OPINION OF ADVOCATE GENERAL ALBER

delivered on 22 June 1999 *

A — Introduction

1. In the present case the Corte d'Appello di Torino (Court of Appeal, Turin), Italy, has referred a number of questions to the Court of Justice concerning the interpretation of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (signed on 27 September 1968) [1] — known as the Brussels Convention — (hereinafter 'the Convention'), and of Article 30 of the EC Treaty (now, after amendment, Article 28 EC), Article 36 of the EC Treaty (now, after amendment, Article 30 EC) and Article 86 of of the EC Treaty (now Article 82 EC). The referring court is uncertain as to whether a judgment handed down in France which in its opinion contravenes the principles of free circulation of goods and freedom of competition must be enforced in Italy pursuant to the Convention.

2. In regard to the initial proceedings the referring court merely mentions that the French company Régie Renault (known today as Renault SA; hereinafter 'the applicant') brought an application against the company Maxicar and against Orazio Formento (hereinafter 'the defendants') for a judgment handed down by the Cour d'Appel (Court of Appeal), Dijon, in 1990 to be declared enforceable pursuant to Article 31 of the Brussels Convention, i.e. by granting leave to enforce it. The judgment imposed a fine of FRF 20 000 on Mr Formento for forgery and ordered the defendants, as jointly and severally liable with a further undertaking, to pay FRF 100 000 by way of damages. According to statements *inter alia* of the Commission, the defendants were adjudged in France for having manufactured imitation replacement parts for Renault automobiles in Italy and imported them into France without the permission of the applicant, the proprietor of the relevant industrial property rights.

3. The Corte d'Appello di Torino dismissed — on 25 February 1997 according to the Commission — an application for enforcement of that judgment, which was upheld on appeal in France, and Renault — on 28 March 1997 according to the defendants — lodged an appeal against that decision at this same court. In those proceedings the Corte d'Appello di Torino

* Original language: German.

1 — OJ 1978 L 304, p. 36; as amended by the Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1), the Convention of 25 October 1982 on the accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and the Convention of 26 May 1989 on the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p. 1).

now turns to the Court of Justice with a reference for a preliminary ruling.

4. According to the referring court, the defendants contested the appeal on the grounds that the French judgment could not be declared enforceable in Italy, because it contravened public policy in the field of economic law in addition to being irreconcilable with a similar judgment given in a dispute between the same parties in Italy. According to the referring court, the defendants submitted that the Cour d'Appel de Dijon had ruled against them because industrial designs in the car manufacturing sector required particularly strict protection due to the fact that they represented a decisive factor in the success of a model with car buyers and at the same time influenced the undertaking's prestige. The Cour d'Appel de Dijon had furthermore stated that every feature of the bodywork was an expression of some element of its creator's concept for the bodywork as a whole, and that the legal protection accorded the whole must also extend to all of its essential features, otherwise such protection would be rendered illusory. It was not possible to rely on the lawfulness of such activities in Italy in support of the actions of the independent spare parts manufacturers. According to the defendants, the reasoning of the French court, which accords legal significance to the design of an automobile and extends the protection due to the whole to the individual components, is unacceptable and contravenes public policy in the economic sphere within the meaning of Article 27(1) of the Brussels Convention. According to the defendants, to recognise the decision of the Cour d'Appel de Dijon would render it enforceable outside French territory and thereby increase the effect of the infringement of the principle of the free movement of goods.

5. Furthermore, the defendants maintain that the reasoning of the French court was in blatant contradiction to that in the judgment of the Tribunale di Milano, of May 1995, in a dispute between Maxicar and Renault, concerning the lawfulness of the reproduction of body panels by independent spare part manufacturers. They say that that judgment is final and was given in a dispute between the same parties within the meaning of Article 27(3) of the Brussels Convention.

6. The referring court is of the opinion that developments in the Court of Justice's case-law would seem to indicate that the use of intellectual and industrial property rights is being set clear and exact limits in regard to the free movement of goods and freedom of competition. This has led to doubts arising as to the actual meaning of these principles, which are also to be considered principles of public policy within the meaning of the Convention. Because the referring court is furthermore of the opinion that it is authorised to submit references for a preliminary ruling to the Court of Justice pursuant to the Protocol on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter 'the Protocol'), it refers the following questions for a preliminary ruling:

'1. Are Articles 30 to 36 of the EEC Treaty to be interpreted as precluding the

proprietor of industrial or intellectual property rights in a Member State from asserting the corresponding exclusive right so as to prevent third parties from manufacturing, selling and exporting to another Member State component parts which, taken as a whole, make up the bodywork of an automobile already on the market, that is to say, component parts intended to be sold as spare parts for that automobile?

2. Is Article 86 of the EEC Treaty to be applied so as to prohibit the abuse of the dominant position held by each automobile manufacturer in the market for spare parts for automobiles of its manufacture, which consists in seeking to eliminate any competition from independent manufacturers of spare parts through the exercise of its industrial and intellectual property rights and the attendant judicial sanctions?

3. Is, therefore, a judgment handed down by a court of a Member State to be considered contrary to public policy within the meaning of Article 27 of the Brussels Convention if it recognises industrial or intellectual property rights over such component parts which, taken as a whole, make up the bodywork of a car and affords protection to the proprietor of such purported exclusive rights by preventing third parties trading in another Member State from manufacturing, selling, transporting, importing or exporting in that Member State such component parts, which taken as a whole, make up the bodywork of a car already on the market, or, in any event, by sanctioning such conduct?'

B — Applicable provisions of the Convention and the Protocol

7. Under Article 26(1) of the Convention, a judgment given in a Contracting State is to be recognised in another Contracting State without any special procedure being required therefor.

8. Article 27 states the exceptions to this rule. A judgment is not to be recognised:

'1. if such recognition is contrary to public policy in the State in which recognition is sought;

...

3. if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought;

...'

9. The enforcement of a judgment is governed by Article 31, which states that a judgment given in a Contracting State and enforceable in that State is to be enforced in another Contracting State when, on the application of any interested party, it has been declared enforceable there. In Italy, such application is to be submitted, pursuant to Article 32, to the Corte d'Appello.

10. Where leave to enforce is granted, the party against whom enforcement is sought may appeal, pursuant to Article 36, against that decision. In Italy the court with jurisdiction to hear such an appeal is, pursuant to Article 37, the Corte d'Appello. Article 40 provides that if the application for enforcement is refused, the applicant may appeal, in Italy, to the Corte d'Appello.

11. Under Article 1 of the Protocol the Court of Justice of the European Communities 'shall have jurisdiction to give rulings on the interpretation of the Convention ... and also on the interpretation of the present Protocol'. However, not every court is entitled to request preliminary rulings on questions of interpretation. Article 2(1) of the Protocol lists the courts in the individual Contracting States which may make references for preliminary rulings. In the case of Italy, that is the Corte Suprema di Cassazione. Also entitled to submit questions of interpretation pursuant to paragraphs 2 and 3 of Article 2 are:

'2. the courts of the Contracting States when they are sitting in an appellate capacity;

3. in the cases provided for in Article 37 of the Convention, the courts referred to in that Article.'

It should be noted at this stage, that Article 40 — appeal against refusal of an application for enforcement — is not expressly mentioned in Article 2 of the Protocol.

C — Judgment of the Court of Justice in Case 53/87 *Cicra and Another* v *Renault* [2]

12. In the above case questions were referred to the Court involving the same set of problems as in Questions 1 and 2 in the

2 — Case 53/87 *Consorzio italiano della componentistica di recambio per autoveicoli and Maxicar* v *Régie nationale des usines Renault* [1988] ECR 6039.

present case, and also worded in a similar way. The applicants were Cicra, a trade association made up of a number of Italian undertakings which manufacture and market motor vehicle bodypart components as spare parts, and Maxicar, a member of the association. Thus the parties in the present case are identical to the parties in the previous case. Because the previous judgment and its wording are of such great significance in answering Questions 1 and 2, it is necessary, by way of introduction, to examine this case in detail.

