JUDGMENT OF THE COURT
OF 24 MAY 1977 [1]

Hoffmann-La Roche v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH (preliminary ruling requested by the Oberlandesgericht Karlsruhe)

'Interpretation of Article 177'

Case 107/76

1. *Questions referred for a preliminary ruling — Interlocutory proceedings for an interim order — Reference of such cases to the Court — Validity*
   (EEC Treaty, second paragraph of Article 177)

2. *Questions referred for a preliminary ruling — Interlocutory proceedings for an interim order ('einstweilige Verfügung') — Reference of such cases to the Court — Proceedings on the substance of the case — Institution thereof — Possibility — Duty to refer cases to the Court — None*
   (EEC Treaty, third paragraph of Article 177)

1. The summary and urgent character of a procedure in the national court does not prevent the Court from regarding itself as validly seised under the second paragraph of Article 177 whenever a national court or tribunal considers that it is necessary to make use of that paragraph.
2. The third paragraph of Article 177 of the EEC Treaty must be interpreted as meaning that a national court or tribunal is not required to refer to the Court a question of interpretation or validity mentioned in that article when the question is raised in interlocutory proceedings for an interim order ('einstweilige Verfügung') even where no judicial remedy is available against the decision to be taken in the context of those proceedings, provided that each of the parties is entitled to institute proceedings or to require proceedings to be instituted on the substance of the case and that during such proceedings the question provisionally decided in the summary proceedings may be re-examined and may be the subject of a reference to the Court under Article 177.

In Case 107/76

Reference to the Court under Article 177 of the EEC Treaty by the Oberlandesgericht Karlsruhe for a preliminary ruling in the action pending before that court between

1 — Language of the Case: German.

HOFFMANN-LA ROCHE, Grenzach-Wyhlen (Germany)

and

CENTRAFARM VERTRIEBSGESELLSCHAFT PHARMAZEUTISCHER ERZEUGNISSE MBH, Bentheim (Germany),

on the interpretation of Articles 30, 36, 86 and 177 of the said Treaty,

THE COURT

composed of: H. Kutscher, President, A. M. Donner and P. Pescatore Presidents of Chambers, J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate-General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and issues

The order making the reference and the written observations submitted under Article 20 of the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

1. The *plaintiff in the interlocutory action in the national court* (hereinafter called 'the plaintiff') is an independent undertaking forming part of the worldwide organization known as Roche-SAPAC.

The Roche-SAPAC group has developed, *inter alia,* the psycho-therapeutic product 'Valium'. The plaintiff manufactures Valium under a licence which it has obtained from Hoffmann-La Roche and Co AG, Basel, and sells it in the Federal Republic of Germany under the name Valium Roche.

Valium and Roche are trade-marks protected by international registration and owned by Hoffmann-La Roche and Co AG, Basel. The proprietary medicinal product has, in accordance with the provisions of the Arzneimittelgesetz (German law on Medicines) been registered in the register of proprietary medicines of the Bundesgesundheitsamt (Federal Public Health Office).

Another subsidiary of the Roche-SAPAC organization makes Valium in Great Britain under a licence from Hoffmann-La Roche and Co AG, Basel, and puts it on the market in packages containing 100 and 500 tablets. It markets the Valium at prices which are considerably lower than those charged in Germany.

2. The *defendant in the interlocutory action in the national court* (hereinafter called 'the defendant') is the legally independent German marketing company of the Netherlands drug undertaking Centrafarm BV, whose objects include, among others, international trade in medicinal products. The defendant purchased Valium Roche from its Netherlands parent company. The latter had in turn purchased it in Great Britain in the original packages put on the British market by the British subsidiary of Hoffmann-La Roche and Co AG. The parent company of the defendant repackaged the products in the Netherlands in batches of 1 000 tablets. On the new package it affixed — albeit in an outward presentation different from the presentation on the original package — the names Valium and Roche, the number of the entry on the register of the Bundesgesundheitsamt, together with the name 'Centrafarm' and the words 'Marketed by Centrafarm GmbH 4444 Bentheim-1'. Each package also came with an information leaflet in German which differed only slightly from that of the plaintiff. The leaflet is signed Hoffmann-La Roche and repeats the notice that the medicinal preparation is marketed by the defendant.

3. The plaintiff, which regards the conduct of the defendant as an infringement of the trade-mark rights of the undertaking from which it has obtained a licence, asked the Landgericht Freiburg for an interim order (einstweilige Verfügung) prohibiting the defendant upon pain of penalty:

from using in the course of its business dealings in medicinal preparations the names Valium and/or Roche as a trade-mark, except where the user consists of placing on the market or offering for sale the product in the original presentation in which it was put on to the market by a third party with the consent of Hoffmann-La Roche and Co AG, Basel.

The defendant has expressed doubts as to whether its conduct infringes German trade-mark law. It is also of the opinion that there is some ground for supporting the view that the plaintiff is making improper use of its trade-mark right in order to abuse its position on the market (Article 86 of the EEC Treaty). In any case, the plaintiff, it is argued, is infringing the rules laid down by the EEC Treaty which secure free competition (Article 30), by abusing the legal provisions concerning trade-marks and medicinal preparations in order to partition off national markets, on which there exist unjustified price differentials.

On 31 December 1975 the First Commercial Chamber of the Landgericht Freiburg granted the interim order so requested. It confirmed its order by a judgment of 16 February 1976.

