OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 29 March 2006 [1]

I — Introduction

1. By decision of 29 July 2004, the Rechtbank van Koophandel te Brussel (Brussels Commercial Court, hereinafter 'Rechtbank van Koophandel') referred five questions to this Court for a preliminary ruling under Article 234 EC on the interpretation of Article 3a(1)(a), (b) and (c) of Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising [2] (hereinafter 'Directive 84/450' or simply 'the Directive'), as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 [3] so as to include comparative advertising (hereinafter 'Directive 97/55').

1 — Original language: Italian.
2 — OJ 1984 L 250, p. 17.
3 — OJ 1997 L 290, p. 18.

II — Legal framework

The relevant Community provisions

2. The purpose of Directive 84/450 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' (Article 1).

3. In accordance with Article 2(2) of the Directive, '"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'.

4. Article 3 of the Directive provides that:

'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 ...;

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

(c) the nature, attributes and rights of the advertiser ...'

5. Article 3a(1) of the Directive in turn provides that:

'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 or services, which may include price; ...'

6. Lastly, on 11 May 2005, the European Parliament and the Council adopted Directive 2005/29/EC (hereinafter 'Directive 2005/29') 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, [4] which introduces some amendments to Directive 84/450 on the subject of misleading advertising, but without prejudice to the provisions on comparative advertising. That directive is to be transposed by the Member States by 12 June 2007.

4 — OJ 2005 L 149, p. 22.

The relevant national provisions

7. Directive 84/450 was transposed into Belgian law by the Law of 14 July 1991 [5] relating to commercial practices and consumer information and protection which also contains, in the consolidated version of 8 April 2003, [6] all the amendments relating to comparative advertising introduced by Directive 97/55.

8. Article 23a.1 of that law lays down the criteria for determining whether comparative advertising is permissible. That article reproduces the full text of Article 3a(1) of the Directive.

III — Facts and procedure

9. Lidl Belgium GmbH & Co. KG (hereinafter 'Lidl') is a company incorporated under German law which operates a chain of stores and is active mainly in the retail trade in foodstuffs and has several outlets in Belgium. Etablissementen Franz Colruyt NV (hereinafter 'Colruyt') is another company which is active in the same economic sector and operates more than 170 supermarkets in Belgium under the name 'Colruyt'.

10. On 19 January 2004, Colruyt sent its customers a leaflet which read as follows:

'Dear customer, Last year, 2003, you were able once again to make significant savings with Colruyt. On the basis of our average price index for the past year we have calculated that a family spending EUR 100 each week in Colruyt stores saved between EUR 366 and EUR 1 129 by shopping at Colruyt's rather than at any other supermarket (such as Carrefour, Cora, Delhaize, etc.); and saved between EUR 155 and EUR 293 by shopping at Colruyt's instead of a hard discounter or wholesaler (Aldi, Lidl, Makro). On the reverse side you will see the evolution of the price differential vis-à-vis other stores in the course of 2003. ... In order to be able to continue to guarantee the lowest prices, we compare daily 18 000 prices in other stores. ... Each month we use those prices to calculate the price differential between Colruyt and the other stores. We refer to this as our price index which is certified by Quality Control (Instituut voor Kwaliteitscontrole), an independent body. The result: at Colruyt's you enjoy, every day and at any time of the year, the lowest prices. In 2004 also we remain true to this guarantee.'

5 — *Belgisch Staatsblad*, 29.8.1991.
6 — *Belgisch Staatsblad*, 8.4.2003.

11. Colruyt also used the following text on its checkout receipts, referring customers to its website for further explanations in regard to the system of price comparison which it applied:

'How much did you save in 2003? If you spent EUR 100 at Colruyt's each week, then, according to our price index, you will have saved between EUR 366 and EUR 1 129 in comparison with another supermarket (such as Carrefour, Cora, Delhaize, etc.); between EUR 155 and EUR 293 in comparison with a hard discounter or wholesaler (Aldi, Lidl, Makro).'

