OPINION OF ADVOCATE GENERAL STIX-HACKL delivered on 27 May 2004 [1]

I — Introduction

1. In the present case, the Court of Justice is once again called upon to interpret Article 7 (1) of Directive 89/104/EEC [2] (hereinafter 'Directive 89/104') in relation to the principle of the EEA-wide exhaustion of the rights conferred by a trade mark.

2. In the main proceedings, marked goods were manufactured outside the EEA and imported into the EEA by the trade mark proprietor, or in any event by companies associated with the proprietor. Subsequent sales of those goods were made partly by the associated companies and partly by third parties, and it is not disputed that the sales were made within the EEA. The trade mark proprietor having brought proceedings for infringement of the mark with a view to exercising control over those sales within the EEA, the national court raised the question whether, and if so from what time, the rights of the proprietor are or were to be treated as exhausted.

3. Against that background, the national court is essentially asking whether the mere importation of the marked goods into the EEA is to be regarded as the putting onto the market which gives rise to exhaustion, or whether this should instead be treated as occurring as a result of later acts of the trade mark proprietor.

II — Legal framework

4. Article 5 of the Directive provides in extract:

'Rights conferred by a trade mark

1. The registered trade mark shall confer on the proprietor exclusive rights therein. The

1 — Original language: German.

2 — 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).

proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

(a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered;

...

3. The following, inter alia, may be prohibited under paragraphs 1 and 2:

...

(b) offering the goods, or putting them on the market or stocking them for these purposes under that sign, or offering or supplying services thereunder;

(c) importing or exporting the goods under the sign;

...'.

5. Article 7 of the Directive is headed 'Exhaustion of the rights conferred by a trade mark'. Article 7(1) states:

'The trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent.'

6. Under Article 65(2) in conjunction with paragraph 4 of Annex XVII to the Agreement on the European Economic Area, Article 7(1) of the Directive was amended for the purposes of the Agreement by substituting the words 'in a Contracting State' for the expression 'in the Community'.

III — The facts, the main proceedings and the questions referred

7. Peak Holding AB (hereinafter 'Peak Holding') is the owner of a number of trade marks

registered in Sweden or in the Community. The right to use the trade marks was transferred to a related company Peak Performance Production AB (hereinafter 'Peak Production'), which produces and sells garments and accessories under those trade marks in Sweden and abroad.

8. In September 2000, Handelskompaniet Factory Outlet i Löddeköpinge AB, the predecessor of Axolin-Elinor AB (hereinafter 'Axolin-Elinor'), offered a consignment of approximately 25 000 garments with Peak Holding's trade mark for sale to consumers in its stores, and advertised the offer in newspapers. The garments in the consignment were produced outside Europe on Peak Production's behalf.[3] They were imported into Europe for the purposes of sale and in 1996-1998 were included in Peak Production's standard range.

9. It is common ground between the parties to the main proceedings that 70% of those garments were displayed for sale to consumers in the stores during that period. While Axolin-Elinor claimed that those garments were displayed for sale in independent stores, Peak Holding submitted that the sales had been made in Peak Production's own stores.

10. In November and December 1999, all the garments in the consignment in question were available for sale to consumers in Copenhagen in Base Camp, the store supplied by Peak Production's sister company, Carli Gry Denmark A/S. Peak Production then sold the remainder of the garments to the French company COPAD International. Peak Production claims that it was a condition of the sale that the consignment should not be resold in countries in Europe other than Slovenia and Russia, except that 5% of the total quantity could be sold in France.

11. Axolin-Elinor expressly denies that any such restriction was agreed upon, and contends instead that it acquired the consignment from the Swedish company Truefit Sweden AB.

12. The parties do not dispute that the consignment in question did not leave the EEA from the time when it left Peak Production's warehouse in Denmark until it was delivered to Axolin-Elinor.

3 — It is not possible to establish with certainty from the order for reference whether the word 'Europe' refers only to EEA Contracting States. It is assumed for the purposes of this Opinion that the consignment in question was manufactured outside the EEA.

