European Court of Justice, 7 January 2004, Rolex

TRADEMARK LAW

Transit via Euopean Community

- **Articles 2 and 11 of Council Regulation No 3295/94 are applicable to situations in which goods in transit between two countries not belonging to the European Community are temporarily detained in a Member State by the customs authorities of that State.**

It should be recalled at the outset that, as the Court stated in paragraph 29 of Polo/Lauren, Article 1 of Regulation No 3295/94 is to be interpreted as being applicable where goods imported from a non-member country, are, in the course of their transit to another non-member country, temporarily detained in a Member State by the customs authorities of that State on the basis of that regulation and at the request of the company which holds the rights claimed to have been infringed.

It must also be recalled that Article 11 of Regula-tion No 3295/94 requires Member States to introduce penalties for infringements of the prohibition laid down in Article 2 of the regulation on the release for free circulation, export, re-export and placing under a suspensive procedure of counterfeit goods.

Compatibility with Regulation (EC) No 3295/94

- **The duty to interpret national law so as to be com-patible with Community law, in the light of its wording and purpose.**

Moreover, according to settled case-law, national courts are required to interpret their national law within the limits set by Community law, in order to achieve the result intended by the Community rule in question (see Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8, and Case C-262/97 Engelbrecht [2000] ECR I-7321, paragraph 39).

If such a compatible interpretation is possible, it will be for the national court, in order to secure for holders of intellectual property rights protection of those rights against abuses prohibited by Article 2 of Regulation No 3295/94, to apply to the transit of coun-terfeit goods across the national territory the civil-law remedies applicable under national law to other con-duct prohibited by that article, provided that they are effective and proportionate and constitute an effective deterrent.

- **Even though the Community rule does not require any national implementing measures, and not a direc-tive, Article 11 of Regulation No 3295/94 empowers Member States to adopt penalties for infringements of Article 2 of that regulation.**

However, a particular problem arises where the principle of compatible interpretation is applied to criminal matters. As the Court has also held, that prin-ciple finds its limits in the general principles of law which form part of the Community legal system and, in particular, in the principles of legal certainty and non-retroactivity. In that regard, the Court has held on sev-eral occasions that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of deter-mining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive (see, in particular, Pretore di Salò, para-graph 20; Case C-168/95 Arcaro [1996] ECR I-4705, paragraph 37, and Joined Cases C-74/95 and C-129/95 X [1996] ECR I-6609, paragraph 24).

Even though in the case at issue in the main proceedings the Community rule in question is a regulation, which by its very nature does not require any national implementing measures, and not a direc-tive, Article 11 of Regulation No 3295/94 empowers Member States to adopt penalties for infringements of Article 2 of that regulation, thereby making it possible to transpose to the present case the Court's reasoning in respect of directives.

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European Court of Justice, 7 January 2004

(D.A.O. Edward, A. La Pergola and P. Jan)

JUDGMENT OF THE COURT (Fifth Chamber)

7 January 2004 (1)

(Counterfeit and pirated goods - No criminal penalty for the transit of counterfeit goods - Compatibility with Regulation (EC) No 3295/94)

In Case C-60/02,

REFERENCE to the Court under Article 234 EC by the Landesgericht Eisenstadt (Austria) for a preliminary ruling in the criminal proceedings before that court against

X,

on the interpretation of Council Regulation (EC) No 3295/94 of 22 December 1994 laying down measures concerning the entry into the Community and the export and re-export from the Community of goods infringing certain intellectual property rights (OJ 1994 L 341, p. 8), as amended by Council Regulation (EC) No 241/1999 of 25 January 1999 (OJ 1999 L 27, p. 1).

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward (Rapporteur), acting for the President of the Fifth Chamber, A. La Pergola and P. Jann, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:
- Montres Rolex SA, by G. Kucsko, Rechtsanwalt,
- the Austrian Government, by C. Pesendofer, acting as Agent,
- the Finnish Government, by E. Bygglin, acting as Agent,
- the Commission of the European Communities, by J.C. Schieferer, acting as Agent,

having regard to the report of the Judge-Rapporteur,
after hearing the **Opinion of the Advocate General** at the sitting on 5 June 2003,
gives the following

Judgment

1. By order of 17 January 2002, received at the Court on 25 February 2002, the Landesgericht (Regional Court) Eisenstadt referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Council Regulation (EC) No 3295/94 of 22 December 1994 laying down measures concerning the entry into the Community and the export and re-export from the Community of goods infringing certain intellectual property rights (OJ 1994 L 341, p. 8), as amended by Council Regulation (EC) No 241/1999 of 25 January 1999 (OJ 1999 L 27, p. 1) ('Regulation No 3295/94').

2. That question was raised in a number of judicial investigations conducted at the request of Montres Rolex SA ('Rolex'), Tommy Hilfiger Licensing Inc., La Chemise Lacoste SA, Guccio Gucci SpA and The GAP Inc., all of whom are trade mark proprietors, following the confiscation by the Kittsee customs authorities (Austria) of shipments of goods presumed to be counterfeit copies of those companies' brands.

Legal background

Community law

3. In accordance with Article 1 of Regulation No 3295/94, that regulation lays down:

'(a) the conditions under which the customs authorities shall take action where goods suspected of being goods referred to in paragraph 2(a) are:
- entered for free circulation, export or re-export, in accordance with Article 61 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code,
- found in the course of checks on goods under customs supervision within the meaning of Article 37 of Council Regulation (EEC) No 2913/92, placed under a suspensive procedure within the meaning of Article 84(1)(a) of that regulation, re-exported subject to notification or placed in a free zone or free warehouse within the meaning of Article 166 thereof;

and

(b) the measures which shall be taken by the competent authorities with regard to those goods where it has been established that they are indeed goods referred to in paragraph 2(a).'

4. Article 1(2)(a) of Regulation No 3295/94 provides, inter alia, that 'goods infringing an intellectual property right' means counterfeit goods.