4. The defendant lodged an appeal against that judgment before the Freiburg Senate of the Oberlandesgericht Karlsruhe.

By order dated 14 October 1976, the Oberlandesgericht stayed its proceedings and referred the following questions of interpretation to the Court of Justice under Article 177 of the EEC Treaty:

1. Is the Court of a Member State under a duty to refer a question concerning the interpretation of Community law under the third paragraph of Article 177 of the Treaty establishing the European Economic Community to the Court of Justice of the European Communities for a ruling when this question arises during interlocutory proceedings for an interim order when in such proceedings no appeal

lies against the court's decision, but when on the other hand it is open to the parties to have the question concerning the subject-matter of the interlocutory proceedings made the subject-matter of an ordinary action, during which a reference under the third paragraph of Article 177 of the Treaty establishing the European Economic Community would have if necessary to be made?

If Question (1) is answered in the affirmative a ruling on the following questions is requested:

2. Is the person entitled to a trade-mark right protected for his benefit both in Member State A and in Member State B empowered under Article 36 of the EEC Treaty, in reliance on this right, to prevent a parallel importer from buying from the proprietor of the mark or with his consent in Member State A of the Community medicinal preparations which have been put on the market with his trade-mark lawfully affixed thereto and packaged under this trade-mark, from transferring them into containers of a different size, providing them with new packaging, affixing to such packaging the proprietor's trade-mark and importing the preparations distinguished in this manner into Member State B?
3. Is the proprietor of the trade-mark entitled to do this, or does he thereby infringe provisions of the EEC Treaty — in particular those contained in Article 86 thereof — even if he acquires a dominant position within the market in Member State B with regard to the medicinal preparation in question, when the prohibition on imports of a repacked product to which the proprietor's trade-mark has been affixed has in actual fact a restrictive effect on the market, because different sizes of packages are used in countries A and B and because the importation of the product in another manner has not yet in fact made any appreciable progress on the market, and when the actual effect of the prohibition is that between the Member States there is maintained a substantial — in certain circumstances disproportionate — price differential, without its being impossible to prove that the owner of the mark is using the prohibition solely or mainly to maintain this price differential?

5. As regards the first question referred concerning Article 177 of the Treaty the Oberlandesgericht states:

'Under the second paragraph of Article 177 the national court which has to deal with such questions of interpretation may refer them to the European Court for a ruling. It is the Senate's view that in principle a reference which is in the discretion of the Court is out of the question during an application for an interim order, because it is inconsistent with the summary nature of an application for the grant of an injunction, which is aimed at securing the prompt provisional protection of legal rights.

However under the third paragraph of Article 177 of the EEC Treaty where a question concerning the interpretation of the Treaty is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice. The court which in any given case is called upon to make a decision against which there is no further remedy is the court or tribunal which is under an obligation to order a reference... However there is no agreement on the question whether this proposition applies whenever a question to be referred arises in the context of an application for the grant of an interim order... The Senate is inclined to follow the majority view expressed in the case-law and juridical writings that the obligation to make a reference to the Court of Justice does not accord with the summary and necessarily expeditious procedure laid down for applications for

an interim order. It takes the view that the expression 'judicial remedy' in the third paragraph of Article 177 of the EEC Treaty should not be interpreted in a technical, procedural sense but can only mean that the parties are no longer able to obtain further clarification of the legal question under consideration by resorting to domestic legal proceedings. However in the case of an application for an interim order the parties are free to have the disputed legal question resolved in the main action in which the duty to make a reference may arise. ... Also militating against any obligation to make a reference is the fact that a reference has to be founded on facts in respect of which the parties only have to adduce *prima facie* evidence and which they do not have to prove fully and which may in certain conclusive respects appear in a different light in the main action. It would therefore be possible for rulings to be obtained which in the end have no effect on the decision.'

6. As for the substance of the case, the Oberlandesgericht states that under domestic German trade-mark law the plaintiff could, within the limits set out in the interim order, require the defendant to discontinue the use of the designations Valium and Roche as trade-marks.

According to the Oberlandesgericht, it is true that the fact of preventing the importation of goods which have been transferred into other containers and to which the plaintiff's trade-mark has been affixed amounts to a 'measure having equivalent effect' within the meaning of Article 30 of the Treaty. Nevertheless the conduct of the defendant is justified under Article 36 of the Treaty, because to affect adversely the function as an indicator of origin is to affect adversely the specific subject-matter of the trade-mark right.

As regards Article 86 of the Treaty, the Oberlandesgericht relies on the findings reached by the Kammergericht in its decision of 5 January 1976 delivered in a cartel case between the plaintiff and the Bundeskartellamt (Federal Cartel Office) and is of the opinion that Hoffmann-La Roche occupies a dominant position. In its opinion, that position is abused in so far as it is used in order to maintain prices at an excessively high level. On the other hand, it is not an abuse for an undertaking to avail itself of the actual subject-matter of a right to which it is entitled in the same manner as any other person entitled to a similar right and which is justified by objectives unconnected with the abuse of a dominant position on the market.