13. The Court began by stating that 'with respect to the protection of designs and models, in the present state of Community law and in the absence of Community standardisation or harmonisation of laws the determination of the conditions and procedures under which such protection is granted is a matter for national rules. It is for the national legislature to determine which products qualify for protection, even if they form part of a unit already protected as such.' [3]

14. The Court continued:

'It should then be noted that the authority of a proprietor of a protective right in respect of an ornamental model to oppose the manufacture by third parties, for the purposes of sale on the internal market or export, of products incorporating the design or to prevent the import of such products manufactured without its consent in other Member States constitutes the substance of his exclusive right. To prevent the application of the national legislation in such circumstances would therefore be tantamount to challenging the very existence of that right.

It should also be borne in mind that pursuant to Article 36 restrictions on imports or exports justified on grounds of the protection of industrial and commercial property are permissible provided that they do not constitute a means of arbitrary discrimination or a disguised restriction on trade between the Member States. In that regard it need merely be stated, in the light of the documents before the Court, ... that such legislation is not intended to favour national products at the expense of products originating in other Member States.' [4]

15. With respect to Article 86, the Court stated that the mere fact of securing an exclusive right granted by law, the essence of which is to enable the manufacture and sale of protected products by unauthorised third parties to be prevented, cannot be regarded as an abusive means of eliminating competition. [5]

3 — Ibid., paragraph 10. It should be noted that the state of Community law with respect to protection of models for spare parts has not been changed by Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 concerning the legal protection of designs (OJ 1988 L 289, p. 28), because Article 14 of the Directive expressly excludes this area from harmonisation.

4 — Ibid., paragraph 11 et seq.

5 — Ibid., paragraph 15.

16. In regard to the difference in prices between components sold by the manufacturer and those sold by independent producers, the Court noted that 'the Court has held ... that a higher price for the former than for the latter does not necessarily constitute an abuse, since the proprietor of protective rights in respect of an ornamental design may lawfully call for a return on the amounts which he has invested in order to perfect the protected design.' [6]

17. The Court thus answered the questions referred to it in the following manner:

'(1) The rules on the free movement of goods do not preclude the application of 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.

(2) The mere fact of obtaining protective rights in respect of ornamental designs for car bodywork components does not constitute an abuse of a dominant position within the meaning of Article 86 of the Treaty. The exercise of the corresponding exclusive right may be prohibited by Article 86 of the Treaty if it involves, on the part of an undertaking holding a dominant position, certain abusive conduct such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation, provided that such conduct is liable to affect trade between Member States.'

D — Question 3

18. The present proceedings are particularly concerned — as has been confirmed by the referring court itself — with the question of whether or not the concept of public policy within the meaning of Article 27(1) of the Convention covers also Community law. Should this question be answered in the negative, then a further examination of the first two questions on the interpretation of Community law will no longer be necessary. It is for this reason that it would seem reasonable to examine the third question first, which, incidentally, is also the way the majority of participants have chosen to proceed, at least at the hearing.

6 — Ibid., paragraph 17.

Admissibility

19. In connection with the third question referred to the Court it must first be determined whether the referring Court is at all entitled to submit questions on the interpretation of the Convention to the Court.

Observations of the parties

20. The applicant is of the opinion that no such right exists. In support of this view it relies on Article 2 of the Protocol. Because the referring court decided the matter at first instance and is hearing the dispute on the basis of Article 40 of the Convention and not Article 37, Article 2 of the Protocol does not confer the right to refer questions to the Court. In support of this line of reasoning the applicant refers to the case-law of the Court. [7] The Court declared inadmissible a reference for a preliminary ruling submitted by a court which had received an application for a declaration of enforceability. This rule is to be narrowly interpreted and cannot be extended by means of analogy with the provision referring to Article 37, which itself represents an exception in this regard.

21. The defendants, the French Government and the Commission are however of the opinion that the reference for a preliminary ruling is admissible. The defendants maintain that in the present dispute the referring court is acting in an appellate capacity within the meaning of Article 2(2) and (3) of the Protocol. Its decision on the appeal can only be contested, pursuant to Article 41, by an appeal in cassation. The Jenard Report [8] also confirms that the referring court is to be considered as acting in an appellate capacity. The case cited by the applicant may not be relied upon here, because it concerned a reference for a preliminary ruling of a court which was deciding at first instance.

22. The French Government is also of the opinion that the referring court is acting in an appellate capacity under Article 40, which it considers as confirmed by the Court's case-law [9].

23. The Commission firstly points out that in certain language versions of the Convention the proceedings under Article 40 are designated as appellate proceedings. Because the Jenard Report also clearly shares this view, the Commission also concludes that the referring court is authorised to request preliminary rulings on the basis of Article 2(2) of the Protocol. Furthermore, the Commission points out the similarities which exist between the proceedings under Article 37 and those under Article 40 of the Convention, for example the fact that they are adversarial proceedings. It can therefore not be ruled out that

7 — Order of 28 March 1984 in Case 56/84 *Von Gallera* v *Maître* [1984] ECR 1769.

8 — Report on the Convention on jurisdiction and the enforcement of judgements in civil and commercial matters by P. Jenard (OJ 1979 C 59, p. 1).

9 — Case 178/83 *Firma P* v *Firma K* [1984] ECR 3033, paragraph 11.

Article 2(3) of the Protocol implicitly encompasses cases falling under Article 40 of the Convention. Despite the limited possibilities of requesting a preliminary ruling under the Convention, such an expansive interpretation would be admissible in view of striking a balance between the different types of proceedings which exist under the Convention and the equal treatment of parties under Article 40 in relation to the parties to proceedings under Article 37.

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24. If one looks at the wording of the Convention and the Protocol, it becomes apparent that the proceedings under Articles 37 and 40 are set out or designated differently in the different language versions. The German version uses the term 'Rechtsbehelf' in Articles 37 and 40 and requires in Article 2(2) of the Protocol that the court be acting in the capacity of a 'Rechtsmittelinstanz'

25. The French version designates the proceedings pursuant to Articles 37 and 40 of the Convention as 'recours' and requires, pursuant to Article 2(2) of the Convention, that the courts 'statuent en appel'.

26. The English version however speaks, in Articles 37 and 40, of an 'appeal' as well as requiring in Article 2(2) of the Protocol that the courts 'are sitting in an appellate capacity'.

27. The wording does therefore not allow one to deduce with any certainty whether the referring court is sitting in an appellate capacity in the context of Article 40 of the Convention. Were one to consider the structure of Article 2 of the Protocol, one could conclude that that is not the case for a court in the context of Article 40. Since paragraph 2 designates those courts which sit in an appellate capacity, and paragraph 3 then expressly mentions Article 37, one could conclude that those courts falling under Article 37 are precisely not considered as appellate instances. However, because — as the Commission has rightly pointed out — the proceedings under Article 37 and those under Article 40 are so similar — both proceedings are moreover used to contest a court's decision in respect to the authorisation of enforcement — and are set out identically in the different language versions examined, one could conclude that a court deciding in proceedings pursuant to Article 40 is not to be considered an appellate instance either.

28. The case-law of the Court, however, points in another direction. In the judgment in Case 178/83,[10] also referred to by the French Government, a national court deciding an appeal under Article 40 of the Convention referred a question on the interpretation of this article to the Court of Justice. The reference for a preliminary ruling was not rejected by the Court on the ground of inadmissibility. Rather, the Court interpreted Article 40, thereby answering the question referred to it. Within its interpretation the Court reasoned: 'It is nonetheless true that the Convention formally requires that both parties should be given a hearing at the appellate level,

10 — Ibid.

without regard to the scope of the decision in the lower court'. [11] It thus becomes clear that the referring court is sitting at second instance. A court called upon to decide a dispute pursuant to Article 40 of the Convention is therefore entitled to submit a reference for a preliminary ruling to the Court of Justice. The order of the Court in Case 56/84 referred to by the applicant does not lead to a contradictory conclusion in the present case, because that matter concerned a reference for a preliminary ruling from a court which had been called upon to authorise enforcement and which was thus sitting at first instance. The reference for a preliminary ruling in that case was considered inadmissible [12].

