

European Court of Justice, 19 September 2006, Lidl v Colruyt



v



ADVERTISING

Comparative advertising

- Comparative advertising relating collectively to selections of basic consumables sold by two competing chains of stores

The condition under which comparative advertising is permissible that is laid down by Article 3a(1)(b) of the Directive must be interpreted as not precluding comparative advertising from relating collectively to selections of basic consumables sold by two competing chains of stores in so far as those selections each consist of individual products which, when viewed in pairs, individually satisfy the requirement of comparability laid down by that provision.

- Express and exhaustive listing of products and prices not required

The requirement, laid down by Article 3a(1)(c) of the Directive, that the advertising 'objectively compares' the features of the goods at issue must be interpreted as not signifying, in the event of comparison of the prices of a selection of comparable basic consumables sold by competing chains of stores or of the general level of the prices charged by them in respect of the range of comparable products which they sell, that the products and prices compared, that is to say both those of the advertiser and those of all of his competitors involved in the comparison, must be expressly and exhaustively listed in the advertisement.

- Prices and general pricelevels are verifiable features

Article 3a(1)(c) of the Directive must be interpreted as meaning that the following constitute, for the purposes of that provision, 'verifiable' features of goods sold by two competing chains of stores:

- the prices of those goods;
- the general level of the respective prices charged by such chains of stores in respect of their selection of comparable products and the amount liable to be saved by consumers who purchase such products from one rather than the other of those chains, in so far as the goods in question do in fact form part of the selection of comparable products on whose basis that general price level has been determined.

- A feature satisfies the requirement of verifiability only if the advertiser indicates, in particular for the attention of the persons to whom the advertisement is addressed, where and how they may readily examine those details with a view to verifying, the details as to their accuracy

Article 3a(1)(c) of the Directive must be interpreted as meaning that a feature mentioned in comparative advertising satisfies the requirement of verifiability laid down by that provision, in cases where the details of the comparison which form the basis for the mention of that feature are not set out in the advertising, only if the advertiser indicates, in particular for the attention of the persons to whom the advertisement is addressed, where and how they may readily examine those details with a view to verifying, or, if they do not possess the skill required for that purpose, to having verified, the details and the feature in question as to their accuracy.

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European Court of Justice, 19 September 2006

(V. Skouris, P. Jann, C.W.A. Timmermans, K. Schiemann and J. Malenovský, J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Lenaerts, P. Kūris, E. Juhász, G. Arestis, A. Borg Barthet and M. Ilešič)

JUDGMENT OF THE COURT

19 September 2006 (*)

(Directives 84/450/EEC and 97/55/EC – Misleading advertising – Comparative advertising – Conditions under which comparative advertising is permitted – Comparison of the general level of the prices charged by chains of stores – Comparison of the prices of a selection of products)

In Case C-356/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Rechtbank van Koophandel te Brussel (Belgium), made by decision of 29 July 2004, received at the Court on 18 August 2004, in the proceedings Lidl Belgium GmbH & Co KG

v

Etablissements Franz Colruyt NV,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, K. Schiemann (Rapporteur) and J. Malenovský, Presidents of Chambers, J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Lenaerts, P. Kūris, E. Juhász, G. Arestis, A. Borg Barthet and M. Ilešič, Judges,

Advocate General: A. Tizzano,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 7 December 2005,

after considering the observations submitted on behalf of:

– Lidl Belgium GmbH & Co KG, by M. Lebbe, advocaat,

– Etablissements Franz Colruyt NV, by H. De Bauw, advocaat,

– the Belgian Government, by M. Wimmer, acting as Agent,
 – the French Government, by G. de Bergues and R. Loosli-Surrans, acting as Agents,
 – the Polish Government, by T. Nowakowski, acting as Agent,
 – the Commission of the European Communities, by A. Aresu and R. Troosters, acting as Agents,
 after hearing the [Opinion of the Advocate General](#) at the sitting on 29 March 2006,
 gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Article 3a(1)(a), (b) and (c) of Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising (OJ 1984 L 250, p. 17), as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 (OJ 1997 L 290, p. 18) ('the Directive').
 V. Skouris, President, P. Jann, C.W.A. Timmermans, K. Schiemann (Rapporteur) and J. Malenovský, Presidents of Chambers, J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Lenaerts, P. Kūris, E. Juhász, G. Arestis, A. Borg Barthet and M. Ilešič

Article 1 of the Directive states:

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

3 As provided in Article 2(2) of the Directive, 'misleading advertising' means:

'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'

4 Article 2(2a) of the Directive defines comparative advertising as:

'any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor'

5 Article 3 of the Directive states:

'In determining whether advertising is misleading, account shall be taken of all its features, and in particular of any information it contains concerning:

- (a) the characteristics of goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services;
- (b) the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided;
- (c) the nature, attributes and rights of the advertiser, such as his identity and assets, his qualifications and

ownership of industrial, commercial or intellectual property rights or his awards and distinctions.'

6 Article 3a(1) of the Directive provides:

'Comparative advertising shall, as far as the comparison is concerned, be permitted when the following conditions are met:

- (a) it is not misleading according to Articles 2(2), 3 ...;
- (b) it compares goods or services meeting the same needs or intended for the same purpose;
- (c) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price; ...'

7 Article 4(1) of the Directive states:

'Member States shall ensure that adequate and effective means exist to combat misleading advertising and for the compliance with the provisions on comparative advertising in the interests of consumers as well as competitors and the general public.

...'

8 Article 6 of the Directive states:

'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 interest 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 in the case of comparative advertising to require the advertiser to furnish such evidence in a short period of time; and
- (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.'

The main proceedings and the questions referred for a preliminary ruling

9 Lidl Belgium GmbH & Co KG ('Lidl') and Etablissements Franz Colruyt NV ('Colruyt') each operate in Belgium a chain of stores which essentially retail basic consumables, under the names Lidl and Colruyt respectively.

10 On 19 January 2004, Colruyt sent its customers a mailshot ('the letter at issue') worded as follows:

'...'

Last year, 2003, you were able once again to make significant savings with Colruyt.

On the basis of our average price index for the past year we have calculated that a family spending EUR 100 each week in Colruyt stores:

- saved between EUR 366 and EUR 1 129 by shopping at Colruyt's rather than at any other supermarket (such as Carrefour, Cora, Delhaize, etc.);
- and saved between EUR 155 and EUR 293 by shopping at Colruyt's instead of a hard discounter or wholesaler (Aldi, Lidl, Makro).

On the reverse side you will see the evolution of the price differential vis-à-vis other stores in the course of 2003. The figures indicate that the price differential be-

tween Colruyt and the other stores has increased even further over the last few months.

In order to be able to continue to guarantee the lowest prices, we compare daily 18 000 prices in other stores. In addition, we also collect all promotions. Our data are thus very much up-to-date. We store all the prices in our central computer.

Each month we use those prices to calculate the price differential between Colruyt and the other stores. We refer to this as our price index which is certified by Quality Control (Instituut voor Kwaliteitscontrole), an independent body.

The result: at Colruyt's you enjoy, every day and at any time of the year, the lowest prices. In 2004 also we remain true to this guarantee.'

11 The reverse side of the letter at issue features two charts. The first sets out the price differential between Colruyt and its competitors as at 22 December 2003, a differential which is stated to have been calculated by it on the basis of a daily comparison of the prices, including promotional prices, of comparable products sold in each Colruyt store and in the competing stores located in the region. The second illustrates the development of that differential over the whole of 2003.

12 In addition, the following text appears on the checkout receipts issued at stores operated by Colruyt: 'How much did you save in 2003?

If you spent EUR 100 at Colruyt's each week, then, according to our price index, you will have saved:

- between EUR 366 and EUR 1 129 in comparison with another supermarket (such as Carrefour, Cora, Delhaize, etc.);
- between EUR 155 and EUR 293 in comparison with a hard discounter or wholesaler (Aldi, Lidl, Makro).'

13 Both the letter at issue and the checkout receipts also refer to Colruyt's website where further explanation can be found of the system of price comparison applied by it and the method of calculating the price index.

14 In addition, some of Colruyt's advertising leaflets and checkout receipts contain the following statement regarding a selection of basic consumables sold in Colruyt stores, recognisable by their red labelling on which the word 'BASIC' appears:

'BASIC: Absolutely the lowest prices in Belgium.

Even cheaper than the comparable selection of the hard discounters (Aldi, Lidl) and the "Eerste prijs/1er prix" products of other supermarkets (such as Carrefour, Cora, etc.).

