OPINION OF ADVOCATE GENERAL MISCHO

delivered on 13 April 2000 *

1. The aim of the action for failure to comply with Treaty obligations brought by the Commission of the European Communities, which forms the subject of this Opinion, is a declaration that, by implementing, pursuant to the French Code de la Propriété Intellectuelle (Intellectual Property Code), procedures for the 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 has failed to fulfil its obligations under Article 30 of the EC Treaty (now, after amendment, Article 28 EC).

2. Before proceeding to examine the submissions of the parties in greater depth, I propose to review a number of points which will need to be kept in mind when weighing certain of the arguments put forward by the parties.

3. Thus, it is important to note that the action brought by the Commission is not directed against the measures taken by the French authorities to prevent goods manufactured in breach of the industrial and commercial property rights conferred by French law from gaining access to the French market.

4. In fact, the Commission's complaint relates exclusively to goods which are manufactured in a Member State in which, contrary to the situation in France, they are not protected by an exclusive right and are then transported across France to be placed on the market in another Member State in which they are similarly unprotected.

5. Like the parties, I shall use the word 'transit' to describe this temporary introduction of the goods into the territory of a Member State, on the clear understanding that in this case it is not a question of 'transit' in the legal sense as defined, for example, in the Community Customs Code, [1] but of 'transit' in the physical sense of the term.

* Original language: French.

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

6. Hence we are not faced with the situation which forms the subject of the bulk of the Court's existing case-law, namely that in which the goods at issue are intended to be imported into, that is to say placed on the market in, the territory of a Member State whose legislation makes it possible to obtain an exclusive right.

7. Consequently, nor does the action relate to the possession of goods in France for the purpose of marketing them in that State or the possession of goods manufactured in France in breach of the domestic legislation applicable.

8. In the present case, the goods are in the possession of the carrier solely to enable them to be transported to another Member State in which they are to be marketed.

9. It should also be noted that the facts criticised by the Commission differ from those at issue in various cases cited by the parties.

10. In particular, the defendant seeks to have the present case treated as part of a so-called 'saga' which is said also to embrace the *CICRA and Maxicar*[2] and *Renault*[3] cases, which likewise concerned spare parts used for repairing motor vehicles.

11. There can be no doubt that these two cases differ fundamentally from the present case.

12. The issue in *CICRA* was whether the holder of an intellectual property right in a Member State could oppose the importation into that State of the goods at issue. As we have seen, the action brought by the Commission relates to goods intended to be marketed in a Member State other than that in which the intellectual property right is applicable.

13. *Renault* also relates to whether the holder of the right can oppose the manufacture, sale or exportation of objects protected by an intellectual property right, rather than their mere passage through the territory covered by that right.

14. Following on from these preliminary remarks, I now propose to consider the various aspects of the dispute.

2 — Case 53/87 *CICRA and Maxicar* v *Renault* [1988] ECR 6039.

3 — Case C-38/98 *Renault* [2000] ECR I-2973.

Is there an obstacle to intra-Community trade?

15. Since the purpose of the action is a declaration that there has been a breach of the provisions of the Treaty on the free movement of goods, it is necessary to determine, first of all, whether the national measures in question are capable of obstructing intra-Community trade.

16. Both the Commission and the defendant consider this to be the case. The national provisions cited by the Commission authorise the customs authorities to detain goods, on an application from the intellectual property right holder, when the latter considers that his right has been infringed.

17. The goods may be detained for up to 10 days. If, before this period expires, the holder of the right initiates legal proceedings, he can have the application of the measure prolonged. Ultimately, at the end of those proceedings, the court may order the confiscation of the goods at issue.

18. In this connection, both the Commission and the defendant cite a judgment of the French Cour de Cassation (Court of Cassation) of 26 April 1990, from which it is clear that, under the applicable French law, the mere presence in France of the goods which were manufactured in another Member State and are intended to be marketed in a third Member State constitutes counterfeiting which could give rise, *inter alia*, to confiscation.

19. The defendant mentions various other decisions which confirm that case-law, in particular, a judgment of the Cour de Cassation of 17 February 1999.

