

Court of Justice EU, 18 November 2010, Lidl v Vierzon Distribution

'Not everybody can be E. Leclerc! Low prices – And the proof is E. Leclerc is still the cheapest'



'In English, they say "hard discount" – in French they say "E. Leclerc"'

ADVERTISING LAW

Comparative advertising: sufficient degree of interchangeability

- the fact alone that food products differ in terms of the extent to which consumers would like to eat them and the pleasure to be derived from consuming them, according to the conditions and place of production, their ingredients and who produced them, cannot preclude the possibility that the comparison of such products may meet the requirement [...] that the products compared display a sufficient degree of interchangeability.

39 In the light of all the foregoing, the first part of the answer to be given to the question referred by the tribunal de commerce de Bourges is that Article 3a(1)(b) of Directive 84/450 is to be interpreted as meaning that the fact alone that food products differ in terms of the extent to which consumers would like to eat them and the pleasure to be derived from consuming them, according to the conditions and place of production, their ingredients and who produced them, cannot preclude the possibility that the comparison of such products may meet the requirement laid down in that provision that the products compared meet the same needs or are intended for the same purpose, that is to say, that they display a sufficient degree of interchangeability.

40 The specific assessments as to whether there is such a sufficient degree of interchangeability between the food products that are the subject of the comparison in the main proceedings fall within the jurisdiction of the referring court, as stated at paragraph 33 above. That court has not, in any event, provided the Court with any information allowing the precise identification of those products and of their specific characteristics or, a fortiori, referred any question of interpretation to the Court relating to such specific data.

Misleading comparison

- it is found, in the light of all the relevant circumstances of the particular case, in particular the information contained in or omitted from the advertisement, that the decision to buy on the part of a significant number of consumers to whom the ad-

vertisement is addressed may be made in the mistaken belief that the selection of goods made by the advertiser is representative of the general level of his prices as compared with those charged by his competitor

In the light of all the foregoing, the second part of the answer to be given to the question referred by the tribunal de commerce de Bourges is that Article 3a(1)(a) of Directive 84/450 is to be interpreted as meaning that an advertisement such as that at issue in the main proceedings may be misleading, in particular if:

– it is found, in the light of all the relevant circumstances of the particular case, in particular the information contained in or omitted from the advertisement, that the decision to buy on the part of a significant number of consumers to whom the advertisement is addressed may be made in the mistaken belief that the selection of goods made by the advertiser is representative of the general level of his prices as compared with those charged by his competitor and that such consumers will therefore make savings of the kind claimed by the advertisement by regularly buying their everyday consumer goods from the advertiser rather than from the competitor, or in the mistaken belief that all of the advertiser's products are cheaper than those of his competitor, or

- it is found that, for the purposes of a comparison based solely on price, food products were selected which, nevertheless, have different features capable of significantly affecting the average consumer's choice, without such differences being apparent from the advertising concerned.

Verifiability of comparative advertising

- meaning that the condition of verifiability set out in that provision requires, in the case of an advertisement, which compares the prices of two selections of goods, that it must be possible to identify the goods in question on the basis of information contained in the advertisement.

Source: curia.europa.eu

Court of Justice EU, 18 November 2010

(J.-C. Bonichot, K. Schiemann (Rapporteur), L. Bay Larsen, C. Toader and A. Prechal)

JUDGMENT OF THE COURT (Fourth Chamber)

18 November 2010 (*)

(Directives 84/450/EEC and 97/55/EC – Conditions under which a comparative advertising is permitted – Price comparison based on selection of food products marketed by two competing retail store chains – Goods meeting the same needs or intended for the same purpose – Misleading advertising – Comparison based on a verifiable feature)

In Case C-159/09,

REFERENCE for a preliminary ruling under Article 234 EC from the tribunal de commerce de Bourges (France), made by decision of 17 March 2009, received at the Court on 8 May 2009, in the proceedings Lidl SNC

v
Vierzon Distribution SA,
THE COURT (Fourth Chamber),
composed of J.-C. Bonichot, President of the Chamber,
K. Schiemann (Rapporteur), L. Bay Larsen, C. Toader
and A. Prechal, Judges,
Advocate General: P. Mengozzi,
Registrar: R. Şereş, Administrator,
having regard to the written procedure and further to
the hearing on 1 July 2010, after considering the obser-
vations submitted on behalf of:
– Lidl SNC, by B. Braun, avocat,
– Vierzon Distribution SA, by G. Schank and F. Reye,
avocats,
– the French Government, by G. de Bergues, S. Menez
and R. Loosli-Surrans, acting as Agents,
– the Czech Government, by M. Smolek and D.
Hadroušek, acting as Agents,
– the Austrian Government, by C. Pesendorfer, acting
as Agent,
– the European Commission, by M. Van Hoof and W.
Wils, acting as Agents,
after hearing the Opinion of the Advocate General at
the sitting on 7 September 2010,
gives the following

Judgment

1 This reference for a preliminary ruling concerns the
interpretation of Article 3a of Council Directive
84/450/EEC of 10 September 1984 concerning mis-
leading and comparative advertising (OJ 1984 L 250, p.
17), as amended by Directive 97/55/EC of the Europe-
an Parliament and of the Council of 6 October 1997
(OJ 1997 L 290, p. 18) ('Directive 84/450').

2 The reference was made in proceedings between Lidl
SNC ('Lidl') and Vierzon Distribution SA ('Vierzon
Distribution') concerning an advertisement distributed
in the press on behalf of the latter company.

Legal context

European Union legislation

3 Article 1 of Directive 84/450 provides as follows:

*'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.'*

4 According to Article 2(2) of Directive 84/450, 'mis-
leading advertising' means:

*'any advertising which in any way, including its
presentation, deceives or is likely to deceive the per-
sons to whom it is addressed or whom it reaches and
which, by reason of its deceptive nature, is likely to af-
fect their economic behaviour or which, for those
reasons, injures or is likely to injure a competitor'*

5 Article 2(2a) of Directive 84/450 defines comparative
advertising as:

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

6 Article 3 of Directive 84/450 is worded as follows:
'In determining whether advertising is misleading, ac-

*count 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 pur-
pose, 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 calcu-
lated, 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.'*

7 Article 3a(1) of Directive 84/450 provides as follows:
*'Comparative advertising shall, as far as the compari-
son 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, rele-
vant, verifiable and representative features of those
goods and services, which may include price;*

...'

National legislation

8 Article L. 121-8 of the code de la consommation
(Consumer Code) provides as follows:

*'Any advertising which compares goods or services by
identifying, explicitly or by implication, a competitor or
goods or services offered by a competitor shall be per-
mitted only if:*

1° it is not misleading or likely to deceive;

*2° it relates to goods or services meeting the same
needs or intended for the same purpose;*

*3° it objectively compares one or more material, rele-
vant, verifiable and representative features of those
goods and services, which may include price.*

...'

