OPINION OF ADVOCATE GENERAL MISCHO

delivered on 16 November 2000 [1]

1. In this case the Bundesgerichtshof (Germany) seeks a preliminary ruling from the Court as to the meaning of the term 'impossible for practical reasons' in the second 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, [2] as subsequently amended ('the Directive').

...

I — Legal background

2. The first sentence of Article 6(1) and Article 6(1)(d) of the Directive, as amended by Council Directive 88/667/EEC of 21 December 1988, [3] provide as follows:

'Member States shall take all measures necessary 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 an enclosed leaflet, with abbreviated information on the container and the packaging referring the consumer to the information specified.'

1 — Original language: French.

2 — OJ 1976 L 262, p. 169.

3 — OJ 1978 L 382, p. 46. That directive was to be implemented by 31 December 1989.

3. Following the adoption of Council Directive 93/35/EEC of 14 June 1993,[4] the last sentence of subparagraph (d) was replaced by the following:

'Where this is impossible for practical reasons, an *enclosed* leaflet, *label, tape or card*[5] must contain that information to which the consumer is referred either by abbreviated information or the symbol given in *Annex VIII*,[6] which must appear on the container and the packaging.'

II — The facts and the questions referred for a preliminary ruling

4. Of the haircare products manufactured and distributed by Hans Schwarzkopf GmbH & Co. KG ('Schwarzkopf'), the range of hair colourings called 'Igora Royal' is distributed exclusively to hairdressers and other professional users. It appears from the order for reference that certain shades of colouring in that range contain chemical substances covered by the Directive, namely diaminophenol and resorcinol.

4 — OJ 1993 L 151, p. 32. This directive was to be implemented by 14 June 1995.

5 — Emphasis added.

6 — Emphasis added.

5. The first part of Annex III requires that the following warnings be given in respect of those substances as follows:

— for diaminophenols:

'Can cause an allergic reaction. Sensitivity test advisable before use. Contains diaminophenols. Do not use to dye eyelashes or eyebrows.'

— for resorcinol:

'Can cause an allergic reaction. Contains resorcinol. Rinse hair well after application. Do not use to dye eyelashes or eyebrows. Rinse eyes immediately if product comes into contact with them.'

6. Similar warnings are laid down for other substances.

7. The Directive also lays down shorter warnings such as:

— 'Not to be used for babies.'

— 'Avoid contact with eyes.'

— 'Do not spray into eyes.'

— 'For preparations in aerosol dispensers: do not spray on a naked flame.'

— 'Avoid contact with eyes. Can cause blindness. Keep away from children.'

8. It appears from the order for reference that, instead of printing the prescribed warnings in full on the packaging (box) and the container (a tube) for the products in this range, Schwarzkopf printed on those items, in eight official languages of the European Communities and in Arabic, the following: 'For commercial use only. Important: follow instructions for use and heed warnings'. Schwarzkopf enclosed with each product a leaflet setting out the warning in full. Schwarzkopf further reproduced on the packaging the symbol prescribed by Annex 8 to the German cosmetics regulation, which is identical to that laid down by Annex VIII to the Directive, namely a picture of an open book with a finger pointing towards it.

9. The Zentrale zur Bekämpfung unlauteren Wettbewerbs eV (Office for the Prevention of Unfair Competition, 'the ZBUW') considers that this practice infringes the German cosmetics regulation and is anti-competitive. The ZBUW brought proceedings against Schwarzkopf to prevent it from placing on the market the products in question without the full warnings appearing on the packaging and container. In the view of the ZBUW this would be feasible if Schwarzkopf confined the full warning to the official language of the country of distribution.

10. Having lost on appeal, [7] Schwarzkopf appealed on a point of law to the Bundesgerichtshof, which ordered:

'The following questions on the interpretation of the second sentence [8] of Arti-

7 — Decision of the Oberlandesgericht Hamburg of 24 October 1996 overturning the decision of the Landgericht Hamburg of 24 May 1995 (corrected by decision of 30 June 1995).

