JUDGMENT OF THE COURT (Sixth Chamber)
23 October 2003 *

In Case C-115/02,

REFERENCE to the Court under Article 234 EC by the Cour de cassation (France) for a preliminary ruling in the proceedings pending before that court between

Administration des douanes et droits indirects

and

Rioglass SA,

Transremar SL

on the interpretation of Article 28 EC,

* Language of the case: French.

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, C. Gulmann, V. Skouris (Rapporteur), F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: J. Mischo,
Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

— Rioglass SA and Transremar SL, by J.-P. Bellecave, avocat,

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

— the Portuguese Government, by L.I. Fernandes, A.S. Neves and J.S. de Andrade, acting as Agents,

— the Commission of the European Communities, by R. Tricot, acting as Agent, and E. Cabau, avocat,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 20 March 2003,

gives the following

Judgment

1 By judgment of 26 March 2002, received at the Registry of the Court on 2 April 2002, the Cour de cassation (Court of cassation) (France) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 28 EC.

2 That question has been raised in proceedings between the Administration des douanes et droits indirects (Customs and Indirect Taxes Administration, 'the customs authority') and Rioglass SA ('Rioglass') and Transremar SL ('Transremar'), both companies registered under Spanish law, concerning the detention in France, on suspicion of infringement of trade mark, of spare parts for cars manufactured in Spain and being transported to Poland.

National law

3 Article L.716-8 of the Code de la propriété intellectuelle (Intellectual Property Code) introduced by Article 11 of Law 94-102 of 5 February 1994 (*Journal Officiel de la République Française* of 8 February 1994, p. 2151) provides:

'The customs authority may, as part of its controls, upon a written request from the owner of a registered trade mark or the holder of an exclusive export right, detain goods which the latter alleges are supplied under a trade mark which infringes his registered trade mark or in respect of which he holds an exclusive right of use.

Where the customs authority detains goods it shall forthwith notify that fact to the Procureur de la République (state prosecutor), the person requesting such detention and the person declaring or in possession of the goods.

Unless within 10 working days of the notification of the detention of the goods the person requesting the detention provides the customs authority with evidence either:

— of an order of the President of the Tribunal de Grande Instance (Regional Court) for interim measures; or

— that the person requesting the detention has instituted civil or criminal proceedings and provided the security required to cover any liability where the infringement is not upheld in final proceedings...

the measure by which the goods are detained shall be discharged.'

The dispute in the main proceedings and the question referred for a preliminary ruling

4 Rioglass manufactures and sells windows and windscreens for all makes of car. According to the file, it was approved by Sogédac, responsible, in its capacity as

agent and central purchaser, for the approval of suppliers to the car manufacturers Peugeot, Citroën and Renault, as a supplier to those manufacturers.

5 In November 1997, Rioglass sold to Jann, a company registered in Poland, a consignment of windows and windscreens, lawfully produced in Spain, intended for various makes of car. Transremar was given responsibility for the transport of those goods. The goods were exported from Spain to Poland under cover of a Community transit certificate EX T2 issued on 24 November 1997, and thus qualified for the duty-suspension arrangements which allow movement between two points in the customs territory of the Community and Poland free of import duty, tax or commercial policy measures. Some of the windows and windscreens, intended for use in Peugeot, Citroën or Renault models, bore the logo or trade mark of those constructors alongside the manufacturer's trade mark.

6 On the same day, French customs officers carried out an inspection of Transremar's lorry near Bordeaux. On 25 November 1997 and 27 November 1997, the customs officers drew up, respectively, a report of detention of the goods and a report of seizure of the goods on suspicion of infringement of trade mark.

7 Rioglass and Transremar applied for interim relief seeking an order that the detention and seizure measures be lifted. By two orders of 8 December 1997 and 8 January 1998, the judge hearing the application for interim relief dismissed the applications, whereupon the applicants brought appeal proceedings against those orders. Their appeals were upheld by the Cour d'appel de Bordeaux (Bordeaux Court of Appeal) which ruled, in its judgment of 22 November 1999, that the detention of the lorry, the windscreens and the windows constituted a clear infringement of the right to private property and ordered the customs authority to return the goods, documents and deposits.

8 The customs authority lodged an appeal against that judgment before the Cour de cassation.

9 The Cour de cassation referred in that context to the judgment in Case C-23/99 *Commission* v *France* [2000] ECR I-7653, in which the Court of Justice held that, by implementing, pursuant to the Code de la propriété intellectuelle, procedures for detention by the customs authorities of goods lawfully manufactured in a Member State of the European Community which are intended, following their transit through French territory, to be placed on the market in another Member State, where they may be lawfully marketed, the French Republic had failed to fulfil its obligations under Article 28 EC.

