# OPINION OF ADVOCATE GENERAL
# RUIZ-JARABO COLOMER
delivered on 8 April 2008 [1]

## I — Introduction

1. The Rechtbank van koophandel (Commercial Court), Brussels is referring four questions for a preliminary ruling: two of them relate to the legality of measures adopted by the Belgian customs authorities to combat counterfeit goods; the remainder concern the use of the information obtained in the course of carrying out such measures in legal proceedings against parallel imports, outside the law governing action taken by customs officials to detect pirated goods.

2. The number of meanings of the word 'pirate' (from the Greek πειρατής (peirates): bandit, looter) is quite surprising. Used as a noun, any child would be able to describe the archetypal pirate just by listing his most characteristic features: the wooden leg, the hook for a hand, the unkempt beard and the eye patch, which are the inevitable price of choosing such a risky way of life, full of adventures and dangers.

3. This picture has been handed down since at least 19th century romanticism; [2] even an author such as Balzac, who cannot be suspected of being a slave to the dictates of this literary style, so pervasive in the first half of the 19th century, incorporated a piracy story into one of his novels, doubtless as a ploy to increase the dramatic impact of the trials and tribulations suffered by Madame D'Aiglemont throughout her life. [3]

4. The noun is used, by extension, as an adjective, particularly in conjunction with goods, referring to their lack of authenticity or the unorthodox means used to put them on the market. But this definition contrasts with the real spoils obtained by these characters, because the riches that they stole were never considered illegal, only their seizure by force

1 — Original language: Spanish.

2 — Hollywood has glamorised the image of these likeable rebels with the films of the adventures of Captain Jack Sparrow and his followers entitled 'Pirates of the Caribbean', in which any resemblance to reality is pure coincidence.

3 — Balzac, H. de, *La femme de trente ans* (A woman of thirty), Flammarion, Paris, 1996, in particular p. 217 et seq., describes how Hélène, daughter of Madame D'Aiglemont and her husband, forms a relationship with a privateer and starts a family aboard his ship, the *Othello*; after various difficulties and a battle against the *Saint-Ferdinand*, commanded by the General, Hélène's father, she is shipwrecked in the Bay of Biscay and manages to rescue only one of her children.

from the rightful owners. One poet, in an ode to rebellion typical of that era, wrote that his ship was the pirate's most valued possession, prized above all the fabulous stolen treasures. [4]

5. In the legal debate to be addressed here, the undertakings engaging in parallel trade could, with a little imagination, be compared to pirates and those protecting their intellectual property rights to privateers, who were individuals licensed by their government to hunt down the ships of enemy powers. However, in European law the two terms are reversed, since although the analogy holds true for trade with third countries, in intra-Community trade the parallel importer is acting within the law and has carte blanche to pursue companies which try to hinder such freedom of movement. It all depends on your point of view as, in the eyes of these big companies the 'free riders' or parallel traders are the real filibusters. [5]

## II — The legal framework

### A — *Community legislation*

6. Efforts to combat the marketing of counterfeit and pirated goods have been channelled into Regulation (EC) No 1383/2003 [6] and its implementing measure, Regulation (EC) No 1891/2004 ('the Implementing Regulation'). [7]

7. Article 1(1) of Regulation No 1383/2003 defines its scope by setting out the conditions for action by the customs authorities when goods are suspected of infringing an intellectual property right because they are counterfeit or pirated. Article 3(1) restricts this scope by excluding authentic goods which may be in circulation as parallel imports.

8. Action by customs authorities is triggered by the holder of the right that is suspected of being infringed submitting an application in

4 — Espronceda, J. de, (1808-1842) author of 'La canción del pirata' (The pirate's song), reproduced in *Las mil mejores poesías de la lengua castellana,* Ediciones Ibéricas, 31st edition, Madrid, 1995, pp. 302-303, wrote these lines: 'Que es mi barco mi tesoro, / que es mi Dios la libertad, / mi ley la fuerza y el viento, / mi única patria la mar' (My treasure is my gallant bark, / My only God is liberty, / My law is might, the wind my mark, / My country is the sea. (Translation by James Kennedy)).

5 — This is the name given to a type of pirate operating mainly in the Caribbean, with freedom to plunder at will. In *The Buccaneers of America* Alexandre Olivier Oexmelin (or Exquemelin) provides some curious details about the lives of these buccaneers, such as the amount they could claim in compensation for a battle wound: 100 piastras for an eye and 600 for a right arm. Melegari, V., *Piratas, corsarios y filibusteros,* translation into Spanish by Fermín Muñoz, Bruguera, Barcelona, 1968, p. 82 et seq.

