

JUDGMENT OF THE COURT (Fifth Chamber)

6 July 1995

In Case C-470/93,

REFERENCE to the Court under [Article 267 TFEU] by the Landgericht Köln for a preliminary ruling in the proceedings pending before that court between

Verein gegen Unwesen in Handel und Gewerbe Köln eV

and

Mars GmbH

on the interpretation of [Article 34 TFEU],

THE COURT (Fifth Chamber),

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

Advocate General: P. Leger,

Registrar: H. A. Ruhl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mars GmbH, by J. Sedemund, Rechtsanwalt, Cologne,

- the Commission of the European [Union], by R. Wainwright, Principal Legal Adviser, and A. Bardenhewer, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mars GmbH and the Commission, at the hearing on 16 March 1995,

after hearing the Opinion of the Advocate General at the sitting on 28 March 1995,

gives the following

Judgment

- 1 By order of 11 November 1993, received at the Court on 17 December 1993, the Landgericht Köln (Regional Court, Cologne) referred to the Court for a preliminary ruling under [Article 267 TFEU] a question

relating to the interpretation of [Article 34 TFEU].

- 2 The question was raised in proceedings between an association for combatting unfair competition, the Verein gegen Unwesen in Handel und Gewerbe Köln eV, and Mars GmbH (hereafter 'Mars') concerning the use of a certain presentation for the marketing of ice-cream bars of the Mars, Snickers, Bounty and Milky Way brands.
- 3 Mars imports those goods from France where they are lawfully produced and packaged by an undertaking belonging to the American group, Mars Inc., Mc Lean, in a uniform presentation for distribution throughout Europe.
- 4 At the material time, the ice-cream bars were presented in wrappers marked '+10%'. That presentation had been chosen as part of a short publicity campaign covering the whole of Europe during which the quantity of each product was increased by 10%.
- 5 Under Paragraph 1 of the Gesetz gegen unlauteren Wettbewerb (Law on Unfair Competition, hereafter 'the UWG') proceedings may be brought in order to restrain improper competitive practices while under Paragraph 3 of that Law proceedings may be brought in order to restrain the use of misleading information. Furthermore, under Paragraph 15 of the Gesetz gegen Wettbewerbsbeschränkungen (Law on Restraints of Competition, hereafter 'the GWB'), agreements between undertakings restricting the freedom of one of the parties to fix prices in contracts concluded with third parties for the supply of goods are void.
- 6 The plaintiff association brought proceedings under those provisions before the Landgericht Köln in order to prevent the '+10%' marking from being used in Germany.

- 7 It contends first of all that the consumer is bound to assume that the advantage indicated by the '+10%' marking is granted without any price increase, since a product whose composition is only slightly changed and which is sold at a higher price offers no advantage. So, in order not to mislead the consumer, the retailer should maintain the final price previously charged. Since the marking in question was binding on the retail trade as regards the fixing of the price for sale to the ultimate consumer, it constituted a breach of Paragraph 15 of the GWB which had to be brought to an end in accordance with Paragraph 1 of the UWG.
- 8 Secondly, the plaintiff in the main proceedings contends that the way in which the '+10%' marking was incorporated in the presentation gave the consumer the impression that the product had been increased by a quantity corresponding to the coloured part of the new wrapping. The coloured part occupied considerably more than 10% of the total surface area of the wrapping and this, in the plaintiff's view, was misleading and therefore contrary to Paragraph 3 of the UWG.
- 9 In interlocutory proceedings the Landgericht Köln had, by order of 10 December 1992, granted an interim restraining order against the defendant. The Landgericht took the view that the presentations in question, conveying the idea that more of the product, negligible in quantitative terms, was being offered without any increase in price, restricted freedom of retail trade in the matter of the fixing of prices.
- 10 When it came to rule on the substance of the case, the Landgericht Köln decided to refer the following question to the Court:

'Is it compatible with the principles of the free movement of goods to prohibit the marketing in a Member State of ice-cream snacks in a

particular presentation which are produced in another Member State and lawfully marketed there in that same presentation, which is described in the application,

- (1) on the ground that the (new) presentation is liable to give consumers the impression that the goods are offered for the same price as under the old presentation,
- (2) on the ground that the visual presentation of the new feature "+10% icecream" gives consumers the impression that either the volume or the weight of the product has been considerably increased?

Applicability of [Article 34 TFEU]

- 11 The first question to be examined is whether a prohibition of the marketing of goods bearing on their packaging a publicity marking such as that in question in the main proceedings constitutes a measure having an effect equivalent to a quantitative restriction within the meaning of [Article 34 TFEU].
- 12 According to the case-law of the Court, [Article 34 TFEU] is designed to prohibit any trading rules of Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-[Union] trade (see the judgment in Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837, paragraph 5). The Court has held that, in the absence of harmonization of legislation, obstacles to the free movement of goods that are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods, such as those relating, for example, to their presentation, labelling and packaging, are prohibited by [Article 34 TFEU], even if those rules

apply without distinction to national products and to imported products (judgment in Joined Cases C-267/91 and C-268/91 *Keck and Mithortard* [1993] ECR I-6097, paragraph 15).

