OPINION OF MR ADVOCATE-GENERAL CAPOTORTI DELIVERED ON 5 MAY 1977 [1]

Mr President,
Members of the Court,

1. In this case two very different questions have been submitted to the Court. The Court is first asked to determine the extent of the duty, referred to in the third paragraph of Article 177 of the EEC Treaty, to refer to the Court in connexion with national legal proceedings which fall within the category of 'interlocutory' proceedings or proceedings 'en référé'. Secondly, questions are asked concerning the interpretation of Articles 36 and 86 of the EEC Treaty in relation to the protection of a trade-mark, but only on the assumption that the previous question is answered in a particular way. The Court has decided to give separate consideration to the two kinds of issue involved and to confine itself at this stage to dealing with the first of them. This will enable me to be very concise in describing the facts which gave rise to the national proceedings in connexion with which the national court has submitted to this Court the abovementioned questions of interpretation of Community law.

The German company Hoffman-La Roche, which is a subsidiary of the multinational Roche-SAPAC group, manufactures a tranquillizer called Valium under licence from the Hoffmann-La Roche company of Basel and puts it on the market in the Federal Republic of Germany under the name Valium Roche. Both these names are internationally protected by means of registered trade-marks the owner of which is Hoffmann-La Roche AG of Basel. The German Hoffmann-La Roche company puts Valium on sale in Germany exclusively in packages of 20 and 50 tablets.

There is another subsidiary company of the multinational La Roche-SAPAC group in Great Britain which also manufactures the tranquillizer Valium under licence from the Basel company of the same name and places it on sale in packages containing 100 and 500 tablets at prices lower than that charged for the same product by the subsidiary situated in the Federal Republic.

The German undertaking Centrafarm, a subsidiary of the Dutch company Centrafarm BV, which is engaged in the manufacture and sale of pharmaceutical products, purchased in Great Britain, through the parent company, the packets of 500 Valium tablets, packed the tablets in packages of 1 000, on which it affixed the name Valium Roche, in addition to its own name, and the legend 'Marketed by Centrafarm' and sold the drug in the new package on the German market. In this way it took advantage of the appreciable difference in price between Valium produced in Great Britain and that manufactured in Germany.

Acting on behalf of the Basel undertaking, the German Hoffmann-La Roche company brought proceedings against Centrafarm claiming that there had been an infringement of the trade-mark right owned by the Basel Hoffmann-La Roche company. Specifically, it brought interlocutory proceedings (Verfügungsverfahren) before the Landgericht Freiburg for an interim order (einstweilige Verfügung) prohibiting Centrafarm from using the Valium and Roche trade-marks in dealings other than the distribution of Roche products in their original packing.

1 — Translated from the Italian.

The Freiburg court found in favour of the plaintiff's application, issued an interim order and confirmed it in the subsequent judgment. Centrafarm then appealed against this decision before the Oberlandesgericht Karlsruhe which, pursuant to the third paragraph of Article 177 of the EEC Treaty, referred the following questions to the Court:

1. Is the court of a Member State under a duty to refer a question concerning the interpretation of Community law under the third paragraph of Article 177 of the Treaty establishing the European Economic Community to the Court of Justice of the European Communities for a ruling when this question arises during interlocutory proceedings for an interim order, when in such proceedings no appeal lies against the court's decision, but when on the other hand it is open to the parties to have the question concerning the subject-matter of the interlocutory proceedings made the subject-matter of an ordinary action, during which a reference under the third paragraph of Article 177 of the Treaty establishing the European Communities would have if necessary to be made?