7. In German law, an application for an interim order is admissible in respect of the subject-matter of the dispute 'where there is reason to fear that a change in an existing situation may frustrate or seriously endanger the exercise of a party's right' (paragraph 935 of the Zivilprozeßordnung (Code of Civil Procedure). 'An application for an interim order is also admissible where the application seeks a ruling on an urgent matter in a disputed legal relationship, in so far as that ruling appears to be necessary, notably in the case of durable legal relationships, in order to avoid substantial disadvantages, to prevent the use of force or for other reasons' (paragraph 940 of the Zivilprozeßordnung).

In proceedings where only *'prima facie* evidence' of the right and the reasons in support of the adoption of the interim measure need be adduced (paragraphs 936 and 920 (2) of the Zivilprozeß-ordnung) the application for an interim order is normally heard by the judge hearing the main action (paragraphs 937 (1) and 943 of the Zivilprozeßordnung).

Before making an interim order, the court can require the payment of security (paragraphs 936 and 921 (2) of the Zivilprozeßordnung). The interim order may be annulled at any time, upon application, by reason of the occurrence

of new facts, *'prima facie* evidence' of which must have been adduced (paragraphs 936 and 927 (1) of the Zivilprozeßordnung). Interim orders are subject to appeal only. 'Revision' (legal review) by the Bundesgerichtshof is excluded by paragraph 545 (2) of the Zivilprozeßordnung.

When the court of first instance has made an interim order without hearing oral arguments, which it has power to do in cases of urgency under paragraph 937 (2) of the Zivilprozeßordnung, the validity of the order must first be contested by way of an objection (paragraphs 924, 925 and 936 of the Zivilprozeßordnung) before an appeal may be made to the higher court.

It is open to the parties to have disputed points of law clarified as part of a main action. Where the applicant in interlocutory proceedings is unsuccessful he may also institute a main action if he wishes. Where the defendant in interlocutory proceedings fails he may, by virtue of paragraphs 926 and 936 of the Zivilprozeßordnung, require the applicant in those proceedings to institute the main action within a period to be fixed by the court. Where the applicant does not comply with the order of the court the interim order is annulled (paragraphs 926 (2) and 936 of the Zivilprozeßordnung).

The applicant in interlocutory proceedings is required to pay damages if it appears that the interim order was unjustified from the beginning or where it is annulled on the ground that the applicant has not fulfilled his obligation to institute the main action before the court (paragraph 945 of the Zivilprozeßordnung).

The order for reference was entered in the Court Registry on 17 November 1976.

The applicant in the main action, represented by Messrs G. Greuner and O. C. Brändel, Karlsruhe, and by Messrs Bappert, Witz and Selbherr, Freiburg, the defendant in the main action, represented by Messrs A. F. de Savornin Lohman, Brussels, Konrad Huber, Freiburg, and Jürgen Kicker, Frankfurt-am-Main, the Government of the Federal Republic of Germany, the Government of the French Republic, the Government of the United Kingdom and the Commission, represented by its Legal Adviser, Sven Ziegler, acting as Agent, assisted by M. Beschel of the Legal Service, submitted written observations under Article 20 of the Statute of the Court of Justice of the EEC.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court, without any preparatory inquiry, decided to open the oral procedure, limited, at that stage of the proceedings, to the first question referred by the Oberlandesgericht Karlsruhe.

II — Written observations submitted to the Court concerning the first question referred to the Court for a preliminary ruling by the Oberlandesgericht Karlsruhe

1. The *applicant* points out that the question of the *right* of the national courts or tribunals to refer questions to the Court for a preliminary ruling in the case of interlocutory proceedings (Eilverfahren) has received an answer in the affirmative in the case law of the Court itself: judgment of 12 November 1969 in Case 29/69, *Stauder* v *City of Ulm* ([1969] ECR 419).

As for the use that a court hearing an interlocutory application for interim measures makes of this possibility, the question should be dealt with by the latter according to its national law, taking into account the special features of the procedure to be applied by it.

The existence or otherwise of an *obligation* to the case to the Court of Justice in so-called interlocutory proceedings depends on the interpretation to be given to the concept of 'judicial remedy' and of incontestability which appear in the third paragraph of Article 177 of the EEC Treaty. Having determined the legal content of those concepts, it is necessary to verify whether, according to the national rules of procedure of the court or tribunal referring the matter to the Court of Justice, the final decision given by that court or tribunal at the conclusion of the procedure referring the case to the Court is no longer open to a 'judicial remedy' within the meaning so found. An adequate answer to this latter question can only be given when the possible consequences of that answer have been envisaged, taking into account the differences to be found in the rules of procedure of the various Member States.

To say that there is an obligation to make a reference to the Court is not compatible with the particular characteristics of interlocutory proceedings. The soundness of this argument is to be found in the fact that in respect of interlocutory proceedings the nine legal systems make provision for shortened time-limits, relaxation of procedural formalities, and 'summary' rules for the establishment of facts. The purpose of those procedures is to reach a decision rapidly — and, as a *quid pro quo,* to reach it on a provisional basis only. The decision is of its nature subject to confirmation in the procedure in the main action. Learned national authors and national case-law support this opinion.

An obligation to make a reference to the Court in respect of interlocutory proceedings pending before the final court (or tribunal) of appeal would, in terms of the national legal systems, involve extremely dissimilar courts and tribunals, as well as stages of procedure. As a first consequence, the frequency of cases referred to the Court would be extremely variable. Interlocutory proceedings rarely reach the higher courts. On the other hand, one can readily imagine to what extent the Court would be 'submerged' by requests for preliminary rulings, if the Danish and Italian district courts in fact ordered cases to be referred to the Court for preliminary rulings in every case in which Community law plays a part. In such cases, it would in practice be impossible to respect any obligation to make a reference to the Court which might arise, and the true 'solution' would probably be that all kinds of pretexts would be found for not making references to the Court.

