

JUDGMENT OF THE COURT

8 April 2003 *

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),

* Language of the case: German.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet, 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 demon-

strate 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 objectively. 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 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.

Rodríguez Iglesias	Puissochet	Wathelet	Timmermans
Edward	Skouris	Macken	Colneric
von Bahr	Cunha Rodrigues	Rosas	

Delivered in open court in Luxembourg on 8 April 2003.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President