Outlook of the European Court of Justice Regarding Comparative Advertising

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Abstract

Advertising transcends the borders of the States and has an impact on the single market. Moreover, it may lead to distortions of competition. One purpose of regulating advertising stems from the imperatives of protecting consumers. They are the recipients of the advertising message and their interests can be harmed by advertising. Misleading advertising is prohibited, as is comparative advertising, in certain situations, in expressly determined hypotheses. The analysis in concreto of two such facts, in the reflection of the decisions given by the European Court of Justice, is the theme of this study. At the same time, we will analyze the sanctions regulated at national level in the event of committing the acts that constitute illicit comparative advertising, as well as the administrative bodies empowered to apply the sanctions in order to clean up the competitive environment.

Keywords*: advertising; misleading advertising; comparative advertising; administrative bodies; sanctions.*

JEL Classification: K33, K41

1. The regulation of misleading advertising and comparative advertising. *Sedes materie*

The regulation of misleading and comparative advertising at national level is contained in Law no. 158 of 2008 on misleading advertising and comparative advertising[2], which is *sedes materie* and is the result of transpositions of Directive 2006/114/EC[3] on misleading advertising and advertising comparative.

In the field of advertising, the general framework at national level was regulated by Law no. 148 of 2000 on advertising[4] as a result of the transposition of Directive 84/450/EEC on misleading advertising[5]. This was done mainly on the grounds that advertising crosses state borders and has a direct effect on the organization and functioning

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[2] Published in the Official Gazette, no. 559 / 24.07.2008, consolidated version on 15.02.2022, hereinafter referred to as *Legea nr. 158 din 2008.*

[3] Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, published in OJ L376/21, hereinafter referred as *Directiva 2006/114/CE*, https://eur-lex.europa.eu/legal-content/RO/LSU/?uri=celex:32006L0114, accessed on 15.02. 2022, hereinafter referred as Directiva 2006/114/CE.

[4] Published in the Official Gazette no. 359 / 02.08.2000, entered into force on 2 November 2000, hereinafter referred to as *Legea nr. 148 din 2000, repealed in part by Legea 158 din 2008.*

[5] Directive no. 84/450/EEC of 10 September 1984 on the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, published in OJ L290/ 18, hereinafter referred to as *Directiva 84/450/CEE*, https://eur-lex.europa.eu/legal-content/RO/TXT/ HTML/?uri=CELEX:31984L0450&from=EN, accessed on 15.02.2022, hereinafter referred to as Directiva 84/450/CEE.

of the common market, and misleading advertising can lead to distortions of competition.

Law no. 148 of 2000, had as purpose, as provided by art. 1, the protection of consumers of products and services, the protection of persons carrying out a production or trade activity, providing a service or practicing a trade or profession, as well as the protection of the general public interest against misleading advertising, similar to art. 1 of Directive 84/450/EEC.

Consumers, as recipients of the advertising message, need protection, because their economic interests can be harmed by advertising. This is one of the protective purposes pursued by the regulation of protective advertising. According to the provisions of art. 1, Law no. 148 of 2000, also ensures the protection of the general public interest against misleading advertising.

Directive no. 84/450/EEC established *ab initio* that, following the harmonization of national provisions on protection against misleading advertising, the second stage of regulation would be the field of comparative advertising. Assuming the comparison of the essential, relevant, verifiable and representative characteristics of the delivered product or of the pressed services without that comparison being misleading, it constitutes a legal means of publicity.

Consequently, the objective of Directive no. 97/55/EC[6] which amended Directive 84/450/EEC, established the conditions for the lawfulness of comparative advertising, which include criteria for the objective comparison of the characteristics of goods and services.

Moreover, the conditions for comparative advertising in the Member States[7] they need to be harmonized, because comparative advertising contributes to highlighting, in an objective way, the advantages of comparable products, stimulating competition between suppliers of goods and services in the interest of consumers.[8]

This aims, in accordance with Article 1, to protect traders against misleading advertising and its unfavorable consequences and to establish the conditions under which comparative advertising is permitted.

The definition given to the notion of "advertising" in Law no. 158 of 2008, is similar to the one contained in Directive no. 2006/114/EC, i.e. any form of presentation of a commercial, industrial, artisanal or self-employed activity aimed at promoting the supply of goods and services, including real estate, rights and obligations.

The concept of "misleading advertising" and "comparative advertising" within the meaning of Law 150 of 2008 are defined as follows:

a) Misleading advertising. Misleading advertising is advertising that, in any way, including through presentation, misleads or may mislead the people to whom it is addressed or who come into contact with it. The misleading nature of advertising can affect the economic behavior of consumers or can harm a competitor by constituting an

[6] Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising to include comparative advertising, published in OJ L 290/18 (23/10/1997) p. 0018 - 0023 hereinafter referred to as *Directiva 97/55/CE,* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31997L0055, accessed on 15.02.2022.

[7] Hereinafter referred to as SM.