You will recognise the BASIC products by their red labelling and the word BASIC.'

15 Certain advertising leaflets also contain the following wording:

'BASIC = Absolutely rock-bottom prices:

In addition to a significant overall price reduction we can offer you from now on a large number of products that you can compare with those of the typical hard discounters (like Aldi and Lidl) and with the "Eerste prijs/1er prix" products of other supermarkets. These

are our BASIC products: everyday basic products at absolutely rock-bottom prices.'

16 Lidl brought proceedings before the Rechtbank van Koophandel te Brussel (Brussels Commercial Court) for an order requiring the cessation of those various advertising practices which it considers to be contrary to Article 23a of the Belgian Law of 14 July 1991 on commercial practices and consumer information and protection as amended by the Law of 25 May 1999 (Moniteur belge/Belgisch Staatsblad of 23 June 1999, p. 23670). That provision transposed Article 3a of the Directive into national law.

17 In Lidl's submission, the advertising at issue is not objective, not verifiable and misleading. As regards, first, the advertising relating to the general level of prices, that advertising does not specify the products being compared, the number of them or their prices. Moreover, the general price level, calculated on the basis of a select sample of products sold by Colruyt, is extended by extrapolation to that advertiser's entire product range. Finally, the advertising does not differentiate individually between the advertiser's various competitors by a specific reference to the general price level of each of them, but refers to them in groups, placing them imprecisely within a range of price levels. As regards, second, 'BASIC' products, the advertising at issue identifies neither the products being compared nor their prices.

18 It was in those circumstances that the Rechtbank van Koophandel te Brussel decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 3a(1)(a) of [the] Directive ... be construed as meaning that the comparison of the general price level of advertisers with that of competitors, in which an extrapolation is made on the basis of a comparison of the prices of a sample of products, is impermissible inasmuch as this creates in any event the impression that the advertiser is cheaper over its entire range of products, whereas the comparison made relates only to a limited sample of products, unless the advertisement makes it possible to establish which and how many products of the advertiser, on the one hand, and of the competitors used in the comparison, on the other, have been compared, and makes it possible to ascertain where each competitor concerned by the comparison is positioned in the comparison and what its prices might be in comparison with those of the advertiser and of the other competitors used in the comparison?

(2) Must Article 3a(1)(b) of [the] Directive ... be construed as meaning that comparative advertising is allowed only if the comparison relates to individual goods or services that meet the same needs or are intended for the same purpose, to the exclusion of product selections, even if those selections, on the whole and not necessarily in regard to every component, meet the same needs or are intended for the same purpose?

(3) Must Article 3a(1)(c) of [the] Directive ... be construed as meaning that comparative advertising in

which a comparison of the prices of products, or of the general price level, of competitors is made will be objective only if it lists the products and prices being compared of the advertiser and of all the competitors in the comparison and makes it possible to ascertain the prices being charged by the advertiser and its competitors, in which case all products used in the comparison must be expressly indicated for each individual supplier?

(4) Must Article 3a(1)(c) of [the] Directive ... be construed as meaning that a feature in comparative advertising will satisfy the requirement of verifiability in that article only if that feature can be verified as to its accuracy by those to whom the advertising is addressed, or is it sufficient if the feature can be verified by third parties to whom the advertising is not addressed?

(5) Must Article 3a(1)(c) of [the] Directive ... be construed as meaning that the price of products and the general price level of competitors are in themselves verifiable features?

Consideration of the questions

Preliminary observations

19 It should be noted at the outset, first, that two separate methods of comparative advertising are at issue in the main proceedings.

20 The first method involves comparing the general level of the prices charged by competing chains of stores in respect of their ranges of comparable products and inferring therefrom the amount that consumers can save on an annual basis depending on whether they purchase their basic consumables each day from one rather than another of those chains ('the first method of comparison at issue'). Those general price levels are determined monthly, then annually, on the basis of a daily record of the individual prices of a very wide sample of basic consumables, whether identical (branded products) or similar (unbranded products or the chain's own brand), sold by both the advertiser and each of its competitors. In order to determine the general price levels, the individual prices thus recorded are weighted according to the quantities of each product that are purchased from the advertiser.

21 The second method of advertising is based on the assertion that all of the advertiser's products that have a red label bearing the word 'BASIC' are sold by it at the lowest price in Belgium ('the second method of comparison at issue'). This selection of products consists of, first, branded products and, second, products sold unbranded or under the advertiser's own brand name. The price comparison relates, in the case of the first category, exclusively to identical branded products sold by both the advertiser and its competitor and, in the case of the second category, to products of comparable quality sold by the advertiser and its competitor.

22 The second preliminary point to note is that, given the objectives of the Directive and in particular the fact that, as the second recital in the preamble to Directive 97/55 points out, comparative advertising helps to demonstrate objectively the merits of the various comparable products and thus stimulate

competition between suppliers of goods and services to the consumer's advantage, it is settled case-law that the conditions required of comparative advertising must be interpreted in the sense most favourable to it ([Case C-112/99 Toshiba Europe \[2001\] ECR I-7945, paragraphs 36 and 37](#), and [Case C-44/01 Pippig Augenoptik \[2003\] ECR I-3095, paragraph 42](#); see also [Case C-59/05 Siemens \[2006\] ECR I-0000, paragraphs 22 to 24](#)).

Order in which the questions are to be examined

23 Since the first question relates in a more specific way to the concept of misleading advertising and is asked exclusively in relation to the first method of comparison at issue, it is justified to deal first with the other four questions which, in a more general manner, relate to the other conditions under which comparative advertising is permitted and concern each of the methods of comparison at issue.

Question 2

24 By its second question, the referring court essentially seeks to ascertain whether Article 3a(1)(b) of the Directive must be interpreted as meaning that comparative advertising relating collectively to selections of basic consumables sold by two competing chains of stores rather than to individual products sold by them is capable of satisfying the condition, laid down by that provision, that it must 'compare goods or services meeting the same needs or intended for the same purpose'.

25 As is apparent from the second recital in the preamble to Directive 97/55, the harmonisation by the directive of the conditions governing the use of comparative advertising is to help to demonstrate objectively the merits of the 'various comparable products'. As stated in the ninth recital in its preamble, this requirement that the products be comparable is intended in particular to prevent comparative advertising from being used in an anti-competitive and unfair manner.

26 Article 3a(1)(b) of the Directive sets out that requirement, laying down that, if comparative advertising is to be permitted, the competing goods being compared must meet the same needs or be intended for the same purpose, that is to say they must display a sufficient degree of interchangeability for consumers.

27 It is true, therefore, that in order to satisfy the condition laid down by that provision, all comparative advertising must, in the interests of both consumers and competitors, rest in the final analysis on the comparison of pairs of products satisfying that requirement of interchangeability.

28 On the other hand, Article 3a(1)(b) of the Directive cannot be interpreted as meaning that every comparative advertisement must refer exclusively to such pairs of comparable products, viewed separately, and cannot relate collectively to two sets of such comparable products.

29 The Court has previously pointed out that the choice as to the number of comparisons which the advertiser wishes to make between the products which he is offering and those offered by his competitors falls

within the exercise of his economic freedom (Pippig Augenoptik, paragraph 81).

30 Nothing permits the view immediately to be taken that such freedom does not also extend to the ability to make a comparison relating to the whole or part of the comparable product ranges sold by an advertiser and his competitor.

31 First, the wording of Article 3a(1)(b) of the Directive in no way dictates such an interpretation.

32 Second, as recalled in paragraph 22 of the present judgment, the conditions required of comparative advertising must be interpreted in the sense most favourable to it.

33 Having regard, in particular, to the fact that comparative advertising helps to stimulate competition between suppliers of goods and services to the consumer's advantage, the benefit of such advertising to consumers must thus necessarily be taken into account in assessing the requirement of comparability laid down by Article 3a(1)(b) of the Directive (see, to similar effect in relation to Article 3a(1)(g) of the Directive, Siemens, paragraphs 23 and 24).

34 In this regard it must be accepted, as the Advocate General has observed in points 35 and 36 of his Opinion, that the possibility of making a collective comparison relating to a selection of comparable products allows the advertiser to provide consumers with advertising information containing global and summarised data that may prove particularly useful to them.

35 That is especially true in a sector such as the mass distribution sector in which consumers usually make multiple purchases designed to meet their everyday needs. From the viewpoint of such purchases, comparative information relating to the general level of the prices charged by chains of stores or to the level of the prices charged by them in respect of a given selection of products which they sell is liable to prove more useful to consumers than comparative information limited to the prices of some particular product or other. That is indeed the reason why consumer-protection associations regularly carry out surveys of the general price levels of such stores.

