OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 15 MAY 1974 [1]

Mr President,
Members of the Court,

Introduction

The present case raises in a new context a problem with which you have already become familiar during the last few years.

It is the question of the relationship between rights of industrial and commercial property on the one hand, and on the other hand the rules established by the Treaty of the European Economic Community both in the field of competition and in that of free movement of goods.

In the first place, whilst the subject matter of industrial property rights differs, depending upon whether they are patents, the protection of know-how or, on the other hand, trade marks, these systems have one factor in common: they confer on the holders an exclusive right which, by its nature, affects the conditions of competition.

In the second place, the protection thus conferred is limited to the national territory, so that it is capable of obstructing the free movement of the products within the Common Market.

There is therefore the essential difficulty which arises from the confrontation between the right of industrial property — a national right with territorial effect — and Community law, the uniform application of which in each of the Member States guarantees its efficacy, and which, in case of conflict, must take precedence over national law.

The Court has expressly referred to this contradiction between the very existence of the common market and industrial property in its judgments of 29 February 1968 (Case 24/67 *Parke Davis* Rec. 1968, p. 82) and 18 February 1971 (Case 40/70, *Sirena* Rec. 1971, p. 69) by finding that: 'for as long as national rules relating to the protection of industrial and commercial property have not been made the subject matter of unification within the Community framework, the national character of the protection which they confer is liable to create obstacles both to the free circulation of patented goods or those covered by trade marks, and to the Community competition rules'.

Today we have once again this conflict lying at the root of the request for a preliminary ruling, referred to you by the Tribunal d'Arrondissement of Luxembourg, sitting in a commercial matter, in connexion with a suit involving a well-known trade mark of German origin, which was sequestrated at the end of the second world war, and subsequently expropriated. However, this trade mark was no longer registered in the name of the German undertaking itself; the latter had already disposed of it — in so far as Belgium and the Grand Duchy of Luxembourg are concerned — to a subsidiary established in Brussels in 1927.

I — Facts

The parties to the national proceedings have assured you that they are not at issue as to the facts; they disagree as to the legal consequences to be drawn therefrom.

I shall therefore briefly recite the circumstances in which the Tribunal of Luxembourg came to submit to you the two preliminary questions.

Hag AG of Bremen, who were at the turn of the century the first holders of

1 — Translated from the French.

patents for the decaffeination of raw coffee, registered in its name in many countries trade marks that include the words 'Café Hag' coupled with the symbol of a heart or of a lifebuoy.

These trade marks were registered in Belgium and in the Grand Duchy since 1908. On an international level they were also since 1925 registered at Berne in accordance with the Madrid Arrangement.

Sales of 'Hag' Coffee on the Belgian and Luxembourg markets at first took place through a general representative of the German undertaking, and subsequently, as from 1927, through Café Hag SA, a subsidiary it established in Brussels, which was wholly controlled by the parent company.

Increasingly having its own means of production, the subsidiary soon found it possible by itself to satisfy Belgian and Luxembourg requirements.

In 1934 Hag AG assigned its trade marks in respect of these countries to its Belgian subsidiary, an assignment accompanied by the transfer of the decaffeination processes.

The following year, the assignment was regularized at international level in accordance with the procedure instituted by the implementing regulation of the Madrid Arrangement: the deletion of the international Hag/Bremen trade mark in so far as Belgium and Luxembourg were concerned; fresh registration in those countries of national trade marks in the name of Café Hag SA.

Accordingly, whatever may have been the real motives of this operation — a division of the market between parent company and subsidiary, a means of mitigating the difficulties arising from a growing protectionism or anticipation at a commercial level of the foreseeable risks arising at the time from the threat of a European conflict — it is clear that the goods offered on the Belgo-Luxembourg market were henceforth produced only the by Café Hag company of Brussels and sold under its trade mark.

This situation continued until the end of the war.

After the liberation of Belgium, the Société anonyme (public limited company) Café Hag was placed under sequestration, as enemy property, by the Belgian administration. Subsequently, giving effect to the Final Act of the Paris Conference on Reparations of 14 January 1946, Article 6 of which obliges the signatory powers — including Belgium — to dispose of German property, rights and interests, the 'Office des séquestres' (Sequestration department) sold the shares in the company to the Van Oevelens, an Belgian family, who thus became the owners of both the undertaking and the trade marks registered in its name.

