JUDGMENT OF THE COURT (Sixth Chamber)

27 November 2003 *

In Case C-283/01,

REFERENCE to the Court under Article 234 EC by the Hoge Raad der Nederlanden (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Shield Mark BV

and

Joost Kist h.o.d.n. Memex,

on the interpretation of Article 2 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),

* Language of the case: Dutch.

THE COURT (Sixth Chamber),

composed of: V. Skouris, acting for the President of the Sixth Chamber, J.N. Cunha Rodrigues, J.-P. Puissochet, R. Schintgen and F. Macken (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

— Shield Mark BV, by T. Cohen Jehoram and E.J. Morée, advocaten,

— the Netherlands Government, by H.G. Sevenster, acting as Agent,

— the French Government, by G. de Bergues and A. Maitrepierre, acting as Agents,

— the Italian Government, by U. Leanza, acting as Agent, assisted by O. Fiumara, avvocato dello Stato,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the United Kingdom Government, by J.E. Collins, acting as Agent, and D. Alexander, Barrister,

— the Commission of the European Communities, by N.B. Rasmussen and H.M.H. Speyart, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Shield Mark BV, represented by T. Cohen Jehoram, of the Netherlands Government, represented by N.A.J. Bel, acting as Agent, and also of the Commission, represented by N.B. Rasmussen and H. van Vliet, acting as Agent, at the hearing on 27 February 2003,

after hearing the Opinion of the Advocate General at the sitting on 3 April 2003,

gives the following

Judgment

1 By judgment of 13 July 2001, received at the Court on 18 July 2001, the Hoge Raad der Nederlanden (Netherlands) referred to the Court under Article 234 EC

two questions for a preliminary ruling on the interpretation of Article 2 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').

2 Those question were raised in proceedings between Shield Mark BV ('Shield Mark') and Mr Kist, trading as Memex, concerning the latter's use in the course of his trade of signature tunes (jingles) previously registered by Shield Mark at the Benelux Trade Marks Office ('BBM') as sound marks.

Legal framework

Community legislation

3 According to the first recital in the preamble to the Directive, the purpose of the Directive is to approximate the laws of Member States on trade marks in order to remove the disparities capable of impeding the free movement of goods and freedom to provide services and distorting competition within the common market. However, as indicated in the third recital, the Directive does not seek to achieve full-scale approximation of those laws.

4 The seventh recital to the Directive states that 'attainment of the objectives at which this approximation of laws is aiming requires that the conditions for obtaining and continuing to hold a registered trade mark are, in general, identical in all Member States' and that, 'to this end, it is necessary to list examples of signs which may constitute a trade mark, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings'.

5 Article 2 of the Directive, entitled 'Signs of which a trade mark may consist', contains the list of examples referred to in the seventh recital. It provides:

'A trade mark may consist of any sign capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings.'

6 Article 3 of the Directive, entitled 'Grounds for refusal or invalidity', provides in paragraph 1(a) and (b):

'The following shall not be registered or if registered shall be liable to be declared invalid:

(a) signs which cannot constitute a trade mark;

(b) trade marks which are devoid of any distinctive character'.

Legislation applicable to Benelux

7 The Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands laid down their trade marks law in a common law, the uniform Benelux law on trade marks (Trb. 1962, 58, and Trb. 1983, 187; 'the LBM'), and responsibility for its implementation was entrusted to a common institution, the BBM.

8 The LBM was amended, with effect from 1 January 1996, by the Protocol of 2 December 1992 amending that law (Trb. 1993, 12, 'the Protocol'), in order to transpose the Directive into the legal order of those three Member States.

9 However, it was not deemed necessary to amend the LBM for the purpose of expressly transposing Articles 2 and 3 of the Directive. In that regard, the sixth and seventh subparagraphs of point I.2 of the grounds of the Protocol provide:

'Article 2 of the Directive, concerning signs which may be protected, does not require amendment of the LBM. The wording of that article corresponds almost wholly with Article 1 of the LBM. While it is true that, unlike Article 2 of the

Directive, Article 1 of the LBM does not require that the signs be capable of being represented graphically, in practice signs are none the less required to satisfy that requirement in order to benefit from protection as a trade mark.

