

JUDGMENT OF THE COURT (Fifth Chamber)

7 January 2004 *

In Case C-60/02,

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

X,

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

* Language of the case: German.

THE COURT (Fifth Chamber),

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

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- Montres Rolex SA, by G. Kucsko, Rechtsanwalt,
- the Austrian Government, by C. Pesendofer, acting as Agent,
- the Finnish Government, by E. Bygglin, acting as Agent,
- the Commission of the European Communities, by J.C. Schiefferer, acting as Agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 5 June 2003,

gives the following

Judgment

- 1 By order of 17 January 2002, received at the Court on 25 February 2002, the Landesgericht (Regional Court) Eisenstadt referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Council Regulation (EC) No 3295/94 of 22 December 1994 laying down measures concerning the entry into the Community and the export and re-export from the Community of goods infringing certain intellectual property rights (OJ 1994 L 341, p. 8), as amended by Council Regulation (EC) No 241/1999 of 25 January 1999 (OJ 1999 L 27, p. 1) ('Regulation No 3295/94').
- 2 That question was raised in a number of judicial investigations conducted at the request of Montres Rolex SA ('Rolex'), Tommy Hilfiger Licensing Inc., La Chemise Lacoste SA, Guccio Gucci SpA and The GAP Inc., all of whom are trade mark proprietors, following the confiscation by the Kittsee customs authorities (Austria) of shipments of goods presumed to be counterfeit copies of those companies' brands.

Legal background

Community law

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

‘(a) the conditions under which the customs authorities shall take action where goods suspected of being goods referred to in paragraph 2(a) are:

— entered for free circulation, export or re-export, in accordance with Article 61 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code,

— found in the course of checks on goods under customs supervision within the meaning of Article 37 of Council Regulation (EEC) No 2913/92, placed under a suspensive procedure within the meaning of Article 84(1)(a) of that regulation, re-exported subject to notification or placed in a free zone or free warehouse within the meaning of Article 166 thereof;

and

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

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

5 That provision states that counterfeit goods include:

‘— goods, including the packaging thereof, bearing without authorisation a trade mark which is identical to the trade mark validly registered in respect of the same type of goods, or which cannot be distinguished in its essential aspects from such trade mark, and which thereby infringes the rights of the holder of the trade mark in question under Community law or the law of the Member State where the application for action by the customs authorities is made,

— any trade mark symbol (logo, label, sticker, brochure, instructions for use, guarantee document) whether presented separately or not, in the same circumstances as the goods referred to in the first indent,

— packaging materials bearing the trade marks of counterfeit goods, presented separately in the same circumstances as the goods referred to in the first indent’.

6 Article 2 of Regulation No 3295/94 provides:

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

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

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

9 Article 8 of Regulation No 3295/94 provides:

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

- (a) as a general rule, and in accordance with the relevant provisions of national law, to destroy goods found to be goods referred to in Article 1(2)(a), or dispose of them outside the channels of commerce in such a way as to preclude injury to the holder of the right, without compensation of any sort and without cost to the Exchequer;
- (b) to take, in respect of such goods, any other measures having the effect of effectively depriving the persons concerned of the economic benefits of the transaction.

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

...

3. In addition to the information given pursuant to the second subparagraph of Article 6(1) and under the conditions laid down therein, the customs office or the competent service shall inform the holder of the right, upon request, of the names and addresses of the consignor, of the importer or exporter and of the manufacturer of the goods found to be goods referred to in Article 1(2)(a) and of the quantity of the goods in question.'

10 Article 11 of Regulation No 3295/94 provides:

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

National law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 17 Tommy Hilfiger Licensing Inc. and La Chemise Lacoste SA, both holders of various protected trade marks, likewise sought the opening of a judicial investigation against x in respect of alleged infringements of the same provisions of the MSchG. However, on 8 March 2003, the national court informed the Court of Justice that the second of the abovementioned companies had withdrawn its action.
- 18 Guccio Gucci SpA and The GAP Inc., both holders of various protected trade marks, also sought the opening of a judicial investigation against X, whom they had identified as probably being either the director or proprietor of Beijing Carpet Import, a company established in Beijing (China), or the director or proprietor of H. SW Spol SRO, a company established in Bratislava (Slovakia).
- 19 According to the Landesgericht, in order to institute a judicial investigation under Paragraph 84(1) of the Strafprozeßordnung, the conduct complained of must constitute a criminal offence. The national court also observes that Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which has the status of a constitutional law in the Austrian legal system, prohibits the punishment of acts which, at the time of their commission, were not illegal under national or international law.
- 20 Under the MSchG, only the import and export of counterfeit goods, and not their mere transit across the national territory, constitutes illegal use of a trade mark. Moreover, Austrian criminal law draws a clear distinction between the concepts of import and export on the one hand, and that of the transit of goods on the other.

