JUDGMENT OF THE COURT (Fourth Chamber)

18 November 2010 *

In Case C-159/09,

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

Lidl SNC

v

Vierzon Distribution SA,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, K. Schiemann (Rapporteur), L. Bay Larsen, C. Toader and A. Prechal, Judges,

* Language of the case: French.

Advocate General: P. Mengozzi,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 1 July 2010,

after considering the observations submitted on behalf of:

— Lidl SNC, by B. Braun, avocat,

— Vierzon Distribution SA, by G. Schank and F. Reye, avocats,

— the French Government, by G. de Bergues, S. Menez and R. Loosli-Surrans, acting as Agents,

— the Czech Government, by M. Smolek and D. Hadroušek, acting as Agents,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the European Commission, by M. Van Hoof and W. Wils, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 September 2010,

gives the following

Judgment

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

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

Legal context

European Union legislation

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

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

4 According to Article 2(2) of Directive 84/450, '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 2(2a) of Directive 84/450 defines comparative advertising as:

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

6 Article 3 of Directive 84/450 is worded as follows:

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

(a) the characteristics of goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services;

(b) the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided;

(c) the nature, attributes and rights of the advertiser, such as his identity and assets, his qualifications and ownership of industrial, commercial or intellectual property rights or his awards and distinctions.'

7 Article 3a(1) of Directive 84/450 provides as follows:

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

(a) it is not misleading according to Articles 2(2), 3 and 7(1);

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

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

…'

National legislation

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

'Any advertising which compares goods or services by identifying, explicity 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 and services, which may include price.

…'

The dispute in the main proceedings and the question referred for a preliminary ruling

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

10 On 23 September 2006, Vierzon Distribution placed an advertisement in a local newspaper ('the advertisement at issue'), which reproduced till receipts listing, by means of general descriptions, accompanied, as appropriate, by their weight or volume, 34 products, in the main foodstuffs, purchased from the store belonging to

Vierzon Distribution and that operated by Lidl, respectively, and showing a total cost of EUR 46.30 for the Vierzon Distribution products as against EUR 51.40 for those of Lidl.

11 The advertisement also included the slogans 'Not everybody can be E. Leclerc! Low prices — And the proof is E. Leclerc is still the cheapest' and 'In English, they say "hard discount" — in French they say "E. Leclerc"'

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

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

14 Vierzon Distribution disputes those claims, submitting, inter alia, that two products which are not the same may be compared, provided that they meet the same needs or are intended for the same purpose and, in that regard, are sufficiently interchangeable,

which is the case here. The differences between the products at issue are sufficiently clear from the till receipts in question and consumers would not therefore have been deceived. The fact that Vierzon Distribution itself chose the products to be compared is not unlawful and, since the items were purchased on the same day, any possibility that the prices could have been manipulated is also ruled out.

15 In those circumstances, the tribunal de commerce de Bourges decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

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

The question referred

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

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

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

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

20 However, before so doing, it should be noted that it is apparent from the Court's case-law that the purpose of the various conditions listed in Article 3a(1) of Directive 84/450 under which comparative advertising is permitted is to achieve a balance between the different interests which may be affected by allowing comparative advertising. Thus, it is apparent from a reading of recitals 2, 7 and 9 in the preamble to Directive 97/55 that the aim of Article 3a of Directive 84/450 is to stimulate competition between suppliers of goods and services to the consumer's advantage, by

allowing competitors to highlight objectively the merits of various comparable products while, at the same time, prohibiting practices which may distort competition, be detrimental to competitors and have an adverse effect on consumer choice (*L'Oréal and Others*, paragraph 68).

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

22 It should also be noted that Directive 84/450 carried out an exhaustive harmonisation of the conditions under which comparative advertising in Member States might be permitted and that such a harmonisation implies by its nature that the lawfulness of comparative advertising throughout the European Union is to be assessed solely in the light of the criteria laid down by the European Union legislature (see Case C-44/01 *Pippig Augenoptik* [2003] ECR I-3095, paragraph 44).

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

24 Furthermore, recital 8 in the preamble to Directive 97/55 states that the comparison of the price only of goods and services should be possible if this comparison respects certain conditions, in particular that it not be misleading.

