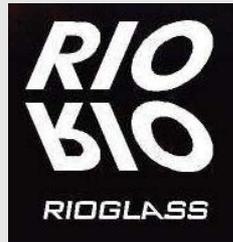


European Court of Justice, 23 October 2003, Rioglass



FREE MOVEMENT OF GOODS

Free movement of goods in transit

- [Article 28 EC precludes the implementation of procedures for detention by the customs authorities of goods lawfully manufactured in a Member state and intended to be placed on the market in a non-member country](#)

Article 28 EC is to be interpreted as precluding the implementation, pursuant to a legislative measure of a Member State concerning intellectual property, of procedures for detention by the customs authorities of goods lawfully manufactured in another Member State and intended, following their transit through the territory of the first Member State, to be placed on the market in a non-member country.

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European Court of Justice, 23 October 2003

(J.-P. Puissechet, C. Gulmann, V. Skouris, F. Macken and J.N. Cunha Rodrigues)

JUDGMENT OF THE COURT (Sixth Chamber)

23 October 2003 (1)

(Free movement of goods - Measures having equivalent effect - Procedures for detention under customs control - Goods in transit intended for the market of a non-member country - Spare parts for motor cars)

In Case C-115/02,

REFERENCE to the Court under Article 234 EC by the Cour de cassation (France) for a preliminary ruling in the proceedings pending before that court between Administration des douanes et droits indirects and

Rioglass SA,
Transremar SL

on the interpretation of Article 28 EC,

THE COURT (Sixth Chamber),

composed of: J.-P. Puissechet, President of the Chamber, C. Gulmann, V. Skouris (Rapporteur), F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: J. Mischo,

Registrar: M.-F. Contet, Principal Administrator, after considering the written observations submitted on behalf of:

- Rioglass SA and Transremar SL, by J.-P. Bellecave, avocat,
- the French Government, by A. Colomb and G. de Bergues, acting as Agents,
- the Portuguese Government, by L.I. Fernandes, A.S. Neves and J.S. de Andrade, acting as Agents,
- the Commission of the European Communities, by R. Tricot, acting as Agent, and E. Cabau, avocat, having regard to the report of the Judge-Rapporteur, after hearing the [Opinion of the Advocate General](#) at the sitting on 20 March 2003,

gives the following

Judgment

1. By judgment of 26 March 2002, received at the Registry of the Court on 2 April 2002, the Cour de cassation (Court of cassation) (France) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 28 EC.

2. That question has been raised in proceedings between the Administration des douanes et droits indirects (Customs and Indirect Taxes Administration, 'the customs authority') and Rioglass SA ('Rioglass') and Transremar SL ('Transremar'), both companies registered under Spanish law, concerning the detention in France, on suspicion of infringement of trade mark, of spare parts for cars manufactured in Spain and being transported to Poland.

National law

3. Article L.716-8 of the Code de la propriété intellectuelle (Intellectual Property Code) introduced by Article 11 of Law 94-102 of 5 February 1994 (Journal Officiel de la République Française of 8 February 1994, p. 2151) provides:

'The customs authority may, as part of its controls, upon a written request from the owner of a registered trade mark or the holder of an exclusive export right, detain goods which the latter alleges are supplied under a trade mark which infringes his registered trade mark or in respect of which he holds an exclusive right of use.

Where the customs authority detains goods it shall forthwith notify that fact to the Procureur de la République (state prosecutor), the person requesting such detention and the person declaring or in possession of the goods.

Unless within 10 working days of the notification of the detention of the goods the person requesting the detention provides the customs authority with evidence either:

- of an order of the President of the Tribunal de Grande Instance (Regional Court) for interim measures; or
- that the person requesting the detention has instituted civil or criminal proceedings and provided the security required to cover any liability where the infringement is not upheld in final proceedings ...

the measure by which the goods are detained shall be discharged.'

The dispute in the main proceedings and the question referred for a preliminary ruling

4. Rioglass manufactures and sells windows and windcreens for all makes of car. According to the file, it was approved by Sogédac, responsible, in its capacity as agent and central purchaser, for the approval of suppliers to the car manufacturers Peugeot, Citroën and Renault, as a supplier to those manufacturers.