20. In these circumstances, I find myself obliged to agree with the parties that the detention procedures criticised by the Commission do, in fact, constitute a measure having effect equivalent to a quantitative restriction since they have the effect, at best, of delaying the passage of the goods in transit and, at worst, they could constitute the essential preliminary to the prohibition of the goods' passage, or even their confiscation.

21. However, the Commission and the defendant adopt different analyses of the precise nature of the measure in question.

22. According to the Commission, the contested detention procedures are carried out by the customs authorities at border crossings. Thus, they can concern only imports and are therefore 'applicable in a discriminatory manner'. It follows that they can be justified only on the grounds listed in Article 36 of the EC Treaty (now, after

amendment, Article 30 EC) and that there can be no question of an 'overriding requirement' for the propose of the rule in '*Cassis de Dijon*'. [4]

23. On the other hand, the defendant insists that these procedures can be applied by the customs authorities anywhere in French territory and are never triggered merely by the crossing of the frontier.

24. It adds that the customs authorities are not the only authority to possess such powers and that any suspect goods, including goods of domestic origin, can be detained.

25. The Commission responds by noting that the defendant is unable to quote any specific case in which the goods detained were manufactured in France and can only quote one case in which they might have been.

26. It must be noted, however, that the Commission is unable to cite a single relevant provision to show that the detention measures in question can be applied only to imports or that they must be applied at the border.

27. Nor is it alleged that the measures benefit only French motor-vehicle manufacturers, since the Commission withdrew this objection during the pre-litigation procedure.

28. Thus, in my view, it has not been definitively established that the national measures in question are not applicable without discrimination.

29. In any event, in the present case, this finding is of only relative importance since, as noted by the Commission in the reply, the defendant has not invoked in its defence the various 'overriding requirements' to which it had referred in the pre-litigation procedure.

Possibility of justifying the obstacle

30. Thus, the dispute relates only to the possibility of justifying the measures in question on the basis of Article 36 of the Treaty, since there is no relevant secondary legislation which might provide a solution.

4 — Case 120/78 *Rewe* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, '*Cassis de Dijon*'.

31. Clearly, and on this the parties are agreed, no solution is offered by Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs. [5]

32. With respect to the protection of spare parts used for the repair of motor vehicles, Article 14 of the Directive reads as follows:

'Transitional provision

Until such time as amendments to this directive are adopted on a proposal from the Commission in accordance with the provisions of Article 18, Member States shall maintain in force their existing legal provisions relating to the use of the design of a component part used for the purpose of the repair of a complex product so as to restore its original appearance and shall introduce changes to those provisions only if the purpose is to liberalise the market for such parts.'

33. Thus, Directive 98/71 does not achieve complete harmonisation since, with regard to the particular case of the parts at issue in the present action, it refers to national law. Accordingly, it is indeed to the Treaty that we must refer in order to assess the compatibility of the national provisions with Community law. [6]

34. Clearly, the abovementioned Article 14, relied on by the defendant, does not imply that any measure maintained in force by a Member State is automatically consistent with Community law, since that provision cannot exempt the national authorities from compliance with the Treaty.

35. The French Government also puts forward two other arguments derived from secondary legislation.

36. Firstly, it notes the extent of the prerogatives granted to Member States by Community law with respect to the exercise of controls, whether under national or Community rules. According to the French Government, this principle is illustrated by Decision No 3052/95/EC of the European Parliament and of the Council of 13 December 1995 establishing a procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community. [7]

5 — OJ 1998 L 289, p. 28.

6 — For an example of the settled case-law see Case 72/83 *Campus Oil and Others* [1984] ECR 2727.

7 — OJ 1995 L 321, p. 1.

37. Admittedly, as pointed out by the Commission, the defendant acknowledges that the fact that a measure is subject to notification under this procedure in no way establishes a presumption that the measure is valid. However, it considers that this decision shows that a national control measure is not prima facie contrary to Community law.

38. Even if this deduction is correct, nor does it follow that such a measure could never be contrary to Community law. Each particular case should be examined in the light of the provisions of the Treaty and the case-law of the Court.

39. The French Government also seeks support for its case in 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. [8]

40. It argues that the detention measures criticised are consistent with the provisions of that regulation which grants Member States wide powers to protect the rights of intellectual property right holders against counterfeit goods from non-member countries.

