REPORT FOR THE HEARING
in Case C-373/90 *

I — Facts and procedure

A — *Legal context of the dispute*

(a) Community law

1. Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (Official Journal L 250, p. 17) lays down, in accordance with the seventh recital in the preamble, minimum and objective criteria for determining whether advertising is misleading.

Article 2(2) gives the following definition of what constitutes 'misleading advertising':

'... 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'.

Article 3 lists a number of factors to be taken into account in determining whether advertising is misleading.

Article 4(1) provides:

'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'.

Article 6 of the directive reads:

'Member States shall confer upon the courts or administrative authorities powers enabling them in the civil or administrative proceedings provided for in Article 4:

(a) to require the advertiser to furnish evidence as to the accuracy of factual claims in advertising if, taking into account the legitimate interests of the advertiser and any other party to the proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case; and

* Language of the case: French.

(b) to consider factual claims as inaccurate if the evidence demanded in accordance with (a) is not furnished or is deemed insufficient by the court or administrative authority'.

Finally, Article 7 provides that the directive shall not preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection for consumers.

(b) National law

2. Article 44 of French Law No 73-1193 of 27 December 1973 on the Orientation of Business and Crafts, known as the *'Loi Royer'*, is the measure communicated by the French Government as the provision implementing the above directive. It reads:

'I. Any advertising containing any form of false allegation, information or presentation, which is likely to deceive, and which relates to one or more of the following: the existence, nature, composition, substantial qualities, material constituents, type, origin, quantity, method and date of manufacture, properties, price and conditions of sale of goods or services which are the subject of the advertising, conditions of their use, results to be expected from their use, reasons for the sale or the provision of services or the methods of such sale or provision, the extent of the obligations undertaken by the advertiser, or the identity, qualities or aptitudes of the manufacturer, the retailers, the promoters or the providers shall be prohibited'.

Untruthful or misleading advertising renders the advertiser liable to the penalties provided for in Article 1 of the Law on Fraud of 1 August 1905, namely imprisonment of between three months and two years and/or a fine of between FF 500 and FF 250 000 (Article 44-II, ninth paragraph, of Law No 73-1193). The fine can be raised to 50 per cent of the cost of the offending advertising, if the advertising budget is over FF 500 000 (Article 44-II, tenth paragraph).

B — *Background to the dispute*

3. On 20 February 1990, Jean-Pierre Richard, the Chairman of the Board of Directors of the Société Richard-Nissan, lodged a complaint before the Juge d'Instruction (Examining Magistrate) attached to the Tribunal de Grande Instance (Regional Court) of Bergerac against X, together with a claim for civil indemnity, for untruthful and unlawful advertising, under Article 44 of Law No 73-1193, referred to above.

The Société Richard-Nissan enjoys an exclusive importation contract on French territory for Nissan vehicles, which are then distributed through a network of dealers.

The complaint was against a Bergerac garage, which published advertisements in the press with the exhortation: 'Buy your new vehicle cheaper', followed by the words: 'One year manufacturer's guarantee.'

The advertisements relate to vehicles registered for the purposes of importation,

which have never been driven, and are sold in France at prices lower than those charged by local dealers because Belgian basic models possess fewer accessories than the basic models sold in France.

C — *Question referred for a preliminary ruling*

4. In those circumstances, the Examining Magistrate at the Tribunal de Grande Instance, Bergerac, wrote to the Court of Justice on 12 December 1990, asking 'whether such a marketing practice is in compliance with the European rules currently in force'.

D — *Procedure before the Court of Justice*

5. That letter was lodged at the Registry of the Court on 17 December 1990.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice, written observations were submitted on 2 April 1991 by the Commission of the European Communities, represented by Xavier Lewis and Maria Condou-Durande, members of its Legal Service, acting as Agents.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted to the Court

6. The *Commission* asserts, in limine, that Directive 84/450, referred to above, has a dual purpose. It is designed, on the one hand, to set up a Community framework of consumer protection against misleading advertising and, on the other hand, to prevent Member States being able to hinder the free movement of goods by applying divergent legislation on the subject. In the Commission's opinion, this dual purpose was acknowledged, moreover, by Mr Advocate General Lenz in his Opinion in Case 177/83 *Kohl* [1984] ECR 3651.

Also, according to a recent case (Case C-106/89 *Marleasing* [1990] ECR I-4135), the French courts must interpret and apply Law No 73-1193 of 27 December 1973, referred to above, in the light of those two objectives of Directive 84/450.

The Commission maintains that, although this particular case does not appear to involve a cross-border advertising campaign, the complaint does relate to vehicles that cross a border between two Member States. The advertising by the garage owner in Bergerac constitutes the culmination of a trade network that enjoys a certain amount of protection in Community law. The Commission therefore warns against the danger of applying the national law implementing Directive 84/450 in a way that would compromise the declared aims of the directive, namely protection of the consumer and respect for the principle of free movement of goods.

