European Court of Justice, 2 February 1994, Clinique

CLINIQUE

ADVERTISING

Prohibition of the use of the name of a cosmetic product liable to mislead consumers not permitted

- **Articles 30 and 36 of the Treaty and Article 6(2) of the Directive on cosmetic products must be interpreted as precluding 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".**

In order to determine whether, in preventing a product being attributed with characteristics which it does not have, the prohibition of the use of the name "Clinique" for the marketing of cosmetic products in the Federal Republic of Germany can be justified by the objective of protecting consumers or the health of humans, it is necessary to take into account the information set out in the order of reference. In particular, it is apparent from that information that the range of cosmetic products manufactured by the Estée Lauder company is sold in the Federal Republic of Germany exclusively in perfumeries and cosmetic departments of large stores, and therefore none of those products is available in pharmacies. It is not disputed that those products are presented as cosmetic products and not as medicinal products. It is not suggested that, apart from the name of the products, this presentation does not comply with the rules applicable to cosmetic products. Finally, according to the very wording of the question referred, those products are ordinarily marketed in other countries under the name "Clinique" and the use of that name apparently does not mislead consumers. In the light of these facts, the prohibition of the use of that name in the Federal Republic of Germany does not appear necessary to satisfy the requirements of consumer protection and the health of humans. The clinical or medical connotations of the word "Clinique" are not sufficient to make that word so misleading as to justify the prohibition of its use on products marketed in the aforesaid circumstances.

The answer to the question referred to the Court must therefore be that Articles 30 and 36 of the Treaty and Article 6(2) of Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products must be interpreted as precluding 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".

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European Court of Justice, 2 February 1994

(J.C. Moitinho de Almeida, D.A.O. Edward, R. Joliet, G.C. Rodríguez Iglesias and F. Grévisse)

In Case C-315/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Landgericht Berlin for a preliminary ruling in the proceedings pending before that court between

Verband Sozialer Wettbewerb eV

and

1. Clinique Laboratories SNC
2. Estée Lauder Cosmetics GmbH

on the interpretation of Articles 30 and 36 of the EEC Treaty with regard to the prohibition of the use of the name of a cosmetic product liable to mislead consumers,

THE COURT (Fifth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, D.A.O. Edward, R. Joliet, G.C. Rodríguez Iglesias and F. Grévisse (Rapporteur), Judges,

Advocate General: C. Gulmann,

Registrar: H.A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Verband Sozialer Wettbewerb eV, the plaintiff in the main proceedings, by Manfred Burchert, Rechtsanwalt, Berlin,
- Clinique Laboratories SNC and Estée Lauder Cosmetics GmbH, the defendants in the main proceedings, by Kay Jacobsen, Rechtsanwalt, Berlin,
- the Government of the Federal Republic of Germany, by Alfred Dittrich, Regierungsdirektor at the Federal Ministry of Justice, Alexander von Muehlendahl, Ministerialrat in the Federal Ministry of Justice, and Claus-Dieter Quassowski, Regierungsdirektor at the Federal Ministry of Economic Affairs, acting as Agents,
- the Commission of the European Communities, by Richard Wainwright, Legal Adviser, and Angela Bardenhewer, a member of the Commission' s Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the plaintiff and defendants in the main proceedings, the German Government and the Commission at the hearing on 15 July 1993,

after hearing the **Opinion of the Advocate General** at the sitting on 29 September 1993,

gives the following

Judgment

1 By order of 30 June 1992, which was received at the Court on 22 July 1992, the Landgericht (Regional Court) Berlin referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 30 and 36 of that Treaty.