It was in 1971 that these trade marks — the confirmatory registration (dépôt confirmatif) of which — had incidentally taken place under the new system of the uniform Benelux law — were (without including the undertaking of the Hag company) assigned to the Van Zuylen Frères firm (Caféterie Chat Noit), an assignment which on 25 April 1972 was notified to the 'bureau Benelux des marques' (Benelux trade marks registry).

As regards Hag AG of Bremen, this company had after the war acquired rights of its own to the 'Café Hag' trade marks in respect of Belgium and the Grand Duchy but this registration was evidently later than the trade marks upon which Van Zuylen Frères rely today. It had also attempted again to get a foothold on the Belgo-Luxembourg market by registering and using the 'Decofa' trade mark but it does not seem to have had success.

That is why in May 1972 it decided to deliver to Luxembourg, through the agency of a Luxembourg agent soluble Hag coffee bearing its name. These direct importations induced Van Zuylen to bring a first action for infringement.

Without denying Van Zuylen's rights in the Hag trade mark as regards Belgium and Luxembourg, the German company argued as a first point that these rights

could not be pleaded against it, since it had acquired equivalent rights as a result of international and Benelux registrations effected in its name after 1945.

In order to deal with this first claim Van Zuylen on 4 April 1973 brought a second action for cancellation of these trade mark registrations belonging to Hag AG, in so far as they related to the territories of Belgium and Luxembourg.

Thereupon the defendant argued before the Luxembourg judge that Van Zuylen's rights were ineffective since these were derived rights, acquired under an agreement that was null and void as it was contrary to the provisions of Article 85 of the Treaty of Rome. At this stage of the proceedings the parties agreed to ask the Tribunal of Luxembourg to refer to this Court a first preliminary question, the effect of which goes beyond the strict field of competition law, since it touches upon the interpretation not only of Article 85 but also of Articles 5, 30 and subsequent Articles, and in particular Article 36 of the Treaty relating to the free movement of goods.

The order referring the matter asks you to decide whether one or other of these provisions has the effect of allowing the present holder of a trade mark in Member States (A) of the Community — in this case Van Zuylen in the Grand Duchy — to resist on the grounds of its trade mark mark rights imports into the territory of that State by a person holding the same trade mark in another Member State (B), that is to say Hag AG in Germany — of products originating in the second State bearing the said trade mark.

So as to enable him to determine with precision the factual circumstances giving rise to this question, the Luxembourg judge went on to explain:

— that the trade mark was transferred by the original holder in Member State (B) to its subsidiary set up in Member State (A) under *agreements* entered into before the coming into force of the Treaty;

— that this subsidiary, placed under sequestration in 1944 by State (A), was transferred rogether with the trade mark to a third party — in the event, Van Oevelen;

— that this third Party in turn transferred the trade mark to the present holder in State (A) — the firm Van Zuylen Frères;

— that finally there is between the present holder of the trade marks in State (A) and (B) (i.e. Van Zuylen) and the original holder (Hag AG) no legal, financial, technical or economic link.

The second preliminary question referred to you arises from the application to intervene in the proceedings made to the Tribunal of Luxembourg by German merchants, the Joachim Kunde company, which, having imported into Luxembourg Hag coffee in the form of coffee beans — purchased directly from Hag AG in Bremen — desired to establish its rights to effect such importations.

Without ruling upon the admissibility of this intervention, the referring court asks you whether the reply to this second question must be identical to the reply to the first question in a case where the offer for sale of goods bearing a trade mark is made in Member State (A) not by the original holder of the trade mark but by an importer who duly acquired the products in State (B) from this original holder.

Thus the Tribunal d'Arrondissement of Luxembourg, adopting the parties' agreed wording of the request for a preliminary ruling, addresses strictly to questions on the interpretation of Community law, and is very directly influenced by the solutions suggested by the judgments of this Court of 18 February 1971 (the *Sirena* case, aforementioned) and of 8 June 1971 (Case 78/70, *Deutsche Grammophon*, Rec. 1971, p. 487).

Although the Commission thought it necessary to touch on this problem, I for my part consider it unnecessary to investigate whether a solution *de lege ferenda* might, if necessary, permit a settlement of the conflict that opposes Van Zuylen to Hag AG. In particular I see no purpose in calculating whether the provisions of Article 12 (1) and (2) of the draft Convention for a European trade mark law might be applicable to this case.

Equally, the Commission recognizes that the drafting of this Article which is at present envisaged, would not resolve the problem of trade marks expropriated after the war.