6 — Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights (OJ 2003 L 196, p. 7).

7 — Commission Regulation (EC) No 1891/2004 of 21 October 2004 laying down provisions for the implementation of Council Regulation (EC) No 1383/2003 (OJ 2004 L 328, p. 16).

accordance with Article 5 of Regulation No 1383/2003, even before an infringement has taken place. However, if officials suspect particular goods, Article 4 authorises them to inform ex officio the holder of the intellectual property right, to suspend the release of the goods (the customs release is the release for free circulation) or to detain them for a period of three working days from such notification, so that the right-holder can submit an application.

9. In both instances the form of application set out in Annex 1 of the Implementing Regulation must be used, and, in accordance with Article 6 of Regulation No 1383/2003, this must be accompanied by a declaration from the right-holder accepting liability towards the persons affected by the act or omission of the right-holder in the event that a procedure initiated pursuant to Article 9(1) is discontinued or in the event that the goods are found not to infringe an intellectual property right.

10. Article 4(2) of Regulation No 1383/2003 concerns the enquiries made by the customs authorities:

'In accordance with the rules in force in the Member State concerned, the customs authorities may, without divulging any information other than the actual or supposed number of items and their nature and before informing the right-holder of the possible infringement, ask the right-holder to provide them with any information they may need to confirm their suspicions.'

11. Article 9 of Regulation No 1383/2003 governs the actions of the customs authorities once the application submitted by the holder of the intellectual property right infringed is accepted. Article 9(1) requires them to suspend release of the goods or detain them if they entertain the slightest suspicion. Article 9(2) requires them to inform the right-holder, the declarant or the holder of the goods of the actual or estimated quantity and the actual or supposed nature of the goods.

12. Article 9(3) is divided into three subparagraphs:

'With a view to establishing whether an intellectual property right has been infringed …, the customs office or department which processed the application shall inform the right-holder, at his request and if known, of the names and addresses of the consignee, the consignor, the declarant or the holder of the goods and the origin and provenance of goods suspected …

The customs office shall give the applicant … the opportunity to inspect goods whose release has been suspended …

When examining goods, the customs office may take samples and, …, hand them over or send them to the right-holder, at his express request, strictly for the purposes of analysis and to facilitate the subsequent procedure. …'

13. Under the first paragraph of Article 12 of Regulation No 1383/2003, a right-holder can use the particulars cited in the first subparagraph of Article 9(3) only for the purposes specified in Articles 10, 11 and 13(1).

14. The second paragraph of Article 12 concerns how the information obtained by the customs authorities can be used:

'Any other use, not permitted by the national legislation of the Member State where the situation arose, may, on the basis of the law of the Member State in which the goods in question are located, cause the right-holder to incur civil liability and lead to the suspension of the application for action …'

15. Regulation No 1383/2003 came into force on the seventh day following that of its publication in the *Official Journal of the European Union*, in other words, on 9 August 2003, but the second paragraph of Article 25 of the regulation deferred its application until 1 July 2004.

16. In accordance with the first paragraph of Article 9 of the Implementing Regulation:

'Applications for action [by the customs authorities] lodged before 1 July 2004 shall remain valid until their legal expiry date and shall not be renewed. However, they must be accompanied by the declaration required under Article 6 of … Regulation [No 1383/2003], … The declaration shall release any deposit and fee payable in the Member States.'

17. The Implementing Regulation became binding on the day of its publication in the Official Journal, 30 October 2004, but the second paragraph of Article 11 applied it retrospectively from 1 July 2004.

18. Lastly, mention should be made of Article 15 of the Community Customs Code, [8] which provides:

'All information which is by nature confidential or which is provided on a confidential basis shall be covered by the obligation of professional secrecy. It shall not be disclosed by the customs authorities without the express permission of the person or authority providing it; the communication of information shall be permitted where the customs authorities may be obliged or authorised to do so pursuant to the provisions in force, particularly in respect of data protection, or in connection with legal proceedings.'

B — *The Belgian legislation*

19. Under Article 320(1) of the AWDA, [9] every official and every person who, in whatever capacity, is involved in the application of tax legislation or who has access to the offices of the customs and excise administration, outside the exercise of his official functions, is under an obligation to 'respect complete confidentiality in respect of all matters of which he becomes apprised by virtue of the exercise of his functions'.

