JUDGMENT OF THE COURT

18 October 2005 *

In Case C-405/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Gerechtshof te 's-Gravenhage (Netherlands), made by decision of 28 August 2003, received at the Court on 29 September 2003, in the proceedings

Class International BV

v

Colgate-Palmolive Company,

Unilever NV,

SmithKline Beecham plc,

Beecham Group plc,

* Language of the case: Dutch.

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and J. Malenovský, Presidents of Chambers, C. Gulmann (Rapporteur), R. Schintgen, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues, A. Borg Barthet, M. Ilešič and J. Klučka, Judges,

Advocate General: F.G. Jacobs,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 March 2005,

after considering the observations submitted on behalf of:

— Class International BV, by G. van der Wal, advocaat,

— SmithKline Beecham plc and Beecham Group plc, by M.A.A. van Wijngaarden, advocaat,

— the Commission of the European Communities, by N.B. Rasmussen, W. Wils and H. van Vliet, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 May 2005,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 5(1) and (3)(b) and (c) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1) ('the Directive') and Article 9(1) and (2)(b) and (c) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) ('the Regulation').

2 That reference was made in proceedings between Class International BV ('Class International') on the one hand and SmithKline Beecham plc ('SmithKline Beecham') and the Beecham Group plc ('Beecham Group') on the other concerning the attachment by SmithKline Beecham and Beecham Group of goods bearing their trade marks coming from outside the European Community and stored by Class International, owner of those goods, in a warehouse in Rotterdam.

Relevant Community provisions

3 Article 5 of the Directive, entitled 'Rights conferred by a trade mark', is worded as follows:

'1. The registered trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

(a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered:

...

3. The following, inter alia, may be prohibited under [paragraph 1]:

...

(b) offering the goods, or putting them on the market or stocking them for these purposes under that sign, or offering or supplying services thereunder;

(c) importing ... the goods under the sign:

...'

4 Article 9(1)(a) and (2)(b) and (c) of the Regulation define the rights conferred by a Community trade mark in the same terms.

5 Article 7(1) of the Directive, entitled 'Exhaustion of the rights conferred by a trade mark', states:

'The trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent.'

6 Article 13(1) of the Regulation defines exhaustion of the rights conferred by a Community trade mark in the same terms.

7 Article 65(2) of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) provides that specific provisions and arrangements in the European Economic Area ('the EEA') concerning intellectual, industrial and commercial property are contained, inter alia, in Annex XVII to that Agreement.

8 Point 4 of that Annex refers to the Directive.

9 For the purposes of the EEA Agreement, point 4 adapts Article 7(1) of the Directive by replacing the term 'in the Community' with the words 'in a Contracting Party'.

10 Article 91(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) ('the Customs Code') provides:

'The external transit procedure shall allow the movement from one point to another within the customs territory of the Community of:

(a) non-Community goods, without such goods being subject to import duties and other charges or to commercial policy measures;

...'

11 Article 98(1) of the Customs Code states:

'The customs warehousing procedure shall allow the storage in a customs warehouse of:

(a) non-Community goods, without such goods being subject to import duties or commercial policy measures;

...'

12 Article 58 of the Customs Code states:

'1. Save as otherwise provided, goods may at any time, under the conditions laid down, be assigned any customs-approved treatment or use irrespective of their nature or quantity, or their country of origin, consignment or destination.

2. Paragraph 1 shall not preclude the imposition of prohibitions or restrictions justified on grounds of ... the protection of industrial and commercial property.'

The main proceedings and the questions referred for a preliminary ruling

13 SmithKline Beecham and Beecham Group, which are companies established in the United Kingdom in the GlaxoSmithKline group, are separate proprietors of the Aquafresh trade marks, which are Community trade marks and trade marks registered at the Benelux Trade Marks Office, in particular for toothpastes.

14 In February 2002 Class International brought into the Community at Rotterdam a container load of toothpaste products bearing the Aquafresh trade mark, bought from Kapex International, a South African undertaking.

