OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 30 November 2006 [1]

1. By this reference for a preliminary ruling, the Cour d'appel de Bruxelles (Brussels Court of Appeal) is submitting to the Court of Justice a series of questions on the interpretation of several provisions on comparative advertising contained in Council Directive 84/450/EEC of 10 September 1984 on misleading and comparative advertising, [2] as amended by Directive 97/55/EC of the European Parliament and the Council of 6 October 1997. [3]

2. These questions have arisen in the context of legal proceedings between the Comité Interprofessionnel du Vin de Champagne (Interprofessional Committee on Champagne Wine) (hereinafter: the 'CIVC') and the company Veuve Clicquot Ponsardin (hereinafter: 'Veuve Clicquot'), on the one hand, and De Landtsheer Emmanuel (hereinafter: 'De Landtsheer'), on the other, and relate to the advertising practices employed by De Landtsheer to market its beer 'Malheur Brut Réserve'.

The legislative background

Community law

3. Directive 97/55/EEC introduced into Directive 84/450/EEC, which had originally covered only misleading advertising, a number of provisions concerning comparative advertising.

4. Article 2(2a) of Directive 84/450/EEC, as amended by Directive 97/55/EEC (herein-

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

after: 'Directive 84/450'), [4] defines 'comparative advertising', for the purposes of the Directive, as 'any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor'.

5. Article 3a of Directive 84/450 provides as follows:

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

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

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

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

(d) it does not create confusion in the market place 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;

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

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

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

4 — Directive 84/450 has been most recently amended by Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer practices in the internal market and amending Council Directive 84/450/EEC ('unfair commercial practices directive') (OJ 2005 L 149, p. 22). Some of the amendments introduced by Directive 2005/29 relate to provisions of Directive 84/450 on comparative advertising, among them Article 3a, but concern aspects which are not material to this case. Furthermore, Directive 2005/29 requires the adoption of the domestic provisions necessary for its transposition by 12 June 2007, and requires that those provisions be applied by 12 December 2007. For the purposes of this Opinion, I shall therefore refer to the text of Directive 84/450 as amended by Directive 97/55, without taking account of the further amendments introduced by Directive 2005/29.

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

...'

National law

6. The Belgian Law of 14 July 1991 on commercial practices, consumer information and consumer protection (Loi sur les pratiques du commerce et sur l'information et la protection du consommateur, hereinafter: 'LPCC'), in the version in force at the time of the events which gave rise to this case, contains the provisions by which the Kingdom of Belgium transposed Directives 84/450 and 97/55.

7. Article 23(1) of the LPCC prohibits misleading advertising.

8. Article 22 of the LPCC defines comparative advertising as 'any advertising which identifies, expressly or by implication, a competitor or goods or services offered by a competitor'; Article 23a of the LPCC, for its part, sets out the conditions under which comparison is permitted, reproducing word for word,[5] in Article 23a(1), the content of Article 3a(1) of Directive 84/450, while Article 23a(3) expressly prohibits any form of comparative advertising which fails to meet those conditions.

The main proceedings and the questions referred

9. The facts which gave rise to the main proceedings, as they appear from the case-file, may be summarised as follows.

10. De Landtsheer, a limited company with its registered office in Belgium, produces and markets several varieties of beer under the trade mark 'MALHEUR'. In 2001 it launched on the market a beer by the name of 'Malheur Brut Réserve'. This product was brewed using a process based on the

5 — Except for the amendment of subparagraph (a), which, in the LPCC, refers, as far as the concept of 'misleading' is concerned, to Article 23(1) to (5) of the LPCC itself.

production method for sparkling wine, and De Landtsheer intended to brand it an exceptional product, conferring on it an image different from the usual image of beer as a common everyday drink. During 2002, the product was sold for about EUR 8 per 750 ml bottle.

11. The following words, among others, appeared on the bottle, on the leaflet attached to the neck of the bottle and/or on the cardboard packaging: 'BRUT RESERVE', 'La Première Bière BRUT au monde' (The First BRUT Beer in the World), 'Bière blonde à la méthode traditionnelle' (Light beer produced according to the traditional method) and 'Reims-France', as well as a reference to the wine-growers of Reims and Epernay.

12. Furthermore, in presenting the product, the management of De Landtsheer used the term 'Champagnebier' to convey the impression that, though a beer, it was produced using the champagne method.

13. Finally, in other contexts, De Landtsheer extolled the originality of its beer, citing the characteristics of sparkling wine and, above all, champagne, in an interview given to a daily newspaper, for example ('What is particularly original about this beer is its acidity, which is clearly reminiscent of champagne'; 'Unlike sparkling wines, the froth stays for a long time'), and, again, on certain television programmes ('It is brewed in the same way as champagne, although it is still a beer').

14. On 8 May 2002, the CIVC and Veuve Clicquot brought an action against De Landtsheer before the Tribunal de commerce (commercial court), Nivelles, seeking a ruling that, particularly as a result of its use of the abovementioned words and descriptions in relation to a beer, De Landtsheer had committed breaches of Articles 23(1) and 23a(3) of the LPCC, concerning misleading advertising and comparative advertising respectively, and ordering De Landtsheer to put an end to those breaches.

15. By a judgment of 26 July 2002, the Tribunal de commerce ordered De Landtsheer to cease all use, in relation to beer, of the 'Reims-France' indication of origin, the 'Champagne' designation of origin and the reference to 'méthode traditionnelle', as well as any reference to the Champagne producers or the taste or production method of champagne. The application of the CIVC and Veuve Clicquot was rejected in relation to the use, in conjunction with a beer, of the indications 'BRUT', 'RESERVE', 'BRUT RESERVE' and 'La première bière BRUT au monde'.

16. On 13 September 2002, De Landtsheer appealed that judgment to the Cour d'appel de Bruxelles, save for that part in which it was prohibited from using the designation of origin 'Champagne' in the expression 'Champagnebier'. For their part, the CIVC and Veuve Clicquot lodged a cross-appeal against the partial dismissal of their application.

17. The order for reference states, moreover, that De Landtsheer declared that it would henceforth refrain absolutely from using, for the beer it produces, the indication 'Reims-France' [6] and the reference to the wine-growers of Reims and Epernay.

18. Before the Cour d'appel de Bruxelles, the CIVC and Veuve Clicquot claimed that, as well as being in breach of the ban on misleading advertising under Article 23(1) of the LPCC, the use, for the beer produced by De Landtsheer, of the indications 'BRUT', 'RESERVE', 'BRUT RESERVE', 'La première bière BRUT au monde' and 'méthode traditionnelle', as well as the reference, in statements designed to promote the sale of that beer, to sparkling wine and champagne, and the taste of or production methods of the latter products, constituted unlawful comparative advertising within the meaning of Articles 22 and 23a of the LPCC. De Landtsheer, however, disputed that those practices constituted either misleading or comparative advertising.

19. In order to resolve the dispute, the Cour d'appel de Bruxelles decided that it was necessary to submit to the Court the following questions for a preliminary ruling, all of which relate to the interpretation of the provisions of Directive 84/450 on comparative advertising:

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

(2) With a view to determining whether there is a competitive relationship between the advertiser and the undertaking to which reference is made within the meaning of Article 2(2a) of Directive 84/450:

(a) On the basis in particular of a comparison of Article [2(2a)] with

6 — Nevertheless, noting that De Landtsheer was contesting the illegality of the use of the indication 'Reims-France' for its beer, the Cour d'appel de Bruxelles described that indication as misleading in terms of the origin of the product at issue, which is manufactured in Belgium, and confirmed the order to cease using that indication issued by the court of first instance.