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

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

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

27 It should be noted, first, that unlike, in particular, Article 3a(1)(c) of Directive 84/450, Article 3a(1)(b) does not in any way deal with or, therefore, prejudge, the angle from which the comparison may lawfully be made or, in other words, the characteristics of the goods or services concerned to which comparative advertising may refer. It follows that, unlike what was suggested, inter alia, by the Czech and Austrian Governments, the angle from which the comparison is made, being in this case price, can

have no bearing on whether two products meet the same needs or are intended for the same purpose within the meaning of Article 3a(1)(b) of Directive 84/450.

28 Moreover, it should be noted, first, that the judgments in *Lidl Belgium* and *De Landtsheer Emmanuel*, in which the Court pointed out, as stated at paragraph 25 above, that the condition laid down in Article 3a(1)(b) of Directive 84/450 provides that, if comparative advertising is to be permitted, the goods being compared must display a sufficient degree of interchangeability for consumers, were in fact delivered in cases involving advertising relating to food products.

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

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

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

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

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

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

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

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

37 As pointed out by, inter alia, the Czech Government and the Commission, to decide that, unless they are identical, two food products cannot be regarded as comparable within the meaning of Article 3a(1)(b) of Directive 84/450 would effectively rule out any real possibility of comparative advertising regarding a particularly important category of consumer goods, irrespective of the angle from which the comparison is made.

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

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

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

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

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

42 More specifically, with regard to a comparison based, as in the main proceedings, on price, it was pointed out at paragraph 24 above that recital 8 in the preamble to Directive 97/55 states that the comparison of the price only of goods and services should be possible if this comparison respects certain conditions, in particular that it be not misleading.

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

44 Article 2(2) of Directive 84/450 defines misleading advertising as any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor.

45 As is apparent from the description given at paragraphs 10 and 11 above, the advertisement at issue is based on a selection of a limited number of products, for the most part foodstuffs, marketed by two competing stores. Those products are identified by

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

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

47 That court must, first, take into account the perception of an average consumer of the products or services being advertised who is reasonably well informed and reasonably observant and circumspect. As regards an advertisement such as that at issue, it is not disputed that it is addressed not to a specialist public but to end consumers who purchase their basic consumables in a chain of stores (see *Lidl Belgium*, paragraph 78 and the case-law cited).

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

49 The Court has also held that an omission may render advertising misleading, in particular where, bearing in mind the consumers to whom it is addressed, the advertising seeks to conceal a fact which, had it been known, would have deterred a significant number of consumers from making a purchase (*Lidl Belgium*, paragraph 80 and the case-law cited).

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

51 An advertisement such as that at issue could also be misleading if the referring court found that, for the purposes of the price-based comparison in the advertisement, food products were selected which are in fact objectively different and the differences are capable of significantly affecting the buyer's choice.

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

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

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

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

56 In the light of all the foregoing, the second part of the answer to be given to the question referred by the tribunal de commerce de Bourges is that Article 3a(1)(a) of

Directive 84/450 is to be interpreted as meaning that an advertisement such as that at issue in the main proceedings may be misleading, in particular if:

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

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

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

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

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

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

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

61 Such identification makes it possible, in accordance with the objective of consumer protection pursued by Directive 84/450, for the persons to whom an advertisement of that kind is addressed to be in a position to satisfy themselves that they have been correctly informed with regard to the purchases of basic consumables which they are prompted to make (*Lidl Belgium*, paragraph 72).

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

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

64 In the light of the foregoing, the third part of the answer to be given to the question referred by the tribunal de commerce de Bourges is that Article 3a(1)(c) of Directive 84/450 is to be interpreted as meaning that the condition of verifiability set out in that provision requires, in the case of an advertisement, such as that at issue in the main proceedings, which compares the prices of two selections of goods, that it must be possible to identify the goods in question on the basis of information contained in the advertisement.

Costs

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

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 3a(1)(b) of Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising, as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997, is to be

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

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

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

— **it is found that, for the purposes of a comparison based solely on price, food products were selected which, nevertheless, have different features capable**

of significantly affecting the average consumer's choice, without such differences being apparent from the advertising concerned.

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

[Signatures]