where such derogations are justified for the purpose of safeguarding the rights which constitute the specific subject matter of this property.

2. The exercise, by the owner of a trade mark, of the right which he enjoys under the legislation of Member State to prohibit the sale, in that State, of a product which has been marketed under the trade mark in another Member State by the trade mark owner or with his consent is incompatible with the rules of the EEC Treaty concerning the free movement of goods within the Common Market. In this connexion, it is a matter of no significance that there exist, as between the exporting and importing Member States, price differences resulting from governmental measures adopted in the exporting State with a view to controlling the price of the product.

3. The owner of the trade mark relating to a pharmaceutical product cannot avoid the incidence of Community rules concerning the free movement of goods for the purpose of controlling the distribution of the product with a view to protecting the public against defects therein.

4. Article 42 of the Act concerning the Conditions of Accession and the Adjustments to the Treaties cannot be invoked to prevent importation into the Netherlands, even before 1 January 1975, of goods put onto the market in the United Kingdom by the trade mark owner or with his consent.

5. Article 85 of the Treaty is not concerned with agreements or concerted practices between undertakings belonging to the same concern and having the status of parent company and subsidiary, if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings.

In Case 16/74

Reference to the Court under Article 177 of the EEC Treaty by the Hoge Raad of the Netherlands for a preliminary ruling in the action pending before that court between

CENTRAFARM BV, with registered office in Rotterdam, with ADRIAAN DE PEIJPER, resident at Nieuwerkerk aan de IJssel,

and

WINTHROP BV, with registered office in Haarlem,

on the interpretation of the rules of the EEC Treaty on the free movement of goods, in conjunction with Article 42 of the Act annexed to the Treaty concerning the accession of the new Member States to the European Economic Community, and on the interpretation of Article 85 of the EEC Treaty, in relation to trade mark rights,

THE COURT

composed of: R. Lecourt, President, C. Ó Dálaigh and Lord Mackenzie Stuart, Presidents of Chambers, A. M. Donner, R. Monaco, J. Mertens de Wilmars, P. Pescatore, H. Kutscher and M. Sørensen (Rapporteur), Judges,

Advocate-General: A. Trabucchi
Registrar: A. Van Houtte

gives the following

# JUDGMENT

## Facts

The decision making the reference and the written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

### I — Facts and procedure

1. Winthrop BV, a wholly-owned subsidiary of the English concern Sterling-Winthrop Group Ltd., markets, in the Netherlands, with the consent of the concern and under the trade mark 'Negram' of which it is the owner in the Netherlands, acidum nalidixicum, a medicinal preparation for which the company Sterling Drug, the parent company of Sterling-Winthrop Group Ltd., owns Dutch patent No 125 254.

Centrafarm imported from England a certain quantity of this medicinal preparation, which it marketed in the Netherlands under the trade mark 'Negram'. This product had been obtained, by an English associate of Centrafarm, from the Sterling-Winthrop Group Ltd., which holds the right to use the trade mark 'Negram' in England.

By importing the goods from Great Britain Centrafarm took advantage of a considerable price differential. It appears that in Great Britain the product is sold for half the price at which it sells in the Netherlands.

2. On 16 June 1971 Winthrop submitted to the president of the Arrondissements-Rechtbank of Rotterdam, sitting in chambers, an application for the immediate adoption of measures of conservation against the actions of Centrafarm and of its director, and requiring them to refrain from any direct or indirect infringement of the trade mark 'Negram', owned by Winthrop. In contrast with Case 15/74, *Sterling Drug*, the president granted the application.

Centrafarm brought an appeal against the order of the president before the Gerectshof (Court of Appeal) at The Hague. That court found in favour of Winthrop, and Centrafarm and De Peijper brought an appeal on a point of law before the Hoge Raad against the judgment of the Gerechtshof.

