JUDGMENT OF THE COURT (Fifth Chamber)

13 January 2000 *

In Case C-220/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Landgericht Köln, Germany, for a preliminary ruling in the proceedings pending before that court between

Estée Lauder Cosmetics GmbH & Co. OHG

and

Lancaster Group GmbH

on the interpretation of Articles 30 and 36 of the EC Treaty (now, after amendment, Articles 28 EC and 30 EC) and Article 6(3) 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 (OJ 1988 L 382, p. 46) and Council Directive 93/35/EEC of 14 June 1993 (OJ 1993 L 151, p. 32),

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, J.C. Moitinho de Almeida (Rapporteur), C. Gulmann, J.-P. Puissochet and P. Jann, Judges,

Advocate General: N. Fennelly,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Estée Lauder Cosmetics GmbH & Co. OHG, by K. Henning Jacobsen, Rechtsanwalt, Berlin,

— Lancaster Group GmbH, by A. Lubberger, Rechtsanwalt, Frankfurt am Main,

— the German Government, by A. Dittrich, Ministerialrat at the Federal Ministry of Justice, and C.-D. Quassowski, Ministerialrat at the Federal Ministry of Economic Affairs, acting as Agents,

— the French Government, by K. Rispal-Bellanger, Deputy Head of the Legal Directorate of the Ministry of Foreign Affairs, and R. Loosli-Surrans, Chargé de Mission in the same directorate, acting as Agents,

— the Finnish Government, by H. Rotkirch, Ambassador, Head of the Legal Affairs Department at the Ministry of Foreign Affairs, and T. Pynnä, Legal Adviser at the same Ministry, acting as Agents,

— the Commission of the European Communities, by H. Støvlbæk, of its Legal Service, and K. Schreyer, a national civil servant on secondment to that service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Estée Lauder Cosmetics GmbH & Co. OHG, represented by K. Kleinschmidt, Rechsanwalt, Berlin; Lancaster Group GmbH, represented by A. Lubberger; the French Government, represented by R. Loosli-Surrans; and the Commission, represented by K. Schreyer, at the hearing on 17 June 1999,

after hearing the Opinion of the Advocate General at the sitting on 16 September 1999,

gives the following

Judgment

1 By order of 24 March 1998, received at the Court on 15 June 1998, the Landgericht Köln (Regional Court, Cologne) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Articles 30 and 36 of the EC Treaty (now, after amendment, Articles 28 EC and 30 EC) and Article 6(3) 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 (OJ 1988 L 382, p. 46) and Council Directive 93/35/EEC of 14 June 1993 (OJ 1993 L 151, p. 32) (hereinafter 'Directive 76/768').

2 That question was raised in proceedings brought by Estée Lauder Cosmetics GmbH & Co. OHG ('Estée Lauder') against Lancaster Group GmbH ('Lancaster') concerning the marketing of the cosmetic product 'Monteil Firming Action Lifting Extreme Creme' under a name which incorporates the term 'lifting'.

The relevant Community legislation

3 Article 6(3) of Directive 76/768 provides:

'Member States shall take all measures necessary to ensure that, in the labelling, putting up for sale and advertising of cosmetic products, text, names, trade marks, pictures and figurative or other signs are not used to imply that these products have characteristics which they do not have.

Furthermore, any reference to testing on animals must state clearly whether the tests carried out involved the finished product and/or its ingredients.'

4 The purpose 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 (OJ 1984 L 250, p. 17) is defined in Article 1 thereof as follows:

'The purpose of this Directive is to protect consumers, persons carrying on a trade or business or practising a craft or profession and the interests of the public in general against misleading advertising and the unfair consequences thereof.'

5 Article 2(2) of Directive 84/450 defines 'misleading advertising' as 'any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor'.

6 Article 3 of Directive 84/450 states that in order to determine whether advertising is misleading, account is to be taken of all its features, and lists several points to be taken into consideration in so doing.