Article [3a(1)(b)], should any undertaking which can be identified in the advertising be regarded as a competitor within the meaning of Article 2(2a), whatever the goods or services it offers?

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

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

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

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

(3) Does a comparison of Article 2(2a) of Directive 84/450 with Article 3a of that directive mean that

(a) either any comparative advertising is unlawful which enables a type of product to be identified where a competitor or the goods offered by him cannot be identified from the wording?

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

(4) If it should be concluded that there has been comparative advertising within the meaning of Article 2(2a), must it be inferred from Article 3a(1)(f) of the Directive that any comparison is unlawful which, in respect of products without designation of origin, relates to products with designation of origin?'

Procedure before the Court of Justice

20. Pursuant to Article 23 of the Statute of the Court of Justice, De Landtsheer, the CIVC, Veuve Clicquot, the Belgian Government and the Commission submitted written observations to the Court.

21. At the hearing on 21 September 2006, oral argument was presented by the lawyers representing De Landtsheer, the CIVC and Veuve Clicquot, the French Government and the Commission.

Legal analysis

The first question

22. By its first question, the national court is essentially asking the Court to clarify whether the reference, in an advertising message, to a type of product only, rather than to a particular undertaking or product specifically offered by that undertaking, is such that the message is covered by the concept of comparative advertising within the meaning of Article 2(2a) of Directive 84/450. The national court is asking the Court whether a reference to a type of product may be regarded as tantamount to identifying, along with all of the undertakings which offer it, each of those undertakings or the relevant products.

23. I would point out, by way of preliminary comment, that, as far as may be ascertained from the order for reference, the national proceedings relate to a number of statements by De Landtsheer, which appear on the packaging of its product (label, leaflet attached to the neck of the bottle, cardboard packaging) [7] or made in other contexts, such

7 — That applies to the indications and expressions 'BRUT RESERVE', 'La première bière BRUT au monde', 'Bière blonde à la méthode traditionnelle', 'Reims-France' and to the reference to the winegrowers of Reims and Epernay.

as a vague 'presentation' of the actual product, [8] an interview with a daily newspaper or certain television programmes. [9]

24. The national court takes the view that those statements patently constitute advertising, but it raises the question whether they constitute comparative advertising, within the meaning of Article 2(2a) of Directive 84/450, in the light of some of the indications or references or expressions which the statements contain.

25. In particular, as the Commission stressed at the hearing, some of those indications and expressions are construed by the national court as referring to sparkling wine, [10] others as referring to champagne. [11] The CIVC and Veuve Clicquot dispute that distinction, which they consider to be artificial, and emphasise, more particularly, that indications which evoke sparkling wine are bound also to evoke the (sparkling) wine of Champagne.

26. For the purpose of answering the questions submitted by the Cour d'appel de Bruxelles, it is not, however, necessary, to review the accuracy of those assessments, that being a matter for the national court. The Court of Justice is not in fact required to give a ruling on whether the advertising messages forming the subject matter of the main proceedings constitute comparative advertising or are indeed lawful, but simply to assist the national court in interpreting the provisions of Directive 84/450, which are faithfully reproduced by the provisions of the LPCC cited before that court.

27. It will suffice, particularly for the purpose of answering the first question, to take note of the fact that the national court interprets the messages at issue as containing a reference to a type of product.

28. In its judgment in *Toshiba Europe*, [12] the Court held that, as regards the comparative nature of advertising, it is apparent from Article 2(2a) of Directive 84/450 that the test is that comparative advertising identifies, explicitly or by implication, a competitor or goods or services offered by a competitor. The Court also pointed out that, as far as that test is concerned, the Community legislature has laid down a broad definition,

8 — That applies to the expression 'Champagnebier'.

9 — That applies to certain references to sparkling wine or champagne, and to the taste or production method of the latter.

10 — I am referring, in particular, to the indications 'BRUT', 'RESERVE' and 'méthode traditionnelle': see the order for reference, at paragraph 21.

11 — See the order for reference, at paragraph 24.

12 — Case C-112/99 [2001] ECR I-7945, paragraphs 29 to 31.

as is confirmed by the sixth recital in the preamble to Directive 97/55, [13] which states that the Community legislature wished to lay down a broad concept of comparative advertising so as to cover all its forms. The Court therefore concluded that, for there to be comparative advertising within the meaning of Article 2(2a) of Directive 84/450, it is sufficient that a representation be made in any form which refers, even by implication, to a competitor or to the goods or services which he offers. [14] According to the Court, it does not matter that there is a comparison between the goods and services offered by the advertiser and those of a competitor.

29. The CIVC, Veuve Clicquot and the Belgian Government argue that it is possible to elicit from that approach by the Court elements which support an interpretation of the concept of comparative advertising within the meaning of Article 2(2a) which is sufficiently broad to cover also cases where the advertising refers to a type of product rather than one or more specific undertakings or their goods or services.

30. For my part, I do not consider that the broad nature of the definition of comparative advertising provided by the provision in question is of itself conclusive for the purposes of answering the question submitted by the national court.

31. In the first place, the sixth recital in the preamble to Directive 97/55 basically focuses on the *desirability* of providing a broad definition of comparative advertising. It is true that the recital also indicates that this concept should include *all modes* of comparative advertising, thereby giving the impression that it requires that general concept to be broadly defined. The recital is, however, self-evidently tautological, since it appears, in the final analysis, to be saying that all comparative advertising must be regarded as comparative advertising. That being so, it is of little help in analysing the first question referred.

32. Furthermore, if, as the Court pointed out in *Toshiba Europe*, the test required by Article 2(2a) of Directive 84/450 is that comparative advertising should identify, explicitly or by implication, a competitor or goods or services offered by a competitor, the reference contained in the sixth recital in the preamble to Directive 97/55 could, it seems, be construed as a reference to all the various forms that identification could assume, but without in the process clarifying exactly what identification means.

13 — According to that recital, 'it is desirable to provide a broad concept of comparative advertising to cover all modes of comparative advertising'.

14 — See also to that effect Case C-44/01 *Pippig* [2003] ECR I-3095, paragraph 35.

33. It appears rather difficult to establish from the text of Directive 97/55 whether the Community legislature intended using that directive to regulate the phenomenon of comparison with (or, in any event, evocation of) a specific or identifiable competitor, or with (some of) its products or services, in all the various forms which that comparison (or evocation) may take, or whether the legislature actually intended using that phenomenon to regulate, in unitary fashion, other forms of advertising also — such as, for instance: comparison with an imaginary or unidentifiable competitor; comparison with competitors in general (in the form, for example; of what is known as superlative advertising); or comparison between production or distribution systems.

