Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 19 October 2016[1]

Case C-562/15

Carrefour Hypermarchés SAS
v
ITM Alimentaire International SASU

(Request for a preliminary ruling from the cour d'appel de Paris (Court of Appeal, Paris, France))

(Reference for a preliminary ruling — Misleading advertising — Comparative advertising — Directive 2006/114/EC — Article 4(a) and (c) — Advertising comparing the prices of products sold in shops having different formats or sizes — Permissibility — Unfair commercial practices — Directive 2005/29/EC — Article 7 — Misleading omission — Material information)

I – Introduction

1. The Court has already addressed, on numerous occasions, the issue of comparative advertising, setting out the conditions regarding the permissibility of such advertising,[2] listed in Article 4 of Directive 2006/114/EC.[3] This request for a preliminary ruling will result in an extension of that case-law. The cour d'appel de Paris (Court of Appeal, Paris, France) raises new issues concerning the interpretation Article 4(a) and (c), which require that comparative advertising is not misleading and that it objectively compares one or more material, relevant, verifiable and representative features of the goods and services compared.

2. The dispute in the main proceedings which gave rise to this request for a preliminary ruling is between two retail competitors, namely ITM Alimentaire International SASU ('ITM'), which is responsible for the strategy and commercial policy of shops in the Intermarché retail chain, and Carrefour Hypermarchés SAS ('Carrefour'), which forms part of the Carrefour group. The subject matter of the dispute is an advertising campaign, launched by Carrefour in 2012, comparing the prices of leading brand products in shops in the Carrefour retail chain and in competitors' shops, including prices in shops in the Intermarché retail chain. ITM claims, in particular, that Carrefour has not complied with national provisions concerning the neutrality and objectivity of any comparative campaign, by comparing the prices in *hypermarkets* in the Carrefour retail chain with the prices in *supermarkets* in the Intermarché retail chain, without informing the public of the criteria for selecting the shops or the difference in the formats of the sales outlets being compared.

1 — Original language: French.

2 — See, inter alia, judgments of 25 October 2001, *Toshiba Europe* (C-112/99, EU:C:2001:566); of 8 April 2003, *Pippig Augenoptik* (C-44/01, EU:C:2003:205); of 19 September 2006, *Lidl Belgium* (C-356/04, EU:C:2006:585), and of 18 November 2010, *Lidl* (C-159/09, EU:C:2010:696).

3 — Directive of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (OJ 2006 L 376, p. 21).

3. In that context, the referring court seeks to ascertain whether, under Article 4(a) and (c) of Directive 2006/114, a comparison of the prices of goods sold by retail outlets is permitted only if the goods are sold in shops having the same format or of the same size. Moreover, the referring court asks the Court whether the fact that the shops whose prices are compared are of different sizes and formats constitutes material information within the meaning of Article 7 of Directive 2005/29/EC[4] and, if so, to what degree must that information be disseminated to the consumer. In that regard, this case raises the issue of the interaction between Directive 2006/114 and Directive 2005/29.

II – Legal framework

A – EU law

1. Directive 2006/114

4. Article 2(b) of Directive 2006/114 provides:

'For the purposes of this Directive:

…

(b) "misleading advertising" means any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor'.

5. Article 4(a) and (c) of Directive 2006/114 provides:

'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(b), 3 and 8(1) of this Directive or Articles 6 and 7 of Directive 2005/29 …;

…

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

4 — Directive 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).

2. Directive 2005/29

6. Article 6 of Directive 2005/29, entitled 'Misleading actions', provides, in paragraph 1(d):

'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:

…

(d) the price or the manner in which the price is calculated, or the existence of a specific price advantage'.

7. Article 7 of Directive 2005/29, entitled 'Misleading omissions', provides, in paragraphs 1 and 2:

'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.

2. It shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.'

B – French law

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

'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 permitted 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, relevant, verifiable and representative features of those goods or services, which may include price'.

9. It is clear from the order for reference that Article L. 121-8 et seq. of the Consumer Code transposes Directive 2006/114 into French law.

III – The dispute in the main proceedings, the question referred and the procedure before the Court

10. In December 2012, Carrefour launched a major television advertising campaign, entitled 'Garantie prix le plus bas' (Lowest price guarantee), comparing the prices of 500 leading brand products in its shops and in competitors' shops and offering to reimburse consumers twice the price difference if they found cheaper prices elsewhere. That campaign, comprising eight advertisements, revealed price differences which favoured Carrefour shops as compared with competitors' shops, including Intermarché shops.

11. From the second televised advertisement onwards, the Intermarché shops selected for the comparison were all supermarkets, whereas the Carrefour shops were all hypermarkets. In the televised advertisements, the word 'super', in smaller letters, appeared under the name Intermarché.

12. On 2 October 2013, having given Carrefour formal notice to stop disseminating that advertising, ITM brought legal proceedings against Carrefour before the tribunal de commerce de Paris (Commercial Court, Paris) (France) claiming, inter alia, that Carrefour should be ordered to pay the sum of EUR 3 million by way of damages for the harm sustained by ITM and prohibited from disseminating on television or on the internet the advertising concerned or any comparative advertising based on similar methods of comparison.

