JUDGMENT OF THE COURT (Fifth Chamber)

13 September 2001 *

In Case C-169/99,

REFERENCE to the Court under Article 234 EC by the Bundesgerichtshof (Germany) for a preliminary ruling in the proceedings pending before that court between

Hans Schwarzkopf GmbH & Co. KG

and

Zentrale zur Bekämpfung unlauteren Wettbewerbs eV,

on the interpretation of the last sentence of Article 6(1)(d) of Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products (OJ 1976 L 262, p. 169), as amended by Council Directive 93/35/EEC of 14 June 1993 (OJ 1993 L 151, p. 32), in conjunction with Articles 30 and 36 of the EC Treaty (now, after amendment, Articles 28 EC and 30 EC),

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet, D.A.O. Edward (Rapporteur), P. Jann and L. Sevón, Judges,

Advocate General: J. Mischo,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Hans Schwarzkopf GmbH & Co. KG, by O.C. Brändel and G. Jordan, Rechtsanwälte,

— Zentrale zur Bekämpfung unlauteren Wettbewerbs eV, by C. von Gierke, Rechtsanwalt,

— the French Government, by K. Rispal-Bellanger and R. Loosli-Surrans, acting as Agents,

— the Netherlands Government, by M.A. Fierstra, acting as Agent,

— the Finnish Government, by T. Pynnä, acting as Agent,

— the Commission of the European Communities, by C. Schmidt and H. Støvlbæk, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Hans Schwarzkopf GmbH & Co. KG and the Commission at the hearing on 5 October 2000,

after hearing the Opinion of the Advocate General at the sitting on 16 November 2000,

gives the following

Judgment

1 By order of 25 March 1999, received at the Court on 5 May 1999, the Bundesgerichtshof (Federal Court of Justice, Germany) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of the last sentence of Article 6(1)(d) of Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products (OJ 1976 L 262, p. 169), as amended by Council Directive 93/35/EEC of 14 June 1993 (OJ 1993 L 151, p. 32), in conjunction with Articles 30 and 36 of the EC Treaty (now, after amendment, Articles 28 EC and 30 EC).

2 The two questions have been raised in proceedings between Hans Schwarzkopf GmbH & Co. KG (hereinafter 'Schwarzkopf') and the Zentrale zur Bekämpfung unlauteren Wettbewerbs eV (hereinafter 'the ZBUW') concerning the labelling of cosmetic products manufactured and distributed by Schwarzkopf.

The relevant Community legislation

3 The fourth recital of the preamble to Directive 76/768 states that it is necessary to determine at Community level the regulations which must be observed as regards the composition, labelling and packaging of cosmetic products.

4 Article 6(1)(d) of Directive 76/768, as amended by Article 1(4) of Council Directive 88/667/EEC of 21 December 1988, amending for the fourth time Directive 76/768 (OJ 1988 L 382, p. 46), provides:

'Member States shall take all necessary measures to ensure that cosmetic products may be marketed only if the container and packaging bear the following information in indelible, easily legible and visible lettering:

...

(d) particular precautions to be observed in use, and especially those listed in the column "conditions of use and warnings which must be printed on the label"

in Annexes III, IV, VI and VII, which must appear on the container and packaging as well as any special precautionary information on cosmetic products for professional use, in particular in hairdressing. Where this is impossible for practical reasons, this information must appear on the enclosed leaflet, with abbreviated information on the container and the packaging referring the consumer to the information specified.'

5 The last sentence of Article 6(1)(d) of Directive 76/768, as amended by Article 1(6) of Directive 93/35, provides:

'Where this is impossible for practical reasons, an enclosed leaflet, label, tape or card must contain that information to which the consumer is referred either by abbreviated information or the symbol given in Annex VIII, which must appear on the container and the packaging.'

6 Article 7(1) and (2) of Directive 76/768 provides:

'1. 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.

2. They may, however, require that the particulars provided for in Article 6(1)(b), (c) and (d) be expressed at least in their own national or official language or languages.'

7 Article 7 of Directive 76/768 was amended for the first time by Directive 93/35. In the version laid down by Article 1(10) of Directive 93/35, Article 7(2) of Directive 76/768 provides:

'They may, however, require that the particulars provided for in Article 6(1)(b), (c), (d) and (f) be expressed at least in their own national or official language or languages; they may also require that the particulars provided for in Article 6(1)(g) be expressed in a language easily understood by the consumer. To that end, the Commission shall adopt a common ingredients nomenclature in accordance with the Article 10 procedure.'

