

Court of Justice EC, 26 September 2000,
Commission v French Republic



CUSTOMS SEIZURE

Unauthorized detention of goods in transit to another Member State where they may be lawfully marketed

- [by implementing, pursuant to the French 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 has failed to fulfil its obligations under Article 30 of the EC Treaty \(now, after amendment, Article 28 EC\)](#)

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Court of Justice EC, 26 September 2000

(M. Wathelet en V. Skouris)

JUDGMENT OF THE COURT

26 September 2000 (1)

(Failure by a Member State to fulfil its obligations - Free movement of goods - Procedures for detention under customs control - Goods in transit - Industrial property right - Spare parts for the repair of motor vehicles)

In Case C-23/99,

Commission of the European Communities, represented by R.B. Wainwright, Principal Legal Adviser, and O. Couvert-Castéra, a national civil servant on secondment to its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg, applicant,

v

French Republic, represented by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and R. Loosli-Surrans, Chargé de Mission in the same directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8 B Boulevard Joseph II, defendant,

APPLICATION for a declaration that, by implementing, pursuant to the French 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 has failed to fulfil its obligations under Article 30 of the EC Treaty (now, after amendment, Article 28 EC),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida and L. Sevón (Presidents of Chambers), P.J.G. Kapteyn, J.-P. Puissochet, P. Jann, H. Ragnemalm (Rapporteur), M. Wathelet and V. Skouris, Judges,

Advocate General: J. Mischo,

Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 15 February 2000, at which the Commission was represented by R. Tricot, of its Legal Service, acting as Agent, and the French Government by R. Loosli-Surrans,

after hearing [the Opinion of the Advocate General at the sitting on 13 April 2000,](#)

gives the following

Judgment

1. By application lodged at the Court Registry on 2 February 1999, the Commission of the European Communities brought an action, pursuant to Article 169 of the EC Treaty (now Article 226 EC), for a declaration that, by implementing, pursuant to the French Code de la Propriété Intellectuelle (Intellectual Property Code), 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 has failed to fulfil its obligations under Article 30 of the EC Treaty (now, after amendment, Article 28 EC).

Community legislation

2. Article 36 of the EC Treaty (now, after amendment, Article 30 EC) provides that the provisions on the free movement of goods in 'Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of... the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'.

3. In the field of industrial property relating to designs, 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) does not concern counterfeit

goods which are manufactured or marketed in the Community, but only those coming from non-member countries.

4. Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 (OJ 1998 L 289, p. 28) deals with the legal protection of designs without fully harmonising the laws of the Member States in that field. The prescribed deadline for implementation is 28 October 2001.

5. Article 14 of Directive 98/71, entitled 'Transitional provision', 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.'

6. The 20th recital in the preamble to Directive 98/71 states that *'... the transitional provision in Article 14 concerning the design of a component part used for the purpose of the repair of a complex product so as to restore its original appearance is in no case to be construed as constituting an obstacle to the free movement of a product which constitutes such a component part'*.

7. As regards measures constituting an obstacle to the free movement of goods, Article 1 of Decision No 3052/95/EC of the European Parliament and of the Council of 13 December 1995 establishing a procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community (OJ 1995 L 321, p. 1) refers, in particular, to measures the direct or indirect effect of which is a general ban on the goods or a refusal to allow the goods to be placed on the market.

French legislation

8. Articles L. 335-10, L. 521-7 and L. 716-8 of the French Code de la Propriété Intellectuelle, which apply, respectively, to copyright and related rights, registered designs, and trade marks, provide for a procedure for detention by the customs authorities of goods presumed to be counterfeit. When it makes its checks, the customs administration may, on a written application from the proprietor of the protected right, detain goods which the proprietor of the right claims to be counterfeit. The detention measure is automatically revoked unless, within 10 working days of the notification of the detention of the goods, the applicant demonstrates to the customs authorities that the matter has been referred to the competent courts.

9. The sale, manufacture, importation and possession of counterfeit goods in French territory constitute criminal offences which are defined in Articles L. 335-2 (copyright), L. 521-4 (designs) and L. 716-9 (trade marks) of the Code de la Propriété Intellectuelle.

10. The French Cour de Cassation (Court of Cassation) has given a number of judgments on the offence of

counterfeiting in cases where counterfeit goods were only in transit through French territory. In a judgment of 26 April 1990, in *Asin Crespo Ricardo and Others v Ministère Public* (Bulletin de la Cour de Cassation, 1990, No 160), concerning spare parts for motor vehicles, the Criminal Chamber of that court held that a product merely circulating in French territory infringes the right of the proprietor of a trade mark or design. That case-law is applied even if the product was lawfully manufactured in a Member State with a view to being marketed, equally lawfully, in another Member State.

Facts and pre-litigation procedure

11. The European Automobile Panel Association lodged a complaint with the Commission on the ground that the French customs authorities detain, at the frontier with Spain, spare parts for motor vehicles which are manufactured in that Member State and which are intended to be placed on the market in another Member State where their marketing is authorised, following their transit through France.

12. The French customs authorities consider that the spare parts in question, intended for French makes of motor vehicle, constitute, under French law, counterfeit goods infringing rights protected under the Code de la Propriété Intellectuelle, by virtue of the protection of registered designs and copyright. Those authorities detain under customs control goods presumed to be counterfeit in order to enable the proprietors of the protected rights to take the necessary steps to protect their rights within the prescribed time-limits.

13. Agents of the Direction Générale des Douanes et Droits Indirects (Directorate General of Customs and Indirect Taxation) of the Ministry of Economic Affairs, Finance and the Budget drew up, in particular, two written reports of 16 January and 26 February 1997 concerning spare parts for French makes of motor vehicle which are manufactured by Spanish companies and purchased by Italian companies.

14. By letter of 13 May 1997, the Commission informed the French authorities that the detention of spare parts under customs control is liable to constitute an impediment to the free movement of goods, contrary to Article 30 of the Treaty, since those parts are not intended to be marketed in French territory and they are lawfully produced in Spain and marketed, just as lawfully, in Italy.

15. By letter of 2 June 1997, the French authorities replied, first, that the counterfeit spare parts in question constitute a risk to the safety of users by reason of their dubious quality, second, that the checks made by the customs authorities before goods suspected of being counterfeit are placed on the market are consistent with the principle of proportionality since they are essential for the effective protection of one of the objectives referred to in Article 36 of the Treaty and, finally, that action to counteract counterfeiting helps to safeguard the interests of innovative industries and to ensure fair competition in the common market.

