Court of Justice EU, 9 February 1982, Polydor v Harlequin

COPYRIGHT – FREE MOVEMENT OF GOODS

The enforcement of copyrights against the importation and marketing of gramophone records in the United Kingdom lawfully manufactured and placed on the market in the Portuguese Republic by licensees does not constitute a restriction on trade:

- **does not constitute a means of arbitrary discrimination or a disguised restriction on trade between the Community and Portugal**

Due the enforcement by the proprietor or by persons entitled under him of copyrights protected by the law of a Member State against the importation and marketing of gramophone records lawfully manufactured and placed on the market in the Portuguese Republic by licensees of the proprietor is justified on the ground of the protection of industrial and commercial property within the meaning of Article 23 of the Agreement between the European Economic Community and the Portuguese Republic of 22 July 1972 (Official Journal, English Special Edition 1972 (31 December) (L 301), p. 167) and therefore does not constitute a restriction on trade such as is prohibited by Article 14 (2) of that Agreement. Such enforcement does not constitute a means of arbitrary discrimination or a disguised restriction on trade between the Community and Portugal within the meaning of the said Article 23.

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Court of Justice EU, 9 February 1982

(J. Mertens de Wilmars, G. Bosco, A. Touffait, O. Due, P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, U. Everling, A. Chloros and F. Grévisse)

In Case 270/80

REFERENCE to the Court under Article 177 of the EEC Treaty by the Court of Appeal of England and Wales for a preliminary ruling in the case pending before that court between

POLYDOR LIMITED AND RSO RECORDS INC.

and

HARLEQUIN RECORD SHOPS LIMITED AND SIMONS RECORDS LIMITED,

on the interpretation of Articles 14 and 23 of the Agreement concluded on 22 July 1972 between the European Economic Community and the Portuguese Republic (Official Journal, English Special Edition 1972 (31 December) (L 301), p. 167),

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and

O. Due (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart,

A. O'Keeffe, T. Koopmans, U. Everling, A. Chloros and F. Grévisse, Judges,

Advocate General: S. Rozès

Registrar: A. Van Houtte

gives the following

JUDGMENT

I. Facts and Issues

The order for reference, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I - Facts and procedure

This case concerns the importation into the United Kingdom of gramophone records from Portugal.

1. The plaintiffs in the main action are Polydor Limited and RSO Records lnc .. RSO Records lnc. (hereinafter referred to as "*RSO*") is the proprietor of the copyrights in a number of sound recordings collectively entitled "*Spirits Having Flown*" featuring the work of artists known as "*The Bee Gees*".

Polydor Limited (hereinafter referred to as "*Polydor*") is the exclusive licensee of RSO under the copyrights in the United Kingdom and under its exclusive licence manufactures gramophone records and cassettes reproducing those recordings, which it sells and distributes in the United Kingdom.

In Portugal records and cassettes reproducing the same recordings are manufactured and marketed by Phonogram and Polygram Discos, companies incorporated under Portugese law, which are licensees of RSO in Portugal. Those two companies belong to the same group of companies as RSO and Polydor.

Harlequin Record Shops Limited (hereinafter referred to as "*Harlequin*"), the first defendant in the main action, carries on the business of retail sale of records in the United Kingdom.

Simons Records Limited (hereinafter referred to as "*Simons*"), the second defendant in the main action, carries on in the United Kingdom the business of importing records, which it sells and distributes wholesale to retailers in the United Kingdom.

2. Since May 1979 Simons has imported into the United Kingdom from Portugal copies of records produced in Portugal by Phonogram and Polygram from the sound recording which is the subject of the copyright. A number of those records were sold by Simons to Harlequin, which sold them to customers in a retail shop. The imports and sales by Simons and the sales by Harlequin were made without the consent of Polydor or RSO. On 17 July 1979 RSO and Polydor issued a writ in the Chancery Division of the High Court of Justice claiming inter alia an injunction restraining Harlequin from selling and distributing the records and cassettes.

On the same day a Notice of Motion was served claiming an interim injunction restraining such acts until the trial of the action. On 20 July 1979 Simons, at its own request, was added as a defendant to the proceedings and served a Notice of Motion seeking an order to stay the proceedings and to
refer three questions to the Court of Justice of the European Communities under Article 177 of the EEC Treaty. Harlequin and Simons claimed that the records imported by Simons were copies of records made in Portugal by a Portuguese-owned pressing plant for Polygram and were sold by Polygram to Simons' supplier.
By a judgment of 21 December 1979 the Chancery Division of the High Court refused to order a reference under Article 177 and granted an injunction until full trial of the action preventing inter alia Simons from importing the records in question from Portugal and preventing Simons and Harlequin from selling and distributing the records in the United Kingdom. Harlequin and Simons appealed to the Court of Appeal against that order. They claimed that under Community law Polydor was not entitled to enforce the rights conferred upon it by Section 16 (2) of the Copyright Act, 1956. This defence is based on the Agreement between the European Economic Community and the Portuguese Republic signed in Brussels on 22 July 1972 (hereinafter referred to as the "*Agreement*").
That Agreement was adopted on behalf of the Community by Regulation (EEC) No 2844/72 of the Council of 19 December 1972 (Official Journal, English Special Edition 1972 (31 December) (L 301), p. 166). The detailed rules for implementing the safeguard measures provided for in the agreement were laid down by Regulation (EEC) No 2845/72 of the Council of the same date (Official Journal, English Special Edition 1972 (31 December) (L 301), p. 370).
The provisions of the Agreement relied upon by Harlequin and Simons are Articles 14 (2) and 23. Article 14 (2) reads as follows:
"Quantitative restrictions on imports shall be abolished on 1 January 1973 and any measures having an effect equivalent to quantitative restrictions on imports shall be abolished not later than 1 January 1975."
Article 23 provides as follows:
"The Agreement shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, law and order or public security, the protection of life and health of humans, animals or plants, the protection of national treasures of artistic, history or archaeological value, the protection of industrial and commercial property, or rules relating to gold or silver. Such prohibitions or restrictions must not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Contracting Parties."
Harlequin and Simons claimed in particular that following the judgment of 5 February 1976 (Case 87/75 Conceria Daniele Bresciani v Amministrazione Italiana delle Finanze [1976] ECR 129) Articles 14 and 23 of the Agreement had direct effect. Furthermore, they submitted that the case-law of the Court of Justice, according to which the provisions of the EEC Treaty on the free movement of goods, and in particular Articles 30 and 36, prevent the proprietor of an intellectual or industrial property right from relying on that right to restrain the importation of a product marketed by him or with his consent, should also be applied in relation to the Agreement with Portugal. Articles 14 and 23 of that Agreement are indeed based on the same principles as Articles 30 and 36 of the EEC Treaty.
3. In view of those arguments the Court of Appeal refused to grant the interim measures claimed by Polydor. lt asked the Court of Justice under Article 177 of the EEC Treaty to give a preliminary
ruling on the following questions:
"1. Is the enforcement by Company A of their United Kingdom copyrights against a gramophone record lawfully made and sold in the State of Portugal by licensees under the equivalent Portuguese copyrights a measure having equivalent effect to quantitative restrictions on imports within the meaning of Article 14 (2) of the said Agreement dated 22 July 197 2 made between the European Economic Community and the State of Portugal?
2. If the answer to the first question is affirmative:
(a) Is such enforcement by Company A justified within the meaning of Article 23 of the said Agreement dated 22 July 1980 for the protection of the said United Kingdom copyrights?
(b) Does such enforcement by Company A constitute a means of arbitrary discrimination or a disguised restriction on trade between the State of Portugal and the European Economic Community?
3. Is Article 14 (2) of the said Agreement dated 22 July 1972 directly enforceable by individuals within the European Economic Community having regard in particular to the said European Economic Community Council regulation dated 19 December 1972 giving effect to the said Agreement?
4. Can an importer into the United Kingdom of the gramophone records referred to in Question 1 rely on Article 14 (2) of the said Agreement dated 22 July 1972 as a defense when sued by Company A for infringement of their said copyrights in the United Kingdom?"
The order for reference dated 15 May 1980 was lodged at the Court Registry on 8 December 1980.
4. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by Polydor and RSO, the plaintiffs in the main action, represented by R. A. Morritt, QC, of Lincoln's lnn, instructed by Joynson Hicks & Co. and assisted by I. Van Bael and J.-F. Bellis of the Brussels Bar, by Harlequin and Simons, the defendants in the main action, represented by A. Wilson of the Bar of England and Wales, by the United Kingdom Government, by the Government of the Federal Republic of Germany, by the Netherlands Government, by the Danish Government, by the French Government and by the Commission of the European Communities, represented by its Legal Advisers, Jean Groux and Jacques Bourgeois, assisted by D. A. 0. Edward, QC, of

