JUDGMENT OF THE COURT

6 May 2003 *

In Case C-104/01,

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

Libertel Groep BV

and

Benelux-Merkenbureau,

on the interpretation of Article 3 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,

composed of: J.-P. Puissochet, President of the Sixth Chamber, acting for the President, M. Wathelet and C.W.A. Timmermans, Presidents of Chambers, C. Gulmann, D.A.O. Edward, P. Jann, F. Macken, S. von Bahr and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: P. Léger,

Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

— Libertel Groep BV, by D.W.F. Verkade and D.J.G. Visser, advocaten,

— Benelux-Merkenbureau, by C.J.J.C. van Nispen, advocaat,

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

— the United Kingdom Government, by R. Magrill, acting as Agent, assisted by 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 the Benelux-Merkenbureau, represented by C.J.J.C. van Nispen, of the Netherlands Government, represented by J. van Bakel, acting as Agent, of the United Kingdom Government, represented by M. Tappin, Barrister, and of the Commission, represented by H.M.H. Speyart, at the hearing on 30 April 2002,

after hearing the Opinion of the Advocate General at the sitting on 12 November 2002,

gives the following

Judgment

1 By order of 23 February 2001, received at the Court on 5 March 2001, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Article 3 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, hereinafter 'the Directive').

2 Those questions were raised in proceedings between Libertel Groep BV (hereinafter 'Libertel') and the Benelux-Merkenbureau (Benelux Trade Mark Office, hereinafter 'the BTMO') relating to the refusal by the latter to register the colour orange as a trade mark for telecommunications goods and services, as requested by Libertel.

Legal background

Paris Convention

3 Trade-mark law is governed at international level by the Convention for the Protection of Industrial Property signed in Paris on 20 March 1883, as last revised at Stockholm on 14 July 1967 (United Nations Treaties Series, No 11851, vol. 828, pp. 305 to 388, hereinafter 'the Paris Convention'). All the Member States are signatories to the Convention.

4 Article 6 quinquies B(2) of the Paris Convention provides that trade marks may be denied registration or invalidated when they are devoid of any distinctive character.

5 Article 6 quinquies C(1) of the Paris Convention provides as follows:

'In determining whether a mark is eligible for protection, all the factual circumstances must be taken into consideration, particularly the length of time the mark has been in use.'

Community legislation

6 Article 2 of the Directive, entitled 'Signs of which a trade mark may consist', provides as follows:

'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.'

7 Article 3(1) and (3) of the Directive, headed 'Grounds for refusal or invalidity', provides as follows:

'1. 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;

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service;

(d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade;

(e) signs which consist exclusively of:

— the shape which results from the nature of the goods themselves, or

— the shape of goods which is necessary to obtain a technical result, or

— the shape which gives substantial value to the goods;

...

3. A trade mark shall not be refused registration or be declared invalid in accordance with paragraph 1(b), (c) or (d) if, before the date of application for registration and following the use which has been made of it, it has acquired a

distinctive character. Any Member State may in addition provide that this provision shall also apply where the distinctive character was acquired after the date of application for registration or after the date of registration.'

8 Article 6 of the Directive provides as follows:

'1. The trade mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade,

(a) his own name or address;

(b) indications concerning the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of the service, or other characteristics of goods or services;

(c) the trade mark where it is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts;

provided he uses them in accordance with honest practices in industrial or commercial matters.

2. The trade mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade, an earlier right which only applies in a particular locality if that right is recognised by the laws of the Member State in question and within the limits of the territory in which it is recognised.'

Uniform Benelux Law on Trade Marks

9 The Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands have set down their trade-mark laws in a common piece of legislation, the Uniform Benelux Law on Trade Marks (Trb. 1962, 58), which was amended with effect from 1 January 1996 by the Protocol of 2 December 1992 amending that law (Trb. 1993, 12) to implement the Directive in the legal order of those three Member States.