[8] On the law and the directive see R.D. Apan, *Creditul destinat consumului şi domeniile conexe,* Sfera, Cluj Napoca, 2007, pp. 133-134.

act of unfair competition.[9]

b) Comparative advertising. Comparative advertising is defined as any advertising that explicitly or implicitly identifies a competitor or the goods or services offered by it.

According to the provisions of art. 4, of Law 158 of 2008, establishes the principle according to which misleading advertising is prohibited *de plano*. In order to determine whether the advertising is misleading, art. 5 of Law 158 of 2008 stipulates that all aspects of it must be taken into account, in particular any information contained therein regarding:

a) the characteristics of the goods or services, such as: availability, nature, method of execution, composition, method and date of manufacture of goods or provision of services, if they correspond to their purpose, destination, quantity, technical-functional parameters, geographical or commercial origin, the expected results as a result of their use or the essential results and characteristics of the tests or checks performed on the goods or services;

b) the price or the method of calculating the price and the conditions under which the goods are distributed or the services are provided;

c) the nature, duties and rights of the trader who advertises himself, such as: his identity and assets, qualifications and possession of industrial, commercial or intellectual property rights or his awards and distinctions.

According to art. 6 of Law 158 of 2008, comparative advertising is considered legal if it meets, cumulatively, the following conditions:

a) is not misleading, according to the provisions of art. 3 lit. b) and of art. 5 of Law 158 of 2008, as well as of art. 5-7 of Law no. 363/2007 on combating incorrect practices of traders in relation to consumers and harmonization of regulations with European legislation on consumer protection;[10]

b) compares goods or services that meet the same needs or are intended for the same purposes;

c) compares, objectively, one or more essential, relevant, verifiable and representative characteristics of the respective goods or services, which may include the price;

d) does not discredit or denigrate the trademarks, trade names, other distinctive signs, goods, services, activities or situation of a competitor;

e) in the case of products with a designation of origin, it refers, in each case, to products with the same designation;

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

g) does not present goods or services as imitations or reproductions of goods or services bearing a protected trademark or trade name;

h) does not create confusion between traders, between the advertiser and a competitor or between brands, trade names, other distinctive signs, goods or services of

[9] Misleading advertising in comparative law, see in Y. Eminescu, *Concurența neloială,* Ed. Lumina Lex, Bucharest, 1997, pp. 88-97.

[10] Published in the Official Gazette no. 454 of July 24, 2013, available online at, https://legislatie.just.ro/Public/DetaliiDocument/95934, amended and supplemented, hereinafter referred to as *Legea 363 din 2007*.

the advertiser and those of a competitor.

In determining the cases in which the comparative advertising is considered lawful, therefore allowed, the negative criterion is used, the hypotheses being expressly determined.[11]

2. Interpretation of the concept of unlawful comparative advertising in the light of the judgments of the European Court of Justice[12]

An analysis of the interpretation of the provisions of art. 3, para. (1) of Directive 54/450/EC and the provisions of art. Article 4 of Directive 2006/114, in the light of the case-law of the CJEU, is relevant for the definition of the concept of unlawful comparative advertising.

It should be noted that Directive 2006/114 is a result of the codification of Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising, which, after being amended several times, was repealed and replaced by Directive 2006/114, so, that the Court's case-law on the interpretation of Directive 84/450 is fully applicable in situations falling within the scope of Directive 2006/114.

In essence, it is for the Court's interpretation of comparative advertising to be misleading, and the comparison may be misleading.

2.1. Judgment of the Court of 18 November 2010 in Case C-159/09 concerning *Lidl SNC v. Vierzon Distribution SA*[13]

2.1.1. The text interpreted by the Court - art. 3 of Directive 84/450/EEC

Article 3a (1) of Directive 84/450 provides: *"Comparative advertising shall be allowed, for comparison purposes, if the following conditions are met: (a) it is not misleading in accordance with Article 2 (2), Article 3 and Article 7 (1); (b) compares goods or services that meet the same needs or are intended for the same purposes; (c) objectively compare one or more material, relevant, verifiable and representative features of those goods or services, which may include the price; (d) does not create confusion in the marketplace between the advertiser and a competitor or between the advertiser's trademarks and trade marks, other distinctive signs, goods or services and those of a competitor; (e) does not discredit or denigrate the trade marks, trade names, other distinctive signs, goods, services, activities or situation of a competitor; (f) in the case of products with a designation of origin, refers in each case to products with the same designation; origin of competing products; (h) does not present goods or services as imitations or reproductions of goods or services bearing a protected trade mark or a protected trade name.*

2. Any comparison relating to a special offer shall state in a clear and unequivocal manner the deadline for the offer or, where appropriate, the fact that the

[11] See French case law on misleading and comparative advertising G. Cas and R. Bout., *Concurrence – Distribution – Consommation,* Lamy, Paris, 1991, pp. 692-704 and pp. 727-743.

[12] Hereinafter referred to as the ECJ.