20. This provision forms part of the Belgian *ordre public*, as do all fiscal rules, although this does not preclude information passing from a fiscal (customs) investigation to civil proceedings.

21. Belgian procedural law allows civil courts to admit evidence given by officials as witnesses [10] and to require the customs authorities to produce documents from the fiscal records. [11] In these cases it is possible for persons under a duty of confidentiality to defer to judicial instructions.

## III — The facts giving rise to the main proceedings

22. Beecham Group and other undertakings, the claimants in the main proceedings ('*Beecham and Others*'), belong to the GlaxoSmithKline group ('GSK'), which specialises in the manufacture and marketing of medicinal products and other health products and jointly own certain registered trade marks.

8 — Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1).

9 — Koninklijk besluit van 18 juli 1977 tot coördinatie van de algemene bepalingen inzake douane en accijnzen (Royal Decree of 18 July 1977 on the coordination of general provisions relating to customs and excise).

10 — Article 915 et seq. of the Gerechtelijk Wetboek (Civil Procedure Code).

11 — Article 877 et seq. of the Civil Procedure Code.

23. The defendant, Andacon NV, is a pharmaceuticals wholesaler.

24. In the financial years 2003 and 2004, the claimants' Kenyan sister company, GSK Export Ltd, sold a significant quantity of its group's products to the Ethiopian company MBATA (Ethiopia) Pvt. Ltd Company ('MBATA'), whose registered office is in Addis Ababa. The ultimate recipient of the goods was the Ethiopian army.

25. The geographical location of Ethiopia, in the so-called Horn of Africa and without access to the Red Sea since the independence of Eritrea, meant that the medicines had to be transported by sea to the port of Djibouti, unloaded and then transported by road to the Abyssinian capital.

26. GSK submitted an application for action by the customs authorities pursuant to Article 3(1) of Regulation No 3295/94, [12] in the United Kingdom and the competent UK customs department granted the application on 26 November 2003, stipulating that it was valid until 25 November 2004, and communicated this to its Belgian counterparts in December of the same year.

12 — Council Regulation (EC) No 3295/94 of 22 December 1994 laying down measures to prohibit the release for free circulation, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods (OJ 1994 L 341, p. 8).

27. In early October 2004 the Belgian border authorities informed GSK that a large consignment of products bearing its distinctive mark had been imported into Belgium through the port of Antwerp from outside the European Union.

28. GSK was authorised to inspect *in situ* some samples of the products in order to ascertain whether or not they were counterfeit. The batch numbers allowed GSK to certify that medicines sold to MBATA had been imported into the European Union, the Ethiopian army being stated as their final recipient.

29. The initial inspection showed that the goods in question were authentic and consequently the Belgian customs authorities declined to provide further information to the proprietor of the trade mark as they took the view that parallel imports are not covered by Regulation No 1383/2003.

30. Following an application by GSK, the President of the Rechtbank van Eerste Aanleg (Court of First Instance), Antwerp, by a decision of 5 October 2004, prohibited any person in possession of these medicinal products or the other items coming from Djibouti which GSK Export Ltd had sold to MBATA, even if in transit, from disposing of them, and appointed, at the applicants' expense, a judicial officer as custodian of the goods in question, authorising him to obtain all the necessary information relating to

quantities, names, origin and destination of the products and to incorporate such information into his official report.

31. At the request of the designated custodian, 202 batches of medicines were impounded by act of 6 October 2004 signed by a judicial officer.

32. The investigation showed that MBATA at first intended to resell the impounded goods to a company based in the United Kingdom and latterly intended to sell them to the undertaking AYEZAN E-Gistic L.l.c. ('AYEZAN'), which is governed by United Arab Emirates law.

33. The United Arab Emirates company brought third party proceedings against the decision of 5 October 2004, which were dismissed as unfounded by the president of the Court of First Instance, Antwerp on 24 March 2005.

34. AYEZAN appealed against this decision to the Hof van Beroep (Court of Appeal), Antwerp. By an order of 1 March 2006, that court requested the Antwerp customs office to place the full file relating to the import of 202 batches of medicinal products on the court record and the regional director acceded to this request on 28 April 2006.