13. By judgment of 31 December 2014, the tribunal de commerce de Paris (Commercial Court, Paris) ordered Carrefour to pay the sum of EUR 800 000 to ITM by way of compensation for the harm sustained, upheld the applications to prohibit the dissemination of the advertising and ordered that the judgment be published.

14. That court held, inter alia, that Carrefour adopted a misleading method of selecting sales outlets, distorting the representativeness of the price surveys and failing to comply with the objectivity requirements arising from Article L. 121-8 of the Consumer Code, and that those breaches of the requirement of objectivity in a comparative advertising campaign constituted unfair competition. [5]

15. In that regard, that court held as follows:

'The CARREFOUR shops selected were hypermarkets, which was not made clear to consumers, since that information appeared not in the televised advertisements, but only on the internet, where it was stated in small print on the homepage of the CARREFOUR website that the lowest price guarantee "applies only in CARREFOUR and CARREFOUR PLANET shops. It therefore does not apply in CARREFOUR Market, CARREFOUR contact or CARREFOUR city shops".

All the Intermarché shops selected from the second advertisement onwards were supermarkets and the basis of comparison changed without consumers being informed of that change.

Moreover, that change in the size of the selected INTERMARCHÉ sales outlets (although INTERMARCHÉ has 1 336 supermarkets and 79 hypermarkets, that is 5% of the total) in which the price surveys were carried out illustrates the tendentious nature of the price comparison method, which totally lacked objectivity, since CARREFOUR, without expressly saying so, was comparing its 223 hypermarkets with INTERMARCHÉ's 1 336 supermarkets.'

5 — The tribunal de commerce de Paris (Commercial Court, Paris) also held that Carrefour had failed to fulfil its obligations, under Article L. 121-12 of the Consumer Code, to prove the material accuracy of the announcements and statements in the advertising in question. Moreover, that court considered that the use of price information determined several months prior to the dissemination of the televised advertisements was misleading in the light of that article.

16. Carrefour appealed against the judgment of the tribunal de commerce de Paris (Commercial Court, Paris) before the cour d'appel de Paris (Court of Appeal, Paris), which decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) [Must] Article 4(a) and (c) of Directive 2006/114 … be interpreted as meaning that a comparison of the price of goods sold by retail outlets is permitted only if the goods are sold in shops having the same format or of the same size[?]

(2) [Does] the fact that the shops whose prices are compared are of different sizes and formats [constitute] material information within the meaning of [Directive 2005/29] that must necessarily be brought to the knowledge of the consumer[?]

(3) If so, to what degree and/or via what medium must that information be disseminated to the consumer[?]'

17. Written observations have been lodged by Carrefour, ITM, the French Government and the European Commission; those parties participated at the hearing held on 6 July 2016.

IV – Legal assessment

A – The interpretation of Article 4(a) and (c) of Directive 2006/114 (first question)

1. The proposed interpretations

18. The two parties to the dispute in the main proceedings maintain that the first question referred requires a negative response, that is to say that Article 4(a) and (c) of Directive 2006/114 does not require that a comparison of the price of goods sold by retail outlets must apply to goods sold in shops having the same format or the same size.

19. The French Government submits that a comparison of prices carried out for goods sold in shops having different formats or sizes constitutes an objective comparison within the meaning of Article 4(c) of Directive 2006/114 but may constitute misleading comparative advertising for the purposes of Article 4(a) of that directive, which it is for the referring court to ascertain.

20. The Commission argues that, in most cases, an asymmetry in the size and format of the advertiser and the competitor is not likely to deceive consumers or to affect their behaviour. However, according to the Commission, it is not inconceivable that, in certain circumstances, such differences may be misleading within the meaning of Article 4(a) of Directive 2006/114, which would depend, inter alia, on the level of information given to consumers. Similarly, verification of the condition of objectivity set out in Article 4(c) would depend on a case-by-case analysis.

21. For my part, I consider, for the reasons set out below, that Article 4(a) and (c) of Directive 2006/114 does not, in principle, preclude an advertiser from comparing for advertising purposes the prices in shops having different formats or sizes (part A.2).[6] However, I take the view that advertising, such as that at issue in the main proceedings, may, in certain circumstances, be misleading within the meaning of Article 4(a) (part A.3) and be in breach of the condition of objectivity laid down in Article 4(c) (part A.4).

6 — It is not apparent from the order for reference what meaning the referring court attaches to the concepts of 'format' and 'size'. On the basis of the observations presented to the Court, I assume that the concept of 'format' refers to the type of shop (for example a hypermarket, a supermarket or a local shop), whilst the concept of 'size' refers to the sales area of the shop.