29. It remains to be said — as observed by the Commission — that there is no apparent reason for treating the proceedings under Article 37 differently from those under Article 40 of the Convention. Both proceedings are concerned with appealing against the judicial authorisation or non-authorisation of enforcement. It is merely the party involved which has changed. Thus it is not apparent why a reference for a preliminary ruling may be made in only one of the proceedings. Should, for this reason, the Court of Justice decide that the referring court is not sitting in an appellate capacity pursuant to Article 2 (2) of the Protocol, then a reference for a preliminary ruling would still be admissible under Article 2(3) of the Protocol, by analogy with the proceedings under Article 37 of the Convention.

11 — Ibid., paragraph 11.

12 — Order of the Court in Case 56/84, cited in note 7, paragraphs 3 and 5.

The substance of Question 3

The concept of public policy

Observations of the parties

30. The applicant observes that this question is concerned with whether an error of interpretation in a foreign judgment may be considered a violation of international public policy. With respect to the term 'public policy' the applicant firstly refers to the Jenard Report. According to this report, the public-policy clause may only be invoked on rare and exceptional occasions, and authorisation for enforcement of a foreign judgment may only be refused where recognition of the judgment, that is, the consequences it might have in the Member State, would be contrary to public policy.

31. According to the applicant, the Court has also ruled that the term 'public policy' may only be invoked in connection with Community law in exceptional cases. [13]

13 — Case 145/86 *Hoffmann* v *Krieg* [1988] ECR 645.

32. Referring to the the Opinion in Case 220/95,[14] the applicant argues that the term 'public policy' could only be applied to situations which could result in very grave effects on the collective sensibilities of a Member State. The present case is, however, only concerned with whether an error of interpretation is capable of violating public policy. This cannot be the case.

33. The applicant further submits that to extend the scope of the term 'public policy' in such a way would lead to a judge being able to substantively review the decision at issue under the pretext that the foreign court had committed an error of interpretation. Yet the Brussels Convention prohibits precisely this in two places, namely Articles 29 and 34, as is also confirmed by the Jenard Report.

34. The applicant further argues that to allow such review would be to fail to recognise the Convention's aim, which is to ensure the rapid enforcement of judgments in other Member States, as well as further increasing the possibilities for appeal.

35. The applicant continues by observing that the Court has consistently held that the protection of designs and models is a matter for national legislation and cannot be governed by the courts of another Member State. A refusal by the Italian court to recognise a French judgment, sanctioning infractions committed on French territory, would be a violation of French sovereignty.

36. According to the defendants, it is not for the Court to substantively review the judgment at issue in the present case, but — on the contrary — to define the notion of 'public policy in economic matters,' i.e. one of the limits set out in the Convention on granting leave to enforce a foreign judgment. In doing so, the term must be considered as meaning international public policy, which also comprises Community public policy and hence the principles of the free movement of goods and freedom of competition.

37. The defendants reason that the provision contained in Article 27(1) constitutes an escape clause permitting Contracting States to refuse to grant leave to enforce judgments in cases where fundamental principles which touch upon public policy are at stake. That such a clause only be used in exceptional cases does not mean that it cannot be applied in the present case.

38. The term 'public policy' cannot, according to the defendants, be limited to questions of morality or religion. The defendants also refer, in connection with

14 — Opinion of Advocate General Jacobs in Case C-220/95 *Van den Boogaard* v *Laumen* [1997] ECR I-1147, at I-1149.

this point, to the Opinion in Case 220/95. [15] In this case, Advocate General Jacobs stated that even economic issues were capable of calling fundamental interests of public policy into question.

39. Recognition of the French judgment and thus of French law in regard to spare parts would, argue the defendants, be tantamount to sacrificing freedom of competition in favour of the Community-wide enforceability of judgments. More is at stake here than merely two contradictory rulings, namely a systematic contradiction between two systems of case-law.

40. In the defendants' view it is an undisputed fact, moreover, that the social order of a Member State would be called into question if a party were able to rely on two contradictory judgments. The defendants refer, in connection with this point, to the judgment in the *Hoffman* case. [16]

41. They argue that, if one were not to consider the French judgment a violation of Community law on the ground that protection for spare parts is a matter for the Member State in question, then this would inevitably have the result that leave to enforce could not be granted for reasons of public policy in economic matters.

42. It is by this reasoning that the defendants come to the conclusion that it is possible to refuse recognition of and leave to enforce a judgment which is incompatible with fundamental principles of the free movement of goods in another Member State for reasons of public policy. This is also the case for a judgment which is the expression of a legal point of view which is incompatible with the established case-law in the State in which enforcement is sought.

43. Because Article 27(1) refers to 'public policy in the State in which recognition is sought', the French Government firstly raises the question as to whether the Court is at all entitled to rule on the meaning of this term, or whether this is exclusively a matter for national courts. It then goes on to reason that, even if the term 'public policy' does not contain any Community aspect, an examination, pursuant to the Convention, of the compatibility of a judgment with public policy is not simply a matter of determining whether or not any contradictions exist between the law applied by the State in which the judgment was handed down and the State in which enforcement is sought. Were this to be otherwise, then only a small number of judgments would be enforceable and the Convention's aim would not be achieved. Article 27(1) refers to the international public policy of the State in question. In respect to the recognition of foreign judgments this term only comprises a reduced scope, that is to say, it concerns solely the question as to whether *recognition* of the judgment violates public policy. The judgment itself may no longer be the subject of material review.

44. The French Government further argues that the aim of the Convention, namely the

15 — Ibid.
16 — Cited in note 13.

Community-wide enforceability of judgments, also implies that Article 27(1) be narrowly interpreted. According to the Jenard Report, the term is to be interpreted by analogy to that contained in more recent Conventions. Here the French Government refers to the Hague Convention of 1 February 1971, in which recognition can be refused, *inter alia*, where it is manifestly incompatible with public policy. The use of the word 'manifestly' demonstrates that a judgment may be refused recognition on the ground that to do so would violate public policy only on the most exceptional of occasions.

45. In respect to what constitutes public policy, the French Government furthermore submits that Community-wide enforceability of judgments may only be subject to restrictions where ethical, religious or moral values are at issue. This is the case, for instance, in respect to the physical integrity of human beings, but can surely not be applied to the concepts of Community law in economic matters.

46. The Netherlands Government considers it desirable that the notion of public policy not be defined by each and every individual Member State, but rather that it be attributed some autonomous meaning which could be uniformly interpreted in all States party to the Convention. This would increase the legal protection of every individual person and ensure the uniform application of the Convention.

47. With respect to the term itself, the Netherlands Government has stated, referring to the Jenard Report and the judgment in the *Hoffmann* case, [17] that the scope of the term must be limited to fundamental principles. This could include fundamental principles of the Community legal system.

48. On the question of whether the Court is able to determine the substance of the notion of public policy, the Commission is of the opinion that in an area such as that of the Brussels Convention it is not possible to leave the interpretation of the scope of a term that is capable of having far-reaching consequences in regard to attaining the underlying aim of the Convention in the sole hands of national authorities. According to the Commission, it was precisely in order to avoid disputes in respect to interpretation between the courts of the individual Member States that the Protocol was adopted which provides that the Court is to be responsible for ensuring uniform application of the Convention, particularly by means of preliminary rulings. It was against this background that the Court ruled that there must be a uniform application in all Contracting States of the Convention and the case-law developed in connection therewith. [18]

49. By way of answering the actual question the Commission begins by generally observing that the matter at issue is whether a judgment, in the event that it should be marred by an error of interpretation, is

17 — Cited in note 13.

18 — Case C-432/93 *Société d'Informatique Service Réalisation Organisation* v *Ampersand Software* [1995] ECR I-2269, paragraph 39.

capable of contravening public policy. In making this point, the Commission refers to the underlying aim of the Convention, namely the Community-wide enforceability of judgments. To this end the Convention relies upon the principle of mutual trust in the judicial systems of the various Contracting States in question. It is for this reason that no material review of a foreign judgment is permitted. This can be inferred from Articles 29 and 34 of the Convention, as well as the Jenard Report.

50. Because Article 27 represents an exception to this rule, it is to be interpreted narrowly. In respect to the other possibilities mentioned in Article 27, Article 27(1) is of secondary importance, that is to say, it represents the most restricted option amongst the exceptions. In this connection the Commission invokes the case-law of the Court. [19] A further restriction consists in the fact that it is not the judgment in itself which must constitute a violation of public policy but rather its recognition.