13. Asserting that the marketing that Axolin-Elinor had carried out infringed Peak Holding's trade mark right, Peak Holding brought an action in October 2000 before the Lunds tingsrätt (Lund District Court). The Tingsrätt dismissed the action, holding that the goods had been put on the market by virtue of the fact that they had been offered for sale to consumers in the Base Camp store and that the trade mark right could not be restored after that event. Peak Holding appealed against the judgment of the Tingsrätt to the Hovrätt över Skåne och Blekinge (Court of Appeal for Skåne and Blekinge).

14. As that court was of the opinion that an interpretation of Article 7(1) of Directive 89/104 was necessary for a resolution of the dispute, it decided to stay the proceedings and to refer the following questions for a preliminary ruling:

1. Are goods to be regarded as having been put on the market by virtue of the fact that the trade mark proprietor:

   (a) has imported them into the common market and paid import duty on them with the intention that they be sold there?

   (b) has offered them for sale in the trade mark proprietor's own shops or those of a related company within the common market but a sale of the goods has not taken place?

2. If goods have been put on the market under one of the above alternatives and exhaustion of the trade mark right thereby occurs without there having been a sale of the goods, can a trade mark proprietor interrupt exhaustion by returning the goods to a warehouse?

3. Are goods to be regarded as having been put on the market by virtue of the fact that they have been sold by the trade mark proprietor to another company in the internal market, if, upon the sale, the proprietor imposed a restriction on the buyer under which he was not entitled to resell the goods in the common market?

4. Is the answer to question 3 affected if the trade mark proprietor, upon selling the consignment to which the goods belonged, gave the buyer permission to resell a small part of the goods in the

common market but did not specify the individual goods to which that permission applied?

IV — Legal analysis

15. The first question asks in particular at what precise time goods bearing a trade mark are to be regarded as having been 'put on the market'. The second question appears to be supplementary to the first in that it applies if goods are to be regarded as having been put on the market as a result of the acts referred to by the national court in the first question. As the first two questions are closely connected, I should like to consider them together.

16. The third and fourth questions referred concern the relationship between the criterion of putting goods on the market and that of the consent provided for in Article 7(1), with the fourth question merely addressing a particular form of that, possibly decisive, consent. Both questions should therefore be considered together.

A — *The first and second questions*

17. The first and second questions essentially require that a definition of the concept of putting on the market be provided that will enable it to be determined at what time goods bearing a trade mark are to be treated as if they had been put on the market in the EEA by the trade mark proprietor himself. That point is of great practical importance. On its solution will depend in particular the analysis under trade mark law of intra-group transactions [4] and of ancillary transactions. [5]

18. It should be noted at the outset that the rights conferred by a trade mark are stated in Article 5 of Directive 89/104 to be exclusive. Article 5(3) lists the rights of the trade mark proprietor in detail. Under Article 5(3)(b), those rights include the right to prohibit offering goods or putting them on the market under that sign or stocking them for those purposes. According to settled Community case-law, the fundamental rights of the proprietor include the right to control

4 — Is, for example, the exclusive right of the trade mark proprietor to be treated as exhausted where he has disposed of goods bearing the mark to a related company?

5 — Is, for example, the exclusive right of the trade mark proprietor to be treated as exhausted where he has delivered goods bearing the mark to a forwarding agent?

the place and time of the putting of goods on the market in the EEA of goods bearing the mark. [6]

19. The principle of Community-wide exhaustion embodied in Article 7(1) of Directive 89/104 represents a balancing of interests between the free movement of goods on the one hand and the exercise of the rights conferred by a trade mark on the other. Without that principle, the proprietor would have the right to prevent goods bearing the mark being put onto the market in a particular Member State where he himself or a third party with his consent had put the same goods on the market in another Member State. That would materially affect the functioning of the internal market. In the interests of a properly-functioning internal market, the principle of Community-wide exhaustion, now contained in Article 7(1) of Directive 89/104, thus enables the principle of the territorial scope of the protection afforded by national trade marks to be overcome. [7] Because a balancing of interests is achieved, the trade mark proprietor is given the right to decide when the goods are put on the market in the EEA for the first time, [8] but is denied any trade mark control over the subsequent distribution of the goods.

