



## Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

13 October 2022\*

(Reference for a preliminary ruling – Intellectual property – Directive 2004/48/EC – Enforcement of intellectual property rights – Article 10 – Corrective measures – Destruction of goods – Concept of ‘infringement of an intellectual property right’ – Goods bearing an EU trade mark)

In Case C-355/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Najwyższy (Supreme Court, Poland), made by decision of 29 December 2020, received at the Court on 7 June 2021, in the proceedings

**Perfumesco.pl sp. z o.o. sp.k.**

v

**Procter & Gamble International Operations SA,**

intervener:

**Rzecznik Praw Obywatelskich,**

THE COURT (Ninth Chamber),

composed of J.-C. Bonichot, acting as President of the Chamber, S. Rodin and O. Spineanu-Matei (Rapporteur), Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Perfumesco.pl sp. z o.o. sp.k., by T. Snażyk, radca prawny,
- Procter & Gamble International Operations SA, by D. Piróg and A. Rytel, adwokaci,

\* Language of the case: Polish.

- Rzecznik Praw Obywatelskich, by M. Taborowski,
- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by K. Herrmann, S.L. Kaléda, P.-J. Loewenthal and J. Samnadda, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Article 10 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigendum at OJ 2004 L 195, p. 16).
- 2 The request has been made in proceedings between Perfumesco.pl sp. z o.o. sp.k. and Procter & Gamble International Operations SA ('Procter & Gamble') concerning an action for the destruction of goods as a result of an alleged infringement of rights conferred by an EU trade mark.

### **Legal context**

#### ***International law***

- 3 Article 46 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, as set out in Annex 1C to the Marrakesh Agreement establishing the World Trade Organisation, approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1) ('the TRIPS Agreement'), entitled 'Other Remedies', provides:

'In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimise the risks of further infringements. In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.'

## ***European Union law***

### *Directive 2004/48*

4 Recitals 3 to 5, 7, 9, 10 and 17 of Directive 2004/48 state:

‘(3) ... without effective means of enforcing intellectual property rights, innovation and creativity are discouraged and investment diminished. It is therefore necessary to ensure that the substantive law on intellectual property, which is nowadays largely part of the *acquis communautaire*, is applied effectively in the Community. In this respect, the means of enforcing intellectual property rights are of paramount importance for the success of the internal market.

(4) At international level, all Member States, as well as the Community itself as regards matters within its competence, are bound by [the TRIPS Agreement].

(5) The TRIPS Agreement contains, in particular, provisions on the means of enforcing intellectual property rights, which are common standards applicable at international level and implemented in all Member States. This Directive should not affect Member States’ international obligations, including those under the TRIPS Agreement.

...

(7) It emerges from the consultations held by the [European] Commission ... that, in the Member States, and despite the TRIPS Agreement, there are still major disparities as regards the means of enforcing intellectual property rights. For instance, the arrangements for applying provisional measures, which are used in particular to preserve evidence, the calculation of damages, or the arrangements for applying injunctions, vary widely from one Member State to another. In some Member States, there are no measures, procedures and remedies such as the right of information and the recall, at the infringer’s expense, of the infringing goods placed on the market.

...

(9) ... Effective enforcement of the substantive law on intellectual property should be ensured by specific action at Community level. Approximation of the legislation of the Member States in this field is therefore an essential prerequisite for the proper functioning of the internal market.

(10) The objective of this Directive is to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the internal market.

...

(17) The measures, procedures and remedies provided for in this Directive should be determined in each case in such a manner as to take due account of the specific characteristics of that case, including the specific features of each intellectual property right and, where appropriate, the intentional or unintentional character of the infringement.’

5 Article 2 of that directive, entitled ‘Scope’, provides, in paragraph 1:

‘Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for rightholders, the measures, procedures and remedies provided for by this Directive shall apply, in accordance with Article 3, to any infringement of intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned.’

6 Article 3 of that directive, entitled ‘General obligation’, provides in paragraph 2:

‘Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.’

