

Comparative Advertising in Europe: The Preliminary Ruling in *Pippig vs. Hartlauer* and Open Questions After the 1997 Directive

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I. INTRODUCTION: A BRIEF OVERVIEW ON THE DEVELOPMENT OF THE LEGAL STATUS OF COMPARATIVE ADVERTISING¹

Comparative advertising has been dealt with in a different way in Europe² than in the United States from the beginning: While the United States had permitted its use and the Federal Trade Commission (FTC) has even welcomed it in 1971 as a positive instrument to provide information for consumers who therefore would make more sophisticated purchase decisions,³ the opposite was the case in most European countries. Particularly, Germany and Austria were known for their prohibition of nearly any kind of comparative advertising⁴—even if

1. Comparative advertising in this Article means “any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor.” See Article 2a of the Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997, amending Directive 84/450/EEC on misleading advertising so as to include comparative advertising (O.J. L 290, 18). On the different categories of comparative advertising, see Bodewig, *The Regulation of Comparative Advertising in the European Union*, 9 TUL. EUR. & CIV. L.F. 179, 182 (1994); Mills, *Comparative Advertising—Should It Be Allowed In The United Kingdom?*, 86 TRADEMARK REPORTER 174, 175 (1996).

2. An overview about comparative advertising in the (at that time) nine Member States of the EU, before the Directive, can be found at Bodewig, *supra* note 1, at 190; see also The Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Precontractual Commercial Practices and the Handling of Consumer Complaints by Business, a study coordinated by Prof. Schulze and Prof. Schulte-Nölke for the European Commission in 2003, p. 29, available at http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/studies/index_en.htm (last visited 3.6.2005); for Germany, see Steckler & Bachmann, *Comparative Advertising in Germany with Regard to the European Union*, 19 EUR. INTELL. PROP. REV. 578 *et seq.* (1997); Mittelstaedt, *Comparative Advertising in German Law*, 19 EUR. INTELL. PROP. REV. 75 (1991); BERLIT, VERGLEICHENDE WERBUNG [COMPARATIVE ADVERTISING] (published at Beck, Munich 2002); for France, see Romano, *Comparative Advertising in the United States and in France*, 25 NW. J. INT’L L. & BUS. 371 (2005). For the law of advertising in Europe, see also Schricker (ed.), RECHT DER WERBUNG IN EUROPA [THE LAW OF ADVERTISING IN EUROPE] (published at Nomos, Baden-Baden starting 1995); MICKLITZ/KEBLER, MARKETING PRACTICES REGULATION AND CONSUMER PROTECTION IN THE EC MEMBER STATES AND THE US (published at Nomos, Baden-Baden 2002), and the country reports in Harte-Bavendamm & Henning-Bodewig (ed.), UWG KOMMENTAR [COMMENTARY ON THE LAW AGAINST UNFAIR COMPETITION] 180 (published at Beck, Munich 2004).

3. KANWIT, REGULATORY MANUAL SERIES, FEDERAL TRADE COMMISSION § 22.17 n.13 (1985).

4. The comparison of different general systems of producing, procuring, distribution, method of working or applying of means (*Systemvergleich*, e.g., the comparison of a cash store with a credit business, Reichsgericht [former German supreme court, RG] Markenschutz und Wettbewerb [MuW] 32, p. 14) and the comparison of different types of products (*Warenvergleich*, e.g., the comparison of coffee with caffeine and coffee without caffeine, RG Gewerblicher Rechtsschutz und Urheberrecht [GRUR] 31, p. 986) were allowed as long they did not name a certain producer with whom they compared their own good. Also permitted were the so called *Abwehr-, Aufklärungs- und Fortschrittsvergleich*. Comparative advertising was allowed when it was made as a defense to an unlawful attack by a competitor or upon request by a customer or when it was necessary to inform about a technical improvement of the product, see BAUMBACH & HEFERMEHL, WETTBEWERBSRECHT [COMPETITION LAW] § 1 no. 333, 343, 348 (published at Beck,

not misleading.⁵ Comparative advertising was a violation of § 1 of the German Law against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb, UWG)⁶ and of § 1 of the Austrian Law against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb, UWG).⁷ The arguments brought by the German and Austrian courts were mainly the following⁸: Comparative advertising is harmful because it has a certain tendency to be misleading as every producer will present only the positive sides of his product but fail to disclose any shortcomings his product might have.⁹ The second argument was the inherent and more general lack of objectivity, as nobody objectively judges matters of his own interest. It was considered that neither the seller nor the producer should give a judgment on their own products, this task being better left to the consumer. The third argument regarded the interests of the competitors: even if the comparison is true and the goods of the competitor are of less value than those of the person running the advertisement, the competitor should not have to tolerate that this fact is used by others as a means to improve their own position.¹⁰ This attitude, of course, leads to less competition with the negative side effect that consumers pay higher prices for goods that are already available for a cheaper price by a more innovative or productive competitor. As a result, existing inefficiencies disappear more slowly or not at all at the expense

Munich 22d ed. 2001); Doepner & Hufnagel, *German Courts Implement the EU Directive 97/55/EC—A Fundamental Shift in the Law on Comparative Advertising?*, 88 TRADEMARK REPORTER 537 (1998) for further references.

5. If the comparison was misleading, it was in any case prohibited by § 2 Austrian UWG or § 3 German UWG.

6. RGBI 1909/499. For an early comparison of the German and the American unfair competition law, see Wolff, *Unfair Competition by Truthful Disparagement*, 47 YALE L.J. 1304 (1937/38). A new German law of unfair competition entered into force on 8th July 2004 (BGBl. I p. 1414). Comparative advertising is now regulated in § 6 of the new law, but basically with the same content as in the old law. Cf. commentaries on the new law, e.g., Sack in Harte-Bavendamm & Henning-Bodewig (ed.), *supra* note 2, § 6; Koos in Fezer (ed.), *UWG KOMMENTAR (COMMENTARY ON THE LAW AGAINST UNFAIR COMPETITION) II* § 6 (published at Beck, Munich 2005); Köhler, in BAUMBACH & HEFERMEHL, *supra* note 4, § 6 (published at Beck, Munich 23d ed. 2004).