20. A particular feature of the (partial) harmonisation of national trade mark laws under Directive 89/104 is that the principle of the Community-wide exhaustion of rights, which was originally developed in the context of the internal market, has also acquired importance for trade with non-Member States. [9] The Court of Justice has made it clear in that regard that the putting of goods on the market outside the EEA does not exhaust the trade mark proprietor's right to oppose the importation of those goods without his consent and has concluded from that that 'the Community legislature has allowed the proprietor of the trade mark to control the initial marketing in the EEA of goods bearing the mark' [10] without, however, examining the spirit and purpose of the principle of exhaustion beyond the — irrelevant in the context — considerations of the proper functioning of the internal market. [11]

6 — And indeed, because of the principle of EEA-wide exhaustion, even if the goods were first put on the market by the trade mark proprietor outside the EEA — see Fezer, *Markenrecht*, Third edition, Munich, 2001, § 24 Markengesetz, point 93. For a critical analysis, see Mr Justice Laddie, reference for a preliminary ruling in Joined Cases C-414/99 to C-416/99 *Davidoff and Others* [2001] ECR I-8691 (extracts of which are published in IIC Vol. 30, No 5/1999, p. 567), paragraph 36: 'In my view this illustrates how *Silhouette* has bestowed on a trade mark owner a parasitic right to interfere with the distribution of goods which bears little or no relationship to the proper function of the trade mark right. It is difficult to believe that a properly-informed legislature intended such a result, even if it is the proper construction of Article 7(1) of the Directive.'

7 — With regard to the role of the exhaustion principle in the balancing of interests, see also my Opinion in Joined Cases C-414/99 to C-416/99 *Davidoff and Others* [2001] ECR I-8691, point 80 et seq.

8 — That point was expressly made in the judgment in *Davidoff and Others*, cited in footnote 7, paragraph 33 and the case-law cited there.

9 — See also my Opinion in *Davidoff and Others*, cited in footnote 7, points 78 and 84 and the observations made in footnote 6.

10 — Judgment in *Davidoff and Others*, cited in footnote 7, paragraph 33. See also in that regard the judgment in Case C-173/98 *Sebago and Maison Dubois* [1999] ECR I-4103, paragraph 21.

11 — See also Thomas Hays in *Parallel Importation under European Law*, London, 2004, points 7.55, 10.02 et seq. and 10.11 et seq.

21. It should lastly be noted at the outset that a strengthening of the rights of the trade mark proprietor, for example by deferring the time of the act which is deemed to amount to exhaustion, would in principle create new opportunities for restricting the free movement of goods within the EEA.

22. The answer to the first two questions relating to the criterion of putting on the market under Article 7(1) of Directive 89/104 requires that that provision be interpreted in accordance with the customary methods of interpretation. Those methods require that the suggested meanings proposed by the national court in the first question should be considered.

Literal interpretation of Article 7(1) of Directive 89/104

23. Notwithstanding any differences that there may be in the different language versions of Article 7(1) of Directive 89/104, [12] the Swedish Government rightly points out that, if one takes everyday language as a basis, the words used in the provision would mean that an act of the trade mark proprietor that is directed towards the market is necessary in any event if the criterion of putting on the market is to be regarded as satisfied. That is also confirmed by a historical consideration. In the leading case of *Centrafarm* v *Winthrop*, [13] the Court stated: 'Such an obstacle [to the free movement of goods] is not justified when the product has been *put onto the market* in a legal manner in the Member State from which it has been imported, by the trade mark proprietor himself or with his consent, so that there can be no question of abuse or infringement of the trade mark' (emphasis added).

24. It follows from the importance of the direction of the trade mark proprietor's act, that is to say towards the market, coupled with the exhaustion of rights conferred by the mark under Article 7(1) of Directive 89/104, that the wording of that provision, of itself, means that internal transactions, such as the transfer of goods bearing the mark to a retail subsidiary, or preparatory acts, such as the importation by the proprietor of goods from non-member countries which have been manufactured there on his behalf, cannot be considered to constitute the putting on the market of the goods bearing the mark.