5. That provision states that counterfeit goods include:

'- goods, including the packaging thereof, bearing without authorisation a trade mark which is identical to the trade mark validly registered in respect of the same type of goods, or which cannot be distinguished in its essential aspects from such trade mark, and which thereby infringes the rights of the holder of the trade mark in question under Community law or the law of the Member State where the application for action by the customs authorities is made,
- any trade mark symbol (logo, label, sticker, brochure, instructions for use, guarantee document) whether presented separately or not, in the same circumstances as the goods referred to in the first indent,
- packaging materials bearing the trade marks of counterfeit goods, presented separately in the same circumstances as the goods referred to in the first indent'.

6. Article 2 of Regulation No 3295/94 provides:

'The entry into the Community, release for free circulation, export, re-export, placing under a suspensive procedure or placing in a free zone or free warehouse of goods found to be goods referred to in Article 1(2)(a) on completion of the procedure provided for in Article 6 shall be prohibited.'

7. Article 3 of that regulation provides, inter alia, that the holder of a trade mark may lodge an application in writing with the competent service of the customs authority for action by the customs authorities in relation to goods suspected to be counterfeit.

8. In accordance with the first subparagraph of Article 6(1) of the same regulation, where a customs office to which the decision granting an application by the holder of a trade mark has been forwarded is satisfied that the goods correspond to the description of the counterfeit goods contained in that decision, it is to suspend release of those goods or detain them.

9. Article 8 of Regulation No 3295/94 provides:

'1. Without prejudice to the other forms of legal recourse open to the right-holder, Member States shall adopt the measures necessary to allow the competent authorities:

(a) as a general rule, and in accordance with the relevant provisions of national law, to destroy goods found to be goods referred to in Article 1(2)(a), or dispose of them outside the channels of commerce in such a way as to preclude injury to the holder of the right, without compensation of any sort and without cost to the Exchequer;

(b) to take, in respect of such goods, any other measures having the effect of effectively depriving the persons concerned of the economic benefits of the transaction.

Save in exceptional cases, simply removing the trade marks which have been affixed to the counterfeit goods without authorisation shall not be regarded as having such effect.

...

3. In addition to the information given pursuant to the second subparagraph of Article 6(1) and under the conditions laid down therein, the customs office or the competent service shall inform the holder of the right,

upon request, of the names and addresses of the consignor, of the importer or exporter and of the manufacturer of the goods found to be goods referred to in Article 1(2)(a) and of the quantity of the goods in question.'

10. Article 11 of Regulation No 3295/94 provides:

'Moreover, each Member State shall introduce penalties to apply in the event of infringements of Article 2. Such penalties shall be effective and proportionate and constitute an effective deterrent.'

National law

11. Paragraph 1 of the Strafgesetzbuch (Austrian Criminal Code) provides:

'Punishments or preventive measures may be imposed only for offences which are expressly classified by statute as punishable under criminal law and which were punishable at the time of their commission.'

12. Paragraph 84(1) of the Strafprozeßordnung (Austrian Code of Criminal Procedure) states:

'Where an authority or public entity suspects the commission of an offence which is subject to investigation ex officio, and which falls within its statutory area of responsibility, that authority or entity is obliged to report the offence to a public prosecutor's office or a security authority'.

13. Paragraph 10(1) of the Markenschutzgesetz (Law on the protection of trade marks; 'the MSchG') provides:

'Without prejudice to earlier rights, the registered trade mark shall confer on the proprietor the exclusive right to prevent all third parties not having his consent from using in the course of trade:

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

(2) any sign which is identical or similar to the trade mark in relation to identical or similar goods or services where there exists a likelihood of confusion on the part of the public, which includes the likelihood of association between the sign and the trade mark.'

14. According to Paragraph 10a of the MSchG, the use of a sign to designate a product or service includes, in particular:

'(1) affixing the sign to the goods or to the packaging thereof, or to objects in respect of which the service is, or is intended to be, provided;

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

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

(4) using the sign on business papers and announcements, and in advertising.'

15. Paragraph 60 of the MSchG lists the penalties which apply to the counterfeit of trade marks.

The dispute in the main proceedings and the question referred to the Court

16. Rolex, which is one of the complainants in the main proceedings, is the holder of various protected trade marks. Its trade mark rights were infringed by unidentified persons seeking to transport 19 counterfeit watches bearing the Rolex trade mark from Italy to Poland, by way of Austria. According to Rolex, that infringement of its trade mark rights is punishable under Paragraphs 10 and 60(1) and (2) of the MSchG. It therefore requested the Landesgericht Eisenstadt to open a judicial investigation against X in respect of alleged infringements of those provisions.

17. Tommy Hilfiger Licensing Inc. and La Chemise Lacoste SA, both holders of various protected trade marks, likewise sought the opening of a judicial investigation against X in respect of alleged infringements of the same provisions of the MSchG. However, on 8 March 2003, the national court informed the Court of Justice that the second of the abovementioned companies had withdrawn its action.

18. Guccio Gucci SpA and The GAP Inc., both holders of various protected trade marks, also sought the opening of a judicial investigation against X, whom they had identified as probably being either the director or proprietor of Beijing Carpet Import, a company established in Beijing (China), or the director or proprietor of H. SW Spol SRO, a company established in Bratislava (Slovakia).

19. According to the Landesgericht, in order to institute a judicial investigation under Paragraph 84(1) of the Strafprozeßordnung, the conduct complained of must constitute a criminal offence. The national court also observes that Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which has the status of a constitutional law in the Austrian legal system, prohibits the punishment of acts which, at the time of their commission, were not illegal under national or international law.

20. Under the MSchG, only the import and export of counterfeit goods, and not their mere transit across the national territory, constitutes illegal use of a trade mark. Moreover, Austrian criminal law draws a clear distinction between the concepts of import and export on the one hand, and that of the transit of goods on the other.

21. The national court refers to **Case C-383/98 Polo/Lauren [2000] ECR I-2519** in which the Court of Justice held that Regulation No 3295/94 also applies to situations in which goods imported from one non-member country are exported to another non-member country, which implies that that regulation also applies to the mere transit of goods. However, since that judgment was given in a civil case, the national court is uncertain as to whether the same reasoning is applicable at criminal law when no criminal offence has been committed under national law.

