JUDGMENT OF THE COURT
4 November 1997 *

In Case C-337/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Hoge Raad der Nederlanden for a preliminary ruling in the proceedings pending before that court between

Parfums Christian Dior SA and Parfums Christian Dior BV

and

Evora BV

on the interpretation of Articles 30, 36 and the third paragraph of Article 177 of the EC Treaty and of Articles 5 and 7 of the 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 COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann (Rapporteur), H. Ragnemalm, R. Schintgen (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn, J. L. Murray, D. A. O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann and L. Sevón, Judges,

* Language of the case: Dutch.

Advocate General: F. G. Jacobs,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Parfums Christian Dior SA and Parfums Christian Dior BV, by C. Gielen, Advocate, Amsterdam, and H. van der Woude, of the Brussels Bar,

— Evora BV, by D. W. F. Verkade and O. W. Brouwer, Advocates, Amsterdam, and P. Wytinck, of the Brussels Bar,

— the French Government, by C. de Salins, Deputy Director at the Legal Affairs Directorate of the Ministry of Foreign Affairs, and P. Martinet, Foreign Affairs Secretary in the same directorate, acting as Agents,

— the Italian Government, by U. Leanza, Head of the Contentious Diplomatic Affairs Department of the Ministry of Foreign Affairs, acting as Agent, assisted by O. Fiumara, Avvocato dello Stato,

— the Government of the United Kingdom, by L. Nicoll, of the Treasury Solicitor's Department, acting as Agent, and by M. Silverleaf, Barrister,

— the Commission of the European Communities, by B. J. Drijber, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Parfums Christian Dior SA and Parfums Christian Dior BV, represented by C. Gielen and H. van der Woude; of Evora BV, represented by O. W. Brouwer, L. de Gryse, of the Brussels Bar, and P. Wytinck; of the French Government, represented by P. Martinet; and of the Commission, represented by B. J. Drijber, at the hearing on 5 February 1997,

after hearing the Opinion of the Advocate General at the sitting on 29 April 1997,

gives the following

Judgment

1 By judgment of 20 October 1995, received at the Court on 26 October 1995, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty six questions on the interpretation of Articles 30, 36 and the third paragraph of Article 177 of that Treaty and of Articles 5 and 7 of the 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, hereinafter 'the Directive').

2 The questions have been raised in proceedings between (i) Parfums Christian Dior SA, a company incorporated under French law established in Paris (hereinafter 'Dior France') and Parfums Christian Dior BV, a company incorporated under Netherlands law established in Rotterdam (hereinafter 'Dior Netherlands') and (ii) Evora BV, a company incorporated under Netherlands law established at Renswoude (hereinafter 'Evora'), concerning advertising carried out by Evora for Dior products which it has put on sale.

3 Dior France develops and produces perfumes and other cosmetic products which are sold at premium prices and which are considered to belong to the market for luxury cosmetic products. For the sale of its products outside France it has

appointed exclusive representatives, including Dior Netherlands in the Netherlands. Like other exclusive representatives of Dior France in Europe, Dior Netherlands uses a selective distribution system to distribute Dior products in the Netherlands, which means that Dior products are sold only to selected retailers who are under an obligation to sell Dior products only to ultimate consumers and never to resell to other retailers unless they are also selected to sell Dior products.

4 In the Benelux, Dior France has exclusive rights to the Eau Sauvage, Poison, Fahrenheit and Dune picture trade marks, for *inter alia* perfumes. Those marks consist of illustrations of the packaging in which the bottles containing the perfumes bearing those names are sold. In addition, Dior France has copyright in both that packaging and those bottles and in the packaging and bottles of products marketed under the name of Svelte.

5 Evora operates a chain of chemists' shops under the name of its subsidiary Kruidvat. Although they have not been appointed as distributors by Dior Netherlands, the Kruidvat shops sell Dior products which Evora has obtained by means of parallel imports. The legality of retailing those products has not been challenged in the main proceedings.

6 In a Christmas promotion in 1993, Kruidvat advertised for sale the Dior products Eau Sauvage, Poison, Fahrenheit, Dune and Svelte and during the promotion it depicted in advertising leaflets the packaging and bottles of some of those products. According to the judgment making the reference, each depiction of the packaging and bottles related clearly and directly to the goods offered for sale and the advertising was carried out in a manner customary to retailers in this market sector.