If Question (1) is answered in the affirmative, a ruling on the following question is requested:

2. Is the person entitled to a trade-mark right protected for his benefit both in Member State A and in Member State B empowered under Article 36 of the EEC Treaty, in reliance on this right, to prevent a parallel importer from buying from the proprietor of the mark or with his consent in Member State A of the Community medicinal preparations which have been put on the market with his trade-mark lawfully affixed thereto and packaged under this trade-mark, from transferring them into containers of a different size, providing them with new packaging, affixing to such packaging the proprietor's trade-mark and importing the preparations distinguished in this manner into Member State B?
3. Is the proprietor of the trade-mark entitled to do this or does he thereby infringe provisions of the EEC Treaty — in particular those contained in Article 86 thereof — even if he acquires a dominant position within the market in Member State B with regard to the medicinal preparation in question, when prohibition on imports of a repacked product to which the proprietor's trade-mark has been affixed has in actual fact a restrictive effect on the market, because different sizes of packages are used in countries A and B and because the importation of the product in another manner has not yet in fact made any appreciable progress on the market, and when the actual effect of the prohibition is that between the Member States there is maintained a substantial — in certain circumstances disproportionate — price differential, without its being possible to prove that the owner of the mark is using the prohibition solely or mainly to maintain this price differential?'

For the reason stated earlier, this opinion is exclusively concerned with the issues arising under the first question.

2. It was clearly the special characteristics of 'interlocutory' proceedings before the ordinary civil courts which induced the national court to submit its first question.

Accordingly, it seems reasonable for me to begin by briefly describing those characteristics on the basis of the procedural rules of the Member States, especially those of the Federal Republic of Germany. I need hardly add that it will be possible to give a general answer to this question in so far as, in the law of the various Member States, the procedures of the type indicated have features in common; I refer of course to features which are relevant for the purposes of interpreting the third

paragraph of Article 177. If it is not, this Court will still be able to supply an answer based on the distinguishing features of the interlocutory procedures available under German law in the field of industrial property. But even in that case Article 177 would be interpreted on the basis of a typical set of circumstances and not the basis of one particular factual situation.

Under the German Code of Civil Procedure (paragraphs 935 to 945) the interim measures known as 'einstweilige Verfügungen' are designed to provide speedy protection for certain rights which may be threatened. Both the evidence of the right and of the threat and the court's consideration of the application involve a considerably smaller degree of care and accuracy than in ordinary proceedings: all that is required is *'prima facie'* evidence (which is confined to demonstrating that the plaintiff's statement is probably true) and the finding is a summary one.

The unsuccessful party can appeal before the court concerned against an order which it has issued and, as happened in the present case, the decision confirming the order can in turn be the subject of an appeal. Apart from this, however, the ordinary substantive procedure is unaffected in that either of the parties concerned has the power to institute it at any time and in this way secure a judgment which wholly supersedes the interim measure.

In France, the purpose of 'demandes en référé' (interlocutory applications for interim measures (Articles 808 to 811 of the Code of Civil Procedure) is to obtain interim measures in urgent cases. The finding is of a summary nature and for this reason Article 808 of the said Code does no more than provide for measures 'qui ne se heurtent à aucune contestation sérieuse' (to which no serious opposition is raised) together with those 'que justifie l'existence d'un différend' (which are justified by the existence of a dispute). This latter form of words emphasizes the tendency to treat interlocutory proceedings as 'ancillary' to proceedings already pending in the main action; in any case, ordinary proceedings can at any time be instituted.

The situation in Belgium and in Luxembourg can be expressed in terms similar to those applied to France. Accordingly I need only cite Articles 1035 to 1041 of the Belgian Judicial Code of 1967 from which it is clear that an interim order cannot prejudge the main proceedings which can be brought at any time and regardless of whether the order has or has not been contested.

In the Netherlands, the emergency procedure, the so-called 'kort geding' is governed by Article 289 *et seq.* of the Code of Civil Procedure. These rules reproduce many of the basic features revealed during the consideration of German and French law, in particular, the summary nature of the judgment and the fact that, in order to enable the facts and the law as to the substance to be considered, the law grants those concerned the right to institute ordinary proceedings at any time. It should however be noted that a Netherlands court can lay down a time-limit for the commencement of the main action or may itself decide to place the case on the ordinary cause list.

In Italy, Article 700 of the Code of Civil Procedure provides that an application for interim measures may be made by any person who 'has reasonable cause to fear that, during the time required to assert his right by normal process, he may suffer imminent and irreparable damage'. But the consequences of interim measures are subject to the express condition that, unless they are already pending, the plaintiff institutes proceedings on the substance of the case. The interim measure is granted after summary proceedings.

