

European Court of Justice, 8 April 2003, Pippig v Hartlauer



ADVERTISING – TRADEMARK LAW

Comparative advertising

- [No stricter national provisions on protection against misleading advertising allowed](#)

Article 7(2) of Directive 84/450 precludes the application to comparative advertising of stricter national provisions on protection against misleading advertising as far as the form and content of the comparison is concerned, without there being any need to establish distinctions between the various elements of the comparison, that is to say statements concerning the advertiser's offer, statements concerning the competitor's offer and the relationship between those offers;

- [The advertiser is in principle free to state the brand name of rival products in comparative advertising](#)

Article 3a(1)(a) of Directive 84/450 must be interpreted as meaning that, whereas the advertiser is in principle free to state or not to state the brand name of rival products in comparative advertising, it is for the national court to verify whether, in particular circumstances, characterised by the importance of the brand in the buyer's choice and by a major difference between the respective brand names of the compared products in terms of how well known they are, omission of the better-known brand name is capable of being misleading.

- [Comparison of products from different distribution channels](#)

The answer to the second question must therefore be that Article 3a(1) of Directive 84/450 does not preclude compared products from being bought through different distribution channels.

- [Test purchase](#)

The answer to the third question must therefore be that Article 3a of Directive 84/450 does not preclude an advertiser from carrying out a test purchase with a competitor before his own offer has even commenced, where the conditions for the lawfulness of comparative advertising set out therein are complied with.

- [Price comparison is not discrediting of a competitor](#)

Having regard to the above considerations, the answer to the fourth question must be, first, that a price com-

parison does not entail the discrediting of a competitor, within the meaning of Article 3a(1)(e) of Directive 84/450 either on the grounds that the difference in price between the products compared is greater than the average price difference or by reason of the number of comparisons made.

- [Using the competitors name, logo and picture of its shop front](#)

Secondly, Article 3a(1)(e) of Directive 84/450 does not prevent comparative advertising, in addition to citing the competitor's name, from reproducing its logo and a picture of its shop front, if that advertising complies with the conditions for lawfulness laid down by Community law.

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European Court of Justice, 8 April 2003

(G.C. Rodríguez Iglesias, J.-P. Puissechet, M. Wathelet and C.W.A. Timmermans, D.A.O. Edward, V. Skouris, F. Macken, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues and A. Ro)

JUDGMENT OF THE COURT

8 April 2003 (1)

(Approximation of laws - Directives 84/450/EEC and 97/55/EC - Misleading advertising - Conditions for comparative advertising to be lawful)

In Case C-44/01,

REFERENCE to the Court under Article 234 EC by the Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between Pippig Augenoptik GmbH & Co. KG

and

Hartlauer Handelsgesellschaft mbH,

Verlassenschaft nach dem verstorbenen Franz Josef Hartlauer,

on the interpretation of Council Directive 84/450/EEC of 10 September 1984 on misleading and comparative advertising (OJ 1984 L 250, p. 17), as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 (OJ 1997 L 290 p. 18),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissechet, M. Wathelet and C.W.A. Timmermans (Presidents of Chambers), D.A.O. Edward, V. Skouris, F. Macken, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues (Rapporteur) and A. Rosas, Judges,

Advocate General: A. Tizzano,

Registrar: M.-F. Contet, Administrator,

after considering the written observations submitted on behalf of:

- Pippig Augenoptik GmbH & Co. KG, by F. Hitzenbichler, Rechtsanwalt,

- Hartlauer Handelsgesellschaft mbH and Verlassenschaft nach dem verstorbenen Franz Josef Hartlauer, by A. Haslinger, H. Mück, P. Wagner, W. Müller and W. Graziani-Weis, Rechtsanwälte,

- the Austrian Government, by C. Pesendorfer, acting as Agent,

- the Commission of the European Communities, by J. Sack and M. França, acting as Agents, having regard to the Report for the Hearing, after hearing the oral observations of Pippig Augenoptik GmbH & Co. KG, Hartlauer Handelsgesellschaft mbH, Verlassenschaft nach dem verstorbenen Franz Josef Hartlauer (the Estate of Franz Josef Hartlauer), and the Commission at the hearing on 23 April 2002, after hearing the [Opinion of the Advocate General](#) at the sitting on 12 September 2002, gives the following

Judgment

1. By order of 19 December 2000, received at the Court on 2 February 2001, the Oberster Gerichtshof (Supreme Court, Austria) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Council Directive 84/450/EEC of 10 September 1984 on misleading and comparative advertising (OJ 1984 L 250, p. 17), as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 (OJ 1997 L 290 p. 18; 'Directive 84/450').

2. Those questions were raised in proceedings between the Austrian company Pippig Augenoptik GmbH & Co. KG ('Pippig'), the Austrian company Hartlauer Handelsgesellschaft mbH ('Hartlauer') and the estate of Franz Josef Hartlauer, a former director of Hartlauer, concerning advertising by Hartlauer to promote the sale of its optical products by comparing them with spectacles sold by Pippig.

Legal background

Community legislation

3. Directive 84/450, which in its initial version concerned only misleading advertising, was amended by Directive 97/55 in order to cover comparative advertising as well. The title of Directive 84/450 was therefore amended by Article 1(1) of Directive 97/55.

4. The seventh recital in the preamble to Directive 84/450 states:

'Whereas minimum and objective criteria for determining whether advertising is misleading should be established for this purpose'.

5. Article 1 of Directive 84/450 provides:

'The purpose of this Directive 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.'

6. According to Article 2(2) of Directive 84/450, 'misleading advertising' for the purposes of the directive 'means any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor'.

7. According to Article 2(2a) of Directive 84/450, 'comparative advertising' means any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor.

8. Article 3a(1) of Directive 84/450 provides:

'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;

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

9. Article 7(1) and (2) of Directive 84/450 provide:

'1. This Directive shall not preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection, with regard to misleading advertising, for consumers, persons carrying on a trade, business, craft or profession, and the general public.

2. Paragraph 1 shall not apply to comparative advertising as far as the comparison is concerned.'

10. The 2nd, 3rd, 14th, 15th and 18th recitals in the preamble to Directive 97/55 are worded as follows:

'(2) Whereas the completion of the internal market will mean an ever wider range of choice; whereas, given that consumers can and must make the best possible use of the internal market, and that advertising is a very important means of creating genuine outlets for all goods and services throughout the Community, the basic provisions governing the form and content of comparative advertising should be uniform and the conditions of the use of comparative advertising in the Member States should be harmonised; whereas if these conditions are met, this will help demonstrate objectively the merits of the various comparable products; whereas comparative advertising can also stimulate competition between suppliers of goods and services to the consumer's advantage;

...

(3) ... the acceptance or non-acceptance of comparative advertising according to the various national laws may constitute an obstacle to the free movement of goods and services and create distortions of competition ...;

...

(14) Whereas ... it may be indispensable, in order to make comparative advertising effective, to identify the goods or services of a competitor, making reference to a trade mark or trade name of which the latter is the proprietor;

(15) Whereas such use of another's trade mark, trade name or other distinguishing marks does not breach this exclusive right in cases where it complies with the conditions laid down by this Directive, the intended target being solely to distinguish between them and thus to highlight differences objectively;

...

(18) Whereas Article 7 of Directive 84/450/EEC allowing Member States to retain or adopt provisions with a view to ensuring more extensive protection for consumers, persons carrying on a trade, business, craft or profession, and the general public, should not apply to comparative advertising, given that the objective of amending the said Directive is to establish conditions under which comparative advertising is permitted'.

National legislation

11. The Republic of Austria transposed Directive 97/55 by amending, with effect from 1 April 2000, the Bundesgesetz gegen den unlauteren Wettbewerb (Federal Law Against Unfair Competition) of 16 November 1984 (BGBl. 1984/448; 'the UWG'). The order for reference shows, however, that Austrian case-law took account of that directive even before the expiry of the transposition period when interpreting Article 2 of the UWG.

12. According to Paragraph 2(1) of the UWG: 'Proceedings for an injunction may be brought against anyone who, for competition purposes, in the course of business, makes statements regarding business relations which are liable to mislead. ...'

The dispute in the main proceedings and the questions referred

13. Pippig operates three specialist opticians' shops in Linz (Austria), in which it markets spectacles. It obtains its supplies from around 60 different manufacturers and has a representative assortment of the collection of each of its suppliers.

14. Hartlauer is a commercial company whose branches, spread throughout the whole of Austria, have optical shelves where the spectacles sold are, in the great majority of cases, of little-known brands and sold at low prices. As far as spectacles of better-known brands are concerned, Hartlauer is not supplied directly by the same suppliers as opticians, but obtains them outside normal distribution channels, particularly by parallel imports.

15. At the beginning of September 1997, Hartlauer circulated throughout the whole of Austria an advertising leaflet stating that 52 price comparisons for spectacles carried out over six years had shown a total price differential of ATS 204 777, or ATS 3 900 on average per pair of spectacles, between the prices charged by Hartlauer and those of traditional opticians. The leaflet claimed in particular that, for a clear Zeiss lens, opticians made a profit of 717%.

16. The advertising leaflet also contained a direct comparison between the price of ATS 5 785 charged by Pippig for Titanflex Eschenbach spectacles with Zeiss lenses and the price of ATS 2 000 charged by Hartlauer for spectacles of the same model but with lenses of the Optimed brand.

17. That price comparison was also announced in advertisements on various Austrian radio and television channels, in which, by contrast with the advertising leaflet, it was not stated that the spectacles compared had lenses of different brands. The television advertisements showed the shop front of the applicant in the main proceedings, with the sign 'Pippig'.

18. The preparation of that comparative advertising included the carrying out of a test purchase. An employee of Hartlauer went to a Pippig shop on 8 July 1997 and ordered Titanflex Eschenbach spectacles and Zeiss lenses. Those spectacles were then photographed and the photograph was used twice in the advertising leaflet distributed by Hartlauer, once to illustrate Pippig's offer for those spectacles and once to illustrate Hartlauer's offer for spectacles of the same model with Optimed lenses, since, at the date of the test purchase, Titanflex Eschenbach frames were not yet sold in Hartlauer's shops.

19. Pippig brought legal proceedings against Hartlauer and the successors of Franz Josef Hartlauer, demanding that Hartlauer refrain from all comparative advertising on price in the form described in paragraphs 15 to 18 of this judgment, on the grounds that such advertising was misleading and discrediting. It also sought damages against the defendants and the publication of the judgment at their expense.

20. The first instance and appeal courts having accepted most, but not all, of Pippig's claims, the applicant and the defendants both brought an appeal for 'Revision' before the Oberster Gerichtshof.