36 Accordingly, in so far as the selections of products of two competitors to which the comparison relates each consist of products which, when viewed individually, satisfy the requirement of comparability laid down by Article 3a(1)(b) of the Directive, a matter which is for the referring court to establish, such selections can themselves be regarded as meeting that requirement.

37 That may be so in particular in the case of selections composed of comparable products sold by two competing chains of stores where it is asserted that the products comprising the advertiser's selection have the common feature of being cheaper than the – comparable – products comprising his competitor's. Such pairs of comparable products do not cease to meet the same needs or to be intended for the same purpose simply because they are compared collectively from the point of view of that common comparative feature.

38 The requirement laid down by Article 3a(1)(b) of the Directive may also be satisfied when a comparison

is made of the general price level of all the comparable basic consumables sold by two competing chains of stores with a view to inferring therefrom the amount liable to be saved by consumers who make their purchases of such goods from one rather than the other of those chains. In such a situation, both the pairs of comparable products sold by those competing chains and the whole formed by those comparable products when they are acquired together in the context of the purchase of basic consumables are capable of satisfying the condition that they meet the same needs or are intended for the same purpose.

39 Having regard to all of the foregoing, the answer to the second question should be that the condition under which comparative advertising is permissible that is laid down by Article 3a(1)(b) of the Directive must be interpreted as not precluding comparative advertising from relating collectively to selections of basic consumables sold by two competing chains of stores in so far as those selections each consist of individual products which, when viewed in pairs, individually satisfy the requirement of comparability laid down by that provision.

Question 3

40 By its third question, the referring court seeks to ascertain whether Article 3a(1)(c) of the Directive must be interpreted as meaning that the requirement, laid down by that provision, that the advertising 'objectively compares' the features of the goods concerned signifies, in the event of comparison of the prices of a selection of basic consumables sold by chains of stores or of the general level of the prices charged by them in respect of the range of comparable products which they sell, that all the products and prices compared, that is to say both those of the advertiser and those of all of his competitors involved in the comparison, must be expressly listed in the advertisement.

41 As is apparent from the second recital in the preamble to Directive 97/55, the harmonisation by that directive of the conditions governing the use of comparative advertising is, in particular, to help to demonstrate 'objectively' the merits of the various comparable products.

42 The seventh recital in the preamble to Directive 97/55 states that the conditions for permitted advertising should include criteria of objective comparison of the features of goods and services.

43 Read in the light of those two recitals, Article 3a(1)(c) of the Directive must be interpreted as laying down two types of requirement relating to the objectivity of the comparison.

44 First, and as appears from the seventh recital in the preamble to Directive 97/55, the cumulative criteria requiring the product's feature in respect of which the comparison is made to be material, relevant, verifiable and representative, as laid down by that provision, help to ensure that the comparison is objective. However, the third question referred for a preliminary ruling does not directly concern those criteria; the criterion of verifiability is covered in the fourth and fifth questions.

45 Second, Article 3a(1)(c) of the Directive, echoing the second recital in the preamble to Directive 97/55, expressly states that features which meet the four criteria referred to above must in addition be compared objectively.

46 As the Advocate General has observed in point 44 of his Opinion, this last requirement is essentially intended to preclude comparisons which result from the subjective assessment of their author rather than from an objective finding.

47 It follows that an obligation to set out expressly in the advertisement the various products which comprise the selections compared and their prices cannot apply here by virtue of such a requirement. Data such as the price of an article or the general level of the prices charged by a chain of stores in respect of a range of products do not appear capable of being the subject of subjective assessment, nor can whether the assessment is objective or subjective be affected by whether or not the products and prices to which the comparison relates are expressly listed.

48 It should, moreover, be noted that Article 2(2a) of the Directive defines comparative advertising as any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor, so that advertising may be classified as comparative within the meaning of the Directive where a competitor's products or services, although not explicitly referred to in the advertising, are identified by it by implication.

49 Furthermore, having regard to the interpretative principles recalled in paragraph 22 of the present judgment, it must be stated that in the case of advertisements relating, as is true of the two methods of comparison at issue, to a large number of goods sold by various competing chains of stores, to require that each of the products compared be, in all circumstances, expressly mentioned in that advertisement could affect the very practicability of such advertising methods.

50 Lidl nevertheless relied on the fact that the Court has previously held that any obligation to restrict each price comparison to the average prices of the products offered by the advertiser and those of rival products would be contrary to the objectives of the Community legislature, the Court observing in this regard that comparative advertising must help to demonstrate objectively the merits of the various comparable products and that such objectivity implies that the persons to whom the advertising is addressed are capable of knowing the actual price differences between the products compared and not merely the average difference between the advertiser's prices and those of his competitors (Pippig Augenoptik, paragraphs 81 and 82).

51 It must be pointed out that the Court did not in any way intend by that statement to preclude generally any possibility of comparative advertising that relates to the general level of the prices charged by two competitors in respect of a comparable range of products. In so far as the claimed difference in the general price level is indeed based on real price differences recorded between comparable products and the criterion of com-

parison thus adopted satisfies, in the light of the advertisement's context, the various requirements laid down by the Directive, in particular by Article 3a(1)(c), such a method of comparative advertising cannot be precluded.

52 First, a comparison designed to demonstrate the difference in the general level of the prices charged by two competing chains of stores in respect of a range of comparable products necessarily presupposes that the actual prices of the comparable products sold by the two competitors are individually compared first.

53 Second, while it is indeed clear that the comparative criterion of the average difference between the prices charged by two competitors or that of the general level of the prices charged by them will appear entirely irrelevant in certain factual contexts which, such as that in Pippig Augenoptik which concerned advertising for pairs of spectacles, relate to an advertisement addressed to consumers called upon to make a single purchase in a shop selling only a certain category of products, the position may be entirely different in other factual contexts. That may be the very situation in the specific context of the present case in which, as is apparent from paragraph 35 above, the general price level is liable to be a particularly relevant criterion of comparison.

54 Having regard to all of the foregoing, the answer to the third question should be that the requirement, laid down by Article 3a(1)(c) of the Directive, that the advertising 'objectively compares' the features of the goods at issue must be interpreted as not signifying, in the event of comparison of the prices of a selection of comparable basic consumables sold by competing chains of stores or of the general level of the prices charged by them in respect of the range of comparable products which they sell, that the products and prices compared, that is to say both those of the advertiser and those of all of his competitors involved in the comparison, must be expressly and exhaustively listed in the advertisement.

Question 5

55 By its fifth question, which it is appropriate to examine third, the referring court seeks to ascertain whether Article 3a(1)(c) of the Directive must be interpreted as meaning that the prices of products, and the general level of the prices charged by chains of stores in respect of their selections of comparable products, constitute verifiable features for the purposes of that provision.

56 As regards the prices of products sold by two competitors, such as, in particular, those referred to by the second method of comparison at issue, it must be stated at the outset that Article 3a(1)(c) of the Directive expressly confirms that the prices of two articles may be included among the features which are simultaneously material, relevant, verifiable and representative and the comparison of which is accordingly in principle permissible in so far as the other conditions that the Directive lays down in order for comparative advertising to be permitted are satisfied. The eighth recital in the preamble to Directive 97/55 likewise confirms that the

comparison of the price only of goods and services must be possible if this comparison respects certain conditions, in particular that it not be misleading.

57 As the Court has previously pointed out, the comparing of rival offers, particularly as regards price, is indeed inherent in comparative advertising (Pippig Augenoptik, paragraph 80).

58 It follows that the price of a product constitutes a verifiable feature within the meaning of Article 3a(1)(c) of the Directive.

59 In the light, in particular, of the interpretative principle recalled in paragraph 22 of the present judgment, nothing appears moreover to preclude the same from being true of the general level of the prices charged by chains of competing stores in respect of comparable selections of basic consumables, and of the amount liable to be saved by consumers who purchase such goods from one rather than the other of those competing chains.

60 As soon as the prices of the particular comparable products comprising the selection offered by competing chains of stores have been taken into account for the purpose of determining the general level of the prices charged by them in respect of that comparable selection, both the individual price of each particular product thus taken into account and those general price levels, the amount which consumers who purchase their basic consumables from one rather than the other of those competing chains can expect to save and, finally, the validity of the methods of calculation adopted for those purposes are in principle capable of being subject to verification.

