Verein gegen Unwesen In Handel und Gewerbe Köln eV v. Mars GmbH (Case C-470/93)

Before the Court of Justice of the European Communities (5th Chamber)

ECJ (5th Chamber)

(Presiding, Gulmann P.C. (Rapporteur); Jann, Moitinho de Almeida, Edward and Sevón JJ.) Mr Philippe Léger, Advocate General.

6 July 1995

Reference from Germany by the Landgericht Köln (Regional Court, Cologne), under Article 177 EEC.

Provision considered:
EEC 30

Free movement of goods. Inter-state trade. Packaging.

In the absence of harmonised legislation, Article 30 EEC prohibits national measures, such as those which bar retail price fixing in order to promote price competition, from being so applied as to restrict or prohibit, by reason of their packaging or presentation, the marketing of goods coming from other Member States, even if those rules apply without distinction to both national and imported products. [12]
Procureur du Roi v. Dassonville (8/74): [1974] E.C.R. 837, [1974] 2 C.M.L.R. 436; Keck and Mithouard (C 267-268/91): [1993] I E.C.R. 6097, [1995] 1 C.M.L.R. 101, followed.

Imports. Regulation of trade. Packaging.

Where the packaging of goods indicates a promotional increase in the quantity of the goods contained, the mere possibility that importers and retailers might increase the price of the goods and that consequently consumers might misassume that the price previously charged is being maintained is insufficient to justify a general prohibition *2 which may hinder intra-Community trade. This, in

any case, does not prevent Member States from taking appropriate steps against duly proved actions which have the effect of misleading consumers. [19]

Imports. Regulation of trade. Packaging. Consumer protection.

Where an increase in the quantity of a product is advertised by means of a band on the packaging which is considerably greater in percentage surface area than the percentage increase in the product itself, it is reasonable to assume sufficient circumspection in the consumer not to be misled into expecting an increase larger than that represented. The disparity does not, therefore, justify an import restriction. [22]-[24]
The Court *interpreted* Article 30 EEC *in the context of* German law prohibiting retail price fixing and the use of misleading information, D marketing in Germany a range of ice-cream bars, lawfully produced in France, whose packaging bore a band accurately announcing "+10%", *to the effect that* the general restriction of such imports on the basis of the practice of freedom of retail trade was disproportionate to the objective of consumer protection pleaded as a justifiable derogation from Article 30 EEC because (a) the objective could be met through less restrictive measures based on due proof rather than mere possibility, and (b) consumers were in general not so gullible as suggested by the plaintiff, and so *that* the marketing of the French ice-cream bars in that packaging was protected by Article 30.

Representation

Jochim Sedemund, of the Cologne Bar, for the defendant.
Richard Wainwright, Principal Legal Adviser, and A. Bardenhewer, for the E.C. Commission, as *amicus curiae*.

The following cases were referred to in the judgment:
1. Procureur du Roi v. Dassonville S.A. ETS Pourcroy and S.A. Breuval et Cie (8/74), 11 July 1974: [1974] E.C.R. 837, [1974] 2 C.M.L.R. 436.
2. Keck and Mithouard (C 267-268/91), 24 November 1993: [1993] I E.C.R. 6097, [1995] 1 C.M.L.R. 101.
3. Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (120/78), 20 February 1979: [1979] E.C.R. 649, [1979] 3 C.M.L.R. 494.
4. Pall Corporation v. P.J. Dahlhausen & Co. (C-238/89), 13 December 1990: [1990] I E.C.R. 4827.
5. Schutzverband gegen Unwesen In der Wirtschaft eV v. Yves Rocher GmbH (C-126/91), 30 April 1991: [1993] I E.C.R. 2361.

The following further cases were referred to by the Advocate General:
*3 1. Hünermund & Others v. Landesapothekerkammer Baden Württemberg (C-292/92), 14 May 1992: [1992] I E.C.R. 6787.
2. Punto Casa SpA v. Sindaco del Comune di Capena (C 69 & 258/93), 2 June