15 SmithKline Beecham and Beecham Group ('Beecham'), having been informed that those toothpaste products could be counterfeit, had an attachment carried out in respect of the container on 5 March 2002.

16 An examination of the attached goods carried out in April 2002 showed that the goods were original and not counterfeit.

17 Class International applied to the Rechtbank te Rotterdam for the release of the goods and for an order against Beecham for damages for the harm it believed it had suffered.

18 Those applications were rejected by order of 24 May 2002.

19 Class International appealed against that decision to the Gerechtshof te 's-Gravenhage (Regional Court of Appeal, The Hague).

20 It claimed before that court that the attached goods were not imported but were in transit.

21 The Gerechtshof observes that it has not been shown that there was already a purchaser for the goods when they entered the Netherlands or at the time when the goods were attached. It considers that it is possible that the first purchaser will be established in the EEA. It states that several pleas raised before it concern the question whether the temporary storage in a customs warehouse of original goods with customs status T 1 and/or the transit of those goods to countries outside the EEA should be regarded as use of the trade mark.

22 The Gerechtshof te 's-Gravenhage considered that the interpretation of Article 5(1) and (3)(b) and (c) of the Directive and Article 9(1) and (2)(b) and (c) of the Regulation was necessary to decide the case and decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) May the proprietor of a trade mark oppose the (direct or indirect) introduction without his consent of goods from third countries, bearing a trade mark within the meaning of [the Directive] and/or of [the Regulation], into the territory of a Member State (in this case the territory of the Netherlands/Benelux countries) in the context of transit or transit trade as referred to below?

(2) Does "using a sign in the course of trade" within the meaning of the opening words of Article 5(1) in conjunction with Article 5(3)(b) and (c) of the Directive and the opening words of Article 9(1) in conjunction with Article 9(2)(b) and (c) of [the Regulation] cover the storing, in a customs office or warehouse within the territory of a Member State, of original branded goods (bearing a trade mark within the meaning of [the Directive]), the [Benelux uniform trade mark law] and/or [the Regulation]) which have not been imported into the EEA by the trade mark proprietor or with his consent, which come from outside the EEA and which have the customs status of non-Community goods (for example, T1 or [accompanying administrative document])?

(3) Does it make any difference to the answers to Questions (1) and (2) whether or not, at the time of entering the abovementioned territory, the final destination of those goods is specified, or that no (purchase) agreement has or has yet been concluded with a customer in a third country in respect of those goods?

(4) In the context of answering Questions (1), (2) and (3), is it relevant whether there are additional circumstances, such as

(a) the circumstance that the trader, who is the owner of the goods in question or in any event is entitled to dispose of them and/or engages in parallel trade, is established in one of the Member States;

(b) the circumstance that those goods are being offered for sale or sold by the trader established in a Member State, from that Member State, to another trader established in a Member State, whilst the place of delivery is not (yet) specified;

(c) the circumstance that those goods are being offered for sale or sold by the trader established in a Member State, from that Member State, to another trader established in a Member State, whilst the place of delivery of the goods to be offered for sale or sold in that way is specified but the final destination is not, whether or not with the express statement or contractual restriction that the goods involved are non-Community (transit) goods;

(d) the circumstance that those goods are being offered for sale or sold by the trader established in a Member State to a trader established outside the EEA, whilst the place of delivery and/or final destination of the goods may or may not be specified;

(e) the circumstance that those goods are being offered for sale or sold by the trader established in a Member State to a trader established outside the EEA, who the (parallel) trader knows or has serious reason to suppose will resell or supply the goods in question to ultimate consumers within the EEA?

(5) Must the term "offering" in the provisions referred to in Question (1) be construed as also meaning the offering (for sale) of original branded goods (bearing a trade mark within the meaning of the directive, the [Benelux uniform trade mark law] and/or [the Regulation]) which are stored in a customs office or warehouse within the territory of a Member State, which have not been introduced into the EEA by the trade mark proprietor or with his consent, which come from outside the EEA and which have the status of non-Community goods (for example, T1 or [accompanying administrative document]), in the circumstances set out above in Questions (3) and (4)?

