

Comparative advertising is only misleading if it is likely to have an impact on the economic behaviour of the persons to whom it is addressed (Ruling n° 217 – 21-22.925)

22/03/2023



Ruling No. 217

**Dismissal**

FRENCH REPUBLIC

ON BEHALF OF THE FRENCH PEOPLE

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## **RULING OF THE COMMERCIAL, FINANCIAL AND ECONOMIC CHAMBER OF THE *COUR DE CASSATION* (COURT OF CASSATION) OF 22 MARCH 2023**

The company Caen Distribution, a simplified joint-stock company with registered office at [Address 2], lodged appeal No. C 21-22.925 against the ruling delivered on 22 July 2021 by the *Cour d'appel* (Court of Appeal) of Caen (second civil and commercial chamber) in the dispute between:

- (1) Carrefour Hypermarchés, a simplified joint-stock company, with registered offices at [Address 1];
- (2) Opti-mix, a simplified joint-stock company with registered offices at [Address 3], respondents in the quashing.

The applicant bases its appeal on the single plea for quashing appended to this ruling.

The case file was sent to the prosecutor-general.

On the report by Ms Bellino, judge referee, the observations of SCP Piwnica et Molinié, lawyer of Caen Distribution, SARL Delvolvé and Trichet, lawyer of Carrefour Hypermarchés, and the advisory opinion of Mr Debacq, advocate-general, following which the president asked the lawyers whether they wished to make further comments, after debate in the public hearing of 31 January 2023 attended by Mr Vigneau, president, Ms Bellino, reporting judge referee, Ms Darbois, elder judge, Ms Poillot-Peruzzetto, Ms Champalaune, Ms Michel-Amsellem,

Mr Calloch, judges, Ms Comte, Ms Bessaud, Mr Regis, judge referees, Mr Debacq, advocate-general, and Ms Labat, Chamber Registrar, the Commercial, Finance and Economics Chamber of the *Cour de cassation* (Court of Cassation), composed, pursuant to Article R. 431-5 of the Judicial Code, of the abovementioned president and judges, after deliberation thereof in accordance with the law, has delivered this ruling.

Partial withdrawal

- 1. Caen Distribution is hereby notified of the withdrawal of its appeal in so far as it is directed against Opti-mix.

## **Facts and procedure**

- 2. According to the ruling under appeal (Caen, 22 July 2021), the company Carrefour Hypermarchés (the Carrefour company), which operates a hypermarket in Hérouville-Saint-Clair, had Opti-mix carry out a price collection operation at the Leclerc hypermarket operated by Caen Distribution in Caen and the Leclerc hypermarket operated by Ifs Distribution in Ifs in order to establish comparative advertising. This advertising was published in the *Ouest-France* newspaper on 30 January 2015.
- 3. On 3 April 2015, Caen Distribution filed an official transcript of a bailiff's report to establish a parallel between the prices noted on the supporting documents provided by Carrefour, those recorded in its store's computer database and those appearing on the cash receipts filed on the same date.
- 4. Considering that the advertising was inaccurate, Caen Distribution sued Carrefour for damages, in particular on the basis of Articles L. 121-8, L. 120-1 and L. 121-12 of the consumer protection code in its wording applicable at the time.

## **Review of the plea**

## Statement of plea

5. Caen Distribution objects to the ruling for dismissing its claims for compensation for damage suffered due to the misleading comparative advertising carried out by Carrefour, whereas:

"(1) comparative advertising which, by the use of incorrect prices, misleads or is liable to mislead the persons to whom it is addressed and which, for that reason, causes damage or is liable to cause damage to a competitor constitutes misleading and unfair advertising, which is therefore unlawful; the *Cour d'appel* (Court of Appeal) found that the 45 prices of the products verified by the bailiff, out of a total of 247 prices of products that were the subject of the comparative advertising carried out by Carrefour, were false and that in each case the price noted was higher than the actual price applied in the E. Leclerc store in Caen; in dismissing the claim for compensation lodged by Caen Distribution, the operator of the shop, for the damage suffered as a result of misleading and unfair advertising on the ground, incorrect in law, whereby "the combined application of Articles 2(b) and 4(a) of Directive 2006/114/EC of the European Parliament and of the Council with regard to misleading and comparative advertising, in reference to Article 6(1) of Directive 2005/29/EC of the European Parliament and of the Council on unfair commercial practices, presupposes the establishment of two cumulative criteria: that the advertising contains false information or information that is likely to mislead the average consumer and that it is such as to lead the average consumer to make a commercial decision that he would not have taken otherwise", when the misleading nature of the comparative advertising, as defined in Article 2(b) of Directive 2006/114/EC, does not presuppose that the advertising is such as to lead the consumer to take a decision that he would not have taken otherwise, the *Cour d'appel* (Court of Appeal) infringed Articles 2 and 4 of Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising and, together and by misapplication, Article 6 of 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;