2 That question was raised in proceedings between a trade association, the Verband Sozialer Wettbewerb eV, and the companies Clinique Laboratories SNC and Estée Lauder Cosmetics GmbH concerning the use of

the name "Clinique" for the marketing of cosmetic products in the Federal Republic of Germany.
3 Those companies are, respectively, the French and German subsidiaries of the United States company Estée Lauder and market cosmetics manufactured by that company. Those products have been sold for many years under the name "Clinique" except in the Federal Republic of Germany, where they have been marketed, since their launch in 1972, under the name "Linique". With a view to reducing packaging and advertising costs arising from this difference in names, the company decided to market the products intended for the German market under the name "Clinique".
4 Under Paragraph 3 of the German Gesetz gegen den unlauterern Wettbewerb (Law against Unfair Competition) ("UWG") of 7 June 1909, as amended, certain categories of persons referred to in Paragraph 13(2) thereof may bring proceedings to stop the use of misleading information. Paragraph 27 of the Lebensmittel- und Bedarfsgegenstaendegesetz (Law on Foodstuffs and Consumer Items) ("LMBG") of 15 August 1974, as amended, prohibits the marketing of cosmetic products using misleading names or packaging and, in particular, the attribution to such products of properties which they do not possess.
5 The plaintiff in the main proceedings brought an action under Paragraph 3 of the UWG and Paragraph 27 of the LMBG seeking to stop the use in the Federal Republic of Germany of the name "Clinique" on the ground that that name could mislead consumers into believing that the products in question had medicinal properties.
6 The Landgericht Berlin, before which the case was brought, considered as a preparatory measure commissioning a market research survey to determine whether such a name would in fact mislead a significant proportion of consumers. However, it took the view that such an inquiry would serve no purpose if, as the defendants in the main proceedings argued, the prohibition of the name in question amounted to an unlawful restriction of intra-Community trade. That court considered that the latter issue necessitated an interpretation of the EEC Treaty and consequently referred the following question to the Court for a preliminary ruling:
"Are Articles 30 and 36 of the EEC Treaty to be interpreted as precluding the application of a national provision on unfair competition under which the importation and marketing of a cosmetic product which has been lawfully manufactured and/or lawfully marketed in another European country may be prohibited on the ground that consumers would be misled by the product name - Clinique - in that they would take it to be a medicinal product, where that product is lawfully marketed without any objection under that name in other countries of the European Community?"
7 It should be noted at the outset that the Court, which is competent under Article 177 of the Treaty to provide courts of the Member States with all the elements of interpretation of Community law, may deem it necessary to consider provisions of Community law to which the national court has not referred in its question (judgment in Case C-241/89 SARPP v Chambre Syndicale des Raffineurs et Conditionneurs de Sucre de France [1990] ECR I-4695, paragraph 8). It is therefore necessary to determine which provisions of Community law are applicable to the main proceedings in this case before examining whether those provisions preclude the use of the name "Clinique" in the circumstances described by the national court.
8 It appears from the case-file that the national provisions at issue, that is to say, Paragraph 3 of the UWG and Paragraph 27 of the LMBG, correspond to certain provisions in the Community directives on the approximation of the laws of the Member States concerning misleading advertising and cosmetic products.
9 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 (Official Journal 1984 L 250, p. 17) is designed to protect consumers, competitors and the public in general against misleading advertising and the unfair consequences thereof.
10 As the Court has already held, that directive confines itself to a partial harmonization of the national laws on misleading advertising by establishing minimum objective criteria for determining whether advertising is misleading and minimum requirements for the means of affording protection against such advertising (judgment in Case C-238/89 Pall Corp. v P.J. Dahlhausen [1990] ECR I-4827, paragraph 22).
11 Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products (Official Journal 1976 L 262, p. 169), on the other hand, has, as already held by the Court, provided exhaustively for the harmonization of national rules on the packaging and labelling of cosmetic products (**judgment in Case C-150/88 Parfuemerie-Fabrik 4711 v Provide [1989] ECR 3891, paragraph 28**).
12 As the Commission has correctly pointed out, however, that directive must, like all secondary legislation, be interpreted in the light of the Treaty rules on the free movement of goods (see, in particular, the judgment in Case C-47/90 Delhaize and Le Lion v Promalvin and AGE Bodegas Unidas [1992] ECR I-3669, paragraph 26).
13 In that connection, the Court has recently ruled that Article 30 of the Treaty prohibits obstacles to the free movement of goods resulting from rules that lay down requirements to be met by such goods (such as requirements as to designation, form, size, weight, composition, presentation, labelling, packaging), even if those rules apply without distinction to all products, unless their application can be justified by a public-interest objective taking precedence over the free movement of goods (judgment of 24 November 1993 in Joined Cases C-267/91 and C-268/91 Keck and Mithouard, paragraph 15).
14 The rules contained in Directive 76/768 include the obligation set out in Article 6(2) (which was transposed in German law by Paragraph 27 of the LMBG), which

