

OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 24 October 1991*

Mr President,
Members of the Court,

look at the context of the dispute in
national and Community law.

1. In a somewhat brief letter of 12 December 1990, the Examining Magistrate attached to the Tribunal de Grande Instance (Regional Court) of Bergerac referred a question to the Court on advertising by a parallel importer of motor vehicles.

The dispute pending before the national court originated with a complaint about untruthful advertising lodged by the exclusive importer of Nissan cars on French territory against a Bergerac garage that advertises along the lines of '*buy your new vehicle cheaper*'. The advertising refers to vehicles imported from Belgium which, while never having been driven, have been registered for the purposes of importation. The information from the court *a quo* also shows that the vehicles are sold at a lower price than that charged by French dealers, and with fewer accessories than the models normally marketed by them.

2. To appreciate the significance of the question, which asks only 'whether such a marketing practice is in compliance with the European rules currently in force', one must

The French legal provision which the parallel importer is accused of infringing is Article 44 of Law No 73-1193 of 27 December 1973 on the Orientation of Business and Crafts, known as the '*Loi Royer*'. This prohibits all advertising containing any form of false allegation, information or presentation which is likely to deceive and relates to one or more of the following: 'the existence, nature, composition, substantial qualities, material constituents, type, origin, quantity, method and date of manufacture, properties, price and conditions of sale of goods or services which are the subject of the advertising, conditions of their use, results to be expected from their use, reasons for the sale or the provision of services or the methods of such sale or provision, the extent of the obligations undertaken by the advertiser, or the identity, qualities or aptitudes of the manufacturer, the retailers, the promoters or the providers'.

That law was notified to the Commission as the implementing measure in France of 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.¹ The national court must therefore interpret and

* Original language: Italian.

1 — Official Journal L 250, p. 17.

apply the law in question in the light of the wording and purposes of the directive.

The case-law of this Court shows that the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so as far as possible in the light of the wording and the purpose of the directive, in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.²

3. As emerges, in particular, from its own preamble, the directive in question pursues two aims at once. On the one hand, it seeks to guarantee an adequate level of consumer protection by establishing minimum and objective criteria as a basis for determining whether any given form of advertising is misleading, while on the other hand it seeks to ensure the free movement of goods and services by favouring the execution of advertising campaigns across a number of Member States.

Indeed, as the Court has had occasion to point out, legislation which restricts or prohibits certain forms of advertising and

certain means of sales promotion may, although it does not directly affect imports, be capable of restricting their volume because it affects marketing opportunities.³

Misleading advertising is defined in Articles 2 and 3 of the directive. In particular, Article 2(2) defines as 'misleading' any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor. It is important to emphasize straight away that, as emerges clearly from the wording of the rule, the two essential elements of misleading advertising, namely deception and an effect on the consumer's behaviour, are cumulative.

Article 3 goes on to provide an explanatory list of factors and characteristics to be taken into account in determining whether advertising is misleading.

Finally, Article 7 permits Member States to retain or adopt provisions with a view to ensuring more extensive protection for consumers, persons carrying on a trade,

² — Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8.

³ — Case C-362/88 *GB-INNO* [1990] ECR I-667, paragraph 7; and Case 286/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575, paragraph 15.

business, craft or profession, and the general public.

4. Before examining the effect of the above rules in relation to the case before the Court, it should be emphasized that to forbid the kind of advertising at issue here would be likely in practice to hit parallel importers particularly hard, by preventing them from sufficiently advertising their product. In the first place, it is parallel importers more than anyone else who find it useful to advertise that motor vehicles are *new*—especially those who sell cars that have already been registered in another Community country. It should be emphasized here that, as the Commission confirmed at the hearing, the type-approval still necessary in the country of 'parallel' importation is made quicker and easier if the vehicle has already been registered in another Community country. In the second place, the description of the vehicles as *cheaper* reflects the defining element in the parallel importer's business; he naturally buys in a country where, accessories being equal, list prices are lower than in the country into which he imports. This is, moreover, the phenomenon at the root of parallel imports and their sole commercial justification.