[13]Available online at https://curia.europa.eu/juris/document/document.jsf?text=&docid=79197&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=21155505, accessed on 01.03.2022.

special offer is made subject to the availability of goods or services and, where the special offer does not. it has started again, the start date of the period during which the special price or other special conditions apply."

In French national law, the text was transposed into Article L. 121 8 of the French Consumer Code, which provides: "Any form of advertising comparing goods or services by explicitly or implicitly identifying a competitor or goods or services it is not permitted unless: 1° it is not misleading or misleading; 2° compares goods or services that meet the same needs or are intended for the same purposes; 3° compares, objectively, one or more material, relevant, verifiable and representative characteristics of those goods or services, which may also include the price."

2.1.2. The main dispute

Lidl runs a chain of grocery stores in France, and Vierzon is a store located near Lidl, belonging to Vierzon Distribution, which sells consumer products under the name Leclerc.

On September 23, 2006, Vierzon published an advertisement in a local newspaper *reproduced cash vouchers listing, by means of generic designations accompanied, where appropriate, by the indication of weight or volume, 34 products, mostly of a food nature, purchased from the Vierzon store and from the Vierzon store. Lidl, highlighting a total cost of 46.30 euros for Vierzon Distribution, and 51.40 euros for Lidl.*

The advertisement also contained the slogans *"not everyone is E. Leclerc! low prices: proof that E. Leclerc remains the cheapest"* and *"in English it is called "hard discount", in French it is called "E. Leclerc"*. On 16 March 2007, Lidl brought an action before the Commercial Court of Bourges for damages against Vierzon for damages for unfair competition and for the publication in the press and the display in its store of extracts from the judgment to be given.

Lidl alleges infringement of Article L. 121 8 of the French Consumer Code, on the ground that *advertising misleads or misleads consumers, both by its presentation and by the fact that Viezon selected only the products which benefited it after possibly aligning its prices with those of its competitor.* In addition, *the selected products would not be comparable, as the qualitative and quantitative differences between them would be due to the fact that they do not meet the same needs.* Lidl claims that the mere reproduction, in the contested advertisement, of the bills stating the list of products compared *does not enable consumers to assess their own characteristics and to understand the reasons for the price differences relied on in that advertisement.*

Vierzon challenged those assertions on the ground that a comparison may relate to two goods which are not identical, in so far as they meet the same needs or are intended for the same purposes and have a sufficient degree of interchangeability in that regard also, that the differences between the products in question are sufficiently apparent from the vouchers so that consumers are not misled. Vierzon's selection of the products to be compared would not be unlawful, in his view, and the same day's purchase would preclude the possibility of price manipulation.

2.1.3. Preliminary question

In those circumstances, the Tribunal de Commerce de Bourges decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling: *"Article 3a of Directive [84/450] must be interpreted as meaning that it would not be lawful to carry out comparative advertising in the light of the prices of products which meet the same needs or are intended for the same purposes, in other words having a degree of sufficiently interchangeable, simply because, in the case of foodstuffs, the edible character of each of these products and, in any case, the satisfaction felt when consumed varies entirely depending on the conditions and place of manufacture, the ingredients used and the the manufacturer's experience?"*

Previous case law of the Court[14] noted that Article 3a was intended to promote advertising *"Stimulating competition between suppliers of goods and services for the benefit of consumers*, enabling competitors to objectively highlight the advantages of different comparable products and at the same time prohibiting practices which may distort competition, be detrimental to competitors and have a negative effect on consumer choice."

2.1.4. ECJ benchmarks

Article 3a (1) (b) of Directive 84/450, premises the ECJ's analysis is that comparative advertising only on the price of goods and services should be possible, provided that the method of comparison is not misleading. The Court enshrines that the comparative nature of goods in respect of goods is permitted only if they meet the same needs and are intended for the same purposes, with an appropriate degree of interchangeability.

The Court notes that, in its previous judgments, Lidl Belgium[15] and De Landtsheer Emmanuel[16], the requirement laid down in Article 3a (1) (b) of Directive 84/450 makes the comparison of comparative advertising conditional on the fact that the goods being compared have a sufficient degree of interchangeability for the consumer, or that those judgments have been given precisely in cases which featured advertisements for food products.

The Court also determines what is characteristic of the concept of 'comparative advertising', namely, 'identification of a competitor', and at the same time, of the advertiser or of *goods* or *services* offered by him, the Court notes that competing undertakings 'shall be based on the substitutability of the goods or services which those

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[14] The judgment of the Court of Justice in Case C-487/07 Article 3a (1) of Directive 84/450, as amended by Directive 97/55, must be interpreted as meaning that the person who publishes the advertisement expressly or implicitly in comparative advertising that the product it markets is an imitation of a product bearing a well-known mark is 'goods or services as imitations or reproductions' within the meaning of Article 3a (1) (h). The profit made by the advertiser as a result of such unauthorized comparative advertising shall be deemed to be obtained "unfairly" from the reputation of that trade mark within the meaning of Article 3a (1) (g), available online at https://curia.europa.eu/juris/document/document.jsf?docid=75459&doclang=RO, accessed on 09.03.2022.