7. BGBl. 1984/448.

8. BAUMBACH & HEFERMEHL, *supra* note 4, § 1 no. 334; Doepner & Hufnagel, *supra* note 4, at 541.

9. This statement is of course true for any kind of advertising and therefore not persuasive.

10. The argument used by the academia in favor of a more permissive regulation on comparative advertising was that it would lead to more market transparency. Also mentioned was the constitutional right of free speech and the fact that § 14 UWG prohibits only statements which cannot be verified. See, for more details, BAUMBACH & HEFERMEHL, *supra* note 4, § 1 no. 335; Rummel, in Koziol (ed.), *ÖSTERREICHISCHES HAFTPFLICHTRECHT [AUSTRIAN TORTS LAW]* 269 (published at Manz, Vienna 2d ed. 1984).

of the consumer and the more innovative and productive producer, hence delaying innovation overall.¹¹

But times have changed. In Austria since the reformation of the UWG in 1988,¹² the comparison of prices has been allowed as long “as the comparison did not violate this provision (§ 2) or § 1 UWG.”¹³ This wording was strongly criticized by Austrian academics¹⁴ as the courts had previously prohibited comparative advertising as being a violation of § 1 or § 2 UWG. So, according to its wording, the new § 2 UWG would not have changed anything. But the Austrian courts followed the view of the academics and used this reform not only as an opportunity to allow a comparison of prices¹⁵ in advertisements, but also other kinds of comparative advertising: The Austrian Supreme Court (Oberster Gerichtshof, OGH) held¹⁶ that an objective comparison of features of a product is allowed as long as it is true and not misleading. This change in the Austrian approach anticipated the developments within the European Community: The 1997 Directive on Comparative Advertising (97/55/EC) of the European Parliament and of the Council of 6 October 1997, which amended the 1984 Directive on Misleading Advertising (84/450/EC) now generally allows comparative advertising as long as certain requirements are met. This 1997 Directive was implemented in Austria in § 2 UWG in 1999.¹⁷

The Directive was also implemented in Germany in § 2 and § 3, sentence 2, UWG.¹⁸ But developments in this direction in Germany had already started with a decision¹⁹ in 1961 in which the German Supreme Court (Bundesgerichtshof, BGH) held that comparative advertising is

11. KANWIT, *supra* note 3, § 22.17 n.13 (1985), 2; see Burns, *The Paradox of Antitrust and Lanham Act Standing*, 42 UCLA L. REV. 47, 53, 54 (1994) for further references.

12. BGBl. 1988/422; see Schuhmacher, *Das Wettbewerbsrecht nach den Novellen 1988 [Competition Law After the Reforms of 1988]*, in FS [FESTSCHRIFT, LIBER AMICORUM] OSTHEIM 495 n.4 (published at Orac, Vienna 1990).

13. § 1 UWG forbids advertising which is *contra bonos mores*.

14. Schuhmacher, *supra* note 12, at 508 with further references.

15. *E.g.*, Oberster Gerichtshof [Austrian Supreme Court, OGH] Österreichische Blätter für gewerblichen Rechtsschutz und Urheberrecht [ÖBl] 1989, p. 149; OGH ÖBl 1989, p. 152; OGH ÖBl 1991, p. 71; OGH Medien und Recht [MR] 1994, p. 31; see KOPPENSTEINER, ÖSTERREICHISCHES WETTBEWERBSRECHT [AUSTRIAN COMPETITION LAW] § 33 no. 48 (published at Orac, Vienna 2d ed. 1997).

16. OGH ÖBl 1990, p. 154. This leading decision was followed in many other decisions, e.g., OGH ÖBl 1991, p. 160; OGH MR 1994, p. 31.

17. BGBl. 1999 I/185. For this implementation, see GAMERITH, KRITISCHES ZUR UWG-NOVELLE IM FERNABSATZ-GESETZ [CRITICAL REMARKS TO THE REFORM OF THE UNFAIR COMPETITION LAW], *ecolx* 1999, p. 700; Wamprechtshamer, Die Neuordnung der vergleichenden Werbung [New Order of Unfair Competition Law], ÖBl 2000, p. 147.

18. *Cf.* note 6.

19. BGH GRUR 62, p. 45.

allowed if there is a sufficient reason for it in the specific case and if the statement is true and within the limits of what is strictly necessarily.²⁰ But as only few comparative advertisements were regarded as meeting these requirements, comparative advertising was very rare in Germany. After the implementation of the Directive these jurisprudential rules are no longer a requirement; it is sufficient that comparative advertisements are in accord with the provisions of the Directive.

So today, in all European Member States comparative advertisements are allowed as long as they meet the requirements of the Directive. But there are still open questions as to what the Directive states. This is shown by a preliminary ruling²¹ which the OGH²² referred to the European Court of Justice (ECJ) and which was decided by the ECJ in April 2003.²³ The aim of this short Article is to present the questions the OGH asked the ECJ and the solutions and arguments of the advocate general and the ECJ to these problems. This Article will also deal with the problems of a harmonization of unfair competition law in Europe in more detail.

II. THE 1997 DIRECTIVE ON COMPARATIVE ADVERTISING²⁴

The reasons for introducing the Directive and allowing comparative advertising are the same as those found in the United States. They are the same arguments the OGH used in its decision in 1988 in which it allowed general comparative advertising for the first time and are also the same arguments many scholars who wrote in favor of comparative advertising used: market transparency and consumer information.