8 — German version of the order for reference: 'Art. 6 Abs. 1 lit. d Halbsatz 3'.

cle 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 88/667/EEC of 21 December 1988 amending for the fourth time Directive 76/768/EEC (OJ 1988 L 382, p. 46), in conjunction with Articles 30 and 36 of the EC Treaty, are referred to the Court of Justice of the European Communities for a preliminary ruling:

Is the term "practical reasons" in the second sentence [9] of Article 6(1)(d) of Directive 76/768/EEC to be interpreted as also permitting the inclusion of prescribed warnings in several languages, where the manufacturer or marketer of cosmetic products considers it 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 on an enclosed leaflet only, with the packaging and container simply furnishing abbreviated information for lack of space? Specifically, is it permissible for the packaging and container to carry not the full warning but only abbreviated information where a company, for the reasons given above, considers it desirable to market its products in a uniform get-up in the languages of the nine different countries where the product is sold (which include eight EU Member States)?'

9 — German version of the order for reference: 'Art. 6 Abs. 1 lit. d Halbsatz 3'.

III — Preliminary observations

11. Two preliminary observations may be made.

12. The first concerns the terms of the order for reference. According to the wording of that order, the Court is asked to interpret Article 6(1)(d) of the Directive in the version contained in Directive 88/667.

13. Contrary to the wording of the operative part of the order, the referring court, however, remarks in the second subparagraph of paragraph III.1 of the grounds of the order that:

'The dispute between the parties concerns the question whether the defendant may rely on the exception in Article 4(2)(2) of the cosmetics regulation. The version of that regulation which entered into force on

1 January 1997 applies in this case. It provides...'

14. The version of the German cosmetics regulation which entered into force on 1 January 1997 is that which implements Directive 93/35.

15. Furthermore, in its description of the facts, the Bundesgerichtshof states that the packaging reproduces the symbol which appears in Annex 8 to the German cosmetics regulation. [10] That annex was only added to the cosmetics regulation following implementation of Directive 93/35. [11]

16. On the other hand, it was made clear at the hearing that the action was heard in the German courts on 9 February 1995, that is, after the adoption of Directive 93/35, but before the expiry of the period prescribed for implementation, and its entry into force in German law.

17. Nevertheless, having regard to the passages of the order for reference just cited, and to the fact that, in any event, the term at issue ('impossible for practical reasons') has not changed from one version of the Directive to another, I consider that it is permissible to refer to Directive 93/35 in so far as this may throw light on the presumed intentions of the Community legislature.

18. My second observation concerns the fact that, in the Commission's view, any derogation from the rule only concerns the 'special precautionary information on cosmetic products for professional use, in particular in hairdressing'.

19. That interpretation is probably based on the fact that, in the German language version of the Directive prior to Directive 93/35, the different sections of Article 6(1)(d) were separated by semicolons, such that the passage referring to impossibility for practical reasons could be read as referring only to the passage immediately before it, namely that concerning the particular precautions to be observed by professional users. By contrast, in the other language versions the phrase 'Where this is impossible for practical reasons' begins with a capital letter and therefore is to be read as referring to the entirety of the preceding text.

20. In Directive 93/35, that section of subparagraph (d) was changed, in the German language version, to a free-standing

10 — The order for reference states at point I, third subparagraph, second sentence, of the grounds that: 'Auf der Verpackung befindet sich zusätzlich noch das Symbol gemäss Anlage 8 zur Kosmetik-Verordnung'.

11 — Article 1 (14) provides that: 'Annex VIII to the Directive is appended'.

sentence. I do not therefore accept the Commission's interpretation.

21. Moreover, I have found no reference in the annexes to the Directive to particular precautions to be observed by hairdressers or other professional users.

22. In other words, the warnings relating to products containing diaminophenol or resorcinol, with which this case is concerned, are therefore directed as much at non-professional users of such products as at hairdressers. The shelves of department stores contain numerous hair colourings aimed at the general public, the packaging of which displays in one, two, three or four languages the warnings in question.