10 Article 6bis of the Uniform Benelux Law on Trade Marks, as amended, (hereinafter 'the UBL') provides as follows:

'1. The Benelux Trade Mark Office shall refuse to register a filing where it considers that:

(a) the sign filed does not constitute a trade mark within the meaning of Article 1, in particular because it lacks any distinctive character, as provided for in Article 6 quinquies B(2) of the Paris Convention;

(b) the filing relates to a trade mark referred to in Article 4(1) and (2).

2. The refusal to register must relate to the sign that constitutes the trade mark in its entirety. It may be confined to one or more of the goods for which the mark is intended to be used.

3. The Benelux Office shall inform the applicant without delay and in writing of its intention to refuse registration in whole or in part, shall state the grounds and shall allow him a right to respond within a period of time to be laid down in an implementing regulation.

4. If the objections of the Benelux Office to registration have not been removed within the period granted, registration of the filing shall be refused in whole or in part. The Benelux Office shall notify the applicant without delay and in writing, stating the grounds for refusal and advising of the remedy, set out in Article 6ter, against the decision.

5. Refusal to register a filing for all the goods, or some of them, shall render the filing invalid in whole or in part. Invalidity shall not be effective until the time-limit for bringing an appeal under Article 6ter has expired without an appeal being brought, or until the application for an order to register has been irrevocably refused.'

11 Article 6ter of the UBL provides as follows:

'The applicant may, within two months following notification under Article 6bis(4), file at the Cour d'Appel, Brussels, the Gerechtshof at The Hague

or the Cour d'Appel, Luxembourg, an application for an order that the filing be registered. The applicant's address, that of his representative, or the postal address given upon filing shall determine which court has territorial jurisdiction.'

The main proceedings and the questions referred for a preliminary ruling

12 Libertel is a company established in the Netherlands whose principal activity is the supply of mobile telecommunications services.

13 The BTMO is the competent authority with regard to trade marks for the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands. Since 1 January 1996 the BTMO has had responsibility for examining filings of trade marks in the light of the absolute grounds for refusal.

14 On 27 August 1996 Libertel filed with the BTMO an orange colour as a trade mark for certain telecommunications goods and services comprising, as regards goods in Class 9, telecommunications equipment, and in respect of services in Classes 35 to 38, the telecommunications services and physical, financial and technical management of telecommunications systems.

15 In the space for reproducing the trade mark, the application form contained an orange rectangle and, in the space for describing the trade mark, the word 'orange' without reference to any colour code.

16 By letter of 21 February 1997 the BTMO informed Libertel that it was provisionally refusing registration of the sign. It considered that unless Libertel could show that the sign filed, consisting exclusively of the colour orange, had acquired distinctive character through use, it was devoid of any distinctive character within the meaning of Article 6bis(1)(a) of the UBL.

17 Libertel objected to that provisional refusal. The BTMO, taking the view that there was no need to reconsider the refusal, served notice of final refusal by letter of 10 September 1997.

18 Pursuant to Article 6ter of the UBL, Libertel appealed against that refusal before the Gerechtshof te 's-Gravenhage (Regional Court of Appeal, The Hague) (Netherlands), which was dismissed by judgment of 4 June 1998.

19 On 3 August 1998 Libertel appealed in cassation to the Hoge Raad der Nederlanden.

20 In the course of the Hoge Raad's examination of the dispute, questions arose as to the correct application of Article 6bis(1)(a) of the UBL, and consequently also as to the interpretation of Article 3(1)(b) of the Directive. Accordingly, by order of 23 February 2001, the Hoge Raad referred the following questions to the Court for a preliminary ruling:

'(1) Is it possible for a single specific colour which is represented as such or is designated by an internationally applied code to acquire a distinctive character for certain goods or services within the meaning of Article 3(1)(b) of the Directive?

(2) If the answer to the first question is in the affirmative:

(a) in what circumstances may it be accepted that a single specific colour possesses a distinctive character in the sense used above?