the Scots Bar. Upon hearing the report of the Judge Rapporteur and the views of the **Advocate General**, the Court decided to open the oral procedure without any preparatory inquiry.

II. Summary of observations the Court the written submitted to Harlequin and Simons take the view that Article 14 (2) of the Agreement confers upon Community citizens rights which the courts of Member States must protect.

Regulation No 2844/72 of the Council of 19 December 1972 (Official Journal, English Special Edition 1972 (31 December) (L 301), p. 166) provides in Article 1 that the Agreement is "*hereby concluded, adopted and confirmed on he half of the Community*", and, following Article 5, that the regulation is "*binding in its entirety and directly applicable in all Member States*".

Consequently, by virtue of Article 189 of the EEC Treaty the Agreement is directly applicable in the Member States of the EEC.

In considering whether the individual provisions of a Treaty confer rights on individuals which the courts of Member States must protect, the Court considers "*the spirit, the general scheme and the wording*" of the Treaty (judgment of 5 February 1976 in Case 87/75 Bresciani [1976] ECR 129, at p. 140). Harlequin and Simons take the view that such a consideration makes it plain that Article 14 (2) of the Agreement is indeed of such a nature as to confer such rights. Article 14 (2) is, moreover, in clear and peremptory terms.

In support of their thesis Harlequin and Simons refer to the case-law of the Court, and in particular to the judgments of 5 February 1976 (in the Bresciani case cited above), of 11 October 1979 (Case 225/78 Eauhelier [1979] ECR 3151), of 30 November 1977 (Case 52/77 Cayrol [1977] ECR 2261) and of 15 June 1976 (Case 51/75 EMI v CBS [1976] ECR 811) and to the opinions of certain writers (March Hunnings, "*Enforceability of the EEC-EFTA Free Trade Agreements*", (1977) 2 E.L. Rev. 163, at pp. 180 to 184; Waelbroeck "*Enforceability of the EEC-EFTA Free Trade Agreements: A reply*", (1978) 2 E.L. Rev. 27, at pp. 29 and 30).

As far as Article 14 (2) of the Agreement is concerned, Harlequin and Simons submit that, like Article 30 of the EEC Treaty, it must be interpreted as covering measures, such as injunctions, which restricts the importation of goods which infringe an industrial property right, including copyright, in the importing State (cf. judgment of 8 June 1971 in Case 78/70 **Deutsche Grammopbon Geselfschaft v Metro** [1971] ECR 487).

Indeed, the expressions "*quantitative restrictions on imports"* and "*any measures having an effect equivalent to quantitative restrictions on imports*" appearing in that provision are substantially the same as those used in Article 30 of the EEC Treaty. They should therefore be interpreted as having the same effect for the following reasons:

(a) The structure of the Agreement is comparable to that of the EEC Treaty in its treatment of provisions relating to the freedom of movement of goods;

(b) The Agreement incorporates Article 23 which is similar to Article 36 of the EEC Treaty and expressly refers to the protection of industrial property, a reference which would not be needed if Article 14 did not cover injunctions restraining the importation of infringing goods;

(c) The Agreement was signed after the decision of the Court in the **Deutsche Grammopbon Geselfschaft case** cited above. Had it been intended that Article 14 should not cover injunctions restraining the importation of infringing goods, it would have been a simple matter to draft the Agreement to make that clear;

(d) Injunctions completely restraining the import of infringing goods constitute a very severe restriction on trade between Member States, and it would be surprising if those who negotiated the Agreement intended them to be excluded;

(e) In the Bresciani case (cited above) the Court interpreted the words "*charges having equivalent effect*" to customs duties in the second Yaoundé Convention in a manner identical to the Court's interpretation in the same case of the corresponding words in Article 13 (2) of the EEC Treaty.

As far as Article 23 of the Agreement is concerned, Harlequin and Simons submit that it must be interpreted and must take effect in the same way as Article 36 of the EEC Treaty. That follows from the virtual identity of the words used in the respective articles and the similar context in which they are found in the two treaties.

Harlequin and Simons nevertheless contend that on the facts of the proceedings the injunction sought is not "*justified*" within the meaning of Article 23 of the Agreement and constitutes a "*means of arbitrary discrimination or a disguised restriction on trade*" between Portugal and the EEC.

The facts on which Harlequin and Simons rely in support of their contention are as follows:

(a) The records in question were lawfully made in Portugal;

(b) They were made and distributed in Portugal by Polydor's sister companies which operate under a parallel license from RSO. In conclusion, Harlequin and Simons propose that the Court should give the following replies to the questions put:

"*1. The enforcement of UK copyrights against the import into the UK of gramophone records lawfully made and sold in Portugal by a licensee under the corresponding Portuguese copyright IS a measure having equivalent effect to quantitative restrictions on imports within the meaning of Article 14 (2) of the Agreement.*

2. Such enforcement is not justified within the meaning of Article 23 of the said Agreement and constitutes a means of arbitrary discrimination and a disguised restriction on trade between Portugal and the EEC.

3. Articles 14 (2) and 23 of the said Agreement confer rights on individuals which the courts of Member States must protect.

4. Accordingly an importer into the UK of such records may rely on the said Article 14 (2) as a defense to an action for infringement of the said UK copyrights."

Polydor and RSO, the plaintiffs in the main action, (hereinafter referred to as "*Polydor*") consider that the four questions referred to the Court in fact raise two