20. BAUMBACH & HEFERMEHL, *supra* note 4, § 1 no. 333, with further decisions which followed the rules pointed out in this leading decision.

21. The European Court of Justice (ECJ) has jurisdiction to give preliminary rulings *inter alia* concerning the interpretation of the Treaty or of acts of the institutions of the EC. National courts facing uncertainty concerning the meaning of such acts may consult the ECJ for interpretation; national supreme courts have to consult the ECJ if such a question is raised in a case before them. The preliminary ruling is regulated in article 234 of the EC Treaty which can be found on www.europa.eu.int.

22. OGH ÖBI 2002 no. 46.

23. ECJ 8.4.2003 C-44/01. This decision can be found at www.curia.eu.int. Cf. to this decision e.g. Ohly, *Irreführende vergleichende Werbung. Anmerkungen zu EuGH "Pippig Augenoptik/Hartlauer"* [Misleading Comparative Advertising, Remarks] GRUR 2003, p. 641, and Augenhöfer, *Pippig versus Hartlauer. EuGH klärt offene Fragen hinsichtlich vergleichender Werbung [Pippig vs. Hartlauer. ECJ Answers Open Questions]*, *Recht der Wirtschaft (RdW)* 2003, p. 682.

24. 95/55/EC. For the history of the unfair competition legislation in the EU, see Kirmani, *Cross-Border Comparative Advertising in the European Union*, 19 B.C. INT'L & COMP. L. REV. 201 (1996); for the background of the Directive, see Spink & Petty, *Comparative Advertising in the European Union*, 47 INT'L & COMP. L.Q. 855 (1998).

Comparative advertising is said—unlike other commercials which hardly ever contain any information at all but try to catch the consumer on an emotional level—to provide the consumer with product information not only about one product but about two or even more products. The second recital of the preamble to the Directive states that a harmonization of the conditions of comparative advertising “will help to demonstrate objectively the merits of the various comparable products; whereas comparative advertisement can also stimulate competition between suppliers of goods and services to the consumer’s advantage.” The third recital of the preamble also notes that having different legal conditions for comparative advertising in the Member States may constitute an obstacle to the free movement of goods and services and create distortions of competition; “whereas, in particular, firms may be exposed to forms of advertising developed by competitors to which they cannot reply in equal measure; whereas the freedom to provide services relating to comparative advertising should be assured; whereas the Community is called on to remedy the situation.” In addition, different regulations would force companies which operate throughout the European Union to run different commercials in the different Member States²⁵ which would also contradict the aim of the European Union to have a unified internal market, “whereas the internal market comprises an area which has no internal frontiers and in which goods, persons, services and capital can move freely.”²⁶ “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.”²⁷

25. This obstacle may also explain why comparative advertising does not play such a big role in Europe as it does in the United States where it makes up between 20% and 50% of the whole advertising market (see Spink & Petty, *supra* note 24, at 855; Romano, *supra* note 2, at 371, with further references).

26. *Cf.* the first recital in the preamble of the Directive.

27. Article 1 of the Directive. In May 2005, this article was revised by the 2005 Directive on Unfair Commercial Practices (2005/29/EC) of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, which is available at www.europa.eu.int. This new Directive, which has to be implemented by the Member States within two years, regulates unfair business-to-consumer commercial practices—including misleading and comparative advertising. The previous 1984 Directive on misleading advertising as amended by the 1997 Directive on comparative advertising therefore remains in force only for business-to-business relations. Article 1 of the 1997 Directive on comparative advertising now reads: “The purpose of this Directive is to protect traders against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted.” This article is quite interesting since article 1 of the new 2005 Directive protects

As noted earlier,²⁸ comparative advertising under article 2a of the Directive means “any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor.”²⁹ Under the Directive, comparative advertisements are allowed as long as they meet the conditions set out in the “checklist”³⁰ of article 3a(1), which are the following:

- a) it is not misleading according to articles 2(2), 3 and 7 (1)³¹;
- 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) does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.

The goal of this Article is not to consider these conditions but to point out the questions which the OGH brought before the ECJ.

only consumers. This means that under the new regime the interests of the public in general are protected by none of the Directives.

28. *Cf.* note 1.

29. To the question of when a comparison is a comparison according to the Directive, see, e.g., Dilly & Ulmar, *Vergleichende Werbung ohne Vergleich?* [*Comparative Advertising Without a Comparison?*] *Wettbewerb in Recht und Praxis* [WRP] 2005, p. 467; Köhler, *Was ist vergleichende Werbung?* [*What Is Comparative Advertising?*] *GRUR* 2005, p. 273. These articles show that even years after this Directive became effective there are still—elementary—questions which remain open.

30. Doepner & Hufnagel, *supra* note 4, at 546-47.

31. This part of article 3a as amended by the Unfair commercial practices Directive now reads: “it is not misleading within the meaning of Articles 2(2), 3 and 7(1) of this Directive or Articles 6 and 7 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to consumer commercial practices in the internal market.”

III. THE CASE OF *PIPPIG AUGENOPTIK GMBH & CO KG VS. HARTLAUER HANDELSGESELLSCHAFT MBH*³²A. *The Facts*

The plaintiff was an optician who ran three stores in Linz (a town in upper Austria) in which he sold well-known brands of eyeglasses. He got the glasses directly from the producers with whom he had a regular business relationship. In all his stores he always had a representative collection of all glasses.

The defendant was a big chain which possessed stores all over Austria in which different goods were sold (e.g., electronic goods, articles for telephones, photo equipment, etc). In about one hundred of the stores of the defendant there were optic departments too, in which mainly glasses from less known brands were sold at cheap prices. Glasses from well known brands make up only about 5% of the collection and the defendant did not buy them directly from the producers or their representatives in Austria but obtained them through parallel imports. Due to this practice, generally only a few examples of each brand were kept in stock.