3. Before deciding further, the Hoge Raad stayed the proceedings and requested the Court of Justice, pursuant

to Article 177 of the EEC Treaty, to give a preliminary ruling on the following questions:

*I. As regards the rules concerning the free movement of goods:*

(a) Assuming that:

1. different undertakings in different countries belonging to the EEC forming part of the same concern are entitled to the use of the same trade mark for a certain product;
2. products bearing that trade mark, after being lawfully marketed in one country by the trade mark owner, are exported by third parties and are marketed and further dealt in in one of the other countries;
3. the trade mark legislation in the lastmentioned country gives the trade mark owner the right to take legal action to prevent goods with the relevant trade mark from being marketed there by other persons, even if such goods had previously been marketed lawfully in another country by an undertaking there entitled to that trade mark and belonging to the same concern,

do the rules set out in the EEC Treaty concerning the free movement of goods, notwithstanding the provisions of Article 36, prevent the trade mark owner from exercising the right mentioned under 3 above?

(b) If the rules concerning the free movement of goods do not in all circumstances preclude the trade mark owner from exercising the right mentioned under (a) 3, is he precluded from so doing if the exercise of that right arises exclusively or partially from an attempt to partition the markets of the relevant countries from each other in relation to the said goods or at least has the effect of thus partitioning those markets?

(c) Can the trade mark owner successfully rely in justification of the exercise of the abovementioned right on the fact that the price differences in the relevant countries, which make it profitable for third parties to market in one country products coming from another country, and give the trade mark owner in that other country an interest in taking action against such practices, are the consequence of governmental measures whereby in the exporting country the prices of those products are kept lower than would have been the case in the absence of those measures?

(d) At any rate where the relevant product is a pharmaceutical product, can the trade mark owner successfully rely in justification of the exercise of his trade mark right in the manner mentioned on the fact that the state of affairs described under (a) prevents him from controlling the distribution of the product, which control is considered by him necessary so that measures for the protection of the public can be taken in the event of defects appearing?

(e) Is it a consequence of Article 42 of the Treaty of Accession that, if the rules of the EEC Treaty relating to the free movement of goods prevent the exercise of a trade mark right as stated above, those rules cannot be invoked in the Netherlands until 1 January 1975 insofar as the relevant goods come from the United Kingdom?

*II. As regards Article 85:*

Can it be stated that the situation described under I (a) involves practices of the kind forbidden by Article 85 of the EEC Treaty, and must an action for infringement as mentioned therein, insofar as it is to be regarded as a consequence of such practices, be held impermissible for this reason?'

4. The interlocutory judgment of the Hoge Raad of 1 March 1974 was registered at the Court on 4 March 1974.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on behalf of Winthrop BV by T. Schaper, of The Hague, Advocate with the Hoge Raad, on behalf of Centrafarm BV and Adriaan de Peijper by L. D. Pels Rijcken, of The Hague, Advocate with the Hoge Raad, and by A. F. de Savornin Lohman, Advocate at Rotterdam, and on behalf of the Commission by its Legal Adviser, Bastiaan van der Esch, acting as agent.

Having heard the report of the Judge-Rapporteur and the opinion of the Advocate-General the Court decided to open the oral procedure without any preparatory inquiry.

## II — Written observations submitted to the Court

*Observations submitted by Winthrop BV*

The company first considers the four judgments given by the Hoge Raad on the subject-matter of the present case, where the Hoge Raad decided that:

— the rights appertaining to a trade mark cannot be exercised to prevent parallel imports of products which have been put into circulation in another country by the trade mark owner himself;

— parallel imports of products put into circulation abroad by other legal persons may be prohibited; this state of affairs does not amount to an abuse of the trade mark, even if the other legal person belongs to the same concern and has been constituted and exercises rights in the trade mark solely for the purpose of preventing parallel imports by means of that trade-mark.

Winthrop BV is opposed to any radical change in this case law. It claims that a modification, leading to a more equitable situation, could be achieved by continued application of the criterion of abuse of rights; it should be established, taking account of all the particular features of each specific case, whether a given use of a right in a specific situation does or does not in fact constitute an abuse of that right.