requires Member States to take "all measures necessary to ensure that in the labelling, presentation for sale and advertising of cosmetic products, the wording, use of names, trade marks, images or other signs, figurative or otherwise, suggesting a characteristic which the products in question do not possess, shall be prohibited".

15 Article 6(2), which is contained in a directive designed, as is plain in particular from the second and third recitals in its preamble, to ensure free trade in cosmetic products, thus defines the measures to be taken in the interests of consumer protection and fairness of commercial transactions, which are included among the imperative requirements specified in the case-law of the Court in the context of the application of Article 30 of the Treaty. It also pursues the objective of protecting the health of humans, within the meaning of Article 36 of the Treaty, in so far as misleading information as to the characteristics of such products may have an effect on public health.

16 It should also be recalled that the Court has consistently held that rules must be proportionate to the goals pursued (see, in particular, the judgment in Case 382/87 Buet v Ministère Public [1989] ECR 1235, paragraph 11).

17 The German legislation which transposed Article 6(2) of Directive 76/768 must in its application be consistent with Articles 30 and 36 of the Treaty, as interpreted in the Court' s case-law. In order to reply to the national court' s question, it is necessary to determine in the light of the criteria set out in that case-law whether Community law precludes the prohibition referred to in that question.

18 The Court has already ruled that a prohibition, justified under Paragraph 3 of the UWG, on placing in circulation in the Federal Republic of Germany products the name of which is followed by the symbol (R) to indicate that it is a registered trade mark, even though the mark is not protected in that State, is capable of impeding intra-Community trade. Such a prohibition 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 (judgment in Pall, cited above, paragraph 13).

19 The prohibition also under Paragraph 3 of the UWG of the distribution within the Federal Republic of Germany of cosmetic products under the same name as that under which they are marketed in the other Member States constitutes in principle such an obstacle to intra-Community trade. 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.

20 In order to determine whether, in preventing a product being attributed with characteristics which it does not have, the prohibition of the use of the name "Clinique" for the marketing of cosmetic products in the Federal Republic of Germany can be justified by the objective of protecting consumers or the health of humans, it is necessary to take into account the information set out in the order of reference.

21 In particular, it is apparent from that information that the range of cosmetic products manufactured by the Estée Lauder company is sold in the Federal Republic of Germany exclusively in perfumeries and cosmetic departments of large stores, and therefore none of those products is available in pharmacies. It is not disputed that those products are presented as cosmetic products and not as medicinal products. It is not suggested that, apart from the name of the products, this presentation does not comply with the rules applicable to cosmetic products. Finally, according to the very wording of the question referred, those products are ordinarily marketed in other countries under the name "Clinique" and the use of that name apparently does not mislead consumers.

22 In the light of these facts, the prohibition of the use of that name in the Federal Republic of Germany does not appear necessary to satisfy the requirements of consumer protection and the health of humans.

23 The clinical or medical connotations of the word "Clinique" are not sufficient to make that word so misleading as to justify the prohibition of its use on products marketed in the aforesaid circumstances.

24 The answer to the question referred to the Court must therefore be that Articles 30 and 36 of the Treaty and Article 6(2) of Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products must be interpreted as precluding 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".