7 Article 10 of that directive, entitled ‘Corrective measures’, provides:

‘1. Without prejudice to any damages due to the rightholder by reason of the infringement, and without compensation of any sort, Member States shall ensure that the competent judicial authorities may order, at the request of the applicant, that appropriate measures be taken with regard to goods that they have found to be infringing an intellectual property right and, in appropriate cases, with regard to materials and implements principally used in the creation or manufacture of those goods. Such measures shall include:

- (a) recall from the channels of commerce;
- (b) definitive removal from the channels of commerce,  
or
- (c) destruction.

2. The judicial authorities shall order that those measures be carried out at the expense of the infringer, unless particular reasons are invoked for not doing so.

3. In considering a request for corrective measures, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account.’

*Regulation (EC) No 207/2009*

8 Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1), as amended by Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 (OJ 2015 L 341, p. 21) (‘Regulation No 207/2009’), was repealed and replaced, with effect from 1 October 2017, by Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1). However, taking into account the date of the facts in the main proceedings, Regulation No 207/2009 remains applicable.

9 Article 9 of Regulation No 207/2009, entitled ‘Rights conferred by an EU trade mark’, provided:

‘1. The registration of an EU trade mark shall confer on the proprietor exclusive rights therein.  
2. Without prejudice to the rights of proprietors acquired before the filing date or the priority date of the EU trade mark, the proprietor of that EU trade mark shall be entitled to prevent all third parties not having his consent from using in the course of trade, in relation to goods or services, any sign where:

(a) the sign is identical with the EU trade mark and is used in relation to goods or services which are identical with those for which the EU trade mark is registered;

...

3. The following, in particular, may be prohibited under paragraph 2:

(a) affixing the sign to the goods or to the packaging thereof;

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

(c) importing or exporting the goods under that sign;

...

4. Without prejudice to the rights of proprietors acquired before the filing date or the priority date of the EU trade mark, the proprietor of that EU trade mark shall also be entitled to prevent all third parties from bringing goods, in the course of trade, into the Union without being released for free circulation there, where such goods, including packaging, come from third countries and bear without authorisation a trade mark which is identical with the EU trade mark registered in respect of such goods, or which cannot be distinguished in its essential aspects from that trade mark.

The entitlement of the proprietor of an EU trade mark pursuant to the first subparagraph shall lapse if, during the proceedings to determine whether the EU trade mark has been infringed, initiated in accordance with Regulation (EU) No 608/2013 of the European Parliament and of the Council [of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003 (OJ 2013 L 181, p. 15)], evidence is provided by the declarant or the holder of the goods that the proprietor of the EU trade mark is not entitled to prohibit the placing of the goods on the market in the country of final destination.’

10 Article 102 of that regulation, entitled ‘Sanctions’, provided:

‘1. Where an EU trade mark court finds that the defendant has infringed or threatened to infringe an EU trade mark, it shall, unless there are special reasons for not doing so, issue an order prohibiting the defendant from proceeding with the acts which infringed or would infringe the EU trade mark. It shall also take such measures in accordance with its national law as are aimed at ensuring that this prohibition is complied with.

2. The EU trade mark court may also apply measures or orders available under the applicable law which it deems appropriate in the circumstances of the case.’

### ***Polish law***

- 11 Article 286 of the ustawa – Prawo własności przemysłowej (Intellectual Property Law) of 30 June 2000 (Dz. U. of 2020, Article 286), in the version applicable to the dispute in the main proceedings (‘the Intellectual Property Law’), provides:

‘The Sąd [(Court)] hearing a case alleging infringement of the rights may, at the request of the proprietor, rule on goods belonging to the infringer which have been illegally manufactured or marked and on the means and materials used to manufacture or mark them. It may, in particular, order that they be withdrawn from the market, allocated to the rightholder in the amount of money assigned to him or her, or destroyed. In its decision, the Sąd [(Court)] shall take into account the seriousness of the infringement and the interests of third parties.’

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

- 12 Procter & Gamble is a producer of perfumery products. Under a licensing agreement granted by HUGO BOSS Trade Mark Management GmbH Co. KG (‘HUGO BOSS TMM’), it alone was authorised to use the EU word mark HUGO BOSS (‘the HUGO BOSS mark’) and to initiate and pursue, in its own name, actions relating to the infringement of the rights over that mark. The mark was registered in respect of the following goods in Class 3 of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, of 15 June 1957, as revised and amended:

‘Fragrant sprays; perfumes, deodorants for personal use; soaps; articles for body and beauty-care’.