IV — The queries of the referring court and the observations of Schwarzkopf

23. After stating the reasons why the German appeal court adopted a strict interpretation of the term 'practical reasons', which was also supported by the German legal writers, the Bundesgerichtshof nevertheless asks whether it should uphold that interpretation given that 'its effect is to give general priority to consumer protection, leaving almost no scope for recognising "practical reasons" when considering individual cases'. In this regard the referring court cites the second recital of the Directive in support of the contention that the prescribed information need not be reproduced in full on the packaging and container in the circumstances of this case. That recital states that the aim of the Directive is to free cosmetics manufacturers from the barriers to intra-Community trade which result from the differing requirements in the Member States as to the ingredients of the products. Similarly, the way in which provisions regarding such notices are interpreted can also hamper intra-Community trade and exports to third countries if comprehensive warnings have to be reproduced in the language of a particular country in full on the packaging and the container, and abbreviated information, such as that used in this case ('For commercial use only. Important: follow instructions for use and heed warnings'), in different languages, is considered inadequate. Facilitating movement within the Community is an important consideration in the light of Articles 30 and 36 of the EC Treaty (now, after amendment, Articles 28 EC and 30 EC). It may justify the view — to which the referring court is inclined — that the abbreviated information ought to be considered sufficient in the circumstances of this case, especially since the consumer can — and is invited so to do — consult an accompanying leaflet, and the hair colourings made by the defendant are ultimately only intended for professional use (by hairdressers and others), even though it is not impossible that they might find their way to consumers directly. According to the Bundesgerichtshof, Schwarzkopf rightly points out that both professional users and consumers are accustomed, from using pharmaceutical products, to referring to enclosed leaflets

for further warnings. The referring court concludes that the type of statement made in this case should be sufficient to meet the requirements for the protection of health.

24. Schwarzkopf submits that the provision in question should be interpreted as meaning that the obligation in issue should be mitigated, not only in those cases where it is objectively impossible to display the full wording of the prescribed warnings on the packaging and containers, but in all cases where there are 'practical reasons' for so doing.

25. In this case, Schwarzkopf claims that such practical reasons reside in the wish to create a uniform get-up of the range of products, with identical accompanying leaflets, allowing European-wide marketing, and in the benefits which accompany that. These advantages are economic in nature in that they result in savings in distribution, greater competition or adaptation to the increasing internationalisation of trade, but they also bring about increased protection against possible health risks for both consumers and professional users. It is not, however, possible to bring about that objective by including the full text of the mandatory warnings, in nine languages, on the packaging and container without resorting to a packaging which was deceptive in appearance, because disproportionate to the size of the contents.

26. Schwarzkopf submits that it is necessary to weigh the interests at stake in order to determine whether the aim of protection, to which the directive in question is directed, is best served by the existence of abbreviated warnings in several European languages together with full warnings on an accompanying leaflet, or by the inclusion of the full text of the warning on the packaging and container in the language of the country of distribution. In this regard, it should be borne in mind that the products are intended exclusively for professional use, that is, by specialists who are on notice as to the risks involved.

V — Assessment

1. *What is meant by 'not possible for practical reasons' or 'impossible for practical reasons'?*

27. Community law terms are to be interpreted by the Court in order to ensure

their uniform application in all Member States.

28. In *Stauder*, [12] the Court held, in connection with a decision addressed to all the Member States, that 'the necessity for uniform application and accordingly for uniform interpretation makes it impossible to consider one version of the text in isolation, but requires that it be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve, in the light, in particular, of the versions in all [official] languages'.

29. In this case, I take the view that there are no differences between the various language versions of Article 6(1)(d).

30. In the German language version, it is 'practical reasons' which render the full inclusion of the warning 'not possible' ('ist dies aus praktischen Gründen nicht möglich'). The Swedish language version may be similarly translated as 'when that cannot be done for practical reasons' ('Om detta är ogörligt av praktiska skäl').

31. Whilst it is true that the English language version ('where this is impossible for practical reasons') and the Danish, [13] Spanish, [14] Finnish, [15] Greek [16] and Dutch [17] language versions, the expression 'not possible' is replaced by 'impossible', these two expressions are, to my mind, equivalent.

32. The French language version, together with the Italian [18] and Portuguese [19] versions, uses the expression 'en cas d'impossibilité pratique'. That may, at first sight, appear to be a little stronger, but there is no difference in fact between the adjective 'impossible' and the noun 'impossibility'.

33. In fact, the differences concern more what is meant by 'practical'. The question is whether the requirement to include the warning in full is only to be relaxed where it is 'objectively' impossible to reproduce the full text, because of insufficient space, or, as Schwarzkopf contends, also in all cases where there are *sufficient practical reasons*, including those of an economic nature, for so doing. [20]

34. The ZBUW, the French, Netherlands and Finnish Governments, and the Com-

12 — Case 29/69 [1969] ECR 419, paragraph 3.

13 — Hvis dette i praksis er umuligt.

14 — Cuando esto fuera imposible en la práctica.

15 — Jos tamä on käytännön syistä mahdotonta.