61 It must be pointed out, however, that in order for the prices of the goods comprising a selection of products or the general level of the prices charged by a chain of stores in respect of its selection of comparable goods to be verifiable, it is a necessary precondition that, even though, as is apparent from paragraph 54 of the present judgment, the goods whose prices have been thus compared are not required to be expressly and exhaustively listed in the advertisement addressed to the consumer, they must nevertheless be capable of being individually and specifically identified on the basis of the information contained in that advertisement. The prices of goods can necessarily only ever be verified if it is possible to identify the goods.

62 In light of all of the foregoing, the answer to the fifth question should be that Article 3a(1)(c) of the Directive must be interpreted as meaning that the following constitute, for the purposes of that provision, 'verifiable' features of goods sold by two competing chains of stores:

- the prices of those goods;
- the general level of the respective prices charged by such chains of stores in respect of their selection of comparable products and the amount liable to be saved by consumers who purchase such products from one rather than the other of those chains, in so far as the goods in question do in fact form part of the selection of comparable products on whose basis that general price level has been determined.

Question 4

63 By its fourth question, the referring court seeks to ascertain whether Article 3a(1)(c) of the Directive must be interpreted as meaning that a feature mentioned in comparative advertising satisfies the requirement of verifiability laid down by that provision only if the persons to whom the advertising is addressed are in a position to verify that feature as to its accuracy themselves.

64 It should be noted, first, that while that provision requires, in order to ensure objectivity of comparative advertising, that features compared by the advertising be verifiable, that is to say capable of proof, it does not, on the other hand, contain any detail for the purpose of determining the precise conditions in which, and by whom, those features must be capable of verification as to their accuracy.

65 Second, the objectives pursued by the Directive do not permit the inference that verification of the compared features as to their accuracy should be a possibility available particularly to consumers as opposed to other interested parties, including the competitors involved in the comparison.

66 In this regard, the seventh recital in the preamble to Directive 97/55 states that the establishment of the conditions under which comparative advertising is permitted, which should include criteria of objective comparison of the features of goods and services, must enable it to be determined which practices relating to comparative advertising may distort competition, be detrimental to competitors and have an adverse effect on consumer choice.

67 Article 4 of the Directive, for its part, obliges the Member States to ensure that adequate and effective means exist for securing compliance with the provisions on comparative advertising in the interests of consumers as well as competitors and the general public.

68 Third, the penultimate recital in the preamble to the Directive states that the advertiser should be able to prove, by appropriate means, the material accuracy of the factual claims he makes in his advertising, and may in appropriate cases be required to do so by the appropriate court or administrative authority.

69 More specifically, Article 6 of the Directive obliges the Member States to confer on the administrative authorities or courts called upon to ensure compliance with the Directive the power to require the advertiser, when the circumstances of the particular case so demand and taking into account the legitimate interest of the advertiser and any other party to the proceedings, to furnish evidence as to the accuracy of factual claims in advertising and 'in the case of comparative advertising to require the advertiser to furnish such evidence in a short period of time'. This provision also requires those administrative authorities and courts to be conferred the power to consider factual claims to be inaccurate if the evidence so demanded is not furnished or is deemed insufficient.

70 It follows that, while the advertiser must indeed be in a position to prove, in a short period of time, the

factual accuracy of the comparison which he has made, the Directive does not, on the other hand, require him to make such proof available to all interested parties before his advertisement appears.

71 However, the possibility that consumers can obtain from the advertiser, in administrative or judicial proceedings, proof of the factual accuracy of claims in the advertising is not capable of releasing the advertiser, when the products and the prices compared are not set out in the advertisement, from the obligation to indicate, in particular for the attention of the persons to whom the advertisement is addressed, where and how they may readily examine the details of the comparison with a view to verifying their accuracy or having it verified.

72 Such an obligation makes it possible, in accordance with the objective of consumer protection pursued by the Directive, for the persons to whom an advertisement of that kind is addressed to be in a position to satisfy themselves that they have been correctly informed with regard to the purchases of basic consumables which they are prompted to make.

73 Such accessibility of the details of the comparison nevertheless does not mean that the accuracy of the features compared must in all circumstances be capable of being verified by those to whom the advertising is addressed acting in person. It is sufficient for the details allowing such verification to be accessible to those persons under the conditions set out in paragraph 71 of this judgment, in such a way that they may, as a general rule, carry out the desired verification themselves or, more exceptionally and if such verification demands a skill which they do not possess, have it carried out by a third party.

74 Having regard to all the foregoing considerations, the answer to the fourth question should be that Article 3a(1)(c) of the Directive must be interpreted as meaning that a feature mentioned in comparative advertising satisfies the requirement of verifiability laid down by that provision, in cases where the details of the comparison which form the basis for the mention of that feature are not set out in the advertising, only if the advertiser indicates, in particular for the attention of the persons to whom the advertisement is addressed, where and how they may readily examine those details with a view to verifying, or, if they do not possess the skill required for that purpose, to having verified, the details and the feature in question as to their accuracy.

Question 1

75 By its first question, the referring court essentially seeks to ascertain whether an advertisement containing a comparison of the general level of the prices charged by a chain of stores with that of competing chains in respect of their ranges of comparable products and setting out the amount that can be saved by consumers purchasing their basic consumables from one of them must be regarded as misleading advertising for the purposes of Article 3a(1)(a) of the Directive when that general price level is determined on the basis of only some of the products sold by the advertiser, on the ground that such advertising would necessarily give

consumers the impression that the advertiser is cheaper over his entire range of products. The referring court wonders, however, whether the fact that the advertising makes it possible to establish, in respect of both the advertiser and his competitors, which and how many products are being compared in order to determine the general level of the prices charged by each of them might prevent the advertising from being in any way misleading. It also raises the question whether it matters from the latter point of view that the advertising indicates the general price level of each of the various competitors involved in the comparison both in relation to the advertiser and between themselves.

76 Article 2(2) of the 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.

77 It is for national courts to ascertain in the circumstances of each particular case, and bearing in mind the consumers to which the advertising is addressed, whether the latter may be misleading (see, in particular, Case C-373/90 X [1992] ECR I-131, paragraphs 15 and 16).

78 Those courts must take into account the perception of an average consumer of the products or services being advertised who is reasonably well informed and reasonably observant and circumspect (see X, paragraphs 15 and 16; [Case C-210/96 Gut Springenheide and Tusky \[1998\] ECR I-4657, paragraph 31](#); [Case C-220/98 Estée Lauder \[2000\] ECR I-117, paragraph 27](#); Case C-99/01 Linhart and Biffl [2002] ECR I-9375, paragraph 31; and [Pippig Augenoptik, paragraph 55](#)). In the present instance, both the advertising methods at issue are addressed not to a specialist public but to end consumers who purchase their basic consumables in a chain of stores.

79 In carrying out the requisite assessment, national courts must also take account of all the relevant factors in the case (Estée Lauder, paragraphs 27 and 30), having regard, as follows from Article 3 of the Directive, to the information contained in the advertising and, more generally, to all its features.

80 The Court has thus held that an omission may render advertising misleading, in particular where, bearing in mind the consumers to which it is addressed, the advertising seeks to conceal a fact which, had it been known, would have deterred a significant number of consumers from making a purchase (X, paragraph 15).

81 With regard, more specifically, to price comparisons, the eighth recital in the preamble to Directive 97/55 states that the comparison of the price only of goods and services should be possible if this comparison respects certain conditions, in particular that it not be misleading.

82 The Court has thus already been led to state that advertising relating to the lower prices of cars that are parallel imports can be considered to be misleading

only if it is established that the decision to buy on the part of a significant number of consumers to whom the advertising in question is addressed was made in ignorance of the fact that the lower price of the vehicles was matched by a smaller number of accessories on the cars sold by the parallel importer (X, paragraph 16).

83 Analogously, comparative advertising relating to the general level of the prices charged by competing chains of stores in respect of their comparable ranges of products and to the amount that can be saved by consumers purchasing their basic consumables from one of those chains rather than the other should, for example, be considered to be misleading if it is established, in the light of all the relevant circumstances of the particular case, that the decision to buy on the part of a significant number of consumers to whom that advertising is addressed is made in the mistaken belief that all the advertiser's products have been taken into account in calculating the general price level, and the amount of savings, that are claimed by the advertising. The same must be true if it is established that such a decision is made in the mistaken belief that that amount will be saved by consumers irrespective of the nature and quantity of the products which they acquire from the advertiser or, for example, in the mistaken belief that all the advertiser's products without exception are cheaper than those of his competitors.