The dispute in the main proceedings and the ques- tion referred for a preliminary ruling

9 Lidl operates a chain of food supermarkets in France,
in particular a store located near to that of Vierzon Dis-
tribution, which sells everyday consumer goods under
the name 'Leclerc'.

10 On 23 September 2006, Vierzon Distribution placed
an advertisement in a local newspaper ('the advertise-
ment at issue'), which reproduced till receipts listing,
by means of general descriptions, accompanied, as ap-
propriate, by their weight or volume, 34 products, in
the main foodstuffs, purchased from the store belong-
ing to Vierzon Distribution and that operated by Lidl,
respectively, and showing a total cost of EUR 46.30 for
the Vierzon Distribution products as against EUR 51.40
for those of Lidl.

11 The advertisement also included the slogans 'Not
everybody can be E. Leclerc! Low prices – And the
proof is E. Leclerc is still the cheapest' and 'In English,

they say “hard discount” – in French they say “E. Leclerc””

12 On 16 March 2007, Lidl brought an action before the tribunal de commerce de Bourges (Commercial Court, Bourges) seeking an order that Vierzon Distribution pay damages on the ground of unfair competition and that extracts from the judgment to be delivered be published in the press and on posters in its store.

13 In support of its action, Lidl claims, inter alia, infringement of Article L. 121-8 of the Consumer Code. It submits that the advertisement at issue deceives, or even misleads consumers, both as a result of its presentation and because Vierzon Distribution selected only products which placed it in an advantageous position after aligning, where necessary, its prices on those of its competitor. Moreover, the products were not comparable, since their qualitative and quantitative differences meant that they did not meet the same needs. Lidl adds that the reproduction alone in the advertisement at issue of till receipts showing the list of the products compared does not enable consumers to perceive the specific characteristics of those products or, therefore, to understand the reasons for the differences in prices claimed in the advertisement.

14 Vierzon Distribution disputes those claims, submitting, inter alia, that two products which are not the same may be compared, provided that they meet the same needs or are intended for the same purpose and, in that regard, are sufficiently interchangeable, which is the case here. The differences between the products at issue are sufficiently clear from the till receipts in question and consumers would not therefore have been deceived. The fact that Vierzon Distribution itself chose the products to be compared is not unlawful and, since the items were purchased on the same day, any possibility that the prices could have been manipulated is also ruled out.

15 In those circumstances, the tribunal de commerce de Bourges decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling: ‘Is Article 3a of Directive [84/450] to be interpreted as meaning that it is unlawful to engage in comparative advertising on the basis of the price of products meeting the same needs or intended for the same purpose, that is to say, products which are sufficiently interchangeable, on the sole ground that, in regard to food products, the extent to which consumers would like to eat those products or, in any case, the pleasure of consuming them, is completely different according to the conditions and the place of production, the ingredients used and the experience of the producer?’

The question referred

16 Article 3a of Directive 84/450, with which the question referred is concerned, lists, in subparagraphs (1)(a) to (h), various cumulative conditions which comparative advertising must satisfy in order to be permitted (see, inter alia, [Case C-487/07 L’Oréal and Others \[2009\] ECR I-5185, paragraph 67](#)).

17 In the present case, the Court considers that, in order to take account of the doubts expressed by the tribunal

de commerce de Bourges and to provide it with guidance on points of interpretation which may be of assistance in adjudicating on the case pending before it, it is necessary, as suggested by the French, Austrian and Czech Governments, the European Commission and, lastly, the Advocate General at point 40 of his Opinion, to refer to the conditions under which comparative advertising is permitted set out in Article 3a(1)(a) to (c) of Directive 84/450, respectively.

18 Accordingly, the tribunal de commerce de Bourges is to be regarded as essentially asking by its question whether Article 3a(1)(a) to (c) of Directive 84/450 is to be interpreted as meaning that it precludes any advertising practice, such as that described in the order for reference, which compares, from a price angle, a basket of food products marketed by two competing retail store chains, bearing in mind in particular the differences between the food products thus compared in terms of their method and place of production, the ingredients used and who produces them, such differences implying in particular that those goods differ as to the extent to which consumers like to eat them and the pleasure to be derived from consuming them.

19 In view of the formulation of the question referred and the emphasis placed on the condition set out in Article 3a(1)(b) of Directive 84/450, the Court considers it appropriate to consider that provision first and then to go on to examine Article 3a(1)(a) and, lastly, Article 3a(1)(c).

20 However, before so doing, it should be noted that it is apparent from the Court’s case-law that the purpose of the various conditions listed in Article 3a(1) of Directive 84/450 under which comparative advertising is permitted is to achieve a balance between the different interests which may be affected by allowing comparative advertising. Thus, it is apparent from a reading of recitals 2, 7 and 9 in the preamble to Directive 97/55 that the aim of Article 3a of Directive 84/450 is to stimulate competition between suppliers of goods and services to the consumer’s advantage, by allowing competitors to highlight objectively the merits of various comparable products while, at the same time, prohibiting practices which may distort competition, be detrimental to competitors and have an adverse effect on consumer choice ([L’Oréal and Others, paragraph 68](#)).

21 It follows that the conditions listed in Article 3a(1) of Directive 84/450 must be interpreted in the sense most favourable to permitting advertisements which objectively compare the characteristics of goods or services, while ensuring at the same time that comparative advertising is not used anticompetitively and unfairly or in a manner which affects the interests of consumers ([L’Oréal and Others, paragraph 69 and the case-law cited](#)).

22 It should also be noted that Directive 84/450 carried out an exhaustive harmonisation of the conditions under which comparative advertising in Member States might be permitted and that such a harmonisation implies by its nature that the lawfulness of comparative advertising throughout the European Union is to be as-

essed solely in the light of the criteria laid down by the European Union legislature (see [Case C-44/01 Pippig Augenoptik \[2003\] ECR I-3095, paragraph 44](#)).

23 Lastly, with regard to advertising which, as in the main proceedings, compares prices, it should be underlined that the comparing of rival offers, particularly as regards price, is indeed inherent in comparative advertising ([Case C-356/04 Lidl Belgium \[2006\] ECR I-8501, paragraph 57 and the case-law cited](#)).

24 Furthermore, recital 8 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.

Article 3a(1)(b) of Directive 84/450

25 Article 3a(1)(b) of Directive 84/450 provides that, if comparative advertising is to be permitted, the comparison must relate to goods or services which meet the same needs or are intended for the same purpose. The Court has already held that that condition implies that the goods being compared must display a sufficient degree of interchangeability for consumers ([Lidl Belgium, paragraph 26](#), and [Case C-381/05 De Landtsheer Emmanuel \[2007\] ECR I-3115, paragraph 44](#)).