The Commission emphasizes that the advertising by the garage in question contains three elements which the national courts must analyse in accordance with the criteria for interpretation enumerated by Directive 84/450. The advertising in question is stating that:

(1) the cars are cheaper;

(2) the cars are new;

(3) the cars are guaranteed by the manufacturer.

In the Commission's view, the national courts must therefore determine whether these three statements are false by reference to Article 44 of Law No 73-1193, referred to above, interpreted in the light of the wording and the purposes of Directive 84/450.

Regarding, first, the statement that the cars are cheaper, the Commission argues that, in accordance with Article 3(a) of the directive, the specifications of the cars sold are factors to be taken into account in determining whether this statement is false within the meaning of the French law quoted above or misleading within the meaning of Article 2(2) of the directive. It is therefore for the national courts to determine *in concreto* whether the statement is false or misleading, by reference to the models offered for sale, their fittings and the price of those fittings, and by reference also to the knowledge, desires and beliefs of the category of consumers to whom the advertising is addressed.

Regarding, secondly, the newness of the cars, the Commission observes that Article 44 of French Law No 73-1193, quoted above, prohibits all advertising that contains false allegations concerning, in particular, the 'substantial qualities' of the thing offered for sale. The Commission recalls that, in a judgment of 18 April 1989 (No 87-82. 313 P. F.), the Criminal Division of the French Cour de Cassation held that the newness of a car was one of its substantial qualities within the meaning of the French Law on Fraud of 1 August 1905. The Cour de Cassation held that 'to count as new, a vehicle must not only not have been driven, but must also not yet have been registered'. However, that rule is enunciated in general and abstract terms, and the Cour de Cassation draws attention, in the next point of its judgment, to the fact that the customers had not been informed of this registration.

On the other hand, the Commission continues, Article 3(a) of Directive 84/450 makes no mention of the 'substantial quality' of the goods advertised. The omission is not conclusive, however, as the list of features contained in the provisions, which are to be taken into account in determining whether advertising is misleading, is not exhaustive.

According to the Commission, there is no definition *de lege lata* in Community law of the term "new car". Article 32 of the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (Official Journal L 145, p. 1) mentions second-hand

goods but does not define them. The Commission indicates that it proposed a directive to the Council on 3 February 1988, completing the VAT system and modifying Articles 32 and 28 of Directive 77/388, setting up special arrangements for second-hand goods, works of art, antiques and collectors' items. 'Second-hand goods' are briefly defined for the purposes of the proposed directive as 'used movable property that has been used and is suitable for further use as it is or after repair, including all means of transport'.

The Commission maintains that, without a definition of 'new car' in positive Community law, it is for the national courts to determine whether a feature of a car offered for sale has been misleadingly advertised, and whether the deception regarding that feature is likely to affect the economic behaviour of the consumer within the meaning of Article 2(2) of Directive 84/450.

The Commission points out that the national courts must approach such an appraisal bearing in mind the dual purpose of the directive, namely protection of the consumer and respect for the principle of free movement of goods.

The Commission notes from the dossier that Michel Boussat, the owner and manager of the Garage Lilian-Boussat which placed the advertising impugned in the main proceedings, has said the cars come from Belgium, where they were registered for the purposes of importation into France, and that they have never been driven on the public highway.

Thus, besides checking the truth of Mr Boussat's statement, the national courts must also determine, according to the Commission, whether the fact that the cars have never been driven and the fact that they were registered for import purposes constitute elements on which consumers have been misled. The question on the use of the cars appears to be one of pure fact. The question of their registration in Belgium before delivery to final consumers in France, on the other hand, may present certain difficulties.

The Commission maintains that it is for the national courts to enquire whether buyers of such cars know of the registration in Belgium, and to enquire whether the registration was done not in their name but in the name of a garage owner or an intermediary. If the buyers are unaware of the fact, the courts should then proceed to qualify the registration as a factor to take into account under Article 3(a) of Directive 84/450 in determining whether or not the advertising is misleading.

The Commission believes it would be contrary to the directive to qualify the statement that the cars are new as misleading, simply because, for example, they have been registered before delivery to the buyers for importation purposes only, when the registration is necessary to carry out such importation.

The Commission maintains that, even if Article 7 of the directive allows Member States to give greater protection to consumers than that provided for in the directive, that does not mean that defining a

new car as one that has never been registered can validly be called a consumer protection measure. To apply this French rule without regard to any other facts would effectively prohibit the advertising of a car registered for importation purposes only as a new, and hence attractive, car. By the same token, such a general and abstract rule cannot be justified as necessary to satisfy mandatory requirements for the defence of the consumer within the meaning of the case-law of the Court (see Case 120/78 *Rewe-Zentrale AG* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, Case 778/79 *Gilli and Andres* [1980] ECR 2071 and Case C-362/88 *GB-INNO-BM* [1990] ECR I-667).