5. In November 1997, Rioglass sold to Jann, a company registered in Poland, a consignment of windows and windcreens, lawfully produced in Spain, intended for various makes of car. Transremar was given responsibility for the transport of those goods. The goods were exported from Spain to Poland under cover of a Community transit certificate EX T2 issued on 24 November 1997, and thus qualified for the duty-suspension arrangements which allow movement between two points in the customs territory of the Community and Poland free of import duty, tax or commercial policy measures. Some of the windows and windcreens, intended for use in Peugeot, Citroën or Renault models, bore the logo or trade mark of those constructors alongside the manufacturer's trade mark.

6. On the same day, French customs officers carried out an inspection of Transremar's lorry near Bordeaux. On 25 November 1997 and 27 November 1997, the customs officers drew up, respectively, a report of detention of the goods and a report of seizure of the goods on suspicion of infringement of trade mark.

7. Rioglass and Transremar applied for interim relief seeking an order that the detention and seizure measures be lifted. By two orders of 8 December 1997 and 8 January 1998, the judge hearing the application for interim relief dismissed the applications, whereupon the applicants brought appeal proceedings against those orders. Their appeals were upheld by the Cour d'appel de Bordeaux (Bordeaux Court of Appeal) which ruled, in its judgment of 22 November 1999, that the detention of the lorry, the windcreens and the windows constituted a clear infringement of the right to private property and ordered the customs authority to return the goods, documents and deposits.

8. The customs authority lodged an appeal against that judgment before the Cour de cassation.

9. The Cour de cassation referred in that context to the judgment in Case C-23/99 *Commission v France* [2000] ECR I-7653, in which the Court of Justice held that, by implementing, pursuant to the Code de la propriété intellectuelle, procedures for detention by the customs authorities of goods lawfully manufactured in a Member State of the European Community which are intended, following their transit through French territory, to be placed on the market in another Member State, where they may be lawfully marketed, the French Republic had failed to fulfil its obligations under Article 28 EC.

10. The Cour de cassation formed the view, however, that resolution of the dispute called for an interpretation of Community law in order to determine whether the

solution adopted in that judgment also applied in the present case, and decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Is Article 30 of the Treaty, now Article 28 EC, to be interpreted as meaning that it precludes the implementation, pursuant to the Code de la propriété intellectuelle, of procedures for detention by the customs authorities of goods lawfully manufactured in a Member State of the European Community which are intended, following their transit through French territory, to be placed on the market in a non-member country, in the present case, Poland?'

The question referred for a preliminary ruling

Observations submitted to the Court

11. According to Rioglass and Transremar, the Court's reasoning in *Commission v France*, cited above, is perfectly applicable to the circumstances of the present case. They argue that the transport in issue in the main proceedings should be treated as a Community transit operation. Any measure of detention or seizure, carried out pursuant to the Code de la propriété intellectuelle, the Customs Code or 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 (OJ 1994 L 341, p. 8), of goods not intended to be placed on the market in France but which are merely being transported through that country in order to be marketed in a non-member country cannot be justified on the grounds of the protection of industrial and commercial property. Furthermore, there is no provision enabling a Member State to limit the free movement of Community goods in its territory merely because those goods are intended for a non-member country.

12. The French Government submits that Article 28 EC applies only to national measures liable to restrict intra-Community trade whereas the goods in question in the present case are intended to be placed on the market in a non-member country. The judgment in *Commission v France* is therefore irrelevant for purposes of the present case. According to the French Government, it is the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part (OJ 1993 L 348, p. 2, 'the agreement') which must be applied for the purpose of resolving the dispute in the main proceedings.

13. In this respect it is apparent from the case-law (Case 104/81 *Kupferberg* [1982] ECR 3641, paragraphs 29 to 31, Case C-312/91 *Metalsa* [1993] ECR I-3751, paragraphs 11 and 12, and Case C-63/99 *Gloszczuk* [2001] ECR I-6369, paragraph 48), that the mere similarity between the wording of a provision of one of the Treaties establishing the Communities and of an international agreement between the Communities and a non-member country does not suffice for the same meaning to be ascribed to the terms of that agreement as they bear in the Treaties.

14. Thus, referring to the judgment in Case 270/80 *Polydor and RSO* [1982] ECR 329, and emphasising that the purpose of the agreement differs from that of Articles 28 EC to 30 EC, the French Government submits that Article 10(4) of the agreement must be interpreted as not precluding implementation by the customs authorities of a Member State of procedures for the detention of goods originating in another Member State and intended, following their transit through the first State, to be placed on the Polish market.