7 Under Article 4 of Directive 84/450, 'Member States shall ensure that adequate and effective means exist for the control of misleading advertising in the interests of consumers as well as competitors and the general public'. It also specifies the type of legal provisions necessary, including power for the courts to order the cessation of misleading advertising.

8 Article 7 of Directive 84/450 states that the Directive does not preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection for the persons concerned.

The relevant German legislation

9 Under Paragraph 1 of the Gesetz gegen den unlauteren Wettbewerb (Law against Unfair Competition; 'the UWG') of 7 June 1909:

'Injunction proceedings and claims for damages may be brought against anyone who, in the course of trade and for the purposes of competition, resorts to improper practices'.

10 Under Paragraph 3 of the UWG:

'Injunction proceedings may be brought against anyone who, in the course of trade and for the purposes of competition, provides misleading information about, in particular, the characteristics, origin, method of manufacture or price calculation of specific goods or of the whole offer, or about price lists, the nature or source of the supply of goods, or about the reason or purpose of the sale, or about the quantity of stocks held, with a view to securing an end to the dissemination of the information in question.'

11 Paragraph 27(1) of the Lebensmittel- und Bedarfsgegenständegesetz (Federal Law on Foodstuffs and Consumer Items) of 15 August 1974 ('the LMBG') provides:

'It is forbidden to market cosmetic products under a misleading name or on the basis of information or a manner of putting up for sale which is misleading, or to advertise any particular cosmetic product or cosmetic products in general using misleading descriptions or other material. Information is misleading in particular where:

1. it is implied that a cosmetic product has effects which it does not, given the current state of scientific knowledge, or which are not supported by sufficient scientific evidence;

2. the name, suggested uses, manner of putting up for sale, description or any other information give the impression that the results are certain to be successful;

3. the name, suggested uses, manner of putting up for sale, claims made, or other statements are likely to lead to a false understanding of:

(a) the identity, status, aptitude or business achievements of the manufacturer, the inventor or persons working for them;

(b) the origin of the cosmetic products, or their quantity, weight, date of manufacture or packaging, shelf life or other considerations conditioning purchaser response.'

The dispute in the main proceedings

12 Lancaster markets a firming cream for the skin — 'Monteil Firming Action Lifting Extreme Creme' — the name of which incorporates the term 'lifting'.

13 In the main proceedings, Estée Lauder argues that the term 'lifting' is misleading because it gives purchasers the impression that use of the product will obtain results which, above all in terms of their lasting effects, are identical or comparable to surgical lifting, whereas this is not the case so far as the cream in point is concerned. It seeks an order restraining the defendant from engaging in the commercial marketing, distribution and promotion of cosmetic products whose name incorporates the term 'lifting' (in particular, the cream in question) on the ground that this is incompatible with Paragraph 3 of the UWG, Paragraph 27(1) of the LMBG and Directive 76/768.

14 Whilst admitting that the cream in question does not have the same long-term effect as surgical lifting, Lancaster maintains that it nevertheless has a significant firming effect. It denies that the expectations entertained by the public with regard to this cream are those alleged by Estée Lauder. It submits that, in any event, the order sought would, if granted, be contrary to Articles 30 and 36 of the Treaty. Nor is there any justification for the expenditure that would be entailed by the adoption of a new name for the product if Lancaster had to repackage it solely for distribution in Germany, when no objection to the current name has

been raised in the other Member States. The prohibition sought would amount to a disproportionate restriction, given the minor importance of the public interest to be protected, which consists in preventing consumers from being mistaken solely as to the duration of the product's effects.

15 The national court takes the view that use of the word 'lifting' in the name of the cosmetic product at issue in the main proceedings would, in accordance with case -law, be contrary to Paragraph 27(1) of the LMBG — which prohibits the marketing of cosmetic products under misleading names and, in particular, the attribution to products of effects which they do not possess — if a not inconsiderable number of consumers (approximately 10% to 15%) is misled.

