OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 16 September 1999 *

I — Introduction

1. The parties in the main proceedings giving rise to the present reference from the Landgericht, Köln (Regional Court, Cologne, hereinafter 'the national court') are the German subsidiaries of competing multinational cosmetic companies. The subject-matter of the dispute is the facial firming cream 'Monteil Firming Action Lifting Extreme Creme' (hereinafter 'the cream'), which is manufactured in Monaco and distributed throughout Europe by companies in the Lancaster group. [1] The defendant is the German member of that group and is responsible for organising the distribution of the cream not only on the German market but throughout Lancaster's selective distribution system.

2. The plaintiff, the German subsidiary of the Estée Lauder group, claims that use of the word 'lifting' in the name of the cream is misleading because it conveys the impression that it has lasting effects comparable to those of a face-lift operation. It is common case that the cream does not produce any lasting effect, although the defendant claims that it produces a significant firming effect. The action has been brought, pursuant to German law on unfair competition, primarily as a defensive measure by the plaintiff to protect its market position, since, as it emerged at the oral hearing, a consumer-protection organisation had succeeded before another German court, the Kammergericht (Higher Regional Court), Berlin, in obtaining an injunction prohibiting the use by the plaintiff of the word 'lifting' in respect of its own facial firming cream. [2]

3. The defendant denies that the cream will arouse the alleged expectation of permanent effects. It submits that the order sought would, if granted, hinder the freedom of movement of goods guaranteed by Community law by necessitating additional marketing expenditure to rename and repackage the product solely for the German market. It also contends that it would be disproportionate, in view of the minimal danger of any possible consumer error.

* Original language: English.

1 — It appears from information provided to the Court by the defendant that the cream is imported directly from Monaco to a central distribution centre at Wiesbaden, Germany, whence it is supplied to the various authorised distributors, both within and outside the Community.

2 — See 25 U 2991/93.

4. The national court has taken the view that, in the absence of expert evidence, it cannot dismiss 'the possibility that more than an inconsiderable number of consumers might be misled'. It cites a Bundesgerichtshof (Federal Court of Justice) judgment of 12 December 1996, upholding the earlier view taken by the Kammergericht, Berlin in the successful action taken against Estée Lauder that the use of the word 'lifting' could be misleading. [3] However, it is uncertain whether Community law requires it to depart from the rule developed in German case-law, whereby the use of a word may be prohibited if 10% to 15%, at least, of potential consumers could be misled. In particular, it wishes to know whether, in the light of cases like *Mars*, such a threshold would constitute too strict a standard of protection. [4]

5. Accordingly, the following question has been referred to the Court:

'Are Articles 30 and 36 of the EC Treaty and/or Article 6(3) of Council Directive 76/768/EEC 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?'

II — The relevant legal context

6. The German Gesetz gegen den unlauteren Wettbewerb (Law Against Unfair Competition) of 7 June 1909 (hereinafter 'the UWG'), because of its potential to affect trade in goods, has given rise to numerous references to the Court, most notably for present purposes that in *Clinique*. [5] Paragraph 3 of the UWG provides:

'Injunction proceedings may be brought against anyone who, in the course of trade and for the purposes of competition, provides misleading information [on the features of products] with a view to securing an end to the dissemination of the information in question.'

3 — 1 ZR 7/97, NJW-RR 1997, p. 931.

4 — Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln* v *Mars* (hereinafter '*Mars*') [1995] ECR I-1923.

5 — Case C-315/92 *Verband Sozialer Wettbewerb* v *Clinique Laboratories and Estée Lauder* (hereinafter '*Clinique*') [1994] ECR I-317.

There is a similar provision in the specific German legislation dealing with consumer products. Thus, under Paragraph 27(1) of the Lebensmittel-und Bedarfsgegenständegesetz (Law on Foodstuffs and Consumer Items) of 15 August 1974 ('the LmBG'):

'It is forbidden to sell cosmetic products under a misleading name or on the basis of misleading information ... Information is misleading in particular:

(1) if effects are attributed to the cosmetic products which ... are supported by insufficient scientific evidence ...'

Paragraph 27(3) of the LmBG provides that a name is misleading 'if words which are apt to confuse ... are used ... in relation to factors which have a bearing on an assessment of the products'.

7. Apart from Articles 30 and 36 of the EC Treaty (now, after amendment, Articles 28 EC and 30 EC), it will be necessary to refer not only to Directive 76/768/EEC [6] mentioned by the national court but also to Directive 84/450/EEC on misleading advertising. [7]

8. The 1976 Directive prescribes conditions for the marketing of cosmetic products. The second recital in the preamble shows that one of the main objectives of the Directive is to facilitate free trade in cosmetic products. Thus, under Article 7(1), Member States are required not to '... refuse, prohibit or restrict the marketing of any cosmetic products which comply with the requirements of this Directive and the Annexes thereto'. Article 6(3), which results from the amendments effected by Directive 88/667/EEC, is the central provision in the present case. [8] It 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

6 — Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products (hereinafter 'the 1976 Directive'), OJ 1976 L 262, p. 169.