Costs

25 The costs incurred by the German Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, 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 (Fifth Chamber),

in answer to the question referred to it by the Landgericht Berlin, by order of 30 June 1992, hereby rules:

Articles 30 and 36 of the EEC Treaty and Article 6(2) of Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products must be interpreted as precluding 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".

Opinion of the Advocate-General

Mr President,

Members of the Court,

1. The Landgericht Berlin has referred to the Court for a preliminary ruling a question on the interpretation of Article 30 of the EEC Treaty. That question has arisen in proceedings between a German association which has standing to bring legal proceedings with a view to securing the enforcement of the German Law against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb) ("UWG") and the French and German subsidiaries of the United States company Estée Lauder.

2. The following facts emerge from the order making the reference:

- Estée Lauder produces a wide range of cosmetic products which are marketed under the name "Clinique";
- at the time when the products were launched in Europe at the beginning of the 1970s, Estée Lauder decided to market them in Germany under the name "Linique" "in view of the case-law on Paragraph 3 of the UWG (ban on misleading information)";
- the defendant subsidiaries now wish to market the products in Germany under the name "Clinique" since "because of that difference of name, difficulties arise with supplies to Germany from other countries and from Germany to other countries" and "the packaging and advertising costs occasioned by the different names are considerable";
- relying on Paragraph 3 of the UWG and Paragraph 27(1)(1) of the German Law on Foodstuffs and Consumer Items (Lebensmittel- und Bedarfsgegenstaendegesetz) ("LMBG"), which prohibits, inter alia, the provision of misleading information to consumers, the plaintiff claims that the defendants should be ordered not to sell their products under the name Clinique;
- the defendants have argued that a ban would make it impossible for them to import cosmetics manufactured under the Clinique name in England or Belgium and that such a ban would be contrary to Article 30 of the EEC Treaty;
- the national court takes the view that "the claims in the application are pertinent since it is possible that an appreciable proportion of the sector of the market concerned might attribute prophylactic or curative medical effects on the skin to the Clinique range of cosmetics";
- the national court takes the view that it may be necessary for "evidence thereof ... to be obtained by a market research survey commissioned by the court" and that "if it were to be confirmed that some 10 to 20% of consumers would be misled, it would be necessary to ban the use of the name Clinique";
- the abovementioned measure to determine whether consumers would be misled would be redundant if, as contended by the defendants, a ban would be contrary to Community law.

3. It was against that background that the Landgericht Berlin referred the following question for a preliminary ruling:

"Are Articles 30 and 36 of the EEC Treaty to be interpreted as precluding the application of a national provision on unfair competition under which the importation and marketing of a cosmetic product which has been lawfully manufactured and/or lawfully marketed in another European country may be prohibited on the ground that consumers would be misled by the product name - Clinique - in that they would take it to be a medicinal product, where that product is lawfully marketed without any objection under that name in other countries of the European Community?"

4. Paragraph 3 of the UWG provides that "Injunction proceedings may be brought against anyone who, in the course of trade and for purposes of competition, provides misleading information on, in particular, ..., with a view to securing an end to the dissemination of the information in question".

Paragraph 27 of the LMBG provides that "It is forbidden to sell cosmetic products under a misleading name or on the basis of misleading information ... Information is misleading in particular: (1) if effects are attributed to the cosmetic products which ... are supported by insufficient scientific evidence ...".