34. Consequently, what seems to me to be broad is less the concept of comparative advertising adopted by Directive 97/55, than the degree of uncertainty over the interpretation of that concept, as well as other aspects to which the Directive relates. Moreover, this was a Directive approved only on conclusion of a lengthy and difficult legislative process because of the very different approaches to this subject that had previously characterised the laws of the Member States. [15]

35. That said, it seems to me that, because it uses, in particular, the words 'identifies' and 'a competitor' (in the singular, therefore), the literal meaning of Article 2(2a) of Directive 84/450 tends to suggest that the definition at issue does not cover advertising which refers to a type of product and which does not make it possible, even merely by implication, to identify, *by distinguishing them in relation to competitors generally*, one or more *specific* competitors (or their product).

36. In terms of the objective pursued by Directive 97/55, however, it may be pointed out that it was designed to make uniform 'the basic provisions governing the form and content of comparative advertising' and to harmonise the 'conditions of the use of comparative advertising in the Member States' (second recital in the preamble), in particular, by establishing the 'conditions under which comparative advertising is permitted' (18th recital in the preamble).

37. From the latter perspective, by introducing Article 3a into Directive 84/450, the Directive defines the conditions under which comparative advertising is lawful, [16] in the light of which conditions, as the seventh recital in the preamble to Directive 97/55

15 — The first Commission proposal for a directive on comparative advertising, amending Directive 84/450, dates back to 1991 (OJ 1991 C 180, p. 14). Once the Economic and Social Committee and the European Parliament had given their opinions, an amended proposal was then tabled by the Commission in 1994 (OJ 1994 C 136, p. 4) and approved, with amendments, on conclusion of the stages involved in the codecision procedure, only in October 1997.

16 — See Article 1 of Directive 84/450, according to which its purpose '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.*' (emphasis added).

indicates, it will be possible to 'determine which practices relating to comparative advertising may distort competition, be detrimental to competitors and have an adverse effect on consumer choice'.

38. This means that Article 3a of Directive 84/450 does not merely require the Member States to regard as lawful the kind of comparative advertising which — according to the definition provided by Article 2(2a) of the Directive itself, the scope of which is the subject of our analysis — meets the conditions listed therein. Were that the case, Member States would remain free to regulate comparative advertising which fails to meet those conditions. However, the effect of Article 3a is also to prohibit the Member States from permitting comparative advertising which fails to meet those conditions.

39. It therefore appears that the broader the definition of comparative advertising within the meaning of Directive 84/450, the greater will be the extent to which different forms of advertising are subject to the rather stringent rules contained in Article 3a. For example, Article 3a(1)(c) stipulates that comparative advertising containing a comparison should 'objectively [compare] one or more material, relevant, verifiable and representative features' of the goods or services to which it relates.

40. The 11th recital in the preamble to Directive 97/55 makes clear that 'the conditions of comparative advertising should be cumulative and respected in their entirety'. [17] From this it must be inferred that *any* form of comparative advertising must respect, 'as far as the comparison is concerned', [18] *all* of the conditions set out in Article 3a, so that, if such advertising contains a comparison, this must, in particular, display the characteristics listed in Article 3a(1)(c).

41. That being so, to uphold the submissions of the CIVC, Veuve Clicquot and the Belgian Government, and answer the first question referred in the affirmative, would, in particular, be to confirm the illegality, on the ground of their incompatibility with Article 3a(1)(c), of less aggressive forms of advertising, such as *general* [19] statements or claims of superiority, leadership, unique or exclusive character compared with all competitors

17 — At paragraph 54 of its judgment in *Pippig*, the Court pointed out the cumulative nature of the conditions laid down in Article 3a(1) of Directive 84/450.

18 — The expression 'as far as the comparison is concerned' recurs in various parts of Directive 97/55: see the seventh recital in the preamble, Article 3a(1), introduced into Directive 84/450 by Directive 97/55, and Article 7(2) of Directive 84/450, as replaced by Directive 97/55.

19 — That is to say, containing no reference to specific circumstances.

(most frequently conveyed through the use of the superlative: for instance, the best, the most sought-after), which, at the time when Directive 97/55 was adopted, were generally regarded as lawful in the domestic legal orders of the Member States, [20] on condition that they contained no denigrating references to competitors, as being merely harmless boasting (puffery).

42. I am inclined to the view that, had the Community legislature wished to require the Member States to prohibit such forms of advertising, which are, moreover, tolerated within their domestic legal orders, it would have made this clearer in the text of Directive 97/55. However, the recitals in the preamble to Directive 97/55 in fact indicate that the aim of the Community legislature was basically to liberalise, albeit subject to specific conditions governing their legality, forms of advertising capable of informing consumers but still prohibited under the legislation of various Member States. [21]

43. An interpretation of the concept of comparative advertising within the meaning of Article 2(2a) of Directive 84/450 which has the effect of making subject to the Directive itself — and thus to the conditions of legality which the Directive lays down — and consequently prohibiting even the blandest forms of so-called superlative advertising, seems to me to be inappropriate, particularly bearing in mind that Directive 84/850 lays emphasis on the expectations of the average consumer who is reasonably well informed and reasonably observant and circumspect, [22] and, therefore, has enough critical discernment to be able to distinguish general puffery from a message with informative content before deciding to make a purchase.

44. Furthermore, to accept the interpretation that the concept of comparative advertising within the meaning of Directive 84/450 does not require that one or more *specific* competitors or the corresponding goods or services be identified would mean that Directive 97/55 would give rise to a severe restriction in relation also to forms of advertising which make a non-generic comparison with all competing products or with an unidentifiable competitor ('brand X'). In

20 — Even, to my knowledge, in countries such as Germany, Italy and Luxembourg, which had very restrictive rules concerning comparative advertising.

21 — See, in particular, the fifth recital in the preamble, which states, inter alia, that 'comparative advertising, when it compares material, relevant, verifiable and representative features and is not misleading, may be a legitimate means of informing consumers of their advantage'.

22 — *Pippig*, paragraph 55, and Case C-356/04 *Lidl* [2006] ECR I-8501, paragraph 78). See also, with reference to other Community provisions designed to protect consumers from misleading indications, contained respectively in Council Regulation (EEC) No 1907/90 of 26 June 1990 on certain marketing standards for eggs (OJ 1990 L 173, p. 5) and Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products (OJ 1976 L 262, p. 169), on the one hand, Case C-210/96 *Gut Springenheide and Tusky* [1998] ECR I-4657, paragraph 37, and, on the other, Case C-220/98 *Estée Lauder* [2000] ECR I-117, paragraphs 27 to 30, and Case C-99/01 *Linhart and Biffl* [2002] ECR I-9375, paragraph 31.

point of fact, given the vague nature of the terms used to make the analogy in comparisons of that nature, such forms of advertising seem unlikely to meet the condition that they be *verifiable*, as required by Article 3a(1)(c).

45. Moreover, it does not seem possible to take the view that the forms of advertising which I mentioned in points 41 and 44 above should be covered by the concept of comparative advertising within the meaning of Directive 84/450 because they are, at any rate, based on at least an implied comparison. I should point out here that, according to the decision in *Toshiba Europe*,[23] the test for comparative advertising within the meaning of Article 2(2a) of the Directive is not the comparison, *which may in fact even be absent*, but the reference, explicit or by implication, to a competitor or goods or services offered by a competitor.