7 — 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.

8 — Council Directive 88/667/EEC of 21 December 1988 amending for the fourth time Directive 76/768/EEC on the approximation of the laws of the Member States relating to cosmetic products, OJ 1988 L 382, p. 46. A further sentence was also added by Article 1(9) of Council Directive 93/35/EEC of 14 June 1993 amending for the sixth time Directive 76/768/EEC on the approximation of the laws of the Member States relating to cosmetic products, OJ 1993 L 151, p. 32, but it is not relevant in the present case.

products have characteristics which they do not have.'

9. Directive 84/450/EEC contains the general Community rules regulating misleading advertising. Article 2(2) of that directive 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'. Article 3 furnishes a list of the features which should be taken into account for the purposes of determining whether advertising is misleading, including the characteristics of the goods or services advertised. Article 7 permits Member States to retain or adopt national provisions designed to ensure 'more extensive protection for consumers ...'.

III — Observations

10. Written observations have been submitted by the plaintiff, the defendant, the Federal Republic of Germany, the French Republic, the Republic of Finland and the Commission, all of whom, with the exception of Germany and Finland, also submitted oral observations.

IV — Analysis

11. At the present stage of the main proceedings, the national court has adopted no definitive position regarding the supposedly potentially misleading use of the word 'lifting'. It seeks guidance regarding the scope of protection that may, in conformity with Community law, be provided in national law to consumers of cosmetic products such as the cream in question. Since it emerges from the order for reference that the goods at issue have been imported from Monaco, a third country, it is appropriate to consider the status in Community law of goods directly imported from Monaco.

A — *The Monacan question*

12. According to Article 227 of the EC Treaty (now, after amendment, Article 299 EC), the territory of the Principality of Monaco is not enumerated as one of the territories to which the Treaty applies. Thus, as the Commission and France rightly observed at the hearing, it is a third country for Community-law purposes. It has nevertheless been part of the customs territory of the Community at least since 1968, when Article 2 of Council Regulation (EEC) No 1496/68 of 27 September 1968 on the definition of the customs territory of the Community declared that certain territories, including Monaco, 'situated outside the territory of Member States' but listed in the annex to the regulation, were to 'be considered part of the customs territory of the Community'.[9] The precise

9 — OJ, English Special Edition, First Series 1968 (II), p. 436.

legal consequences of Monaco's legislative inclusion within the Community's customs territory are not spelled out in the relevant legislation. [10] However, since no customs duties or charges having equivalent effect may be applied to trade between Monaco and the Community, it seems at first sight to follow that goods originating there and exported directly to a Member State should be treated as if they were of Community origin.

13. The most convincing legal basis for this interpretation lies in the analogy with the notion of goods in 'free circulation in a Member State' enunciated in Articles 9 and 10 of the EC Treaty (now, after amendment, Articles 23 EC and 24 EC), whose effect is that goods of third-country origin that have satisfied, in a particular Member State, the customs formalities for entry onto the Community's customs territory, and that have been subject to the appropriate tariff required under the Community's common external tariff ('CCT'), are deemed to be in 'free circulation' in that Member State. In *Donckerwolcke* v *Procureur de la République*, the Court held that 'products entitled to "free circulation" are definitely and wholly assimilated to products originating in Member States'; the result of this assimilation is that 'the provisions of Article 30 concerning the elimination of quantitative restrictions and all measures having equivalent effect [apply] without distinction to products originating in the Community and to those which were put into free circulation in any one of the Member States, irrespective of the actual origin of the products'. [11] Later in that judgment, the Court added the rider that such assimilation could 'only take full effect if [the] goods are subject to the same conditions of importation both with regard to customs and commercial considerations, irrespective of the State in which they were put in free circulation'. [12] However, it has not been suggested that any differences in customs or commercial policy still remain in respect of imports of cosmetic products into the Community. Indeed, the current general rules, which are contained in Council Regulation (EC) No 3285/94 of 22 December 1994 on common rules on imports and repealing Regulation (EC) No 518/94, [13] expressly provide (see Article 1(2) of the Regulation) that third-country imports of the products to which it applies 'shall be freely imported into the Community and accordingly, without prejudice to the safeguard measures which

10 — The current provision, which is contained in Article 3(2)(b) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Article 1(b) of Council Regulation (EC) No 82/97 of the European Parliament and of the Council of 19 December 1996 amending Regulation (EEC) No 2913/92 establishing a Community Customs Code (OJ 1997 L 17, p. 1), is worded as follows: 'Although situated outside the territory of the French Republic, the territory of the Principality of Monaco as defined in the Customs Convention signed in Paris on 18 May 1963 ... shall, by virtue of that Convention, also be considered to be part of the customs territory of the Community'.