15. The Portuguese Government submits that Article 28 EC precludes the implementation of procedures, such as those in issue in the main proceedings, for the detention of goods lawfully manufactured in one Member State and intended, following their transit through the Member State in question, to be placed on the market of a non-member country on the ground that those procedures may delay the movement of the goods by 10 days and are therefore disproportionate to the objective which they seek to achieve.

16. Finally, the Commission takes the view that Articles 28 EC to 30 EC are the only relevant provisions for the purposes of replying to the question referred. It considers that neither the Community rules on the harmonisation and unification of intellectual property rights nor Regulation No 3295/94 are relevant in the present case. According to settled case-law, Article 28 EC applies to all goods originating in or destined for a Member State. Therefore the Court's reasoning in *Commission v France* is applicable in the present case. It matters little in that regard that the goods in question are intended for export to a non-member country provided that they originate in a Member State and, in particular as in the present case, that they were lawfully manufactured in that Member State.

Reply of the Court

17. It should be noted as a preliminary point that the fact that the goods in question in the main proceedings were intended for export to a non-member country does not necessarily lead to the conclusion that, in a situation such as that in the present case, those goods do not fall within the scope of the EC Treaty provisions on the free movement of goods between Member States.

18. Given that, as is apparent from the file, the present case involves goods lawfully manufactured in one Member State in transit within another Member State, it must be pointed out that, according to settled case-law, the Customs Union established by the EC Treaty necessarily implies that the free movement of goods between Member States should be ensured. That freedom could not itself be complete if it were possible for Member States to impede or interfere in any way with the movement of goods in transit. It is therefore necessary, as a consequence of the Customs Union and in the mutual interest of the Member States, to acknowledge the existence of a general principle of freedom of transit of goods within the Community. That principle is, moreover, confirmed by the reference to transit in Article 30 EC (see, to that effect, Case 266/81 *SIOT* [1983] ECR 731, paragraph 16, and Case C-367/89 *Richardt*

and '*Les Accessoires Scientifiques*' [1991] ECR I-4621, paragraph 14).

19. The Court has moreover already held that Articles 28 EC to 30 EC are applicable to goods in transit through a Member State but intended for a non-member country (see, to that effect, Case C-350/97 *Monsees* [1999] ECR I-2921 and *Richardt* and '*Les Accessoires Scientifiques*', cited above).

20. It follows that, even if goods in transit are intended for a non-member country, they come within the scope of Articles 28 EC to 30 EC and the question referred for a preliminary ruling must accordingly be examined in the light of those provisions.

21. The Court is bound to conclude in that connection, firstly, that a measure of detention under customs control such as that in issue in the main proceedings, which delays the movement of goods and, if the competent court rules that they are to be confiscated, may block their movement completely, has the effect of restricting the free movement of goods and therefore constitutes an obstacle to that freedom (on the same French legislation, see *Commission v France*, paragraphs 22 and 23).

22. Therefore, given that the detention under customs control in issue in the main proceedings was carried out on the basis of the Code de la propriété intellectuelle, it is necessary to determine whether the obstacle to the free movement of goods created by that detention under customs control may be justified by the need to ensure the protection of industrial and commercial property referred to in Article 30 EC.

23. In order to answer that question it is necessary to take account of the purpose of that exception, which is to reconcile the requirements of the free movement of goods and the right of industrial and commercial property, by avoiding the maintenance or establishment of artificial barriers within the common market. Article 30 EC allows derogations from the fundamental principle of the free movement of goods within the common market only to the extent to which such derogations are justified for the purpose of safeguarding rights which constitute the specific subject-matter of such property (see, inter alia, [Case C-10/89 *Hag GF* \[1990\] ECR I-3711, paragraph 12](#), Case C-61/97 *FDV* [1998] ECR I-5171, paragraph 13, and *Commission v France*, paragraph 37).

24. According to the judgment for reference, the goods in issue in the present case were detained on suspicion of infringement of trade mark.

25. With respect to trade marks, it is settled case-law that the specific subject-matter of a trade mark is, in particular, to guarantee to the owner that he has the exclusive right to use that mark for the purpose of putting a product on the market for the first time and thus to protect him against competitors wishing to take unfair advantage of the status and reputation of the trade mark by selling products illegally bearing it (see, in particular, [Case 16/74 *Centrafarm* \[1974\] ECR 1183, paragraph 8](#), [Case 102/77 *Hoffmann-La Roche* \[1978\] ECR 1139, paragraph 7](#), and [Case C-349/95 *Loendersloot* \[1997\] ECR I-6227, paragraph 22](#)).