21. Taking the view that interpretation of Directive 84/450 was necessary in order to resolve the dispute before it, the Oberster Gerichtshof decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 7(2) of Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising ("the directive") to be interpreted to the effect that "comparative advertising, as far as the comparison is concerned" means the statements regarding the product offered by the advertiser himself, the statements regarding the product offered by the competitor and the statements regarding the relationship between the two products (the result of the comparison)? Or is there a "comparison" within the meaning of Article 7(2) of the directive only in so far as the statements are made regarding the result of the comparison, with the consequence that misconceptions regarding other features of the compared goods/services may be assessed on the basis of a national standard governing misleading statements which is possibly more strict?'

Is the reference in Article 3a(1)(a) of the directive to Article 7(1) of the directive a *lex specialis* in relation to Article 7(2) of the directive, with the result that a national standard governing misleading statements which is possibly more strict may be applied to all elements of the comparison?

Is Article 3a(1)(a) of the directive to be interpreted as meaning that the comparison of the price of a brand-name product with the price of a no-name product of equivalent quality is not permitted where the name of the manufacturer is not indicated, or do Article 3a(1)(c) and Article 3a(1)(g) of the directive preclude indication of the manufacturer? Is the image of a (brand-name) product a feature of the product/service within the meaning of Article 3a(c) of the directive? Does it follow from a (possible) negative answer to this question that any (price) comparison of a brand-name product with a no-name product of equivalent quality is not permitted?

(2) Is Article 7(2) of the directive to be interpreted as meaning that differences in the procurement of the product/service whose features are compared with features of the advertiser's product/service must also be assessed solely on the basis of Article 3a of the directive?

If this question is answered in the affirmative:

Is Article 3a of the directive to be interpreted as meaning that a (price) comparison is permitted only if the compared goods are procured through the same distribution channels and are thus offered by the advertiser and his competitor(s) in a comparable selection?

(3) Is "comparison" within the meaning of Article 7(2) of the directive to be construed as including the creation of the bases for comparison through a test purchase?

If this question is answered in the affirmative:

Is Article 3a of the directive to be interpreted as meaning that the deliberate initiation of a (price) comparison which is favourable to the advertiser through a test purchase which is made before the beginning of the advertiser's own offer and is arranged accordingly makes the comparison unlawful?

(4) Is a comparison discrediting within the meaning of Article 3a(1)(e) of the directive if the advertiser selects the goods purchased from the competitor in such a way that a price difference is obtained which is greater than the average price difference and/or if such price comparisons are repeatedly made with the result that the impression is created that the prices of the competitor(s) are generally excessive?

Is Article 3a(1)(e) of the directive to be interpreted as meaning that the information on the identification of the competitor must be restricted to the extent absolutely necessary and it is therefore not permitted if, in addition to the competitor's name, its company logo (if it exists) and its shop are shown?

The first question

22. In its first question, the referring court asks, first, whether Article 7(2) of Directive 84/450 applies to all elements of the comparison, namely statements regarding the product offered by the advertiser, statements

regarding the product offered by the competitor, and statements regarding the relationship between the two products, or whether it applies only to that latter element. Second, it asks whether Article 3a(1)(a) of Directive 84/450 must be interpreted as allowing stricter, national, provisions on protection against misleading advertising to be applied to comparative advertising. Third, it asks whether Article 3a(1)(a) of Directive 84/450 should be interpreted as authorising the comparison of branded products with unbranded ones, where the names of the manufacturers are not indicated.

Submissions to the Court

23. Pippig argues that Article 3a(1)(a) of Directive 84/450 is a crucial provision, in that it provides that comparative advertising may not be misleading within the meaning of Articles 2(2), 3, and 7(1) of that directive. It submits that Article 3a(1)(a) refers not to Article 7(2) but to Article 7(1), with the result that, as far as misleading comparative advertising is concerned, it is legitimate to apply stricter national criteria to all elements of the comparison.

24. According to Pippig, for Article 7(2) of Directive 84/450 not to be deprived of all useful effect, that provision must be interpreted in such a way that, apart from cases of misleading advertising, the comparison cannot in itself be restricted.

25. Pippig maintains that, on a proper interpretation of Article 3a(1)(a) of Directive 84/450, comparison between the price of a brand-name product and the price of a product of similar quality without a brand name is unlawful where the name of the manufacturer of the brand-name product is not indicated. That, Pippig submits, follows from the requirement for an objective comparison stated in the 7th and 15th recitals in the preamble to Directive 97/55.

26. The defendants in the main proceedings argue that Article 7(2) of Directive 84/450 established a 'fixed standard', expressly excluding the application by Member States of stricter national criteria on deception in relation to all the elements of comparative advertising. A contrary interpretation would lead to an advertising campaign containing comparative advertising, designed to be carried out in all Member States, being capable of authorisation in some States and prohibited in others.

27. The defendants further argue that, since Optimed lenses, like Zeiss lenses, are brand-name products, the comparative advertising at issue in the main proceedings is lawful. A different interpretation would lead to comparative advertising being possible only between identical products, which would have no sense in the light of Article 3a(1)(b), (d), (e), (g) and (h) of Directive 84/450.

28. Moreover, statement of the name of the competitor envisaged by the comparison is not obligatory; the optional nature of such a designation is apparent both from Article 3a of Directive 84/450 and the 15th recital in the preamble to Directive 97/55.

29. The Austrian Government maintains that a stricter national criterion for deception should be accepted as

lawful in place of the risk of deception referred to in Article 3a(1)(a) of Directive 84/450, but not in place of the definition of comparative advertising or the conditions set out in Article 3a(1)(b) to (h) of that directive. A contrary interpretation would leave Article 3a(1)(a) of Directive 84/450 devoid of meaning. It is also difficult to explain why misleading advertising might, at the national level, be treated more strictly outside a comparison than in the context of a comparison.

30. The Austrian Government argues that, even if comparison of an unbranded product with a branded one often leads to a situation of deception or discredit, such a comparison should not automatically be regarded as unlawful.

31. In the Commission's view, Directive 84/450 contains exhaustive legislation covering all aspects of a comparison of goods or services for advertising purposes. It therefore leaves no room for stricter national legislation or case-law as to the lawfulness of such advertising.

32. In those circumstances, the reference to Article 7(1) appearing in Article 3a(1)(a) of Directive 84/450 can only mean that comparative advertising, which as such is lawful in accordance with the provisions of that directive, would however be unlawful if, in an area other than comparison proper, it were to contain misleading information.

33. The Commission also notes that there is nothing in Directive 84/450 to prohibit comparison of branded products with unbranded ones. In the case of spectacles, however, the fact that they have lenses of a famous brand might be a characteristic increasing their quality and thus their price, so that the presence or absence of such lenses in the spectacles being compared for price should be mentioned in order to prevent the advertising from being misleading.

Findings of the Court

34. In relation to the first part of the question, concerning the application of Article 7(2) of Directive 84/450 to all the elements of comparison, the Court notes that, according to Article 2(2)(a) of Directive 84/450, comparative advertising means any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor.

35. As the Court has already held, that is a broad definition covering all forms of comparative advertising, so that, in order for there to be comparative advertising, it is sufficient for there to be a statement referring even by implication to a competitor or to the goods or services which he offers ([Case C-112/99 Toshiba Europe \[2001\] ECR I-7945, paragraphs 30 and 31](#)).

36. All comparative advertising is designed to highlight the advantages of the goods or services offered by the advertiser in comparison with those of a competitor. In order to achieve that, the message must necessarily underline the differences between the goods or services compared by describing their main characteristics. The comparison made by the advertiser will necessarily flow from such a description.

37. Therefore, in the context of Directive 84/450, it is not necessary to establish distinctions in the legislation

between the various elements of comparison, that is to say the statements concerning the advertiser's offer, the statements concerning the competitor's offer, and the relationship between those two offers.

38. As for the second part of the question, concerning the application to comparative advertising of stricter national provisions on protection against misleading advertising, the Court takes the view that the objective of Directive 84/450 is the establishment of conditions in which comparative advertising must be regarded as lawful in the context of the internal market.

39. To that end, Article 3a of Directive 84/450 enumerates the conditions to be satisfied, including the requirement that comparative advertising must not be misleading within the meaning of Articles 2(2), 3 and 7(1) of the directive (see Article 3a(1)(a) of Directive 84/450).

40. The Community legislature having carried out only a minimal harmonisation of national rules on misleading advertising, Article 7(1) of Directive 84/450 allows Member States to apply stricter national provisions in that area, to ensure greater protection of consumers in particular.

41. However, Article 7(2) of Directive 84/450 expressly provides that Article 7(1) does not apply to comparative advertising so far as the comparison is concerned.

42. Thus, the provisions of Directive 84/450 on the conditions for comparative advertising to be lawful on the one hand refer to Article 7(1), as regards the definition of misleading advertising (Article 3a(1)(a)) and, on the other hand, exclude the application of that same provision (Article 7(2)). Faced with that apparent textual contradiction, those provisions must be interpreted in such a way as to take account of the objectives of Directive 84/450 and in the light of the case-law of the Court according to which the conditions required of comparative advertising must be interpreted in the sense most favourable to it (*Toshiba Europe*, paragraph 37).

43. According to the second recital in the preamble to Directive 97/55, the basic provisions governing the form and content of comparative advertising should be uniform and the conditions of the use of comparative advertising in the Member States should be harmonised. According to the third recital, the acceptance or non-acceptance of comparative advertising according to the various national laws may constitute an obstacle to the free movement of goods and services and create distortions of competition. The 18th recital excludes stricter national provisions on misleading advertising being applied to comparative advertising, given that the aim of the Community legislature in adopting Directive 97/55 was to establish conditions under which comparative advertising is to be permitted throughout the Community.

44. It follows that Directive 84/450 carried out an exhaustive harmonisation of the conditions under which comparative advertising in Member States might be lawful. Such a harmonisation implies by its nature that the lawfulness of comparative advertising throughout

the Community is to be assessed solely in the light of the criteria laid down by the Community legislature. Therefore, stricter national provisions on protection against misleading advertising cannot be applied to comparative advertising as regards the form and content of the comparison.

45. As for the third part of the question, concerning the lawfulness of comparing branded products with unbranded ones, the Court notes that, in the main proceedings, the products in question are all branded products.

46. In those circumstances, the question raised should be understood as concerning the lawfulness of the comparison between products of different brands where the names of the manufacturers are not identical.

47. In that respect, it should be noted at the outset that, under certain conditions, Directive 84/450 allows an advertiser to state in comparative advertising the brand of a competitor's product.

48. That is apparent, first, from the 14th recital in the preamble to Directive 97/55, according to which it may be indispensable, in order to make comparative advertising effective, to identify the goods or services of a competitor, making reference to a trade mark or trade name of which the latter is the proprietor.