In the light of the purpose of referring matters to the Court for preliminary rulings, which consists in ensuring that Community law is uniformly applied by the national courts and tribunals, there is no practical necessity for the proposition that there is also an obligation to refer cases to the Court in interlocutory proceedings. The rules of procedure of all the Member States allow the two parties applying for the granting of an interim measure of legal protection the possibility, at least, of bringing a main action, that is to say an ordinary action on the questions which have given rise to the interlocutory proceedings.

In nearly all the procedural laws of the various States, an interim measure is not absolute and may be annulled upon application if the circumstances upon which the order was decided change. In German law, a person who has wrongly obtained an interim measure is also strictly liable for the damage thus caused (Gefährdungshaftung). In all the national laws on procedure, the measures involved are purely interim, adopted on the basis of a summary examination of the factual situation and of the legal situation and which — for example from the point of view of the development of law — carry considerably less weight than decisions

against which there is no judicial remedy in an ordinary action.

On the other hand, at least in some Member States, the considerable practical importance of procedures for provisional legal protection has been stressed and it has been argued that if there were no obligation to refer cases to the Court, an incorrect application of Community law could cause serious damage. That argument is not convincing either. A party to the case who considers that he has failed in the interlocutory proceedings, the reason being that the court has adopted a wrong position on a preliminary question of Community law may, in cases of doubt, commence a main action.

It follows that an examination of the function of the third paragraph of Article 177 requires that the said provision be interpreted as meaning that since in an ordinary (main) action it is possible to have the interim measures of legal protection adopted in the interlocutory proceedings reviewed, a 'judicial remedy' within the meaning of that article exists, such that the question of an obligation to refer the case to the Court only arises in the main action.

An obligation to refer a matter to the Court of Justice is also inopportune from the point of view of economy of proceedings: interlocutory proceedings concern facts into which only a provisional inquiry is made and which are not fully established but of which *prima facie* evidence is adduced only. They can change decisively. A particularly striking example is furnished by the present case, in which the situation concerning the facts giving rise to the third question referred to the Court for a preliminary ruling has changed by reason of the judgment of the Bundesgerichtshof of 16 December 1976, which annulled the order of the Kammergericht of 5 January 1976. From the point of view of the costs for the Community, as well as of the costs borne by the parties, situations of that kind should be avoided as far as possible.

Accordingly the applicant is of the opinion that a uniform obligation to refer matters to the Court which is incumbent upon all national courts or tribunals which decide interlocutory matters without any further judicial remedy being available should not be envisaged, without even taking into consideration the state of the proceedings in the court below, if only because of the differences of level which exist between those courts or tribunals, and, therefore, because of the differences in the situation of the case which has come up on appeal.

Nor can the answer to the question whether there is an obligation to refer cases to the Court be different depending on whether the urgent measure applied for has or has not already been granted, for that would be tantamount to treating the interest of the applicant in speed very differently from the defendant's interest, which would be objectively indefensible.

2. The *defendant* hopes that the Court will also answer questions Nos 2 and 3, even should it give a negative answer to question No 1. There is no point in leaving problems which have arisen as regards Community law unanswered after the loss of time brought about by proceedings before the Court has in any event occurred.

The defendant is of the opinion, first, that a main action (Klage zur Hauptsache) within the meaning of paragraph 926 of the German Code of Civil Procedure does not constitute a 'judicial remedy under national law' within the meaning of the third paragraph of Article 177 of the EEC Treaty. In general, learned German authors accept this point of view.

In order that a given application, made by a party, shall constitute a 'judicial remedy' within that article, it is necessary

to require at least that it shall enable the party that has failed to put its case before a court or tribunal of a higher level having the power to annul or to alter the existing judgment.

In German law the main action is brought not by the party who has failed but by the one who has been successful. The court of first instance is called upon to pass judgment on the main action, even where the interim order *(einstweilige Verfügung)* has been made by a higher court or tribunal.

The court delivering judgment in the main action does not annul the interim order nor does it modify the said order. In fact it delivers judgment during the course of an ordinary action on the subject-matter of the dispute which is brought before it. A party having failed in the interlocutory proceedings must, upon obtaining judgment dismissing the main action, apply, by virtue of paragraph 927 of the Zivil-prozeßordnung, for the annulment of the interim order. Where the question whether the judgment in the main action is in contradiction with the interim order is contested, the question is decided by the court which made the interim order.

Finally, there is no doubt that an application made by the party who has failed for the setting of a time-limit for the lodging of the application in the main action does not constitute a 'judicial remedy' within the meaning of the third paragraph of Article 177. That application has to be addressed to the court of first instance and it does not give rise to any examination as to the substance of the case. The time-limit is not fixed by the court but by the 'Rechtspfleger' (a court official fulfilling certain judicial functions).

Another significant fact concerning this point is that anything stated, proved, recognized or conceded in the interlocutory proceedings is not deemed to have been so done in the main action.