35. By a judgment of 13 September 2006 the Hof van Beroep dismissed the appeal as unfounded.

36. In the view of that court the customs authorities were entitled to show the proprietor of the trade mark some samples of the suspect goods in order to ascertain whether or not they were counterfeit for the purposes of Article 4(2) of Regulation No 1383/2003. However, it did not accept that making a sample available in this way was equivalent to the thorough inspection referred to in the second subparagraph of Article 9(3), which makes it possible for the origin and provenance of the goods to be investigated in detail or for a thorough technical analysis of a sample taken to be carried out pursuant to the final subparagraph of Article 9(3).

37. Although the order for reference does not provide much detail in respect of the proceedings before the referring court, it appears that Beecham and others are applying to the Rechtbank van koophandel on the one hand for Andacon NV to be prohibited from using the trade marks at issue in the course of trading activities without the authorisation of their proprietors and, on the other, for the impounded goods to be destroyed.

38. By contrast, Andacon NV is objecting to the use of the information obtained by the Belgian customs authorities for purposes other than those set out in Regulation No 1383/2003 and, in particular, in proceedings to combat parallel imports.

**IV — The questions referred and the procedural steps before the Court of Justice**

39. The importance of the Regulations referred to above, which are directly applicable in the Member States, has led the Rechtbank van koophandel, Brussels, before ruling on the substance of the dispute, to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must the first paragraph of Article 9 of Regulation (EC) No 1891/2004 be construed as prohibiting the competent customs service or the competent customs office from providing, or causing to be provided, information within the terms of Article 9(2) of Regulation (EC) No 1383/2003, or arranging, or causing to be arranged, an inspection within the terms of the second subparagraph of Article 9(3) of Regulation (EC) No 1383/2003, so long as the application for action made prior to 1 July 2004 has not been supplemented by the declaration referred to in Article 6 of Regulation (EC) No 1383/2003? In other words, is the declaration in question a formal condition governing the continued effectiveness of the application for action?

(2) Is Article 4(2) of Regulation (EC) No 1383/2003 to be construed as allowing the Antwerp customs authorities to grant the trade mark proprietor access to six samples of the goods in order to be able to determine whether or not the goods in question were counterfeit, it being understood that such notification of a sample is not to be treated as equivalent to a thorough inspection within the terms of the second subparagraph of Article 9(3) of Regulation (EC) No 1383/2003? If so, ought this granting of access to have occurred within the period of three working days laid down in Article 4(1) of that regulation?

(3) Does Regulation No 1383/2003 preclude customs officials from providing information acquired whilst acting in implementation of its provisions outside the channels envisaged by Article 9(2) and the first subparagraph of Article 9(3) of the regulation, for example, in the questioning of witnesses or in a submission of documents ordered by Belgian courts of first instance?

(4) Does Regulation No 1383/2003 preclude information obtained by virtue of Article 4(2) (see Question 2), Article 9(2) and Article 9(3) thereof, other than that referred to in the first subparagraph of Article 9(3), or information obtained by virtue of the questioning of witnesses or the submission of documents ordered by

a Belgian court (see Question 3), from being used in proceedings not designed to secure a declaration that goods are counterfeit, for example in proceedings to counter parallel imports?'

## V — Analysis of the questions referred

### A — *A preliminary issue: jurisdiction of the Court of Justice*

40. The order for reference was lodged at the Registry of the Court of Justice on 5 March 2007.

41. On 16 May 2007 Beecham and others appealed to the Hof van Beroep, Brussels against the decision to make a reference for a preliminary ruling.

42. During the written procedure Beecham and others, Andacon NV, the German and Belgian Governments and the European Commission submitted observations.

43. No application for a hearing having been made, following the general meeting of 26 February 2008 the case was ready for the Advocate General's Opinion to be delivered.

44. The arguments contained in the submissions made to the Court by the claimants in the main proceedings on the subject of this procedural requirement make it essential to look into it before going on to deal with the request for a preliminary ruling.

45. I have indicated above that Beecham and others have challenged the order for reference made by the referring court. They argue that, owing to the fact that the challenge under the national legal system is devolutive, that is to a higher court, the Rechtbank van koophandel, Brussels is no longer seized of the case, which is now in the hands of the Hof van Beroep, Brussels.

46. The argument used is not without ingenuity, as it brings into play settled case-law preventing the Court of Justice from giving a preliminary ruling on a question submitted by a national court when the interpretation of Community law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical. [13]

13 — Case 244/80 *Foglia* [1981] ECR 3045, paragraph 18; Case C-350/03 *Schulte* [2005] ECR I-9215, paragraph 43; and Case C-239/05 *BVBA Management, Training en Consultancy* [2007] ECR I-1455, paragraph 52.