- 13 Although it applies to all products without distinction, a prohibition such as that in question in the main proceedings, which relates to the marketing in a Member State of products bearing the same publicity markings as those lawfully used in other Member States, is by nature such to hinder intra-[Union] trade. It may compel the importer to adjust the presentation of his products according to the place where they are to be marketed and consequently to incur additional packaging and advertising costs.

- 14 Such a prohibition therefore falls within the scope of [Article 34 TFEU].

The grounds of justification relied on

- 15 It is settled law that obstacles to intra-[Union] trade resulting from disparities between provisions of national law must be accepted in so far as such provisions may be justified as being necessary in order to satisfy overriding requirements relating, *inter alia*, to consumer protection and fair trading. However, in order to be permissible, such provisions must be proportionate to the objective pursued and that objective must be incapable of being achieved by measures which are less restrictive of intra-[Union] trade (see the judgments in Case 120/78 *ReveZentral* [1979] ECR 649; Case C-238/89 *Pall* [1990] ECR I-4827, paragraph 12; and Case C-126/91 *Yves Rocher* [1993] ECR I-2361, paragraph 12).

- 16 It is contended in the main proceedings that the prohibition is justified

on two legal grounds, which are indicated in the first and second parts of the preliminary question.

The consumer's expectation that the price previously charged is being maintained

- 17 It is argued that the '+10%' marking may lead the consumer to think that the 'new' product is being offered at a price identical to that at which the 'old' product was sold.
- 18 As the Advocate General points out in Paragraphs 39 to 42 of his Opinion, on the assumption that the consumer expects the price to remain the same, the referring court considers that the consumer could be the victim of deception within the meaning of Paragraph 3 of the UWG and that if the price did not increase the offer would meet the consumer's expectation but then a question would arise concerning the application of Paragraph 15 of the GWB, which prohibits manufacturers from imposing prices on retailers.
- 19 As regards the first possibility, it must be observed first of all that Mars has not actually profited from the promotional campaign in order to increase its sale prices and that there is no evidence that retailers have themselves increased their prices. In any case, the mere possibility that importers and retailers might increase the price of the goods and that consequently consumers may be deceived is not sufficient to justify a general prohibition which may hinder intra-[Union] trade. That fact does not prevent the Member States from taking action, by appropriate measures, against duly proved actions which have the effect of misleading consumers.
- 20 As regards the second possibility, the principle of freedom of retail trade in the matter of the fixing of prices, provided for by a system

of national law, and intended in particular to guarantee the consumer genuine price competition, may not justify an obstacle to intra-[Union] trade such as that in question in the main proceedings. The constraint imposed on the retailer not to increase his prices is in fact favourable to the consumer. It does not arise from any contractual stipulation and has the effect of protecting the consumer from being misled in any way. It does not prevent retailers from continuing to charge different prices and applies only during the short duration of the publicity campaign in question.

The visual presentation of the '+10%' marking and its alleged misleading effect

- 21 It is accepted by all the parties that the '+10%' marking is accurate in itself.
- 22 However, it is contended that the measure in question is justified because a not insignificant number of consumers will be induced into believing, by the band bearing the '+10%' marking, which occupies more than 10% of the total surface area of the wrapping, that the increase is larger than that represented.
- 23 Such a justification cannot be accepted.
- 24 Reasonably circumspect consumers may be deemed to know that there is not necessarily a link between the size of publicity markings relating to an increase in a product's quantity and the size of that increase.
- 25 The reply to the preliminary question must therefore be that [Article 34 TFEU] is to be interpreted as precluding a national measure from

prohibiting the importation and marketing of a product lawfully marketed in another Member State, the quantity of which was increased during a short publicity campaign and the wrapping of which bears the marking '+10%',

- a) on the ground that that presentation may induce the consumer into thinking that the price of the goods offered is the same as that at which the goods had previously been sold in their old presentation,
- b) on the ground that the new presentation gives the impression to the consumer that the volume and weight of the product have been considerably increased.

Costs

- 26 The costs incurred by the Commission of the European [Union], which has 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 11 November 1993, hereby rules:

[Article 34 TFEU] is to be interpreted as precluding a national measure from prohibiting the importation and marketing of a product lawfully marketed in another Member State, the quantity of which was increased during a short publicity campaign and the wrapping of which bears the marking '+10%',

- (a) on the ground that that presentation may induce the consumer into thinking that the price of the goods offered is the same as that at which the goods had previously been sold in their old presentation,**

- (b) on the ground that the new presentation gives the impression to the consumer that the volume and the weight of the product have been considerably increased.**

Gulmann

Jann

Moitinho de Almeida Edward

Sevon

Delivered in open court in Luxembourg on 6 July 1995.

R. Grass

C. Gulmann

Registrar

President of the Fifth Chamber