In September 1997 the defendant sent about 2 million leaflets to households all over Austria. These leaflets contained a comparison between the prices of glasses sold by opticians and by defendant's stores. In particular, they contained the statement that 52 price comparisons with various Austrian opticians showed that the glasses sold by the defendant were cheaper by €14,979 (about US\$18,382). On average the differential was €285 (about US\$350) per pair. The leaflet also noted that an optician's profit from the sale of Zeiss glasses was 717% and that the low prices were the reason why opticians always attacked the defendant.

Besides these general statements, the leaflets also contained a specific comparison of an Eschenbach-Titan frame with Zeiss bifocal lenses sold at plaintiff's store and the same glasses but with Optimed lenses sold at defendant's stores. The price at the plaintiff's shop was €423; the price at the defendant's shop was €146. The same comparison was contained in TV and radio ads in September 1997. In this spot it was not mentioned that the glasses compared were equipped with different lenses. In the TV spot a front view of one of the plaintiff's stores was shown.

32. *Cf.* note 23. The closing argument from advocate general *Tizzano* from 12 September 2002 is also available at www.curia.eu.int. As decisions by the ECJ are most of the time very short and following the advocate general, it makes sense to refer to the opinion of the advocate general in order to find out the arguments on which the court based its decision.

The mentioned comparison was based on a test purchase made by an employee of the defendant on the 8th of July 1997. The employee asked for the very expensive Zeiss lenses for his frame. The glasses were picked up on the 1st of August 1997 and photographed for the leaflet. At the time the glasses were bought at the plaintiff's store, the frame in question was not available at the defendant's store, which only got the product later, and not in all sizes and colors.

The plaintiff considered the comparative advertisement as damaging and brought a claim against the defendant. The trial court found partly for the plaintiff and the judgment was largely confirmed by the appellate court. Both parties appealed the judgment of the appellate court and the case was brought before the OGH. The OGH considered it to be necessary—as there were regulations of the European Union involved—to ask the ECJ for an interpretation of the questions raised in this case.

B. The Closing Argument of Advocate General Tizzano and the Decision of the ECJ

1. Duty to Inform About Differences in the Compared Products—
Permission to Name the Label of a Competitor

The first part of the closing argument of the advocate general dealt with the following question:

Is it misleading and therefore forbidden under article 3a(1) lit a of the 1997 Directive to compare eyeglasses which contain two different kind of lenses, one a “no-name” and the other a brand mark, without informing the consumer about the differences? The advocate general followed the arguments of the plaintiff and the Commission which stated that in buying glasses the lenses play an important role. Therefore a comparison which does not point out that the glasses have different lenses is misleading. The advocate general stressed that in this regard under article 2 number 2 of the 1984 Directive on misleading advertising it is enough that an advertisement might mislead somebody—it does not have to have misled somebody in fact. In deciding if an advertisement is misleading or contains the possibility of misleading somebody, one has to take into account the likely expectations of an average, informed, vigilant and intelligent consumer.³³ The advocate general found that even

33. The ECJ had applied this standard every time it has had to decide about the misleading quality of statements since the decision of the 16.7.1998 C-210/96 Gut Springenheide, E.C.R. I-4657 [1998]. Compare to the differences between this standard applied by the ECJ and the ones applied by the national courts see below, C.b.bb.

such an informed consumer would assume that the comparison would involve glasses containing the same kind of lenses.³⁴ He concluded that there exists a duty to inform about differences which are relevant for the buying decision.³⁵ He also found that defendant's objection—arguing that it would impose a heavy burden to identify the name brands in detail and would even make comparative advertising impossible, since it is impossible to compare the price of two brands if you have to name all components—was not convincing: It could be a heavy burden if one thinks of a product which contains a lot of components which do not influence the buying decision. But this argument fails in respect of characteristic and essential components of products, such as lenses in glasses. In addition, in this case, the fact that the brands of the lenses were printed in the leaflets shows that it would have been possible to add the same information in the television and radio spots as well.

The answer the ECJ gave to this question, however, differs from the arguments advanced by the advocate general. It stated that all the products in this case are branded products. The ECJ therefore understood the question “as concerning the unlawfulness of the comparison between products of different brands where the names of the manufacturers are not identical.” In this regard the ECJ first noted that the 1997 Directive allows the advertiser under certain conditions to state in comparative advertising the brand of the competitor's product. According to the ECJ this follows from the fourteenth recital of the preamble to the 1997 Directive which states that it may be indispensable, “in order to make comparative advertising effective, to identify the goods

34. A ruling of the OGH (OGH ÖBI 2002 no. 61) which was given shortly before the ECJ decided the *Hartlauer* case might be in conflict with this statement and also with the decision of the ECJ as it states that there is no such empirical theorem that only same products or services are compared. The OGH therefore held that one has to announce the cost relevant features in a comparative ad. Whereas the advocate general seems to think that one can generally assume that the goods compared are the same and one has to name details only if they differ and the ECJ even thinks that one has to name differences only when one of the compared brands is significantly better known. On the whole, it is submitted, it was right of the OGH to decide that this advertisement violated § 2 UWG as the competitors were not named and therefore the consumer would not have been able to check if the comparison was true. The rest of this decision is also interesting as it shows how fast a statement can be regarded as disparaging in Austria: The defendant (who runs a printing-office) had distributed a leaflet in which he asked “Do you ask yourself if you have paid too much in your printing-office in the past?; . . . because we print faster and more efficient and that round around the clock.” The OGH regarded this advertisement—although the competitors were not named—as a disparagement. It is submitted that this illustrates very clearly that there are still big differences between comparative advertising in the United States, where an advertisement of this sort would probably never be regarded as being in violation of § 43a of the Lanham Act (Trademark Act of 1946), and European countries like Germany or Austria.