5. The plaintiff in the main proceedings argues that marketing of the products under the name Clinique would be contrary to those two provisions in so far as that name could mislead consumers into thinking that the products had medicinal effects. It points out that in German there is a similarity in sound between the words "Clinique" and "Klinik" and that the word "Klinik" in German unquestionably means a hospital. (1)

6. It may be noted that the provisions relied on by the plaintiff in the main proceedings are general clauses, which means that the specific content of the provisions has to be determined by case-law. On the basis of the UWG, which dates from 1909, there has arisen in Germany "within the parameters of the general clauses contained in Paragraphs 1 and 3 of the UWG, in an interplay between case-law and legal writing, a closely woven fabric of intersecting case situations which at least to some extent provide consumers, undertakings and society on the whole with legal certainty and leads to foreseeability in matters relating to competition". (2)

7. It is undoubtedly correct that judicial decisions in Germany have - in contrast to the position in most of the other Member States - contributed to the imposition of a relatively strict standard with regard to what constitutes misleading information and that this can be said to have secured a relatively high level of protection for the interests of consumers and others which the legislation is designed to protect. This applies not least in the context of information which may be regarded as unjustifiably attributing medicinal properties to products. (3)

8. The question referred concerns the interpretation of Article 30 of the EEC Treaty on the prohibition of

restrictions on intra-Community trade and the significance of that provision for the application to a specific case of the prohibition of misleading information laid down in the German legislation.

9. While the Court cannot, in proceedings for a preliminary ruling, take a position on how a national court should decide a particular case, it can provide that court with all appropriate material on the interpretation of Community law to enable it to determine, when giving its decision, whether the national provisions are compatible with Community law.

In order to give the national court the most appropriate answer, the Court can link the interpretation of Article 30 of the EEC Treaty closely to the specific facts of the case before the national court.

It is, however, necessary to bear in mind that the question in this case is not whether national legislation is generally compatible with Article 30; rather, the question concerns the application of national rules to a particular legal situation requiring a specific assessment of whether consumers are misled in the particular circumstances. It would in my opinion be wrong for the Court, in a case such as this, to link its interpretation of Article 30 too closely to the particular facts of the case. If it were to do so, it would be running the risk of interpreting Article 30 in the light of facts which have been inadequately clarified before it or of taking a position on the particular circumstances of the case, which is not its task but that of the national court. In addition, it would be beyond the capacity of the Court, through its interpretation of Article 30, to assume the task of ensuring a uniform application of general provisions such as those in this case. Under the system of the Treaty, that task devolves on the national courts, which are responsible for ensuring the correct application of Community law.

10. It is relevant to the decision in this case that the Council has adopted directives requiring Member States to introduce rules prohibiting misleading advertising.

One is Council Directive 84/450/EEC relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising. (4) Article 2 of that directive defines misleading advertising and is linked to Article 3, which provides that in determining whether advertising is misleading account must be taken of all its features. Article 4 requires Member States to ensure "that adequate and effective means exist for the control of misleading advertising in the interests of consumers as well as competitors and the general public". Finally, Article 7 provides that the directive does not preclude "Member States from retaining or adopting provisions with a view to ensuring more extensive protection for consumers".

Another is Council Directive 76/768/EEC on the approximation of the laws of the Member States relating to cosmetic products, (5) which, with the particular objective of ensuring free trade in those products, contains rules on their composition, labelling and packaging. Articles 6(2) and 7(1) of that directive, which are relevant to the present case, provide respectively as follows:

- "Member States shall take all measures necessary to ensure that in the labelling, presentation for sale and advertising of cosmetic products, the wording, use of names, trade marks, images or other signs, figurative or otherwise, suggesting a characteristic which the products in question do not possess, shall be prohibited", and
- "Member States may not, for reasons related to the requirements laid down in this Directive and the Annexes thereto, refuse, prohibit or restrict the marketing of any cosmetic products which comply with the requirements of this Directive and the Annexes thereto".

11. The German Government has pointed out that the provisions of those two directives have been implemented in German law by way of, inter alia, the above rules on misleading information, and that any prohibition under the German rules will be consistent with the directives. It argues in that connection that the question referred to the Court must be answered on the basis of the directives inasmuch as measures consistent with the directives cannot a priori infringe Article 30 of the EEC Treaty unless the Community rules in question are themselves at variance with Article 30.

