JUDGMENT OF THE COURT (First Chamber)

19 April 2007 *

In Case C-381/05,

REFERENCE for a preliminary ruling under Article 234 EC, from the Cour d'appel (Court of Appeal), Brussels (Belgium), made by decision of 13 October 2005, received at the Court on 19 October 2005, in the proceedings

De Landtsheer Emmanuel SA

v

Comité Interprofessionnel du Vin de Champagne,

Veuve Clicquot Ponsardin SA,

* Language of the case: French.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, J.N. Cunha Rodrigues (Rapporteur), K. Schiemann, M. Ilešič and E. Levits, Judges,

Advocate General: P. Mengozzi,
Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the written procedure and further to the hearing on 21 September 2006,

after considering the observations submitted on behalf of:

— De Landtsheer Emmanuel SA, by J. Stuyck and M. Demeur, avocats,

— Comité Interprofessionnel du Vin de Champagne and Veuve Clicquot Ponsardin SA, by T. van Innis and N. Clarembeaux, avocats,

— the Belgian Government, by L. Van den Broeck, acting as Agent,

— the French Government, by R. Loosli-Surrans, acting as Agent,

— Commission of the European Communities, by J.-P. Keppenne and A. Aresu, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 November 2006,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 2(2a) and Article 3a(1)(b) and (f) 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) ('the directive').

2 The reference was made in the context of proceedings between the Comité Interprofessionnel du Vin de Champagne ('the CIVC') and the French company Veuve Clicquot Ponsardin SA ('Veuve Clicquot'), on the one hand, and the Belgian company De Landtsheer Emmanuel SA ('De Landtsheer'), on the other, concerning the advertising practices employed by De Landtsheer to market its beer 'Malheur Brut Réserve'.

Legal context

Community legislation

3 According to Article 2(2a) of the directive, 'comparative advertising' means any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor.

4 Article 3a(1) of the directive provides:

'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;

...

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

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

...'

5 Article 13(1) of Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1992 L 208, p. 1), provides:

'Registered names shall be protected against:

(a) any direct or indirect commercial use of a name registered in respect of products not covered by the registration in so far as those products are comparable to the products registered under that name or insofar as using the name exploits the reputation of the protected name;

(b) any misuse, imitation or evocation, even if the true origin of the product is indicated or if the protected name is translated or accompanied by an expression such as "style", "type", "method", "as produced in", "imitation" or similar;

(c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the product concerned, and the packing of the product in a container liable to convey a false impression as to its origin;

(d) any other practice liable to mislead the public as to the true origin of the product.

...'

National legislation

6 Article 23 of the Loi du 14 juillet 1991 sur les pratiques du commerce et l'information et la protection du consommateur (Law of 14 July 1991 on commercial practices, consumer information and consumer protection) (*Moniteur belge* of 29 August 1991), as amended by the Law of 25 May 1999 (*Moniteur belge* of 23 June 1999) ('the LPCC'), lays down:

'Without prejudice to other statutory or regulatory provisions, any advertising is prohibited which:

(1) includes claims, information or representations which could be misleading as to the identity, nature, composition, origin, quantity, availability, method and date

of manufacture or characteristics of a product or its impact on the environment; characteristics shall mean the merits of a product, in particular in terms of its properties, its possible uses, the results to be expected from its use, the terms on which it may be acquired, in particular the price or the manner in which the price is calculated and the material features of tests or checks carried out on the product and of the accompanying services;

...

(6) without prejudice to the provisions of Article 23a, includes elements which denigrate another seller, his goods, services, or activities;

(7) without prejudice to the provisions of Article 23a, includes comparisons which are misleading, denigrating or which gratuitously enable one or more other sellers to be identified.

(8) without prejudice to the provisions of Article 23a, includes elements capable of causing confusion with another seller, his goods, services, or activities;

...'

7 Article 23a of the LPCC is worded as follows:

'(1) Comparative advertising shall be permitted when the following conditions are met in respect of the comparison:

(1) it is not misleading according to Article 23(1) to (5) of this law;

...

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

...

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

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

...

(2) Any comparison referring to a special offer shall indicate in a clear and unequivocal way the date when the offer ends or, where appropriate, that the special offer is subject to the availability of the goods and services, and, where the special offer has not yet begun, the date of the start of the period during which the special price or other particular conditions shall apply.