12. In 2003 Colruyt also launched a selection of basic products under the name 'BASIC'. Some passages in its advertising leaflets contained the following statements: 'BASIC: absolutely the lowest prices in Belgium. Even cheaper than the comparable selection of the hard discounters (Aldi, Lidl) ...'; 'BASIC — ABSOLUTELY ROCK-BOTTOM PRICES — In addition to a significant overall price reduction we can offer you from now on a large number of products that you can compare with those of the typical hard discounters (like Aldi and Lidl) and with the 'Eerste prijs/Premier prix' products of other supermarkets. These are our BASIC products: everyday basic products at absolutely rock-bottom prices'. Colruyt also employed an advertising slogan to the same effect on its checkout receipts.

13. As it took the view that such practices amounted to unfair comparative advertising which was consequently unlawful under the abovementioned Belgian Law of 14 July 1991, Lidl brought proceedings before the Rechtbank van Koophandel.

14. That court, having doubts as to the interpretation of the Directive, found it necessary to refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 3a(1)(a) of Directive 84/450/EEC (as introduced by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising) be construed as meaning that the comparison of the general price level of advertisers with that of competitors, in which an extrapolation is made on the basis of a comparison of the prices of a sample of products, is impermissible inasmuch as this creates in any event the impression that the advertiser is cheaper over its entire range of products, whereas the comparison made relates only to a limited sample of products, unless the advertisement makes it possible to establish which and how many products of the advertiser, on the one hand, and of the competitors used in the comparison, on the other, have been compared, and

makes it possible to ascertain where each competitor concerned by the comparison is positioned in the comparison and what its prices might be in comparison with those of the advertiser and of the other competitors used in the comparison?

(2) Must Article 3a(1)(b) of Directive 84/450/EEC (as introduced by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising) be construed as meaning that comparative advertising is allowed only if the comparison relates to individual goods or services that meet the same needs or are intended for the same purpose, to the exclusion of product selections, even if those selections, on the whole and not necessarily in regard to every component, meet the same needs or are intended for the same purpose?

(3) Must Article 3a(1)(c) of Directive 84/450/EEC (as introduced by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising) be construed as meaning that comparative advertising in which a comparison of the prices of products, or of the general price level, of competitors is made will be objective only if it lists the products and prices being compared of the advertiser and of all the competitors in the comparison and makes it possible to ascertain the prices being charged by the advertiser and its competitors, in which case all products used in the comparison must be expressly indicated for each individual supplier?

(4) Must Article 3a(1)(c) of Directive 84/450/EEC (as introduced by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising) be construed as meaning that a feature in comparative advertising will satisfy the requirement of verifiability in that article only if that feature can be verified as to its accuracy by those to whom the advertising is addressed, or is it sufficient if the feature can be verified by third parties to whom the advertising is not addressed?

(5) Must Article 3a(1)(c) of Directive 84/450/EEC (as introduced by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising) be

construed as meaning that the price of products and the general price level of competitors are in themselves verifiable features?'

15. In the proceedings thus instituted before the Court, written observations have been submitted by Colruyt, Lidl, the French Republic, the Republic of Poland and the Commission.

16. In addition, Colruyt, the Kingdom of Belgium and the Commission presented arguments at the hearing on 7 December 2005.

IV — Legal analysis

Introduction

17. By its numerous and detailed questions, the referring court raises the issue of the legality of two specific forms of comparative advertising, both based on a comparison of prices without, however, any explanation in the advertisement as to which goods were compared and what prices were charged in each particular case.

18. In particular, the advertising in question on the one hand compares the general price levels in various supermarkets, calculated on the basis of a sample of products selected from all the products sold by the various competing companies (hereinafter 'price level advertising'); on the other, it states categorically that a certain line of products is absolutely the cheapest on the market (hereinafter 'BASIC products advertising').

19. I must first point out, however, that some of the questions that the Rechtbank van Koophandel asks about the advertising thus described do not seem to me to be entirely clear and also appear to raise the same issues more than once (for example, the fact that the contested advertisements do not expressly indicate the goods and prices that are being compared by the advertiser).

20. It therefore seems to me to be appropriate to avoid the problems raised by the wording or rephrasing of the questions and to concentrate on their substance. To that end, in the light of the context and all the material submitted to the Court, it seems to me that the referring court is essentially asking three questions in this case and those are the questions which I propose to answer.

21. The questions to be considered are accordingly:

(i) In the light of the requirement of 'homogeneity' [7] laid down in Article 3a(1)(b) of the Directive, is it permissible for comparative advertising to compare not only individual products but also product selections (the second question)?