In Great Britain, particularly under English law, 'interlocutory injunctions' may be sought in order to prevent

irreparable damage on the basis of *prima facie* evidence of the right which the plaintiff is relying upon and of the probability of the facts. But the duration of the effects of an 'injunction' cannot continue after the conclusion of the main action, whether this has already begun or whether it has still to be brought (and if the plaintiff does not take the necessary action the court sets him a time-limit).

In the case of Ireland, the grant of an 'interlocutory injunction' and the rules which apply to it correspond to those described in the case of Great Britain.

Finally, in Denmark, interlocutory procedures for interim measures result in the grant of an injunction (forbud) which is provisional and which must, within a short period of time, be followed by ordinary proceedings, which are called justification proceedings (justifikationssag). Clearly, therefore, there is much in common between the form which interim measures take in Italy, in Great Britain and in Ireland.

As the result of this brief digression into comparative law the following conclusions can be drawn: (a) procedures corresponding to those which lead to the German 'einstweilige Verfügungen' exist in all the Member States; (b) the features which they have in common and which distinguish them from ordinary proceedings are, first, their urgent and summary character and, second, the fact that they are without prejudice to fresh and more detailed consideration of the issues of fact and of law in the form of ordinary proceedings; because of this, the proceedings in question result in measures which are always interim; (c) there are differences between the various legal systems as regards the court empowered to adopt the measures in question; the right (if any) to challenge them in a court of appeal or even the supreme court; and, above all, the relationship with the ordinary proceedings in the main action which, in some countries, are left to be brought as they see fit by the parties whereas in other countries this is an absolute condition before legal effect can be given to an interim measure.

3. As we have seen, the question on which a preliminary ruling must be given refers not to the second paragraph of Article 177 of the Treaty of Rome but to the third; that is to say it is concerned with the extent of the duty to refer cases to the Court, not with the right to refer conferred on every court or tribunal of one of the Member States which considers a decision on one of the issues specified in the third paragraph of the said article to be necessary to enable it to give judgment. In the order of 7 October 1976, however, the Oberlandesgericht Karlsruhe expressed the view that there can be, in principle, no question of an option to refer in interlocutory proceedings because this would be inconsistent with the character of the interlocutory procedure 'which is aimed at securing the prompt provisional protection of legal rights'. This statement requires consideration to be given to this issue not least because, if the character of the interlocutory procedure were really such as to be absolutely incompatible with a reference to the Court being one of choice — because it is optional, it can be made taking into account the conduct of the parties and the real degree of urgency of the interim measure requested — the conclusion would be inevitable that, at the level of the higher courts, compulsory reference would *a fortiori* be incompatible with the nature of interlocutory proceedings.

On the subject of the right of a court or tribunal giving judgment in summary proceedings to refer the case to this Court pursuant to Article 177, it must be borne in mind at once that the Court has, already on several occasions, been called upon to give a preliminary ruling on questions arising out of interlocutory proceedings in the courts of various countries: for example, from courts in the Netherlands in Cases 15 and 16/74,

Centrafarm; from German courts in Case 29/69, *Stauder* and Case 78/70, *Deutsche Grammophon-Gesellschaft;* and from Italian courts in a large number of cases to which various 'interlocutory proceedings' gave rise. In some of these cases an intervener formally raised the question of the admissibility of references for a preliminary ruling submitted during summary proceedings (I refer to Case 43/71, *Politi,* in which judgment was given on 14 December 1971, [1971] ECR 1039, and to Case 162/73, *Birra Dreher,* in which judgment was given on 21 February 1974, [1974] ECR 201). The objections were in particular based on the absence of adversary proceedings, which is a characteristic of the specific procedure for the grant of an injunction provided for under Article 633 of the Italian Code of Civil Procedure. However, the Court has always dismissed these objections and has on every occasion held questions referred to it during interlocutory proceedings by the courts to be admissible. The main consideration on which the Court's attitude has been based is that, under Article 177, it is open to *any national court or tribunal* to request the Court of Justice for a preliminary ruling and that for this purpose it is sufficient to establish that the authority concerned is exercising the functions of a court or tribunal and that it regards it as essential, before it can give a ruling, for Community law to be interpreted by the Court of Justice (see the judgments, referred to above, in *Politi* and *Birra Dreher).* I should add that, if this view is taken in connexion with interlocutory proceedings which do not have adversary proceedings which are the distinguishing characteristic of an ordinary action, it is even more valid in the case of interlocutory proceedings such as those in Germany where the right of the defence to be heard is safeguarded (even if this sometimes applies only to the written procedure).

