

European Court of Justice, 18 May 1993, Yves Rocher



ADVERTISING – FREE MOVEMENT OF GOODS

Price comparison

- [Prohibiting eye catching advertising of new price for imported goods, referring to a higher price in a previous catalogue, precluded by free movement of goods](#)

Article 30 of the EEC Treaty is to be interpreted as precluding the application of a rule of law of Member State A which prohibits an undertaking established in that State, carrying on mail order sales by catalogue or sales brochure of goods imported from Member State B, from using advertisements relating to prices in which the new price is displayed so as to catch the eye and reference is made to a higher price shown in a previous catalogue or brochure.

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European Court of Justice, 2 November 2008

(O. Due, C. N. Kakouris, M. Zuleeg en J. L. Murray, G. F. Mancini, J. C. Moitinho de Almeida, F. Grévisse, M. Diez de Velasco en P. J. G. Kapteyn)

In Case C-126/91,

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

Schutzverband gegen Unwesen in der Wirtschaft e.V.
and

Yves Rocher GmbH

on the interpretation of Articles 30 and 36 of the EEC Treaty,

THE COURT,

composed of: O. Due, President, C.N. Kakouris, M. Zuleeg and J.L. Murray (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, F. Grévisse, M. Diez de Velasco and P.J.G. Kapteyn, Judges,

Advocate General: M Darmon,

Registrar: D. Triantafyllou, Administrator,

after considering the written observations submitted on behalf of:

° Schutzverband gegen Unwesen in der Wirtschaft, by Rudolf Friedrich, Rechtsanwalt, Karlsruhe,

° Yves Rocher GmbH, by Dirk Schroeder, Rechtsanwalt, Cologne, and Robert Colin and Marie-Laure Coignard, of the Paris Bar,

° the Government of the Federal Republic of Germany, by Joachim Karl, Regierungsdirektor in the Federal Ministry of Economic Affairs, and Alexander von Muehlendahl, Ministerialrat in the Ministry of Justice, acting as Agents,

° the Government of the French Republic, by Edwige Belliard, Deputy Director for Legal Affairs in the Ministry of Foreign Affairs, acting as Agent, and Jean-Louis Falconi, Secretary for Foreign Affairs in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Deputy Agent,

° the Commission of the European Communities, by Rafael Pellicer, of its Legal Service, assisted by Roberto Hayder, a national civil servant seconded to the Legal Service, acting as Agents,

having regard to the Report for the Hearing, after hearing the oral observations of Yves Rocher GmbH, the German Government, the French Government and the Commission of the European Communities at the hearing on 2 June 1992, after hearing the Opinion of the Advocate General at the sitting on 15 September 1992,

gives the following

Judgment

1 By order of 11 April 1991, received at the Court on 30 April 1991, the Bundesgerichtshof (Federal Court of Justice) 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 the Treaty, in order to assess the compatibility with those provisions of a rule of national law on commercial advertising.

2 That question was raised in proceedings between the Schutzverband gegen Unwesen in der Wirtschaft e.V., a non-profit-making association based in Munich (hereinafter "the Schutzverband"), and Yves Rocher GmbH (hereinafter "Yves Rocher"), a subsidiary of the French company Laboratoires de Biologie Végétale Yves Rocher, concerning advertisements by Yves Rocher which consisted in a comparison between the old and new prices of its products.

3 Before 1986 advertising by means of comparisons between prices charged by the same undertaking was lawful in so far as it was not unfair or liable to mislead consumers. Following pressure by certain retailers, the German legislature adopted the Gesetz zur Aenderung wirtschafts-, verbraucher-, arbeits- und sozialrechtlicher Vorschriften (Law amending certain provisions of economic, consumer, labour and social welfare legislation) of 25 July 1986 inserting into the Gesetz gegen den unlauteren Wettbewerb (Law against unfair competition, hereinafter "the UWG") of 7 June 1909 a Paragraph 6e prohibiting advertisements making use of individual price comparisons. That prohibition is intended to protect consumers and competitors against advertising by means of price comparisons.

4 However, the prohibition under Paragraph 6e of the UWG is not absolute. There is an exception in favour of price comparisons which are not "eye-catching" (blickfangmaessig) (Paragraph 6e(2)(1) of the UWG) and advertising by means of catalogues (Paragraph 6e(2)(2) of the UWG).

5 Yves Rocher sells by mail order in the Federal Republic of Germany cosmetics supplied by its parent company, most of which are manufactured in France. Advertising for those products is produced by the parent company to a standard design for the various Member States in question, and is distributed in catalogues and sales brochures. As part of its sales activities, Yves Rocher distributed a brochure which, under the heading "Save up to 50% and more on 99 of your favourite Yves Rocher products", showed, next to the crossed-out old prices, the new lower prices of those products, in large red characters.

6 The Schutzverband considered that such advertising was contrary to Paragraph 6e (2)(1) of the UWG and brought proceedings against Yves Rocher in the Landgericht Muenchen I (Munich I Regional Court). The Landgericht took the view that that provision of the UWG prohibited advertising in which old and new prices were compared, if that advertising was "eye-catching", and ordered Yves Rocher not to distribute such advertising.

