Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 21 March 2013[1]

Case C-657/11

Belgian Electronic Sorting Technology NV
v
Bert Peelaers
Visys NV

(Request for a preliminary ruling from the Hof van Cassatie (Belgium))

(Directives 84/450/EEC and 2006/114/EC — Misleading and comparative advertising — Definition of 'advertising' — Registration and use of a domain name — Use of metatags)

1. The digital revolution which has taken place over the last two decades with the advent and further development of the Internet has profoundly altered the methods of promoting and marketing the goods and services offered by undertakings. In that altered context, disputes concerning situations involving use of the Internet by undertakings for commercial purposes have arisen more and more frequently. However, the development of written law is unable to keep up with technological advances. Consequently, in order to resolve those cases, which have also been brought before the Court on several occasions,[2] it is often necessary to apply traditional legal concepts, sometimes set out in acts of the Union that were not originally intended to be applied to cases involving use of the Internet. Therefore, disputes of that kind are likely to give rise to questions as to the scope of those traditional legal concepts.

2. The dispute which has given rise to the present request for a preliminary ruling from the Hof van Cassatie (Court of Cassation, Belgium) is a typical example of such a case. In connection with a dispute concerning use of the Internet for promotional purposes, the national court asks the Court to interpret the term 'advertising' as used in Article 2(1) of Council Directive 84/450/EEC[3] and corresponding Article 2(a) of Directive 2006/114/EC,[4] which codified Directive 84/450,[5] to determine whether that term covers, on the one hand, the registration and use of a domain name and, on the other, the use of metatags in the source code of a website.

3. As a preliminary point, it may be useful to clarify what is meant by the terms 'domain name' and 'metatags'.

1 — Original language: Italian.

2 — See, of the many cases in point, Joined Cases C-236/08 to C-238/08 *Google France and Google* [2010] ECR I-2417; Case C-324/09 *L'Oréal and Others* [2011] ECR I-6011, and Case C-323/09 *Interflora and Interflora British Unit* [2011] ECR I-8625.

3 — Council Directive 84/450/EEC of 10 September 1984 relating to the approximations of laws, regulations and administrative provisions of the Member States concerning misleading advertisements (OJ 1984 L 250, p. 17).

4 — 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).

5 — See recital 1 in the preamble to Directive 2006/114.

4. A domain name is a combination of letters and numbers linked specifically to one or more alphanumeric Internet addresses,[6] in turn formed from figures and dots that are capable of identifying a computer or server connected to the Internet. To put it more simply, the domain name represents a simplified and accessible form of an alphanumeric address corresponding to a website.

5. Metatags, on the other hand, are codified words in the source code[7] of a website. They are not visible on a webpage and are designed to describe its content. When an online search is carried out using a search engine, the metatags are recognised by the search engine and help determine the order in which the various websites identified by it as matching the search carried out by the user are displayed. In principle, there are two types of metatags: 'meta description tags', which describe the content of a site, and 'key words metatags', which consist of a series of key words which relate to the content of the site itself. The dispute before the national court concerns the use of the latter type of metatags.

I – Legal context

6. Article 2(1) of Directive 84/450, reproduced *expressis verbis* by Article 2(a) of Directive 2006/114, provides:

'For the purpose of this Directive,

1. "advertising" means the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations …'

7. Article 2 of Directive 2000/31/EC[8] provides:

'For the purpose of this Directive, the following terms shall bear the following meanings:

…

(f) "commercial communication" means any form of communication designed to promote, directly or indirectly, the goods, services or image of an undertaking, organisation or person engaged in commercial, industrial or craft activity or practising a regulated profession. The following do not in themselves constitute commercial communications:

— information allowing direct access to the activity of the company, organisation or person, in particular a domain name or an electronic-mail address,

…'

6 — Those alphanumeric addresses are generally known as IP addresses (Internet Protocol addresses) and are made up of a numeric string which specifically identifies a host connected to an information network which uses the Internet Protocol as a communication protocol.