47. However, the comparison between the present case and the litigation which culminated in the judgments giving rise to this doctrine of the Court is not convincing. The connection between the interpretation of Community law sought and the relevance of the legal proceedings does not cease to be valid or become purely theoretical once national legal remedies have been activated.

48. The jurisdiction of the Court of Justice cannot be called into question on this basis, since once the procedure before the appeal court has run its course, the matter is returned to the original court, the source of the reference for a preliminary ruling, which resumes handling the case. If the appeal is successful, the Court of Justice removes the case from the register [14] and, if the appeal is dismissed, the reference is once again relevant.

49. In practice, in circumstances of this kind the Court of Justice has modified the case-law according to which references for preliminary rulings would continue to be processed so long as the request by the national court was not withdrawn or quashed, [15] and now decides on such matters according to whether domestic appeals against judicial decisions to refer questions to the Court of Justice have suspensory effect or not. Thus, it stays the proceedings when national procedural law provides that this is the case, [16] and continues them if it does not.

14 — Order of 16 January 1996 in Case C-310/94 *Ardon and Others* (not published in the ECR); Order of 8 December 1993 in Case C-269/92 *Bosman* (not published in the ECR); Order of 24 April 1991 in Case C-34/90 *Plapied and Gallez* (not published in the ECR); and Order of 16 June 1970 in Case 31/68 *Chanel* v *Cepeha* [1970] ECR 403.

15 — Case 127/73 *BRT-I* [1974] ECR 51, paragraph 9, and Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 10.

16 — Order of 16 June 1970 in *Chanel*, cited; order of 20 January 1988 in Case C-132/87 *Nationaal Instituut vor Landbouwkrediet* (not published in the ECR); and order of 4 July 1990 in *Plapied and Gallez*, cited.

50. This solution has two advantages: on the one hand it respects the rights of appeal of individuals under their national law; on the other hand it preserves the position of the national court as the source of the reference for a preliminary ruling and avoids leaving it vulnerable to the procedural tactics of the parties in the main proceedings.

51. The records relating to the case show that, in the absence of information about the suspensory effect of appeals against orders for reference, the Court of Justice wrote to the Hof van Beroep, Brussels, requesting clarification on Belgian procedural law.

52. That appeal court sent a letter dated 8 January 2008, which was delivered to the Court Registry the following 17 January, to the effect that the appeal did not have this suspensory effect and consequently the preliminary ruling procedure could continue in the normal way.

53. The questions referred should therefore be held admissible and examined in more detail.

B — *The first question*

54. The question derives from the legislative changes brought about at the time the events of the main proceedings took place.

55. The description of the legal framework indicates that Regulation No 1383/2003 was published in August of that year and came into force on 1 July 2004, while the Implementing Regulation was not adopted until 21 October 2004, was published in the Official Journal on 30 October, and became applicable retrospectively on the same date as the primary Regulation, 1 July 2004.

56. As the first paragraph of Article 9 of the Implementing Regulation requires that applications for action presented before 1 July 2004 be accompanied by the declaration referred to in Article 6 of Regulation No 1383/2003, the referring court seeks to establish whether this requirement applies to Beecham and others, given that the events in question occurred in early October of that year, prior to the publication of the printed version of the Implementing Regulation. In particular it is seeking to establish whether this requirement is a necessary precondition to the validity of the application for action.

57. In the face of such legislative deficiencies, I think the right solution is to have recourse to the most fundamental tools of legal interpretation, the general principles of any legal system.

58. Under the principle of publication of legal measures, which is closely allied to the principle of legal certainty, citizens cannot be required to abide by laws if the diffusion mechanisms do not make the laws accessible to them. Only thus can the expression 'ignorance of the law is no excuse for not complying with it', so familiar to Spanish lawyers, [17] take on its full meaning.

59. In the present case, to blame the claimants in the main proceedings for not having submitted the declaration referred to in Article 6(1) of Regulation No 1383/2003 as a supplement to the application for action presented by GSK to the UK customs authorities in November 2003, as advocated by Andacon NV, contradicts these principles.