49. That is also the result of Article 3a(1)(d), (e) and (g) of Directive 84/450. Those provisions set out three conditions for comparative advertising to be lawful, requiring, respectively, that it does not create confusion in the market place between the brand names of the advertiser and those of a competitor, that it does not discredit or denigrate the brands of a competitor, and that it does not take unfair advantage of the reputation of a competitor's brand. It follows that, where the comparison does not have the intention or effect of giving rise to such situations of unfair competition, the use of a competitor's brand name is permitted by Community law.

50. Moreover, the Court has already held that the use of another person's trade mark may be legitimate where it is necessary to inform the public of the nature of the products or the intended purpose of the services offered (Toshiba Europe, paragraph 34).

51. In the context of comparative advertising, therefore, it is open to an advertiser to state the trade mark of a competitor.

52. It is possible that, in particular circumstances, the omission of such a statement in an advertising message involving a comparison might mislead, or at least be capable of misleading, the persons to whom it is addressed, thereby making it misleading within the meaning of Article 2(2) of Directive 84/450.

53. In cases where the brand name of the products may significantly affect the buyer's choice and the comparison concerns rival products whose respective brand names differ considerably in the extent to which they are known, omission of the better-known brand name goes against Article 3a(1)(a) of Directive 84/450, which lays down one of the conditions for comparative advertising to be lawful.

54. Given the cumulative nature of the requirements set out in Article 3a(1) of Directive 84/450, such comparative advertising is prohibited by Community law.

55. It is, however, for the national court to verify in each case, having regard to all the relevant factors of the case which is brought before it, whether the conditions set out in paragraph 53 of this judgment are met, taking into account the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect ([Case C-220/98 Estee Lauder \[2000\] ECR I-117, paragraphs 27 and 30](#)).

56. The answer to the first question must therefore be that:

- Article 7(2) of Directive 84/450 precludes the application to comparative advertising of stricter national provisions on protection against misleading advertising as far as the form and content of the comparison is concerned, without there being any need to establish distinctions between the various elements of the comparison, that is to say statements concerning the advertiser's offer, statements concerning the competitor's offer and the relationship between those offers;

- Article 3a(1)(a) of Directive 84/450 must be interpreted as meaning that, whereas the advertiser is in principle free to state or not to state the brand name of rival products in comparative advertising, it is for the national court to verify whether, in particular circumstances, characterised by the importance of the brand in the buyer's choice and by a major difference between the respective brand names of the compared products in terms of how well known they are, omission of the better-known brand name is capable of being misleading.

The second question

57. In its second question, the referring court asks essentially whether differences in the method of obtaining supplies of the products whose qualities are compared may have an impact on the lawfulness of the comparative advertising.

Observations submitted to the Court

58. Pippig argues that, where differences in the method of acquiring goods or services are decisive for advertising, and the provenance of the product may be important for the consumer and thus for the calculation of the price, those differences must also be assessed in the light of Article 3a of Directive 84/450. Such an interpretation is, it submits, in accordance with the objective of Directive 84/450, given that Article 3a(1)(a) of the latter expressly refers to the provisions of Articles 3 and 7(1) of the directive. Article 3(a) of Directive 84/450 provides that the statement in advertising of the commercial origin of goods or services constitutes a decisive element in assessing whether it is misleading.

59. According to the defendants in the main proceedings, differences in the means of procuring a product do not in any way change its characteristics; spectacles of a given brand remain the same branded product, whether acquired from an official distributor or through parallel imports. Comparative advertising concerning products of the same brand can, moreover, take place

only between a parallel importer and an official distributor, since official distributors habitually comply with the sale prices recommended by manufacturers, thereby eliminating competition on price.

60. The Austrian Government maintains that Article 3a of Directive 84/450 does not preclude comparison between products which the advertiser and its competitors obtain through different distribution channels. The Commission also supports that interpretation where there are no particular circumstances to the contrary, such as, for example, an intention by the consumer to make regular purchases of a product.

Findings of the Court

61. As has been pointed out in paragraph 44 of this judgment, Directive 84/450 carried out an exhaustive harmonisation of the conditions under which comparative advertising may be lawful in Member States. Those conditions, which are set out in Article 3a(1) of that directive, do not include a requirement that the compared products be obtained through the same distribution channels.

62. Moreover, such a condition would be contrary both to the objectives of the internal market and to those of Directive 84/450.

63. In the first place, in completing the internal market as an area without internal frontiers in which free competition is to be ensured, parallel imports play an important role in preventing the compartmentalisation of national markets.

64. Secondly, it is clear from the second recital in the preamble to Directive 97/55 that comparative advertising is designed to enable consumers to make the best possible use of the internal market, given that advertising is a very important means of creating genuine outlets for all goods and services throughout the Community.

65. The answer to the second question must therefore be that Article 3a(1) of Directive 84/450 does not preclude compared products from being bought through different distribution channels.

The third question

66. In its third question, the referring court essentially asks whether Article 3a of Directive 84/450 precludes an advertiser from carrying out a test purchase with a competitor before even commencing his own offer.

Observations submitted to the Court

67. Pippig argues that Article 3a(1)(a) of Directive 84/450 expressly refers to the conditions for the lawfulness of comparative advertising set out in Article 3 of the same directive. That latter provision states that 'the results and material features of tests or checks carried out on the goods or services' may determine whether advertising is misleading. Therefore, Pippig argues, an advertiser deliberately provoking a price comparison favourable to itself by carrying out a test purchase to that end even before the beginning of its own offer makes the comparison unlawful.

68. Against that, the defendants in the main proceedings and the Commission consider that Article 3a of Directive 84/450 does not require that, at the date of a test purchase from a rival, the advertiser must already

be offering for sale the product that will subsequently be compared with the one involved in the test purchase. In the submission of the defendants in the main proceedings, it is inevitable for the test purchase to precede the advertising and thus to happen before the period in which the advertiser itself offers the compared product at a lower price.

69. The Austrian Government points out that the conditions for a price comparison to be lawful are exhaustively laid down in Article 3a of Directive 84/450. It is therefore for the national court to determine whether the deliberate provoking of a price comparison favourable to the advertiser, by carrying out a test purchase even before its own offer begins, may constitute misleading advertising.

Findings of the Court

70. Since a test purchase carried out by an advertiser with a competitor is not in itself prohibited by Directive 84/450, the advertising message comparing that advertiser's offer with the competitor's will be unlawful only if it fails to comply with one of the conditions laid down in Article 3a(1) of that directive, which it is for the national court to verify.

71. The answer to the third question must therefore be that Article 3a of Directive 84/450 does not preclude an advertiser from carrying out a test purchase with a competitor before his own offer has even commenced, where the conditions for the lawfulness of comparative advertising set out therein are complied with.

The fourth question

72. By its fourth question, the national court first asks whether a price comparison entails discrediting the competitor and is therefore unlawful for the purposes of Article 3a(1)(e) of Directive 84/450 when the products are chosen in such a way as to obtain a price difference greater than the average price difference and/or the comparisons are repeated continuously, creating the impression that the competitor's prices are excessive. Secondly, it asks whether, on a proper interpretation of that provision, comparative advertising is unlawful where, in addition to citing the name of the competitor, it reproduces the competitor's logo and a picture of its shop.

Observations submitted to the Court

73. Pippig argues that a comparison entails discredit, within the meaning of Article 3a(1)(e) of Directive 84/450, where the advertiser chooses the goods purchased from the competitor in such a way as to obtain a greater price difference than normal and where it makes such price comparisons incessantly so as to give the impression that the competitor's prices are generally excessive. The requirement of objectivity implies that the advertiser has no right to give such an impression.

74. It follows from the 15th recital in the preamble to Directive 97/55 that use of the trade mark, trade name or logo of a firm, or a picture of a competitor's shop front, does not breach the exclusive right of the owner in cases where such use complies with the conditions laid down by Directive 84/450, the aim being solely to make a distinction with the products and services of a competitor and thus to highlight differences objec-

tively. In the case concerned in the main proceedings, however, Pippig considers that it was not indispensable for the advertiser to appear 'triumphantly' before the shop of the competitor whose products were being compared.

75. The defendants argue that Article 3a of Directive 84/450 does not require comparative advertising to be reduced to indicating any average price difference between the offers of the undertakings being compared. There is no restriction on the number of price comparisons that may validly be made. If such a requirement, which does not appear in Article 3a, were to be introduced, price comparisons concerning certain products, between undertakings charging the same prices on average, would be excluded.

76. Reference in advertising to a competitor's commercial premises or shop addresses constitutes a valid means of identifying the competitor, accepted by the 14th recital in the preamble to Directive 97/55.

77. The Austrian Government considers that it is for the national court to determine, on the basis of the criteria in Article 3a(1) of Directive 84/450 and particularly in conjunction with Article 2(2) thereof, whether comparative advertising on price entails the discredit of a competitor and whether it is unlawful to show the competitor's logo and shop in addition to citing its name.

78. The Commission considers that stating higher prices charged by a competitor cannot in itself constitute a discrediting or denigration of that competitor. Therefore, in order to determine whether a price comparison is objective and not misleading, it is sufficient to apply Article 3a(1)(a) to (c) of Directive 84/450. The Commission argues that, since no price level is prescribed, the statement that a competitor consistently charges 'excessive' prices cannot, in principle, constitute a discrediting or denigration, unless it is suggested that usurious prices are being charged.

79. Finally, the Commission observes that merely showing the logo and shop of a competitor does not constitute a discrediting or denigration either, if it is not accompanied by a false or defamatory allegation. Such reproduction might increase the effectiveness and credibility of a comparative advertising campaign.

Findings of the Court

80. Concerning the first part of the question, the Court takes the view that comparing rival offers, particularly as regards price, is of the very nature of comparative advertising. Therefore, comparing prices cannot in itself entail the discrediting or denigration of a competitor who charges higher prices, within the meaning of Article 3a(1)(e) of Directive 84/450.

81. The choice as to the number of comparisons which the advertiser wishes to make between the products which he is offering and those offered by his competitors falls within the exercise of his economic freedom. Any obligation to restrict each price comparison to the average prices of the products offered by the advertiser and those of rival products would be contrary to the objectives of the Community legislature.

82. In the words of the second recital in the preamble to Directive 97/55, comparative advertising must help

demonstrate objectively the merits of the various comparable products. Such objectivity implies that the persons to whom the advertising is addressed are capable of knowing the actual price differences between the products compared and not merely the average difference between the advertiser's prices and those of its competitors.