7 — The term 'source code' is used to refer to a written text making up a set of instructions in a programming language that must be compiled in order to be executed. In the case of websites, such source codes are normally written in HTML, the language generally used to format hypertext documents available on the Internet.

8 — Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1).

II – Facts, the proceedings before the national court and the questions referred

8. Belgian Electronic Sorting Technology NV, also known as NV BEST ('BEST'), and Visys NV ('Visys'), the applicant and second defendant in the main proceedings respectively, are both companies active in the sector of the manufacture and distribution of sorting systems incorporating laser technology.

9. On 3 January 2007 Mr Bert Peelaers ('Mr Peelaers'), the founding member of Visys and the first defendant in the main proceedings, registered the domain name 'www.bestlasersorter.com' which corresponds to a website whose content is, like that of the website corresponding the domain 'www.lasersorter.com', identical to that of sites used previously by Visys with the domain names 'www.visys.be' and 'www.visysglobal.be'.

10. On 4 April 2008 BEST registered with the Benelux Trade Mark Office a figurative mark made up of the word 'BEST' for goods and services in Classes 7, 9, 40 and 42 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957.

11. On 23 April 2008 a court official established that, when the search terms 'Best Laser Sorter' were entered in the search engine on the site 'www.google.be', the second search result to appear, directly after BEST's website, was a link to Visys' website. Furthermore, it was clear that Visys also used as metatags for its websites terms such as 'Helius sorter, LS9000, Genius sorter, Best+Helius, Best+Genius, and Best nv' which referred to BEST's identity or corresponded to the names of goods which it marketed.

12. Considering that the registration and use of the domain name 'www.bestlasersorter.com' and the use of the metatags corresponding to the names of its goods misappropriated its trade mark and trade name and constituted inter alia an infringement of the provisions on misleading and comparative advertising,[9] BEST brought, on 30 April 2008, proceedings against Mr Peelaers and Visys, seeking an order that the two latter desist from such conduct. The defendants lodged a counterclaim seeking annulment of the figurative mark 'BEST'.

13. The court at first instance dismissed both the main claims and counterclaim, other than the claim brought by BEST for a declaration that the use of the metatags constituted an act in breach of the law on comparative and misleading advertising. However, the court hearing the appeal dismissed the claims brought by BEST in their entirety and upheld the counterclaim, annulling the figurative mark BEST on the grounds that it lacked distinctive character.

14. By judgment of 8 December 2011 the referring court, before which an appeal on a point of law had been brought, dismissed the grounds of appeal raised by BEST, with the exception of that alleging infringement of the provisions on comparative and misleading advertising, in respect of which it considered it necessary to stay the proceedings before it and refer the following question to the Court for a preliminary ruling:

'Is the term "advertising" in Article 2 of … Directive 84/450/EEC …, and in Article 2 of Directive 2006/114/EC … to be interpreted as encompassing, on the one hand, the registration and use of a domain name and, on the other, the use of metatags in a website's metadata?'

9 — The national law relevant to the present case on which the main claims are based is the Law of 14 July 1991 on commercial practices and consumer information and protection (Handelspraktijkenwet) designed to transpose Directive 84/450 into Belgian law.

III – Procedure before the Court

15. The order for reference was received at the Court Registry on 21 December 2011. Written observations have been submitted by BEST, Mr Peelaers and Visys, the Belgian, Estonian, Italian and Polish Governments, and the Commission. At the hearing on 24 January 2013, submissions were made by BEST, Mr Peelaers and Visys, the Belgian Government and the Commission.

IV – Legal assessment

A – *Request for the Court to reply of its own motion to certain questions*

16. It should be noted, as a preliminary point, that the question referred to the Court in the present case concerns only the interpretation of the term 'advertising' contained in Directives 84/450 and 2006/114.

17. In that context, I therefore consider it necessary to dismiss the request which BEST made to the Court and repeated at the hearing, asking it to reply of its own motion to certain questions relating to trade marks, which the referring court did not consider it necessary to refer to the Court, despite being requested to do so by BEST.