7 Yves Rocher appealed against that decision to the Oberlandesgericht Muenchen (Higher Regional Court, Munich), which set aside the Landgericht's order on the basis of Paragraph 6e(2)(2) of the UWG. The Schutzverband appealed on a point of law against that decision to the Bundesgerichtshof, which held that Paragraph 6e(2)(2) did not apply. However, the Bundesgerichtshof considered that the application of Paragraph 6e(1) of the UWG raised a question concerning the interpretation of Community law, and therefore stayed the proceedings pending a preliminary ruling by the Court on the following question:

"Must Article 30 of the EEC Treaty be interpreted as precluding the application of a rule of law of Member State A prohibiting an undertaking established in that State, carrying on mail order sales by catalogue or sales brochure of goods imported from Member State B, from using advertisements relating to prices in which there is an eye-catching display of the new price and reference is made to a higher price shown in an earlier catalogue or sales brochure?"

8 Reference is made to the Report for the Hearing for a fuller account of the facts and legal background of the main proceedings, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

9 Under Article 30 of the Treaty, quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. It is settled law that all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade constitute measures having an effect equivalent to

quantitative restrictions ([judgment in Case 8/74 Dassonville \[1974\] ECR 837, paragraph 5](#)).

10 The Court has also held that national legislation which restricts or prohibits certain forms of advertising or certain means of sales promotion may, although it does not directly affect imports, be such as to restrict their volume because it affects marketing opportunities for the imported products. To compel an economic operator 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 (see the judgments in Case 286/81 Oosthoek's Uitgeversmaatschappij [1982] ECR 4575, paragraph 15; [Case 382/87 Buet \[1989\] ECR 1235, paragraph 7](#); [Case C-362/88 GB-INNO-BM \[1990\] ECR I-667, paragraph 7](#); and [Joined Cases C-1/90 and C-176/90 Aragonesa de Publicidad Exterior and Publivia \[1991\] ECR I-4151, paragraph 10](#)).

11 A prohibition of the kind at issue in the main proceedings is thus capable of restricting imports of products from one Member State into another and therefore constitutes, in that respect, a measure having equivalent effect to a quantitative restriction within the meaning of Article 30 of the Treaty.

12 However, 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 fair trading ([see, in particular, GB-INNO-BM, cited above, paragraph 10](#)). Those rules must, however, as the Court has repeatedly held (see, in particular, [Buet, cited above, paragraph 11](#)), be proportionate to the goals pursued.

13 It is undisputed that a prohibition of the kind at issue in the main proceedings applies both to domestic products and to imported products.

14 Moreover, the German Government has stated that the prohibition in Paragraph 6e of the UWG is intended to protect consumers against the special lure of advertising containing price comparisons, which is frequently liable to mislead. First, it is particularly easy to deceive consumers, since they are generally not in a position to verify the comparison between the old and the new prices. Second, advertising by means of price comparisons may suggest a level of prices which is favourable as a whole, without that being true for the entire range of products.

15 Since the protection of consumers against misleading advertising is a legitimate objective from the point of view of Community law, the Court must examine, in accordance with the settled case-law, whether the national provisions are suitable for attaining the aim pursued and do not go beyond what is necessary for that purpose.

16 It should be observed, first, that a prohibition of the kind at issue in the main proceedings applies where price comparisons catch the eye, whether or not they are correct. The prohibition does not therefore apply to price comparisons which are not eye-catching. In the present case the advertising is prohibited not because it is alleged to be incorrect, but because it is eye-catching. It follows that any eye-catching advertising making use of price comparisons is prohibited, whether it is true or false.

17 Moreover, the prohibition in question goes beyond the requirements of the objective pursued, in that it affects advertising which is not at all misleading and contains comparisons of prices actually charged, which can be of considerable use in that it enables the consumer to make his choice in full knowledge of the facts.

18 Furthermore, a comparative examination of the laws of the Member States shows that information and protection of the consumer can be ensured by measures which are less restrictive of intra-Community trade than those at issue in the main proceedings (see paragraph 52 of the Opinion of the Advocate General).

19 It follows that a prohibition of the kind at issue in the main proceedings is not proportionate to the aim pursued.

20 The German Government argues further that the prohibition in question cannot be incompatible with Article 30 of the Treaty, in that it causes only a marginal restriction of the free movement of goods.

21 On this point, leaving aside rules having merely hypothetical effect on intra-Community trade, it has been consistently held that Article 30 of the Treaty does not make a distinction between measures which can be described as measures having equivalent effect to a quantitative restriction according to the magnitude of the effects they have on trade within the Community.

22 As for the protection of fair trading, and hence of competition, it is important to note that correct price comparisons, prohibited by a rule of law of the kind at issue, cannot in any way distort the conditions of competition. On the other hand, a rule which has the effect of prohibiting such comparisons may restrict competition.

23 Accordingly, the answer to the national court's question must be that Article 30 of the Treaty is to be interpreted as precluding the application of a rule of law of Member State A which prohibits an undertaking established in that State, carrying on mail order sales by catalogue or sales brochure of goods imported from Member State B, from using advertisements relating to prices in which the new price is displayed so as to catch the eye and reference is made to a higher price shown in a previous catalogue or brochure.

Costs

24 The costs incurred by the German and French Governments 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,

in answer to the question referred to it by the Bundesgerichtshof by order of 11 April 1991, hereby rules:

Article 30 of the EEC Treaty is to be interpreted as precluding the application of a rule of law of Member State A which prohibits an undertaking established in that State, carrying on mail order sales by catalogue or sales brochure of goods imported from Member State B, from using advertisements relating to prices in which the new price is displayed so as to catch the eye and reference is made to a higher price shown in a previous catalogue or brochure.