kingdom, may be reluctant to seek many such favours for fear of prejudicing any future licence applications they may make, given that licences are only granted at the discretion of the government.

In fact, however, even if the government were to grant waivers automatically, this would not necessarily save the landing requirement from the Article 34 prohibition. In the *International Fruit Company*[21] case in 1971 the European Court ruled that a national provision which required, even purely as a formality, an import or export licence or any similar procedure was prohibited.[22] As the Court insisted in *Dassonville*,[23] the prohibition covers all trading rules enacted by Member States which are capable, directly or indirectly, actually or potentially, of hindering intra-Community trade.[24] The requirement that North Sea production may only be exported directly where a waiver is granted would seem to fall with the Article 34 prohibition as interpreted by the Court. Therefore, the Commission could, it seems, institute proceedings against the United Kingdom under Article 169 of the Treaty. Provided specified procedural conditions are met, this provision empowers the Commission to bring a Member State in breach of Community law before the Court.

The fact that the Commission has not yet taken such action may perhaps be attributable to its satisfaction that, in practice, waivers are granted with sufficient readiness to avoid any actual restriction of exports to other Member States. Alternatively, the Commission may have been influenced by certain legal difficulties. In particular, it should be noted that the landing requirement is not contained in the Regulations themselves but in the model clauses for licences. Thus the legal effect of this requirement derives from contract rather than legislation. In these circumstances, it is not clear that the requirement constitutes a measure having equivalent to a quantitative restriction for the purposes of Article 34. It is true that in a line of cases following *Deutsche Grammaphon* the Court recognised that companies seeking to enforce contractual rights to industrial property might infringe Articles 30–34.[25] However, the ultimate basis of these rights was legislative,

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[20]*See* the Reply of Commissioner Davignon to an Oral Question (E.P. Debs No. 214, 77, 10 March 1977).

[21]Cases 51-54/71 (1971) E.C.R. 1107.

[22]*Id.* 1116.

[23]Case 8/74 (1974) E.C.R. 837.

[24]*Id.* 852.

[25]Case 78/70 (1971) E.C.R. 487.

and the action of the companies concerned in reality constituted an attempt to secure enforcement of a legislative prohibition on infringement of industrial property rights.[26] The same could not be said of the landing requirement. Moreover, since the licences may be treated as setting out proprietary rights over oil extracted from the North Sea, the government may argue that their terms are protected by Article 222, according to which none of the provisions of the Treaty are to prejudice national law governing property ownership. Nevertheless, the Court has always insisted that while this provision may safeguard the existence or "specific subject matter" of property rights, it does not permit them to be exercised in disregard of the rules of the common market.[27] A final source of uncertainty arises from doubts as to the applicability of the Treaty to the continental shelf[28]—a matter which has not yet been squarely faced by the Court. In view of these three questions, the Commission may feel that the legal situation is insufficiently clear to justify institution of formal proceedings in such a politically controversial area.[29] Indeed, Article 169 requires that the Commission "consider" a Member State to be in breach of Community law before the procedure contained in this provision is initiated. It is possible that the Commission does not believe this requirement to be met.

Interest Relief Grant Scheme

In fact, the only element of the United Kingdom's North Sea oil policy in respect of which the Commission has taken formal action was the interest relief grant scheme. This scheme, operated under section 8 of the Industry Act 1972, allowed for the government to pay 3 percent for up to eight years of the interest on loans needed by North Sea operators for the purchase of equipment or services from companies in the United Kingdom. The Commission felt that, as it stood, this scheme was incompatible with the common market under Article 92(1) of the Treaty, which deals with state aids. However, if the aid were made available in the case of purchases from any company in the Community, it would assist in the development of the oil industry in the Community—a principal objective of the common oil policy advocated by the Community institutions[30]—and could, therefore, be permitted. Since the government proved unwilling to extend the scope of the scheme in this way, the Commission issued a Decision on May 1, 1979 requiring the government to cease offering grants for contracts two months

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[26] *Cf.* F.G. Jacobs, *Industrial Property and the EEC Treaty—A Reply*, 24 I.C.L.Q. (1975) 643–58, 646.

[27] *See, e.g.*, Cases 56 and 58/64 *Consten and Grundig* (1966) E.C.R. 299, 345.