26 As pointed out by the French Government and the Commission, the very manner in which the question referred is formulated suggests that, while it considers, on the one hand, that the products in the advertisement at issue display a sufficient degree of interchangeability for that condition to be satisfied, the tribunal de commerce de Bourges nevertheless seeks to satisfy itself that such an assessment is not ruled out by the fact that those products are foodstuffs. That court asks, more specifically, whether the fact that products of such a kind inevitably vary as to the extent to which consumers like to eat them or the pleasure to be derived from consuming them, bearing in mind the differences which characterise them in terms of their method and place of production, the ingredients used and who produces them, should lead to the conclusion that there can be no comparison of such products, any comparison thus being possible only in the case of identical food products.

27 It should be noted, first, that unlike, in particular, Article 3a(1)(c) of Directive 84/450, Article 3a(1)(b) does not in any way deal with or, therefore, prejudge, the angle from which the comparison may lawfully be made or, in other words, the characteristics of the goods or services concerned to which comparative advertising may refer. It follows that, unlike what was suggested, inter alia, by the Czech and Austrian Governments, the angle from which the comparison is made, being in this case price, can have no bearing on whether two products meet the same needs or are intended for the same purpose within the meaning of Article 3a(1)(b) of Directive 84/450.

28 Moreover, it should be noted, first, that the judgments in [Lidl Belgium](#) and [De Landtsheer Emmanuel](#), in which the Court pointed out, as stated at paragraph 25 above, that the condition laid down in Article 3a(1)(b) of Directive 84/450 provides that, if

comparative advertising is to be permitted, the goods being compared must display a sufficient degree of interchangeability for consumers, were in fact delivered in cases involving advertising relating to food products.

29 It should be noted, secondly, that recital 9 in the preamble to Directive 97/55 states that, in order to prevent comparative advertising being used in an anti-competitive and unfair manner, only comparisons between ‘competing’ goods and services meeting the same needs or intended for the same purpose should be permitted.

30 The Court stated in particular that the reason for which Article 3a(1)(b) of Directive 84/450 provides, as a condition for permitting comparative advertising, that the goods or services compared must meet the same needs or be intended for the same purpose is to be found, inter alia, in the fact that, under Article 2(2a) of the directive, the key element of comparative advertising is the identification of a ‘competitor’ of the advertiser or of the goods and services which it offers and that whether undertakings are competing undertakings depends, by definition, on the substitutable nature of the goods or services that they offer on the market (see [De Landtsheer Emmanuel, paragraphs 27 to 29](#)).

31 As the Court has observed, those two provisions of Directive 84/450 are thus obviously close, so that similar criteria are applicable mutatis mutandis to both of the provisions for the purpose of determining the degree of substitution (see, to that effect, [De Landtsheer Emmanuel, paragraphs 46 and 48](#)).

32 The fact that products are, to a certain extent, capable of meeting identical needs leads to the conclusion that there is a certain degree of substitution for one another ([De Landtsheer Emmanuel, paragraph 30 and the case-law cited](#)).

33 Before it can be concluded that there is a real possibility of substitution, in accordance with Article 3a(1)(b) of Directive 84/450, an individual and specific assessment of the products which are specifically the subject of the comparison in the advertisement is necessary ([De Landtsheer Emmanuel, paragraph 47](#)). Such a specific assessment of the degree of substitution falls within the jurisdiction of the national courts.

34 Thirdly, other considerations preclude any interpretation of Article 3a(1)(b) of Directive 84/450 which would essentially result in prohibiting comparative advertising relating to food products unless such products are identical.

35 First, there is nothing in the wording of that provision to suggest any such prohibition.

36 Secondly, such a prohibition would, by means of a broad interpretation of that condition governing whether comparative advertising is permitted, lead to a considerable restriction on the scope of comparative advertising (see, by analogy, [De Landtsheer Emmanuel, paragraphs 70 and 71](#)).

37 As pointed out by, inter alia, the Czech Government and the Commission, to decide that, unless they are identical, two food products cannot be regarded as comparable within the meaning of Article 3a(1)(b) of

Directive 84/450 would effectively rule out any real possibility of comparative advertising regarding a particularly important category of consumer goods, irrespective of the angle from which the comparison is made.

38 The outcome of such a prohibition would therefore run counter to the Court's settled case-law that the conditions required of comparative advertising must be interpreted in the sense most favourable to it ([De Landtsheer Emmanuel, paragraph 63](#)).

39 In the light of all the foregoing, the first part of the answer to be given to the question referred by the tribunal de commerce de Bourges is that Article 3a(1)(b) of Directive 84/450 is to be interpreted as meaning that the fact alone that food products differ in terms of the extent to which consumers would like to eat them and the pleasure to be derived from consuming them, according to the conditions and place of production, their ingredients and who produced them, cannot preclude the possibility that the comparison of such products may meet the requirement laid down in that provision that the products compared meet the same needs or are intended for the same purpose, that is to say, that they display a sufficient degree of interchangeability.

40 The specific assessments as to whether there is such a sufficient degree of interchangeability between the food products that are the subject of the comparison in the main proceedings fall within the jurisdiction of the referring court, as stated at paragraph 33 above. That court has not, in any event, provided the Court with any information allowing the precise identification of those products and of their specific characteristics or, a fortiori, referred any question of interpretation to the Court relating to such specific data.

Article 3a(1)(a) of Directive 84/450

41 Article 3a(1)(a) of Directive 84/450 provides that, if comparative advertising is to be permitted, the comparison must not be misleading.

42 More specifically, with regard to a comparison based, as in the main proceedings, on price, it was pointed out at paragraph 24 above that recital 8 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 be not misleading.

43 Moreover, it is apparent from recital 2 in the preamble to Directive 97/55 that the harmonisation by the directive of the conditions under which comparative advertising is permitted is intended to help, inter alia, 'demonstrate objectively' the 'merits' of the various comparable products.

44 Article 2(2) of Directive 84/450 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.

45 As is apparent from the description given at paragraphs 10 and 11 above, the advertisement at issue is based on a selection of a limited number of products,

for the most part foodstuffs, marketed by two competing stores. Those products are identified by generic names, accompanied, as appropriate, by their weight or volume, which appear on till receipts from each of those stores showing, in addition to the individual price of each of the products in question, the total amount paid to purchase such an assortment of goods. The advertisement also contains slogans of a general nature proclaiming that the store of the advertiser, whose till receipt is thus reproduced showing a lower total cost than that of its competitor, is cheaper.

46 It is for the referring court to ascertain in the circumstances of each particular case, and bearing in mind the consumers to which such advertising is addressed, whether the latter may be misleading ([see Lidl Belgium, paragraph 77 and the case-law cited](#)).

47 That court must, first, 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. As regards an advertisement such as that at issue, it is not disputed that it is addressed not to a specialist public but to end consumers who purchase their basic consumables in a chain of stores ([see Lidl Belgium, paragraph 78 and the case-law cited](#)).