(ii) If the answer to that question is in the affirmative, do the conditions contained in Article 3a(1)(c) with regard to the 'objectivity' and 'verifiability' of the comparison require the identity and price of the products included in the selections that are being compared to be expressly indicated in the advertisement (the third, fourth and fifth questions)?

(iii) Is advertising which compares the general price level based on a basket of products selected from products sold by various companies to be regarded as 'misleading' within the meaning of Article 3a(1)(a) inasmuch as it may cause consumers to believe that a certain company is cheaper over its entire range of products (the first question)?

7 — The requirement of 'homogeneity' means that comparative advertising must compare 'goods ... meeting the same needs or intended for the same purpose' (Article 3a(1)(b) of the Directive).

22. Ultimately, as we see, it is a matter of determining whether advertisements of the kind at issue comply with the conditions with regard to permissibility laid down in this connection by the directive on comparative advertising and notably with the requirements in respect of the 'homogeneity', 'objectivity', 'verifiability' and 'non-misleading character' of such advertising, bearing in mind that, as specified in the 11th recital in the preamble to Directive 97/55, those conditions are cumulative, in the sense that comparative advertising must satisfy all of them in their entirety in order to be compatible with Community law.

23. That being said, I therefore pass on to the examination of the individual questions in the form and order set out above.

The permissibility of comparisons between product selections

24. By its second question, the referring court is essentially asking the Court whether the condition of 'homogeneity' referred to in Article 3a(1)(b) of the Directive precludes advertising which does not compare individual goods or services but makes a comparison between selections of goods or services.

25. The parties differ in their views on this point. Lidl and the Polish and French Governments argue that the answer to the question should be in the affirmative. The reason which they give is that in their view such advertising is contrary to the letter of the provision in question (according to the French and Polish authorities) and is in any case likely to mislead consumers because of the heterogeneous nature of the products constituting the selection (according to Lidl).

26. The Commission, for its part, does not consider that a comparison between groups of products is in itself unlawful. In its view, the determining factors in this connection are, rather, the specific characteristics of the advertisement that is distributed and whether or not it meets the requirements with regard to permissibility referred to in the Directive.

27. Colruyt — supported on this point by the Belgian Government — maintains, on the contrary, that advertising based on product selections is entirely lawful because the products concerned are selected so as to ensure that the comparison is always between products which 'have the same characteristics and meet the same needs'.

28. For my own part, I must say at once that I do not share the view that Article 3a(1)(b) of the Directive does not, in principle, permit advertisements based on a comparison between selections of various products.

29. In the first place, it does not appear to me that the wording of the provision in question precludes such a comparison. In fact, this simply provides that advertising must 'compare goods or services meeting the same needs or intended for the same purpose'. In my view, the scope of that condition is very different from what Lidl and the Polish and French Governments suggest, in the sense that it is not concerned with the quantity or diversity of the products that are being advertised but with their nature, and with two aspects of that nature.

30. On the one hand, the condition referred to in Article 3a(1)(b) requires that the comparison in comparative advertising must always be between 'goods or services', thus precluding comparisons between various competitors which do not refer to the goods they supply or the services they provide for consumers. For example, in my view advertising of the type 'company X is more reliable than company Y' is unacceptable inasmuch as the comparison does not turn on any product or service but on a quality or characteristic of the companies mentioned in the advertising.

31. On the other hand, the purpose of that provision is to restrict comparative advertising to goods which are interchangeable and homogeneous. Again by way of example, I consider that advertising comparing a car with a bicycle cannot be regarded as permissible, since the goods in question clearly meet different needs.

32. In short, the requirement in question is intended to preclude 'artificial' forms of advertising based on comparisons which are incongruous or outlandish inasmuch as they are not in fact based on goods or services, or are based on goods or services which are not comparable.