The main action is an ordinary contentious action. Nor is the court deciding the interlocutory proceedings bound under procedural law by the judgment in the main action. The latter only constitutes a fact which, like other new facts, may itself give rise to the annulment of the interim order.

Moreover, the interlocutory judgment is not 'interlocutory' *(einstweilig)* in the sense of being conditional or subject to a time-limit. The interlocutory judgment is delivered on the basis of an ordinary judicial procedure, and not a summary one. The order has all the effects of a judgment delivered in a main action. The parties simply have the possibility of having the same dispute heard by way of a different procedure involving a complete examination of the facts.

Secondly, the defendant examines the question whether, nevertheless, a reference under Article 177 is excluded in interlocutory proceedings 'by the very nature of the case'. It is of the opinion that a reference is not so excluded.

It is true that a significant proportion of learned German authors are not in agreement with this opinion. However, that proportion of learned authors does not take into account the judgment of the Court of 16 January 1964 in Case 166/73, *Rheinmühlen-Düsseldorf* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ([1974] ECR 33).

An interpretation by a national court, excluding *a priori* both the right and the obligation to make a reference to the Court of Justice in a given form of procedure, is incompatible with the requirement that Community law must be interpreted uniformly.

To desist from applying Article 177 in respect of interlocutory proceedings in the field of the law on the protection of industrial and commercial property and on unfair competition would be a particularly grave decision. In effect, the

greater part of disputes of that kind are dealt with in interlocutory proceedings without a main action ensuing therefrom.

A distinction should be made depending on whether the court is required by its national legal system to apply the law fully and entirely, or whether what is involved is a procedure in which the court may decide not to examine the legal aspects of the dispute, or in which the court may deliver judgment on the basis of what it considers fair and reasonable. It is only in the latter case that it is not required to make a reference to the Court of Justice.

However in German interlocutory proceedings the court is required to apply the law fully and entirely. The only latitude which it possesses is at the level of the examination of the facts.

3. The *Government of the Federal Republic of Germany* points out firstly that even if the Oberlandesgericht Karlsruhe is right in considering that a reference for a preliminary ruling made as part of interlocutory proceedings can in many cases be useless, because the purpose of proceedings of that kind is to preserve rights rapidly and on a provisional basis, nevertheless that is no argument for saying, in general terms, that a court may not make a reference under the second paragraph of Article 177 of the Treaty within the context of interlocutory proceedings.

A national court would be particularly inclined to refer the case to the Court of Justice during the course of such proceedings where — as in the present case — the interim order has been granted and where the party affected by that order himself suggests that a reference be made to the European Court of Justice. From the point of view of German procedural law, the rights of both parties are sufficiently protected in such a situation.

In the opinion of the Government of the Federal Republic of Germany, there is no obligation to refer the matter to the Court in the case of interlocutory proceedings. Such proceedings and the ordinary procedure form a single entity. Looked at as a whole, and although there is a formal distinction, there is in substance just one 'case pending' within the meaning of the third paragraph of Article 177 of the EEC Treaty. Therefore interim orders are not final legal decisions within the meaning intended by the third paragraph of Article 177 of the EEC Treaty, but provisional decisions. Therefore a 'judicial remedy under national law' lies against those decisions, since it is possible to go forward to the main action.

Such an interpretation of the third paragraph of Article 177 of the EEC Treaty can also be based upon a whole series of practical considerations. If there were, in effect, an obligation to refer the matter to the Court of Justice in the circumstances described by the court making the reference, it could happen that in certain cases of urgency there would arise a situation equivalent to a denial of justice by reason of the time required by an application for a preliminary ruling.

Another practical disadvantage of the obligation to make a reference to the Court would arise from the fact that the Court would in certain circumstances be required to deliver rulings on questions of interpretation which would, in fact, be of no interest at all for the purposes of the dispute, because the arguments which led the court to grant the interim order emerge as irrelevant in the main action. Finally it would also be possible, supposing that the obligation to refer the case to the Court within the meaning of the third paragraph of Article 177 of the Treaty exists, improperly to compel a court or tribunal to make such a reference. Thus the plaintiff in a main action could apply for an interim order upon seeing his chances of success in the appeal court slipping away and thus compel the appeal court to make a

reference to the Court of Justice although its decision in the main action is still, strictly speaking, open to further appeal.

The Government of the Federal Republic of Germany also stresses that the answer to the first question can have an effect on a series of other areas of jurisdiction in which interlocutory proceedings are also of great importance in practice.

It is of the opinion that it is futile to point out, against the suggested interpretation of the third paragraph of Article 177 of the Treaty and in favour, therefore, of an obligation to refer cases to the Court of Justice, the fact that in many cases the parties abide by what has been decided in the interlocutory proceedings without going on to a main action. For the same situation exists as regards many other decisions of national courts which strictly speaking are subject to appeal.

4. The *Government of the United Kingdom* points out that in the legal procedures of the United Kingdom interim relief is available only if urgency can be established. It is therefore essential to grant or reject the interlocutory application forthwith and impracticable to accept the inevitable delays of a reference to the Court.

The Government is also of the opinion that, having regard to the objectives of Article 177 and its place in the legal order of the Community, the reference in the third paragraph of Article 177 to a 'court ... against whose decisions there is no judicial remedy under national law' should not be understood as applying to a court dealing with an interlocutory application for interim relief.