16. On 3 December 1997, taking the view that that reply was not satisfactory, the Commission sent the

French Republic a letter putting it on notice to submit its observations within two months. In that letter, the Commission states that the checks and detention in question are, in its view, contrary to Articles 30 and 36 of the Treaty and that they may also be contrary to the second paragraph of Article 7a of the EC Treaty (now, after amendment, the second paragraph of Article 14 EC).

17. In its reply of 13 February 1998, the French Republic maintained its earlier arguments and contended, in particular, that, according to the judgment of the Cour de Cassation in *Asin Crespo Ricardo and Others v Ministère Public*, cited above, Community rules do not preclude the application of national legislation permitting the detention of counterfeit goods circulating in French territory. It stated that the customs administration's checks are carried out throughout French territory, thus also in the frontier region, but that the event giving rise to those checks is never the crossing of the frontier.

18. By letter of 24 July 1998, the Commission sent a reasoned opinion to the French Republic, in which it restated its position as to the nature of the detention undertaken by the customs authorities of that Member State and requested the French Republic to take the measures necessary to comply with Community rules within two months from the notification of that opinion.

19. In response to that reasoned opinion, the French authorities contended, by letter of 29 September 1998, that the purpose of detaining goods is to protect industrial and commercial property within the meaning of Article 36 of the Treaty and that the French legislation is fully consistent with the effect given by the Court of Justice to the principle of the territoriality of national legislation.

20. In the light of that response, and noting that the French Republic had not adopted the measures necessary to comply with the reasoned opinion, the Commission brought this action.

The alleged failure to fulfil obligations and the findings of the Court

21. The Commission submits that the detention of spare parts carried out by the French customs authorities constitutes a restriction on the free movement of goods contrary to Article 30 of the Treaty.

22. In that regard, French legislation authorises the national customs authorities, on an application from the proprietor of the right in designs of spare parts for motor vehicles, to detain spare parts presumed to be counterfeit goods for a period of 10 days during which the applicant may refer the matter to the competent national courts. The Court is bound to conclude 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.

23. That finding cannot be affected by the French Government's argument that the detention procedure does not restrict trade between Member States since it does not apply solely to the entry of goods into French

territory but may be initiated against spare parts found anywhere in that territory. By reason of the fact that detention applies, in particular, to goods coming from or being sent to other Member States, it has a restrictive effect on trade between Member States and constitutes in principle a measure having an effect equivalent to a quantitative restriction on imports, contrary to Article 30 of the Treaty.

24. It is therefore necessary to examine whether that measure may be justified.

25. Before attempting to justify the detention procedure in question on the basis of Article 36 of the Treaty, the French Government submits that the French legislation on detention under customs control is consistent with various texts of secondary legislation, namely Decision No 3052/95, Regulation No 3295/94 and Article 14 of Directive 98/71.

26. The French Government contends, first, that the Member States have retained their principal powers in the matter of inspection of goods circulating in their territory and it relies for that purpose on Decision No 3052/95, which establishes a procedure for exchange of information on national measures derogating from the principle of the free movement of goods. It submits that it is difficult to imagine that measures liable to be taken and then notified under that decision, such as the detention under customs control at issue in this case, may in themselves constitute breaches of Community law.

27. As far as that argument is concerned, the Court finds it sufficient to observe that, according to the fifth recital in the preamble thereto, the main purpose of Decision No 3052/95 is to make it possible to enhance knowledge concerning the implementation of the free movement of goods in non-harmonised sectors and to identify the problems encountered with a view to finding appropriate solutions to them. Its purpose is not to define the type of measures which are compatible with the rules of the Treaty relating to the free movement of goods. The fact that a procedure for detention under customs control is one of the type of measures referred to in Decision No 3052/95 cannot therefore ever have the effect of rendering such a procedure compatible with the rules of the Treaty.

28. The French Government submits, next, that under Regulation No 3295/94 the proprietor of a design right may submit a written application to the customs authorities in order that they take action where counterfeit goods coming from non-member countries are released for free circulation, export or re-export, or indeed are discovered during an inspection.

29. The French Government accepts that Regulation No 3295/94 does not concern intra-Community trade, but contends that the protection which it offers upon the entry of counterfeit goods coming from non-member countries may be nullified if those goods are initially released for free circulation in a Member State, such as the Kingdom of Spain, thus giving them the status of Community goods, and they may then be in transit without obstacle through another Member State. It would suffice for Member States to release goods into

free circulation in their territory in order for those goods no longer to be open to interception by another Member State, which is more concerned about industrial and commercial protection, where the territory of the second State is used solely as a mere crossing point. Such a practice has the effect of rendering Regulation No 3295/94 pointless or, at the very least, considerably limiting its purpose.

30. According to the Commission, Regulation No 3295/94 is not relevant in this case in so far as it concerns solely trade with non-member countries. In addition, the Commission contends that, although the Regulation offers significant opportunities for control in order to combat the importation into Member States of counterfeit goods coming from non-member countries, whereas the same opportunities do not exist in respect of Community goods, that is due to the fact that the latter goods are covered by the principle of free movement laid down by the Treaty.

31. As far as this issue is concerned, the Court observes that considerations concerning the effectiveness of Regulation No 3295/94 cannot justify a breach of the rules of the Treaty relating to the free movement of goods within the Community.

32. The French Government submits, finally, that the French legislation is compatible with Article 14 of Directive 98/71. It contends that, in the absence of harmonisation of protection of designs, Member States may maintain their existing legal provisions in that field. It follows that the French legislation designed to protect the right in question, including during the transit of spare parts, is allowed by that article.

33. It must, however, be remembered that, although Article 14 of Directive 98/71 authorises Member States to maintain in force their legislation relating to the protection of the designs of spare parts referred to by that article, that possibility exists only to the extent that the national legislation is compatible with the rules of the Treaty. Article 14 of that directive cannot have the effect of validating all the national provisions on the protection of the rights concerned. As the 20th recital in the preamble to Directive 98/71 states, national legislation must, in any event, be consistent with the rules of the Treaty relating to the free movement of goods.

34. It is therefore necessary to examine whether the impediment to the free movement of goods caused by the procedure for detention under customs control may be justified, as the French Government submits, by the need to ensure the protection of industrial and commercial property referred to in Article 36 of the Treaty.