33. I should add that, in my view, to consider advertisements based on product selections to be prohibited as such would also be contrary to the aims of the Directive. Indeed, according to the preamble to the Directive, comparative advertising is a very important means which can also 'stimulate competition between suppliers of goods and services to the consumer's advantage' inasmuch as it can 'help demonstrate objectively the merits of the various comparable products' (second recital) and may thus be a 'legitimate means of informing' consumers (fifth recital). [8]

34. In other words, the Community legislature considers that comparative advertising is likely to increase the transparency of the market by providing consumers with an effective means of information and guidance. And the Court has held, in that very connection, that 'the conditions required of comparative advertising must be interpreted in the sense most favourable to it'. [9]

35. An interpretation prohibiting comparisons between selections of goods on any occasion or in any circumstances would hardly be consistent with those aims, inasmuch as it would clearly restrict comparative advertising. Advertisements of this kind, containing collected and summarised data, may in fact be useful to the consumer.

36. This is particularly true in the mass distribution sector in which the parties to the main proceedings operate. Indeed, it seems to me to be clear that, as Colruyt argues, the average consumer chooses to shop in a particular supermarket not only on the basis of the prices of individual products but also because of its general policy on prices. Consequently, advertising which compares information which is more general and more complete than information relating to individual goods may be of assistance to the consumer, if it is properly set out, since it indicates which supermarkets are generally likely to charge the lowest prices.

8 — On the close link between protecting the consumer and providing the consumer with information, established in all Community policy on the subject of consumer protection, see Case C-362/88 *GB-INNO-BM* [1990] ECR I-667, paragraph 14, and Case C-126/91 *Yves Rocher* [1993] ECR I-2361, paragraph 17.

9 — See Case C-112/99 *Toshiba Europe* [2001] ECR I-7945, paragraph 37, and Case C-44/01 *Pippig Augenoptik* [2003] ECR I-3095, paragraph 2.

37. On the other hand, if I am not mistaken, advertising relating not to individual goods or services but to baskets or lines of products is not unusual in the Member States. I note for example that the Brussels Commercial Court itself, in an earlier judgment, did not consider that such advertising was in itself unlawful but assessed the content and the form of the advertising in that case in the light of the criteria laid down in the Directive. [10]

38. I therefore take the view that the condition of 'homogeneity' referred to in the provision in question cannot be interpreted as meaning that advertisements based on a comparison between product selections are in themselves unlawful. Obviously, in order to be completely permissible, such advertising must satisfy each and every one of the requirements laid down in Article 3a(1) of the Directive (see point 22 above). And we shall see later whether that is so in the case of the advertisements at issue in the main proceedings.

39. In the light of the foregoing considerations, I therefore propose that the Court reply to the national court that the condition referred to in Article 3a(1) of the Directive does not preclude advertising which makes a comparison between selections of goods or services.

10 — Judgment of 30 June 2004 in *Cora* v *Colruyt*, p. 6. A copy of that judgment was appended to the written statement filed by Colruyt in the course of the proceedings.

The condition concerning the verifiability of the comparison

40. By its third, fourth and fifth questions, the Rechtbank van Koophandel seeks to ascertain whether the requirements of 'objectivity' and 'verifiability' referred to in Article 3a(1)(c) of the Directive mean that the advertisement must expressly indicate the identity and the price of the products included in the selections that are being compared.

41. The parties differ in their views on this point also. Lidl, the Polish Government and the French authorities argue that the question should be answered in the affirmative. In their view, advertising which does not mention the essential features that are being compared is neither objective nor verifiable, inasmuch as it does not allow those to whom it is addressed to check the correctness and accuracy of the advertiser's assertions. And that is precisely what has happened in the present case, in that the advertisements at issue in the main proceedings do not enable consumers to realise at once which goods and prices the advertisements are referring to and so to verify whether the comparison that has been made is correct.

42. The Commission too considers that Article 3a(1)(c) of the Directive, and in

particular the condition of verifiability laid down in that provision, means that it is vital that the advertising should first of all enable the products that are being compared to be identified. However, it takes the view that they need not necessarily be identified in the advertisement itself and that it is sufficient if the advertisement allows them to be identified by implication. However, in that respect too, the price level advertising distributed by Colruyt in the present case cannot in its view be regarded as permissible, inasmuch as the consumer is not told which goods the advertiser has compared in order to determine the price levels that are quoted. On the other hand, it considers that the advertising concerning the BASIC products is permissible inasmuch as the comparison relates to all Colruyt's products bearing that label and similar products in competing supermarkets, and that this indirectly enables consumers to ascertain which products have been compared.