60. On the one hand, as Regulation No 1383/2003 contains no transitional provisions, in particular as regards applications for action made prior to its entry into force, Beecham and others could assume that applications covered by Regulation

17 — It is included in Article 6(1) of the Código Civil (Civil Code), under the heading 'Generally applicable effects of laws' (Preliminary Title, Chapter III).

No 3295/94 would remain valid. According to this approach, Article 6 of Regulation No 1383/2003 had effect only in the future, in respect of applications made after 1 July 2004.

61. Moreover, as the Commission quite rightly argues, the correct interpretation of paragraph 1 of Article 9 of the Implementing Regulation would indicate that applications for action submitted to customs offices remain valid until the expiry of the period for which they were granted; but this basic proposition is irrespective of the eventual fate of the declaration required under the article itself to supplement it, because this document relates to any deposit and fee payable in the Member States. By contrast with applications presented after 1 July 2004, [18] the legislator has not made this formality a condition for the continued validity of applications submitted prior to that date, in order to maintain consistency with Regulation No 3295/94, [19] which did not make it a compulsory requirement either.

62. To take the stance supported by Andacon NV would amount to accepting that the basic requirements for validity of applications processed prior to 1 July 2004 had been modified by adding an additional requirement, namely the supplementary declaration referred to in Article 6 of Regulation No 1383/2003, which under Regulation No 3295/94 was a matter left to the discretion of the Member States. This would be contrary to the principles of legal certainty and the protection of legitimate expectations and would also harm the vested rights of those whose applications had been granted prior to the legislative change.

63. Consequently, the first question must be answered in the negative to the effect that the declaration referred to in Article 6 of Regulation No 383/2003 does not constitute a formal condition to the continued effectiveness of applications for action submitted prior to 1 July 2004.

C — *The second question*

64. The second question seeks the guidance of the Court of Justice regarding the extent of the customs action permitted under Article 4(2) of Regulation No 1383/2003, and asks whether this article allows the Antwerp customs office to grant the trade mark proprietor access to six samples of the goods in order to determine whether or not the goods in question were unauthorised copies.

65. The Rechtbank van koophandel understands that such notification is not to be treated as equivalent to the thorough inspec-

18 — Second subparagraph of Article 5(5) of Regulation No 1383/2003.

19 — Article 3(2), in conjunction with Article 3(6).

tion under the second subparagraph of Article 9(3), during which the origin and provenance of goods can be checked, or to the thorough technical analysis of the evidence collected pursuant to the third subparagraph of Article 9(3).

66. If so, the referring court also asks whether this granting of access ought to have occurred within the period of three working days laid down in Article 4(1) of that regulation.

67. I agree with the Commission that the situations to which Articles 4 and 9 of Regulation No 1383/2003 apply are different, and therefore, in the light of their relevance to the final answer, it is appropriate to give a brief explanation of these situations.

68. The first of these provisions refers to the measures which the customs authorities can take *prior to* an application for action, as indicated by the heading of Chapter II, Section 1 of the regulation in question, which contains only Article 4.

69. This involves a brief procedure, intended to make the proprietor of the intellectual property right which has potentially been infringed aware of the suspect goods so that the proprietor can apply for customs action within three days of receipt of the notification, in accordance with Article 5 of Regulation No 1383/2003.

70. The aim is to lay a basis for later, more thorough, investigations by both the customs authorities and by the right-holder, which are only permitted following the acceptance by the customs authorities of a formal request to inspect. Once this document has been processed the inspections contemplated by Article 9 can take place. In other words, Articles 4 and 9 are mutually exclusive.

71. The order for reference indicates that GSK had submitted the application as far back as November 2003 and it had been granted by the UK customs authorities in the same month and received by the Belgian authorities the following December. In these circumstances, as the Belgian Government points out, it does not help the Rechtbank van koophandel, Brussels to know how Article 4 of Regulation No 1383/2003 should be interpreted and for this reason I do not propose to give an answer to the second question.

D — *The third and fourth questions*

72. The referring court has concerns about the use of the information obtained by the customs authorities outside the channels envisaged by Regulation No 1383/2003 and, in particular, whether such information should be revealed in giving evidence as a witness or submitted as evidence in other litigation pursuant to a court order (third question) or used in proceedings whose aim is to prevent parallel imports (fourth question).

73. Notwithstanding the need to respond to these questions separately, I am in agreement with the German Government [20] that they should be addressed together, as they have an underlying feature in common: the handling of information pertaining to a clearly delimited field, such as customs procedures, which is then used in other litigation.