35. According to the Commission, the protection of industrial and commercial property does not justify the detention under customs control of Community goods in transit, which are covered by the principle of free movement, since mere transit does not affect the specific subject-matter of the protected right.

36. The French Government submits, on the contrary, that the detention measures requested by the proprietor of a design right, in that their purpose is to enforce his

exclusive right, form part of the specific subject-matter of that right as it is recognised by Community legislation. It contends that, in France, spare parts are protected by the design right and that every such part which is manufactured, placed on the market without the consent of the proprietor of that right and found in French territory, whether it is intended for import or export or is in transit, constitutes a counterfeit, so that it is justified for the customs authorities to take action by detaining the product.

37. In order to answer the question whether detention under customs control of goods in transit, as provided for under the French legislation, is justified by the exception referred to in Article 36 of the Treaty relating to industrial and commercial property, 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 36 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 CNL-SUCAL v HAG \[1990\] ECR I-3711, paragraph 12](#); and [Case C-61/97 FDV v Laserdisken \[1998\] ECR I-5171, paragraph 13](#)).

38. As far as design rights are concerned, certain restrictions on the free movement of goods have been allowed on the basis of Article 36 of the Treaty, where their purpose was to protect the specific subject-matter of the right of industrial and commercial property (see, to that effect, [Case 53/87 CICRA and Others v Renault \[1988\] ECR 6039, paragraph 11](#)).

39. It is clear from the case-law of the Court that the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without his consent, products incorporating the design forms part of the specific subject-matter of his right (see, in particular, [Case 238/87 Volvo v Veng \[1988\] ECR 6211, paragraph 8](#)).

40. It is thus necessary to determine whether the right of the proprietor of a protected design of spare parts to prevent third parties from putting in transit, without his consent, products incorporating that design also forms part of the specific subject-matter of his right.

41. The French Government contends that detention under customs control forms part of the specific subject-matter of the design right, namely the exclusive right of the proprietor to market a product with a particular appearance for the first time. The French Government, relying on the case-law of the Court and, *inter alia*, [Case C-9/93 IHT Internationale Heiztechnik v Ideal-Standard \[1994\] ECR I-2789](#), submits that in putting their goods into circulation for the first time in French territory, by means of transit, without the consent of the proprietor of the exclusive right, the manufacturers of copies of protected spare parts infringe that exclusive right.

42. As far as that submission is concerned, it should be observed that manufacture, sale and importation involve use by the third party of the appearance of the product which the design right seeks to protect. Authorisation given to a third party to manufacture or market identical parts and, consequently, to use the appearance of the original design will thus normally give rise to the payment of fees to the proprietor of the right.

43. Intra-Community transit, on the other hand, consists in the transportation of goods from one Member State to another across the territory of one or more Member States and involves no use of the appearance of the protected design. As the Advocate General points out at point 84 of his Opinion, it does not, moreover, give rise to the payment of fees when the transportation is undertaken by a third person with the authorisation of the proprietor of the right. Intra-Community transit does not therefore form part of the specific subject-matter of the right of industrial and commercial property in designs.

44. The putting into circulation referred to in the case-law relied on by the French Government and referred to in paragraph 41 above was not therefore the mere physical transportation of the goods but consisted in placing them on the market, that is to say the marketing of those goods. However, in this case, the product is marketed not in French territory, through which it only passes in transit, but in another Member State, where the product is not protected and may therefore be lawfully sold.

45. Since the manufacture and marketing of the product are lawful in the Member States where those operations take place and transit does not form part of the specific subject-matter of the design right in the Member State where transit takes place, it must be concluded that the impediment to the free movement of goods caused by the product's detention under customs control in the latter Member State in order to prevent its transit is not justified on grounds of the protection of industrial and commercial property.

46. The French Government further contends that detention under customs control limited to 10 days is necessary, in any event, in order to check that the goods have indeed been manufactured in a Member State other than the French Republic and are also destined for another Member State.

47. As regards that contention, the Court finds that it is clear from the case-file and the observations submitted by the French Government at the hearing that the main purpose of the 10 days of detention under customs control is not to identify the Member States of origin and destination of the goods but to enable the proprietor of the right to have those goods inspected by an expert in order to prove that they are unauthorised copies of spare parts and are, therefore, under French law, counterfeit goods. However, since the mere transit of unauthorised copies does not form part of the specific subject-matter of design rights, the conducting of an inspection by an expert for the purpose of determining whether the spare parts are such copies

cannot justify their being detained under customs control.

48. As regards the investigation of the origin and destination of the goods in transit, it should be possible for this to be carried out on the spot if the transporter is in possession of the relevant documents or if he can obtain them immediately. In any event, detention for up to 10 days is disproportionate in relation to the purpose of such an investigation and, accordingly, cannot be justified in regard to the purpose of protection of industrial and commercial property referred to in Article 36 of the Treaty.

49. Consequently, the Court finds 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 has failed to fulfil its obligations under Article 30 of the Treaty.

Costs

50. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT,

hereby:

1. Declares that, by implementing, pursuant to the French 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 has failed to fulfil its obligations under Article 30 of the EC Treaty (now, after amendment, Article 28 EC);

2. Orders the French Republic to pay the costs. Delivered in open court in Luxembourg on 26 September 2000.

OPINION OF ADVOCATE GENERAL MISCHO

delivered on 13 April 2000 (1)

Case C-23/99

Commission of the European Communities

v

French Republic

(Failure by a Member State to fulfil its obligations - Infringement of Article 30 of the EC Treaty (now, after amendment, Article 28 EC) - Procedures for detention by the customs authorities of goods in transit between two Member States in which they are lawfully manufactured and marketed - Goods not complying with an industrial property right conferred by the

Member State of transit - Spare parts for the repair of motor vehicles)

1. The aim of the action for failure to comply with Treaty obligations brought by the Commission of the European Communities, which forms the subject of this Opinion, is a declaration that, by implementing, pursuant to the French Code de la Propriété Intellectuelle (Intellectual Property Code), 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 has failed to fulfil its obligations under Article 30 of the EC Treaty (now, after amendment, Article 28 EC).

2. Before proceeding to examine the submissions of the parties in greater depth, I propose to review a number of points which will need to be kept in mind when weighing certain of the arguments put forward by the parties.

3. Thus, it is important to note that the action brought by the Commission is not directed against the measures taken by the French authorities to prevent goods manufactured in breach of the industrial and commercial property rights conferred by French law from gaining access to the French market.