issues and may therefore be reduced to two questions phrased as follows:
1. Should Article 14 (2) of the Agreement, read jointly with Article 23 thereof, be interpreted in such a way that it extends the case-law of the Court of Justice on exhaustion of industrial and intellectual property rights in the Community to trade between the Community and Portugal?
2. Do Articles 14 (2) and 23 of the Agreement create rights directly enforceable in national courts on the Community?
Polydor submits that both questions should be answered in the negative. lt stresses first that there is a fundamental difference between the rules applicable to the interpretation of the EEC Treaty and those applicable to the interpretation of classical international treaties. The fundamental difference in approach between classical international law and Community law as regards direct effect was made clear by the Court in its judgment of 5 February 1963 in Case 26/62 Van Gend en Loos [1963] ECR I.
The distinction between classical international law and Community law was restated by the Court in its judgment of 15 July 1964 in Case 6/64 Costa v ENEL [1964] ECR 585.
Apart from the question of direct effect, the methods followed for the interpretation of the substantive content of treaty provisions also differ under Community law as compared with international law. In contrast to the traditional approach under international law, the Court of Justice, in interpreting the provisions of the EEC Treaty, has applied dynamic methods of interpretation, which have been referred to as the "*teleological*" approach.
Consequently, the interpretation applied by the Court to a given provision of the Treaty of Rome, including the eventual recognition of its directly enforceable character, may not be automatically applied to provisions similar in wording appearing in international agreements between the Community and nonmember countries. That principle was stated by the Court in its judgment of 12 December 1972 in Joined Cases 21 to 24/72 International Fruit Company [1972] ECR 1219 and in its judgment of 11 October 1979 in the Houhelier case cited above.
A comparison of the Agreement with the EEC Treaty demonstrates that there is a basic difference in the nature of the two treaties. lt is apparent from that comparison that the Agreement belongs to the category of classical international agreements. lt merely imposes reciprocal obligations upon the contracting parties without involving any transfer of sovereign powers to common institutions. Hence the Agreement must be construed in accordance with the rules of international law on interpretation. As regards the interpretation of Articles 14 (2) and 23 of the Agreement, Polydor submits that the case-law of the Court of Justice on the exhaustion of industrial and intellectual property rights in the Community may not be extended to trade between the Community and Portugal.
The rationale of the Court's case-law on the exercise of industrial and intellectual property rights under Articles 30 and 36 of the EEC Treaty is to promote the integration of the national markets into a single market and to prevent the "*partitioning*" of the common market (judgment of 8 June 1971 in Case 78/70 **Deutsche Grammopbon Geselischaft v Metro** Groflmiirkte cited above; judgment of 31 October 197 4 in Case 15/7 4 **Centraform v Sterling Drug** [197 4] ECR 1147; judgment of 31 October 197 4 in Case 16/74 **Centraform v Winthrop** [1974] ECR 1183; judgment of 3 July 197 4 in Case 192/73 Van Zuylen Frères v Hag [1974] ECR 731; judgment of 20 January 1981 in Joined Cases 55 and 57/80 **Musik- Vertrieb membran GmbH & K-tel v GEMA** [1981] ECR 147). That rationale cannot be transposed to the Agreement, which is intended solely to establish a free-trade area between the contracting parties. Moreover, there is nothing in the text of the Agreement which indicates that the concept of "*measures having an effect equivalent to quantitative restrictions on imports*" in Article 14 (2) must be interpreted in exactly the same manner as Article 30 of the EEC Treaty. In that respect the wording of Article 14 (2) of the Agreement is markedly different from that of Article 2 (1) of the 1963 Yaoundé Convention which was the subject of the Court's judgment in the Bresciani case cited above. Indeed, Article 2 (1) expressly referred to the provisions of Articles 12, 13, 14 and 17 of the EEC Treaty. lt was for that reason that the Court concluded that Article 2 (1) of the Yaoundé Convention had to be given the same meaning as that of Article 13 of the EEC Treaty.
However, there is nothing comparable in the terms of Article 14 (2) of the Agreement.
Furthermore, the concept of "*measures having an effect equivalent to quantitative restrictions on imports*" appears not only in Article 30 of the Treaty but a also in Article 10 of the Convention which established the European FreeTrade Association (hereinafter referred to as the "*EIT A Convention*") and in Article XI of the General Agreement on Tariffs and Trade (hereinafter referred to as "*GA TT*").
That concept is interpreted in the context of neither the EIT A Convention nor GA TT as embodying the doctrine of exhaustion of rights. There is therefore no reason to read that doctrine into Article 14 (2), especially as the EIT A Convention and the Agreement share the same objective, namely the establishment of a free-trade area. lt is therefore more likely that the meaning of Article 14 (2) corresponds more closely to that of Article 10 of the EFTA Convention than to that of Article 30 of the Treaty of Rome.
Polydor points out that the preamble to the Agreement declares in its last recital that "*no provision of this Agreement may be interpreted as exempting the Contracting Parties from the obligations which are incumbent upon them under other international agreements*". In view of that, Article 14 (2) of the Agreement must be interpreted in the light of the international copyright conventions. Polydor submits that the fact that neither of the contracting parties has

ever intended to give to Articles 14 (2) and 23 of the Agreement the same meaning as that of Articles 30 and 36 of the Treaty of Rome as regards the exercise of industrial and intellectual property rights is confirmed by their subsequent behaviour in the application of the Agreement.
No step was taken by the Community and its Member States or by Portugal and the other EFTA countries to amend their legislation on copyright and other industrial or intellectual property rights. In addition, the interpretation of the provisions at issue advocated by the defendants in the main actions has been rejected by certain supreme courts in the EFTA countries (judgment of the Austrian Supreme Court of 10 July 1979 in the case of Austro-Mechana v Gramola Winter & Co. (1980) Rev. Int. Dr. Aut., No 104; judgment of the Swiss Federal Supreme Court of 25 January 1979 in the case of Sunlight AG v Bosshard Partners Intertrading [1980) 3 C.M.L.R. 664, also known as the "*Omo*" case).
As regards direct effect, Polydor submits that Articles 14 (2) and 23 of the Agreement are not capable of creating rights which may be directly relied upon before the courts.
First, there is nothing in the terms of the Agreement to indicate that the contracting parties intended that individuals might be directly concerned.
On the contrary, the use of the verb "*abolish*" in Article 14 (2) implies that further intervention by the contracting parties is required for the implementation of the provision. Thus, there is a marked difference in wording from Article 30 of the EEC Treaty, which provides that quantitative restrictions and measures having equivalent effect "*shall ... be prohibited*" (judgment of 22 March 1977 in Case 74/76 Janel/i and Volpi v Merani [1977) ECR 557, and especially at p. 575).
Secondly, placed in the institutional context of the Agreement, the provisions on the abolition of "*measures having an effect equivalent to quantitative restrictions on imports*" (Article 14 (2)) and on disguised restrictions on trade (Article 23) are incapable of being applied as they stand by the courts of the contracting parties.
In the absence of common institutions empowered to ensure uniform interpretation binding on all contracting parties, those concepts are too vague to be justiciabie in dornestic courts of the contracting parties.
Polydor considers that its thesis that Articles 14 (2) and 23 of the Agreement are incapable of being enforced before the national courts is in accordance with the case-law of the Court on the direct effects of international agreements (judgment of 12 December 1972 in the International Fruit case cited above; judgment of 24 October 1973 in Case 9/73 Schlüter [1973] ECR 1135; judgment of 5 February 1976 in the Bresciani case cited above).
Moreover, provisions equivalent to Articles 14 (2) and 23 of the Agreement have been held not to have direct effect by the Swiss Federal Supreme Court (judgment of 25 January 1977 in the Sunlight case cited above).
Finally, the fact that the Agreement was concluded on behalf of the Community in the form of a "*regulation*" has no relevance in determining whether Article 14 (2) may be enforced before the national courts.
Even though the Treaty does not provide for a special procedure in this matter, an examination of the relevant Community practice shows that, prior to its entry into force, every international agreement to which the Community is a party is the subject of an act of the Council "*concluding*" the agreement. The act to which the text of the agreement is annexed is published in the Official Journal. The act concluding the agreement may be either a "*regulation*" or a "*decision*".
Whatever the form of the act concluding the agreement may be, that can have no effect on the problem of the direct enforceability of the agreement. lt's essential purpose is, above all, to approve the agreement on behalf of the Community. A further related purpose of the act is to empower the President of the Council to give notification to the other contracting parties that the procedures necessary for the entry into force of the agreement have been completed on the part of the Community or, for agreements in a simplified form, to authorize the President to designate a person to sign the agreement. In certain cases also, the act concluding the agreement provides for measures for the implementation of the agreement.
That the form of the act, whether it is a regulation or a decision, concluding an international agreement on behalf of the Community is irrelevant for the purpose of deciding the issue of direct enforceability is also apparent from the approach followed by the Court in previous cases dealing with this issue. In none of those cases has the Court paid any attention to the form of the act by which the agreement had been concluded. In each case the Court limited its inquiry to the "*spirit, the general scheme and the wording*" of the agreement concerned (judgment of 12 December 1972 in the International Fruit case cited above; judgment of 24 October 1973 in the Schlüter case cited above; judgment of 5 February 1976 in the Bresciani case cited above).
Polydor submits that the extension of the Community doctrine of exhaustion of rights to the context of free-trade agreements would confer a unilateral advantage on producers in non-member countries to the detriment of Community industry. Owners of patents, copyright and other industrial and intellectual property rights in the Community would be deprived of the possibility of enforcing their rights against import from EFTA countries without being able to benefit from the same treatment in those countries.
In conclusion, Polydor submits that the questions put should be answered as follows:
"1. The answer to Question 1 should be in the negative. The enforcement by Company A of their United Kingdom copyrights against a gramophone record lawfully made and sold in Portugal by licensees under the equivalent · Portuguese copyrights is not a measure having equivalent effect to quantitative restrictions on import within the meaning of Article 14 (2) of the Agreement between the European Economic Community and the Portuguese Republic.