46. In the light of the above considerations, and bearing in mind the wording of Article 2(2a) of Directive 84/450, I consider that that provision must be construed to the effect that the test for comparative advertising must be that the message refers, albeit only by implication, to one or more *specific* competitors or the corresponding goods or services.

23 — Paragraphs 29 and 31.

47. I think it useful to add that whether it is possible to identify one or more *specific* competitors or the corresponding goods or services in the advertising message must be assessed from the point of view of the consumer — and, more precisely, the average consumer who is reasonably well informed and reasonably observant and circumspect — and not from the point of view of the competitor. What is important is to assess whether, when that consumer perceives the advertising message, that message conjures up in his mind the image of one or more *specific* competitors of the advertiser (or the related goods and services). Consequently, it is immaterial that a specific competitor may feel individually affected by the advertising message.

48. There may be many different ways of identifying the competitor (or the related products or services): as well as forms of explicit identification (reference to the competitor's trade name, its trade marks or its distinctive signs), it is possible to imagine various kinds of implicit identification, which might, for example, take the form of a reference to factual circumstances pertaining to the competitor's undertaking, its communications (for example, slogans or testimonial advertising), its market position (for example, market leader), the special features of its products or services, or any other aspect which the consumer may perceive as being an allusion to that *specific* competitor or the related goods or services.

49. In those circumstances, there is, of course, nothing to prevent the reference to a type of product contained in the advertising message from itself potentially conjuring up, in the mind of the abovementioned consumer, the image of one or more *specific* competitors or the related goods or services.

50. For example, that will happen when the type of product to which the message refers is offered by just one other competitor in addition to the advertiser (duopoly); or if the message refers to a type of product which is supplied by just one undertaking, and, though different from the type offered by the advertiser, is nonetheless in competition with it.

51. I acknowledge that, as the Commission has suggested, depending on the circumstances, the reference to a type of product may be tantamount to implicitly identifying a larger number of competitors (two or more), provided that they are conjured up *individually* in the mind of the consumer. In particular, it is always possible that the reference to a type of product, offered in circumstances in which a limited oligopoly of undertakings exists — all of them well known to the public — will enable the consumer to call to mind each of those undertakings individually.

52. However, I disagree with the view of the CIVC and Veuve Clicquot, which seems to me basically to have been embraced also by the French Government at the hearing, that the reference to a product with a designation of origin is of itself sufficient to permit the identification that Article 2(2a) of Directive 84/450 requires.

53. There is little point in considering whether a reference of that nature may be interpreted as a reference to a type of product or rather, as the CIVC and Veuve Clicquot claim, to 'very specific products' having special characteristics linked to their particular geographical provenance. It is true, as those parties and the French Government have pointed out, that the identification which the provision at issue requires must not necessarily relate to a *competitor*, but may equally concern *a* competitor's *goods or services*. Nevertheless, in so far as the provision in any event refers to a *competitor's* goods and services and given that, as I stated above, 'a competitor' must be interpreted as a *specific* competitor, that is to say, a competitor perceived individually by the consumer, the arguments advanced by the CIVC, Veuve Clicquot and the French Government fail to carry conviction.

54. The same applies to the argument of the CIVC and Veuve Clicquot based on the fact

that the number of economic operators authorised to use a designation of origin is finite. The fact that those operators may constitute a determinate group, and that it is, therefore, in theory possible to identify them precisely, does not mean that, faced with an advertising message that evokes the designation of origin, the average consumer will necessarily be prompted to conjure up the image of each of those operators individually.

55. Consequently, it will be for the national court to determine whether the indications and expressions at issue, used by De Landtsheer, assessed within the overall presentation of the advertising message in which they are contained [24] and, therefore, in the light also of the other elements — including graphic or decorative elements — which make up the message, are of a nature, bearing in mind the knowledge of the market which the average consumer who is reasonably well informed and reasonably observant and circumspect may possess, to enable that consumer to identify one or more *specific* undertakings or the related products or services.

56. I therefore propose that the Court should answer the first question referred as follows:

The reference, in an advertisement, to a type of product does not in itself meet the requirement of identification under Article 2(2a) of Directive 84/450 in the sense that it would have the effect of identifying each undertaking which offers that type of product or related goods. A reference of that nature may have the effect of implicitly identifying a competitor or the goods offered by that competitor, within the meaning of the abovementioned provision, only if, in the light of all of the facts of the specific case, it enables an average consumer who is reasonably well informed and reasonably observant and circumspect to conjure up the image of one or more specific undertakings which offer that type of product or related goods.

The second question

57. The second question, which is divided into several sub-questions, seeks, firstly, to determine whether a competitive relationship, within the meaning of Article 2(2a) of Directive 84/450, exists between the advertiser and the other undertaking which (or the products or services of which) that advertising identifies. Consequently, that question too seeks clarification of the scope of the rules introduced by Directive 97/55. Furthermore, this second question also calls for an

24 — It is clear from the judgment in *Toshiba Europe*, at paragraphs 57 and 58, that, in order to determine the effect that an indication used in advertising may have in the mind of consumers at whom the advertising is directed, it is necessary to take into account the overall presentation of the advertising at issue. See also *Lidl*, at paragraph 79.

interpretation of the scope of the conditions of legality for the purposes of Article 3a(1)(b) of Directive 84/450.

58. The national court first asks whether, on the basis of a comparison of the wording of Article 2(2a) and of Article 3a(1)(b) of Directive 84/450, it is necessary to regard as a 'competitor', within the meaning of Article 2(2a), any undertaking which the advertising makes it possible to identify, whatever the goods or services it offers (Question 2(a)).

59. If that question elicits a negative answer, the national court asks the Court what criteria should be applied in evaluating whether there is a competitive relationship within the meaning of Article 2(2a) of Directive 84/450 (Question 2(b), (c) and (d)).

60. Finally, the national court asks whether those criteria are the same as the criteria to be applied in ascertaining whether the condition of legality under Article 3a(1)(b) is met (Question 2(e)).

61. In my view, Question 2(a) must definitely be answered in the negative. As De Landtsheer and the Commission have pointed out, the text of Article 2(2a) of Directive 84/450 does not leave room for doubt: in order for comparative advertising to exist, the advertising must make it possible to identify a *competitor* undertaking (or the related goods or services) and not just any undertaking (or its related goods or services). The products and services offered by the undertaking which has been identified, as well as those offered by the advertiser, must, therefore, be taken into account in order to determine whether the advertising refers to a competitor and is, consequently, comparative within the meaning of the above provision.

62. The fact — and this appears to cause the national court some hesitation — that, under Article 3a(1)(b), a competitive relationship between the products forming the subject-matter of the comparison is required also as a condition for the legality of the advertising, does not in fact require an interpretation of Article 2(2a) which is so blatantly far removed from its literal meaning.

63. It seems to me to be worth making clear that the statutory definition of comparative

advertising does not require there to be competition between the products which may be the subject of comparison contained in the advertising. What matters is that the advertising should make it possible to identify that there is competition between the advertiser and the other undertaking (or its product) in relation to *any part of the range* of goods or services they each offer.

64. That the existence of a competitive relationship within the meaning of Article 2(2a) does not have to be evaluated solely in relation to the goods or services to which the advertising refers is clear from the fact that that provision requires the identification, not of *competing* goods or services, but of 'goods or services offered by a competitor' or, alternatively, the person or situation of a 'competitor' (institutional or personal advertising). In the latter case, it is obvious that, since no specific goods or services are identified, it would not be possible to assess the existence of a competitive relationship in terms of the products or services forming the subject-matter of the advertising.