4. In fact, the Commission's complaint relates exclusively to goods which are manufactured in a Member State in which, contrary to the situation in France, they are not protected by an exclusive right and are then transported across France to be placed on the market in another Member State in which they are similarly unprotected.

5. Like the parties, I shall use the word 'transit' to describe this temporary introduction of the goods into the territory of a Member State, on the clear understanding that in this case it is not a question of 'transit' in the legal sense as defined, for example, in the Community Customs Code, (2) but of 'transit' in the physical sense of the term.

6. Hence we are not faced with the situation which forms the subject of the bulk of the Court's existing case-law, namely that in which the goods at issue are intended to be imported into, that is to say placed on the market in, the territory of a Member State whose legislation makes it possible to obtain an exclusive right.

7. Consequently, nor does the action relate to the possession of goods in France for the purpose of marketing them in that State or the possession of goods manufactured in France in breach of the domestic legislation applicable.

8. In the present case, the goods are in the possession of the carrier solely to enable them to be transported to another Member State in which they are to be marketed.

9. It should also be noted that the facts criticised by the Commission differ from those at issue in various cases cited by the parties.

10. In particular, the defendant seeks to have the present case treated as part of a so-called 'saga' which is said also to embrace the CICRA and Maxicar (3) and Renault (4) cases, which likewise concerned spare parts used for repairing motor vehicles.

11. There can be no doubt that these two cases differ fundamentally from the present case.

12. The issue in CICRA was whether the holder of an intellectual property right in a Member State could oppose the importation into that State of the goods at issue. As we have seen, the action brought by the Commission relates to goods intended to be marketed in a Member State other than that in which the intellectual property right is applicable.

13. Renault also relates to whether the holder of the right can oppose the manufacture, sale or exportation of objects protected by an intellectual property right, rather than their mere passage through the territory covered by that right.

14. Following on from these preliminary remarks, I now propose to consider the various aspects of the dispute.

Is there an obstacle to intra-Community trade?

15. Since the purpose of the action is a declaration that there has been a breach of the provisions of the Treaty on the free movement of goods, it is necessary to determine, first of all, whether the national measures in question are capable of obstructing intra-Community trade.

16. Both the Commission and the defendant consider this to be the case. The national provisions cited by the Commission authorise the customs authorities to detain goods, on an application from the intellectual property right holder, when the latter considers that his right has been infringed.

17. The goods may be detained for up to 10 days. If, before this period expires, the holder of the right initiates legal proceedings, he can have the application of the measure prolonged. Ultimately, at the end of those proceedings, the court may order the confiscation of the goods at issue.

18. In this connection, both the Commission and the defendant cite a judgment of the French Cour de Cassation (Court of Cassation) of 26 April 1990, from which it is clear that, under the applicable French law, the mere presence in France of the goods which were manufactured in another Member State and are intended to be marketed in a third Member State constitutes counterfeiting which could give rise, *inter alia*, to confiscation.

19. The defendant mentions various other decisions which confirm that case-law, in particular, a judgment of the Cour de Cassation of 17 February 1999.

20. In these circumstances, I find myself obliged to agree with the parties that the detention procedures criticised by the Commission do, in fact, constitute a measure having effect equivalent to a quantitative restriction since they have the effect, at best, of delaying the passage of the goods in transit and, at worst, they could constitute the essential preliminary to

the prohibition of the goods' passage, or even their confiscation.

21. However, the Commission and the defendant adopt different analyses of the precise nature of the measure in question.

22. According to the Commission, the contested detention procedures are carried out by the customs authorities at border crossings. Thus, they can concern only imports and are therefore 'applicable in a discriminatory manner'. It follows that they can be justified only on the grounds listed in Article 36 of the EC Treaty (now, after amendment, Article 30 EC) and that there can be no question of an 'overriding requirement' for the propose of the rule in 'Cassis de Dijon'. (5)

23. On the other hand, the defendant insists that these procedures can be applied by the customs authorities anywhere in French territory and are never triggered merely by the crossing of the frontier.

24. It adds that the customs authorities are not the only authority to possess such powers and that any suspect goods, including goods of domestic origin, can be detained.

25. The Commission responds by noting that the defendant is unable to quote any specific case in which the goods detained were manufactured in France and can only quote one case in which they might have been.

26. It must be noted, however, that the Commission is unable to cite a single relevant provision to show that the detention measures in question can be applied only to imports or that they must be applied at the border.

27. Nor is it alleged that the measures benefit only French motor-vehicle manufacturers, since the Commission withdrew this objection during the pre-litigation procedure.

28. Thus, in my view, it has not been definitively established that the national measures in question are not applicable without discrimination.

29. In any event, in the present case, this finding is of only relative importance since, as noted by the Commission in the reply, the defendant has not invoked in its defence the various 'overriding requirements' to which it had referred in the pre-litigation procedure.

Possibility of justifying the obstacle

30. Thus, the dispute relates only to the possibility of justifying the measures in question on the basis of Article 36 of the Treaty, since there is no relevant secondary legislation which might provide a solution.

31. Clearly, and on this the parties are agreed, no solution is offered by Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs. (6)

32. With respect to the protection of spare parts used for the repair of motor vehicles, Article 14 of the Directive reads as follows:

'Transitional provision

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.'

33. Thus, Directive 98/71 does not achieve complete harmonisation since, with regard to the particular case of the parts at issue in the present action, it refers to national law. Accordingly, it is indeed to the Treaty that we must refer in order to assess the compatibility of the national provisions with Community law. (7)

34. Clearly, the abovementioned Article 14, relied on by the defendant, does not imply that any measure maintained in force by a Member State is automatically consistent with Community law, since that provision cannot exempt the national authorities from compliance with the Treaty.

35. The French Government also puts forward two other arguments derived from secondary legislation.

36. Firstly, it notes the extent of the prerogatives granted to Member States by Community law with respect to the exercise of controls, whether under national or Community rules. According to the French Government, this principle is illustrated by Decision No 3052/95/EC of the European Parliament and of the Council of 13 December 1995 establishing a procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community. (8)

37. Admittedly, as pointed out by the Commission, the defendant acknowledges that the fact that a measure is subject to notification under this procedure in no way establishes a presumption that the measure is valid. However, it considers that this decision shows that a national control measure is not *prima facie* contrary to Community law.

38. Even if this deduction is correct, nor does it follow that such a measure could never be contrary to Community law. Each particular case should be examined in the light of the provisions of the Treaty and the case-law of the Court.