83. As for the second part of the question, concerning the reproduction in the advertising message of the competitor's logo and a picture of its shop front, it is important to note that, according to the 15th recital in the preamble to Directive 97/55, use of another's trade mark, trade name or other distinguishing marks does not breach that exclusive right in cases where it complies with the conditions laid down by the directive.

84. Having regard to the above considerations, the answer to the fourth question must be, first, that a price comparison does not entail the discrediting of a competitor, within the meaning of Article 3a(1)(e) of Directive 84/450 either on the grounds that the difference in price between the products compared is greater than the average price difference or by reason of the number of comparisons made. Secondly, Article 3a(1)(e) of Directive 84/450 does not prevent comparative advertising, in addition to citing the competitor's name, from reproducing its logo and a picture of its shop front, if that advertising complies with the conditions for lawfulness laid down by Community law.

Costs

85. The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Oberster Gerichtshof by order of 19 December 2000, hereby rules:

1. Article 7(2) 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 of the Council of 6 October 1997, precludes the application to comparative advertising of stricter national provisions on protection against misleading advertising as far as the form and content of the comparison is concerned, without there being any need to establish distinctions between the various elements of the comparison, that is to say statements concerning the advertiser's offer, statements concerning the competitor's offer and the relationship between those offers.

2. Article 3a(1)(a) of Directive 84/450, as amended, must be interpreted as meaning that, whereas the advertiser is in principle free to state or not to state the brand name of rival products in comparative advertising, it is for the national court to verify whether, in particular circumstances, characterised by the importance of the brand in the buyer's choice and by a major difference between the respective brand names of the compared

products in terms of how well known they are, omission of the better-known brand name is capable of being misleading.

3. Article 3a(1) of Directive 84/450, as amended, does not preclude compared products from being purchased through different distribution channels.

4. Article 3a(1) of Directive 84/450, as amended, does not preclude an advertiser from carrying out a test purchase with a competitor before his own offer has even commenced, where the conditions for the lawfulness of comparative advertising set out therein are complied with.

5. A price comparison does not entail the discrediting of a competitor, within the meaning of Article 3a(1)(e) of Directive 84/450, as amended, either on the grounds that the difference in price between the products compared is greater than the average price difference or by reason of the number of comparisons made. Article 3a(1)(e) of Directive 84/450, as amended, does not prevent comparative advertising, in addition to citing the competitor's name, from reproducing its logo and a picture of its shop front, if that advertising complies with the conditions for lawfulness laid down by Community law.

OPINION OF ADVOCATE GENERAL
TIZZANO

delivered on 12 September 2002 (1)

Case C-44/01

Pippig Augenoptik GmbH & Co. KG

v

Hartlauer Handelsgesellschaft mbH, Verlassenschaft nach dem verstorbenen Franz Josef Hartlauer (Reference for a preliminary ruling from the Oberster Gerichtshof (Austria))

(Approximation of legislation - Misleading and comparative advertising - Permissibility of comparative advertising)

1. By order lodged on 2 February 2001, the Oberster Gerichtshof (Supreme Court), Vienna, Austria, referred a number of questions to the Court of Justice for a preliminary ruling on the interpretation of Directive 84/450/EEC (2) relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, as amended by Directive 97/55/EC (3) so as to include comparative advertising (in the following observations, I shall refer to Directive 84/450/EEC, as amended, simply as 'Directive 84/450' or 'the directive'). By these questions, the referring court seeks to ascertain, in particular, the conditions under which comparative advertising is to be regarded as permissible within the meaning of the directive and the extent to which Member States may introduce more restrictive measures in this connection.

The legal framework

The relevant Community provisions

2. The purpose of Directive 84/450 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 conditions under which comparative advertising is permitted' (Article 1).

3. 'Misleading advertising' is defined in Article 2(2) as 'any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor'; in determining whether advertising is misleading, Article 3 states that account must be taken of all its features. (4) However, Article 7(1) provides that the directive 'shall not preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection, with regard to misleading advertising, for consumers, persons carrying on a trade, business, craft or profession, and the general public'.

4. Comparative advertising is defined in Article 2a of the directive as 'any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor'. In that connection, Article 3a of the directive 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;
- (h) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.

2. Any comparison referring to a special offer shall indicate in a clear and unequivocal way the date on which the offer ends or, where appropriate, that the special offer is subject to the availability of the goods and services, and, where the special offer has not yet begun, the date of the start of the period during which the special price or other specific conditions shall apply'.

5. For present purposes, it should be noted that although, as we have seen, Article 7(1) allows more extensive protection to be ensured at national level,

with regard to misleading advertising, for consumers, persons carrying on a trade, business, craft or profession, and the general public, Article 7(2) provides that that paragraph, 'shall not apply to comparative advertising as far as the comparison is concerned'. The reason for that provision is given in particular in the 18th recital in the preamble to Directive 97/55, where it is explained that the provision on the introduction of more restrictive national measures 'should not apply to comparative advertising, given that the objective of amending the said directive is to establish conditions under which comparative advertising is permitted'.

The relevant national provisions

6. Directive 97/55 was transposed in Austria by means of an amendment to the law on unfair competition (Bundesgesetz gegen den unlauteren Wettbewerb, hereinafter referred to as the 'UWG') which entered into force on 1 April 2000. However, the provisions of the UWG were already being interpreted in the case-law in the light of the provisions on comparative advertising contained in Directive 84/450.

7. According to the order for reference, before the abovementioned amendment entered into force, the second sentence of Paragraph 2(1) of the UWG stated that comparative price advertising (5) was permissible, so long as it did not infringe Paragraph 2(1) itself or Paragraph 1 of the UWG. Paragraph 2(1) provided in particular that an injunction may be brought against any trader who, to gain a competitive advantage, makes statements which are liable to mislead consumers; Paragraph 1 on the other hand, so far as we are given to understand, imposed a general obligation of correct conduct (understood to mean respect for current usage) in business relations.

8. From 1 April 2000, in order to give full effect to the directive, Paragraph 2(2) of the UWG was partly amended, the new version stating that comparative advertising was permitted so long as it complied not only with Paragraphs 1 and 2(1) but also with Paragraphs 7 and 9(1) to (3) concerning the prohibition on discrediting competitors, creating confusion with their distinguishing marks and taking unfair advantage of their reputation. At the same time a new Paragraph 2(3) was added, providing that in any case comparative advertising must refer only to products with the same designation of origin and that any comparison referring to a special offer must indicate in an unequivocal way the period during which the offer was to apply and state, where appropriate, that it would last only for so long as the goods and services were available.

Facts and procedure

9. The main proceedings concern a dispute between Pippig Augenoptik GmbH & Co. KG (hereinafter referred to as 'Pippig') and Hartlauer Handelsgesellschaft mbH (hereinafter referred to as 'Hartlauer') and the estate of Franz Josef Hartlauer, deceased, former managing director of Hartlauer.

10. Pippig is a firm of specialist opticians, with three shops in Linz, selling well-known brands of spectacles. It obtains supplies direct from the manufacturers, with whom it has a permanent relationship, and it has a rep-

resentative selection of the various brands in each of its shops.

11. Hartlauer, on the other hand, is a major distribution chain with large stores throughout Austria, selling products of various kinds (electronic goods, computers, telephones, photographic and optical goods, etc.). Hartlauer stores have optical divisions (more than 100 in all), which also sell little-known brands of spectacles at low prices. As regards the more famous brands (about 5% of the total), Hartlauer has no direct relationship with the manufacturers but obtains supplies through parallel imports, with the result that only a few models of each brand and a limited number of examples are generally available in its optical divisions.

12. In September 1997, Hartlauer arranged for a leaflet to be distributed throughout Austria, with a print run of almost two million, advertising its own optical products as compared with spectacles on sale at specialist opticians. The leaflet claimed in particular that 52 price comparisons with various Austrian opticians showed that spectacles sold by Hartlauer cost ATS 204 777 less overall (on average ATS 3 900 less per pair of spectacles). The leaflet also stated that an optician's profit on the sale of Zeiss lenses amounted to 717% and that the low prices charged by Hartlauer were the reason for the constant attacks levelled against it by the optical industry.

13. In addition to these general comparisons with specialist opticians, the leaflet also made a specific comparison between the price of ATS 5 785 charged by Pippig for an Eschenbach flexible titanium frame with Zeiss bifocal lenses and the price of ATS 2 000 charged by Hartlauer for the same frame with lenses having equivalent features made by Optimed (a less well known firm). The same comparison was also made in a number of commercials broadcast on various radio and television channels in September 1997 but in this case the brands of the spectacle lenses were not compared and it was not made clear that different brands were involved. (6) The television commercials also included shots of Pippig's shop with the company logo.

14. According to the information provided by the referring court, the said comparison was carried out by means of a test purchase made on 8 July 1997 from one of Pippig's shops by one of Hartlauer's employees, who asked to have that particular type of rare and very expensive Zeiss lenses set in the Eschenbach frame. The test spectacles were collected on 1 August and were then photographed for the advertising leaflet, where they appeared twice, representing both the Pippig and the Hartlauer models. Apparently, Eschenbach frames in flexible titanium were not yet on sale in Hartlauer stores when the test purchase was made. They became available only later and, even then, in small numbers and not in all colours and sizes.

15. Considering itself to be injured by such comparative advertising, Pippig brought an action claiming that the court should declare it to be unlawful; authorise the publication of the judgment to that effect in various national newspapers; prohibit the broadcasting of similar advertising in future; and lastly order Hartlauer to pay

damages. Pippig's first two claims were partly accepted by the court before which the action was brought, in a judgment which was subsequently largely upheld on appeal.

16. All the parties lodged extraordinary applications for review before the Oberster Gerichtshof. According to the order for reference, four main questions were raised before that court, namely: (i) whether the comparison between spectacles with brand-name lenses and no-name lenses is lawful; (ii) whether the comparison between a brand-name product purchased directly from the manufacturer and the same product obtained through parallel import is a comparison of like with like; (iii) whether a comparison by means of a test purchase, made before the offer from the person making the comparison opened and presented in such a manner as to maximise the price difference, is lawful; (iv) whether a comparison which gives the general impression that specialist opticians charge excessive prices is such as to discredit those opticians.

17. As there are now specific Community rules on comparative advertising, in order to resolve those issues, the Oberster Gerichtshof therefore considered it necessary to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 7(2) of Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising ("the directive") to be interpreted to the effect that "comparative advertising, as far as the comparison is concerned" means the statements regarding the product offered by the advertiser himself, the statements regarding the product offered by the competitor and the statements regarding the relationship between the two products (the result of the comparison)? Or is there a "comparison" within the meaning of Article 7(2) of the directive only in so far as the statements are made regarding the result of the comparison, with the consequence that misconceptions regarding other features of the compared goods/services may be assessed on the basis of a national standard governing misleading statements which is possibly more strict?