26. The implementation of such protection is therefore linked to the marketing of the goods.

27. Transit, such as that in issue in the main proceedings, which consists in transporting goods lawfully manufactured in a Member State to a non-member country by passing through one or more Member States, does not involve any marketing of the goods in question and is therefore not liable to infringe the specific subject-matter of the trade mark.

28. Furthermore, as Advocate General Mischo noted at point 45 of his Opinion, that conclusion holds good regardless of the final destination of the goods in transit. The fact that the goods are subsequently placed on the market in a non-member country and not in another Member State does not alter the nature of the transit operation which, by definition, does not constitute a placing on the market.

29. Therefore, a measure of detention under customs control, such as that in issue in the main proceedings, cannot be justified on the ground of protection of industrial and commercial property within the meaning of Article 30 EC.

30. In those circumstances, the answer to the question referred for a preliminary ruling must be that Article 28 EC is to be interpreted as precluding the implementation, pursuant to a legislative measure of a Member State concerning intellectual property, of procedures for detention by the customs authorities of goods lawfully manufactured in another Member State and intended, following their transit through the territory of the first Member State, to be placed on the market in a non-member country.

Costs

31. The costs incurred by the French and Portuguese Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, 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 (Sixth Chamber),

in answer to the question referred to it by the Cour de cassation by judgment of 26 March 2002, hereby rules: Article 28 EC is to be interpreted as precluding the implementation, pursuant to a legislative measure of a Member State concerning intellectual property, of procedures for detention by the customs authorities of goods lawfully manufactured in another Member State and intended, following their transit through the territory of the first Member State, to be placed on the market in a non-member country.

OPINION OF ADVOCATE GENERAL MISCHO

delivered on 20 March 2003 (1)

Case C-115/02

Administration des douanes et droits indirects

v

Rioglass SA and Transremar SL

(Reference for a preliminary ruling from the Cour de Cassation (France))

(Free movement of goods - Measures having equivalent effect - Procedures for detention under customs control - Goods in transit intended for the market of a non-member country - Spare parts for motor cars)

1. In its judgment in Case C-23/99, (2) the Court found that, by implementing, pursuant to the Code de la Propriété Intellectuelle, procedures for the detention by the customs authorities of goods lawfully manufactured in a Member State of the European Community which are intended, following their transit through French territory, to be placed on the market in another Member State where they may be lawfully marketed, the French Republic had failed to fulfil its obligations under Article 30 of the EC Treaty (now, after amendment, Article 28 EC).

2. In the present case, the Cour de Cassation (Court of Cassation) (France) asks, essentially, whether that decision may be transposed to a situation in which goods lawfully manufactured in a Member State are destined for a non-member country, in this instance Poland.

I - Legal framework

A - Community law

3. In addition to Article 28 EC, an interpretation of which is expressly sought by the referring court, reference is also made to Article 10(4) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part (3) (hereinafter 'the Agreement'), which states:

'Quantitative restrictions on imports into Poland of products originating in the Community and measures having equivalent effect shall be abolished on entry into force of this Agreement with the exception of those listed in Annex V which shall be abolished in accordance with the timetable provided in that Annex.'

4. Article 35 of the Agreement provides:

'The Agreement shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of ... protection of intellectual, industrial and commercial property Such prohibitions and restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Parties.'

B - National law

5. Article L.716-8 of the Code de la Propriété Intellectuelle, introduced by Article 11 of Law 94-102 of 5 February 1994, (4) provides:

'The customs authority may, as part of its controls, upon a written request from the owner of a registered trade mark or the holder of an exclusive export right, detain goods which the latter alleges are supplied under a trade mark which infringes his registered trade mark or in respect of which he holds an exclusive right of use.

Where the customs authority detains goods it shall forthwith notify that fact to the Procureur de la République, the person requesting such detention and the person declaring or in possession of the goods.

Unless within 10 working days of the notification of the detention of the goods the person requesting the detention provides the customs authority with evidence either:

- of an order of the President of the Tribunal de Grande Instance for interim measures; or
 - that the person requesting the detention has instituted civil or criminal proceedings and provided the security required to cover any liability where the infringement is not upheld in final proceedings
- The measure by which the goods are detained shall be discharged.'