Nor did Article 3 of the Directive entail an amendment of the LBM. The absolute grounds for refusal or invalidity set out in the first paragraph of that article may be found in Articles 1 and 4(1) and (2), taken together with Article 14(A)(1) of the LBM....'

10 Article 1 of the LBM, which was not thus amended by the Protocol, provides in the first paragraph:

'Denominations, designs, prints, seals, letters, numbers, shapes of products or of packaging and all other signs serving to distinguish an undertaking's products shall be regarded as individual trade marks.'

11 Article 1(b) of the regulation implementing the LBM provides that '[t]he Benelux deposit of a trade mark shall be done in French or Dutch by production of a document bearing... a reproduction of the trade mark'.

12 Although, before the entry into force of the Protocol on 1 January 1996, the BBM did not carry out a substantive check of the registration of a trade mark, such a check, where necessary, being made *ex post facto*, on the occasion of an invalidity action or in a counterclaim action in a case involving breach of the rights of the holder of the trade mark, it now examines applications on the basis of the absolute grounds for refusal laid down in the LBM.

13 As regards sound marks, the BBM initially considered that they could be registered. However, following the judgment of the Gerechtshof te's Gravenhage (Regional Court of Appeal) (Netherlands) of 27 May 1999, delivered in proceedings between the parties to the main proceedings, the BBM has generally refused to register sound marks.

Main proceedings and questions referred to the Court

14 Shield Mark is the holder of 14 trade marks registered at the BBM, the first on 5 June 1992 and the most recent on 2 February 1999, for various products and services in Classes 9 (computer software (recorded), etc.), 16 (magazines, newspapers, etc.), 35 (publicity, business management, etc.), 41 (education, training, organisation of seminars on publicity, marketing, intellectual property and communications in the business sector, etc.) and 42 (legal services) of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as amended and modified.

15 Four of those trade marks consist of a musical stave with the first nine notes of the musical composition 'Für Elise', by Ludwig van Beethoven. Two of them also state: 'Sound mark. The trade mark consists of the representation of the melody

formed by the notes (graphically) transcribed on the stave', plus, in one case, 'played on a piano'.

16 Four other trade marks consist of the first nine notes of 'Für Elise'. Two of them also state: 'Sound mark. The trade mark consists of the melody described', plus, in one case, 'played on a piano'.

17 Three further marks consist of the sequence of musical notes 'E, D#, E, D#, E, B, D, C, A'. Two of them also state: 'Sound mark. The trade mark consists of the reproduction of the melody formed by the sequence of notes as described', plus, in one case, 'played on a piano'.

18 Two of the trade marks registered by Shield Mark consist of the denomination 'Kukelekuuuuu' (an onomatopoeia suggesting, in Dutch, a cockcrow). One of them states: 'Sound mark, the trade mark consists of an onomatopoeia imitating a cockcrow'.

19 Last, one mark consists of a 'cockcrow' and also states: 'Sound mark, the trade mark consists of the cockcrow as described'.

20 In October 1992, Shield Mark launched a radio advertising campaign, each of its commercials beginning with a signature tune employing the first nine notes of 'Für Elise'. Furthermore, from February 1993 Shield Mark has issued a news sheet describing the services which it offers on the market. Its news sheets are displayed on stands in bookshops and newspaper kiosks and the signature tune is heard each time a news sheet is removed from the stand. Last, Shield Mark publishes software for lawyers and marketing specialists and each time the disk containing the software starts up a cockcrow is heard.

21 Mr Kist, who operates as a communications consultant, in particular in advertising law and trade marks law, organises seminars on intellectual property and marketing and publishes a review dealing with those matters.

22 During an advertising campaign which began on 1 January 1995, Mr Kist used a melody consisting of the first nine notes of 'Für Elise' and also sold a computer program which, when starting up, emits a cockcrow.