22. In those circumstances, the Landesgericht Eisenstadt decided, by its order for reference, as rectified by order of 4 March 2002, to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Is a provision of national law, in casu Paragraph 60(1) and (2) of the MSchG, in conjunction with Paragraph 10a thereof, which may be interpreted as meaning that the mere transit of goods manufactured/distributed in contravention of provisions of the law on trademarks is

not punishable under criminal law, contrary to Article 2 of Council Regulation (EC) No 3295/94 of 22 December 1994 laying down measures to prohibit the release for free circulation, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods, as amended by Council Regulation (EC) No 241/1999 of 25 January 1999?'

Admissibility of the request for a preliminary ruling

ervations submitted to the Court

23. According to Rolex, a national court may refer a question to the Court of Justice only if there is a case pending before it and it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see, to that effect, Case 138/80 Borker [1980] ECR 1975, paragraph 4; Case 318/85 Greis Unterweger [1986] ECR 955, paragraph 4, and Case C-111/94 Job Centre [1995] ECR I-3361, paragraph 9).

24. In Austrian law, the purpose of a preliminary investigation is to conduct an initial examination of the allegations of a criminal offence and to clarify the facts to the extent necessary to uncover any evidence likely to result in the discontinuance of the criminal proceedings or in their prosecution. The decision as to whether to open a preliminary investigation is therefore not of a judicial nature. Accordingly, the request for a preliminary ruling in this case is not admissible.

Findings of the Court

25. The Court has already had occasion to rule in favour of the admissibility of a request for a preliminary ruling arising in the context of a preparatory inquiry in criminal proceedings, which could have resulted in an order that no further action be taken, a summons to appear, or an acquittal (see, to that effect, Case 14/86 Pretore di Salò [1987] ECR 2545, paragraphs 10 and 11).

26. Furthermore, in Case 338/85 Pardini [1988] ECR 2041, the Court agreed to answer questions raised in proceedings concerning interim measures which could be confirmed, varied or revoked.

27. Moreover, in the proceedings pending before the national court, that court will in any event, as the Advocate General correctly observed in point 22 of his Opinion, adopt a decision of a judicial nature, whether or not that decision relates to the possible application of criminal penalties, to the confiscation and destruction of the goods suspected of being counterfeit, or to an acquittal or an order that no further action be taken.

28. Finally, the choice of the most appropriate time to refer a question to the Court for a preliminary ruling lies within the exclusive jurisdiction of the national court (see, in particular, Joined Cases 36/80 and 71/80 Irish Creamery Milk Suppliers Association and Others [1981] ECR 735, paragraphs 5 to 8; Case 72/83 Campus Oil and Others [1984] ECR 2727, paragraph 10; Case C-66/96 Høj Pedersen and Others [1998] ECR I-7327, paragraphs 45 and 46, and Case C-236/98 JämO [2000] ECR I-2189, paragraphs 30 and 31).

29. The request for a preliminary ruling is therefore admissible.

The question referred to the Court

Observations submitted to the Court

30. According to Rolex and the Austrian Government, Regulation No 3295/94 also applies to goods in transit from one non-member country to another non-member country passing through the Community territory (Polo/Lauren, cited above, paragraph 27). The adoption of Regulation No 241/1999 has not in any way affected that interpretation (Polo/Lauren, paragraph 28).

31. The Austrian Government infers from Articles 6(2)(b) and 11 of Regulation No 3295/94 that the Member States are empowered to lay down in their national law the penalties applicable to such offences, but that it is the provisions of that regulation, and in particular Article 2 thereof, which establish what constitutes a punishable offence. Therefore, the Austrian authorities are obliged to impose penalties on the mere transit of counterfeit goods through Austria.

32. Rolex explains that at the material time in the case which gave rise to the judgment in Polo/Lauren, which was prior to the reform brought about by the MSchG, there was no detailed description in the provisions of Austrian law relating to counterfeit goods of what constituted the use of a trade mark to designate goods or services. Accordingly, in its judgment of 29 September 1986, Baygon, the Oberster Gerichtshof (Supreme Court) (Austria) took the view that there was no infringement of trade mark law if the product bearing the foreign trade mark was exported to another non-member country where it was then placed on the market.

33. On 23 July 1999, a major reform of trade mark law came into effect in Austria with the adoption of the Markenrechts-Novelle 1999 (Law amending the law on trade marks) (BGBl. I, 1999/111). In particular, trade mark law was brought into line with the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1). Article 5(3) of that directive was thus transposed into Austrian law, namely by the new Article 10a of the MSchG.

34. In the preparatory documents relating to that law, there is an express reference to the rejection of the ruling of the Oberster Gerichtshof in Baygon. The Austrian legislature thus clearly provided that in Austrian law the reexport, and therefore also the mere transit, of goods can constitute an infringement of trade mark law.

35. Therefore, the interpretation advocated by the national court, whereby the mere transit of goods manufactured in breach of the provisions of trade mark law is not subject to criminal penalties, is incorrect.

36. Rolex adds that Article 10 et seq. of the MSchG provide for both civil-law remedies and criminal penalties for infringements of trade mark law. For reasons of legal certainty and the predictability of judicial decisions, it is inconceivable that one and the same rule should be interpreted differently depending on whether it provides for civil-law remedies or imposes criminal penalties.

37. According to the Finnish Government, Regulation No 3295/94 was adopted on the basis of Article 113 of the EC Treaty (now, after amendment, Article 133 EC),

the purpose of which is to protect, by way of the common commercial policy, trade in the Community, in particular at its borders, by adequate measures. Regulation No 3295/94 thus protects, first, the internal market against counterfeit and pirated goods, and second, the holders of intellectual property rights against any infringement of those rights.

38. Article 11 of Regulation No 3295/94 requires Member States to introduce penalties for infringements of Article 2 of that regulation. Those penalties must be effective and proportionate and constitute an effective deterrent.

39. Moreover, the principle of equivalence requires that the penalties for infringements of Community law must, both as regards substantive and procedural requirements, be comparable to those applicable to infringements of corresponding national provisions. The Member States could thus indirectly be required to lay down criminal penalties.