(6) With which of the parties does the burden of proof rest as regards the acts mentioned above under (1), (2) and (5)?'

The questions referred for a preliminary ruling

Preliminary observations

23 Taking account of the amendment made to Article 7(1) of the Directive by the EEA Agreement, and by way of description of the situation of the trade mark proprietor as regards the rule of exhaustion of the exclusive rights conferred by Article 5 of the Directive, the questions are raised in reference to goods coming from outside the EEA and introduced into the EEA.

24 They are also raised in reference to the external transit procedure and the customs warehousing procedure, suspensive procedures provided for by the Customs Code.

25 It must be observed that, although the Directive is referred to in Annex XVII to the EEA Agreement under the common rules applicable therein, the Regulation was not inserted into that Annex following its adoption.

26 In addition, it must be noted that the Customs Code does not apply, outside the Community, in the States of the European Free Trade Association which are Contracting Parties to the EEA, which has introduced a free trade area and not a customs union.

27 In the light of those observations, and since the outcome of the case in the main proceedings, in view of the facts set out by the national court, does not require the territory of the EEA to be taken into account, reference will be made only to the territory of the Community in the rest of this judgment and in the Court's answers.

Whether the trade mark proprietor may prevent the introduction into the Community, under the external transit procedure or the customs warehousing procedure, of original goods bearing the mark

28 By its first question, concerning external transit, and its second question the national court asks, essentially, whether Article 5(1) and (3)(c) of the Directive and Article 9 (1) and (2)(c) of the Regulation must be interpreted as meaning that the trade mark proprietor is entitled to oppose the introduction into the Community, under the external transit procedure or the customs warehousing procedure, of original goods

bearing that mark which had not already been put on the market in the Community previously by that proprietor or with his consent. Further, by its third question, which should be examined with the first part of the first question and the second question, the referring court seeks to ascertain whether the trade mark proprietor may, at least, make the placing of the goods in question under the external transit procedure or the customs warehousing procedure conditional on the existence, at the time of introduction of those goods into the Community, of a final destination already specified in a third country, possibly pursuant to a sale agreement.

Observations submitted to the Court

29 Class International claims that the placing of original goods under the external transit procedure or the customs warehousing procedure does not constitute 'using [the sign] in the course of trade' within the meaning of Article 5(1) of the Directive and Article 9(1) of the Regulation which may be prevented by the proprietor under those provisions. The rule of exhaustion of the exclusive rights of the trade mark proprietor, provided for in Article 7(1) of the Directive and 13(1) of the Regulation, has the sole objective of according that proprietor territorial exclusivity for the initial marketing of its goods in the Community. However, placing goods under the external transit procedure or the customs warehousing procedure does not constitute marketing those goods in the Community.

30 In any event, the trade mark proprietor cannot make entry for those procedures conditional on the existence of a final destination already specified in a third country. If such a condition could be imposed, the transit of trademarked goods, which has existed since the trade marks themselves exist, would be rendered impossible or very difficult, a result which the legislature could certainly not have intended to arrive at through the combined effect of trade mark provisions.

31 Beecham submits that the trade mark proprietor can oppose the introduction into the Community of original goods bearing his mark under the external transit procedure or the customs warehousing procedure. It states that Article 58(2) of the Customs Code reserves the application of prohibitions or restrictions justified on grounds of the protection of industrial and commercial property. The fact that the goods are not yet in free circulation within the meaning of Article 24 EC is irrelevant. In any event, the risk that goods placed under the external transit procedure or the customs warehousing procedure will be released for free circulation is very real and permanent. 'Importing' within the meaning of Article 5(3)(c) of the Directive and Article 9(2)(c) of the Regulation in fact corresponds to the physical introduction of goods into the Community and must be distinguished from 'importing' for customs law purposes. Whether, at the time of introduction of the goods, the final destination of those goods is specified or not is of no relevance.