84 Such advertising will also be misleading if it is established that the collective reference which it contains to a range of amounts that may be saved by consumers who purchase their basic consumables from the advertiser rather than from competing chains of stores and the failure to specify individually the general level of the prices charged by each of those chains in competition with the advertiser and the amount that can be saved in relation to each of them are such as to deceive a significant number of persons to whom the advertising is addressed as to the amount that they are actually liable to save by purchasing their basic consumables from the advertiser rather than from some particular competitor or other, and to affect their economic behaviour to that extent.

85 Accordingly, the answer to the first question should be that Article 3a(1)(a) of the Directive must be interpreted as meaning that comparative advertising claiming that the advertiser's general price level is lower than his main competitors', where the comparison has related to a sample of products, may be misleading when the advertisement:

- does not reveal that the comparison related only to such a sample and not to all the advertiser's products,
- does not identify the details of the comparison made or inform the persons to whom it is addressed of the information source where such identification is possible, or
- contains a collective reference to a range of amounts that may be saved by consumers who make their purchases from the advertiser rather than from his competitors without specifying individually the general level of the prices charged, respectively, by each of

those competitors and the amount that consumers are liable to save by making their purchases from the advertiser rather than from each of the competitors.

86 It is for the referring court to determine whether the advertisements at issue in the main proceedings display such characteristics.

Costs

87 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds,

the Court (Grand Chamber) hereby rules:

1. The condition under which comparative advertising is permissible that is laid down by Article 3a(1)(b) of Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising, as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997, must be interpreted as not precluding comparative advertising from relating collectively to selections of basic consumables sold by two competing chains of stores in so far as those selections each consist of individual products which, when viewed in pairs, individually satisfy the requirement of comparability laid down by that provision.

2. Article 3a(1)(c) of Directive 84/450, as amended by Directive 97/55, must be interpreted as meaning that the requirement, laid down by that provision, that the advertising 'objectively compares' the features of the goods at issue does not signify, in the event of comparison of the prices of a selection of comparable basic consumables sold by competing chains of stores or of the general level of the prices charged by them in respect of the range of comparable products which they sell, that the products and prices compared, that is to say both those of the advertiser and those of all of his competitors involved in the comparison, must be expressly and exhaustively listed in the advertisement.

3. Article 3a(1)(c) of Directive 84/450, as amended by Directive 97/55, must be interpreted as meaning that the following constitute, for the purposes of that provision, 'verifiable' features of goods sold by two competing chains of stores:

- the prices of those goods;
- the general level of the respective prices charged by such chains of stores in respect of their selection of comparable products and the amount liable to be saved by consumers who purchase such products from one rather than the other of those chains, in so far as the goods in question do in fact form part of the selection of comparable products on whose basis that general price level has been determined.

4. Article 3a(1)(c) of Directive 84/450, as amended by Directive 97/55, must be interpreted as meaning that a feature mentioned in comparative advertising satisfies the requirement of verifiability laid down by that provision, in cases where the details of the comparison which form the basis for the mention of that feature are

not set out in the advertising, only if the advertiser indicates, in particular for the attention of the persons to whom the advertisement is addressed, where and how they may readily examine those details with a view to verifying, or, if they do not possess the skill required for that purpose, to having verified, the details and the feature in question as to their accuracy.

5. Article 3a(1)(a) of Directive 84/450, as amended by Directive 97/55, must be interpreted as meaning that comparative advertising claiming that the advertiser's general price level is lower than his main competitors', where the comparison has related to a sample of products, may be misleading when the advertisement:

- does not reveal that the comparison related only to such a sample and not to all the advertiser's products,
- does not identify the details of the comparison made or inform the persons to whom it is addressed of the information source where such identification is possible, or
- contains a collective reference to a range of amounts that may be saved by consumers who make their purchases from the advertiser rather than from his competitors without specifying individually the general level of the prices charged, respectively, by each of those competitors and the amount that consumers are liable to save by making their purchases from the advertiser rather than from each of the competitors.

OPINION OF ADVOCATE GENERAL
TIZZANO

delivered on 29 March 2006 1(1)

Case C-356/04

Lidl Belgium GmbH & Co. KG

v

Etablissementen Franz Colruyt NV

(Reference for a preliminary ruling from the Rechtbank van Koophandel (Brussels))

(Directives 84/450/EEC and 97/55/EC – Comparative advertising – Misleading advertising – Whether permissible – Conditions)

I – Introduction

1. By decision of 29 July 2004, the Rechtbank van Koophandel te Brussel (Brussels Commercial Court, hereinafter 'Rechtbank van Koophandel') referred five questions to this Court for a preliminary ruling under Article 234 EC on the interpretation of Article 3a(1)(a), (b) and (c) 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 (2) (hereinafter 'Directive 84/450' or simply 'the Directive'), as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 (3) so as to include comparative advertising (hereinafter 'Directive 97/55').

II – Legal framework

The relevant Community provisions

2. The purpose of Directive 84/450 is 'to protect consumers, persons carrying on a trade or business or practising a craft or profession and the interests of the

public in general against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted' (Article 1).

3. In accordance with Article 2(2) of the Directive, "misleading advertising" means 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'.

4. Article 3 of the Directive provides that:

'In determining whether advertising is misleading, account shall be taken of all its features, and in particular of any information it contains concerning:

- (a) the characteristics of goods or services ...;
- (b) the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services are provided;
- (c) the nature, attributes and rights of the advertiser ...'

5. Article 3a(1) of the Directive in turn provides that:

'Comparative advertising shall, as far as the comparison is concerned, be permitted when the following conditions are met:

- (a) it is not misleading according to Articles 2(2), 3 and 7(1);
- (b) it compares goods or services meeting the same needs or intended for the same purpose;
- (c) it objectively compares one or more material, relevant, verifiable and representative features of those goods or services, which may include price; ...'

6. Lastly, on 11 May 2005, the European Parliament and the Council adopted Directive 2005/29/EC (hereinafter 'Directive 2005/29') concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, (4) which introduces some amendments to Directive 84/450 on the subject of misleading advertising, but without prejudice to the provisions on comparative advertising. That directive is to be transposed by the Member States by 12 June 2007.

The relevant national provisions

7. Directive 84/450 was transposed into Belgian law by the Law of 14 July 1991 (5) relating to commercial practices and consumer information and protection which also contains, in the consolidated version of 8 April 2003, (6) all the amendments relating to comparative advertising introduced by Directive 97/55.

8. Article 23a.1 of that law lays down the criteria for determining whether comparative advertising is permissible. That article reproduces the full text of Article 3a (1) of the Directive.

III – Facts and procedure

9. Lidl Belgium GmbH & Co. KG (hereinafter 'Lidl') is a company incorporated under German law which operates a chain of stores and is active mainly in the retail trade in foodstuffs and has several outlets in Belgium. Etablissements Franz Colruyt NV (hereinafter 'Colruyt') is another company which is active in the same economic sector and operates more than 170 supermarkets in Belgium under the name 'Colruyt'.

10. On 19 January 2004, Colruyt sent its customers a leaflet which read as follows:

'Dear customer, Last year, 2003, you were able once again to make significant savings with Colruyt. On the basis of our average price index for the past year we have calculated that a family spending EUR 100 each week in Colruyt stores saved between EUR 366 and EUR 1 129 by shopping at Colruyt's rather than at any other supermarket (such as Carrefour, Cora, Delhaize, etc.); and saved between EUR 155 and EUR 293 by shopping at Colruyt's instead of a hard discounter or wholesaler (Aldi, Lidl, Makro). On the reverse side you will see the evolution of the price differential vis-à-vis other stores in the course of 2003. ... In order to be able to continue to guarantee the lowest prices, we compare daily 18 000 prices in other stores. ... Each month we use those prices to calculate the price differential between Colruyt and the other stores. We refer to this as our price index which is certified by Quality Control (Instituut voor Kwaliteitscontrole), an independent body. The result: at Colruyt's you enjoy, every day and at any time of the year, the lowest prices. In 2004 also we remain true to this guarantee.'

11. Colruyt also used the following text on its checkout receipts, referring customers to its website for further explanations in regard to the system of price comparison which it applied:

'How much did you save in 2003? If you spent EUR 100 at Colruyt's each week, then, according to our price index, you will have saved between EUR 366 and EUR 1 129 in comparison with another supermarket (such as Carrefour, Cora, Delhaize, etc.); between EUR 155 and EUR 293 in comparison with a hard discounter or wholesaler (Aldi, Lidl, Makro).'