There would be little justification for a compulsory reference to the European Court in circumstances where the decision of the national court would itself be of little effect in the national order. In the judicial system of the United Kingdom a decision on an application for interim relief will rarely set a binding precedent except on questions of procedure. An interim injunction can be rescinded or varied on fresh application at any time, and it is in any event of limited duration pending the outcome of the main trial. In the latter, the evidence will be fully presented by both parties and subjected to close scrutiny, and the law will be thoroughly examined, which is not the case in proceedings on an application for interim relief.

Alternatively, the United Kingdom submits that there is no obligation to refer in many cases of this kind because a conclusive ruling on a Community law point is not normally necessary to enable the court to give its judgment. As in the case presently before the Court, the Community law point which arises in the interim application will normally be related to the issue in dispute between the parties in the main litigation. Now a conclusive determination of such a point is neither required nor obtainable under the interim procedures operating in the United Kingdom. In deciding whether an injunction should be granted a United Kingdom court will only consider whether the party seeking it has made out a serious claim on which it would have a reasonable prospect of succeeding if it were tried.

The United Kingdom does not, however, wish to suggest that references should not be made in cases concerning interim relief, but rather that the question must be left to the discretion of the national court. The United Kingdom accepts that there are cases where references might well be made. An example is where it becomes apparent, in the course of the proceedings, that the parties will accept the outcome of the interlocutory application as resolving their dispute and not pursue the main proceedings.

5. The *French Government* does not express an opinion on the first question referred.

6. The *Commission* stresses that a reference for a preliminary ruling made by a national court under the first and second paragraphs of Article 177 of the EEC Treaty is equally *admissible* in the case of interlocutory proceedings.

It refers *inter alia* to Case 78/70 *(Deutsche Grammophon* v *Metro* [1971] ECR 487) in which the Court received a reference for a preliminary ruling from a German court giving a judgment in interlocutory proceedings which was not subject to appeal. The judgment of the Court of Justice in that case did not mention the slightest doubt as to the admissibility of the reference or as to the Court's jurisdiction to entertain it.

As regards the present dispute, the Commission argues that the Oberlandesgericht Karlsruhe has explained in its order for reference the extent to which it considered the interpretation of certain rules of Community law was necessary for the purposes of the decision to be delivered in the main action. The task of the Court is now to interpret the questions submitted to it so as to lead to a solution in conformity with Community law. Therefore in this case the question whether the Oberlandesgericht is or is not required to make a reference to the Court becomes irrelevant. Therefore the second and third questions referred to the Court should be answered even should it be concluded that no such obligation exists.

The Commission also argues that a court or tribunal whose judgment is final in interlocutory proceedings is *required* to make a reference to the Court of Justice of the European Communities under the third paragraph of Article 177 of the EEC Treaty where the said interlocutory proceedings, far from serving as no more than the provisional upholding of the right at issue until such time as judgment be delivered in the main action, in fact contribute to the definitive outcome of the dispute. Such an evolution of the function of interlocutory proceedings can be found in German judicial practice in certain fields, in particular in the field of industrial property. Given a situation in which the fact of granting or refusing an application for interim measures of itself, for economic reasons, means final 'victory' or 'defeat' for the parties, a court is frequently led to examine the facts in depth — although it could content itself with '*prima facie* evidence' thereof — and to deal with points of law in as complete a manner as possible. If the facts of the case are not contested and if all that is involved is 'only' the clarification of points of law, the court often examines the question raised with just as much care as the court hearing an 'ordinary' main action, the consequence being that a decision on the substance of the case is no longer given.

The Commission is of the opinion that if this thinking is adopted, the objection that the urgent and summary nature of interlocutory proceedings necessarily excludes any obligation to make a reference to the Court is also invalid. The truth is that Community law takes into account the fact that it is legitimately necessary for the legal systems of the Member States to guarantee effective legal protection, since they release the national courts from the obligation to refer the case to the Court where measures of immediate protection are alone involved.

If, however, the national practice is such that in fact interlocutory proceedings have the character of 'full' and independent legal proceedings, the mandatory provisions of Community law also apply. Otherwise the Member States could at any moment avoid the obligation to make references to the Court of Justice, laid down in the third paragraph of Article 177 of the EEC Treaty, by adjusting their rules of procedure accordingly.

Nor, in the Commission's view, do the objections concerning the urgency of interlocutory proceedings put forward

against the obligation to refer cases to the Court have the practical importance that is generally attached to them for most of the time for no precise reason. In fact, it is only the court against whose decision there is no judicial remedy which is under that obligation, and before an interlocutory application has come before that court, a considerable period of time generally elapses. Moreover, the dates of the various stages of the interlocutory action in the national court show this clearly. Thus, the time necessary for the procedure for a reference to the Court, which represents several months, can hardly be considered as jeopardizing the guarantee of legal protection.

The Commission also stresses that according to the second subparagraph of Article 55 (1) of the Rules of Procedure of the Court of Justice, it is possible for certain cases to be heard not in the order in which they have been entered on the Register, but by 'priority'.

Moreover the Oberlandesgericht Karlsruhe is right in pointing out that in order to answer the question whether a reference to the Court need or need not be made, it is not necessary to determine whether the court below has granted or refused an interim order. In fact, in all cases, the decision delivered involves economic disadvantages for one of the parties which it must bear in conformity with the legal order of the Member State.

If the main action has been 'replaced' it is for the national court to deliver a decision, taking into account all the circumstances characterizing the proceedings.

