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Provisional text

JUDGMENT OF THE COURT (Second Chamber)

8 February 2017 (*)

(Reference for a preliminary ruling — Comparative advertising — Directive 2006/114/EC — Article 4 — Directive 2005/29/EC — Article 7 — Objective price comparison — Misleading omission — Advertising comparing the prices of goods sold in shops having different sizes or formats — Permissibility — Material information — Degree of communication of information and the medium for communication of that information)

In Case C-562/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the cour d'appel de Paris (Court of Appeal, Paris, France), made by decision of 29 October 2015, received at the Court on 4 November 2015, in the proceedings

Carrefour Hypermarchés SAS

v

ITM Alimentaire International SASU

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, A. Prechal, A. Rosas, C. Toader and E. Jarašiūnas (Rapporteur), Judges,
Advocate General: H. Saugmandsgaard Øe,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 6 July 2016,

after considering the observations submitted on behalf of:

Carrefour Hypermarchés SAS, by B. Moreau-Margotin, M. Karsenty-Ricard, B. L'Homme-Houzai and F. Guerre, avocates,

ITM Alimentaire International SASU, by P. Deprez and J.-C. André, avocats,

the French Government, by D. Colas and J. Traband, acting as Agents,

the European Commission, by C. Valero and D. Roussanov, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 October 2016,

gives the following

Judgment

The present request for a preliminary ruling concerns the interpretation of Article 4(a) and (c) of Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (OJ 2006 L 376, p. 21) and of Article 7 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22).

The request has been made in proceedings between ITM Alimentaire International SASU ('ITM') and Carrefour Hypermarchés SAS ('Carrefour') concerning a television advertising campaign launched by Carrefour in which the prices of leading brand products in Carrefour shops and in the shops of competitors were compared.

Legal framework

European Union law

Under Article 2(b) of Directive 2006/114 'misleading advertising' is defined, for the purposes of that directive, 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’.

Article 4 of that directive provides that:

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

it is not misleading within the meaning of Articles 2(b), 3 and 8(1) of this Directive or Articles 6 and 7 of Directive 2005/29 ... ;

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

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

it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor;

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

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;

it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name;

it does not create confusion among traders, between the advertiser and a competitor or between the advertiser’s trade marks, trade names, other distinguishing marks, goods or services and those of a competitor.’

Article 6 of Directive 2005/29, entitled ‘Misleading actions’, provides:

‘1. A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:

...

the price or the manner in which the price is calculated, or the existence of a specific price advantage;

...’

Article 7 of Directive 2005/29, entitled ‘Misleading omissions’, provides:

‘1. A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

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

3. 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 in deciding whether information has been omitted.

...’

French law

Article L. 121-8 of the code de la consommation (Consumer Code), in the version in force at the time of the facts in the main proceedings, provides:

‘Any advertising which compares goods or services by identifying, explicitly or by implication, a competitor or goods or services offered by a competitor shall be permitted only if:

it is not misleading or likely to deceive;

it relates to goods or services meeting the same needs or intended for the same purpose;

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 questions referred for a preliminary ruling

In December 2012, Carrefour launched a major television advertising campaign, entitled ‘garantie prix le plus bas Carrefour’ (Carrefour lowest price guarantee), which compared the prices of 500 leading brand products charged in its shops and in shops of competitors, including Intermarché shops, and offered to reimburse consumers twice the price difference if they found cheaper prices elsewhere.

The television advertisements broadcast showed price differences favourable to Carrefour and, in particular, products sold in Intermarché shops were shown as being consistently more expensive than those sold by Carrefour. From the second televised advertisement onwards, all of the Intermarché shops selected for comparison were supermarkets and all of the Carrefour shops were hypermarkets. That information appeared only on the home page of the Carrefour website, where it was stated in small print that the guarantee ‘applied only in Carrefour and Carrefour Planet shops’ and that it therefore did ‘not apply in Carrefour Market, Carrefour Contact or Carrefour City shops’. In the television advertisements, the word ‘Super’ appeared in smaller letters beneath the name Intermarché.

