Court of Justice of the European Communities: Judgment on Misleading and Comparative Advertising

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The Oberster Gerichtshof (the Austrian Supreme Court) referred a number of questions to the Court of Justice of the European Communities for a preliminary ruling regarding the interpretation of Council Directive 84/450/EEC on misleading and comparative advertising, as amended by Directive 97/55/EC. The questions arose in proceedings between the Austrian company Pippig Augenoptik GmbH & Co. KG ("Pippig") and the Austrian company Hartlauer Handelsgesellschaft mbH ("Hartlauer"). Both companies sell spectacles. Pippig markets the spectacles in three specialist opticians' shops and obtains its supplies from a number of different manufacturers, whereas Hartlauer is not supplied by the same suppliers as opticians are, but obtains the spectacles outside normal distribution channels, particularly by parallel import, and sells them in its department stores.

The dispute between the two companies concerns the comparative advertisement that Hartlauer published in an advertising leaflet and broadcast on Austrian radio and television channels. The advertisement compared the prices charged for spectacles by the two companies. This comparison was made by carrying out test purchases, which were conducted over six years. Pippig now claims that Hartlauer's comparative advertising is misleading and discrediting. In order to solve the dispute, the Oberster Gerichtshof sought interpretation of the Directive on misleading and comparative advertising by referring a number of questions to the Court of Justice for a preliminary ruling.

The Court ruled as follows. Article 7(2) of the Directive 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. There is no need to distinguish in the legislation between the various elements of the comparison, such as statements concerning the advertiser's offer, statements concerning the competitor's offer and the relationship between those offers.

With regard to the interpretation of Article 3a(1)(a), the Court decided that, although in principle the advertiser is free to state or not to state the brand name of rival products in comparative advertising, in some particular cases the omission of the brand name could be misleading: for instance, where the brand plays an important role in the consumer's choice or where there is a major difference in

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the fame of the brand names of the compared products. It is for the national court to verify if these particular circumstances are present.

Furthermore, with regard to the interpretation of Article 3a(1), the Court ruled that the article does not preclude compared products from being purchased through different distribution channels. Also, this article does not preclude an advertiser from carrying out a test purchase with a competitor before his own offer has even commenced, as long as the conditions for the lawfulness of comparative advertising set out in the article are complied with.

The Court held that a price comparison is not discrediting to the competitor, within the meaning of Article 3a(1)(e), 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. Pippig had argued that it was unfair that Hartlauer compared prices that implied a greater price difference than the actual average difference. Also, it argued that repeating the comparisons was discrediting, because repetition creates the impression that the competitor's prices are excessive. In addition, the article does not prevent the reproduction of the competitor's logo and a picture of its shop front in addition to citing its name, as long as the advertisement complies with the conditions for lawfulness laid down by Community law.

Case C- 44/01, Pippig Augenoptik GmbH & Co. KG v. Hartlauer Handelsgesellschaft mbH, Verlassenschaft nach dem verstorbenen Franz Josef Hartlauer, Judgment of the European Court of Justice of 8 April 2003

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001CJ0044:EN:PDF

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

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31984L0450:EN:HTML

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

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