51. In respect to the substance of the term 'public policy' the Commission submits that the fact that a foreign judgment is based upon legislation which does not exist, or which exists in a different form, in the other State does not itself, simply because of the difference, constitute a circumstance that would allow a court to refuse recognition on the ground that it contravenes public policy. To refuse recognition on this ground is only possible where the differences between the two legal systems are so fundamental that to enforce such a judgment would severely threaten basic, indispensable principles, as well as the very underlying values of those legal systems. A court must, however, authorise enforcement of a judgment even when, on the basis of its own legal system, it would have given a different ruling. It is no different, for example, between two separate courts within Italy. Here also, a judgment which is *res judicata* has to be recognised. The same applies where the judgment has been handed down in another State.

52. The Commission observes that it is difficult to positively define the term 'public policy'. Referring to the Opinion in Case C-220/95, [20] the Commission mentions, as a starting point, moral and religious perceptions in each of the Contracting States. International public policy, as covered by Article 27(1), consists of the fundamental and central core of the legal principles which represent the internal public policy of a State. This is a continuously evolving concept.

53. According to the Commission, it is neither necessary nor useful to answer the question in abstract terms, and thus it has limited itself to examining the matter at issue. The exceptional circumstance which led the national court in this case to question whether it was faced with a violation of public policy was an alleged error of interpretation of certain provisions of Community law. Thus the problem does not lie in the fact that the judgment rests

19 — Case C-78/95 *Hendrikman and Feyen* v *Magenta Druck & Verlag* [1996] ECR I-4943, and Case 145/86, cited in note 13.

20 — Cited in note 14.

upon principles which could affect the sensibilities and fundamental interests of the State in which enforcement is sought. An (alleged) error of interpretation does not entitle a court to deny recognition and refuse enforcement of a judgment.

54. In the event that a foreign judgment is genuinely marred by an error, then it is always possible — the Commission continues — to exhaust the appeals process of the State in question. Article 27(1) cannot be considered as such a means of appeal. Moreover, to allow otherwise would permit national courts to materially review a judgment under the Convention and thereby undermine its principal aim.

55. The Commission then goes on to ask whether this conclusion is any different where — as is the case here — provisions of Community law are involved. The Commission answers this in the negative on the grounds that Community law does not contain any particularities in comparison with national law, in so far as national courts, according to the established case-law of the Court of Justice, must guarantee the legal protection available under the provisions of national as well as Community law with equal effectiveness. Any errors of interpretation may be challenged by appeals to the superior courts in either case.

56. At the hearing the Commission even went so far as to ask whether considerations pertaining to economic matters could be included in the concept of 'public policy'. The Commission answered this question in the negative. It argued that Community law governs, influences or pervades all aspects of economic life in the Member States. The principles which form the basis of national laws and which represent Europe's *de facto* economic constitution can only be common to all Member States. It is therefore impossible to refuse recognition of a judgment by relying upon a discrepancy in the values and principles of Member States.

Opinion

57. In answering the third question it is first necessary to examine whether the Court has jurisdiction to interpret the term 'public policy' in Article 27(1) of the Convention. Doubts may arise due to the wording of Article 27(1), which refers to 'public policy in the State in which recognition is sought'. This could be a purely internal concept to be interpreted by the relevant national court.

58. Article 1 of the Protocol provides, however, that the Court is to have jurisdiction to rule on the interpretation of the Convention. This jurisdiction thus extends to the Convention in its entirety, as no

provision is expressly excluded from it. The spirit and purpose of such interpretation by the Court is to avoid differing interpretations of the Convention. [21] As a consequence, the Court must also be considered as having jurisdiction to interpret the term 'public policy' in Article 27(1). To leave this concept exclusively to national courts could not only result in the Convention being applied in differing ways, but also, through excessively broad interpretation, undermine the entire aim of the Convention. For that reason it must be held that the Court has jurisdiction to interpret the concept of public policy in this case. That is all the more so as that concept includes principles of Community law.

59. In respect to the question itself, the referring court would like to know whether the judgment at issue is contrary to public policy, in other words it would like to know how the concept of public policy is to be interpreted in this context. Article 27 lists generally the reasons for not recognising a judgment. It represents an exception clause, since, as stated in its preamble, the Convention is intended to facilitate recognition of judgments and to introduce an expeditious procedure for securing their enforcement. Mutual recognition and enforcement of judicial decisions is thus to be ensured, thereby strengthening the legal protection of persons residing in the Community.

60. It is for this reason that Article 29 of the Convention provides that under no circumstances may a foreign judgment be reviewed as to its substance. This provision is also to be found in Article 34(3), which emphasises its importance. According to the Jenard Report, this means that the court to which an application for recognition of a foreign judgment has been made may neither substitute its will for that of the foreign court nor refuse recognition, even where it is of the opinion that the judgment suffers from some flaw, whether in regard to a point of fact or of law. [22] It is only where actual recognition would be contrary to public policy that leave to enforce need not be granted.

61. Thus the Convention has established a system of recognising foreign judgments which is based upon trust in the legal system of the other State, in order to ensure the free movement of judgments [23]. To deny recognition of a foreign judgment can therefore only be permissible in exceptional cases. From this reasoning it follows that the concept of 'public policy' may only operate in exceptional cases. [24] This must be borne in mind when interpreting this term. Were the entirety of a State's law to belong to its public policy, then Community-wide enforcement of judgments would, for all practical purposes, cease to exist. Any judgment could be refused recognition where its enforcement would be contrary to any legal provision in the other State. The concept of public policy can therefore comprise only fundamental principles. The fact that the ruling was handed down on

21 — Report on the Protocols on the interpretation by the Court of Justice of the Convention of 29 February 1968 on the mutual recognition of companies and legal persons and of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgements in civil and commercial matters (OJ 1979 C 59, p 66).

22 — Jenard Report on Article 29, cited in note 8, p. 46.

23 — Opinion of Advocate General Darmon of 2 December 1992 in Case C-172/91 *Sonntag* v *Waidmann* [1993] ECR I-1963, at I-1977, point 70 et seq.

24 — Jenard Report on Article 27, p. 44.

the basis of another, differing legal system is not, in itself, sufficient to constitute a violation of public policy.

62. As has already been demonstrated, an error of interpretation by the initial court is not, in itself, sufficient grounds for refusing recognition. This also applies in respect to errors of interpretation of Community law, because, as correctly pointed out by the Commission, Community law does not play any exceptional role in this regard. The Court has consistently held that national courts are required to ensure the legal protection which individuals derive from the direct effect of Community law. [25]

63. To summarise, one may affirm that public policy is not violated by a foreign judgment solely because it was handed down on the basis of another, differing legal system, or because of an error in interpretation. Any such 'errors' in a ruling must be accepted and leave to enforce granted. The concept of public policy must thus be limited to fundamental principles, and a refusal to recognise a foreign judgment on that ground can only be permitted in those cases where enforcement is completely incompatible with those fundamental principles.

64. In this context the Commission points out that it is the referring court's view that the French court committed an error in interpreting provisions of Community law equally applicable in both States. The Commission is of the opinion that this does not constitute an exceptional case, i.e. one that severely threatens fundamental interests of the national community. In such a case there is always the possibility of appealing the judgment in the State in question.

65. The Commission is right in so far as it observes that a refusal to recognise a foreign judgment because of an error of interpretation would probably not be a typical case of non-recognition of a judgment for reasons of public policy. There would no doubt be such a case where a judgment given under foreign law could not possibly be enforced due to irreconcilable differences in the fundamental attitudes of the State in which enforcement was sought. The issue in the present case, however, is merely that a court is said to have committed an error of interpretation when handing down a judgment. In such an event it is possible to appeal against the judgment in the State of origin, but this does not necessarily lead to the judgment being quashed. In the present case the French judgment was indeed upheld on appeal in France. Judgments which are upheld on appeal or against which no appeal is filed, became *res judicata* and must be recognised in spite of any 'error'. *Res judicata* of a judgment can be set aside only with great difficulty. But to refuse to grant leave to enforce that judgment by invoking the public policy of the State in which recognition is sought would, in effect, be to do precisely that.