18. In that respect, it should be recalled that it is settled case-law that it is for the referring court alone to determine the subject-matter of the questions it proposes to refer to the Court. It is solely for the national courts before which actions are brought, and that must bear the responsibility for the subsequent judicial decision, to determine in the light of the special features of each case both the need of a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions they submit to the Court. It is not, therefore, necessary to examine questions proposed by the parties that go beyond the scope of that referred by the national court,[10] *a fortiori* when it is clear that that court has expressly dismissed the request for those questions to be referred to the Court.[11]

B – *The question referred*

19. The question referred to the Court for a preliminary ruling in the present case is divided into three parts. The national court asks whether the term 'advertising' contained in Directives 84/450 and 2006/114 encompasses, first, registration of a domain name, second, the use of a domain name and, third, use of metatags in the source code of websites.

20. However, before analysing the various parts of the question in detail, I consider it necessary to make certain preliminary observations on the term 'advertising', as laid down in the two abovementioned directives.

10 — Case C-154/05 *Kersbergen-Lap and Dams-Schipper* [2006] ECR I-6249, paragraphs 22 and 23.

11 — See, to that effect, Case 247/86 *Alsatel* [1988] ECR 5987, paragraphs 7 and 8.

1. Term 'advertising' within the meaning of Directives 84/450 and 2006/114

(a) Whether it is desirable to give a broad interpretation of the term 'advertising' contained in Directives 84/450 and 2006/114

21. Article 2(1) of Directive 84/450, like Article 2(a) of Directive 2006/114, defines 'advertising' as 'the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services'.

22. The two directives provide, therefore, a particularly broad definition of the term 'advertising', which may thus appear in many different forms[12] that cannot be rigidly predetermined. From that perspective, and in the light of that definition, various considerations lead me to concur with the approach suggested by the some of the intervening parties, to the effect that it would be appropriate for the term 'advertising' to be given a broad interpretation.

23. First, I consider that this is suggested by the literal construction of the particularly broad definition itself laid down in the two directives. By referring generally to 'the making of a representation in any form' the wording of that definition demonstrates, in my view, the European legislature's intention not to impose any limitations a priori on the list of representations covered by that provision, other than the condition that the representation actually be made. On the other hand, the fact that the definition does not specify the form in which such representation must be made means that the definition includes any method of making it.

24. Second, an extensive approach in interpreting the term 'advertising' would appear to be the most consistent with the objectives pursued by the directives at issue and, in particular, the specific aims of safeguarding the proper functioning of competition in the single market and freedom and awareness of consumer choice.[13] In that regard, I agree with the Italian Government's observations to the effect that a strict interpretation of the term 'advertising' might leave unregulated certain forms of advertising communication less apparent but potentially more harmful to consumers. Furthermore, the European legislature's intention of including in the scope of Directive 2006/114 all possible forms of advertising is evident from recital 8 in the preamble to that directive, according to which '[i]t is desirable to provide a broad concept of comparative advertising to cover all modes of comparative advertising'.

25. Third, a broad interpretation of the term 'advertising' is consistent also with the approach adopted by the Court in this respect, both with regard to comparative advertising, in relation to which the Court has acknowledged that the broad definition contained in the directives covers all forms of such advertising,[14] and the means of disseminating an advertising message.[15]

26. It is therefore with these considerations in mind that I shall analyse in detail the individual elements that make up the term 'advertising' within the meaning of the definition mentioned at points 6 and 21 above.

12 — Case C-112/99 *Toshiba Europe* [2001] ECR I-7945, paragraph 28.

13 — See, in that regard, recitals 3, 4 and 9 in the preamble to Directive 2006/114.

14 — As regards comparative advertising in particular, see, in addition to *Toshiba* (cited in footnote 12), also Case C-44/01 *Pippig Augenoptik* [2003] ECR I-3095, paragraph 35, and Case C-381/05 *De Landtsheer Emmanuel* [2007] ECR I-3115, paragraph 16.