35. In this sense already OGH ÖBI 1996, p. 28; OGH ecolex 1995, p. 731.

or services of a competitor, making reference to a trade mark or trade name of which the latter is the proprietor.” The same conclusion can be drawn, according to the ECJ, from article 3a(1) lit d, e and g of the Directive: Those provisions state that comparative advertising shall not “create confusion in the market place between the brand names of the advertiser and those of a competitor”; that it shall not “discredit or denigrate the brands of a competitor”; and that it shall not “take unfair advantage of the reputation of a competitor’s brand.” The ECJ therefore came to the conclusion that the mentioning of the competitor’s brand name in a comparative advertisement is allowed as long as it does not violate any of the mentioned provisions. The ECJ then referred to its own decision in *Toshiba*³⁶ in which it 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.” After explaining why the use of the competitor’s brand name is allowed in a comparative advertisement the ECJ noted that there are imaginable situations in which the use of such a brand name might be misleading and therefore in violation of article 3a(1) lit a of the Directive. Such a case, according to the ECJ, occurs when “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.” The omission of the better known brand name violates article 3a(1) lit a. But, unlike the advocate general, the ECJ did not state that the comparative advertisement in this case violated article 3a(1) lit a of the Directive. It held that it is up to the national court to decide this question taking into account the requirements laid down by the ECJ and also taking into account “the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect.”³⁷

The OGH held that in this case the advertisement was misleading as the brand name “Zeiss” was well known while the brand name “Optimed” was not. The advertisement therefore failed to give the consumer the information needed for a rational buying decision.

2. Possibility To Have Stricter National Regulations than Those Provided by the Directive

The OGH also asked the ECJ how article 7(2) of the Directive coheres with article 7(1) of the Directive, since article 3a(1) lit a states

36. ECJ 25.10.2001, case C-112/99 Toshiba, E.C.R. I-7945 (2001).

37. ECJ 13.1.2000, case C-220/98 Estee Lauder E.C.R. I-117 (2000).

that “comparative advertising shall not be misleading under articles 2(2), 3 and 7(1).” The first provision states that the Member States may have stricter regulations regarding misleading advertising than the Directive provides. The latter provision however notes that “(P)aragraph 1 shall not apply to comparative advertising as far as the comparison is concerned.” The plaintiff and the Austrian Government took these provisions to mean that stricter national regulations regarding misleading comparative advertising are permitted. In contrast, the Commission and also the defendant thought that paragraphs 1 and 2 of article 7 resulted from a mistake and—assuming that the aim of the Directive was to create a new, final legal basis for comparative advertising in Europe³⁸—the Member States should not be allowed to have any different and or stricter national rules than those set out in the Directive.

In his closing argument the advocate general first made clear that he had doubts whether the OGH was entitled to present this question to the ECJ as there did not seem to be a stricter provision in Austria anyway and national courts are not entitled to present hypothetical questions to the ECJ.³⁹ But the advocate general decided to answer the question in any event and came to the conclusion that paragraphs 1 and 2 of article 7 did not result from a mistake:

The purpose of the 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.” Therefore article 7(1) states that “(t)his 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 out a trade, business, craft or profession, and the general public.” From these provisions the advocate general concluded that article 3a(1) lit a means that comparative advertising shall not be misleading in terms of the specific provisions of the Directive as well as any existing stricter national provisions. The European legislator, he reasoned, wanted to ensure that there would not exist a lower level of protection against

38. The eighteenth recital of the preamble reads as follows: “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 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.”

39. See, e.g., ECJ 13.6.2000, case C-36/99 *Idéal Tourisme* E.C.R. I-6049 (2000); ECJ 15.12.1995, case C-415/93 *Bosman* E.C.R. I-4921 (1995).

misleading comparative advertising than against other types of misleading advertising. This, the advocate general held, does not undermine article 7(2) as comparative advertising can never be judged by national regulations. Rather article 7(2)—according to the advocate general—wanted to ensure only that the Member States did not introduce more conditions for comparative advertising than are provided in article 3a(1) lit a-h.⁴⁰ But the article did not intend—as is shown by the reference in article 3a(1) lit a to article 7(1)—to forbid stricter national regulations with regard to when comparative advertising is misleading.

Here the ECJ did not follow the advocate general. It first noted that the 1997 Directive enumerates the conditions for comparative advertising in an exhaustive way, including the requirement that comparative advertising must not be misleading within the meaning of articles 2(2), 3, and 7(1). It also noted that the Community legislator had previously carried out only a minimal harmonization of national rules on misleading advertising. The 1984 Directive allowed Member States to apply stricter national provisions in this area to ensure greater consumer protection. The ECJ further held that the textual contradiction between article 7(1) and article 7(2) has to 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 favorable to it.”⁴¹ The ECJ then referred to the second recital in the preamble to Directive 97/55. This recital states that 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 harmonized. 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 eighteenth recital excludes stricter national provisions on misleading advertising being applied to comparative advertising, since the aim of the 1997 Directive was to establish “conditions under which comparative advertising is to be permitted throughout the Community.”

The ECJ therefore concluded that the Directive “carried out an exhaustive harmonization of the conditions under which comparative

40. Skeptical on whether the Austrian implementation—which refers to § 1 (prohibits ads which are *contra bonos mores*), § 7 (prohibits a denigration of competitors) and 9 (misuse of the logo of a competitor)—goes further than the conditions set out in the Directive, GAMERITH, *supra* note 17, at 700.