25 — Case C-312/93 *Peterbroeck* v *Belgian State* [1995] ECR I-4599.

66. Erroneous rulings can also be handed down and acquire *res judicata* in the State in which recognition is sought. In other words, these judgments would also have to be recognised in that State despite their errors. Recognition of foreign judgments thus cannot in itself constitute a breach of the public policy of the State in which recognition is sought.

67. This problem is further accentuated in the present case by the fact that an alleged erroneous interpretation of Community law is at issue. Community law is applicable in both States, taking precedence over any potentially contradictory provisions of national law. Thus there can not be any fundamental differences in legal points of view. Nevertheless, it cannot be completely ruled out that because of such an erroneous interpretation the enforcement of the judgment could breach fundamental principles, including those of Community law. This is however, in the situation described, only conceivable in the most exceptional of cases. There would have to be a clear violation of fundamental principles. In the present case it is even questionable whether freedom of competition and the free movement of goods constitute such fundamental principles. In respect to the free movement of goods, for example, Community law already provides restrictions for reasons of internal public policy, which is understood in broader terms than public policy under the Convention. Nor can a very blatant violation be concerned here since, as the defendants have themselves pointed out, the domestic legal situation in Italy has changed. The defendants note that the referring court in the *Cicra* case had stated, in its order for reference, that the protection of designs and models on automobile bodyparts must be considered compatible with Italian law. They state that, at that time, the principle of protecting car bodyparts by means of industrial and intellectual property rights had also been confirmed by all Member States concerned and by the Commission. This means that the legal point of view in Italy, as now presented, which allegedly renders enforcement of the French judgment impossible, was not always valid. It was previously much closer to the French legal point of view. The latter can therefore not be considered as standing in such stark contradiction to the former that enforcement of the contested judgment would breach fundamental principles. A violation of public policy can therefore not be entertained in the present case.

Article 27(3) of the Convention

Observations of the parties

68. The French Government points out — in the alternative — that in the order for reference there is a brief mention of a judgment of the Tribunale di Milano which could stand in the way of enforceability under Article 27(3). However, because the referring court raised no questions in this regard, the Court of Justice is not required to examine the matter any further.

Opinion

69. The Court has held that a violation of public policy cannot be relied upon where a judgment has previously been handed down in the State addressed which is incompatible with the foreign judgment for which recognition is sought within the meaning of Article 27(3).[26] In this event the judgment is still to be denied recognition, but on the basis of Article 27(3) and not on grounds of public policy under Article 27(1). This also follows from the judgment in the *Hoffmann* case.[27] In that case the Court ruled that, according to the scheme of the Convention, use of the public-policy clause is in any event precluded when the issue is whether a foreign judgment is compatible with a national judgment.

70. The order for reference mentions an Italian judgment which is in contradiction to the French judgment and thus refers to Article 27(3). However, because the questions referred relate expressly to Article 27(1), only this provision should be examined here. It should, nevertheless, be noted at this point that in the event of incompatibility with an Italian judgment within the meaning of Article 27(3), the public-policy exception under Article 27(1) would not be applicable.

71. With Article 27(3) the Contracting Parties accord greater authority, within enforcement proceedings, to the judgments of their own Courts as opposed to those of a foreign judgment requiring recognition. Thus for the purposes of enforceability of a foreign judgment, a conflict with an individual national judgment which falls under Article 27(3) weighs more heavily than a conflict with national rules which does not as such fall under Article 27(1). This differentiation is a consequence of the fact that enforcement proceedings are aimed at the execution of a specific enforceable instrument. The application of substantive law is limited to the proceedings on the substance and can, in the context of enforcement, be reviewed only with respect to breaches of national public policy. The consequences of having contradictory rulings belong, on the other hand, to the sphere of enforcement of judgments and are thus to be examined within enforcement proceedings.

72. However, the order for reference does not contain sufficient information in order to decide whether Article 27(3) of the Convention in fact relevant in the present case.

E — Questions 1 and 2

73. In view of the answer to Question 3, Questions 1 and 2 need be considered only on an alternative basis.

26 — This would be the case here if it ruled differently on the same issue, or if it relied on premises that were incompatible with the *res judicata* or judicial effects of the Italian judgment.

27 — Case 145/86, cited in note 13, paragraph 21.

Admissibility

Observations of the parties

74. The applicant is of the opinion that the referring court is not entitled to submit a reference for a preliminary ruling to the Court of Justice under Article 177 of the EC Treaty (now Article 234 EC). The Court has consistently held that the solution to problems of interpretation referred to the Court must enable the referring court to rule on the matter it is required to adjudicate. In the present case, however, the national court was merely required to rule upon whether or not to grant leave to enforce and thus had to limit itself to examining whether the conditions in Article 27(1) of the Convention were fulfilled. Under no circumstances was it able to review the judgment as to its substance. The principles of Community law are not relevant in this context.

75. The applicant also points out, in the alternative, that the Court has already answered the questions referred to it in the judgment in the *Cicra* case [28]. In such a case a reference for a preliminary ruling may no longer be made. [29] Where no doubts exist as to interpretation, even a court of final instance is not obliged to submit a reference for a preliminary ruling. [30]

28 — Case 53/87, cited in note 2.

29 — Joined Cases 28/62, 29/62 and 30/62 *Da Costa en Schaake and Others* v *Nederlandse Belastingadministratie* [1963] ECR 31 at p. 44 et seq.

30 — Case 283/81 *CILFIT* v *Ministry of Health* [1982] ECR 3415.

76. The defendants are of the opinion that Questions 1 and 2 of the order for reference are admissible. A foreign judgment cannot be recognised if it is incompatible with rights protected under Community law. It is therefore necessary that the Court, in interpreting Article 27 of the Convention, simultaneously interpret the relevant provisions of the Treaty — here Articles 30 to 36 (now, after amendment, Articles 28, 29 and 30 EC; Articles 31 to 33 and 35 of the EC Treaty having been repealed by the Treaty of Amsterdam) and Article 86 — in the context of Article 177 of the Treaty.

77. The defendants further submit that enough elements exist for it to be necessary for the Court of Justice to examine the issue anew. The questions referred to the Court here arose in a completely different context from these in the original ruling. The questions previously referred to the Court were raised in connection with an exclusively Italian dispute, whereas the present case revolves around a declaration of enforceability which manifests international characteristics and directly affects intra-Community trade.

78. The defendants continue by observing that at the time of the first preliminary ruling Italian law, like French law, allowed protection of individual bodywork components. This was then precluded by the Corte Suprema di Cassazione in 1996, which incidentally conforms to English, Spanish and German law. The present case also involves, in addition to protection of patents and models, copyright law.

79. Furthermore, the original judgment was handed down at a time when harmonisation of national provisions was assumed to be just around the corner.

80. By way of an additional important argument in favour of re-examining the problem at issue, the defendants point to the recent case-law of the Court which no longer distinguishes between the existence and the use of a protective right [31], or which extends the notion of exercising such a right. [32]

81. The French Government observes that, according to the wording of the Protocol, Questions 1 and 2 are inadmissible. The scope of the Convention is to be distinguished from that of the Treaty. Furthermore it follows from Article 4 of the Protocol that the preliminary ruling procedure under the Convention is a 'lex specialis'. Admittedly it follows from Article 5 that Article 177 and the relevant case-law may be referred to in order to define the limits and details under which the Court is to exercise its jurisdiction in respect to preliminary rulings on the Convention. However, the case-law in respect to Article 177 requires that the Court refrain from answering questions which are of no importance to the particular legal dispute. [33]

82. The French Government further holds that, because in the present case the referring Court is only concerned with the enforcement of a judgment within the Convention, it is only entitled to submit questions on the interpretation of the Convention.

83. The Court is also obliged, according to the French Government, to declare the questions referred to it inadmissible, because it has already answered them in the *Cicra* [34] case.

84. The Commission additionally points out — as does the Netherlands Government — that the order for reference contains only sparse details and facts in regard to the French judgment and the dispute underlying it. The Commission refers, for example, to the fact that no indication was given as to whether the protective rights could also be relied upon against French firms which manufacture spare parts in France. There was also no indication as to whether Renault refused to deliver spare parts to certain distributors or set prices at an excessively high level. The Commission thus asks itself whether it is at all possible to answer the questions referred to the Court.

