OPINION OF ADVOCATE GENERAL DARMON

delivered on 15 September 1992 *

Mr President,
Members of the Court,

1. Is Article 30 of the EEC Treaty infringed by national rules under which advertisements comparing the prices charged for a single product during different periods are prohibited if those advertisements are 'eye-catching'? That, in substance, is the question referred to by the Court by the Bundesgerichtshof.

2. The facts which gave rise to that question are the following: Yves Rocher GmbH sells cosmetics in Germany, mainly by mail-order. The cosmetics are supplied to it by its French parent company, Yves Rocher. The parent company designs uniform advertising for most of the Member States of the Community and the advertising media used are sales catalogues and brochures. A brochure accordingly came to be distributed in Germany with the words 'Save up to 50% and more on 99 of your favourite Yves Rocher products' below which the old prices, which were in standard type with a line through them, were placed next to the new, lower prices in large red type. [1]

3. The Schutzverband gegen Unwesen in der Wirtschaft (Association against Unfair Competition) brought an action for an injunction [2] against Yves Rocher GmbH on the ground that the advertising in question was contrary to the German legislation on unfair competition.

4. Article 6 of the Gesetz gegen den unlauteren Wettbewerb (Law against Unfair Competition, hereinafter 'the UWG'), as amended by the Law of 25 July 1986, provides *inter alia* that:

'(1) An injunction may be sought against any person who, in commercial dealings with the final consumer, compares with higher prices, in publications or announcements intended for a large number of persons, the prices actually charged for certain goods or services selected from the total range available, or who announces price reductions of a given amount or percentage and thereby conveys the impression that the price previously charged was the higher price stated.

(2) Subparagraph (1) shall not apply:

* Original language: French.

1 — See Annex 5 to the observations of Yves Rocher.

2 — A consequence of the action for an injunction could be a complete judicial prohibition against the advertising in question.

(1) to references to prices which are not displayed so as to catch the eye;

(2) if reference is made, in a manner not designed to catch the eye, to a higher price appearing in an earlier catalogue or comparable sales brochure offering a full range of goods or services ...'.

5. The Landgericht (Regional Court) considered that the new prices had been displayed in an eye-catching manner and consequently granted the application for an injunction.

6. However, the court hearing the appeal took the view that Yves Rocher GmbH could rely on the exemption provided for in Paragraph 6e(2)(2) of the UWG.

7. The Bundesgerichtshof, hearing an appeal on a point of law, proceeds on the assumption that (i) the new price is displayed in an eye-catching manner; (ii) the exemption under Paragraph 6e(2)(2) of the UWG is not applicable; (iii) the advertising at issue falls within the scope of Paragraph 6e(1) of the UWG. [3]

8. The Bundesgerichtshof, which considers that the prohibition imposed by Paragraph 6e(1) affects intra-Community trade, has referred the following question to the Court: must Article 30 of the EEC Treaty be interpreted as precluding the application of a rule of law of Member State A prohibiting an undertaking established in that State, carrying on mail-order sales by catalogue or sales brochure of goods imported from Member State B, from using advertisements relating to prices in which there is an eye-catching display of the new price and reference is made to a higher price shown in an earlier catalogue or sales brochure? [4]

9. Let me point out at once that the question referred by the national court is extremely precise; it is not whether the prohibition on advertising by comparing prices in general, but whether a certain *form* of advertising of that kind, is compatible with Article 30 of the Treaty. [5]

10. Article 6 of the UWG, which has given rise to the question referred by the national court, lays down the principle that an action for an injunction may be brought against advertising which consists in the juxtaposition of the old and the new prices for the same product, *whether or not the old price mentioned is correct.*

11. The prohibition is not infringed if the advertising does not highlight the reference to the price in such a way as to catch the eye. [6] According to the *travaux préparatoires* for the Law of 25 July 1986 amending the UWG, that exemption is designed to permit retailers to strike out the old price when prices are reduced and to place the new price next to it without having to use a new label. [7]

3 — Reference for a preliminary ruling, p. 3 of the English translation.