(3) Any comparative advertising which does not meet the conditions laid down in paragraphs (1) and (2) shall be prohibited.'

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

8 De Landtsheer produces and markets several varieties of beer under the trade mark Malheur. In 2001 it launched a beer under the name 'Malheur Brut Réserve', which

was brewed using a process based on the production method for sparkling wine and which it wished to brand as an exceptional product.

9 The wording 'BRUT RÉSERVE', 'La première bière BRUT au monde' ('The first BRUT beer in the world'), 'Bière blonde à la méthode traditionnelle' ('Traditionally-brewed light beer') and 'Reims-France' as well as a reference to the winegrowers of Reims and Épernay appeared inter alia on the bottle, on a leaflet attached to the bottle and on the cardboard packaging. At the time of the launch of the product, De Landtsheer used the expression 'Champagnebier' to make the point that it was a beer made according to the 'méthode champenoise' (champagne method). Moreover, De Landtsheer extolled the originality of the new beer, Malheur, by ascribing to it the characteristics of a sparkling wine and, in particular, those of champagne.

10 On 8 May 2002, the CIVC and Veuve Clicquot brought an action against De Landtsheer before the Tribunal de commerce de Nivelles (Commercial Court of Nivelles) (Belgium), seeking, in particular, a prohibition on the use of the wording set out above. Such a use was, it was claimed, not only misleading but also amounted to comparative advertising that was not permitted.

11 By judgment of 26 July 2002, the Tribunal de commerce ordered De Landtsheer, inter alia, to cease all use of the wording 'Méthode traditionnelle', the designation of origin 'Champagne', the indication of provenance 'Reims-France' and the references to the winegrowers of Reims and Épernay and to the method of producing champagne. The CIVC and Veuve Clicquot's claim concerning the use of the wording 'BRUT', 'RÉSERVE', 'BRUT RÉSERVE' and 'La première bière BRUT au monde' was rejected.

12 De Landtsheer withdrew its use of the designation of origin 'Champagne' in the expression 'Champagnebier' but it appealed against that judgment in relation to all other elements of the case. The CIVC and Veuve Clicquot brought a cross-appeal relating to the use of the wording 'BRUT', 'RÉSERVE', 'BRUT RÉSERVE' and 'La première bière BRUT au monde'.

13 The Cour d'appel (Court of Appeal), Brussels, considered that an interpretation of the directive was necessary to enable it to resolve the case before it and therefore decided to stay proceedings pending a preliminary ruling from the Court of Justice on the following questions:

'(1) Does the definition of comparative advertising cover advertisements in which the advertiser refers only to a type of product, so that in those circumstances such advertisements must be regarded as referring to all undertakings which offer that type of product, and each of them can claim to have been identified?

(2) With a view to determining whether there is a competitive relationship between the advertiser and the undertaking to which reference is made within the meaning of Article [2(2a)] of the directive:

(a) On the basis in particular of a comparison of Article [2(2a)] with Article [3a(1)(b)] should any undertaking which can be identified in the advertising

be regarded as a competitor within the meaning of Article 2(2a), whatever the goods or services it offers?

(b) In the event of a negative response to that question and if other conditions are required in order for a competitive relationship to be established, is it necessary to consider the current state of the market and consumer habits in the Community or is it necessary also to consider how those habits might evolve?

(c) Must any investigation be confined to that part of the Community territory in which the advertising is disseminated?

(d) Is it necessary to consider the competitive relationship in relation to the types of products being compared and the way in which those types of products are generally perceived, or is it necessary, in order to assess the degree of substitution possible, to take into account also the particular characteristics of the product which the advertiser intends to promote in the advertising concerned and the image it intends to give it?

(e) Are the criteria by which a competitive relationship within the meaning of Article 2(2a) can be established identical to the criteria for verifying whether the comparison satisfies the condition referred to in Article [3a(1)(b)]?