12. That view, in my opinion, is incorrect. It oversimplifies the problem and fails to take proper account of the nature of the Community obligations which the two directives impose on Member States. Those obligations are couched in very general terms and require national legal systems to protect consumers and others against misleading information within specified areas. Thus, the directive on misleading advertising lays down only relatively vague criteria as to what constitutes misleading advertising. Moreover, the directive does not prevent Member States from imposing more stringent provisions. It is also important that the obligations under the directive should be interpreted in accordance with the requirements which flow from the Treaty rules on the free movement of goods.

13. The national court was in my opinion correct to ask the Court to interpret Article 30 of the EEC Treaty. (6)

14. The reply to the question in the reference must therefore be based on the established case-law of the Court with regard to that provision to the effect that:

- the prohibition covers "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade" and
- "obstacles to intra-Community trade resulting from disparities between provisions of national law must be accepted in so far as such provisions, applicable to domestic and to imported products without distinction, may be justified as necessary in order to satisfy imperative 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 not be capable of being achieved by

measures which are less restrictive of intra-Community trade". (7)
15. The order making the reference is based on the assumption, which in any event is undeniable, that a ban on the marketing in Germany of the cosmetic products in question under the name Clinique will in fact be restrictive of intra-Community trade.
16. It must also be assumed that if the ban is imposed, this will constitute an obstacle to intra-Community trade stemming from the application of national rules which apply to domestic and imported products without distinction.
17. As we know, the Court has also held that obstacles to trade can be justified on the grounds set out in Article 36 of the EEC Treaty or in the Court' s case-law only if common rules have not been laid down at Community level in the areas in question. (8)
As already mentioned, there are common rules relevant to the question referred in this case, but in my opinion they do not preclude justifying the present measure in restraint of trade on the basis of the so-called "rule of reason".
18. It might well be argued that the cosmetics directive, Article 6(2) of which requires all Member States to ensure that consumers are not misled and Article 7(1) of which requires Member States not to prohibit or restrict the marketing of products which comply with the requirements of the directive, has precisely the objective of harmonizing national requirements with regard to cosmetic products and therefore contains such common rules as, according to the Court' s case-law, preclude measures in restraint of trade from being regarded as justified. No such argument, however, is set out in any of the observations submitted to the Court. Nor, in my opinion, can it properly be argued that the fact that the products are lawfully marketed in other Member States under the name Clinique means that in Germany too they must be regarded as satisfying the requirement set out in Article 6(2) of the directive that products must not be attributed with characteristics which they do not possess. This follows already from the fact that there may exist in this field linguistic, cultural and social differences between the Member States which have the result that a name which is not misleading in one Member State may well be misleading in another.
19. The Community rules in this case do not therefore in my opinion preclude the possibility of justification. However, the significance of those provisions (and this is the real thrust of the abovementioned arguments of the German Government) is that they show that great importance is attached to the desire to protect consumers and others against misleading information in connection with the marketing of goods and services, not least where medicinal properties are attributed to products which do not have them. (9)
20. There has never been any doubt in the Court' s case-law that the desire to protect consumers and traders against unfair or misleading conduct on the part of undertakings marketing goods is one of the imperative requirements which can justify obstacles to the free movement of goods. (10)
There can also be no doubt that this argument for protection is of particular weight when the requirement arises in connection with the application of a ban on misleading information which also has a health-protection aspect, namely, the desire to prevent consumers attributing to products medicinal properties which they do not have.
21. A further requirement under the consistent case-law of the Court, however, is that application of the relevant national provisions must be essential to consumer protection, that it must be proportionate to the objective pursued and that that objective cannot be achieved by measures which are less restrictive of trade.
22. The Commission has argued that it is not necessary to prohibit the use of the name Clinique for the purposes of consumer protection and fair trading. In support of that argument, it has put forward the following points:
- The products in question are sold exclusively in perfumeries and the perfumery departments of large stores and as they are unavailable in pharmacies they cannot be assumed to give rise to medicinal associations.
- The name "Clinique" must be understood as the commercial name of the product. Since cosmetic products are sold as lipstick, mascara, face-cream, and so on, the labelling makes it clear to the consumer that the product in question is a cosmetic product.