[15]Judgment of the Court of 18 November 2010 in Case C-159/09, available online at https://eur-lex. europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:62009CJ0159&from=MT, accessed on 09.03.2022.

[16] Judgment of the Court of 19 April 2007 in Case C-381/05, available online at https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:62005CJ0381&from=SV, accessed on 09.03.2022.

undertakings offer on the market.'

In the analysis of the interpretation, art. 3a, the Court considers that an individual and concrete assessment of the products being compared in the advertisement is necessary, as well as whether the products are likely to meet identical needs, which results from the existence of a degree of substitution of appreciation between them.

Reflecting the Court's consistent case law[17], the conditions imposed for comparative advertising *must be interpreted in the most favorable way*, that is to say, in such a way as to permit such advertising.

It is for the national court to determine, in the Court's view, in the light of the circumstances of the case whether, in the light of the consumers to whom it is addressed, such advertising may be misleading. The Court also refers to the assessment criteria, namely: *on the one hand, 'take into account the perception of the average consumer of the goods or services in question, normally informed and sufficiently careful and informed'*, and, on the other hand, to consider whether the a significant number of targeted consumers may be mistakenly convinced that the advertiser's selection of products is representative of the general price level of the advertiser in relation to that of its competitor and that, therefore, to suggest that those consumers will save on the value of the advertisers if they regularly make their purchases of consumer goods from the advertiser rather than from that competitor or even with the erroneous belief that all the publisher's products advertising is cheaper than that of its competitor.

An essential factor in the misleading nature of comparative advertising is the analysis of "whether, in order to make the price comparison by that advertisement, foodstuffs were selected which actually present objective differences which are likely to significantly influence the purchaser's choice."

However, the Court considers that the average consumer assumes *that advertising implicitly includes "the assertion that there is an equivalence between the other characteristics of those products which are also likely to have a significant influence on that consumer's choice.*"

The failure to inform the consumer about the differences between the products and the comparative analysis with exclusive reference to price is considered by the Court at the level of principle, as being likely to mislead the consumer, to influence his economic behavior, with the consequence that it makes him buy from the advertiser and not from his competitor.

The Court imposes on the referring court the obligation to verify whether, by advertising, the description of the company's products provides consumers with concrete and precise identification of the products, thus creating the possibility of verifying their prices.

2.1.5. Judgment of the Court

Article 3a (1) (b) of Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising, as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 must be interpreted as meaning that the mere fact that the food differs in its edibility and the satisfaction of the

[17] Judgment of the Court of 26 January 2017 in Case C-609/13 P, available online at https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:62013CJ0609&from=DE, accessed on 09.03.2022.

consumer, depending on the conditions and the place of manufacture, the ingredients and the identity of the manufacturer, is not such as to exclude the possibility that the contrastive analysis of such products may satisfy the requirement laid down in that provision and that they must meet the same needs or be intended for the same purposes, ie have a sufficient degree of interchangeability. Article 3a (1) (a) of Directive 84/450, as amended by Directive 97/55, must be interpreted as meaning that an advertisement such as that at issue in the main proceedings *may be misleading*, in particular:

- if it is established, having regard to all the relevant circumstances of the case, in particular the information or omissions accompanying such advertising, that the purchasing decision of a significant number of consumers addressed *may be erroneously believed that the product selection by the person publishing the advertisement is representative of the general level of the latter's prices* in relation to that charged by its competitor and from the person who published the advertisement rather than from that competitor or even with the erroneous belief that all of the advertiser's products are cheaper than

- if it is found that, in order to make a comparison only from the point of view of price, foodstuffs have been selected which actually differ in such a way as to have a significant effect on the choice of the average consumer, without these differences being reflected in the intended advertising.

Article 3a (1) (c) of Directive 84/450, as amended by Directive 97/55, must be interpreted as requiring that the requirement of verifiability provided for in that provision requires, as regards advertising such as the one in the main proceedings, which compares the prices of two lots of goods, so that the goods in question can be accurately identified on the basis of the information contained in that advertisement.

The case-law of the Court referred to in Case C-159/09 of 18 November 2009 is: (i) The Judgement from 18th of June 2009, L'Oréal and others, C-487/07[18], pct. 67; (ii) The Judgement from 8th of April 2003, Pippig Augenoptik, C-44/01[19], pct. 44; (iii) The Judgement from 19th of September 2006, Lidl Belgium, C-356/04[20], pct. 57; (iv) The Judgement from 19th of April 2007, De Landtsheer Emmanuel, C-381/05[21], pct. 27, pct. pct. 28, pct. 30, pct. 44, pct. 46, pct. 48, pct. 47, pct. 70, pct. 71.