(b) does it make any difference if registration is sought for a large number of goods and/or services, rather than for a specific product or service, or category of goods or services respectively?

(3) In the assessment of the distinctive character of a specific colour as a trade mark, must account be taken of whether, with regard to that colour, there is a general interest in availability, such as can exist in respect of signs which denote a geographical origin?

(4) When considering the question whether a sign, for which registration as a trade mark is sought, possesses the distinctive character referred to in Article 3(1)(b) of the Directive, must the Benelux Trade Mark Office confine itself to an assessment *in abstracto* of distinctive character or must it take account of all the actual facts of the case, including the use made of the sign and the manner in which the sign is used?'

The questions referred for a preliminary ruling

Preliminary considerations

21 The questions referred, which concern Article 3 of the Directive, relate to whether, and if so in what circumstances, a colour *per se*, not spatially defined, is capable of possessing distinctive character for certain goods or services.

22 In order to consider those questions it is necessary as a preliminary matter to determine whether a colour *per se* is capable of constituting a trade mark for the purposes of Article 2 of the Directive.

23 To that end, the colour must satisfy three conditions. First, it must be a sign. Secondly, that sign must be capable of graphic representation. Thirdly, the sign must be capable of distinguishing the goods or services of one undertaking from those of other undertakings.

24 The Council of the European Union and the Commission made a joint declaration, entered in the minutes of the Council meeting on the adoption of the Directive, that they 'consider that Article 2 does not exclude the possibility... of registering as a trade mark a combination of colours or a single colour... provided that they are capable of distinguishing the goods or services of one undertaking from those of other undertakings' (OHIM OJ No 5/96, p. 607).

25 However, that declaration cannot be used to interpret a provision of secondary legislation where, as in this case, no reference is made to the content thereof in the wording of the provision in question and it therefore has no legal significance (Cases C-292/89 *Antonissen* [1991] ECR I-745, paragraph 18, and C-329/95 *VAG Sverige* [1997] ECR I-2675, paragraph 23). The Council and the Commission also explicitly recognised that limitation in the preamble to their declaration, which states as follows: 'Since the following statements of the Council and the Commission are not part of the legal text they are without prejudice to the interpretation of that text by the Court of Justice of the European Communities'.

26 Accordingly, it is for the Court to determine whether Article 2 of the Directive is to be interpreted as meaning that a colour *per se* is capable of constituting a trade mark.

27 In that regard it must be pointed out that a colour *per se* cannot be presumed to constitute a sign. Normally a colour is a simple property of things. Yet it may constitute a sign. That depends on the context in which the colour is used. None the less, a colour *per se* is capable, in relation to a product or service, of constituting a sign.

28 Furthermore, as the Court has held, a graphic representation within the meaning of Article 2 of the Directive must enable the sign to be represented visually, particularly by means of images, lines or characters, so that it can be precisely identified (Case C-273/00 *Sieckmann* [2002] ECR I-11737, paragraph 46).

29 In order to fulfil its function, the graphic representation within the meaning of Article 2 of the Directive must be clear, precise, self-contained, easily accessible, intelligible, durable and objective (*Sieckmann*, paragraphs 47 to 55).

30 In this case the query referred to the Court relates to an application to register a colour *per se*, represented by a sample of the colour on a flat surface, a description in words of the colour and/or an internationally recognised colour identification code.

31 A mere sample of a colour does not, however, satisfy the requirements set out in paragraphs 28 and 29 of this judgment.

32 In particular a sample of a colour may deteriorate with time. There may be certain media on which it is possible to reproduce a colour in permanent form. However with other media, including paper, the exact shade of the colour cannot be protected from the effects of the passage of time. In these cases, the filing of a sample of a colour does not possess the durability required by Article 2 of the Directive (see *Sieckmann*, paragraph 53).

33 It follows that filing a sample of a colour does not *per se* constitute a graphic representation within the meaning of Article 2 of the Directive.