16 — Se periptosi pou, afto me praktika adynato.

17 — Wanneer dit in de praktijk onmogelijk is.

18 — In caso di impossibilita pratica.

19 — Em caso de impossibilidade prática.

20 — The referring court uses the term 'renunciation' ('Verzicht').

mission submit, in essence, that since the warning is intended to protect public health, any derogation from the obligation to set it out in full must be interpreted strictly.

35. The ZBUW goes on to explain that what is meant by that is that recourse to the derogation is only possible where the manufacturer faces 'obstacles which, for technical reasons, render it impossible to include appropriate information on the container, such as the reduced size of the container or technical difficulties in displaying information on the container in indelible, easily legible and visible lettering', even if the 'impossibility' is not total.

36. The Netherlands Government contends that the 'practical impossibility' of complying with the warning obligation must relate to the shape or volume of the product in question, having regard to its nature, function, or usual get-up.

37. The ZBUW adds, in common with the Commission, and the Finnish and Netherlands Governments, that purely economic considerations are insufficient to justify recourse to the derogation. The same is true as regards reasons of expediency, convenience or relating to the wishes of the manufacturer or distributor, who naturally prefer a situation which is simpler, more practical, easier or more economical than that resulting from the application of the provisions of the Directive. The same conclusion may be reached from an assessment of the interests involved. Public health must be protected as a matter of priority and the term 'practical reasons' should be understood in the light of considerations relating to its production.

38. I, too, propose to the Court that the term in question be interpreted as meaning 'material impossibility'.

39. I will examine in due course whether that interpretation must be regarded as incompatible with Article 30 of the Treaty, because it would require undertakings to produce different packaging for each Member State for which the goods are intended.

40. The first reason which leads me to share the view of ZBUW, the three Governments and the Commission is the fact that the expressions 'not possible', 'impossible' or 'impossibility' are used by reference to a factual situation over which the party relying on it has no control, or which do not depend upon that party's intention.

41. Second, it should be observed that, if the Council had intended also to include economic reasons, it would have been easy for it to make specific provision for this in

the text by stating: 'Where this is impossible for practical reasons or for reasons of economy in the manufacture of the packaging or containers...'.

42. Conversely, however, one could equally contend that, if the Council had only intended to include practical reasons resulting from the size or shape of the product, it could have made this clear, as it did in other passages of Article 6, inserted in 1993.

43. At the end of paragraph 1, the two following subparagraphs have been added:

'Where it is impracticable, *for reasons of size or shape*,[21] for the particulars referred to in points (d) and (g) to appear in an enclosed leaflet, those particulars shall appear on a label, tape or card which is enclosed or attached to the cosmetic product.

In the case of soap, bath balls and other small products where it is impracticable, for reasons of size or shape, for the particulars referred to in point (g)[22] to appear on a label, tag, tape or card or in an enclosed leaflet,[23] those particulars shall appear on a notice in immediate proximity to the container in which the cosmetic product is exposed for sale.'

44. However, as the Commission has pointed out, the difference between the wording of those subparagraphs and that of subparagraph (d) provides the basis for an argument by way of converse inference just as much as it does for an argument by analogy. If the Community legislature has not defined what is meant by 'impossible for practical reasons' within the meaning of subparagraph (d), it is just as likely that it may have deliberately omitted, rather than have forgotten, to do so.

45. I therefore agree with the Commission's submission that 'the last — and most important — aspect in the light of which the provision in question must be viewed is determinative: the purpose of the legislation of which it forms part'.

2. *The purpose of the Directive*

46. In my opinion, the argument that the Directive is designed only secondarily to assure the protection of the health of users of the products in question is unsustainable.

21 — Emphasis added.

22 — Paragraph (g) refers to the list of ingredients. It includes an identical derogation to that in paragraph (d) in issue in this case.

23 — Emphasis added.

47. In terms of its logic, the approach followed by the Council seems to have been as follows:

48. First, it established that there was a barrier to free movement of the products in question because the Member States had adopted divergent provisions governing the composition and labelling of cosmetics products (first and second recitals in the preamble to the Directive).

49. The Council was aware that it could not invoke the *Cassis de Dijon*[24] decision against those divergent provisions because the Member States were entitled to rely on the Article 36 proviso which permits restrictions on imports justified on grounds of public health to be maintained.