2. The possibility, in principle, of comparing prices of goods sold in shops having different formats or sizes

22. Article 4 of Directive 2006/114 lists the conditions which must be cumulatively met for comparative advertising to be permitted.[7] Those conditions include, in particular, in point (a) of that article, the requirement that the comparative advertising must not be misleading and, in point (c), the requirement that the advertising objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price.

23. It is clear from the case-law of the Court relating to Directive 84/450/EEC,[8] which was repealed and replaced by Directive 2006/114,[9] that the first directive carried out an exhaustive harmonisation of the conditions under which comparative advertising in Member States might be permitted, which implies that the lawfulness of comparative advertising throughout the European Union is to be assessed solely in the light of the criteria laid down by the EU legislature.[10]

24. Since Directive 2006/114 codified Directive 84/450,[11] I take the view that the case-law of the Court concerning the interpretation of the latter directive is fully applicable to situations covered by Directive 2006/114.

25. For the following reasons, I consider that Article 4(a) and (c) of Directive 2006/114 does not, in principle, prevent a price comparison for advertising purposes in relation to goods sold in shops having different formats or sizes, provided that the comparison is not misleading within the meaning of Article 4(a) and that it is objective within the meaning of Article 4(c).

26. First, there is no basis in the wording of Directive 2006/114 for a general prohibition on comparisons of prices for goods sold in shops having different formats or sizes. Although Article 4(b) of that directive requires that the goods or services forming the subject matter of the comparative advertising are comparable,[12] no such requirement is laid down in relation to the sales outlets in which those goods are sold.[13]

27. Secondly, such a prohibition would be, in my view, contrary to the aims pursued by Article 4 of Directive 2006/114, that is to say, according to the Court, '*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'.[14]

7 — See recital 11 of Directive 2006/114. Under Article 2(c) of that directive, '"comparative advertising" means any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor'. See, concerning the concept of 'comparative advertising', judgment of 19 April 2007, *De Landtsheer Emmanuel* (C-381/05, EU:C:2007:230, paragraphs 14 to 24).

8 — Council Directive of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250, p. 17), as amended by Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 (OJ 1997 L 290, p. 18) and by Directive 2005/29.

9 — See recital 1 and Article 10 of Directive 2006/114.

10 — See judgments of 8 April 2003, *Pippig Augenoptik* (C-44/01, EU:C:2003:205, paragraph 44), and of 18 November 2010, *Lidl* (C-159/09, EU:C:2010:696, paragraph 22). See, also, the second subparagraph of Article 8(1) of Directive 2006/114 and Article 7(2) of Directive 84/450.

11 — See recital 1 of Directive 2006/114 and paragraph 4 of the explanatory memorandum to the Proposal for a directive of the European Parliament and of the Council concerning misleading and comparative advertising of 19 May 2006 (COM(2006) 222 final), which led to its adoption.

12 — Under Article 4(b), comparative advertising is to be permitted when it 'compares goods or services meeting the same needs or intended for the same purpose'. See, as regards that condition, judgments of 19 September 2006, *Lidl Belgium* (C-356/04, EU:C:2006:585, paragraphs 24 to 39), and of 18 November 2010, *Lidl* (C-159/09, EU:C:2010:696, paragraphs 25 to 40).

13 — See, as regards the comparison of products purchased through different distribution channels, judgment of 8 April 2003, *Pippig Augenoptik* (C-44/01, EU:C:2003:205, paragraph 65).

14 — Emphasis added. Judgment of 18 November 2010, *Lidl* (C-159/09, EU:C:2010:696, paragraph 20 and the case-law cited), which was concerned with the provision corresponding to Article 3a of Directive 84/450. See, also, recitals 6, 8 and 9 of Directive 2006/114 and judgment of 19 September 2006, *Lidl Belgium* (C-356/04, EU:C:2006:585, paragraph 33).

28. It is from that perspective of stimulating competition that the Court found that the conditions under which comparative advertising is permitted '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'.[15] A restrictive interpretation of Article 4(a) and (c), resulting in a general prohibition on comparisons of prices for goods sold in shops having different formats or sizes, would clearly not be the most favourable for comparative advertising and might prevent price competition.

29. Thirdly, such a prohibition would be difficult to reconcile with the Court's emphasis, in its case-law on comparative advertising, on an advertiser's economic freedom as regards methods of comparison. The Court has held in particular that the choice as to the number of comparisons which the advertiser wishes to make between the products which he is offering and those offered by his competitors falls within the exercise of the advertiser's economic freedom.[16] Moreover, the Court has accepted the lawfulness, under certain conditions, of comparative advertising relating collectively to selections of basic consumables sold by two competing chains of stores and the lawfulness of comparative advertising relating to the general level of the prices charged by those two competitors in respect of their comparable range.[17]

30. In my view, there is in principle no reason to consider that an advertiser's economic freedom does not also extend to the possibility of comparing prices in shops having different formats and sizes. In so far as an advertiser is capable of benefiting from economies of scale, as a result of the size, format or number of shops available to him, and, consequently, of charging prices lower than those of his competitors, he should be able to derive the benefits therefrom for marketing purposes.

