JUDGMENT OF THE COURT
17 FEBRUARY 1977 [1]

Farbwerke Hoechst AG v Hauptzollamt Frankfurt-am-Main (preliminary ruling requested by the Hessisches Finanzgericht)

'Value for customs purposes of trade-marks'

Case 82/76

1. *Value for customs purposes — Determination — Association — Definition for the purposes of Article 2 (2) of Regulation No 803/68 — Application to the case of Article 3 (7) (b) of that regulation*

2. *Value for customs purposes — Determination — Association — Concept (Regulation No 803/68, Article 2 (2))*

3. *Value for customs purposes — Determination — Territorial distribution rights — Transfer in exchange for royalties — Right to manufacture the imported product — Assignment free of charge — Regulation No 1788/69, Article 2 (1) (a) — Application*

1. The definition of the concept of 'persons associated in business' set out in Article 2 (2) of Regulation No 803/68 of the Council is also valid for the purposes of the application of Article 3 (7) (b) of that regulation.
2. An association such as that referred to in Article 2 (2) of Regulation No 803/68 is created by a contract whereby the foreign supplier of a product grants to the Community buyer distribution rights which are territorially defined against payment of royalties in the form of a percentage share of the proceeds of sales.
3. A contract by which, primarily, territorial distribution rights are transferred in return for royalties and, in addition, the right, assigned free of charge, to manufacture the imported product, falls within the provisions of Article 2 (1) (a) of Regulation No 1788/69 of the Commission.

In Case 82/76

Reference to the Court pursuant to Article 177 of the EEC Treaty by the Hessisches Finanzgericht for a preliminary ruling in the proceedings pending before that court between:

1 — Language of the Case: German.

FARBWERKE HOECHST AG, Frankfurt-am-Main,

v

HAUPTZOLLAMT FRANKFURT,

on the interpretation of Regulation (EEC) No 803/68 of the Council of 27 June 1968 on the valuation of goods for customs purposes (OJ English Special Edition, 1968 (I), p. 170) and of Regulation (EEC) No 1788/69 of the Commission of 10 September 1969 determining certain exceptions within the meaning of Article 3 (2) of Council Regulation (EEC) No 803/68 (OJ English Special Edition, 1969 (II), p. 387).

THE COURT

composed of: H. Kutscher, President, A. M. Donner and P. Pescatore, Presidents of Chambers, J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate-General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts of the case, the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

Farbwerke Hoechst AG of Frankfurt, the plaintiff in the main action, entered into an agreement with the Hoffmann-La Roche undertaking (hereinafter referred to as La Roche) of Basel, Switzerland, dated 9 September 1970 under which it was given the right to be supplied by La Roche with a preparation developed by that undertaking composed of two substances, sulfadoxin and trimethoprim, to manufacture, itself or by means of one of its subsidiaries from this preparation, special medicinal products for veterinary medicine and to market them in all the countries of the world except the USA. The plaintiff in the main action is allowed to market the special medicinal

preparations under its own trade-mark and name.

It is not allowed to make allusion to La Roche in its advertising material without the express consent of that firm. The consideration 'for the release of the distribution rights' was the agreement by the plaintiff in the main action to pay a royalty amounting to 3 % of the net turnover.

From 14 April 1971 to 12 September 1972 the plaintiff in the main proceedings imported ten batches containing altogether 59 939 ampoules, each of 100 ml, of the special medicinal preparation composed of the two above mentioned substances. The product had been manufactured and supplied by La Roche. After the goods had been imported they were re-packed in the bonded warehouse into smaller packages on which was affixed for the first time the trade-mark 'Borgal' registered in the Federal Republic of Germany in the name of the plaintiff in the main action. The Hauptzollamt (Principal Customs Office) Frankfurt, the defendant in the main action, fixed the value for customs purposes on a provisional basis when the goods were deposited in the bonded warehouse. On the basis of these values, between 3 May 1971 and 13 April 1971, the plaintiff in the main action submitted the quantities of 'Borgal' in question for release into free circulation and on the same basis the defendant in the main action proceeded to calculate the duties; consequently the royalties paid by the plaintiff under the licence were not added to the value of these goods for customs purposes and no addition to it was made for user of the trade-mark 'Borgal'.