- The presentation and content of the advertisements are typical for cosmetic products, including the information that the products have undergone dermatological or allergy tests.
23. I can see the cogency of the Commission' s argument based essentially on the view that there is not, on an overall assessment, a real risk that individuals will be misled and that it is therefore not imperative to prohibit the marketing of goods under the name Clinique.
24. It is none the less my view that it would be wrong to answer the question in the terms suggested by the Commission, to the effect that Article 30 must be interpreted as meaning that the imposition of a ban under Paragraph 3 of the UWG on the intended marketing would be incompatible with that article.
25. In the first place, such a reply to the question referred would overstep the boundaries of what in a case such as this is the Court' s task and what is the task of the national court in connection with the application of Community law to the case in hand (see point 9 above).
Secondly, it can be argued that the Commission fails to take sufficient account of the fact that the starting point, according to the case-law of the Court, is that it is for the individual Member States to decide the degree of protection they deem to be correct with a view to safeguarding the matters which under Article 36 of the Treaty and the Court' s case-law may properly be taken

into consideration by the Member States - even though the rules adopted may give rise to barriers to trade. (11)
It may be appropriate in this connection to refer to an argument submitted to the Court by the defendants in the main proceedings. They contended that nothing can justify the view expressed that German consumers require a greater level of protection than consumers in the other Member States. (12) It should be noted in this connection that, as just mentioned above, under Community law it is primarily a matter for national legislatures to determine the level of protection desired in each country. Moreover, as already mentioned, there may be specific differences in linguistic, social and cultural conditions which have the result that something which does not mislead consumers in one country may do so in another.
26. It is therefore in my opinion not possible in this case to state from the outset that a ban on the proposed marketing of the products would be unnecessary within the meaning of Article 30 to attain the level of protection intended under German law if the market research survey envisaged by the national court were to show that the specified percentage of German consumers would be misled as to the characteristics of the products in question.
27. A specific ban would also, in my opinion, not be contrary to the directive on misleading advertising. One reason is simply that the directive does not prevent the Member States from imposing a more stringent level of protection than that laid down in the directive. But I also do not consider that such a result would in principle be contrary to any of the specific minimum requirements which the directive imposes on the legislation of Member States. (13)
28. That does not, however, rule out the possibility that requirements may be derived from Community law for the application by the German courts of the prohibitions in the two national provisions on misleading information.
It is essential that national courts, when applying the law in specific cases, bear in mind the fundamental importance of the free movement of goods within Community law and that they should be aware (particularly in cases involving general provisions such as those material to the present case) that measures which constitute obstacles to trade will be lawful only if they are imperative and proportionate to the objective pursued and if that objective cannot be achieved by measures which are less restrictive of intra-Community trade.
It may also be appropriate in the present case to stress that proper application of Community law (including the directive on misleading advertising) requires that the appraisal be based on an overall assessment which takes account of all relevant factors including the circumstances in which the products are sold and the danger of persons being misled with regard to the consumer group concerned.
This, in my opinion, means inter alia that the national court making the reference should, when finally deciding whether a market research survey need be conducted at all and, if so, when commissioning it, take account of the factors to which the Commission has referred above.

Conclusion

29. On the basis of the above considerations, I propose that the Court reply to the question referred in the following terms:
Article 30 of the EEC Treaty must be interpreted as meaning that it does not in principle preclude the application of national provisions on unfair competition to prohibit the marketing of a cosmetic product on the ground that consumers might be misled by the name of the product into believing that the product has medicinal characteristics, even though the product is lawfully marketed in other Member States under the name in question.
The national court must, however, when applying national provisions, ensure that their application will not lead to obstacles to trade between Member States, unless that application is imperative for consumer protection and fair trading, and unless the measure chosen is proportionate to the objective pursued and that objective cannot be achieved by measures which are less restrictive of intra-Community trade.
The national court must also under Community law, when considering whether the national rules must be applied, base itself on an overall assessment which takes account of all relevant factors, including the circumstances in which the products are sold and the danger of persons being misled with regard to the consumer group concerned.