65. I agree with the Belgian Government and the Commission on the need to give a broad interpretation to the competitive relationship to which Article 2(2a) refers. The process of ascertaining whether a relationship of that nature actually exists should not, in particular, adhere to all of the criteria for defining the relevant market set out in the Commission Notice on the definition of the relevant market for the purposes of Community competition law (hereinafter: the 'Notice on the relevant market'), [25] which is cited in the written observations.

66. As we know, the definition of the relevant market in the context of the application of the rules on competition is principally designed to identify the competitive constraints to which the undertakings concerned are subject, thus making it possible to assess the market power of each of them. [26] In the context of an analysis of that nature, the first significant element concerns the demand substitutability of the products, that is to say, the extent to which consumers consider the products interchangeable. The degree of substitutability will obviously depend on the products' ability to meet the same consumer requirement.

67. Nevertheless, since the purpose of defining the relevant market in the context of competition law is to identify those undertakings which represent an effective competitive constraint on the undertakings concerned — that is to say, which are capable of influencing their conduct and, in particular,

25 — OJ 1997 C 372, p. 5.

26 — To that effect, see paragraph (2) of the Notice on the relevant market.

their decisions on pricing — the analysis will focus, in that context, on identifying, in particular by monitoring cross-price elasticity in relation to the asking price of the products in question, a significant degree of substitutability between the products themselves. As is clear from the Notice on the relevant market, [27] for operational and practical reasons, the definition of the relevant market focuses on the demand substitutability resulting from small permanent variations in relative prices. In particular, the product of another undertaking will be considered sufficiently to restrain the price of the product of the undertaking in question in the short term if, faced with a hypothetical, small non-transitory increase in that price in the area at issue, the degree of substitution between the two products would be such as to make the hypothetical price increase unprofitable. [28]

68. It seems to me to be inappropriate to use those criteria for the purpose of determining whether there is a competitive relationship within the meaning of Article 2(2a) of Directive 84/450. A very different approach should be taken in that context.

69. The essential aim of advertising is specifically to influence consumers' purchasing decisions in order to boost demand for the advertised product, and the aim of comparative advertising, more particularly, is largely to bring about shifts in demand from another undertaking's product to that of the advertiser. The Community legislature views comparative advertising favourably because, under certain conditions, it can inform consumers and stimulate competition between suppliers of goods and services to the consumer's advantage. [29] The Community legislature does, however, make comparative advertising subject to a number of conditions which are designed, among other things, to prevent it resulting in a distortion of competition, disadvantaging competitors or having a negative impact on consumer choice. [30]

70. It follows that the competitive relationship which must be identified under Article 2(2a) of Directive 84/450 is not the kind of relationship which constitutes an effective competitive constraint on the freedom of commercial conduct of the undertaking concerned, but the kind of relationship which may potentially both extend consumers' purchasing options and confer advantage in, and, therefore, constitute a risk of, improper advertising activity.

27 — See paragraph (15).

28 — See paragraphs (16) to (18) of the Notice on the relevant market.

29 — See the second and fifth recitals in the preamble to Directive 97/55.

30 — See the seventh recital in the preamble to Directive 97/55.

71. In that context, it seems to me necessary to take the view that, in terms of the competitive relationship to which it refers, Article 2(2a) of Directive 84/450 does not require that there should be a significant degree of substitutability between the products of the undertakings concerned, as is, in fact, normally required for a finding in terms of competition law that such products belong to the same relevant market.

72. As the Commission has suggested, it is sufficient that there should be a certain degree of substitutability between the products of the undertakings concerned. They may, therefore, be substitutable to only a limited degree. In other words, a competitive relationship may be deemed to exist even if a significant degree of substitutability exists only where there is a marked variation in the relative price of the products and, in my view, even if a marked variation in that price produces only a limited degree of substitutability.

73. For that reason — and contrary to the view taken by De Landtsheer — it is not only those undertakings which would be included in the same relevant market, in application of the rules of competition, which should be regarded as competitors for the purposes of Article 2(2a).

74. Moreover, given the risk that the undertaking identified in the advertising may suffer real damage as a result of the advertising comparison (or even just from being identified without a comparison), it does not seem to me that we should exclude the possibility of identifying a competitive relationship, within the meaning of Article 2(2a) of Directive 84/450, even in cases in which the advertiser is not currently offering products which have demand substitutability with those of the undertaking in question, or in which, although offering such products, the advertiser is in fact operating in a different geographical market. The advertiser could represent a potential competitor of the undertaking identified in the advertising and have an interest in denigrating its image in order to prepare the ground for its own subsequent entry on to the market on which that undertaking operates.

75. I therefore agree with the Belgian Government and the Commission in attaching importance, for the purposes of Article 2(2a) of Directive 84/450, to merely potential competition also. [31]

76. A situation of potential competition may, in particular, exist, in cases where there

31 — I would point out, however, that, in competition law, potential competition, except possibly where it results from a high degree of supply-side substitutability, is not taken into account for the purposes of defining the relevant market, but may be taken into account at a subsequent stage, such as when determining the existence on that market of a dominant position within the meaning of Article 82 EC or assessing the impact on competition of a particular merger operation: see paragraphs (14) and (24) of the Notice on the relevant market.

is a substantial degree of supply-side substitutability. Obviously, supply-side substitutability is significant in terms of defining the relevant market in the context of applying the rules on competition, if it represents an effective competitive constraint in relation to the undertakings concerned. In determining its own commercial policy, an undertaking must, indeed, take account of the potential capacity of certain undertakings — which do not currently produce its own product (or product variety) but another product (or product variety) which may not act as a substitute for its own product as far as consumers are concerned — to modify their production processes over a short period of time, and without incurring significant additional costs or excessive risks, so as to be able itself to offer the product (or product variety) in question in response to small non-transitory variations in the relative price. If that capacity is significant, then, for the purposes of applying the rules on competition, the market for the product will include not only all demand-substitutable products but also products which are substitutable solely in terms of supply. [32]

77. But that is not all. It is frequently observed that advertising is designed, among other things, to reinforce brand loyalty and reduce the elasticity of demand for the goods advertised, that is to say, their fungibility. I would, however, point out that, on the contrary, advertising is also designed to suggest to the consumer fresh opportunities for replacing the goods purchased with substitute products and thus diminish the degree to which goods are not interchangeable.

78. It is therefore necessary to bear in mind that advertising may be designed not only to bring about shifts in market shares, but also shifts in demand from one market to another (particularly towards another type of product), and, consequently, to have an effect on the actual expansion of the markets.

79. The very nature of advertising seems, therefore, to demand a concept of the relevant competitive relationship under Article 2(2a) of Directive 84/450 which is based on a dynamic view of the markets.

80. It follows, and this brings me to my response to Question 2(b), that, in order to ascertain whether the abovementioned competitive relationship exists, it is necessary to bear in mind not only the current state of the markets and current consumer habits but also the prospects that these will evolve and so, consequently, will the markets themselves. In other words, it will be necessary to ascertain whether, even if consumers do not currently regard as interchangeable the

32 — See paragraphs (20) to (23) of the Notice on the relevant market.

products the advertiser is offering and those offered by the other undertaking to which the advertising refers, the kind of relations exist which suggest the potential for an — albeit partial and limited — shift in demand from one set of products to the other in the near future.