12 — While the German version uses the term 'Inverkehrbringen' (putting into trade or circulation), the Dutch ('in de handel zijn gebracht'), the French ('mis dans le commerce'), the Italian ('immessi in commercio') and the Spanish and the similarly-worded Portuguese versions ('comercializado' and 'comercializados') refer to sales made in course of trade, whereas the Danish ('markedsført'), English ('put on the market') and Swedish ('marknaden') versions refer specifically to the market.

13 — Case 16/74 [1974] ECR 1183, paragraph 10.

25. As regards goods bearing the mark manufactured outside the EEA, it may also be observed that the trade mark proprietor need not necessarily, on their importation into the EEA, have yet decided how they are to be sold for the first time in the EEA. If the mere importation of and customs clearance on the initiative of the trade mark proprietor of goods bearing a trade mark were to be sufficient to exhaust the rights conferred by the mark, the proprietor would, in the final analysis, have no control over the first sale of the goods bearing the mark in the EEA.

26. If one therefore treats the mere importation into the EEA as being irrelevant to the question when goods are put on the market, the point remains open whether the offering of goods in the EEA amounts to their being *put on the market*, or whether it is instead necessary that they be sold, or at least that power to dispose of them is transferred under an arrangement that is more than a provisional one, for them to be treated as having been put on the market.

27. It hardly seems possible to resolve this question on the basis of a literal interpretation of Article 7(1) of Directive 89/104, as both the offering and sale of the marked goods are acts which are 'directed towards the market'. The best that could be stated — as, for example, the Swedish Government has observed — in the context of a literal interpretation is that to treat the relevant point as being the sale of the goods is not convincing, inasmuch as the goods are in fact taken off the market precisely because they are sold. Axolin-Elinor adopts a similar approach when it contends that the offering of goods in a shop clearly indicates that they are on the market.

Systematic interpretation of Article 7(1) of Directive 89/104

28. From a systematic point of view, it is necessary to give primary consideration to the relationship between Article 5(3) and Article 7(1) of Directive 89/104. Article 5(3)(b) provides that the trade mark proprietor may, inter alia, prohibit 'offering the goods, or putting them on the market or stocking them for these purposes under that sign ...'. Those words suggest that a distinction is to be drawn between the mere offering of goods for sale and their being put on the market.

29. It is however open to question whether putting on the market under that provision is the same as the identical expression in Article 7(1). The fact that the same words are used and that both provisions distinguish between acts directed towards the market and those which are purely internal in character support that approach. [14] The fact that the provisions serve different purposes

14 — See, in that regard, in relation to the German law transposing the Directive, Ingerl and Rohnke, *Markengesetz*, Second edition, Munich 2003, § 24, point 18.

argues against such a uniform interpretation; while Article 5 contains detailed provisions governing the extent of the protection provided by the exclusive rights in the mark, Article 7(1) contains a restriction on those exclusive rights. [15]

30. A systematic interpretation of Article 7 (1) of Directive 89/104 accordingly fails to provide a clear answer.

Teleological interpretation of Article 7(1) of Directive 89/104

31. The starting point for a teleological interpretation of Article 7(1) of Directive 89/104 is the balancing function of the principle of exhaustion of rights mentioned above. [16] Any interpretation must accordingly be discounted that would restrict the right of the trade mark proprietor to control the first putting on the market in the EEA of the goods bearing the mark. It should be noted at the same time that the limitations on the proprietor's rights under Article 7(1) of Directive 89/104 not only serve the proper functioning of the internal market, but also assist legal certainty inasmuch as they prevent the proprietor having control over all subsequent sales, thereby enabling trade mark law to protect purchasers in good faith.

32. It is also necessary in the context of a teleological interpretation to ensure that the proprietor may exercise his exclusive rights to the extent mentioned [17] and may benefit economically from them, without legal certainty being threatened thereby.