39. The French Government also seeks support for its case in 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. (9)

40. It argues that the detention measures criticised are consistent with the provisions of that regulation which grants Member States wide powers to protect the rights of intellectual property right holders against counterfeit goods from non-member countries.

41. In particular, Regulation No 3295/94 allows the holder of a right to lodge an application in writing with the customs authorities for them to take action where counterfeit goods are entered for free circulation, export or re-export or are found when checks are being made.

42. The defendant also cites the Opinion of the Advocate-General in *Polo/Lauren* (10) which, it says, confirms that Regulation No 3295/94 authorises Member States to prevent the transit across their

territory of counterfeit goods originating in a non-member country which are intended for re-export to another non-member country.

43. However, the French Government accepts the Commission's argument that Regulation No 3295/94 applies only to goods from non-member countries, which, unlike goods lawfully manufactured in a Member State, do not benefit from the principle of free movement of goods.

44. At the same time, it points out that failure to take the measures to which the Commission objects would seriously jeopardise the achievement of the Regulation's objectives since it would then be enough for 'laxer' Member States to release the goods into free circulation in their territory in order for those goods not to be open to interception by another Member State with a greater concern for the protection of industrial and commercial property, where that State is a mere crossing point.

45. The desire to implement a provision of secondary legislation, albeit with greater zeal than the Member States which the defendant describes as 'lax', cannot justify an infringement of the Treaty.

46. Moreover, the Court has consistently held that when one Member State considers that another is in breach of its obligations under Community law, rather than resort to national measures to redress the situation, it should use the means placed at its disposal by Community law.

47. The French Government then shades its argument by noting that the action by the customs authorities for which Regulation No 3295/94 provides can be taken only if importation infringes the law in the Member State in which the intervention of the authorities is requested. It follows that there is nothing to prevent a non-member country operator from obtaining the release into free circulation in another Member State of goods which are counterfeit under French law. These would then qualify as Community goods and, according to the Commission's view, would have to be allowed free passage across French territory, which would jeopardise the achievement of the objectives of Regulation No 3295/94.

48. First of all, it should be noted that the measures criticised by the Commission do not appear to be consistent with the provisions of Regulation No 3295/94.

49. Under Article 3 of the Regulation, the application lodged with the customs authorities must relate to goods from a non-member country. However, the defendant does not claim that the same condition applies to goods detained under the French legislation.

50. Moreover, the application must relate to a precisely defined situation, that is to say one in which the goods in question are entered for free circulation, export or re-export or found when checks are made on goods placed under a suspensive procedure within the meaning of the Community Customs Code.

51. Both sides agree that in French law the possibility of detaining the goods is not conditional upon the existence of such a situation.

52. It must therefore be concluded that the detention measures criticised by the Commission have a much wider scope than those for which Regulation No 3295/94 provides and, accordingly, cannot be regarded as justified by the latter's objectives.

53. In any event, a Member State cannot plead the compliance of a measure with the objective of a piece of secondary legislation in order to justify an infringement of the Treaty. Indeed, secondary legislation cannot have the effect of altering the scope of a Member State's obligations under the Treaty.

54. In this connection, the Commission puts forward the following arguments to prove the existence of an infringement of the provisions of the Treaty relating to the free movement of goods.

55. With respect to the protection of industrial property, it notes that, in accordance with the Court's settled case-law, a derogation from the Treaty is allowed only if the national measures in question are necessary and proportionate to the objective of safeguarding rights which constitute the specific subject-matter of the industrial property protected.

56. In this respect, the French authorities' reliance on the Court's case-law on trade mark law is not directly relevant inasmuch as the spare parts in question did not involve counterfeit trade marks.

57. In relation to the protection of designs and, in particular, the protection applicable to spare parts for motor vehicles, the Commission refers to *CICRA and Maxicar*, in which the Court ruled that the Treaty does not preclude national legislation under which a car manufacturer who holds protective rights in an ornamental design in respect of spare parts intended for cars of its manufacture is entitled to prohibit third parties from manufacturing parts covered by those rights for the purpose of sale on the domestic market or for exportation or to prevent the importation from other Member States of parts covered by those rights which have been manufactured there without his consent. The Court noted that such legislation was intended to protect the very substance of the exclusive right conferred on the proprietor and was therefore not contrary to Articles 30 and 36 of the Treaty.

58. According to the Commission, the exclusive right conferred on the holder of the design right covers manufacturing and marketing in the national territory and, in view of the principle of the territoriality of industrial property law, which the Court upheld in *IHT Internationale Heiztechnik and Danziger*, (11) cannot have the effect of protecting that right on other markets. In the present case, the goods in question are neither manufactured in France nor intended to be placed on the French market. Therefore the detention measures applied by the French authorities cannot be interpreted as protecting the specific subject-matter of the right as defined by the Court.

59. Admittedly, in *CICRA and Maxicar*, the Court considered that a prohibition not only on importing, but also on exporting the goods infringing the exclusive right was justified, but the judgment makes it clear that it was manufacture in the national territory, in breach of

the exclusive right, which could lawfully be prohibited, no matter whether the goods were manufactured for sale on the domestic market or for export.

60. Mere transit through French territory does not in itself constitute an infringement of the exclusive right conferred by French law on the design right holder.

61. Moreover, if the detention measures applied by the French customs authorities to Community goods in transit were accepted, then, in the present case, that would amount to extending the reach of French law to other Member States, and that would be contrary to the principle upheld by the Court according to which it is for each national legislature to determine the goods eligible for industrial protection. The extra-territorial effect would be further enhanced by France's geographical position at the centre of the European Community. Thus, it would be enough for an operator to acquire industrial protection in France to assure himself of exclusive rights throughout the Community, to the detriment of goods lawfully manufactured in Spain and Portugal.

62. In the Commission's view, these examples show that the balance to be struck between the protection of industrial property and the principle of free movement of goods, to which the *Keurkoop* judgment refers, (12) would clearly be upset, to the detriment of free movement.

63. Thus, the protection of industrial property does not justify the detention by customs authorities of Community goods being carried in transit in accordance with the principle of free movement.

64. With respect to Article 36, the French Government points out that the protection of industrial and commercial property is one of the exceptions to the principle of free movement of goods. The system of detaining goods for checking purposes is intended to provide such protection. The measures are not disproportionate since the goods are detained only temporarily and are preserved intact.