34 On the other hand, a verbal description of a colour, in so far as it is composed of words which themselves are made up of letters, does constitute a graphic representation of the colour (see *Sieckmann*, paragraph 70).

35 A description in words of the colour will not necessarily satisfy the conditions set out in paragraphs 28 and 29 of this judgment in every instance. That is a question which must be evaluated in the light of the circumstances of each individual case.

36 A sample of a colour, combined with a description in words of that colour, may therefore constitute a graphic representation within the meaning of Article 2 of the Directive, provided that the description is clear, precise, self-contained, easily accessible, intelligible, and objective.

37 For the same reasons as those set out at paragraph 34 of this judgment, the designation of a colour using an internationally recognised identification code may be considered to constitute a graphic representation. Such codes are deemed to be precise and stable.

38 Where a sample of a colour, together with a description in words, does not satisfy the conditions laid down in Article 2 of the Directive in order for it to constitute a graphic representation because, *inter alia*, it lacks precision or durability, that deficiency may, depending on the facts, be remedied by adding a colour designation from an internationally recognised identification code.

39 As to the question whether a colour *per se* is capable of distinguishing the goods or services of one undertaking from those of other undertakings, within the meaning of Article 2 of the Directive, it is necessary to determine whether or not colours *per se* are capable of conveying specific information, in particular as to the origin of a product or service.

40 In that connection, it must be borne in mind that, whilst colours are capable of conveying certain associations of ideas, and of arousing feelings, they possess little inherent capacity for communicating specific information, especially since they are commonly and widely used, because of their appeal, in order to advertise and market goods or services, without any specific message.

41 However, that factual finding would not justify the conclusion that colours *per se* cannot, as a matter of principle, be considered to be capable of distinguishing the goods or services of one undertaking from those of other undertakings. The possibility that a colour *per se* may in some circumstances serve as a badge of origin of the goods or services of an undertaking cannot be ruled out. It must therefore be accepted that colours *per se* may be capable of distinguishing the goods or services of one undertaking from those of other undertakings, within the meaning of Article 2 of the Directive.

42 It follows from the foregoing that, where the conditions described above apply, a colour *per se* is capable of constituting a trade mark within the meaning of Article 2 of the Directive.

43 It is in the light of the considerations set out at paragraphs 22 to 42 of this judgment that it is now possible to examine the questions referred for a preliminary ruling.

The third question

44 It is appropriate first of all to examine the third question, by which the national court is asking whether, in assessing the potential distinctiveness of a specific colour as a trade mark, it is necessary to consider whether there is a general interest in that colour remaining available to all, as is the case with respect to signs which designate a geographical origin.

45 According to a number of the observations submitted to the Court, it is possible, using current technology, to identify a very wide range of shades of colour. That may be true, but it is irrelevant to the question under consideration here. For the purposes of determining whether a colour *per se* is registrable as a trade mark it is necessary to take as a standpoint that of the relevant public.

46 In the absence of any indication to the contrary in the order for reference, it must be considered that the case in the main proceedings relates to goods and services intended for all consumers. Accordingly, the relevant public in this case must be deemed to be composed of the average consumer, reasonably well-informed and reasonably observant and circumspect (see Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 26).

47 The number of colours which that public is capable of distinguishing is limited, because it is rarely in a position directly to compare products in various shades of colour. It follows that the number of different colours that are in fact available as potential trade marks to distinguish goods or services must be regarded as limited.

48 It is settled case-law that trade mark rights constitute an essential element in the system of undistorted competition which the EC Treaty seeks to establish and maintain (see Case C-10/89 *HAG II* [1990] ECR I-3711, paragraph 13, and Case C-63/97 *BMW* [1999] ECR I-905, paragraph 62). The rights and powers that trade marks confer on their proprietors must be considered in the light of that objective.

49 Furthermore, under Article 5(1) of the Directive, a trade mark confers on its proprietor an exclusive right, in relation to certain goods and services, that allows him to monopolise the sign registered as a trade mark for an unlimited period.