50. That is apparent from the third recital, which states that 'the main objective of these laws is the safeguarding of public health and..., as a result, the pursuit of the same objective must inspire Community legislation in this sector'.

51. The Council therefore determined at Community level the rules which must be observed as regards the composition, labelling and packaging of cosmetic products (fourth recital).

52. The Council drew from this the logical conclusion, in Article 7(1), that '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'.

53. In parallel with this, the Council provided in Article 3 of the Directive that 'Member States shall take all necessary measures to ensure that only cosmetic products which conform to the provisions of this Directive and its Annexes may be put on the market'.

54. As has already been seen, the same rule is specifically repeated in Article 6(1), in respect of the information which must appear on the container and packaging.

55. Those rules apply even where a product is marketed only in the Member State of manufacture.

24 — Case 120/78 *Rewe-Zentral* [1979] ECR 649, referred to as '*Cassis de Dijon*'.

56. Furthermore, it should be noted that the Directive does not apply to all products without exception. The Council has excluded from its scope 'cosmetic products containing one of the substances listed in Annex V'. With regard to those products, 'Member States may take such measures as they deem necessary' (Article 1(3), inserted by Directive 88/667). Those measures may clearly extend to prohibiting the sale of these products.

57. Lastly, Article 12 provides that 'if a Member State notes, on the basis of a substantiated justification, that a cosmetic product, although complying with the requirements of the directive,[25] represents a hazard to health, it may provisionally prohibit the marketing of that product in its territory or subject it to special conditions'.

58. The Commission must then enter into consultation, issue an opinion and take the appropriate steps. 'If the Commission is of the opinion that technical amendments to the directive are necessary, such amendments shall be adopted by either the Commission or the Council in accordance with the procedure laid down in Article 10. In that event, the Member State which has adopted safeguard measures may maintain them until entry into force of the adaptations.'

25 — Emphasis added.

59. It is therefore absolutely undeniable that the safeguarding of public health is the essential objective of the directive. The Commission, for its part, has confirmed this in the first recital of the most recent directive amending Directive 76/768,[26] where it states that 'the main objective of Directive 76/768/EEC is to protect public health'.

60. It is therefore undeniable that, where there is a conflict between the principles of the free movement of cosmetic products and the concerns relating to the safeguarding of public health, it is the latter which must take precedence.

61. It is also clear, that, given the pre-eminence accorded, within the framework of this directive, to the concern to safeguard public health, the expressions 'where this is impossible for practical reasons' or 'where that is not possible for practical reasons' must be interpreted narrowly. They can only refer to those cases where the full inclusion of the warning on the packaging and the container is materially impossible.

62. I would add, lastly, that Schwarzkopf's argument presenting the legislation in question as a barrier to the free movement of goods is, to say the least, paradoxical. As I have shown, the free movement of cosmetic

26 — That is, Commission Directive 97/18/EC of 17 April 1997 postponing the date after which animal tests are prohibited for ingredients or combinations of ingredients of cosmetic products (OJ 1997 L 114, p. 43).

products was made possible only through the adoption of certain common rules, and it seems, therefore, scarcely conceivable that a manufacturer should now wish to free itself from them by arguing that one of them constitutes a barrier to intra-Community trade.

63. On the other hand, the Court has held, in the *Clinique*[27] case, that the 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)'.

64. Certain of the arguments put forward by Schwarzkopf amount, in essence, to maintaining that the rule in issue constitutes a hindrance to free trade which is unnecessary for the attainment of the objective pursued.

3. *Is the rule in question disproportionate?*

65. Schwarzkopf submits that the rule cannot be justified on the ground of public health and consumer protection because the system it has adopted results, through the inclusion of abbreviated warnings in several languages, in equivalent, if not better, protection for consumers and professional users.

66. Schwarzkopf claims, first, that this system makes it possible to give information also to foreigners resident in the country of distribution who are not fluent in the language of that country. To that the Commission replies, rightly in my view, that the abbreviated warning would also have to appear in the Turkish language, given that the Federal Republic of Germany has a sizeable resident population of Turkish mother tongue. Moreover, that argument in no way justifies the conclusion that the double inclusion of the full warning required by the Directive is not necessary for the attainment of, or that it is disproportionate to, the objective pursued.