Is the reference in Article 3a(1)(a) of the directive to Article 7(1) of the directive a *lex specialis* in relation to Article 7(2) of the directive, with the result that a national standard governing misleading statements which is possibly more strict may be applied to all elements of the comparison?

Is Article 3a(1)(a) of the directive to be interpreted as meaning that the comparison of the price of a brand-name product with the price of a non-name product of equivalent quality is not permitted where the name of the manufacturer is not indicated, or do Article 3a(1)(c) and Article 3a(1)(g) of the directive preclude indication of the manufacturer? Is the image of a (brand-name) product a feature of the product/service within the meaning of Article 3a(1)(c) of the directive? Does it follow from a (possible) negative answer to this question that any (price) comparison of a brand-name

product with a no-name product of equivalent quality is not permitted?

2. Is Article 7(2) of the directive to be interpreted as meaning that differences in the procurement of the product/service whose features are compared with features of the advertiser's product/service must also be assessed solely on the basis of Article 3a of the directive?

If this question is answered in the affirmative:

Is Article 3a of the directive to be interpreted as meaning that a (price) comparison is permitted only if the compared goods are procured through the same distribution channels and are thus offered by the advertiser and his competitor(s) in a comparable selection?

3. Is "comparison" within the meaning of Article 7(2) of the directive to be construed as including the creation of the bases for comparison through a test purchase?

If this question is answered in the affirmative:

Is Article 3a of the directive to be interpreted as meaning that the deliberate initiation of a (price) comparison which is favourable to the advertiser through a test purchase which is made before the beginning of the advertiser's own offer and is arranged accordingly makes the comparison unlawful?

4. Is a comparison discrediting within the meaning of Article 3a(1)(e) of the directive if the advertiser selects the goods purchased from the competitor in such a way that a price difference is obtained which is greater than the average price difference and/or if such price comparisons are repeatedly made with the result that the impression is created that the prices of the competitor(s) are generally excessive?

Is Article 3a(1)(e) of the directive to be interpreted as meaning that the information on the identification of the competitor must be restricted to the extent absolutely necessary and it is therefore not permitted if, in addition to the competitor's name, its company logo (if it exists) and its shop are shown?

18. In the proceedings instituted before the Court, in addition to the parties in the main proceedings, the Austrian Government and the Commission intervened. The intervening parties, with the exception of the Austrian Government, made their submissions at the hearing on 23 April 2002.

Legal analysis

The first question

19. The first question raises a number of points designed to ascertain, on the one hand, whether a national standard that is stricter than the Community rules may be applied to comparative advertising and, on the other, whether the name of the manufacturers must be indicated when comparing the price of a brand-name product with the price of a no-name product of equivalent quality. It will be best to consider these two aspects separately, starting with the second, in order to preserve a logical sequence.

(a) As to whether the name of the manufacturers must be indicated when comparing the price of a brand-name product with the price of a no-name product of equivalent quality

20. With regard to this aspect of the question, the referring court is in fact starting from the conclusion reached by the national courts of first and second instance that price comparisons between brand-name products and no-name (or, to be more precise, less well known brand-name) (7) products of equivalent quality are not permitted if the names of the manufacturers are not indicated. In particular, so far as we are given to understand, they found that the advertising material comparing the price charged by Pippig for the Eschenbach frame with Zeiss bifocal lenses and the price charged by Hartlauer for the same frame with lenses with equivalent features made by Optimed (a much less well known brand) was not permitted in cases where there was no indication of the brand names of the lenses in the spectacles that were being compared. (8) In this connection, the referring court is seeking essentially to ascertain, first, whether such comparative advertising is misleading and therefore not permitted under Article 3a(1)(a) of the directive and, second, whether in such a situation the provisions of Article 3a(1)(c) and (g) preclude indication of the brand names of the lenses in the spectacles that are being compared.

21. On the first point, Hartlauer contends that Article 3a(1)(a) of the directive does not require any indication of the brand names of the products that are being compared, if only because in many cases such a requirement would make comparative advertising excessively difficult, if not impossible. Pippig and the Commission maintain that, on the contrary, the brand of the lenses is one of the factors determining the consumers' choice when they come to purchase a pair of spectacles; they therefore take the view that advertising material such as the material at issue, which compares the price of spectacles without giving any indication as to the brand names of the lenses, should be held to be misleading. The Austrian Government expressed substantially the same sentiments, though not in such clear terms.

22. To my mind, the second view is certainly more convincing. 'Misleading advertising' is defined in Article 2(2) of the directive as 'any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor'. For advertising to be considered misleading within the meaning of Article 2(2), it is therefore enough that there be a likelihood that it will deceive consumers and affect (9) their economic behaviour or, for those reasons, injure a competitor. (10) The Court has therefore held that in order to determine whether advertising is misleading it is in principle necessary to take 'into account the presumed expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect'. (11)

23. On those criteria, (12) it therefore seems to me obvious that advertising material of the kind at issue in the present case, comparing the retail price charged by two traders for a pair of spectacles and stating that the

frames are the same and that the lenses have the same features but not that the lenses have different brand names, one very familiar to the public and the other not, is misleading. (13) Such advertising is in fact likely to deceive an average consumer who is reasonably well-informed and reasonably observant and circumspect, who may be led to believe that the price comparison relates to the same pair of spectacles with the same frames and the same lenses. Consequently, as the brand name of the lenses is undoubtedly one of the factors that may affect the consumers' choice when they purchase a pair of spectacles, it follows that the misleading nature of such advertising may also affect their economic behaviour and thus injure the competitor named in the material. I therefore take the view that failure to mention the brand name of the lenses makes advertising material of the kind at issue misleading.

24. Nor do I think there is any merit in Hartlauer's contention that a requirement to indicate the brand names of the products that are being compared would make comparative advertising excessively difficult, if not impossible: that, for example, it would be impossible to compare the prices of two cars of the same make if the brand names of all the accessories (tyres, stereo system, alarm system, etc.) had to be indicated. I agree that such a requirement might be excessive in cases where it meant indicating the brand names of a great number of accessories that have little bearing on the consumers' choice but that certainly cannot be said of material and crucial components of the product, which is precisely what spectacle lenses are. Also, in the present case, indicating the brand name of the lenses would obviously not have made the comparison impossible, since the brand name is clearly indicated in the advertising leaflets.

25. Having explained that, in my view, advertising of the kind at issue must be considered misleading because it gives no indication as to the brand names of the lenses in the spectacles that were being compared, in order to reply to the referring court it must also be determined whether the provisions contained in Article 3a(1)(c) and (g) preclude indication of brand names in such cases. In particular, since Article 3a(1)(c) provides that, to be permitted, comparative advertising must objectively compare one or more material, relevant, verifiable and representative features of the products in question, the referring court wants to know whether the brand name may be such a feature. It then asks whether indication of the brand name is precluded by the provision contained in Article 3a(1)(g) that the product advertised must 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.

26. On this point, the intervening parties agree that the two provisions in question do not preclude indication of the brand names of competing products. Hartlauer and the Austrian Government observe, in particular, that the possibility of including such information in advertising material is implicitly admitted by the provisions of the directive, which state that comparative advertising is

permitted on condition that it does not create confusion between the advertiser's trade marks, trade names or other distinguishing marks and those of competitors; that it does not discredit or denigrate those trade marks, trade names or other distinguishing marks; that it does not take unfair advantage of their reputation; and that it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name (Article 3a(1)(d), (e), (g) and (h)). They also point out that the possibility of indicating the brand names of competitors' products is expressly recognised in the 14th and 15th recitals in the preamble to the directive, which state respectively that (i) 'it may, however, be indispensable, in order to make comparative advertising effective, to identify the goods or services of a competitor, making reference to a trade mark or trade name of which the latter is the proprietor'; and (ii) 'such use of another's trade mark, trade name or other distinguishing marks does not breach this exclusive right in cases where it complies with the conditions laid down by this directive, the intended target being solely to distinguish between them and thus to highlight differences objectively'.

27. I agree that those provisions of Article 3a(1) of the directive presuppose the possibility of indicating the brand names of the products that are being compared; that is precisely why, as we have seen, those provisions make the permissibility of comparative advertising subject to a number of conditions designed to prevent it from giving rise to unfair competition. I also agree that the possibility of indicating the brand names of competing products is clearly confirmed in the 14th and 15th recitals in the preamble to the directive, which are at pains to emphasise that in some cases reference to a trade mark or trade name is actually indispensable in order to make comparative advertising effective and that, so long as such reference complies with the conditions laid down by the directive, it is not contrary to the rules on the protection of exclusive rights.

28. It must also be pointed out that the possibility of indicating the distinguishing marks of the products in question in comparative advertising was expressly admitted by Advocate General Léger in his Opinion in Toshiba, where he stated that 'in order to be effective and fair, comparative advertising must permit the target group to identify the products presented and to distinguish those made by one undertaking from those of its competitor. One cannot therefore exclude every reference by an operator to distinguishing marks used by its competitors'. (14) That argument was implicitly confirmed by the Court in its judgment, in which it essentially acknowledged the distinguishing marks of a competitor may be indicated in comparative advertising on certain conditions. (15) The Court was also careful to point out that 'it is apparent from Article 6(1)(c) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1) and the case-law of the Court (Case C-63/97 BMW [1999] ECR I-905, paragraphs 58 to 60) that the use of another person's trade mark may be legitimate where it is

necessary to inform the public of the nature of the products or the intended purpose of the services offered'. (16)

29. Turning now more specifically to the question whether the brand name of a product may be considered to be a material, relevant, verifiable and representative feature of that product and consequently a feature susceptible of comparison within the meaning of Article 3a(1)(c) of the directive, I must point out that the Austrian court appears to be labouring under a misapprehension in this connection. Its question seems to be based on the idea that indication of the brand names of the products mentioned in advertising of the kind at issue may give rise to a comparison between the different brands, which may then become the actual subject of the comparative advertising. It is however clear that, on the contrary, the comparison in such advertising turns essentially on the price of the products (and possibly on their quality, which is assumed to be equivalent) and that the proposed indication of the brand names of the products serves simply to identify them, as stated in the 14th recital in the preamble to the directive. That being so, I do not think Article 3a(1)(c) of the directive can be held to preclude indication of the products in question in advertising of the kind at issue.

30. Lastly, as to Article 3a(1)(g), which provides that the product that is being advertised must not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor, it seems obvious to me that that provision does not, generally speaking, preclude indication of the brand name of competitors' products (indeed it even implicitly admits it) but merely seeks to prevent possible abuses.