12. In 2003 Colruyt also launched a selection of basic products under the name 'BASIC'. Some passages in its advertising leaflets contained the following statements: 'BASIC: absolutely the lowest prices in Belgium. Even cheaper than the comparable selection of the hard discounters (Aldi, Lidl) ...'; 'BASIC – ABSOLUTELY ROCK-BOTTOM PRICES – In addition to a significant overall price reduction we can offer you from now on a large number of products that you can compare with those of the typical hard discounters (like Aldi and Lidl) and with the 'Eerste prijs/Premier prix' products of other supermarkets. These are our BASIC products: everyday basic products at absolutely rock-bottom prices'. Colruyt also employed an advertising slogan to the same effect on its checkout receipts.

13. As it took the view that such practices amounted to unfair comparative advertising which was consequently unlawful under the abovementioned Belgian

Law of 14 July 1991, Lidl brought proceedings before the Rechtbank van Koophandel.

14. That court, having doubts as to the interpretation of the Directive, found it necessary to refer the following questions to the Court for a preliminary ruling:

'1) Must Article 3a(1)(a) of Directive 84/450/EEC (as introduced by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising) be construed as meaning that the comparison of the general price level of advertisers with that of competitors, in which an extrapolation is made on the basis of a comparison of the prices of a sample of products, is impermissible inasmuch as this creates in any event the impression that the advertiser is cheaper over its entire range of products, whereas the comparison made relates only to a limited sample of products, unless the advertisement makes it possible to establish which and how many products of the advertiser, on the one hand, and of the competitors used in the comparison, on the other, have been compared, and makes it possible to ascertain where each competitor concerned by the comparison is positioned in the comparison and what its prices might be in comparison with those of the advertiser and of the other competitors used in the comparison?

2) Must Article 3a(1)(b) of Directive 84/450/EEC (as introduced by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising) be construed as meaning that comparative advertising is allowed only if the comparison relates to individual goods or services that meet the same needs or are intended for the same purpose, to the exclusion of product selections, even if those selections, on the whole and not necessarily in regard to every component, meet the same needs or are intended for the same purpose?

3) Must Article 3a(1)(c) of Directive 84/450/EEC (as introduced by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising) be construed as meaning that comparative advertising in which a comparison of the prices of products, or of the general price level, of competitors is made will be objective only if it lists the products and prices being compared of the advertiser and of all the competitors in the comparison and makes it possible to ascertain the prices being charged by the advertiser and its competitors, in which case all products used in the comparison must be expressly indicated for each individual supplier?

4) Must Article 3a(1)(c) of Directive 84/450/EEC (as introduced by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising) be construed as meaning that a feature in

comparative advertising will satisfy the requirement of verifiability in that article only if that feature can be verified as to its accuracy by those to whom the advertising is addressed, or is it sufficient if the feature can be verified by third parties to whom the advertising is not addressed?

5) Must Article 3a(1)(c) of Directive 84/450/EEC (as introduced by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising) be construed as meaning that the price of products and the general price level of competitors are in themselves verifiable features?

15. In the proceedings thus instituted before the Court, written observations have been submitted by Colruyt, Lidl, the French Republic, the Republic of Poland and the Commission.

16. In addition, Colruyt, the Kingdom of Belgium and the Commission presented arguments at the hearing on 7 December 2005.

IV – Legal analysis

Introduction

17. By its numerous and detailed questions, the referring court raises the issue of the legality of two specific forms of comparative advertising, both based on a comparison of prices without, however, any explanation in the advertisement as to which goods were compared and what prices were charged in each particular case.

18. In particular, the advertising in question on the one hand compares the general price levels in various supermarkets, calculated on the basis of a sample of products selected from all the products sold by the various competing companies (hereinafter ‘price level advertising’); on the other, it states categorically that a certain line of products is absolutely the cheapest on the market (hereinafter ‘BASIC products advertising’).

19. I must first point out, however, that some of the questions that the Rechtbank van Koophandel asks about the advertising thus described do not seem to me to be entirely clear and also appear to raise the same issues more than once (for example, the fact that the contested advertisements do not expressly indicate the goods and prices that are being compared by the advertiser).

20. It therefore seems to me to be appropriate to avoid the problems raised by the wording or rephrasing of the questions and to concentrate on their substance. To that end, in the light of the context and all the material submitted to the Court, it seems to me that the referring court is essentially asking three questions in this case and those are the questions which I propose to answer.

21. The questions to be considered are accordingly:

(i) In the light of the requirement of ‘homogeneity’ (7) laid down in Article 3a(1)(b) of the Directive, is it permissible for comparative advertising to compare not only individual products but also product selections (the second question)?

(ii) If the answer to that question is in the affirmative, do the conditions contained in Article 3a(1)(c) with regard to the ‘objectivity’ and ‘verifiability’ of the comparison require the identity and price of the products included in the selections that are being compared to be expressly indicated in the advertisement (the third, fourth and fifth questions)?

(iii) Is advertising which compares the general price level based on a basket of products selected from products sold by various companies to be regarded as ‘misleading’ within the meaning of Article 3a(1)(a) inasmuch as it may cause consumers to believe that a certain company is cheaper over its entire range of products (the first question)?

22. Ultimately, as we see, it is a matter of determining whether advertisements of the kind at issue comply with the conditions with regard to permissibility laid down in this connection by the directive on comparative advertising and notably with the requirements in respect of the ‘homogeneity’, ‘objectivity’, ‘verifiability’ and ‘non-misleading character’ of such advertising, bearing in mind that, as specified in the 11th recital in the preamble to Directive 97/55, those conditions are cumulative, in the sense that comparative advertising must satisfy all of them in their entirety in order to be compatible with Community law.

23. That being said, I therefore pass on to the examination of the individual questions in the form and order set out above.

The permissibility of comparisons between product selections

24. By its second question, the referring court is essentially asking the Court whether the condition of ‘homogeneity’ referred to in Article 3a(1)(b) of the Directive precludes advertising which does not compare individual goods or services but makes a comparison between selections of goods or services.

25. The parties differ in their views on this point. Lidl and the Polish and French Governments argue that the answer to the question should be in the affirmative. The reason which they give is that in their view such advertising is contrary to the letter of the provision in question (according to the French and Polish authorities) and is in any case likely to mislead consumers because of the heterogeneous nature of the products constituting the selection (according to Lidl).

26. The Commission, for its part, does not consider that a comparison between groups of products is in itself unlawful. In its view, the determining factors in this connection are, rather, the specific characteristics of the advertisement that is distributed and whether or not it meets the requirements with regard to permissibility referred to in the Directive.

27. Colruyt – supported on this point by the Belgian Government – maintains, on the contrary, that advertising based on product selections is entirely lawful because the products concerned are selected so as to ensure that the comparison is always between products which ‘have the same characteristics and meet the same needs’.

28. For my own part, I must say at once that I do not share the view that Article 3a(1)(b) of the Directive does not, in principle, permit advertisements based on a comparison between selections of various products.

29. In the first place, it does not appear to me that the wording of the provision in question precludes such a comparison. In fact, this simply provides that advertising must 'compare goods or services meeting the same needs or intended for the same purpose'. In my view, the scope of that condition is very different from what Lidl and the Polish and French Governments suggest, in the sense that it is not concerned with the quantity or diversity of the products that are being advertised but with their nature, and with two aspects of that nature.

30. On the one hand, the condition referred to in Article 3a(1)(b) requires that the comparison in comparative advertising must always be between 'goods or services', thus precluding comparisons between various competitors which do not refer to the goods they supply or the services they provide for consumers. For example, in my view advertising of the type 'company X is more reliable than company Y' is unacceptable inasmuch as the comparison does not turn on any product or service but on a quality or characteristic of the companies mentioned in the advertising.

31. On the other hand, the purpose of that provision is to restrict comparative advertising to goods which are interchangeable and homogeneous. Again by way of example, I consider that advertising comparing a car with a bicycle cannot be regarded as permissible, since the goods in question clearly meet different needs.

32. In short, the requirement in question is intended to preclude 'artificial' forms of advertising based on comparisons which are incongruous or outlandish inasmuch as they are not in fact based on goods or services, or are based on goods or services which are not comparable.

