

JUDGMENT OF THE COURT (Third Chamber)

17 March 2005^{*}

In Case C-228/03,

REFERENCE for a preliminary ruling under Article 234 EC by the Korkein oikeus (Finland), by decision of 23 May 2003, received at the Court on 26 May 2003, in the proceedings

The Gillette Company,

Gillette Group Finland Oy

v

LA-Laboratories Ltd Oy,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Borg Barthet, S. von Bahr, U. Löhmus and A. Ó Caoimh (Rapporteur), Judges,

^{*} Language of the case: Finnish.

Advocate General: A. Tizzano,
Registrar: R. Grass,

having regard to the written procedure and following the hearing on 21 October 2004,

after considering the observations submitted on behalf of:

- The Gillette Company and Gillette Group Finland Oy, by R. Hilli and T. Groop, asianajajat,

- LA-Laboratories Ltd Oy, by L. Latikka, hallituksen puheenjohtaja,

- the Finnish Government by T. Pynnä, acting as Agent,

- the United Kingdom Government, by C. Jackson, acting as Agent, assisted by M. Tappin, Barrister,

- the Commission of the European Communities by M. Huttunen and N.B. Rasmussen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 December 2004,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Article 6(1)(c) of 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).

- 2 The reference was made in a dispute between, on the one hand, The Gillette Company and Gillette Group Finland Oy ('Gillette Company', 'Gillette Group Finland' and, collectively, 'the Gillette companies') and, on the other, LA-Laboratories Ltd Oy ('LA-Laboratories'), concerning the latter's use of the Gillette and Sensor marks on the packaging of its products.

Legal background

Community provisions

- 3 According to the first recital in the preamble to Directive 89/104, the trade mark laws at present applicable in the Member States contain disparities which may impede the free movement of goods and freedom to provide services and may

distort competition within the common market. According to that recital, it is therefore necessary, in view of the establishment and functioning of the internal market, to approximate the laws of Member States. The third recital states that it does not appear to be necessary at present to undertake full-scale approximation of the trade mark laws of the Member States.

- 4 The 10th recital of the directive states, *inter alia*, that the aim of the protection conferred by the registered trade mark is in particular to guarantee the trade mark as an indication of origin.

- 5 Article 5(1) of the directive provides:

‘The registered trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

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

- (b) any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods or services covered by the trade mark and the sign, 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.’

6 Article 5(3)(a) and (b) of Directive 89/104 provide:

'The following, inter alia, may be prohibited under paragraphs 1 and 2:

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

(b) offering the goods, or putting them on the market or stocking them for these purposes ...'

7 Article 6 of that directive, headed 'Limitation of the effects of a trade mark' provides:

'1. The trade mark shall not entitle the proprietor to prohibit a third party from using, in the course of trade,

...

(c) the trade mark where it is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts;

provided he uses them in accordance with honest practices in industrial or commercial matters.

...'

- 8 Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250, p. 17), as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 (JO 1997 L 290, p. 18) is designed, according to Article 1 thereof, to protect consumers, persons carrying on a trade or business or practising a craft or profession and the interests of the public in general against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted.

- 9 According to Article 3a(1) of that directive:

'Comparative advertising shall, as far as the comparison is concerned, be permitted when the following conditions are met:

...

- (d) it does not create confusion in the market place between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor;

- e) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor;

...

- g) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;

- h) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.'

National provisions

10 In Finland, trade mark law is governed by the tavaramerkkilaki (Law on Trade Marks) (7/1964) of 10 January 1964, as amended by Law No 39/1993 of 25 January 1993 ('the tavaramerkkilaki').

11 Article 4(1) of the tavaramerkkilaki, concerning the content of the exclusive rights of the trade mark owner, provides:

‘The right under Articles 1 to 3 of this law to affix a distinctive sign on one’s goods means that no one other than the proprietor of the sign may, in the course of trade, use as a sign for his products references which could create confusion, whether on the goods or their packaging, in advertising or business documents or otherwise, including by word of mouth ...’

12 According to Article 4(2):

‘It is regarded as unauthorised use for the purposes of the first subparagraph *inter alia* if a person, when putting on the market spare parts, accessories or the like which are suited to a third party’s product, refers to that party’s sign in a manner that is liable to create the impression that the product put on the market originates from the proprietor of the sign or that the proprietor has agreed to the use of the sign.’