50 The possibility of registering a trade mark may be limited for reasons relating to the public interest.

51 The various grounds for refusing registration in Article 3 of the Directive must therefore be interpreted in the light of the public interest underlying each of them (Case C-299/99 *Philips* [2002] ECR I-5475, paragraph 77).

52 As regards Article 3(1)(c) of the Directive, the Court has recognised that this provision pursues an aim that is in the public interest, which requires that the signs and indications descriptive of the categories of goods or services for which registration is sought may be freely used by all (see Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, paragraph 25, and Joined Cases C-53/01 to C-55/01 *Linde and Others* [2003] ECR I-3161, paragraph 73).

53 Similarly, with regard to Article 3(1)(e) of the Directive, the Court has held that this provision pursues an aim which is in the public interest, namely that a shape whose essential characteristics perform a technical function and were chosen to fulfil that function may be freely used by all (*Philips*, paragraph 80, and *Linde*, paragraph 72).

54 As regards the registration as trade marks of colours *per se*, not spatially delimited, the fact that the number of colours actually available is limited means that a small number of trade mark registrations for certain services or goods could exhaust the entire range of the colours available. Such an extensive monopoly would be incompatible with a system of undistorted competition, in particular because it could have the effect of creating an unjustified competitive

advantage for a single trader. Nor would it be conducive to economic development or the fostering of the spirit of enterprise for established traders to be able to register the entire range of colours that is in fact available for their own benefit, to the detriment of new traders.

55 It must therefore be acknowledged that there is, in Community trade-mark law, a public interest in not unduly restricting the availability of colours for the other operators who offer for sale goods or services of the same type as those in respect of which registration is sought.

56 The greater the number of the goods or services for which the trade mark is sought to be registered, the more excessive the exclusive right which it may confer is likely to be, and, for that very reason, the more likely is that right to come into conflict with the maintenance of a system of undistorted competition, and with the public interest in not unduly restricting the availability of colours for the other traders who market goods or services of the same type as those in respect of which registration is sought.

57 The Commission argued in its observations that the notion that certain signs must remain available and cannot therefore be allowed to enjoy protection finds expression in Article 6 of the Directive rather than in Articles 2 and 3. That argument cannot be accepted.

58 Article 6 of the Directive concerns the limits on the effects of a trade mark once it has been registered. The Commission's argument amounts to proposing that there should be a minimal review of the grounds for refusal in Article 3 of the Directive at the time when the application for registration is considered, on the basis that the risk that operators might appropriate certain signs which ought to remain available is neutralised by the limits which Article 6 imposes at the stage when

advantage is taken of the effects of the registered mark. That approach is, essentially, tantamount to withdrawing the assessment of the grounds of refusal in Article 3 of the Directive from the competent authority at the time when the mark is registered, in order to transfer it to the courts with responsibility for ensuring that the rights conferred by the trade mark can actually be exercised.

59 That approach is incompatible with the scheme of the Directive, which is founded on review prior to registration, not an *a posteriori* review. There is nothing in the Directive to suggest that Article 6 leads to such a conclusion. On the contrary, the large number and detailed nature of the obstacles to registration set out in Articles 2 and 3 of the Directive, and the wide range of remedies available in the event of refusal, indicate that the examination carried out at the time of the application for registration must not be a minimal one. It must be a stringent and full examination, in order to prevent trade marks from being improperly registered. As the Court has already held, for reasons of legal certainty and good administration, it is necessary to ensure that trade marks whose use could successfully be challenged before the courts are not registered (Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 21).

60 Accordingly, the reply to the third question referred must be that, in assessing the potential distinctiveness of a given colour as a trade mark, regard must be had to the general interest in not unduly restricting the availability of colours for the other traders who offer for sale goods or services of the same type as those in respect of which registration is sought.

The first question and Question 2(a)

61 By its first question and Question 2(a), the national court is essentially asking whether and, if so, in what circumstances a colour *per se* may be held to be distinctive within the meaning of Article 3(1)(b) and Article 3(3) of the Directive.