43. Colruyt and the Belgian Government, for their part, consider that it is not necessary for the advertised products to be identifiable as there is no express requirement to that effect in Article 3a(1) of the Directive. They maintain, first, that the criterion of 'verifiability' does not mean that all statements made in advertisements must be verifiable by the consumer but merely that the advertiser must be able to provide objective proof of their accuracy, before a court if necessary. Also, the criterion of 'objectivity' referred to in that provision does not, in their view, add anything to the criterion of 'verifiability'. They consider that if the condition of 'verifiability' is satisfied, that is sufficient in itself to classify comparative advertising as 'objective'.

44. For my part, I must say at once that I do not think that the condition of 'objectivity' referred to in Article 3a(i)(c) is really relevant for the purpose of answering the question raised by the referring court. In my view, that requirement simply means that the attributes of the products that are being advertised must be such as to enable them to be compared in a fair and impartial manner; that is to say, the comparison made in the advertisement must relate to objectively observable characteristics, not to attributes which may be a matter of subjective tastes or preferences.

45. To provide a simple example, a company can certainly compare the price of two similar products by stating that one is cheaper than the other, inasmuch as price is an objective characteristic which is not open to debate. On the other hand, it cannot advertise its own products as being aesthetically more beautiful or more elegant than those of its competitors, since those features are clearly a matter of subjective judgment

which may vary from one person to another. [11]

46. The question raised by the Rechtbank van Koophandel must therefore be examined primarily in the light of the requirement with regard to 'verifiability' of advertising, referred to in Article 3a(1)(c).

47. In this respect, the argument advanced by Lidl, the Polish and French Governments and the Commission, according to which an advertisement can be regarded as 'verifiable' only if it enables those to whom it is addressed to identify the goods or services that are being compared, seems to me to be persuasive.

48. In point of fact, the condition in question would be deprived of all useful effect if individuals (primarily consumers or the advertiser's competitors) who might have an interest in checking the accuracy and correctness of the advertiser's statements were unable to do so, since it is clearly impossible to make a comparison if the terms of the comparison are not known and cannot be ascertained.

49. Moreover, comparative advertising which does not allow the goods or the features that are being compared to be identified is also out of line with the informative purpose pursued by the Directive, which I have already mentioned (see points 33 and 34 above). Because of its vague and indeterminate nature, such advertising would not be capable of giving the consumer any proper guidance in his choice of purchases.

50. In short, I should say that such advertising displays all the dangers traditionally associated with some forms of comparative advertising (running down competitors, misleading consumers, confusing one product with another, etc.) without offering any of the advantages that comparative advertising can bring for the consumer (improving market transparency, stimulating competition between the various companies, etc.).

51. That being said, I must dissent from the positions taken by Lidl and the Polish and French Governments when they insist that advertisements must identify and list all the products that are being compared, together with the prices in each particular case.

11 — See also Advocate General Leger's Opinion in *Toshiba Europe*, points 50 and 51.

52. In the first place, I do not think the Directive supports such an interpretation. In fact, Article 2 establishes that comparative advertising means 'any advertising which explicitly or *by implication* identifies a competitor or goods or services offered by a competitor'.[12] Nor does the Directive lay down any other conditions, depending on whether advertisements contain explicit references or references by implication; it simply explains a number of requirements which must be observed by any form of advertisement (explicit or by implication) which falls within the definition of 'comparative advertising' contained in the above-mentioned Article 2.

53. In the second place, the contested interpretation would make comparative advertising into an instrument which it would be difficult or impossible to use whenever the information compiled was complex and varied. In the present case, for example, Colruyt claims that thousands of different products and prices were compared; so clearly in that case it would not be easy, to say the least, to include in the advertisement itself an extremely long list of the products that were being compared, together with the prices in each particular case. But similar requirements of brevity and simplicity in advertisements may obtain in various other cases, for example when comparing the chemical components of various cleaning products or the nutritional values of certain food products.

54. In fact, in my view, an advertisement must always be correct and accurate but it need not also always be as detailed and complete as a scientific or statistical publication. One can think, for example, of cases where inessential or qualifying aspects are left out of the advertisement or, conversely, of cases where the consumer can obtain the necessary information to identify the essential terms of the comparison in some other way (for example, on the advertiser's website, which may be mentioned in the advertisement).