31. Moreover, advertising relating to such price differences may prove useful to consumers, allowing them, in the words of the Court, to make the best possible use of the internal market, given that advertising is a very important means of creating genuine outlets for all goods and services throughout the European Union.[18] I consider that the average consumer is fully capable of deciding whether a price difference justifies, in his view, purchasing a product in one or other of the shops, when those shops have different formats or sizes, which may also entail differences in terms of the geographical proximity of the shops.

32. I therefore consider that Article 4(a) and (c) of Directive 2006/114 does not, in principle, prevent the operator of a hypermarket from comparing the prices charged in his own shop with those charged in competing shops having different formats or sizes, such as supermarkets or local shops, provided that the goods chosen for the comparison are comparable and that the comparison is not misleading within the meaning of Article 4(a) and that it is objective within the meaning of Article 4(c).

15 — Emphasis added. Judgment of 18 November 2010, *Lidl* (C-159/09, EU:C:2010:696, paragraph 21 and the case-law cited). See, also, judgment of 25 October 2001, *Toshiba Europe* (C-112/99, EU:C:2001:566, paragraph 37). That case-law concerns the interpretation of Article 3a of Directive 84/450 which is, in essence, reproduced in Article 4 of Directive 2006/114.

16 — Judgment of 19 September 2006, *Lidl Belgium* (C-356/04, EU:C:2006:585, paragraph 29 and the case-law cited).

17 — Judgment of 19 September 2006, *Lidl Belgium* (C-356/04, EU:C:2006:585, paragraph 39).

18 — Judgment of 23 February 2006, *Siemens* (C-59/05, EU:C:2006:147, paragraph 22 and the case-law cited). See, also, recital 6 of Directive 2006/114. See, in relation to the usefulness of comparative information relating to the general level of the prices charged by chains of stores, judgment of 19 September 2006, *Lidl Belgium* (C-356/04, EU:C:2006:585, paragraph 35).

33. That conclusion also applies to retail chains, such as Carrefour and Intermarché.[19] I therefore see no legal basis for allowing the imposition on such retail chains of conditions, as regards comparative advertising, which are more restrictive than or additional to those imposed on economic operators under Directive 2006/114.

34. Nevertheless, like the French Government and the Commission, I consider that, in the particular circumstances, a difference between the size or format of the advertiser's shops and the competitor's shops may have an effect on whether the comparative advertising is permissible in the light of the conditions laid down in Article 4(a) and (c) of Directive 2006/114.

35. That may be the case in particular where, as in this case, the advertiser carries out a comparison of the prices in shops having different formats or sizes, although the advertiser and the competitor belong to retail outlets which each have shops of identical or similar formats or sizes.

36. In such a case, there is a risk that the comparative advertising may be misleading within the meaning of Article 4(a) of Directive 2006/114 and be in breach of the condition of objectivity laid down in Article 4(c), which will be analysed in the following sections (parts A.3 and A.4).

3. The condition laid down in Article 4(a) of Directive 2006/114 that comparative advertising must not be misleading

37. Article 4(a) of Directive 2006/114 provides, as a condition regarding its permissibility, that comparative advertising must not be misleading within the meaning of, inter alia, Article 2(b) of that directive or Articles 6 and 7 of Directive 2005/29.[20]

38. It is clear from a combined reading of those provisions[21] that the finding that comparative advertising is misleading within the meaning of Article 4(a) of Directive 2006/114 depends, first, on its capacity to deceive a consumer, whether by act or by omission, and, secondly, on its capacity to affect a consumer's economic behaviour, in particular by affecting his transactional decision,[22] or to injure a competitor. Comparative advertising is also misleading within the meaning of that article, if the advertiser omits material information, within the meaning of Article 7(1) of Directive 2005/29, provided that that omission is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.[23]

19 — For the purposes of this Opinion, the term 'retail outlet' refers to a group of shops which operate under identical or similar names. At the hearing, Carrefour stated that the name Carrefour is used for the hypermarkets forming part of the Carrefour group, whereas the supermarkets belonging to that group operate under the name Carrefour Market. It is apparent from the observations submitted by ITM that the hypermarkets belonging to the Intermarché group operate under the name Intermarché Hyper, whereas the supermarkets use the name Intermarché Super.

20 — Article 4(a) of Directive 2006/114 also refers to Article 3 of that directive, which lists the features that must be taken into account in determining whether advertising is misleading, including, according to Article 3(b) thereof, 'the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided', and to Article 8 of that directive, according to which that directive is not to 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.

21 — See points 4, 6 and 7 of this Opinion.

22 — See, as regards the concept of 'transactional decision', Article 2(k) of Directive 2005/29.

23 — See, as regards the interpretation of the concept of 'material information' within the meaning of Article 7(1) thereof, points 62 to 71 of this Opinion.