41. ECJ 25.10.2001, case C-112/99 Toshiba, E.C.R. I-7945 (2001).

advertising in Member States might be lawful.” Such a harmonization, according to the ECJ, implies by its very 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 legislator. Therefore, “stricter national provisions on protection against misleading advertising cannot be applied to comparative advertising as regards to form and content of the comparison.”

It is submitted that the decision of the ECJ is convincing.⁴² If the ECJ had followed the arguments of the advocate general, those Member States with a bias against comparative advertising would have an opportunity to restrict such advertisements by applying stricter national rules. Such restrictions could be achieved via the consumer model⁴³ since the ECJ and national courts often have a different model in mind: The ECJ⁴⁴ applies the standard of the informed, average, intelligent consumer, while in contrast the BGH⁴⁵ and the OGH⁴⁶ previously had in mind a dull-witted and impulsive consumer in need of protection. On the one hand the ECJ has decided the consumer has a right to information⁴⁷ but he also has a duty to inform himself,⁴⁸ on the other hand the BGH and the OGH have thought for a long time that consumers are rather ignorant and have to be protected.

42. A great part of German academia seem to have interpreted article 7(2) in this way already before this decision. See, e.g., BAUMBACH & HEFERMEHL, *supra* note 4, § 1 no. 367a; Sack, *Die Auswirkungen des europäischen Rechts auf das Verbot irreführender Werbung [The Effects of the European Law on the Prohibition of Comparative Advertising]*, in Schwarze (ed.), *WERBUNG UND WERBEVERBOTE IM LICHT DES EUROPÄISCHEN GEMEINSCHAFTSRECHTS [ADVERTISING AND THE PROHIBITION OF ADVERTISING IN THE LIGHT OF EUROPEAN LAW]* 102, 111 (published at Nomos, Baden Baden 1999); different KÖHLER & PIPER, *GESETZ GEGEN DEN UNLAUTEREN WETTBEWERB [UNFAIR COMPETITION LAW]* § 2 no. 3 (published at Beck, Munich 3d ed. 2002), all with further references. For Austria, see Wamprechtshamer, *supra* note 17, at 149, according to whom stricter national standards were permitted.

43. See for the different roles the consumers may have in the competition process BEATER, *UNLAUTERER WETTBEWERB [UNFAIR COMPETITION]* § 13 no. 22 *et seq.* (published at Beck, Munich 2002).

44. E.g., ECJ 16.7.1998 case C-210/96, Gut Springenheide E.C.R. I-4657 (1998); ECJ 28.1.1999 case C-303/97, Kessler E.C.R. I-513 (1999); ECJ 13.1.2000 case C-220/98 Estee Lauder E.C.R. I-117 (2000); see to the European consumer standard Rüffler, *Europäisches Verbraucherleitbild und Demoskopie [European Consumer Model] Wirtschaftsrechtliche Blätter [wbl]* 1998, p. 381; Faber, *Elemente verschiedener Verbraucherbegriffe in EG-Richtlinien, zwischenstaatlichen Übereinkommen und nationalem Zivil- und Kollisionsrecht [Different European Consumer Models]* ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT [ZeuP] 1998, p. 854.

45. Fundamental BGH GRUR 59, p. 365; see BAUMBACH & HEFERMEHL, *supra* note 4, § 3 no. 31; KÖHLER & PIPER, *supra* note 42, § 3 no. 50 for further references.

46. E.g., OGH ÖBI 1976, p. 18; OGH ÖBI 1993, p. 161; OGH ÖBI 1994, p. 20; see KOPPENSTEINER, *supra* note 15, § 33 no. 24 with further references.

47. E.g., ECJ 18.5.1993, case C-126/91 Yves Rocher, E.C.R. 1993, I-2361 (1993).

48. SCHULZE & SCHULTE-NÖLKE, *CASEBOOK EUROPÄISCHES VERBRAUCHERRECHT [EUROPEAN CONSUMER LAW]* 145 (published at Nomos, Baden Baden 1999).

Only five years ago the BGH finally switched to the model of the rational consumer. In the so called “Orient-Teppichmusterentscheidung⁴⁹ (oriental carpet pattern decision)” the BGH held that—at least if durable goods of some value are involved—one cannot apply the standard of the impulsive consumer. The OGH followed this decision explicitly in the so called Lego-decision⁵⁰ and noted that the standards which have to be applied are those of the “average, attentive and informed consumer who pays more or less attention depending on the value” of the good advertised. In the meantime the official explanatory remarks to the new German law on unfair competition⁵¹ make clear that this law is based on an intelligent and rational consumer. The situation is not as clear in Austria. Since the mentioned Lego-decision, the OGH has sometimes applied the model of the rational consumer,⁵² sometimes the model of the protection-needing, impulsive consumer⁵³ and sometimes it has left the question open.⁵⁴

Although there seems to be a trend towards a more rational consumer model even in Austria, and Germany’s new law on unfair competition is officially based on such a model, the fact remains that one cannot say that a harmonized European law on misleading advertising exists, despite the Directive on misleading advertising.

In fact, there is not only a two-standard system, a national and a European one, but a 26-standard system as every Member State applies a slightly different consumer standard and this can influence the outcome of a trial regarding the lawfulness of an advertisement significantly. Therefore, despite the Directive, an advertisement can still be allowed in one Member State and prohibited in another. For example, contrary to the Austrian or German tradition the consumer model applied by English courts is that of a very smart, skeptical person, who knows that all advertising is somewhat exaggerated and therefore questions every

49. BGH Juristen Zeitung [JZ] 2000, p. 973; see to this decision Beater, Die stillen Wandlungen des Wettbewerbsrechts [Silent Changes in Competition Law] JZ 2000, p. 973. The decision was confirmed, e.g., in BGH GRUR 2000, p. 820, 821; BGH GRUR 2002, p. 1061, 1063; BGH GRUR 2001, p. 1166, 1168, 1169.