In relation to this concept it must be borne in mind that:

— on the one hand, attitudes have changed regarding both the imposition of prices by means of a trade mark and the limited significance to be given to the fact that two undertakings belonging to the same concern have different legal personality;

— on the other hand, Winthrop BV has brought its action above all because the behaviour of Centrafarm has made it impossible for it to control the distribution of the product, such control being necessary, in its view, to enable measures to be taken to protect the public in the event of defects appearing in that product.

With regard to the answer to be given to the questions referred by the Hoge Raad, Winthrop BV confines its remarks to an examination of question I (d) in relation to the problem of the 'health and life of humans'.

The company recalls that the fact that the products were not put into circulation in the Netherlands by the company or in its name is not the only fact that it has adduced in support of its action. One of the overriding reasons which prompted it to bring an action was that the behaviour of Centrafarm is preventing it from controlling the distribution of its products.

Such control is necessary first and foremost to enable the company to undertake measures for the protection of the public in the event of a consignment of medicinal preparations proving defective. Such measures generally amount to locating and withdrawing from the market as rapidly as possible

all the medicinal preparations making up the consignment in question.

The very existence of parallel imports renders such control impossible since one or more intermediaries, whose behaviour is beyond the control and the responsibility of the manufacturer, intervene in the process. In this connection the company refers to a statement to this effect made by the Dutch Secretary of State for Public Health on 18 September 1973 in reply to questions put by a member of the Second Chamber.

Moreover, the company notes that as a result of the parallel imports and the manner in which they were effected, the Dutch authorities took measures against Centrafarm for infringement of the Dutch law on the supply of medicinal preparations.

It claims, furthermore, that Article 85 of the EEC Treaty is not applicable in the present case, and refers to the line of argument developed in the statement submitted by Sterling Drug Inc. in Case 15/74. In its opinion, the only other justification for the idea that its action constitutes an abuse of a right may be found in a directly applicable prohibition of behaviour such as to impede trade between Member States. However, according to Article 36 of the EEC Treaty, the 'health and life of humans' is one justification for such behaviour. The loss of all control over the distribution of medicinal preparations adduced by Winthrop concerns the 'specific subject matter' of the protection of 'health' as mentioned at Article 36. Accordingly, the reply to question I (d) should be affirmative.

*Observations submitted by Centrafarm*

Centrafarm first examines the premises upon which the questions of the Hoge Raad are based. The questions referred speak only of a single trade mark in which the various undertakings have a right. But the claims for interim measures made by Winthrop also concern imports effected by Centrafarm from the Federal Republic of Germany of the same products marketed under the trade mark 'Negram'.

The company further claims that the third postulate of the Hoge Raad is hypothetical. That court has not yet reached any decision as to whether the legislation with regard to trade marks in force in the Netherlands gives the owner of the trade mark the right to prevent imports.

On this point Centrafarm notes that according to national law the case-law in various countries has evolved and that the problem raised in this case has already been solved in the Federal Republic, in Switzerland, in France, in Austria and in Sweden at the level of national law on trade marks. It refers to the various judgments given in those States.

As regards Dutch law on the free movement of goods, the company refers to Article 33 of the Uniform Benelux Law on trade marks and mentions a judgment of the Hoge Raad of 14 December 1956.

It is clear from the case-law cited that the supreme courts of these countries are opposed, on the ground of their own national law, to the exercise of trade mark rights for the purpose of partitioning off national markets. The decisions cited are founded upon the limited function of a trade mark right, the objective of which cannot be to ensure that the owner of the right is the exclusive seller of products bearing the trade mark, its sole legal function being to protect the owner and the public from confusion as to the origin of the goods.

In order to reply to the first question referred by the Hoge Raad, reference should be made to an important precedent, namely the Judgment in the Deutsche Grammophon case. The recitals of that Judgment relating to the interpretation of Article 36 of the EEC Treaty are of the highest importance for the present case.

Although it is true that the goods which were put into circulation in the

Netherlands by means of a parallel import did not originate from Winthrop BV itself but from its parent company, it is nevertheless true that the medicinal preparation Negram imported into the Netherlands by Winthrop BV also orginates from its parent company. There is therefore no question of creating public confusion as to the origin of the goods. Since it is the function of a trade mark right to protect the owner against confusion as to the origin of the product, Winthrop BV has in fact exercised its right for an objective other than that for which it was intended.