On 2 October 2013, after having given Carrefour notice to stop disseminating that advertisement, ITM, the company responsible for the strategy and commercial policy of the food outlets belonging to the 'Mousquetaires group', including Intermarché Hyper and Intermarché Super, brought proceedings against Carrefour before the tribunal de commerce de Paris (Commercial Court, Paris, France) by which it sought an order requiring Carrefour to pay damages of EUR 3 million to ITM, an injunction prohibiting the dissemination of the advertisement at issue and of any comparative advertising based on similar comparison methods, the cessation, subject to a penalty, of the internet streaming of eight advertising spots, the cessation, subject to a penalty, of any presentation comparing the difference in average prices of different retail outlets on the basis of a method of comparison lacking in objectivity, subject to a periodic penalty in default, and also the publication of any judgment to be delivered.

By judgment of 31 December 2014, the tribunal de commerce de Paris (Commercial Court, Paris) ordered Carrefour to pay to ITM EUR 800 000 as compensation for the harm sustained, upheld the applications for the prohibition of the dissemination of the advertising and ordered the publication of that judgment.

That court held, *inter alia*, that, by adopting a misleading method of selecting sales outlets and distorting the representativeness of the price comparisons, Carrefour had failed to comply with the objectivity requirements under Article L. 121-8 of the Consumer Code, and that those breaches of the requirement of objectivity in a comparative advertising campaign constituted acts of unfair competition. It also pointed out that the information featuring on the Carrefour website did not make it clear to consumers that the comparison was being made between shops of different sizes.

Carrefour appealed against that judgment to the cour d'appel de Paris (Court of Appeal, Paris, France) and, in the context of the preparation of the case for final decision, requested that the matter be referred to the Court of Justice.

Before that court, Carrefour argued that the interpretation of Directive 2006/114, which Article L. 121-8 of the Consumer Code seeks to transpose, was necessary in order to resolve the dispute in the main proceedings with regard to the question whether a comparison of the prices of selected goods was permitted only if the goods were sold in shops which had the same size or format.

ITM opposed the request for a preliminary ruling, arguing that the proposed question was not necessary for the purpose of resolving the dispute in the main proceedings since what was in issue in those proceedings was not a prohibition of comparing the prices of products sold in shops of different sizes but rather the assessment of the misleading nature of the advertising to the extent that consumers were not clearly and objectively informed of the difference in the format or size of the shops being compared.

The judge responsible for preparing the case for final decision noted that it was indeed the very principle of comparative price advertising between shops with different formats that had formed the basis of the decision of the court of first instance and noted that the cour d'appel de Paris (Court of Appeal, Paris), which is required to examine the dispute in its entirety, must address that point. Furthermore, the judge pointed out that, if the principle of comparative advertising of prices between shops having different formats were to be considered to be consistent with Directive 2006/114, the cour d'appel (Court of Appeal) would also have to consider whether the fact that the shops whose prices were being compared were of different sizes and formats constituted material information, within the meaning of Directive 2005/29, that must necessarily be brought to the attention of the consumer and, if so, to what degree and/or via what medium that information must be communicated to consumers.

In those circumstances, the cour d'appel de Paris (Court of Appeal, Paris) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

[Must] Article 4(a) and (c) of Directive [2006/114] ..., which provides that "[c]omparative advertising shall ... be permitted when ... it is not misleading [and] it objectively compares one or more material, relevant, verifiable and representative features of those goods and services", be interpreted as meaning that a comparison of the price of goods sold by retail outlets is permitted only if the goods are sold in shops having the same format or of the same size [?]

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

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

Consideration of the questions referred

By its three questions, which should be considered together, the referring court asks, in essence, whether Article 4(a) and (c) of Directive 2006/114 must be interpreted as meaning that advertising, such as that at issue in the main proceedings, which compares the prices of products sold in shops having different sizes or formats is unlawful. Furthermore, the referring court is unsure whether the fact that the shops whose prices are being compared are of different sizes or formats constitutes material information, within the meaning of Article 7(1) and (2) of Directive 2005/29, to which Article 4(a) of Directive 2006/114 refers, and, where relevant, what degree and what medium of communication that information must have.