In any case, this is no more than a draft prepared by a group of experts, from which one cannot draw any pertinent indication on the interpretation of the Treaty.

Yet it is this interpretation which you are asked to sign, and which I now therefore propose to go into, first as regards the competition rules under Article 85 and subsequently as regards the principles governing the free movement of goods.

II — Application of Article 85 of the Treaty

Article 85 of the Treaty is silent on the relationship between the Community system on competition and national legislations relating to trade mark rights.

Nevertheless, you have in *Grundig Consten* (Judgment of 13 July 1966, Rec. 1966, p. 429) and *Sirena* (Judgment of 18 February 1971, aforementioned), had occasion to express your views on the compatibility of trade mark rights with the rules of the Treaty in the field of competition.

The problem lies in deciding whether, assuming national legislation allows a holder of a trade mark to oppose importations of goods bearing the same trade mark originating in another Member State, Community law may affect the extent of such right.

Your Court replied to this question in the affirmative, inspired by a principle 'applicable in the competition field, to the effect that, while rights which the legislation of a Member State confers on trade mark holders are not affected in their existence by Articles 85 *et seq.*, their *exercise* may, on the other hand, be subject to the prohibitions laid down by these provisions'. You also drew inspiration in this field from the arguments which the Commission expressed in its Regulation No 67/67, which, without wishing to prejudge relations existing between the competition rules and rights to industrial property, clearly showed its intention not to allow these rights to be exercised in a manner amounting to an abuse with a view to creating an absolute territorial protection.

There is no doubt that the exercise of a trade mark right lends itself particularly to a division or to a partitioning-off of national markets to an extent which affects trade between Member States. It can thus result in hindering the establishment of a single market, and in obstructing free movement of goods, essential objectives of the Common Market.

But in the field of Article 85 one must be mindful of the fact that the coming into play of this provision implies the existence of an agreement between undertakings, or at any rate of concerted practices.

Doubtless this first condition was complied with in the *Grundig Consten* case. In fact, parallel with a sole distribution agreement, a subsidiary agreement had been entered into between Grundig and its agent, by which the German firm had authorized Consten to register in its name the trade mark 'Gint' in France. Consten therefore clearly held the rights attaching to this trade mark, this was so by virtue of an 'agreement' the object of which was obviously to reinforce the absolute territorial protection which Consten enjoyed.

The existence of the element of concertation, required for Article 85 to apply, was thus manifest.

In the *Sirena* case you went further.

Having admitted that trade mark rights, as a legal concept, do not *per se* possess the characteristics of the contract or concerted act envisaged by Article 85 (1), your Court affirmed that 'their exercise may nevertheless come within the prohibitions of this Treaty if it is the object, the means, or the consequence, of an agreement'.

One finds no difficulty in agreeing that the exercise of a trade mark right comes within the provisions of Article 85 where it constitutes the very subject of such an agreement. In particular this is so, where you have a licensing agreement by means of which the holder of the trade mark imposes upon the licensee restrictions that are not justified solely for the particulars of the right: the imposition of sale prices or of production quotas.

The same applies where, in the framework of parallel licences, the holder purports to require his agents to undertake not to export, so as to assure each of them of an absolute territorial protection.

On the other hand, in the case of a transfer pure and simple, of a trade mark right, it is more difficult, in the absence of special circumstances, to find an agreement having a restraint upon competition as its object or effect.

It is the very essence of such a disposal to effect a total transfer of the right and to confer upon the transferee the very prerogatives which had been held by the transferor.

This is no doubt why you were in the *Sirena* judgment led to affirm that 'Article 85 therefore applies *as soon as,* by virtue of trade mark rights, imports of products originating in other Member States, bearing the same trade mark because their owners have acquired the trade mark itself or the right to use it through agreements with one another or with third parties, are prevented'.

Thus it is of little importance that the agreement did not have the object of restricting competition; it is enough for it to have this effect, for it to have this consequence, for it to create a legal situation of a kind tending to obstruct parallel imports.

But does this not involve stretching the wording of Article 85 somewhat, and adopting too wide an interpretation of this provision?

It would appear that you were in the *Sirena* case induced to go this far by certain factual elements to which Mr Advocate-General Dutheillet de Lamothe had rightly drawn attention in his opinion.

An examination of the file in fact makes one think that the contractual situation upon which the Italian undertaking relied, reveals, when considered in conjunction with parallel contracts concluded between the American company Mark Allen (the original holders of the trade mark) and French, Belgian, Dutch and German firms, the existence of agreements, or at any rate of concerted practices, condemned by Article 85.