National law

8 The Kosmetik-Verordnung (German Cosmetics Order) of 19 June 1985 (BGBl. 1985 I, p. 1082), as amended with effect from 1 January 1997 by the 25th Order amending the Kosmetik-Verordnung, of 23 December 1996 (BGBl. 1996 I, p. 2186), provides in Article 4(2), second sentence:

'If, for practical reasons, the entire wording of the particulars cannot appear on the container and the packaging, those particulars must appear on an enclosed leaflet, strip of paper or card to which the consumer is referred by abbreviated information on the container and the packaging or by the symbol given in Annex VIII.'

The main proceedings and the questions referred for a preliminary ruling

9 Amongst the hair treatment products manufactured and distributed by Schwarzkopf is a range of dyes called 'Igora Royal'. These dyes are intended for hairdressers and other professional users and not for private consumers. They contain chemical substances such as methylphenylenediamines and resorcinol.

10 According to the Kosmetik-Verordnung, the presence of those two types of substances must be indicated by the following warnings:

— for methylphenylenediamines: 'For commercial use only. Contains methylphenylenediamines. Can cause an allergic reaction. Wear suitable gloves',

— for resorcinol: 'For commercial use only. Contains resorcinol. Rinse eyes immediately if product comes into contact with them'.

11 Schwarzkopf has included those warnings in full only on the leaflet enclosed with the products concerned. Only the following abbreviated information, in nine languages (German, French, Dutch, English, Spanish, Swedish, Italian, Portuguese and Arabic), appears on the outer packaging and the container, which is a tube: 'For commercial use only. Important: follow instructions for use and heed warnings'.

12 The ZBUW, which is an organisation for protecting the economic interests of undertakings, having as its purpose, in particular, to campaign against unfair

competition, considers that Schwarzkopf is under an obligation to put the full wording of the warnings on both the packaging and the container in the official language of each country of distribution concerned. This, if limited to that one language, would present no practical problem.

13 The ZBUW therefore applied for an injunction against Schwarzkopf to restrain it from marketing the products concerned for as long as the prescribed warnings do not appear on their packaging and their containers. It also made a subsidiary claim concerning the wording of the leaflet and the information appearing on the container. Schwarzkopf resisted those claims on the ground that the applicable German legislation made provision for not including the full wording of the warnings on the packaging and the container 'for practical reasons'.

14 The judgment given at first instance upheld only the ZBUW's subsidiary claim. However, its primary claim was upheld on appeal. Schwarzkopf then appealed on a matter of law to the Bundesgerichtshof against that judgment.

15 Taking the view that the appeal on a point of law depended on the interpretation of Directive 76/768, as amended by Directive 88/667, and of Articles 30 and 36 of the Treaty, the Bundesgerichtshof decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'Is the notion of "impossible for practical reasons" in the second sentence of Article 6(1)(d) of Directive [76/768, in the version laid down in Directive 88/667] to be interpreted as also permitting the inclusion of the prescribed warnings in several languages, where the manufacturer or distributor of cosmetic products considers this desirable on economic grounds and to enhance the marketability of the products in the Community, if as a result the full warning appears in a clearly legible format only on the enclosed leaflet, and only abbreviated information can

be put on the packaging and container for lack of space? Specifically, is it permissible to omit the full warning from the packaging and container and put on them only abbreviated information if, for the reasons given above, an undertaking considers it desirable to market its products in a uniform get-up in the languages of nine different countries (including eight EU Member States) in which the product is sold?'

The relevant version of Directive 76/768

16 The Commission points out that the version of Directive 76/768 to be interpreted is not that contained in Directive 88/667, to which the preliminary questions refer, but the version laid down in Directive 93/35.

17 As to that point, the Bundesgerichtshof held in its order for reference that the version of the Kosmetik-Verordnung in force as from 1 January 1997 was the version applicable to the case before it. That version of the Kosmetik-Verordnung is the version following upon transposition of Directive 93/35 into German law.

18 The version of Directive 76/768 that the Court is required to interpret is not therefore the version in Directive 88/667 but the version in Directive 93/35 (hereinafter 'the amended Directive 76/768'). In any event, as the Advocate General points out in point 17 of his Opinion, the phrase 'impossible for practical reasons', whose interpretation is necessary for answering the preliminary questions, appears in the last sentence of Article (1)(d) of Directive 76/768 in both those versions.

The questions referred for a preliminary ruling

19 By its questions, which concern the same legal issue, the national court is asking essentially whether it is 'impossible for practical reasons', within the meaning of the last sentence of Article 6(1)(d) of the amended Directive 76/768, to set out the obligatory warnings in full on the container and packaging of a cosmetic product in the language or languages prescribed in the Member State in which it is to be marketed, where the producer or distributor wishes to label the product in nine languages, including eight official languages of the Community, for economic considerations and in order to facilitate the movement of the product within the Community, and this entails abbreviating those warnings on the container and the packaging.