4 — It should be pointed out that the national court is referring to the legislation prohibiting that type of advertising by price comparison and not to the legislation which permits an action for an injunction to be brought against such advertising, which could result in its prohibition by the court.

5 — Comparative advertising is generally understood as meaning advertising in which the prices of one product are compared with those of competitors.

6 — Paragraph 6e(2)(1) of the UWG.

7 — See the observations of the defendant company, p. 11 of the French translation.

12. A second exemption is provided for advertising by catalogue which is not 'eye-catching'. [8] Thus advertising by catalogue using a price comparison is unlawful if the new price is highlighted in an eye-catching manner, whether or not the prices mentioned are correct. That is the prohibition which the Bundesgerichtshof is asking the Court to consider. In other words, may a Member State prohibit a price comparison, *even if genuine*, on the ground that it is designed in such a way that the indication of the new price catches the eye?

13. That type of advertising is regulated by Community law only in so far as the advertising in question is *misleading*. That kind of advertising is the subject 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. [9] However, the national court is asking the Court to consider rules prohibiting price comparisons which may be correct. It should be pointed out, moreover, that a proposal for a Council directive concerning comparative advertising and amending Directive 84/450/EEC concerning misleading advertising, [10] which authorizes comparative advertising under certain conditions, has not yet been adopted. Nor does it concern advertising by comparing the various successive prices of a single product. [11]

14. With regard to the free movement of goods, the Court has consistently held that:

'In the absence of common rules relating to the production and marketing of the product in question, it is for Member States to regulate all matters relating to its production, distribution and consumption on their own territory subject, however, to the condition that those rules do not present an obstacle, directly or indirectly, actually or potentially, to intra-Community trade'. [12]

15. If obstacles to free trade result from those disparities between national laws, the obstacles:

'must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to ... the fairness of commercial transactions and the defence of the consumer'. [13]

16. I shall begin by considering whether legislation of the kind submitted to the Court by the national court — which does not discriminate in any way against imported products since advertising by comparing prices is prohibited irrespective of the origin of the products advertised — may affect intra-Community trade.

17. Legislation on advertising concerns a service. It does not regulate imports of goods directly. Can it restrict the volume of

8 — Paragraph 6e(2)(2) of the UWG. If the advertising of the French company Yves Rocher had not been designed to catch the eye, the price comparison which it contained would have been lawful.

9 — OJ 1984 L 250, p. 17.

10 — (COM(91) 147 Final), OJ 1991 C 180, p. 14.

11 — Ibid., Article 1.

12 — Judgment in Case 788/79 *Gilli and Andres* [1980] ECR 2071, paragraph 5.

13 — Judgment in Case 120/78 *Rewe* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, paragraph 8.

imports in so far as it affects marketing opportunities for imported products?

18. Since its judgment in Case 8/74 [14], the Court has consistently held that the prohibition against measures having an effect equivalent to quantitative restrictions laid down in Article 30 of the Treaty applies to all trading rules enacted by Member States

'which are capable of hindering, directly or *indirectly*, actually or *potentially*, intra-Community trade'. [15]

It is sufficient for the measure to be objectively capable of hindering trade: it is not necessary to prove that the measure in question actually restricts imports or that it has an appreciable effect on intra-Community trade. [16]

19. In the *Oosthoek's* [17] case, the Court was called upon to decide whether Netherlands legislation restricting the freedom to offer free gifts within the framework of a commercial activity was compatible with Articles 30 and 34 of the EEC Treaty.

20. A Netherlands publisher sent books as free gifts to purchasers of an encyclopedia imported, in part, from Belgium. The Court accepted that 'transactions forming part of intra-Community trade' [18] were involved and, in relation to provisions such as those of the Netherlands law examined in the light of Article 30 of the Treaty, it ruled that:

'Legislation which restricts or prohibits certain forms of advertising and certain means of sales promotion may, although it does not directly affect imports, be such as to restrict their volume because it affects marketing opportunities for the imported products. The possibility cannot be ruled out that to compel a producer either to adopt advertising or sales promotion schemes which differ from one Member State to another or to discontinue a scheme which he considers to be particularly effective may constitute an obstacle to imports even if the legislation in question applies to domestic products and imported products without distinction.' [19]

21. The Court even accepted that the scope of Article 30 encompassed the Luxembourg law which had the effect of prohibiting the distribution in the Grand Duchy of advertising leaflets of the Belgian company GB-INNO-BM encouraging consumers in Luxembourg to shop in supermarkets in Belgium. [20]

22. As the Commission points out, that must apply *a fortiori* when it is perfectly clear that the prohibition on advertising

14 — Case 8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837.