65. In the field of industrial property, the Court has established a balance between the free movement of goods and the legitimate protection of intangible property rights. Thus, it has ruled that a measure is proportionate, and hence lawful, if intended to protect the specific subject-matter of the property right in question.

66. Where designs are concerned, the benchmark should be the judgment in *Keurkoop*. In that case the Advocate General, taking up the observations of the Commission, defined the specific subject-matter as 'the exclusive right of the proprietor ... to market a product of a given ... design'. Thus, measures taken by the proprietor of the rights form part of the specific subject-matter of the ownership of the design when they are intended to enforce his exclusive rights.

67. In *Keurkoop*, the Court held that the proprietor of a right to a design acquired under the legislation of a Member State may oppose the importation of goods from another Member State which are identical in appearance to the design which has been filed. The French Government considers that if this ruling is

applied to the case in question, then the conclusion must be that, with respect to slavish copies of motor vehicle spare parts in transit, in cases in which copies of designs are placed on the market without the consent of the holder of the right, actions to prevent the import, export, transit or first sale of those goods in the national territory constitute no more than the legitimate exercise of industrial property rights.

68. In support of this analysis, the French Government cites a passage from the Commission's observations in the new *Renault* case, C-38/98, currently pending before the Court, which, it says, reflects the gist of the operative part of the Court's judgment in *CICRA* and *Maxicar*: 'as Community law now stands, Articles 30 and 36 of the Treaty must be construed as not precluding national legislation which allows the holder of specific industrial property rights in spare parts, which together make up the bodywork of a type of motor vehicle already placed on the market, to exercise those specific exclusive rights by prohibiting third parties from manufacturing, selling, importing or exporting non-original replacements for those parts and by invoking the protection of the courts in order to make such prohibitions effective'.

69. The French Government concludes by expressing the view that controls applied to protect designs relating to motor vehicle spare parts under arrangements which are not harmonised at Community level do not necessarily fall within the scope of Article 30 and, in certain circumstances, are covered by the exemption referred to in Article 36 of the Treaty with respect to restrictions justified on the grounds of the protection of industrial property.

70. What are we to make of these arguments?

71. I do not share the conclusions which the defendant draws from the case-law it cites.

72. The *CICRA* and *Maxicar* case relates to the situation in which the holder of the right is seeking to prevent the manufacture of the product protected by the right. As the Commission points out, manufacture in the territory protected cannot, without further formality, be treated in the same way as mere transit through that territory.

73. Accordingly, the fact that the Court has ruled that the right to prevent manufacture is part of the very essence of the intellectual property right cannot be taken to mean that the same would apply to the right to prevent mere transit.

74. For similar reasons, I am not convinced by the arguments which the defendant seeks to base on *Keurkoop*. In that case the Court ruled that, in principle, the right to oppose the marketing of an imported product identical in appearance to that protected by the design right forms part of the very essence of the industrial and commercial property right. On the other hand, the judgment makes no mention of the separate question of transit, which was not raised.

75. Accordingly, for the same reasons as make *CICRA* and *Maxicar* of only limited relevance to this case I am also unable to accept the defendant's argument by analogy based on *Keurkoop*.

76. As the Commission points out, the Court has consistently held that only measures designed to safeguard exclusive rights which constitute the specific subject-matter of the intellectual property right may benefit from the exception to the fundamental principle of free movement laid down by Article 36 of the Treaty. (13)

The specific subject-matter of the design right

77. Like the parties, I shall concentrate my analysis on the protection of the design right since it follows from the documents before the Court that the motorvehicle parts which form the subject of the complaints that led the Commission to bring its action did not involve a counterfeit trade mark and were protected by such a right.

78. Initial guidance is provided by Directive 98/71 itself. (14) Thus, Article 12(1) of the Directive, entitled 'Rights conferred by the design right', reads:

'The registration of a design shall confer on its holder the exclusive right to use it and to prevent any third party not having his consent from using it. The aforementioned use shall cover, in particular, the making, offering, putting on the market, importing, exporting or using of a product in which the design is incorporated or to which it is applied, or stocking such a product for those purposes.'

79. This list, admittedly illustrative since preceded by the words 'in particular', does not contain any reference to the mere transportation of the product.

80. In any event, it is clear that the specific subject-matter of the right is the power to prevent the 'use' of the product.

What does this concept involve?

81. Obviously, the manufacture of goods identical, at least in appearance, to the product protected involves a 'use' of the design. Indeed, such manufacture presupposes the copying of the appearance of the product, that is to say precisely the characteristic covered by the design right.

82. The same applies to the marketing of goods that simulate the appearance of the product protected. In fact, the appearance is decisive for consumers purchasing a product covered by a design right, otherwise there would be little point in wanting to protect it with an exclusive right. Thus, the success of marketing depends, in particular, on the appearance of the product offered for sale.

83. On the other hand, it cannot be argued that the carrier 'uses' the product in the same way as in the two situations described above. For the purposes of the transport operation, the appearance of the goods transported is of no importance and has nothing to do with the benefits which the carrier derives from providing the transport service. By contrast, the success of the manufacture and marketing of the product is inseparable from its appearance, which the right is intended to protect.

84. Accordingly, it is perfectly logical that the holder of the right should be entitled to obtain the payment of royalties from those to whom he grants a manufacturing or distribution licence. On the other

hand, it is much more difficult to imagine him persuading a carrier to pay him royalties for the honour of transporting goods protected by his right. (15)

85. Thus, there is an intrinsic difference between mere transportation, on the one hand, and manufacture or marketing, on the other.

86. Moreover, it is not the intention of the holder of the right to oppose the transport operation, considered in isolation. His interest lies in preventing the parts from reaching a consumer who will be able to purchase them without the holder of the right being able to obtain the payment to which he is entitled as the proprietor of an intellectual property right. Thus, the only reason for which the holder of the right might wish to oppose the mere transportation of the parts at issue is the fact that the transport operation will end in their being placed on the market, which is what the holder of the right really wishes to prevent.

87. Thus, it is only within the context of a subsequent marketing operation that the transportation of the goods is likely to harm the interests of the right holder. On the other hand, considered in isolation, it has no bearing on those interests and therefore, unlike manufacture and marketing, cannot fall within the protection of the specific subject-matter of the right.

88. This analysis is confirmed by all the case-law of the Court in the field of intellectual property. Whatever the right concerned, (16) in defining the specific subject-matter of that right the Court has always made explicit reference to placing on the market.