10 The Cour de cassation formed the view, however, that resolution of the dispute called for an interpretation of Community law in order to determine whether the solution adopted in that judgment also applied in the present case, and decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Is Article 30 of the Treaty, now Article 28 EC, to be interpreted as meaning that it precludes the implementation, pursuant to the Code de la propriété intellectuelle, of procedures for detention by the customs authorities of goods lawfully manufactured in a Member State of the European Community which are intended, following their transit through French territory, to be placed on the market in a non-member country, in the present case, Poland?'

The question referred for a preliminary ruling

Observations submitted to the Court

11 According to Rioglass and Transremar, the Court's reasoning in *Commission* v *France*, cited above, is perfectly applicable to the circumstances of the present case. They argue that the transport in issue in the main proceedings should be treated as a Community transit operation. Any measure of detention or seizure, carried out pursuant to the Code de la propriété intellectuelle, the Customs Code or 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), of goods not intended to be placed on the market in France but which are merely being transported through that country in order to be marketed in a non-member country cannot be justified on the grounds of the protection of industrial and commercial property. Furthermore, there is no provision enabling a Member State to limit the free movement of Community goods in its territory merely because those goods are intended for a non-member country.

12 The French Government submits that Article 28 EC applies only to national measures liable to restrict intra-Community trade whereas the goods in question in the present case are intended to be placed on the market in a non-member country. The judgment in *Commission* v *France* is therefore irrelevant for purposes of the present case. According to the French Government, it is the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part (OJ 1993 L 348, p. 2, 'the agreement') which must be applied for the purpose of resolving the dispute in the main proceedings.

13 In this respect it is apparent from the case-law (Case 104/81 *Kupferberg* [1982] ECR 3641, paragraphs 29 to 31, Case C-312/91 *Metalsa* [1993] ECR I-3751, paragraphs 11 and 12, and Case C-63/99 *Gloszczuk* [2001] ECR I-6369, paragraph 48), that the mere similarity between the wording of a provision of one of the Treaties establishing the Communities and of an international agreement between the Communities and a non-member country does not suffice for the same meaning to be ascribed to the terms of that agreement as they bear in the Treaties.

14 Thus, referring to the judgment in Case 270/80 *Polydor and RSO* [1982] ECR 329, and emphasising that the purpose of the agreement differs from that of Articles 28 EC to 30 EC, the French Government submits that Article 10(4) of the agreement must be interpreted as not precluding implementation by the customs authorities of a Member State of procedures for the detention of goods originating in another Member State and intended, following their transit through the first State, to be placed on the Polish market.

15 The Portuguese Government submits that Article 28 EC precludes the implementation of procedures, such as those in issue in the main proceedings, for the detention of goods lawfully manufactured in one Member State and intended, following their transit through the Member State in question, to be placed on the market of a non-member country on the ground that those procedures may delay the movement of the goods by 10 days and are therefore disproportionate to the objective which they seek to achieve.

16 Finally, the Commission takes the view that Articles 28 EC to 30 EC are the only relevant provisions for the purposes of replying to the question referred. It considers that neither the Community rules on the harmonisation and unification of intellectual property rights nor Regulation No 3295/94 are relevant in the present case. According to settled case-law, Article 28 EC applies to all goods originating in or destined for a Member State. Therefore the Court's reasoning in *Commission* v *France* is applicable in the present case. It matters little in that

regard that the goods in question are intended for export to a non-member country provided that they originate in a Member State and, in particular as in the present case, that they were lawfully manufactured in that Member State.

Reply of the Court

17 It should be noted as a preliminary point that the fact that the goods in question in the main proceedings were intended for export to a non-member country does not necessarily lead to the conclusion that, in a situation such as that in the present case, those goods do not fall within the scope of the EC Treaty provisions on the free movement of goods between Member States.

18 Given that, as is apparent from the file, the present case involves goods lawfully manufactured in one Member State in transit within another Member State, it must be pointed out that, according to settled case-law, the Customs Union established by the EC Treaty necessarily implies that the free movement of goods between Member States should be ensured. That freedom could not itself be complete if it were possible for Member States to impede or interfere in any way with the movement of goods in transit. It is therefore necessary, as a consequence of the Customs Union and in the mutual interest of the Member States, to acknowledge the existence of a general principle of freedom of transit of goods within the Community. That principle is, moreover, confirmed by the reference to transit in Article 30 EC (see, to that effect, Case 266/81 *SIOT* [1983] ECR 731, paragraph 16, and Case C-367/89 *Richardt and 'Les Accessoires Scientifiques'* [1991] ECR I-4621, paragraph 14).

