Court of Justice of the European Communities: Legality of Collective Comparative Advertising

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In its ruling in case C-356/04 the Court of Justice sheds light on the compatibility of advertisements comparing ranges of products with the Misleading and Comparative Advertising Directive.

Colruyt, a company operating a chain of supermarket stores in Belgium, availed itself of two methods of comparative advertising. The first consisted in comparing general price levels in various supermarkets on the basis of prices charged in respect of a wide range of identical or similar basic consumables offered by itself and its competitors. As a second tactic, Colruyt advertised a line of products asserting that the individual products of that line are all cheaper than their counterparts offered by competitors. In order to stop Colruyt's marketing practices Lidl, one of Colruyt's competitors, brought proceedings before the Brussels *Rechtbank van Koophandel* (Commercial Court). That court referred a number of questions to the ECJ for a preliminary ruling.

The ECJ first confirms that such comparative advertising can in principle meet the criterion of Article 3a(1)(b) of the Directive that the advertising must "compare goods or services meeting the same needs or intended for the same purpose". The provision's wording does not exclude that the ability to compare "comparable" product ranges is part of the advertiser's economic freedom. Besides, the disputed methods of comparative advertising stimulate competition to the consumer's advantage and provide that same consumer with useful information. Especially in the case of supermarket products, consumers rather base their price preferences on how much a basket of groceries costs than on comparative information limited to prices of some individual product or other. It is against this background that the ECJ sanctions the methods of comparative advertising at issue, provided the selections compared consist of individual products which, when viewed in pairs, individually satisfy the "comparability" requirement.

Secondly, the Court denies that in order to be "objective" (pursuant to Article 3a(1)(c) of the Directive), advertising consisting in price comparisons based on selections of products must expressly mention all products and prices compared. The objectivity criterion merely intends "to preclude comparisons that result form the subjective assessment of their author rather than from an objective finding".

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Whether or not individual products and prices are expressly listed is irrelevant for the objectivity of the advertisements at issue. Interestingly, to come to this conclusion the Court had to distinguish the context of the present case (basic consumables) from that of *Pippig Augenoptik* (spectacles) in which presentation of price differences did matter to the objectivity of the advertising concerned.

The third question answered by the Court was whether prices of products and general price levels constitute “verifiable” features for comparison (pursuant to Article 3a(1)(c) of the Directive). The Court referred to earlier case law to confirm that a product’s price is a verifiable feature. As to the verifiability of comparisons of general price levels, it is a necessary precondition that the goods whose prices form part of the comparison be individually and specifically identifiable on the basis of the information contained in the advertisement.

Fourthly, the ECJ makes clear that the verifiability criterion requires the addressees of the advertising to be placed in a position allowing them to verify the accuracy of the advertising themselves. It is true that from a competition point of view it suffices that the advertiser is capable, in a short period of time, of supplying evidence of the factual correctness of his comparison. However, in accordance with the consumer protection objective pursued by the Directive, an obligation to indicate how the addressees of the advertisements can verify the accuracy of the comparison is crucial so as to enable them to ensure that they have been well-informed as regards the purchases they are prompted to make.

Lastly, the ECJ examines the question whether general price level comparisons must be considered misleading pursuant to Article 3a(1)(a) of the Directive when the price levels are determined on the basis of only some of the products sold by the advertiser, because consumers might otherwise assume the advertiser to be cheaper over the full product range. According to the Court, such collective comparative advertising may be misleading when it:

- does not reveal that the comparison relates only to a sample and not all products;

- does not identify the details of the comparison or communicate to the addressees the information source where identification is possible;

- contains a collective reference to a range of amounts that may be saved without specifying individually the general level of the prices charged by every competitor and the amount that consumers are liable to save by making their purchases from the advertiser.

Court of Justice of the European Communities, Lidl Belgium V. Etablissementen Franz Colruyt , C-356/04, judgment of 19 September 2006

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