It should be noted that Directive 2006/114 codifies Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising (OJ 1984 L 250, p. 17), which, after having been amended on several occasions, was repealed and replaced by Directive 2006/114, with the result that the Court's case-law on the interpretation of Directive 84/450 is fully applicable to situations covered by Directive 2006/114.

Accordingly, it should be noted that Directive 2006/114 carries out an exhaustive harmonisation of the conditions under which comparative advertising in Member States might be permitted and that such 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 (judgments of 8 April 2003, *Pippig Augenoptik*, C-44/01, EU:C:2003:205, paragraph 44, and of 18 November 2010, *Lidl*, C-159/09, EU:C:2010:696, paragraph 22).

Furthermore, according to settled case-law of the Court, since comparative advertising contributes to demonstrating, in an objective manner, the advantages of various comparable goods and thus to stimulating competition between suppliers of goods and services to the consumer's advantage, the conditions to be met for such advertising must be interpreted in the sense most favourable to that advertising, while ensuring at the same time that comparative advertising is not used anticompetitively and unfairly or in a manner which affects adversely the interests of consumers (see, to that effect, judgments of 25 October 2001, *Toshiba Europe*, C-112/99, EU:C:2001:566, paragraphs 36 and 37; of 19 September 2006, *Lidl Belgium*, C-356/04, EU:C:2006:585, paragraph 22; and of 18 November 2010, *Lidl*, C-159/09, EU:C:2010:696, paragraphs 20 and 21 and the case-law cited).

However, on the one hand, Article 4 of Directive 2006/114 does not require the format or size of the shops selling the goods whose prices are being compared to be similar and, on the other hand, a comparison of the prices of comparable products sold in shops of different formats and sizes, in itself, is likely to contribute to the achievement of the objectives of comparative advertising referred to in the preceding paragraph of this judgment and does not undermine fair competition or the interests of consumers.

That being said, advertising which compares the price of products sold in shops of different sizes or formats cannot be regarded as permitted, within the meaning of Article 4 of Directive 2006/114, unless all of the conditions laid down in that article are satisfied.

In particular, such advertising must compare prices objectively and must not be misleading.

It follows from Article 4(c) of Directive 2006/114 that the prices must be compared objectively (see, to that effect, judgment of 19 September 2006, *Lidl Belgium*, C-356/04, EU:C:2006:585, paragraph 45).

However, in certain circumstances the difference in size or format of the shops in which the prices being compared by the advertiser have been identified may distort the objectivity of the comparison. This may be the case where the advertiser and the competitors whose prices have been identified belong to retail chains which each have a range of shops of different sizes and formats and where the advertiser compares the prices charged in shops in its retail chain having larger sizes and formats with those identified in shops having smaller sizes and formats in competing retail chains, without that fact appearing in the advertising.

As observed by the Advocate General in points 43 and 57 of his Opinion, the prices of consumer products are likely to vary according to the format or size of the shop, with the result that an asymmetric comparison of that kind may have the effect of artificially creating or increasing the difference between the advertiser's prices and the prices of competitors, depending on the selection of the shops used in the comparison.

However, Article 4(a) of Directive 2006/114 requires comparative advertising not to be misleading, within the meaning of Article 2(b) of that directive or of Articles 6 and 7 of Directive 2005/29.

It is apparent from those provisions that comparative advertising will be misleading if it may in any way, either by action or omission, deceive the consumers to whom it is addressed and affect the economic behaviour of those consumers or, for those reasons, adversely affect a competitor. Advertising will, therefore, be misleading under, inter alia, Article 4(a) of Directive 2006/114, read in conjunction with Article 7(1) and (2) of Directive 2005/29, if it omits material information that the average consumer requires, according to the context, in order to take an informed transactional decision or if it hides such information or provides it in an unclear, unintelligible, ambiguous or untimely manner and which consequently may cause the average consumer to take a transactional decision that he would not have taken otherwise.