One might think, according to the Commission, that if, as a matter of practicality, prior registration for import purposes were by itself enough to prevent a parallel importer of a new car into another Member State from saying in his advertising that the car is new, that importer would be deprived of the opportunity to establish and develop that kind of trade. To do that, the garage owner must be able to advertise. For the advertising to be attractive, he must be able to state that the vehicle is new.

In the Commission's view, the national court hearing the main proceedings should ascertain whether the registration in Belgium was necessary to enable a garage owner, like the advertiser in this dispute, to carry out an import operation. If importation by such a garage owner should be found legally possible without having to register the car in the name of a person other than the ultimate buyer, the court should ascertain whether registration might not make the operation administratively simpler or more profitable.

The Commission insists that Community law gives a certain amount of protection to 'parallel' car sales. Indeed, on 12 December 1984, the Commission enacted Regulation (EEC) No 123/85 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (Official Journal 1985 L 15, p. 16). Under Article 10(2), the Commission may withdraw the benefit of the application of the regulation 'where the manufacturer or an undertaking within the distribution system continuously or systematically ... makes it difficult for final consumers ... to obtain contract goods or corresponding goods, or to obtain servicing for such goods, within the common market'.

In this regard, the Commission would merely add that Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit (Official Journal 1977 No L 38, p. 1) does not require, in Article 39 and thereafter, that cars be registered in order to take advantage of the procedure for internal Community transit, but merely that they should be covered by a 'T2' declaration.

In its notice concerning that regulation (Official Journal 1985 C 17, p. 4), the Commission gave some examples of abusive hindrances, such as manufacturers' or importers' withholding of their cooperation in the registration of vehicles which European consumers have imported from other Member States, or abnormally long delivery periods.

Thus, the Commission adds, if the national court considers in the present case that to apply the general and abstract rule, by which a new car is one that has never been registered, would lead inescapably to the conclusion that the advertising in question is misleading and must therefore be prohibited, which would in turn lead to direct or indirect hindrance to the free movement of goods, then the court must set aside the application of the national rule. It goes without saying that that applies only if there is no other factor in the present case allowing the court to conclude that there has been misleading advertising within the meaning of Articles 2 and 3 of Directive 84/450.

Turning thirdly, and lastly, to the point whether the cars sold are guaranteed by the manufacturer, the Commission argues that an imported car must enjoy the manufacturer's guarantee in the country of importation. The length of the guarantee depends on the conditions in force in the country of importation. The Commission's notice concerning Regulation No 123/85, referred to above, includes among the examples of abusive hindrances the refusal by dealers to perform guarantee work on vehicles which they have not sold and which have been imported from other Member States. The Commission therefore proposes that the question should be answered as follows:

'(1) National courts dealing with disputes on a subject-matter within the ambit 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 are required to apply national law in the light of the wording and the purposes of that directive with a view to protecting the consumer against misleading advertising.

(2) Articles 2 and 3 of Directive 84/450 must be interpreted as meaning that the national courts must enquire, taking account of the facts of the particular case, whether the advertising in question is objectively likely to deceive the category of consumers to which it is addressed, and whether it is likely to affect their behaviour or injure a competitor.

(3) Articles 2 and 3 of Directive 84/450 must also be interpreted as meaning that, in the absence of any other misleading factor within the meaning of the directive, the national courts must set aside the application of a general and abstract national rule which would prohibit the advertising of a new car, which has already been registered for the purpose of importation only, when such a prohibition directly or indirectly affects the free movement of goods.'

III — Oral procedure

7. The civil party in the main proceedings, *Jean-Pierre Richard*, did not submit written observations. In the oral procedure he argued, first, that, as for the cars being less expensive, prices could only be compared when the products were comparable, which was not so in this case. The vehicles bought

in France by French consumers and imported by the Société Richard-Nissan were fully-fitted vehicles, i. e. with all the optional extras, whereas the vehicles imported by the Bergerac garage owner and the other parallel importers were bare vehicles. Therefore, according to Mr Richard, advertising of the type in question here, which extols the cheaper character of the cars, is untruthful in that the consumers think, when they go to a parallel importer, that they have bought the car under the same conditions as if they had bought it from a dealer.

Regarding, secondly, the newness of the cars, Mr Richard refers to the case-law of the French Cour de Cassation mentioned above. He emphasizes that that court considered such vehicles were not new because, in France, a vehicle imported by a parallel importer is not registered as a new vehicle. On resale, therefore, it is, for administrative purposes, not what one would call 'first-hand' but 'second-hand'.

Thirdly and lastly, on the question of the manufacturer's guarantee, Mr Richard explained that parallel importers gave potential buyers the impression that they themselves were giving the guarantee, whereas in fact it was not they who repaired the vehicles when problems arose. At that point, buyers had to contact the official dealer network, because if parallel importers repaired a vehicle without being dealers the customer lost the guarantee.

G. C. Rodríguez Iglesias
Judge-Rapporteur