(3) Does it follow from a comparison of Article 2(2a) of [the directive] with Article 3a of that directive either that

(a) no comparative advertising is permitted enabling a type of product to be identified where no competitor or goods offered by a competitor can be identified from that reference?

or

(b) the question whether the comparison is permitted must be considered in the light only of national legislation other than that by which the provisions of the directive on comparative advertising are transposed, which could lead to a lower level of protection for consumers or undertakings offering the type of product being compared with the product offered by the advertiser?

(4) If it should be concluded that there has been comparative advertising within the meaning of Article 2(2a), [must it] be inferred from Article 3a(1)(f) of the directive that no comparison is permitted which, in respect of products without designation of origin, relates to products with designation of origin[?]'

The questions referred for a preliminary ruling

The first question

14 By its first question, the referring court asks essentially whether Article 2(2a) of the directive must be interpreted as meaning that a reference in an advertisement to a type of product and not to a specific undertaking or product can be considered to be comparative advertising.

15 It must be pointed out that under Article 2(2a) of the directive, 'comparative advertising' means any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor.

16 According to settled case-law, that is a broad definition covering all forms of comparative advertising, so that, in order for there to be comparative advertising, it is sufficient for there to be a statement referring even by implication to a competitor or to the goods or services which he offers (see Case C-112/99 *Toshiba Europe* [2001] ECR I-7945, paragraphs 30 and 31, and Case C-44/01 *Pippig Augenoptik* [2003] ECR I-3095, paragraph 35).

17 The test for determining whether an advertisement is comparative in nature is thus whether it identifies, explicitly or by implication, a competitor of the advertiser or goods or services which the competitor offers (*Toshiba Europe*, paragraph 29).

18 The mere fact that an undertaking solely refers in its advertisement to a type of product does not mean that the advertisement in principle falls outside the scope of the directive.

19 Such an advertisement is capable of being comparative advertising provided a competitor or the goods or services which it offers may be identified as actually referred to by the advertisement, even if only by implication.

20 In that context, it is irrelevant that the reference to a type of product might, given the circumstances of the case and, in particular, the structure of the market in question, enable a number of competitors, or the goods or services that they offer, to be identified.

21 A literal interpretation of Article 2(2a) of the directive which required a single competitor of the advertiser, or the goods or services of a single competitor, to be identified would be incompatible with a broad definition of comparative advertising and, accordingly, contrary to the settled case-law of the Court.

22 It is for the national courts, in each individual case, to determine whether, having regard to all the relevant elements of the case, an advertisement enables consumers to identify, explicitly or by implication, one or more specific undertakings or the goods or services that they provide as actually referred to by the advertising.

23 Those courts, when making that assessment, must take into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect (see *Pippig Augenoptik*, paragraph 55, and Case C-356/04 *Lidl Belgium* [2006] ECR I-8501, paragraph 78).

24 The answer to the first question must therefore be that Article 2(2a) of the directive is to be interpreted as meaning that a reference in an advertisement to a type of product and not to a specific undertaking or product can be considered to be comparative advertising where it is possible to identify that undertaking or the goods that it offers as being actually referred to by the advertisement. The fact that a number of the advertiser's competitors or the goods or services that they offer may be identified as being in fact referred to by the advertisement is of no relevance for the purpose of recognising the comparative nature of the advertising.

The second question

25 The second question is divided into three parts.

26 First, the national court wishes to know, essentially, whether the existence of a competitive relationship, within the meaning of Article 2(2a) of the directive,

between the advertiser and the undertaking identified in the advertisement may be established independently of the goods or services offered by the undertaking. Second, if the answer to that question is in the negative, it asks the Court, in relation to ascertaining whether there is a competitive relationship, about the relevance of certain criteria, such as the current or evolving state of the market and consumer habits, the determination of a part of the Community territory restricted to the area in which the advertisement is disseminated and the substitutability of the products which are the subject of the comparison — this last factor depending on the types of products assessed in the abstract or having regard to the characteristics and image which the advertiser wishes to impart to them. Third, the national court asks whether those criteria are identical to the criteria for verifying whether the comparison satisfies the condition referred to in Article 3a(1)(b) of the directive.

The first part

27 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.

28 Whether undertakings are competing undertakings depends, by definition, on the substitutable nature of the goods or services that they offer on the market.

29 It is precisely for that reason that Article 3a(1)(b) of the directive 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.