15 — As early as Case C-68/92 *Commission* v *France* [1993] ECR I-5881, paragraph 16, the Court held that since advertising consists in the dissemination of a message intended to inform consumers of the existence and the qualities of a product or service, with a view to increasing sales, that message can be spread by various means and not only by means of spoken or printed words and/or pictures, the press or the media. In that respect, see also point 55 of the Opinion of Advocate General Bot in Case C-530/09 *Inter-Mark Group* [2011] ECR I-10675.

(b) The individual elements which make up the term 'advertising'

27. It may be inferred from the definition set out in Articles 2(1) and 2(a) of Directives 84/450 and 2006/114, respectively, that three elements must exist for there to be 'advertising': one, there must be 'the making of a representation in any form'; two, that representation must be made 'in connection with a trade, business, craft or profession'; and three, it must have as its specific aim 'to promote the supply of goods or services'.

28. Although the second and third element of that definition would not appear to pose any particular problems of interpretation, it is the interpretation of the first element, that is to say the existence of 'the making of a representation in any form', that lies, in my view, at the heart of the question at issue in the present case.

29. However, as regards specifically that first constituent element of the definition of advertising, it is necessary to make a preliminary point concerning terminology. It should be noted that, with regard to that element of the definition, the various versions of the directive in the different official languages do not correspond precisely. For example, whilst in Italian the definition refers to 'qualsiasi forma di messaggio', in French and Spanish it contains the terms 'toute forme de communication' and 'toda forma de comunicación' respectively, and in English it refers to 'the making of a representation in any form' and in German to 'jede Äußerung'.

30. It must be noted in that regard that it is settled case-law that the provisions of EU law must be interpreted and applied uniformly in the light of the versions in all the European Union languages.[16] When there is divergence between the various language versions of a provision, the latter must be interpreted by reference to the general scheme and the purpose of the rules of which it forms part.[17]

31. Regardless of the various nuances which the terms used can have in the different language versions, it seems clear to me that they all refer to the general concept of communication in the sense of the activity of conveying signs and information from one person to another.[18] Therefore, in the light of the general scheme and purpose of Directives 84/450 and 2006/114 I consider it necessary to interpret the definition at issue by reference to the general concept of communication which is used, moreover, in the various language versions.[19]

32. In communication science, the term 'communication' can normally be broken down into different elements[20] which generally include the following: (i) the sender, or the system (object or person) that sends out the message; (ii) the recipient, or the person targeted who receives and absorbs the information; (iii) the channel, or the means by which the message is conveyed and received; (iv) the formal code, or the system of signs which enables the communication activity to take place; (v) the context, or the situation in which the communicative act occurs (and to which it refers); and, finally, (vi) the true and actual message, or the content of what is to be communicated.

16 — Case C-449/93 *Rockfon* [1995] ECR I-4291, paragraph 28; Case C-296/95 *EMU Tabac and Others* [1998] ECR I-1605, paragraph 36; and Case C-280/04 *Jyske Finans* [2005] ECR I-10683, paragraph 31.

17 — See, most recently, Case C-558/11 *Kurcums Metal* [2012] ECR, paragraph 48 and the case-law cited. See also Case C-437/97 *EKW and Wein & Co* [2000] ECR I-1157, paragraph 42, and Case C-1/02 *Borgmann* [2004] ECR I-3219, paragraph 25.

18 — The very etymology of the term 'communication' (from the Latin *cum*, 'with', and *munire*, 'bind, build', and also *comunico*, 'share') evokes the idea of conveying information.

19 — For example, in addition to the French and Spanish versions mentioned above, the Portuguese version also refers to 'qualquer forma de comunicação'.

20 — The pioneer of this approach back in the late 1940s was Harold D. Lasswell in his work, 'The Structure and Functions of Communication in Society' (New York, 1948). According to the model drawn up by him, known as the '5 Ws', and subsequently reprised and developed by other authors, every communicative act can be described by asking the following question: 'Who says What in What channel to Whom with What effect?