Question I (a) and question I (b) must therefore be answered in the affirmative. The exercise of a trade mark right in the situation described in question I (a) must, it seems, inevitably result in a partitioning of national markets for the product covered by the trade mark in question.

As regards question I (c), Centrafarm claims that the owner of the trade mark cannot invoke measures adopted by the public authorities whereby prices in the exporting country are kept lower than would have been the case in the absence of those measures. The maintenance of such price differentials does not form part of the essential function of the trade mark right, nor can it be considered to be the 'specific subject matter' of that right, which might accordingly be covered by the exception contained in Article 36, first sentence, of the Treaty.

As regards question I (d), the company states that it is not the objective of a trade mark right to enable the owner better to control the distribution of an article bearing the trade mark on the grounds of possible defects in the product. Medicinal preparations which are marketed not under a trade mark but under their generic name may also be defective. If it were necessary to undertake controls such as that described in the question they would have to be organized otherwise than by invoking a trade mark right to prevent parallel imports.

In relation to the questions concerning Article 85 of the EEC Treaty Centrafarm notes that the situation described clearly shows that national markets within the Community are partitioned off. In view of the state of dependency existing between a parent company and a wholly-owned subsidiary, it is inconceivable that Winthrop BV should have been able to exercise its trade mark right to prevent parallel imports of products manufactured and put into circulation by its parent company in the absence of agreement from the latter. Furthermore, Winthrop BV acquired its right to the trade mark 'Negram' on the basis of one or more agreements concluded with the parent company, as required under the old Dutch legislation on trade marks, since Winthrop BV would otherwise not have been able to exercise on its own account and register under its own name the trade mark 'Negram', which had been affixed to the product by the manufacturer, Sterling-Winthrop Group Ltd.

According to the judgment of 18 February 1971 (Case 40/70, *Sirena,* Rec. 1971, p. 69) the exercise of a trade mark right is prohibited by the Treaty when it is the 'object, means or consequence' of an agreement between undertakings as intended by Article 85 of the Treaty. Centrafarm refers in particular to recital 11 of that Judgment and claims that the latter can be applied word for word to the present situation.

The fact that, in the present case, the undertakings are members of the same concern does not preclude the application of Article 85. It is indeed conceivable that these undertakings do not compete with one another, but the outcome of the abovementioned agreements and the concerted practices pursued by Winthrop BV and by its English parent company was that Winthrop BV acquired in the Netherlands a right in the trade mark 'Negram' and that, by the exercise of that right, it attempted to partition national markets within the Community

in order to maintain different prices on those markets for the product in question. Notwithstanding the fact that the undertakings belong to the same concern, the exercise of the trade mark right in this case is covered by Article 85 of the Treaty. This is made clear by the Judgment of 25 November 1971 (Case 22/71, *Béguelin,* Rec. 1971, p. 949) and especially recitals 12 to 14 of that Judgment.

*Observations submitted by the Commission*

The observations submitted by the Commission on the various questions referred are as follows:

*Question I (a)*

1. A court of one of the Member States before which a trade-mark right was pleaded in justification and which reached a decision involving the prohibition of imports of products coming from other Member States would be in violation of the prohibition contained in Article 30 of the EEC Treaty. Just as in cases involving patents, any exception to this prohibition must be founded upon Article 36, which places all restrictions justified on the grounds of the protection of industrial and commercial property on the same footing, and which admits of those exceptions solely in order to safeguard the rights which form the specific subject matter of that property (Case 78/70, *Deutsche Grammophon).* The question which arises therefore is whether the right to prohibit imports into the Netherlands of products coming from other countries is tied to the very existence of the Dutch trade mark 'Negram'.

The answer must be negative. The existence of a trade mark necessarily implies the exclusive right to be the first to put products bearing that trade mark into circulation. The specific subject matter of that right is to protect the economic situation of the owner of the trade mark and to safeguard the image which the public has of that trade mark.