- 21 The national court refers to Case C-383/98 *Polo/Lauren* [2000] ECR I-2519 in which the Court of Justice held that Regulation No 3295/94 also applies to situations in which goods imported from one non-member country are exported to another non-member country, which implies that that regulation also applies to the mere transit of goods. However, since that judgment was given in a civil case, the national court is uncertain as to whether the same reasoning is applicable at criminal law when no criminal offence has been committed under national law.
- 22 In those circumstances, the Landesgericht Eisenstadt decided, by its order for reference, as rectified by order of 4 March 2002, to stay the proceedings and refer the following question to the Court for a preliminary ruling:

‘Is a provision of national law, *in casu* Paragraph 60(1) and (2) of the MSchG, in conjunction with Paragraph 10a thereof, which may be interpreted as meaning that the mere transit of goods manufactured/distributed in contravention of provisions of the law on trademarks is not punishable under criminal law, contrary to Article 2 of Council Regulation (EC) No 3295/94 of 22 December 1994 laying down measures to prohibit the release for free circulation, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods, as amended by Council Regulation (EC) No 241/1999 of 25 January 1999?’

Admissibility of the request for a preliminary ruling

Observations submitted to the Court

- 23 According to Rolex, a national court may refer a question to the Court of Justice only if there is a case pending before it and it is called upon to give judgment in

proceedings intended to lead to a decision of a judicial nature (see, to that effect, Case 138/80 *Borker* [1980] ECR 1975, paragraph 4; Case 318/85 *Greis Unterweger* [1986] ECR 955, paragraph 4, and Case C-111/94 *Job Centre* [1995] ECR I-3361, paragraph 9).

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

Findings of the Court

- 25 The Court has already had occasion to rule in favour of the admissibility of a request for a preliminary ruling arising in the context of a preparatory inquiry in criminal proceedings, which could have resulted in an order that no further action be taken, a summons to appear, or an acquittal (see, to that effect, Case 14/86 *Pretore di Salò* [1987] ECR 2545, paragraphs 10 and 11).
- 26 Furthermore, in Case 338/85 *Pardini* [1988] ECR 2041, the Court agreed to answer questions raised in proceedings concerning interim measures which could be confirmed, varied or revoked.

- 27 Moreover, in the proceedings pending before the national court, that court will in any event, as the Advocate General correctly observed in point 22 of his Opinion, adopt a decision of a judicial nature, whether or not that decision relates to the possible application of criminal penalties, to the confiscation and destruction of the goods suspected of being counterfeit, or to an acquittal or an order that no further action be taken.
- 28 Finally, the choice of the most appropriate time to refer a question to the Court for a preliminary ruling lies within the exclusive jurisdiction of the national court (see, in particular, Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association and Others* [1981] ECR 735, paragraphs 5 to 8; Case 72/83 *Campus Oil and Others* [1984] ECR 2727, paragraph 10; Case C-66/96 *Høj Pedersen and Others* [1998] ECR I-7327, paragraphs 45 and 46, and Case C-236/98 *JämO* [2000] ECR I-2189, paragraphs 30 and 31).
- 29 The request for a preliminary ruling is therefore admissible.

The question referred to the Court

Observations submitted to the Court

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

- 31 The Austrian Government infers from Articles 6(2)(b) and 11 of Regulation No 3295/94 that the Member States are empowered to lay down in their national law the penalties applicable to such offences, but that it is the provisions of that regulation, and in particular Article 2 thereof, which establish what constitutes a punishable offence. Therefore, the Austrian authorities are obliged to impose penalties on the mere transit of counterfeit goods through Austria.
- 32 Rolex explains that at the material time in the case which gave rise to the judgment in *Polo/Lauren*, which was prior to the reform brought about by the MSchG, there was no detailed description in the provisions of Austrian law relating to counterfeit goods of what constituted the use of a trade mark to designate goods or services. Accordingly, in its judgment of 29 September 1986, *Baygon*, the Oberster Gerichtshof (Supreme Court) (Austria) took the view that there was no infringement of trade mark law if the product bearing the foreign trade mark was exported to another non-member country where it was then placed on the market.
- 33 On 23 July 1999, a major reform of trade mark law came into effect in Austria with the adoption of the Markenrechts-Novelle 1999 (Law amending the law on trade marks) (BGBl. I, 1999/111). In particular, trade mark law was brought into line with the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1). Article 5(3) of that directive was thus transposed into Austrian law, namely by the new Article 10a of the MSchG.
- 34 In the preparatory documents relating to that law, there is an express reference to the rejection of the ruling of the Oberster Gerichtshof in *Baygon*. The Austrian legislature thus clearly provided that in Austrian law the reexport, and therefore also the mere transit, of goods can constitute an infringement of trade mark law.