2. It follows from the answer to Question 1 that Question 2, which was submitted only in case the answer to Question 1 should be in the affirmative, has no longer any purpose.
3. The answers to Questions 3 and 4 should be in the negative. Article 14 (2) of the said Agreement does not create rights directly enforceable by individuals in national courts within the Community." The United Kingdom Government, the Government of the Federal Republic of Germany, the Danish Government, the French Government and The Netherlands Government maintain that Articles 14 (2) and 23 of the Portuguese Agreement should not be interpreted as meaning:
1. That they prevent the owner of a copyright in the United Kingdom or his licensee from being able to rely on his rights in order to restrain the importation of records lawfully produced and sold in Portugal by a licensee under Portuguese law; or
2. That they confer rights which individuals may enforce before the national courts within the Community. Their observations reiterate the arguments presented by Polydor. They stress that the structure of the Agreement and the intentions of its authors are such that infringements of a provision of the Agreement are to give rise to consultations between the two contracting parties, namely the Community and Portugal, or, possibly, to the adaption of safeguard measures by one of the two parties. Such an intention is clearly apparent inter alia from the combined provisions of Articles 26 (1) and 30 (3) (a) of the Agreement. In view of that it would be contrary to the general scheme of the Agreement to confer direct effect on provisions of this type.
In that regard the United Kingdom Government adds that the prohibition of measures having an effect equivalent to quantitative restrictions appears not only in the seven free-trade agreements entered into with the EFTA countries, but also, and practically in the same terms, in all the agreements concluded by the Community with the Mediterranean countries (for example the Maghreb and Mashreq agreements, the trade agreements with Cyprus, Israel, Malta and Spain, and the agreements with Turkey and Yugoslavia). The same provision is to be found in GA TT itself (Articles XI and XX). The Commission submits that whether or not the relevant terms of the Agreement and the EEC Treaty are the same, their spirit and general scheme are different. lt follows that mere identity of wording cannot be conclusive as to the nature or content of the obligations undertaken, or as to the legal meaning and effect of the provisions in question.
As far as the direct effect of Articles 14 (2) and 23 of the Agreement are concerned, the Commission observes that where the prohibition of measures having
equivalent effect is invoked in the case of restrictions connected with the protection of industrial and commercial property, it is difficult to dissociate the scope and effect of the prohibition from the scope and effect of the justifications.
In that respect it is relevant to note that the case-law of the Court on intra Community trade establishes a very close link between Articles 30 and 36 of the EEC Treaty and that the Court replies to questions of interpretation referred to it by taking these two provisions together. The decision as to the extent to which a restriction based on the protection of industrial and commercial property is justified in the light of the requirement of the free movement of goods involves a balancing of two opposing interests. In the context of agreements concluded by the Community, the assessment of that balance of interests is very closely linked to the objectives of the agreements. The objectives of the Agreement, namely "*to eliminate progressively the obstacles to substantially all their trade*" and "*the harmonious development of their commerce*", are both less ambitious and less precise than those of the EEC Treaty. They involve an assessment m which considerations of expediency have
a large part to play.
The Commission therefore has doubts as to the direct effect of Article 14 (2), especially with respect to measures which in intra-Community trade may be described as applicable without distinction.
It takes the view that Article 14 (2) in conjunction with Article 23 of the Agreement has no direct effect with respect to measures relating to the protection of industrial and commercial property.
With regard to the interpretation of Articles 14 (2) and 23 of the Agreement, the Commission submits that the case-law of the Court on the interpretation of Articles 30 and 36 of the EEC Treaty cannot as such be transposed to the interpretation of the provisions in question. The reasoning underlying the decisions of the Court depends on the major premise that the EEC created, and was intended to create, a common or single market. Moreover, it is a characteristic of the common market created by the EEC Treaty that the Treaty also creates the institutional framework and machinery which enable the Community, acting as such, to eliminate disparities between national laws or to counteract divergences in national policies. The Commission doubts whether an obligation to abolish "*measures having an effect equivalent to quantitative restrictions on imports*" can under international law be construed as preventing owners and licensees of copyrights within the Community from relying on those rights to restrain the importation of products manufactured under licence in Portugal.
The scheme of international protection of such rights depends upon the protection afforded by the national law of sovereign States. The limitation of rights to the territory of the State which grants the protection (or to nationals of that State) is inherent in the scheme of international protection. Further, the existing scheme of international protection gives rise to the legitimate expectation of rights on the part of the owners of a property right such as copyright.
In that context, it is not probable that international law would, by implication only, construe a bilateral free-trade agreement in such a way as to restrict the exercise of such rights in a manner which is generally recognized as legitimate and conforms with the expectations of the

owners of the rights. Moreover, since the scheme of international protection of copyright is itself based on international conventions involving lengthy and complex negotiations, it is improbable that international law would imply a derogation from the principles laid down by such conventions. The Commission states in conclusion that it is inclined to consider that the obligation undertaken by the Community under Articles 14 and 23 of the Agreement does not require the law of the Member States to prevent owners and licensees of copyright within the Community from exercising their rights in such a way as to restrain the import into the Community of articles manufactured under licence in Portugal.

III. Oral procedure

At the sitting on 13 October 1981 oral argument was presented by the following: R. A. Morritt, QC, of Lincoln's lnn, assisted by Ivo Van Bael and Jean-François Bellis, of the Brussels Bar, for Polydor; A. Wilson, of the Bar of England and Wales, for Harlequin and Simons; G. Dagtoglou, acting as Agent, assisted by Robin Jacob, QC, of Gray's lnn, for the United Kingdom Government; M. Seidl, acting as Agent, for the Government of the Federal Republic of Germany; G. Guillaume, acting as Agent, for the Government of the French Republic; and C.-D. Ehlermann, the Director-General of the Commission's Legal Department, and J. Bourgeois, Legal Adviser to the Commission, acting as Agents, assisted by D. A. 0. Edward, QC, of the Scots Bar, for the Commission of the European Communities.

At the sitting the Commission put forward the following view: According to the judgment of 12 December 1972 in Joined Cases 21 to 24/72 International Fruit Company NV and Others v Produktschap voor Groenten en Fruit [1972] ECR 1219, a private party may invoke a provision of international law against the validity of an act of the Community if, first, the provision is binding on the Community and, secondly, if the provision has direct effect. Under those circumstances, the question of direct effect is of fundamental importance for the Community's position in international relations, for its autonomy, its identity and its capacity to defend its interests and those of the Member States for which it has accepted responsibility.