[28] The Commission's view on this matter is given in the Memorandum on the Applicability of the E.E.C. Treaty to the Continental Shelf, SEC (70) 3095 final. *See also* Woodliffe, *North Sea Oil and Gas—The European Community Connection*, 12 C.M.L.R. (1975) 7-26.

[29] The Commission has generally proved reluctant to employ the Article 169 procedure in such areas. *See* Evans, *The Enforcement Procedure of Article 169 EEC: Commission Discretion*, 4 E.L. REV. (1979) 442–56.

[30] *Supra* note 11.

after that date.[31] The scheme was duly terminated.[32] However, it may be doubted whether the government would have been willing to put an end to the scheme, had it not been committed generally to reduction of public expenditure. Besides, the government apparently takes advantage of the discretionary nature of the system whereby licences are granted so as to put pressure on applicants to favour the purchase of British goods and services.[33] Moreover, the Offshore Supplies Office is in a position to operate as an instrument for ensuring that such purchases are favoured.[34] Therefore, the government may have been satisfied that the interests of British suppliers could be safeguarded without the expenditure entailed by the interest relief grant scheme. Accordingly, the Commission has apparently taken up these possible infringements of the freedom to provide services and the free movement of goods with the government[35] but has not yet pressed the matter.

British National Oil Corporation

The most serious problems, however, arise in relation to the British National Oil Corporation, which was established under the Petroleum and Submarine Pipelines Act 1975 to ensure state participation in the exploitation of the North Sea reserves.[36] The tasks of the Corporation are set out in section 2(1) of this Act. Under section 2(1)(e) the Corporation is to do anything required of it to give effect to participation agreements entered into by the Secretary of State with companies operating in the North Sea. As far as the first four licensing rounds were concerned, such agreements resulted from the renegotiation of existing licences. The new terms granted BNOC an option to purchase 51 percent of the oil produced under each licence. In the case of companies with United Kingdom refineries, sale back arrangements were included on condition that the company concerned refined the oil in question in the United Kingdom.[37] In some cases, however, oil sold back in this way could be exported, provided that it was substituted with an equivalent quantity of imported oil.[38] In the fifth and sixth licensing rounds the participation agreements entailed BNOC becoming a full co-

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[31] *See* Commission Reply to Written Question 723/78 by Mrs. Ewing (O.J. 1979, C185/1).

[32] *See* the Reply of Mr. Gray to a Written Question by Mr. Wilson (974 H.C. Deb. 5s.c. 207, November 21, 1979).

[33] *See* FIRST REPORT FROM THE COMMITTEE OF PUBLIC ACCOUNTS, NORTH SEA OIL AND GAS, 1972–73, HC 122, 53.

[34] *See* the Memorandum of Understanding of the United Kingdom Offshore Operators Association, annexed to an Offshore Supplies Office Press Notice, November 6, 1975.

[35] Commission Reply to Written Question 280/77 (O.J. 1978, 277/1).

[36] *United Kingdom Oil and Gas Policy*, Cmnd. 5696. On BNOC *see generally* Woodliffe, *State Participation in the Development of United Kingdom Petroleum Reserves*, (1977) *Public Law* 249-71.

[37] *See, e.g.*, the agreement concluded with Mobil (Dep't of Energy Press Notice, April 6, 1978).

[38] *See, e.g.*, the agreement concluded with Chevron (Dep't of Energy Press Notice, February 16, 1978).

licensee and enjoying proprietary rights over 51 percent of the oil produced,[39] though in the seventh round the present government decided that the Corporation should merely have an option to purchase 51 percent of the oil.[40] Secondly, under Section 2(1)(d) of the Act the Corporation is to perform services required of it by any Minister of the Crown. In particular, the Corporation is required to dispose of the 12½ percent of a licencee's production which the government may take as royalty.[41] Thirdly, the Corporation was empowered under Section 2(1)(a) to explore for and produce oil on its own account and has, accordingly, become sole licensee in certain fields such as Clyde and Caber. Finally, under section 2(1)(c) the Corporation is empowered to trade in oil with commercial companies and may thus sell oil not covered by sale back arrangements and purchase oil additional to that obtained through arrangements for participation or the payment of royalty in kind. As a result, the Corporation handles between a half and two-thirds of total production from the United Kingdom continental shelf.