The dispute in the main proceedings and the questions referred

13 Gillette Company secured the registration in Finland of the trade marks Gillette and Sensor for products falling within Class 8 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, namely: hand tools and implements (hand-operated); cutlery; side arms; razors. Gillette Group Finland, which holds the exclusive right to use those marks in Finland, has been marketing razors in that Member State, particularly razors composed of a handle and a replaceable blade and such blades on their own.

- 14 LA-Laboratories also sells razors in Finland that are composed of a handle and a replaceable blade and blades on their own similar to those marketed by Gillette Group Finland. Those blades are sold under the mark Parason Flexor and their packaging has affixed to it a sticker with the words 'All Parason Flexor and Gillette Sensor handles are compatible with this blade'.
- 15 The order for reference shows that LA-Laboratories was not authorised by a trade mark licence or any other contract to use the marks of which Gillette Company is the proprietor.
- 16 The Gillette companies brought an action before the Helsingin käräjäoikeus (Finland) (Court of First Instance of Helsinki) arguing that LA-Laboratories had infringed the registered marks Gillette and Sensor. According to them, the practices of LA-Laboratories created a link in the mind of consumers between the products marketed by the latter and those of the Gillette companies, or gave the impression that that company was authorised, by virtue of a licence or for another reason, to use the Gillette and Sensor marks, which was not the case.
- 17 In its judgment of 30 March 2000, the Helsingin käräjäoikeus held that, under Article 4(1) of the tavaramerkkilaki, the Gillette companies held the exclusive right to affix the Gillette and Sensor marks to their products and their packaging, and to use those marks in advertising. Therefore, by mentioning those marks in an eye-catching manner on the packaging of its products, LA-Laboratories had infringed that exclusive right. The Helsingin käräjäoikeus further held that Article 4(2) of the tavaramerkkilaki, which provides for an exception to that principle of exclusivity,

must be interpreted narrowly in the light of Article 6(1)(c) of Directive 89/104. In its view, that provision does not relate to the essential parts of a product but only to spare parts, accessories and other similar parts, which are compatible with the manufactured product or marketed by another person.

18 That court held that both the handle and the blade were to be regarded as essential parts of the razor and not as spare parts or accessories. It therefore held that the exception under Article 4(2) of the tavaramerkkilaki did not apply. On those grounds, that court decided to prohibit LA-Laboratories from pursuing or renewing the infringement of the Gillette companies' rights over the Gillette and Sensor marks, and ordered that company, first, to remove and destroy the stickers used in Finland referring to those trade marks, and, second, to pay the Gillette companies a total of FIM 30 000 in damages for the harm suffered by them.

19 On appeal, the Helsingin hovioikeus (Court of Appeal of Helsinki), by a decision of 17 May 2001, held, first, that, where a razor of the type currently at issue in the main proceedings was composed of a handle and a blade, the consumer could replace that latter part by a new blade, sold separately. The latter, being in substitution for a former part of the razor, could therefore be regarded as a spare part within the meaning of Article 4(2) of the tavaramerkkilaki.

20 Secondly, that court held that the indication on the sticker affixed to the packaging of the razor blades marketed by LA-Laboratories, to the effect that, besides being compatible with handles of the Parason Flexor type, those blades were also

compatible with handles marketed by the Gillette companies, could be useful to the consumer and that LA-Laboratories might therefore be able to demonstrate the need to mention the Gillette and Sensor trade marks on that sticker.

21 Thirdly, the Helsingin hovioikeus held that the packaging of razor blades marketed by LA-Laboratories visibly bore the Parason and Flexor signs, unequivocally indicating the origin of the product. It further held that the reference to the Gillette and Sensor marks in small standard lettering on stickers of a relatively modest size affixed to the exterior of that packaging could not in any way have given the impression that there was a commercial connection between the Gillette companies and LA-Laboratories, and that the latter had therefore referred to those marks in circumstances allowed by Article 4(2) of the tavaramerkkilaki. The Helsingin hovioikeus therefore annulled the judgment of the Helsingin käräjäoikeus and dismissed the action brought by the Gillette companies.