When during inspections of the undertaking's books the existence of the licensing agreement with La Roche and the affixing of the trade-mark came to light the defendant issued an amended notice of assessment dated 14 December 1973. On re-calculating the customs duty it made, in addition to an increase, which is no longer disputed, to the royalties paid under the licence, a further increase amounting to DM 15·15 per 100 ampoules for the presumed value of the trade-mark 'Borgal'.

In relation to the valuation of goods for customs purposes Regulation No 803/68 of the Council provides:

'Article 1

1. For the purpose of applying the Common Customs Tariff, the value for customs purposes of the goods imported shall be taken to be the normal price, that is to say, the price which they would fetch, at the time referred to in Article 5, on a sale in the open market between a buyer and a seller independent of each other.

2. The normal price of any imported goods shall be determined on the following assumptions:

(a) that the goods are delivered to the buyer at the place of introduction into the customs territory of the Community;

(b) that the seller bears all costs, charges and expenses incidental to the sale and to the delivery of the goods at the place of introduction, which are hence included in the normal price;

(c) that the buyer bears any duties or taxes applicable in the customs territory of the Community, which are hence not included in the normal price.

Article 2

1. A sale in the open market between a buyer and seller independent of each other presupposes:

(a) that the price is the sole consideration; by consideration is meant not only the fulfilment of a legal or contractual obligation, but also any other form of consideration;

(b) that the price is not influenced by any commercial, financial or other relationship, whether by contract or otherwise, between the seller or any natural or legal person associated in business with him and the buyer or any natural or legal person associated in business with him (other than the relationship created by the sale itself);
(c) that no part of the proceeds of any subsequent resale, other disposal or use of the goods will accrue, either directly or indirectly, to the seller or any natural or legal person associated in business with him.

2. Two persons shall be deemed to be associated in business with one another if, whether directly or indirectly, either of them has any interest in the business or property or some third person has an interest in the business or property of both of them.

Article 3

1. When the goods to be valued
(a) are manufactured in accordance with any patented invention or are goods to which any protected design has been applied; or
(b) are imported under a trade-mark; or
(c) are imported for sale, other disposal or use under a foreign trade-mark, the normal price shall be determined on the assumption that it includes the value of the right to use the patent, design or trade-mark in respect of the goods. This provision shall also apply in the case of copyright of any other intellectual or industrial property right.

2. Exceptions to the provisions of paragraph 1 may be determined in accordance with the procedure laid down in Article 17, where the rights referred to in that paragraph are held by a person established in a Member State.

3. ...
4. ...
5. ...
6. ...

7. A trade-mark shall be treated as a foreign trade-mark for the purposes of this article if it is the mark of;
(a) any person by whom the goods to be valued have been grown, produced, manufactured, offered for sale or otherwise dealt with, outside the customs territory of the Community; or
(b) any person associated in business with any person referred to in subparagraph (a); or
(c) any person whose rights in the trade-mark are restricted by an agreement with any person referred to in subparagraph (a) or (b).'

Regulation No 1788/69 of the Commission determines certain exceptions within the meaning of Article 3 (2) of Council Regulation No 803/68. Article 2 of the Commission regulation states:

'1. In so far as the right to use a trade-mark treated as a foreign trade-mark within the meaning of Article 3 (7) of Regulation (EEC) No 803/68 does not entail the payment of any royalty, the value of such right shall not be included in the value for customs purposes where one or more of the following conditions are satisfied:
(a) the trade-mark is that of a sole agent or sole concessionaire established in a Member State, there is no business association between the agent or concessionaire and the supplier of the goods to be valued other than the relationship created by the agency or concession and the rights of the agent or concessionaire in the trade-mark are not restricted within the meaning of Article 3 (7) (c) of Regulation (EEC) No 803/68;
(b) the trade-mark is that of a person established in a Member State who is associated in business with the supplier of the goods to be valued but who also imports for sale, under the same trade-mark, identical goods obtained in the open market, as provided for in Article 1 (1) of Regulation (EEC) No 803/68;

(c) the trade-mark is that of a person established in a Member State whose business association with the supplier of the goods to be valued stems solely from the fact that a third party has a share in the property of both, if such association has no influence whatsoever on transactions involving the goods in question;

(d) the trade-mark is that of a person established in a Member State whose business association with the supplier of the goods to be valued stems solely from the fact that he has granted a loan to the supplier, or has received a loan from him, or that both have received a loan from a third party, if such association has no influence whatsoever on transactions involving the goods in question.