33. In my view, an approach based on such a definition of the term 'communication' can be taken as a starting point for establishing whether or not the three cases mentioned by the national court in its question are covered by the first constituent element of the definition of advertising, and therefore whether they constitute 'the making of a representation in any form' for the purposes of the abovementioned directives.

34. On the other hand, specifically as regards the second element of that definition, that is to say the making of a representation in connection with a trade, it may be pointed out that the reference to the fact that the representation must be 'disseminated' appears to imply that it must be targeted impersonally at the public by means of conveying the message capable of delivering it to an indeterminate number of people, which would appear to exclude interpersonal communications.[21]

35. Finally, as regards the third element, namely the promotional purpose, it can be noted that the provision cited in no way requires that aim to be directly and immediately clear from the representation, so that it is not, therefore, necessary for the representation to refer explicitly to the goods or services promoted by it. Consequently, I consider that cases of indirect promotion of goods and services can also be covered by the definition. Therefore, the directive will not apply solely to cases of product or trade mark advertising (in which the representation affects the image of the product or service offered or of the trade mark by which it is marketed), but also to cases of so-called 'institutional advertising', that is to say advertising which, by affecting the image of an undertaking, is designed to promote business organisation as such, thus seeking indirectly to increase demand for the goods and services of the undertaking in question.

(c) Relationship between the term 'advertising' contained in Directives 84/450 and 2006/114 and the term 'commercial communication' contained in Directive 2000/31

36. Finally, I think it necessary too, again as a preliminary point, to dwell for a moment on an argument put forward by the Commission, Visys and Mr Peelaers, concerning the relationship between the term 'advertising' contained in Directives 84/450 and 2006/114 and 'commercial communication' contained in Directive 2000/31.

37. On the basis of the finding that the definition of 'commercial communication' contained in Article 2(f) of Directive 2000/31 establishes that '[t]he following do not in themselves constitute commercial communications: … information allowing direct access to the activity of [a] company, … in particular a domain name', the Commission and the defendants in the main proceedings consider that the same approach must be applied *mutatis mutandis* to the term 'advertising' contained in Directives 84/450 and 2006/114, whose definition is almost identical to that of 'commercial communication' contained in Directive 2000/31. They claim that consequently the exclusion of domain names from the term 'commercial communication' automatically leads to their exclusion from the scope of the term 'advertising', so that the reply to the first and second part of the question must be in the negative.

38. I do not agree with that approach.

39. It should be noted first of all in that regard that Directives 84/450 and 2006/114, on the one hand, and Directive 2000/31, on the other, were adopted in order to pursue different objectives,[22] and therefore the definitions contained in the former cannot necessarily be transposed to the latter.

21 — However, it should be noted in that regard that not all the language versions of the directive refer to the concept of 'disseminate'.

22 — In my view, this finding rules out the establishment of a *lex generalis*/*lex specialis* relationship between the directives at issue, as claimed by some of the intervening parties.

40. More precisely, under Article 1 thereof the specific purpose of Directive 2006/114 is to protect traders against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted. However, it is clear from recitals 4, 6, 8 and 9 in the preamble to that directive, and Article 1 of Directive 84/450, which, as stated above, was codified by Directive 2006/114, that the purpose of the rules on misleading and comparative advertising is also to protect the consumers' interests and their freedom of choice, which could be limited or undermined by improper advertising. Those rules are also aimed at ensuring the smooth functioning of the internal market by avoiding distortions of competition within it.[23]

41. As regards Directive 2000/31, under Article 1 thereof it seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.

42. More specifically, the purpose of the rules on commercial communications laid down in Directive 2000/31 is to promote the transparency of the activities carried out by undertakings operating in the field of information society services, in the interests of consumer protection and fair trading.[24] To that end, it provides for certain information which electronic commercial communications must necessarily contain,[25] and lays down certain provisions on unsolicited commercial communications designed to protect the recipients of those communications, in order to avoid disruption to the functioning of interactive networks,[26] and provisions aimed at guaranteeing compliance with the rules governing members of the regulated professions.[27]