22 The Gillette companies appealed to the Korkein oikeus, which took the view that the case raised questions as to the interpretation of Article 6(1)(c) of Directive 89/104 in relation to the criteria for determining whether, by its nature, a product is or is not comparable to a spare part or an accessory, in relation to the requirement that use of a mark belonging to another person must be necessary in order to indicate the intended purpose of a product, and in relation to the concept of honest practices in industrial or commercial matters, the interpretation of those provisions also having to take account of Directive 84/450.

23 In those circumstances, the Korkein oikeus decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

‘When applying Article 6(1)(c) of the First Council Directive 89/104/EEC to approximate the laws of the Member States relating to trade marks;

(1) What are the criteria

(a) on the basis of which the question of regarding a product as a spare part or accessory is to be decided, and

(b) on the basis of which those products to be regarded as other than spare parts and accessories which can also fall within the scope of the said subparagraph are to be determined?

(2) Is the permissibility of the use of a third party’s trade mark to be assessed differently, depending on whether the product is like a spare part or accessory or whether it is a product which can fall within the scope of the said subparagraph on another basis?

- (3) How should the requirement that the use must be “necessary” to indicate the intended purpose of a product be interpreted? Can the criterion of necessity be satisfied even though it would in itself be possible to state the intended purpose without an express reference to the third party’s trade mark, by merely mentioning only for instance the technical principle of functioning of the product? What significance does it have in that case that the statement may be more difficult for consumers to understand if there is no express reference to the third party’s trade mark?
- (4) What factors should be taken into account when assessing use in accordance with honest commercial practice? Does mentioning a third party’s trade mark in connection with the marketing of one’s own product constitute a reference to the fact that the marketer’s own product corresponds, in quality and technically or as regards its other properties, to the product designated by the third party’s trade mark?
- (5) Does it affect the permissibility of the use of a third party’s trade mark that the economic operator who refers to the third party’s trade mark also markets, in addition to a spare part or accessory, a product of his own with which that spare part or accessory is intended to be used with?

The first, second and third questions

- 24 In its first, second and third questions, which it will be convenient to examine together, the national court essentially asks what criteria must be used in interpreting the requirement that use by a third party of a trade mark of which

he is not the owner must be necessary in order to indicate the intended purpose of a product, within the meaning of Article 6(1)(c) of Directive 89/104. The court also asks, first, according to what criteria products must be regarded as accessories or spare parts within the meaning of that provision and, second, whether the criteria for assessing the lawfulness of the use of the trade mark in relation to those latter products are different from those applicable to other products.

25 It should be noted as a preliminary point that trade mark rights are an essential element in the system of undistorted competition which the EC Treaty seeks to establish and maintain. Under such a system, an undertaking must be in a position to keep its customers by virtue of the quality of its products and services, something which is possible only if there are distinctive marks which enable customers to identify them (see, in particular, Case C-10/89 *Hag* [1990] ECR I-3711, paragraph 13; Case C- 517/99 *Merz & Krell* [2001] ECR I-6959, paragraph 21, and Case C-206/01 *Arsenal Football Club* [2002] ECR I-10273, paragraph 47).

26 In that context, the essential function of a trade mark is to guarantee the identity of origin of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin. For the trade mark to be able to fulfil its essential role in the system of undistorted competition which the Treaty seeks to establish and maintain, it must offer a guarantee that all the goods or services bearing it have been manufactured or supplied under the control of a single undertaking which is responsible for their quality (see, in particular, Case 102/77 *Hoffman-La Roche* [1978] ECR 1139, paragraph 7, Case C-299/99 *Philips* [2002] ECR I-5475, paragraph 30, and *Arsenal Football Club*, paragraph 48).