85. The Commission furthermore observes that Questions 1 and 2 concern Articles 30

31 — Case C-350/92 *Spain* v *Council* [1995] ECR I-1985.

32 — Joined Cases C-241/91 P and C-242/91 P *RTE and ITP* v *Commission* [1995] ECR I-743 (hereinafter 'the *Magill* judgment').

33 — Case C-18/93 *Corsica Ferries Italia* v *Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783.

34 — Case 53/87, cited in footnote 2.

to 36 and 86 of the Treaty and thus should have been referred to the Court on the basis of Article 177 and not, as was the case, on the basis of Article 2 of the Protocol. To reject the questions as inadmissible on that ground would, however, be excessively formalistic and contrary to the spirit of co-operation between national courts and the Court of Justice. The interpretative role assumed by the Court is similar under both procedures — Article 177 of the Treaty or Article 2 of the Protocol. The Commission argues that it is also desirable, from the point of view of procedural efficiency, that the Court answer the questions submitted to it, because otherwise the competent court would refer the questions to the Court again under Article 177, which would delay the proceedings and be contrary to the aim of the Convention.

Opinion

86. Pursuant to Article 2 of the Protocol national courts are entitled to submit questions to the Court with respect to interpretation of the Convention. The present case is concerned with interpreting the concept of public policy under Article 27(1) of the Convention. As has been shown, this term can also extend to fundamental principles of Community law. The competent court is thus at least entitled to submit questions to the Court in regard to the scope, under Community law, of the concept of public policy. That is to say, the national court may ask which fundamental principles of Community law belong to the public policy of a State. This does not necessarily mean, however, that it may also request information on the interpretation of the corresponding Community principles and the provisions of the EC Treaty.

87. If, however, one considers the spirit and purpose of the preliminary ruling procedure, namely to enable the referring court to resolve the dispute submitted to it, then it might also be necessary in this context to provide an interpretation of the relevant provisions of the EC Treaty. If the concept of public policy also comprises principles of Community law, then the national court may, under certain circumstances, be required to examine whether recognition of a foreign judgment would constitute a violation of these principles. In order to do this, however, it sometimes requires interpretation of the respective provisions of the EC Treaty by the Court. Moreover, it would be — as the Commission has pointed out — excessively formalistic to consider the questions referred to the Court as inadmissible solely because they were not submitted under Article 177 of the EC Treaty. This would also be pointless from the point of view of procedural efficiency.

88. At this point it is worth re-stating that the observations made here are only for the event that the Court should decide to give a different answer to Question 3.

In answer to Question 1

Observations of the parties

89. The applicant refers here to the *Cicra* judgment from 1988 and the conclusion arrived at by the Court on that occasion, namely that protection of designs and models, in the absence of harmonisation of laws, was subject to national rules. [35] At that time the Court came to the conclusion that the rules on the free movement of goods did not preclude the application of national rules which allow a car manufacturer who holds protective rights on an ornamental design in respect of spare parts to prevent third parties from manufacturing the protected parts. [36]

90. Because the questions here are formulated in similar terms, and the parties and issue in the present case are identical with those in the 1988 *Cicra* judgment, the applicant believes the Court is also required to answer the questions submitted to it here in the same manner as in the *Cicra* judgment. The legal situation has not changed, insofar as, even following the enactment of Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs, [37] establishment of conditions under which protection in respect to designs and models can be accorded has remained a matter for the Member States. The applicant refers here to Article 14 of the Directive, which confirms the existing rules in force in the Member States for a transitional period of at least three years. Recital 20 in the preamble to the Directive, which states that Article 14 is in no case to be construed as constituting an obstacle to the free movement of a product, does not permit any other conclusion either. It merely recalls Articles 30 and 36 of the Treaty, which are still applicable.

91. The applicant furthermore observes that the facts underlying the dispute go back to 1985. As regards the cases cited by the referring court, [38] these too do not permit any other conclusion.

92. The defendants firstly point out that it would be contrary to the spirit and purpose of legal protection for designs and models if individual components of the bodywork of a car were also to be subject to protection. The point is to protect a new idea or design in its entirety, thereby stimulating competition. Where components such as spare parts are concerned, which must be exact replications of the originals, the result of protection is precisely to prevent competition. The proprietor of such rights is thus accorded a double monopoly and is more than merely compensated for his investment costs. Moreover, the defendants continue, this infringes upon the interests of consumers.

35 — Case 53/87, cited in note 2, paragraph 10.

36 — Ibid., paragraph 13.

37 — OJ 1998 L 289, p. 28.

38 — Case C-235/89 *Commission* v *Italy* [1992] ECR I-777, and Case C-350/92, cited in note 31.

93. The defendants observe that protection afforded to individual components of the bodywork of a car must be considered a measure having equivalent effect within the meaning of Article 30 of the EC Treaty. Furthermore, such a practice is not justified under Article 36, because it consists of a disguised restriction of trade. In support of this statement the defendants reason that there is an abuse of such protection where it is extended to an object which is not suited to such protection. This is even more the case, because the French court failed to examine whether the conditions for affording such protection had been fulfilled in this particular case.

94. The defendants reason that, although the Court ruled in the *Cicra* case that it is for the national legislature to decide which parts could be subject to protection, this discretionary power does not go so far as to extend protection to products which, according to the spirit and purpose of design and copyright laws, do not deserve such protection.

95. In respect to Directive 98/71 the defendants refer to its spirit and purpose, namely the promotion of market liberalisation. Because this directive too has not brought about any harmonisation in the disputed area of spare parts, the defendants ask the Court to answer the questions in their favour and thereby put an end to the mischief in this area.

96. The Netherlands Government first refers to the *Cicra* judgment and then examines whether the more recent case-law of the Court cited in the reference for a preliminary ruling [39] is capable of altering the conclusions arrived at in that case. It answers this in the negative on the ground that it is not apparent, from the information provided in the order for reference, that the French rules in respect to industrial and intellectual property are discriminatory.

97. The Commission first makes general statements on Articles 30 and 36 and observes, on the basis of the *Cicra* judgment, that the Court has already ruled that no disguised restriction on trade is involved. There have been no subsequent changes in regard to the case-law or legislation which could change the conclusion arrived at in that judgment. The cases cited in the order for reference are of no relevance here.

98. As far as Directive 98/71 is concerned, the Commission reasons that it contains a confirmation of the situation up until now, whereby the granting of protective rights is a matter for the Member States.

39 — Case C-30/90 *Commission* v *United Kingdom* [1992] ECR I-829 and Case C-235/89, cited in note 38.

Opinion

99. Because the wording of the first question in the *Cicra* case is almost identical to that submitted in the present case, the Court has already answered the referring court's first question in the *Cicra* judgment, at which time it concluded that there was no incompatibility with Community law. It is now argued that a new tendency has become apparent from the more recent case-law of the Court. The order for reference refers to the judgment of the Court in Case C-30/90. [40] Here the referring court relies mostly upon the Court's statement that 'the provisions of the Treaty, and in particular Article 222 according to which the Treaty in no way prejudices the rules in Member States governing the system of property ownership, cannot be interpreted as reserving to the national legislature, in relation to industrial and commercial property, the power to adopt measures which would adversely affect the principle of free movement of goods within the common market'. [41]

100. It does not, however, follow that the protection of industrial property has been restricted. On the contrary, the Court adds that prohibitions and restrictions on imports justified on grounds of the protection of industrial and commercial property are allowed by Article 36 of the Treaty only subject to the express proviso that they do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. [42] However, it was precisely this point that the Court had already examined in the *Cicra* judgment in Case 53/87, ruling that in light of the documents submitted to it, the exclusive rights in respect of car bodywork components was not intended to favour national products. [43] On this point, the 1992 ruling does not go any further than the 1988 *Cicra* judgment.

101. Moreover, it should be noted that in Case C-30/90 it was essentially the fact that national provisions distinguished between the manufacture of a product on national territory and the importation of that product from the territory of another Member State, thereby placing imports at a disadvantage, which was contested. [44] It was on the grounds of this discrimination that the Court ruled that the United Kingdom had violated its obligations under Article 30 of the EC Treaty. It is, however, not apparent from the documents provided by the referring court — which it must be said do not provide much detail — that foreign spare parts manufacturers are discriminated against in this manner in the present case.

