



## **Comparative advertising based on prices as between shops having different formats and sizes is unlawful in certain circumstances**

*Such advertising is also liable to be misleading if the consumer is not informed clearly in the advertising itself of the difference in format and size of the shops in respect of which the comparison is being made*

In December 2012, Carrefour launched a television advertising campaign entitled ‘garantie prix le plus bas Carrefour’ (Carrefour lowest price guarantee). That advertising compared the prices of 500 leading brand products charged in Carrefour shops and in competitors’ shops (including Intermarché shops) and offered to reimburse consumers twice the price difference if they found cheaper prices elsewhere. From the second televised advertisement onwards, all of the Intermarché shops selected for comparison were supermarkets, while all of the Carrefour shops were hypermarkets. That information appeared only in smaller letters beneath the name Intermarché.

ITM, a company responsible for the strategy and commercial policy of the outlets belonging to the Intermarché retail chain, has brought proceedings before the French courts seeking an injunction to stop that advertising and damages in respect of misleading advertising.

The Cour d’appel de Paris (Court of Appeal, Paris), before which the case has been brought, asks the Court of Justice whether such advertising, which compares the prices of products sold in shops having different sizes or formats, is lawful in the light of the directive on misleading and comparative advertising.<sup>1</sup> It also asks whether the fact that the shops concerned are of different sizes or formats constitutes material information which, in accordance with Directive 2005/29 concerning unfair commercial practices,<sup>2</sup> must necessarily be brought to the knowledge of the consumer so that the latter can take a commercial decision in full knowledge of the facts.

By today’s judgment, the Court points out, first of all, that under Directive 2006/114 all comparative advertising must compare prices objectively and must not be misleading. However, where the advertiser and the competitors belong to retail chains which each have a range of shops of different sizes and formats, and where the comparison does not relate to shops of the same size or format, the objectivity of the comparison may be distorted if the advertising does not mention that difference: indeed, the prices of everyday consumer goods are likely to vary in relation to the format or size of the shop, with the result that an asymmetric comparison may have the effect of artificially creating or increasing the difference between the advertiser’s prices and the prices of competitors, depending on the selection of the shops used in the comparison.

The Court also notes that comparative advertising which omits or hides material information which the average consumer requires, according to the context, in order to take an informed transactional

<sup>1</sup> Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (OJ 2006 L 376, p. 21).

<sup>2</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (OJ 2005 L 149, p. 22).

decision or which provides that information in an unclear, unintelligible, ambiguous or untimely manner, and which may consequently cause the average consumer to take a transactional decision that he would not otherwise have taken, is misleading. Advertising such as that at issue in the present case is liable to influence the economic behaviour of the consumer by causing him to take a decision in the mistaken belief that he will benefit from the price differences claimed in the advertising when buying the products concerned in any of the shops in the advertiser's retail chain rather than in shops belonging to the competing retail chains. Nevertheless, the Court declares that such advertising will be misleading only if the consumer is not informed of the fact that the comparison is being made between the prices charged in shops having larger sizes or formats in the retail chain of the advertiser and the prices displayed in shops having smaller sizes or formats belonging to competing retail chains. In that regard, the Court points out that that information not only must be provided clearly but must also be contained in the advertisement itself. It is for the Cour d'appel de Paris (Court of Appeal, Paris) to determine whether that condition is met in the present case.

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**NOTE:** A request for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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