41. In particular, Regulation No 3295/94 allows the holder of a right to lodge an application in writing with the customs authorities for them to take action where counterfeit goods are entered for free circulation, export or re-export or are found when checks are being made.

42. The defendant also cites the Opinion of the Advocate-General in *Polo/Lauren* [9] which, it says, confirms that Regulation No 3295/94 authorises Member States to prevent the transit across their territory of counterfeit goods originating in a non-member country which are intended for re-export to another non-member country.

43. However, the French Government accepts the Commission's argument that Regulation No 3295/94 applies only to goods from non-member countries, which, unlike goods lawfully manufactured in a Member State, do not benefit from the principle of free movement of goods.

8 — OJ 1994 L 341, p. 8.

9 — Opinion of Mr Ruiz Jarabo Colomer of 16 December 1999 (Case C-383/98 *Polo/Lauren* [2000] ECR I-2519).

44. At the same time, it points out that failure to take the measures to which the Commission objects would seriously jeopardise the achievement of the Regulation's objectives since it would then be enough for 'laxer' Member States to release the goods into free circulation in their territory in order for those goods not to be open to interception by another Member State with a greater concern for the protection of industrial and commercial property, where that State is a mere crossing point.

45. The desire to implement a provision of secondary legislation, albeit with greater zeal than the Member States which the defendant describes as 'lax', cannot justify an infringement of the Treaty.

46. Moreover, the Court has consistently held that when one Member State considers that another is in breach of its obligations under Community law, rather than resort to national measures to redress the situation, it should use the means placed at its disposal by Community law.

47. The French Government then shades its argument by noting that the action by the customs authorities for which Regulation No 3295/94 provides can be taken only if importation infringes the law in the Member State in which the intervention of the authorities is requested. It follows that there is nothing to prevent a non-member country operator from obtaining the release into free circulation in another Member State of goods which are counterfeit under French law. These would then qualify as Community goods and, according to the Commission's view, would have to be allowed free passage across French territory, which would jeopardise the achievement of the objectives of Regulation No 3295/94.

48. First of all, it should be noted that the measures criticised by the Commission do not appear to be consistent with the provisions of Regulation No 3295/94.

49. Under Article 3 of the Regulation, the application lodged with the customs authorities must relate to goods from a non-member country. However, the defendant does not claim that the same condition applies to goods detained under the French legislation.

50. Moreover, the application must relate to a precisely defined situation, that is to say one in which the goods in question are entered for free circulation, export or re-export or found when checks are made on goods placed under a suspensive procedure within the meaning of the Community Customs Code.

51. Both sides agree that in French law the possibility of detaining the goods is not conditional upon the existence of such a situation.

52. It must therefore be concluded that the detention measures criticised by the Commission have a much wider scope than those for which Regulation No 3295/94 provides and, accordingly, cannot be regarded as justified by the latter's objectives.

53. In any event, a Member State cannot plead the compliance of a measure with the objective of a piece of secondary legislation in order to justify an infringement of the Treaty. Indeed, secondary legislation cannot have the effect of altering the scope of a Member State's obligations under the Treaty.

54. In this connection, the Commission puts forward the following arguments to prove the existence of an infringement of the provisions of the Treaty relating to the free movement of goods.

55. With respect to the protection of industrial property, it notes that, in accordance with the Court's settled case-law, a derogation from the Treaty is allowed only if the national measures in question are necessary and proportionate to the objective of safeguarding rights which constitute the specific subject-matter of the industrial property protected.

56. In this respect, the French authorities' reliance on the Court's case-law on trade mark law is not directly relevant inasmuch as the spare parts in question did not involve counterfeit trade marks.

57. In relation to the protection of designs and, in particular, the protection applicable to spare parts for motor vehicles, the Commission refers to *CICRA and Maxicar*, in which the Court ruled that the Treaty does not preclude national legislation under which a car manufacturer who holds protective rights in an ornamental design in respect of spare parts intended for cars of its manufacture is entitled to prohibit third parties from manufacturing parts covered by those rights for the purpose of sale on the domestic market or for exportation or to prevent the importation from other Member States of parts covered by those rights which have been manufactured there without his consent. The Court noted that such legislation was intended to protect the very substance of the exclusive right conferred on the proprietor and was therefore not contrary to Articles 30 and 36 of the Treaty.