Finally, the same conclusion is reached regarding the purpose of Article 177 on the basis of much wider considerations in the judgment of 16 January 1974 in Case 166/73, *Rheinmühlen Düsseldorf* [1974] ECR 33 *et seq.* That judgment stresses *inter alia* that: 'Article 177 is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community. Whilst it thus aims to avoid divergences in the interpretation of Community law which the national courts have to apply, it likewise tends to ensure this application by making available to the national judge a means of eliminating difficulties which may be occasioned by the requirement of giving Community law its full effect within the framework of the judicial systems of the Member States'. On the basis of this premise, the judgment goes on to declare: 'The provisions of Article 177, which enable every national court or tribunal *without distinction* to refer a case to the Court for a preliminary ruling where it considers that a decision on the question is necessary to enable it to give judgment, must be seen in this light'.

4. Consideration must now be given to the central issue, that of the scope of the third paragraph of Article 177 in relation to interlocutory procedures. That provision expressly imposes a duty to bring a matter before the Court of Justice for a preliminary ruling on a question of Community law upon any 'court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law'. The terms in which the provision is couched have led an influential section of legal opinion to the conclusion that the duty affects only those courts which are so placed in the judicial hierarchy of the member countries that their decisions cannot be the subject of appeal: in other words, the so-called supreme courts. On the other hand it has been argued that the *raison d'être* of the duty is the need to make sure of an interpretation by the Court before the delivery of a decision

which cannot be impugned or, in consequence, changed. It would therefore be necessary to read the third paragraph of Article 177 as referring to any court whatever which had to give a final ruling *ex lege*, regardless of its position in the judicial hierarchy (in particular, to courts which by law exercise jurisdiction at only one level).

The first interpretation is, in fact, supported not only by the wording of Article 177 but also the fact that, in pursuit of the objective of the uniform interpretation of Community law, the authors of the Treaty had grounds for concern about national decisions capable of establishing authoritative precedents, that is to say, decisions of the supreme courts, and not about every final decision especially as it would not, in any event, have been possible to foretell which and how many decisions subject to appeal were destined to become final in the absence of an appeal or other remedy by an unsuccessful party. A further argument is perhaps to be found in Articles 2 and 3 of the Protocol on the Interpretation by the Court of Justice of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, where the duty to refer questions of interpretation of the Convention to the Court for a preliminary ruling is imposed only upon a few specifically named supreme courts at the level of the Cour de Cassation (Supreme Court) and the Councils of State. However, this argument can be reversed in so far as it can be objected that where it was wished to restrict the duty to the supreme courts, it was considered necessary to name them individually.

In my view, it is not possible to resolve this issue beyond any possibility of doubt. There is an important precedent to which I must refer: in the judgment of 15 July 1964 in Case 6/64, namely the famous *Costa* v *ENEL* case ([1964] ECR 585) the Court held *obiter* that by the terms of Article 177 'national courts against whose decisions ... there is no judicial remedy, must refer to the Court of Justice so that a preliminary ruling may be given ...'. Apart from this, another consideration, which can justifiably be regarded as decisive, is the close relationship between the exercise of the interpretative jurisdiction conferred under Article 177 and the Court's responsibility to ensure respect for Community law in addition and above all in the interests of individuals. It is hardly necessary to recall that the doctrine of direct effect was precisely intended to increase the safeguards that Community rules would be observed by deriving therefrom to the greatest possible extent rights for individuals and thus placing the latter in a position to take action claiming that those safeguards should be enforced. It seems to me, therefore, that in order that the Court may fully and effectively discharge its task of uniformly protecting the rights which the Community legal system has created in favour of individuals, it is reasonable to regard the courts, at every level, as under a duty to seek a preliminary ruling in the course of any proceedings which must of necessity result in a final decision. If, on the assumption that Community law is held to be the deciding factor in a decision, the right to seek a preliminary ruling in such cases were left to the discretion of a court, this would be to invite the risk of an erroneous interpretation without any chance of its being corrected on appeal or any possibility of appeal to the highest court, at which level a reference to this Court would undoubtedly become mandatory.