And you did not fail to point out that 'the simultaneous assignment to several concessionaires of national trade mark rights for the same product, if it has the effect of re-establishing rigid frontiers between Member States, may affect trade between States and distort competition in the Common Market'.

It appears to me that the facts of the present case do not allow one to arrive at the same conclusion, at any rate on the basis of Article 85.

Not that one could reasonably doubt the existence of the agreement to assign which in 1934/35 was entered into between Hag AG of Bremen and the Café Hag company of Belgium. Although the records of the German enterprise were destroyed during the war and the text of the agreement could not be made available, the parties to the national proceeding acknowledge that

such an agreement was in fact entered into.

Nor can I accept the thesis argued by those representing Van Zuylen, that an agreement to assign, completely carried out, having had all its effects in the past, could not come within the provisions of Article 85.

This argument was formally condemned by the *Sirena* judgment; the legal position created by an agreement to assign entered into before the coming into force of the Treaty remains unchanged, and, as was pointed out by the defendant in the national proceedings, it suffices to point out that Van Zuylen even today expects to rely upon this assignment, to have to admit that it is capable of producing legal consequences.

It is by other considerations that I hope to show that Article 85 is not applicable. As the Luxembourg court affirms — and the parties to the national proceedings do not dispute this fact — the assignment of the trade mark was by Hag-Bremen to a subsidiary over which it exercised absolute control. One cannot therefore see in this assignment an agreement between different and independent undertakings but simply an internal arrangement taking place within the same economic unit. There cannot exist, between a parent and a subsidiary not having the power of taking autonomous decisions, any competition capable of being restricted by the conclusion of an agreement. In this respect I rely upon the view which you took in your judgments of 25 November 1971 (*Beguelin,* Case 22/71, Rec. 1971, p. 959) and of 13 July 1972 (the *Dye stuffs* case, Rec. 1972, p. 619 *et seq.*): 'where a subsidiary does not enjoy real autonomy in determining its course of action in the market, the prohibitions set out in Article 85 (1) may be considered inapplicable in the relationship between it and the parent company with which it forms one economic unit'.

Should this answer no longer apply where, as is argued by Hag-Bremen and by the Commission, the links uniting the parent company and the subsidiary have ceased to exist, even though this happened by a compulsory transfer to a third party of the shares in the subsidiary's capital, since they were considered enemy property?

If I have correctly understood this argument, the agreement to transfer of 1934/35, which — being concluded between two undertakings that were financially linked — was not in itself of a kind tending to affect competition, since the coming into force of the Treaty of Rome, produces anti-competition effects, since these links have been dissolved.

The objective effects of the agreement for transfer must therefore have amounted to creating an illegal situation which today is prohibited by Article 85.

It seems to me impossible to accept this reasoning, precisely because no element of concertation — capable of being litigated under this provision of the Treaty — continues to exist or has been re-established between Hag-Bremen and the current holder of the trade mark in Belgium and Luxembourg.

The essential condition for applying Article 85 is absent without there being any need to point — as was done by Van Zuylen — to the fact that the sale of the capital in the Café Hag company by the Belgian Office des séquestres to the Van Oevelen family was in the nature of an act of a public authority.

It would really be wrong to think that only the competition rules can properly be resorted to in order to counteract the limitations on the free movement of goods in the Common Market created by national trade mark rights.

These provisions can only be taken into consideration to the extent that there is an agreement or a concerted practice within the meaning of Article 85, or, *mutatis mutandis,* an abuse of a dominant position within the meaning of Article 86.

This can be deduced from the judgment of 29 February 1968 *(Parke Davis,* Case

24/67, Rec. 1968, p. 82) by which you recognized that *in the absence of any agreement* referred to by this provision, the use of a patent cannot fall under Article 85.

Accordingly, whilst the formula of the Sirena judgment, according to which an exclusive right *may* be 'the object, the means or the consequence of an agreement' remains perfectly valid, it is *a contrario* evident that Article 85 cannot usefully be relied upon to oppose the exercise of an industrial property right when that right is neither the object, nor the means nor the consequence of an agreement prohibited by this Article.

III — Application of Articles 5, 30 and 36 of the Treaty

Here one has the limits beyond which it is not possible to base oneself upon the competition rules in the Treaty, in order to resolve the contradiction which exists between Community law and the national law on industrial property.