62 It is settled case-law that the essential function of a trade mark is to guarantee the identity of the origin of the marked goods or service to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin (see *Canon*, paragraph 28, and Case C-517/99 *Merz & Krell* [2001] ECR I-6959, paragraph 22). A trade mark must distinguish the goods or services concerned as originating from a particular undertaking. In that connection, regard must be had both to the ordinary use of trade marks as a badge of origin in the sectors concerned and to the perception of the relevant public.

63 The relevant public, as defined in paragraph 46 of this judgment, is made up of average consumers, reasonably well-informed and reasonably observant and circumspect.

64 Account should be taken of the fact that the average consumer only rarely has the chance to make a direct comparison between the different marks but must place his trust in the imperfect picture of them that he has kept in his mind (see, in different contexts, *Lloyd Schuhfabrik Meyer*, paragraph 26, and Case C-291/00 *LTJ Diffusion* [2003] ECR I-2799, paragraph 52).

65 The perception of the relevant public is not necessarily the same in the case of a sign consisting of a colour *per se* as it is in the case of a word or figurative mark consisting of a sign that bears no relation to the appearance of the goods it denotes. While the public is accustomed to perceiving word or figurative marks instantly as signs identifying the commercial origin of the goods, the same is not necessarily true where the sign forms part of the look of the goods in respect of which registration of the sign as a trade mark is sought. Consumers are not in the habit of making assumptions about the origin of goods based on their colour or the colour of their packaging, in the absence of any graphic or word element, because as a rule a colour *per se* is not, in current commercial practice, used as a

means of identification. A colour *per se* is not normally inherently capable of distinguishing the goods of a particular undertaking.

66 In the case of a colour *per se*, distinctiveness without any prior use is inconceivable save in exceptional circumstances, and particularly where the number of goods or services for which the mark is claimed is very restricted and the relevant market very specific.

67 However, even if a colour *per se* does not initially have any distinctive character within the meaning of Article 3(1)(b) of the Directive, it may acquire such character in relation to the goods or services claimed following the use made of it, pursuant to Article 3(3) of the Directive. That distinctive character may be acquired, *inter alia*, after the normal process of familiarising the relevant public has taken place. In such cases, the competent authority must make an overall assessment of the evidence that the mark has come to identify the product concerned as originating from a particular undertaking, and thus to distinguish that product from goods of other undertakings (*Windsurfing Chiemsee*, cited above, paragraph 49).

68 The reply to the first question referred must therefore be that a colour *per se*, not spatially delimited, may, in respect of certain goods and services, have a distinctive character within the meaning of Article 3(1)(b) and Article 3(3) of the Directive, provided that, *inter alia*, it may be represented graphically in a way that is clear, precise, self-contained, easily accessible, intelligible, durable and objective. The latter condition cannot be satisfied merely by reproducing on paper the colour in question, but may be satisfied by designating that colour using an internationally recognised identification code.

69 The reply to Question 2(a) must be that a colour *per se* may be found to possess distinctive character within the meaning of Article 3(1)(b) and Article 3(3) of the Directive, provided that, as regards the perception of the relevant public, the mark is capable of identifying the product or service for which registration is sought as originating from a particular undertaking and distinguishing that product or service from those of other undertakings.

Question 2(b)

70 By Question 2(b), the national court is asking whether it is relevant to assessing whether a colour has a distinctive character within the meaning of Article 3(1)(b) of the Directive that registration of the colour *per se* as a trade mark is sought for a large number of goods and services, or for a specific product or service, or for a specific group of goods or services.

71 In the light of the considerations set out at paragraphs 56, 66 and 67 of this judgment, the reply to Question 2(b) must be that the fact that registration as a trade mark of a colour *per se* is sought for a large number of goods or services, or for a specific product or service or for a specific group of goods or services, is relevant, together with all the other circumstances of the particular case, to assessing both the distinctive character of the colour in respect of which registration is sought, and whether its registration would run counter to the general interest in not unduly limiting the availability of colours for the other operators who offer for sale goods or services of the same type as those in respect of which registration is sought.