From another point of view, the problem of direct effect raises the question of the proper division of powers within the Community legal system between the legislature and the executive on the one hand and the judiciary on the other. The Commission is of the option that the concept of direct effect, as developed in Community law, must not as such be transposed to the field of the Community's international relations, for two reasons. The first is based on the different nature and aims of international agreements. The second reason is that it is necessary to maintain in the context of these free-trade agreements a balance of the advantages and disadvantages which may exist between the parties to an international treaty.

With regard to the different nature and aims of international agreements, the Commission emphasizes that those agreements do not provide for any harmonization of law or for a common policy. Nor do they lay down rules for the judicial settlement of disputes by virtue of which the provisions of the treaties are interpreted in a manner binding on all the contracting parties.

As regards the need to maintain a proper balance of advantages and disadvantages between the parties to an agreement, that balance is substantially different if private parties can enforce an international agreement within the Community whilst they cannot do so in other contracting States. lndeed, the stage may be reached at which non-member countries may obtain all the rights of Community membership without having to assume the corresponding obligations. That is particularly true with regard to the agreements between the Community and the former EFTA countries.

In the case of a reciprocal agreement, such as that concerned in this case, the Court should recognize direct effect only where the provisions are drafted in an entirely clear way for all the parties or where provisions which leave room for interpretation have been clarified by the contracting parties.

In that regard the Commission recalls that the Court has recognized the direct effect of the provisions on State aids only where Article 92 of the EEC Treaty has been applied in accordance with Article 93 (2). Moreover, in the second Defrenne case (judgment of 8 April 1976 in Case 43/75 Gabrielle Defrenne v Société Anonyme Beige de Navigation Aérienne Sabena [1976] ECR 455), the Court held that for the purpose of ascertaining direct effect a distinction had to be drawn between the hard core of Article 119, which had direct effect, and what might be termed the surrounding grey area where prior legislative action was necessary.

On the basis of that distinction the Commission arrives at the conclusion first that Article 14 of the Agreement with Portugal has no direct effect, except perhaps its hard core, and secondly, that Article 14, in conjunction with Article 23, has certainly no direct effect. Indeed, even if an interpretation of those provisions which related to the enforcement of industrial and commercial property rights were accepted, it would certainly not fall within the hard core of Article 14. Moreover, it is preferable to leave the possible development of such an interpretation to the contracting parties in the course of their regular contacts rather than to impose such an interpretation judicially on one of the parties only, that is to say on the Community.

The Advocate General delivered her opinion at the sitting on 1 December 1981.

Decision

By order of 15 May 1980, which was received at the Court on 8 December 1980, the Court of Appeal of England and Wales referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of Articles 14 (2) and 23 of the Agreement between the European Economic Community and the Portuguese Republic, which was signed in Brussels on 22 July 1972 and was concluded and adopted on behalf of the Community by Regulation (EEC) No 2844/72 of the Council of 19 December 1972

(Official Journal, English Special Edition (31 December)
(L 301), p. 166).
The main proceedings concern an action for infringement of copyright brought against two British undertakings, Harlequin Record Shops Limited and Simons Records Limited (hereinafter referred to as "*Harlequin*" and "*Simons*" respectively), specializing in the importation and sale of gramophone records, which imported from Portugal and put on sale in the United Kingdom records featuring the popular music of the group known as "*The Bee Gees*", without obtaining the consent of the proprietor of the copyrights or of his exclusive licensee in the United Kingdom. The proprietor of the copyrights in the sound recordings in question, RSO Records loc. (hereinafter referred to as "*RSO*"), granted to an affiliated company, Polydor Limited (hereinafter referred to as "*Polydor*"), an exclusive licence to manufacture and distribute gramophone records and cassettes reproducing those recordings in the United Kingdom. Records and cassettes reproducing the same recordings were manufactured and marketed in Portugal by two companies incorporated under Portuguese law, which were licensees of RSO in Portugal. Simons purchased records containing those recordings in Portugal in order to import them into the United Kingdom with a view to their sale. Harlequin purchased a number of those records from Simons for the purpose of retail sale.
The Court of Appeal established that under English law Harlequin and Simons had thereby infringed Section 16 (2) of the Copyright Act, 1956. That provision provides that a copyright is infringed by any person who, without the licence of the owner of the copyright, imparts an article into the United Kingdom, if to his knowledge the making of that article constituted an infringement of that copyright, or would have constituted such an infringement if the article had been made in the place into which it is so imported.
Harlequin and Simons maintained, however, that the proprietor of a copyright might not rely upon that right in order to restrain the importation of a product into a Member State of the Community, if that product had been lawfully placed on the market in Portugal by him or with his consent. In support of that submission the companies relied upon Articles 14 (2) and 23 of the Agreement between the European Economic Community and the Portuguese Republic of 1972 (hereinafter referred to as "*the Agreement*"), claiming that those provisions were based on the same principles as Articles 30 and 36 of the EEC Treaty and accordingly had to be interpreted in a similar manner.
In order to enable it to assess that submission on the part of the defence, the Court of Appeal referred to the Court of Justice for a preliminary ruling the following questions:
"*1. Is the enforcement by Company A of their United Kingdom copyrights against a gramophone record lawfully made and sold in the State of Portugal by licensees under the equivalent Portuguese copyrights a measure having equivalent effect to quantitative restrictions on imparts within the meaning of Article 14 (2) of the said Agreement dated 22 July 1972 made between the European Economic Community and the State of Portugal?*
2. If the answer to the first question is affirmative:
(a) Is such enforcement by Company A justified within the meaning of Article 23 of the said Agreement dated 22 July 1980 for the protection of the said United Kingdom copyrights?
(b) Does such enforcement by Company A constitute a means of arbitrary discrimination or a disguised restriction on trade between the State of Portugal and the European Economic Community?
3. Is Article 14 (2) of the said Agreement dated 22 July 1980 directly enforceable by individuals within the European Economic Community having regard in particular to the said European Economic Community Council regulation dated 19 December 1972 giving effect to the said Agreement?
4. Can an importer into the United Kingdom of the gramophone records referred to in Question 1 rely on Article 14 (2) of the said Agreement dated 22 July 1972 as a defence when sued by Company A for infringement of their said copyrights in the United Kingdom?"
According to the well-established case-law of the Court, the exercise of an industrial and commercial property right by the proprietor thereof, including the commercial exploitation of a copyright, in order to prevent the importation into a Member State of a product from another Member State, in which that product has lawfully been placed on the market by the proprietor or with his consent, constitutes a measure having an effect equivalent to a quantitative restriction for the purposes of Article 30 of the Treaty, which is not justified on the ground of the protection of industrial and commercial property within the meaning of Article 36 of the Treaty.
The first two questions, which may be considered together, seek in substance to determine whether the same interpretation must be placed on Articles 14 (2) and 23 of the Agreement. In order to reply to those questions it is necessary to analyse the provisions in the light of both the object and purpose of the Agreement and of its wording.
By virtue of Article 228 of the Treaty the effect of the Agreement is to bind equally the Community and its Member States. The relevant provisions of the Agreement re ad as follows:
Article 14 (2). "*Quantitative restrictions on imparts shall be abolished on 1 January 1973 and any measures having an effect equivalent to quantitative restrictions on imparts shall be abolished not later than 1 January 1975.*"
Article 23. "*The Agreement shall not preclude prohibitions or restrictions on imparts . . . justified on grounds of ... the protection of industrial and commercial property ... Such prohibitions or restrictions must not, however, constitute a means of arbitrary discrimination or a disguised restrictions on trade between the Contracting Parties.*"
10 According to its preamble, the purpose of the Agreement is to consolidate and to extend the economic

relations existing between the Community and Portugal and to ensure, with due regard for fair conditions of competition, the harmonious development of their commerce for the purpose of contributing to the work of constructing Europe. To that end the contracting parties decided to eliminate progressively the obstacles to substantially all their trade, in accordance with the provisions of the General Agreement oh Tariffs and Trade (hereinafter referred to as the "*General Agreement*") concerning the establishment of free-trade areas.