48 In carrying out the requisite assessment, the national court must also take account of all the relevant factors in the case, having regard, as follows from Article 3 of Directive 84/450, to the information contained in the advertisement at issue and, more generally, to all its features ([see Lidl Belgium, paragraph 79 and the case-law cited](#)).

49 The Court has also held that an omission may render advertising misleading, in particular where, bearing in mind the consumers to whom 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 ([Lidl Belgium, paragraph 80 and the case-law cited](#)).

50 In those various respects, advertising such as the advertisement at issue could, first, be misleading, as is apparent from case-law, if the referring court were to find that, in the light of all the relevant circumstances of the particular case, in particular the information contained in or omitted from the advertisement, the decision to buy on the part of a significant number of consumers to whom the advertising is addressed may be made in the mistaken belief that the selection of goods made by the advertiser is representative of the general level of his prices as compared with those charged by his competitor and that such consumers will therefore make savings of the kind claimed by the advertisement by regularly buying their everyday consumer goods from the advertiser rather than from the competitor, or in the mistaken belief that all of the advertiser's products are cheaper than those of his competitor (see, to that effect, [Lidl Belgium, paragraphs 83 and 84](#)).

51 An advertisement such as that at issue could also be misleading if the referring court found that, for the purposes of the price-based comparison in the

advertisement, food products were selected which are in fact objectively different and the differences are capable of significantly affecting the buyer's choice.

52 If such differences are not disclosed, such advertising, where it is based solely on price, may indeed be perceived by the average consumer as claiming, by implication, that the other characteristics of the products in question, which may also have a significant effect on the choices made by such a consumer, are equivalent.

53 The Court has already held, *inter alia*, with regard to a comparison based on the prices charged by two competing stores, that, in cases where the brand name of the products may significantly affect the buyer's choice and the comparison concerns rival products whose respective brand names differ considerably in the extent to which they are known, omission of the better-known brand name goes against Article 3a(1)(a) of Directive 84/450 ([Pippig Augenoptik, paragraph 53](#)).

54 The same may be true, in some cases, with regard to other features of the products compared, such as their composition or the method or place of production, to which the question for a preliminary ruling refers, where it is apparent that such features may, by their nature, in the same way as the price itself, have a significant effect on the buyer's choice.

55 In such cases, the fact that the consumer is not informed of the differences between products being compared in terms of price alone may deceive the consumer as to the reasons for the difference in prices claimed and the financial advantage that can in fact be obtained by the consumer by buying his goods from the advertiser rather than from a given competitor and have a corresponding effect on the consumer's economic behaviour. The latter may thus be led to believe that he will in fact obtain an economic advantage because of the competitive nature of the advertiser's offer and not because of objective differences between the products being compared.

56 In the light of all the foregoing, the second part of the answer to be given to the question referred by the tribunal de commerce de Bourges is that Article 3a(1)(a) of Directive 84/450 is to be interpreted as meaning that an advertisement such as that at issue in the main proceedings may be misleading, in particular if:

– it is found, in the light of all the relevant circumstances of the particular case, in particular the information contained in or omitted from the advertisement, that the decision to buy on the part of a significant number of consumers to whom the advertisement is addressed may be made in the mistaken belief that the selection of goods made by the advertiser is representative of the general level of his prices as compared with those charged by his competitor and that such consumers will therefore make savings of the kind claimed by the advertisement by regularly buying their everyday consumer goods from the advertiser rather than from the competitor, or in the mistaken belief that all of the advertiser's products are cheaper than those of his competitor, or

– it is found that, for the purposes of a comparison based solely on price, food products were selected which, nevertheless, have different features capable of significantly affecting the average consumer's choice, without such differences being apparent from the advertising concerned.

Article 3a(1)(c) of Directive 84/450

57 Article 3a(1)(c) of Directive 84/450 provides that, if comparative advertising is to be permitted, the comparison must objectively compare one or more material, relevant, verifiable and representative features of those goods and services, which may include price.

58 Recital 5 in the preamble to Directive 97/55 states that, when comparative advertising compares material, relevant, verifiable and representative features and is not misleading, it may be a legitimate means of informing consumers of their advantage ([De Landtsheer Emmanuel, paragraph 62](#)).

59 In the light of the information available to it and the arguments submitted to it, the Court intends, in the circumstances of this case, to rule exclusively on the question of the requirement of verifiability.

60 It should be noted that, in [Lidl Belgium](#), which concerned comparative advertising in which the comparison was based on price, the Court held that, in order for the prices of the goods comprising two selections of products to be verifiable, it is a necessary precondition that the goods whose prices have been thus compared must be capable of being individually and specifically identified on the basis of the information contained in the advertisement. The prices of goods can indeed necessarily only ever be verified if it is possible to identify those goods ([see, to that effect, Lidl Belgium, paragraph 61](#)).

61 Such identification makes it possible, in accordance with the objective of consumer protection pursued by Directive 84/450, 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 ([Lidl Belgium, paragraph 72](#)).

62 It is for the referring court, in the present case, to verify whether the description of the products compared, as set out in the advertisement at issue, is sufficiently clear to enable the consumer to identify the products being compared for the purpose of checking the accuracy of the prices shown in the advertisement.

63 As the Commission stated at the hearing, that could not be the case if, *inter alia*, it transpired that the stores referred to in the advertisement at issue marketed a number of food products which might tally with the descriptions given on the till receipts reproduced on that advertisement, so that it is not possible to identify precisely the goods thus compared.

64 In the light of the foregoing, the third part of the answer to be given to the question referred by the tribunal de commerce de Bourges is that Article 3a(1)(c) of Directive 84/450 is to be interpreted as meaning that the condition of verifiability set out in that provision requires, in the case of an advertisement, such as that at

issue in the main proceedings, which compares the prices of two selections of goods, that it must be possible to identify the goods in question on the basis of information contained in the advertisement.

Costs

65 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national 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 (Fourth Chamber) hereby rules:

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, is to be interpreted as meaning that the fact alone that food products differ in terms of the extent to which consumers would like to eat them and the pleasure to be derived from consuming them, according to the conditions and place of production, their ingredients and who produced them, cannot preclude the possibility that the comparison of such products may meet the requirement laid down in that provision that the products compared meet the same needs or are intended for the same purpose, that is to say, that they display a sufficient degree of interchangeability.