30 As the Court has already held, the fact that the 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 (Case 170/78 *Commission* v *United Kingdom* [1980] ECR 417, paragraph 14, and Case 356/85 *Commission* v *Belgium* [1987] ECR 3299, paragraph 10).

31 The reply to the first part of the second question must therefore be that the existence of a competitive relationship between the advertiser and the undertaking identified in the advertisement cannot be established independently of the goods or services offered by that undertaking.

The second part

32 As noted in paragraph 28 of the present judgment, whether there is a competitive relationship between undertakings depends on the finding that the goods that they offer have a certain degree of substitutability for one another.

33 The specific assessment of that degree of substitution, which is a task for the national courts, to be carried out in the light of the aims of the directive and the principles identified by the Court in its case-law, requires criteria to be examined in order for it to be ascertained whether there is a competitive relationship between at least a part of the range of products offered by the undertakings concerned.

34 In that connection it is clear from recital 2 in the preamble to Directive 97/55 that comparative advertising helps to demonstrate objectively the merits of the various comparable products and to stimulate competition between suppliers of goods and services to the consumer's advantage.

35 According to settled case-law, the conditions required of comparative advertising must be interpreted in the sense most favourable to it (*Toshiba Europe*, paragraph 37, *Pippig Augenoptik*, paragraph 42 and *Lidl Belgium*, paragraph 22).

36 More specifically, with a view to determining whether there is a competitive relationship between products, the Court has held that it is necessary to consider not only the present state of the market but also the possibilities for development within the context of free movement of goods at the Community level and the further potential for the substitution of products for one another which may be revealed by intensification of trade (*Commission* v *United Kingdom*, paragraph 6).

37 The Court also stated that, for the purpose of measuring the possible degree of substitution, it is impossible to restrict oneself to consumer habits in a Member State or in a given region. Those habits, which are essentially variable in time and space, cannot be considered to be a fixed rule (*Commission* v *United Kingdom*, paragraph 14).

38 In the present case, it is important to point out that the national courts which are called upon to assess whether there is a competitive relationship between undertakings for the purpose of the possible application of the legislation on comparative advertising exercise their jurisdiction in the part of the Community territory in which those undertakings are established. It is in that territory that, by means of an advertisement, an undertaking is seeking to change the purchasing decisions of consumers by demonstrating the merits of the products which it offers.

39 In that context, the competitive relationships at issue must be analysed in relation to the market in which the comparative advertising is disseminated. However, since in this area an analysis of how consumption habits are evolving is required, and since it cannot be ruled out that changes to those habits that are seen in one Member State may spread to other Member States, it is for the national courts to take that into account in order to assess the impact of changes in those habits in its own Member State.

40 Moreover, since the interchangeable nature of the products essentially rests on the purchasing decisions of consumers, it is clear that, in so far as those decisions are

likely to evolve in step with consumer recognition of the merits of the goods or services, the specific characteristics of the products which the advertising is seeking to promote, over and above an abstract assessment as types of product, must be regarded as relevant factors when assessing the degree of substitution.

41 That is all the more true of the image which the advertiser wishes to impart to its products, this being one of the determinant factors in the way consumer choices evolve.

42 In the light of all the foregoing, the answer to the second part of the second question must be that, in order to determine whether there is a competitive relationship between the advertiser and the undertaking identified in the advertisement, it is necessary to consider:

— the current state of the market and consumer habits and how they might evolve;

— the part of the Community territory in which the advertising is disseminated, without, however, excluding, where appropriate, the effects which the evolution of consumer habits seen in other Member States may have on the national market at issue, and

— the particular characteristics of the product which the advertiser seeks to promote and the image which it wishes to impart to it.

The third part

43 In the context of Community harmonisation of comparative advertising, Articles 2(2a) and 3a(1)(b) of the directive serve different purposes.

44 Article 2(2a) lays down the criteria which serve to define the term comparative advertising, thereby delimiting the scope of the directive. Article 3a(1)(b) lays down one of the conditions which comparative advertising must satisfy for it to be permitted, requiring that the competing products being compared meet the same needs or be intended for the same purpose, that is to say that they must display a sufficient degree of interchangeability for consumers (*Lidl Belgium*, paragraph 26).