39. According to the case-law of the Court, it is for the referring court to ascertain in the circumstances of the case, and bearing in mind the consumers to which such advertising is addressed, whether comparative advertising may be misleading within the meaning of Article 4(a) of Directive 2006/114.[24] Whether or not comparative advertising is misleading therefore depends on a case-by-case assessment.[25]

40. The referring 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. In carrying out the requisite assessment, that court must also take account of all the relevant factors in the case, having regard, as follows from Article 3 of Directive 2006/114, to the information contained in the advertisement at issue and, more generally, to all its features.[26]

41. In the present case, from the second advertisement onwards, Carrefour carried out a comparison of the prices charged solely in hypermarkets in the Carrefour retail chain and in supermarkets in the Intermarché retail chain, although each retail chain has both hypermarkets and supermarkets.

42. I consider that an asymmetric comparison of that kind might deceive an average consumer as to the actual difference in the prices charged in the advertiser's shops and in the competitor's shops, by giving that consumer the impression that all the shops in the retail chains were taken into consideration in calculating the price information presented in the advertising, although that information applies only to certain types of shops in those retail chains.

43. In that regard, it is appropriate to conclude that, generally, the prices of consumer products are likely to vary according to the format and size of the shop[27] and that an asymmetric comparison of that kind could therefore have the effect of artificially creating or increasing any difference between the advertiser's and the competitor's prices, depending on the selection of the shops for the comparison.

44. Furthermore, I consider that such advertising which claims that the advertiser's general price level is lower than that of his competitors is generally capable of having a significant influence on a consumer's economic behaviour, in particular on his decision to enter the shops of one or other retail chain.[28]

45. It follows that advertising such as that at issue in the main proceedings may be misleading within the meaning of Article 4(a) of Directive 2006/114, which it is for the referring court to ascertain. That court must, inter alia, determine whether, in the light of all the relevant circumstances of the case, and in particular in the light of the information in or omissions from the advertising at issue,[29] the transactional decision of a significant number of consumers to whom that advertising is addressed is likely to be made in the mistaken belief that all the shops in the retail chains have been taken into

24 — See judgment of 18 November 2010, *Lidl* (C-159/09, EU:C:2010:696, paragraph 46 and the case-law cited).

25 — See, to that effect, concerning the determination of whether a commercial practice is 'unfair' in the light of the criteria set out in Articles 5 to 9 of Directive 2005/29, order of 8 September 2015 in *Cdiscount* (C-13/15, EU:C:2015:560, paragraph 38 and the case-law cited).

26 — See, to that effect, judgment of 18 November 2010, *Lidl* (C-159/09, EU:C:2010:696, paragraph 47 and 48 and the case-law cited). See, also, recital 18 of Directive 2005/29.

27 — The information before the Court does not, however, make it possible to determine the exact correlation between the format and the size of the shop, on the one hand, and the price level, on the other hand.

28 — According to the case-law of the Court, the concept of 'transactional decision', within the meaning of Directive 2005/29, covers not only the decision whether or not to purchase a product, but also the decision directly related to that decision, in particular the decision to enter the shop. See judgment of 19 December 2013, *Trento Sviluppo and Centrale Adriatica* (C-281/12, EU:C:2013:859, paragraph 36).

29 — In the present case, the word 'super' appeared, in the televised advertisements, in smaller letters under the name Intermarché. See point 11 of this Opinion.

account in calculating the general price level and the amount of savings which are claimed by the advertising and that, accordingly, those consumers will make savings of the kind claimed by the advertising by regularly buying their everyday consumer goods from shops in the advertiser's retail chain rather than from shops in the competitor's retail chain. [30]

46. If that were the case, the advertising would, in my view, be deemed to be misleading within the meaning of Article 4(a) of Directive 2006/114, unless the advertiser is in a position to show that the price information contained in the advertising actually applies to all the shops in the retail chains. [31]

4. The condition laid down in Article 4(c) of Directive 2006/114 that the comparison must be objective

47. Under Article 4(c) of Directive 2006/114, comparative advertising is to be permitted if it objectively compares one or more material, relevant, verifiable and representative features of the goods and services, which may include price.

48. According to the case-law of the Court, that provision lays down two types of requirement relating to the objectivity of the comparison. First, the cumulative criteria requiring the product's feature in respect of which the comparison is made to be material, relevant, verifiable and representative, as laid down by that provision, help to ensure that the comparison is objective. Second, that article expressly states that features which meet the four criteria referred to above must in addition be compared objectively. This last requirement is essentially intended to preclude comparisons which result from the subjective assessment of their author rather than from an objective finding. [32]

49. In the case in the main proceedings, the tribunal de commerce de Paris (Commercial Court, Paris) criticised Carrefour, inter alia, for having adopted a method of selecting sales outlets which distorted the representativeness of the price surveys and which failed to comply with the objectivity requirements arising from national provisions by comparing the prices charged in its own hypermarkets with those charged in supermarkets in the Intermarché retail chain. [33]

50. For its part, Carrefour claimed, at the hearing before the Court, that a distinction must be drawn between, first, the selection of the parameters to be used for the purpose of comparison, which falls within the advertiser's economic freedom, and, secondly, the specific implementation of the comparison, which is subject to the condition of objectivity laid down in Article 4(c) of Directive 2006/114. Again according to Carrefour, an advertiser is free to select the competitors with which it is going to compare itself and that selection cannot be restricted to shops having the same format or of the same size.