55. In my view, it can therefore be concluded that the condition concerning the verifiability of the advertiser's statements can be held to have been observed not only, of course, when all the elements of the comparison are included directly in the advertisement but also when the advertisement indicates where and how an average consumer can find those elements easily or in any case clearly makes it possible for the consumer to ascertain what they are from the context and the circumstances of the case.

56. That being said, it is scarcely necessary to point out that none of these hypothetical

12 — Emphasis added. On the scope of the concept of comparative advertising, see also *Toshiba Europe*, paragraph 31, and *Pippig Augenoptik*, paragraph 35.

cases applies when that knowledge cannot be obtained except by instituting proceedings before a supervisory judicial or administrative authority. However, that is what would happen if we were to accept Colruyt's argument that the requirement of verifiability at issue should be held to be satisfied even where a consumer or a competitor has no other way of identifying the data on which the comparison in the advertisement is based than to apply to such an authority.

57. Such a view, in addition to rendering the guarantee of verifiability worthless to consumers by obliging them to have recourse to complex and costly procedures, would also effectively distort the logic of the system established by the Directive. The judicial route must in fact be reserved for ascertaining whether advertising is misleading or in any case unlawful and for imposing penalties accordingly, not for simply acquiring information.

58. Nor can it be objected that the information on which the comparison was based could be held to be covered by the rules on confidentiality of business information; or that it might be difficult to supply it in full and in detail because of the number and/or volume of the items concerned. In my view, the argument of business confidentiality, which the defendant mentioned at the hearing, is not very persuasive in the present case, since the information in question is simply a list of products offered to the public and the prices in each particular case. Moreover, I have already pointed out that all that information — even if it is voluminous — could be found in some other way and, in particular, could be made available to the consumer through means of communication in common use (see point 54 et seq. above).

59. I therefore confirm that, in my view, to require full transparency and verifiability of statements made in advertisements cannot be regarded, in law or in fact, as placing an impossible burden on the advertiser.

60. I should add that this view also seems to me to be in keeping with the spirit of the abovementioned Directive 2005/29 amending Directive 84/450. It is certainly true that Directive 2005/29 is not concerned with comparative advertising but with unfair business-to-consumer commercial practices; nevertheless, I think it can provide useful indications as to the general guidance given by the Community legislature. Thus, Article 7(1) and (3) of that directive specifically provide that '[a] commercial practice shall be regarded as misleading if ... it omits material information ... . Where the medium used to

communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader *to make the information available to consumers by other means* shall be taken into account'. [13]

61. Passing on now to examine the advertising campaign conducted by Colruyt in the light of the foregoing considerations, I am not sure that, on the basis of the test I suggested earlier (see point 55 above), an advertisement such as the one for BASIC products makes it possible to identify the goods that are being compared and consequently to verify the prices in each particular case. In any case, even supposing that the consumer does in fact succeed, on the basis of the information contained in the advertisement, in identifying the advertiser's products referred to in the advertisement, it still remains to be ascertained whether that information also enables the products of Colruyt's competitors which are included in the comparison to be identified (in particular: the consumer must be able not only to know which is Colruyt's 'Basic' cheese but also to recognise the allegedly 'similar' cheese sold by Lidl).

62. I also have serious doubts as to the price level advertising. It does not seem to me that in the present case it enables the goods that are being compared to be identified, still less the statements made in the contested advertisement to be verified. The goods and the prices in each particular case are not mentioned in the advertisement and cannot be obtained in any other way. Also, Colruyt itself stated at the hearing that 'there is currently no provision [for making the data on which the price comparison is based available to competitors or consumers]'.

63. That being said, I must in any event point out that the last word on the subject must rest with the referring court, which is certainly in the best position to determine whether or not the forms of comparative advertising distributed by Colruyt do in fact satisfy the requirement of 'verifiability' in the terms which I have endeavoured to define above.

64. In the light of the foregoing, I therefore propose that the Court reply that the requirements in respect of the 'objectivity' and 'verifiability' of the comparison, laid down in Article 3a(1)(c) of the Directive, do not preclude advertisements which do not expressly mention the goods and prices that are being compared when the advertisements in question indicate where and how an average consumer can find those ele-

13 — Emphasis added.

ments easily or in any case clearly make it possible for the consumer to ascertain what they are from the context and the circumstances of the case.