While Directive 2005/29 does not define the concept of 'material information', it is nevertheless apparent from Article 7(1) and (2) of that directive that information which the average consumer requires, according to the context, in order to take an informed transactional decision and the omission of which, therefore, may cause that consumer to take a transactional decision that he would not have taken otherwise is 'material'.

It is for national courts to ascertain, in the light of the circumstances of each particular case, whether, bearing in mind the consumers to whom it is addressed, advertising may be misleading (see, to that effect, judgments of 18 November 2010, *Lidl*, C-159/09, EU:C:2010:696, paragraph 46 and the case-law cited, and of 12 May 2011, *Ving Sverige*, C-122/10, EU:C:2011:299, paragraph 51). In order to do that, national courts must, first, take into account the perception of an average consumer of the goods or services being advertised who is reasonably well informed and reasonably observant and circumspect and, secondly, take account of all the relevant factors in the case, having regard, as follows from Article 3 of Directive 2006/114, to the information contained in the advertisement at issue and, more generally, to all of its features (see, to that effect, judgment of 18 November 2010, *Lidl*, C-159/09, EU:C:2010:696, paragraphs 47 and 48 and the case-law cited).

In the present case, advertising in which the advertiser, with a view to comparing the prices of products sold in its shops with those of products sold in competitors' shops, uses, on the one hand, the prices charged in shops having larger sizes or formats in its retail chain and, on the other hand, the prices charged in shops having smaller sizes or formats in the retail chains of competitors, whereas each of those retail chains contains a range of shops of different sizes and formats, is liable to deceive the average consumer by giving that consumer the impression that all the shops forming part of those retail chains have

been taken into consideration in making the comparison and that the price differences indicated are valid for all the shops in each chain irrespective of their size or format, whereas, for the reasons set out in paragraph 27 of the present judgment, that is not necessarily the case.

That advertising is liable to influence the economic behaviour of the consumer by causing him to take a decision in the mistaken belief that he will benefit from the price differences claimed in the advertising when buying the products concerned in all the shops in the advertiser's retail chain rather than in shops belonging to the competing retail chains.

It follows that such advertising is liable to be misleading within the meaning of Article 4(a) of Directive 2006/114.

That will not be the case, however, if the consumer is informed that the advertising in question compares the prices charged in shops having larger sizes or formats in the advertiser's retail chain with the prices displayed in shops having smaller sizes or formats in the retail chains of competitors, since the consumer will then know that it is only when buying the products concerned in the shops having larger sizes or formats in the advertiser's retail chain that he can benefit from the price differences claimed in the advertising. Consequently, that information, in the context of such advertising comparing the prices charged in shops forming part of retail chains each possessing a range of shops of different sizes and formats, is necessary to enable the consumer to take an informed decision to buy the products concerned in the advertiser's shops rather than in competitors' shops and not to take a decision to purchase which he would not otherwise have taken. Therefore, the issue in this context is one of material information, within the meaning of Article 7(1) and (2) of Directive 2005/29.

It follows from the foregoing considerations that advertising, such as that at issue in the main proceedings, comparing the prices of products sold in shops having different sizes or formats is liable, where those shops are part of retail chains each having a range of shops having different sizes and formats and the advertiser compares the prices charged in shops having larger sizes or formats in its retail chain with those displayed in shops having smaller sizes or formats belonging to a competing retail chain, not to comply with the requirement that there be an objective comparison under Article 4(c) of Directive 2006/114 and to be misleading, within the meaning of Article 4(a) of that directive, unless consumers are informed that the comparison was made between prices charged in shops having larger sizes or formats in the advertiser's retail chain with those displayed in shops having smaller sizes or formats in competitors' retail chains.

Concerning the question of the degree to which such material information must be communicated, and by what medium this must be done, it should be noted that Directive 2005/29 does not contain any specific details in that regard. Nevertheless, it is apparent, first, from Article 7(2) of that directive that material information cannot be hidden or provided in an unclear, unintelligible, ambiguous or untimely manner and, secondly, from Article 7(1) and (3) of that directive that, in order to assess whether information has been omitted, account must be taken of the limitations of the communication medium used and, where that medium imposes limits of space or time, any measures taken by the trader to make the information available to consumers by other means.