33. It was stated above that those requirements would not be satisfied if the goods bearing the trade mark were to be treated as having been put on the market merely because of their being imported into the EEA. [18]

34. Although both the Commission and the Swedish Government accept that the opportunity to derive economic benefit from the mark is the determining factor, they draw different conclusions from the point. While the Commission is of the view that the economic benefit referred to can only arise when the goods bearing the mark are sold,

15 — See in relation to the German law transposing the Directive, Fezer, *Markenrecht*, cited in footnote 6, paragraph 7d and Ströbele and Hacker, *Markengesetz*, Seventh edition, Cologne 2003, § 24, point 33 and the case-law cited therein.

16 — See point 19 above.

17 — See point 19 above.

18 — See point 24 et seq. above.

the Swedish Government takes the view that it is sufficient that the trade mark proprietor be in a position to offer his goods to the public, as in such a case — irrespective of whether the goods are actually sold — he could in any event control the circumstances in which the first sale of the goods occurred.

35. The opinion of the Swedish Government can certainly be supported from an economic perspective, which would equate putting on the market with marketing in the sense of introducing the goods to the market, and thus also interpret the completion of the sale of the goods as leaving the market. If the market is defined as a place where services are freely traded for consideration, in which the price is established by supply and demand, then it must be pointed out that the interpretation favoured by the Swedish Government is by no means obligatory. Prices are established in the market through the interplay of supply and demand and are only finally set when goods are sold. There is thus something to be said in favour of the interpretation favoured by the Commission. Only that interpretation does justice to the concept of the market as a place in which services are freely traded for consideration. [19]

19 — See also, in another context, the Opinion of Advocate General Léger in Case C-371/02 *Björnekulla Fruktindustrier* [2004], not yet published in the ECR, point 40: 'The word "marketplace" implies the interface of supply and demand or an exchange, a transaction ...'.

36. According to Axolin-Elinor, it can nevertheless not be disputed that goods offered in a shop have been put on the market. It is also the case that if the relevant point is treated as being the offer to final consumers, the principal function of the trade mark, that is to say the guarantee of origin, will be maintained.

37. There are many reasons why that approach is not convincing. Even if it must be accepted that an act directed towards the market is involved, the approach fails to give adequate consideration to the interests of the trade mark proprietor, as the protection of his investment in the mark cannot be realised in economic terms purely by offering goods bearing the mark for sale. [20]

38. Practical considerations are also against treating the offering of the goods as being the relevant point. Peak Holding argues in that regard that it is difficult to treat the offer for sale as being the relevant point, since, where goods are stored in warehouses, it is unclear which of them are subject to exhaustion. Reference should also be made in that

20 — It should be noted in that context that while, in its judgment in Case C-206/01 *Arsenal Football Club* [2002] ECR I-10273 the Court confirmed the traditional function of the mark as an indicator of the origin of the goods, at the same time, following the line of reasoning of Advocate General Ruiz-Jarabo Colomer (Opinion in Case C-206/01, point 46), it emphasised its growing importance as a vehicle for investment and publicity. Seen from that point of view, the approach of Axolin-Elinor appears unduly restrictive.

context to the judgment in *Sebago and Maison Dubois*, [21] which states: '... the rights conferred by the trade mark are exhausted only in respect of the individual items of the product which have been put on the market with the proprietor's consent in the territory there defined. The proprietor may continue to prohibit the use of the mark in pursuance of the right conferred on him by the Directive in regard to individual items of that product which have been put on the market in that territory without his consent'. It follows from that judgment that in order to decide whether exhaustion has occurred, it must be established in any event which particular goods have been put on the market — whether by the proprietor himself or with his consent. If it were sufficient for goods to be offered for them to be put on the market, it would be unclear how to apply the necessary tests with adequate legal certainty to goods stored in warehouses which may possibly not be intended for sale.