5. At this juncture, the decisive test in identifying the courts which are bound by the obligation referred to in the third paragraph of Article 177 is whether the decision to be taken by a court at the conclusion of the proceedings is or is not final.

As we have seen, the provision refers in terms to decisions against which 'there is no judicial remedy under national law'.

How are those words to be interpreted?

Here again, a literal interpretation must be eschewed. In the first place there is more than one conception of judicial remedy and it differs from one legal system to another: it can be extended to mean any type of appeal, any appropriate means of securing a review of the case, or it can be restricted so as to distinguish the appeal from the remedy, using the words 'judicial remedy' exclusively for that channel of appeal which, in the end, serves to produce a final decision in law. Secondly, there are channels of appeal which can be used by third persons and not by the parties involved: for example, third-party proceedings or, under certain legal systems, an action by the public prosecutor in the interests of the law. Finally, in some legal systems, there are so-called exceptional means of redress, in particular, a re-opening of the case on the discovery of new facts. This, in my view, suffices to show that a literal interpretation would, on this point, leave many questions unanswered.

Bearing in mind the established trend of legal opinion, I feel justified in making the initial statement that appeals by persons other than the parties involved and exceptional remedies such as a re-opening of the case are, in principle, regarded as falling outside the concept of judicial remedy referred to in the third paragraph of Article 177. Moreover, it is generally recognized that this concept does not include an appeal, either; and this is because, after judgment at appeal court level, there is usually available to the parties a third level of proceedings, even though it is confined to examination of questions of law, namely the supreme court. In view of this, and recognizing the need for an interpretation which is based on the spirit and not on the letter of the provision, I feel justified in concluding that the decisions referred to in the third paragraph of Article 177 are all those which are final in the sense that they do not give rise to any review of the case on the request of either of the parties either as regards the facts or even only as regards the law without any fresh facts or exceptional conditions being necessary. There can, accordingly, be no doubt that the supreme courts whose decisions are final in the sense described are among the courts under a duty to seek a preliminary ruling but, consistently with what I said earlier, so are all those lower courts which are likewise competent to give a final decision.

This viewpoint must now be applied to interlocutory proceedings. As the result of my earlier excursion into comparative law, I am convinced that of the features common to those procedures in the various Member States, despite their differences on other major aspects, one of fundamental importance is the fact that all interlocutory proceedings are without prejudice to ordinary proceedings, on the same facts and legal problems, which must conclude with a judgment formally superseding the interim measure, whether it confirms the measure or declares it to be without validity or effect. Only after the conclusion of ordinary proceedings will there be a definite decision at supreme court or equivalent level and it will therefore be at that level that the duty referred to in the third paragraph of Article 177 will undoubtedly apply. But until the stage of the 'main' proceedings is concluded, there will at all times exist only an interim measure subject to the form of judicial review constituted by the main action and by means of which review it is possible to correct any mistake in the interpretation of the Community provision which the court hearing interlocutory proceedings may have made.

As we have seen, the main action may be instituted either on the initiative of one of the parties or be imposed by law (or possibly by the court hearing interlocutory proceedings), and in certain cases the interim measure is adopted in connexion with a main action which is

already pending, while in other cases this action is instituted after the interlocutory decision. These possible differences do not, in my view, affect the basic consideration, which is the provisional nature of the interim measure and the availability of a remedy and of a method of procedure which can amend it. This means that in a case where the main action is already pending or where it constitutes a necessary development of the interlocutory procedure, the provisional character of the interim measure emerges more clearly; in such cases, it is even easier to understand the absurdity of comparing the position of the court in interlocutory proceedings with that of a final court of appeal.