16 It refers to the 'Lifting creme' judgment of 12 December 1996 of the Bundesgerichtshof (Federal Court of Justice), in which it was held that the finding by a lower court that use of the word 'lifting' is misleading was 'not incompatible with practical experience'. It adds that, in the absence of a survey of public opinion, it does not have sufficient evidence to reach the opposite conclusion.

17 The national court is uncertain whether, in view of the fact that the notion of 'consumers' developed by the Court in its case-law in the field of the directives that are relevant here presupposes a certain measure of alertness and discrimination on the part of the consumer, the percentage of persons misled must be higher than the 10% to 15% required by German case-law.

18 The national court goes on to ask whether, if consumers are misled in the present case in the sense contemplated by Community law, the restriction on the free movement of goods as a result of the prohibition of the name at issue is

compatible with Article 30 of the Treaty, since that name is lawfully used in another Member State and the marketing of the product in the other Member States is claimed to be lawful for the purposes of that article.

19 It should be pointed out that in the case referred to by the national court, the Bundesgerichtshof found that the error on the part of a not inconsiderable number of consumers (in expecting the firming effects of the cream at issue, 'Horphag Lifting Creme', to last for a certain length of time, whereas they disappeared within 2 to 24 hours of the cream being applied) was such as to justify a ban on the marketing of the cream under Paragraph 27(1) of the LMBG since the name of the cream had been an important factor in the decision to purchase.

20 In those circumstances, the Landgericht Köln decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Are Articles 30 and 36 of the EC Treaty and/or Article 6(3) of Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products to be interpreted as precluding the application of national legislation on unfair competition which allows the importation and distribution of a cosmetic product lawfully manufactured or distributed in a Member State of the European Union to be prohibited on the ground that consumers will be misled by the word "lifting" in the name, indicating the effect of the product, into assuming that it is of lasting effect, if that product is being distributed with the same indication of its effect on the packaging lawfully and without challenge in other countries within the European Union?'

21 It is apparent from the documents in the case in the main proceedings that the error into which consumers could be misled in the present case does not consist in

the mistaken belief that the product will bring about results identical or comparable to the effects of surgery, but merely the belief that the results achieved will last for a certain length of time.

The question

22 By its question, the national court is essentially asking whether Articles 30 and 36 of the Treaty and Directive 76/768 preclude national legislation which, as interpreted in the case-law of the country concerned, prohibits the importation and marketing of a particular cosmetic product whose name incorporates the term 'lifting', where use of that term may mislead consumers in that State as to the duration of the product's effects, when the same product is marketed lawfully and without challenge under the same name in other Member States.

23 It should be borne in mind that Directive 76/768 provided exhaustively for the harmonisation of national rules on the packaging and labelling of cosmetic products (Case C-150/88 *Parfümerie-Fabrik 4711* v *Provide* [1989] ECR 3891, paragraph 28, and Case C-315/92 *Verband Sozialer Wettbewerb* v *Clinique Laboratories and Estée Lauder* [1994] ECR I-317, paragraph 11).

24 One of the rules defined by Directive 76/768 concerns the obligation, laid down in Article 6(3) thereof, under which Member States must take all measures necessary to ensure that, in the labelling, putting up for sale and advertising of cosmetic products, text, names, trade marks, pictures and figurative or other signs are not used to imply that these products have characteristics which they do not have.

25 Accordingly, that provision, which is incorporated in a directive primarily designed (according to the second and third recitals in its preamble) to ensure freedom of trade in cosmetic products, defines the measures to be taken in the interests of consumer protection and fair trading, which rank among the imperative requirements which the Court has consistently held may justify restrictions on the free movement of goods within the meaning of Article 30 of the Treaty. Directive 76/768 also seeks to protect human health, within the meaning of Article 36 of the Treaty, in so far as any information which is misleading as to the characteristics of such products could have an impact on public health.