11 — Case 41/76 *Donckerwolcke* v *Procureur de la République* [1976] ECR 1921, paragraphs 17 to 18. See also Case 119/78 *Peureux* v *Services Fiscaux de la Haute-Saône et du Territoire de Belfort* [1979] ECR 975, where the Court held, regarding Article 30, that 'the prohibition of measures having an effect equivalent to quantitative restrictions in intra-Community trade has the same scope as regards products imported from another Member State after being in free circulation there as for those originating in the same Member State', paragraph 26.

12 — *Donckerwolcke*, paragraph 25.

13 — OJ 1994 L 349, p. 53.

may be taken under Title V, shall not be subject to any quantitative restrictions'. [14]

14. Admittedly, the assimilation to the notion of goods in free circulation,which applies to goods already imported from a third country, of goods being exported directly from Monaco, a third country, to Germany implies an extension of that notion. In particular, it involves applying the prohibition of measures having equivalent effect to quantitative restrictions as against Germany where there is no reciprocal arrangement capable of being invoked in the contrary situation of direct exports from Germany to Monaco. That the lack of any international agreement with Monaco [15] can occasionally give rise to problems was acknowledged by the agent representing France at the hearing. [16] This may be contrasted with the situation now prevailing in respect of the Republic of San Marino. Like Monaco, it had been considered from 1968 to be part of the Community's customs territory, but its trade relations with the Community have, since 1992, been governed by a special international agreement. [17] Notwithstanding the lack of a complete system governing trade relations between Monaco and the Community, I believe that the very fact that Monaco is part of the customs territory of the Community justifies treatment of goods originating in Monaco as benefiting from the rules on free movement. To my mind, reliance on the fact that Monaco is within the Community for customs purposes provides a more convincing basis for that extension than that suggested by the defendant at the hearing, viz. that the fact that the goods in the present case (presumably in common with most Monacan exports) pass physically through France en route from Monaco to Germany suffices to render Community law applicable. That would lead to anomalously different treatment of goods exported by sea from Monaco to, for example, Spain and Italy. It is clear from Article 10 of the Treaty and *Donckerwolcke* that third-country goods must physically be imported into and legally satisfy the relevant CCT formalities, including payment of the appropriate tariff, in a Member State before they may be regarded as being in free circulation. Monaco's legal status, as part of the Community's customs territory, renders these requirements superfluous. Consequently, I am satisfied that the legal significance of the Community legislature's decision to

14 — Pursuant to its Article 1(1), Regulation No 3285/94 applies to imports of products originating in third countries, with the exception of textile products and products originating in certain, not including Monaco, third countries; see Annex I to Council Regulation (EC) No 519/94 of 7 March 1994 on common rules for imports from certain third countries and repealing Regulations (EEC) Nos 1765/82, 1766/82 and 3420/83, OJ 1994 L 67, p. 89.

15 — See Snyder, *International Trade and Customs Law of the European Union* (1998), p. 504, at footnote 3.

16 — She observed that Monaco is effectively obliged — apparently as a result of the bilateral customs union agreement between Monaco and France of 18 May 1963, ratified in France by Decree No 63-982 of 24 September 1963, JORF, p. 8679 — to respect Community legislation such as the 1976 Directive. The Court was informed that problems still arise and that, following approaches made by the French and Monacan authorities, the Commission is now considering the need for the negotiation of an international agreement with Monaco.

17 — See Council Decision 92/561/EEC of 27 November 1992 on the conclusion of an interim Agreement on trade and customs union between the European Economic Community and the Republic of San Marino, OJ 1992 L 359, p. 13. The agreement establishes a customs union between the Community and San Marino (Article 1), under which (Article 8) quantitative restrictions and measures having equivalent effect to quantitative restrictions are expressly prohibited in trade between the contracting parties.

accord Community customs territory status to Monaco is that, whenever Monacan goods are exported to a Member State, they should thereafter be equated, for all trade purposes, with goods in free circulation.

15. It follows that the fact that the products in question in the main proceedings are imported directly from Monaco to Germany does not affect the analysis of whether the injunction which the national court is minded to grant would be compatible with Community law.

B — *The substantive issue*

16. Not surprisingly, the written and oral submissions made to the Court in the present case do not disclose any substantial disagreement regarding the principles to be applied in formulating an answer to the question posed by the national court. The principal legal issues have been settled by relatively recent case-law. The real issue in the case is the extent to which consumer protection, provided under German rules, in particular a rule tending to presume that the possible confusion of some 10% to 15% of consumers suffices to justify a restriction on the sale of a product, may be applied despite its adverse effect on trade between Member States and when product rules in the relevant field have been harmonised at Community level. Only Finland suggests, with some support from France at the hearing, that, notwithstanding the 1976 Directive, Member States may maintain their own stricter rules on consumer protection.