31. I should point out in this connection that the Court stated in its judgment in Toshiba, cited above, that it would in any event be necessary, when assessing whether the condition laid down in that provision had been observed, 'to have regard to the 15th recital in the preamble to Directive 97/55, which states that the use of a trade mark or distinguishing mark does not breach the right to the mark where it complies with the conditions laid down by Directive 84/450 as amended, the aim being solely to distinguish between the products and services of the advertiser and those of his competitor and thus to highlight differences objectively'. (17) On that basis, it held that 'an advertiser cannot be considered as taking unfair advantage of the reputation attached to distinguishing marks of his competitor if effective competition on the relevant market is conditional upon a reference to those marks'. (18) The Court went on to say that an indication of the distinguishing marks of a competitor in comparative advertising enables the advertiser 'to take unfair advantage of the reputation attached to those marks only if the effect of the reference to them is to create, in the mind of the persons at whom the advertising is directed, an association between the manufacturer whose products are identified and the competing supplier, in that those persons associate the reputation of the manufacturer's products with the products of the competing supplier. In order to determine whether that condition is satis-

fied, account should be taken of the overall presentation of the advertising at issue and the type of persons for whom the advertising is intended'. (19)

32. In the light of that judgment also, I therefore take the view that indication of the brand name of a competitor's products is not contrary to Article 3a(1)(g) where such indication is justified by the objective requirement to identify the competitor's products and highlight the qualities of the products that are being advertised (if necessary by a direct comparison between them) (20) and that its sole aim is not therefore to take advantage of the reputation of the trade mark, trade name or other distinguishing marks of a competitor. That is the case unless, in view of the peculiarities of the case at issue, it is clear that such information is given in a manner that is likely to create an association in the public between the advertiser and his competitor, conferring the reputation of the latter's products on the former's. (21) I do not therefore think that, in the present case, indication of the brand name of the lenses would have been contrary to Article 3a(1)(g) of the directive since, on the one hand it has already been explained that that indication was necessary to identify accurately the products that were the subject of the commercials and to avoid the possibility of misleading consumers and, on the other, it is not apparent that it could have created an association between Zeiss and Optimed lenses, conferring the reputation of the former on the latter.

33. To conclude my observations on this point, I consider that advertising material of the kind at issue in the present case, comparing the retail price charged by two traders for a pair of spectacles and stating that the frames are the same and that the lenses have the same features but not that the lenses have different brand names, one very familiar to the public and the other not, is misleading and therefore not permitted under Article 3a(1)(a). In such cases, the provisions contained in Article 3a(1)(c) and (g) of the directive do not preclude indication of the brand names of the lenses in the spectacles in question.

(b) As to whether a national standard that is stricter than the Community rules may be applied to comparative advertising

34. Probably on the assumption that the national courts' assessment of the question examined above was based on the application of a national standard which contains a stricter concept of what constitutes misleading advertising than that contained in the Community rules, the referring court is in fact seeking by this part of the question to ascertain whether a stricter national standard of this kind may be applied to comparative advertising.

35. In that connection, it should be noted first that, in listing the conditions under which comparative advertising is permitted, Article 3a(1) of the directive states under (a) that such advertising must not be misleading according to Articles 2(2), 3 and 7(1), that is to say with reference either to the concept of 'misleading advertising' defined in Articles 2(2) and 3 of the directive or to any national provisions which, by virtue of the

discretion accorded to the Member States under Article 7(1), define misleading advertising in stricter terms with a view to ensuring 'more extensive protection ... for consumers, persons carrying on a trade, business, craft or profession, and the general public'. The court points out however that Article 7(2) of the directive appears to preclude the application of more restrictive national provisions of this kind to comparative advertising inasmuch as it provides that Article 7(1) shall not apply to such advertising 'as far as the comparison is concerned'. Faced with this apparent contradiction, it therefore asks the Court whether Member States may make the permissibility of comparative advertising conditional on compliance with national standards that are stricter than those contained in the directive in respect of the definition of misleading advertising. If so, the court also wants to know whether the stricter national standards may apply only to the description of the products/services that are being compared (the two subjects of the comparison) or may on the contrary also apply to the results of the comparison (the relationship between the products/services that are being compared).

36. Pippig and the Austrian Government consider that stricter national standards may apply to comparative advertising and they naturally cite Article 7(1), invoked in Article 3a(1)(a), in support of their view. In an attempt to resolve the apparent contradiction between those provisions and Article 7(2) of the directive, Pippig argues in particular that, under Article 7(2), the right to compare products and services must not be subject to further conditions over and above those laid down in the directive except in cases of misleading advertising within the meaning of Article 7(1). Similarly, the Austrian Government considers that Member States may apply stricter standards in assessing whether advertising material is misleading but not with regard to the definition of comparative advertising and the conditions under which it may be permitted laid down in Article 3a(1)(b) to (h). Thus it is clear, even if the Austrian Government does not expressly say so, that both consider that stricter national standards on misleading advertising may apply to all elements of the comparison.

37. The Commission and Hartlauer take the opposite view in their observations, citing in particular the 18th recital in the preamble to Directive 97/55. This states that 'Article 7 of Directive 84/450/EEC allowing Member States to retain or adopt provisions with a view to ensuring more extensive protection for consumers, persons carrying on a trade, business, craft or profession, and the general public, should not apply to comparative advertising, given that the objective of amending the said Directive is to establish conditions under which comparative advertising is permitted'. (22) They claim that, in pursuing that objective (repeated in Article 1 of Directive 84/450, as amended), the Community legislature laid down all the conditions under which comparative advertising is permitted, adopting an exhaustive regulation on all the elements of comparison. This is reflected, in their view, in the

prohibition on applying stricter national standards 'to comparative advertising as far as the comparison is concerned' (Article 7(2)). (23) As to the reference to Article 7(1) contained in Article 3a(1)(a), the Commission explained at the hearing that, in its view, this must have been an oversight on the part of the Community legislature.

38. For my own part, I feel I must draw attention first to the shortcomings in the order for reference, which does not fully explain the respects in which the national standard contains a stricter concept of what constitutes misleading advertising than that contained in the Community rules. The ambiguity of the order for reference in this connection is also clearly apparent in the following passage: 'In the present case the question of the scope of Article 7(2) is of importance. The answer to that question determines whether the defendant's advertising must be assessed wholly or in part on the basis of the national standard for misleading statements which is possibly more strict'. (24) It could mean that the Austrian court referred the matter to the Court without first establishing whether and in what respects the national standard with regard to misleading advertising was actually stricter than the Community rules. As the order for reference is unclear and imprecise about the national legal framework and as that part of the question is patently hypothetical, it could be declared inadmissible without further ado. (25)

39. However, overlooking the shortcomings of the order for reference and turning in a spirit of cooperation to the observations of the parties to shed light on the reasons for the reference, it may be supposed that the referring court agreed with the lower courts' view that comparing spectacles with brand-name lenses with spectacles with no-name lenses is inherently misleading and therefore considered that those assessments were based on a stricter understanding of the term 'misleading' than that contained in the Community rules. However, even if that were so, in view of my earlier remarks it would in any case be unnecessary to give the national court an answer on this point. If it is in fact considered that, in cases such as the present one, failure to indicate the brand name of the lenses is sufficient to render comparative advertising misleading and therefore not permitted under the provisions contained in Article 2(2) of the directive, it follows that it is unnecessary to determine whether in such cases the national authorities may apply a concept of what is 'misleading' that is stricter than that contained in the aforesaid provisions of the directive. Solely in the alternative, in case the Court does not share the view expounded under (a) above, I shall therefore now consider that question.

40. In this connection, I recognise that there appears to be a contradiction between Article 3a(1)(a) of the directive, which refers to Article 7(1) in defining the conditions under which comparative advertising may be permitted, and Article 7(2), which on the contrary precludes the application of Article 7(1) 'to comparative advertising as far as the comparison is concerned'. I do not think it is possible to get round that problem,

as Hartlauer and the Commission attempt to do, by ignoring one of the two provisions (Article 3a(1)(a)) on the ground that it is simply the result of an error or oversight on the part of the legislature. On the contrary, I think it is essential to seek an interpretation of the provisions in question that will resolve the apparent contradiction between them and reconcile the various requirements underlying those provisions.

41. To that end, I note first that the primary purpose of Directive 84/450 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' (Article 1). That is why Article 7(1) provides that the directive 'shall not preclude Member States from retaining or adopting provisions with a view to ensuring more extensive protection, with regard to misleading advertising, for consumers, persons carrying on a trade, business, craft or profession, and the general public', such as for example national provisions which contain a concept of misleading advertising that is stricter and more restrictive than the definition contained in Articles 2(2) and 3 of the directive.

42. In keeping with that purpose, Article 3a(1) laying down the conditions under which comparative advertising may be permitted provides in subparagraph (a) that such advertising must not be misleading according to the relevant provisions of the directive or to any stricter national provisions that may be adopted pursuant to Article 7(1). In that way, the Community legislature sought to prevent consumers, other traders and the general public from being afforded different and less extensive protection against the danger of anything misleading in advertising material only in cases where the material makes a comparison between competing products or services.

43. However, as Hartlauer and the Commission rightly point out, following the amendments introduced by Directive 97/55, Directive 84/450 also seeks to harmonise the laws, regulations and administrative provisions of the Member States concerning comparative advertising in order to remove the obstacles to the free movement of goods arising from differences between the national laws on the subject and to assure the freedom to provide services in that field (third recital in the preamble to Directive 97/55). To that end, the new Article 3a was added to Directive 84/450, providing that comparative advertising is, 'as far as the comparison is concerned', to be permitted in all the Member States when the conditions specified in that article are met. (26) And since the amendments introduced by Directive 97/55 are intended to lay down conditions under which comparative advertising is permitted, as the 18th recital confirms, Article 7(2) of Directive 84/450 provides that paragraph (1) 'shall not apply to comparative advertising as far as the comparison is concerned'.

44. Unlike Hartlauer and the Commission, however, I do not think Article 7(2) of the directive precludes the application to comparative advertising of a national standard that is stricter than the Community rules in respect of the definition of comparative advertising. In

my view, the sole purpose of that article is to prevent the permissibility of comparative advertising 'as far as the comparison is concerned' from being subject to conditions over and above those laid down in Article 3a. In other words, what it means is that the conditions under which comparative advertising is permitted are exhaustive, precisely because the purpose of the directive is to ensure that, under the conditions specified, such comparisons may be made and released in all the Member States. But, as the conditions expressly laid down in Article 3a(1) include the condition that comparative advertising must not be misleading according to the definition of 'misleading' contained in Articles 2(2) and 3 or to any stricter national provisions that may be adopted pursuant to Article 7(1), I conclude that Article 7(2) does not preclude the application of such national provisions to comparative advertising.