33. I should add that, in my view, to consider advertisements based on product selections to be prohibited as such would also be contrary to the aims of the Directive. Indeed, according to the preamble to the Directive, comparative advertising is a very important means which can also 'stimulate competition between suppliers of goods and services to the consumer's advantage' inasmuch as it can 'help demonstrate objectively the merits of the various comparable products' (second recital) and may thus be a 'legitimate means of informing' consumers (fifth recital). (8)

34. In other words, the Community legislature considers that comparative advertising is likely to increase the transparency of the market by providing consumers with an effective means of information and guidance. And the Court has held, in that very connection, that 'the conditions required of comparative advertising must be interpreted in the sense most favourable to it'. (9)

35. An interpretation prohibiting comparisons between selections of goods on any occasion or in any circumstances would hardly be consistent with those aims, inasmuch as it would clearly restrict comparative

advertising. Advertisements of this kind, containing collected and summarised data, may in fact be useful to the consumer.

36. This is particularly true in the mass distribution sector in which the parties to the main proceedings operate. Indeed, it seems to me to be clear that, as Colruyt argues, the average consumer chooses to shop in a particular supermarket not only on the basis of the prices of individual products but also because of its general policy on prices. Consequently, advertising which compares information which is more general and more complete than information relating to individual goods may be of assistance to the consumer, if it is properly set out, since it indicates which supermarkets are generally likely to charge the lowest prices.

37. On the other hand, if I am not mistaken, advertising relating not to individual goods or services but to baskets or lines of products is not unusual in the Member States. I note for example that the Brussels Commercial Court itself, in an earlier judgment, did not consider that such advertising was in itself unlawful but assessed the content and the form of the advertising in that case in the light of the criteria laid down in the Directive. (10)

38. I therefore take the view that the condition of 'homogeneity' referred to in the provision in question cannot be interpreted as meaning that advertisements based on a comparison between product selections are in themselves unlawful. Obviously, in order to be completely permissible, such advertising must satisfy each and every one of the requirements laid down in Article 3a(1) of the Directive (see point 22 above). And we shall see later whether that is so in the case of the advertisements at issue in the main proceedings.

39. In the light of the foregoing considerations, I therefore propose that the Court reply to the national court that the condition referred to in Article 3a(1) of the Directive does not preclude advertising which makes a comparison between selections of goods or services.

The condition concerning the verifiability of the comparison

40. By its third, fourth and fifth questions, the Rechtbank van Koophandel seeks to ascertain whether the requirements of 'objectivity' and 'verifiability' referred to in Article 3a(1)(c) of the Directive mean that the advertisement must expressly indicate the identity and the price of the products included in the selections that are being compared.

41. The parties differ in their views on this point also. Lidl, the Polish Government and the French authorities argue that the question should be answered in the affirmative. In their view, advertising which does not mention the essential features that are being compared is neither objective nor verifiable, inasmuch as it does not allow those to whom it is addressed to check the correctness and accuracy of the advertiser's assertions. And that is precisely what has happened in the present case, in that the advertisements at issue in the main proceedings do not enable consumers to realise at once which goods and prices the advertisements are

referring to and so to verify whether the comparison that has been made is correct.

42. The Commission too considers that Article 3a(1)(c) of the Directive, and in particular the condition of verifiability laid down in that provision, means that it is vital that the advertising should first of all enable the products that are being compared to be identified. However, it takes the view that they need not necessarily be identified in the advertisement itself and that it is sufficient if the advertisement allows them to be identified by implication. However, in that respect too, the price level advertising distributed by Colruyt in the present case cannot in its view be regarded as permissible, inasmuch as the consumer is not told which goods the advertiser has compared in order to determine the price levels that are quoted. On the other hand, it considers that the advertising concerning the BASIC products is permissible inasmuch as the comparison relates to all Colruyt's products bearing that label and similar products in competing supermarkets, and that this indirectly enables consumers to ascertain which products have been compared.

43. Colruyt and the Belgian Government, for their part, consider that it is not necessary for the advertised products to be identifiable as there is no express requirement to that effect in Article 3a(1) of the Directive. They maintain, first, that the criterion of 'verifiability' does not mean that all statements made in advertisements must be verifiable by the consumer but merely that the advertiser must be able to provide objective proof of their accuracy, before a court if necessary. Also, the criterion of 'objectivity' referred to in that provision does not, in their view, add anything to the criterion of 'verifiability'. They consider that if the condition of 'verifiability' is satisfied, that is sufficient in itself to classify comparative advertising as 'objective'.

44. For my part, I must say at once that I do not think that the condition of 'objectivity' referred to in Article 3a(i)(c) is really relevant for the purpose of answering the question raised by the referring court. In my view, that requirement simply means that the attributes of the products that are being advertised must be such as to enable them to be compared in a fair and impartial manner; that is to say, the comparison made in the advertisement must relate to objectively observable characteristics, not to attributes which may be a matter of subjective tastes or preferences.

45. To provide a simple example, a company can certainly compare the price of two similar products by stating that one is cheaper than the other, inasmuch as price is an objective characteristic which is not open to debate. On the other hand, it cannot advertise its own products as being aesthetically more beautiful or more elegant than those of its competitors, since those features are clearly a matter of subjective judgment which may vary from one person to another. (11)

46. The question raised by the *Rechtbank van Koophandel* must therefore be examined primarily in the light of the requirement with regard to 'verifiability' of advertising, referred to in Article 3a(1)(c).

47. In this respect, the argument advanced by Lidl, the Polish and French Governments and the Commission, according to which an advertisement can be regarded as 'verifiable' only if it enables those to whom it is addressed to identify the goods or services that are being compared, seems to me to be persuasive.

48. In point of fact, the condition in question would be deprived of all useful effect if individuals (primarily consumers or the advertiser's competitors) who might have an interest in checking the accuracy and correctness of the advertiser's statements were unable to do so, since it is clearly impossible to make a comparison if the terms of the comparison are not known and cannot be ascertained.

49. Moreover, comparative advertising which does not allow the goods or the features that are being compared to be identified is also out of line with the informative purpose pursued by the Directive, which I have already mentioned (see points 33 and 34 above). Because of its vague and indeterminate nature, such advertising would not be capable of giving the consumer any proper guidance in his choice of purchases.

50. In short, I should say that such advertising displays all the dangers traditionally associated with some forms of comparative advertising (running down competitors, misleading consumers, confusing one product with another, etc.) without offering any of the advantages that comparative advertising can bring for the consumer (improving market transparency, stimulating competition between the various companies, etc.).

51. That being said, I must dissent from the positions taken by Lidl and the Polish and French Governments when they insist that advertisements must identify and list all the products that are being compared, together with the prices in each particular case.

52. In the first place, I do not think the Directive supports such an interpretation. In fact, Article 2 establishes that comparative advertising means 'any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor'. (12) Nor does the Directive lay down any other conditions, depending on whether advertisements contain explicit references or references by implication; it simply explains a number of requirements which must be observed by any form of advertisement (explicit or by implication) which falls within the definition of 'comparative advertising' contained in the abovementioned Article 2.

53. In the second place, the contested interpretation would make comparative advertising into an instrument which it would be difficult or impossible to use whenever the information compiled was complex and varied. In the present case, for example, Colruyt claims that thousands of different products and prices were compared; so clearly in that case it would not be easy, to say the least, to include in the advertisement itself an extremely long list of the products that were being compared, together with the prices in each particular case. But similar requirements of brevity and simplicity in advertisements may obtain in various other cases, for example when comparing the chemical components of

various cleaning products or the nutritional values of certain food products.

54. In fact, in my view, an advertisement must always be correct and accurate but it need not also always be as detailed and complete as a scientific or statistical publication. One can think, for example, of cases where inessential or qualifying aspects are left out of the advertisement or, conversely, of cases where the consumer can obtain the necessary information to identify the essential terms of the comparison in some other way (for example, on the advertiser's website, which may be mentioned in the advertisement).

55. In my view, it can therefore be concluded that the condition concerning the verifiability of the advertiser's statements can be held to have been observed not only, of course, when all the elements of the comparison are included directly in the advertisement but also when the advertisement indicates where and how an average consumer can find those elements easily or in any case clearly makes it possible for the consumer to ascertain what they are from the context and the circumstances of the case.

56. That being said, it is scarcely necessary to point out that none of these hypothetical cases applies when that knowledge cannot be obtained except by instituting proceedings before a supervisory judicial or administrative authority. However, that is what would happen if we were to accept Colruyt's argument that the requirement of verifiability at issue should be held to be satisfied even where a consumer or a competitor has no other way of identifying the data on which the comparison in the advertisement is based than to apply to such an authority.

57. Such a view, in addition to rendering the guarantee of verifiability worthless to consumers by obliging them to have recourse to complex and costly procedures, would also effectively distort the logic of the system established by the Directive. The judicial route must in fact be reserved for ascertaining whether advertising is misleading or in any case unlawful and for imposing penalties accordingly, not for simply acquiring information.