7 Taking the view that this advertising did not correspond to the luxurious and prestigious image of the Dior marks, Dior France and Dior Netherlands (hereinafter 'Dior') brought proceedings before the Rechtbank te Haarlem (District Court,

Haarlem) for infringement of those marks and for an order requiring Evora to desist and to continue to desist from making use of Dior picture trade marks and from any publication or reproduction of its products in catalogues, brochures, advertisements or otherwise. Dior claimed in particular that the use made by Evora of its trade marks was contrary to the provisions of the Uniform Benelux Law on Trade Marks in force at that time and was liable to damage their luxurious and prestigious image. Dior also claimed that the advertising carried out by Evora infringed its copyright.

8 The President of the Rechtbank granted Dior's application and Evora was ordered with immediate effect to desist from making use of Dior's picture trade marks and from any publication or reproduction of the Dior products at issue in catalogues, brochures, advertisements or otherwise, in a manner not conforming to Dior's customary manner of advertising. Evora appealed against that order to the Gerechtshof (Regional Court of Appeal), Amsterdam.

9 That court set aside the lower court's order and refused the measures applied for. In particular, it rejected Dior's argument that Dior could oppose the further commercialization of the goods under Article 7(2) of the Directive, which provides that the proprietor of a trade mark may oppose its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor where there are legitimate reasons, especially where the condition of the goods is changed or impaired after they have been put on the market. The Gerechtshof considered that this provision envisaged only harm caused to the reputation of a trade mark by some alteration of the physical condition of the goods to which the mark applies.

10 Dior appealed in cassation against that judgment to the Hoge Raad. It argued in particular that the expression 'condition of the goods' used in Article 7(2) of the Directive also covers the 'mental' condition of the goods, by which it means the allure, prestigious image and aura of luxury surrounding the goods, resulting from the manner in which the trade mark owner has chosen to present and advertise the goods using his trade mark rights.

11 Evora argued that its advertising — carried out in the manner customary to retailers in this market sector — did not infringe Dior's exclusive rights and that the provisions of the Directive and Articles 30 and 36 of the Treaty precluded Dior from relying on its trade mark rights and copyright to prohibit it from advertising the Dior products which it markets.

12 In those circumstances, the Hoge Raad decided that questions on the interpretation of the Uniform Benelux Law on Trade Marks should be referred to the Benelux Court of Justice ('the Benelux Court') and questions on Community law should be referred to the Court of Justice of the European Communities. In this context, the Hoge Raad has also raised the question whether in this instance it or the Benelux Court is to be regarded as the court or tribunal against whose decisions there is no judicial remedy under national law and which court is therefore obliged under the third paragraph of Article 177 of the Treaty to make a reference to the Court of Justice.

13 The Hoge Raad also points out that, although at the time when it submitted its reference, the Benelux States had still not adapted their legislation to the Directive, despite the expiry of the period laid down for that purpose, the interpretation of the Directive is not without relevance, given the case-law of the Court to the effect that, where an individual relies on a directive which has not been transposed in the national legal system within the period laid down, the national rules are to be interpreted, as far as possible, in the light of the wording and purpose of the directive (see, in particular, Case C-91/92 *Faccini Dori* v *Recreb* [1994] ECR I-3325). In the event that it is not possible to interpret the relevant national rules in accordance with the Directive, a question as to the interpretation of Articles 30 and 36 of the Treaty also arises.

14 The Hoge Raad has therefore decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Where, in proceedings relating to trade marks in one of the Benelux countries in connection with the interpretation of the Uniform Benelux Law on Trade

Marks, a question relating to the interpretation of the First Council Directive (89/104/EEC) of 21 December 1988 to approximate the laws of the Member States relating to trade marks arises, is the highest national court or the Benelux Court to be regarded as the court or tribunal of the Member State against whose decisions there is no remedy under national law and which is therefore obliged under the third paragraph of Article 177 of the EC Treaty to make a reference to the Court of Justice?

2. Is it in keeping with the system of the aforementioned Directive, in particular Articles 5, 6 and 7 thereof, to assume that, where it is a question of the resale of goods which have been put on the market in the Community under a trade mark by the trade mark proprietor or with his consent, the reseller is also free to use that trade mark for the purposes of bringing such further commercialization to the attention of the public?

