Supreme Court explains Van Doren/Lifestyle criterion in Converse judgment

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- **The burden of proving exhaustion is not reversed only because the trademark owner makes use of an exclusive distribution system**
- **The mere existence of an exclusive distribution system does not imply a risk of partitioning of national markets**
- **This interpretation of the CJEU's *Van Doren/Lifestyle* judgment is in line with decisions by the highest courts in other EU member states**

In *Converse* (Case ECLI:NL:HR:2022:1942), the Dutch Supreme Court has found that the Court of Appeal of 's-Hertogenbosch was right in finding that the burden of proving exhaustion would not be reversed only because the defendant stated that Converse made use of an exclusive distribution system. The Supreme Court confirmed that the appeal court had correctly interpreted the decision of the Court of Justice of the European Union (CJEU) in *Van Doren/Lifestyle* (Case C-244/00).

Background

In 2009 Converse conducted several test purchases of Converse shoes at multiple shoe store chains in the Netherlands and Belgium and came to the conclusion that these shoes were counterfeit. The shoe store chains had purchased the counterfeit shoes from several Dutch companies - Sporttrading Holland BV, Ferro Footwear BV, Sport Concept BV and Brandustry BV - that were active in the production, development, sales, import and export of (sports) shoes, among others.

These companies went bankrupt at a later point and were all represented by the same insolvency practitioner, who also represented these companies in the court proceedings against Converse. Converse had seized upwards of 60,000 shoes from these companies and had those analysed by an expert, who concluded that the seized shoes were a mix of authentic and counterfeit shoes.

Court proceedings were then started and, in the first instance, the District Court of Zeeland-West Brabant decided that Converse had to prove that the trademark rights to the authentic products were not exhausted, and that Converse had failed to do so. This was due to the fact that Converse used an exclusive distribution system, which reversed the burden of proving the exhaustion of trademark rights.

The Court of Appeal of 's-Hertogenbosch overturned this decision. It decided that the insolvency practitioner did not succeed in establishing that there was a real risk of partitioning of national markets if he had to bear the burden of proving that the rights to the Converse shoes were exhausted. This led to an appeal in cassation by the insolvency practitioner.

Supreme Court decision

The insolvency practitioner claimed that the Court of Appeal of 's-Hertogenbosch had misinterpreted the *Van Doren/Lifestyle* judgment. According to him, the CJEU ruled that the mere fact that a trademark owner makes use of an exclusive distribution system brings a risk of partitioning of national markets. This circumstance was sufficient to reverse the burden of proving the exhaustion of trademark rights.

The Supreme Court rejected this argumentation. The CJEU's reference to exclusive distribution systems in *Van Doren/Lifestyle* did not imply that, every time a trademark owner makes use of such a system, there is a real risk of partitioning of national markets. Such interpretation would not be in line with the rationale of the special evidence rule under *Van Doren/Lifestyle*. The defendant needs to establish that there is a real risk of partitioning of national markets due to the exclusive distribution system

of the trademark owner. This is also in line with the understanding of the *Van Doren/Lifestyle* judgment by the (highest) courts in other EU member states and by the lower courts. In the present case, the insolvency practitioner was unable to properly establish this risk.

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