32 The Commission of the European Communities takes the view that 'importing' within the meaning of Article 5(3)(c) of the Directive and Article 9(2)(c) of the Regulation covers importing with a view to marketing the goods within the Community. That conclusion is consistent with the definition of goods in free circulation laid down in Article 24 EC. In the absence of release for free circulation, the trade mark proprietor could not therefore generally oppose the introduction of original goods under the external transit procedure or the customs warehousing procedure.

The Court's answer

33 Article 7(1) of the Directive and Article 13(1) of the Regulation limit exhaustion of the rights conferred on the proprietor of a trade mark to cases where goods are put on the market in the Community. They allow the proprietor to market his products

outside the Community without thereby exhausting his rights within it. By making it clear that putting goods on the market outside the Community does not exhaust the proprietor's right to oppose the importation of those goods without his consent, the Community legislature has thus allowed the trade mark proprietor to control the initial marketing in the Community of goods bearing the mark (see, in particular, on the subject of the Directive and with reference to the territory of the EEA, Joined Cases C-414/99 to C-416/99 *Zino Davidoff and Levi Strauss* [2001] ECR I-8691, paragraph 33).

34 'Importing' within the meaning of Article 5(3)(c) of the Directive and Article 9(2)(c) of the Regulation, which the trade mark proprietor may oppose in so far as it entails 'using [the mark] in the course of trade' within the meaning of Article 5(1) of the Directive and Article 9(1) of the Regulation, therefore requires introduction of those goods into the Community for the purposes of putting them on the market therein.

35 The putting on the market in the Community of goods coming from a third country is subject to their release for free circulation within the meaning of Article 24 EC.

36 Entry of non-Community goods for customs procedures such as external transit or customs warehousing is distinguishable from placing them under the customs procedure of release for free circulation, which, pursuant to the first paragraph of Article 79 of the Customs Code, confers on non-Community goods the customs status of Community goods.

37 Pursuant to Article 37(2) of the Customs Code, non-Community goods subject to the external transit procedure or the customs warehousing procedure remain under customs supervision until, in particular, their customs status is changed to Community goods. In accordance with Article 91(1)(a) and Article 98(1)(a) of the Customs Code, they are not subject to import duties or to commercial policy measures. In fact, goods coming from third countries and placed under the external transit procedure generally pass through one or more Member States then to be dispatched to a third country. As for non-Community goods placed under the customs warehousing procedure, they are generally stored in Community customs territory while awaiting a final destination, which is not necessarily known at the time of storage.

38 On the other hand, non-Community goods released for free circulation become Community goods. They gain the benefit of the free movement of goods pursuant to Article 23(2) EC. In accordance with Article 24 EC and the second paragraph of Article 79 of the Customs Code, they must be covered by formalities in respect of the importation of goods and give rise to the levy of customs duties and, where necessary, the application of commercial policy measures.

39 Article 48 of the Customs Code provides that non-Community goods presented to customs are to be assigned a customs-approved treatment or use authorised for such non-Community goods.

40 Under Article 4(15) and (16), Article 37(2) and Article 182 of the Customs Code, that customs-approved treatment or use means:

— the placing of goods under a customs procedure, for example release for free circulation, transit or customs warehousing;

— their entry into a free zone or free warehouse;

— their re-exportation from the customs territory of the Community;

— their destruction;

— their abandonment to the Exchequer.

41 Article 58(1) of the Customs Code states that goods may at any time be assigned any customs-approved treatment or use irrespective of their nature or quantity, or their country of origin, consignment or destination.

42 It is therefore apparent that non-Community goods placed under the external transit procedure or the customs warehousing procedure may at any time be assigned another customs-approved treatment or use. They may, in particular, be placed under another customs procedure, where appropriate that of release for free circulation, or else be re-exported outside the territory of the Community.

43 Release for free circulation, a requirement for putting goods on the market in the Community, is therefore only one of the options open to the trader who brings goods into the Community customs territory.

44 As long as that option is not chosen and the requirements of the customs-approved treatment or use, other than release for free circulation, under which the goods have been placed are satisfied, the mere physical introduction of those goods into the territory of the Community is not 'importing' within the meaning of Article 5(3)(c) of the Directive and Article 9(2)(c) of the Regulation and does not entail 'using [the mark] in the course of trade' within the meaning of Article 5(1) and Article 9(1) respectively.