When the owner of a trade mark transfers the latter he ceases to be alone in having the right to use that trade mark. Products manufactured by the assignee of the trade mark or by a licencee are not fraudulent imitations of the original product. It is no longer possible, on the basis of Article 36, to justify the prevention of imports of products which are not copies but original products.

It is of little importance in this situation whether or not the relevant undertakings belong to the same concern. It is however important to know whether the products have been put into circulation within the Common Market by the owner of the trade mark or with his consent.

2. The Commission refers in general to its observations with regard to questions I (b), (d), (e) and (f) referred by the Hoge Raad in Case 15/74. Nevertheless, it recalls certain points, this time in relation to trade-mark rights.

*Question I (b)*

The determining factor for the application of the prohibition contained in Article 30 is not the intention to partition markets but the fact that such a partition in fact exists. Insofar as the question referred is also concerned to ascertain the limits to Article 36, the Commission further remarks that this provision must be capable of being invoked as an exception to the rule constituted by Article 30, where the products imported have not been put into circulation by persons legally authorized to use a trade mark.

*Question I (c)*

The considerable price differential with regard to the same product as between two countries is not a ground for impeding the importation of products from that country where the level of

prices is lowest by claiming the protection granted by a trade mark.

One of the essential aspects of the Common Market is that it offers the possibility of manufacturing products at the place where production proves to be least expensive. It is true that the establishment of fixed prices in a given Member State or the grant of subsidies to certain undertakings could provoke differences between prices which would have an effect upon trade between Member States. It is however the task of the Community authorities to frustrate such a development, wherever necessary, by introducing, for example, a scheme for the harmonization of legislations.

However, if the Community authorities fail in their duty the national courts are nevertheless not entitled to bring judgments which conflict with the provisions of Article 30 by invoking a trade mark right.

*Question I (d)*

The production and marketing of medicinal preparations give rise to the problem of the control of medicinal preparations which display certain defects. Various measures have already been adopted with a view to solving this problem. As concerns the Netherlands, the legal basis for these measures is Article 18 (2) of the Decree concerning proprietary medicinal products. It is not necessary, for the application of these measures, that a medicinal preparation should be marketed by a single undertaking; control may also be exercised where several parallel importers are involved.

These circumstances do not permit Article 36 to be invoked and the prohibition contained in Article 30 is therefore still applicable to the situation in question.

*Question I (e)*

Article 42 of the Act of Accession lays down a period within which measures having equivalent effect *already in force* must be abolished. For this reason these provisions are not concerned with the problem of *new* measures having equivalent effect, which must arise in this case if the Hoge Raad finds in favour of Winthrop BV.

*Question II concerning Article 85 of the EEC Treaty*

On the basis of the hypothesis that in the situation described by the Hoge Raad written, verbal or tacit agreements are involved, there can be no doubt that the exercise of a trade mark right can conflict with the rules on competition.

The application of Article 85 (1) to agreements by which trade-marks are transferred for the purpose of partitioning off markets has already been clearly confirmed by various judgments of the Court. However, Article 85 should not be applied to agreements concluded between undertakings belonging to the same concern, the sole objective of which is the allocation of tasks within one and the same economic unit. But if the agreements concluded within the context of a single concern have a wider ambit and, for example, restrict the possibility open to undertakings outside that concern of penetrating a given market, such agreements must be held to be covered by the provisions of Article 85 (1).

In view of its remarks with regard to Article 30 et seq. the Commission confines itself to these theoretical observations. The question whether Article 85 (1) is applicable must be answered in relation to each case as it arises; in the Commission's opinion, on the basis of the documents in the file, it appears that the question should be answered in the affirmative.

Finally, in reply to the second part of the question, the Commission claims that the action for declaration of an infringement on the basis of a trade mark right gives a licencing agreement, which otherwise contains no clauses

limiting competition, a more marked effect on the partitioning of the various markets, which is therefore contrary to the provisions of Article 85 (1) of the Treaty. In these circumstances, Article 85 (1) is wholly applicable.