15 — Ibid., paragraph 5, emphasis added.

16 — See the judgments in Case 12/74 *Commission* v *Germany* [1975] ECR 181, paragraph 14, and Case 16/83 *Prantl* [1984] ECR 1299, paragraph 20.

17 — Judgment in Case 286/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575.

18 — Paragraph 9.

19 — Paragraph 15; see also the judgments in Case 152/78 *Commission* v *France* [1980] ECR 2299, paragraph 11, Case C-362/88 *GB-INNO-BM* [1990] ECR I-667, paragraph 7, Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 29, and Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad* [1991] ECR I-4151, paragraphs 10 and 11.

20 — Judgment in Case C-362/88, cited above, paragraph 8.

concerns, in the Member State in which potential customers live, sales of goods which are imported into that State from another Member State. [21]

23. Thus legislation which lays down conditions that are unknown in the majority of the other Member States in that it provides that advertising in which the advertising medium shows the old, higher price and the new price is prohibited if the latter price is displayed in such a way as to catch the eye, may affect the volume of sales and consequently intra-Community trade. That is so particularly where

(1) the goods in question are exclusively imported,

(2) the advertising technique used proves to be particularly effective.

24. The German Government cannot therefore argue that advertising which is intended solely for the market of *a single* Member State has no effect on intra-Community trade. Since the advertising in fact seeks to promote imported goods in that country, it affects intra-Community trade.

25. The prohibition on advertising by comparing prices which gave rise to the question referred by the national court is capable of restricting imports of products from one Member State to another and thus constitutes a measure having equivalent effect for the purposes of Article 30 of the Treaty.

21 — Observations of the Commission, p. 10 of the French translation.

26. The restriction imposed by that prohibition must be accepted if it is applicable to domestic and imported goods without distinction and, in the absence of Community rules, can be justified in accordance with the case-law of the Court by mandatory requirements relating to consumer protection and fair trading. [22] I refer to mandatory requirements and not to mere reasons, albeit serious ones, as suggested by the applicant in the main proceedings, which considers that a mandatory requirement cannot be the only criterion. [23]

27. There is no doubt at all that such a provision can meet the aforementioned objectives relating to consumer protection and fair trading since it prevents misleading price comparisons. However, as it can also affect correct price comparisons and thus restrict without justification the provision of information to the consumer, is it proportionate to those objectives?

28. As we have seen, the prohibition at issue is applicable where prices catch the eye, *regardless of whether or not they are correct*. The rationale for such a rule is to be found in the reasons for Paragraph 6e of the UWG stated in the Government's draft law and referred to by the defendant in the main proceedings: to counter the widespread abuses regarding the use of prices which have been crossed out and similar devices, to prevent the risks arising from the particular attraction it exerts and the danger of being misled. [24] According to the German Government, 'what is at issue is not the fact of

22 — Judgment in Case 120/78, cited above, paragraph 8, and subsequent case-law; see, in particular, the judgment in Case C-362/88, cited above, paragraph 10.

23 — Observations of the applicant in the main proceedings, p. 9 of the French translation.

24 — See the observations of Yves Rocher, p. 12 of the French translation.

deception ... it is the *abstract risk of deception* to which such "allurement" as an advertising technique generally gives rise'. [25] It is true that price-comparison advertising lends itself easily to dubious practices such as that of artificially inflating the reference price so as to give the misleading impression that prices have been reduced. Moreover, the consumer is not always in a position to check whether an earlier reference price is genuine. Finally, as A. Reuter has pointed out, eye-catching advertising increases the danger of deception 'denn der Blickfang verkürzt, und wer verkürzt, sagt häufig nicht die ganze Wahrheit'. [26]