1994: [1993] I E.C.R. 2355.
3. Tankstation 't Heukske VOF & J.B.E. Boermans (C 401-402/92), 2 June 1994: [1994] I E.C.R. 2199.
4. Fietje (27/80), 16 December 1980: [1980] E.C.R. 3839, [1981] 3 C.M.L.R. 722.
5. Officier Van Justitie v. de Kik Vorsch Groothandel-Import-Export BV (94/82), 22 March 1982: [1983] E.C.R. 947, [1994] 2 C.M.L.R. 323.
6. Verband Sozialer Wettbewerb eV v. Clinique Laboratoires SNC & Estee Lauder Cosmetics GmbH (C-315/92), 2 February 1994: [1994] I E.C.R. 317.
7. Oosthoek's Uitgeversmaatschappij BV (286/81), 15 December 1982: [1982] E.C.R. 4575, [1983] 3 C.M.L.R. 428.
8. Buët v. Ministere Public (382/87), 16 May 1989: [1989] E.C.R. 1235, [1993] 3 C.M.L.R. 659.
9. GB-INNO-BM (Company) v. Confederation du Commerce Luxembourgeois Asbl (362/88), 7 March 1990: [1990] I E.C.R. 667, [1991] 2 C.M.L.R. 801.
10. Aragonesa de Publicidad Exterior SA and Publivia SAE v. Departamento de Sanidad Y Securidad Social de la Generalitat de Cataluña (C 1 & 76/90), 25 July 1991: [1991] I E.C.R. 4151, [1994] 1 C.M.L.R. 887.
11. Complaint against X (C-373/90), 16 January 1992: [1992] I E.C.R. 131.

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Opinion of the Advocate General (M Philippe Léger)

1. Since delivery of the judgment in the Keck case on 24 November 1993 [FN1] national rules applicable without distinction "... restricting or prohibiting certain selling arrangements ..." do not constitute measures having an effect equivalent to quantitative restrictions within the meaning of the Dassonville judgment, [FN2] "... so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States". [FN3] On the other hand, rules making the marketing of *4 products subject to certain conditions (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) are covered by Article 30 E.C. Treaty. [FN4]

FN1 Joined Cases C 267-268/91, Keck and Mithouard: [1993] I E.C.R. 6097, [1995] 1 C.M.L.R. 101.

FN2 Case 8/74, Dassonville: [1974] E.C.R. 837, [1974] 2 C.M.L.R. 436, para. [5].

FN3 Para. [16].

FN4 Para. [15].

2. What is meant by the term "selling arrangement"?
3. Does it cover rules regulating advertising? Do rules relating to advertising on

the packaging of marketed products concern a product characteristic as referred to in paragraph [15] of the Keck judgment or a selling arrangement within the meaning of paragraph [16] of that judgment?
4. In his Opinion in the Hünermund case, [FN5] Tesauro, A.G. felt that this distinction, applied to the field of advertising, would give rise to difficulties of interpretation which could only be resolved case by case. [FN6]

FN5 Case C-292/92, Hünermund and Others v. Landesapothekerkammer Baden-Württemberg: [1993] I E.C.R. 6787.

FN6 Paras. 22 and 24 of the Opinion. See also Stuyck, J.: Note on the Keck Judgment In Cahiers de Droit Européen, [1994] Nos 3-4, pp. 431 & 451.

5. The question referred to the Court by the Landgericht Köln is an illustration of this.
6. The Mars company markets in Germany ice-cream bars of the Mars, Snickers, Bounty and Milky Way brands which it imports from France where they are lawfully produced and packaged with uniform presentation for distribution throughout Europe.
7. The packaging is marked "+10%".
8. The Verein gegen Unwesen in Handel und Gewerbe (Association against Improper Practices in Trade and Businesses) is seeking an injunction against the Mars company pursuant to section 3 of the Gesetz gegen den unlauteren Wettbewerb (Act on Unfair Competition, hereinafter "the UWG"), which provides that:
Whoever in commercial transactions for the purposes of competition gives misleading information about, in particular, the quality, origin, method of manufacture or price calculation of specific goods ... or of the whole offer, or about price lists, the nature or source of the supply of goods ... or about the reason or purpose of the sale, or about the quantity of stocks held may be restrained by action from continuing to provide such information.
9. It bases its action on two grounds:
1) that that presentation is liable to mislead consumers who would expect the price at which the goods are offered to be the same as that under the old presentation;
2) that the "+10%" marking gives the impression that the product has been increased by a quantity corresponding to the coloured part of the new packaging. The visual highlighting of the "+10%" marking is much greater than the increase in volume which it represents.
10. The question referred by the Landgericht Köln is whether, where "ice-cream snacks" lawfully produced and marketed in a Member *5 State in the presentation described in the application, the principle of the free movement of goods allows those products to be prohibited from being marketed in that presentation in another Member State on the two grounds raised by the plaintiff association.
11. I will consider two points in turn. Does a prohibition of marketing of ice-cream

bars bearing the promotional marking "+10% ice-cream" on their wrappers constitute an obstacle to trade between Member States and does it fall within the scope of application of Article 30 of the Treaty? If this is the case, is such a prohibition justified on the grounds advanced by the plaintiff association?