17. To begin with, it is not contested that the grant of an injunction by the national court restricting the sale of the cream merely because the word 'lifting' is used in its name would constitute a measure having equivalent effect to a quantitative restriction on imports prohibited, in principle, by Article 30 of the Treaty, as well as a restriction on trade in cosmetic products contrary to Article 7(1) of the 1976 Directive. [18] The cream is sold widely under similar conditions in other Member States so that compliance with special German rules would, as in the *Clinique* case, entail for the exporter additional labelling and advertising costs for that market alone. [19] Consequently, it is necessary only to consider the extent to which such a restriction is none the less permissible.

18 — Although the UWG and the LmBG apply equally to both German and imported products, the grant of the injunction would clearly constitute a 'products rule' for the purposes of Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097 and the restraint on trade it would entail must thus be justified.

19 — See *Clinique* (footnote 5), paragraph 19.

18. It is equally well established in the case-law of the Court, in particular in *Clinique*, that the 1976 Directive 'provided exhaustively for the harmonisation of national rules on the packaging and labelling of cosmetic products'. [20] It 'defines the measures to be taken in the interests of consumer protection and fairness of commercial transactions, which are included among the imperative requirements specified in the case-law of the Court in the context of the application of Article 30 of the Treaty'. [21] In other words, this particular imperative requirement is adopted by the 1976 Directive and the rules to pursue it are therein exhaustively defined.

19. Member States are prevented, by Article 7(1) of the 1976 Directive, from prohibiting or restricting the marketing of cosmetic products which comply with the terms prescribed in that Directive. In the present case, it is common case that the cream is packaged and labelled in accordance with those terms. The question that arises is whether Germany may, in pursuit of the objective of Article 6(3), none the less restrict its marketing in that Member State.

20. The debate in the present case, thus, centres around the obligation imposed on Member States by Article 6(3) to ensure that products are not labelled or marketed so as 'to imply that [they] have characteristics which they do not have'. The 1976 Directive leaves to the Member States the choice of measures to give effect to this obligation. This is not surprising since it would be impossible to lay down in advance comprehensive criteria which may be applied in all cases to determine whether product claims are erroneous. None the less, the 1976 Directive must be interpreted as providing exhaustively for the rules to be applied to protect consumers from selling or marketing practices which make or even imply false claims about cosmetic products. In other words, the relevant standard is laid down at Community level and must simply be applied on a case-by-case basis by the Member States. Consequently, the latter are precluded from legislating in the matter and are confined to acting within the confines of the harmonised rules. [22]

21. The 1976 Directive may, therefore, be contrasted with Directive 84/450/EEC, which provides only for partial harmonisation of national rules governing misleading advertising through the establishment of minimum objective criteria for determining whether particular advertising is misleading. [23] I cannot therefore agree with the contention, advanced by Finland and supported by France at the hearing, that Article 6(3) of the 1976 Directive should

20 — Ibid., paragraph 11. See also Case C-77/97 *Österreichische Unilever* v *Smithkline Beecham Markenartikel* [1999] I-431, paragraph 24 (hereinafter '*Unilever*') and the cases there cited.

21 — *Clinique*, paragraph 15.

22 — See Case C-1/96 *R* v *MAFF, ex parte Compassion in World Farming* [1998] ECR I-1251, paragraph 47, Case C-323/93 *Centre d'Insémination de la Crespelle* v *Coopérative de la Mayenne* [1994] I-5077, paragraph 31 and Case 148/78 *Pubblico Ministero* v *Ratti* [1979] ECR 1629, paragraphs 36 to 38.

23 — Case 238/89 *Pall* [1990] ECR I-4827, paragraph 22, *Clinique*, paragraph 10 and Joined Cases C-34/95 to C-36/95 *Ko* v *De Agostini and TV-Shop* [1997] ECR I-3843, paragraph 37.

be interpreted in the light of Directive 84/450/EEC. Member States, although left with the primary responsibility for controlling the use of misleading labelling claims, are required to apply the standard prescribed in Article 6(3), i.e. to prohibit false or misleading claims regarding the characteristics possessed by a cosmetic product. Finland's view, based on an analogy with Article 7 of Directive 84/450/EEC, that Member States may apply higher standards of consumer protection is thus misconceived. Each Member State must apply the same Community-law standard.