43. Furthermore, under Article 2 of both Directive 2000/31 and Directives 84/450 and 2006/114 the definitions contained therein are to bear the relevant meanings solely for the purposes of the respective directives themselves. In that context, although it is conceivable that the definition of a term contained in one directive could be used to interpret a term defined in another, I consider that that cannot be done automatically. Moreover, it is necessary to note how the two directives define two differently named terms, namely, on the one hand, 'advertising' and, on the other, 'commercial communication'. It is probable that if the European legislature had considered that the two terms constituted a single concept it would have given them the same name.

44. Finally, and at all events, it must be noted that the actual definition of commercial communication contained in Directive 2000/31, in so far as it uses the phrase 'in themselves', does not exclude the possibility, in certain circumstances, of domain names' being a form of communication which does constitute a commercial communication.[28]

45. In the light of all of those considerations, I consider that the fact that Article 2(f) of Directive 2000/31 provides that domain names do not in themselves constitute commercial communications cannot automatically exclude those domain names from the ambit of the term 'advertising' contained in Directives 84/450 and 2006/114.

23 — See recitals 2, 3 and 6 in the preamble to Directive 2006/114.

24 — See recital 29 in the preamble to Directive 2000/31/EC. See also, to that effect, *L'Oréal and Others* (cited in footnote 2).

25 — See Article 6 of Directive 2000/31.

26 — See Article 7 of Directive 2000/31 and recitals 30 and 31 in the preamble thereto.

27 — See Article 8 of Directive 2000/31 and recital 32 in the preamble thereto.

28 — It is also clear from the Commission proposal for the adoption of Directive 2000/31, which the Commission itself mentions in its observations (COM(1998) 586 final, p. 11), that that institution considered that the mention of domain names did not have to constitute a commercial communication only in certain circumstances. Therefore, that does not exclude the possibility, in other circumstances, of domain names not being regarded as a commercial communication.

2. On the three parts of the question referred

46. It is, therefore, in the light of the foregoing considerations that I can now go on to analyse those three parts that make up the question referred by the national court.

(a) Registration of the domain name

47. In the first part of its question the national court asks the Court, in essence, whether the registration of a domain name can constitute advertising within the meaning of Directives 84/450 and 2006/114.

48. It should be noted in that regard that the registration of a domain name is nothing other than a formal act by which a person asks the body designated to manage domain names, which is generally governed by private law,[29] to register the domain name which it has chosen and presumably intends to use. If the conditions for registration are satisfied[30] and the relevant consideration is paid, that body enters into a contractual undertaking to enter that domain name into its database and link Internet users which type in that domain name only to the IP address specified by the domain name holder.[31]

49. It should further be noted that the mere registration of a domain name in no way means that it will then actually be used to create a website, and it could remain unused indefinitely.

50. In those circumstances, it is, in my view, evident rather that the explanation of a formality such as that described above in no way constitutes the making of a representation for promotional purposes. I therefore consider that it cannot be included in the definition of 'advertising' contained in Directives 84/450 and 2006/114.

(b) Use of the domain name

51. In the second part of its question the national court asks the Court, in essence, to rule whether the use of a domain name can constitute advertising within the meaning of Directives 84/450 and 2006/114.

52. The national court does not specify exactly what it means, in its question, by 'use' of the domain name. However, it must be pointed out in that regard that, as is also clear from the statements which some of the intervening parties made at the hearing, a domain name may be used in rather different ways.

53. The first and most obvious use of a domain name is to create and actually make available on the Internet a website that can be viewed at an IP address corresponding to that domain name. That use of the domain name would appear to be relevant to the main proceedings inasmuch as Visys has in fact used the domain names referring to the name of its competitor by putting online websites at addresses corresponding to it.