45 The trade mark proprietor cannot therefore oppose that introduction pursuant to those provisions or make it conditional on the existence of a final destination already specified in a third country, possibly pursuant to a sale agreement.

46 That conclusion is not called into question by Article 58(2) of the Customs Code, under which the choice by the trader concerned of customs-approved treatment or use is not to preclude the imposition of prohibitions or restrictions justified on grounds of, inter alia, the protection of industrial and commercial property.

47 The saving provision in question is only for cases in which the customs-approved treatment or use would adversely affect industrial and commercial property rights. Placing non-Community goods under a suspensive customs procedure does not make it possible for them to be put on the market in the Community in the absence of release for free circulation. In the field of trade marks, such placing of original goods bearing a mark is not therefore, per se, interference with the right of its proprietor to control the initial marketing in the Community.

48 Finally, the contention that there is a real and permanent risk that goods placed under the external transit procedure or the customs warehousing procedure will be released for free circulation is not conclusive for the answer to be given to the question under consideration.

49 An operator may also, at any time, release for free circulation non-Community goods from the time when they enter the customs territory, without placing them under a suspensive procedure beforehand.

50 The answer to the first part of the first question and the second and third questions must therefore be that Article 5(1) and (3)(c) of the Directive and Article 9(1) and (2)(c) of the Regulation must be interpreted as meaning that a trade mark proprietor cannot oppose the mere entry into the Community, under the external transit procedure or the customs warehousing procedure, of original goods bearing that mark which had not already been put on the market in the Community previously by that proprietor or with his consent. The trade mark proprietor cannot make the placing of the goods at issue under the external transit procedure or the customs warehousing procedure conditional on the existence, at the time of the introduction of those goods into the Community, of a final destination already specified in a third country, possibly pursuant to a sale agreement.

Whether the trade mark proprietor may prohibit the offering for sale or the sale of original products placed under the external transit procedure or the customs warehousing procedure

51 By the second part of the first question and the fourth and fifth questions, which should be examined together, the national court asks, essentially, whether 'offering' and 'putting on the market' the goods within the meaning of Article 5(3)(b) of the Directive and Article 9(2)(b) of the Regulation can include, respectively, offering and selling original goods bearing a trade mark and having the customs status of non-Community goods, when the offering is made and/or the sale is effected while the goods are placed under the external transit procedure or the customs warehousing procedure. If so, it seeks to ascertain in what circumstances the trade mark proprietor can oppose such offering or sale.

Observations submitted to the Court

52 Class International claims that offering for sale non-Community goods, whether or not they are located in the Community, is not to be considered to be using the trade mark in the course of trade when it does not have the objective or effect of putting those goods on the market in the Community. Offering for sale cannot therefore be prevented by the trade mark proprietor on the sole ground that it is done while the goods are placed under the external transit procedure or the customs warehousing procedure. The trade mark proprietor can plead interference with his exclusive rights, notwithstanding the customs status of the non-Community goods covering the disputed products, only if he proves facts supporting the conclusion that the manifest objective of the trader being sued is to put those goods on the market in the Community. In that respect, the circumstances referred to by the national court in its fourth question are not conclusive.

53 Beecham submits that offering for sale original goods having the status of non-Community goods placed under the customs warehousing procedure comes within Article 5(3)(b) of the Directive and Article 9(2)(b) of the Regulation. The trade mark proprietor can therefore oppose such offering. None of the cases referred to in the fourth question is capable of changing that analysis.

54 The Commission takes the view that the offering for sale under discussion does not necessarily come within Article 5(3)(b) of the Directive and Article 9(2)(b) of the Regulation. The goods may be offered to a potential purchaser who it is virtually certain will not market them in the Community. An infringement of the Directive or the Regulation results only from a situation in which the goods are offered for sale to a purchaser who, in all likelihood, will release them for free circulation and market them in the Community. The factual circumstances referred to in the fourth question could be relevant. However, it is for the national court to weigh them up and determine if it is proven that the goods will not be released for free circulation in the Community.