I --The scope of application of Article 30 of the Treaty

12. Section 3 of the UWG is a rule which is applicable without distinction to national and imported products alike. It allows a prohibition to be imposed on the marketing in Germany of ice-cream bars bearing the advertising which I have mentioned.
13. Does that prohibition relate to the *characteristics of the product,* within the meaning of paragraph [15] of the Keck judgment, or to *selling arrangements* within the meaning of paragraph [16] of that judgment?
14. The first case, remember, concerns rules which, in the absence of harmonisation, require a product to have a certain presentation, a certain composition or certain intrinsic qualities which are different from those required in the Member State of origin.
15. By requiring an imported product to be repackaged or its substantive qualities to be modified in order for it to be sold in the State of importation, such rules constitute an obstacle to trade by making imports more costly or more difficult and therefore favouring, or creating a competitive advantage for, the domestic industry of that State.
16. In the second case, the national rules have no link with imports and apply to commercial activity in general. They affect imports only indirectly in that they may lead to a reduction or compression of sales but they do not affect the marketing of products from other Member States in a different way than the marketing of domestic products. They do not prevent their access to the market. They impede imports no more than they impede domestic products. I would refer, for example, to rules governing the opening of shops on Sunday. [FN7]

FN7 See Joined Cases C 68 & 258/93, Punto Casa and Ppv: [1994] I E.C.R. 2355.

17. Provisions on advertising are divided between the two cases. Whereas some rules have only an indirect link with free movement and escape the application of Article 30 of the Treaty, others are indissociable from the presentation of the product and are caught by that article.
18. The situation is this:
19. Some regulate commercial activity in general and have no link *6 with imports. *They do not prevent marketing of the product itself under a uniform presentation and with uniform characteristics--those imposed by the Member State of origin--throughout the Community.* They do not affect the functioning of the internal market. They reflect a political choice: what are the limits to be placed on advertising?
20. Thus, since the Keck judgment, the Court has held in its judgment in the Hünermund case, [FN8] that Article 30 of the Treaty does not apply to a rule of

professional conduct, laid down by the pharmacists' professional body in a Member State, which prohibits pharmacists from advertising pharmaceutical products outside the pharmacy. Such a rule constitutes a selling arrangement within the meaning of paragraph [16] of the Keck judgment in so far as "... the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products". [FN9]

FN8 Cited above.

FN9 Para. [21].

21. Similarly, the Court held, on the same grounds, [FN10] in its judgment of 9 February 1995 in Case C-142/93, Société d'Importation Édouard Leclerc-Siplec, [FN11] that the French decree which bans televised advertising in the distribution sector "... concerns selling arrangements since it prohibits a particular form of promotion (televised advertising) of a particular method of marketing products (distribution)". [FN12]

FN10 Para. [21].

FN11 Case C-412/93, not yet reported.

FN12 Para. [22] of the judgment.

22. Other rules on advertising, however, affect sales of imported products to a greater extent than sales of domestic products and are likely to impede intra-Community trade.
23. This is certainly the case with a prohibition of advertising appearing on product packaging. [FN13] First, the importer will be forced to modify the presentation, packaging and promotional markings appearing on the product in order to comply with the legislation of the State of importation, which will mean that he must bear additional costs which are not borne by the domestic producer in that State. Secondly, he will be obliged to arrange separate distribution channels and to make sure that products bearing the promotional words or marks in question are not marketed on the territory of the State in which the prohibition applies. [FN14]

FN13 See para. 20 of the Opinion of Van Gerven, A.G. in Joined Cases C 401-402/92, Tankstation 't Heukske and Boermans: [1994] I E.C.R. 2199.

FN14 See, by analogy, para. [13] in Case-238/89, Pall: [1990] I E.C.R. 4827.