- 35 Therefore, the interpretation advocated by the national court, whereby the mere transit of goods manufactured in breach of the provisions of trade mark law is not subject to criminal penalties, is incorrect.
- 36 Rolex adds that Article 10 et seq. of the MSchG provide for both civil-law remedies and criminal penalties for infringements of trade mark law. For reasons of legal certainty and the predictability of judicial decisions, it is inconceivable that one and the same rule should be interpreted differently depending on whether it provides for civil-law remedies or imposes criminal penalties.
- 37 According to the Finnish Government, Regulation No 3295/94 was adopted on the basis of Article 113 of the EC Treaty (now, after amendment, Article 133 EC), the purpose of which is to protect, by way of the common commercial policy, trade in the Community, in particular at its borders, by adequate measures. Regulation No 3295/94 thus protects, first, the internal market against counterfeit and pirated goods, and second, the holders of intellectual property rights against any infringement of those rights.
- 38 Article 11 of Regulation No 3295/94 requires Member States to introduce penalties for infringements of Article 2 of that regulation. Those penalties must be effective and proportionate and constitute an effective deterrent.
- 39 Moreover, the principle of equivalence requires that the penalties for infringements of Community law must, both as regards substantive and procedural requirements, be comparable to those applicable to infringements of corresponding national provisions. The Member States could thus indirectly be required to lay down criminal penalties.

- 40 The Finnish Government considers that if Austrian law does not lay down effective penalties for the transit of counterfeit and pirated goods, it is in breach of Community law.
- 41 According to that Government, in order to ensure the effective implementation of Community law, it is essential that the provisions of secondary law are applied in a uniform manner in all the Member States. If counterfeit goods could be transported across Community territory without incurring any effective penalties by virtue of a mere declaration that the final destination of those goods is in a non-member country, there would be a high risk of shipments declared as being in transit in fact ending up on the Community market as a result of exploitation of the weaknesses in the Community transit system. That is a classic method for offences relating to the transport of alcohol and tobacco.
- 42 The Commission regrets the fact that the order for reference does not contain adequate information on the details of the customs arrangements applicable to counterfeit goods or on the customs status of such goods in order to determine the precise legal provisions applicable in the case at issue in the main proceedings. The order for reference does not state whether or not the goods originated in the Community. As regards the proceedings following the complaint lodged by Rolex, the order for reference states that before entering Poland the goods were 'imported' into Austria from Italy. As regards the proceedings relating to the complaints lodged by La Chemise Lacoste SA and Guccio Gucci SpA, the goods were imported into Austria from China and destined for Slovakia.
- 43 According to the Commission, it is therefore necessary to consider several possible scenarios.

- 44 If the goods did not originate in the Community, the order for reference does not provide any information as to the applicable customs regime. Therefore, the question remains as to whether the case concerns a transit operation or another customs regime. Likewise, it remains unclear whether the goods were lawfully brought onto the Community customs territory.
- 45 On the other hand, if the goods originated in the Community, it should be held that, being imported from Italy, they are already in free circulation since they have acquired the status of Community goods on the customs territory of the Community.
- 46 If that is the case, the Commission recalls that Regulation No 3295/94 does not concern counterfeit goods which are manufactured or marketed in the Community, but only those coming from non-member countries (see Case C-23/99 *Commission v France* [2000] ECR I-7653, paragraph 3). In that case, the issue of the compatibility of Austrian law with that regulation does not arise and the request for a preliminary ruling is inadmissible.
- 47 Finally, if the goods did not originate in the Community and have not been placed under a Community customs regime, they must be regarded as having been unlawfully imported onto the Community customs territory. In that case, there is nothing to support the conclusion that in the case at issue in the main proceedings there is any contradiction between the sufficiently clear provisions of Regulation No 3295/94 and the relevant provisions of Austrian law.

- 48 In relation to Articles 8(1) and 11 of Regulation No 3295/94, the Commission refers to two possibilities.
- 49 The first possibility is that the Republic of Austria took the measures provided for in Article 8(1) of the regulation, but that their application to the transit procedure is called in question by national provisions which are capable of being interpreted as running counter to those measures.
- 50 The second possibility is that that Member State did not take the measures provided for in Article 8(1) of Regulation No 3295/94. That raises the issue of the application of the rule laid down in that article in so far as there are provisions of national law establishing that the transit of the goods concerned does not constitute illegal use of a trade mark.
- 51 In addition, the Commission concludes from paragraphs 23 to 25 of the judgment in Case C-223/98 *Adidas* [1999] ECR I-7081 that where counterfeit or pirated goods are placed under a suspensory procedure, such as the transit arrangements, national provisions that can be interpreted as set out in the preceding paragraph are in breach of Article 2 of Regulation No 3295/94. In its view, the national provisions must be interpreted so as to be compatible with Article 2 of the regulation with the result that, inter alia, the measures provided for in Article 8(1) of the regulation are to apply to goods placed under a suspensory procedure.