II - Main proceedings and question referred

6. Rioglass SA (hereinafter 'Rioglass'), a company established under Spanish law, manufactures and markets windows and windscreens for all makes of car. It can be seen from the documents before the Court that Rioglass has been authorised by the company Sogédac, which is responsible in its capacity as intermediary and central buying office for authorising suppliers to the French carmakers Peugeot, Citroën and Renault, to act as supplier to those manufacturers.

7. In November 1997, Rioglass sold to Jann, a company established in Poland, a series of windows and windscreens, lawfully manufactured in Spain, intended for various makes of car. Rioglass entrusted the transport of these goods to Transremar SL (hereinafter 'Transremar'), a company established under Spanish law. The goods were exported from Spain to Poland under cover of an EX T2 Community transit document, issued on 24 November 1997, thereby benefiting from the suspensive procedure which permits their circulation between the customs territory of the Community and Poland free from import duties, taxation and commercial policy measures. A number of windows and windscreens to be fitted to Peugeot, Citroën or Renault models carried, alongside the manufacturer's trade mark, the logos or trade marks of the French carmakers.

8. On 25 November 1997, the French customs authorities carried out a check near Bordeaux on a lorry belonging to Transremar, pursuant to which the customs officers drew up a written report of detention of the goods, followed, on 27 November 1997, by a written report of seizure on the ground of suspected infringement of the trade mark.

9. Rioglass and Transremar applied to the judge hearing applications for interim relief for an order lifting the measures of detention and seizure. By two orders, dated 8 December 1997 and 8 January 1998, the judge rejected the applications. The applicants entered an appeal. They succeeded in their appeal before the Cour d'Appel de Bordeaux (Court of Appeal, Bordeaux) (France), which held, in its judgment of 22 November 1999, that the detention of the lorry and of the windscreens and windows constituted a manifest misuse of powers and ordered the customs and indirect taxes authority (hereinafter the 'customs authority') to return the goods, documents and security.

10. The customs authority appealed against this judgment before the Cour de Cassation. That court,

referring to the judgment in *Commission v France*, cited above, took the view that the dispute could not be resolved without an interpretation of Community law, for the purpose of determining whether the result set out in that judgment applied also in the present case.

11. The Cour de Cassation decided therefore to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 30 of the Treaty, now Article 28 EC, to be interpreted as meaning that it precludes the implementation, pursuant to the Code de la propriété intellectuelle, of procedures for detention by the customs authorities of goods lawfully manufactured in a Member State of the European Community which are intended, following their transit through French territory, to be placed on the market in a non-member country, in the present case Poland?'

III - Assessment

12. The French Government is alone, among the various interveners, in considering the detention measures at issue to be compatible with Community law.

13. It takes the view, in this connection, that the national court is mistaken in referring to Article 28 EC. It argues that this provision is not applicable to the facts in question since these relate to goods destined for a non-member country. There is thus no reason to refer to an article whose scope is limited to intra-Community trade. It follows also, in the French Government's view, that the judgment in *Commission v France*, cited above, is without relevance in the present case.

14. As the goods detained were destined for Poland, it is thus the Association Agreement with Poland, and in particular Articles 10(4) and 35 thereof, that is applicable.

15. The French Government cites in this connection the case-law of the Court, (5) according to which the fact of a Treaty provision and a provision of an association agreement being identical does not imply that the two provisions must be given the same interpretation. Such an agreement does not serve the same purpose as the Treaty, a point which must be taken into account when interpreting the texts concerned.

16. For their part, neither Rioglass and Transremar, on the one hand, nor the Commission and the Portuguese Government, on the other, make any reference to the said agreement. They submit that Articles 28 EC and 30 EC should apply in the main proceedings and that the judgment in *Commission v France*, cited above, therefore determines the outcome in the present case.

17. Rioglass and Transremar also invoke Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks. (6)

18. Lastly, all the interveners refer to Regulation (EC) No 3295/94. (7) In the French Government's view, that regulation provides justification for the customs measures that gave rise to the main proceedings, whereas both the Portuguese Government and the Commission dispute its relevance.

19. It is apparent from the above account that the existence of an impediment to the transit of the goods is not

disputed. The national legislation concerned allows the customs authorities to detain the parts in question for a period of 10 days. Such detention may be followed by confiscation ordered by the competent national court.

20. The opinions submitted to the Court do, however, differ in the matter of identifying the provision in whose light the impediment should be analysed and it should therefore be established, firstly, whether Article 28 EC, the subject-matter of the question referred to the Court for a preliminary ruling, is indeed applicable to the main proceedings.