74. Firstly, it should be noted that the referring court is asking about information relating to the actual or estimated quantity of goods, their actual or supposed nature, the names and addresses of the consignee, the consignor, the declarant or the holder of the goods and the origin and provenance of the suspect goods, within the terms of Article 9(2) and the first subparagraph of Article 9(3) of Regulation No 1383/2003.

75. Secondly, the rules vary depending on who is transmitting the information, so that the legal position of customs officials is different from that of right-holders who have obtained such information in the event that they wish to use it for other purposes.

76. Thus, border officials are not bound by Article 12 of Regulation No 1383/2003 because the first paragraph of that article, which restricts how the information obtained can be used to the purposes mentioned in the regulation itself, refers only to 'a right-holder'. The implication is therefore that customs personnel are not subject to this provision but to Article 15 of the Community Customs Code as the general law applicable in this area.

77. This provision permits customs authorities to communicate information where they may be obliged or authorised to do so by virtue of data protection, or in connection with legal proceedings. Consequently, the law applicable to the use of such information outside the customs context is national procedural law, which in the present case is Belgian law.

20 — The German Government has submitted observations only in relation to the last two questions.

78. The answer to the third question must therefore be that Regulation No 1383/2003 does not preclude customs officials from providing information obtained whilst acting in implementation of its provisions outside the channels indicated by Article 9(2) and the first subparagraph of Article 9(3) of the regulation, within the context of the questioning of witnesses or of documentary evidence ordered by national courts.

79. As far as the right-holder is concerned, the legal position is not essentially different from that of customs officials. Although, as I have indicated above, the first paragraph of Article 12 of Regulation No 1383/2003 limits the range of possible uses of the information provided to the right-holder by the customs authorities to the purposes expressly indicated in the regulation, the second paragraph of Article 12 states that the lawfulness of other uses is subject to the law of the Member State in which the goods are located, which is usually the Member State whose customs authorities notified the right-holder of the existence of the suspect goods.

80. This reopens the range of possible uses to cover all those available under national law, in all types of proceedings, including civil proceedings and those in which actions to prevent parallel imports are admissible.

81. The Court of Justice has held that the proprietor of a trade mark can oppose parallel imports from third countries where the goods bearing its mark are being brought into the Community without its express or implied consent. Such goods do not fall within the doctrine of the exhaustion of trade mark rights, which only applies within the European Economic Area. [21]

82. Consequently, in the absence of consent, there is an infringement of the rights of the proprietor of the mark. [22] The aim of Regulation No 1383/2003 is to combat the marketing of counterfeit and pirated goods which infringe intellectual property rights and it would therefore be strange if the proprietor of such rights could not use customs information to protect these rights in other judicial contexts by seeking to prevent parallel imports.

83. In short, I think that the fourth question should also be answered in the negative, to the effect that Regulation No 1383/2003 does not preclude information obtained pursuant to Article 9(2) and Article 9(3) from being used in proceedings intended to counter parallel imports from third countries, when these infringe a trade mark right.

21 — Case C-355/96 *Silhouette* [1998] ECR I-4799 at paragraphs 18 and 22 to 26, in relation to Joined Cases C-414/99 to C-416/99 *Zino Davidoff and Levi Strauss* [2001] ECR I-8691 at paragraph 47 and Case C-173/98 *Sebago and Maison Dubois* [1999] ECR I-4103 at paragraphs 17 to 20.

22 — Case C-244/00 *Van Doren + Q.* [2003] ECR I-3051 at paragraph 26 and Case C-16/03 *Peak Holding* [2004] ECR I-11313 at paragraph 36.

## VI — Conclusion

84. In the light of the foregoing considerations, I propose that the Court of Justice give the following reply to the questions referred for a preliminary ruling by the Rechtbank van koophandel:

(1) The declaration referred to in Article 6 of Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights does not constitute a formal condition to the continued validity of applications for customs action submitted prior to 1 July 2004.

(2) Regulation (EC) No 1383/2003 does not preclude customs officials from providing information obtained whilst acting in implementation of its provisions outside the channels indicated by Article 9(2) and the first subparagraph of Article 9(3) of the regulation, within the context of the questioning of witnesses or of documentary evidence ordered by national courts.

(3) Regulation No 1383/2003 does not preclude information obtained pursuant to Article 9(2) and Article 9(3) from being used in proceedings intended to counter parallel imports from third countries, when these infringe a trade mark right.