29. Thus, according to the legislation at issue, 'eye-catching' price labelling raises a *presumption of fraud*, as it were, on the part of the advertiser, with the result that, in the interests of consumer protection, it prohibits such advertising just as it prohibits dishonest or misleading advertising. It is not only misleading advertisements that are prohibited but also those which, from the way in which they are designed, could easily mislead. Thus the prohibition is absolute whereas fraud or mere inaccuracy in the price labelling is only *a possibility and therefore uncertain.*

30. It is clear that behind 'eye-catching' advertising, it is 'misleading' advertising that is the real target. A prohibition of misleading advertising alone is deemed to be inadequate on evidential grounds. Many misleading or dishonest advertisements cannot be proven to be so. For example, in the case of price-comparison as an advertising technique, it is very difficult to prove that the earlier reference price has actually been charged. In order to lessen that difficulty, the legislature had recourse to the concept of eye-catching advertising — materially easy to prove even if its appraisal may be subjective — which presupposes that such advertising masks an intention to mislead, or at any rate prevents any 'abstract risk' in that regard.

31. Let me say at once that a prohibition of that kind is not in my view necessary to satisfy the mandatory requirements relating to consumer protection and fair trading.

32. The Court has already had occasion, in *GB-INNO-BM*, to consider national rules on price-comparison as an advertising technique.

33. In that case the Grand-Ducal Regulation of 23 December 1974 on unfair competition provided that offers involving a price reduction should not contain either any indication of the duration of the offer or any reference to the earlier prices, even though they might be correct.

34. The Belgian company GB-INNO-BM had distributed advertising leaflets in Luxembourg which contained information regarding the period during which price reductions were valid and gave the reduced prices with reference to the old prices.

35. The Court pointed out that the principal consequence of the Luxembourg regulation

25 — Observations of the German Government, p. 7 of the French translation.

26 — 'for eye-catching publicity constitutes an abridgement, and whoever abridges frequently does not tell the whole truth', A. Reuter, Neues zu Euro-Marketing und §§ 6e, 7 UWG, *Betriebsberater*, 1990, p. 1652.

was to *deny* the consumer access to certain information, whereas the way to protect the consumer was to provide him with *better information*, as evidenced by the Community policy on the subject, [27] and it laid down the following principle:

'under Community law concerning consumer protection the provision of information to the consumer is considered one of the principal requirements. Thus Article 30 cannot be interpreted as meaning that national legislation which denies the consumer access to certain kinds of information may be justified by mandatory requirements concerning consumer protection'. [28]

36. From that, the Court concluded that Article 30 of the Treaty precludes advertising from being made subject to national legislation prohibiting the old price from being stated in an advertisement. [29] A measure which denies the consumer certain information cannot be regarded as a measure designed to protect him.

37. I regard the need to provide the consumer with appropriate information enabling him to make a fully informed decision whether or not to buy as one of the threads which runs through the Court's case-law on mandatory requirements relating to consumer protection.

38. Thus, in holding that national rules on advertising which restrict the provision of information to the consumer without justification are contrary to Article 30, [30] the Court is declaring national rules which protect the inadequately informed consumer compatible with that article. [31]

39. The Court accepts restrictions on the provision of information to the consumer only when it could be a source of confusion or is liable to mislead. [32]

40. Thus, so far as concerns the labelling of products, a prohibition regarding certain information about the product is a measure having an effect equivalent to a quantitative restriction, which is prohibited by Article 30 of the Treaty, unless that information is of such a kind as to mislead the purchaser. [33]

41. Is the fact that the new price is displayed in an 'eye-catching' manner in itself sufficient to mislead the consumer?

42. The legislation to which the national court refers can be distinguished from the Luxembourg legislation in Case C-362/88 — which imposed a blanket prohibition against

27 — See paragraphs 13 and 14 of the judgment in Case C-362/88, cited above.

28 — Paragraph 18.

29 — Paragraph 21.

30 — Judgment in Case C-362/88, cited above.

31 — See the judgment in Case 382/87 *Buet and Another* v *Ministère Public* [1989] ECR 1235, in particular paragraph 13, where it was held that the application to imported products of a prohibition on canvassing in relation to the sale of educational material laid down by a national law on the protection of consumers is not incompatible with Article 30 of the Treaty.

