

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 7 September 2010¹

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.

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.

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.

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

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.

4. The law that applies to this case is Directive 84/450/EEC² ('the Directive'), as amended by Directive 97/55/EC.³

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).

1 — Original language: Italian.

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’.

- (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 3 of the Directive reads as follows:

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:

‘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;
- (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/EC⁴ 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.

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).

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

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

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

- (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;

- (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;

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

- (b) it compares goods or services meeting the same needs or intended for the same purpose;

- (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.’

- (c) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;

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

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

‘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.

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:

....'

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

(a) the existence or nature of the product;

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

...

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.

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:

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

(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;

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

....'

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

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).

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.

ingredients used and the experience of the producer?’

III — Procedure before the Court

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

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.

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:

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

‘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

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

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.

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.

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.

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

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 principal, 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

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 *Kücükdıveci* [2010] ECR I-365, paragraph 46 and the case-law cited.

of domestic law which transposed, in substantially literal fashion, Directive 84/450/EEC as amended by Directive 97/55/EC.

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

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.

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

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

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

10 — See, for example, most recently, the judgment of 28 January 2010 in Case C-406/08 *Uniplex (UK)* [2010] ECR I-817, 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.

provisions on protection against misleading advertising may not be applied.¹⁴

trade names and designations of origin and are thus not applicable.

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,

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

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.

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’.

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.

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 interchangeability²². 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

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.

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.

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.

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.

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.

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,

29 — *Lidl Belgium*, cited in footnote 17, paragraph 61.

30 — *Ibid.* paragraph 83.

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.