58. According to the Commission, the exclusive right conferred on the holder of the design right covers manufacturing and marketing in the national territory and, in view of the principle of the territoriality of industrial property law, which the Court

upheld in *IHT Internationale Heiztechnik and Danziger*, [10] cannot have the effect of protecting that right on other markets. In the present case, the goods in question are neither manufactured in France nor intended to be placed on the French market. Therefore the detention measures applied by the French authorities cannot be interpreted as protecting the specific subject-matter of the right as defined by the Court.

59. Admittedly, in *CICRA and Maxicar*, the Court considered that a prohibition not only on importing, but also on exporting the goods infringing the exclusive right was justified, but the judgment makes it clear that it was manufacture in the national territory, in breach of the exclusive right, which could lawfully be prohibited, no matter whether the goods were manufactured for sale on the domestic market or for export.

60. Mere transit through French territory does not in itself constitute an infringement of the exclusive right conferred by French law on the design right holder.

61. Moreover, if the detention measures applied by the French customs authorities to Community goods in transit were accepted, then, in the present case, that would amount to extending the reach of French law to other Member States, and that would be contrary to the principle upheld by the Court according to which it is for each national legislature to determine the goods eligible for industrial protection. The extra-territorial effect would be further enhanced by France's geographical position at the centre of the European Community. Thus, it would be enough for an operator to acquire industrial protection in France to assure himself of exclusive rights throughout the Community, to the detriment of goods lawfully manufactured in Spain and Portugal.

62. In the Commission's view, these examples show that the balance to be struck between the protection of industrial property and the principle of free movement of goods, to which the *Keurkoop* judgment refers, [11] would clearly be upset, to the detriment of free movement.

63. Thus, the protection of industrial property does not justify the detention by customs authorities of Community goods being carried in transit in accordance with the principle of free movement.

64. With respect to Article 36, the French Government points out that the protection of industrial and commercial property is one of the exceptions to the principle of free movement of goods. The system of detaining goods for checking purposes is intended to provide such protection. The

10 — Case 9/93 *IHT Internationale Heiztechnik* v *Ideal-Standard* [1994] ECR I-2789.

11 — Case 144/81 *Keurkoop* v *Nancy Kean Gifts* [1982] ECR 2853.

measures are not disproportionate since the goods are detained only temporarily and are preserved intact.

65. In the field of industrial property, the Court has established a balance between the free movement of goods and the legitimate protection of intangible property rights. Thus, it has ruled that a measure is proportionate, and hence lawful, if intended to protect the specific subject-matter of the property right in question.

66. Where designs are concerned, the benchmark should be the judgment in *Keurkoop*. In that case the Advocate General, taking up the observations of the Commission, defined the specific subject-matter as 'the exclusive right of the proprietor... to market a product of a given... design'. Thus, measures taken by the proprietor of the rights form part of the specific subject-matter of the ownership of the design when they are intended to enforce his exclusive rights.

67. In *Keurkoop*, the Court held that the proprietor of a right to a design acquired under the legislation of a Member State may oppose the importation of goods from another Member State which are identical in appearance to the design which has been filed. The French Government considers that if this ruling is applied to the case in question, then the conclusion must be that, with respect to slavish copies of motor vehicle spare parts in transit, in cases in which copies of designs are placed on the market without the consent of the holder of the right, actions to prevent the import, export, transit or first sale of those goods in the national territory constitute no more than the legitimate exercise of industrial property rights.

68. In support of this analysis, the French Government cites a passage from the Commission's observations in the new *Renault* case, C-38/98, currently pending before the Court, which, it says, reflects the gist of the operative part of the Court's judgment in *CICRA and Maxicar*: 'as Community law now stands, Articles 30 and 36 of the Treaty must be construed as not precluding national legislation which allows the holder of specific industrial property rights in spare parts, which together make up the bodywork of a type of motor vehicle already placed on the market, to exercise those specific exclusive rights by prohibiting third parties from manufacturing, selling, importing or exporting non-original replacements for those parts and by invoking the protection of the courts in order to make such prohibitions effective'.