23 Shield Mark brought an action against Mr Kist for infringement of its trade mark and unfair competition.

24 By judgment of 27 May 1999, the Gerechtshof te's Gravenhage granted Shield Mark's application in so far as it was based on the law of civil responsibility, but dismissed it in so far as it was basedon trade marks law, on the ground that it was

the intention of the Governments of the Member States of Benelux to refuse to register sounds as trade marks.

25 Shield Mark appealed to the Hoge Raad der Nederlanden, which decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. (a) Must Article 2 of the Directive be interpreted as precluding sounds or noises from being regarded as trade marks?

(b) If the answer to question 1(a) is in the negative, does the system established by the Directive require that sounds or noises must be capable of being regarded as trade marks?

2. (a) If the answer to question 1(a) is in the negative, what requirements does the Directive lay down for sound marks as regards the reference in Article 2 to the need for the sign to be capable of being represented graphically and, in conjunction therewith, as regards the way in which the registration of such a trade mark must take place?

(b) In particular, are the requirements referred to in (a) satisfied if the sound or the noise is registered in one of the following forms:

— musical notes;

— a written description in the form of an onomatopoeia;

— a written description in some other form;

— a graphical representation such as a sonogram;

— a sound recording annexed to the registration form;

— a digital recording accessible via the internet;

— a combination of those methods;

— some other form and, if so, which?'

First question

26 By part (a) of its first question, the national court is asking whether Article 2 of the Directive must be interpreted as precluding sound signs from being regarded as trade marks. In the event that the answer is in the negative, it asks, by part (b) of its first question, whether that article implies that sound signs must be capable of being regarded as trade marks.

Observations submitted to the Court

27 According to Shield Mark, it follows from the seventh recital to the Directive that Article 2 thereof does not contain an exhaustive list of signs of which a trade mark may consist. Accordingly, all signs capable of serving to distinguish an undertaking's products or services from those of other undertakings may, in principle, serve as trade marks. It follows, in its submission, that since sound signs are clearly capable of doing so they may fulfil the role of a trade mark.

28 That interpretation is supported, in particular, by the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-273/00 *Sieckmann* [2002] ECR I-11737, by the preliminary work on the Directive and the Council documents available to the public concerning the adoption of both the Directive and Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), and also by the Examination Guidelines of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM).

29 The Netherlands, French, Italian, Austrian and United Kingdom Governments maintain that sounds are capable of distinguishing products or services of one undertaking from those of other undertakings. As the list of signs of which a trade mark may consist in Article 2 of the Directive is merely indicative, sounds may constitute trade marks.

30 The French and Austrian Governments further state that, owing to the objective of the Directive, which is to approximate the laws of the Member States relating to trade marks, sounds must be capable of being regarded as trade marks provided that they are capable of being represented graphically.

31 The Commission observes that Article 2 of the Directive requires that, in order to be registered as a trade mark, a sign must be capable of being represented graphically and capable of distinguishing the goods or services of one undertaking from those of other undertakings. In its view, it follows from the system established by Articles 2 and 3 of the Directive that distinctive character for the purposes of Article 2, unlike Article 3, does not relate to whether a sign may actually assume a distinctive character for the goods or services for which its registration as a trade mark is sought, but rather to the possession, by the sign in question, of a distinctive character in general terms, irrespective of the various categories of products or services.

32 Sounds and noises are perceptible by human beings, who are able to remember them, and they allow the goods or services of one undertaking to be distinguished from those of other undertakings. Furthermore, they are capable of being represented graphically.

33 Since the list of signs of which a trade mark may consist in Article 2 of the Directive is not limitative, the Commission infers that signs consisting of sounds or noises are in principle capable of being registered as trade marks, on condition that they are capable of distinguishing goods or services without any risk of confusion and that they are capable of being represented graphically in a clear, precise and stable manner which allows third parties to understand without difficulty what trade mark is being protected.

The Court's response

34 As regards the first question, the purpose of Article 2(a) of the Directive is to define the types of signs of which a trade mark may consist. That provision states that a trade mark may consist of 'particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging...'.