39. It should also be pointed out that to treat the time of the offer as being the relevant point would make it impossible to prevent parallel imports from non-member countries where the goods were in the EEA first of all and failed to find a buyer there. In *Silhouette International Schmied* v *Hartlauer Handelsgesellschaft*, [22] where those facts arose, the Court, as is well known, considered the permissibility of a national rule providing for the international exhaustion of trade mark rights, which in turn logically supposes that the rights conferred by a trade mark were not to be treated as already exhausted when goods are offered in a Member State.

40. If one therefore treats — from an economic point of view — the disposal of the goods bearing the mark as being the time which is relevant to their being put on the market, [23] it must finally be determined from a legal point of view whether a change of ownership is required. The order for reference suggests this, as the first question refers to there being no 'sale' of the goods. The Commission has also argued — particularly at the hearing — in favour of 'sale' as being the relevant factor.

41. It should be pointed out in that regard that a change of ownership also leaves open the question whether the trade mark pro-

21 — Cited in footnote 10 (paragraph 19).

22 — Case C-355/96 [1998] ECR I-4799.

23 — Which could also be inferred from, for example, the judgment in Case C-115/02 *Rioglass and Transremar* [2003] ECR I-12705, paragraph 28, which states that a transit operation (which consists in transporting goods lawfully manufactured in a Member State to a non-member country by passing through one or more Member States) 'by definition does not constitute a placing on the market [in the sense of putting a product on the market — see also paragraph 25 of that judgment]'.

prietor can obtain an economic benefit from the mark. In other words, the change of ownership of the marked goods must be irrelevant if the necessary economic approach is to be followed. [24]

42. If a change of ownership is irrelevant, it becomes necessary to treat the transfer of the actual right of disposal of the goods as being the relevant point. Goods are accordingly put on the market when a third party, whose decisions in relation to the sale of the goods cannot be ascribed to the trade mark proprietor, for example because that third party is objectively independent, [25] has acquired the actual right of disposal of the goods.

43. I therefore propose that the answer to the first question should be that goods bearing a trade mark are not put on the market merely by reason of their importation into the EEA and customs clearance, nor by reason of their being offered for sale in shops belonging to the trade mark proprietor or undertakings associated with him. Goods are instead put on the market in the EEA within the meaning of Article 7(1) of Directive 89/104, with the effect that the rights are exhausted, when an independent third party has acquired the right of disposal of the goods bearing the mark.

44. In the light of that proposed answer, it is no longer necessary to consider the second question.

B — *The third and fourth questions*

45. The last two questions essentially ask whether and to what extent a contractual expression of will by the trade mark proprietor with regard to the sale of the goods bearing the mark is relevant to the criterion of consent under Article 7(1) of Directive 89/104.

46. Underlying that question is the notion that if a breach of that contractual expression

24 — When goods bearing a trade mark are sold under reservation of title, the transfer of the right of disposal precedes a change in legal ownership. To that extent, the reservation of title has no effect on the exhaustion provided for under trade mark law. Where goods are transferred by way of security, it is doubtful in any event whether an act directed towards the market is involved, as the assignor remains in possession of the goods in question. See to that effect Mulch, *Der Tatbestand der markenrechtlichen Erschöpfung*, Cologne 2001, p. 20.

25 — This does not as a rule apply to transactions between related companies or to transactions within a distribution system.

of will can be proved there would be no consent within the meaning of Article 7(1) of the Directive, so that the question whether the marked goods had been put on the market in the EEA would no longer be relevant.

47. It is clear from the order for reference that the trade mark proprietor Peak Holding wished the great majority of the remaining items to be sold in non-member countries. Peak Holding inserted a provision to that effect in the contract with the French company COPAD. The third and fourth questions are clearly inspired by Peak Holding's argument that the breach of that provision imposing a territorial restriction on sales would amount to a failure of consent within the meaning of Article 7(1) of Directive 89/104, thus precluding the exhaustion of the rights in the mark.