The problem of the obligation to refer the matter to the court in the case of an application for interim measures does not arise in the same way in all the Member States. This will be seen for example when one compares the (real) legal situations of the Netherlands and of Italy: in their objectives and their content, the Netherlands provisions relating to the procedure of 'kort geding' largely correspond to the rules laid down by paragraph 935 *et seq.* of the Zivilprozeßordnung. However, in Netherlands law, the actual independence of 'kort geding' is much greater than that attributed to the interlocutory proceedings covered by the provisions of Article 935 *et seq.* of the Zivilprozeßordnung.

On the other hand the provisions of Italian law concerning interlocutory proceedings (Article 700 *et seq.* of the Italian Code of Civil Procedure) make it clear that such proceedings are of an entirely subordinate nature (procedimenti sommari di urgenza). When a court makes an 'ordinanza' or a 'decreto', 'with a view to avoiding an imminent danger or serious and irreparable damage, it is required, by law, at the same time to lay down a reasonable time-limit for the commencement of the main action'. In that context, therefore, there cannot, in the Commission's opinion, be any obligation to refer the case to the Court of Justice under the third paragraph of Article 177 of the EEC Treaty.

The Commission says that as an essential indication of the autonomous function of interlocutory proceedings it may be noted that at the time when those proceedings have reached the uppermost level of appeal, no main action has yet been commenced and nothing suggests that such an action will be commenced. Such is indeed the situation which characterizes the main action in question in the present case.

III — Oral procedure

At the hearing on 23 March 1977, Hoffmann-La Roche, represented by Messrs Brändel, Selbherr and Lübbert, Centrafarm, represented by Messrs Huber and de Savornin Lohman, the Government of the Federal Republic of Germany, represented by its Agents Messrs Bülow of the Federal Ministry of

Justice and Seidel of the Federal Ministry for Economic Affairs, and the Commission, represented by its Legal Adviser, Sven Ziegler, acting as Agent, assisted by Manfred Beschel of the Legal Service, submitted their oral arguments.

Those arguments included the following points:

1. The *plaintiff* declared that the main action has been pending before the Landgericht Freiburg since January 1976. For that reason the Commission ought now, according to its written observations, to take the view that in the present case there is no obligation to refer the case to the Court of Justice.

The Commission is of the opinion that it is for the national court to decide when the main action is replaced by the interlocutory proceedings, and to do so by taking into account all the circumstances of the particular case. That would be impossible in practice. A court is required to respect the principle that it decides the issue before it, and what the parties will do is beyond its cognizance. Furthermore, the authors of the Treaty were not concerned with the concrete exercise of the right to pursue the action, but with the possibilities that the said right offers to the parties.

2. The *defendant* argued that as regards interlocutory proceedings concerning the protection of industrial and commercial property, German law does make proof of urgency a prerequisite. Article 25 of the German Law on Unfair Competition provides that an application for interim measures based on the provisions of that law is admissible notwithstanding the fact that the conditions defined in paragraphs 935 and 940 of the Zivilprozeßordnung are not fulfilled.

Since German case-law and learned German authors take the view that almost all infringements of the provisions of the law on trade-marks, of the law on copyright in respect of designs and models or of the law on cartels simultaneously constitute an infringement of the general provision in Article 1 of the Law on Unfair Competition (Gesetz gegen den unlauteren Wettbewerb), it must be concluded that the admissibility of an application for interim measures in the field of the protection of industrial and commercial property does not depend on proof of urgency.

3. The *Government of the Federal Republic of Germany* pointed out that in that country urgency is presumed by the law as regards proceedings appertaining to the field of competition.

Referring to the different solution proposed by the Commission, the Federal Government declares that the question whether the parties actually use their right to obtain in a main action a definitive decision on the substance of their claims is irrelevant. If the Commission's arguments had to be accepted, the question would arise whether the court hearing the interlocutory application must in fact, before making a reference to the Court of Justice as was mandatory, clarify the question whether the parties have the intention of pursuing the main action. That, in practice, the court cannot do.

4. The *Commission* argued that the fact that there is, here, an indication which it regards as important, namely the fact that in the present case a main action is actually pending, does not necessarily involve transforming or seeing from another angle the abstract question whether the third paragraph of Article 177 does or does not require that a case is referred to the Court of Justice in interlocutory proceedings. That fact is a matter which it is for the national court to decide at the time when it examines the question whether there is or is not an obligation to refer the case to the Court of Justice. The question at issue here is the question of the criteria of

Community law in the light of which the existence of an obligation to refer need or need not be acknowledged.

5. In answer to a question put by a member of the Court, the Federal Government declared that it is true that if Article 177 of the Treaty is interpreted literally and if particular emphasis is placed on the plural form of the word 'decision' in the phrase 'against whose decisions there is no judicial remedy', that fact may give rise to the impression that the provision in question has in mind the courts against 'whose decisions' there is not, speaking generally, any judicial remedy, that is to say only the courts having the power of judicial review or courts of appeal. However, if that were the case, it follows that whole areas of case-law would be excluded from the Court's jurisdiction to give interpretation.

The Advocate-General delivered his opinion at the hearing on 5 May 1977.