- 13 In order for customers to be able to test the goods bearing the HUGO BOSS mark, HUGO BOSS TMM makes available free of charge to sellers and authorised distributors, samples of products or ‘testers’, solely for the purpose of presenting and promoting cosmetics, in bottles identical to those used for their sale under the HUGO BOSS mark. Their external packaging is a uniform bright colour with clear information stating that the samples are not intended for sale, for example, by one of the following indications: ‘*not for sale*’ (not intended for sale), ‘*demonstration*’ or ‘*tester*’. The samples are not placed on the market in the European Economic Area (EEA) either by HUGO BOSS TMM or with its consent.
- 14 Since January 2012, Perfumesco.pl has been operating a wholesale perfumery business through an online shop. It regularly sends price lists to sellers of online cosmetics, offering for sale, in particular, samples of perfumery products bearing the HUGO BOSS mark and marked ‘*Tester*’, stating that the samples do not differ in terms of scent from the normal product. The referring court states that Perfumesco.pl does not remove or cover bar codes that appear on the external packaging of goods bearing that mark, and that, relying on its contractual partners as to the lawful origin of the goods it buys, it does not verify the origin of those goods nor check whether those bar codes have been removed.
- 15 On 28 July 2016, pursuant to a protective order, a court bailiff seized in Poland perfumes, eau de toilette and scented water in packaging bearing the HUGO BOSS mark, namely, testers not intended for sale, products designated by codes indicating, according to Procter & Gamble’s

statement, that the manufacturer intended them to be placed on the market outside the EEA and products in respect of which the bar codes affixed to the packaging had been removed or obscured.

- 16 Procter & Gamble brought an action before the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland), which, by judgment of 26 June 2017, ordered, inter alia, Perfumesco.pl to destroy perfumes, eau de toilette and scented water whose packaging bore the HUGO BOSS mark, in particular testers, which had not been placed on the market in the EEA by HUGO BOSS TMM or with its consent.
- 17 By judgment of 20 September 2018, the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw, Poland) dismissed the appeal brought by Perfumesco.pl. That court stated, inter alia, that, in accordance with Article 102(2) of Regulation No 207/2009, the EU trade mark court may take the measures provided for by the applicable law which it deemed to be appropriate in the circumstances of the case and that that provision permitted the application of Article 286 of the Intellectual Property Law. It found that the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) had applied that article without erring.
- 18 First, it considered that, on its wording, Article 286 of the Intellectual Property Law applied only if the products had been manufactured or marked illegally and that that was not the case in the dispute before it. Procter & Gamble did not dispute that the perfumes seized were original products, but argued that HUGO BOSS TMM had not consented to their being placed on the market in the EEA and that Perfumesco.pl had not proved the existence of such consent.
- 19 Next, that court found that Article 286 should be interpreted in accordance with Article 10(1) of Directive 2004/48, which it transposes into Polish law, and that all goods infringing intellectual property rights had to be considered to be illegally manufactured within the meaning of Article 286.
- 20 Lastly, it noted that the perfumes seized bore masking stickers, preventing identification of the geographical region for which they were intended, and that masking codes had been affixed in place of the removed safety codes. It stated that, even if there was no evidence that the removal of those codes was the act of Perfumesco.pl., the latter should have known, as a perfumery professional, that the goods were placed on the market despite their doubtful origin. It also pointed out that testers had been offered for sale by Perfumesco.pl., which should have been fully aware that HUGO BOSS TMM had not consented to their being placed on the market in the EEA.
- 21 Perfumesco.pl. brought an appeal on a point of law before the referring court, the Sąd Najwyższy (Supreme Court, Poland), alleging, inter alia, infringement of Article 286 of the Intellectual Property Law. In that regard, it submits that Procter & Gamble contends a lack of consent on the part of the proprietor of the HUGO BOSS mark to the placing on the market in the EEA of the goods seized, without denying that those goods are original products.
- 22 That court observes that the lower courts hearing the case in the main proceedings drew attention to the wording of Article 10(1) of Directive 2004/48 and interpreted Article 286 of the Intellectual Property Law in a manner consistent with EU law. It notes that, according to those courts, Article 10(1) of Directive 2004/48 concerns goods which are found to infringe an intellectual property right and that, therefore, the destruction of goods may be ordered, even where they have not been illegally ‘manufactured or marked’ under national law.