45. The view that Article 7(2) merely precludes the introduction of conditions over and above those laid down in Article 3a is also indirectly confirmed by the fact that both provisions relate only to comparative advertising. It can in fact be argued that Article 7(2) of the directive provides that Article 7(1) is not to apply to comparative advertising 'as far as the comparison is concerned' precisely because Article 3a lays down the conditions under which such advertising is permitted only 'as far as the comparison is concerned' and does not require those conditions to be met in the case of comparative advertising which refers to a competitor or to goods or services offered by a competitor but does not make a real and specific comparison between those goods/services and those of the advertiser. (27)

46. But, above all, this solution is preferable because it resolves the apparent contradiction between the various provisions of the directive and also effectively reconciles the two purposes of the directive, namely, on the one hand, to protect consumers, traders and the general public from the dangers of misleading advertising (justifying the application of even stricter national measures against anything 'misleading' in advertising material) and, on the other, to lay down an exhaustive list of conditions under which comparative advertising is permitted so as to ensure that such comparisons can be made and publicised in all the Member States. The problem with the opposite view, held by Hartlauer and the Commission, is that it assumes without any objective justification that consumers, traders and the general public are being afforded different and less extensive protection against the danger of anything misleading in advertising material only in cases where the material makes a comparison between competing products or services. Also, on that view, it would still have to be explained why Article 3a(1)(a) should provide that comparative advertising must not be misleading according to Article 7(1) of the directive.

47. In the light of the foregoing considerations, I therefore take the view that the national authorities may apply to comparative advertising a national standard which contains a stricter concept of what constitutes misleading advertising than that contained in the Community rules. On the basis of those considerations,

it is also possible to suggest a satisfactory solution to the other problem raised by the Austrian court as to the elements of comparative advertising to which such a stricter national standard may apply. If it is in fact the case that Article 7(2) is merely intended to prevent Member States from adding to the conditions under which comparative advertising is permitted, then it is clear that that provision does not preclude the application of a stricter national standard to all the elements of the comparison, nor is it necessary in this connection to distinguish between the description of the products/services that are being compared and the results of the comparison.

The second question

48. The second question arises from the fact that Pippig has a direct relationship with Eschenbach, from which it obtains regular supplies of the advertised frames, in various colours and sizes, whereas Hartlauer obtains a small selection of the frames in question, through parallel imports. In that connection, so far as we are given to understand, the Austrian court is in fact seeking to ascertain whether, on the strength of Article 7(1) of the directive, Member States may establish independently that a price comparison is permitted only if the trader making the comparison and his competitors obtain the goods that are being compared through the same distribution channels and thus offer a similar selection of those goods or whether, under Article 7(2), such a condition for comparative advertising to be permitted may lawfully be imposed only in so far as it is among those laid down in Article 3a of the directive. If that is the case, the national court wants to know whether the condition in question is in fact covered by Article 3a.

49. Neither of the intervening parties considers that, generally speaking, Article 3a of the directive allows price comparisons between given products only if they are procured through the same distribution channels, nor do they think such a condition can be independently imposed by Member States on the strength of Article 7(1). However, the Austrian Government and the Commission, although they consider that this was not so in the present case, observe that the failure to indicate the difference in distribution channel could theoretically give rise to misleading advertising, with the result that under Article 3a(1)(a) comparative advertising would not be permitted in certain cases where it is important to consumers that there be a direct relationship between the retailer and the manufacturer. Pippig argues, somewhat confusedly, that when different distribution channels or a different selection of products have a material effect on the price, when advertising refers to those elements, or when the consumer is led to believe that the distribution channels are the same, comparative advertising must be considered to be permitted only if it does not mislead consumers with regard to those elements.

50. For my own part, I must first agree that there is no provision in Article 3a of the directive to the effect that the price of certain products may be compared only if they are procured through the same distribution channel. Consequently, since, as I have already said, the

conditions under which comparative advertising is permitted are set out exhaustively in that article of the directive, it seems obvious to me that Member States cannot indiscriminately prohibit any advertising that compares the price charged for certain products by competing traders who obtain their supplies through different distribution channels. (28)

51. However, as the Austrian Government and the Commission have rightly pointed out, that does not rule out the possibility that in certain cases such a comparison could be misleading and therefore not permitted under Article 3a(1)(a) unless it was accompanied by some indication of the different distribution channels. That might be so, for example, in cases where it was important for consumers to be able to get spare parts or original accessories from their own retailer at any time or avail themselves of special after-sales services that require a direct relationship with the manufacturer. I agree that such special circumstances do not appear to obtain in cases such as the present one since, according to the order for reference, 'it makes no difference ... to the purchaser ... whether the seller has purchased the spectacles on the basis of a permanent supplier relationship with the manufacturer or by some other method'.

52. I should add that, when different distribution channels entail significant differences in the selection of products offered to the public, a price comparison could also be misleading if the advertising material indicates (or suggests) that the retailers are offering a similar selection of the products in question. In that case, the material could mislead consumers about the selection offered by the competing traders and thus about an element that could affect their choice between two or more traders selling the same product. However, I do not think advertising material of the kind at issue, which compares the price of a specific type of frame without giving any indication, directly or by implication, as to the selection offered by the traders concerned, is in itself such as to mislead consumers on that aspect of the matter.

53. Lastly, a different problem would arise if the trader obtaining supplies through parallel imports only purchased the advertised products occasionally and offered them for sale at a bargain price for short periods until the stocks available from time to time were exhausted. In that case, the specific provision contained in Article 3a(2) of the directive would apply, namely that 'any comparison referring to a special offer shall indicate in a clear and unequivocal way the date on which the offer ends or, where appropriate, that the special offer is subject to the availability of the goods and services, and, where the special offer has not yet begun, the date of the start of the period during which the special price or other specific conditions shall apply'.

54. For present purposes it must however be noted that, in the three cases mentioned earlier, the permissibility of comparative advertising will not be determined by whether there is a comparison of the price charged for products obtained through different distribution channels but rather by whether the information contained in

the advertising material is inadequate or misleading. I therefore consider that the answer to this question should be that there is no provision in Article 3a of the directive to the effect that comparative advertising relating to the price charged for certain products by competing traders is permitted only if they procure their supplies through the same distribution channels. In view of the fact that the conditions under which comparative advertising is permitted, as laid down in that article, are exhaustive, such a condition cannot be imposed independently by the national authorities.

The third question

55. The third question concerns the test purchase Hartlauer made for the purposes of the comparative advertising and more specifically the fact that: (i) the purchase was made before the spectacles that were being compared were on sale in Hartlauer stores; and (ii) to that end, spectacles (frames and lenses) were carefully selected so as to obtain the greatest possible or at least a greater than average price difference. In that connection, the Austrian court is seeking, first, to ascertain whether, with reference to the method used for the purpose of comparative advertising, Article 7(2) of the directive may nevertheless allow Member States to impose conditions as to permissibility over and above those laid down in Article 3a; if that is the case, it wants to know whether a comparison made by means of a test purchase of the kind at issue is to be regarded as unlawful within the meaning of that article of the directive.

56. In that connection, Hartlauer argues, on the one hand, that Article 7(2) of the directive also covers the means used for the purpose of comparative advertising and, on the other, that Article 3a does not require the originator of the comparison to have the advertised products on sale at the time when the test purchase is made, it being sufficient that they be on sale when the advertising material is released. The Commission likewise takes the view that the matter must be considered solely in the light of Article 3a of the directive, which does not preclude a trader, for the purposes of comparative advertising, from finding out the prices charged by his competitors by any legitimate means (including a test purchase) even before offering the products in question on the market. The Austrian Government likewise considers that the permissibility of such comparative advertising should be assessed solely in relation to the conditions laid down in Article 3a of the directive but adds that it is for the national court to determine whether the deliberate initiation of a price comparison which is favourable to the advertiser, through a test purchase made before the start of the advertising campaign, may give rise to misleading advertising. Pippig takes essentially the same view in its observations, in that it recognises that Article 7(2) of the directive also covers the means used for the purpose of comparative advertising but claims that that is not the real issue in the present case and that the Court should rule that the question whether comparative advertising is misleading should also be assessed in relation to such means.

57. In reply to that question, I must first repeat that, under Article 7(2) of the directive, Member States may not subject the permissibility of comparative advertising to conditions over and above those laid down in Article 3a, even if such conditions relate to the means used to make comparisons. (29) Since therefore, as the intervening parties essentially admit, there is no provision in Article 3a to the effect that comparative advertising is permitted only if there has been no test purchase of the kind at issue, such a condition cannot be imposed independently by the national authorities.

58. As to whether advertising material may be misleading, I consider that a price comparison of the kind at issue may be misleading and consequently unlawful within the meaning of Article 3a(1)(a) of the directive in cases where the advertising material is released before the products in question are offered at the price quoted or where the comparison is presented in such a way as to give the false impression that the price difference indicated also applies to other products. However, I do not think a comparison can be regarded as misleading merely because it was based on a test purchase made before the products concerned were offered for sale by the originator of the comparison or because the products selected were being sold at very different prices by competitors. On the second point, it seems to me to be both logical and natural for retailers to compare only the price of products which they sell on much more favourable terms than their competitors.

59. In conclusion, I consider that the answer to the third question should be that there is no provision in Article 3a to the effect that comparative advertising concerning the price charged for certain products by competing traders is permitted only if the comparison is not based on a test purchase made before the products concerned were offered for sale by the originator of the comparison and if it does not concern products carefully selected so as to obtain a very substantial price difference. As the conditions under which comparative advertising is permitted, as laid down in that article of the directive, are exhaustive, such a condition cannot be imposed independently by the national authorities.

The fourth question

60. By the fourth question, the Austrian court seeks to ascertain, lastly, whether price comparisons discredit competitors and are therefore unlawful within the meaning of Article 3a(1)(e) of the directive: (i) where products showing a greater than average price difference are selected for the purposes of the comparison and/or comparisons are repeatedly made so as to create the impression that the prices charged by competitors are generally excessive, and (ii) where the information on the identity of competitors is not restricted to the extent absolutely necessary and, in particular, where, in addition to their names, their company logos (if they exist) and their shops are shown.

61. Pippig suggests that that question should be answered in the affirmative, pointing out that competitors may be discredited both by the misleading impression given by the advertising material and by the indication of their distinguishing marks in cases where this infor-

mation is not essential to an objective price comparison.

