

Case	Relevant ECJ case for scope Case – 159-09 Lidl SNC v Vierzon Distribution SA, which allowed comparative advertising of non-identical supermarket products; this case also addresses Articles 4a and 4c 2006/114/EC / Arts 3a (1a) and 3a (1c) CAD).
Claims	<p>17. The dispute before the national court concerns two companies both of which operate supermarkets, Lidl and Vierzon. On 23 September 2006, Vierzon, which trades under the name Leclerc, published a comparative advertisement in a local paper which compared the till receipts for a number of items of shopping from four different supermarkets.</p> <p>18. The lists of items purchased, together with their prices, included 34 products for each supermarket. These were everyday items, mostly foodstuffs that, to a large extent, could be substituted one for another. The brand names of the various items were not mentioned. The total cost of each 'shopping basket' indicated that Leclerc supermarket was the best of all of them, charging EUR 46.30 for the chosen items. Lidl was ranked second, with a total cost of EUR 51.40, while the other two supermarkets were still more expensive. The four lists of items and their prices were accompanied by a slogan claiming that supermarkets trading under the name of Leclerc were the cheapest.</p> <p>19. Following the publication of that advertisement, Lidl issued proceedings against Vierzon before the Tribunal de commerce de Bourges, arguing, in particular, that it had infringed the rules on comparative advertising.</p> <p>20. Considering it necessary to obtain an interpretation of the rules of the European Union on comparative advertising, the national court stayed proceedings and referred the following question to the Court of Justice for a preliminary ruling:</p> <p>'Is Article 3a of Directive 84/450/EEC, as amended by Directive 97/55/EC, to be interpreted as meaning that it is unlawful to engage in comparative advertising on the basis of the price of products meeting the same needs or intended for the same purpose, that is to say, products which are sufficiently interchangeable, on the sole ground that, in regard to food products, the extent to which consumers would like to eat those products, or, in any case, the pleasure of consuming them, is completely different according to the conditions and the place of production, the ingredients used and the experience of the producer?'</p>
Ruling	In accordance with Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising, a comparative advertisement which compares, solely on the basis of price, foodstuffs which, though different in terms of taste, nevertheless display a sufficient degree of interchangeability, is lawful. It is for the national court to determine whether that condition is satisfied, along with all the other conditions laid down in Article 3a of Directive 84/450/EEC, in particular the condition prohibiting misleading advertising.
Key notes	<p>42. Of more direct relevance to the present case are the second and third conditions under which comparative advertising is permitted. The second condition requires, as we have seen, that the comparative advertisement 'compares goods or services meeting the same needs or intended for the same purpose'. On this point, mindful of the favourable disposition toward comparative advertising manifested by the legislature responsible for the Directive, the Court has had occasion to state that this condition should not be interpreted too narrowly. In particular, it has been interpreted as meaning that the goods being compared must simply display 'a sufficient degree of interchangeability for consumers'. (17)</p> <p>60. Therefore, notwithstanding that the national court alone can rule on the point, it seems to me unlikely that, in the present case, failure to state the brand name of the products compared could constitute behaviour amounting to misleading advertising. It would be different if, for example, the failure to state the brand name of the products compared was used by the advertiser to mislead consumers about the products. That would be the case where a comparison was designed to suggest, misleadingly, that a product offered for sale at a significantly lower price was of the same brand as a more expensive product.</p> <p>62. The Court has also had occasion to observe that the method used to select the specific products that go into each 'shopping basket' compared in an advertisement could, in theory, also constitute misleading advertising. In particular, that could be the case if the products chosen could give rise to the mistaken belief on the part of the consumer that <i>all</i> the</p>

advertiser's products were cheaper than *all* the products of his competitors. (30) I would, however, observe that those observations are not relevant to the present case. The Court in fact made them in relation to a situation in which an advertisement compared, not specific products, but the general level of prices charged by competing supermarkets. By contrast, in the case now under consideration there are no general claims about prices, which are even lower in one supermarket than in some other. The comparative advertisement on which the referring court must rule compares, as has been seen, a clear, specific number of products on sale at competing supermarkets. The fact that the comparison is accompanied by a general slogan to the effect that the advertiser's supermarket is the best, no figures or quantities being provided, seems to me entirely irrelevant.