11 Under Article XXIV (8) of the General Agreement a free-trade area is to be understood to mean "*a group of two or more customs territories in which the duties and other restrictive regulations of commerce ... are eliminated on substantially all the trade between the constituent territories in products originating in such territories."*

12 In pursuance of the above-mentioned objective the Agreement seeks to liberalize trade in goods between the Community and Portugal. According to Article 2 the Agreement is to apply, subject to special arrangements provided for in respect of certain products, to products originating in the Community or in Portugal which fall within Chapters 25 to 99 of the Brussels Nomenclature.

13 In that connection Articles 3 to 7 of the Agreement provide for the abolition of customs duties and of charges having equivalent effect in trade between the Community and Portugal. The same principle is applied by Article 14 to quantitative restrictions and measures having equivalent effect. Those provisions are supplemented in Article 21 by the prohibition of fiscal measures or practices of a discriminatory nature and in Article 22 by the abolition of all restrictions on payments relating to trade in goods.

Moreover, in Articles 26 and 28 the Agreement contains certain rules on competition, public aid and dumping. By virtue of Article 32 a joint committee is established which is to be responsible for the administration of the Agreement and to ensure its proper implementation.

14 The provisions of the Agreement on the elimination of restrictions on trade between the Community and Portugal are expressed in terms which in several respects are similar to those of the EEC Treaty on the abolition of restrictions on intra-Community trade. Harlequin and Simons pointed out in particular the similarity between the terms of Articles 14 (2) and 23 of the Agreement on the one hand and those of Articles 30 and 36 of the EEC Treaty on the other.

Is However, such similarity of terms is not a sufficient reason for transposing to the provisions of the Agreement the above-mentioned case-law, which determines in the context of the Community the relationship between the protection of industrial and commercial property rights and the rules on the free movement of goods.

16 The scope of that case-law must indeed be determined in the light of the Community's objectives and activities as defined by Articles 2 and 3 of the EEC Treaty. As the Court has had occasion to emphasize in various contexts, the Treaty, by establishing a common market and progressively approximating the economic policies of the Member States, seeks to unite national markets into a single market having the characteristics of a dornestic market.

17 Having regard to those objectives, the Court, inter alia, in its judgment of 22 June 1976 in Case 119/75 **Terrapin** (Overseas) Ltd. v Terranova Industry C.A. Kapjêrer & Co. (1976) ECR 1039, interpreted Articles 30 and 36 of the Treaty as meaning that the territorial protection afforded by national laws to industrial and commercial property may not have the effect of legitimizing the insulation of national markets and of leading to an artificial partitioning of the markets and that consequently the proprietor of an industrial or commercial property right protected by the law of a Member State cannot rely on that law to prevent the importation of a product which has lawfully been marketed in another Member State by the proprietor himself or with his consent.

Is The considerations which led to that interpretation of Articles 30 and 36 of the Treaty do not apply in the context of the relations between the Community and Portugal as defined by the Agreement. It is apparent from an examination of the Agreement that although it makes provision for the unconditional abolition of certain restrictions on trade between the Community and Portugal, such as quantitative restrictions and measures having equivalent effect, it does not have the same purpose as the EEC Treaty, inasmuch as the latter, as has been stated above, seeks to create a single market reproducing as closely as possible the conditions of a dornestic market.

19 It follows that in the context of the Agreement restrictions on trade in goods may he considered to be justified on the ground of the protection of industrial and commercial property in a situation in which their justification would not he possible within the Community.

20 In the present case such a distinction is all the more necessary inasmuch as the instruments which the Community has at its disposal in order to achieve the uniform application of Community law and the progressive abolition of legislative disparities within the common market have no equivalent in the context of the relations between the Community and Portugal.

21 It follows from the foregoing that a prohibition on the importation into the Community of a product originating in Portugal based on the protection of copyright is justified in the framework of the free-trade arrangements established by the Agreement by virtue of the first sentence of Article 23.

The findings of the national court do not disclose any factor which would permit the conclusion that the enforcement of copyright in a case such as the present constitutes a means of arbitrary discrimination or a disguised restriction on trade within the meaning of the second sentence of that article.

22 For all those reasons the reply which must be given to the first two questions is that the enforcement by the proprietor or by persons entitled under him of copyrights protected by the law of a Member State against the

importation and marketing of gramophone records lawfully manufactured and placed on the market in the Portuguese Republic by licensees of the proprietor is justified on the ground of the protection of industrial and commercial property within the meaning of Article 23 of the Agreement and therefore does not constitute a restriction on trade between the Community and Portugal such as is prohibited by Article 14 (2) of the Agreement. Such enforcement does not constitute a means of arbitrary discrimination or a disguised restriction on trade between the Community and Portugal.

23 In view of the replies given to the first two questions, it is unnecessary to reply to the third and fourth questions.

Costs

24 The costs incurred by the Government of the United Kingdom, the Government of the Federal Republic of Germany, the Government of the Kingdom of Denmark, the Government of the French Republic, the Government of the Kingdom of the Netherlands and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on casts is a matter for that court.

On those grounds,

THECOURT,

in answer to the questions submitted to it by the Court of Appeal by order of 15 May 1980, hereby rules:

Due The enforcement by the proprietor or by persons entitled under him of copyrights protected by the law of a Member State against the importation and marketing of gramophone records lawfully manufactured and placed on the market in the Portuguese Republic by licensees of the proprietor is justified on the ground of the protection of industrial and commercial property within the meaning of Article 23 of the Agreement between the European Economic Community and the Portuguese Republic of 22 July 1972 (Official Journal, English Special Edition 1972 (31 December) (L 301), p. 167) and therefore does not constitute a restriction on trade such as is prohibited by Article 14 (2) of that Agreement. Such enforcement does not constitute a means of arbitrary discrimination or a disguised restriction on trade between the Community and Portugal within the meaning of the said Article 23.

OPINION OF MRS ADVOCATE GENERAL ROZÈS

DELIVERED ON 1 DECEMBER 1981[1]

Mr President, Members of the Court,

The Court of Justice has been requested by the Court of Appeal of England and Wales to give a preliminary ruling

on certain questions concerning the conditions for the exercise of artistic property rights under Community law and the provisions of the Agreement between the EEC and Portugal of 22 July 1972.

The facts are as follows:

The trio known as *"The Bee Gees"* transferred its rights in the songs collectively entitled *"Spirits Having Flown"* to RSO Records Inc. [hereinafter referred to as *"RSO"*]. That company in turn granted a licence in respect of those rights for the United Kingdom, a Member State of the Community, to Polydor Limited [hereinafter referred to as *"Polydor"*], which manufactures and distributes recordings of that work in that State.

Recordings of the same work are also manufactured and sold in Portugal, a non-member country, by Phonogram and Polygram Discos, companies incorporated under Portuguese law, which are licensees in that country of RSO's rights in the songs. Those companies belong to the same group of companies as Polydor.

Gramophone records from Portugal containing the sound recording in question were imported into the United Kingdom by Simons Records Limited [hereinafter referred to as *"Simons"*] and were marketed by Harlequin Record Shops Limited [hereinafter referred to as *"Harlequin"*] without the consent either of Polydor or of RSO.