With regard to advertising such as that at issue in the main proceedings, it follows from the foregoing considerations that the information on the basis of which the comparison was made between the prices charged in shops having larger sizes or formats in the advertiser's retail chain and those displayed in shops having smaller sizes or formats in competitors' retail chains is information in the absence of which it is highly likely that the advertising would fail to fulfil the objective comparison requirement and would be misleading. Therefore, that information must not only be provided clearly but, as the Advocate General stated in points 75 to 79 of his Opinion, be contained in the advertisement itself.

It is for the referring court to ascertain whether, in the case in the main proceedings, in the light of the circumstances of the case, the advertising at issue fails to meet the objective comparison requirement and is misleading, taking into consideration the information referred to in paragraph 31 of the present judgment, in particular the indications given in the advertising itself concerning shops in the advertiser's retail chain and those in the retail chains of competitors whose prices have been compared, that information being relevant for the purpose of assessing both the objectivity of the comparison and whether that advertising is misleading.

Having regard to all of the foregoing considerations, the answer to the questions referred is as follows:

Article 4(a) and (c) of Directive 2006/114, read in conjunction with Article 7(1) to (3) of Directive 2005/29, must be interpreted as meaning that advertising, such as that at issue in the main proceedings, which compares the prices of products sold in shops having different sizes or formats, where those shops are part of retail chains each of which includes a range of shops having different sizes or formats and where the advertiser compares the prices charged in shops having larger sizes or formats in its retail chain with those displayed in shops with smaller sizes or formats in the retail chains of competitors, is liable to be unlawful, within the meaning of Article 4(a) and (c) of Directive 2006/114, unless consumers are informed clearly and in the advertisement itself that the comparison was made between the prices charged in shops in the advertiser's retail chain having larger sizes or formats and those indicated in the shops of competing retail chains having smaller sizes or formats.

It is for the referring court, in order to assess the lawfulness of such advertising, to ascertain whether, in the case in the main proceedings, in the light of the circumstances of the present case, the advertising at issue satisfies the objective comparison requirement and/or is misleading, first, by taking into consideration the average consumer of the products in question who is reasonably well informed and reasonably observant and circumspect and, secondly, by taking into account the information contained in that advertising, in particular the information concerning the shops in the advertiser's retail chain and those in the retail chains of competitors whose prices have been compared and, more generally, all of the elements in that advertising.

Costs

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 (Second Chamber) hereby rules:

Article 4(a) and (c) of Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, read in conjunction with Article 7(1) to (3) of Directive 2005/29/EC of the European Parliament and Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council, and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), must be interpreted as meaning that advertising, such as that at issue in the main proceedings, which compares the prices of products sold in shops having different sizes or formats, where those shops are part of retail chains each of which includes a range of shops having different sizes or formats and where the advertiser compares the prices charged in shops having larger sizes or formats in its retail chain with those displayed in shops having smaller sizes or formats in the retail chains of competitors, is liable to be unlawful, within the meaning of Article 4(a) and (c) of Directive 2006/114, unless consumers are informed clearly and in the advertisement itself that the comparison was made between the prices charged in shops in the advertiser's retail chain having larger sizes or formats and those indicated in the shops of competing retail chains having smaller sizes or formats.

It is for the referring court, in order to assess the lawfulness of such advertising, to ascertain whether, in the case in the main proceedings, in the light of the circumstances of the present case, the advertising at issue satisfies the objective comparison requirement and/or is misleading, first, by taking into consideration the average consumer of the products in question who is reasonably well informed and reasonably observant and circumspect and, secondly, by taking into account the information contained in that advertising, in particular the information concerning the shops in the advertiser's retail chain and those in the retail chains of competitors whose prices have been compared and, more generally, all of the elements in that advertising.

[Signatures]

* Language of the case: French