- 23 The referring court notes, on the one hand, that several arguments also accepted in the legal literature support a literal interpretation of Article 286 of the Intellectual Property Law, in particular the fact that the amendment of that article in 2007 resulted from the implementation of Directive 2004/48. On the other hand, taking account of the obligation to interpret national law in conformity with EU law, the interpretation of Article 286 should be based on the interpretation of Article 10(1) of that directive.
- 24 In those circumstances the Sąd Najwyższy (Supreme Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Article 10 of Directive [2004/48] be interpreted as precluding the interpretation of a provision of national law to the effect that a protective measure in the form of destruction of goods relates only to goods illegally manufactured or illegally marked, and cannot be applied to goods illegally placed on the market in the [EEA] which cannot be found to have been illegally manufactured or illegally marked?’

### **Admissibility of the request for a preliminary ruling**

- 25 In their observations, the Rzecznik Praw Obywatelskich (Ombudsman, Poland) and the Commission raise the question whether the referring court, namely the Sąd Najwyższy (Supreme Court), sitting as three judges of the Civil Chamber, is, in the light of that chamber’s procedure for appointing judges, a ‘court or tribunal’ within the meaning of Article 267 TFEU.
- 26 First, the Ombudsman is of the opinion that the request for a preliminary ruling is inadmissible on the ground that it comes from a body which is not established by law and which is neither independent nor impartial.
- 27 Second, the Commission, without clearly arguing that the request for a preliminary ruling is inadmissible, observes that the instrument of appointment to the Sąd Najwyższy (Supreme Court) of each of the three judges making up the referring court, was adopted by the President of the Republic of Poland following a procedure conducted in circumstances identical to those which led, in particular, to the appointment of the judge who made the request for a preliminary ruling to the Court in the case giving rise to the judgment of 29 March 2022, *Getin Noble Bank* (C-132/20, EU:C:2022:235).
- 28 In accordance with settled case-law, in order to determine whether a body making a reference is a ‘court or tribunal’ within the meaning of Article 267 TFEU, which is a question governed by EU law alone, and therefore to assess whether the request for a preliminary ruling is admissible, the Court takes account of a number of factors such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, to that effect, judgment of 9 July 2020, *Land Hessen*, C-272/19, EU:C:2020:535, paragraph 43, and of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraph 66).
- 29 The independence of Member States’ judges is of fundamental importance for the EU legal order in various respects. That independence is, in particular, essential to the proper working of the system of judicial cooperation embodied by the preliminary ruling mechanism under Article 267



TFEU, in so far as the mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence (see, to that effect, judgment of 9 July 2020, *Land Hessen* C-272/19, EU:C:2020:535, paragraph 45 and the case-law cited).

- 30 The guarantees of independence and impartiality required under EU law presuppose the existence of rules, in particular as regards the composition of the body and the appointment, length of service and grounds for withdrawal, objection to and dismissal of its members, in order to dispel any reasonable doubt in the minds of litigants as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (judgments of 9 July 2020, *Land Hessen* C-272/19, EU:C:2020:535, paragraph 52, and of 16 November 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, C-748/19 to C-754/19, EU:C:2021:931, paragraphs 67 and 71).
- 31 In the present case, there is no doubt that, as such, the Sąd Najwyższy (Supreme Court) is one of the ordinary Polish courts.
- 32 In so far as a request for a preliminary ruling emanates from a national court or tribunal, it must be presumed that it satisfies the requirements, referred to in paragraph 28 above, irrespective of its actual composition (see, to that effect, judgment of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraph 69).
- 33 That presumption applies, however, solely for the purposes of assessing the admissibility of requests for a preliminary ruling made under Article 267 TFEU. It therefore cannot be inferred that the conditions for appointment of the judges that make up the referring court necessarily satisfy the guarantees of access to an independent and impartial tribunal previously established by law, for the purposes of the second subparagraph of Article 19(1) TEU or Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') (see, to that effect, judgment of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraph 74).
- 34 Moreover, the presumption may be rebutted where a final judicial decision handed down by a national or international court or tribunal leads to the conclusion that the judge or judges constituting the referring court are not an independent and impartial tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU, read in the light of the second paragraph of Article 47 of the Charter. The same would apply if, beyond the personal situation of the judge or judges formally submitting a request under Article 267 TFEU, other factors were to have repercussions on the functioning of the referring court to which those judges belong and thus contribute to undermining the independence and impartiality of that court (see, to that effect, judgment of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235, paragraphs 72 and 75).
- 35 In the present case, no specific and precise evidence has been submitted which would make it possible to rebut, in the circumstances set out in the preceding paragraph, the presumption that the present request for a preliminary ruling comes from a body satisfying the requirements set out in paragraph 28 above.
- 36 Consequently, the request for a preliminary ruling is admissible.