40. The Finnish Government considers that if Austrian law does not lay down effective penalties for the transit of counterfeit and pirated goods, it is in breach of Community law.

41. According to that Government, in order to ensure the effective implementation of Community law, it is essential that the provisions of secondary law are applied in a uniform manner in all the Member States. If counterfeit goods could be transported across Community territory without incurring any effective penalties by virtue of a mere declaration that the final destination of those goods is in a non-member country, there would be a high risk of shipments declared as being in transit in fact ending up on the Community market as a result of exploitation of the weaknesses in the Community transit system. That is a classic method for offences relating to the transport of alcohol and tobacco.

42. The Commission regrets the fact that the order for reference does not contain adequate information on the details of the customs arrangements applicable to counterfeit goods or on the customs status of such goods in order to determine the precise legal provisions applicable in the case at issue in the main proceedings. The order for reference does not state whether or not the goods originated in the Community. As regards the proceedings following the complaint lodged by Rolex, the order for reference states that before entering Poland the goods were 'imported' into Austria from Italy. As regards the proceedings relating to the complaints lodged by La Chemise Lacoste SA and Guccio Gucci SpA, the goods were imported into Austria from China and destined for Slovakia.

43. According to the Commission, it is therefore necessary to consider several possible scenarios.

44. If the goods did not originate in the Community, the order for reference does not provide any information as to the applicable customs regime. Therefore, the question remains as to whether the case concerns a transit operation or another customs regime. Likewise, it remains unclear whether the goods were lawfully brought onto the Community customs territory.

45. On the other hand, if the goods originated in the Community, it should be held that, being imported from Italy, they are already in free circulation since they have acquired the status of Community goods on the customs territory of the Community.

46. If that is the case, the Commission recalls that Regulation No 3295/94 does not concern counterfeit goods which are manufactured or marketed in the Community, but only those coming from non-member countries (see Case C-23/99 Commission v France [2000] ECR I-7653, paragraph 3). In that case, the issue of the compatibility of Austrian law with that regulation does not arise and the request for a preliminary ruling is inadmissible.

47. Finally, if the goods did not originate in the Community and have not been placed under a Community customs regime, they must be regarded as having been unlawfully imported onto the Community customs territory. In that case, there is nothing to support the conclusion that in the case at issue in the main proceedings there is any contradiction between the sufficiently clear provisions of Regulation No 3295/94 and the relevant provisions of Austrian law.

48. In relation to Articles 8(1) and 11 of Regulation No 3295/94, the Commission refers to two possibilities.

49. The first possibility is that the Republic of Austria took the measures provided for in Article 8(1) of the regulation, but that their application to the transit procedure is called in question by national provisions which are capable of being interpreted as running counter to those measures.

50. The second possibility is that that Member State did not take the measures provided for in Article 8(1) of Regulation No 3295/94. That raises the issue of the application of the rule laid down in that article in so far as there are provisions of national law establishing that the transit of the goods concerned does not constitute illegal use of a trade mark.

51. In addition, the Commission concludes from paragraphs 23 to 25 of the judgment in Case C-223/98 Adidas [1999] ECR I-7081 that where counterfeit or pirated goods are placed under a suspensory procedure, such as the transit arrangements, national provisions that can be interpreted as set out in the preceding paragraph are in breach of Article 2 of Regulation No 3295/94. In its view, the national provisions must be interpreted so as to be compatible with Article 2 of the regulation with the result that, inter alia, the measures provided for in Article 8(1) of the regulation are to apply to goods placed under a suspensory procedure.

52. However, the Commission submits that a particular problem could arise in relation to Article 11 of Regulation No 3295/94. The obligation on the national court to interpret the relevant rules of its national law in the light of the content of Community law finds its limits in the general principles of law which form part of the Community legal system and, in particular, in the principles of legal certainty and non-retroactivity in criminal law.

53. Accordingly, in Case 80/86 Kolpinghuis Nijmegen [1987] ECR 3969, paragraphs 12 and 13, the Court

held that the unimplemented provisions of a directive cannot, of themselves and independently of a national law adopted by a Member State for their implementation, have the effect of determining or aggravating the liability in criminal law of persons who infringe the provisions of that directive. The Commission concludes that where national provisions lend themselves to an interpretation which is incompatible with the prohibitions laid down in Article 2 of Regulation No 3295/94, those prohibitions cannot, of themselves, have the effect of determining or aggravating the liability in criminal law of persons who infringe them.

Findings of the Court

54. It should be recalled at the outset that, as the Court stated in paragraph 29 of Polo/Lauren, Article 1 of Regulation No 3295/94 is to be interpreted as being applicable where goods imported from a non-member country, are, in the course of their transit to another non-member country, temporarily detained in a Member State by the customs authorities of that State on the basis of that regulation and at the request of the company which holds the rights claimed to have been infringed.

55. It must also be recalled that Article 11 of Regulation No 3295/94 requires Member States to introduce penalties for infringements of the prohibition laid down in Article 2 of the regulation on the release for free circulation, export, re-export and placing under a suspensive procedure of counterfeit goods.

56. Moreover, as the Advocate General correctly observed in point 36 of his Opinion, the interpretation of the scope of that regulation is not conditional upon the type of national proceedings (civil, criminal, administrative) in which that interpretation is relied on.

57. The national court considers that Article 60 of the MSchG can be interpreted as not applying to the mere transit of goods, which is challenged by the Austrian Government and the complainants in the main proceedings.

58. It is not for the Court of Justice to rule on the interpretation of national law, which is a matter for the national court alone. If the national court were to find that the relevant provisions of national law do not prohibit and, thus, do not penalise the mere transit of counterfeit goods through the Member State concerned, contrary none the less to the requirements under Articles 2 and 11 of Regulation No 3295/94, it would be proper to conclude that those articles preclude the national provisions in question.

59. Moreover, according to settled case-law, national courts are required to interpret their national law within the limits set by Community law, in order to achieve the result intended by the Community rule in question (see Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8, and Case C-262/97 Engelbrecht [2000] ECR I-7321, paragraph 39).