22. The 1976 Directive must also, as the Court pointed out in *Clinique*, 'like all secondary legislation, be interpreted in the light of the provisions of the Treaty on free movement of goods'. [24] It is settled law that the prohibition of quantitative restrictions and of all measures having equivalent effect applies not only to national measures but also to measures adopted by the Community institutions. [25] Article 6(3) is contained in a directive designed, by means of harmonisation, to further the free movement of cosmetic products. It is, consequently, to be considered as pursuing the dual objectives of free trade and consumer protection. In giving effect to any national rules implementing those objectives, where they are in conflict, national courts are naturally called upon to strike a balance between them. The function of this Court, in responding to a question such as that posed by the national court in this case, is, as Germany and France rightly submit, to provide clear and useful interpretative criteria to assist the latter in that task.

23. In the light of these preliminary remarks, I shall endeavour to outline the considerations which should guide the Court in addressing the question referred by the national court. That question, it will be recalled, notes, firstly, that the cream is 'lawfully manufactured and distributed in a Member State [Germany] of the European Union ... [and is also marketed] with the same indication of its effect on the packaging lawfully and without challenge in other countries of the European Union' and, secondly, that German law on unfair competition may provide that its sale and distribution 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 ...'. This antithesis highlights the essential problem raised by the case, which, in my view, is to adopt the appropriate standard for protection of consumers against being misled or confused by false claims. Whereas German law permits the prohibition of marketing where a product may mislead 10% to 15% of consumers, the national court observes, referring to *Mars*, that Community law treats consumers as being both sufficiently alert and sensible and, thus, as not needing protection from claims that might only deceive so few consumers. The plaintiff, in its written observations, describes vividly the sharply

24 — *Clinique*, paragraph 12.

25 — See in particular Case 15/83 *Denkavit Nederland* v *Hoofdproduktschap voor Akkerbouwprodukten* [1984] ECR 2171, paragraph 15 and Case C-51/93 *Meyhui* v *Schott Zwiesel Glaswerke* (hereinafter '*Meyhui*') [1994] ECR I-3879, paragraph 11.

divergent views expressed in German legal literature regarding the appropriate level of protection. At one extreme is the view that the right to equality of economic opportunity suggests that Articles 30 and 36 of the Treaty should not be interpreted with the mature and critical consumer in mind, as that would discriminate against consumers with limited intellectual capacity! [26] At the other end of the spectrum is the view that Community law imposes the standard of the well-informed consumer and that German unfair-competition law should abandon 'the attempt, which is as stupid as it is pointless, to seek to protect practically the last "simpleton" ("Trottel") from the danger of being misled by advertising'. [27]

24. The appropriate standard of consumer protection must, in my view, start from the proposition enunciated in the constant case-law of the Court that the free movement of goods between the Member States is a fundamental principle of Community law. [28] Reliance either on one of the grounds of derogation set out in Article 36 of the Treaty or on a mandatory requirement must be considered as an exception to that principle. The scope of such exceptions must not be 'extended any further than is necessary for the protection of the interests which it is intended to secure and the measures taken ... must not create obstacles to imports which are disproportionate to those objects'. [29] As the Court has specifically acknowledged, citing *Clinique* and *Mars*, measures of protection against 'the risk of misleading consumers cannot override the requirements of the free movement of goods and so justify barriers to trade, unless that risk is sufficiently serious ...'. [30] The obligation to 'observe the principle of proportionality' applies equally to 'the measures which Member States are required to take for the implementation' of Article 6(3) of the 1976 Directive. [31] Thus, the Community interest in protecting consumers, which the directive recognises, may be allowed to impinge on the free movement of cosmetic products only to the extent that is clearly necessary to serve that interest.

25. Community law, in its approach to the protection of consumers, has preferred to emphasise the desirability of disseminating information, whether by advertising, labelling or otherwise, as the best means of promoting free trade in openly competitive markets. The presumption is that consumers will inform themselves about the quality and price of products and will make intelligent choices. As long ago as the '*Cassis de Dijon*' case the Court offered

26 — Reference is made to Reuthental, 'Verstößt das Deutsche Irreführungsgebot gegen Artikel 30 EGV', *WRP* 12/97, p. 1154, at p. 1160.

27 — See Emmerich, *The Law of Unfair Competition*, section 12(8)(b), 4th ed., 1995.

28 — See Case C-200/96 *Metronome Musik* v *Music Point Hokamp* [1998] ECR I-1953, paragraph 14, and Case C-61/97 *Egmont Film* v *Laserdisken* [1998] ECR I-5171, paragraph 13.

29 — Case 72/83 *Campus Oil* v *Minister for Industry and Energy* [1984] ECR 2727, paragraph 37.

30 — See Case C-313/94 *Graffione* [1996] ECR I-6039, paragraph 24.