As is shown by the evolution of the Court's case-law, it is a fact that the essence of the matter lies in the rules that govern the free movement of goods within the Common Market.

Articles 30 and 36 of the Treaty in my opinion constitute the appropriate legal basis and permit the conflict between the principle of the unity of the market and the exclusive rights conferred by national laws to be resolved without having recourse to the notion of agreement.

By its judgment of 8 June 1971 (*Deutsche Grammophon,* Case 78/70, Rec. 1971, p. 487) the Court has taken a clear stand by affirming that in a case where the exercise — in that case of a right similar to a copyright — 'does not fulfil the requirements of the definition of an agreement or concerted practice under Article 85, to answer the question it must further be decided whether the exercise of the particular right in issue conflicts with other provisions of the Treaty, in particular those relating to the free movement of goods'.

And it is clearly by referring to this decision that the Luxembourg court equally placed the preliminary questions referred to you within the area of Articles 5, 30 *et seq.,* and in particular of Article 36 of the Treaty.

Article 5, the reference to which is explained by the fact that this generally applicable provision had already been put forward in the *Deutsche Grammophon* case, lays down — as the Court has pointed out — a general obligation, imposed upon Member States, to abstain from any measure capable of placing in jeopardy the attainment of the aims of the Treaty.

It is in particular on the basis of this provision that you have — in the judgment of 15 July 1964 (*Costa v Enel,* Case 6/64, Rec. 1964, p. 1159) upheld the primacy of Community law over national laws.

Does this amount to saying that this obligation of 'loyal and general cooperation' addressed to Member States and therefore attaching to all state organs without excepting therefrom national courts, would by itself suffice to limit the exercise of national industrial property rights?

Certainly not, but it has its value as a principle, the implications of which must in each particular case be spelt out by precise provisions of the Treaty.

In the field that interests us, it is Articles 30 and 36 which allow a positive and concrete content to be given to the principles laid down by Article 5.

Article 30, as we know, prohibits quantitative restrictions on imports and 'all measures having equivalent effect'.

Article 36 in its first proposition exempts from this prohibition restrictions or measures having equivalent effect justified on grounds of, *inter alia,* the protection of industrial and commercial property.

But in its second part it lays down that this exemption shall not however

constitute 'a means of arbitrary discrimination or a disguised restriction on trade between Member States'.

From the combinations of these two sentences one can deduce:

1. that whilst in principle national law relating to industrial and commercial property remains in force, the rights flowing therefrom are concerned and affected by the establishment of the Common Market, to an extent that has to be determined.

   To maintain that they are in no way affected would amount to denying Article 36 any useful effect on this point.

2. in any event, only such restrictions on imports can benefit from the exception to the prohibition in principle under Article 30 as are justified by reasons relating to the protection of industrial property, and not all restrictions inherent in the excercise of those rights.

3. in any case, any use of these rights that might have as a consequence the bringing about of an arbitrary discrimination or a disguised restriction on trade between Member States, remains prohibited.

The question therefore is to what extent Article 36 affects not the very existence of a right to industrial property, but its exercise.

It is upon this distinction, adopted in the *Deutsche Grammophon* judgment, that the Court based its interpretation of Article 36 by emphasizing that 'although Article 36 permits prohibitions or restrictions on the free movement of goods that are justified for the protection of industrial and commercial property it allows such restrictions on the freedom of trade *only* to the extent that they are justified for the protection of the rights that form the specific subject matter of this property'.

Although the judgment to which I refer concerns the exclusive right, conferred by German legislation upon a manufacturer of sound recordings, which your court described as a right similar to copyright, the considerations of principle which you devoted to the interpretation of Article 36 are without any doubt generally applicable.

From these considerations, the Court concluded that 'if a protection right analogous to copyright is used in order to prohibit in one Member State the marketing of goods that have been bought on to the market by the holder of the right or with his consent in the territory of another Member State solely because this marketing has not occurred in the domestic market, such a prohibition, *maintaining the isolation of the national markets,* conflicts with the essential aim of the Treaty, the integration of the national markets into one uniform market'.

The conclusive reason lies in the fact that the exercise of the right relied upon by *Deutsche Grammophon* would have brought about that division of the markets which is prohibited by the Treaty. In other words, the obstacles placed in the way of the importation of original products coming from other Member States are not from the point of view of the Treaty justified by the existence of a right to protection set up by national law, but constitute a disguised restriction on trade between Common Market countries, prohibited by Article 36, second sentence.