- 52 However, the Commission submits that a particular problem could arise in relation to Article 11 of Regulation No 3295/94. The obligation on the national court to interpret the relevant rules of its national law in the light of the content of Community law finds its limits in the general principles of law which form part of the Community legal system and, in particular, in the principles of legal certainty and non-retroactivity in criminal law.
- 53 Accordingly, in Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraphs 12 and 13, the Court held that the unimplemented provisions of a directive cannot, of themselves and independently of a national law adopted by a Member State for their implementation, have the effect of determining or aggravating the liability in criminal law of persons who infringe the provisions of that directive. The Commission concludes that where national provisions lend themselves to an interpretation which is incompatible with the prohibitions laid down in Article 2 of Regulation No 3295/94, those prohibitions cannot, of themselves, have the effect of determining or aggravating the liability in criminal law of persons who infringe them.

Findings of the Court

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

- 55 It must also be recalled that Article 11 of Regulation No 3295/94 requires Member States to introduce penalties for infringements of the prohibition laid down in Article 2 of the regulation on the release for free circulation, export, re-export and placing under a suspensive procedure of counterfeit goods.
- 56 Moreover, as the Advocate General correctly observed in point 36 of his Opinion, the interpretation of the scope of that regulation is not conditional upon the type of national proceedings (civil, criminal, administrative) in which that interpretation is relied on.
- 57 The national court considers that Article 60 of the MSchG can be interpreted as not applying to the mere transit of goods, which is challenged by the Austrian Government and the complainants in the main proceedings.
- 58 It is not for the Court of Justice to rule on the interpretation of national law, which is a matter for the national court alone. If the national court were to find that the relevant provisions of national law do not prohibit and, thus, do not penalise the mere transit of counterfeit goods through the Member State concerned, contrary none the less to the requirements under Articles 2 and 11 of Regulation No 3295/94, it would be proper to conclude that those articles preclude the national provisions in question.
- 59 Moreover, according to settled case-law, national courts are required to interpret their national law within the limits set by Community law, in order to achieve the

result intended by the Community rule in question (see Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8, and Case C-262/97 *Engelbrecht* [2000] ECR I-7321, paragraph 39).

- 60 If such a compatible interpretation is possible, it will be for the national court, in order to secure for holders of intellectual property rights protection of those rights against abuses prohibited by Article 2 of Regulation No 3295/94, to apply to the transit of counterfeit goods across the national territory the civil-law remedies applicable under national law to other conduct prohibited by that article, provided that they are effective and proportionate and constitute an effective deterrent.
- 61 However, a particular problem arises where the principle of compatible interpretation is applied to criminal matters. As the Court has also held, that principle finds its limits in the general principles of law which form part of the Community legal system and, in particular, in the principles of legal certainty and non-retroactivity. In that regard, the Court has held on several occasions that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive (see, in particular, *Pretore di Salò*, paragraph 20; Case C-168/95 *Arcaro* [1996] ECR I-4705, paragraph 37, and Joined Cases C-74/95 and C-129/95 X [1996] ECR I-6609, paragraph 24).
- 62 Even though in the case at issue in the main proceedings the Community rule in question is a regulation, which by its very nature does not require any national implementing measures, and not a directive, Article 11 of Regulation No 3295/94 empowers Member States to adopt penalties for infringements of Article 2 of that

regulation, thereby making it possible to transpose to the present case the Court's reasoning in respect of directives.

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

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

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

— The duty to interpret national law so as to be compatible with Community law, in the light of its wording and purpose, in order to attain the aim pursued by the latter, cannot, of itself and independently of a law adopted by a Member State, have the effect of determining or aggravating the liability in criminal law of an entity which has failed to observe the requirements of Regulation No 3295/94.

Costs

- ⁶⁵ The costs incurred by the Austrian and Finnish Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Landesgericht Eisenstadt by order of 17 January 2002, hereby rules:

1. Articles 2 and 11 of Council Regulation (EC) No 3295/94 of 22 December 1994 laying down measures concerning the entry into the Community and

the export and re-export from the Community of goods infringing certain intellectual property rights, as amended by Council Regulation (EC) No 241/1999 of 25 January 1999, are applicable to situations in which goods in transit between two countries not belonging to the European Community are temporarily detained in a Member State by the customs authorities of that State.

2. The duty to interpret national law so as to be compatible with Community law, in the light of its wording and purpose, in order to attain the aim pursued by the latter, cannot, of itself and independently of a law adopted by a Member State, have the effect of determining or aggravating the liability in criminal law of an entity which has failed to meet the requirements of Regulation No 3295/94.

Edward

La Pergola

Jann

Delivered in open court in Luxembourg on 7 January 2004.

R. Grass

V. Skouris

Registrar

President