3. In the event that the second question is answered in the affirmative, do exceptions exist to that rule?

4. In the event that the third question is answered in the affirmative, is there room for an exception where the advertising function of the trade mark is endangered by the fact that, as a result of the manner in which the reseller uses the trade mark in order to attract public attention in that way, he damages the luxurious and prestigious image of the trade mark?

5. Can there be said to be "legitimate reasons" within the meaning of Article 7(2) of the Directive where, as a result of the way in which the reseller advertises the goods, the "mental condition" of the goods — that is to say, their allure, prestigious image and aura of luxury resulting from the manner in which the trade mark proprietor has chosen to present and advertise the goods using his trade mark rights — is altered or impaired?

6. Do the provisions of Article 30 and 36 of the EC Treaty preclude the proprietor of a (picture) trade mark or a holder of copyright relating to the bottles and pack-

aging used for his goods from making it impossible, by invoking the trade mark right or copyright, for a reseller who is free further to commercialize those goods to advertise the goods in a manner customary to retail traders in the relevant sector? Is this the case also where the reseller, as a result of the manner in which he uses the trade mark in his advertising material, damages the luxurious and prestigious image of the trade mark or the publication or reproduction take place in circumstances such that damage may be done to the person entitled to the copyright?'

The first question

15 According to the judgment referring the question,

— the Benelux Court was established by a treaty signed in Brussels on 31 March 1965 between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands and is composed of judges of the supreme courts of each of those three States, and,

— under Article 6(3) of that treaty and Article 10 of the Benelux Convention on Trade Marks, concluded on 19 March 1962 between the three Benelux Member States, the Hoge Raad is in principle bound to submit to the Benelux Court for a preliminary ruling questions on the interpretation of the Uniform Benelux Law on Trade Marks annexed to that convention.

16 Article 6 of the Treaty establishing the Benelux Court is worded as follows:

'1. In the cases specified below, the Benelux Court shall rule on questions of the interpretation of the legal rules designated under Article 1 which arise in proceedings before courts of one of the three countries, sitting in their territory in Europe ...

2. Where it appears that judgment in a case before a national court requires resolution of a point of interpretation of a legal rule designated under Article 1, that court may, if it considers that a ruling on the point is necessary in order for it to give judgment, stay any final judgment, even of its own motion, in order for the Benelux Court to rule on the question of interpretation.

3. In the circumstances set forth in the previous subparagraph, a national court against whose decisions no appeal lies under domestic law shall be bound to refer the question to the Benelux Court. ...'

17 Article 7(2) of the same Treaty provides:

'National courts which then give judgment in the case shall be bound by the interpretation given in the judgment delivered by the Benelux Court.'

18 It is with reference to that legal system that, by its first question, the Hoge Raad asks whether, in a case where a question relating to the interpretation of the Directive is raised in proceedings in one of the Benelux Member States concerning the interpretation of the Uniform Benelux Law on Trade Marks, it is the highest national court or the Benelux Court which is the national court against whose decisions there is no judicial remedy under national law and which is therefore obliged under the third paragraph of Article 177 of the Treaty to make a reference to the Court of Justice.

19 In order to reply to that question, it is necessary to examine first whether a court like the Benelux Court may refer questions to the Court of Justice for a preliminary ruling and, if so, whether it may be obliged to do so.

20 First of all, it appears that the question submitted by the Hoge Raad is based, quite rightly, on the premiss that a court such as the Benelux Court is a court which may submit questions to this Court for a preliminary ruling.

21 There is no good reason why such a court, common to a number of Member States, should not be able to submit questions to this Court, in the same way as courts or tribunals of any of those Member States.

22 In this regard, particular account must be taken of the fact that the Benelux Court has the task of ensuring that the legal rules common to the three Benelux States are applied uniformly and of the fact that the procedure before it is a step in the proceedings before the national courts leading to definitive interpretations of common Benelux legal rules.

23 To allow a court, like the Benelux Court, faced with the task of interpreting Community rules in the performance of its function, to follow the procedure provided for by Article 177 of the Treaty would therefore serve the purpose of that provision, which is to ensure the uniform interpretation of Community law.

24 Next, as regards the question whether a court like the Benelux Court may be under an obligation to refer a question to the Court of Justice, it is to be remembered that, according to the third paragraph of Article 177 of the Treaty, where a question of Community law is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal must bring the matter before the Court of Justice.