Observations submitted to the Court

20 Schwarzkopf submits that cases of 'practical impossibility', allowing derogation from the obligation to put full warnings on a product's container and packaging, are not limited to cases of objective impossibility. It explains that it planned to create a uniform get-up for the range of products in question in order to enable the products to be distributed throughout the Community and to take account of the increasing internationalisation of trade and the growing linguistic diversity in the Member States. Its aim was, in particular, to enable European citizens to understand the warnings provided for by Directive 76/768 when they work in a Member State in which their mother language is not used.

21 It maintains that it is important to bear in mind that the products in question are intended for use exclusively by professional users, who use them daily, so that it can be assumed that, contrary to what would be the case where final consumers

are concerned, putting the warnings on the leaflet will be sufficient for those professional users. A strict interpretation of the notion of 'practical impossibility' must be rejected in view of the obstacle to the free movement of goods which that narrow view would entail.

22 The ZBUW argues that an assessment of the interests in question and the aim pursued by Directive 76/768 of protecting public health militate in favour of adopting a very strict construction of the expression 'impossible for practical reasons'. In its view, that expression alludes to technical difficulties making proper marking of certain information on containers impossible. Whilst 'practical reasons' cannot be equated with total impossibility of putting the information in question on the actual container, purely economic considerations cannot, however, satisfy the test.

23 The French, Netherlands and Finnish Governments, which have submitted observations to the Court, all consider that the notion of practical impossibility must be construed strictly, in accordance with the objectives of protecting public health and providing information to consumers.

24 The Finnish Government points out that the aim of Directive 76/768 is to protect the health not only of consumers but also of professional users. The health risk is often higher for the latter group owing to repeated use of the products. The French Government states that customers have every interest in having professional users, as providers of services, comply with all the safety rules in their regard.

25 The Netherlands Government points out that the specific size or shape of the product concerned (for example, a mini lipstick or eyeliner) or a particular get-up, usual for the product concerned (for example, unwrapped bars of soap or

bath drops) could make full external labelling 'impossible for practical reasons'. Only in such circumstances could the obligation to provide the best possible information to the consumer for safe use of a product be met by a separate leaflet.

26 The Commission is extremely doubtful whether purely economic reasons can amount to 'impossibility' within the meaning of Article 6(1)(d) of the amended Directive 76/768 and therefore proposes a negative reply to the questions referred for a preliminary ruling.

Findings of the Court

27 In adopting Directive 76/768, the Community legislature sought to reconcile the objective of achieving the free movement of cosmetic products and that of safeguarding public health.

28 As is clear from the second and third recitals of the preamble to Directive 76/768, the Community legislature, although finding that the differences between national laws on cosmetic products obliged Community cosmetic producers to vary their production according to the Member State for which the products were intended and that those differences impeded free movement of those products, concluded that those national provisions had the aim of safeguarding public health and that, consequently, Community harmonisation must pursue the same objective. The amendments subsequently made to Directive 76/768 were guided by those same considerations.

29 Article 6(1)(d) of the amended Directive 76/768 makes no distinction, as regards the level of public health protection, between different groups of users. Whilst the

provision does make reference to the special precautions to be observed in the case of cosmetic products for professional use, the underlying purpose is not to lay down special rules for professional users but only to define the information which must be put on the containers and packaging of cosmetic products.

30 It is clearly important that the precautions to be observed in use are brought to the attention of hairdressers and other professional users in order to ensure the protection of both their own health and that of their clients. Methylphenylenediamines may cause allergic reactions, so that the wearing of suitable gloves is advised when they are used. As regards resorcinol, if it enters into contact with the eyes, they should be rinsed immediately.

31 Finally, it must be borne in mind that the last sentence of Article 6(1)(d) of the amended Directive 76/768 constitutes an exception to the rule enacted by the rest of that provision and must therefore be construed strictly.

32 However, it is accepted that the cases in which it will be 'impossible for practical reasons' to comply with the labelling rules will not necessarily amount to objective or absolute impossibility. Indeed, it would not be necessary to invoke the objective of protecting public health or any other aim of public interest to justify infringement of an obligation of Community law if compliance with that obligation were objectively impossible.

33 It follows that the notion of practical impossibility must have a broader meaning covering, in particular, cases where it would be objectively possible to provide the prescribed warnings in full but only at the price of using characters so small that they would be almost illegible and where full warnings, printed in legible

characters, would cover almost all the product so that the producer could no longer put the product's name and other relevant information on the product in a useful way.