89. The same applies to the intellectual property rights which have already been the subject of harmonisation by the Community legislature. (17)

90. I can see no reason for setting aside all these precedents and granting to designs protection more extensive than that accorded to, for example, copyright or patents, especially as the design directive itself also highlights manufacture and marketing.

91. It follows that national measures aimed not at preserving the exclusive right of the proprietor to manufacture or market the object protected but at preventing the mere transit of the object through the territory to which the right applies cannot be justified on the grounds that they protect the specific subject-matter of the intellectual property right.

92. It could, of course, be argued that, in the present case, the measures in dispute are nevertheless aimed at protecting the specific subject-matter of the right since, by resorting to them, the holder of the right can prevent the goods concerned from reaching another Member State in which they are to be marketed.

93. However, this argument overlooks the fact that, in the case to which the Commission's action relates, the goods can be lawfully marketed in the Member State of destination.

94. Thus, to accept this argument would be to give effect in the territory of that other Member State to the prohibition in force in France. As the Commission explains, this would constitute an extra-territorial effect of French law, contrary to the principle of territoriality of intellectual property law. This principle goes to the

very essence of the right, which must be regarded as a monopoly in the territory to which it applies, and is enshrined in the case-law of the Court. (18)

95. Moreover, it would be paradoxical, in this instance, to allow an operator to prevent the transportation of goods across one Member State and thus, indirectly, the marketing of those goods in another, where it was lawful, when transportation is incidental to marketing. That would be putting the cart before the horse.

96. The defendant also claims that the detention measures form part of the protection of the specific subject-matter of the intellectual property right because, in any event, the latter includes the right of the holder to put the protected goods into circulation for the first time.

97. Since, in the present case, the parts at issue were first 'put into circulation' in France, it is permissible, under the Treaty, for French law to give the holder of the intellectual property right the right to oppose the said 'putting into circulation'.

98. This argument seems to me to be based on a confusion between the notion of 'putting into circulation' (Fr. mise en circulation) in the purely physical sense and 'putting into circulation' as the term is used in Community law.

99. When the case-law of the Court on the free movement (Fr. circulation) of goods mentions 'putting into circulation' in another Member State, it is not referring to the goods being simply moved from place to place on board a means of transport but rather to their being put on the market.

100. Thus, if, as in the present case, goods are moved physically across the territory of one Member State before being put on the market in another, then, contrary to the view taken by the defendant, it is in the second State that the first 'putting into circulation' takes place.

101. The dubiousness of relying on a purely physical interpretation of the term is further illustrated by the circumstances of the case. Physically, the goods at issue were first put into circulation not in France but in Spain since, having been manufactured in that State, the parts necessarily began their 'circulation' when they left the factory.

Is it necessary to prohibit transit?

102. The defendant also argues that the detention measures criticised by the Commission are essential to ensure the effectiveness of the campaign against counterfeiting, a campaign justified by the priority given to the issue both within the Community and in the context of the third pillar.

103. The action brought by the Commission therefore seriously jeopardises Community's objectives.

104. More specifically, the French Government explains that the detention measures, with the possibility of subsequent prohibition, are necessary to prevent any risk of parts manufactured in another Member State being clandestinely sold in France rather than being transported to their purported destination in a third Member State.

105. In other words, the measures in question should not be understood as being aimed at bringing mere transit within the specific subject-matter of the intellectual property right, but simply as intended to safeguard the prerogatives which Community law accords to the holder of the right, namely, as we have seen, the exclusive right to manufacture and market the product protected.

106. Detention, as a preliminary to total prohibition of the passage of the goods, is therefore necessary because, if parts lawfully manufactured in another Member State which are intended to be lawfully marketed in a third Member State were allowed to pass in transit through France, there would be too great a risk of 'transit' turning into clandestine importation, which would indisputably infringe the prerogatives of the holder of the intellectual property right.

107. It is true that detention measures intended solely to prevent the marketing in France of parts manufactured without the consent of the holder of the right would, indeed, form part of the protection of the specific subject-matter of the intellectual property right, since that right consists of the exclusive right of the holder to manufacture the protected product and place it on the market in the territory to which the right applies, an exclusive right which, of course, it is possible to exploit by granting licences.

108. However, it follows from the settled case-law of the Court that it is not sufficient for a measure which restricts a fundamental freedom laid down by the Treaty to be covered by one of the grounds for exemption listed in Article 36 of the Treaty; it must also be proportionate to the objective to be achieved. (19)

109. In the particular case of control measures, the Court has ruled that for a national control procedure to be justified under Article 36 of the Treaty it must not be possible for the objective pursued to be realised as effectively by measures which do not restrict intra-Community trade so much. Thus the procedure must not entail unreasonable cost or delay. (20)

110. The principle of proportionality cannot be said to be observed by measures such as those at issue, taken to avoid the risk that cargo allegedly intended for the market of another Member State will be put on the market in France, measures from which there is no escape even if it is established that the goods really are intended for another Member State.

111. Moreover, the Court has already stressed, in *Monsees*, (21) the gravity of measures that make transit totally impossible.

112. Bans of this sort seriously impede the flow of trade across a would-be single market. They should therefore be a measure of last resort and not, as in this case, a measure of ordinary law.

113. In my opinion, the defendant is wrong to assert that the Commission has failed to suggest measures less restrictive of trade which are capable of countering the alleged risk.

114. Thus, the Commission has pointed out that a simple document check should be sufficient to ensure

that the cargo checked does in fact come from another Member State and is intended for a third Member State. I share this view.

115. Firstly, it should be noted that in many cases the Court has ruled that import bans were disproportionate to the stated objective and that labelling measures were to be considered sufficient. (22) This should apply with even greater force to a transit ban.

116. I find it very hard to believe that a check based on an examination of the documents accompanying the load would not be sufficient for the purpose. Such a document check would clearly be a less restrictive measure than the detention measures criticised by the Commission.

117. In this connection, the defendant points out that the requirement to possess documents could in itself constitute an obstacle to the free movement of goods.

118. Of course, this is true. However, the objection must be set aside when, as in the present case, a document check is a measure less restrictive than that applied by a Member State and proportionate to the stated objective, namely protecting the specific subject-matter of the intellectual property right.

119. The French Government adds that, in many cases, the lorries intercepted by the competent services do not carry a single document which could be produced to the authorities.