48. That approach misunderstands the legal nature of exhaustion as a restriction on the rights conferred by the mark *which arises by operation of law*, as the Swedish Government rightly submits. Both semantically and from the point of view of its spirit and purpose, the concept of exhaustion requires that a distinction be made between putting on the market by the trade mark proprietor himself and putting on the market by a third party — but with the proprietor's consent.[26] The concept of consent in Article 7(1) of Directive 89/104 represents a criterion of attributability which allows it to be established whether the putting on the market of goods in the EEA by a third party is to be attributed to the trade mark proprietor.[27]

49. Where the goods bearing the mark are put on the market in the EEA by the trade mark proprietor himself, exhaustion of rights arises by operation of law, irrespective of the contract between the proprietor and the purchaser. Breach of any territorial restrictions on sale which the proprietor may have imposed on a purchaser of the goods in relation to their sale in the EEA may give rise to claims under the contract, but is irrelevant in principle under trade mark law.

50. A reference also to the judgment in *Davidoff and Others* [28] alters nothing in that analysis. There, the Court held, inter alia, that 'a rule of national law which proceeded upon the mere silence of the trade mark proprietor would not recognise implied

26 — See also my Opinion cited in footnote 7, point 42.

27 — As long ago as its judgment in Case C-9/93 *IHT Internationale Heiztechnik* v *Ideal-Standard* [1994] ECR I-2789, paragraph 43, the Court made it clear that 'the consent implicit in any assignment is not the consent required for application of the doctrine of exhaustion of rights'.

28 — Cited in footnote 7.

consent but rather deemed consent. This would not meet the need for consent positively expressed required by Community law'.[29] It can indeed be concluded from that that the consent of the trade mark proprietor within the meaning of Article 7(1) of Directive 89/104, that is to say the consent to the putting of the goods on the market in the EEA by a third party, cannot be inferred merely from the absence of territorial restrictions on sale in the contract between the trade mark proprietor and his purchaser.

51. Whether, conversely, the insertion of a territorial restriction on sales in that contract excludes the consent of the trade mark proprietor within the meaning of Article 7(1) of Directive 89/104 as a matter of principle, however, is only relevant in so far as exhaustion is to be deduced from that consent. That question arises where goods are reimported from non-member countries.[30] Such issues do not arise in the main proceedings, where the question is only at what time the marked goods were put on the market in the EEA by the trade mark proprietor himself.

52. It is not necessary to consider whether the territorial restriction on sales in the contract between Peak Holding and COPAD is compatible with competition law, as that point is of no relevance in answering the third question.

53. As regards the fourth question, suffice it to observe that if the presence of a territorial restriction on sales is of no relevance to the question whether or not exhaustion arises in a case such as that in the main proceedings,[31] the same must apply *a fortiori* where that provision is used in a particular form.

54. The answer to the third and fourth questions should therefore be that where goods bearing the mark are sold to another undertaking within the EEA, it is irrelevant to the consideration of when exhaustion arises under Article 7(1) of Directive 89/104 whether and to what extent the trade mark proprietor has imposed territorial restrictions on sale on the purchaser.

29 — Op. cit., paragraph 58.

30 — If the marked goods have not yet been put on the market in the EEA by the proprietor, but have none the less been imported by a third party into the EEA, for example by way of grey reimports, the question that arises in relation to a possible exhaustion of rights conferred by the mark is not whether the goods were put on the market in the EEA by the trade mark proprietor himself, but whether they were put on the market in the EEA by the third party with his consent.

31 — See point 51 above.

V — Costs

55. The costs incurred by the Swedish Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

VI — Conclusion

56. I therefore propose that the Court should answer the questions referred as follows:

1. Article 7(1) of Directive 89/104/EEC is to be interpreted as meaning that goods bearing a trade mark are not put on the market merely by reason of their importation into the EEA and customs clearance, nor by reason of their being offered for sale in shops belonging to the trade mark proprietor or undertakings associated with him. Goods are instead put on the market in the EEA when an independent third party has acquired the right of disposal of the goods bearing a mark, for example as the result of a sale.

2. Where goods bearing a mark are sold to another undertaking within the EEA, it is irrelevant to the consideration of when exhaustion arises under Article 7(1) of Directive 89/104/EEC whether and to what extent the trade mark proprietor has imposed territorial restrictions on sale on the purchaser.