In carrying out the relevant operations the Corporation works closely with the government. In particular, it is apparently the government which decides whether the conditions for sale back are met, and where the Corporation handles royalty oil it will do so on behalf of the government and in accordance with its instructions. More generally, Section 3(1) of the 1975 Act requires that in formulating plans for its general conduct the Corporation must act upon lines settled from time to time with the government, and Section 4 empowers the latter to issue any general or specific directions to the Corporation thought fit. Finally, Sections 40 *et seq.* of the Act provided for the Corporation to be financed from the National Oil Account, which was under government control, and under Section 1(3)(c) there are to be two serving civil servants on the board of the Corporation.[42] The Commission was apparently concerned that this manner of financing for the Corporation may have constituted state aid of the kind prohibited by Article 92 of the Treaty, and the present government's commitment to reducing the size of the public sector in the British economy lead to the Petroleum and Continental Shelf Bill,[43] which makes provision for the abolition of the National Oil Account. Nevertheless, the other features of the Act mentioned above remain, and these mean that the Corporation may be tightly controlled by the government. In effect, the Corporation provides an instrument through which the government may determine the destination of up to two-thirds of

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[39]Dept. of Energy Press Notice, January 5, 1977.

[40]Dept. of Energy Press Notice, July 2, 1980.

[41]The power of the government to take royalty in kind was incorporated into the licenses in accordance with Model Clause 11 in Part II of Schedule 2 to the 1975 Act. The government began to require the payment of some royalty in this way in the second half of 1979. *See* Dept. of Energy Press Notice, August 25, 1978.

[42]T.C. Daintith and G.D.M. Willoughby, A Manual of United Kingdom Oil and Gas Law (London, 1977), 18 describes this latter arrangement as unprecedented in the history of British public enterprise.

[43]House of Commons Bill 62, Sess. 1980–81.

North Sea production. Thus in 1976 the government announced that its policy was that this proportion was expected to be refined in the United Kingdom.[44]

However, several problems arise in relation to Community law. In the first place, Articles 85 and 86 of the Treaty are applicable to BNOC. The wording of both provisions covers "any undertaking." In the absence of any restrictive definition of the term, its applicability to both public and private undertakings may be assumed. Indeed, this is confirmed by Article 90 (2), which states that the rules of the Treaty, including those contained in Articles 85-94, apply to public undertakings.

As for Article 85, paragraph one of this provision prohibits agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. Clauses in participation agreements concluded in respect of the first four licensing rounds which required domestic refining or at least substitution by an equivalent quantity of imported oil as a condition for sale back of the oil purchased by the Corporation would seem to be caught by Article 85. Moreover, there is evidence that similar clauses are included in BNOC contracts for the sale of oil other than that covered by sale back arrangements.[45] These too would seem to offend against Article 85.

As for Article 86, this provision prohibits an undertaking from abusing a dominant position in a substantial part of the common market insofar as it may affect trade between Member States. The inclusion of the above-mentioned clauses in BNOC contracts for the sale of oil might amount to the imposition of unfair trading conditions as prohibited by Article 86(b). Moreover, the *Commercial Solvents*[46] and *A.B.G.*[47] rulings demonstrate that a refusal to sell may constitute an abuse for the purposes of Article 86. Certainly, if BNOC were to refuse to sell to a company unable to satisfy the sale back conditions, such an abuse would appear to be present. As for the position of BNOC, the Corporation's involvement in the disposal of over half of North Sea oil production means that it is held in a substantial part of the common market. However, it is less clear whether the Corporation's position can be described as one of dominance. *Dominance* has been defined by the European Court as the ability to act independently without taking into account to any substantial extent competitors or purchasers or suppliers.[48] In normal circumstances, the international oil market is such that purchasers refused oil by the Corporation would be able to obtain sat-

[44]Sunday Times, April 4, 1976.

[45]Thus in July 1979 the government called upon the Corporation to renegotiate certain of its contracts to prevent North Sea production being "diverted" from the United Kingdom (969 H.C. Deb. 5s.c. 910, 2 July 1979).

[46]Cases 6 and 7/73 (1974) 1 E.C.R. 223.

[47]Case 77/77 B.P. v. Commission (1978) E.C.R. 1513.