29 — For example, the Internet Corporation for Assigned Names and Numbers (ICANN), which is a private organisation, is competent for the assigning of generic top level domains (such as .com, or .org). Top level .eu domains, on the other hand, are assigned by the non-profit-making association EUR*id* (European Registry for Internet Domains) under the terms of Regulation (EC) No 733/2002 of the European Parliament and of the Council of 22 April 2002 on the implementation of the .eu Top Level Domain (OJ 2002 L 113, p. 1).

30 — In general, the body competent for registration grants or refuses it solely on the basis of the availability of the domain name requested, without checks normally being carried out on the existence or otherwise of the applicant's right to the chosen name.

31 — See footnote 6 above.

54. Regardless of the purpose of promoting supplies of goods and services which may, or may not, be connected with such use of the domain name and must be determined case by case, I consider that, in order to establish whether or not actually putting a website online at an address corresponding to a domain name can constitute a form of advertising, it is necessary to determine whether or not putting a website online constitutes the making of a representation within the meaning of the definition of advertising contained in Directives 84/450 and 2006/114.

55. To that end, I consider that the approach set out at points 32 and 33 above can be taken as a starting point by establishing whether or not the elements normally regarded as specific to communication are present. When a website is put online, I consider that it is possible to identify a sender, that is to say, the person who puts the website online at an address corresponding to the domain name, a recipient, that is to say, the user who connects to the site by entering the domain name in the browser, and a message, that is to say, the content of the website, which may or may not have a promotional purpose within terms specified at point 35 above. The channel used to convey the message is the computer which connects to the Internet. The formal code is made up of the written, visual or aural signs used to convey the message via the website. The context depends on each particular situation.

56. Furthermore, putting a website online undoubtedly constitutes a means of conveying the message contained therein directed impersonally at the public and capable of delivering it to an indeterminate number of people. The requirement that the representation be 'disseminated' (made) at point 34 above is therefore also satisfied.

57. The foregoing considerations lead me therefore to think that putting a website online at an address corresponding to a domain name constitutes use of the domain name which gives rise to the making of a representation within the meaning of Directives 84/450 and 2006/114. Consequently, when that representation is made in connection with a trade with a view to promoting goods and services, it will constitute advertising within the meaning of those directives.

58. That said, it appears to me beyond doubt, however, that it is possible to conceive of other domain name uses that could, in particular circumstances, constitute forms of advertising.

59. For example, the domain name is often used by undertakings within advertising communications made by conventional means, such as television advertisements, posters, and advertisements in periodicals, to refer to the website of the undertaking (or more specifically of the product or service concerned). In this way, the consumer is made aware that it is possible to obtain by that avenue additional, potentially promotional, information that supplements and consolidates the advertising message or that is aimed at promoting business organisation as such, and thus indirectly its goods and services.[32] Therefore, in such contexts it seems to me beyond doubt that the domain name is used for forms of communication constituting advertising.

60. However, it is also possible for the domain name itself to be of a promotional nature in the strict sense when, for example, it contains elements commending the goods or services on offer. Regardless of the issues concerning the competitor's trade mark and trade name, the case of the site www.bestlasersorter.com appears to me to be a rather glaring example of that kind in that it clearly suggests that by connecting to the site in question one will find the best sorting systems incorporating laser technology. Therefore, depending on the use of such a domain name, that name can constitute in itself an advertising message.

32 — As regards the concept of 'institutional advertising', see point 35 above.

61. For example, as regards the case at issue in the main proceedings in particular, I consider that entering into the database of a research engine a domain name with characteristics promoting the goods or services offered by an undertaking and actually used on the website can constitute an advertising communication. As a result of the search carried out by the Internet user on the search engine, the domain name entered by the holder in its database will appear explicitly on the screen. Such use of the domain name constitutes the making of a representation which, in view of the promotional purpose inherent in that domain name, is of an advertising nature.