## Consideration of the question referred

- 37 By its question, the referring court asks, in essence, whether Article 10(1) of Directive 2004/48 must be interpreted as precluding the interpretation of a national law provision according to which a protective measure in the form of the destruction of goods cannot be applied to goods which have been manufactured and to which an EU trade mark has been affixed, with the consent of the proprietor of that mark, but which were placed on the market in the EEA without his or her consent.
- 38 The concept of ‘infringing an intellectual property right’, within the meaning of Article 10(1), must therefore be interpreted.
- 39 In that regard, it must be borne in mind that, according to established case-law as regards the interpretation of a provision of EU law, it is necessary to consider not only its wording but also its context and the objectives pursued by the measure of which it forms part. The legislative history of a provision of EU law may also reveal elements relevant to its interpretation (judgment of 10 June 2021, *KRONE – Verlag*, C-65/20, EU:C:2021:471, paragraph 25 and the case-law cited).
- 40 According to the wording of Article 10(1) of Directive 2004/48, Member States are under an obligation to ensure ‘that the competent judicial authorities may order, at the request of the applicant, that appropriate measures be taken with regard to goods that they have found to be infringing an intellectual property right’. Those measures include that laid down in Article 10(1)(c), namely the destruction of goods.
- 41 Thus, it is apparent from the wording of Article 10(1) of Directive 2004/48 that that provision does not limit the application of the corrective measures for which it provides to certain types of infringement of an intellectual property right. In addition, in accordance with Article 10(3) of that directive, read in the light of recital 17 thereof, in considering a request for corrective measures it is for the competent judicial authorities to take account of the fact that the seriousness of the infringement and the remedies ordered must be proportionate, and of the interests of third parties. Thus, it is for those authorities to decide on the measure to be adopted in each individual case.
- 42 That interpretation of Article 10 of Directive 2004/48 is supported both by the context of the article and by the objectives of the directive.
- 43 First, as regards the context of which Article 10 of Directive 2004/48 forms part, it is apparent from recitals 4 and 5 of that directive that all Member States and the European Union itself as regards matters within its competence, are internationally bound by the TRIPS Agreement. That agreement contains, inter alia, provisions on the means of enforcing intellectual property rights, which are common standards applicable at international level and implemented in all Member States.
- 44 Article 10 transposes Article 46 of the TRIPS Agreement into the EU legal order, under which the judicial authorities may ‘order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce ...’ Thus, Article 46 does not limit its scope to a specific category of infringement of intellectual property rights. On the contrary, due to its very general wording, it covers all goods found to be infringing an

intellectual property right, irrespective of the form of infringement. The fact that the last sentence of Article 46 lays down specific obligations concerning ‘counterfeit trademark goods’ confirms that analysis.