67. The Council clearly intended that the warning be such as to 'catch the eye' of users, first, picking up the box and, second, on taking hold of the tube. It may thus be assumed that the Council had in mind that certain people will not tend to read a leaflet, even when they are referred to it. The Finnish Government also added, rightly, that not all of the containers are intended to be used once only, and the leaflet could become lost after the product is first used.

27 — Case C-315/92 *Verband Sozialer Wettbewerb 'Clinique'* [1994] ECR I-317, paragraph 12.

68. Schwarzkopf nevertheless submits that the system that it has adopted ensures a protection equivalent to that provided by the inclusion of a full warning on the packaging and containers, since the consumer and the professional user are accustomed, from their experience of using medicines, to read the enclosed leaflet.

69. The ZBUW rightly objects, however, that, according to the Directive, cosmetic products must not be harmful to human health when they are applied under normal or foreseeable conditions of use,[28] and therefore, consumers and professional users cannot be expected to be as careful in their use of cosmetic products as they are in the use of medicines.

70. For my part, I agree that consumers and professional users cannot be required to exercise the same degree of caution in the handling of cosmetic products as of medicines, since they do not expect cosmetic products to be harmful to health. The Directive defines cosmetic products as being[29] 'any substance or preparation intended to be placed in contact with the various external parts of the human body (epidermis, hair system, nails, lips and external genital organs) or with the teeth and the mucous membranes of the oral cavity with a view exclusively or mainly to cleaning them, perfuming them, changing their appearance and/or correcting body odours and/or protecting them or keeping them in good condition'.

71. Cosmetics are therefore readily distinguishable from medicines, which are defined as being[30] 'any substance or combination of substances presented for treating or preventing disease in human beings or animals. Any substance or combination of substances which may be administered to human beings or animals with a view to making a medical diagnosis or to restoring, correcting or modifying physiological functions in human beings or in animals is likewise considered a medicinal product'.

72. The average consumer is well aware that some medicines can have side effects, and will therefore be more likely to refer to the conditions for use on the enclosed leaflet. Nor should we forget that most medicines are prescribed by doctors, who will already have explained to the patient the proper dosage and drawn his attention to any possible side effects.

28 — See Article 2(1) of the Directive, which states 'A cosmetic product put on the market within the Community must not cause damage to human health when applied under normal or reasonably foreseeable conditions of use, taking account, in particular, of the product's presentation, its labelling, any instructions for its use and disposal as well as any other indication or information provided by the manufacturer or his authorised agent or by any other person responsible for placing the product on the Community market'.

29 — See Article 1(1)(1) of the Directive.

30 — See Article 1(2) of Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products (OJ, English Special Edition, First Series 1965-1966, p. 24).

73. It is not, therefore, appropriate to compare the behaviour of consumers in the use of medicines with their behaviour in the use of cosmetic products, because the latter are supposed to be harmless.

74. In any case, it should be noted that Council Directive 92/27/EEC of 31 March 1992 concerning the labelling of medicinal products for human use and on package leaflets, [31] also requires the appending of certain warnings on the packaging, without any possibility of referring, in this regard, to the leaflet which, for its part, must contain other information.

75. Thus packaging must bear the name of the medicinal product, a statement of the active ingredients expressed qualitatively and quantitatively per dosage unit, a list of those excipients known to have a recognised action or effect, as well as:

— the method and, if necessary, the route of administration;

— a special warning that the medicinal product must be stored out of reach of children;

— a special warning, if necessary, for the medicinal product concerned;

— special storage precautions, if any;

— special precautions for disposal of unused medicinal products or waste materials derived from such products, if appropriate;

— in the case of self-medication, instructions on the use of the medicinal products.

76. It is evident that this information will in practice never be able to be included on a single package in all of the languages of the Member States.

77. As regards cosmetic products, it is also necessary to bear in mind, as the Finnish and Netherlands Governments point out, that the Community legislature has clearly accorded to the appending of the full wording of the warnings set out in the Annexes to the Directive on the packaging and the container of a cosmetic product in the national or official language, or languages, of the country of distribution a greater protective effect for the average cosumer and professional user than to the

31 — OJ 1992 L 113, p. 8.

appending of an abbreviated warning with a reference to an enclosed leaflet.

78. The French and Netherlands Governments submit, also rightly, that the consumer must be able to inform himself of any precautions to be taken before buying a cosmetic product, and therefore without opening the packaging, in order to be able to choose with full knowledge of the facts.