The Court's answer

55 As is clear from paragraph 44 of this judgment, non-Community goods placed under the external transit procedure or the customs warehousing procedure are not regarded as 'imported' for the purposes of Article 5(3)(c) of the Directive and Article 9(2)(c) of the Regulation.

56 Such goods may be the subject of offering for sale or sales to a third country.

57 In those situations, when the goods are original goods bearing a trade mark, the trade mark proprietor's right to control the initial marketing in the Community is not adversely affected.

58 On the other hand, if the offering or the sale necessarily entails putting goods bearing the mark on the market in the Community, the exclusive rights conferred on the proprietor of that mark by Article 5(1) of the Directive and Article 9(1) of the Regulation have been adversely affected, regardless of the place in which the addressee of the offer or the purchaser is established and irrespective of the provisions of the contract ultimately concluded regarding any restrictions on resale or the customs status of the goods. The offering or the sale is then 'using [the mark] in the course of trade' within the meaning of Article 5(1) of the Directive and Article 9(1) of the Regulation. It follows that the trade mark proprietor may oppose it pursuant to Article 5(3)(b) of the Directive and Article 9(2)(b) of the Regulation.

59 The likelihood that the goods will be put on the market in the Community cannot, however, be assumed on the sole basis of the fact, referred to or implied in paragraphs (a) and (e) of the national court's fourth question, that the owner of the goods, the addressee of the offer or the purchaser engage in parallel trade. Other evidence must prove that the offering or the sale necessarily entails putting on the market in the Community the specific goods at issue.

60 In addition, the trade mark proprietor can assert its right of prohibition only against the trader who puts or is preparing to put non-Community goods bearing that mark on the market in the Community, or else offers or sells those goods to another trader who is bound to put them on the market in the Community. He cannot rely on his right against a trader who offers or sells those goods to another trader on the sole ground that that trader is likely then to put them on the market in the Community, a situation envisaged by subparagraph (e) of the national court's fourth question.

61 The answer to the second part of the first question and the fourth and fifth questions must therefore be that 'offering' and 'putting on the market', within the meaning of Article 5(3)(b) of the Directive and Article 9(2)(b) of the Regulation, may include, respectively, the offering and sale of original goods bearing a trade mark and having the customs status of non-Community goods, when the offering is done and/or the sale is effected while the goods are placed under the external transit procedure or the customs warehousing procedure. The trade mark proprietor may oppose the offering or the sale of such goods when it necessarily entails the putting of those goods on the market in the Community.

The onus of proof

62 Having regard to the answers to the first five questions, it must be stated that, by its sixth question, the national court asks, essentially, which party has the burden, in a situation such as that at issue in the main proceedings, of proving the facts which would give grounds for exercising the right of prohibition provided for in Article 5 (3)(b) and (c) and Article 9(2)(b) and (c) of the Regulation.

Observations submitted to the Court

63 Class International asserts that the trade mark proprietor who claims that the offering or sale transactions are unlawful must prove those facts.

64 Beecham contends that the trade mark proprietor must only prove interference with the mark. For that purpose, he must prove that he is the proprietor of the mark, that the goods come from outside the Community and that they have been brought into the territory of the Community. It is then for the trader against whom the interference is alleged to prove either that he has obtained the proprietor's authorisation or that he has not used the mark in the course of trade and is not likely to do so.

65 The Commission submits that the issue of the onus of proof is not resolved either by the Directive or by the Regulation. Concerning the Directive, it notes that, according to the 10th recital in the preamble thereto, 'the ways in which likelihood of confusion may be established, and in particular the onus of proof, are a matter for national procedural rules which are not prejudiced by the Directive'. It also notes that, according to the eighth recital, concerning conflicts between marks, 'it is up to the Member States to establish the applicable rules of procedure'.