21. The French Government, which is alone in proposing that this question be answered in the negative, relies, as we have seen, on the fact that the goods at issue in the present case were intended to be placed on the market in a non-member country, which would rule out the application of Article 28 EC, since that provision is applicable only to national measures liable to constitute a barrier to intra-Community trade.

22. Clearly, however, the fact that a measure impedes, as in the present case, the movement of goods destined for a non-member country does not in any way imply that the same measure does not also constitute an impediment to the free movement of the goods concerned within the internal market. The issue is not therefore, as in the judgment in *Bouhelier and Others*, (8) cited by the French Government, one of transposing the Treaty to relations with non-member countries, but rather one of determining whether relations between the Member States are affected.

23. This is indisputably the case in the present instance since the national measure at issue prevents, or at least impedes, the transit through France of goods lawfully manufactured in another Member State, as the Court has already found in its judgment in *Commission v France*, cited above, where it held that such detention, 'which delays the movement of goods and, if the competent court rules that they are to be confiscated, may block their movement completely, has the effect of restricting the free movement of goods'. (9)

24. As the Commission points out, the internal market is affected in two ways. On the one hand, the transit of goods originating in a Member State, including the transport activity, itself constitutes an economic activity covered by the fundamental freedoms established by the Treaty. On the other hand, any other view could result in the export of goods manufactured in a Member State and destined for a non-member country being deemed either lawful or unlawful under Community law depending on the route taken by the goods within the Community, a state of affairs which could lead to re-routing of traffic and thus constitutes a manifest distortion of freedom of movement and of competitive conditions within the single market.

25. This dual impact is present whatever the destination of the goods transiting a Member State. It follows that Articles 28 EC to 30 EC are applicable in a situation such as that which gave rise to the main proceedings, regardless of whether the goods detained are intended for a non-member country.

26. This conclusion is borne out by the case-law of the Court. In cases in which problems of transit through a Member State to a non-member country were at issue, (10) the Court has consistently applied Articles 30 and 36 of the EC Treaty. These cases differ from those cited by the French Government, in which, unlike in the present instance, the problem of transit through a Member State did not arise. Only in such cases has the Court analysed the situation in the light of the agreements in force with the State of destination of the goods concerned.

27. According to the case-law (11) concerning problems of transit through a Member State to a non-member country, 'it is necessary, as a consequence of the Customs Union and in the mutual interest of the Member States, to acknowledge the existence of a general principle of freedom of transit of goods within the Community. That principle is, moreover, confirmed by the reference to "transit" in Article 36 of the Treaty'.

28. It follows from the foregoing that the question whether the restriction at issue is capable of justification should be examined in the light of the Treaty provisions. There is no need therefore to analyse the provisions of the EU-Poland Agreement or, more particularly, to consider whether or not they should be interpreted as having the same effect as the Treaty provisions concerning the free movement of goods.

29. It could, however, be further observed that, according to the Court's consistent case-law, (12) Treaty provisions are not applicable where there exists Community harmonisation in the area concerned. And, in the area of trade mark law, there do indeed exist Community rules on harmonisation and unification. (13)

30. It should however be observed that the national court framed its question with reference to intellectual property rights in general rather than to trade mark law alone. It follows that the existence of the Community rules concerning trade marks cannot be a decisive factor in formulating an answer to the question referred. Furthermore, the facts of the matter itself are not limited to the issue of trade marks since, as the Commission points out, the French customs authorities also referred, in their written reports of 25 and 27 November 1997, to suspected counterfeiting of designs.

31. Besides, neither Directive 89/104 nor Regulation No 40/94 contains any provision regarding interim, protective measures concerning, in particular, detention by the customs authorities such as those at issue in the present case. As regards the law on designs, it should be noted that Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs (14) was not applicable at the material time. In any event, that Directive provides only for partial harmonisation of the protection of designs, particularly in respect of spare parts for motor cars such as those in question, concerning which it refers to national law, as can be seen from Article 14, which provides: '... Until such time as amendments to this Directive are adopted on a proposal from the Commission in accordance with the provisions of Article 18, Member States shall maintain in force their

existing legal provisions relating to the use of the design of a component part used for the purpose of the repair of a complex product so as to restore its original appearance and shall introduce changes to those provisions only if the purpose is to liberalise the market for such parts’.