(*) Original language: Danish.

(1) - The plaintiff in the main proceedings refers in its written observations to the definition of the word Klinik in the Brockhaus Encyclopedia, 17th edition, and claims that in German the word Klinik is understood as referring to either a public or private hospital; the word Krankenhaus is normally used to refer to ordinary hospitals, whereas Klinik generally refers to a university hospital, that is to say, a hospital of a particularly high standard .

(2) - Dr H. Piper, President of the Bundesgerichtshof, Zu den Auswirkungen des EG-Binnenmarktes auf das deutsche Recht gegen den unlauteren Wettbewerb , Wettbewerb in Recht und Praxis, 11/92, p. 685.

(3) - The German Government has given an account of this case-law in its observations (see Part III of its observations).

(4) - OJ 1984 L 250, p. 17.

(5) - OJ 1976 L 262, p. 169.

(6) - The Court also dismissed a (at least in some respects) similar argument by the German Government in its judgment in Case C-238/89 Pall Corp. v P.J. Dahlhausen [1990] ECR I-4827, which concerned the legality of a ban imposed under Paragraph 3 of the UWG on the marketing of products bearing the symbol (R) next to the trade mark. The Court dismissed the German arguments based on the directive on misleading advertising by stating that since the

prohibition at issue has been found not to be justified by imperative requirements relating to consumer protection or fair trading, it can also find no basis in the aforementioned directive. That directive confines itself to a partial harmonization of the national laws on misleading advertising by establishing, firstly, minimum objective criteria for determining whether advertising is misleading, and, secondly, minimum requirements for the means of affording protection against such advertising .

The Court' s judgment in Case C-373/90 Complaint against X [1992] ECR I-131, which concerned the legality of advertisements for cars introduced into France by way of parallel imports, cannot be cited in support of the German Government' s argument, even though the Court concentrated its reply to the question referred in that case on an interpretation of the directive on misleading advertising. The Court took the view that the question whether the disputed sales practice was consistent with the relevant Community rules was to be understood as a question on the interpretation of the directive on misleading advertising.

(7) - Judgment in Case C-238/89 Pall Corp. cited above, paragraphs 11 and 12.

(8) - See the Court' s judgment in Case 120/78 Rewe-Zentral v Bundesmonopolverwaltung fuer Branntwein [1979] ECR 649 and most recently its judgment of 18 May 1993 in Case C-126/91 Schutzverband gegen Unwesen in der Wirtschaft v Yves Rocher, at paragraph 12, which concerns rules in the UWG on comparative advertising.

(9) - It is appropriate in this connection to refer to Article 2 of Council Directive 79/112/EEC 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 (OJ 1979 L 33, p. 1), which provides that products which are not medicinal products must not under Community law give the impression that they are medicinal products. Article 2(1)(b) of the directive provides that the labelling and methods of packaging used must not attribute to any foodstuff the property of preventing, treating or curing a human disease, or refer to such properties. I agree with the German Government in its argument that a similar rule must be read into Article 6(2) of the cosmetics directive.

(10) - See, most recently, paragraph 12 of the judgment in Case C-126/91 Yves Rocher, cited above in footnote 8.

(11) - See, for example, the judgment in Case 188/84 Commission v France [1986] ECR 419 (woodworking machines), paragraph 15.

(12) - See the written observations of the defendants, p. 9, section II(3)(b).

(13) - As already pointed out in footnote 6, the Court has interpreted the directive in its judgment in Case C-373/90 Complaint against X [1992] ECR I-131. So far as I can see, the interpretation given there is of only limited relevance to the present case.