51. For the following reasons, I am not convinced by the arguments put forward by Carrefour.

30 — See, to that effect, judgments of 19 September 2006, *Lidl Belgium* (C-356/04, EU:C:2006:585, paragraphs 83 to 85), and of 18 November 2010, *Lidl* (C-159/09, EU:C:2010:696, paragraphs 50 and 56).

31 — See, as regards the advertiser's obligation to furnish evidence as to the accuracy of factual claims in advertising, recital 19 of Directive 2006/114 and judgment of 19 September 2006, *Lidl Belgium* (C-356/04, EU:C:2006:585, paragraphs 68 and 70). In the present case, it appears that it is not disputed that the information on price differences presented in the advertising campaign at issue applied only to hypermarkets in the Carrefour retail chain as compared with supermarkets in the Intermarché retail chain.

32 — Judgment of 19 September 2006, *Lidl Belgium* (C-356/04, EU:C:2006:585, paragraphs 43 to 46), which was concerned with Article 3a(1)(c) of Directive 84/450. See, also, recital 9 of Directive 2006/114.

33 — See points 13 to 15 of this Opinion.

52. First, although it is true that an advertiser has, according to the case-law of the Court, discretion as to the methods of comparison, [34] I see no reason to regard that discretion as being absolute in nature. Moreover, I can see no legal basis in Directive 2006/114 for drawing the distinction proposed by Carrefour. On the contrary, according to the wording of Article 4, the conditions listed in points (a) to (h) of that article apply 'as far as the comparison is concerned' and not only to certain elements of that comparison.

53. Secondly, like the Commission, I consider that, in the present case, it is not so much the choice of the competitor which is at issue, but rather the *manner* in which that choice is made by the advertiser and, in that context, the information which is given to consumers.

54. I therefore take the view that the issue which arises first and foremost in the present case is whether advertising, such as the advertising at issue, satisfies the requirement arising from Article 4(c) of Directive 2006/114 that the advertising 'objectively compares' one or more features of the goods.

55. In the context of a comparison in terms of price, the requirement that the comparison be objective entails, in my view, that any price information contained in the advertisement must reflect the prices actually charged by the advertiser and the competitor. In other words, the objectivity requirement means that an advertiser must portray market conditions in a fair and accurate way. [35] I note, in that regard, that Directive 2006/114 is intended in particular to protect traders against misleading advertising and the unfair consequences thereof. [36]

56. As is clear from point 41 of this Opinion, in the present case, from the second advertisement onwards, Carrefour carried out a comparison of the prices charged solely in hypermarkets in the Carrefour retail chain and in supermarkets in the Intermarché retail chain, although each retail chain has both hypermarkets and supermarkets.

57. As stated above, I consider that, generally, the prices of consumer products are likely to vary according to the format and size of the shop and that, consequently, an asymmetric comparison of that kind could have the effect of artificially creating or increasing any difference between the advertiser's and the competitor's prices, depending on the selection of the shops for the comparison. [37] In that case, the comparison would not reflect market conditions in a fair and accurate way, and therefore would not satisfy the objectivity requirement laid down by Article 4(c) of Directive 2006/114.

58. In the present case, it is for the referring court to determine whether the selection of the shops for the comparison at issue has the effect of artificially creating or increasing any difference between the advertiser's and the competitor's prices.

34 — See point 29 of this Opinion.

35 — See, in that regard, paragraph 18 of Annex I to Directive 2005/29, according to which 'passing on materially inaccurate information on market conditions … with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions' constitutes a commercial practice which is in all circumstances considered unfair. See, as regards customer review tools and price comparison websites, point 3.4.2 of the Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee on the application of Directive 2005/29.

36 — Article 1 of Directive 2006/114. See, also, judgment of 13 March 2014, *Posteshop* (C-52/13, EU:C:2014:150, paragraphs 22 and 27).

37 — See point 43 of this Opinion.

B – The interpretation of Directive 2005/29 (second question)

1. The question referred and the proposed interpretations

59. By its second question, the referring court seeks to ascertain whether the fact that the shops whose offers are compared in comparative advertising are of different sizes and formats constitutes material information within the meaning of Article 7 of Directive 2005/29. [38]

60. Carrefour proposes that that question should be answered in the negative. According to that party, a consumer is a customer of a retail chain and his behaviour is determined neither by the format nor by the area of a shop. However, ITM submits that the difference in the sizes or formats of the shops compared constitutes material information within the meaning of Directive 2005/29 when it affects the representativeness of the price surveys, since it is, in that case, likely to have a significant bearing on a consumer's decision on whether to make a purchase.

61. The French Government and the Commission claim that, in the present case, the consumer's knowledge that the shops whose prices are compared are of different sizes or formats could constitute material information within the meaning of Directive 2005/29, which it is for the referring court to ascertain.