102. Reference is also made to the judgment in Case C-350/92. [45] This case was

40 — Case C-30/90, cited in note 39.

41 — Ibid., paragraph 18. Article 222 of the EC Treaty referred to in the quotation is now Article 295 EC.

42 — Ibid., paragraph 19.

43 — Case 53/87, cited in note 2, paragraph 12.

44 — Case 30/90, cited in note 39, paragraph 6.

45 — Case C-350/92, cited in note 31.

concerned with whether the Council was able to adopt a regulation on the creation of a supplementary protection certificate for medicinal products, even though the Court had ruled, in a 1992 judgment — the judgment in Case C-30/90 — that it was for the national legislature to determine the conditions and rules regarding the protection conferred by patents. The Court ruled that 'neither Article 222 nor Article 36 of the Treaty reserves a power to regulate substantive patent law to the national legislature, to the exclusion of any Community action in the matter'. [46]

103. The present case, however, is not concerned with whether the Community legislature was allowed to adopt a certain harmonisation measure. The problem is rather that even following the adoption of Directive 98/71 harmonisation has not taken place in the area of spare parts. This judgment too would therefore not seem to indicate a change in the Court's case-law as against the 1988 *Cicra* judgment.

104. In regard to the legislation too, the situation has remained the same since 1988, because — as outlined above — the area at issue here is expressly excluded from harmonisation pursuant to Article 14 of Directive 98/71. That is to say, the existing situation has been confirmed.

46 — Ibid., paragraph 22.

105. The defendants are of the opinion that a further difference in respect to the situation in the *Cicra* case is that the present case also involves the granting of copyright protection. In this regard, however, reference should be made to the judgment in Joined Cases 55/80 and 57/80. [47] Here the Court ruled:

'However, Article 36 of the Treaty provides that the provisions of Article 30 to 34 shall not preclude prohibitions or restrictions on imports justified on grounds of the protection of industrial and commercial property. The latter expression includes the protection conferred by copyright ... '. [48]

106. In the area of Articles 30 and 36 no distinction is therefore to be made between the protection of industrial and commercial property and copyright. For this reason there is no visible change in case-law, legislation or in the facts which would justify any deviation from the ruling handed down in the *Cicra* case.

In answer to question 2

Observations of the parties

107. In this context the applicant again refers to the 1988 *Cicra* judgment. In as far

47 — Joined Cases 55/80 and 57/80 *Musik-Vertrieb membran* v *GEMA — Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* [1981] ECR 147.

48 — Ibid., paragraph 9.

as the Court ruled in that case that a dominant position could result solely from the fact that protective rights in respect of ornamental designs on car bodywork components had been obtained, the applicant observes that this is not the case here. In support of this reasoning it states that the car market cannot be separated from the market for spare parts. This market is characterised by strong competition, but a dominant position is not automatically achieved because of protective rights in respect of ornamental designs on particular car bodywork components. In denying the existence of a dominant position one must also dismiss the notion of an abuse thereof.

108. In its judgment in the *Cicra* case — the applicant goes on to argue —, the Court distinguished between the holding and the exercise of a right in addition to presenting several examples as to what constitutes an abuse of a dominant position. The applicant was not accused of any such conduct in the *Cicra* judgment. Thus the applicant never exercised its industrial and intellectual property rights in order to discriminate or to distort competition. The protection which it was thus accorded merely served to compensate it for the high investment costs, which the defendants did not have to pay. The advantage for consumers as suggested by the defendants is, the applicant argues, in practice enjoyed by repairers, who purchase the spare parts and install them, without passing on the cost savings to consumers.

109. The applicant is of the opinion that the *Magill* judgment [49] referred to by the national court confirms the principles set out in the 1988 *Cicra* judgment and that the former even expressly refers to the latter, as well as to the judgment in Case 238/87. [50] In the *Magill* judgment the Court ruled that the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct. [51] Such exceptional circumstances could be the introduction to the market of a new product for which strong potential demand exists, or in the unjustified refusal to grant licenses and finally in the creation of a derivative market in which all competition is excluded. The normal exercise of an exclusive right by the proprietor of a protective right for designs and models, which consists of opposing the manufacture of components by third parties, could, argues the applicant, under no circumstances represent one of the exceptional circumstances referred to in the *Magill* case.

110. With respect to Question 2 the defendants do not refer to the abusive conduct mentioned in the *Cicra* judgment. They argue that what is concerned in the present case is rather to establish whether the systematic granting of rights in respect of ornamental designs for spare parts, or the systematic bringing of legal proceedings against independent spare parts manufacturers might not represent abuse of a dominant position. Second, the defendants argue that one must ask whether the manufacturers — even where their rights are recognised — should not be obliged to

49 — Cited in note 32.

50 — Case 238/87 *Volvo v Erik Veng* [1988] ECR 6211.

51 — Cited in note 32, paragraph 50.

grant licenses for the manufacture of spare parts. An undertaking which enjoys a dominant position has a special responsibility, which is why it should not be allowed to restrict competition in any form.

111. An ornamental design which does not fulfil the necessary requirements and which was obtained in an abusive manner could not, argue the defendants, fulfil the same function as the rights referred to by the Court in the *Cicra* judgment. This is even more the case because it is not a single ornamental design, but rather a widely spread practice which is involved. The rights were furthermore obtained in an abusive manner in France, without examining whether the requirements had been fulfilled, and then extended to other Member States.

112. The defendants finally undertake a detailed analysis of the *Magill* judgment and come to the conclusion that the similarities between the facts which formed the basis of the *Magill* judgment and those in the present case make any further comment superfluous. An abuse of a dominant position must therefore, in the defendants' opinion, be acknowledged.

113. The Belgian and Netherlands Governments also undertake an analysis of the *Volvo* and *Magill* judgments in this context. The Belgian Government comes to the conclusion that there is no reason to change the answer to the question as given in the *Cicra* judgment.

114. The Netherlands Government points out that the order for reference contains only limited information. It considers it improbable, however, that in this case the introduction of a new product is being impeded by the refusal to grant licences. Moreover, research and development require significant investment, so that the proprietor of a protective right has a legitimate interest in recuperating these costs. Were he to be denied this possibility, then significant price increases would ensue. Regarding the question as to whether car manufacturers have reserved a derivative market to the exclusion of all competition, the Netherlands Government is of the opinion that a distinction must be drawn between the market for manufacture of spare parts, the market for their sale and the market for their consumption. It further observes that the manufacture of spare parts is protected by exclusive rights in respect of ornamental designs. Regarding the sale of spare parts, the Netherlands Government refers to Regulation (EC) No 1475/95. [52] The lawfulness of exercising a dominant position must be judged according to whether or not the freedom of the (authorised) distributors and other sellers is guaranteed.

115. The Netherlands Government further observes that it would seem that the manufacturers had reserved the market for the consumption of spare parts. However, such parts should also be available to independent repairers. The Government observes that, in the final analysis, it is for national courts to assess whether the facts allow one to determine that there is abuse of a dominant position.

52 — Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1995 L 145, S. 25). (Article 85 of the EC Treaty, mentioned in the title of the regulation, is now Article 81 EC.)

116. By way of answering the second question the Commission, finally, refers to the 1988 *Cicra* judgment as well as a further judgment from the same year, namely the *Volvo* judgment in Case 238/87. It comes to the conclusion that, on the basis of the very sparse information contained in the order for reference, the applicant cannot be accused of conduct of the kinds listed as abusive in the above mentioned cases. Furthermore, the Commission observes that the scope of the questions referred to the Court in this case is much more restricted than in the *Volvo* case. Question 2 must therefore be answered to the effect that there is no abuse of a dominant position.