67. The French Government and the Commission take the view, on the contrary, that whether that comparison is likely to mislead consumers depends on the circumstances of the case and primarily on the method used to calculate the price levels. In their view, it is therefore for the national court to determine whether the advertisement distributed by Colruyt is in fact misleading.

The misleading nature of the price level advertising

68. Lastly, according to Colruyt and the Belgian authorities, comparative advertising based on price levels is not misleading within the meaning of the Directive unless the range of products on which the comparison is based is not sufficiently representative.

65. Lastly, the referring court seeks essentially to ascertain whether advertising which compares the price levels in certain supermarkets, calculated on the basis of a sample of products, is to be regarded as 'misleading' inasmuch as it may cause the consumer to believe that the terms on offer are more favourable over the entire range of products.

69. For my own part, I note first that, in accordance with Article 2(2) of the Directive, 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'.

66. The parties differ in their views on this point. Lidl and the Polish authorities consider that such advertising must be held to be misleading. In their view, to state that Colruyt generally charges lower prices than its competitors, without giving any precise indication either of the prices or of the products in question, creates the impression that this chain of supermarkets is always and in all circumstances cheaper.

70. In order to determine whether those conditions are satisfied, it is necessary

according to the Community case-law 'to take into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect'. [14] The assessment in this connection must therefore be carried out case by case with due regard to 'all the relevant factors, including the circumstances in which the products are sold ..., the presentation and the content of advertising material, and the risk of error in relation to the group of consumers concerned'. [15]

71. In the light of those criteria, it seems to me that comparative price level advertising which is based on an extrapolation from selected data and which causes the consumer to believe that the price differences cited apply to all the products sold by the advertiser may be held to be misleading within the meaning of the Directive. It appears, in my view, to be likely to raise false expectations in the average consumer, who may expect to make a certain level of saving, irrespective of the type or quantity of the goods he purchases.

72. That said, however, I must point out that it is not for the Court to determine whether in the present case Colruyt's advertisements are in fact such as to cause a sufficiently significant number of consumers [16] to believe that the advertiser is cheaper over the entire range of products which it sells. That calls for an assessment of the facts which, as we know, is a matter for the referring court. [17] I therefore agree with the French Government and the Commission that it is for that court to consider whether, in the light of all the relevant circumstances, the advertisements contested by Lidl are in fact misleading.

73. I therefore propose that the Court reply that comparative advertising which compares the price levels in various supermarkets on the basis of an extrapolation from selected data and which give rise to the belief that the price differences cited apply to all the products sold by those supermarkets is misleading within the meaning of Article 3a(1)(a) of the Directive.

14 — Case C-220/98 *Estée Lauder* [2000] ECR I-117, paragraph 27. See also Case C-210/96 *Gut Springenheide and Tusky* [1998] ECR I-4657, paragraph 37.

15 — Case C-313/94 *Graffione* [1996] ECR I-6039, paragraph 26; see also Case C-373/90 *X* [1992] ECR I-131, paragraphs 15 and 16.

16 — On that condition, see *Estée Lauder*, paragraph 31, and *Gut Springenheide and Tusky*, paragraph 34.

17 — See, to that effect, Case C-203/90 *Gutshof-Ei* [1992] ECR I-1003; Case 94/82 *De Kikvorsch* [1983] ECR 947; *Graffione*; and *Gut Springenheide and Tusky*.

V — Conclusion

74. In the light of the foregoing, I therefore propose that the Court reply as follows to the questions referred to it by the Rechtbank van Koophandel:

(1) The condition with regard to permissibility referred to in Article 3a(1)(b) of Directive 84/450/EEC does not preclude advertising which makes a comparison between selections of goods or services.

(2) The requirements in respect of the 'objectivity' and 'verifiability' of the comparison, laid down in Article 3a(1)(c) of the Directive, do not preclude advertisements which do not expressly mention the goods and prices that are being compared when the advertisements in question indicate where and how an average consumer can find those elements easily or in any case clearly make it possible for the consumer to ascertain what they are from the context and the circumstances of the case.

(3) Comparative advertising which compares the price levels in various supermarkets on the basis of an extrapolation from selected data and which gives rise to the belief that the price differences cited apply to all the products sold by those supermarkets is misleading within the meaning of Article 3a(1)(a) of the Directive.