2. The rules set out in paragraph 1 shall also apply where goods are imported for sale, other disposal or use, under a foreign trade-mark, after subsequent manufacture or processing.'

The defendant in the main action justifies the imposition of the increase on the ground that the trade-mark 'Borgal' was to be treated as a foreign trade-mark for the purposes of Article 3 (7) of Regulation (EEC) No. 803/68 of the Council, because by entering into the licensing agreement the plaintiff was 'associated in business', within the meaning of Article 2 (2) of the said regulation, with the seller of the goods who is resident outside the customs territory of the Community and also because the inclusion of the value of the trade-mark in the value for customs was not precluded by Article 2 of Regulation (EEC) No 1788/69 of the Commission.

Following the rejection of its administrative complaint against the amended notice to pay customs duty the plaintiff in the main action brought proceedings before the Finanzgericht. It relied on the following arguments: The business association for the purposes of Article 3 (7) of Regulation No 803/68 is not the same as the notional business association in Article 2 (2) of the same regulation; on the contrary the business association within the meaning of Article 3 (7) must be given a narrow interpretation and must be proved to exist in each specific case. These two provisions have different objects: Article 2 contains the definition of the ideal sale. The fiction of the business association contained in paragraph 2 of that article does not mean that certain consequences automatically follow. This only occurs if the business association has influenced price formation.

On the other hand the automatic effect of Article 3 (7) in conjunction with paragraph 1 of the same article, if the conditions prescribed are fulfilled, is that the value of the right to use the trade-mark must be taken into account when the normal price is calculated. Since the concept of the normal price is linked to the value of the goods it must be ascertained in each case whether the value of an imported product has been increased by reason of the affixing of the trade-mark. Accordingly if a licensing agreement is to be treated as a business association it too must be connected with the imported goods. This is the case for example if the subject-matter of the licence is the assignment of certain rights (patent, trade-mark, manufacturing and similar rights). The plaintiff in the main action on the other hand argued that it merely re-packed and labelled the goods at issue after they had been imported, which is no more than one of the functions of a distributor.

The trade-mark 'Borgal' did not influence the amount of the invoiced import prices. In the case of chemotherapeutical products of a complex nature, marketing under a trade-mark only serves the purpose of identifying the product. La Roche sells the product at the same price, irrespective of whether at a later date it is sold under a trade-mark. For this reason, considered objectively, the trade-mark 'Borgal' did not bring about

an increase in the value of the product during the relevant period.

Finally the plaintiff in the main action criticizes the method of assessment used to fix the value of the trade-mark in question. The average rate used might at most apply to a trade-mark which is moderately well known; the trade-mark 'Borgal' acquired from a third party as an 'unused mark' for the sum of DM 3 000 does not meet this criterion.

The defendant in the main action took the view that the concept 'associated in business' as defined in Article 2 (2) of Regulation No 803/68 must apply to the whole of the legislation relating to the valuation of goods for customs purposes. By virtue of the 'licensing agreement' the plaintiff must be regarded as associated in business within the meaning of Article 3 (7) of Regulation No 803/68 with the result that the trade-mark 'Borgal' which it has had registered in the territory of the Community is to be treated as a foreign trade-mark.

The present case does not constitute one of the exceptions set out in Regulation (EEC) No 1788/69. At most, the method of calculation applied for the purpose of fixing the value of the trade-mark to be added to the valuation for customs purposes could be the only factor open to doubt. The plaintiff in the main action has however not made any other — better — proposal in this respect.

By order of 18 June 1976 the Hessisches Finanzgericht stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling pursuant to Article 177 of the EEC Treaty:

'1. Is Article 2 (2) of Regulation (EEC) No 803/68 of the Council on the valuation of goods for customs purposes under which two persons shall be deemed to be associated in business *inter alia* if either of them has any interest in the business or property of the other also applicable to the business association mentioned in Article 3 (7) (b) of the same regulation?

2. If the answer to this question is in the negative, by what criteria is a business association within the meaning of Article 3 (7) (b) of Regulation No 803/68 to be determined?