Article 3a(1)(a) of Directive 84/450, as amended by Directive 97/55, is to be interpreted as meaning that an advertisement such as that at issue in the main proceedings may be misleading, in particular if:

– it is found, in the light of all the relevant circumstances of the particular case, in particular the information contained in or omitted from the advertisement, that the decision to buy on the part of a significant number of consumers to whom the advertisement is addressed may be made in the mistaken belief that the selection of goods made by the advertiser is representative of the general level of his prices as compared with those charged by his competitor and that such consumers will therefore make savings of the kind claimed by the advertisement by regularly buying their everyday consumer goods from the advertiser rather than the competitor, or in the mistaken belief that all of the advertiser's products are cheaper than those of his competitor, or

– it is found that, for the purposes of a comparison based solely on price, food products were selected which, nevertheless, have different features capable of significantly affecting the average consumer's choice, without such differences being apparent from the advertising concerned.

Article 3a(1)(c) of Directive 84/450, as amended by Directive 97/55, is to be interpreted as meaning that the condition of verifiability set out in that provision requires, in the case of an advertisement, such as that at issue in the main proceedings, which compares the prices of two selections of goods, that it must be possible to identify the goods in question on the basis of information contained in the advertisement.

Opinion of the Advocate General Mengozzi

delivered on 7 September 2010 1(1)

Case C 159/09

Lidl SNC

v

Vierzon Distribution SA

(Reference for a preliminary ruling from the Tribunal de commerce de Bourges, France)

(Comparative advertising – Comparison of prices charged by competing supermarket chains – Goods meeting the same needs or intended for the same purpose)

1. The Court has on several occasions in the past been presented with questions concerning comparative advertising. Its case-law on the subject is now quite extensive. In the present case, however, the question raised by the referring court, the Tribunal de commerce de Bourges presents a fresh aspect, namely the question whether or not the rules on comparative advertising can be applied to advertising that compares food products.

2. The national court is essentially asking this Court to express its approval or disapproval of French case-law which tends to rule comparative advertising unlawful in the case of foodstuffs, regarding them as, by their very nature, not amenable to comparison one with another.

I – Relevant legislation

3. The legal provisions to which reference must be made in order to answer this question are all provisions of European Union law. Indeed, the referring court noted in its order for reference that the provisions of national law that apply, that is to say Articles 121-8 and 121-9 of the Code de la consommation (Consumer Code), do no more than repeat the text of the provisions of European Union law applicable at the material time.

A – Directive 84/450/EEC, as amended by Directive 97/55/EC

4. The law that applies to this case is Directive 84/450/EEC (2) ('the Directive'), as amended by Directive 97/55/EC. (3)

5. 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'. Article 2(2a) defines 'comparative advertising' as 'any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor'.

6. Article 3 of the Directive reads as follows:

'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’.

7. Article 3a of the Directive provides as follows:

‘1. 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 and services, which may include price;

(d) it does not create confusion in the market place between the advertiser and a competitor or between the advertiser’s trade marks, trade names, other distinguishing marks, goods or services and those of a competitor;

(e) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor;

(f) for products with designation of origin, it relates in each case to products with the same designation;

(g) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;

(h) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.

...’.

8. Lastly, Article 7 of the Directive is worded as follows:

‘1. This Directive shall not preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection, with regard to misleading advertising, for consumers, persons carrying on a trade, business, craft or profession, and the general public.

2. Paragraph 1 shall not apply to comparative advertising as far as the comparison is concerned.

...’.

B – Directive 84/450/EEC, as subsequently amended by Directive 2005/29/EC

9. Directive 2005/29/EC (4) in turn amended Directive 84/450/EEC. In particular, in so far as concerns the present case, the amendment related to Article 3a and Article 7.

10. Article 3a of Directive 84/450/EEC is now worded as follows:

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

(a) it is not misleading within the meaning of Articles 2(2), 3 and 7(1) of this Directive or Articles 6 and 7 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market;

(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;

(d) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor;

(e) for products with designation of origin, it relates in each case to products with the same designation;

(f) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;

(g) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name;

(h) it does not create confusion among traders, between the advertiser and a competitor or between the advertiser’s trade marks, trade names, other distinguishing marks, goods or services and those of a competitor’.

11. Article 7 of Directive 84/450/EEC now reads as follows:

‘1. This Directive shall not preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection, with regard to misleading advertising, for traders and competitors.

2. Paragraph 1 shall not apply to comparative advertising as far as the comparison is concerned.

...’.

12. At the time of the facts in the main proceedings, Directive 2005/29/EC had already entered into force. The period for its transposition into national law, namely 12 June 2007, had not yet, however, expired at that time. (5)

C – Directive 2005/29/EC

13. Articles 6 and 7 of Directive 2005/29/EC, to which Article 3a of Directive 84/450/EEC now refers in its definition of the notion of misleading advertising, are devoted to ‘misleading actions’ and ‘misleading omissions’ respectively.

14. Article 6 provides as follows:

‘1. A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:

(a) the existence or nature of the product;

(b) the main characteristics of the product ...;

...

2. A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves:

(a) any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor;

...’.

15. Article 7 is worded as follows:

‘1. A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

...

4. In the case of an invitation to purchase, the following information shall be regarded as material, if not already apparent from the context:

(a) the main characteristics of the product, to an extent appropriate to the medium and the product;

...

(c) the price inclusive of taxes ...’.

16. Subsequent to Directive 2005/29/EC, the rules on misleading and comparative advertising were consolidated, without any substantial amendment, in Directive 2006/114/EC. (6)

II – Relevant facts and the question referred for a preliminary ruling

17. The dispute before the national court concerns two companies which operate supermarkets, Lidl and Vierzon. On 23 September 2006, Vierzon, which trades under the name Leclerc, published a comparative advertisement in a local newspaper which compared the till receipts for a number of items of shopping from four different supermarkets.

18. The lists of items purchased, together with their prices, included 34 products for each supermarket. These were everyday items, mostly foodstuffs that, to a large extent, could be substituted one for another. The brand names of the various items were not mentioned. The total cost of each ‘shopping basket’ indicated that Leclerc supermarket was the best of all of them, charging EUR 46.30 for the chosen items. Lidl was ranked second, with a total cost of EUR 51.40, while the other two supermarkets were still more expensive. The four lists of items and their prices were accompanied by a slogan claiming that supermarkets trading under the name of Leclerc were the cheapest.

19. Following the publication of that advertisement, Lidl issued proceedings against Vierzon before the Tribunal de commerce de Bourges, arguing, in particular, that it had infringed the rules on comparative advertising.

20. Considering it necessary to obtain an interpretation of the rules of the European Union on comparative advertising, the national court stayed proceedings and referred the following question to the Court of Justice for a preliminary ruling:

‘Is Article 3a of Directive 84/450/EEC, as amended by Directive 97/55/EC, to be interpreted as meaning that it is unlawful to engage in comparative advertising on the basis of the price of products meeting the same needs or intended for the same purpose, that is to say, products which are sufficiently interchangeable, on the sole ground that, in regard to food products, the extent to which consumers would like to eat those products, or, in any case, the pleasure of consuming them, is completely different according to the conditions and the place of production, the ingredients used and the experience of the producer?’