[48]*In re* Continental Can Co. Inc., (1972) C.M.L.R. D11, D27; Case 27/76 United Brands v. Commission (1978) E.C.R. 207.

isfactory supplies elsewhere, and the Corporation's competitors could thus take advantage of its refusal to supply. It does not seem possible, then, to say that the Corporation normally enjoys a dominant position. However, in the *A.B.G.* case the Commission argued that an undertaking might find itself in a dominant position as a result of structural changes in the market itself, such as those resulting from an international oil shortage.[49] This argument was rejected by Advocate-General Warner,[50] but the Court itself did not expressly consider this argument and was able to decide the case on a different point. Therefore, the possibility remains that BNOC might abuse a dominant position within the meaning of Article 86, if it imposed conditions requiring domestic refining or at least substitution by imported oil in contracts for the sale of North Sea production or refused to sell to a company unable to satisfy these conditions.

It is true that under Article 90(2) undertakings, such as BNOC, entrusted with the operation of services of general economic interest benefit from a certain relaxation of the rules of the common market. However, this provision goes on to stipulate that the development of trade must not be affected to such an extent as would be contrary to the interests of the common market. The restriction of trade in oil which may result from BNOC operations is incompatible with the interests of the Community as expressed in the common oil policy and, more particularly, is likely to exacerbate the effects of an international oil shortage within the Community as a whole. Therefore, insofar as the Corporation does infringe Article 85 or 86, the infringements will not be saved by Article 90(2).[51]

However, it is established that a public undertaking itself cannot infringe these provisions when, like the BNOC, it is not acting independently but merely carrying out government instructions.[52] Thus in March, 1977 the European Commission announced that there was no reason to believe that BNOC was not respecting the Treaty.[53] Nevertheless, the related action of the United Kingdom government may be incompatible with the Treaty, and it is this question which the Commission is currently examining.[54]

In particular, Article 37(1) requires the Member States to adjust their commercial monopolies so as to ensure that no discrimination exists between nationals of Member States regarding the conditions under which goods are procured or marketed. The conditions for sale back and similar clauses in other BNOC contracts for the sale of oil would seem to involve such discrimination, since they discriminate against companies from other

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[49](1978) E.C.R. 1513, 1520.

[50]*Id.* 1537.

[51]*See also* D. Vaughan, *U.K. and E.E.C. Anti-Trust Implications*, PLET SEMINAR, Cambridge, 1978 (Paper 24(a)).

[52]Pappalardo, *Regime de L'Article 90: Aspects Juridiques*, SEMAINE DE BRUGES 1968 (Bruges, 1969), 75–103, 86.

[53]*See* Commission Reply to an Oral Question by Lord Bessborough (E.P. Debs No. 214, 77, 10 March 1977).

[54]*See* Commission Reply to Written Question 723/78 by Mrs. Ewing (O.J. 1979, C185/1).

Member States wishing to refine the oil concerned outside the United Kingdom. However, a *commercial monopoly* is defined in Article 37(1) as a body through which a Member State, in law or in fact, directly or indirectly, supervises, determines or appreciably influences imports or exports between Member States. As the European Court stated in *Costa* v. *E.N.E.L.*,[55] this means that an undertaking must play an effective role in the import or export of a particular product.[56] In other words, the pattern of North Sea oil trade must be shown to be different from what it would have been in the absence of BNOC operations. However, in April, 1978, either because of informal representations from the Commission or oil company pressure based on the fact that a suitable refinery input mix requires the export of some North Sea production and the import of heavier crudes from elsewhere, the government announced that its policy of requiring up to two-thirds of North Sea production to be refined in the United Kingdom had been relaxed.[57] This announcement may have been associated with increased use of the substitution option in BNOC contracts. If so, the effect of BNOC operations may merely be to ensure that maximum possible use is made of North Sea production for meeting domestic refinery needs. This would presumably have occurred even in the absence of BNOC. Therefore, in normal circumstances it will not be easy to prove that the Corporation constitutes a body of the kind envisaged by Article 37(1). However, in the context of an international oil shortage the Corporation might be instructed to include no substitution option in its contracts, and the oil companies might have insufficient oil from elsewhere to take advantage of existing options. In these circumstances, the Corporation would constitute a body of the kind envisaged by Article 37(1), and the United Kingdom would be in breach of this provision. Certainly, there is evidence that the government intends to employ the Corporation to restrict North Sea oil exports in the face of such a shortage.[58] Indeed, this intention may have been one of the factors which prevented United Kingdom representatives in the Council of Ministers from approving[59] a Commission proposal of December 1977[60] which would have required that in an international oil shortage the Member States ensure that their supplies of indigenous crude oil (or petroleum products derived from it) be maintained at the average quarterly level of the previous year.

Moreover, even though Article 37(1) may be regarded as *lex specialis* in relation to "commercial monopolies," the European Court has accepted that other provisions of the Treaty may still be applicable in the case of

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[55]Case 6/64 (1964) E.C.R. 585.

[56]*Id.* 598.

[57]*See* the Reply of Dr. Mabon to a Written Question by Mr. Skeet (948 H.C. Deb. 5s.c.161-62, 19 April 1978).

[58]O.J. 1978, C15/3.

[59]TWENTY-FIFTH REPORT FROM THE SELECT COMMITTEE ON EUROPEAN LEGISLATION, 1977-78, HC 69 iv and v, 6.

[60]*See, e.g.*, Standing Committee D, 13th Sitting, June 24, 1975, col. 760.

such bodies. First, Article 34 may be infringed where the government enforces sale back conditions to prevent the sale of oil for export by BNOC, and other instructions requiring the Corporation to include similar clauses in contracts for the sale of oil not covered by sale back arrangements are measures capable of restricting intra-Community trade such as to fall within the scope of this provision. Secondly, under Article 90(1) in the case of public undertakings Member States must neither enact nor maintain in force any measure contrary to the rules of the common market. The expression "measures" in this provision is thought to cover not merely legislation and other formal legal measures but also any other governmental instruction to a public undertaking.[61] Therefore, insofar as the government requires BNOC to act in a manner which would render the latter in violation of Article 85 or 86 were it acting independently, the conduct of the government will be such as to infringe Article 90(1).

In its defence, the United Kingdom would presumably invoke Articles 90(2) and 222. As for Article 90(2), it is thought that this provision may offer a limited defence to a Member State as well as public undertakings.[62] However, for the reasons given above, this provision will not protect action taken to restrict North Sea oil exports to other Member States and is thus unlikely to avail the United Kingdom in respect of governmental action relating to BNOC any more than the Corporation itself. As for Article 222, the United Kingdom might argue that BNOC operations amount to the exercise of property rights over oil extracted under licence. However, since this provision does not permit action to be taken in disregard of the rules of the common market,[63] it is doubtful whether the United Kingdom will be able to find an adequate defence in Article 222 any more than in Article 90(2).

Conclusion

There would seem, then, to be considerable doubt as to whether the United Kingdom's North Sea oil policy accords with this country's obligations under the EEC Treaty. Article 55 imposes a duty on the Commission to ensure that Community law is respected, and a procedure for taking a Member State in breach of Community law before the Court exists in Article 169. However, the Commission apparently recognises that the application of Community law raises issues of such political sensitivity that the Article 169 procedure may not constitute the most appropriate means of ensuring its application.

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[61] A Vandencasteele, *Libre Concurrence et Intervention des Etats dans la Vie Economique*, 15 C.D.E. (1979) 540-74, 546. *See also* J. MEGRET *et al*., LE DROIT DE LA CEE (Brussels, 1972), vol. 4, 87.

[62] A. Deringer, *The Interpretation of Article 90 (2) of the E.E.C. Treaty*, 2 C.M.L. REV. (1964-65) 129-38, 138.

[63] *Supra* note 27.

Instead, the Commission has favoured informal action and resort to the less formal procedure in Article 93 in respect of the interest relief grant scheme. Informal representations to the government do seem to have enjoyed a degree of success. In addition, the Commission's proposal of December, 1977 amounted to an attempt to clarify the legal obligations of the Member States in an international shortage and to secure a legal binding commitment from their representatives in the Council to refrain from interfering with intra-Community trade in oil in the face of such a shortage. This proposal, however, failed to secure Council approval. On the other hand, it is possible that a solution may be achieved at the political level. Certainly, in April, 1980 the United Kingdom Prime Minister agreed to a European Summit Communique expressing the willingness of Member States to increase production of indigenous oil in the event of an international oil shortage.[64] It is possible that this commitment will subsequently be extended to cover the maintenance, or even the raising, of the level of exports to other Member States in the event of such a shortage. Unless this is achieved, the Commission may eventually feel compelled to initiate Article 169 proceedings against the United Kingdom.

[64]Bull. E.C. 4-1980, point 1.1.8.