32 — Judgment in Case 94/82 *De Kikvorsch* [1983] ECR 947, paragraphs 11 and 12.

33 — Ibid., paragraph 13. See also Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (OJ 1979 L 33, p. 1).

stating the old price — and from the rules of other Member States — which permit references to the old price — by the concept of 'publicité accrocheuse' (eye-catching advertising) which is a less-than-satisfactory rendering of the term 'blickfangmäßig' (catching the eye).

43. That concept is the decisive criterion in this case. Advertising is either prohibited or authorized according to whether or not the price stated catches the eye. What the law penalizes is not the information provided, that is to say the content of the advertisement, but its design and presentation, in other words its 'visibility'.

44. I will not attempt to conceal my misgivings. Without wishing to manipulate the paradox excessively, can it not be argued that the ability of advertising to catch the eye is precisely what determines whether or not it is good advertising? What is the point of an advertisement which does not catch the eye? Is it not true to say that a prohibition against advertising which catches the eye is a prohibition against advertising *per se*? How can it be contrary to the interests of the consumer or constitute unfair competition to lay emphasis on what is most important to the purchaser, namely the new price?

45. Furthermore, at what point does advertising become eye-catching and therefore capable of being prohibited? If an advertisement is considered to be eye-catching when the new price appears in large print in a red circle, does the same apply when the circle is grey? Here it is not possible to avoid a subjective evaluation which gives rise to uncertainty, as evidenced in the present case by the differing appraisals of the national courts. That concept is thus in my opinion a factor which undoubtedly gives rise to uncertainty in the law.

46. The concept of 'eye-catching' publicity is justified, as we have seen, by the fact, according to the German Government, [34] that it allows 'the abstract risk of deception' to be prevented. But what, in that regard, does the criterion of 'eye-catching advertising' signify?

47. Let me point out first of all that for the purposes of the question referred by the national court, eye-catching advertising is advertising which emphasizes the new price without having recourse to any device, ruse or particular subtlety. It does not, for example, attempt to convey the impression that the selling price is a figure which appears in the advertisement but which is not in fact the price. It does not confuse the consumer since it distinguishes the old price from the new one. The 'risk of deception' is due solely to the fact that it is difficult to check the old selling price given.

48. However, in the field of mail-order catalogue selling in particular, the prohibition on eye-catching price comparisons is in my view even less justified since *the old price appearing in the catalogue can very easily be checked.* [35] Therefore there is no difficulty in establishing that the old price, as stated in the advertisement, is incorrect.

49. I would endorse the concept of 'eye-catching' advertising if it invariably enabled inaccuracies to be detected. The case referred by the national court is sufficient proof that it can lead to the prohibition of correct price comparisons. It is clear that the distinction

34 — See the observations of the German Government, p. 6 of the French translation.

35 — See, in that regard, p. 7 of the observations of the French Government.

between advertising which is eye-catching and that which is not, does not correspond to the distinction between advertising which is misleading and advertising which is fair.

50. Moreover, the prohibition of price comparisons involving the display of prices so as to catch the eye could lead to vaguely-worded advertisements announcing, in a general way, price reductions but not stating either the old or the new price and therefore containing much less information and affording far less protection to the interests of consumers than price-comparison as an advertising technique, even where the comparison of prices catches the eye. [36]

51. Furthermore, it should be possible to achieve the objective pursued using other, less restrictive means.

52. A survey of the rules governing that type of advertising in the other Member States reveals that specific requirements relating to the provision of information concerning