Following the conclusion of the written procedure the oral procedure was openend on 3 July 1974. The company Winthrop BV was represented by T. Schaper, the company Centrafarm and Adriaan De Peijper by Advocates Pels Rijcken and de Savornin Lohman and the Commission by its Legal Adviser, Mr van der Esch.

During the course of the oral procedure, in reply to a question put by the Court, the two companies and the Commission gave their explanations with regard to the substantial differences existing between prices in Great Britain and those in the Netherlands.

The company *Winthrop BV* points out that the product 'Negram' was put into the European market in 1963. The company claims that the price difference can be imputed to the following factors:

1. changes in exchange rates (accounting for about 60 % of the difference),

2. freight, import duties, importer's profit margin (accounting for about 15 % of the difference) and

3. the fact that prices of pharmaceutical products are kept at a low level by artificial means by the authorities in Great Britain.

In this respect the company refers to the booklet entitled 'International price comparison'. It is stated therein that the levels of prices for pharmaceutical products in Great Britain is, in general, 30 % lower than that in countries of a comparable size, due to the current system of regulation of prices. In this report, produced by a semi-official body, it is stated that international companies pursuing research projects are dependent upon profit margins which are sufficiently high to enable them to absorb the rise in the cost of research, whereas the British system merely allows current research costs to be covered.

The company *Centrafarm* claims, firstly, that the booklet mentioned by Winthrop BV appears to have been compiled as a defence of the British pharmaceutical industry. For its part, the company refers to three official reports, in particular the 1973 Report of the Monopolies Commission with regard to Roche products. The company gives a brief survey of the voluntary price regulation scheme as practised in Great Britain and concludes that, with the exception of a single case, the British Government has never imposed any sale price, either upon manufacturers, on importers or on wholesalers, and that prices are established by the industry in consultation with the Health Ministry.

The company further remarks that although Negram is not a unique medicinal preparation, it can be said that, over a limited field, it occupies a central position, not to say a dominant position. The company also claims that there is a very powerful system of agreements in the Dutch pharmaceutical trade to which 95 % of the manufacturers and dealers are associated.

Finally, Centrafarm sets out the difficulties which would face national courts in the event of an affirmative answer to the questions referred. Would they be able to enforce the prohibition whenever it appeared that, in the exporting country, there existed a measure the effect of which was to lower the price of a good below the level at which it would have been fixed by the free play of competition? The company also claims that since price formation is far from free in most countries an affirmative answer to the question put by the Hoge Raad would leave the present situation within the Community unchanged. It is to be expected that, in most cases, trade mark owners could claim that price differentials are the consequence of measures adopted by the public authorities.

The *Commission* claims that it appears from the documents at its disposal that the main objective of the British rules on the subject is the achievement of a certain transparency of manufacturing costs, including costs of research and development.

In the Commission's opinion, price differentials as between Great Britain and the Netherlands are to be explained in terms of perfectly normal factors, such as a greater volume of sales in Great Britain and slightly less intense competition on the Dutch market.

The Advocate-General delivered his opinion at the hearing on 18 September 1974.

## Law

1 By interim decision of 1 March 1974, registered at the Court on 4 March, the Hoge Raad der Nederlanden (Dutch Supreme Court) referred certain questions, by virtue of Article 177 of the EEC Treaty, on trade mark rights in relation to the provisions of the Treaty and of the Act concerning the Accession of the three new Member States.

2 In the decision making the reference the Hoge Raad set out as follows the elements of fact and of national law in issue in relation to the questions referred:

— several undertakings forming part of the same concern are entitled to use the same trade mark for a certain product in various States belonging to the EEC,

— products bearing that trade mark, after being lawfully marketed in one of the Member States by the trade mark owner, are subsequently acquired and exported by third parties to one of the other States, where they are marketed and further dealt in,

— the trade mark legislation in the last-mentioned State gives the trade mark owner the right to take legal action to prevent goods from being marketed there under the relevant trade mark by other persons, even if such goods had previously been marketed lawfully in another country by an undertaking there entitled to use that trade mark and forming part of the same concern.