120. This is indeed surprising. Even though the Commission does not refer to any general rules requiring the possession of appropriate documentation, it should be recalled that transport services are provided not only within a certain legislative and regulatory context but also on the basis of contractual arrangements, which are unlikely not to take written form. The defendant itself makes reference to the fact that commercial transactions normally generate documents such as order forms, contracts, delivery notes and invoices.

121. It is clear from the file that the operators subjected to the detention measures which gave rise to the complaints that led the Commission to bring its action had documents such as invoices in their possession.

122. Moreover, in view of the ready availability of modern means of communication, it seems to me that when the competent authorities carry out a check on a carrier with no documents at all, they should be able to have the necessary documents forwarded to them in less than 10 days.

123. In any event, the argument is immaterial. The fact that some operators might not respect even an obligation to carry documents cannot justify prohibiting all of them from exercising a fundamental freedom guaranteed by the Treaty. There is nothing to prevent the French authorities, within the context of a document check, from applying detention procedures to those carrying no documents at all.

124. Accordingly, even if the purpose of the detention measures at issue is considered to be the protection of the specific subject-matter of the intellectual property right, by ruling out any risk of a 'transit' operation turning into a clandestine importation, they

nevertheless fall foul of Community law since they are disproportionate to the objective pursued.

Detention as a temporary measure?

125. The French Government refers to the possibility of goods that were genuinely in transit being allowed to pass at the conclusion of the detention procedure. Thus, in practice, the detention measures in dispute would not, as in *Monsees*, lead to a ban on transit, but merely a delay.

126. I find it hard to reconcile this statement with the national case-law cited by the defendant as well as by the Commission.

127. It follows from the documents before the Court that, in accordance with the apparently well established case-law of the French courts, the mere transportation in French territory of spare parts lawfully manufactured in another Member State which are intended for marketing in a third Member State is considered to constitute the offence of counterfeiting and is therefore liable to various sanctions, including prohibition.

128. That said, I am nevertheless prompted to consider whether the detention measures criticised by the Commission would be compatible with Community law if, instead of leading to a ban on transit, they had only the effect of delaying the passage of goods lawfully manufactured in one Member State which were intended to be lawfully marketed in another Member State, assuming that such passage were authorised once the true origin and destination of the goods detained was established.

129. The provisions applicable allow the goods to be detained for up to 10 working days. A detention period of this duration is likely to involve considerable expense for the operator concerned.

130. The fact that, in practice, this period may be shorter is irrelevant since, in accordance with the case-law, a Member State cannot invoke the existence of a practice that is in accordance with Community law in order to maintain in force a provision that is not.

131. It should also be pointed out that the check that would have to be carried out by the services concerned would not be a complicated technical examination, like that at issue in *Commission v France*, (23) where the Court did not explicitly consider a time-limit of 21 days for inspecting imported wine to be contrary to the Treaty.

132. The authorities would not be required to establish that the spare parts at issue complied with a national or Community technical standard but solely to verify their origin and destination on the basis of documents. This should take a matter of hours rather than days.

133. I conclude that even if the detention measures which form the subject of the Commission's action were not such as to lead to a total ban on the transit of goods lawfully manufactured in one Member State which were intended to be placed on the market in another Member State and would therefore have only the effect of suspending the passage of those goods, they would still not be consistent with the requirements of Community law.

134. It follows from the foregoing that the detention procedures which form the subject of the action brought by the Commission constitute an obstacle to the free movement of the goods concerned, although those goods were lawfully manufactured in one Member State and were intended to be lawfully marketed in another Member State, and that this obstacle is not such as to qualify for exemption under Article 36 of the Treaty.

Conclusion

135. I therefore consider that the Commission's action should be upheld and that the Court should

- declare that, by implementing, pursuant to the French 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 has failed to fulfil its obligations under Article 30 of the EC Treaty (now, after amendment, Article 28 EC);

- order the defendant to pay the costs.

trade marks: Case 16/74 Centrafarm and Others v Winthrop [1974] ECR 1183.

17: - See, for example, Article 5 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1); Article 13 of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1); Article 5 of Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor goods (OJ 1987 L 24, p. 36); Article 25 of the Agreement relating to Community patents, done at Luxembourg on 15 December 1989 (OJ 1989 L 401, p. 1); and Article 20 of the amended proposal for a European Parliament and Council Directive approximating the legal arrangements for the protection of inventions by utility model (COM(99) 309 final).

18: - See IHT Internationale Heiztechnik and Danziger.

19: - Case 104/75 De Peijper [1976] ECR 613, and Campus Oil and Others.

20: - Case 406/85 Procureur de la République v Gofette and Gilliard [1987] ECR 2525, paragraph 10.

21: - Case C-350/97 Monsees [1999] ECR I-2921.

22: - Case 261/81 Rau v De Smedt [1982] ECR 3961, and Case 407/85 3 Glocken and Others v USL Centro-Sud and Others [1988] ECR 4233.

23: - Case 42/82 Commission v France [1983] ECR 1013.

1: - Original language: French.

2: - Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1; hereinafter 'the Community Customs Code').

3: - Case 53/87 CICRA and Maxicar v Renault [1988] ECR 6039.

4: - Case C-38/98 Renault [2000] ECR I-2973.

5: - Case 120/78 Rewe v Bundesmonopolverwaltung für Branntwein [1979] ECR 649, 'Cassis de Dijon'.

6: - OJ 1998 L 289, p. 28.

7: - For an example of the settled case-law see Case 72/83 Campus Oil and Others [1984] ECR 2727.

8: - OJ 1995 L 321, p. 1.

9: - OJ 1994 L 341, p. 8.

10: - Opinion of Mr Ruiz Jarabo Colomer of 16 December 1999 (Case C-383/98 Polo/Lauren [2000] ECR I-2519).

11: - Case 9/93 IHT Internationale Heiztechnik v Ideal-Standard [1994] ECR I-2789.

12: - Case 144/81 Keurkoop v Nancy Kean Gifts [1982] ECR 2853.

13: - Case 78/70 Deutsche Grammophon v Metro [1971] ECR 487.

14: - See point 31 above.

15: - Of course, the situation would be different if, for example, the holder of the right also held a trade mark right and allowed the carrier to refer to that trade mark for advertising purposes. For example, company X, the trusted carrier for manufacturer Y.

16: - With respect to patents: Case 15/74 Centrafarm and Others v Sterling Drug [1974] ECR 1147; with respect to plant varieties: Case 258/78 Nungesser v Commission [1982] ECR 2015; with respect to copyright, Deutsche Grammophon; and with respect to