2.2. Judgment of the Court of 8th February 2017 in Case C 562/15 -*Carrefour Hypermarchés SAS v. ITM Alimentaire International SAS*

The reference for a preliminary ruling under Article 267 TFEU of the Cour d'appel de Paris was made by decision of 29 October 2015, received by the Court on 4 November 2015, in the preliminary ruling procedure. This judgment concerns the interpretation of Article 4 (a) and (c) of Directive 2006/114/EC and Article 7 of Directive 2005/29/EC, concerning unfair business-to-consumer commercial practices in the internal market.

[18]Available online at https://curia.europa.eu/juris/document/document.jsf;jsessionid=EC70B06BC02B9E56AED7AB5C62B941F7?text=&docid=75459&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=21131451, accessed on 21.10.2021.

[19] Available online at https://curia.europa.eu/juris/liste.jsf?num=C-44/01, accessed on 21.10.2021.

[20]Available online at https://curia.europa.eu/juris/liste.jsf?num=C-356/04, accessed on 21.10.2021.

[21]Available online at https://curia.europa.eu/juris/document/document.jsf?text=&docid=60929&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=21140643, accessed on 21.10.2021.

2.2.1. Interpreted texts Directive 2006/114/EC, art. 4 of Directive 2005/29/EC Article 4 of Directive 2006/114/EC

"Comparative advertising shall be allowed, as far as the comparison is concerned, if the following conditions are met: (a) it is not misleading within the meaning of Article 2 (b), Article 3 and Article 8 (1) of this Directive; or Articles 6 and 7 of Directive 2005/29 […]; (b) compares goods or services that meet the same needs or are intended for the same purposes; c) compares objectively one or more essential, relevant, verifiable and representative features of the goods or services, which may include the price; (d) does not discredit or denigrate a competitor's trade marks, trade names, other distinctive signs, goods, services, activities or situation; (e) in the case of products with a designation of origin, refer in each case to products with the same designation; (f) does not take unfair advantage of a competitor's trade mark, trade name or other distinguishing marks or designation of origin of competing products; (g) does not present goods or services as imitations or reproductions of goods or services bearing a protected trademark or trade name; (h) does not create confusion between traders, between the advertiser and a competitor or between the brands, trade names, other distinctive signs, goods or services of the advertiser and those of a competitor."

Article 6 of Directive 2005/29, entitled 'Misleading actions', provides: 1. A commercial practice is considered to be misleading if it contains false information and is therefore false or otherwise misleads or may mislead the average consumer, even if the information is correct in fact, about one or more of the following and, in any event, leads to or may lead to a o in another situation: […](d) the price or the method of calculating the price or the existence of a specific price advantage.

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

"1. A commercial practice shall be deemed to be misleading if, in analyzing the facts and taking into account all the characteristics and circumstances as well as the limitations of the communication medium used, it omits significant information which the average consumer needs in that context. to make an informed business decision which, as a result, causes or is likely to cause the average consumer to make a business decision that he or she would not otherwise have made.

2. A commercial practice shall also be considered a misleading omission if, in the light of all the matters described in paragraph 1, a trader conceals meaningful information in that paragraph or provides it in an unclear, unintelligible manner, ambiguous or inappropriate or if it does not state its true commercial intent if it is not already clear from the context or if, in any event, it causes or may cause the average consumer to in other circumstances.

3. Where the means of communication used for the commercial practice in question impose space or time limits, those limits and any other measures taken by the trader to make the information available to consumers by other means shall be taken into account when deciding if information has been omitted.

French national regulations. *Article L. 121 8 of the French Consumer Code, in the version in force at the material time, provides: "Any form of advertising which compares goods or services by explicitly or implicitly identifying a competitor or a competitor is only allowed if: 1° he is not misleading or misleading; 2° concerns goods or services that meet the same needs or have the same objective; 3° objectively compares one or more essential, relevant, verifiable and representative characteristics of the*

respective goods or services, of which the price may be a part."

2.2.2. The main dispute

The application was lodged by Alimentaire International SASU (ITM) against Carrefour Hypermarchés SAS (Carrefour) in connection with a television advertising campaign launched by Carrefour, which compares the prices of products from major brands in Carrefour stores and in company stores competitor.

The campaign was launched in December 2012, was a large-scale television advertising campaign entitled "Guaranteed Lowest Price Carrefour" and compared the prices of 500 products from major brands in Carrefour stores and in competing stores including Intermarché stores, and through this advertisement the consumer was offered a refund of twice the price difference if he found the product cheaper elsewhere.

The commercials mentioned Carrefour's favorable price differences, and the products sold in Intermarché's stores were systematically presented as more expensive than those belonging to Carrefour. Starting with the second TV spot, all the Intermarché stores selected for comparison were supermarkets, and all Carrefour stores were hypermarkets. This information appeared only on the main page of the Carrefour website, accompanied by the lower case statement that the warranty was "valid only in Carrefour and Carrefour Planet stores" and was therefore not "valid in Carrefour Market stores, Carrefour Contact, Carrefour City". In the commercials under the name Intermarché, the words "Super" appeared in lower case.