60. If such a compatible interpretation is possible, it will be for the national court, in order to secure for holders of intellectual property rights protection of those rights against abuses prohibited by Article 2 of Regulation No 3295/94, to apply to the transit of counterfeit goods across the national territory the civil-law remedies applicable under national law to other conduct prohibited by that article, provided that they are effective and proportionate and constitute an effective deterrent.

61. However, a particular problem arises where the principle of compatible interpretation is applied to criminal matters. As the Court has also held, that principle finds its limits in the general principles of law which form part of the Community legal system and, in particular, in the principles of legal certainty and non-retroactivity. In that regard, the Court has held on several occasions that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive (see, in particular, Pretore di Salò, paragraph 20; Case C-168/95 Arcaro [1996] ECR I-4705, paragraph 37, and Joined Cases C-74/95 and C-129/95 X [1996] ECR I-6609, paragraph 24).

62. Even though in the case at issue in the main proceedings the Community rule in question is a regulation, which by its very nature does not require any national implementing measures, and not a directive, Article 11 of Regulation No 3295/94 empowers Member States to adopt penalties for infringements of Article 2 of that regulation, thereby making it possible to transpose to the present case the Court's reasoning in respect of directives.

63. If the national court reaches the conclusion that national law does not prohibit the transit of counterfeit goods across Austrian territory, the principle of non-retroactivity of penalties, as enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is a general principle of Community law common to the constitutional traditions of the Member States, would prohibit the imposition of criminal penalties for such conduct, even if the national rule were contrary to Community law.

64. The answer to the question referred by the national court must therefore be:

- Articles 2 and 11 of Council Regulation No 3295/94 are applicable to situations in which goods in transit between two countries not belonging to the European Community are temporarily detained in a Member State by the customs authorities of that State.
- The duty to interpret national law so as to be compatible with Community law, in the light of its wording and purpose, in order to attain the aim pursued by the latter, cannot, of itself and independently of a law adopted by a Member State, have the effect of determining or aggravating the liability in criminal law of an entity which has failed to observe the requirements of Regulation No 3295/94.

Costs

65. The costs incurred by the Austrian and Finnish Governments and by the Commission of the European Communities, 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.
On those grounds,
THE COURT (Fifth Chamber),
in answer to the question referred to it by the Landesgericht Eisenstadt by order of 17 January 2002, hereby rules:
1. Articles 2 and 11 of Council Regulation (EC) No 3295/94 of 22 December 1994 laying down measures concerning the entry into the Community and the export and re-export from the Community of goods infringing certain intellectual property rights, as amended by Council Regulation (EC) No 241/1999 of 25 January 1999, are applicable to situations in which goods in transit between two countries not belonging to the European Community are temporarily detained in a Member State by the customs authorities of that State.
2. The duty to interpret national law so as to be compatible with Community law, in the light of its wording and purpose, in order to attain the aim pursued by the latter, cannot, of itself and independently of a law adopted by a Member State, have the effect of determining or aggravating the liability in criminal law of an entity which has failed to meet the requirements of Regulation No 3295/94.

OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 5 June 2003 (1)
Case C-60/02
Montres Rolex S.A. and Others
(Reference for a preliminary ruling from the Landesgericht Eisenstadt (Austria))
(Pirated and counterfeit goods - No punishment under criminal law where goods are in external transit - Compatibility with Regulation No 3295/94)

Introduction

1. The Landesgericht (Regional Court), Eisenstadt, Austria, in its capacity as a court of preliminary investigation, (2) wishes to know whether Council Regulation (EC) No 3295/94 of 22 December 1994 laying down measures to prohibit the release for free circulation, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods ('the Anti-Piracy Regulation') (3) precludes a rule of national law which does not penalise the placing of such goods under an external transit customs procedure.
2. This case has two distinctive features. First, the referring court's interpretation of the disputed provision of national law is contested; second, in the view of the Landesgericht, the complaint should actually be that there has been an omission from the provision concerned. In that case, the Court's reply would be akin to a declaration of failure to fulfil an obligation.

The facts and the main proceedings

3. It is clear from the order for reference that the facts which gave rise to this reference for a preliminary ruling occurred between November 2000 and July 2001. Those facts may be summarised as follows.
4. Montres Rolex S.A., the holder of several trade marks relating to watches, sought in November 2000 to institute a preliminary judicial investigation against persons unknown. Montres Rolex S.A. also sought confiscation of a consignment of watches illegally bearing its trade mark and the destruction of those watches on conclusion of the proceedings. In the opinion of the undertaking, the goods had originated in Italy and their final destination was to have been Poland.
5. In July 2001, Tommy Hilfinger Licensing Inc. and Chemise Lacoste S.A. (4) sought a similar investigation in relation to articles of clothing bearing their respective trade marks without their consent, and also the destruction of those articles of clothing. At the same time, and in relation to certain leather items and articles of clothing destined for Slovakia, Guccio Gucci SpA and The Gap Inc. sought to institute preliminary judicial investigations against the suspected perpetrators of infringements of their trade mark rights, namely the director or proprietor of a company whose registered office is in Beijing, China, and the proprietor of an undertaking based in Bratislava, Slovakia. In both cases, the claimants in the main proceedings claimed that the goods in question had come from China and were intended for import into Slovakia. As in the abovementioned cases, they sought the confiscation of the articles and their subsequent destruction.
6. All the alleged imitations were detained at the Kittsee customs office.