31 — See *Unilever*, cited in footnote 20 above, paragraph 27, and also *Clinique*, paragraph 16.

informative labelling as a better alternative than a ban on sale. [32] This reliance on the availability and utility of information is particularly well illustrated by the '*Beer Purity Law*' case in which Germany sought to defend, *inter alia* on consumer-protection grounds, the German-law requirement that only products manufactured from malted barley, hops, yeast and water could be marketed as 'beer' in Germany. [33] The Court, although agreeing with the legitimacy of seeking to enable consumers 'who attribute specific qualities to beer manufactured from particular raw materials to make their choice in the light of that consideration', felt that this objective could be achieved by a system of consumer-information requirements which would permit 'the consumer to make his choice in full knowledge of the facts ...'; breweries could, thus, be obliged to indicate on their labels the raw materials used, while, as regards beers sold on draught, they could be required to ensure that 'the requisite information ... appear on the casks or the beer taps'. [34] A few years later, the Court held in *Pall*, rejecting the possibility of error by German consumers regarding the place of registration of a trade mark in respect of imported products bearing the symbol '(R)' as a justification for allowing such use to be prohibited pursuant to the UWG, that 'even assuming that consumers, or some of them, might be misled on that point, such a risk cannot justify so considerable an obstacle to the free movement of goods, since consumers are more interested in the qualities of a product than the place of registration of the trade mark'. [35] The Court has thus emphasised that 'Community policy ... establishes a close link between protecting the consumer and providing the consumer with information'. [36]

26. In my view, however, it is the emergence in the Court's more recent case-law of a model of a hypothetical average consumer for cases of alleged confusion that is likely to be of the greatest utility both to national courts and to the Court, in the latter case to obviate the need to decide such cases on an individual basis. It appears to have been Germany that first laid emphasis on the significance of the inference which 'the average well-informed consumer' [37] might draw regarding whether a product would have prophylactic or therapeutic properties in successfully defending the view of German authorities, whose validity was challenged in that case by the Commission, that eye lotions could be regarded as medicinal products and,

32 — Case 120/78 *Rewe* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

33 — Case 178/84 *Commission* v *Germany* [1987] ECR 1227.

34 — Ibid., paragraphs 35 and 36.

35 — Cited in footnote 23 above, paragraph 19.

36 — C-362/88 *GB-INNO-BM* [1990] ECR I-667 at paragraph 14. In Case 126/91 *Yves Rocher* [1993] ECR I-2361, the Court held to be a disproportionate restriction of trade a general prohibition under the German UWG on eye-catching price comparisons in advertising 'in that it affects advertising which is not at all misleading and contains comparisons of prices actually charged, which can be of considerable use in that it enables the consumer to make his choice *in full knowledge of the facts*' (paragraph 17, emphasis added).

37 — See Case C-290/90 *Commission* v *Germany* [1992] ECR I-3317, paragraph 11. A few months before the judgment in *Commission* v *Germany*, the Court had averted to the need to bear in mind the consumers to which a claim — in that case, one allegedly involved in advertising as 'new' previously registered imported cars that had not been driven on a public highway — is addressed; see Case C-373/90 *Complaint against X* [1992] ECR I-131, paragraph 15.

thus, subject to an authorisation procedure prior to marketing.[38] In 1994 in *Meyhui* the Court upheld a Community-law requirement imposed, pursuant to a 1969 directive,[39] on manufacturers of glass falling within certain categories ('crystal glass' and 'crystalline') to use only descriptions of such glass that appear in the language or languages of the Member State in which the product is marketed, since '... the difference in the quality of the glass used is not easily discernible to the *average consumer* for whom the purchase of crystal glass products is not a frequent occurrence', who must therefore 'be given the clearest information possible so that he does not confuse a product [in the above categories] with a product in the higher categories and consequently ... pay too much'.[40]

27. This identification of the level of protection required by the average consumer crystallised in the 1995 *Mars* judgment. *Mars* concerned a complaint that the application of a '+10%' marking whose dimensions exceeded ten per cent of the surface of the wrapper on ice-cream bars infringed Paragraph 3 of the UWG by misleading consumers into believing that either the volume or the weight of the product had been increased by an amount greater than ten per cent. The Court adopted, for the first time, the notion of the 'reasonably circumspect consumer' who might 'be deemed to know that there [was] not necessarily a link between the size of the publicity markings relating to an increase in the product's quantity and the size of that increase'.[41]

28. That approach has since been firmly established, in particular by two recent cases. *Gut Springenheide*[42] concerned a complaint brought before a German court relating to allegedly misleading information contained in both a trade mark used on and a notice supplied inside the packaging of eggs contrary, in that case, to Community legislation.[43] The national court expressly asked whether the proper test was 'the informed average consumer or the casual consumer'. The Court's judgment is of general application: it drew particular attention to the existence of similar consumer-protection provisions in other Community legislation and referred to a number of its earlier decisions, including *GB-INNO-BM*, *Pall*, *Clinique* and *Mars*. It

38 — See Council Directive 65/65/EEC of 26 January 1965 on the approximation of provisions laid down by Law, Regulation or Administrative Action relating to proprietary medicinal products, OJ, English Special Edition, First Series 1965-1966, p. 20.