32. It is apparent from the foregoing considerations that the situation in the present case is not one in which the existence of harmonisation is such as to render the Treaty rules inapplicable.

33. It must therefore be determined whether measures such as those at issue in the main proceedings can be justified in the light of one of the considerations appearing in Article 30 EC, namely the protection of commercial and industrial property, an argument advanced by the French authorities and examined by all the interveners.

34. A point to be made at the outset is that the terms of the analysis are the same as those of the analysis undertaken by the Court in its judgment in *Commission v France*, cited above. The present case involves the same procedures for detention under customs control and the question also arose, in the aforementioned judgment, of the possible justification of those procedures by the protection of industrial and commercial property, under Article 30 EC.

35. Admittedly, in the main proceedings, suspected infringement of trade marks is also, indeed above all, at issue, whereas, in the earlier judgment, the question was one of alleged counterfeiting of designs. As we shall see, this is of no consequence for the line of argument.

36. The Court's analysis in *Commission v France*, cited above, should first be considered. The Court stressed that Article 36 of the Treaty, in referring to industrial and commercial property as possible justification for a restriction of the free movement of goods, seeks to reconcile the requirements of such free movement and the right of industrial and commercial property, by avoiding the maintenance or establishment of artificial barriers within the common market. According to the Court, this provision ‘allows derogations from the fundamental principle of the free movement of goods within the common market only to the extent to which such derogations are justified for the purpose of safeguarding rights which constitute the specific subject-matter of such property (see, *inter alia*, Case C-10/89 *Hag* [1990] ECR I-3711, paragraph 12; and Case C-61/97 *FDV* [1998] ECR I-5171, paragraph 13)’.

37. The Court went on to analyse the content of the specific subject-matter of the right of industrial and commercial property concerned, namely a right in designs, in order to ascertain whether the ability to prevent third parties having the goods concerned transit the territory within which that right applies, without the consent of the holder thereof, formed part of the specific subject-matter of that right.

38. In replying in the negative to this question, the Court drew a distinction between such actions as sale, manufacture and importing on the one hand, and transit on the other. The former, it argued, involve use by the

third party of the appearance of the product which the design right seeks to protect. Furthermore, the specific subject-matter of that right is concerned with securing for its holder the exclusive right to market for the first time a product bearing the protected appearance, thereby guaranteeing the holder remuneration in return for his authorisation to use that appearance.

39. In contrast, transit involves no use of the appearance of the protected design and does not therefore affect the specific subject-matter of the right of industrial and commercial property.

40. The Court concluded that the impediment to the free movement of goods caused by the product's detention under customs control in the Member State where transit takes place is not justified by the need to protect industrial and commercial property.

41. This line of argument may be transposed, *mutatis mutandis*, to the present case.

42. Thus, restriction of the free movement of goods would be capable of justification only on grounds of the protection of the specific subject-matter of the right of industrial and commercial property at issue in the present case, namely the right in a trade mark.

43. However, as the Commission judiciously points out, the Court has already had occasion, in a consistent line of decisions, (15) to define the content of the specific subject-matter of the right in a trade mark, which is in particular to guarantee the holder the exclusive right to use the trade mark for the purpose of putting a product on the market for the first time.

44. The specific subject-matter thus implies, as for the right in designs at issue in *Commission v France*, cited above, exclusive use in the context of a product placed on the market for the first time. By its very nature, however, transit cannot constitute such use, nor therefore can it affect the specific subject-matter of the right, since it is limited, as the Court observed in *Commission v France*, (16) cited above, to the physical circulation of the goods in question and does not involve the marketing thereof.

45. This conclusion holds good whatever the final destination of the goods in transit. Whether that destination is located in another Member State or in a non-member country is immaterial to the fact that, by its very definition, transit does not constitute placing on the market and does not therefore affect the specific subject-matter of the right of the holder of the trade mark, namely, let it be remembered, to place on the market for the first time a product bearing that trade mark.

46. It follows from the foregoing considerations that the impediment to the free movement of goods caused by the detention under customs control of products lawfully manufactured in another Member State in order to prevent their transit is not justified on grounds of the protection of industrial and commercial property.

47. It should be noted, lastly, that it is not contended that the measures of detention are necessary in order to ascertain the origin or destination of the products concerned. In any event, the Court has already, in paragraph 48 of the judgment in *Commission v France*, cited above, held that the measures of detention at issue

cannot be justified on those grounds since it should normally be possible for such an investigation to be carried out on the spot. The Court added that detention for up to 10 days was, on any view, disproportionate in relation to the purpose of such an investigation.