Admittedly, that provision mentions only signs which are capable of being perceived visually, are two-dimensional or three-dimensional and can thus be represented by means of letters or written characters or by a picture (*Sieckmann*, cited above, paragraph 43).

35 However, as is clear from the language of both Article 2 of the Directive and the seventh recital in the preamble thereto, which refers to a 'list [of] examples' of signs of which a trade mark may consist, that list is not exhaustive. Consequently, that provision, although it does not mention signs which are not in themselves capable of being perceived visually, such as sounds, does not, however, expressly exclude them (see, to that effect, regarding olfactory signs, *Sieckmann*, paragraph 44).

36 Furthermore, as Shield Mark, the intervening Governments and the Commission have stated, sound signs are not by nature incapable of distinguishing the goods or services of one undertaking from those of other undertakings.

37 In those circumstances, Article 2 of the Directive must be interpreted as meaning that sounds may constitute a trade mark, on condition that they may also be represented graphically, a question to be dealt with when the Court considers the second question.

38 As regards part (b) of the first question, Article 2 of the Directive does not preclude the registration of sounds as trade marks. Consequently, the Member States cannot preclude such registration as a matter of principle.

39 Although the Directive does not seek to achieve full-scale approximation of the laws of the Member States relating to trade marks, it is clear from the seventh recital to the Directive that the conditions for obtaining and continuing to hold a trade mark are to be the same in all the Member States.

40 In that regard, as the French Government has observed, the nature of the signs of which a trade mark may consist cannot differ from one Member State to another.

41 The answer to the first question must therefore be that Article 2 of the Directive is to be interpreted as meaning that sound signs must be capable of being regarded as trade marks provided that they are capable of distinguishing the goods or services of one undertaking from those of other undertakings and are capable of being represented graphically.

Second question

42 By its second question, the national court is asking the Court to state the conditions on which a sound sign is capable of being represented graphically within the meaning of Article 2 of the Directive and, in particular, whether musical notes, a written description in the form of an onomatopoeia, a written description in some other form, a graphical representation such as a sonogram, a sound recording annexed to the registration form, a digital recording accessible via the internet, a combination of those methods, or any other form meet the requirements of graphical representation.

Observations submitted to the Court

43 First of all, Shield Mark, the intervening Governments and the Commission agree that any graphical representation of a sound sign must satisfy various requirements in order for the sign to be capable of being a trade mark.

44 Thus, in Shield Mark's submission, the graphical representation must be clear, precise and comprehensible, without undue effort, to third parties. According to the Netherlands Government, it must be complete, clear and precise, so that it is possible to know to what the exclusivity of the holder of the trade mark relates, and intelligible to those with an interest in consulting the trade mark register. The French Government claims that the graphical representation must be clear and precise, although it is not essential that the perception of the sign be immediate for the public; furthermore, the protected sign must be intelligible. The Italian Government submits that the representation must be suitable for expressing the sound, for rendering it comprehensible and for distinguishing it. The Austrian Government maintains that the sound of a sound sign must be clear from a graphical representation or must be capable of being inferred with sufficient clarity, so that the scope of such protection as the trade mark may afford is recognisable with sufficient precision. According to the United Kingdom Government, the graphical representation must be sufficiently complete in itself, clear, precise and understood, without undue effort, by persons consulting the trade mark register. Last, the Commission claims that the representation must be clear, precise and stable and must allow third parties to understand without difficulty what the protected trade mark is.

45 As regards, second, the acceptable forms of graphical representation of sound signs, Shield Mark, the French, Austrian and United Kingdom Governments and the Commission maintain that a musical stave constitutes a graphical representation for the purposes of Article 2 of the Directive.

46 Shield Mark and the French Government, unlike the United Kingdom Government and the Commission, take the view that a reference to a well-known work, such as 'the first nine notes of "Für Elise"', constitutes a graphical representation.

47 Unlike the French and United Kingdom Governments, Shield Mark and the Commission maintain that the description of a tune by the transcription of the notes of which it is composed, such as 'E, D#, E, D#, E, B, D, C, A' must be regarded as a graphical representation of the melody concerned.