39 — See Council Directive 69/493/EEC of 15 December 1969 on the approximation of the laws of the Member States relating to crystal glass, OJ, English Special Edition, First Series 1969 (II), p. 599.

40 — *Meyhui*, cited in footnote 25 above, paragraph 18 (emphasis added).

41 — Paragraph 24.

42 — Case C-210/96 *Gut Springenheide and Tusky* v *Oberkreisdirektor Steinfurt* (hereinafter '*Gut Springenheide*') [1998] ECR I-4657.

43 — See Council Regulation (EEC) No 2771/75 of 29 October 1975 on the common organisation of the market in eggs (OJ 1975 L 282, p. 49) and Article 10 of Council Regulation (EEC) No 1907/90 of 26 June 1990 on certain marketing standards for eggs (OJ 1990 L 173, p. 5), as amended.

continued by enunciating (paragraphs 31 to 32) the following test:

'In those cases, in order to determine whether the description, trade mark or promotional description or statement in question was liable to mislead the purchaser, the Court took into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect, without ordering an expert's report or commissioning a consumer research poll.

So national courts ought, in general, to be able to assess, on the same conditions, any misleading description or statement designed to promote sales.'

Although couched as a test which the Court had itself already applied, it is clear that it was principally intended to be the test applied by national courts. This emerges clearly, to my mind, from *Sektkellerei Kessler*.[44] That case concerned an allegation of confusion arising from the brand name of a German sparkling wine. The Court stressed (paragraph 33) the need to establish, 'having regard to the opinions or habits of the consumers concerned, that there is a real risk of their economic behaviour being affected' and later (paragraph 36) reiterated the *Gut Springenheide* test:

'... it is for the national court to assess in the light of the circumstances whether, bearing in mind the consumers to whom it is addressed, a brand name or its component parts are liable to be confused with all or part of the description of certain wines. In that respect, it is also apparent from the Court's case-law that the national court must take into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect' (paragraph 36).

29. Thus it is clear that the test to be applied to any case of restriction on the sale or marketing of a product on the ground of protecting the consumer from misleading labelling or other accompanying information is whether its presence on the market would, in some material respect, be likely to mislead the hypothetical consumer so defined. To my mind, the obligation of national courts scrupulously to apply this test is particularly important in cases where the source for the consumer-protection objective lies in a directive, such as the 1976 Directive, which occupies the field in so far as the marketing of cosmetic products is concerned. The test should enable the national court to assess the facts of each case against this standard on the basis of its own judgment of how such a consumer would be affected. The standard involved, being based on a cumulation of four factors, is clearly a high one. Having regard

44 — Case C-303/97 *Verbraucherschutzverein* v *Sektkellerei G. C. Kessler* (hereinafter '*Sektkellerei Kessler*') [1999] ECR I-513.

to all the relevant surrounding circumstances of the case, and especially the selling arrangements employed by the vendor, the national court must be satisfied that the average consumer, who is reasonably well informed and observant about the product in question and who exercises reasonable circumspection when using his critical faculties to assess the claims made by or in respect of it, would be confused. The approach is thus not statistical. Market surveys may, in certain cases, be of assistance, although it must be remembered that they are subject to the frailties inherent in the formulation of survey questionnaires and often subject to diverging interpretation as to their significance. [45] Accordingly, they do not absolve the national court from the need to exercise its own faculty of judgment based on the standard of the average consumer as defined in Community law. In conclusion, the important point is that a single Community-law test is now available and it would, therefore, be inappropriate for a national court to base its final decision as to confusion on statistical evidence regarding the probable effect on 10% to 15% of potential consumers.

30. In order further to assist the national court in the instant case, it may be helpful if I refer briefly to some of the factors which it should take into account in reaching a judgment as to whether the average consumer of the cream in question would be confused by the evocation of a face-lift, or more generally cosmetic surgery, inherent in the use of the word 'lifting' in its name. In the first place, it is clear from the considerable similarities between the facts and issues raised by the *Clinique* case and those involved in this case that the national court should take into account the fact that the cream is clearly marketed and sold as a cosmetic product, is sold exclusively in perfumeries and cosmetic departments of large stores and has been marketed in other Member States without apparently misleading consumers. [46] In addition, Community law recognises, as the Court confirmed particularly in *Graffione*, that peculiar social, cultural or linguistic features in a Member State may justify a different view being taken as to the effect of a particular claim on consumers in that Member State. [47] The national court may need therefore to consider whether, from a linguistic perspective, the use of the English word 'lifting' rather than a German word with the same or a similar connotation is apt to mislead German consumers. It should, however, also take into account the fact that the use of the word does not appear to have given rise to cause for concern in other Member States, even those where German is the national or a widely spoken language. As for social or cultural factors, the national court has not averted in its order for reference to any peculiarities

45 — In *Sektkellerei Kessler* (cited in foornote 44) the Court, citing paragraphs 35 to 37 of its judgment in *Gut Springenheide*, (cited in foornote 42) also expressed reservations as to their utility: 'It is only where it has particular difficulty in appraising the misleading nature of the brand name that, in the absence of any Community provision on the matter, the national court must assess whether it is necessary, under the conditions laid down by its national law, to decide upon measures of enquiry such as an expert's report or a consumer research poll as guidance for its judgment'.