50. OGH ÖBI 2001, p. 18 with annotations by Hauer and Augenhöfer.

51. Official explanatory remarks to § 5, BT-Drucks. 15/1487, p. 19; *cf.* also note 6.

52. OGH ÖBI 2001, p. 228 with an annotation by Kurz (in this decision the OGH did not consider a higher value of the involved goods as a precondition for applying the standard of the average, rational consumer); ÖBI 2001 no. 5 with an annotation by Augenhöfer; wbl 2001 no. 230 (trade market law).

53. OGH ÖBI 2002 no. 65; 2003 no. 20; MR 2002, p. 106; MR 2003, p. 331.

54. OGH wbl 2003 no.117; MR 2003, p. 48 with an annotation by Pöchlhammer; ÖBI-LS 2003 no. 120; ÖBI-LS 2004/105.

statement made in an advertisement.⁵⁵ A German court⁵⁶ has regarded an advertisement by Ryanair containing a comparison between its own prices and those of other carriers for a flight to the same city as misleading as the advertisement did not state the fact that Ryanair did not fly to the city airport, but only to an airport nearby the named city. On the other hand, the English High Court⁵⁷ did not regard a similar comparative advertisement as misleading, saying that a rational consumer would inform himself about the details of the deal offered. As the mentioned German case concerned a comparative advertisement and was decided after the *Pippig/Hartlauer* case by the ECJ, one has to doubt if this decision was in conformity with EC law.

However, the problem remains that 25 courts can have a totally different understanding of the operative legal conditions for comparative advertising, including the likelihood that a comparative advertisement is misleading for the average rational consumer. These national differences are of course greater for misleading non-comparative, advertising since, for those advertisements, even after the *Pippig/Hartlauer* decision, stricter national rules are allowed under article 7(1) of the Directive.

Obviously the European legislator has recognized this problem in the 2005 Unfair Commercial Practices Directive. The third recital to this Directive⁵⁸ states that as a result of the minimum harmonization in the 1984 Directive on Misleading Advertising “Member States’ provisions on misleading advertising diverge significantly.” Consequently, the 2005 Directive does not contain a provision similar to article 7(1) of the 1984 Directive calling for only a minimum harmonization. Furthermore, its article 4 provides that “Member States shall neither restrict the freedom

55. This standard seems to be very similar to the one applied in the United States. See Romano, *supra* note 2, at 397. Cf. for the different national consumer models applied in the Member States Lettl, *Der lauterkeitsrechtliche Schutz vor irreführende Werbung in Europa* [Protection Against Misleading Advertising in Europe] GRUR Int. 2004, p. 85; HUCKE, *ERFORDERLICHKEIT EINER HARMONISIERUNG DES WETTBEWERBSRECHTS IN EUROPA* [NEED FOR A HARMONIZED UNFAIR COMPETITION LAW IN EUROPE] (published at Nomos, Baden-Baden 2001).

56. OLG Köln 1/27/2005 (Az 24 O 4/05).

57. Chancery Division, HC 0884/HC 00 00527, 10/25/2000.

58. Cf. note 27. See to the proposal for this Directive, e.g., Collins (ed.), *THE FORTHCOMING EC DIRECTIVE ON UNFAIR COMMERCIAL PRACTICES* (published at Kluwer, the Hague/London/New York 2004); Göhre, *Frischer Wind aus Brüssel?* [Fresh Air from Brussels?] WRP 2002, p. 36; Wiebe, *Die “guten Sitten” im Wettbewerb—eine europäische Regelungsaufgabe?* [The Good Morals in Competition—A Task for the European Union?] WRP 2002, p. 283; Seidelberger, *Vorschläge für eine europäische Harmonisierung des Lauterkeitsrechts* [Proposals for a European harmonization of Unfair Competition Law] ÖBf 2002, p. 260; Köhler & Bornkamm & Bodewig, *Vorschlag für eine Richtlinie zum Lauterkeitsrecht und eine UWG-Reform* [Proposal for a Directive Regarding the Unfair Competition Law] WRP 2002, p. 1317. Cf. to this Directive also Augenhofer, in *ÖJZ* September 2005.

to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive.” The meaning of this provision is subject to discussion.⁵⁹ But it is submitted that this provision, which was preferred during the legislative process to the highly discussed country of origin principle,⁶⁰ underlines that the European legislator is really seeking harmonization in the field of unfair competition in the long run.⁶¹ Nevertheless, it seems that there is a long way to go. First of all, it is surprising that the 1984 Directive on Misleading Advertising as amended by the unfair commercial practices 2005 Directive on Unfair Commercial Practices, is still based on the principle of minimum harmonization. Article 7(1) of this Directive in its amended form still states: “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 traders and competitors.” In contrast, stricter national rules to protect consumers with regard to commercial practices under the 2005 Directive are generally not allowed. But the harmonization aimed at by this last Directive is not as complete as one might possibly think: To start with, this Directive does not cover all forms of advertising and article 3 states it is without prejudice to contract law. Furthermore the seventh recital of the Directive states that Member States are allowed to continue “to ban commercial practices in their territory, in conformity with Community law, for reasons of taste and decency even where such practices do not limit consumers’ freedom of choice.” In addition, the ninth recital to this Directive states that it is also without prejudice to national rules on the health and safety of goods. Consequently it seems to be in conformity with this Directive to have stricter national rules as long as they can be justified as promoting the safety and health of consumers. Without going into detail, it seems rather obvious that because of these

59. Cf. Gamerith, Der Richtlinienentwurf über unlautere Geschäftspraktiken—Möglichkeiten einer harmonischen Umsetzung. Studie für den Arbeitskreis “UWG” des Bundesministeriums für Wirtschaft und Arbeit [Proposal for a Directive on Unfair Commercial Practices—Possibilities for a Harmonized Implementation. Study for the Working Group on Unfair Competition of the Ministry of Economics and Labour] WRP 2005, p. 391, 411, 412 with further references.