48 Shield Mark and the French and Austrian Governments accept, in essence, that a sonogram constitutes a graphical representation, while the Austrian Government further states that such a sign may be registered provided that it is accompanied by an acoustic reproduction on a data carrier, and the French Government states that this mode of representation might be accompanied by a sound recording or a digital recording. The United Kingdom Government, on the other hand, maintains that, generally, this form of graphical representation cannot be accepted and the Commission rejects the contention that, at the current stage of technology, a sonogram may be an acceptable form of graphical representation when filing a sign for registration as a trade mark.

49 Unlike the French and Austrian Governments, Shield Mark and, in certain circumstances (where the description is clear and unambiguous), the United Kingdom Government and the Commission take the view that an onomatopoeia is also capable of being registered.

50 As regards a sound recording annexed to the registration form, the French Government submits that it might accompany a sonogram or a spectrogram and the Austrian Government maintains that it must be annexed to a sonogram. On

the other hand, this purported mode of 'graphical representation' is disputed as a means of filing an application for a sign as a trade mark by Shield Mark, the United Kingdom Government and the Commission.

The Court's response

51 As a preliminary observation, it is to be remembered that, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59).

52 Nevertheless, the Court has taken the view that, in order to determine whether it has jurisdiction, it should examine the conditions in which the case was referred to it by the national court. The spirit of cooperation which must prevail in the preliminary-ruling procedure requires the national court, for its part, to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (see, inter alia, *Bosman*, cited above, paragraph 60).

53 The Court may therefore decline to rule on a question referred by a national court for a preliminary ruling where, inter alia, the problem is hypothetical (see, inter alia, Case C-111/01 *Gantner Electronic* [2003] ECR I-4207. paragraph 36).

54 In the present case, Shield Mark did not file an application for registration in the form of a sonogram, a sound recording, a digital recording or a combination of those methods, so that, in the absence of relevance, an answer cannot be provided to the question in so far as it relates to those modes of representation.

55 As regards, in the first place, the requirements to be satisfied by any graphical representation, the Court held in *Sieckmann*, cited above, which concerned olfactory signs, that Article 2 of the Directive must be interpreted as meaning that a trade mark may consist of a sign which is not in itself capable of being perceived visually, provided that it can be represented graphically, particularly by means of images, lines or characters, and that its representation is clear, precise, self-contained, easily accessible, intelligible, durable and objective.

56 Those conditions are also binding on sound signs, which, like olfactory signs, are not in themselves capable of visual perception.

57 As regards, in the second place, acceptable forms of graphical representation, although it is for the national court to determine, in each specific case before it, whether the sign was capable of constituting a trade mark and could therefore be validly registered, the Court is none the less competent to provide guidance as to whether a representation by means of musical notes or a representation using the written language constitutes a graphical representation of a sound sign for the purposes of Article 2 of the Directive.

58 It must be emphasised at the outset that a sign cannot be registered as a sound mark where the applicant has failed to state in the application for registration that the sign in question must be understood as being a sound sign. In such a case, the competent trade mark registration authority, and the public, in particular traders; are entitled to consider that it is a word mark or a figurative mark as represented graphically in the application for registration.

59 As regards, first, the representation of a sound sign by a description using the written language, it cannot be precluded a priori that such a mode of graphical representation satisfies the requirements defined at paragraph 55 of this judgment. However, in the case of signs such as those at issue in the main proceedings, a graphical representation such as 'the first nine notes of "Für Elise"' or 'a cockcrow' at the very least lacks precision and clarity and therefore does not make it possible to determine the scope of the protection sought. Accordingly, it cannot constitute a graphical representation of that sign for the purposes of Article 2 of the Directive.