58. Nor can it be objected that the information on which the comparison was based could be held to be covered by the rules on confidentiality of business information; or that it might be difficult to supply it in full and in detail because of the number and/or volume of the items concerned. In my view, the argument of business confidentiality, which the defendant mentioned at the hearing, is not very persuasive in the present case, since the information in question is simply a list of products offered to the public and the prices in each particular case. Moreover, I have already pointed out that all that information – even if it is voluminous – could be found in some other way and, in particular, could be made available to the consumer through means of communication in common use (see point 54 et seq. above).

59. I therefore confirm that, in my view, to require full transparency and verifiability of statements made

in advertisements cannot be regarded, in law or in fact, as placing an impossible burden on the advertiser.

60. I should add that this view also seems to me to be in keeping with the spirit of the abovementioned Directive 2005/29 amending Directive 84/450. It is certainly true that Directive 2005/29 is not concerned with comparative advertising but with unfair business-to-consumer commercial practices; nevertheless, I think it can provide useful indications as to the general guidance given by the Community legislature. Thus, Article 7(1) and (3) of that directive specifically provide that '[a] commercial practice shall be regarded as misleading if ... it omits material information Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account'. (13)

61. Passing on now to examine the advertising campaign conducted by Colruyt in the light of the foregoing considerations, I am not sure that, on the basis of the test I suggested earlier (see point 55 above), an advertisement such as the one for BASIC products makes it possible to identify the goods that are being compared and consequently to verify the prices in each particular case. In any case, even supposing that the consumer does in fact succeed, on the basis of the information contained in the advertisement, in identifying the advertiser's products referred to in the advertisement, it still remains to be ascertained whether that information also enables the products of Colruyt's competitors which are included in the comparison to be identified (in particular: the consumer must be able not only to know which is Colruyt's 'Basic' cheese but also to recognise the allegedly 'similar' cheese sold by Lidl).

62. I also have serious doubts as to the price level advertising. It does not seem to me that in the present case it enables the goods that are being compared to be identified, still less the statements made in the contested advertisement to be verified. The goods and the prices in each particular case are not mentioned in the advertisement and cannot be obtained in any other way. Also, Colruyt itself stated at the hearing that 'there is currently no provision [for making the data on which the price comparison is based available to competitors or consumers]'.

63. That being said, I must in any event point out that the last word on the subject must rest with the referring court, which is certainly in the best position to determine whether or not the forms of comparative advertising distributed by Colruyt do in fact satisfy the requirement of 'verifiability' in the terms which I have endeavoured to define above.

64. In the light of the foregoing, I therefore propose that the Court reply that the requirements in respect of the 'objectivity' and 'verifiability' of the comparison, laid down in Article 3a(1)(c) of the Directive, do not preclude advertisements which do not expressly mention the goods and prices that are being compared when the advertisements in question indicate where and how

an average consumer can find those elements easily or in any case clearly make it possible for the consumer to ascertain what they are from the context and the circumstances of the case.

The misleading nature of the price level advertising

65. Lastly, the referring court seeks essentially to ascertain whether advertising which compares the price levels in certain supermarkets, calculated on the basis of a sample of products, is to be regarded as ‘misleading’ inasmuch as it may cause the consumer to believe that the terms on offer are more favourable over the entire range of products.

66. The parties differ in their views on this point. Lidl and the Polish authorities consider that such advertising must be held to be misleading. In their view, to state that Colruyt generally charges lower prices than its competitors, without giving any precise indication either of the prices or of the products in question, creates the impression that this chain of supermarkets is always and in all circumstances cheaper.

67. The French Government and the Commission take the view, on the contrary, that whether that comparison is likely to mislead consumers depends on the circumstances of the case and primarily on the method used to calculate the price levels. In their view, it is therefore for the national court to determine whether the advertisement distributed by Colruyt is in fact misleading.

68. Lastly, according to Colruyt and the Belgian authorities, comparative advertising based on price levels is not misleading within the meaning of the Directive unless the range of products on which the comparison is based is not sufficiently representative.

69. For my own part, I note first that, in accordance with Article 2(2) of the Directive, misleading advertising means ‘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’.

70. In order to determine whether those conditions are satisfied, it is necessary according to the Community case-law ‘to take into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect’. (14) The assessment in this connection must therefore be carried out case by case with due regard to ‘all the relevant factors, including the circumstances in which the products are sold ... , the presentation and the content of advertising material, and the risk of error in relation to the group of consumers concerned’. (15)

71. In the light of those criteria, it seems to me that comparative price level advertising which is based on an extrapolation from selected data and which causes the consumer to believe that the price differences cited apply to all the products sold by the advertiser may be held to be misleading within the meaning of the Directive. It appears, in my view, to be likely to raise false expectations in the average consumer, who may expect

to make a certain level of saving, irrespective of the type or quantity of the goods he purchases.

72. That said, however, I must point out that it is not for the Court to determine whether in the present case Colruyt’s advertisements are in fact such as to cause a sufficiently significant number of consumers (16) to believe that the advertiser is cheaper over the entire range of products which it sells. That calls for an assessment of the facts which, as we know, is a matter for the referring court. (17) I therefore agree with the French Government and the Commission that it is for that court to consider whether, in the light of all the relevant circumstances, the advertisements contested by Lidl are in fact misleading.

73. I therefore propose that the Court reply that comparative advertising which compares the price levels in various supermarkets on the basis of an extrapolation from selected data and which give rise to the belief that the price differences cited apply to all the products sold by those supermarkets is misleading within the meaning of Article 3a(1)(a) of the Directive.

V – Conclusion

74. In the light of the foregoing, I therefore propose that the Court reply as follows to the questions referred to it by the Rechtbank van Koophandel:

1) The condition with regard to permissibility referred to in Article 3a(1)(b) of Directive 84/450/EEC does not preclude advertising which makes a comparison between selections of goods or services.

2) The requirements in respect of the ‘objectivity’ and ‘verifiability’ of the comparison, laid down in Article 3a(1)(c) of the Directive, do not preclude advertisements which do not expressly mention the goods and prices that are being compared when the advertisements in question indicate where and how an average consumer can find those elements easily or in any case clearly make it possible for the consumer to ascertain what they are from the context and the circumstances of the case.

3) Comparative advertising which compares the price levels in various supermarkets on the basis of an extrapolation from selected data and which gives rise to the belief that the price differences cited apply to all the products sold by those supermarkets is misleading within the meaning of Article 3a(1)(a) of the Directive.

1 – Original language: Italian.

2 – OJ 1984 L 250, p. 17.

3 – OJ 1997 L 290, p. 18.

4 – OJ 2005 L 149, p. 22.

5 – Belgisch Staatsblad, 29.8.91.

6 – Belgisch Staatsblad, 8.4.2003.

7 – The requirement of ‘homogeneity’ means that comparative advertising must compare ‘goods ... meeting the same needs or intended for the same purpose’ (Article 3a(1)(b) of the Directive).

8 – On the close link between protecting the consumer and providing the consumer with information, established in all Community policy on the subject of consumer protection, see Case C-362/88 GB-INNO-

BM [1990] ECR I-667, paragraph 14, and Case C-126/91 Yves Rocher [1993] ECR I-2361, paragraph 17.
9 – See Case C-112/99 ToshibaEurope [2001] ECR I-7945, paragraph 37, and Case C-44/01 PippigAugenoptik [2003] ECR I-3095, paragraph 42.

10 – Judgment of 30 June 2004 in Cora v Colruyt, p. 6. A copy of that judgment was appended to the written statement filed by Colruyt in the course of the proceedings.

11 – See also Advocate General Léger’s Opinion in Toshiba Europe, points 50 and 51.

12 – Emphasis added. On the scope of the concept of comparative advertising, see also Toshiba Europe, paragraph 31, and Pippig Augenoptik, paragraph 35.

13 – Emphasis added.

14 – Case C-220/98 Estée Lauder [2000] ECR I-117, paragraph 27. See also Case C-210/96 Gut Springenheide and Tusky [1998] ECR I-4657, paragraph 37.

15 – Case C-313/94 Graffione [1996] ECR I-6039, paragraph 26; see also Case C-373/90 X [1992] ECR I-131, paragraphs 15 and 16.

16 – On that condition, see Estée Lauder, paragraph 31, and Gut Springenheide and Tusky, paragraph 34.

17 – See, to that effect, Case C-203/90 Gutshof-Ei [1992] ECR I-1003; Case 94/82 De Kikvorsch [1983] ECR 947; Graffione; and Gut Springenheide and Tusky.