45 As the Advocate General has pointed out at point 93 of his Opinion, if those criteria were the same, Article 3a(1)(b) of the directive would be totally pointless in that any advertising that could be comparative within the meaning of Article 2(2a) could never prove to be contrary to the condition regarding its permissibility in question.

46 It is true that the two provisions of the directive are obviously close.

47 However, whilst the definition of comparative advertising given in Article 2(2a) assumes that there is a competitive relationship between undertakings proving, for that purpose, sufficient to ascertain whether the products they offer generally display a certain degree of substitutability for one another, the condition laid down in Article 3a(1)(b) requires an individual and specific assessment of the products which are specifically the subject of the comparison in the advertisement before it can be concluded that there is a real possibility of substitution.

48 It should be noted that the criteria set out in paragraphs 36 to 41 of this judgment apply mutatis mutandis to Article 3a(1)(b) of the directive.

49 Taking all the foregoing into account, the answer to the third part of the second question must be that the criteria for establishing the existence of a competitive relationship within the meaning of Article 2(2a) of the directive are not identical to those for determining whether the comparison fulfils the condition in Article 3a(1)(b) of the same directive.

The third question

50 By its third question, the national court asks, first, whether advertising which refers to a type of product without, however, identifying a competitor or the goods offered

by the latter is not permitted under Article 3a(1) of the directive. Secondly, it seeks to ascertain whether the conditions which such advertising must satisfy in order for it to be permitted must be examined in the light of other national provisions instead, even if, in that case, that assessment could lead to a lower level of protection for consumers or undertakings which offer the type of product to which the advertising refers.

51 It is apparent from paragraphs 17 to 19 of the present judgment that, for an advertisement to be considered to be comparative advertising, and accordingly to fall within the scope of the directive, it is essential that the advertisement identifies a competitor of the advertiser or goods or services which the competitor offers.

52 It follows that the conditions which the comparative advertising must satisfy for it to be permitted, as set out in Article 3a(1) of the directive, are applicable only to advertisements which are comparative in character.

53 The question of the permissibility of an advertisement which refers to a type of product without, however, identifying a competitor or the goods offered by that competitor does not fall within the scope of comparative advertising and, consequently, cannot be established on the basis of Article 3a(1) of the directive.

54 The conditions which such advertising must satisfy for it to be permitted must therefore be assessed with regard to other provisions of national law or, where appropriate, Community law, in particular, those of the directive on misleading advertising.

55 Such an assessment will necessarily be based on criteria other than those relating to the permissibility of comparative advertising, without there being any need to take into consideration the different levels of protection for consumers or competing undertakings which may result.

56 From all the foregoing, the answer to the third question must be:

— first, that advertising which refers to a type of product without thereby identifying a competitor or the goods which it offers is not impermissible with regard to Article 3a(1) of the directive,

— secondly, that the conditions governing whether such advertising is permissible must be assessed in the light of other provisions of national law or, where appropriate, of Community law, irrespective of the fact that that could mean a lower level of protection for consumers or competing undertakings.

The fourth question

57 By its fourth question, the referring court asks whether Article 3a(1)(f) of the directive must be interpreted as meaning that, for products without designation of origin, any comparison which relates to products with designation of origin is not permitted.

58 Under Article 3a(1)(f) of the directive, comparative advertising which aims to promote a product with designation of origin is permitted provided that it relates in each case to products with the same designation.

59 It is clear from recital 12 in the preamble to Directive 97/55 that the purpose of that condition permitting such advertising is to reflect the provisions of Regulation No 2081/92 and, in particular, Article 13 of that regulation, the aim of which is to prohibit abuse as regards protected names.

60 As an example of such conduct, Article 13(1) of the regulation refers in particular to any direct or indirect commercial use of a name registered in respect of products not covered by the registration and to their misuse, imitation or evocation.

61 The question whether the condition permitting comparative advertising laid down by Article 3a(1)(f) of the directive also applies where that advertising concerns a product without designation of origin and refers to another product with designation of origin must, first, be examined in the light of the purposes of the directive.