46 — *Clinique*, paragraphs 21.

47 — Cited in footnote 30 above, paragraph 22. The fact that the Court was concerned with trade marks does not, in my view, detract from the general significance of its comment. At paragraph 10 of his Opinion in that case, Advocate General Jacobs had observed that the name 'Cotonnelle' provided 'an excellent illustration of the linguistic factor' since it 'might, arguably, cause a speaker of English, French or Italian to believe that a product is made of cotton [but] it could hardly have that effect on someone who understands only German or Spanish, since the words for cotton in those languages are "Baumwolle" and "algodón" respectively'.

liable to render German consumers more susceptible to being misled by the word 'lifting' than consumers in other Member States, but it is for it to assess whether any such factors actually exist and, if so, whether they influence the inferences drawn by German consumers on seeing the word. The national court may also wish to consider whether the very fact that the cream is specifically intended to be used on a regular, if not daily, basis, thus necessitating ongoing expenditure by consumers desirous of obtaining the desired firming effects, in itself sufficiently emphasises the ephemeral and transient nature of those effects as to dispel any contrary inference that might be drawn from the word 'lifting'. In other words, as the Court has acknowledged particularly in respect of alleged confusion between trade marks, the national court should, in determining whether the Community standard for confusion is met, adopt a 'global appreciation' of the risk. [48]

31. I would recommend that the Court, in addition to specifying the test that is to be applied by the national court, provide guidance, along the lines suggested in the previous paragraph, regarding the factors which the latter may wish to consider in applying that test so that the national court has all the relevant material to enable it to determine whether granting the injunction in this case would be compatible with Community law. However, in doing so, it should, as Advocate General Gulmann advised in *Clinique*, not 'link its interpretation of Article 30 too closely to the particular facts of the case'. [49] I also agree with his view that 'under the system of the Treaty, [the] task' of ensuring uniform application of general provisions such as those found in the 1976 Directive 'devolves on the national courts'. [50] Thus, notwithstanding the earlier willingness of the Court occasionally, 'where the evidence and information before it seemed sufficient and the solution clear', to 'settle [...] the issue itself rather than leaving the final decision for the national court', I am convinced that such departures from the normal division of competence between national courts and the Court of Justice in preliminary-reference cases are inappropriate and, in the light of the development at Community-law level of a test that enables the proper degree of protection of consumers to be determined by national courts, unnecessary. [51] In cases such as that in the main proceedings, the Court should henceforth confine itself to interpreting Community law and providing guidelines for its appli-

48 — See, in particular, the recent judgment of 22 June 1999 in Case C-342/97 *Lloyd Schuhfabrik Meyer* v *Klijsen Handel* [1999] ECR I-3819, paragraphs 25, to 26 and 28.

49 — Paragraph 9 of the Opinion.

50 — Ibid.

51 — See *Gut Springenheide*, paragraph 30. Of the cases cited there, the most notable example of this approach was clearly the judgment in *Clinique*.

cation by the national court. The ultimate application of Community law and, thus, final decision in respect of alleged misleading or confusing product claims should be made by the national court.

32. In conclusion, therefore, I am satisfied the national court should not grant the injunction sought by the plaintiff in the main proceedings, unless it is satisfied that an average German consumer of the cream in question, who is reasonably well informed, observant and circumspect, would, having regard to all of the circumstances in which it is sold, be confused, by use in its name or description of the word 'lifting', into attributing to that cream a characteristic which it does not have.

V — Conclusion

33. In the light of the foregoing, I recommend that the question referred by the Landgericht, Köln be answered as follows:

Articles 30 and 36 of the EC Treaty (now, after amendment, Articles 28 EC and 30 EC), read in conjunction with Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products and in particular its Articles 6(3) and 7(1), preclude the prohibition, pursuant to a Member State's national legislation on unfair competition law, of the importation and distribution of a cosmetic product that is marketed without restriction in other Member States and that satisfies the labelling requirements of Council Directive 76/768/EEC, unless, in that Member State, an average consumer of the product in question, who is reasonably well informed, observant and circumspect, would, having regard to all of the circumstances in which the product is sold, be confused by a claim made in its name or description into attributing a characteristic to it that it does not in fact have.