Opinion

117. The wording of this question is also largely similar to that of the second question in the *Cicra* case. Reference must therefore firstly be made to that judgment, in which the Court came to the conclusion that the simple acquisition of rights in respect of ornamental designs for bodywork components for automobiles did not constitute the abuse of a dominant position within the meaning of Article 86 of the Treaty. As examples of abusive conduct in the exercise of such exclusive rights the Court named the arbitrary refusal to deliver spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation, provided that such conduct is liable to affect trade between Member States. Such conduct is not apparent in the present case, insofar as the sparse information contained in the order for reference can be relied upon. In the present proceedings Question 2 should therefore be answered in the same manner as in the previous judgment.

118. The defendants, however, also consider it an abuse of a dominant position that exclusive protective rights are granted in respect to spare parts, which do not, in themselves, have any independent aesthetic value. As has been stated several times, the establishment of requirements for conferring protective rights in respect of designs and models is a matter for Member States. Where a manufacturer obtains the protective rights in respect of bodywork components pursuant to the rules of a Member State, then this does not constitute abusive conduct, even though the defendants are of the opinion that the components in question do not deserve protection. Directive 98/71 did not alter this situation, as Article 14 provides that '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' for as long as amendments to the directive are not adopted on a proposal from the Commission.

119. With respect to the distribution of compulsory licences as mentioned by the

defendants, the Court ruled, in Case 238/87,[53] also in 1988, that 'the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without its consent, products incorporating the design constitutes the very subject-matter of his exclusive right. It follows that an obligation imposed upon the proprietor of a protected design to grant to third parties, even in return for a reasonable royalty, a licence for the supply of products incorporating the design would lead to the proprietor thereof being deprived of the substance of his exclusive right, and that a refusal to grant such a licence cannot itself constitute an abuse of a dominant position.'[54] It would follow that also the applicant in the present case would not be obliged to grant compulsory licences.

120. The defendants, however, invoke the *Magill* case in order to argue that the abuse of a dominant position must be acknowledged in the present case. The following facts formed the basis of the *Magill* case: three television stations whose programmes could be received by most households in Ireland and between 30 and 40% of households in Northern Ireland allowed only their own programme listings to be published and opposed any reproduction thereof by third parties by claiming copyright protection for their own weekly programme listings under national law. Either they published their own weekly television guide, or they did so through a company established for this purpose. Thus at the material time no comprehensive weekly television guide existed in Ireland or in Northern Ireland.[55]

121. The Court of First Instance had ruled that, while it was plain that the exercise of the exclusive right to reproduce a protected work was not in itself an abuse, that did not apply when, in the light of the details of each individual case, it was apparent that this right was being exercised in such ways and circumstances as in fact to pursue an aim manifestly opposed to the objectives of Article 86. In that event, the copyright could no longer be considered as being exercised in a manner which corresponded to its essential function, within the meaning of Article 36 of the Treaty, which was to protect the moral rights in the work and ensure a reward for the creative effort, while respecting the aims of, in particular, Article 86. From this the Court of First Instance concluded that the primacy of Community law, particularly as regards principles as fundamental as those of the free movement of goods and freedom of competition, prevailed over any use of a rule of national intellectual property law in a manner contrary to those principles.[56]

122. The Court of First Instance acknowledged the existence of such abusive conduct, in that the television companies, by

53 — Case 238/87, cited in note 50.
54 — Ibid., paragraph 8.
55 — *Magill*, cited in note 32, paragraph 6 et seq.
56 — Ibid., paragraph 28.

reserving the exclusive right to publish their weekly television programme listings, were preventing the emergence on the market of a new product, namely a general television magazine likely to compete with their own magazines. They were thus using their copyright in the programme listings in order to secure a monopoly in the derivative market of weekly television guides in Ireland and Northern Ireland. This judgment was upheld on appeal by the Court of Justice.

123. Even if a distinction between the existence and the exercise of an industrial property right is no longer drawn to the extent that restrictions on the free circulation of goods are considered justified by the function of trademark law, [57] the Court again confirmed in the *Magill* ruling, in which it referred to the *Volvo* judgment, that in the absence of Community standardisation or harmonisation of laws, determination of the conditions for granting protection of an intellectual property right is a matter for national rules. Furthermore, the exclusive right of reproduction forms part of the author's rights, so that refusal to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position. [58] The Court then goes on to state — again referring to the *Volvo* judgment — that the exercise of an exclusive right by the proprietor may, in exceptional cases, involve abusive conduct. [59] Thus the *Magill* judgment did not bring about any change to the case-law in comparison with the *Volvo* judgment. In the latter case the Court had already ruled that a refusal to grant such a licence in the case of automobile spare parts does not in itself constitute abuse of a dominant position. [60]

124. For the particular circumstances of the *Magill* case the Court of Justice confirmed the existence of abusive conduct. In doing so it particularly emphasised the fact that there was, according to the findings of the Court of First Instance, no actual or potential substitute for a weekly television guide which would have enabled users to decide in advance which programmes they wished to follow and arrange their leisure activities accordingly. Moreover, it was pointed out that the Court of First Instance had established that there was a specific, constant and regular potential demand on the part of consumers. [61]

125. The issue in the present case is, however, not that the exercise of protective rights impeded the introduction of a completely new product. Automobile spare parts cannot represent such a new product, because they must be identical to the original components. For this reason, one cannot deduce from the *Magill* judgment that Question 2 must be answered in any other way than in the *Cicra* and *Volvo* judgments in 1988.

57 — Case C-10/89 *CNL-SUCAL* v *HAG GF* [1990] ECR I-3711.

58 — *Magill*, cited in note 32, paragraph 49.

59 — Ibid., paragraph 50.

60 — Case 238/87, cited in note 50, paragraph 8.

61 — *Magill*, cited in note 32, paragraph 52.

126. In summary, one can affirm in respect of Questions 1 and 2, that Articles 30 to 36 of the Treaty are to be interpreted as not preventing the proprietor of an industrial or intellectual property right in a Member State from exercising such an absolute right in order to prevent third parties from manufacturing, distributing and exporting into another Member State components which, taken as a whole, constitute the bodywork of an automobile already on the market, that is to say, components intended for sale as spare parts, when this right is not exercised in a discriminatory manner.

127. It is likewise true that the mere acquisition of an ornamental design right in respect of automobile bodywork components does not constitute abuse of a dominant position within the meaning of Article 86 of the Treaty. The same applies for the exercise of the exclusive right inherent to such protective rights, insofar as this does not entail abusive conduct such as setting prices for spare parts at an unfair level or the arbitrary refusal to deliver spare parts to independent repairers.

128. As has already been mentioned, Directive 98/71 on the legal protection of designs has not introduced any changes to the legal position in regard to spare parts, because a transitional period has expressly been provided for them, during which time the Member States are to retain their existing legal provisions. [62] This constitutes a so-called stand-still clause, which — for as long as the directive is not amended — allows changes in national provisions to take place in one direction only, namely when such changes facilitate trade liberalisation.

129. When making the planned future amendments to the directive, the legislature will have to examine whether the granting of compulsory licences should not indeed be taken into consideration. This would seem especially appropriate because not all spare parts play an important role in respect to the external appearance of an automobile, and because the intellectual achievement of the design of each component also tends to vary and may, in individual cases, not be of a standard which would justify a restriction of free trade. Yet for as long as a corresponding European regime has not been adopted, one must accept the result as outlined above. This means that — on the basis of the limited information provided — the French court cannot be said to have wrongly interpreted Articles 30 to 36 and 86, and moreover — even if this had been the case — it would not have contravened general fundamental legal principles severely enough to be considered a violation of public policy.

62 — Article 14 of Directive 98/71.

F — Conclusion

130. In light of the foregoing considerations, the following answer to the questions submitted to the Court is suggested:

A judgment of a court of a Member State is not contrary to the public policy of another Member State within the meaning of Article 27(1) of the Brussels Convention because it recognises an industrial or intellectual property right in respect of components which, taken as a whole, constitute the bodywork of a car already on the market, and thereby protects the proprietor of such an exclusive right by preventing third parties, that is, economic operators of another Member State, from manufacturing and distributing those components in the Member State in which the judgment was given and from importing them into or exporting them from that Member State and imposes sanctions on such conduct. This also applies where the legal order of the other Member State — the State in which enforcement is sought — does not provide such protection, or where the judgment whose enforcement is sought interprets Community law erroneously, since there is a violation of public policy only in exceptional cases, namely where fundamental legal principles are contravened.