81. Furthermore, and here I come to Question 2(d), where the product offered by the advertiser and that of the other undertaking to which the advertising refers belong to different commodity groups,[33] we should not merely consider whether the two types of product are in theory interchangeable but should consider the degree to which the specific products in question are substitutable, in the light of their actual characteristics. It is, in fact, clear that, particularly in relation to commodity sectors characterised by a high degree of product differentiation, it will be possible to identify 'frontier zones' in which specific products, belonging to commodity groups which are not, in theory, exchangeable, may in fact be in competition.

82. Furthermore, bearing in mind that, as pointed out above, comparative advertising is capable of having an effect on product fungibility in terms of demand, we should also not pass over the way in which the advertiser positions its product through the advertising and the image it wishes to convey. If the advertiser itself presents its product as a valid alternative to the product of the other undertaking to which the advertising refers, even though, in theory, that product belongs to a different commodity group, it will, in my view, be necessary to presume that a competitive relationship within the meaning of Article 2(2a) exists, unless it is possible reasonably to exclude, in the light, in particular, of the characteristics, destination and relative price of the products, any risk of a transfer of customers for the benefit of the advertised product.

83. In relation to Question 2(c), I take the view, as do all of the parties which have taken part in these proceedings without exception, that ascertaining whether there is a competitive relationship, within the meaning of Article 2(2a) of Directive 84/450, must be done with reference to that part of Community territory in which the advertising is disseminated.

84. I should, however, make two points in that connection.

33 — As in this case, according to the findings of the national court, which interprets the advertising at issue as containing a reference to a type of product (either sparkling wine or champagne) which is different from the product (beer) proposed by De Landtsheer.

85. First of all, I would point out that the national (judicial or administrative) authority responsible for controlling comparative advertising, in accordance with Article 4(1) of Directive 84/450, has jurisdiction only in relation to the advertising disseminated in the territory over which it exercises authority. It follows that the fact that the area in which the advertising in question is disseminated in theory includes the territory of other Member States also cannot authorise the abovementioned authority to consider that the competitive relationship required under Article 2(2a) exists where it is identified in the territory of other Member States exclusively, and not also in the territory subject to its authority.

86. In this case, for example, the Cour d'appel de Bruxelles will not be permitted to take the view that the advertising at issue refers to a competitor or the products of a competitor within the meaning of Article 22 of the LPCC and Article 2(2a) of Directive 84/450, if it finds that a competitive relationship between, on the one hand, De Landtsheer and, on the other, the producers of sparkling wine or champagne which the aforementioned messages allegedly identify, exists not in Belgium but in another part of Community territory in which that advertising is disseminated. [34]

87. The existence of a current competitive relationship between the goods in question in another part of Community territory may, of course, be taken into account in the context of an analysis of the possible evolution of consumer habits in Belgian territory.

88. Secondly, I would emphasise that the effect of limiting the investigation into the existence of a competitive relationship, within the meaning of Article 2(2a) of Directive 84/450, to the territory in which the advertising is disseminated will be that that advertising, if disseminated in several Member States, may be regarded as comparative within the meaning of the above provision in one Member State but not another, depending on consumer habits and the structure of the markets in each of those States.

89. While that may seem incompatible with one of the aims of Directive 97/55, namely to assure 'the freedom to provide services relating to comparative advertising' in the internal market, [35] it appears inevitable, since it seems in no way sensible systematically to require the controlling authority to assess the existence of the competitive relationship at a European level, regardless of the actual geographical spread of the markets.

34 — It should be borne in mind that some of the advertising to which the main proceedings relate appears on the product packaging. Were the product to be marketed, with that same packaging, in other Member States also, the abovementioned advertising would itself be disseminated at the same time.

35 — See the third recital in the preamble to Directive 97/55.

90. In any event, the problem seems limited, not only as a result of the current trend towards the geographical expansion of the markets and the gradual development of the internal market, but also as a result of the indicative significance that the competitive play which is discernible in other areas of the Community may assume for the purposes of evaluating, on a dynamic basis, the existence of the competitive relationship in question in the territory in which the advertising is disseminated, subject to the powers of the controlling authority.

91. Turning, finally, to Question 2(e), by which the national court is asking whether the criteria to be applied in ascertaining whether there is a competitive relationship under Article 2(2a) are the same as those to be applied in determining whether the condition under Article 3a(1)(b) of Directive 84/450 is met, I would point out that that condition — frequently described as that of 'homogeneity' of the comparison — requires, in order for comparative advertising which contains a comparison to be lawful, that it should 'compare[s] goods or services meeting the same needs or intended for the same purpose'.

92. It would appear that by posing a question of that nature, which requires an interpretation of Article 3a(1)(b) also, the national court is, by implication, suggesting, should it be concluded that the advertising forming the subject-matter of the main proceedings is comparative in nature, that the advertising contains a comparison and, in order to be lawful, must, in consequence, meet the conditions set out in Article 3a. In any event, the national court is not asking the Court for clarification of the concept of comparison or of the scope of Article 3a as such. It is not, therefore, necessary to consider those aspects in the present proceedings for a preliminary ruling.

93. I concur with the Commission's view that the criteria for ascertaining the competitive relationship under Article 2(2a) and the criteria for determining whether the condition under Article 3a(1)(b) is met are not the same. Indeed, it is clear that, were that the case, Article 3a(1)(b) would be totally pointless, in that any form of advertising able to be classified as comparative within the meaning of Article 2(2a) could never be in breach of the condition of legality at issue.

94. The scope of the criteria applied in the two provisions is, therefore, bound to differ. The concept of competition under Article 2(2a) ought to encompass a greater number

of cases than the condition of legality under Article 3a(1)(b), with the result that there may in fact be instances of comparative advertising that fail to meet that condition.

95. I would first point out in that context that Article 3a(1)(b) concerns a relationship that must exist between the products or services forming the subject-matter of the advertising comparison, and in that, as I pointed out above, the relevant competitive relationship under Article 2(2a) must not necessarily be established between those products or services, but may relate to the whole range of products or services offered by the advertiser and by the other undertaking to which the advertising message refers. [36]

96. Furthermore, for the purposes of Article 3a(1)(b), any assessment relating to the substitutability of the products or services from the supply side is immaterial, but it could be relevant (see points 75 and 76 above) for the purpose of Article 2(2a). Thus, if two products are not interchangeable in terms of the demand side also, the advertisement comparing them will fail to meet the condition under Article 3a(1)(b).

97. The latter observation is confirmed by the Court's recent judgment in *Lidl*, [37] in which it made clear that the condition of legality, laid down by Article 3a(1)(b) means that the goods forming the subject-matter of the comparison must display a 'sufficient degree of interchangeability for consumers'. The Court pointed out that Article 3a(1)(b) provides clarification of the requirement that the products must be comparable, set out in the second and ninth recitals in the preamble to Directive 97/55, from which it is apparent that the aim of that requirement is, in particular, to enable comparative advertising to provide the consumer with useful information for his purchasing decisions and to prevent that advertising from being used in an anti-competitive or unfair manner.