48. It should be added that the French Government explains further that the customs officers acted on the basis of Article 1(1)(a), first indent, of Regulation No 3295/94, which reads as follows:

‘This Regulation shall lay down ... the conditions under which the customs authorities shall take action where goods suspected of being counterfeit or pirated are ... entered for free circulation, export or re-export ...’.

49. The Commission is however right in drawing attention to the Court's previous decision that this provision relates only to goods originating in non-member countries. (17) It is not disputed, in this regard, that the products at issue in the main proceedings were Community goods, lawfully manufactured in a Member State.

50. The fact that they had been the subject of an export declaration does not deprive them of that status, which they retain for as long as they have not actually left the customs territory of the Community. The customs code (18) states, in this connection, that ‘[w]ithout prejudice to Articles 163 and 164 [concerning internal transit], Community goods shall lose their status as such when they are actually removed from the customs territory of the Community’. Similarly, the fact that the goods in question came under the internal transit procedure, as the national court points out, does not deprive them of their status as Community goods since, according to Article 163(1) of the customs code, ‘[t]he internal transit procedure shall, under the conditions laid down in paragraphs 2 to 4, allow the movement of Community goods from one point to another within the customs territory of the Community passing through the territory of a third country without any change in their customs status ...’.

51. The Community nature of the goods in question is, in itself, sufficient to rule out application of Regulation No 3295/94 in the present case. There is thus no need to analyse the arguments developed by the French Government in support of the view that the conditions laid down in Article 4 of the Regulation, concerning the existence of an application by the holder of the right for action to be taken by the customs authorities, had been met, while the Commission, which denies, further, the presence, in the present case, of the ‘evident’ state of affairs required under that provision to justify a measure of detention, takes the opposite view, citing in this connection the Cour d'Appel de Bordeaux, which found that the said Article 4 had not been complied with.

52. It follows from the foregoing considerations that measures of detention under customs control such as those at issue in the main proceedings constitute restrictions on the free movement of goods incompatible with Article 28 EC and they are not justified by the need to ensure the protection of industrial and commercial property as provided for in Article 30 EC.

IV - Conclusion

53. In the light of the foregoing, I propose that the question referred by the Cour de Cassation for a preliminary ruling be answered as follows:

Article 28 EC should be interpreted as precluding the implementation of procedures, such as those at issue in the main proceedings, for the detention by the customs authorities of goods lawfully manufactured in a Member State of the European Community which are intended, following their transit through French territory, to be placed on the market in a non-member country, in the present case Poland.

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- 1: - Original language: French.
 - 2: - Case C-23/99 *Commission v France* [2000] ECR I-7653.
 - 3: - OJ 1993 L 348, p. 2.
 - 4: - *Journal Officiel de la République Française* of 8 February 1994, p. 2151.
 - 5: - Judgments in Case 225/78 *Bouhelier and Others* [1979] ECR 3151, Case 270/80 *Polydor and RSO* [1982] ECR 329, Case 104/81 *Kupferberg* [1982] ECR 3641, Case C-312/91 *Metalsa* [1993] ECR I-3751 and Case C-63/99 *Głoszczuk* [2001] ECR I-6369.
 - 6: - OJ 1989 L 40, p. 1.
 - 7: - 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 (OJ 1994 L 341, p. 8).
 - 8: - Cited above.
 - 9: - Paragraph 22.
 - 10: - Judgments in Case C-367/89 *Criminal proceedings against Richardt and ‘Les Accessoires scientifiques’* [1991] ECR I-4621 and Case C-350/97 *Monsees* [1999] ECR I-2921.
 - 11: - Judgment in *Richardt and ‘Les Accessoires scientifiques’*, cited above, paragraph 14.
 - 12: - See, for instance, the judgment in Case 72/83 *Campus Oil and Others* [1984] ECR 2727.
 - 13: - See Council Directive 89/104/EEC and Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).
 - 14: - OJ 1998 L 289, p. 28.
 - 15: - See, for example, the judgment in Case 16/74 *Winthrop* [1974] ECR 1183.
 - 16: - Paragraphs 43 and 44.
 - 17: - Judgment in *Commission v France*, cited above, paragraph 3.
 - 18: - The second paragraph of Article 4(8) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1; hereinafter ‘the customs code’).
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