### As regards question I (a)

3 This question requires the Court to state whether, under the conditions postulated, the rules in the EEC Treaty concerning the free movement of

goods prevent the trade mark owner from ensuring that a product protected by the trade mark is not marketed by others.

4 As a result of the provisions in the Treaty relating to the free movement of goods, and in particular Article 30, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States.

5 By Article 36 these provisions shall nevertheless not include prohibitions or restrictions on imports justified on grounds of the protection of industrial or commercial property.

6 Nevertheless, it is clear from this same Article, in particular its second sentence, as well as from the context, that whilst the Treaty does not affect the existence of rights recognized by the legislation of a Member State in matters of industrial and commercial property, yet the exercise of these rights may nevertheless, depending on the circumstances, be affected by the prohibitions in the Treaty.

7 Inasmuch as it provides an exception to one of the fundamental principles of the Common Market, Article 36 in fact only admits of derogations from the free movement of goods where such derogations are justified for the purpose of safeguarding rights which constitute the specific subject-matter of this property.

8 In relation to trade marks, the specific subject-matter of the industrial property is the guarantee that the owner of the trade mark has the exclusive right to use that trade mark, for the purpose of putting products protected by the trade mark into circulation for the first time, and is therefore intended to protect him against competitors wishing to take advantage of the status and reputation of the trade mark by selling products illegally bearing that trade mark.

9 An obstacle to the free movement of goods may arise out of the existence, within a national legislation concerning industrial and commercial property, of provisions laying down that a trade mark owner's right is not exhausted when the product protected by the trade mark is marketed in another Member State, with the result that the trade mark owner can prevent importation of the product into his own Member State when it has been marketed in another Member State.

10 Such an obstacle 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 owner himself or with his consent, so that there can be no question of abuse or infringement of the trade mark.

11 In fact, if a trade mark owner could prevent the import of protected products marketed by him or with his consent in another Member State, he would be able to partition off national markets and thereby restrict trade between Member States, in a situation where no such restriction was necessary to guarantee the essence of the exclusive right flowing from the trade mark.

12 The question referred should therefore be answered to the effect that the exercise, by the owner of a trade mark, of the right which he enjoys under the legislation of a Member State to prohibit the sale, in that State, of a product which has been marketed under the trade mark in another Member State by the trade mark owner or with his consent is incompatible with the rules of the EEC Treaty concerning the free movement of goods within the Common Market.

As regards question I (b)

13 This question was referred to cover the possibility that Community rules do not under all circumstances prevent the trade mark owner from exercising the right, under his national law, to prohibit imports of the protected product.

14 It follows from the answer given to question I (a) that question I (b) has become devoid of object.

As regards question I (c)

15 This question requires the Court to state, in substance, whether the trade mark owner can, notwithstanding the answer given to the first question, prevent importation of products marketed under the trade mark, given the existence of price differences resulting from governmental measures adopted in the exporting country with a view to controlling prices of those products.

16 It is part of the Community authorities' task to eliminate factors likely to distort competition between Member States, in particular by the harmonization of national measures for the control of prices and by the prohibition of aids which are incompatible with the Common Market, in addition to the exercise of their powers in the field of competition.

17 The existence of factors such as these in a Member State, however, cannot justify the maintenance or introduction by another Member State of measures which are incompatible with the rules concerning the free movement of goods, in particular in the field of industrial and commercial property.

18 The question referred should therefore be answered in the negative.

As regards question I (d)

19 This question requires the Court to state whether the trade mark owner is authorized to exercise the rights conferred on him by the trade mark, notwithstanding Community rules concerning the free movement of goods, for the purpose of controlling the distribution of a pharmaceutical product with a view to protecting the public against the risks arising from defects therein.

20 The protection of the public against risks arising from defective pharmaceutical products is a matter of legitimate concern, and Article 36 of the Treaty authorizes the Member States to derogate from the rules concerning the free movement of goods on grounds of the protection of health and life of humans and animals.