(1) the period during which the reference price was charged,

(2) the statement of the old and the new price,

enable the provision of information to the consumer to be reconciled with consumer protection. That is the case in the United Kingdom with the Consumer Protection (Code of Practice for Traders on Price Indications) Approval Order of 1988 issued by the Secretary of State. [37] Similarly, the Belgian Law of 14 July 1991 on trading practices and on informing and protecting the consumer provides that any advertising displaying a price reduction must refer to the price charged 'previously and habitually for identical products' and must correspond to genuine reductions capable of being justified particularly with regard to the reference price. [38] In Portugal, Decree-Law No 253/86 of 25 August 1986 regulating the sale of products reduced in price [39] imposes an obligation to indicate the 'price previously charged', which is defined as the lowest price for the product in question charged at the same sales outlet during the thirty days before the reduction was introduced. It is for the seller to show proof of the price previously charged. In French law, the very strict rules [40] governing the advertiser's choice of the reference price which appears in the advertisement guarantee that that is the true price and prohibit the trader from increasing the reference price just before announcing a reduction. Thus consumer protection is strengthened by the provision of *more information*, not *less*.

53. In short, the prohibition of that type of publicity by means of price comparisons where the indication of the new price catches the eye would not seem capable of being justified by mandatory requirements relating to consumer protection.

36 — See, in that regard, Reuter, op. cit., p. 1652.

37 — Statutory Instrument 1988, No 2078.

38 — See Article 43 of the abovementioned Law, *Moniteur Belge* of 29 August 1991.

39 — *Diário da República* No 194 of 25 August 1986.

40 — See Article 3 of Decree No 77-105 P of 2 September 1977, BOSP of 3 December 1977.

54. With regard to ensuring fair competition, I do not see how the legitimate interests of the competitors of the originator of the advertisement in question could be harmed if the price comparisons are neither incorrect nor misleading. [41] Fair trading can be protected by prohibiting misleading price indications only, in accordance with Article 4(1) of Council Directive 84/450/EEC of 10 December 1984, cited above.

55. Accurate price comparisons have no effect on the conditions of competition. On the contrary, those conditions are likely to be disturbed by a law which may result in the prohibition of such comparisons, even though they are made in other Member States.

56. The German Government also maintains that the objective of the prohibition on price comparison as an advertising technique is to remove the necessity of checking whether the prices stated are correct, a task which Germany — which has no price-control agency — states it is unable to assume. [42]

57. Let me point out that the simplification of administrative formalities is not part of the mandatory requirements which could justify a restriction on the free movement of goods and that both consumer associations and competitor undertakings check whether prices charged are correct. [43]

58. Finally, rules of the type at issue in the present case cannot be regarded as compatible with Article 30 on the ground that they create an 'entirely marginal' impediment to the free movement of goods. [44] The Court has rejected the application of the 'de minimis' rule in this area. Furthermore, 'the fact that a measure may have restrictive effects which are negligible in economic terms is of no consequence for the purposes of the application of Article 30 of the Treaty, since the prohibition laid down by that article is mandatory regardless of how restrictive the measure is, even if its restrictive effects are minimal.' [45]

59. In my view, Article 7 of the Council Directive of 10 September 1984, which permits the Member States to adopt provisions with a view to ensuring more extensive protection for consumers, does not authorize them to adopt a measure prohibiting price comparisons when those price comparisons are correct. Information which is truthful cannot, it seems to me, fall within the scope of a directive on misleading advertising.

41 — This observation also tallies with the suggestion of the German Government (p. 5 of the French translation) that the Court should apply Article 36 of the Treaty on the ground that, according to the Paris Convention, protection against unfair competition constitutes one of the aims of industrial property.

42 — Ibid., p. 10 of the French translation.

43 — See, in that regard, the Opinion of Advocate General Lenz in Case C-362/88, cited above, point 39.

44 — Observations of the German Government, p. 11 of the French translation.

45 — Mattera, *Le Marché Unique Européen*, Jupiter 1990, p. 235; see the judgments in Cases 16/83, cited above, paragraph 20, and Joined Cases 177 and 178/82 *Van de Haar and Kaveka de Meern* [1984] ECR 1797, paragraph 13.

60. I therefore propose that the question referred for a preliminary ruling should be answered as follows:

Article 30 of the EEC Treaty must be interpreted as precluding the application of a rule of law of Member State A that prohibits an undertaking which is based in that State and which sells by mail order, using catalogues or brochures, goods imported from Member State B, from publishing advertisements relating to prices in which the new price is displayed in such a way as to catch the eye and reference is made to a higher price shown in an earlier catalogue or brochure.