24. Even in the case law prior to the Keck judgment the principle was clearly laid down that the obligation to mark a product with information, in so far as it might

require the manufacturer or the importer to alter the product's presentation, is apt to make the *7 marketing of the product in certain Member States more difficult and therefore has a restrictive effect on trade. [FN15]

FN15 Case 27/80, Fietje: [1980] E.C.R. 3839, [1981] 3 C.M.L.R. 722, para. [10], and Case 94/82, Kikvorsch: [1983] E.C.R. 947, para. [10].

25. In its judgment in the Pall case, [FN16] the Court held that a prohibition in a Member State against using the symbol (R) beside the trade mark in order to indicate that the trade mark was registered constituted an obstacle "... because it can force the proprietor of a trade mark that has been registered in only one Member State to change the presentation of his products according to the place where it is proposed to market them and to set up separate distribution channels in order to ensure that products bearing the symbol (R) are not in circulation in the territory of Member States which have imposed the prohibition at issue". [FN17]

FN16 Cited above.

FN17 Para. [13].

26. Recently, in its judgment in the "Clinique" case, [FN18] the Court held that the name of a product is one of its characteristics within the meaning of paragraph [15] of the Keck judgment. A prohibition of using in the State of importation a name which is lawful in the State of origin constitutes an obstacle to intra-Community trade. The Court held in fact that:
The fact that by reason of that prohibition the undertaking in question is obliged in that Member State alone to market its products under a different name and to bear additional packaging and *advertising* costs demonstrates that this measure does affect free trade. [FN19]

FN18 Case C-315/92, Verband Sozialer Wettbewerb eV v. Clinique Laboratoire SNC and Estée Lauder Cosmetics GmbH: [1994] I E.C.R. 317.

FN19 *ibid,* para. [19], my emphasis.

27. The Court went on to conclude that Articles 30 and 36 of the E.C. Treaty and Article 6(2) of Council Directive 76/768, [FN20] precludes a national measure which prohibits the importation and marketing of a product classified and presented as a cosmetic on the ground that the product bears the name "Clinique".

FN20 Directive 76/768 on the approximation of the laws of the Member States relating to cosmetic products ([1976] O.J. L262/169).

28. The Pall and "Clinique" cases concerned prohibitions of distribution-- based,

as in our case, on the UWG--*owing to the different presentation of the products.* [FN21] This is also so in the present case. The "+10% ice-cream" marking is both informative and promotional. It appears on the packaging of the product itself. Some of the wrappers at issue in the main proceedings are printed in five languages. There is therefore no special packaging for the German market. It is only if the "+10%" marking is prohibited by the German legislation that special wrapping for that State is required. [FN22] Prohibiting such a marking would therefore mean that the product *8 would have to be repackaged and specific packaging and promotional markings used for Germany. The impediment to trade is therefore obvious.

FN21 See the Commission's observations, p. 7 of the French translation.

FN22 On this point, see the defendant's observations, para. I-1.

29. As one can see, not all rules governing advertising are to be put in the category of those concerning selling arrangements. One can therefore understand why the Keck judgment excludes only *certain* selling arrangements from the scope of Article 30.
30. The distinction made in the Keck judgment strikes down the formula which the Court had applied to many sets of national rules governing advertising:
The possibility cannot be ruled out that to compel a producer either to adopt advertising or sales promotion schemes which differ from one Member State to another or to discontinue a scheme which he considers to be particularly effective may constitute an obstacle to imports even if the legislation in question applies to domestic products and imported products without distinction. [FN23]

FN23 Para. [15] in Case 286/81, Oosthoek: [1982] E.C.R. 4575, [1983] 3 C.M.L.R. 428 on the prohibition of offering goods for sale with free gifts. See also Case 382/87, Buet and Ebs: [1989] E.C.R. 1235, [1993] 3 C.M.L.R. 659 on the banning of doorstep selling of educational material; para. [7] in Case C-362/88, GB-INNO-BM: [1990] I E.C.R. 667, [1991] 2 C.M.L.R. 801; para. [10] in Joined Cases C 1 & 176/90, Aragonesa de Publicidad Exterior et Publivia: [1991] I E.C.R. 4151, [1994] 1 C.M.L.R. 887 and para. [10] of the judgment in Case C-126/91, Yves Rocher: [1993] I E.C.R. 2361.

31. That very broad formulation has certainly allowed rules on selling arrangements which, under paragraph [16] of the Keck judgment, now fall outside the ambit of Article 30 of the Treaty, to be caught by that article.