3. If Question 1 is answered in the affirmative, is such a business association established (Article 2 (2) of Regulation No 803/68) by an agreement, the primary object of which is the grant to the domestic buyer by the foreign supplier of goods of selling rights in a specific territory against payment of royalties and under which in addition the said buyer is granted, free of further charges, the right to manufacture the imported product under the patented process from two active substances patented by and to be procured from the undertaking supplying the goods?

4. If the answer is in the affirmative, does it also apply if the purchasing firm does not make use of its manufacturing rights?

5. If the answer is in the affirmative, are the concepts "sole agent" and "sole concessionaire" in Article 2 (1) (a) of Regulation (EEC) No 1788/69 of the Commission two expressions having the same meaning?

6. If the answer is in the negative, does the expression "sole concessionaire" also include a person who has been granted the right by the proprietor of a patent to manufacture the goods under the patent?

7. If Question 5 is answered in the affirmative, does an agreement under which in the first place selling rights within a specific territory are granted for consideration and in addition a right to manufacture the imported goods free of charge is granted but has not been used fall outside the definition of a sole agency relationship?

8. If the answer is in the affirmative, what are the criteria by which the

additions to be made to the value for customs purposes under Article 3 (1) of Regulation (EEC) No 803/68 are to be calculated? Is the criterion the purchase price of the mark acquired as an unused mark ("Leerzeichen") from a third person spread over a given number of future imports or a fixed percentage of the proceeds of sale?

9. If the latter method is to be applied what are the standards for fixing such percentages (that the mark is known to a small, medium or high degree; characterization of the mark as a mere distinguishing mark)?'

The order for reference was entered at the Court Registry on 13 August 1976.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by the Commission of the European Communities, represented by its Legal Adviser Jean Amphoux, acting as Agent, assisted by Manfred Beschel, a member of the Legal Department.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided to open the oral procedure without holding a preparatory enquiry.

II — Summary of the written observations submitted to the Court of Justice

Before undertaking an analysis of the questions referred for a preliminary ruling the *Commission* makes some remarks of a general nature on the principles of the legislation relating to valuation of goods for customs purposes. In particular it emphasizes the importance of the principle of the normal price (cf. Article 1 (1) of Regulation No 803/68) in interpreting the provisions relating to the value for customs purposes.

As to the first and second questions

The Commission first examines the provisions of Regulation No 803/68 governing the taking into account of trade-marks in determining the value for customs purposes (Article 3 (1), Article 3 (4) and Article 3 (7)). It states that the objective of these provisions as a whole is to guarantee the manufacturer of products bearing a trade-mark within the territory complete customs protection against a manufacturer of foreign products bearing a trade-mark. The purpose of a trade-mark is *inter alia* to express a guarantee of constant quality of the products in question and the affixing of the trade-mark has the effect on the open market of increasing the objective value of the products in comparison with similar products which do not bear a mark ('anonymous') and which therefore do not profit from a 'guarantee of quality'. In order to take account of this increase in value Article 3 (1) (b) provides that the normal price of a product 'imported under a trade-mark' is to be determined on the assumption that this includes the value of the right to use the trade-mark.

Article 3 (1) (c) was intended to complete customs protection by providing that the value of the foreign trade-mark should also be taken into account in the value for customs purposes where goods are not imported under a trade-mark but are nevertheless intended to be sold under a foreign mark subsequently.

Paragraph 7 of that article goes further in order to prevent any possible falsification of the normal price. In order to prevent a natural or legal person dependent on a foreign manufacturer from registering in his own name his 'own' trade-mark in a Member State of the Community and affixing it to foreign products which have first been imported without a trade-mark subparagraph (b) of that provision states that a trade-mark must always be regarded as a foreign mark if it belongs to a person who is 'associated in business'

with the foreign manufacturer of the product bearing the trade-mark.

Article 2 (2) of Regulation No 803/68 specifies in a general manner the conditions under which two persons must be regarded as being 'associated in business' and sets out an exhaustive definition. It is intended to make the legal consequences attached by the regulations to the term 'associated in business' applicable whenever the conditions stipulated are fulfilled. The legislative context of the definition consists of all the provisions concerning the determination of the normal price which also include Article 3 (7) (b) of Regulation No 803/68. In addition the scope of application of the definition is not expressly limited to certain rules relating to the value for customs purposes.