- 27 Article 5 of Directive 89/104 defines the '[r]ights conferred by a trade mark', while Article 6 contains rules on the '[l]imitation of the effects of a trade mark'.
- 28 According to the first sentence of Article 5(1) of Directive 89/104, the registered trade mark confers an exclusive right on its owner. In accordance with Article 5(1) (a), the holder of that exclusive right shall be entitled to prevent all third parties not having his consent from using in the course of trade any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered. Article 5(3) of that directive sets out in a non-exhaustive way the types of use which the owner may prohibit under Article 5(1).
- 29 It is important to note that, by limiting the effects of the rights which a trade mark owner derives from Article 5 of Directive 89/104, Article 6 seeks to reconcile the fundamental interests of trade mark protection with those of free movement of goods and freedom to provide services in the common market in such a way that trade mark rights are able to fulfil their essential role in the system of undistorted competition which the Treaty seeks to establish and maintain (see, in particular, Case C-63/97 *BMW* [1999] ECR I-905, paragraph 62, and Case C-100/02 *Gerolsteiner Brunnen* [2004] ECR I-691, paragraph 16).
- 30 Firstly, according to Article 6(1)(c) of Directive 89/104, the trade mark owner may not prohibit a third party from using the mark in trade where it is necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts.

31 It should be noted that that provision does not lay down criteria for determining whether a given intended purpose of a product falls within its scope, but merely requires that use of the trade mark be necessary in order to indicate such a purpose.

32 Moreover, since the intended purpose of the products as accessories or spare parts is cited only by way of example, those doubtless being the usual situations in which it is necessary to use a trade mark in order to indicate the intended purpose of a product, the application of Article 6(1)(c) of Directive 89/104 is, as the United Kingdom Government and the Commission of the European Communities have rightly pointed out in their observations, not limited to those situations. Therefore, in the circumstances of the main proceedings, it is not necessary to determine whether a product must be regarded as an accessory or a spare part.

33 Secondly, it should be noted, on the one hand, that the Court has already held that use of a trade mark to inform the public that the advertiser is specialised in the sale, or that he carries out the repair and maintenance, of products bearing that trade mark which have been marketed under that mark by its owner or with his consent, constitutes a use indicating the intended purpose of a product within the meaning of Article 6(1)(c) of Directive 89/104 (see *BMW*, paragraphs 54 and 58 to 63). That information is necessary in order to preserve the system of undistorted competition in the market for that product or service.

34 The same applies to the case in the main proceedings, the marks of which the Gillette Company is the owner being used by a third party in order to provide the

public with comprehensible and complete information as to the intended purpose of the product which it markets, that is to say as to its compatibility with the product which bears those trade marks.

35 In addition, it is sufficient to note that such use of a trade mark is necessary in cases where that information cannot in practice be communicated to the public by a third party without use being made of the trade mark of which the latter is not the owner (see, to that effect, *BMW*, paragraph 60). As the Advocate General has pointed out in points 64 and 71 of his Opinion, that use must in practice be the only means of providing such information.

36 In that respect, in order to determine whether other means of providing such information may be used, it is necessary to take into consideration, for example, the possible existence of technical standards or norms generally used for the type of product marketed by the third party and known to the public for which that type of product is intended. Those norms, or other characteristics, must be capable of providing that public with comprehensible and full information on the intended purpose of the product marketed by that third party in order to preserve the system of undistorted competition on the market for that product.

37 It is for the national court to determine whether, in the circumstances of the case in the main proceedings, use of the trade mark is necessary, taking account of the requirements referred to in paragraphs 33 to 36 of this judgment and of the nature of the public for which the product marketed by LA-Laboratories is intended.

38 Thirdly, Article 6(1)(c) of Directive 89/104 makes no distinction between the possible intended purposes of products when assessing the lawfulness of the use of a trade mark. The criteria for assessing the lawfulness of the use of a trade mark with accessories or spare parts in particular are thus no different from those applicable to other categories of possible intended purposes.

39 Having regard to the above considerations, the answer to the first, second and third questions must be that the lawfulness or otherwise of the use of the trade mark under Article 6(1)(c) of Directive 89/104 depends on whether that use is necessary to indicate the intended purpose of a product.

Use of the trade mark by a third party who is not its owner is necessary in order to indicate the intended purpose of a product marketed by that third party where such use in practice constitutes the only means of providing the public with comprehensible and complete information on that intended purpose in order to preserve the undistorted system of competition in the market for that product.

It is for the national court to determine whether, in the case in the main proceedings, such use is necessary, taking account of the nature of the public for which the product marketed by the third party in question is intended.