II --The grounds of justification

32. The Court has consistently held that:
... in the absence of common rules relating to marketing, obstacles to the free movement of goods within the Community resulting from disparities between national laws must be accepted in so far as such rules, applicable to domestic and imported products without distinction, may be justified as being necessary in

order to satisfy mandatory requirements relating *inter alia* to consumer protection or the fairness of commercial transactions. [FN24]and Para. [10] In the GB-INNO-BM Case, Cited Above

FN24 Para. [12] of the judgment in the Yves Rocher case, cited above. See also para. [8] in the "Cassis de Dijon" case, Case 120/78: [1979] E.C.R. 649 .

33. Those mandatory requirements may be accepted only if two conditions are met: the rules in question must be proportional to the aim in view [FN25] and that aim must be incapable of being achieved by measures less restrictive of intra-Community trade. [FN26]

FN25 Judgment in the Buet and Ebs case, cited above.

FN26 Judgment in the Cassis de Dijon case, cited above. See also para. [12] in the Pall case, cited above.

34. The prohibition in question would be justified on two grounds.
*9 35. First, the "+10% ice-cream" marking would mislead the consumer who might reasonably believe that the price has remained the same in spite of the increase in the quantity for sale, in short that there would be an improvement in the "quantity/price" relationship, which would explain the promotional campaign launched by Mars.
36. Secondly, the consumer would be deceived by the dimensions of the band marked "+10% ice-cream", which covers more than 10 per cent. of the total surface of the wrapper.
37. Let us examine those two points in turn.

A

38. First, the national court considers that such a promotional offer makes sense only if it is *not* accompanied by a price increase. Such a promotion would have no point if the increase in volume were to entail a proportionate increase in price: "... die nur geringfügig geändert Rezeptur (ist) bei höherem Preis nichts Besonderes ...". [FN27] The promotion can only be explained if, for the same price, the quantity is greater.

FN27 Order of the Landgericht Köln, p. 4.

39. It is not disputed that the defendant company did not take advantage of the promotional campaign in order to increase the sale price. [FN28] There is no indication of the attitude adopted by retailers in this instance.

FN28 *ibid,* p. 13 of the French translation.

40. The national court examined the association which the consumer might make between that marking--which relates only to quantity--and the price and

concluded that the consumer would expect the price to be unchanged. This means that there are two alternative situations:
41. If the retailer increases the price, the consumer could, in the national court's view, be the victim of deception within the meaning of section 3 of the UWG.
42. If the retailer does not increase his price, the offer meets the consumer's expectation and no deception can be identified. However, a question would arise concerning the application of section 15 of the Gesetz gegen Wettbewerbsbeschränkungen (Act against restraints of competition, hereinafter "GWB"), which prohibits manufacturers from imposing prices on retailers. Such a lack of price competition would be contrary to German competition law.
43. Let's consider those two points.
44. a) Where either the producer or the retailer puts up the price when the quantity offered is increased, there is deception or a risk of deception only if the promotional marking in question misleads the consumer and affects his behaviour. *It must be stated here that the* "*+10%*" *marking indicates an increase in volume in relation to the old presentation and is not indicative as to price: there is no indication *10 anywhere of* "*+10% more product for the same price as the old price*". *There is no argument that the promotional marking in question is objectively true.* Consequently, I see neither deception nor the risk of deception here. However, the national court believes that it has shown that a significant number of consumers affected by such an offer will buy the products concerned only because they are convinced that they will get 10 per cent. more product for the same price. Investigating that question would require an assessment of consumer behaviour which, in my view, only the national court is competent to carry out. [FN29]

FN29 See, for a case where reference was made to the national court, para. [15] in Case C-373/90, Complaint against X: [1992] I E.C.R. 131.

45. b) Whether section 15 of the GWB is applicable here and whether the sale of ice-cream bars in the presentation in question entails an obligation-- and not merely an incentive--for the retailer not to alter his prices or constitutes an *agreement* restricting his freedom to set prices requires an interpretation of national law and is a matter exclusively for the national court's assessment.
46. If the conditions for the application of that provision were to be met, it would have to be accepted that the marketing of ice-cream bars in the presentation in question on German territory would constitute an infringement of the principle of the retailer's freedom to set prices laid down in German law.
47. Is it possible in the name of that principle--whose purpose is in particular to guarantee genuine price competition for consumers--and therefore in the name of the overriding requirement to protect consumers, to impede trade exchanges?
48. I do not see how one could regard that principle as justifying such an obstacle when the retailer's obligation not to alter his prices prevents any price increase and *in the present case* is therefore *favourable* to the consumer.