34 Save where the dimensions of the container and the packaging of the product concerned are regulated by special provisions, it will be necessary, in order to determine whether or not it is possible to put the obligatory warnings on them in full, to take into account the dimensions of the container and packaging adopted by the producer. The fact that it might be possible to increase those dimensions to allow the warnings to appear fully and legibly without depriving the producer of the possibility of including other information about the product cannot bar the producer from invoking practical impossibility.

35 However, the producer's or distributor's wish to facilitate the movement of his product within the Community is not sufficient in itself to justify omitting the full obligatory warnings. Since 'impossibility' refers generally to a factual circumstance over which the person invoking it has no control, it is not to be understood as entitling a producer or distributor, because of the number of Community or other languages which he decides to use, to claim, for his own convenience, that full compliance is 'impossible for practical reasons' within the meaning of the last sentence of Article 6(1)(d) of the amended Directive 76/768.

36 That interpretation of the last sentence of Article 6(1)(d) of the amended Directive 76/768 is consonant with the provisions of the Treaty and, in particular, with those of Articles 30 and 36.

37 In this regard, it should be remembered that it is settled case-law that the prohibition of quantitative restrictions and of all measures having equivalent effect applies not only to national measures but also to measures adopted by the

Community institutions (see, in particular, to this effect, the judgment in Case C-51/93 *Meyhui* [1994] ECR I-3879, paragraph 11).

38 It is also settled in case-law that Article 30 of the Treaty prohibits obstacles to the free movement of goods resulting from rules which lay down requirements to be met by such goods (such as requirements as to designation, form, size, weight, composition, presentation, labelling or packaging), even if those rules apply without distinction to all national and imported products, unless their application can be justified by a public-interest objective taking precedence over the free movement of goods (see, in particular, the judgment in Case C-33/97 *Colim* [1999] ECR I-3175, paragraph 38).

39 It is true that national linguistic requirements such as those authorised by Article 7(2) of the amended Directive 76/768 do indeed constitute an obstacle to intra-Community trade in that the products concerned must be given different labelling according to the language or languages prescribed in the Member State in which the products are marketed, thus entailing supplementary packaging costs. The necessity to modify the container or packaging also rules out there being any question of selling arrangements within the meaning of the judgment in Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 16.

40 Those obstacles are, however, justified by the public interest objective of protecting public health. The information which producers or distributors of cosmetic products covered by the amended Directive 76/768 are obliged to put on the product's container and packaging, save where it can be effectively conveyed by the use of pictogrammes or signs other than words, will be of no practical use unless it is given in a language which can be understood by the persons for whom it is intended (see, in relation to foodstuffs, *Colim*, cited above, paragraph 29).

41 It should be added that the obligation to put the obligatory warnings on cosmetic products in full must not make it excessively difficult for cosmetic products having the same get-up to be marketed in several Member States. However, the marketing of cosmetic products cannot be considered to be made excessively difficult if secondary law is interpreted as preventing a producer or distributor wishing to market his products in nine languages, including eight official languages of the Community, from invoking 'practical impossibility' so as to avoid the obligation to place the compulsory warnings in full on the container and packaging.

42 The answer to be given to the questions referred for a preliminary ruling must therefore be that it is not 'impossible for practical reasons', within the meaning of the last sentence of Article 6(1)(d) of the amended Directive 76/768, to set out the obligatory warnings in full on the container and packaging of a cosmetic product in the language or languages prescribed in the Member State in which it is to be marketed, where the producer or distributor wishes to label the product in nine languages, including eight official languages of the Community, for economic considerations and in order to facilitate the movement of the product within the Community, and this entails abbreviating those warnings on the container and packaging.

Costs

43 The costs incurred by the French, Netherlands and Finnish Governments and by the Commission, 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 questions submitted to it by the Bundesgerichtshof by order of 25 March 1999, hereby rules:

It is not 'impossible for practical reasons', within the meaning of the last sentence of Article 6(1)(d) of Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products, as amended by Council Directive 93/35/EEC of 14 June 1993, to set out the compulsory warnings in full on the container and packaging of a cosmetic product in the language or languages prescribed in the Member State in which it is to be marketed, where the producer or distributor wishes to label the product in nine languages, including eight official languages of the Community, for economic considerations and in order to facilitate the movement of the product within the Community, and this entails abbreviating those warnings on the container and packaging.

La Pergola Wathelet Edward

Jann Sevón

Delivered in open court in Luxembourg on 13 September 2001.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber