OPINION OF ADVOCATE GENERAL LÉGER
delivered on 28 March 1995 *

1. Since delivery of the judgment in the *Keck* case on 24 November 1993 [1] national rules applicable without distinction '... restricting or prohibiting certain selling arrangements ...' do not constitute measures having an effect equivalent to quantitative restrictions within the meaning of the *Dassonville* judgment, [2] '... so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States'. [3] On the other hand, rules making the marketing of products subject to certain conditions (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) are covered by Article 30 of the EEC Treaty. [4]

2. What is meant by the term 'selling arrangement'?

3. Does it cover rules regulating advertising? Do rules relating to advertising on the packaging of marketed products concern a product characteristic as referred to in paragraph 15 of the *Keck* judgment or a selling arrangement within the meaning of paragraph 16 of that judgment?

4. In his Opinion in the *Hünermund* case, [5] Mr Advocate General Tesauro felt that this distinction, applied to the field of advertising, would give rise to difficulties of interpretation which could only be resolved case by case. [6]

5. The question referred to the Court by the Landgericht Köln is an illustration of this.

6. The Mars company markets in Germany ice-cream bars of the Mars, Snickers, Bounty and Milky Way brands which it imports from France where they are lawfully

* Original language: French.

1 — Joined Cases C-267/91 and C-268/91 *Bernard Keck and Daniel Mithouard* [1993] ECR I-6097.

2 — Judgment in Case 8/74 *Dassonville* [1974] ECR 837.

3 — Paragraph 16.

4 — Paragraph 15.

5 — Case C-292/92 *Hünermund and Others* v *Landesapothekerkammer Baden-Württemberg* [1993] ECR I-6787.

6 — Paragraphs 22 and 24 of the Opinion. See also Stuyck, J.: note on the *Keck* judgment in *Cahiers de Droit Européen*, 1994, Nos 3-4, p. 431, 451.

produced and packaged with uniform presentation for distribution throughout Europe.

7. The packaging is marked '+10%'.

8. The Verein gegen Unwesen in Handel und Gewerbe (Association against Improper Practices in Trade and Businesses) is seeking an injunction against the Mars company pursuant to Paragraph 3 of the Gesetz gegen den unlauteren Wettbewerb (Law on Unfair Competition, hereinafter 'the UWG'), which provides that:

'Whoever in commercial transactions for the purposes of competition gives misleading information about, in particular, the quality, 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 may be restrained by action from continuing to provide such information'.

9. It bases its action on two grounds:

1) that that presentation is liable to mislead consumers who would expect the price at which the goods are offered to be the same as that under the old presentation;

2) that the '+10%' marking gives the impression that the product has been increased by a quantity corresponding to the coloured part of the new packaging. The visual highlighting of the '+10%' marking is much greater than the increase in volume which it represents.

10. The question referred by the Landgericht Köln is whether, where 'ice-cream snacks' lawfully produced and marketed in a Member State in the presentation described in the application, the principle of the free movement of goods allows those products to be prohibited from being marketed in that presentation in another Member State on the two grounds raised by the plaintiff association.

11. I will consider two points in turn. Does a prohibition of marketing of ice-cream bars bearing the promotional marking '+10% ice-cream' on their wrappers constitute an obstacle to trade between Member States and

does it fall within the scope of application of Article 30 of the Treaty? If this is the case, is such a prohibition justified on the grounds advanced by the plaintiff association?

I — The scope of application of Article 30 of the Treaty

12. Paragraph 3 of the UWG is a rule which is applicable without distinction to national and imported products alike. It allows a prohibition to be imposed on the marketing in Germany of ice-cream bars bearing the advertising which I have mentioned.

13. Does that prohibition relate to the *characteristics of the product*, within the meaning of paragraph 15 of the *Keck* judgment, or to *selling arrangements* within the meaning of paragraph 16 of that judgment?

14. The first case, remember, concerns rules which, in the absence of harmonization, require a product to have a certain presentation, a certain composition or certain intrinsic qualities which are different from those required in the Member State of origin.

15. By requiring an imported product to be repackaged or its substantive qualities to be modified in order for it to be sold in the State of importation, such rules constitute an obstacle to trade by making imports more costly or more difficult and therefore favouring, or creating a competitive advantage for, the domestic industry of that State.

16. In the second case, the national rules have no link with imports and apply to commercial activity in general. They affect imports only indirectly in that they may lead to a reduction or compression of sales but they do not affect the marketing of products from other Member States in a different way than the marketing of domestic products. They do not prevent their access to the market. They impede imports no more than they impede domestic products. I would refer, for example, to rules governing the opening of shops on Sunday. [7]

17. Provisions on advertising are divided between the two cases. Whereas some rules have only an indirect link with free movement and escape application of Article 30 of the Treaty, others are indissociable from the presentation of the product and are caught by that article.

7 — See the judgment in Joined Cases C-69/93 and C-258/93 *Punto Casa and PPV* [1994] ECR I-2355.

18. The situation is this:

19. Some regulate commercial activity in general and have no link with imports. *They do not prevent marketing of the product itself under a uniform presentation and with uniform characteristics — those imposed by the Member State of origin — throughout the Community*. They do not affect the functioning of the internal market. They reflect a political choice: what are the limits to be placed on advertising?

20. Thus, since the *Keck* judgment, the Court has held in its judgment in the *Hünermund* case, cited above, that Article 30 of the Treaty does not apply to a rule of professional conduct, laid down by the pharmacists' professional body in a Member State, which prohibits pharmacists from advertising pharmaceutical products outside the pharmacy. Such a rule constitutes a selling arrangement within the meaning of paragraph 16 of the *Keck* judgment in so far as '... the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products'. [8]

8 — Paragraph 21.

21. Similarly, the Court held, on the same grounds, [9] in its judgment of 9 February 1995 in Case C-412/93 *Société d'importation Édouard Leclerc-Siplec*, [10] that the French decree which bans televised advertising in the distribution sector '... concerns selling arrangements since it prohibits a particular form of promotion (televised advertising) of a particular method of marketing products (distribution)'. [11]

22. Other rules on advertising, however, affect sales of imported products to a greater extent than sales of domestic products and are likely to impede intra-Community trade.

23. This is certainly the case with a prohibition of advertising appearing on product packaging. [12] First, the importer will be forced to modify the presentation, packaging and promotional markings appearing on the product in order to comply with the legislation of the State of importation, which will mean that he must bear additional costs which are not borne by the domestic producer in that State. Secondly, he will be obliged to arrange separate distribution channels and to make sure that products bearing the promotional words or marks in question are not marketed on the territory of the State in which the prohibition applies. [13]

9 — Paragraph 21.

10 — Case C-412/93 [1995] ECR I-179.

11 — Paragraph 22 of the judgment.

12 — See paragraph 20 of the Opinion of Advocate General Van Gerven in Joined Cases C-401/92 and C-402/92 *Tankstation 't Heukske and Boermans* [1994] ECR I-2199.

13 — See, by analogy, paragraph 13 of the judgment in Case-238/89 *Pall* [1990] ECR I-4827.

24. Even in the case-law prior to the *Keck* judgment the principle was clearly laid down that the obligation to mark a product with information, in so far as it might require the manufacturer or the importer to alter the product's presentation, is apt to make the marketing of the product in certain Member States more difficult and therefore has a restrictive effect on trade. [14]

25. In its judgment in the *Pall* case, [15] the Court held that a prohibition in a Member State against using the symbol (R) beside the trade mark in order to indicate that the trade mark was registered constituted an obstacle '... because it can force the proprietor of a trade mark that has been registered in only one Member State to change the presentation of his products according to the place where it is proposed to market them and to set up separate distribution channels in order to ensure that products bearing the symbol (R) are not in circulation in the territory of Member States which have imposed the prohibition at issue'. [16]

26. Recently, in its judgment in the '*Clinique*' case, [17] the Court held that the name of a product is one of its characteristics within the meaning of paragraph 15 of the *Keck* judgment. A prohibition of using in the State of importation a name which is lawful in the State of origin constitutes an obstacle to intra-Community trade. The Court held in fact that

'The fact that by reason of that prohibition the undertaking in question is obliged in that Member State alone to market its products under a different name and to bear additional packaging and *advertising* costs demonstrates that this measure does affect free trade'. [18]

27. The Court went on to conclude that Articles 30 and 36 of the EC Treaty and Article 6(2) of Council Directive 76/768/EEC of 27 July 1976, [19] precludes a national measure which prohibits the importation and marketing of a product classified and presented as a cosmetic on the ground that the product bears the name 'Clinique'.

28. The *Pall* and '*Clinique*' cases concerned prohibitions of distribution — based, as our case, on the UWG — *owing to the different presentation of the products.* [20] This is also so in the present case. The '+10% ice-cream' marking is both informative and promo-

14 — Judgments in Case 27/80 *Fietje* [1980] ECR 3839, paragraph 10, and Case 94/82 *Kikvorsch* [1983] ECR 947, paragraph 10.

15 — Cited above, in footnote 13.

16 — Paragraph 13.

17 — Case C-315/92 *Verband Sozialer Wettbewerb* v *Clinique Laboratoires and Estée Lauder* [1994] ECR I-317.

18 — Ibid., paragraph 19, my emphasis.

19 — Directive 76/768/EEC on the approximation of the laws of the Member States relating to cosmetic products (OJ 1976 L 262, p. 169).

20 — See the Commission's observations, p. 7 of the French translation.

tional. It appears on the packaging of the product itself. Some of the wrappers at issue in the main proceedings are printed in five languages. There is therefore no special packaging for the German market. It is only if the '+10%' marking is prohibited by the German legislation that special wrapping for that State is required. [21] Prohibiting such a marking would therefore mean that the product would have to be repackaged and specific packaging and promotional markings used for Germany. The impediment to trade is therefore obvious.

29. As one can see, not all rules governing advertising are to be put in the category of those concerning selling arrangements. One can therefore understand why the *Keck* judgment excludes only *certain* selling arrangements from the scope of Article 30.

30. The distinction made in the *Keck* judgment strikes down the formula which the Court had applied to many sets of national rules governing advertising:

'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'. [22]

31. That very broad formulation has certainly allowed rules on selling arrangements which, under paragraph 16 of the *Keck* judgment, now fall outside the ambit of Article 30 of the Treaty, to be caught by that article.

II — The grounds of justification

32. The Court has consistently held that:

'... in the absence of common rules relating to marketing, obstacles to the free movement

21 — On this point, see the defendant's observations, point I-1.

22 — Paragraph 15 of the judgment in Case 286/81 *Oosthoek* [1982] ECR 4575 on the prohibition of offering goods for sale with free gifts. See also the judgment in Case 382/87 *Buet and EBS* [1989] ECR 1235 on the banning of doorstep selling of educational material; paragraph 7 of the judgment in Case C-362/88 *GB-INNO-BM* [1990] ECR I-667; paragraph 10 of the judgment in Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior et Publivia* [1991] ECR I-4151 and paragraph 10 of the judgment in Case C-126/91 *Yves Rocher* [1993] ECR I-2361.

of goods within the Community resulting from disparities between national laws must be accepted in so far as such rules, applicable to domestic and imported products without distinction, may be justified as being necessary in order to satisfy mandatory requirements relating *inter alia* to consumer protection or the fairness of commercial transactions'. [23]

33. Those mandatory requirements may be accepted only if two conditions are met: the rules in question must be proportional to the aim in view [24] and that aim must be incapable of being achieved by measures less restrictive of intra-Community trade. [25]

34. The prohibition in question would be justified on two grounds.

35. First, the '+10% ice-cream' marking would mislead the consumer who might reasonably believe that the price has remained the same in spite of the increase in the quantity for sale, in short that there would be an improvement in the 'quantity/price' relationship, which would explain the promotional campaign launched by Mars.

36. Secondly, the consumer would be deceived by the dimensions of the band marked '+10% ice-cream', which covers more than 10% of the total surface of the wrapper.

37. Let us examine those two points in turn.

— A —

38. First, the national court considers that such a promotional offer makes sense only if it is *not* accompanied by a price increase. Such a promotion would have no point if the increase in volume were to entail a proportionate increase in price: '... die nur geringfügig geändert Rezeptur (ist) bei höherem Preis nichts Besonderes ...'. [26] The promotion can only be explained if, for the same price, the quantity is greater.

23 — Paragraph 12 of the judgment in the *Yves Rocher* case, cited in the previous footnote. See also paragraph 8 of the judgment in the 'Cassis de Dijon' case, Case 120/78 [1979] ECR 649 and paragraph 10 of the judgment in the *GB-INNO-BM* case, cited in the previous footnote.

24 — Judgment in the *Buet and EBS* case, cited above in footnote 22, paragraph 11.

25 — Judgment in the 'Cassis de Dijon' case, cited in footnote 23. See also paragraph 12 of the judgment in the *Pall* case, cited above.

26 — Order of the Landgericht Köln, p. 4.

39. It is not disputed that the defendant company did not take advantage of the promotional campaign in order to increase the sale price. [27] There is no indication of the attitude adopted by retailers in this instance.

40. The national court examined the association which the consumer might make between that marking — which relates only to quantity — and the price and concluded that the consumer would expect the price to be unchanged. This means that there are two alternative situations:

41. If the retailer increases the price, the consumer could, in the national court's view, be the victim of deception within the meaning of Paragraph 3 of the UWG.

42. If the retailer does not increase his price, the offer meets the consumer's expectation and no deception can be identified. However, a question would arise concerning the application of Paragraph 15 of the Gesetz gegen Wettbewerbsbeschränkungen (Law against restraints of competition, hereinafter 'GWB'), which prohibits manufacturers from imposing prices on retailers. Such a lack of price competition would be contrary to German competition law.