The applicable Community legislation

7. The goods in question were detained by the customs authorities pursuant to the Anti-Piracy Regulation.
8. The Anti-Piracy Regulation is intended to prevent counterfeit and pirated goods from being placed on the market through the adoption of measures to deal effectively with unlawful trade in such goods (second recital in the preamble). To that end, the regulation lays down the conditions under which the customs authorities may take action where goods suspected of being counterfeit or pirated are entered for free circulation, export or re-export, or where they are found when checks are made on goods placed under a suspensive procedure (Article 1(1)(a)), and, moreover, the measures which must be taken by the competent authorities with regard to those goods where it has been established that they are indeed counterfeit or pirated (Article 1(1)(b)).
9. The release for free circulation, export, re-export or placing under a suspensive procedure of goods found to be counterfeit or pirated on completion of the confiscation procedure is prohibited (Article 2).
10. Under Article 3, the holder of a trade mark, copyright or neighbouring rights, or a design right ('the holder of a right') may lodge an application in writing with the competent service of the customs authority for action by the customs authorities in relation to goods suspected of being counterfeit or pirated. This application must include a sufficiently detailed description of the goods and proof that the applicant is the holder of the right. The competent customs service then deals

with the application and forthwith notifies the applicant in writing of its decision.
11. The first subparagraph of Article 6(1) of the Anti-Piracy Regulation provides that where a customs office to which the decision granting an application by the holder of a right has been forwarded is satisfied, after consulting the applicant where necessary, that specified goods correspond to the description of the counterfeit or pirated goods contained in that decision, it must suspend release of the goods or detain them.
12. Under Article 8(1) and (2), without prejudice to the other rights of action open to him, the holder of a right which has been counterfeited must be entitled to seek the destruction of the pirated goods or their disposal outside commercial channels, or the taking of any other measures which effectively deprive the persons concerned of the economic benefits of the transaction.
13. Article 11 provides:
'Moreover, each Member State shall introduce penalties to apply in the event of infringements of Article 2. Such penalties must be sufficiently severe to encourage compliance with the relevant provisions.'
14. Article 84(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code ('the Customs Code') (5) states that where the term '[suspensive] procedure' is used, it is understood as applying, in the context of non-Community goods, inter alia, to external transit.
15. According to Article 91(1) of the Customs Code: 'The external transit procedure shall allow the movement from one point to another within the customs territory of the Community of:
(a) non-Community goods, without such goods being subject to import duties and other charges or to commercial policy measures;
(b) Community goods which are subject to a Community measure involving their export to third countries and in respect of which the corresponding customs formalities for export have been carried out.'

The applicable Austrian legislation

16. Paragraph 60(1) and (2) of the Markenschutzgesetz (Law on the protection of trade marks; 'the MSchG') (6) provides that it is an offence for anyone to infringe a trade mark right in the course of trade, and, more particularly, in the course of their profession (subparagraph 1), and also for anyone to use, without authorisation, the name, business name or special designation of an undertaking, or a distinguishing sign resembling those designations, to identify goods or services pursuant to Paragraph 10a in such a way that it creates confusion in the course of trade (subparagraph 2).
17. Under Paragraph 10a of the MSchG, the use of a mark to identify goods and services is defined, in particular, as: (1) the use of a mark on goods, or on their packaging, or on objects in respect of which the service is carried out; (2) offering, marketing, or holding goods identified by the mark for those purposes, or offering or supplying services under the mark; (3) importing or exporting goods bearing the mark; and (4) using the mark on commercial documents, announcements or advertising.

The question referred for a preliminary ruling

18. On 17 January 2002, the Landesgericht Eisenstadt decided to join the three cases for the purpose of referring the following question (7) to the Court of Justice for a preliminary ruling under Article 234 EC:
'Is a provision of national law, in casu Paragraph 60(1) and (2) of the Markenschutzgesetz, in conjunction with Paragraph 10a thereof, which may be interpreted as meaning that the mere transit of goods manufactured/distributed in contravention of provisions of the law on trademarks is not punishable under criminal law, contrary to Article 2 of Council Regulation (EC) No 3295/94 of 22 December 1994 laying down measures to prohibit the release for free circulation, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods, as amended by Council Regulation (EC) No 241/1999 of 25 January 1999?'

Procedure before the Court

19. The representatives of Montres Rolex S.A., Guccio Gucci SpA and The Gap Inc., and the representatives of the Austrian and Finnish Governments and the Commission submitted written observations to the Court. A hearing was not held.

Analysis of the question referred

Jurisdiction of the Court

20. The claimant undertakings, who are seeking the confiscation of goods in the main proceedings, oppose the reference of the question for a preliminary ruling and point out that a national court may refer a question to the Court only if there is a case pending before it and it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature. (8) The claimants argue that the preliminary investigations carried out by the referring court do not fall into that category, since the referring court's sole function is to clarify the facts with a view either to discontinuing the criminal action or to bringing formal charges and compiling evidence in the main proceedings.
21. That claim must be dismissed, in accordance with existing case-law.
22. In Pretore di Salò, (9) the Court held admissible a reference which arose in the context of a preliminary investigation in criminal proceedings. The investigation could have resulted in an order that no further action be taken, in a summons to appear, or in an acquittal, but it could not, under any circumstances, create an irreversible procedural situation and nor did it constitute, for the purposes of national law, a judicial act subject to the fundamental safeguards. (10) In Pardini, (11) the Court replied to questions referred in interlocutory proceedings in which the interim measure in question could be confirmed, varied or revoked.
There are numerous precedents where the Court has given rulings in cases brought against persons unknown. (12) The Court has held questions inadmissible in such cases only where they were referred by a representative of the Public Prosecutor's Office who was acting as a party to the proceedings and who had

merely requested the court concerned to examine evidence. (13) That is not the situation in the present case. On the contrary, it is clear from the claims made by the claimants in the main proceedings, and from the order for reference, that the Landesgericht is required to adopt a decision on whether it is appropriate to bring an action which, in addition to possible criminal penalties, could also lead to the confiscation and destruction of the detained goods. For that reason, the proceedings are judicial proceedings in the strict sense.

23. Furthermore, it is settled case-law that, while it may be helpful for the facts of the case to have been established and for questions of purely national law to be settled at the time the reference is made to the Court, it is for the national court alone to decide at what stage in the proceedings it is appropriate to make reference. (14)

24. In short, it is my opinion that the Court has jurisdiction to give a ruling on the question referred by the Landesgericht Eisenstadt.

Substance

25. The Commission has rightly stated that it is not clear from the facts which particular customs procedure the goods in each case are required to undergo. In relation to the proceedings brought at the request of Montres Rolex S.A., the national court refers to trade between Italy and Slovakia, which would not be covered by the Anti-Piracy Regulation if the goods concerned had already been released for free circulation in the territory of the Community.

26. However, from the wording of the question and the nature of the explanations set out in the order for reference and the observations of the claimants in the main proceedings, it can be assumed that the goods were required to undergo the external transit procedure.