On the other hand, where the main action is a stage which may follow the interlocutory procedure and it comes before another court, it performs a function similar to that of a channel of appeal but essentially represents something more in that it provides for the facts and the law to be examined in depth for the first time after the summary consideration given in interlocutory proceedings (and this also applies in legal systems under which an interim measure is *per se* subject to appeals which, however, retain the character of interlocutory findings). Finally, if the main action, even when it must be instituted by one of the parties, takes place before the same court as that hearing the interlocutory proceedings it is, as the German Government has rightly pointed out in this case, possible to refer to the two proceedings as being in essence one and the same, even though in nature there is a formal difference between them. In those circumstances, the passage from the summary to the main proceedings is substantially the same as having recourse to a domestic means of judicial review of the decision which concluded the summary proceedings.

These considerations convince me that the courts before which interlocutory proceedings are pending are under no obligation to refer to this Court for a preliminary ruling on questions of Community law, a decision on which is necessary to enable it to give judgment; as I stated earlier, they have a right to refer the matter to the Court but are under no duty to do so. I ought to add that this conclusion holds good regardless of the level of the court hearing the interlocutory proceedings; under some legal systems (including, as stated earlier, that in Germany) there is provision for an appeal to a court of first instance against an order issued by that court and then to appeal against its decision, still within the context of the interlocutory procedure, as occurred in the present case; under other systems an appeal lies forthwith to a court of appeal; and, on the other hand, in some States all interlocutory proceedings take place at the same level. These differences in no way affect the basic feature, emphasized above, which is common to interlocutory proceedings, namely that proceedings for re-examination or review of the case are available if not obligatory. Therefore, the conclusion reached regarding Article 177 of the Treaty of Rome remains unchanged.

6. Other arguments can be adduced in support of this view. The duty to refer cases to this Court imposed in the third paragraph of Article 177 on courts giving judgment at sole or last instance (provided that, for the purposes of that decision, a question of Community law must be resolved) is imposed because of the need to avoid the adoption of unilateral decisions in this connexion by national courts the amendment of which cannot be sought by the parties. As I have already stated, however, this obligation performs a much more important function when the decision in addition to being final, is given by a supreme court and is therefore vested with such authority that it constitutes a precedent for the other national courts. However, for a decision to 'constitute a precedent' it is essential that it should be

based on an examination in depth of the case in relation to the existence of the right relied upon by the plaintiff. But, as I said earlier, the court hearing interlocutory proceedings confines itself to establishing, as the result of a mere *prima facie* examination, whether or not the applicant's claim appears to be reasonably well founded; consequently, whether its decision is favourable or unfavourable, it cannot constitute a precedent. In particular, this will also apply to any interpretation which the court may have placed on Community law since it may well be based not on any consideration in depth of the issue but only on a *prima facie* appraisal enabling it to reach a speedy decision as required by the urgency of the measure applied for. Accordingly, even if such a decision were, in the absence of any motion by one of the parties instituting ordinary proceedings, to become final, its nature would prevent it from becoming a precedent endangering uniform compliance with Community law, even if it placed an erroneous interpretation on that law.

Again, in view of the interim character of the court's findings in interlocutory proceedings, the possibility must also be envisaged that the court may not be in possession of all the information necessary to identify the question of Community law to be referred to the Court for a preliminary ruling or to make a correct assessment of its importance for the purposes of the judgment. It must not be forgotten, in this connexion, that, even if it is in favour of the plaintiff's application, an order issued following an interlocutory procedure of the same kind as the 'Verfügungsverfahren' is not decisive as to the existence of the right on which the application was based but serves to protect for the time being the position of the apparent owner of the right subject to a later decision on the substance.