B

49. Secondly, it is argued that this prohibition is justified because the "+10% ice-cream" marking--which occupies a quarter of the wrapper--would mislead the consumer who would have the impression that the increase is bigger than that advertised.
50. I am not convinced of this, for the following reasons.
51. First of all, the "+10% ice-cream" marking is accurate. The Court considers that national rules prohibiting misleading advertising are incompatible with the principle of the free movement of goods when they apply to true statements which correspond to reality. [FN30]

FN30 Case C-373/90, Complaint against X, cited above, para. [17], and Case C-126/91, Yves Rocher, cited above, para. [17].

52. Secondly, the argument put forward by the plaintiff in the main proceedings is based on the *assumption* that when seeing that marking the consumer would overestimate the real increase in volume or weight. According to the Landgericht Köln, "... a not inconsiderable *11 number of consumers will gain the impression from the visual presentation ... that the coloured portion of the packaging marked 'new' indicates the weight or volume increase of the product". [FN31]

FN31 Order of the Landgericht, last page of the German text.

53. However, it has not been demonstrated at all that consumers showing normal care consistently make a connection between the size of the promotional markings or statements relating to an increase in the quantity offered and the size of that increase. In this regard, I share the Commission's view:
... it must also be clear to a careful consumer that a certain amount of exaggeration is inherent in any promotion of a product. [FN32]

FN32 Commission observations, p. 12 of the French text.

54. May, for that matter, the national rules require the promotional marking to be "calibrated" to the exact percentage of the increase? Must the width of the band indicating 10 per cent. more ice-cream be 10 per cent. of the total length of the wrapper? To me, that seems too demanding. Taken to the extreme, it would mean that a marking indicating a 5 per cent. increase would not have to exceed 5 per cent. of the length of the wrapper and would consequently become unreadable.
55. In any event, a total ban on advertising of that kind is disproportionate and cannot be justified on grounds of the protection of consumers.
56. Finally, whilst the "+10%" marking is promotional, it also contains *information* intended for the consumer. In its judgment in the GN-INNO-BM case, [FN33] the Court held that "... under Community law concerning consumer protection the provision of information to the consumer is considered one of the principal requirements. Thus Article 30 cannot be interpreted as meaning that national

legislation which denies the consumer access to certain kinds of information may be justified by mandatory requirements concerning consumer protection". [FN34]

FN33 Cited above.

FN34 Para. [18].

57. I would make one last observation on the application of secondary law.
58. It must be the case that once a prohibition is not justified by overriding requirements relating to consumer protection and fair trading, it cannot have any basis in Council Directive 84/450 of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising [FN35] either. According to the settled case law of the Court:
That directive confines itself to a partial harmonisation of the national laws on misleading advertising by establishing, firstly, minimum objective criteria for determining whether advertising is misleading, and, secondly, *12 minimum requirements for the means of affording protection against such advertising. [FN36]

FN35 [1994] O.J. L250/17.

FN36 Judgment in the Pall case, cited above, para. [22] and in the "Clinique" case, cited above, para. [10].

59. This is also the case with Council Directive 79/112 of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, [FN37] Article 2(1) of which lays down the general principle that purchasers are not to be misled about the characteristics of the foodstuff and, in particular, its quantity.

FN37 [1979] O.J. L33/1.

60. Consequently, I propose that the Court should rule:
Articles 30 and 36 of the E.C. Treaty are to be interpreted as precluding a national measure from prohibiting the importation and marketing of the product "ice-cream snack" when it bears on its packaging the marking "+10% ice-cream", unless it is shown before the national court that such a presentation, even when the price has been increased, would lead to confusion in the mind of the consumer who would expect the price at which the goods are offered to be the same as that at which they were offered under the old presentation.

JUDGMENT

[1] By order of 11 November 1993, received at the Court on 17 December 1993,

the Landgericht Köln (Regional Court, Cologne) referred to the Court for a preliminary ruling under Article 177 E.C. a question relating to the interpretation of Article 30 of that treaty.