79. It is important not to lose sight of the fact that the cosmetic products covered by the Directive are intended for the general public. It is absolutely essential that a consumer who wishes to purchase, for example, some talcum powder, is told, before buying, that a talcum powder containing boric acid should not be used for babies (see Annex III, part 1, No 1 to the Directive), or that another such product may cause blindness (No 17 in the same annex).

80. The quality of the information constitutes a key element in consumer protection. The Court has stated that:

'... Community policy on the subject establishes a close link between protecting the consumer and providing the consumer with information...' [32] and that 'it follows from the foregoing that under Community law concerning consumer protection the provision of information to the consumer is considered one of the principal requirements...'. [33]

81. It remains to consider whether a requirement, which is not disproportionate when it concerns products intended for use by the general public, becomes so when it concerns products specifically intended for professional use.

4. *The particular case of professional users*

82. Schwarzkopf submits that account must be taken, when weighing the interests at stake, of the fact that the product at issue is intended exclusively for professional users, for whom the same degree of protection as that required for the average consumer is not necessary.

83. To this, the Finnish Government replies that the Directive is intended to safeguard the health of professional users just as much as that of consumers, and that the fact that a product is intended exclusively

32 — Case C-362/88 *GB-Inno-BM* [1990] ECR I-667, paragraph 14.

33 — *GB-Inno-BM*, cited above, paragraph 18.

for professional use cannot be used as a pretext for applying to those users a less rigorous provision. It adds that professionals face even greater health risks, and also that it cannot be discounted that the product will fall into the hands of ordinary consumers.

84. It should be recalled, in this regard, that, until the adoption of Directive 88/667, Article 6(1)(d) made no mention of a requirement to append to the packaging and container warnings addressed specifically to professional users. It was only as a result of the observations of the Economic and Social Committee that the phrase 'as well as any special precautionary information on cosmetic products for professional use, in particular in hairdressing' was inserted into Article 6(1)(d) of the Directive. The Committee had stated, at paragraph 2.3, of its opinion on the draft directive, [34] that '[t]he Committee expresses its concern over the failure to mention special precautions to be taken in the case of cosmetic products for professional use, in particular by hairdressers. Some information on this matter, intended for all users, is admittedly set out in Annex III. Manufacturers should, however, be required to indicate — at all events in the case of some products — that it is advisable to wear gloves when applying them. Whilst some of these products do not give rise special problems, it is evident that repeated application several times a day may cause problems of irritation and users should therefore be put in a position to avoid these problems'.

85. If a committee within which the views of both businesses and workers are expressed comes to the conclusion that the information prescribed by the Directive would be improved by the addition of material intended for professionals, it can hardly be said that the legislature has infringed the principle of proportionality in not authorising recourse to more succinct information for professionals than for ordinary consumers.

86. Whilst professionals with a long experience are probably aware of the precautions to be taken, the same is not necessarily true for apprentices. Furthermore, it may be that new product marks or commercial names will begin to be used without the employees being immediately aware that they pose the same possible risks as those with which they are familiar.

87. It would, admittedly, be conceivable that, for products intended exclusively for professional use, a briefer warning would suffice, emphasising the essential points such as 'Warning: harmful to the eyes; risk of allergy; read the leaflet carefully'.

34 — Opinion of the Economic and Social Committee on the proposal for a Council Directive amending for the fourth time Directive 76/768 on the approximation of the laws of the Member States relating to cosmetic products (OJ 1987 C 319, p. 5).

88. However, it is not because the Community legislature has not taken that route that it is possible to criticise it for having infringed the principle of proportionality. Differentiating between labelling obligations according to the distribution circuit — public at large or circuit reserved to professionals — or, by contrast, unifying labelling obligations, with alignment on the need to protect the averagely well-informed consumer, are two options between which the Community legislature, because it enjoys an undeniable discretion, was entitled to make a choice. And it is not because that choice does not satisfy a manufacturer that the measures adopted are unlawful. They would be so only if it were proved that, in requiring the appending on products intended for professionals of the same information as that to be appended on the products as for the general public, the Community legislature had, as a result of a manifest error of assessment, placed a disproportionate burden upon manufacturers with regard to the objective of safeguarding public health pursued by it and which it was entitled to pursue. No such proof has been adduced before the Court.