III – Procedure before the Court

21. The order for reference was received at the Court Registry on 8 May 2009. The parties in the main proceedings lodged written observations, along with the Czech, Austrian and French Governments and the Commission.

22. At the hearing on 1 July 2010, the parties in the main proceedings, the French Government and the Commission were heard.

IV – The question referred for a preliminary ruling

A – The admissibility of the question

23. In its written observations, the French Government submits, principally, that the question referred should be ruled inadmissible on the ground that the order for reference fails to set out sufficient information to enable the products which feature in the comparative advertisement and their specific characteristics to be precisely identified.

24. However, it must be observed that the question raised by the referring court, whilst connected with a factual situation that is described only in relatively summary fashion, is in fact a purely legal question and, as such, is expressed with clarity. Any detailed knowledge of the specific factual circumstances of the dispute before the national court, whilst not unhelpful, is not absolutely necessary for the purpose of providing an answer, legal and abstract, to an equally abstract question.

25. It must also be observed that a copy of the comparative advertisement which is the subject of the dispute before the referring court was annexed to the observations of one of the parties to the proceedings before the Court and is therefore among the documents on the Court’s file. Indeed, at the hearing, the French Government expressed itself in terms that suggested that it regarded the problem of admissibility as having been resolved.

26. The objection of inadmissibility must therefore be dismissed.

B – The effect of Directive 2005/29/EC

27. The present case throws up a peculiar problem, one which was raised in particular in the observations of the Austrian Government, concerning the effect, if any, that Directive 2005/29/EC might have on the answer to

be given to the question referred for a preliminary ruling. As I mentioned when setting out the legislative context, that directive was already in force at the time of the relevant facts, but the period for its transposition into national law had not yet expired.

28. In such cases, the case-law of the Court of Justice requires, as far as possible, rules of national law to be interpreted in such a way as not to compromise to any significant degree the attainment of the objectives of a directive where the period for transposition of the directive has not yet expired. (7)

29. In the present case, however, the fundamental question is, I think, whether it would materially alter the answer to be given to the national court if Directive 2005/29/EC were taken into account. In my opinion the answer is that it would not.

30. I would observe at the outset that, in so far as concerns the present case, Directive 2005/29/EC merely provided some clarification concerning misleading advertising. The question raised by the referring court, however, does not concern the conditions under which advertising may be classified as misleading, but solely whether the conditions under which comparative advertising is permitted may be applied in general to foodstuffs. The fact that one of the conditions under which comparative advertising is permitted is that it must not be misleading does not alter the fact that the question referred does not concern the definition of misleading advertising.

31. In any event, even if the amendments introduced by Directive 2005/29/EC were to be taken into account, it seems clear to me that that would not present any particular difficulty. Indeed, in practical terms, that directive merely introduced a number of clarifications, mainly in Articles 6 and 7, to which reference is made in the reformulated Article 3a of Directive 84/450/EEC, which clarified – but did not alter or, still less, distort – the definition of misleading advertising in Directive 84/450/EEC, as amended by Directive 97/55/EC. Consequently, it is difficult to see how an interpretation of misleading advertising that focused solely on the wording of Directive 84/450/EEC in the version applicable at the time of the relevant facts, which was more vague and general, could, to borrow the form of words used by the Court, ‘seriously compromise, after the period for transposition has expired, the attainment of the objective pursued’ (8) by the more recent directive.

32. I therefore think it unnecessary, for the purpose of answering the question referred by the national court, for this Court to take account of the content of Directive 2005/29/EC.

C – The nature of the rights invoked

33. The dispute before the national court involves two private individuals. Arguably, the question referred might therefore entail what is referred to as ‘horizontal’ application of a directive, something contrary to the established case-law of the Court, according to which, in principle, a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual. (9)

34. However, I would observe, as the French Government rightly pointed out in its observations, that the national court is called upon in the present dispute to interpret a provision of domestic law which transposed, in substantially literal fashion, Directive 84/450/EEC as amended by Directive 97/55/EC.

35. Consequently, in view in particular of the duty upon national courts to interpret provisions of national law which transpose a directive, as far as possible, in the light of the wording and purpose of the directive concerned, in order to achieve the result sought by that directive, (10) there is, from this point of view also, no problem as regards the admissibility or relevance of the question referred by the Tribunal de commerce de Bourges, for a preliminary ruling.

D – Directive 84/450/EEC and comparative advertising – general considerations

36. The purpose of Article 3a of the Directive, which lists the conditions under which comparative advertising is permitted in general, is to ‘stimulate competition between suppliers of goods and services to the consumer’s advantage, by allowing competitors to highlight objectively the merits of the various comparable products while, at the same time, prohibiting practices which may distort competition, be detrimental to competitors and have an adverse effect on consumer choice’. (11)

37. On that basis, the case-law of the Court has consistently held that there is a duty to interpret the provisions of the Directive in a sense favourable to comparative advertising, while at the same time always ensuring that consumers are protected from possibly misleading advertising. (12)

38. It should be borne in mind that the definition of comparative advertising in the Directive is a very broad one. All that is in fact required in order for there to be comparative advertising is for a representation to be made, in whatever form, which refers, even by implication, to a competitor or to the goods or services offered by a competitor. It is not even necessary for there to be any real comparison between the goods and services offered by the advertiser and those of a competitor. (13)

39. Moreover, the rules on comparative advertising contained in the Directive are exhaustive. Consequently, any stricter national provisions on protection against misleading advertising may not be applied. (14)

E – The conditions under which comparative advertising is permitted in general

40. The conditions under which comparative advertising is permitted in general are set out in Article 3a(1) of the Directive. There are eight conditions in all, and they are cumulative; it is sufficient for only one of them to be infringed for the comparative advertisement to be unlawful. (15) For the purposes of answering the question referred, however, only the first three conditions are relevant. The remaining conditions relate to use of or references to trade marks, distinguishing marks, trade names and designations of origin and are thus not applicable.

41. The first condition which comparative advertising must satisfy if it is to be permitted is that it must not be

misleading. I have already touched upon this requirement and shall return to it later. (16) The fact nevertheless remains that the referring court is not asking this Court about the definition of misleading advertising. The question referred is simply whether or not the rules on comparative advertising are applicable in a general and abstract manner to comparative advertising that compares foodstuffs.