Polydor and RSO therefore brought an action against Harlequin in the Chancery Division of the High Court of Justice for infringement of their United Kingdom copyrights under Section 16 (2) of the Copyright Act 1956. In defence Harlequin and Simons, which intervened in support of Harlequin, contended that such action constituted a measure having an effect equivalent to quantitative restrictions on imports within the meaning of Article 14 (2) of the Agreement concluded by Regulation (EEC) No 2844/72 of the Council of 19 December 1972 between the European Economic Community and the Portuguese Republic.

The Chancery Division of the High Court granted an injunction restraining Simons and Harlequin from distributing the sound recording in question in the United Kingdom. The matter was brought by those companies before the Court of Appeal, which referred to the Court of Justice four questions seeking to determine whether the case-law concerning the free movement of gramophone records and copyright which the Court has developed in the context of the Treaty of Rome may be applied to the relations between the EEC and Portugal.

As a result of the possible implications for a whole series of agreements concluded with non-member countries, the importance of the problem has not escaped the five Member States which submitted observations. The expression "quantitative restrictions on imports" indeed appears in Article XI of the General Agreement on Tariffs and Trade and in Article 10 of the Convention establishing the European Free Trade Association and in six other agreements concluded between the European Economic Community and States still belonging to that Association.

[1] Translated from the French.

I — In order that Simons and Harlequin may succeed in their defence, each of the following three conditions must be fulfilled:
1. The combined provisions of Articles 14 (2) and 23 of the Agreement between the EEC and Portugal and of Regulation No 2844/72 must confer on persons subject to Community law rights which the national courts are bound to protect, within the meaning given to that expression in the decisions of the Court (judgment of 12 December 1972 in Joined Cases 21 to 24/72 International Fruit [1972] ECR 1219; judgment of 24 October 1973 in Case 9/73 Schlüter [1973] ECR 1135; judgment of 5 February 1976 in Case 87/75 Bresciani [1976] ECR 129).
2. The legal proceedings brought by Polydor and RSO must constitute a measure having an effect equivalent to quantitative restrictions on imports within the meaning of Article 14 of the Agreement, which is not justified on the ground of the protection of industrial and commercial property within the meaning of Article 23 of the Agreement.
3. Finally, if the measure is justified on that ground, it must constitute a means of arbitrary discrimination or a disguised restriction on trade between the contracting parties within the meaning of the last-mentioned provision.
II — The preamble to Regulation No 2844/72 of the Council refers in particular to Article 113 of the EEC Treaty, which appears in the chapter on commercial policy.
Article 1 of the regulation provides :
"The Agreement between the European Economic Community and the Portuguese Republic, the Annexes and Protocols thereto, and the Declarations annexed to the Final Act are hereby concluded, adopted and confirmed on behalf of the Community."
According to Article 5 of the regulation :
"This regulation is binding in its entirety and directly applicable in all Member States."
A regulation is the instrument which is generally used to conclude with non-member countries the commercial agreements referred to in Article 113 of the Treaty and the final wording of Regulation No 2844/72 merely reproduces the terms of Article 189 of the Treaty.
Although the regulation is directly applicable in all Member States, it nevertheless does not necessarily follow that Articles 14 and 23 of the Agreement have *"direct effect"*, that is to say that they confer on Community nationals rights which the courts of the Member States are bound to protect.
Regulation No 2844/72 merely adopts the agreement concluded by the Council, which institution alone is competent to *"act"* under Article 113 of the Treaty. Its effect is to transpose the provisions of the Agreement into the Community legal order, but it alters neither the terms nor the scope thereof. Its function is therefore merely instrumental. Five Member States were anxious to intervene in these proceedings. The Council itself did not submit any observations.
According to the case-law of the Court, it is therefore necessary to go beyond the letter of the provisions and to have regard to the *"spirit"* and the *"general scheme"* of the Agreement as a whole.
III — The reasoning underlying the interpretation which the Court has placed on Articles 30 and 36 of the EEC Treaty and on all the provisions which have *"direct effect"* is based on the premise that the Treaty has established a common or single market.
1. Harlequin and Simons argue that since the Agreement was signed on 22 July 1972, that is to say after the judgment of 8 June 1971 in Case 78/70 Deutsche Grammophon Gesellschaft mbH [1971] ECR 487, Article 14 of the Agreement would have been drafted in terms different to those which resemble fairly closely Article 30 of the Treaty, if the draftsmen had intended to exempt from its provisions the exercise of copyright resulting in a restriction of trade. That argument scarcely seems convincing. On the contrary, it might be argued that the negotiations in progress concerning Portugal's accession to the European Economic Community are intended in particular to extend to that country the Community arrangements concerning the free movement of goods and that to recognize the right of Harlequin and Simons to rely upon the *"direct effect"* of the relevant provisions of the Agreement would be to prejudge the outcome of negotiations in progress for Portugal's accession to the EEC.
2. The third paragraph of Article 234 of the Treaty provides as follows :
"In applying the agreements [that is to say, agreements which were concluded before the entry into force of the Treaty between a Member State and one or more non-member countries and in respect of which the first paragraph provides that the rights and obligations arising therefrom are not to be affected by the provisions of the Treaty], Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States."
That principle applies equally to agreements concluded after the entry into force of the Treaty with a non-member country on behalf of the European Economic Community.
However, whereas the Treaty of Rome established an economic *"community"*, the contracting parties to the Agreement sought to *"ensure ... the ... development of their commerce"* and to *"eliminate progressively the obstacles to substantially all their trade"*. Whilst with regard to the free movement of goods the structure of the Agreement may indeed be comparable to that of the Treaty, there are many aspects to the Treaty other than the fee movement of goods.
Apart from the Joint Committee provided for by Article 32 (1) of the Agreement, no *"common institution"* was established. If *"difficulties arise which could bring about serious deterioration in the economic situation of a region"* or *"if either Contracting Party considers that the other Contracting Party has failed to fulfil an*

obligation under the Agreement", there is provision only for the adoption of appropriate *"safeguard measures"* (Articles 25 to 29), subject to the observance of a consultation procedure within the Joint Committee (Articles 30 and 32 (2)). The detailed rules for implementing the safeguard clauses and precautionary measures provided for in Articles 25 to 30 of the Agreement were laid down by Regulation (EEC) No 2845/72 of the Council of 19 December 1972.

3. The right asserted by Harlequin and Simons would have to be accorded to imports into Portugal of Community products protected in that country by industrial and commercial property rights equivalent to those attaching to the products in the Community.

The Court is aware that the courts of certain member countries of the European Free Trade Association (judgment of the Swiss Federal Court of 25 January 1979 in the Sunlight case; judgment of the Austrian Supreme Court of 10 July 1979 in the Austro-Mechana case, which concerned parallel imports of gramophone records) permit the owners of industrial or intellectual property rights in those countries to rely upon those rights in order to restrain imports from the Communities. Reciprocity is therefore not guaranteed.

4. The previous decisions relied upon by Harlequin and Simons do not appear to me to be conclusive.

The Yaounde Convention of 1963, which was the subject of the Bresciani case, was not based on reciprocity. On the contrary, by that Convention the Community assumed a number of unilateral obligations vis-à-vis certain African States and Madagascar. That *"imbalance"* did not therefore prevent recognition that some of the provisions of the Convention had *"direct effect"*.