Such a limitation is laid down in Article 3 (7) for the definition of a foreign trade-mark and one is justified in thinking that a corresponding restriction would have been provided for Article 2 (2) of the regulation if such had been the intention. Reference must therefore be made to Article 2 (2) in order to define the content of the term 'person associated in business' within the meaning of Article 3 (7) (b) of Regulation No 803/68.

This conclusion makes an answer to the second question superfluous.

As to the third and fourth questions

It is apparent from the text of Article 2 (2) of Regulation No 803/68 itself that that regulation is intended to cover as completely as possible all types of association in business between two persons. 'Any' interest of either of them in the business or property of the other (or a common interest) is sufficient whether these interests are direct or merely indirect.

However certain limits are necessarily implied in this wide definition:

1. The 'interest' must go beyond the obvious interest in the payment of the sale price itself.
2. The 'interest' must be capable of taking concrete form.
3. At the very least the 'interest' must be such as to influence the normal price.

In the light of these considerations the Commission reaches the following conclusions:

The concession of an exclusive distribution right for certain patented products in conjunction with the obligation for the buyer to pay, as consideration for the granting of distribution rights, a royalty of 3 % on the net proceeds of sales constitutes an undeniable 'business association' which is more than a mere sale. The seller has a real interest in the business of the buyer with the exclusive distributorship concession since he must use the buyer as an intermediary to sell his products in a specified territory. This very specific interest in the business of the buyer further consists in a fixed share of the net proceeds of his sales. It may be supposed that without payment of such a royalty the plaintiff in the main action would not have obtained sole distribution rights. That such a case goes beyond a normal contract of sale is evidenced also by Article 2 (1) (c) of Regulation No 803/68 according to which a sale can no longer be deemed to have been 'carried out on the open market' where the seller participates in any form in the proceeds of the resales.

On the other hand the grant of a particular right — protected by a patent — to manufacture such goods (pharmaceutical products) from substances bought from the seller does not constitute, in comparison with the contractual relations referred to above, 'business association' which is independent where the holder of this right has not made use of it. This contractual relationship which is not put into effect does not affect the criteria to

be taken into account in determining the actual value of goods for customs purposes.

This view is confirmed by an Opinion of the Customs Valuation Committee of the Customs Cooperation Council (Annex VI to Document No 22.440).

As to the fifth and sixth questions

Within the scheme of the rules relating to the value for customs purposes the term 'sole agent' and 'sole concessionaire' referred to in Article 2 (1) (a) of Regulation No 1788/69 of the Commission must not be examined as independent terms each having an autonomous meaning and therefore capable of being distinguished from the other. They constitute a single concept which, irrespective of the formal legal position, includes an economic entity to which a third party has assigned exclusive distribution rights for certain goods in a particular territory. The wide meaning of this general term appears clearly from Article 9 (2) (b) of Regulation No 803/68 which includes within this term 'any other person operating in comparable circumstances'.

As to the seventh question

The protective role assigned to the provisions concerning the taking into account of foreign trade-marks (and of trade-marks assimilated to foreign trade-marks) with regard to the value for customs purposes is fully realized in so far as these provisions prevent a foreign manufacturer of products bearing a trade-mark from evading application of the principle of the normal price by resorting to indirect means. Conversely, however, the strict application of these provisions could 'where the right to use the trade-mark belongs to a person established in a Member State, ... lead to a valuation which in certain cases is difficult to justify' (cf. recitals in the preamble to Regulation No 1788/69 of the Commission).

Article 2 of Regulation No 1788/69 lays down the conditions under which a trade-mark — which is in itself to be regarded as a foreign trade-mark — is not to be included in the value for customs purposes in spite of the existence of a business association between the parties. Paragraph 1 (a) is intended to exclude such incorporation where the business association is no more than the relationship of exclusive representation and only where there exists an *additional* 'business association' extending beyond this relationship should the value of the trade-mark be incorporated in the value for customs purposes. The intention of the provision is therefore that the value of the trade-mark should only be taken into account in determining the normal price for business relationships which have certain 'far-reaching' effects.

As it has stated above the Commission believes that the existence of a contract, of which no use has been made, and which concerns the transfer of manufacturing rights for certain pharmaceutical products protected by a patent is not in itself sufficient to create such an additional business association. It is for the national court to decide on the question whether other circumstances may nevertheless require the value of the trade-mark to be taken into account.