[2] The question was raised in proceedings between an association for combatting unfair competition, the Verein gegen Unwesen in Handel und Gewerbe Köln eV, and Mars GmbH (hereafter "Mars") concerning the use of a certain presentation for the marketing of ice-cream bars of the Mars, Snickers, Bounty and Milky Way brands.

[3] Mars imports those goods from France where they are lawfully produced and packaged by an undertaking belonging to the American group, Mars Inc., McLean, in a uniform presentation for distribution throughout Europe.

[4] At the material time, the ice-cream bars were presented in wrappers marked "+10%". That presentation had been chosen as part of a short publicity campaign covering the whole of Europe during which the quantity of each product was increased by 10 per cent.

[5] Under section 1 of the Gesetz gegen unlauteren Wettbewerb (Act on Unfair Competition, hereafter "the UWG") proceedings may be brought in order to restrain improper competitive practices while under section 3 of that Act proceedings may be brought in order to restrain the use of misleading information. Furthermore, under section 15 of the Gesetz gegen Wettbewerbsbeschränkungen (Act on Restraints of Competition, hereafter "the GWB"), agreements *13 between undertakings restricting the freedom of one of the parties to fix prices in contracts concluded with third parties for the supply of goods are void.

[6] The plaintiff association brought proceedings under those provisions before the Landgericht Köln in order to prevent the "+10%" marking from being used in Germany.

[7] It contends first of all that the consumer is bound to assume that the advantage indicated by the "+10%" marking is granted without any price increase, since a product whose composition is only slightly changed and which is sold at a higher price offers no advantage. So, in order not to mislead the consumer, the retailer should maintain the final price previously charged. Since the marking in question was binding on the retail trade as regards the fixing of the price for sale to the ultimate consumer, it constituted a breach of section 15 of the GWB which had to be brought to an end in accordance with section 1 of the UWG.

[8] Secondly, the plaintiff in the main proceedings contends that the way in which the "+10%" marking was incorporated in the presentation gave the consumer the impression that the product had been increased by a quantity corresponding to the coloured part of the new wrapping. The coloured part occupied considerably more than 10 per cent. of the total surface area of the wrapping and this, in the plaintiff's view, was misleading and therefore contrary to section 3 of the UWG.

[9] In interlocutory proceedings the Landgericht Köln had, by order of 10 December 1992, granted an interim restraining order against the defendant. The Landgericht took the view that the presentations in question, conveying the idea that more of the product, negligible in quantitative terms, was being offered

without any increase in price, restricted freedom of retail trade in the matter of the fixing of prices.
[10] When it came to rule on the substance of the case, the Landgericht Köln decided to refer the following question to the Court:
Is it compatible with the principles of the free movement of goods to prohibit the marketing in a Member State of ice-cream snacks in a particular presentation which are produced in another Member State and lawfully marketed there in that same presentation, which is described in the application,
(1) on the ground that the (new) presentation is liable to give consumers the impression that the goods are offered for the same price as under the old presentation,
(2) on the ground that the visual presentation of the new feature "+10% ice-cream" gives consumers the impression that either the volume or the weight of the product has been considerably increased?

Applicability of Article 30 of the Treaty

[11] The first question to be examined is whether a prohibition of the marketing of goods bearing on their packaging a publicity marking *14 such as that in question in the main proceedings constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty.
[12] According to the case law of the Court, Article 30 is designed to prohibit any trading rules of Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (Case 8/74, Procureur du Roi v. Dassonville). [FN38] The Court has held that, in the absence of harmonisation of legislation, obstacles to the free movement of goods that are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods, such as those relating, for example, to their presentation, labelling and packaging, are prohibited by Article 30, even if those rules apply without distinction to national products and to imported products (Joined Cases C 267-268/81 Keck and Mithouard). [FN39]

FN38 [1974] E.C.R. 837, [1974] 2 C.M.L.R. 436, para. [5].

FN39 [1993] I E.C.R. 6097, para. [15].

[13] Although it applies to all products without distinction, a prohibition such as that in question in the main proceedings, which relates to the marketing in a Member State of products bearing the same publicity markings as those lawfully used in other Member States, is by nature such as to hinder intra-Community trade. It may compel the importer to adjust the presentation of his products according to the place where they are to be marketed and consequently to incur additional packaging and advertising costs.
[14] Such a prohibition therefore falls within the scope of Article 30 of the Treaty.