5. It should equally be stressed that Community law gives specific protection to parallel imports of products in general and motor vehicles in particular.

In this regard, Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the

Treaty to certain categories of motor vehicle distribution and servicing agreements⁴ provides in Article 10 that the Commission may withdraw the benefit of the exemption granted to selective distribution systems if, in a particular case, the manufacturer or an undertaking within the distribution system continuously or systematically makes it difficult for final consumers or other undertakings within the distribution system to obtain contract goods or corresponding goods, or to obtain servicing for such goods, within the common market.

Some examples of abusive hindrances are then given by the Commission notice concerning Regulation (EEC) No 123/85.⁵ In particular, they may consist in refusal by dealers to perform guarantee work on vehicles which they have not sold and which have been imported from other Member States, withholding by manufacturers or their importers of their cooperation in the registration of vehicles which European consumers have imported from other Member States, or abnormally long delivery periods.

6. Such an approach is further confirmed by the Commission notice on procedures for the type-approval and registration of vehicles previously registered in another Member State,⁶ and not least by the case-law of the Court, which tends towards limiting administrative obstacles to the regis-

4 — OJ L 15, p. 16.

5 — OJ 1985 C 17, p. 4.

6 — OJ 1988 C 281, p. 9.

tration of cars in Member States other than those in which they were purchased, guaranteeing adequate consumer protection against obstacles placed by manufacturers or dealers against issue of the certificate of compliance, and ensuring that the final consumer gets adequate after-sales service.

As long ago as 1975 in the judgment in *General Motors*,⁷ the Court established that delegation by a Member State to a manufacturer or its authorized agent, in the form of a legal monopoly, of the duty governed by public law which consists in carrying out the technical inspection of vehicles before they are used on the public highway, combined with the freedom of such manufacturer or agent to fix the price for their service, leads to the creation of a dominant position. The Court then went on to hold that abuse of such a position may consist, in particular, in the imposition of a price which is excessive in relation to the economic value of the service provided, and which has the effect of curbing parallel imports by neutralizing the possibly more favourable price levels applying in other sales areas in the Community or by leading to unfair trading within the meaning of Article 86(2)(a) of the Treaty.

Moreover, in the case of *ETA v DK Investment*,⁸ on the importation of watches, the Court held, in general terms, that a guarantee scheme under which a supplier of goods restricts the guarantee to customers of his exclusive distributor places the latter and the retailers to whom he sells in a

privileged position as against parallel importers and distributors and must therefore be regarded as having the object or effect of restricting competition within the meaning of Article 85(1) of the Treaty.

Again, in the case of *Procureur de la République v Gofette and Gilliard*,⁹ the Court held that Articles 30 and 36 of the Treaty must be interpreted as meaning that an approval procedure laid down in a Member State for vehicles imported from another Member State and already approved or authorized for use in that State is compatible with the Treaty only if: (a) the checking procedure does not entail unreasonable cost or delay and the public authorities ensure that these conditions are fully met where the manufacturer or his authorized representative is called on to carry out the necessary checks; and (b) the importer may, as an alternative to the checking procedure, produce documents issued in the exporting Member State in so far as those documents provide the necessary information based on checks already carried out.

Finally, it is apparent from the judgment in Case 154/85 *Commission v Italy*¹⁰ that an increase by a Member State in the number of administrative requirements involving the production of documents necessary for parallel imports of vehicles from other Member States is an infringement of Article 30 of the Treaty.

7. It is, therefore, in the light of the context above that it must be determined whether it is lawful and reasonable to prohibit a type

7 — Case 26/75 [1975] ECR 1367, paragraphs 7, 8, 9 and 12.

8 — Case 31/85 [1985] ECR 3933, paragraph 14.

9 — Case 406/85 [1987] ECR 2525, paragraph 12.

10 — [1987] ECR 2717, paragraphs 12 to 14.

of advertising which, in relation to cars marketed by parallel importers, draws attention on the one hand to the cars' newness and on the other hand to their lower price.

attractive by extolling its features, and another thing to hide its precise characteristics at the moment the commercial transaction takes place.