As this last hypothesis cannot be completely ruled out the Commission further examines the last two questions.

First the Commission observes that it is often impossible to calculate 'to the nearest penny' the value of the trade-mark. Nevertheless under general legal principles the person concerned must be put in a position to be able to know on what considerations the evaluation in a particular case is based. Furthermore Article VII of GATT expressly lays down the principle that the value for customs purposes must be capable of being verified.

Whilst recognizing the practical difficulties the Commission believes that the determination of the value of the trade-mark on the basis of empirical standards which are not specified does not satisfy the requirements of this principle. Although it is impossible to establish a complete system of criteria it may nevertheless be said that the evaluation must take account of both the importance and the purpose of the trade-mark for the categories of goods concerned and also the extent of the renown of the trade-mark. As it is also necessary to base oneself, for the purposes of determining the value of the trade-mark, on the time referred to in Article 5 of Regulation No 803/68 the costs of acquiring the trade-mark incurred at a previous date would not appear capable of constituting the sole criterion for evaluation.

The Commission suggests the following replies to the questions referred:

1. The definition of the term 'persons associated in business' referred to in Article 2 (2) of Regulation No 803/68 of the Council also applies to the provisions in Article 3 (7) (b) of the same regulation.
2. The conclusion of a contract whereby the foreign supplier of a product grants to the buyer within the Community the exclusive distribution rights for a specified territory against payment of royalties in the form of a percentage share of the proceeds of sales is sufficient to establish the existence of a business association within the meaning of Article 2 (2) of the abovementioned regulation. If there also exists between the parties to the contract an agreement whereby the buyer is granted the right to manufacture under a patented procedure products identical to the imported product from two patented substances which he undertakes to purchase from the abovementioned supplier the existence of this right is not in itself sufficient to constitute an additional 'business association' within the meaning of Article 2 (2) of Regulation No 803/68 if no use has been made of the right in question and if in addition there is no evidence of any influence of the trade-mark on the value for customs purposes.
3. The terms 'sole agent' and 'sole concessionaire' referred to in Article 2 (1) (a) of Regulation No 1788/69 of the Commission do not refer to independent concepts but serve jointly to delineate a single complete concept covering all economic entities which have obtained the concession of exclusive distribution rights for certain products in a geographically defined territory.
4. In fixing the value for customs purposes the value of a trade-mark must always be determined in such a way that it is possible to recognize on the basis of what considerations (for example the renown of a trade-mark or the importance and the role of a trade-mark for a certain type of product) the evaluation of the trade-mark is founded and to what extent the trade-mark was taken into account in determining the normal price.

III — Oral procedure

The Commission of the European Communities submitted oral argument at the hearing on 20 January 1977.

The Advocate-General delivered his opinion at the hearing on 3 February 1977.

Law

1 By order of 18 June 1976, which was entered at the Court Registry on 13 August 1976, the Hessisches Finanzgericht referred to the Court, pursuant to Article 177 of the EEC Treaty, nine questions concerning the interpretation of Regulation No 803/68 of the Council of 27 June 1968 on the valuation of goods for customs purposes (OJ English Special Edition, 1968 (I), p. 170) and of Regulation No 1788/69 of the Commission of 10 September 1969 determining certain exceptions within the meaning of Article 3 (2) of the abovementioned Regulation No 803/68 (OJ English Special Edition, 1969 (II), p. 387).

2 These questions were raised in the context of a case concerning the value for customs purposes of pharmaceutical products imported by Farbwerke Hoechst, the plaintiff in the main action (hereinafter referred to as 'Hoechst').

Hoechst concluded a contract with Hoffman-La Roche, whose registered office is in Basel, Switzerland, under which it obtained the right to purchase from La Roche a preparation produced by the latter firm from two substances, sulfadoxin and trimethoprim, or to manufacture this preparation itself from these substances supplied by La Roche and to sell the preparation throughout the world with the exception of the United States of America. It may sell the special medicinal preparation under its own trade-mark and in its own name but is not permitted to mention La Roche in its publicity without the express consent of that firm. As consideration 'for the release of the distribution rights' Hoechst undertook to pay to La Roche a royalty of 3 % of the net turnover.