Since Article 6(1)(c) of Directive 89/104 makes no distinction between the possible intended purposes of products when assessing the lawfulness of the use of the trade mark, the criteria for assessing the lawfulness of the use of a trade mark with accessories or spare parts in particular are thus no different from those applicable to other categories of possible intended purposes of the products.

The fourth question

- 40 In the first part of its fourth question, the national court seeks interpretation of the requirement in Article 6(1)(c) of Directive 89/104 that use of the trade mark by a third party within the meaning of that provision must be in accordance with honest practices in industrial or commercial matters. In the second part of that question, the national court asks whether use of the trade mark by a third party constitutes an indication that the products marketed by the latter are equivalent, both in their quality and their technical or other characteristics, to the products bearing that trade mark.
- 41 As regards the first part of that question, the Court of Justice has consistently held that the condition of 'honest use' within the meaning of Article 6(1) of Directive 89/104 constitutes in substance the expression of a duty to act fairly in relation to the legitimate interests of the trade mark owner (*BMW*, paragraph 61; *Gerolsteiner Brunnen*, paragraph 24). Such an obligation is similar to that imposed on the reseller where he uses another's trade mark to advertise the resale of products covered by that mark (Case C-337/95 *Parfums Christian Dior* [1997] ECR I-6013, paragraph 45; *BMW*, paragraph 61).
- 42 In that regard, use of the trade mark will not comply with honest practices in industrial or commercial matters where, first, it is done in such a manner that it may give the impression that there is a commercial connection between the reseller and the trade mark proprietor (*BMW*, paragraph 51).

43 Nor may such use affect the value of the trade mark by taking unfair advantage of its distinctive character or repute (*BMW*, paragraph 52).

44 In addition, as the United Kingdom Government and the Commission have rightly pointed out in their observations, use of the trade mark will not be in accordance with Article 6(1)(c) of Directive 89/104 if it discredits or denigrates that mark.

45 Finally, where the third party presents its product as an imitation or replica of the product bearing the trade mark of which it is not the owner, such use of that mark does not comply with honest practices within the meaning of Article 6(1)(c).

46 It is for the national court to determine whether, in the case in the main proceedings, the use made of the trade marks owned by Gillette Company has been made in accordance with honest practices, taking account, in particular, of the conditions referred to in paragraphs 42 to 45 of this judgment. In that regard, account should be taken of the overall presentation of the product marketed by the third party, particularly the circumstances in which the mark of which the third party is not the owner is displayed in that presentation, the circumstances in which a distinction is made between that mark and the mark or sign of the third party, and the effort made by that third party to ensure that consumers distinguish its products from those of which it is not the trade mark owner.

47 Concerning the second part of that question, as the United Kingdom Government has rightly pointed out in its observations, the fact that a third party uses a trade

mark of which it is not the owner in order to indicate the intended purpose of its product does not necessarily mean that it is presenting that product as being of the same quality as, or having equivalent properties to, those of the product bearing the trade mark. Whether there has been such a presentation depends on the facts of the case, and it is for the referring court to determine whether it has taken place by reference to the circumstances.

48 Moreover, whether the product marketed by the third party has been represented as being of the same quality as, or having equivalent properties to, the product whose trade mark is being used is a factor which the referring court must take into consideration when it verifies that such use is made in accordance with honest practices in industrial or commercial matters.

49 Having regard to the above considerations, the answer to the fourth question must be that the condition of 'honest use' within the meaning of Article 6(1)(c) of Directive 89/104, constitutes in substance the expression of a duty to act fairly in relation to the legitimate interests of the trade mark owner.

Use of the trade mark will not be in accordance with honest practices in industrial and commercial matters if, for example:

- it is done in such a manner as to give the impression that there is a commercial connection between the third party and the trade mark owner;

- it affects the value of the trade mark by taking unfair advantage of its distinctive character or repute;

- it entails the discrediting or denigration of that mark;

- or where the third party presents its product as an imitation or replica of the product bearing the trade mark of which it is not the owner.

The fact that a third party uses a trade mark of which it is not the owner in order to indicate the intended purpose of the product which it markets does not necessarily mean that it is presenting it as being of the same quality as, or having equivalent properties to, those of the product bearing the trade mark. Whether there has been such a presentation depends on the facts of the case, and it is for the referring court to determine whether it has taken place by reference to the circumstances.