27. As concerns the substance of the case, the referring court asks whether the Anti-Piracy Regulation precludes a national provision which 'may be interpreted' as meaning that the mere transit of counterfeit goods is not punishable under criminal law.

28. It is not easy to reply to a question framed in those terms.

29. In references for preliminary rulings, it is the task of the Court to interpret Community law. However, despite the suggestions which may have been made in some of the observations submitted in these proceedings, the referring court does not appear to harbour any doubts about the meaning of the Anti-Piracy Regulation.

30. As I stated in my Opinion in the Polo/Lauren case, (15) it is clear that the wording of the regulation covers circumstances such as those in point in this case. The title, the third recital and Article 1(1)(a) proclaim the intention to regulate the intervention of the customs authorities when goods suspected of being counterfeit or pirated are entered for free circulation, export or re-export or found when checks are made on goods placed under a suspensive procedure. According to Article 84(1) of the Customs Code, '[suspensive] procedure' is a technical term used as a generic designation for the procedures of 'customs warehousing', 'inward processing in the form of a system of suspension', 'processing under customs control', 'temporary importation' and 'external transit'.

The Customs Code defines the 'external transit procedure' in terms of what it means in practice. Thus, external transit is that which allows the movement from one point to another within the customs territory of the Community of non-Community goods, without such goods being subject to import duties and other charges or to commercial policy measures (Article 91(1)(a)). The Anti-Piracy Regulation is therefore expressly designed to apply to goods passing through Community territory on the way from one non-member country to another.

31. Moreover, according to the Anti-Piracy Regulation, 'counterfeit goods' means all goods which, in various ways, result in the infringement of 'the rights of the holder of the trade mark in question under Community law or the law of the Member State in which the application for action by the customs authorities is made' (Article 1(2)(a)).

32. From a literal interpretation of the Anti-Piracy Regulation it follows, without any room for reasonable doubt, that its provisions are applicable when goods suspected of infringing a trade mark are in Community external transit from one non-Member country to another.

33. Far from being weakened, this literal interpretation is corroborated by the adoption of Regulation No 241/1999, (16) which, for the present purposes, may be viewed as an extension of Regulations (EC) No 3842/86 (17) and No 3295/94, in so far as it enables national authorities to intervene in a wider range of customs procedures.

34. Nor can there be any doubt as to the validity of the Anti-Piracy Regulation. The Community is empowered, under Article 133 EC (Article 113 of the Treaty when the regulation was adopted), to introduce common rules for monitoring counterfeit goods under a suspensive customs procedure such as the external transit procedure. Under Article 133 EC, the Community has jurisdiction to lay down uniform principles applicable to the movement from one point to another within the customs territory of the Community of non-Community goods and goods intended for export, in respect of which the corresponding formalities for export have been carried out, and, in the course of such movement, to have the customs authorities detain goods suspected of being counterfeit or pirated.

35. The Court confirmed that view in its judgment in the Polo/Lauren case. (18)

36. Naturally, that interpretation of the scope of the Anti-Piracy Regulation is not conditional upon the type of proceedings (civil, criminal, administrative) in which it is invoked.

37. Furthermore, the first sentence of Article 11 of the Anti-Piracy Regulation, in conjunction with Article 2 thereof, provides that each Member State must introduce penalties to apply to infringements of the prohibition on the release for free circulation, export,

re-export or placing under a suspensive procedure of counterfeit or pirated goods.

38. It is clear from the above that, where a Member State does not have in place legislation capable of penalising the types of conduct referred to in Article 11, it will be faced not only with the matter of whether it has complied with Community law but also with the possibility of a complaint that it has failed to fulfil an obligation, which must be dealt with under the procedure outlined in Articles 226 EC and 227 EC.

That proposition applies, in particular, to those cases, such as the one currently before the Court, where a lack of adequate legislation has resulted in a failure to fulfil an obligation. It must, however, be qualified in situations where existing national provisions are contrary to Community law. In such cases, the interpretation of the Court may, in practical terms, be tantamount to a finding that there has been a failure to fulfil an obligation. (19)

39. The referring court explains that it is a precondition for carrying out preliminary judicial investigations that the conduct under challenge is an activity punishable under criminal law. Furthermore, Article 7 of the European Convention on Human Rights, (20) which has the status of a constitutional provision in Austria, prohibits punishment on account of activities which did not constitute a criminal offence when they were committed. That fundamental principle is also set out in Paragraph 1(1) of the Austrian Criminal Code (Strafgesetzbuch).

40. Paragraph 60(1) and (2) of the MSchG imposes penalties for counterfeit goods and for the unauthorised use of a name, business name or special designation of an undertaking, or a mark resembling those designations, for the purpose of identifying goods or services pursuant to Paragraph 10a in such a way as is liable to create confusion in the course of trade. Paragraph 10a defines the use of a sign as a trade mark by reference to the import and export of goods, but not to the external transit procedure. (21)

41. The Landesgericht also asserts that, in view of the aforementioned principle of nullum crimen, nulla poena sine lege, mere transit cannot be said to amount to the use of a trade mark in the course of trade because it cannot be classed as import or export.

42. For its part, the Austrian Government submits that the list set out in Paragraph 10a of the MSchG is merely illustrative in nature. That is how the Austrian Government considers the expression 'in particular' (insbesondere) (22) must be understood. It therefore follows, in the opinion of the Austrian Government, that Paragraph 10a does not preclude a finding by the national court, under Article 2 of the Anti-Piracy Regulation, that the transit of counterfeit goods amounts to use of the trade mark.

43. There appears to be no doubt that the overriding principle of legality in criminal law, with its corollary that an extensive interpretation to the disadvantage of the defendant is prohibited, (23) is a principle common to the constitutional traditions of all the Member States, and that it accordingly constitutes a general principle of Community law.