In those circumstances, to refer the question to the Court during the interlocutory proceedings in every case, which is what would occur if it were held that the court hearing the interlocutory proceedings were obliged to do so, could give rise to difficulties which would be avoided by deferring the reference to the Court until the stage of ordinary proceedings.

Finally, the German Government pointed out that in many cases the delay produced by imposing upon the court in interlocutory proceedings the obligation to refer the matter to the Court of Justice would amount to a sort of denial of justice since this would, in practice, appreciably reduce the effectiveness of the measure applied for. It is true that I gave consideration earlier to the question whether the emergency nature of interlocutory procedures is or is not compatible with a reference for a preliminary ruling to the Community Court and that I answered it by stating that there were no grounds for speaking of incompatibility. Despite this I must point out that if, in connexion with interlocutory proceedings, the courts are recognized as having the *right* to refer a question to the Community Court, this does not prejudice their discretion to decide as to the appropriateness or otherwise of the reference to the Court in view of the urgency of the measure applied for, whereas, if the courts were considered to be under a duty to refer matters to the Court of Justice, the discretion to take this decision would no longer exist and the danger that a reference to the Court would conflict with the urgent need to adopt the measure would become incurable.

7. Among the objections raised during the course of these proceedings against the view which I regard as the correct one, there are two which refer in particular to the nature of the interlocutory procedure followed in German law in the matter of industrial property. It was pointed out that this is not a subsidiary procedure since the institution of the main proceedings is only a possibility and, on the contrary,

that, as a matter of fact, the parties frequently refrain from bringing the main action. It was also pointed out that, in matters of industrial property, it is not necessary to prove urgency in order to obtain an interlocutory judgment. Furthermore, it was stated that the law is also applied in the case of interlocutory proceedings and that the type of evidence allowed is of no moment. Finally it was maintained that to ensure that an ordinary action shall follow the interlocutory procedure is something quite different from a 'judicial remedy' against the measure issued at the conclusion of the first proceedings.

I must first answer the last objection, which is clearly based on a literal interpretation of the third paragraph of Article 177. I have already explained that, in order to resolve the issue with which we are concerned, literal interpretation is not the method to be used but if one takes the opposite view one must be absolutely consistent in interpreting literally and must, therefore, regard the obligation to refer to the Court for a preliminary ruling as applying only to the supreme courts or those which, owing to their position in the judicial hierarchy are the only ones 'against whose decisions [in general] there is no judicial remedy under national law'. In cases, consequently, in which the interlocutory procedure does not allow of recourse to the supreme court, which is the position under the German rules of procedure, a court of first or second instance hearing interlocutory proceedings ought not to regard itself as under a duty to request a preliminary ruling from this Court within the meaning of the third paragraph of Article 177, not because it is a court hearing interlocutory proceedings, but because it is not the supreme court.

As for the fact that the commencement of the 'main' action is a possibility related to the discretion of the parties, it is not difficult to show the parallel in the wholly contingent nature of an appeal or application to the highest court against judgments delivered, respectively, by a court of first instance or a court of appeal in the context of an ordinary procedure and, obviously, this uncertainty which concerns the bringing of any appeal does not change into a duty the mere right to refer a matter to the Court provided for in the second paragraph of Article 177 of the EEC Treaty.

Clearly, the frequency with which ordinary proceedings are instituted after interlocutory proceedings is a matter of fact which does not affect the conclusions drawn from the structural relationship, laid down by law, between the two procedures. It is however worth noting, in passing, that in the present case, as was made clear during the hearing, the defendant in the interlocutory proceedings availed itself of the possibility afforded to it under German procedural law (paragraphs 926 and 136 of the Zivilprozeßordnung) to apply to and obtain from the court an order compelling the plaintiff to institute ordinary proceedings (before the Landgericht Freiburg) while the interlocutory proceedings before the Oberlandesgericht Karlsruhe are still pending appeal. This is a small but interesting indication that the transition to ordinary proceedings is no longer so exceptional: one is tempted to make the comment that *'vigilantibus iura succurrunt'!*

As regards the importance which is attached to the condition of urgency in interlocutory proceedings, such as those which were brought in the present case, the German Government has rightly stated that in the matter of protection of industrial property, there is a presumption of urgency. In any event, the main argument which appeared to me to be capable of supporting the view expressed in this opinion does not depend on the element of urgency in interlocutory proceedings.