62. Hartlauer takes the opposite view in its observations. On the first point, it observes in particular that a reasonably well-informed and shrewd consumer would not be likely to think that the difference indicated in the advertising material in the price charged for some products represented the average difference in the price charged for all the products sold by the competitors. It adds that it would be contrary to Article 3a to allow the prices charged for certain products to be compared only if the difference between them represented the average or to introduce special restrictions as to the number and frequency of comparisons. On the second point, Hartlauer observes that showing a competitor's shop with the company logo is not in itself likely to discredit or denigrate that competitor unduly but is, on the contrary, an effective way of identifying him.

63. The Austrian Government, on the other hand, observes that selecting a particularly expensive article for comparison might discredit a competitor by giving the impression that the average price of the entire range of products is excessive, without drawing attention to the objective features (including the brand names of the products) that distinguish the range of products in question. However, it takes the view that that is a matter for the national court to determine, taking account in particular of the definition of misleading advertising contained in Article 2(2) of the directive.

64. Lastly, the Commission considers that advertising material is unlikely to discredit competitors within the meaning of Article 3a(1)(e) of the directive merely by comparing the price of products that are not comparable or by making a comparison that is unobjective or downright misleading and that, in such cases, the question whether the comparative advertising is permissible should on the contrary be determined by reference to the provisions contained in Article 3a(1)(a) to (c). It adds that, in principle, competitors' shops and logos may be shown (without any distortions) in price comparisons but such comparisons may be unlawful within the meaning of Article 3a(1)(e) if they indicate one or more competitors at random to draw attention to the high prices normally charged in a particular profession.

65. To begin with the first part of the question, I must first repeat that a comparison between the prices charged for certain products by two or more competing traders may be misleading if the comparison is presented in such a way as to give the false impression that the price difference indicated also applies to other products. However, in that case, any discredit to competitors will be directly attributable to the fact that the comparative advertising is misleading and must therefore be declared unlawful on the basis of Article 3a(1)(a) of the directive.

66. However, as I have already observed, I do not think that simply comparing products sold by different traders at very different prices is in itself likely to create the impression that the same difference applies to other products, nor do I think the frequency with which the advertising material is released is in itself likely to cre-

ate that impression. So, if the advertising material does not suggest that the same price difference applies to other products and does not therefore give the false impression that the prices charged by competitors are generally excessive, there can clearly be no presumption of discredit to competitors, as any discredit, in the cases mentioned in the question, would arise precisely from that impression.

67. Turning now to the second aspect of the question, I agree with Hartlauer and the Commission that identifying a competitor also by pictures of his shop (with his company logo) is not in itself sufficient to discredit him within the meaning of Article 3a(1)(e) of the directive. Any discredit that might theoretically arise from comparative advertising of the kind at issue is attributable not to the fact that competitors are identified by pictures of their shop as well as by their name and address, but rather to the content and presentation of the comparison. There are in fact only two possibilities: either the comparisons are such as to discredit competitors, in which case they are unlawful within the meaning of Article 3a(1)(e) even if the competitors are identified only by their name and address; or the comparisons do not discredit competitors, in which case they are certainly not unlawful within the meaning of that provision merely because they additionally identify the competitors by pictures of their shop.

68. I therefore consider that the answer to the fourth question should be that price comparisons of the kind at issue do not discredit competitors and are consequently not unlawful within the meaning of Article 3a(1)(e) of the directive merely on the grounds that (i) products showing a greater than average price difference are selected and/or comparisons are repeatedly made, and (ii) the competitors concerned are identified, not only by their name and address but also by pictures of their shop with their company logo.

Conclusions

In the light of the foregoing considerations, I therefore propose that the Court give the following answer to the questions referred by the Oberster Gerichtshof:

(1) Advertising material comparing the retail price charged by two traders for a pair of spectacles and stating that the frames are the same and that the lenses have the same features but not that the lenses have different brand names, one very familiar to the public and the other not, must be considered misleading and therefore not permissible under Article 3a(1)(a) of Directive 84/450/EEC as amended by Directive 97/55/EC. In such cases, the provisions contained in Article 3a(1)(c) and (g) of the directive do not preclude indication of the brand name of the lenses in the spectacles in question.

(2) There is no provision in Article 3a of Directive 84/450/EEC as amended by Directive 97/55/EC to the effect that comparative advertising relating to the price charged for certain products by competing traders is permitted only if they procure their supplies through the same distribution channels. In view of the fact that the conditions under which comparative advertising is permitted, as laid down in that article, are exhaustive,

such a condition cannot be imposed independently by the national authorities.

(3) There is no provision in Article 3a of Directive 84/450/EEC as amended by Directive 97/55/EC to the effect that comparative advertising concerning the price charged for certain products by competing traders is permitted only if the comparison is not based on a test purchase made before the products concerned were offered for sale by the originator of the comparison and if it does not concern products carefully selected so as to obtain a very substantial price difference. As the conditions under which comparative advertising is permitted, as laid down in that article of the directive, are exhaustive, such a condition cannot be imposed independently by the national authorities.

(4) Price comparisons of the kind at issue do not discredit competitors and are consequently not unlawful within the meaning of Article 3a(1)(e) of Directive 84/450/EEC as amended by Directive 97/55/EC, merely on the grounds that: (i) products showing a greater than average price difference are selected and/or comparisons are repeatedly made, and (ii) the competitors concerned are identified, not only by their name and address but also by pictures of their shop with their company logo.

1: - Original language: Italian.

2: - Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250, p. 17).

3: - Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising (OJ 1997 L 290, p. 18; deadline for implementation: 23 April 2000).

4: - Among the features to be taken into account, that Article mentions in particular: (a) the 'characteristics of goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services'; (b) the 'price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided'; and (c) the 'nature, attributes and rights of the advertiser, such as his identity and assets, his qualifications and ownership of industrial, commercial or intellectual property rights or his awards and distinctions'.

5: - The order for reference appears to imply that the provision in question was interpreted broadly in the Austrian case-law, which in practice extended its scope to comparative advertising of any kind.

6: - The script of the radio commercial ran as follows: '... here is the result of this new price comparison: on 1 August a pair of near-vision spectacles with the same dioptric number and the same

Eschenbach frame cost 5 785 Schillings at Pippig of Linz and 2 000 Schillings at Hartlauer. The same goes for any other pair of near-vision or distance spectacles. The difference, the price difference, is clear. Yours, Franz Josef Hartlauer ...'. The content of the television commercial was similar: 'What does this pair of spectacles cost, including the lenses? At this optician's on the Landstraße in Linz, more than 5 700 Schillings. From me, only 2 000 Schillings. The same goes for any other pair of near-vision or distance spectacles. Yours, Franz Josef Hartlauer ...'.

7: - It is clear from the observations of all the parties intervening in the present case (including observations in response to a specific question asked by the Court in the course of the hearing) and from the order for reference itself that, when the national court speaks of 'no-name' products, it in fact means less well known brand-name products (in this case, Optimed lenses). I should make it clear in this connection that I use the term 'brand-name' here in a non-technical sense as a generic term for any distinguishing mark, since it is not clear whether the marks at issue in this case are registered trade marks, de facto trade marks, trade names, or other distinguishing marks.

8: - It appears that it was not made clear in the radio and television commercials that the price comparison was between spectacles with lenses of different brands.

9: - With reference to the verb 'pregiudicare' used in the Italian version of that provision, I consider that it should be interpreted in the neutral sense of 'incidere' (as in the other language versions: 'affect' in English, 'affecter' in French, 'afectar' in Spanish, 'beeinflussen' in German, etc.), without attaching any derogatory meaning to the effect on the economic behaviour of consumers (on the need to take account of the various language versions when interpreting provisions of Community law, see, among many others, the judgment handed down by the Court in Case C-268/99 Jany and Others [2001] ECR I-8615, paragraph 47, and the judgments cited therein).

10: - The possible injury to competitors does not in fact appear to be a necessary condition for declaring advertising to be misleading, since the provision appears to require that the injury be consequent upon deceiving consumers and affecting their economic behaviour, that is to say two factors that are sufficient in themselves to qualify advertising as misleading.

11: - Judgment in Case C-210/96 Gut Springenheide [1998] ECR I-4657, paragraph 31.

12: - On the problems associated with the application of a stricter national standard in national legislation, see points 34 to 47 below.

13: - See in this connection the script of Hartlauer's radio and television commercial, reproduced in footnote 6 above.

14: - Opinion of Advocate General Léger in Case C-112/99 Toshiba [2001] ECR I-7945, point 65, which cites the 15th recital in a footnote.

15: - Judgment in Case C-112/99 Toshiba [2001] ECR I-7945.

16: - Paragraph 34, emphasis added.

17: - Paragraph 53.

18: - Paragraph 54.

19: - Paragraph 60.

20: - I should point out in this connection that the Court stated in the judgment in Toshiba that 'in order for there to be comparative advertising within the meaning of Article 2(2a) of Directive 84/450 as amended, it is ... sufficient for a representation to be made in any form which refers, even by implication, to a competitor or to the goods or services which he offers. It does not matter that there is a comparison between the goods and services offered by the advertiser and those of a competitor' (paragraph 31).

21: - In that case, indication of the competitor's brand name could also be contrary to Article 3a(1)(d), which provides that comparative advertising must 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.

22: - Emphasis added.

23: - On the meaning of that expression, Hartlauer has explained that in its view it covers assertions regarding the product offered by the advertiser, the product offered by the competitor and the relationship between the two.

24: - Emphasis added.

25: - In that connection, see, among many others, the judgments in Case C-343/90 Lourenço Dias [1992] ECR I-4673, paragraphs 17 and 18; Case C-83/91 Meilicke [1992] ECR I-4871, paragraph 25; Case C-415/93 Bosman [1995] ECR I-4921, paragraph 61; Case C-437/97 EKW and Wein & Co. [2000] ECR I-1157, paragraph 52; and Case C-36/99 Idéal tourisme [2000] ECR I-6049, paragraph 20.

26: - Following the amendments introduced by Directive 97/55, Article 1 expressly states that the purpose of the directive is to lay down conditions under which comparative advertising is permitted.

27: - I note in this connection that, as already pointed out in footnote 20, the Court stated in its judgment in Toshiba that 'in order for there to be comparative advertising within the meaning of Article 2(2) of Directive 84/450 as amended, it is ... sufficient for a representation to be made in any form which refers, even by implication, to a competitor or to the goods or services which he offers. It does not matter that there is a comparison between the goods and services offered by the advertiser and those of a competitor' (paragraph 31).

28: - With reference to this question too, I feel I must again draw attention to the shortcomings of the order for reference, which leaves some doubt as to whether there is in fact a national provision prohibiting price comparisons between products obtained through different distribution channels.

29: - With reference to this point too, I feel I must draw attention to the shortcomings of the order for reference, which leaves some doubt as to whether there is in fact a national provision prohibiting comparative ad-

vertising by means of a test purchase of the kind at issue.
