OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 12 September 2002 [1]

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

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).

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;

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'.

(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) and (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.

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.

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 representative 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

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...'.

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

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.

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

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.

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

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.

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

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

16 — Paragraph 34, emphasis added.

17 — Paragraph 53.

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 satisfied, 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,

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.

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) and (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

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.

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

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.

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'.

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.

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

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).

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 differ-

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.

ences 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

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

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 information 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) and (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 create 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.