Carrefour was delayed in ceasing to broadcast this advertisement by ITM, which, on behalf of Intermarché Hyper and Intermarché Super, on 2 October 2013 sued Carrefour before the Tribunal de Commerce de Paris and ordered it to pay EUR 3 million in damages and the prohibition of the broadcasting of the contested advertising and any comparative advertising practice based on similar methods of comparison and the cessation of eight advertisements, the cessation, under penalty of payment of periodic penalty payments, of any presentation comparing the average price difference between different companies on the basis of an unobjective comparison methodology, and the publication of the judgment to be handed down.

By judgment of 31 December 2014, the Paris Commercial Court ordered Carrefour to pay ITM EUR 800 000 in compensation for the damage suffered, upheld the applications for a ban on the advertising in question and ordered that the judgment be published.

The court held that, by adopting a misleading method of selecting outlets which distorted the representativeness of price comparisons, Carrefour did not comply with the requirements of objectivity resulting from Article L. 121 8 of the French Consumer Code and that those infringements of the neutrality and objectivity of a comparative advertising campaign were acts of unfair competition. It also stated that the information on Carrefour's website *did not allow the consumer to be clearly aware that the comparison was made between stores of different sizes*.

Carrefour appealed against that judgment to the Cour d'appel de Paris and sought a reference for a preliminary ruling from the Court, arguing that the interpretation of Directive 2006/114, the transposition of which was to be ensured by Article L. 121 8 of the French Code *it was necessary to resolve the dispute in the main proceedings as to whether a comparison of the prices of the selected products was permissible only if those*

products were sold in shops of the same size or format.

ITM objected to the reference for a preliminary ruling, stating that the matter in question was not necessary for the resolution of the main dispute, but the court considered it necessary to interpret whether the fact that the stores whose prices were compared were of different sizes or formats constituted information within the meaning of Directive 2005/29, information which should necessarily have been brought to the notice of the consumer, and, if so, the question of the level or medium of dissemination which that information should have.

2.2.3. The questions referred to the Court for a preliminary ruling

"*(1) [A] Article 4 (a) and (c) of Directive [2006/114], according to which comparative advertising shall be permitted where […] is not misleading […] [and] compares, in objectively, one or more essential, relevant, verifiable and representative features of those goods and services' must be interpreted as meaning that a comparison of the prices of products sold by distribution companies is identical dimensions [?]*

(2) Does the fact that shops whose prices are compared have different sizes and formats constitute significant information within the meaning of Directive [2005/29], which must necessarily be made known to the consumer?

(3) If so, […] what should be the level and / or medium for the dissemination of this information to the consumer ...?"

2.2.4. ECJ benchmarks

The Court found that "Article 4 of Directive 2006/114 does not require that the format or size of the stores in which the products being compared are sold be similar and, on the other hand, that a comparison be made between the prices of comparable products sold in retail stores different formats or sizes may in itself contribute to the achievement of the objectives of comparative advertising referred to in the preceding paragraph of this Decision and shall not affect the requirement of fair competition or the interests of consumers."

Therefore, advertising comparing the prices of products sold in stores of different sizes or formats may be considered permissible within the meaning of Article 4 of Directive 2006/114 if it satisfies the requirements set out therein or compares prices objectively and the comparison is not misleading.

The Court also notes that, in certain circumstances, the difference in size or format between the stores in which the prices compared by the advertiser were recorded may distort the objectivity of the comparison. This can happen when the advertiser and the competitors whose prices have been registered are part of companies that each own a range of stores of different sizes and formats and when the advertiser compares the prices charged in the stores larger sizes or formats of his company with those registered in stores of smaller sizes or formats of competing companies, without this being mentioned in advertising.

In examining the wording of the directives set *ut supra*, the Court observes that, comparative advertising is misleading which, by any act or omission, is likely to mislead consumers and affect their economic behavior or, for these reasons, it may harm a competitor. Thus, in particular, under Article 4 (a) of Directive 2006/114, in conjunction

with Article 7 (1) and (2) of Directive 2005/29, advertising which omits meaningful information of which the average consumer needs in that context to make an informed business decision or to conceal such information or provide it in an unclear, unintelligible, ambiguous or inappropriate manner and which may result in the average consumer making a decision which it would not have taken in other circumstances, although Directive 2005/29 does not define the concept of 'significant information', it is clear from Article 7 (1) and (2) of the Directive that needs in that context to make an informed business decision and failure to do so may result in a business decision that would not have been in other circumstances.

The Court states that it is for the national courts to determine, in the light of the circumstances of each case, whether, in the light of the consumers to whom they are addressed, advertising may be misleading and take into account the average consumer's perception of the goods or services subject to the publicity in question, which is normally well-informed and sufficiently careful and informed, and, on the other hand, to take account of all the relevant elements of the case, taking into account, as is clear from Article 3 of Directive 2006/114, any information contained in advertising and, in general, all aspects thereof.