19 The Court has moreover already held that Articles 28 EC to 30 EC are applicable to goods in transit through a Member State but intended for a non-member country (see, to that effect, Case C-350/97 *Monsees* [1999] ECR I-2921 and *Richardt and 'Les Accessoires Scientifiques'*, cited above).

20 It follows that, even if goods in transit are intended for a non-member country, they come within the scope of Articles 28 EC to 30 EC and the question referred for a preliminary ruling must accordingly be examined in the light of those provisions.

21 The Court is bound to conclude in that connection, firstly, that a measure of detention under customs control such as that in issue in the main proceedings, which delays the movement of goods and, if the competent court rules that they are to be confiscated, may block their movement completely, has the effect of restricting the free movement of goods and therefore constitutes an obstacle to that freedom (on the same French legislation, see *Commission* v *France*, paragraphs 22 and 23).

22 Therefore, given that the detention under customs control in issue in the main proceedings was carried out on the basis of the Code de la propriété intellectuelle, it is necessary to determine whether the obstacle to the free movement of goods created by that detention under customs control may be justified by the need to ensure the protection of industrial and commercial property referred to in Article 30 EC.

23 In order to answer that question it is necessary to take account of the purpose of that exception, which is to reconcile the requirements of the free movement of goods and the right of industrial and commercial property, by avoiding the maintenance or establishment of artificial barriers within the common market.

Article 30 EC allows derogations from the fundamental principle of the free movement of goods within the common market only to the extent to which such derogations are justified for the purpose of safeguarding rights which constitute the specific subject-matter of such property (see, inter alia, Case C-10/89 *Hag GF* [1990] ECR I-3711, paragraph 12, Case C-61/97 *FDV* [1998] ECR I-5171, paragraph 13, and *Commission* v *France*, paragraph 37).

24 According to the judgment for reference, the goods in issue in the present case were detained on suspicion of infringement of trade mark.

25 With respect to trade marks, it is settled case-law that the specific subject-matter of a trade mark is, in particular, to guarantee to the owner that he has the exclusive right to use that mark for the purpose of putting a product on the market for the first time and thus to protect him against competitors wishing to take unfair advantage of the status and reputation of the trade mark by selling products illegally bearing it (see, in particular, Case 16/74 *Centrafarm* [1974] ECR 1183, paragraph 8, Case 102/77 *Hoffmann-La Roche* [1978] ECR 1139, paragraph 7, and Case C-349/95 *Loendersloot* [1997] ECR I-6227, paragraph 22).

26 The implementation of such protection is therefore linked to the marketing of the goods.

27 Transit, such as that in issue in the main proceedings, which consists in transporting goods lawfully manufactured in a Member State to a non-member country by passing through one or more Member States, does not involve any marketing of the goods in question and is therefore not liable to infringe the specific subject-matter of the trade mark.

28 Furthermore, as Advocate General Mischo noted at point 45 of his Opinion, that conclusion holds good regardless of the final destination of the goods in transit. The fact that the goods are subsequently placed on the market in a non-member country and not in another Member State does not alter the nature of the transit operation which, by definition, does not constitute a placing on the market.

29 Therefore, a measure of detention under customs control, such as that in issue in the main proceedings, cannot be justified on the ground of protection of industrial and commercial property within the meaning of Article 30 EC.

30 In those circumstances, the answer to the question referred for a preliminary ruling must be that Article 28 EC is to be interpreted as precluding the implementation, pursuant to a legislative measure of a Member State concerning intellectual property, of procedures for detention by the customs authorities of goods lawfully manufactured in another Member State and intended, following their transit through the territory of the first Member State, to be placed on the market in a non-member country.

Costs

31 The costs incurred by the French and Portuguese Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, 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 (Sixth Chamber),

in answer to the question referred to it by the Cour de cassation by judgment of 26 March 2002, hereby rules:

Article 28 EC is to be interpreted as precluding the implementation, pursuant to a legislative measure of a Member State concerning intellectual property, of procedures for detention by the customs authorities of goods lawfully manufactured in another Member State and intended, following their transit through the territory of the first Member State, to be placed on the market in a non-member country.

Puissochet Gulmann Skouris

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 23 October 2003.

R. Grass V. Skouris

Registrar President