The comment that the court in interlocutory proceedings also applies the law is in itself beyond dispute; on the

other hand, the whole issue under consideration here would have no point if it were not for the possibility of raising in addition questions of Community law in the course of a procedure of this kind, and if the judge did not consider such questions to be decisive for the outcome of the procedure. The point is a different one: what is out of the question and, in my view, rightly so, is that a court from whom an interim measure is being sought should be called upon to go into a question of law with the same thoroughness and detail as that required of an ordinary court. If this were so, what would be the point of providing for the possibility and, in some legal systems, the requirement of ordinary proceedings after interlocutory proceedings, even when the latter can be brought at more than one level?

It remains for me to comment on the viewpoint expressed by the Commission, which suggested the use of formal and substantive criteria in order to reach a different conclusion. It contends that it is necessary, on the one hand, to take account of the extent to which the interlocutory procedure is or is not dependent on ordinary procedure and, on the other hand, to ascertain what weight is in fact attached in interlocutory proceedings to the element of urgency and, consequently, the depth or otherwise of the judgment made, in law, by the first court. To my mind the result of such an approach would be to make the existence or otherwise of the duty to refer cases to this Court dependent upon an appraisal of each individual case by the national court. We must not lose sight of the fact that the national court already has the responsibility of deciding whether the solution of a question of Community law is necessary to enable it to give judgment and whether a question of interpretation has arisen (in the sense that there is room for doubt, however small, regarding the meaning and scope of a Community rule). If to this were to be added freedom to appraise the independence of the interlocutory proceedings, not in a formal sense but from the point of view of its essential suitability to fulfil the same purpose as ordinary proceedings, the theoretical recognition of the duty to refer cases to the Court under the third paragraph of Article 177 would in practice be difficult to distinguish from the exercise of the normal right to request a preliminary ruling. Since what is involved is the interpretation of a provision, such as that in the third paragraph of Article 177, which is essentially procedural in character, every effort must, in my view, be made to define its scope on the basis of objective and specific criteria which leave the courts which have to apply it with no margin of discretion. This is necessary if a provision, designed to ensure the certainty and uniformity of the application of Community law, is not itself to become a source of doubt and of divergent application in the various Member States.

8. On the basis of the considerations developed so far, is it possible to reply to the first question submitted by the Oberlandesgericht Karlsruhe in a way which holds good for every case in which questions of the type provided for under Article 177 of the EEC Treaty are raised in connexion with interlocutory proceedings or proceedings 'en référé'? I believe I have been able to establish that the common features of the various interlocutory procedures provided for under the law of Member States argue decisively in favour of the view I have expressed and that, under German procedural law, the autonomous character of the interlocutory procedure with which this case is concerned is, if anything, more pronounced than that on which arguments to the contrary are based (arguments which in my view are unconvincing). However, in order to prevent a simple reference to a set of procedures which are not wholly comparable and which are designated by different names in all countries from becoming a source of doubt, it is desirable that the Court should refer

more particularly to interlocutory procedures which have the same characteristics as the 'Verfügungsverfahren' provided for under paragraphs 935 to 945 of the German Code of Civil Procedure.

I conclude, therefore, by suggesting that the reply to be given to the first question submitted by the Oberlandesgericht Karlsruhe should be that a national court giving judgment in interlocutory proceedings, in particular, proceedings of the type of the 'Verfügungsverfahren' provided for under paragraphs 935 to 945 of the Code of Civil Procedure of the Federal Republic of Germany, is not bound to refer the case to the Court of Justice in accordance with the third paragraph of Article 177 of the EEC Treaty, even though there is no judicial remedy against its decisions, provided that either of the parties is free to bring ordinary proceedings on the issues with which the interlocutory proceedings are concerned, which proceedings are capable of resulting in a decision superseding that which concluded the first proceedings.