42. Of more direct relevance to the present case are the second and third conditions under which comparative advertising is permitted. The second condition requires, as we have seen, that the comparative advertisement 'compares goods or services meeting the same needs or intended for the same purpose'. On this point, mindful of the favourable disposition toward comparative advertising manifested by the legislature responsible for the Directive, the Court has had occasion to state that this condition should not be interpreted too narrowly. In particular, it has been interpreted as meaning that the goods being compared must simply display 'a sufficient degree of interchangeability for consumers'. (17)

43. Finally, the third condition under which comparative advertising is permitted is that it 'objectively compares one or more material, relevant, verifiable and representative features of [the goods compared], which may include price'. In this connection, it must be observed that comparative advertising in which price is the only point of comparison, as it is in the present case, is permitted. (18)

44. Having clarified the conditions relevant to the present case under which, as a general rule, comparative advertising is permitted, I shall now go on to address the essential part of the question referred by the national court, namely whether those conditions are applicable to comparisons of foodstuffs.

F – Application of the Directive to comparative advertisements comparing foodstuffs

45. As we have seen, the essence of the question referred by the national court for a preliminary ruling is whether the provisions of European Union law on comparative advertising are, as a general rule, applicable to the comparison of foodstuffs. I would observe at this juncture that the advertisement at issue in the main proceedings does not in fact relate solely to foodstuffs; towards the end of the list of compared products are to be found, for example, detergents. In any event, the vast majority of the products compared are in fact foodstuffs, which explains and justifies the tenor of the question referred for a preliminary ruling.

46. The fact that the comparison in the present case is not of individual items but of a list of goods does not raise any issue as to whether the comparative advertisement is permissible. This particular type of advertisement has in fact been recognised in the case-law of the Court as lawful, provided that the listed items being compared are comparable one for one. (19) Naturally, it is for the referring court to ascertain whether that condition is satisfied. However, on the basis of the information in the Court's file, it seems that, in the present case, the condition in question is satisfied, since the items included in each 'shopping basket'

are listed in a particular order and appear to be interchangeable with the items listed in the same position in each of the other 'shopping baskets'.

47. Directive 84/450/EEC contains no express exception or particular provision relating to foodstuffs. It is difficult therefore to see any basis for regarding as unlawful, in any general sense, comparative advertising that compares foodstuffs, especially in the light of the interpretative principle which, in case of doubt, requires preference always to be given to an interpretation of the Directive that is favourable to comparative advertising. (20) Moreover, the Court has in the past been presented with questions concerning the comparative advertising of foodstuffs and on no such occasion has any difficulty arisen in connection with any purported inapplicability of the Directive to such products. (21) Nor should it be forgotten that the conditions under which comparative advertising is permitted set out in Article 3a(1) of the Directive, include, in subparagraph (f), a provision relating to goods having a designation of origin, which would make no sense if foodstuffs could not be compared.

48. I have already mentioned that, in the Court's interpretation, the requirement laid down in Article 3a(1)(b) of the Directive that the goods being compared must meet the same needs or be intended for the same purpose, simply means that the goods must display a sufficient degree of interchangeability (22). It seems clear to me that that formula does not require that the foodstuffs compared should have the same taste characteristics, provided, of course, that the case does not amount to one of misleading advertising, as will be seen later. The Court followed the same reasoning when it held that a comparative advertisement which compared a product having no designation of origin with a product that did have one was lawful. (23)

49. Moreover, as the Commission correctly pointed out in its written observations, if comparative advertising were lawful only if it compared products that were the same, or in any event, had equivalent characteristics, it would be deprived of most of its meaning, since its very purpose is to compare different products and demonstrate their relative merits (and deficiencies).

50. The Court has already firmly established a number of points concerning the specific rules for determining whether there is a sufficient degree of interchangeability between the products compared. It is an assessment which the national court must make on the basis of the aims of the Directive and the principles laid down by case-law. The national court must, in carrying out its assessment, consider both the present state of the market and possible developments in that market, without necessarily restricting itself to consumer habits in a single Member State or given region. Moreover, the image which the advertiser wishes to impart to the product may also play a part in the assessment. (24)

51. It is impossible to say in advance what factors the national court might regard as being of decisive importance in its assessment of the interchangeability, for consumers, of the products compared. The assessment must be carried out on a case by case basis, taking into

account the specific circumstances of the individual situation. (25) Factors such as the quality of the products compared and whether they belong to any given range of products might, however, be important, provided that they can influence the substitutability, for consumers, of the products compared.

52. On the basis, therefore, that differences in the taste of foodstuffs that are the subject of comparison will not render a comparative advertisement unlawful, such an advertisement will be lawful only if: (a) there is a sufficient degree of interchangeability between the products, which is a matter for the national court to decide; (b) the advertisement is not misleading (I shall return to that point shortly); and (c) the other conditions governing comparative advertising set out in Article 3a(1) of the Directive are satisfied.

53. To include the total taste equivalence test among the criteria according to which the comparative advertising of foodstuffs may be permitted would be tantamount to holding that the Directive is wholly inapplicable to such products. As indeed the Czech Government pointed out in its written observations, such a condition, which was not contemplated by the legislature, would introduce a subjective element to the assessment of whether a comparative advertisement is permissible, enabling competitors to block the comparative advertisements of their rivals by alleging differences in quality or taste between the respective products.

G – Assessing whether the advertisement is misleading

54. As I have already mentioned, the national court is not asking the Court for guidance on misleading advertising. However, since one of the fundamental conditions that must be satisfied if a comparative advertisement is to be permitted is that it must not be misleading, and since the question arises whether the concept of misleading advertising applicable to foodstuffs is different from the concept ordinarily applicable, it seems appropriate to make a few brief observations on the point.

55. As we have seen, the general definition of misleading advertising is in Article 2(2) of Directive 84/450/EEC. (26) There are two essential elements. First, misleading advertising must deceive the persons to whom it is addressed (or at least, must have the potential to deceive them). Secondly, as a consequence of its deceptive nature, misleading advertising must be likely to affect the economic behaviour of the public to whom it is addressed, or harm a competitor of the advertiser.

56. It is always a matter for the national court to assess whether an advertisement is misleading and it must do so on the basis of the specific circumstances of each particular case and bearing in mind in particular the consumers to whom the advertisement is addressed, taking as a reference the average consumer who is reasonably well informed and reasonably observant and circumspect. (27)

57. In the present case, without wishing to encroach upon the national court's exclusive jurisdiction in the

matter, it seems to me possible to identify a number of key points to be borne in mind in determining whether the consumers to whom the comparative advertisement in question was addressed were misled or ran the risk of being misled.

58. First of all, the fact that the comparative advertisement in question does not state the brand names of the goods compared cannot, as a general rule, be regarded as rendering the advertisement misleading. Admittedly, the Court has found that, in some cases, a failure to state the brand names of products being compared might constitute misleading advertising. However, as was made clear in *Pippig Augenoptik*, that would only be in the case where the brand name of the products may significantly affect the buyer's choice and the comparison concerns rival products whose respective brand names differ considerably in the extent to which they are known. (28)

59. In other words, failure to state a brand name can constitute misleading advertising only in a limited number of cases. The threshold set by the Court in *Pippig Augenoptik* is very high. That case concerned a failure to state the brand names of spectacle lenses, and thus a product in quite a different category, in terms of price and degree of interchangeability, from a series of basic household food items. Nor should it be forgotten that, also in that case, the Court referred back to the national court the decision whether or not the advertisement in question was misleading.