26 However, the measures which the Member States are required to take for the implementation of that provision must be consistent with the principle of proportionality (see, in particular, *Verband Sozialer Wettbewerb* v *Clinique Laboratories and Estée Lauder*, cited above, paragraph 16, and Case C-77/97 *Unilever* [1999] ECR I-431, paragraph 27).

27 It should be borne in mind that when it has fallen to the Court, in the context of the interpretation of Directive 84/450, to weigh the risk of misleading consumers against the requirements of the free movement of goods, it has held that, in order to determine whether a particular description, trade mark or promotional description or statement is misleading, it is necessary to take into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect (see, in particular, Case C-210/96 *Gut Springenheide and Tusky* [1998] ECR I-4657, paragraph 31).

28 That test, based on the principle of proportionality, also applies in the context of the marketing of cosmetic products where, as in the case in the main proceedings, a mistake as to the product's characteristics cannot pose any risk to public health.

29 In order to apply that test to the present case, several considerations must be borne in mind. In particular, it must be determined whether social, cultural or linguistic factors may justify the term 'lifting', used in connection with a firming cream, meaning something different to the German consumer as opposed to consumers in other Member States, or whether the instructions for the use of the product are in themselves sufficient to make it quite clear that its effects are short-lived, thus neutralising any conclusion to the contrary that might be derived from the word 'lifting'.

30 Although, at first sight, the average consumer — reasonably well informed and reasonably observant and circumspect — ought not to expect a cream whose name incorporates the term 'lifting' to produce enduring effects, it nevertheless remains for the national court to determine, in the light of all the relevant factors, whether that is the position in this case.

31 In the absence of any provisions of Community law on this matter, it is for the national court — which may consider it necessary to commission an expert opinion or a survey of public opinion in order to clarify whether or not a promotional description or statement is misleading — to determine, in the light of its own national law, the percentage of consumers misled by that description or statement which would appear to it sufficiently significant to justify prohibiting its use (see *Gut Springenheide and Tusky*, cited above, paragraphs 35 and 36).

32 The reply to the question put to the Court must therefore be:

— Articles 30 and 36 of the Treaty and Article 6(3) of Directive 76/768 do not preclude the application of national legislation which prohibits the importa-

tion and marketing of a cosmetic product whose name incorporates the term 'lifting' in cases where the average consumer, reasonably well informed and reasonably observant and circumspect, is misled by that name, believing it to imply that the product possesses characteristics which it does not have.

— It is for the national court to decide, having regard to the presumed expectations of the average consumer, whether the name is misleading.

— Community law does not preclude the national court, should it experience particular difficulty in deciding whether or not the name at issue is misleading, from commissioning, in accordance with its national law, a survey of public opinion or an expert opinion for the purposes of clarification.

Costs

33 The costs incurred by the German, French 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Landgericht Köln by order of 24 March 1998, hereby rules:

— Articles 30 and 36 of the EC Treaty (now, after amendment, Articles 28 EC and 30 EC) and Article 6(3) 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 88/667/EEC of 21 December 1988 and Council Directive 93/35/EEC of 14 June 1993, do not preclude the application of national legislation which prohibits the importation and marketing of a cosmetic product whose name incorporates the term 'lifting' in cases where the average consumer, reasonably well informed and reasonably observant and circumspect, is misled by that name, believing it to imply that the product possesses characteristics which it does not have.

— It is for the national court to decide, having regard to the presumed expectations of the average consumer, whether the name is misleading.

— **Community law does not preclude the national court, should it experience particular difficulty in deciding whether or not the name at issue is misleading, from commissioning, in accordance with its national law, a survey of public opinion or an expert opinion for the purposes of clarification.**

Edward Moitinho de Almeida Gulmann

Puissochet Jann

Delivered in open court in Luxembourg on 13 January 2000.

R. Grass D.A.O. Edward

Registrar President of the Fifth Chamber