69. The French Government concludes by expressing the view that controls applied to protect designs relating to motor vehicle spare parts under arrangements which are not harmonised at Community level do not necessarily fall within the scope of Article 30 and, in certain circumstances, are

covered by the exemption referred to in Article 36 of the Treaty with respect to restrictions justified on the grounds of the protection of industrial property.

70. What are we to make of these arguments?

71. I do not share the conclusions which the defendant draws from the case-law it cites.

72. The *CICRA and Maxicar* case relates to the situation in which the holder of the right is seeking to prevent the manufacture of the product protected by the right. As the Commission points out, manufacture in the territory protected cannot, without further formality, be treated in the same way as mere transit through that territory.

73. Accordingly, the fact that the Court has ruled that the right to prevent manufacture is part of the very essence of the intellectual property right cannot be taken to mean that the same would apply to the right to prevent mere transit.

74. For similar reasons, I am not convinced by the arguments which the defendant seeks to base on *Keurkoop*. In that case the Court ruled that, in principle, the right to oppose the marketing of an imported product identical in appearance to that protected by the design right forms part of the very essence of the industrial and commercial property right. On the other hand, the judgment makes no mention of the separate question of transit, which was not raised.

75. Accordingly, for the same reasons as make *CICRA and Maxicar* of only limited relevance to this case I am also unable to accept the defendant's argument by analogy based on *Keurkoop*.

76. As the Commission points out, the Court has consistently held that only measures designed to safeguard exclusive rights which constitute the specific subject-matter of the intellectual property right may benefit from the exception to the fundamental principle of free movement laid down by Article 36 of the Treaty. [12]

The specific subject-matter of the design right

77. Like the parties, I shall concentrate my analysis on the protection of the design

12 — Case 78/70 *Deutsche Grammophon* v *Metro* [1971] ECR 487.

right since it follows from the documents before the Court that the motor vehicle parts which form the subject of the complaints that led the Commission to bring its action did not involve a counterfeit trade mark and were protected by such a right.

78. Initial guidance is provided by Directive 98/71 itself. [13] Thus, Article 12(1) of the Directive, entitled 'Rights conferred by the design right', reads:

'The registration of a design shall confer on its holder the exclusive right to use it and to prevent any third party not having his consent from using it. The aforementioned use shall cover, in particular, the making, offering, putting on the market, importing, exporting or using of a product in which the design is incorporated or to which it is applied, or stocking such a product for those purposes.'

79. This list, admittedly illustrative since preceded by the words 'in particular', does not contain any reference to the mere transportation of the product.

80. In any event, it is clear that the specific subject-matter of the right is the power to prevent the 'use' of the product. What does this concept involve?

81. Obviously, the manufacture of goods identical, at least in appearance, to the product protected involves a 'use' of the design. Indeed, such manufacture presupposes the copying of the appearance of the product, that is to say precisely the characteristic covered by the design right.

82. The same applies to the marketing of goods that simulate the appearance of the product protected. In fact, the appearance is decisive for consumers purchasing a product covered by a design right, otherwise there would be little point in wanting to protect it with an exclusive right. Thus, the success of marketing depends, in particular, on the appearance of the product offered for sale.

83. On the other hand, it cannot be argued that the carrier 'uses' the product in the same way as in the two situations described above. For the purposes of the transport operation, the appearance of the goods transported is of no importance and has nothing to do with the benefits which the carrier derives from providing the transport service. By contrast, the success of the manufacture and marketing of the product

13 — See point 31 above.

is inseparable from its appearance, which the right is intended to protect.

84. Accordingly, it is perfectly logical that the holder of the right should be entitled to obtain the payment of royalties from those to whom he grants a manufacturing or distribution licence. On the other hand, it is much more difficult to imagine him persuading a carrier to pay him royalties for the honour of transporting goods protected by his right. [14]

85. Thus, there is an intrinsic difference between mere transportation, on the one hand, and manufacture or marketing, on the other.

86. Moreover, it is not the intention of the holder of the right to oppose the transport operation, considered in isolation. His interest lies in preventing the parts from reaching a consumer who will be able to purchase them without the holder of the right being able to obtain the payment to which he is entitled as the proprietor of an intellectual property right. Thus, the only reason for which the holder of the right might wish to oppose the mere transportation of the parts at issue is the fact that the transport operation will end in their being placed on the market, which is what the holder of the right really wishes to prevent.