60 As regards, next, an onomatopoeia, it must be held that there is a lack of consistency between the onomatopoeia itself, as pronounced, and the actual sound or noise, or the sequence of actual sounds or noises, which it purports to imitate phonetically. Thus, where a sound sign is represented graphically by a simple onomatopoeia, it is not possible for the competent authorities and the public, in particular traders, to determine whether the protected sign is the onomatopoeia itself, as pronounced, or the actual sound or noise. Furthermore, an onomatopoeia may be perceived differently, depending on the individual, or from one Member State to another. That is so in the case of the Dutch onomatopoeia 'Kukelekuuuuu', which seeks to transcribe a cockcrow, and which is very different from the corresponding onomatopoeia in the other languages used in the Benelux Member States. Consequently, a simple onomatopoeia cannot without more constitute a graphical representation of the sound or noise of which it purports to be the phonetic description.

61 As regards, last, musical notes, which are a common method of representing sounds, a sequence of notes without more, such as 'E, D#, E, D#, E, B, D, C, A', does not constitute a graphical representation for the purposes of Article 2 of the Directive either. Such a description, which is neither clear, nor precise nor self-contained, does not make it possible, in particular, to determine the pitch and the duration of the sounds forming the melody in respect of which registration is sought and which constitute essential parameters for the purposes of knowing the melody and, accordingly, of defining the trade mark itself.

62 On the other hand, a stave divided into bars and showing, in particular, a clef (a treble clef, bass clef or alto or tenor clef), musical notes and rests whose form (for the notes: semibreve, minim, crotchet, quaver, semiquaver, etc.; for the rests: semibreve rest, minim rest, crotchet rest, quaver rest, etc.) indicates the relative value and, where appropriate, accidentals (sharp, flat, natural) — all of this notation determining the pitch and duration of the sounds — may constitute a faithful representation of the sequence of sounds forming the melody in respect of which registration is sought. This mode of graphical representation of the sounds meets the requirements of the case-law of the Court that such representation must be clear, precise, self-contained, easily accessible, intelligible, durable and objective.

63 Even if such a representation is not immediately intelligible, the fact remains that it may be easily intelligible, thus allowing the competent authorities and the public, in particular traders, to know precisely the sign whose registration as a trade mark is sought.

64 The answer to the second question must be that:

— Article 2 of the Directive must be interpreted as meaning that a trade mark may consist of a sign which is not in itself capable of being perceived visually, provided that it can be represented graphically, particularly by means of images, lines or characters, and that its representation is clear, precise, self-contained, easily accessible, intelligible, durable and objective;

— in the case of a sound sign, those requirements are not satisfied when the sign is represented graphically by means of a description using the written language, such as an indication that the sign consists of the notes going to make up a musical work, or the indication that it is the cry of an animal, or by means of a simple onomatopoeia, without more, or by means of a sequence of musical notes, without more. On the other hand, those requirements are satisfied where the sign is represented by a stave divided into measures and showing, in particular, a clef, musical notes and rests whose form indicates the relative value and, where necessary, accidentals.

Costs

65 The costs incurred by the Netherlands, French, Italian, Austrian and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Hoge Raad der Nederlanden by judgment of 13 July 2001, hereby rules:

1. **Article 2 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks is to be interpreted as meaning that sound signs must be capable of being regarded as trade marks provided that they are capable of distinguishing the goods or services of one undertaking from those of other undertakings and are capable of being represented graphically.**

2. **Article 2 of Directive 89/104 must be interpreted as meaning that a trade mark may consist of a sign which is not in itself capable of being perceived**

visually, provided that it can be represented graphically, particularly by means of images, lines or characters, and that its representation is clear, precise, self-contained, easily accessible, intelligible, durable and objective.

In the case of a sound sign, those requirements are not satisfied when the sign is represented graphically by means of a description using the written language, such as an indication that the sign consists of the notes going to make up a musical work, or the indication that it is the cry of an animal, or by means of a simple onomatopoeia, without more, or by means of a sequence of musical notes, without more. On the other hand, those requirements are satisfied where the sign is represented by a stave divided into measures and showing, in particular, a clef, musical notes and rests whose form indicates the relative value and, where necessary, accidentals.

Skouris Cunha Rodrigues Puissochet

Schintgen Macken

Delivered in open court in Luxembourg on 27 November 2003.

R. Grass

Registrar

V. Skouris

President