2. The interpretation of Article 7 of Directive 2005/29

62. Directive 2005/29 does not define the concept of 'material information', except in the particular case of an invitation to purchase within the meaning of Article 2(i) of that directive. [39]

63. It is apparent from Article 7(1) of Directive 2005/29 that the omission of 'material information that the average consumer needs, according to the context, to take an informed transactional decision' is misleading if it 'causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise'.

64. For the following reasons, I consider that the fact that the shops whose prices are compared in comparative advertising are of different sizes or formats does not systematically constitute 'material information' within the meaning of Article 7(1) of Directive 2005/29.

65. First, although it is certainly not inconceivable that a difference in the format or size of the shops may have an effect on a consumer's choice to purchase goods in one or other of the shops, the concept of 'material information' within the meaning of Article 7(1) of Directive 2005/29 is concerned not with any factor which might affect, in one way or another, a consumer's behaviour, but only with

38 — I note that, pursuant to Article 3(1) thereof, Directive 2005/29 is to apply only to unfair business-to-consumer commercial practices. However, Articles 6 and 7 of that directive may apply indirectly to relations between undertakings, such as the parties to the main proceedings, as a result of the reference made in Article 4(a) of Directive 2006/114 to those provisions. See point 5 of this Opinion.

39 — The information provided to the Court by the referring court did not make it possible to determine whether the advertising at issue constitutes an invitation to purchase within the meaning of Article 2(i) of Directive 2005/29. If that were the case, the information listed in Article 7(4)(a) to (e) of that directive would be regarded as material, if not already apparent from the context. See, as regards the concept of 'invitation to purchase', judgment of 12 May 2011, *Ving Sverige* (C-122/10, EU:C:2011:299).

information which the average consumer 'needs' to make an informed transactional decision.[40] Indeed, that article is based, as is apparent from the *travaux préparatoires* for Directive 2005/29, on an approach seeking 'to balance consumers' needs for information with a recognition that an overload of information can be as much a problem to consumers as a lack of information'.[41]

66. Secondly, it should be recalled that Article 7(1) of Directive 2005/29 imposes on traders a positive obligation to provide consumers with all information deemed material,[42] the omission of which is subject to penalties in accordance with national law, provided that that omission is likely to cause the consumer to take a transactional decision that he would not have taken otherwise.[43] The same applies, under Article 7(2) of that directive, if such information is hidden or provided in an unclear, unintelligible, ambiguous or untimely manner. Moreover, in the context of comparative advertising, the omission of material information means that the advertising is regarded as misleading within the meaning of Article 4(a) of Directive 2006/114, provided that it is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

67. In the absence of a common definition in EU law of the concepts of 'format' and 'size', the imposition on an advertiser of a general obligation to inform consumers that the shops compared are of different formats or sizes might, in my view, create confusion rather than help to achieve a high level of consumer protection, which is the purpose of Directive 2005/29.[44] Having regard to the variety of existing forms of distribution, such an obligation would mean, it seems to me, that that information must be provided in almost all cases in which an advertiser uses comparative advertising, which would significantly reduce the information value of such a statement.

68. Nevertheless, I am of the view that, in certain circumstances, the fact that the shops whose offers are compared are of different sizes and formats may constitute material information within the meaning of Article 7 of Directive 2005/29.

69. That may be the case in particular where, as in this case, the advertiser carries out a comparison of the prices in shops having different formats or sizes, although the advertiser and the competitor belong to retail outlets which each have shops of identical or similar formats or sizes.

70. As stated above,[45] I consider that an asymmetric comparison of that kind may have the effect of artificially creating or increasing any difference between the advertiser's and the competitor's prices, depending on the selection of the shops for the comparison. If that were the case, it seems logical that the difference between the sizes and formats of the advertiser's shops and the competitor's shops could constitute material information which the average consumer needs to make an informed transactional decision within the meaning of Article 7 of Directive 2005/29.

40 — See, also, point 3.4.1 of the Commission staff working document of 25 May 2016, *Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices* (SWD(2016) 163 final, p. 69).

41 — Point 65 of the explanatory memorandum to the Proposal for a directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending Directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive) of 18 June 2003 (COM(2003) 356 final), which led to the adoption of Directive 2005/29. However, see Article 7(5) of Directive 2005/29, according to which information requirements established by EU law in relation to commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II to that directive, are to be regarded as material.

42 — See, to that effect, point 3.4.1 of the Commission staff working document of 25 May 2016 (op. cit.).

43 — See Article 13 of Directive 2005/29.

44 — See Article 1 and recitals 5 and 11 of Directive 2005/29. See, as regards the relationship between consumer economic interests and the interests of competitors, recital 8 of that directive.

45 — See, points 43 and 57 of this Opinion.