62. In the final analysis, however, it is for the national court to establish, in accordance with the specific circumstances of the case at issue in the proceedings pending before it, whether or not the use made of the domain name in a particular case constitutes a representation made in order to promote goods or services and is therefore covered by the term 'advertising' within the meaning of Directives 84/450 and 2006/114.

(c) Use of metatags

63. In the third and final part of the question, the national court asks the Court, in essence, to rule whether the use of metatags in the source code of a website can constitute advertising within the meaning of Directives 84/450 and 2006/114.

64. It may be useful to bear in mind that metatags consist essentially of key words which a website owner inserts into the programming code of its webpage in order to describe the content thereof concisely. They are then recognised by search engines when an Internet user inserts them in connection with a search he carries out using that search engine. Thus, those key words influence the search results by helping to improve the position and visibility of the website in question in the list of results produced by the search that is made. However, the metatags remain invisible to the user.

65. In order to reply to the question referred by the national court, it is necessary to establish whether the use of metatags has the characteristics of a representation made in connection with trade in order to promote the supply of goods or services within the meaning of the definition of advertising mentioned at points 6 and 23 above.

66. Just as in the case of the use of the domain name, I consider that for the purposes of establishing the existence of the first constituent element of the definition of advertising contained in the directives, that is the making of a representation in any form, it is possible to adopt the approach set out at points 32 and 33 above, by analysing whether or not the elements normally regarded as specific to the concept of communication are present.

67. In the case of the use of metatags in the source code of a website, it would seem to me possible to identify a sender, that is the person who inserts the key word in the source code. That person will insert the key word corresponding to the metatag with the specific purpose of having it recognised by search engines and thus influencing the results of the searches carried out by the users thereof.

68. More problematic is the question whether or not a person who receives a piece of information can be regarded as a recipient and whether the key word used as a metatag can constitute a message that is conveyed to that recipient. The user who carries out the search using the search engine will not have direct knowledge of the key word that constitutes the metatag. This will be recognised only by the search engine and will not be communicated directly to the recipient.

69. However, applying a broad interpretation of the concept of communication, as I proposed at points 22 to 25 above, I consider it possible to hold that an Internet user who carries out a search by means of a search engine, is the target, indirectly through the search engine itself, of a piece of information made up of the metatag key word. The message that the sender intends to convey to the

recipient via the metatag and that he receives indirectly via the search engine, consists of the information that the website in whose source code the metatag is contained is linked to the key word and therefore that page is relevant to the user-recipient who carries out the search on the search engine. It is a form of indirect communication but, in my view, can none the less be regarded as form of communication.

70. As regards the other elements of the notion of communication mentioned at point 32 above, in this case too the channel is made up of the computer connected to the Internet and the software that makes up the search engine. The formal code is the language used to indicate the key word and here too the context depends on the facts of the case, and in particular of the search carried out. As regards the requirement that a representation be 'disseminated', that too is, in my view, satisfied in that the insertion of a metatag in the source code of a webpage, in so far as it is considered to be a form of communication, is targeted at an indeterminate number of people, that is to say everyone who wishes to carry out the search on a search engine by reference to the key word which makes up the metatag itself.

71. Applying that approach, I therefore consider that if it were to be found that metatags are inserted into the source code of a webpage in connection with a trade and in order to promote the supply of goods or services, that activity could constitute a form of advertising within the meaning of Directives 84/450 and 2006/114. However, in this case too it will be for the national court to establish whether or not that is so, in accordance with the specific circumstances of the case at issue in the proceedings pending before it.

V – Conclusion

72. On the basis of the foregoing considerations, I propose that the Court reply as follows to the questions submitted by the Hof van Cassatie:

The registration of a domain name does not constitute advertising within the meaning of Article 2 of Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising and Article 2 of Directive 2006/114/EC of 12 December 2006 concerning misleading and comparative advertising.

The use of the domain name and the use of metatags in the source code of a website can constitute advertising within the meaning of those directives. However, it is for the national court to establish whether, in a particular case, the requirements for meeting the definition of advertising within the meaning of those directives are satisfied.