Moreover, that case concerned the interpretation of the words *"charges having an effect equivalent to customs duties"* used in Article 2 (1) of the Convention by comparison with those of Article 13 (2) of the Treaty and not the expression *"measures having an effect equivalent to quantitative restrictions"*. In that regard provisions of the Convention referred expressly to Article 13 of the Treaty of Rome. In other words, the Member States had intended to assume the same obligations towards the African States and Madagascar as they had assumed towards each other and it was as a result of that reference that the Court was able to hold that the provision conferred personal rights on individuals.

On the other hand, in its judgment of 12 December 1972 in the International Fruit case cited above, the Court held that Article XI of the General Agreement on Tariffs and Trade, a provision which also concerns the elimination of quantitative restrictions, was not capable of conferring on citizens of the Community rights which they could invoke before the courts.

By way of contrast to that case, the issue in this case is not whether, just as Community law prevails in principle over national law, international commitments entered into by the Community take precedence over the acts of its institutions (for example, a regulation of the Council of Ministers), but whether commitments entered into by the Community with non-member countries must be regarded by the national courts as being of the same nature and having the same scope as those entered into by the Member States inter se, in other words whether the classical international legal order is identical to the Community internal legal order. Everyday reality shows that that is unfortunately not so.

In the closely-related field of the protection of trade-mark rights, the judgments of the Court contain statements which are unequivocal.

In its judgment of 15 June 1976 in Case 51/75 EMI Records Limited [1976] ECR 811 (in particular at pp. 845 and 846, paragraphs 8 and 11) given in response to a reference from the High Court of Justice, the Court held that the rule contained in Article 30 et seq. of the Treaty applied within the common market but was not to be extended to relations with non-member countries. Consequently, the exercise of a trademark right in order to restrict the marketing of products from those countries does not affect the free movement of goods between Member States and is therefore not caught by the prohibitions contained in Article 30 et seq., because the unity of the common market is not placed in jeopardy. It is not contrary to the Treaty for the proprietor of a trade mark to institute legal proceedings in a Member State of the Community in order to restrain the parallel importation of products bearing that mark from a non-member country.

In its judgment of 31 October 1974 in Case 15/74 Centrafarm [1974] ECR 1147, the Court held that *"in relation to patents, the specific subject-matter of the industrial property is the guarantee that the patentee, to reward the creative efforts of the inventor, has the exclusive right to use an invention with a view to manufacturing industrial products and putting them into circulation for the first time, either directly or by the grant of licences to third parties, as well as the right to oppose infringements"* (paragraph 9 at p. 1162).

That decision was intended to prevent an obstacle to the free movement of goods arising out of the existence of national provisions to the effect that an industrial or commercial property right *"is not exhausted"* when the protected product is marketed, with the result that the owner could prevent the importation of the product when it had been marketed elsewhere.

Applied to this case, that reasoning might lead to the view that if the recordings imported into the United Kingdom were indeed lawfully manufactured and marketed in Portugal with the consent of the composers or the persons entitled through them, payment of the fee for the granting of the right to put the recordings into circulation for the first time constitutes sufficient *"reward"* for the creative effort of the composers and the consideration for the exclusive rights granted. Thus the legitimate exercise of the copyright would be *"exhausted"* once the recordings had been placed on the market in Portugal and the *"essence"* of the right would not be affected by the free marketing thereof in the United Kingdom.

However, such a view would completely undermine the basis of contracts granting exclusive licences of industrial or commercial property rights.
The fee paid to RSO by Phonogram and Polygram Discos was for the exploitation of the rights of reproduction on the Portuguese market. If RSO, in possession of all the facts, had known that the recordings marketed with its consent in Portugal could be freely imported into the United Kingdom and into the other Member States, it would certainly have required much greater consideration. Similarly, if the United Kingdom licensee, Polydor, had been able to foresee that the exclusive right commercially to exploit the muscial work in the United Kingdom would be *"exhausted"* by its being placed on the Portuguese market, the company would never have agreed to pay a further fee for the right to manufacture and sell the recording in the United Kingdom.
Consequently, the value placed on an industrial or commercial property right and the size of the *"reward"* for the efforts of the *"inventor"* and of the person who first puts into circulation the product manufactured from the invention (a reward and value which are part of the *"specific subject-matter"* or *"essence"* of the right) depend on the size and nature of the market on which the product may be distributed.
The doctrine of *"exhaustion"* has been developed solely in the context of relations between Member States in order to achieve complete freedom of movement. It presupposes inter alia that freedom to provide services (judgment of 20 January 1981 in Joined Cases 55 and 57/80 Musik-Vertrieb membran v GEMA [1981] ECR 147, paragraph 25 at p. 165) and, I would add, freedom of establishment are achieved at the same time. It scarcely needs to be stated that the freedom of trade provided for by the Agreement between the EEC and Portugal is not accompanied by the achievement of those other freedoms, which are essential for the establishment of a common market.
Even if the marketing or manufacture of the recordings in question arose, both in the common market and in the non-member country, from the activities of undertakings which were all subsidiaries of a single undertaking, even one established in a Member State, that common origin would be significant only if the copyrights in question coexisted on the territory of the common market, because in such a case the exercise of those rights would be capable of partitioning the market. Whilst the principle of the territoriality of copyright no longer exists within each of the Member States, it continues to exist in the Community's relations with non-member countries.
5. Polydor also rightly points out that the last recital in the preamble to the Agreement between the EEC and Portugal states that *"no provision of this Agreement may be interpreted as exempting the Contracting Parties from the obligations which are incumbent upon them under other international agreements"*. The international agreements on industrial and commercial property (for example, the Convention for the Protection of Industrial Property, signed in Paris in 1883 and last revised in Stockholm in 1967; the Berne Convention of 1886 for the Protection of Literary and Artistic Works) do not entail the *"exhaustion of rights"*. The international Agreement between the EEC and Portugal may not therefore be interpreted in a different manner from the international conventions for the protection of industrial and commercial property.
In the closely-related field of patents, the exhaustion of rights conferred by a Community patent extends only to acts concerning a product covered by that patent which are done within the territories of the contracting States after that product has been put on the market in one of those States by the proprietor of the patent or with his express consent (Article 32 of the Community Patent Convention). Similarly, the rights conferred by a national patent in a Member State are *"exhausted"* only where the product has been put on the market in any contracting State by the proprietor of the patent or with his express consent (Article 81 (1) of the Convention). There is therefore no *"exhaustion"* of the rights where the product has been put on the market of a non-member country which forms a free-trade area with the European Economic Community. That may occur only where that country participates in the Convention (Article 96 of the Convention).
For all those reasons, the *"unionist"* doctrine of the exhaustion of industrial and commercial property rights within the Community, as developed in particular in the Court's judgment of 8 June 1971 in Case 78/70 Deutsche Grammophon Gesellschaft mbH concerning *"sound recordings"*, cannot be transposed to acts concerning a work covered by copyright which are done within the territory of a non-member country, even if the work has been put on the market there either by the proprietor of the right or with his express consent.
IV — Consequently, it appears to me to be unnecessary to consider whether the wording of Article 14 of the Agreement (*"any measures having an effect equivalent to quantitative restrictions on imports shall be abolished ..."*) may be distinguished from that of Article 30 of the Treaty (*"Quantitative restrictions on imports and all measures having equivalent effect shall ... be prohibited ..."*) or whether an injunction prohibiting the importation and sale of the records in question in the United Kingdom constitutes *"a means of arbitrary discrimination or a disguised restriction on trade"* within the meaning of Article 23 of the Agreement.
I propose that in reply to the questions asked the Court should rule that a company importing into a Member State sound recordings lawfully put into circulation in Portugal cannot rely upon the provisions of Regulation No 2844/72 of the Council of 19 December 1972 before a court of that Member State in order to prevent the exercise of exclusive marketing rights in that Member State by the exclusive licensee of the copyrights in those recordings.