89. Nor, if tomorrow the legislature were to make a different choice, would that choice be open to objection, provided that the measures adopted respected the principle of proportionality; nor would that mean that the choice it had made previously was erroneous. The existence of a discretion means, by definition, that different solutions, all perfectly lawful, are open to the decision-maker. It is only in the converse situation, that is, in the case of circumscribed powers, that all choice disappears and a number of lawful solutions cannot exist simultaneously.

5. Article 30 and the multiplicity of languages

90. It remains for me to comment briefly on the argument that the fact of preventing a manufacturer of cosmetic products from using a single packaging and container for all of the Member States of the Community constitutes a restriction of the principle of the free movement of goods, contrary to Article 30 and 34 of the EC Treaty (now, after amendment, Article 29 EC).

91. Let us acknowledge that, if it were possible to satisfy the requirements of the protection of public health and to use one form of packaging for the whole of the Community market, then we would have an ideal situation.

92. However, there can be a gap between the ideal and the attainable. The inescapable reality of the Community is that of the coexistence, within the same market, of a large number of different national and official languages.

93. The costs which flow from that fact are not imposed by the Council, but result from the nature of things. They cannot, therefore, be regarded as an unlawful restriction on trade contrary to Article 30 of the Treaty.

94. The need to print different packages is not, moreover, the equivalent of the 'variation in production' which the Directive sought to avoid (second recital in the preamble). That variation refers to the composition of the products. As for the economic necessities which are required to be taken into account under the third recital in the preamble, we have seen that, in case of conflict, they cannot prevail over the necessities relating to the protection of public health.

95. It is, therefore, right that the Community legislature has provided in Article 7(2) that the Member States 'may 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'. [35]

96. It may be noted in passing that it is materially possible to print the warning, in three languages, on the tube and corresponding packaging. Availing itself of this possibility, [36] a manufacture will need only four types of packaging to cover the 15 Member States, and, at the same time, in so far as the relevant labelling obligations there are comparable, all of the English-, French-, Spanish- and Portuguese-speaking countries of the world (plus, possibly, the Arabic-speaking countries, since there are only 11 Community languages, and so one of the packs could cover two Community languages plus Arabic).

97. I would point out moreover that the burden of linguistic constraints has made itself felt on another level. The Directive provides, in Article 7a, that a series of seven sets of data is made available to the competent authorities in other Member States in the official language or languages of the Member State concerned, or in a language readily understood by them.

98. These include the qualitative and quantitative composition of the product, the

35 — Directive 93/35 has replaced this subparagraph with the following:
'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.'

36 — I have before me a hair colouring reserved for professional use, sold under the name 'Majirel HT'. It carries the following warning in French, English and Spanish on the cardboard packaging *and on the tube*: 'Contains: Diaminophenol, resorcinol and ammonia. Wear appropriate gloves, preferably single-use. Rinse well after applying. May cause an allergic reaction. Sensitivity testing (touch test): see leaflet. Rinse immediately if the product comes into contact with the eyes. Follow the instruction leaflet'. This tube contains 50 ml whilst Schwarzkopf's contains 60 ml.

method of manufacture, an assessment of the safety for human health of the finished product, existing data on undesirable effects on human health, and proof of the effect by the cosmetic product.

99. That shows, once again, that the Community legislature intended to accord first priority to the protection of human health. It clearly considers that if a manufacturer wishes to market his products in other Member States he must bow to the constraints arising from the multiplicity of languages in the Community.

100. I would add that if one were to take the argument of impermissible costs to its logical conclusion, one would be forced to conclude that the Council should abandon the requirement to print warnings not only on the packaging and containers of cosmetic products, but also on those of medicines and phytosanitary products, whenever the length of the warning would prevent its being printed in all of the Community languages, at least where the products are intended for professionals.

101. Having regard to the importance to be attached to the protection of public health, such an argument clearly cannot succeed.

VI — Conclusion

102. In the light of all the foregoing considerations, I propose that the Court rule as follows:

The term 'impossible for practical reasons' in the second sentence of Article 6(1)(d) of Council Directive 76/768/EEC on the approximation of the

laws of the Member States relating to cosmetic products, in conjunction with Articles 30 and 36 of the EC Treaty (now, after amendment, Articles 28 and 30 EC), must be interpreted as meaning that it does not permit the full wording of the warning not to be given merely because the undertaking considers it appropriate, for economic reasons, to market its products in a uniform get-up in nine languages in different States, furnishing only abbreviated information on the packaging and container, so long as it is materially possible to print the full information.