OPINION OF ADVOCATE GENERAL COSMAS

delivered on 10 June 1998 *

I — Introduction

1. In the present case the Court is asked to give a ruling on a question referred to it under Article 177 of the Treaty by the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm). The question concerns the interpretation of certain provisions of Council Regulation (EC) No 3295/94 of 22 December 1994 laying down measures to prohibit the release for free circulation, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods. [1]

II — Facts and procedure

2. Adidas AG (hereinafter 'Adidas') is the holder in Sweden of the right in a trade mark for various sports articles and sports wear. On 16 February 1998, after carrying out a check, the Arlanda Tullmyndighet (Customs Office) (Stockholm) decided to suspend the release for free circulation of certain goods, because it believed that they were counterfeit goods, and at the same time informed Adidas, as the trade-mark holder. A representative of Adidas inspected the goods and established that they were counterfeit.

3. Subsequently, Adidas lodged an application with the competent national service (pursuant to Regulation No 3295/94) for action by the Customs Office under Article 3 of the regulation in order to prevent the release for free circulation of the goods. The Generaltullstyrelsen (Customs and Excise Authority) granted that application on 17 February 1998. Under Regulation No 3295/94 the disputed goods could thus be detained until 17 March 1998, after which date it was considered that the national customs authorities could not lawfully detain the goods, since Adidas, which had not availed itself of the possibility offered by Article 6 of Regulation No 3295/94, had not brought an action before a court.

4. Since Adidas did not know the identity of the declarant or the consignee of the goods, which were required in order for the undertaking to be able to bring an action against them, it requested information

* Original language: Greek.

1 — OJ 1994 L 341, p. 8.

regarding their identity from the customs authorities, pursuant to Article 6 of Regulation No 3295/94. The request was rejected because it was considered to be contrary to the provisions of the national legislation on protection of confidential information. Under that legislation, it appears that the information in question may not be disclosed.

5. Adidas then appealed to the Kammarrätten i Stockholm against the decision of the Arlanda Customs Office to refuse to disclose the identity of the consignee of the goods. Adidas claimed that that refusal meant that in practice Regulation No 3295/94 was not applicable and was therefore contrary to Community law, even though it was based on a provision of national law.

III — The question referred by the national court

6. In order to determine the extent to which the contested national provisions on the protection of confidential information are compatible with Community law, the Kammarrätten i Stockholm considered that it was necessary to refer a question on the interpretation of Regulation No 3295/94 to the Court of Justice of the European Communities. The national court refers in particular to part of the regulation under which the national customs authorities are required to inform the trade-mark holder of the identity of the declarant and/or consignee of goods which have been found to be counterfeit. The question referred by the national court reads as follows:

'Does Council Regulation (EC) No 3295/94 constitute a bar to application of rules of national law under which the identity of declarants or consignees of imported goods, which the trade-mark owner has found to be counterfeit, may not be disclosed to the trade-mark owner?'

IV — Relevant Community legislation

7. Under Article 1(1)(a) of Regulation No 3295/94, that regulation is intended to lay down the conditions under which the customs authorities must take action 'where goods suspected of being counterfeit or pirated are:

— entered for free circulation, export or re-export,

— found when checks are made on goods placed under a suspensive procedure within the meaning of Article 84(1)(a)

of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, or re-exported subject to notification'.

8. The effectiveness of the system for combating trade in counterfeit goods which has been introduced by the Community regulation depends to a large extent on the interest shown by the trade-mark holder in defending his legitimate interests. The trade-mark holder is invited to apply for the adoption of measures in respect of goods which infringe his right. Under Article 3(1) of Regulation No 3295/94, '[i]n each Member State, the holder of a right may lodge an application in writing with the competent service of the customs authority for action by the customs authorities where the goods are placed in one of the situations referred to in Article 1(1)(a)'.

9. Article 4 of Regulation No 3295/94 contains the following provisions, which are intended to make easier the task of the trade-mark holder: '[w]here, in the course of checks made under one of the customs procedures referred to in Article 1(1)(a) and before an application by the holder of the right has been lodged or approved, it appears evident to the customs office that goods are counterfeit or pirated, the customs authority may, in accordance with the rules in force in the Member States concerned, notify the holder of the right, where known, of a possible infringement thereof. The customs authority shall be authorised to suspend release of the goods or detain them for a period of three working days to enable the holder of the right to lodge an application for action in accordance with Article 3.'

10. Article 5 of Regulation No 3295/94 then provides: '[t]he decision granting the application by the holder of the right shall be forwarded immediately to the customs offices of the Member State which are liable to be concerned with the goods alleged in the application to be counterfeit or pirated.' The decision granting the application by the holder of the right concludes the first stage of the procedure. The remainder of the procedure is governed by the provisions of Chapter IV of the regulation at issue, which is entitled 'Conditions governing action by the customs authorities and by the authority competent to take a substantive decision'.

11. Article 6(1) of Regulation No 3295/94 provides: '[w]here a customs office to which the decision granting an application by the holder of a right has been forwarded pursuant to Article 5 is satisfied, after consulting the applicant where necessary, that goods placed in one of the situations referred to in Article 1(1)(a) correspond to the description of the counterfeit or pirated goods contained in that decision, it shall suspend release of the goods or detain them.

The customs office shall immediately inform the service which dealt with the application in accordance with Article 3. That service or the customs office, shall forthwith inform the declarant and the person who applied for action to be taken. *In accordance with national provisions on the protection of personal data, commercial and industrial secrecy and professional and administrative confidentiality, the customs office or the service which dealt with the application shall notify the holder of the right, at his request, of the name and address of the declarant and, if known, of those of the consignee so as to enable the holder of the right to ask the competent authorities to take a substantive decision.* [2] The customs office shall afford the applicant and the persons involved in any of the operations referred to in Article 1(1)(a) the opportunity to inspect the goods whose release has been suspended or which have been detained ...'.

V — Relevant national legislation

13. Paragraph 2 of Chapter 9 of the Sekretesslagen (Swedish Law on Protection of Confidential Information) [3] provides that the principle of protection of confidentiality applies to information obtained in the course of customs control which is not covered by the exception laid down in the third to sixth sentences of the first subparagraph of Paragraph 1 of Chapter 9 of that Law. Under the latter provision, information obtained by the Customs Office may be disclosed if it is shown that this will not result in any damage to the individual concerned.

VI — My answer to the question referred by the national court

12. Article 7(1) of Regulation No 3295/94 provides: '[i]f, within 10 working days of notification of suspension of release or of detention, the customs office referred to in Article 6(1) has not been informed that the matter has been referred to the authority competent to take a substantive decision on the case in accordance with Article 6(2) or that the duly empowered authority has adopted interim measures, the goods shall be released, provided that all the customs formalities have been complied with and the detention order has been revoked. This period may be extended by a maximum of 10 working days in appropriate cases.'

14. A. Council Regulation No 3295/94 seeks to deal with a phenomenon which is a particular threat to unhampered free trade. As is stated in the second recital in the preamble to the regulation, 'the marketing of counterfeit goods and pirated goods causes considerable injury to law-abiding manufacturers and traders and to holders of the copyright or neighbouring rights and misleads consumers ...'. By adopting this regulation, the Community legislator intended to create an effective system to deal with the abovementioned illegal activity,

2 — My emphasis.

3 — SFS 1980:100

primarily through a system of prohibitions and customs controls. It should be noted that customs controls which take place at borders are of very great importance to the Community for another reason. If a counterfeit or pirated product is not detained at the border of a Member State, the product can then circulate freely within the Community.

15. Consequently, there has been particular emphasis on the need for the customs authorities to take action where a risk arises that goods which have been manufactured in breach of intellectual property rules will be placed on the market. This action consists either in 'suspending the release for free circulation, export or re-export' of goods suspected of being counterfeit or pirated or in 'detaining such goods when they are entered for a suspensive procedure or re-exported subject to notification for as long as is necessary to enable it to be determined whether the goods are actually counterfeit or pirated'.[4] For such measures to be taken, it is necessary for the trade-mark holder to apply for action to be taken by the customs authorities and for the application to be granted. In exceptional cases and to ensure full protection, it is possible to detain goods temporarily until the trade-mark holder lodges an application or the application is granted. In any case it is the national authorities which are competent to take a substantive decision on the action brought by the trade-mark holder that determine the fate of the contested goods.

16. It is clear from the above considerations that the trade-mark holder has a central place in the Community system for combating the trade in counterfeit and pirated goods. It is necessary for the trade-mark holder to take the initiative, first, in order for the goods to be detained and, second, for the national authorities which are competent to take a substantive decision in the matter to impose a definitive penalty in respect of the illegal trade. Consequently, the Community system of prohibitions introduced by Regulation No 3295/94 is largely dependent on the trade-mark holder having access to extensive and exhaustive information for it to operate in a satisfactory manner. For that reason, the second subparagraph of Article 6(1) of Regulation 3295/94 provides that information must be disclosed to the holder of the intellectual property right in question. In particular, it provides for the name and address of the declarant and, if known, those of the consignee to be disclosed if the customs authorities are satisfied that the goods correspond to the description of 'counterfeit or pirated goods'.

17. That is, moreover, the fundamental difference between Regulation No 3295/94 and Regulation (EEC) No 3842/86,[5] which was the precursor to

4 — Eighth recital in the preamble to Regulation No 3295/94.

5 — Council Regulation (EEC) No 3842/86 of 1 December 1986 laying down measures to prohibit the release for free circulation of counterfeit goods (OJ 1986 L 357, p. 1).

and was repealed by Regulation No 3295/94. Under the earlier legislation, the trade-mark holder was not granted access to the information regarding the declarant and the importer of goods, even where the authorities were satisfied that those goods corresponded to 'the description of the counterfeit goods', if the competent national authority had not yet taken a substantive decision. Under Article 7(3) of Regulation (EEC) No 3842/86, it was only when the procedure had been concluded and the contested goods had been found to be counterfeit that '[u]nless running counter to provisions of national law, the customs office concerned or the competent authority shall inform the trade-mark owner, upon request, of the names and addresses of the consignor, importer and consignee of the goods found to be counterfeit ...'. Regulation 3295/94, on the other hand, provides that information must be disclosed to the trade-mark holder at two stages of the procedure. First, under the second subparagraph of Article 6(1), information is to be disclosed even before the competent national authority has taken a substantive decision (that is to say, before the contested goods have been definitively found to be counterfeit or pirated). Second, information must be disclosed under Article 8(3) when the procedure has been concluded and it has been established that the goods are counterfeit or pirated.

18. It is apparent from the above that the extension of the trade-mark holder's right to information is directly connected to the extension of his role in the procedure. The 'task' of that person is essentially to refer the matter to the national authorities which are competent to take a substantive decision in order to obtain a final decision on whether or not the detained goods are genuine. If the identity of the declarant and/or the consignee of goods may not be disclosed to the trade-mark holder, it is impossible for him to refer the matter to the competent national authorities. The system which Regulation No 3295/94 seeks to introduce then inevitably loses much of its practical benefit or even becomes entirely ineffective.

19. However, the provision at issue set out in the second subparagraph of Article 6(1) of Regulation No 3295/94 contains a contradiction. Even though the trade-mark holder must take the initiative to refer the matter to the competent national authorities which determine whether the contested goods are actually counterfeit or pirated — which the trade-mark holder cannot do without knowing the identity of the persons against whom the action must be brought — he is notified of the information concerning those persons only if this is done in accordance with national provisions 'on the protection of personal data, commercial and industrial secrecy and professional and administrative confidentiality'. If the wording of that provision is adhered to, the application of that provision gives rise to two problems. On the one hand, it is not precluded — the Community legislator even appears at first sight to permit such a course of action — for the information which is disclosed to the trade-mark holder to be drastically restricted or for the information to be prohibited. On the other hand, it is difficult to see how the Community's system for combating counterfeit or pirated goods will be able to function effectively if it is prohibited under national legislation to disclose information on the declarant and, where possible, the

consignee of the contested goods to the trade-mark holder. In short, the following contradiction arises. Even though it is essential for the information in question to be disclosed to the trade-mark holder in order for the Community's system of controls and prohibitions to be able to function, it appears that it is entrusted to the discretion of the Member States to decide whether that information must be disclosed and it is not precluded for a Member State to introduce a general and absolute prohibition on the disclosure of the information in question, at least on the wording of the contested provisions of Regulation No 3295/94.

20. B. The problem which has just been noted lies at the heart of the question referred by the national court.

21. In assessing the applicable Swedish legislation, as cited and analysed by the national court, it is apparent that the national law on protection of confidential information applies to all information concerning an individual's personal or financial circumstances obtained by the public authorities in the course of customs control. In exceptional cases, the prohibition on disclosing the information in question may be lifted, if it is shown that this will not result in any damage to the individual concerned.

22. In the present case, however, the national court has pointed out that the abovementioned exception does not apply. The information in question, which concerns the identity of the declarant and/or the consignee of the goods, may not be disclosed to Adidas, because it is not certain that this will not result in any damage to those persons. It must therefore be concluded that the national legislation in the present case prevents the disclosure of the information in accordance with the request made by Adidas. Consequently, the question arises as to the extent to which Article 6 of Regulation 3295/94 allows application of national legislation under which disclosure of the information in question to the trade-mark holder, as required by the second subparagraph of Article 6(1) of that regulation, is possible only in exceptional cases.

23. Before examining that question, I consider it necessary to address certain points in the present case which require clarification. We know that Adidas requested information regarding the identity of the consignee of the goods in question with a view to bringing an action before a national court. In the absence of other information, I presume, therefore, that in Sweden it is the courts that are the authority competent 'to take a substantive decision' within the meaning of the second subparagraph of Article 6(1) of Regulation No 3295/94. The Court is also unaware of the extent to which the Swedish law might provide for *ex officio* control, whereby the courts, as the authority competent 'to take a substantive decision', take on the case after the customs or some other administrative authority has submitted the file, that is to say without the trade-mark holder needing to bring an action. If there is a possibility for the competent national court to carry out an *ex officio* control, this partially

removes the bar to the effective application of Regulation No 3295/94 which otherwise results from the fact that it is not possible to disclose information to the trade-mark holder.

24. Despite those uncertainties, the purport of the question asked by the national court is the same. It has been observed above that, under the system introduced by Regulation No 3295/94, it is in principle for the trade-mark holder to take the necessary measures in respect of the counterfeit or pirated goods. In order for the trade-mark holder to be able to refer the matter to the national authorities which are competent to take a substantive decision, however, it is necessary for him to know the identity of the persons against whom the action is to be brought, that is to say the declarant and/or the consignee of the goods. Even though the Community legislator has recognised the existence of national provisions on the protection of personal data, commercial and industrial secrecy and administrative confidentiality, the question still remains whether a prohibition against the disclosure of the information in question other than in exceptional cases may be laid down in such national provisions.

25. C. In the observations which the Commission submitted to the Court, it proposed an approach which reconciles these positions and which would make it possible to consider that there is no conflict between the contested Community rules and national law. The Commission rightly pointed out that the ultimate purpose of the system introduced by the regulation in question is set out in Article 2 of the regulation. That article provides: '[t]he release for free circulation, export, re-export or placing under a suspensive procedure of goods found to be counterfeit or pirated on completion of the procedure provided for in Article 6 shall be prohibited.' The interpretation and application of the Community provisions and the national provisions at issue must contribute to the fulfilment of that purpose. The Commission then stated that in the present case that purpose can be fulfilled only if the identity of the declarant and/or the consignee of the contested goods can be disclosed to Adidas. However, the Commission conceded that it is possible to give an appropriate interpretation of the provisions of the Swedish legislation on protection of confidential information which does not impair the effectiveness of Community law or hinder the fulfilment of the fundamental purpose of the contested legislation.

26. In the view of the Commission, it is possible to grant the request made by Adidas for access to the information obtained by the customs authorities regarding the identity of the declarant and/or consignee of the goods, while at the same time applying the Swedish Sekretesslagen. The Commission relied in particular on the exception laid down in Paragraph 2 of Chapter 9 of the Sekretesslagen, in conjunction with the third to sixth sentences of the first subparagraph of Paragraph 1 of the same law, where it is provided that information obtained by the Customs Office may be disclosed if it is shown that this will not result in any damage to the individual concerned. The Commission proposed an interpretation under which disclosure to the trade-mark holder of the identity of the declarant and/or consignee of goods which appear to be covered by the prohibition laid down in Regulation

No 3295/94 — such disclosure being provided for in Article 6 of the same regulation — is in principle possible by means of the above exception recognised in the Swedish legislation on protection of confidential data. In other words, in the view of the Commission, this means that *in principle* disclosure of the information cannot result in any damage to the individual concerned (the declarant and/or consignee of goods), and as a result disclosure is permitted.

27. The approach taken by the Commission is based on two arguments which are derived from the provisions of Regulation No 3295/94. Under the second subparagraph of Article 6(1) of Regulation No 3295/94, as soon as the competent national administrative authorities are satisfied that certain goods 'correspond to the description of the counterfeit or pirated goods', they are to inform the declarant immediately of this finding. The declarant is therefore able to withdraw the goods in question, which are thus not placed on the market. Member States also have the possibility, under Article 3(6) of Regulation No 3295/94, of requiring the trade-mark holder to provide a security which is intended precisely to protect any rights of third parties who may be affected by the customs control carried out. The persons who above all fall within this group are the declarant and the consignee of the goods which have been checked. In the light of the above factors, the Commission drew the conclusion that, within the specific framework of the application of Article 6 of Regulation No 3295/94, there is reason to apply the exception to the rule on protection of confidential information contained in the Swedish legislation. This means that in principle it must be conceded that it is possible, at the request of the trade-mark holder, to inform him of the name and address of the declarant and also the name and address of the consignee of the goods, if known, to enable the trade-mark holder to refer the matter to the authorities which are competent to take a substantive decision, because disclosure of that information will not be prejudicial to the persons to whom the information relates. Those persons are protected by the fact that they can take appropriate measures when they are informed of the suspicions regarding the authenticity of the goods. If the goods eventually prove in fact to be genuine, they are also able to obtain compensation for the damage they have suffered by claiming the security which the trade-mark holder will be called upon to provide.

28. The above interpretation put forward by Commission is based on the principle that national law must be interpreted in accordance with Community law. As the Court has expressly stated in a number of judgments, the competent court must, so far as possible, interpret national rules 'in the light of the wording and the purpose of the provisions of Community law'. [6] Although it is the duty of the Court to

6 — See, for example, Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraph 20, Case C-472/93 *Spano* [1995] ECR I-4321 and Case C-106/89 *Marleasing* [1990] ECR I-4135. Those judgments concern the incorporation of Community directives into the national legal order. The principle of 'consistent interpretation' does, however, also apply to cases concerning the application of Community regulations where legislative powers are conferred directly upon national authorities by those regulations. In other words, even though regulations by their nature do not require national measures to be taken to ensure the incorporation of the regulation into national law, provision may be made for the regulation to be applied in accordance with certain existing national rules. Regulation No 3295/94 belongs to that particular group. In such cases, I consider that the reference to the principle that national provisions must be interpreted 'in the light' of Community law is of value.

point out to national courts their obligation to interpret provisions of national law in a manner that is consistent with applicable Community provisions, it is not, in my opinion, competent to inform the national court of the interpretation which permits conformity between the national provisions in force and the requirements of the Community legislation. Only the national court is competent in that regard. The task of the Court of Justice is only to interpret relevant provisions of Community law. In applying that interpretation, the national court must itself choose how to proceed in order that the national legal order of the State is consistent with the requirements of the Community legislation.

29. If the above observations are applied to the present dispute, it must be concluded that the concern of the Court is to indicate the extent to which Regulation No 3295/94 allows national legislation which in principle prohibits the disclosure of the identity of the declarant and/or consignee of the goods to the trade-mark holder, or which permits disclosure of that information only in exceptional cases. If the contested Community legislation does not conflict with such a comprehensive national prohibition on the disclosure of that information, the national court can dismiss the action brought by Adidas without examining further the national legislation. If, on the other hand, the national court should take the view that the relevant provisions of Regulation No 3295/94 are not consistent with such a comprehensive national prohibition on the disclosure of information to the trade-mark holder, the national court must, in accordance with the principle of the primacy of Community law, seek to find a way to apply the contested Community rules as satisfactorily as possible. The national court may, if it so wishes, disapply the national prohibition which constitutes a bar to the application of the Community provisions or seek to interpret the national provisions in a way which removes the bar in question. As far as the Adidas case is concerned, however, the national court has expressly stated that, under the existing interpretation of the national legislation on protection of confidential information, it is impossible to disclose the identity of the declarant and/or the consignee of the goods to the trade-mark holder, because it is considered that disclosure of that information may, by its nature, result in damage to the individuals concerned.

30. D. Consequently, and despite the interesting arguments put forward by the Commission concerning the possibility of interpreting the national provisions 'in the light' of Regulation No 3295/94, the question referred by the national court has still not been answered substantively. How far-reaching can national restrictions be on the disclosure to the trade-mark holder of information on the declarant and consignee of goods which the customs authority has found to be counterfeit and still be consistent with the contested Community legislation? As has been stated above, the wording of Article 6 of Regulation No 3295/94 appears to contain a contradiction, since a literal interpretation of the second paragraph of Article 6(1) is likely to lead the reader to interpret the provisions as giving the national legislature total freedom, not only to introduce restrictions on the possibility of informing the trade-mark holder, but also to preclude that possibility completely.

31. It is apparent from a teleological and systematic interpretation of those provisions, which is the interpretation I have considered above, that the limits of the Member States' discretionary power with regard to restrictions on the information which is disclosed to the trade-mark holder are fairly strict. The following arguments can be made in support of that view. First of all, as is clear from the content of the second subparagraph of Article 6(1) of Regulation No 3295/94, the general rule introduced by the Community legislator is that information is to be disclosed to the trade-mark holder. *A contrario*, national obstacles to disclosure of that information may only be of an exceptional nature. A second argument carries greater weight. In view of the crucial role which the trade-mark holder fulfils in the Community control system in this area, the disclosure to the trade-mark holder of the identity of the declarant and the consignee of goods is of considerable importance and restrictions on the disclosure of that information must not jeopardise the fulfilment of the purpose of the system. Lastly — and perhaps most importantly of all — the Community legislator has introduced rules which protect the declarant and the consignee of goods which are subject to control so that their rights or interests are not damaged by the disclosure of their name and address to the trade-mark holder. Those persons are informed immediately when the authority is satisfied that the checked goods 'correspond to the description' of counterfeit or pirated goods. Furthermore, the trade-mark holder may use the information to which he has access on the basis of the second subparagraph of Article 6(1) of Regulation No 3295/94 only to 'ask the competent authorities to take a substantive decision'. If that information is used for purposes other than those prescribed, the trade-mark holder will have to make good the damage suffered by the declarant or consignee as a result. The payment of compensation in respect of that damage or any other damage which those persons may suffer — for example because goods which were eventually found to be genuine were detained — is facilitated by the fact that it is expressly provided that the competent national authorities may require the trade-mark holder to provide a security.

32. In the light of the above considerations, I consider that, when the 'national provisions on the protection of personal data, commercial and industrial secrecy and professional and administrative confidentiality', which are referred to in Regulation No 3295/94, are applied within the specific framework of Regulation No 3295/94, this must not be done in a way which restricts the possibility of disclosing information to the trade-mark holder, as provided for in the contested provisions of the regulation, thereby depriving the regulation of its effectiveness. In particular, the national restrictions or prohibitions on the possibility of disclosing information to the trade-mark holder are consistent with the Community legislation at issue only if they satisfy certain conditions. They must be specific and justified and they must not create obstacles to the disclosure of information to the trade-mark holder which are disproportionate to the purpose pursued. As far as the second and third conditions are concerned, I consider that national restrictions and prohibitions are justified only if the protection of the rights and interests of the consignee and declarant

which is provided under the system of Regulation No 3295/94 (restriction of the use of the information to which the trade-mark holder obtains access, provision of a security) is inadequate. In any case, clear and specific grounds must be given in support of the need for the national restrictions and prohibitions.

33. If these general findings are applied to the present case, it must be concluded that the Community legislation in question — even though it gives Member States the possibility of introducing restrictions and prohibitions on the disclosure of information to the trade-mark holder — nevertheless does not permit national legislation which lays down as a general rule that disclosure of the information in question to the trade-mark holder is prohibited or permits such disclosure only in exceptional cases. A national restriction of that nature is neither specific nor justified and is not compatible with the principle of proportionality. In summary, the restriction undermines the effectiveness of Regulation No 3295/94 and must be set aside.

34. E. In the above assessment, I have examined the issue of the disclosure of the identity of the declarant and consignee of certain goods to the trade-mark holder only with regard to specific rules of secondary Community law, as set out in Regulation No 3295/94. However, it still remains to be established to what extent that specific Community legislation and the possibilities of disclosing information to the trade-mark holder permitted by it are compatible with the fundamental rules and general principles of Community law. In particular it is necessary to determine the extent to which the disclosure of the name and address of the declarant and the consignee of goods whose authenticity has been checked is consistent with the fundamental rules on the protection of private life and free development of the personality.

35. As we know, primary Community law provides for protection of fundamental human rights, as set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the Member States' constitutional traditions. [7] Protection of confidentiality, as part of the right to a private life and free development of the personality, is a general principle of Community law which is recognised by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. That protection is also part of a constitutional tradition common to the Member States and is directly connected to European citizenship as enshrined in the Treaty establishing the European Community.

36. The Court has pointed out the need to protect private life in two types of case in particular. First, it has done so where it has examined the nature and scope of the powers of investigation which the Commis-

7 — See in particular Article F.2 of the Treaty on European Union, signed at Maastricht on 7 February 1992, and Article 6(1) and 6(2) of the Treaty on European Union, signed at Amsterdam, which recently entered into force.

sion has been granted in connection with the application of the rules on competition. The Court has had occasion to refer to the inviolability of the home, which stems from the fundamental right to a private life, and has also recognised the need to protect any person in the sphere of whose private activity public authorities intervene as a general principle of Community law. [8] Secondly, the Court of Justice has held in staff cases that the right to respect for private life 'is one of the fundamental rights protected by the legal order of the Community'. It has also stated that that right includes in particular a person' s 'right to keep his state of health secret'. [9]

37. The Community institutions have not introduced comprehensive rules governing the protection of personal data, commercial and industrial secrecy and administrative confidentiality. It is for that reason that the second subparagraph of Article 6(1) of Regulation No 3295/94 refers to the national provisions. However, the Community legislator has addressed a similar issue, the protection of individuals with regard to the processing of personal data and the free movement of such data. This is dealt with in Directive 95/46/EC. [10] It is notable that recital 10 in the preamble to that directive illustrates the close connection between, on the one hand, the rules on the processing, dissemination and use of personal data and, on the other, respect for fundamental rights, in particular the right to privacy. For that reason the common denominator of legislative work at Community level and at national level is to ensure 'a high level of protection in the Community'. [11]

38. It is apparent from both the abovementioned case-law and Directive 95/46 that protection for the sphere of private activity of natural and legal persons occupies an important place among the legal principles introduced by the Community legal order. However, that protection neither can nor should be absolute. The Court of Justice has held that restrictions may be imposed on fundamental rights 'provided that they in fact correspond to objectives of general public interest and do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the right protected'. [12] On the basis of that principle, the Court held that an applicant for a post as an official at a Community institution may not rely on the right to keep his state of health secret in order to refuse to undergo an Aids screening test prior to appointment. [13] Similarly, a Community official who wishes to obtain

8 — See in particular Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraphs 17 and 19, Case 85/87 *Dow Benelux* v *Commission* [1989] ECR 3137, and Case 97/87 *Dow Chemical Ibérica and Others* v *Commission* [1989] ECR 3165.

9 — Case C-404/92 *X* v *Commission* [1994] ECR I-4737, paragraph 17. See also Case T-500/93 *Y* v *Court of Justice* [1996] ECR-SC I-A-335; II-977; Case T-90/95 *Gill* v *Commission* [1997] ECR-SC I-A-471; II-1231; and Case T-66/98 *Gaspari* v *Parliament* [1999] ECR-SC I-A-55, II-287.

10 — Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

11 — Recital 10 in the preamble to Directive 95/46.

12 — Case C-404/92 *X* v *Commission*, cited above (footnote 9), paragraph 18, and Case C-62/90 *Commission* v *Germany* [1992] ECR I-2575, paragraph 23.

13 — Case C-404/92 *X* v *Commission*, cited above (footnote 9).

reimbursement of certain expenditure on medical treatment from the health insurance fund must provide the medical information for which he is asked and cannot rely on medical confidentiality to circumvent that obligation. [14]

39. This is the same spirit that inspired the authors of Directive 95/46. They did not consider that the right to protection of privacy life was absolute, which would mean a general prohibition on the selecting and processing of personal data. Rather than laying down an absolute prohibition, the directive indicates the need to ensure the balance between the interests involved having particular regard to the principle of proportionality. The processing of personal data must therefore be carried out with the consent of the person concerned 'or be *necessary* [15] for the conclusion or performance of a contract binding on the data subject, or as a legal requirement, or for the performance of a task carried out in the public interest or in the exercise of official authority, or in the legitimate interests of a natural or legal person ...'. [16] The processing must also relate to data which are '*adequate, relevant and not excessive in relation to the purposes for which they are processed*'. [17] [18] Two other recitals in the preamble to Directive 95/46 are of interest to the present case. First, it is recognised that Member States may be led, by virtue of the provisions of Community law, to derogate from the provisions of the directive concerning the right of access to data, the obligation to inform individuals, and the quality of data in order to prevent crime, for criminal investigations and prosecutions and action in respect of breaches of ethics. [19] Lastly, exemptions from the protection given by the directive to those affected are permitted where the use of certain information 'is necessary in relation to a contract or a legal claim, where protection of an important public interest so requires, for example in cases of international transfers of data between tax or customs administrations ...'. [20]

40. The following conclusions can be drawn from the above assessment of the particular issue of law examined. First of all, it is not unreasonable for the information which is obtained by the customs authorities in carrying out their functions and which relates to the identity of the declarant and consignee of goods subject to customs control to be covered by a prohibition on the disclosure of personal information, since the information falls within the protected sphere of private activity. An undertaking which imports and exports goods has every reason not to want competitors, those with whom it does business, and consumers to have access to information about its activity. However, that rule is not self-evident in particular cases such as that referred to in the second subparagraph of Article 6(1) of Regulation No 3295/94. That article provides that information must

14 — See Case T-90/95 *Gill* v *Commission* and Case T-66/98 *Gaspari* v *Commission* (cited above, footnote 9).

15 — My italics.

16 — Recital 30 in the preamble to Directive 95/46.

17 — My italics.

18 — Recital 28 in the preamble to Directive 95/46.

19 — See Recitals 43 and 44 in the preamble to Directive 95/46.

20 — Recital 58 in the preamble to Directive 95/46.

be disclosed to the trade-mark holder in order to safeguard certain interests which are regarded as being worthy of protection in the Community legal order. It is important, on the one hand, to uphold the public interest in combating trade in counterfeit or pirated goods and, on the other, to protect intellectual property rights.

41. I therefore consider that, having regard to the approach adopted in Article 6 of Regulation No 3295/94, the Community legislator has properly balanced the existing interests, on the one hand the interests of the declarant and the consignee of goods and on the other the interests of the trade-mark holder and the market in general. Even though that approach could be regarded as entailing a restriction on the protection of the private activity of the declarant and consignee of goods, it is nevertheless not contrary to the general principles of Community law, because that restriction is legitimate and justified and it is consistent with the obligations stemming from the principle of proportionality.

42. The following arguments support that assertion. First, disclosure of the information in question to the trade-mark holder takes place under Regulation No 3295/94 at a stage when there are already serious suspicions that the goods which are subject to customs control are not genuine. The competent administrative authorities consider that those goods 'correspond to the description of the counterfeit or pirated goods'. In other words, it is not provided in the regulation that personal or professional confidentiality will be lifted for all persons in the course of customs clearance for goods, but only where there are serious suspicions of an infringement.

43. Further, as has been stated above, the disclosure of the identity of the consignee and declarant to the trade-mark holder has a specific purpose. The person who obtains that information may use it only to ask the competent national authorities to take a decision as to whether the goods in question are actually counterfeit or pirated. It should be reiterated that the needs relating to the combating of certain infringements or the administration of justice are regarded as justifying the introduction of exceptions to the rules adopted to protect personal or professional confidentiality. [21]

44. Lastly, the additional guarantees afforded to the declarant and consignee by the Community legislator are not insignificant. I have described those guarantees above and I consider that they should be borne in mind. First, it is clear from the wording of the second subparagraph of Article 6(1) of Regulation No 3295/94 that, before the trade-mark holder is informed of the name and address of the declarant and consignee, the competent administrative service informs them of the suspicions which exist

21 — For example, point 37 above concerning Directive 95/96.

concerning the authenticity of the contested goods. They can subsequently take appropriate measures, in particular by withdrawing the goods from customs. Secondly, and more importantly, the declarant and consignee of the goods are protected by the security which must be provided by the trade-mark holder in case he misuses the information to which he obtains access under Article 6 of Regulation No 3295/94 or if it is found, at the end of the procedure, that the detained goods are not counterfeit or pirated.

45. Article 6 of Regulation No 3295/94 cannot therefore be regarded as being contrary to the general principles of Community law.

VII — Conclusion

46. In the light of the foregoing, I propose that the Court give the following answer to the question referred by the national court:

The second subparagraph of Article 6(1) of Council Regulation (EC) No 3295/94 of 22 December 1994 laying down measures to prohibit the release for free circulation, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods conflicts with national legislation which in principle prohibits, or permits only in exceptional cases, disclosure to the trade-mark holder of the name and address of the declarant and consignee of goods subject to customs control, which would enable the trade-mark holder to ask the competent national authorities to take a decision as to whether those goods are counterfeit or pirated.