66 As regards the consent of the trade mark proprietor to importation of non-Community goods into the Community, it follows clearly from the case-law that it is for the trader being sued to prove it (*Zino Davidoff and Levi Strauss*, cited above, paragraphs 53 and 54). If he did not allege the consent of the proprietor, the trader sued would have to show before the national court that the purpose of entry of the goods was not to market them in the Community and that it was only a logical step

in the transportation of those goods to a third country. The Commission remarks, however, that the establishment of requirements which are too strict regarding the proof which the trader sued should provide could render illusory his right to use the Community as a territory of transit.

The Court's answer

67 In the main proceedings, the national court considers that it has not been shown that there was already a purchaser for the goods when they entered the Netherlands or on the date of their attachment.

68 In a case such as the one referred to, the goods are lawfully under the external transit procedure or the customs warehousing procedure.

69 As long as the conditions of those suspensive procedures are complied with, the situation of the trader concerned is, in principle, lawful.

70 In that regard, the issue of proof is raised when a dispute arises, that is to say, when the trade mark proprietor pleads interference with the exclusive rights conferred on it by Article 5(1) of the Directive and Article 9(1) of the Regulation.

71 The interference which may be pleaded consists either in the release for free circulation of the goods or an offering or sale of those goods which necessarily entails putting them on the market in the Community.

72 Interference is the condition for the exercise of the right of prohibition provided for in Article 5(3)(b) and (c) of the Directive and Article 9(2)(b) and (c) of the Regulation.

73 In respect of the issue of the onus of proving that interference, it must be pointed out, first, that if it were a matter for the national laws of the Member States, the consequence for trade mark proprietors could be that protection would vary according to the legal system concerned. The objective of 'the same protection under the legal systems of all the Member States' set out in the ninth recital in the preamble to the Directive, where it is described as fundamental, would not be attained (see, on the subject of the Directive, *Zino Davidoff and Levi Strauss*, cited above, paragraphs 41 and 42).

74 It must then be stated that, in a situation such as the one in the main proceedings, the onus of proving interference must lie with the trade mark proprietor who alleges it. If that is proven, it is then for the trader sued to prove the existence of the consent of the proprietor to the marketing of the goods in the Community (see, on the subject of the Directive, *Zino Davidoff and Levi Strauss*, cited above, paragraph 54).

75 The answer to the sixth question must therefore be that, in a situation such as the one at issue in the main proceedings, it is for the trade mark proprietor to prove the facts which would give grounds for exercising the right of prohibition provided for in Article 5(3)(b) and (c) of the Directive and Article 9(2)(b) and (c) of the Regulation, by proving either release for free circulation of the non-Community

goods bearing his mark or an offering or sale of the goods which necessarily entails their being put on the market in the Community.

Costs

76 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 5(1) and (3)(c) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks and Article 9(1) and (2)(c) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark must be interpreted as meaning that a trade mark proprietor cannot oppose the mere entry into the Community, under the external transit procedure or the customs warehousing procedure, of original goods bearing that mark which had not already been put on the market in the Community previously by that proprietor or with his consent. The trade mark proprietor cannot make the placing of the goods at issue under the external transit procedure or the customs warehousing procedure conditional on the existence, at the time of the introduction of those goods into**

the Community, of a final destination already specified in a third country, possibly pursuant to a sale agreement.

2. **'Offering' and 'putting on the market' the goods, within the meaning of Article 5(3)(b) of Directive 89/104 and Article 9(2)(b) of Regulation No 40/94, may include, respectively, the offering and sale of original goods bearing a trade mark and having the customs status of non-Community goods, when the offering is done and/or the sale is effected while the goods are placed under the external transit procedure or the customs warehousing procedure. The trade mark proprietor may oppose the offering or the sale of such goods when it necessarily entails the putting of those goods on the market in the Community.**

3. **In a situation such as the one at issue in the main proceedings, it is for the trade mark proprietor to prove the facts which would give grounds for exercising the right of prohibition provided for in Article 5(3)(b) and (c) of Directive 89/104 and Article 9(2)(b) and (c) of Regulation No 40/94, by proving either release for free circulation of the non-Community goods bearing his mark or an offering or sale of the goods which necessarily entails their being put on the market in the Community.**

[Signatures]