The grounds of justification relied on

[15] It is settled law that obstacles to intra-Community trade resulting from disparities between provisions of national law must be accepted in so far as such provisions may be justified as being necessary in order to satisfy overriding requirements relating, *inter alia*, to consumer protection and fair trading. However, in order to be permissible, such provisions must be proportionate to the objective pursued and that objective must be incapable of being achieved by measures which are less restrictive of intra-Community trade (Case 120/78, Rewezentral [FN40]; Case C-238/89, Pall [FN41] and Case C-126/91, Yves Rocher. [FN42]

FN40 [1979] E.C.R. 649, [1979] 3 C.M.L.R. 494.

FN41 [1990] I E.C.R. 4827, para. [12].

FN42 [1993] I E.C.R. 2361, para. [12].

[16] It is contended in the main proceedings that the prohibition is justified on two legal grounds, which are indicated in the first and second parts of the preliminary question.

*15 *The consumer's expectation that the price previously charged is being maintained*

[17] It is argued that the "+10%" marking may lead the consumer to think that the "new" product is being offered at a price identical to that at which the "old" product was sold.
[18] As the Advocate General points out in paragraphs 39 to 42 of his Opinion, on the assumption that the consumer expects the price to remain the same, the referring court considers that the consumer could be the victim of deception within the meaning of section 3 of the UWG and that if the price did not increase the offer would meet the consumer's expectation but then a question would arise concerning the application of section 15 of the GWB, which prohibits manufacturers from imposing prices on retailers.
[19] As regards the first possibility, it must be observed first of all that Mars has not actually profited from the promotional campaign in order to increase its sale prices and that there is no evidence that retailers have themselves increased their prices. In any case, the mere possibility that importers and retailers might increase the price of the goods and that consequently consumers may be deceived is not sufficient to justify a general prohibition which may hinder intra-Community trade. That fact does not prevent the Member States from taking action, by appropriate measures, against duly proved actions which have the effect of misleading consumers.
[20] As regards the second possibility, the principle of freedom of retail trade in the matter of the fixing of prices, provided for by a system of national law, and

intended in particular to guarantee the consumer genuine price competition, may not justify an obstacle to intra-Community trade such as that in question in the main proceedings. The constraint imposed on the retailer not to increase his prices is in fact favourable to the consumer. It does not arise from any contractual stipulation and has the effect of protecting the consumer from being misled in any way. It does not prevent retailers from continuing to charge different prices and applies only during the short duration of the publicity campaign in question.

The visual presentation of the "+10%" marking and its alleged misleading effect

[21] It is accepted by all the parties that the "+10%" marking is accurate in itself.
[22] However, it is contended that the measure in question is justified because a not insignificant number of consumers will be induced into believing, by the band bearing the "+10%" marking, which occupies more than 10 per cent. of the total surface area of the wrapping, that the increase is larger than that represented.
[23] Such a justification cannot be accepted.
[24] Reasonably circumspect consumers are supposed to know that *16 there is not necessarily a link between the size of publicity markings relating to an increase in a product's quantity and the size of that increase.
[25] The reply to the preliminary question must therefore be that Article 30 of the Treaty is to be interpreted as precluding a national measure from prohibiting the importation and marketing of a product lawfully marketed in another Member State, the quantity of which was increased during a short publicity campaign and the wrapping of which bears the marking "+10%",
(a) on the ground that that presentation may induce the consumer into thinking that the price of the goods offered is the same as that at which the goods had previously been sold in their old presentation,
(b) on the ground that the new presentation gives the impression to the consumer that the volume and weight of the product have been considerably increased.

Costs

[26] The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

Order

On those grounds, THE COURT (5th Chamber), in answer to the question referred to it by the Landgericht Köln, by order of 11 November 1993,
HEREBY RULES:
Article 30 E.C. is to be interpreted as precluding a national measure from

prohibiting the importation and marketing of a product lawfully marketed in another Member State, the quantity of which was increased during a short publicity campaign and the wrapping of which bears the marking "+10%",
(a) on the ground that that presentation may induce the consumer into thinking that the price of the goods offered is the same as that at which the goods had previously been sold in their old presentation,
(b) on the ground that the new presentation gives the impression to the consumer that the volume and the weight of the product have been considerably increased.

[1995] 3 C.M.L.R. 1

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