14 — Of course, the situation would be different if, for example, the holder of the right also held a trade mark right and allowed the carrier to refer to that trade mark for advertising purposes. For example, company X, the trusted carrier for manufacturer Y.

87. Thus, it is only within the context of a subsequent marketing operation that the transportation of the goods is likely to harm the interests of the right holder. On the other hand, considered in isolation, it has no bearing on those interests and therefore, unlike manufacture and marketing, cannot fall within the protection of the specific subject-matter of the right.

88. This analysis is confirmed by all the case-law of the Court in the field of intellectual property. Whatever the right concerned, [15] in defining the specific subject-matter of that right the Court has always made explicit reference to placing on the market.

89. The same applies to the intellectual property rights which have already been the subject of harmonisation by the Community legislature. [16]

15 — With respect to patents: Case 15/74 *Centrafarm and Others* v *Sterling Drug* [1974] ECR 1147; with respect to plant varieties: Case 258/78 *Nungesser* v *Commission* [1982] ECR 2015; with respect to copyright, *Deutsche Grammophon*; and with respect to trade marks: Case 16/74 *Centrafarm and Others* v *Winthrop* [1974] ECR 1183.

16 — See, for example, Article 5 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1); Article 13 of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1); Article 5 of Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor goods (OJ 1987 L 24, p. 36); Article 25 of the Agreement relating to Community patents, done at Luxembourg on 15 December 1989 (OJ 1989 L 401, p. 1); and Article 20 of the amended proposal for a European Parliament and Council Directive approximating the legal arrangements for the protection of inventions by utility model (COM(99) 309 final).

90. I can see no reason for setting aside all these precedents and granting to designs protection more extensive than that accorded to, for example, copyright or patents, especially as the design directive itself also highlights manufacture and marketing.

91. It follows that national measures aimed not at preserving the exclusive right of the proprietor to manufacture or market the object protected but at preventing the mere transit of the object through the territory to which the right applies cannot be justified on the grounds that they protect the specific subject-matter of the intellectual property right.

92. It could, of course, be argued that, in the present case, the measures in dispute are nevertheless aimed at protecting the specific subject-matter of the right since, by resorting to them, the holder of the right can prevent the goods concerned from reaching another Member State in which they are to be marketed.

93. However, this argument overlooks the fact that, in the case to which the Commission's action relates, the goods can be lawfully marketed in the Member State of destination.

94. Thus, to accept this argument would be to give effect in the territory of that other Member State to the prohibition in force in France. As the Commission explains, this would constitute an extra-territorial effect of French law, contrary to the principle of territoriality of intellectual property law. This principle goes to the very essence of the right, which must be regarded as a monopoly in the territory to which it applies, and is enshrined in the case-law of the Court. [17]

95. Moreover, it would be paradoxical, in this instance, to allow an operator to prevent the transportation of goods across one Member State and thus, indirectly, the marketing of those goods in another, where it was lawful, when transportation is incidental to marketing. That would be putting the cart before the horse.

96. The defendant also claims that the detention measures form part of the protection of the specific subject-matter of the intellectual property right because, in any event, the latter includes the right of the holder to put the protected goods into circulation for the first time.

97. Since, in the present case, the parts at issue were first 'put into circulation' in France, it is permissible, under the Treaty,

17 — See *IHT Internationale Heiztechnik and Danziger.*

for French law to give the holder of the intellectual property right the right to oppose the said 'putting into circulation'.

98. This argument seems to me to be based on a confusion between the notion of 'putting into circulation' (Fr. *mise en circulation*) in the purely physical sense and 'putting into circulation' as the term is used in Community law.

99. When the case-law of the Court on the free movement (Fr. *circulation*) of goods mentions 'putting into circulation' in another Member State, it is not referring to the goods being simply moved from place to place on board a means of transport but rather to their being put on the market.

100. Thus, if, as in the present case, goods are moved physically across the territory of one Member State before being put on the market in another, then, contrary to the view taken by the defendant, it is in the second State that the first 'putting into circulation' takes place.