The fourth question

72 By its fourth question the national court is asking, essentially, whether, in assessing whether a trade mark has distinctive character within the meaning of Article 3(1)(b) and Article 3(3) of the Directive, the competent authority for registering trade marks must carry out an examination in the abstract or by reference to the actual situation, taking account of all the circumstances of the case, and in particular use which has been made of the mark.

73 It must first of all be observed that the 12th recital in the preamble to the Directive states that 'all Member States of the Community are bound by the Paris Convention for the Protection of Industrial Property' and that 'it is necessary that the provisions of this Directive are entirely consistent with those of the Paris Convention'.

74 Article 6 quinquies C(1) of the Paris Convention states: '[I]n determining whether a mark is eligible for protection, all the factual circumstances must be taken into consideration, particularly the length of time the mark has been in use'.

75 Second, registration of a sign as a trade mark is always applied for in respect of the goods or services mentioned in the application for registration. Accordingly, a trade mark's distinctiveness must be assessed by reference, first, to the goods or services in respect of which registration is sought, and, second, by reference to the relevant public's perception of that mark.

76 Since the competent authority for registering trade marks has to satisfy itself that the sign is not devoid of distinctive character for the goods or services of the undertaking seeking its registration as a trade mark, it may not carry out an examination in the abstract but must of necessity undertake its examination by reference to the actual situation. That examination must take account of all the relevant circumstances of the case, including any use which has been made of the sign in respect of which trade mark registration is sought.

77 The reply to the fourth question referred must therefore be that, in assessing whether a trade mark has distinctive character within the meaning of Article 3(1)(b) and Article 3(3) of the Directive, the competent authority for registering trade marks must carry out an examination by reference to the actual situation, taking account of all the circumstances of the case and in particular any use which has been made of the mark.

Costs

78 The costs incurred by the Netherlands and United Kingdom Governments and 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,

in answer to the questions referred to it by the Hoge Raad der Nederlanden by order of 23 February 2001, hereby rules:

1. A colour *per se*, not spatially delimited, may, in respect of certain goods and services, have a distinctive character within the meaning of Article 3(1)(b) and Article 3(3) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, provided that, *inter alia*, it may be represented graphically in a way that is clear, precise, self-contained, easily accessible, intelligible, durable and objective. The latter condition cannot be satisfied merely by reproducing on paper the colour in question, but may be satisfied by designating that colour using an internationally recognised identification code.

2. In assessing the potential distinctiveness of a given colour as a trade mark, regard must be had to the general interest in not unduly restricting the availability of colours for the other traders who offer for sale goods or services of the same type as those in respect of which registration is sought.

3. A colour *per se* may be found to possess distinctive character within the meaning of Article 3(1)(b) and Article 3(3) of Directive 89/104, provided that, as regards the perception of the relevant public, the mark is capable of identifying the product or service for which registration is sought as

originating from a particular undertaking and distinguishing that product or service from those of other undertakings.

4. The fact that registration as a trade mark of a colour *per se* is sought for a large number of goods or services, or for a specific product or service or for a specific group of goods or services, is relevant, together with all the other circumstances of the particular case, to assessing both the distinctive character of the colour in respect of which registration is sought, and whether its registration would run counter to the general interest in not unduly limiting the availability of colours for the other operators who offer for sale goods or services of the same type as those in respect of which registration is sought.

5. In assessing whether a trade mark has distinctive character within the meaning of Article 3(1)(b) and Article 3(3) of Directive 89/104, the competent authority for registering trade marks must carry out an examination by reference to the actual situation, taking account of all the circumstances of the case and in particular any use which has been made of the mark.

Puissochet	Wathelet	Timmermans
Gulmann	Edward	Jann
Macken	von Bahr	Cunha Rodrigues

Delivered in open court in Luxembourg on 6 May 2003.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President