3 In the course of 1971 and 1972, having imported ten consignments of the special medicinal preparation made up from the two abovementioned substances and supplied by La Roche, Hoechst re-packed the product in smaller packages on which it subsequently affixed for the first time the trade-mark 'Borgal', registered in its name in the Federal Republic of Germany.

The Customs Office, the defendant in the main action, discovered the existence of a licensing agreement between Hoechst and La Roche and the affixing of the trade-mark 'Borgal' and consequently, by amended notice of assessment, determined the customs value of the special medicinal preparations in question by increasing their price both in respect of the

royalties paid to La Roche, which increase is no longer at issue, and also in respect of the presumed value of the trade-mark 'Borgal'.

It is the latter increase which is at issue as the Customs Office holds that in application of Article 3 (7) of Regulation No 803/68 the trade-mark 'Borgal' must be regarded as a foreign mark in view of the fact that Hoechst was 'associated in business' within the meaning of Article 2 (2) of that regulation with La Roche, the vendor of products established outside the customs territory of the Community and that the inclusion of the value of the trade-mark in the value for customs purposes is not excluded by Article 2 of Regulation No 1788/69.

The first four questions

4 In respect of the value for customs purposes of imported goods Articles 1 and 2 of Regulation No 803/68 provide that the value shall be taken to be the normal price and if a sale is actually carried out in the open market the sale price is in general deemed to correspond to the 'normal price'.

Nevertheless these provisions make an exception of the case where the agreed price was influenced by any commercial, financial or other relationship which might exist outside that created by the sale itself between the seller and the buyer (Article 2 (1) (b)).

Article 2 (2) of the regulation provides that two persons are to be deemed to be associated in business if either of them has any interest in the business or property of the other or if they have a common interest in any business or property.

5 Article 3 of Regulation No 803/68 relating to the incidence on the value for customs purposes of the existence of patents, trade-marks and other marks provides in paragraph 7 that a trade-mark shall be treated as a foreign trade-mark which must be taken into account in determining the value for customs purposes *inter alia* 'if it is the mark of ... (b) any person associated in business with ... any person by whom the goods to be valued have been grown, produced, manufactured, offered for sale or otherwise dealt with outside the customs territory of the Community'.

6 The first question asks whether the definition of business association contained in Article 2 (2) of the regulation is also applicable to the concept of association referred to in Article 3 (7) (b) of the same regulation.

If the first question is answered in the affirmative the third question subsequently asks whether an association such as that envisaged by Article 2 (2) may result from 'an agreement, the primary object of which is the grant to the domestic buyer by the foreign supplier of goods of selling rights in a specific territory against payment of royalties and under which in addition the said purchaser is granted, free of further charges, the right to manufacture the imported product under the patented process from the two active substances patented process from the two active substances patented by and to be procured from the undertaking supplying the goods'.

7 As Article 3 (7) does not itself define the concept of 'a person in any way associated in business with' a producer or seller outside the customs territory reference should be made for such a definition to the provisions of Article 2 (2).

This subparagraph does not contain any indication such as to suggest that it solely relates to the application of the first paragraph of that article. On the contrary, as this provision is to be found among the first articles which state the basic concepts for the application of the regulation everything suggests that the terms used in Article 3 (7) refer to its definition of 'business association'. Furthermore, such an interpretation corresponds both to the general objectives of the regulation and to those of Article 3, as the provision in Article 3 (7) (b) seeking to include the case in which an importer of foreign products subject to a trade-mark imports products into the Community without a trade-mark in order to affix or have affixed to them the foreign trade-mark which may be registered in a Member State after the importation and subsequently to sell the goods as products subject to a trade-mark.

The intention of giving as wide an application as possible to this provision of customs law is supported by the fact that in Regulation No 1788/69 the Commission laid down additional rules in order to prevent the application of this provision from giving rise to injustice.

8 The reply to be given to the first question is therefore that the definition of the concept of 'persons associated in business' set out in Article 2 (2) of Regulation No 803/68 of the Council is also valid for the purposes of the application of Article 3 (7) (b) of that regulation.

9 Since the second question which was asked in case the first question should be answered in the negative has therefore lost its purpose, the answer to the

third question should be that an association such as that referred to in Article 2 (2) of Regulation No 803/68 is created by a contract whereby the foreign supplier of a product grants to the Community buyer distribution rights which are territorially defined against payment of royalties in the form of a percentage share of the proceeds of sales. In fact, as it entails participation by the supplier in the proceeds of the marketing of the products in question by the buyer such a contract constitutes precisely the kind of contract referred to in Article 2 (2).