71. In the present case, it is for the referring court to determine whether the selection of the shops for the comparison at issue has the effect of artificially creating or increasing any difference between the prices charged by the advertiser and by the competitor and, in that context, whether the difference between the sizes and formats of the advertiser's shops and the competitor's shops constitutes material information within the meaning of Article 7 of Directive 2005/29.

C – Dissemination to consumers of material information (third question)

72. By its third question, the referring court asks the Court, in the event of an affirmative response to the second question referred, to what degree and/or via what medium must the material information that the shops compared are of different sizes and formats be disseminated to the consumer?

73. In that regard, it should be pointed out, first of all, that Directive 2005/29 provides no precise indication as to the methods of disseminating material information to consumers. However, it is clear from Article 7(2) of that directive that material information cannot be hidden or provided 'in an unclear, unintelligible, ambiguous or untimely manner'. It follows, by contrary inference, that such information must be disseminated to consumers in a clear, intelligible, unambiguous and timely manner.

74. It should be recalled that, in the present case, from the second advertisement onwards, Carrefour carried out a comparison of the prices charged solely in hypermarkets in the Carrefour retail chain and in supermarkets in the Intermarché retail chain, although each retail chain has both hypermarkets and supermarkets.

75. In such a case, if the national court should find that the difference in formats or sizes of the shops whose offers are compared constitutes material information within the meaning of Article 7 of Directive 2005/29,[46] I consider that that information must be contained in the advertisement itself.

76. In that regard, I rely on the following considerations.

77. First, although Article 7(3) of Directive 2005/29 provides for the possibility of the advertiser making material information available to consumers by 'other means', in particular where the principal medium of communication used imposes limitations of space or time,[47] I consider that that provision cannot be applied where the obligation to provide that information to consumers is imposed not on the basis of its intrinsic nature, but solely as a consequence of the trader's choice to engage in a commercial practice which might infringe the requirements arising from Directive 2006/114.

78. Indeed, where, as in the present case, the advertiser carries out an asymmetric comparison of the prices in shops having different formats or sizes, although the advertiser and the competitor belong to retail outlets which each have shops of identical or similar formats or sizes, any obligation on the part of the advertiser to inform consumers that the shops being compared are of different formats or sizes is imposed only on the basis of the advertiser's choice to carry out such a comparison.

79. Secondly, I consider that, in the event that the price information giving rise to clarifications as to the format or size of the shops being compared is contained in the advertisement itself, the same must also apply to any information intended to provide those clarifications. Such an approach ensures, in my view, that the advertisement disseminated to consumers is balanced.

46 — See points 68 to 71 of this Opinion.

47 — See, also, Article 7(1) and, as regards the invitation to purchase, Article 4(a) of Directive 2005/29 and judgment of 12 May 2011, *Ving Sverige* (C-122/10, EU:C:2011:299, paragraphs 50 to 59).

80. In conclusion, I propose that the Court should answer the third question referred to the effect that, where the advertiser carries out a comparison of the prices in shops having different formats or sizes, although the advertiser and the competitor belong to retail outlets which each have shops of identical or similar formats or sizes, and where the national court finds that the difference in formats and sizes of the shops constitutes material information within the meaning of Article 7 of Directive 2005/29, that information must be contained in the advertisement itself.

V – Conclusion

81. In the light of the foregoing considerations, I propose that the Court reply as follows to the questions referred for a preliminary ruling by the cour d'appel de Paris (Court of Appeal, Paris, France):

(1) Article 4(a) and (c) of Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising must be interpreted as meaning that it precludes an advertiser from comparing the prices in shops having different formats or sizes, although the advertiser and the competitor belong to retail outlets which each have shops of identical or similar formats or sizes,

— if it is found, in the light of all the relevant circumstances of the case, and in particular in the light of the information in or omissions from the advertising at issue, that the transactional decision of a significant number of consumers to whom that advertising is addressed is likely to be made in the mistaken belief that all the shops in those retail chains have been taken into account in calculating the general price level and the amount of savings which are claimed by the advertising and that, accordingly, those consumers will make savings of the kind claimed by the advertising by regularly buying their everyday consumer goods from shops in the advertiser's retail chain rather than from shops in the competitor's retail chain, or

— if the selection of the shops for the comparison has the effect of artificially creating or increasing any difference between the prices charged by the advertiser and by the competitor.

(2) The fact that the shops whose offers are compared in comparative advertising are of different sizes and formats may constitute material information within the meaning of Article 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 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 ('the Unfair Commercial Practices Directive'), where the advertiser carries out a comparison of the prices in shops having different formats or sizes, although the advertiser and the competitor belong to retail outlets which each have shops of identical or similar formats or sizes, and where the selection of the shops for the comparison has the effect of artificially creating or increasing any difference between the prices charged by the advertiser and by the competitor.

(3) Where the advertiser carries out a comparison of the prices in shops having different formats or sizes, although the advertiser and the competitor belong to retail outlets which each have shops of identical or similar formats or sizes, and where the national court finds that the difference in formats and sizes of the shops constitutes material information within the meaning of Article 7 of Directive 2005/29, that information must be contained in the advertisement itself.