In the second place, the wording of the judgment allows one to think that your Court's interpretation concerns not only a right similar to copyright but also applies to other rights to exclusive protection, since the Court was careful to lay down that the essential object of the Treaty 'could not be achieved if *by virtue of the various legal systems of the Member States,* individuals were able to divide the market'.

The directions as to interpretation derived from the *Deutsche Grammophon* judgment therefore seem to me capable of being applied without any difficulty to the field of trade marks.

Since the actions brought by Van Zuylen in the Luxembourg Court have the purpose of preventing importations by Hag-Bremen of a product bearing the same trade mark, by relying upon an exclusive right to the trade mark, it is therefore a matter of applying these principles and of investigating whether the very existence of the trade mark registered in Belgium and Luxembourg implies that the plaintiff in the national proceedings has this right, or whether the prohibition applied for does not, on the contrary, arise from the exercise of the right to a trade mark under conditions incompatible with the provisions of Article 36.

The specific object of a trade mark right is essentially to indicate the origin, the provenance of the product, and by so doing to permit the holder to protect the economic position which he has acquired by his financial means, by his technical efforts and by his commercial activity.

It is by reason of his right to be the first to market the product that the holder can thus legally ensure this protection and, in particular, prohibit the marketing by persons not entitled thereto of products covered by his trade mark.

The right to the trade mark therefore confers upon him the power of preventing infringements on the part of third parties.

On the other hand, the principle of territoriality, a consequence of the national character of trade mark legislation — and the existence of a uniform Benelux law does not modify the problem in this respect — does not, according to the Court's case law, arise from the very existence of the right to protection, as was shown by Mr Advocate-General Karl Roemer in his opinion on the *Deutsche Grammophon* case in relation to the exclusive right conferred upon manufacturers of sound recordings.

It is the effect of territorial protection arising from national legislation which is incompatible with the Community principle of free movement of goods.

In the proceedings brought in the Luxembourg Court, the Van Zuylen company, holder of the 'Café Hag' trade mark for Belgium and Luxembourg, is therefore entitled, within the territory where it exercises its right, to oppose the sale of decaffeinated coffee bearing this trade mark and marketed by parties infringing its trade mark. But it cannot oppose the importation of products bearing the same trade mark originating with the German undertaking, which is the original holder of the trade mark.

It is further necessary that the origin of the product be clearly indicated, which is in fact done by the Hag company, since it emphasizes on its packaging that the coffee sold by it in the Grand Duchy is manufactured in the Federal Republic of Germany.

Van Zuylen for its part is obliged to indicate the Belgian origin of coffee sold under the 'Hag' trade mark.

Finally, one must in my opinion resolutely reject the objection which is based on the fact that the German undertaking might in any event sell its products in Luxembourg under a trade mark other than 'Hag'. Besides, this is what at an early stage it tried to do by importing coffee under the trade mark of 'Decofa'. It goes without saying that such importations did not and could not give rise to any difficulty, whether in relation to national trade mark law or in relation to Community law.

But one can imagine that in order to gain a foothold in Belgium or Luxembourg under this new trade mark which is unknown to consumers, the German firm would lose the benefit of the 'Hag' trade mark under which it is well known to the public and would thus be obliged to devote substantial financial and commercial resources to establish the image of this new trade mark, and thus go back to 'zero', so to speak.

In short, I suggest that it is therefore

solely upon the basis of Articles 30 and 36 relating to the free movement of goods within the Community, and bearing in mind the principle of the unity of the Common Market, that the questions referred to you should be answered.

It goes without saying that if you follow my suggestion, the reply to the second question, relating to imports by a German trader into the Grand Duchy of coffee purchased directly from Hag of Bremen cannot be different to that to the first question referred to you.

I would thus suggest the following ruling:

— The power enjoyed the the transferee of a trade mark right, to prohibit within the territory of Member State (A) where the trade mark held by him is registered, the direct importation of products covered by the same trade mark by the company which is the original holder of this trade mark right in another Member State (B), does not form part of the very existence of the right of industrial and commercial property within the meaning of Article 36 of the Treaty.

  This power constitutes an exercise of a trade mark right which conflicts with the fundamental principles of the Treaty arising from the provisions relating to the free movement of goods.

— This is also the case where the importations of the said products into Member State (A) are effected through the agency of a trader established in Member State (B) who acquired these products from the undertaking which holds the trade mark in the same State.