(2) in comparative advertising geared to the low price of the products compared, the use of prices from a competitor that are higher than those actually charged is necessarily such as to substantially distort the economic behaviour of the consumer; the *Cour d'appel* (Court of Appeal) found that the 45 prices of the products verified by the bailiff, out of a total of 247 prices of products that were the subject of the comparative advertising carried out by Carrefour, were false and that in each case the price noted was higher than the actual price applied in the store under the E. Leclerc sign in Caen; that, by nevertheless dismissing Caen Distribution's claim for compensation for damage suffered as a result of the misleading and unfair advertising, on the ground that "no element or document establishes that this comparative advertising, even if based on false elements within the limit indicated above, has altered or was likely to materially distort the consumer's economic behaviour", such that "the comparative advertising cannot be considered misleading" and "cannot therefore be considered an unfair commercial practice", the *Cour d'appel* (Court of Appeal) further infringed Article L 120-1 in its version deriving from the Law of 4 August 2008, applicable to the dispute, Article L 121-1 in its version deriving from the law of 17 March 2014, applicable to the dispute, Article L 121-8 of the consumer protection code in its version deriving from the law of 17 May 2011, applicable to the dispute, together with Articles 2 and 4 of Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 in relation to misleading and comparative advertising, and Article 6 of 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."

## Court's response

6. On the one hand, according to Article L. 121-8 of the consumer protection code in its version deriving from Law No. 2011-525 of 17 May 2011 and transposing Directive 2006/114/EC of 12 December 2006 on misleading and comparative advertising in its wording prior to that resulting from Order No. 2016-301 of 14 March 2016, in order to be lawful, advertising that compares goods or services by implicitly or explicitly identifying a competitor or goods or services offered by a competitor must not be misleading or likely to mislead.

7. According to Article 4(a) of the aforementioned directive, comparative advertising is permissible if it is not misleading as defined in Article 2(b) of that directive or Article 6 of Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.

8. Article 2(b) of Directive 2006/114/EC provides that advertising is misleading if it in any way, including its presentation, misleads or is liable to mislead the persons to whom it is addressed or whom it affects and which, by virtue of its misleading nature, is liable to affect their economic behaviour or which, for these reasons, causes damage or is liable to cause damage to a competitor.

9. Under the terms of Article 6 of Directive 2005/29/EC, a commercial practice is deemed to be misleading if it contains false information and is therefore misleading or misleads or is likely to mislead the average consumer in any way, including by its general presentation, even if the information presented is factually correct, in one or more of the following respects and, in either case, causes or is likely to cause the average consumer to take a commercial decision that he would not have taken otherwise.

10. Consequently, comparative advertising is misleading and therefore unlawful, as defined in the above-mentioned Article L. 1218, interpreted in the light of Article 4(a) of the abovementioned Directive 2006/114/EC, only if it is liable to have an impact on the economic behaviour of the persons to whom it is addressed.

11. The first part of the plea, which states the opposite, is therefore unfounded.

12. On the other hand, having noted that the comparative advertising carried out by Carrefour was based on 45 incorrect prices out of the 227 cited in the advertising, that the price of the shopping basket at the Leclerc hypermarket in Caen therefore remained 13% more expensive than that of the Carrefour hypermarket in Hérouville-Saint-Clair, and that it was not established that the consumer, informed that the price of the competitor's basket was 13% more expensive and not 15.9% more expensive as indicated in the advertising, would have nevertheless modified his behaviour, the *Cour d'appel* (Court of Appeal) was able to hold that it was not demonstrated that this comparative advertising, even based on false elements within the limit previously indicated, was such as to modify the economic behaviour of the consumer.

13. The plea is therefore unfounded.

## ON THESE GROUNDS, the Court:

DISMISSES the request;

Orders the company Caen Distribution to pay the costs;

Pursuant to Article 700 of the Civil Procedure Code, dismisses Caen distribution's claim and orders it to pay Carrefour Hypermarchés the sum of EUR 3,000;

Thus decided by the Commercial, Financial and Economic Chamber of the *Cour de cassation* (Court of Cassation) and pronounced by the President at the public hearing on the twenty-second day of the month of March of the year two thousand and twenty-three.

President : Mr Vigneau

Advocate-general : Mr Debacq

Lawyer(s) : SARL Meier-Bourdeau, Lécuyer and Associés – SCP Thomas-Raquin, Le Guerer, Bouniol-Brochier

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Institution judiciaire

Translated rulings