25 According to the case-law of the Court of Justice, that obligation to refer is based on cooperation, with a view to ensuring the proper application and uniform interpretation of Community law in all the Member States, between national courts, in their capacity as courts responsible for the application of Community law, and the Court of Justice (see, in particular, Case 283/81 *CILFIT and Lanificio di Gavardo* v *Italian Ministry of Health* [1982] ECR 3415, paragraph 7). It is also clear from the case-law that the particular purpose of the third paragraph of Article 177 is to prevent a body of national case-law that is not in accord with the rules of Community law from coming into existence in any Member State (see, in particular, Case 107/76 *Hoffman-La Roche* v *Centrafarm* [1977] ECR 957, paragraph 5, and Joined Cases 35/82 and 36/82 *Morson and Jhanjan* v *State of the Netherlands* [1982] ECR 3723, paragraph 8).

26 In these circumstances, in so far as no appeal lies against decisions of a court like the Benelux Court, which gives definitive rulings on questions of interpretation of uniform Benelux law, such a court may be obliged to make a reference to this Court under the third paragraph of Article 177 where a question relating to the interpretation of the Directive is raised before it.

27 As regards, further, the question whether the Hoge Raad may be obliged to refer questions to this Court, there is no question that such a national supreme court, against whose decisions likewise no appeal lies under national law, may not give judgment without first making a reference to this Court under the third paragraph of Article 177 of the Treaty when a question relating to the interpretation of Community law is raised before it.

28 However, it does not necessarily follow that, in a situation such as that described by the Hoge Raad, both courts are actually obliged to make a reference to this Court.

29 According to the established case-law of the Court, although the last paragraph of Article 177 unreservedly requires national courts or tribunals against whose decisions there is no judicial remedy under national law to refer to the Court any question of interpretation raised before them, the authority of an interpretation provided by the Court under Article 177 may deprive that obligation of its purpose and thus empty it of its substance. This is especially so when the question raised is substantially the same as a question which has already been the subject of a preliminary ruling in a similar case (see, in particular, *CILFIT and Lanificio di Gavardo*, cited above, paragraph 13, and Joined Cases 28/62, 29/62 and 30/62 *Da Costa en Schaake and Others* v *Nederlandse Belastingadministratie* [1963] ECR 31). Such is also the case, *a fortiori*, when the question raised is substantially the same as a question which has already been the subject of a preliminary ruling in the same national proceedings.

30 It follows that, if, prior to making a reference to the Benelux Court, a court like the Hoge Raad has made use of its power to submit the question raised to the Court of Justice, the authority of the interpretation given by the latter may remove from a court like the Benelux Court its obligation to submit a question in substantially the same terms before giving its judgment. Conversely, if no reference has been made to the Court of Justice by a court like the Hoge Raad, a court like the Benelux Court must submit the question to the Court of Justice, whose ruling may then remove from the Hoge Raad the obligation to submit a question in substantially the same terms before giving its judgment.

31 The answer to be given to the first question must therefore be that, where a question relating to the interpretation of the Directive is raised in proceedings in one of the Benelux Member States concerning the interpretation of the Uniform Benelux Law on Trade Marks, a court against whose decisions there is no remedy under national law, as is the case with both the Benelux Court and the Hoge Raad, must make a reference to the Court of Justice under the third paragraph of Article 177 of the Treaty. However, that obligation loses its purpose and is thus emptied of its substance when the question raised is substantially the same as a question which has already been the subject of a preliminary ruling in the same national proceedings.

The second question

32 By its second question, the Hoge Raad asks in substance whether, on a proper interpretation of Articles 5 to 7 of the Directive, when trade-marked goods have been put on the Community market by or with the consent of the proprietor of the trade mark, a reseller, besides being free to resell those goods, is also free to make use of the trade mark to bring to the public's attention the further commercialization of those goods.

33 In order to answer that question, it is necessary first of all to consider the relevant provisions of the Directive to which the Hoge Raad refers.

34 On the one hand, Article 5 of the Directive, which determines the rights conferred by a trade mark, provides, in paragraph (1), that the proprietor is to be entitled to prevent all third parties from using his trade mark in the course of trade and, in paragraph (3)(d), that he may prohibit all third parties from using the trade mark in advertising.

35 On the other hand, Article 7(1) of the Directive, which concerns the exhaustion of the rights conferred by a trade mark, provides that a trade mark is not to entitle its proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by its proprietor or with his consent.

36 If the right to prohibit the use of his trade mark in relation to goods, conferred on the proprietor of a trade mark under Article 5 of the Directive, is exhausted once the goods have been put on the market by himself or with his consent, the same applies as regards the right to use the trade mark for the purpose of bringing to the public's attention the further commercialization of those goods.

37 It follows from the case-law of the Court that Article 7 of the Directive is to be interpreted in the light of the rules of the Treaty relating to the free movement of goods, in particular Article 36 (Joined Cases C-427/93, C-429/93 and C-436/93 *Bristol-Myers Squibb and Others* v *Paranova* [1996] ECR I-3457, paragraph 27) and that the purpose of the 'exhaustion of rights' rule is to prevent owners of trade marks from being allowed to partition national markets and thus facilitate the maintenance of price differences which may exist between Member States (see *Bristol-Myers Squibb*, cited above, paragraph 46). If the right to make use of a trade mark in order to attract attention to further commercialization were not exhausted in the same way as the right of resale, the latter would be made considerably more difficult and the purpose of the 'exhaustion of rights' rule laid down in Article 7 would thus be undermined.

38 It follows that the answer to be given to the second question must be that, on a proper interpretation of Articles 5 and 7 of the Directive, when trade-marked goods have been put on the Community market by the proprietor of the trade mark or with his consent, a reseller, besides being free to resell those goods, is also free to make use of the trade mark in order to bring to the public's attention the further commercialization of those goods.

The third, fourth and fifth questions

39 By its third, fourth and fifth questions, which must be examined together, the Hoge Raad asks in substance whether the rule ensuing from the answer to the second question allows exceptions, in particular

— where the advertising function of the trade mark is endangered by the fact that, as a result of the manner in which the reseller uses the trade mark in order to attract public attention, he damages the luxurious and prestigious image of the trade mark, and

— where, as a result of the way in which the reseller advertises the goods, their 'mental' condition, that is to say the allure, prestigious image and aura of

luxury which they have as a result of the manner in which the trade mark owner has chosen to present and advertise the goods using his trade mark rights, is changed or impaired.

40 According to Article 7(2) of the Directive, the 'exhaustion of rights' rule laid down in paragraph (1) is not applicable where there are legitimate reasons for the proprietor to oppose further commercialization of trade-marked goods, especially where the condition of the goods is changed or impaired after they have been put on the market.

41 The question therefore is whether the situations envisaged by the Hoge Raad constitute legitimate reasons, within the meaning of Article 7(2) of the Directive, allowing the proprietor of a trade mark to oppose use of his trade mark by a reseller to bring to the public's attention the further commercialization of goods bearing that trade mark.

42 According to the case-law of the Court, Article 7 of the Directive comprehensively regulates the question of the exhaustion of trade mark rights in relation to goods put on the market in the Community and the use of the word 'especially' in paragraph (2) indicates that alteration or impairment of the condition of trade-marked goods is given only as an example of what may constitute legitimate reasons (see *Bristol-Myers Squibb*, cited above, paragraphs 26 and 39). Moreover, that provision is intended to reconcile the fundamental interest in the protection of trade mark rights with the fundamental interest in the free movement of goods within the common market (*Bristol-Myers Squibb*, cited above, paragraph 40).

43 The damage done to the reputation of a trade mark may, in principle, be a legitimate reason, within the meaning of Article 7(2) of the Directive, allowing the proprietor to oppose further commercialization of goods which have been put on the market in the Community by him or with his consent. According to the case-law of the Court concerning the repackaging of trade-marked goods, the owner of a

trade mark has a legitimate interest, related to the specific subject-matter of the trade mark right, in being able to oppose the commercialization of those goods if the presentation of the repackaged goods is liable to damage the reputation of the trade mark (*Bristol-Myers Squibb*, cited above, paragraph 75).

44 It follows that, where a reseller makes use of a trade mark in order to bring the public's attention to further commercialization of trade-marked goods, a balance must be struck between the legitimate interest of the trade mark owner in being protected against resellers using his trade mark for advertising in a manner which could damage the reputation of the trade mark and the reseller's legitimate interest in being able to resell the goods in question by using advertising methods which are customary in his sector of trade.

45 As regards the instant case, which concerns prestigious, luxury goods, the reseller must not act unfairly in relation to the legitimate interests of the trade mark owner. He must therefore endeavour to prevent his advertising from affecting the value of the trade mark by detracting from the allure and prestigious image of the goods in question and from their aura of luxury.

46 However, the fact that a reseller, who habitually markets articles of the same kind but not necessarily of the same quality, uses for trade-marked goods the modes of advertising which are customary in his trade sector, even if they are not the same as those used by the trade mark owner himself or by his approved retailers, does not constitute a legitimate reason, within the meaning of Article 7(2) of the Directive,

allowing the owner to oppose that advertising, unless it is established that, given the specific circumstances of the case, the use of the trade mark in the reseller's advertising seriously damages the reputation of the trade mark.

47 For example, such damage could occur if, in an advertising leaflet distributed by him, the reseller did not take care to avoid putting the trade mark in a context which might seriously detract from the image which the trade mark owner has succeeded in creating around his trade mark.

48 In view of the foregoing, the answer to be given to the third, fourth and fifth questions must be that the proprietor of a trade mark may not rely on Article 7(2) of the Directive to oppose the use of the trade mark, by a reseller who habitually markets articles of the same kind, but not necessarily of the same quality, as the trade-marked goods, in ways customary in the reseller's sector of trade, for the purpose of bringing to the public's attention the further commercialization of those goods, unless it is established that, given the specific circumstances of the case, the use of the trade mark for this purpose seriously damages the reputation of the trade mark.

The sixth question

49 By its sixth question the Hoge Raad asks in substance whether Articles 30 and 36 of the Treaty preclude the owner of a trade mark or holder of copyright relating to the bottles and packaging which he uses for his goods from preventing a reseller, by invoking the trade mark right or copyright, from advertising the further commercialization of those goods in a manner customary to retail traders in the relevant sector. It asks, further, whether this is also the case where the reseller, as a result of the manner in which he uses the trade mark in his advertising material, damages the luxurious and prestigious image of the trade mark, or where the publication or reproduction of the trade mark takes place in circumstances liable to cause damage to the person entitled to the copyright.

50 Those questions are based on the following premisses:

— that, under the relevant domestic law, in the situations envisaged, the trade mark owner or holder of copyright may legitimately prohibit a reseller from advertising the further commercialization of the goods, and

— that such a prohibition would constitute an obstacle to the free movement of goods prohibited by Article 30 of the Treaty, unless it could be justified on one of the grounds set forth in Article 36 of that Treaty.

51 Contrary to Dior's contention, the national court is quite right in considering that a prohibition such as that envisaged in the main proceedings may constitute a measure having an effect equivalent to a quantitative restriction, in principle prohibited by Article 30. In this regard, it is enough that, according to the judgment referring the questions for a preliminary ruling, the main proceedings concern goods which the reseller has procured through parallel imports and that a prohibition of advertising such as that sought in the main proceedings would render commercialization, and consequently access to the market for those goods, appreciably more difficult.

52 The question therefore is whether a prohibition such as that sought in the main proceedings may be allowed under Article 36 of the Treaty, according to which the provisions of Articles 30 to 34 are not to preclude prohibitions or restrictions on imports justified on grounds of the protection of industrial and commercial property, provided that they do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

53 As regards the question relating to trade mark rights, it is to be remembered that, according to the case-law of the Court, Article 36 of the Treaty and Article 7 of the Directive are to be interpreted in the same way (*Bristol-Myers Squibb*, cited above, paragraph 40).

54 Consequently, having regard to the answers given to the second, third, fourth and fifth questions, the answer to be given to this part of the sixth question must be that, on a proper interpretation of Articles 30 and 36 of the Treaty, the proprietor of a trade mark may not oppose the use of the trade mark, by a reseller who habitually markets articles of the same kind, but not necessarily of the same quality, as the trade-marked goods, in ways customary in the reseller's sector of trade, for the purpose of bringing the further commercialization of those goods to the public's attention, unless it is established that, given the specific circumstances of the case, the use of the trade mark for this purpose seriously damages the reputation of the trade mark.

55 As regards the part of the sixth question relating to copyright, it is to be remembered that, according to the case-law of the Court, the grounds of protection of industrial and commercial property referred to in Article 36 include the protection conferred by copyright (Joined Cases 55/80 and 57/80 *Musik-Vertrieb Membran and K-tel International* v *GEMA* [1981] ECR 147, paragraph 9).

56 Literary and artistic works may be the subject of commercial exploitation, whether by way of public performance or by way of the reproduction and marketing of the recordings made of them, and the two essential rights of the author, namely the exclusive right of performance and the exclusive right of reproduction, are not called in question by the rules of the Treaty (Case 158/86 *Warner Brothers and Metronome Video* v *Christiansen* [1988] ECR 2605, paragraph 13).

57 It is also clear from the case-law that, while the commercial exploitation of copyright is a source of remuneration for the copyright owner, it also constitutes a form of control on marketing exercisable by the owner and that, from this point of view, commercial exploitation of copyright raises the same issues as that of any other industrial or commercial property (*Musik-Vertrieb Membran and K-tel International*, cited above, paragraph 13). The Court has thus held that the exclusive right of exploitation conferred by copyright cannot be relied on by its owner to prevent or restrict the importation of sound recordings of protected works which have been lawfully marketed in another Member State by the owner himself or with his

consent (*Musik-Vertrieb Membran and K-tel International*, cited above, paragraph 15).

58 Having regard to that case-law — there being no need to consider the question whether copyright and trade mark rights may be relied on simultaneously in respect of the same product —, it is sufficient to hold that, in circumstances such as those in point in the main proceedings, the protection conferred by copyright as regards the reproduction of protected works in a reseller's advertising may not, in any event, be broader than that which is conferred on a trade mark owner in the same circumstances.

59 The answer to be given to the sixth question must therefore be that, on a proper interpretation of Articles 30 and 36 of the Treaty, the proprietor of a trade mark or holder of copyright may not oppose their use by a reseller who habitually markets articles of the same kind, but not necessarily of the same quality, as the protected goods, in ways customary in the reseller's sector of trade, for the purpose of bringing to the public's attention the further commercialization of those goods, unless it is established that, having regard to the specific circumstances of the case, the use of those goods for that purpose seriously damages their reputation.

Costs

60 The costs incurred by the French, Italian and United Kingdom Governments and by the Commission of the European Communities, 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Hoge Raad der Nederlanden by judgment of 20 October 1995, hereby rules:

1. **Where a question relating to the interpretation of the First Council Directive (89/104/EEC) of 21 December 1988 to approximate the laws of the Member States relating to trade marks is raised in proceedings in one of the Benelux Member States concerning the interpretation of the Uniform Benelux Law on Trade Marks, a court against whose decisions there is no remedy under national law, as is the case with both the Benelux Court and the Hoge Raad der Nederlanden, must make a reference to the Court of Justice under the third paragraph of Article 177 of the EC Treaty. However, that obligation loses its purpose and is thus emptied of its substance when the question raised is substantially the same as a question which has already been the subject of a preliminary ruling in the same national proceedings.**

2. **On a proper interpretation of Articles 5 and 7 of Directive 89/104, when trade-marked goods have been put on the Community market by the proprietor of the trade mark or with his consent, a reseller, besides being free to resell those goods, is also free to make use of the trade mark in order to bring to the public's attention the further commercialization of those goods.**

3. **The proprietor of a trade mark may not rely on Article 7(2) of Directive 89/104 to oppose the use of the trade mark, by a reseller who habitually markets articles of the same kind, but not necessarily of the same quality, as the trade-marked goods, in ways customary in the reseller's sector of trade,**

for the purpose of bringing to the public's attention the further commercialization of those goods, unless it is established that, given the specific circumstances of the case, the use of the trade mark for this purpose seriously damages the reputation of the trade mark.

4. **On a proper interpretation of Articles 30 and 36 of the EC Treaty, the proprietor of a trade mark or holder of copyright may not oppose their use by a reseller who habitually markets articles of the same kind, but not necessarily of the same quality, as the protected goods, in ways customary in the reseller's sector of trade, for the purpose of bringing to the public's attention the further commercialization of those goods, unless it is established that, having regard to the specific circumstances of the case, the use of those goods for that purpose seriously damages their reputation.**

Rodríguez Iglesias Gulmann Ragnemalm

Schintgen Mancini Moitinho de Almeida

Kapteyn Murray Edward

Puissochet Hirsch

Jann Sevón

Delivered in open court in Luxembourg on 4 November 1997.

R. Grass G. C. Rodríguez Iglesias

Registrar President