44. Although it is for national courts alone to interpret provisions of national law, it is important to note that, in accordance with settled case-law, those courts must do so, within the limits prescribed by their legal systems, in the light of the wording and the purpose of the Community measure in order to achieve the result pursued by the latter. (24)

45. However, the Court has also held that that obligation on the national court to refer to the content of a directive when interpreting the relevant rules of its national law is limited by the general principles of law which form part of the Community legal system and in particular the principles of legal certainty and non-retroactivity. A directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive. (25)

46. The fact that a State has not defined conduct which, under Community law, ought to be considered unlawful could at the most give rise to an assumption that the State has failed to fulfil its obligations, in respect of which an action could be brought by the Commission or another Member State under Articles 226 EC or 227 EC, but it does not allow citizens of that State to be prosecuted for acts which, though unlawful under Community rules, are not punishable under national law.

47. Finally, it only remains to be said that, although the case-law which has been cited arose in the context of directives, it applies equally to rules which, like Article 11 of the Anti-Piracy Regulation, impose on Member States an obligation to achieve a particular result.

48. The Court may not give any advice which exceeds the guidelines set out, since to do so would amount to interference in the interpretation of national measures, which is expressly prohibited under the division of functions laid down in Article 234 EC.

Conclusion

49. It should therefore be stated in reply to the Landesgericht Eisenstadt that:

(1) Article 11 of Council Regulation (EC) No 3295/94 of 22 December 1994 laying down measures to prohibit the release for free circulation, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods is applicable to situations in which goods in transit between two countries not belonging to the European Community are temporarily detained by the customs authorities in a Member State.

(2) The national court must interpret the provisions of national law, within the limits prescribed by its legal system, in the light of the wording and the purpose of the Community measure in order to achieve the result pursued by the latter.

(3) That duty to interpret national law consistently with the Community measure cannot, of itself and independently of a law adopted by a Member State, have the effect of determining or aggravating the liability in

criminal law of persons who act in contravention of that measure.

1: - Original language: Spanish.
2: - The Austrian Landesgericht is an ordinary court which hears, at first instance, all civil and criminal proceedings which do not come under the jurisdiction of the Bezirksgericht (District Court), in addition to appeals against rulings of the latter court.
3: - OJ 1994 L 341, p. 8. As amended by Council Regulation (EC) No 241/1999 of 25 January 1999 (OJ 1999 L 27, p. 1).
4: - On 8 March 2003, the referring court reported that Chemise Lacoste S.A. had discontinued its action.
5: - OJ 1992 L 302, p. 1.
6: - Bundesgesetzblatt 260/1970.
7: - As it is worded in the corrigendum which the national court sent on 4 March 2002.
8: - Order of the Court of 18 June 1980 in Case 138/80 Borker [1980] ECR 1975, paragraph 4; Order of the Court of 5 March 1986 in Case 318/85 Greis Unterweger [1986] ECR 955, paragraph 4; and judgment in Case C-111/94 Job Centre [1995] ECR I-3661, paragraph 9.
9: - Case 14/86 [1987] ECR 2545. See in particular paragraph 7 of the judgment, in which the Court followed the recommendations of Advocate General Mancini.
10: - See the observations of the Italian Government in the Report for the Hearing.
11: - Case 338/85 [1988] ECR 2041.
12: - See the judgments in Case 110/76 Pretore di Cento [1977] ECR 851; Case 228/87 Pretura unificata di Torino [1988] ECR 5099; Case C-373/90 X [1992] ECR I-131; and Joined Cases C-74/95 and C-129/95 X [1996] ECR I-6609.
13: - See Joined Cases C-74/95 and C-129/995 X, cited in the previous footnote.
14: - Judgments in Joined Cases 36/80 and 71/80 Irish Creamery [1981] ECR 735, paragraphs 5 to 8; Case 72/83 Campus Oil [1984] ECR 2727, paragraph 10; Case C-66/96 Høj Pedersen [1998] ECR I-7327, paragraphs 45 and 46; and Case C-236/98 JämO [2000] ECR I-2189, paragraphs 30 and 31.
15: - Case C-383/98 [2000] ECR I-2519 ('the Polo/Lauren case').
16: - Cited in footnote 3 of this Opinion.
17: - Council Regulation (EEC) No 3842/86 of 1 December 1986 laying down measures to prohibit the release for free circulation of counterfeit goods (OJ 1986 L 357, p. 1).
18: - Cited in point 30 above.
19: - One need think no further than the judgment in Case 43/75 Defrenne II [1976] ECR 455, in which it was held that the national measures in question were contrary to the Community prohibition on sexual discrimination, a finding which was similar in effect to a declaration of infringement of the Treaties.
20: - 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'
21: - See paragraph 17 above.
22: - See paragraph 17 above.
23: - According to the European Court of Human Rights, Article 7(1) of the Convention is not limited to prohibiting retrospective application of criminal law to a defendant and it also enshrines the general principle that crimes can be defined and penalties prescribed only by law, as well as the principle that the criminal law cannot be interpreted extensively to the disadvantage of the defendant - by way of analogy, for example (Eur. Court H.R. Kokkinakis v Greece (judgment of 25 May 1993, Series A No 260-A).
24: - See Case 157/86 Murphy and Others [1988] ECR 673, paragraph 11; Case C-106/89 Marleasing [1990] ECR I-4135, paragraph 8; Case C-334/92 Wagner Miret [1993] ECR I-6911, paragraph 20; Case C-91/92 Faccini Dori [1994] ECR I-3325, paragraph 26; Case C-165/91 Van Munster [1994] ECR I-4661, paragraph 34; Joined Cases C-240/98 to C-244/98 Océano Grupo Editorial and Salvat Editores [2000] ECR I-4941, paragraph 30; and Case C-262/97 Engelbrecht [2000] ECR I-7321, paragraph 39.
25: - See Pretore di Salò, paragraph 20; Case 80/86 Kolpinghuis Nijmegen [1987] ECR 3969, paragraph 13; Case C-168/95 Arcaro [1996] ECR I-4705, paragraph 37; and X, cited above, paragraph 24. See also the Opinion of Mr Jacobs in Joined Cases C-206/88 and C-207/88 Vessoso and Zanetti [1990] ECR I-1461, paragraphs 24 and 25, and the Opinion I delivered in Joined Cases C-74/95 and C-129/95 X, paragraphs 43 to 64.