101. The dubiousness of relying on a purely physical interpretation of the term is further illustrated by the circumstances of the case. Physically, the goods at issue were first put into circulation not in France but in Spain since, having been manufactured in that State, the parts necessarily began their 'circulation' when they left the factory.

Is it necessary to prohibit transit?

102. The defendant also argues that the detention measures criticised by the Commission are essential to ensure the effectiveness of the campaign against counterfeiting, a campaign justified by the priority given to the issue both within the Community and in the context of the third pillar.

103. The action brought by the Commission therefore seriously jeopardises Community's objectives.

104. More specifically, the French Government explains that the detention measures, with the possibility of subsequent prohibition, are necessary to prevent any risk of parts manufactured in another Member State being clandestinely sold in France rather than being transported to their

purported destination in a third Member State.

105. In other words, the measures in question should not be understood as being aimed at bringing mere transit within the specific subject-matter of the intellectual property right, but simply as intended to safeguard the prerogatives which Community law accords to the holder of the right, namely, as we have seen, the exclusive right to manufacture and market the product protected.

106. Detention, as a preliminary to total prohibition of the passage of the goods, is therefore necessary because, if parts lawfully manufactured in another Member State which are intended to be lawfully marketed in a third Member State were allowed to pass in transit through France, there would be too great a risk of 'transit' turning into clandestine importation, which would indisputably infringe the prerogatives of the holder of the intellectual property right.

107. It is true that detention measures intended solely to prevent the marketing in France of parts manufactured without the consent of the holder of the right would, indeed, form part of the protection of the specific subject-matter of the intellectual property right, since that right consists of the exclusive right of the holder to manufacture the protected product and place it on the market in the territory to which the right applies, an exclusive right which, of course, it is possible to exploit by granting licences.

108. However, it follows from the settled case-law of the Court that it is not sufficient for a measure which restricts a fundamental freedom laid down by the Treaty to be covered by one of the grounds for exemption listed in Article 36 of the Treaty; it must also be proportionate to the objective to be achieved. [18]

109. In the particular case of control measures, the Court has ruled that for a national control procedure to be justified under Article 36 of the Treaty it must not be possible for the objective pursued to be realised as effectively by measures which do not restrict intra-Community trade so much. Thus the procedure must not entail unreasonable cost or delay. [19]

110. The principle of proportionality cannot be said to be observed by measures such as those at issue, taken to avoid the risk that cargo allegedly intended for the market of another Member State will be put on the market in France, measures from which there is no escape even if it is established that the goods really are intended for another Member State.

18 — Case 104/75 *De Peijper* [1976] ECR 613, and *Campus Oil and Others*.

19 — Case 406/85 *Procureur de la République* v *Gofette and Gilliard* [1987] ECR 2525, paragraph 10.

111. Moreover, the Court has already stressed, in *Monsees*,[20] the gravity of measures that make transit totally impossible.

112. Bans of this sort seriously impede the flow of trade across a would-be single market. They should therefore be a measure of last resort and not, as in this case, a measure of ordinary law.

113. In my opinion, the defendant is wrong to assert that the Commission has failed to suggest measures less restrictive of trade which are capable of countering the alleged risk.

114. Thus, the Commission has pointed out that a simple document check should be sufficient to ensure that the cargo checked does in fact come from another Member State and is intended for a third Member State. I share this view.

115. Firstly, it should be noted that in many cases the Court has ruled that import bans were disproportionate to the stated objective and that labelling measures were to be considered sufficient.[21] This should apply with even greater force to a transit ban.

116. I find it very hard to believe that a check based on an examination of the documents accompanying the load would not be sufficient for the purpose. Such a document check would clearly be a less restrictive measure than the detention measures criticised by the Commission.

117. In this connection, the defendant points out that the requirement to possess documents could in itself constitute an obstacle to the free movement of goods.

118. Of course, this is true. However, the objection must be set aside when, as in the present case, a document check is a measure less restrictive than that applied by a Member State and proportionate to the stated objective, namely protecting the specific subject-matter of the intellectual property right.

119. The French Government adds that, in many cases, the lorries intercepted by the

20 — Case C-350/97 *Monsees* [1999] ECR I-2921.