Whether the product marketed by the third party has been presented as being of the same quality as, or having equivalent properties to, the product whose trade mark is being used is a factor which the referring court must take into consideration when it verifies that such use is made in accordance with honest practices in industrial or commercial matters.

The fifth question

- 50 By its fifth question, the referring court asks whether a trade mark owner's inability, pursuant to Article 6(1)(c) of Directive 89/104, to prohibit a third party from using the trade mark applies where that third party markets not only a spare part or accessory but also the product itself with which the spare part or accessory is intended to be used.

- 51 As the Finnish and United Kingdom Governments have pointed out in their observations, there is nothing in the directive to prevent a third party from relying on Article 6(1)(c) in such a case. However, that third party's use of the trade mark must be necessary in order to indicate the intended purpose of the product which it markets and must be made in accordance with honest practices in industrial and commercial matters.
- 52 Whether use of a trade mark by a third party in the circumstances described above is necessary in order to indicate the intended purpose of the product which it markets and whether it is made in accordance with honest practices in industrial and commercial matters is a question of fact which it is for the national court to assess by reference to the individual circumstances of each case.
- 53 Having regard to the above considerations, the answer to the fifth question must be that, where a third party that uses a trade mark of which it is not the owner markets not only a spare part or an accessory but also the product itself with which the spare part or accessory is intended to be used, such use falls within the scope of Article 6 (1)(c) of Directive 89/104 in so far as it is necessary to indicate the intended purpose of the product marketed by the latter and is made in accordance with honest practices in industrial and commercial matters.

Costs

- 54 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. The costs incurred in submitting observations to the Court, other than those of the said parties, are not recoverable.

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

- 1. The lawfulness or otherwise of the use of the trade mark under Article 6(1) (c) of the First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks depends on whether that use is necessary to indicate the intended purpose of a product.**

Use of the trade mark by a third party who is not its owner is necessary in order to indicate the intended purpose of a product marketed by that third party where such use in practice constitutes the only means of providing the public with comprehensible and complete information on that intended purpose in order to preserve the undistorted system of competition in the market for that product.

It is for the national court to determine whether, in the case in the main proceedings, such use is necessary, taking account of the nature of the public for which the product marketed by the third party in question is intended.

Since Article 6(1)(c) of Directive 89/104 makes no distinction between the possible intended purposes of products when assessing the lawfulness of the use of the trade mark, the criteria for assessing the lawfulness of the use of the trade mark with accessories or spare parts in particular are thus no different from those applicable to other categories of possible intended purposes for the products.

2. The condition of 'honest use' within the meaning of Article 6(1)(c) of Directive 89/104, constitutes in substance the expression of a duty to act fairly in relation to the legitimate interests of the trade mark owner.

The use of the trade mark will not be in accordance with honest practices in industrial and commercial matters if, for example:

- it is done in such a manner as to give the impression that there is a commercial connection between the third party and the trade mark owner;

- it affects the value of the trade mark by taking unfair advantage of its distinctive character or repute;

- it entails the discrediting or denigration of that mark;

- or where the third party presents its product as an imitation or replica of the product bearing the trade mark of which it is not the owner.

The fact that a third party uses a trade mark of which it is not the owner in order to indicate the intended purpose of the product which it markets does not necessarily mean that it is presenting it as being of the same quality as, or having equivalent properties to, those of the product bearing the trade mark. Whether there has been such presentation depends on the facts of the case, and it is for the referring court to determine whether it has taken place by reference to the circumstances.

Whether the product marketed by the third party has been presented as being of the same quality as, or having equivalent properties to, the product whose trade mark is being used is a factor which the referring court must take into consideration when it verifies that that use is made in accordance with honest practices in industrial or commercial matters.

3. Where a third party that uses a trade mark of which it is not the owner markets not only a spare part or an accessory but also the product itself with which the spare part or accessory is intended to be used, such use falls within the scope of Article 6(1)(c) of Directive 89/104 in so far as it is necessary to indicate the intended purpose of the product marketed by the latter and is made in accordance with honest practices in industrial and commercial matters.

[Signatures]