- 45 Secondly, as regards the objective pursued by Directive 2004/48, the Court has held that Member States should ensure effective protection of intellectual property (see, to that effect, judgments of 12 July 2011, *L’Oréal and Others*, C-324/09, EU:C:2011:474, paragraph 131, and of 18 December 2019, *IT Development*, C-666/18, EU:C:2019:1099, paragraph 39) and, as is apparent from recital 3 of that directive, the latter is aimed at the effective application of the substantive law on intellectual property in the European Union.
- 46 In that regard, the Court has held that the provisions of Directive 2004/48 are not intended to govern all aspects of intellectual property rights, but only those which are inherent, first, in the enforcement of those rights and, second, in infringement of them, by requiring that there must be effective legal remedies designed to prevent, terminate or rectify any infringement of an existing intellectual property right (judgment of 10 April 2014, *ACI Adam and Others*, C-435/12, EU:C:2014:254, paragraph 61).
- 47 Article 3(2) of Directive 2004/48 requires, inter alia, the measures, procedures and remedies provided for by the Member States to be effective, proportionate and dissuasive. Whilst recital 10 of that directive refers, in this context, to the objective of ensuring a high, equivalent and ‘homogeneous’ level of protection of intellectual property in the internal market, the fact remains that, as is apparent from Article 2(1), the directive applies without prejudice to the means which are or may be provided for, in particular, in national legislation in so far as those means may be more favourable for rightholders. In that regard, it is clear from recital 7 of that directive that the concept of ‘means’ used is general in nature and includes measures enabling the cessation of infringements of intellectual property rights (see, by analogy, judgment of 25 January 2017, *Stowarzyszenie Oławska Telewizja Kablowa*, C-367/15, EU:C:2017:36, paragraph 22).
- 48 Consequently, as the Court has already held, Directive 2004/48 lays down a minimum standard concerning the enforcement of intellectual property rights and does not prevent the Member States from providing for measures that are more protective (judgment of 9 June 2016, *Hansson*, C-481/14, EU:C:2016:419, paragraphs 36 and 40). On the other hand, they may not provide for less protective measures, in particular by restricting the application of the measures provided for by that directive to certain types of infringement of intellectual property rights. It is clear from the wording of Article 2(1) of that directive that it covers ‘any infringement of intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned’.
- 49 It follows from the foregoing that Article 10 of Directive 2004/48 covers all goods found to be infringing intellectual property rights, irrespective of the form of infringement, without excluding a priori the application of the corrective measure of destruction, provided for in Article 10(1)(c), in the case of some of those infringements.
- 50 Furthermore, as is apparent from the order for reference, the intellectual property right at issue in the main proceedings concerns the rights conferred by an EU trade mark.
- 51 Although Directive 2004/48 does not contain any definition of intellectual property rights falling within its scope, the Commission’s statement concerning Article 2 of Directive 2004/48 (OJ 2005 L 94, p. 37) sets out that, according to that institution, trade mark rights are among those rights. It

is also apparent from the judgment of 12 July 2011, *L'Oréal and Others* (C-324/09, EU:C:2011:474), that the EU trade mark falls within the concept of 'intellectual property' within the meaning of Directive 2004/48.

- 52 The rights conferred by an EU trade mark on its proprietor are mentioned in Article 9 of Regulation No 207/2009.
- 53 In particular, under Article 9(3)(a) of Regulation No 207/2009, the proprietor may prohibit the affixing of that trade mark to goods or their packaging and Article 9(3)(b) and (c) of that regulation allows him or her to prohibit, in essence, the marketing of goods under that mark.
- 54 Consequently, since, for the reasons set out in paragraph 41 above, it is for the competent national judicial authorities to determine on a case-by-case basis the measure which, among those laid down in Article 10(1) of Directive 2004/48, may be imposed by reason of an infringement of an intellectual property right, it cannot be considered that the corrective measure in the form of the destruction of goods, referred to in Article 10(1)(c) of that directive, is applicable only in the event of infringement of the right conferred by Article 9(3)(a) of Regulation No 207/2009 and that its application is excluded in the event of infringement of the rights conferred by Article 9(3)(b) or (c) of that regulation.
- 55 In the light of all the foregoing considerations, the answer to the question referred is that Article 10(1) of Directive 2004/48 must be interpreted as precluding the interpretation of a provision of national law according to which a protective measure in the form of the destruction of goods may not be applied to goods which have been manufactured and to which an EU trade mark has been affixed, with the consent of the proprietor of that mark, but which were placed on the market of the EEA without his or her consent.

### **Costs**

- 56 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

**Article 10(1) of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights**

**must be interpreted as precluding the interpretation of a provision of national law according to which a protective measure in the form of the destruction of goods may not be applied to goods which have been manufactured and to which an EU trade mark has been affixed, with the consent of the proprietor of that mark, but which were placed on the market in the European Economic Area without his or her consent.**

[Signatures]