98. Article 3a(1)(b) does not, therefore, require that the products or services subject to comparison should be identical or similar in nature or that they should belong to the

36 — In that sense, the example the Commission has put forward seems very apt: it relates to two 'generalist' car manufacturers, which are in competition, within the meaning of Article 2(2a), where their product ranges overlap, at least in part. As far as the Commission is concerned, advertising by one of those manufacturers which identifies the other will, consequently, be comparative but unlawful, since it fails to respect the condition under Article 3a(1)(b), because it compares the monovolume vehicle of one manufacturer with the sports coupé of the other, that is to say, products which do not serve the same purposes.

37 — Paragraphs 25 to 27.

same commodity group, but refers to the goods being interchangeable from the perspective of consumers.

99. Furthermore, it does not seem to me that the Court's reference to a *sufficient* degree of interchangeability from the perspective of consumers must be interpreted to the effect that, when ascertaining compliance with Article 3a(1)(b), there must be a greater degree of demand substitutability between the goods which are being compared than would suffice to establish a competitive relationship between the relevant suppliers within the meaning of Article 2(2a).

100. Of course, since Article 3a(1)(b) lays down a condition for the legality of comparative advertising, it is conceivable that more restrictive criteria for verifying demand substitutability should be applied in relation to that provision than those applied for the purposes of Article 2(2a).

101. Nonetheless, since it is now settled case-law that the conditions governing the legality of comparative advertising must be interpreted in the sense most favourable to comparative advertising,[38] and bearing in mind the fact that the suggestion of possible new substitutes may provide the consumer with useful information and stimulate competition between the suppliers of products or services in the interest of consumers, thereby achieving the aims of Directive 97/55, I see no reason to favour making more stringent, in this area, the criteria for ascertaining demand substitutability in comparison with the criteria which are pertinent in relation to Article 2(2a), *a fortiori* as the conditions of legality laid down in Article 3a(1)(a) and (c) help ensure that the comparison between the goods presented as substitutes is fair and helpful to consumers.

102. Furthermore, the aspects described at points 95 and 96 above seem sufficient to distinguish the scope of the condition governing the competitive relationship under Article 2(2a) from the condition set down under Article 3a(1)(b), and thus to secure the latter's effectiveness.

103. I therefore take the view that the considerations set out at points 80 to 90

38 — *Toshiba Europe*, paragraph 37; *Pippig*, paragraph 42; Case C-59/05 *Siemens* [2006] ECR I-2147, paragraphs 22 to 24; and *Lidl*, paragraphs 22 and 32.

above concerning the elements of assessment cited by the national court in Question 2(b), (c) and (d) are also relevant for the purposes of applying the condition set down in Article 3a(1)(b).

104. It could, at most, be acknowledged that in cases in which the advertising presents as substitutable products or services which the consumer does not currently regard as interchangeable, the prospective analysis of the possible evolution in consumer habits must be made more rigorously, in the context of the application of Article 3a(1)(b). It could, in particular, be considered that it is not sufficient for the advertiser to present the goods being compared as substitutes, either explicitly or by allusion, in order to assume that the condition in question is met; it will in fact be necessary to ascertain that the advertising is indeed capable of diverting to the goods the advertiser is offering at least some of the customers of the other undertaking to which the advertising refers.

105. Turning specifically to the question of the substitutability, in Belgian territory, where the advertising is disseminated, of beer for sparkling wine or champagne and, more particularly, of the beer produced by De Landtsheer and the champagne produced by the specific undertakings allegedly identified by the advertising at issue, it is clear that any assessment of this nature is a matter for the national court. It is not, therefore, necessary to consider, in these proceedings for a preliminary ruling, the arguments, based also on certain judicial or administrative decisions of the Community bodies, which certain parties have raised, either to suggest or to dispute that they are possible substitutes.

106. I therefore propose that the Court should answer the second question in the following terms:

In order to establish whether a competitive relationship within the meaning of Article 2(2a) of Directive 84/450 exists between an advertiser and the undertaking to which its advertising refers, the goods or services which that undertaking offers must be taken into consideration. It must, in fact, be established that the advertiser and that undertaking are actually or potentially in competition in relation to some part of the range of products or services each offers. It will, in fact, be sufficient if there is a degree of demand substitutability, albeit limited, between a product or service of the advertiser and a product or service of the other undertaking.

In assessing whether that competitive relationship exists, the national controlling authority must refer to the situation that exists in the part of Community territory in which the advertising is disseminated and which is subject to its control, and will also have to take into account, among other factors, the possible evolution in consumer habits, the special characteristics of the products or services which form the subject-matter of the advertising and the image which the advertiser is seeking to convey of the product being advertised.

The criteria for ascertaining whether a competitive relationship within the meaning of Article 2(2a) of Directive 84/450 exists and the criteria for ascertaining whether the comparison meets the condition set out in Article 3a(1)(b) of that directive are not identical.

The third question

107. By its third question, the national court is basically asking whether advertising which contains a comparison with a type of product and does not make it possible to identify a specific competitor or product which that competitor offers must, on the basis of Article 2(2a) and Article 3a of Directive 84/450, automatically be regarded as unlawful or whether its legality must be assessed by reference to national provisions other than those which transpose the provisions of that directive on comparative advertising, even though such provisions may theoretically be less favourable to consumers or the undertakings which offer the type of product to which the advertising refers.

108. The actual wording of the question prompts some uncertainty in so far as the example of advertising to which it refers is in any event described as 'comparative advertising'. I believe that that description may be ignored, either because it is simply a material error in the drafting of the question or because it is intended to be construed as meaning advertising which makes a comparison.

109. In point of fact, it is clear from paragraph 23 of the order for reference that the Cour d'appel de Bruxelles is raising the third question in the event that it should be concluded, on the basis of the Court's answer to Questions 1 and 2 that, in this case, there is no comparative advertising within the meaning of Article 2(2a) of Directive 84/450.

110. The third question clearly presupposes that the first question will have been answered to the effect that, as is my view, advertising which makes a comparison with a type of product does not *per se* constitute comparative advertising within the meaning of and for the purposes of Directive 84/450.

111. In that connection, the parties to these proceedings for a preliminary ruling — save for the Belgian Government, which, since it does not share this view, has merely submitted that the question at issue is irrelevant — basically agree that advertising which does not meet the requirements to be classified as comparative advertising within the meaning of Article 2(2a) is not automatically illegal pursuant to the provisions of Directive 84/450 on comparative advertising, but falls outside the scope of those provisions. It follows that the legality of advertising of that nature ought to be assessed on the basis of other provisions of national law, different from those which transpose the provisions of Directive 84/450 in relation to comparative advertising, and on the basis of other provisions of Community law which may be relevant. [39]

112. I do not see how it is possible to disagree with that approach. I therefore propose that the Court should answer the third question as follows:

Advertising which, although containing a comparison, does not fulfil the conditions required for it to be classified as comparative advertising within the meaning of Article 2(2a) of Directive 84/450 does not fall within the scope of the provisions of that directive relating to comparative advertising. The legality of such advertising must, therefore, be assessed by reference to the applicable national legislation, other than that transposing the abovementioned provisions, and the other provisions of Community law which may be relevant, even if the level of protection accorded to the interests of consumers and suppliers of that type of product is consequently reduced.