60. Therefore, notwithstanding that the national court alone can rule on the point, it seems to me unlikely that, in the present case, failure to state the brand name of the products compared could constitute behaviour amounting to misleading advertising. It would be different if, for example, the failure to state the brand name of the products compared was used by the advertiser to mislead consumers about the products. That would be the case where a comparison was designed to suggest, misleadingly, that a product offered for sale at a significantly lower price was of the same brand as a more expensive product.

61. Failure to state brand names could be significant, on the other hand, if, as a result, it was impossible to identify the products being compared. As the Court has held, the products being compared must be capable of being 'individually and specifically' identified. (29) If, as in the present case, the advertisement identifies the products generically ('margarine', 'sandwich spread', 'tinned tomatoes', etc.) without giving the brand name, there may be a risk that the products compared cannot be identified with sufficient precision. That too, however, is for the national court to decide. If, for example, the products compared were the only ones of that type sold in the supermarkets concerned (that is to say, following the examples in the preceding sentence, the only margarine, the only tinned tomatoes etc.) or were by their nature absolutely interchangeable with the rival products, then there could be no risk of being unable to identify the products correctly or at all.

62. The Court has also had occasion to observe that the method used to select the specific products that go into

each ‘shopping basket’ compared in an advertisement could, in theory, also constitute misleading advertising. In particular, that could be the case if the products chosen could give rise to the mistaken belief on the part of the consumer that all the advertiser’s products were cheaper than all the products of his competitors. (30) I would, however, observe that those observations are not relevant to the present case. The Court in fact made them in relation to a situation in which an advertisement compared, not specific products, but the general level of prices charged by competing supermarkets. By contrast, in the case now under consideration there are no general claims about prices, which are even lower in one supermarket than in some other. The comparative advertisement on which the referring court must rule compares, as has been seen, a clear, specific number of products on sale at competing supermarkets. The fact that the comparison is accompanied by a general slogan to the effect that the advertiser’s supermarket is the best, no figures or quantities being provided, seems to me entirely irrelevant.

V – Conclusion

63. In the light of the foregoing considerations, I propose that the Court give the following answer to the question referred to it by the Tribunal de commerce de Bourges:

In accordance with Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising, a comparative advertisement which compares, solely on the basis of price, foodstuffs which, though different in terms of taste, nevertheless display a sufficient degree of interchangeability, is lawful. It is for the national court to determine whether that condition is satisfied, along with all the other conditions laid down in Article 3a of Directive 84/450/EEC, in particular the condition prohibiting misleading advertising.

1 – Original language: Italian.

2 – Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising (OJ 1984 L 250, p. 17). Before its amendment by Directive 97/55/EC, the title of Directive 84/450/EEC was different, reflecting its narrower scope (‘Directive ... relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising’).

3 – Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising (OJ 1997 L 290, p. 18).

4 – Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 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 (‘Unfair

Commercial Practices Directive’) (OJ 2005 L 149, p. 22).

5 – See Article 19 of Directive 2005/29/EC.

6 – Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version) (OJ 2006 L 376, p. 21).

7 – Case C-212/04 Adeneler and Others [2006] ECR I-6057, paragraph 123, and Joined Cases C 261/07 and C-299/07 VTB-VAB [2009] ECR I-2949, paragraph 39.

8 – VTB-VAB, cited above in footnote 7; paragraph 39.

9 – See, for example, most recently, the judgment of 19 January 2010 in Case C 555/07 Küçükdeveci [2010] ECR I-0000, paragraph 46 and the case-law cited.

10 – See, for example, most recently, the judgment of 28 January 2010 in Case C 406/08 Uniplex (UK) [2010] ECR I-0000, paragraph 45 and the case-law cited.

11 – Case C-487/07 L’Oréal and Others [2009] ECR I-5185, paragraph 68.

12 – Ibid. paragraph 69 and the case-law cited therein.

13 – Case C-112/99 Toshiba Europe [2001] ECR I 7945, paragraph 31.

14 – See Case C-44/01 Pippig Augenoptik [2003] ECR I 3095, paragraph 44. By contrast, as far as misleading advertising is concerned, the Directive, in the version applicable at the time of the facts in the main proceedings, provided for only minimal harmonisation, allowing national legislatures to apply more stringent rules, in particular for the protection of consumers (ibidem, paragraph 40), provided that they did not undermine the rules on comparative advertising relating to the form and content of the comparison (ibid. paragraph 44). It should also be observed that, since Directive 2005/29/EC came into effect, European Union law must be regarded as exhaustive, even in certain areas of misleading advertising, since the Member States are now at liberty to lay down more stringent provisions only for the protection of traders and competitors (see recital 6 in the preamble to Directive 2005/29/EC and the new wording of Article 7 of Directive 84/450/EEC).

15 – See recital 11 in the preamble to Directive 97/55/EC, which states that ‘the conditions of comparative advertising should be cumulative and respected in their entirety ...’. See also paragraph 54 of the judgment in Pippig Augenoptik, cited above in footnote 14.

16 – See paragraph 54 et seq. below.

17 – Case C-356/04 Lidl Belgium [2006] ECR I 8501, paragraph 26; and Case C 381/05 De Landtsheer Emmanuel [2007] ECR I 3115, paragraph 44.

18 – See recital 8 in the preamble to Directive 97/55/EC, which states that ‘comparison of the price only of goods and services should be possible if this comparison respects certain conditions, in particular that it shall not be misleading’. See also paragraph 56 of Lidl Belgium, cited in footnote 17.

19 – See paragraphs 34 to 36 of the judgment in Lidl Belgium, cited in footnote 17.

20 – See paragraph 37 above.

21 – See, for example, Lidl Belgium and De Landtsheer Emmanuel, both cited in footnote 17.

22 – See paragraph 42 above.

23 – De Landtsheer Emmanuel, cited in footnote 17 paragraph 66.

24 – Ibid. paragraphs 33 to 37 and 43.

25 – In this connection I would refer to points 98 to 105 of my Opinion of 30 November 2006 in De Landtsheer Emmanuel cited in footnote 17.

26 – Lidl Belgium, cited in footnote 17, paragraph 76.

27 – Case C-373/90 X [1992] ECR I 131, paragraph 15; Pippig Augenoptik, cited in footnote 14, paragraph 55; and Lidl Belgium, cited in footnote 17 paragraphs 77 and 78 and the case-law cited.

28 – Pippig Augenoptik, cited in footnote 14, paragraph 53.

29 – Lidl Belgium, cited in footnote 17, paragraph 61.

30 – Ibid. paragraph 83.