The Court notes that "an advertisement in which the advertiser retains, in order to compare the prices of products sold in its stores with the prices of products sold in competing stores, on the one hand, the prices charged in stores of larger sizes or formats and, on the other hand, the prices recorded in stores of smaller sizes or sizes of competing firms, given that each of these firms has a range of stores of different sizes and sizes, may mislead the average consumer, giving him the impression that all the stores that are part of these companies have been taken into account for the comparison and that the price differences indicated are valid for all the stores of each company, whatever their size or format".

Given that this advertising can have an influence on the consumer's economic behavior, leading him to make a decision with the erroneous belief that he will benefit from the price differences invoked in advertising, by buying the products in question in all stores of the advertising company, than in the shops of competing companies, such advertising is likely to be misleading within the meaning of Article 4 (a) of Directive 2006/114.

It follows from the Court's submissions that the situation is different if the consumer is informed that the advertisement in question compares the prices charged in the larger or larger format shops of the advertiser's company with the prices recorded in smaller or larger format stores. of competing companies, *because then the consumer knows that by buying the products in question only from the stores of larger sizes or formats of the advertising company can benefit from the price differences invoked in advertising. Consequently, in the context of such advertising comparing prices in stores belonging to companies which each own a range of stores of different sizes and formats, this information is necessary for the consumer to take into account the decision to to buy the products in question, rather than from the advertiser's stores rather than from competing stores, and not to be determined to make a purchase decision that they would not have made in other circumstances, so this information is meaningful information. within the meaning of Article 7 (1) and (2) of Directive 2005/29.*

As regards the level and support which such significant information must have, Directive 2005/29 does not contain any precise provision in that regard. However, it

follows from Article 7 (2) of that directive that significant information may not be concealed or provided in an unclear, unintelligible, ambiguous or inappropriate manner and in accordance with Article 7 (1) and (3) it follows from the directive that, in order to assess whether information has been omitted, the limits of the communication medium used must be taken into account and, if that medium imposes space or time limits, any other measures taken by the trader to make the information available to consumers by other means. For these reasons, the Court notes that the information that the comparison was made between the prices charged in the stores of larger or larger sizes of the advertising firm and those recorded in stores of smaller sizes or sizes of the competing firms constitutes a in the absence of which it is very likely that the advertisement would violate the requirement of the objectivity of the comparison and would be misleading. Therefore, this information must not only be provided in a clear manner but also, as the Advocate General pointed out in points 75 to 79 of his Opinion, must appear in the advertising itself.

It is for the referring court to determine whether the advertising in question infringes the requirement as to the objectivity of the comparison and is misleading, these elements being relevant to assess both the objectivity of the comparison and the misleading nature of the advertisement.

2.2.5. The decision of the Court

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 in conjunction with Article 7 (1) to (3) of Directive 2005/29/EC Decision 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 of Regulation (EC) No. 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') must be interpreted as meaning that, within the meaning of the first of those provisions, advertising such as the prices of products sold in stores of different sizes or sizes, when these stores are part of companies that each own a range of stores of different sizes and sizes and when the advertiser compares the prices charged in stores of different sizes or sizes of its company with those registered in stores of smaller sizes or formats of competing companies, unless consumers are informed, in a clear manner and even by the advertising message, that the comparison was made between the prices charged in the stores of larger sizes or formats of the company of the person who publishes it and those registered in stores of smaller sizes or formats of competing firms.

It is for the national court to determine, in order to assess the lawfulness of such advertising, whether, in the case in the main proceedings, given the circumstances of the case, the advertising in question does not satisfy the requirement of objectivity of the comparison and/or is misleading on the one hand, taking into account the perception of the average consumer of the products in question, normally informed and sufficiently careful and informed, and, on the other hand, it also advertises the stores of competing companies whose prices have been compared, and, more generally, of all its elements.

The case-law of the Court referred to in this judgment: (i) Judgement of 8 April

2003, Pippig Augenoptik, C-44/01[22], pct. 44; (ii) Judgement of 18 November 2010 in case C-159/09[23], Lidl SNC against Vierzon Distribution SA, pct. 20, pct. 22, pct. 47, pct. 48; (iii) Judgement of 25 October 2001, Toshiba Europe, C-112/99[24], pct. 36, pct. 37; Judgement of 19 September 2006, Lidl Belgium, C-356/04[25], pct. 22, pct. 45; (iv) Judgement of 12 May 2011, Ving Sverige, C 122/10[26], pct. 51.

Concluding remarks on the jurisprudence of the CJEU reveal to us the perspectives of interpreting two hypotheses in which, in relation to the factual situation in this case, the comparison made by advertising may be misleading and the Court of First Instance must examine, *in concreto,* circumstantial report of each case.