The fourth question

113. The fourth question concerns the condition for the legality of comparative advertising provided for in Article 3a(1)(f) of Directive 84/450. The national court is asking whether that provision means that

39 — It is sufficient to cite here the national provisions transposing those of Directive 84/450 but relating to misleading advertising or, as the Commission pointed out at the hearing, the provisions on the description, designation and presentation of certain products and the protection of certain indications, expressions and terms contained in Council Regulation (EC) No 1493/1999 of 17 May 1999 on the common organisation of the market in wine (OJ 1999 L 179, p. 1).

any comparison between products that do not have designation of origin and products with designation of origin is unlawful.

114. The question has been raised because some of the advertising messages forming the subject-matter of the main proceedings contain references to champagne, a product which has been accorded designation of origin status, which is also protected under Community law.

115. Article 3a(1)(f) stipulates that, with regard to the comparison, 'for products with designation of origin, [comparative advertising] relates in each case to products with the same designation'.

116. Although its wording is certainly not unambiguous, it does not seem to me that there can be any serious doubt as to the interpretation to be given to that provision.

117. De Landtsheer claims that Article 3a(1)(f) applies to all advertising which compares only products with designation of origin, and requires that, for a comparison of that nature to be lawful, the products must share the same designation of origin. In the extreme, the provision could apply to advertising which uses a comparison with products without designation of origin to promote the sale of products with designation of origin. According to both those approaches to interpretation, that provision would not, therefore, apply in this case, given that the advertising messages at issue are designed to promote the sale of a product — the beer produced by De Landtsheer — which does not enjoy designation of origin.

118. Like the CIVC, Veuve Clicquot, the French and Belgian Governments and the Commission, I take the view that those approaches must be rejected.

119. On the one hand, it seems to me to be somewhat strange and unlikely that, in determining the conditions for the legality of comparative advertising, the Community legislature should have been at pains to prohibit comparisons between products with different designations of origin but was not, at the same time, concerned to regulate, by similarly prohibiting them, comparisons between a product with designation of origin and one with no such designation. I do not see the point in prohibiting, for example, a

comparison between the cheese 'Gran Padano' and the cheese 'Parmigiano Reggiano', both of which enjoy protected designation of origin, without, at the same time, prohibiting comparisons between either of those cheeses and another cheese that does not have designation of origin status.

120. On the other hand, the other possible interpretation according to which the provision at issue is applicable solely to comparisons which are designed to promote products with designation of origin seems also to be inappropriate. If a comparison contained in an advertisement between a product without designation of origin status and a product with designation of origin status were permitted only for the supplier of the product without designation of origin, the balance would be abnormally and inexplicably tilted in the latter's favour, and would prevent there being a level playing field in comparative advertising by penalising the suppliers of products with designation of origin.

121. In relation to comparisons which involve a product with designation of origin, Article 3a(1)(f) in fact seems to me to provide clarification of the condition concerning the homogeneity of the comparison under Article 3a(1)(b), given that the ban on what is known as coupling (or parasitic) advertising to protect designations of origin is already contained in Article 3a(1)(g). Basically, in my view, Article 3a(1)(f) is designed to clarify the point that a comparison between goods with designation of origin status and goods without that status or a comparison between goods with different designations of origin cannot be regarded as a homogeneous comparison.

122. We are, therefore, dealing with a form of presumption that the comparison is not homogeneous, the purpose of which to secure greater protection for products with designation of origin in relation to comparative advertising, and to supplement the protection which those products are accorded under other provisions of Community law

123. That is confirmed by the twelfth recital in the preamble to Directive 97/55, the only recital capable of explaining the rule laid down by Article 3a(1)((f), which stipulates that the conditions for comparative advertising 'should include, in particular, consideration of the provisions resulting from Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, [40] and

40 — OJ 1992 L 208, p. 1. That regulation was recently repealed and replaced, as of 31 March 2006, by Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 2006 L 93, p. 12).

in particular Article 13 thereof, and of the other Community provisions adopted in the agricultural sphere'.

124. The provision at issue has been keenly criticised by those legal commentators who have seen in it a kind of unnecessary privilege benefiting products with designation of origin and restricting competition. Although certainly capable of guaranteeing these products a high level of protection, it does not, however, seem to me that the provision is incompatible with the aims of Directive 97/55, and I agree with the Commission that this was a deliberate choice of the Community legislature, which cannot be called into question by way of exegesis.

125. I therefore take the view that Article 3a(1)(f) must be interpreted as meaning that comparative advertising which relates to a product with designation of origin is lawful only if the comparison refers to another product with the same designation of origin.

126. I therefore propose that the Court should answer the fourth question in the affirmative.

Conclusion

127. In the light of the above considerations, I therefore propose that the Court should give the following answers to the questions submitted by the Cour d'appel de Bruxelles:

(1) The reference, in an advertisement, to a type of product does not in itself meet the requirement of identification under Article 2(2a) of Council Directive

84/450/EEC of 10 September 1984 on misleading and comparative advertising, as amended by Directive 97/55/EC of the European Parliament and the Council of 6 October 1997, in the sense that it would have the effect of identifying each undertaking which offers that type of product or related goods. A reference of that nature may have the effect of implicitly identifying a competitor or the goods offered by that competitor, within the meaning of the abovementioned provision, only if, in the light of all of the facts of the specific case, it enables an average consumer who is reasonably well informed and reasonably observant and circumspect to conjure up the image of one or more specific undertakings which offer that type of product or related goods.

(2) In order to establish whether a competitive relationship within the meaning of Article 2(2a) of Directive 84/450 exists between an advertiser and the undertaking to which its advertising refers, the goods or services which that undertaking offers must be taken into consideration. It must, in fact, be established that the advertiser and that undertaking are actually or potentially in competition in relation to some part of the range of products or services each offers. It will, in fact, be sufficient if there is a degree of demand substitutability, albeit limited, between a product or service of the advertiser and a product or service of the other undertaking.

In assessing whether that competitive relationship exists, the national controlling authority must refer to the situation that exists in the part of Community territory in which the advertising is disseminated and which is subject to its control, and will also have to take into account, among other factors, the possible evolution in consumer habits, the special characteristics of the products or services which form the subject-matter of the advertising and the image which the advertiser is seeking to convey of the product being advertised.

The criteria for ascertaining whether a competitive relationship within the meaning of Article 2(2a) of Directive 84/450 exists and the criteria for ascertaining whether the comparison meets the condition set out in Article 3a(1)(b) of that directive are not identical.

(3) Advertising which, although containing a comparison, does not fulfil the conditions required for it to be classified as comparative advertising within the meaning of Article 2(2a) of Directive 84/450 does not fall within the scope of the provisions of that directive relating to comparative advertising. The legality of such advertising must, therefore, be assessed by reference to the applicable national legislation, other than that transposing the abovementioned provisions, and the other provisions of Community law which may be relevant, even if the level of protection accorded to the interests of consumers and suppliers of that type of product is consequently reduced.

(4) It follows from Article 3a(1)(f) of Directive 84/450 that any comparison between products without designation of origin and products with designation of origin is unlawful.