62 As already pointed out at paragraph 34 of the present judgment, comparative advertising helps to demonstrate objectively the merits of the various comparable products and to stimulate competition between suppliers of goods and of services to the consumer's advantage. In the wording of recital 5 in the preamble to Directive 97/55, comparative advertising, when it compares material, relevant, verifiable and representative features and is not misleading, may be a legitimate means of informing consumers of their advantage.

63 It is settled case-law that the conditions required of comparative advertising must be interpreted in the sense most favourable to it (see paragraph 35 of this judgment).

64 Secondly, Article 3a(1)(f) of the directive must be read in conjunction with Article 3a(1)(g) of the same directive.

65 Under the latter provision, comparative advertising is to be permitted provided that it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products.

66 The effectiveness of that requirement would be partly compromised if products without designation of origin were prevented from being compared to those with designation of origin.

67 If there were such a prohibition, the risk that an advertiser might wrongly derive benefit from the designation of origin of a competing product would, a priori, be precluded, since the product whose merits were being promoted by the advertising would, necessarily, have to have the same designation of origin as that of its competitor.

68 Conversely, Article 3a(1)(g) of the directive would apply in all cases where an advertisement promoting a product without designation of origin was aimed at taking unfair advantage from the designation of origin of a competing product.

69 In the context of that assessment, it is particularly important to determine whether the aim of that advertising is solely to distinguish between the products of the

advertiser and those of his competitor and thus to highlight differences objectively (*Toshiba Europe*, paragraph 53, and Case C-59/05 *Siemens* [2006] ECR I-2147, paragraph 14).

70 Where all the other conditions governing whether such advertising is permissible are met, protection of designation of origin which would have the effect of prohibiting absolutely comparisons between products without designation of origin and others with designation of origin would be unwarranted and could not be justified under the provisions of Article 3a(1)(f) of the directive.

71 Moreover, since such a prohibition does not follow expressly from the wording of Article 3a(1)(f) of the directive, to find that prohibition as a matter of principle by means of a broad interpretation of that condition governing whether comparative advertising is permitted would constitute a restriction on the scope of comparative advertising. That result would run counter to the settled case-law of the Court (see paragraph 63 of this judgment).

72 In view of the foregoing considerations, the answer to the fourth question must be that Article 3a(1)(f) of the directive must be interpreted as meaning that, for products without designation of origin, any comparison which relates to products with designation of origin is not impermissible.

Costs

73 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 (First Chamber) hereby rules:

1. **Article 2(2a) 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 a reference in an advertisement to a type of product and not to a specific undertaking or product can be considered to be comparative advertising where it is possible to identify that undertaking or the goods that it offers as being actually referred to by the advertisement. The fact that a number of the advertiser's competitors or the goods or services that they offer may be identified as being in fact referred to by the advertisement is of no relevance for the purpose of recognising the comparative nature of the advertising.**

2. **The existence of a competitive relationship between the advertiser and the undertaking identified in the advertisement cannot be established independently of the goods or services offered by that undertaking.**

In order to determine whether there is a competitive relationship between the advertiser and the undertaking identified in the advertisement, it is necessary to consider:

— **the current state of the market and consumer habits and how they might evolve,**

— **the part of the Community territory in which the advertising is disseminated, without, however, excluding, where appropriate, the effects which the evolution of consumer habits seen in other Member States may have on the national market at issue, and**

— **the particular characteristics of the product which the advertiser seeks to promote and the image which it wishes to impart to it.**

The criteria for establishing the existence of a competitive relationship within the meaning of Article 2(2a) of Directive 84/450, as amended by Directive 97/55, are not identical to those for determining whether the comparison fulfils the condition in Article 3a(1)(b) of the same directive.

3. **Advertising which refers to a type of product without thereby identifying a competitor or the goods which it offers is not impermissible with regard to**

Article 3a(1) of Directive 84/450, as amended by Directive 97/55. The conditions governing whether such advertising is permissible must be assessed in the light of other provisions of national law or, where appropriate, of Community law, irrespective of the fact that that could mean a lower level of protection for consumers or competing undertakings.

4. **Article 3a(1)(f) of Directive 84/450, as amended by Directive 97/55, must be interpreted as meaning that, for products without designation of origin, any comparison which relates to products with designation of origin is not impermissible.**

[Signatures]