21 — Case 261/81 *Rau* v *De Smedt* [1982] ECR 3961, and Case 407/85 *3 Glocken and Others* v *USL Centro-Sud and Others* [1988] ECR 4233.

competent services do not carry a single document which could be produced to the authorities.

120. This is indeed surprising. Even though the Commission does not refer to any general rules requiring the possession of appropriate documentation, it should be recalled that transport services are provided not only within a certain legislative and regulatory context but also on the basis of contractual arrangements, which are unlikely not to take written form. The defendant itself makes reference to the fact that commercial transactions normally generate documents such as order forms, contracts, delivery notes and invoices.

121. It is clear from the file that the operators subjected to the detention measures which gave rise to the complaints that led the Commission to bring its action had documents such as invoices in their possession.

122. Moreover, in view of the ready availability of modern means of communication, it seems to me that when the competent authorities carry out a check on a carrier with no documents at all, they should be able to have the necessary documents forwarded to them in less than 10 days.

123. In any event, the argument is immaterial. The fact that some operators might not respect even an obligation to carry documents cannot justify prohibiting all of them from exercising a fundamental freedom guaranteed by the Treaty. There is nothing to prevent the French authorities, within the context of a document check, from applying detention procedures to those carrying no documents at all.

124. Accordingly, even if the purpose of the detention measures at issue is considered to be the protection of the specific subject-matter of the intellectual property right, by ruling out any risk of a 'transit' operation turning into a clandestine importation, they nevertheless fall foul of Community law since they are disproportionate to the objective pursued.

Detention as a temporary measure?

125. The French Government refers to the possibility of goods that were genuinely in transit being allowed to pass at the conclusion of the detention procedure. Thus, in practice, the detention measures in dispute would not, as in *Monsees*, lead to a ban on transit, but merely a delay.

126. I find it hard to reconcile this statement with the national case-law cited by the defendant as well as by the Commission.

127. It follows from the documents before the Court that, in accordance with the apparently well established case-law of the French courts, the mere transportation in French territory of spare parts lawfully manufactured in another Member State which are intended for marketing in a third Member State is considered to constitute the offence of counterfeiting and is therefore liable to various sanctions, including prohibition.

128. That said, I am nevertheless prompted to consider whether the detention measures criticised by the Commission would be compatible with Community law if, instead of leading to a ban on transit, they had only the effect of delaying the passage of goods lawfully manufactured in one Member State which were intended to be lawfully marketed in another Member State, assuming that such passage were authorised once the true origin and destination of the goods detained was established.

129. The provisions applicable allow the goods to be detained for up to 10 working days. A detention period of this duration is likely to involve considerable expense for the operator concerned.

130. The fact that, in practice, this period may be shorter is irrelevant since, in accordance with the case-law, a Member State cannot invoke the existence of a practice that is in accordance with Community law in order to maintain in force a provision that is not.

131. It should also be pointed out that the check that would have to be carried out by the services concerned would not be a complicated technical examination, like that at issue in *Commission* v *France*,[22] where the Court did not explicitly consider a time-limit of 21 days for inspecting imported wine to be contrary to the Treaty.

132. The authorities would not be required to establish that the spare parts at issue complied with a national or Community technical standard but solely to verify their origin and destination on the basis of documents. This should take a matter of hours rather than days.

133. I conclude that even if the detention measures which form the subject of the

22 — Case 42/82 *Commission* v *France* [1983] ECR 1013.

Commission's action were not such as to lead to a total ban on the transit of goods lawfully manufactured in one Member State which were intended to be placed on the market in another Member State and would therefore have only the effect of suspending the passage of those goods, they would still not be consistent with the requirements of Community law.

134. It follows from the foregoing that the detention procedures which form the subject of the action brought by the Commission constitute an obstacle to the free movement of the goods concerned, although those goods were lawfully manufactured in one Member State and were intended to be lawfully marketed in another Member State, and that this obstacle is not such as to qualify for exemption under Article 36 of the Treaty.

Conclusion

135. I therefore consider that the Commission's action should be upheld and that the Court should

— declare that, by implementing, pursuant to the French Code de la Propriété Intellectuelle, procedures for the 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 has failed to fulfil its obligations under Article 30 of the EC Treaty (now, after amendment, Article 28 EC);

— order the defendant to pay the costs.