When I realised that I would be writing an editorial in the week in which the Court of Justice of the European Union (ECJ) was delivering its judgment in a vigorously contested trade mark infringement suit brought by the world's largest cosmetics and beauty products company against the world's largest internet auction and sales host, I at first assumed that I would be writing a commentary on the substantive law, explaining how it would affect that relative positions of trade mark owners, sellers of genuine and infringing goods bearing their trade marks, internet service providers and consumers. As it turns out, there is no real need to do so. The judgment reiterated both the existence of a privileged immunity from liability of internet service suppliers and the conditions which they must fulfil in order to enjoy that immunity; it confirmed the jurisprudence relating to trade mark infringement which it has articulated in a series of decisions stretching back to its Google France rulings in March 2010 (16 months is a long time in internet law; this ruling now seems to belong to the distant past); it also left a set of answers shorter and easier to understand than the raft of questions on which it was asked to give its preliminary ruling.

The really interesting thing about this case is not the ruling but the circumstances in which businesses trade. Non-European readers of this journal may need a short explanation of the role of the ECJ in the field of intellectual property. European Union law on trade marks, copyright, database rights, designs and plant varieties is largely harmonized between the 27 formerly autonomous countries of the Union. To ensure consistency as between those countries in the application of harmonized IP rules, national courts may refer questions regarding ambiguities and uncertainties inherent in those rules to the ECJ for a preliminary ruling. Once that ruling is given, the national court which referred the questions now has its answers and can get on with judging the dispute before it. Additionally, in the case of pan-European rights such as the Community trade mark and registered Community designs, the ECJ serves as a top-tier court of appeal: this function is exercised in respect of both procedural and substantive law.

As a system, the referral of questions for a response works well in theory. ECJ rulings are binding on all national courts, inferior Community courts and tribunals. They ensure that, as far as possible, the same rules are interpreted and therefore applied consistently across a vast, multilingual and multicultural single market. But does the theory work in practice?

The reference of questions for preliminary rulings is not a novel notion, dating back to the ECJ’s foundation in 1952. In that year, postwar Europe was still striving to rebuild shattered local and national economies. The creation of a single market consisting of even the original six countries—only three of which were of any real size—was an almost unimaginably ambitious goal, a far cry from the global markets for goods and services we take for granted today. Never mind computers: most households didn’t even have a telephone or a refrigerator. It was a slow-moving world by modern standards. It was a world in which the interruption of litigation for around two years (the average time now taken for a preliminary ruling to be delivered) was, if not welcomed, certainly tolerated.

Fast-forward to 2011 and globalisation—though still far from uniform—has become the accepted means of implementing business strategies, not least through the internet. When enterprises like L’Oréal and eBay trade, their daily turnover is vast (at the outbreak of their dispute, L’Oréal’s annual sales were a little short of US$20 billion; those of eBay were ‘only’ US$ 7.7 billion). What is more, this litigation was viewed by many as a test case since L’Oréal was by no means the only company that considered eBay was not taking adequate care to avoid infringing sales, and eBay is certainly not the only company hosting online sales, as the emergence and rapid growth of Alibaba has shown.

When all the other questions are answered, one remains. Should the ECJ’s procedures be amended to provide a truly rapid response when legal issues arise, or is it better to let the parties adjust their commercial activities to lessen the risk of disaster in a market in which, two years down the line, they may be either the substantial winners or the losers in the wake of a ruling which they can seek to influence but cannot control?