3. Competent bodies to establish and apply sanctions in the field of illicit comparative advertising

According to the provisions of art. 7 of Law no. 158 of 2008, in order to combat and stop misleading advertising and to comply with the provisions on comparative advertising, *traders, as well as the associations and organizations that have a legitimate interest* may notify the Ministry of Public Finance or, as the case may be, the National Audiovisual Council. In order to comply with the provisions on comparative advertising, *consumers* may notify the National Authority for Consumer Protection.

Upon notification of the persons provided above or ex officio, the Ministry of Public Finance or the National Authority for Consumer Protection, through its representatives, finds the violation of the provisions in matter of and apply the sanctions provided in art. 10.

*According to the provisions of art. 10, of the Law 158 of 2008, non-compliance by traders with the provisions of art. 4 and 6 constitute contraventions and are sanctioned with a fine from 3,000 lei to 30,000 lei. The finding and application of the sanctions provided shall be made by the representatives of the Ministry of Public Finance or, as the case may be, of the National Authority for Consumer Protection***.**

Regarding the contraventional nature of liability, Law no. 158 of 2008 establishes the following:

a) the facts that attract contraventional liability - misleading advertising or illicit comparative advertising, constitutes a contravention according to the provisions of art. 10, of Law no. 158 of 2008, if it was not committed in such conditions that, according to the criminal law, it is considered a crime, and as a contravention it is sanctioned with a fine.[27]

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[22]Available online at https://curia.europa.eu/juris/showPdf.jsf?text=&docid=48187&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4626432, accessed on 09.03.2022.

[23]Available online at https://curia.europa.eu/juris/document/document.jsf?text=&docid=83843&pageIndex=0&doclang=ro&mode=lst&dir=&occ=first&part=1&cid=4627292, accessed on 09.03.2022.

[24]Available online at https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:61999CJ0112, accessed on 09.03.2022.

[25]Available online at https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:62004CJ0356, accessed on 09.03.2022.

[26]Available online at https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:62010CJ0122, accessed on 09.03.2022.

[27] See also Stanciu A., *Lista de expresii pe care companiile nu trebuie să le folosească în niciun mesaj publicitar. Amenzile ajung la 60.000 de lei*, https://www.economica.net/lista-de-expresii-pe-care-companiile-nu-trebuie-sa-le-foloseasca-in-niciun-mesaj-publicitar-amenzile-ajung-la-60-000-de-lei_504195.html, accesed on 15.02.2022.

b) the procedure for ascertaining and sanctioning these fact - is made by the representative of the Ministry of Economy and Finance or, as the case may be, of the National Authority for Consumer Protection.

The provisions of art. cessation of misleading advertising or unlawful comparative advertising, it may provide for complementary measures to the main sanction. When the publicity has not yet been made public, but when the publicity is imminent, such publicity may be prohibited. Therefore, in addition to the main penalty sanction, namely that of a fine, additional measures may be applied. These may also consist in the publication of the record of the finding of the contravention or of the court decision, in full or in extract, at the expense of the offender and the measures taken.[28]

These provisions are in line with the benchmarks set out in Directive 106/114/ EC, which provides in Article 5 that Member States shall ensure that adequate and effective means are available to combat misleading advertising and to comply with the provisions on comparative advertising, in the interests of traders and competitors. Those means include the legal provisions according to which persons or organizations considered, under national law, to have a legitimate interest in prohibiting misleading advertising or regulating comparative advertising may:

a) bring legal action against this type of advertising or b) bring this type of publicity before a competent administrative authority either to decide on the complaints or to initiate the appropriate legal proceedings.

Each Member State shall decide *ut supra* which procedures shall will apply it and whether it is necessary to allow courts or administrative authorities to use other means of resolving complaints in advance.

Where the aforementioned powers are exercised exclusively by an administrative authority, decisions shall be reasoned in all cases. In this case, procedures shall be provided for the illegal or unjustified exercise of the powers of the administrative authority, or any unlawful or unjustified breach of duties may be subject to judicial review.

According to art. 9, para. 1, at the notification of traders or consumers, associations and organizations that have a legitimate or ex officio interest, the Ministry of Public Finance or, as the case may be, the National Authority for Consumer Protection, through its representatives, shall request the advertiser to provide all necessary evidence regarding the accuracy of the statements, indications or presentations in the advertisement.

According to the provisions of the Law no. 158 of 2008, art. 8, para. 1, the regulations on advertising establish the principle that the advertiser also bears the burden of proof on the accuracy of the statements or indications in the advertisement, thus operating a reversal of the burden of proof. At the request of the representatives of the competent institutions, this person is obliged to provide in accordance with the provisions of art. 9, para. 3 of Law no. 158 of 2008 the documents proving the accuracy of the statements, and in case the documents are not provided within the term established by the ascertaining body, the statements from the advertisement in question will be considered inaccurate.

[28] See also https://mfinante.gov.ro/documents/35673/0/listafaptepublictatesanctionabile_28082019.pdf, accessed on 09.03.2022.

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