43. Let's consider those two points.

44. *a)* Where either the producer or the retailer puts up the price when the quantity offered is increased, there is deception or a risk of deception only if the promotional marking in question misleads the consumer and affects his behaviour. *It must be stated here that the '+10%' marking indicates an increase in volume in relation to the old presentation and is not indicative as to price: there is no indication anywhere of '+10% more product for the same price as the old price'. There is no argument that the promotional marking in question is objectively true.* Consequently, I see neither deception nor the risk of deception here. However, the national court believes that it has shown that a significant number of consumers affected by such an offer will buy the products concerned only because they are convinced that they will get 10% more product for the same price. Investigating that question would require an assessment of consumer behaviour which, in my view, only the national court is competent to carry out. [28]

45. *b)* Whether Paragraph 15 of the GWB is applicable here and whether the sale of

27 — Ibid., p. 13 of the French translation.

28 — See, for a case where reference was made to the national court, paragraph 15 of the judgment in Case C-373/90 *Complaint against X* [1992] ECR I-131.

ice-cream bars in the presentation in question entails an obligation — and not merely an incentive — for the retailer not to alter his prices or constitutes an *agreement* restricting his freedom to set prices requires an interpretation of national law and is a matter exclusively for the national court's assessment.

46. If the conditions for the application of that provision were to be met, it would have to be accepted that the marketing of ice-cream bars in the presentation in question on German territory would constitute an infringement of the principle of the retailer's freedom to set prices laid down in German law.

47. Is it possible in the name of that principle — whose purpose is in particular to guarantee genuine price competition for consumers — and therefore in the name of the overriding requirement to protect consumers, to impede trade exchanges?

48. I do not see how one could regard that principle as justifying such an obstacle when the retailer's obligation not to alter his prices prevents any price increase and *in the present case* is therefore *favourable* to the consumer.

— B —

49. Secondly, it is argued that this prohibition is justified because the '+10% ice-cream' marking — which occupies a quarter of the wrapper — would mislead the consumer who would have the impression that the increase is bigger than that advertised.

50. I am not convinced of this, for the following reasons.

51. First of all, the '+10% ice-cream' marking is accurate. The Court considers that national rules prohibiting misleading advertising are incompatible with the principle of the free movement of goods when they apply to true statements which correspond to reality. [29]

52. Secondly, the argument put forward by the plaintiff in the main proceedings is based on the *assumption* that when seeing that marking the consumer would overestimate the real increase in volume or weight. According to the Landgericht Köln, '... a not

29 — Case C-373/90 *Complaint against X*, cited above, paragraph 17, and Case C-126/91 *Yves Rocher*, cited above, paragraph 17.

inconsiderable number of consumers will gain the impression from the visual presentation ... that the coloured portion of the packaging marked "new" indicates the weight or volume increase of the product'. [30]

53. However, it has not been demonstrated at all that consumers showing normal care consistently make a connection between the size of the promotional markings or statements relating to an increase in the quantity offered and the size of that increase. In this regard, I share the Commission's view:

'... it must also be clear to a careful consumer that a certain amount of exaggeration is inherent in any promotion of a product'. [31]

54. May, for that matter, the national rules require the promotional marking to be 'calibrated' to the exact percentage of the increase? Must the width of the band indicating 10% more ice-cream be 10% of the total length of the wrapper? To me, that seems too demanding. Taken to the extreme, it would mean that a marking indicating a 5% increase would not have to exceed 5% of the length of the wrapper and would consequently become unreadable.

55. In any event, a total ban on advertising of that kind is disproportionate and cannot be justified on grounds of the protection of consumers.

56. Finally, whilst the '+10%' marking is promotional, it also contains *information* intended for the consumer. In its judgment in the *GN-INNO-BM* case, cited above, the Court held that '... 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'. [32]

57. I would make one last observation on the application of secondary law.

58. It must be the case that once a prohibition is not justified by overriding requirements relating to consumer protection and

30 — Order of the Landgericht, last page of the German text.

31 — Commission observations, page 12 of the French text.

32 — Paragraph 18.

fair trading, it cannot have any basis in 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 [33] either. According to the settled case-law of the Court:

'That directive confines itself to a partial harmonization of the national laws on misleading advertising by establishing, firstly, minimum objective criteria for determining whether advertising is misleading, and, secondly, minimum requirements for the means of affording protection against such advertising'. [34]

59. This is also the case with 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, [35] Article 2(1) of which lays down the general principle that purchasers are not to be misled about the characteristics of the foodstuff and, in particular, its quantity.

60. Consequently, I propose that the Court should rule:

Articles 30 and 36 of the EC Treaty are to be interpreted as precluding a national measure from prohibiting the importation and marketing of the product 'ice-cream snack' when it bears on its packaging the marking '+10% ice-cream', unless it is shown before the national court that such a presentation, even when the price has been increased, would lead to confusion in the mind of the consumer who would expect the price at which the goods are offered to be the same as that at which they were offered under the old presentation.

33 — OJ 1984 L 250, p. 17.

34 — Judgment in the *Pall* case, cited above, paragraph 22 and in the 'Clinique' case, cited above, paragraph 10.

35 — OJ 1979 L 33, p. 1.