It is well to add that the fact, which was referred to by the national court that such a contract in addition grants to the buyer the right to manufacture the product in question himself according to the patented procedure from two patented substances which he undertakes to buy from the abovementioned foreign supplier cannot qualify this conclusion in view of the fact that this right does not give rise to the payment of additional royalties.

Questions 5, 6 and 7

10 Pursuant to Article 3 (2) of Regulation No 803/68 the Commission, by means of Regulation No 1788/69 of 10 September 1969, laid down certain exceptions to the rule contained in Article 3 (7) of the former regulation stating that 'where the right to use the trade-mark belongs to a person established in a Member State, the application of Article 3 (1) and (7) ... may lead to a valuation which in certain cases is difficult to justify'.

Article 2 of that regulation provides that 'in so far as the right to use a trade-mark treated as a foreign trade-mark within the meaning of Article 3 (7) of Regulation (EEC) No 803/68 does not entail the payment of any royalty, the value of such right shall not be included in the value for customs purposes where ... the trade-mark is that of a sole agent or sole concessionaire established in a Member State, there is no business association between the agent or concessionaire and the supplier of the goods to be valued other than the relationship created by the agency or concession and the rights of the agent or concessionaire in the trade-mark are not restricted within the meaning of Article 3 (7) (c) of Regulation (EEC) No 803/68'.

11 Believing that this provision might be applicable to the use made by Hoechst of the trade-mark 'Borgal' the national court seeks by means of Questions 5, 6 and 7 clarification for the terms 'sole agent' and 'sole concessionaire'.

12 Comparison of the versions in the different languages of the Community of the text of Article 2 of Regulation No 1788/69 shows that these terms must not be interpreted in the strict technical sense which the terms 'agent' or 'concessionaire' may have in the law of one or other of the Member States but may be interpreted widely and in a non-technical manner. The terms 'sole agent' and 'sole concessionaire' must not be understood as referring to two quite distinct and mutually exclusive legal constructions but as intended to include the different constructions which in the legal systems of the Member States refer under the one or the other of these designations to contractual relationships belonging to the category thus indicated.

Consequently a contract by which primarily territorial distribution rights are transferred in return for royalties and, in addition, the right, assigned free of charge, to manufacture the imported product, falls within the provisions of Article 2 (1) (a) of Regulation No 1788/69 of the Commission.

13 In view of this conclusion it is not necessary to reply to Questions 8 and 9.

Costs

14 The costs incurred by the Commission of the European Communities which submitted observations to the Court are not recoverable.

As these proceedings are, so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Hessisches Finanzgericht, by order of 18 June 1976, hereby rules:

1. **The definition of the concept of 'persons associated in business' set out in Article 2 (2) of Regulation No 803/68 of the Council is also valid for the purposes of the application of Article 3 (7) (b) of that regulation.**

2. **An association such as that referred to in Article 2 (2) of Regulation No 803/68 is created by a contract whereby the foreign supplier of a product grants to the Community buyer distribution rights which are territorially defined against payment of royalties in the form of a percentage share of the proceeds of sales.**

3. **A contract by which, primarily, territorial distribution rights are transferred in return for royalties and, in addition, the right, assigned free of charge, to manufacture the imported product, falls within the provisions of Article 2 (1) (a) of Regulation No 1788/69 of the Commission.**

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 17 February 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 3 FEBRUARY 1977

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Hessisches Finanzgericht. It raises questions of interpretation of the Community Regulations on the valuation of goods for customs purposes and, in particular, questions as to the interpretation of certain provisions of those Regulations about the circumstances in which, in making such a valuation, trade-mark rights should be taken into account.

The facts are these.

On 9th September 1970 the plaintiff in the proceedings before the Finanzgericht, the Firma Farbwerke Hoechst AG, of Frankfurt-am-Main, entered into an agreement with a well-known Swiss company, Hoffmann-La Roche (which I shall call 'HLR'). Under that agreement HLR granted to the plaintiff the exclusive right to distribute in the whole world except the USA a veterinary pharmaceutical preparation (which I shall call 'the preparation'), which had been