JUDGMENT OF THE COURT (Fifth Chamber)
2 February 1994 *

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,

* Language of the case: German.

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. Rühl, 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 Mühlendahl, 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 com-

pany 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 Bedarfsgegenständegesetz (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 (judg-

ment 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 *Parfümerie-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'.

Moitinho de Almeida Edward Joliet

Rodríguez Iglesias Grévisse

Delivered in open court in Luxembourg on 2 February 1994.

J.-G. Giraud

Registrar

J. C. Moitinho de Almeida

President of the Fifth Chamber