On the first aspect, I should say straight away that, in my opinion, one cannot call misleading an advertisement describing as new a vehicle which, although already registered, has never been driven, since registration does not turn a new vehicle into a used one but merely into a . . . registered one. A vehicle will be considered used, on the other hand, if it has been driven on the public highway, even if only for a few kilometres.

Indeed, if one considers the fact of the vehicle's prior registration to be an essential piece of information for the consumer, his protection could be ensured by applying the ordinary rules in each country for guaranteeing fairness in commercial transactions and by punishing the seller who, at the moment of sale, does not inform the consumer of this feature of the vehicle. That, moreover, applies regardless of the advertising used to promote the product.¹²

In the second place, given the particular characteristics of the car market, such advertising is in any case not likely to affect the behaviour of consumers, as indicated by Article 2 of the directive. Indeed, the consumer who goes to a parallel importer normally confers on him a special written mandate for the purchase of the vehicle¹¹ and is therefore perfectly well aware that he is using a particular sales network with its specific features. The sale and purchase of cars, unlike other goods, is normally preceded, moreover, by a certain amount of negotiation in order to establish precisely the characteristics of the product.

9. The above considerations also apply in large measure to the other aspect of the advertising, regarding the cost of the product.

8. It must also be remembered that it is one thing to make the purchase of a product

In this regard, I think one must first emphasize, as a general point, that the lower price of the 'parallel' vehicle is not normally due to its more limited range of accessories but, as already mentioned, is due to the lower cost of the vehicle in the country of origin. That does not, of course, exclude the possibility in individual cases

¹¹ — By reason of Regulation (EEC) No 123/85, referred to above, which places a duty on producers to allow dealers to sell at least to the agents of the final consumer.

¹² — From that standpoint, I cannot share the assertion made, in my view too peremptorily, in a recent judgment of the French Cour de Cassation of 19 April 1989, according to which a car can be described as new only if it has not already been registered. I do, however, agree with that court's decision to overturn the judgment of the appeal court which had acquitted the seller, and I do so in consideration of the fact that, in that particular case, the seller had not told the buyer at the time of the sale that the registration had already taken place.

that the lower cost may be accompanied by a smaller number of accessories, which appears to have happened in this instance. Even in this latter case, however, I do not think one can automatically talk of misleading advertising.

I would also like to say, in relation to this issue, that attention should be shifted from the time of the advertising to the time of the commercial transaction, in the sense that I do not think it right to infer from the bad faith that is always possible in a transaction, and which can be prosecuted as such, that a type of advertising is untruthful.

In determining whether such advertising is really likely to affect the economic behaviour of the persons to whom it is addressed, one should bear in mind that the car market is characterized by a certain price transparency and that the average consumer, who I am convinced is not wholly undiscerning, is inclined, not least in view of the considerable expense he is contemplating, to make a careful comparison of the prices on offer and to enquire of the seller, sometimes very meticulously, about the accessories with which the vehicle is equipped. In this regard, I hope I will be forgiven for recalling the old saying *'vigilantibus non dormientibus iura succurrunt'*.

10. To deal, finally, with the point that Article 7 of the directive allows Member States to adopt provisions with a view to ensuring more extensive protection for consumers, I will say only that, in the present case, it is not a question of specific measures aimed at ensuring such protection, but of the interpretation of the general definitions given by the directive, and that, in any case, the rule cited cannot have the effect of justifying measures that specifically hinder advertising by parallel importers of motor vehicles when, as in this case, consumer protection can be achieved by measures that are less prejudicial to the marketing of the products in question.

11. For those reasons, I suggest that the Court reply to the question put by the national court as follows:

Directive 84/450/EEC, in the light of which the national provisions implementing it must be applied, must be interpreted as meaning that it allows motor vehicles to be advertised as new and less expensive when those vehicles, while never having been driven, have been registered for the purposes of importation and are marketed at a price lower than that charged by dealers operating in the Member State in question, even if they are equipped with fewer accessories than the models normally marketed by those dealers.