Decision

1 By order of 7 October 1976, which reached the Court on 17 November 1976, the Oberlandesgericht Karlsruhe has referred to the Court under Article 177 of the EEC Treaty three questions on the interpretation first of the third paragraph of that article and secondly of certain other provisions of the Treaty, in particular Articles 36 and 86, considered from the point of view of their effect on the protection of trade-mark rights. Those questions have been referred to the Court in the context of proceedings brought before the German courts by an undertaking which, claiming that the trade-mark rights which it exercises in respect of certain medicinal products have been infringed by the conduct of another undertaking, has applied for an interim order *(einstweilige Verfügung)* prohibiting the latter to use the trade-marks at issue.

An appeal was made against the judgment of the Landgericht Freiburg granting that order to the Oberlandesgericht which, before taking its decision, has referred to the Court for a preliminary ruling the three questions mentioned above.

2 By the first question, the Oberlandesgericht asks whether the court of a Member State is, under the third paragraph of Article 177 of the Treaty establishing the European Economic Community, under a duty 'to refer a question concerning the interpretation of Community law to the Court of Justice of the European Communities for a ruling when this question arises during interlocutory proceedings for an interim order when in such

proceedings no appeal lies against the court's decision, but when on the other hand it is open to the parties to have the question concerning the subject-matter of the interlocutory proceedings made the subject-matter of an ordinary action, during which a reference under the third paragraph of Article 177 of the Treaty establishing the European Economic Community would have if necessary to be made'.

3 Under the German Code of Civil Procedure (Zivilprozeßordnung) the court having jurisdiction may, in summary proceedings, grant interim orders in cases of urgency in order to protect certain rights that are under threat. The order, granted without a hearing by the court to which application has been made, is subject to an appeal, brought by the party who has been unsuccessful, before the same court. An appeal then lies against that decision to the higher court which makes a definitive decision on the application for an interim order, without its being possible for the parties to appeal to a further court of appeal in the context of those proceedings. The party against whom an interim order has been granted may, however, by application lodged with the court of first instance, require the plaintiff to institute a main action, to which the provisions of the ordinary Code of Civil Procedure then apply. Although it often happens, especially in matters concerning the protection of industrial and commercial property, that the decision adopted in the interlocutory proceedings is accepted as the solution to the dispute, the possibility of instituting or of requiring the other party to institute the main action is not in any way without practical importance. Moreover, it appears from information given to the Court by the parties during the proceedings that the main action has in fact been instituted in the present case.

4 The third paragraph of Article 177 of the Treaty concerning the jurisdiction of the Court to give preliminary rulings on the interpretation of the Treaty and on the validity and interpretation of measures of secondary Community law provides that:

'Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.'

The first question referred by the Oberlandesgericht concerns that provision alone and not the second paragraph which provides that the other courts or tribunals of the Member States may, but are not required to, bring such

matters before the Court of Justice for preliminary rulings. Although, therefore, the Court is not called upon, in the present case, to interpret the second paragraph, nevertheless it is necessary to note that there is no doubt that the summary and urgent character of a procedure in the national court does not prevent the Court from regarding itself as validly seised under that paragraph whenever a national court or tribunal considers that it is necessary to make use of that paragraph.

5 In the context of Article 177, whose purpose is to ensure that Community law is interpreted and applied in a uniform manner in all the Member States, the particular objective of the third paragraph is to prevent a body of national case-law not in accord with the rules of Community law from coming into existence in any Member State. The requirements arising from that purpose are observed as regards summary and urgent proceedings, such as the proceedings in the present case, relating to interim measures, where an ordinary main action, permitting the re-examination of any question of law provisionally decided in the summary proceedings, must be instituted, either in all circumstances, or when the unsuccessful party so requires. In these circumstances the specific objective underlying the third paragraph of Article 177 is preserved by reason of the fact that the obligation to refer preliminary questions to the Court applies within the context of the main action.

6 Thus the answer to the question referred must be that the third paragraph of Article 177 of the EEC Treaty must be interpreted as meaning that a national court or tribunal is not required to refer to the Court a question of interpretation or of validity mentioned in that article when the question is raised in interlocutory proceedings for an interim order *(einstweilige Verfügung)*, even where no judicial remedy is available against the decision to be taken in the context of those proceedings provided that each of the parties is entitled to institute proceedings or to require proceedings to be instituted on the substance of the case and that during such proceedings the question provisionally decided in the summary proceedings may be re-examined and may be the subject of a reference to the Court under Article 177.

7 The Oberlandesgericht has asked the Court to rule on the second and third questions only in the case of an affirmative answer to the first question.

Since that question has been answered in the negative, the other questions do not need to be answered in the present case.

Costs

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

On those grounds,

THE COURT

in answer to the questions referred to it by the Oberlandesgericht Karlsruhe by order of 14 October 1976, hereby rules:

The third paragraph of Article 177 of the EEC Treaty must be interpreted as meaning that a national court or tribunal is not required to refer to the Court a question of interpretation or of validity mentioned in that article when the question is raised in interlocutory proceedings for an interim order (einstweilige Verfügung), even where no judicial remedy is available against the decision to be taken in the context of those proceedings, provided that each of the parties is entitled to institute proceedings or to require proceedings to be instituted on the substance of the case and that during such proceedings the question provisionally decided in the summary proceedings may be re-examined and may be the subject of a reference to the Court under Article 177.

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 24 May 1977.

A. Van Houtte — Registrar

H. Kutscher — President