21 However, the measures necessary to achieve this must be such as may properly be adopted in the field of health control, and must not constitute a misuse of the rules concerning industrial and commercial property.

22 Moreover, the specific considerations underlying the protection of industrial and commercial property are distinct from the considerations underlying the protection of the public and any responsibilities which that may imply.

23 The question referred should therefore be answered in the negative.

As regards question I (e)

24 This question requires the Court to state whether Article 42 of the Act concerning the Conditions of Accesssion of the three new Member States implies that the rules of the Treaty concerning the free movement of goods cannot be invoked in the Netherlands until 1 January 1975, insofar as the goods in question originate in the United Kingdom.

25 Paragraph 1 of Article 42 of the Act of Accession provides that quantitative restrictions on imports and exports shall, from the date of accesssion, be abolished between the Community as originally constituted and the new Member States.

26 Under paragraph 2 of the same Article, which is more directly relevant to the question, 'measures having equivalent effect to such restrictions shall be abolished by 1 January 1975 at the latest'.

27 In the context, this provision can refer only to those measures having an effect equivalent to quantitative restrictions which, as between the original Member States, had to be abolished at the end of the transitional period, pursuant to Articles 30 and 32 to 35 of the EEC Treaty.

28 It therefore appears that Article 42 of the Act of Accession has no effect upon prohibitions on importation arising from national legislation concerning industrial and commercial property.

29 The case under consideration is therefore subject to the principle enshrined in the Treaty and in the Act of Accesssion, according to which the provisions of the Treaties establishing the European Communities concerning the free movement of goods and, in particular, Article 30. are applicable, from the date of accession, to the new Member States, save where the contrary is expressly stated.

30 It follows that Article 42 of the Act of Accession cannot be invoked to prevent importation into the Netherlands, even before 1 January 1975, of goods put onto the market in the United Kingdom under the conditions set out above by the trade mark owner or with his consent.

As regards question II

31 This question requires the Court to state whether the fact that an undertaking forming part of a concern uses its trade mark rights to prevent the sale by a third party of a product which has previously been put into circulation in another country by an undertaking entitled to use the trade mark in that other country and which forms part of the same concern constitutes a concerted practice as prohibited by Article 85 of the Treaty.

32 Article 85 is not concerned with agreements or concerted practices between undertakings forming part of the same concern and having the status of parent company and subsidiary, if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings.

Costs

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

34 As these proceedings are, insofar as the parties to the main action are concerned, a step in the action pending before the Hoge Raad der Nederlanden, costs are a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the Hoge Raad der Nederlanden, by interim decision of 1 March 1974, hereby rules:

1. **The exercise, by the owner of a trade mark, of the right which he enjoys under the legislation of a Member State to prohibit the sale, in**

that State, of a product which has been marketed under the trade mark in another Member State by the trade mark owner or with his consent is incompatible with the rules of the EEC Treaty concerning the free movement of goods within the Common Market.

2. In this connection, it is a matter of no significance that there exist, as between the exporting and importing Member States, price differences resulting from governmental measures adopted in the exporting State with a view to controlling the price of the product.

3. The owner of a trade mark relating to a pharmaceutical product cannot avoid the incidence of Community rules concerning the free movement of goods for the purpose of controlling the distribution of the product with a view to protecting the public against defects therein.

4. Article 42 of the Act concerning the Conditions of Accession and the Adjustments to the Treaties cannot be invoked to prevent importation into the Netherlands, even before 1 January 1975, of goods put onto the market in the United Kingdom by the trade mark owner or with his consent.

5. Article 85 is not concerned with agreements or concerted practices between undertakings belonging to the same concern and having the status of parent company and subsidiary, if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements or practices are concerned merely with the internal allocation of tasks as between the undertakings.

Lecourt Ó Dálaigh Mackenzie Stuart Donner Monaco
Mertens de Wilmars Pescatore Kutscher Sørensen

Delivered in open court in Luxembourg on 31 October 1974.

A. Van Houtte
Registrar

R. Lecourt
President