60. The country of origin principle means the concept of mutual recognition of Member States’ fair trading rules instead of harmonizing rules. Cf. Micklitz, *A General Framework Directive on Fair Trading*, in Collins (ed.), *supra* note 58, at 43.

61. In addition to the unfair commercial practices Directive there exists a Proposal for a regulation concerning sales promotions in the Internal Market, Com (2001) 546, *available at* www.europe.int. This proposal has been extensively discussed, and it is rather doubtful if and when it will become law. Another proposal in this field of law exists for a regulation on nutrition and health claims made on foods, COM (2003) 424, also *available at* www.europe.int.

restrictions on the scope of the Directive, it does not totally harmonize the field of commercial practices. One has to keep in mind that a Directive by its very definition obligates the Member States only with regard to the goal to be achieved but not how this goal is to be achieved.

Last but not least, the new Directive on Unfair Commercial Practices contains a plurality of legal terms which need to be interpreted. The best example is the general clause in article 5 of the 2005 Directive. This provision states that “1. Unfair commercial practices shall be prohibited. 2. A commercial practice shall be unfair if: a) it is contrary to the requirements of professional diligence, and b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.” As another example one can cite the eighteenth and nineteenth recital to this Directive. The European legislator takes as a benchmark “the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice,” and also seeks to prevent “the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices.” Still, as mentioned above, taking into account the different consumer models the Member States originally have held in mind, one may question whether the average consumer will be always the same in the national courts.⁶²

To sum up, the decision of the ECJ concerning the prohibition of stricter national rules with regard to comparative advertising can be seen as one step towards a harmonized European law on unfair competition. The 2005 Unfair Commercial Practices Directive can be seen as another step. But if the goal of a fully harmonized European unfair competition law is to be realized, there is much work left to do for the European legislator, as well as for the national courts and the ECJ.

3. Different Distribution Channels

The OGH also wanted to know if a comparison of products which came from different distribution channels was prohibited by the Directive. This question arose from the fact that the plaintiff had a long-

62. The European legislator has solved in the eighteenth recital the extensively discussed question of whether the average consumer test is a statistical test. According to the eighteenth recital it is not. But “national courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.”

term business relationship with the producer of the frames of the eyeglasses while the defendant obtained the same frames through parallel imports.

The advocate general found that the conditions set out in article 3a(1) lit a-h are final and that this article does not prohibit the comparison of products which come from different distribution channels. But he agreed with the Commission and the Austrian Government that such a comparison can be—even if it was not the fact in this case—misleading and therefore forbidden by article 3a(1) lit a. Such a comparison might be especially misleading if the consumer needed to get spare parts and components from the seller or if the consumer needed after-sale service requiring a direct relationship between the seller and the producer. In addition the advocate general pointed out that the price comparison might be misleading if the advertiser obtained the goods only on an occasional basis and was therefore selling them only for a short period at a very cheap price. Under such circumstances article 3a(2) would have to be respected. This article states that “(a)ny 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.” But he explained that in the case at hand neither of these circumstances existed and even if they had existed such advertisements would be impermissible because they were misleading or insufficient and not because the goods came from different distribution channels.⁶³

The ECJ came to the same conclusion as the advocate general. Accepting the argument that article 3a(1) establishes comprehensive requirements for comparative advertising and does not require that products are to be obtained from the same distribution channel, the ECJ also noted that such a requirement would contradict both the objectives of the Directive and of the internal market: “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 compartmentalization of national markets. Secondly, it is clear from the second recital in the preamble to Directive 97/55 that comparative advertising is designed to enable

63. The OGH held in ÖBl 1999, p. 184, that there exists a duty to inform about different distribution channels.

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.”

It is submitted that the holding of the ECJ is correct since, from a consumer viewpoint, the particular way in which the seller buys the product is rather unimportant and will hardly ever—except in the circumstances mentioned by the advocate general—affect the buyer’s interest.

4. Test Purchase

The OGH also asked if a competitor was allowed to make a test purchase and to make a price comparison at a time at when he did not yet sell the goods. The advocate general stated that article 3a sets out the conditions for comparative advertising in a comprehensive way and does not prohibit such a test purchase. But he noted that a comparison of prices of this sort could be misleading if the leaflets are distributed before the goods are in the stores of the advertiser or if the advertisement would create the impression that such price differences would exist also with regard to other goods (which was not the fact in the case at hand).

The ECJ followed the arguments of the advocate general and came to the same conclusion. It is submitted that this reasoning is correct because the relevant point is not that the advertiser had the product in stock when he made the test purchase but rather that he had it in stock at the time when he distributed the leaflets.

5. Discrediting or Denigration of a Competitor

The last question from the OGH asked whether a comparison of prices discredits and denigrates a competitor—and therefore is prohibited by article 3a(1) lit e—when a) the price difference between the goods is especially high and/or the price comparison is made again and again so that the impression arises that the competitor’s prices on other goods as well are generally higher, and b) when the competitor is not simply identified by name, but by its logo or a photo of its store.

a. Discrediting or Denigration with Price Comparisons

The advocate general pointed out that a price comparison could be misleading if it created the impression that the same difference would also exist for other products. But then the possible denigration of a competitor would result from the misleading character of the advertisement and would be already prohibited in accordance with article

3a(1) lit a. In addition he took the view that neither the fact that goods with a significant price difference are compared nor the high frequency of such comparisons would create such an impression.⁶⁴ It seems, according to the advocate general, to be logical and natural that a seller would only compare the prices of goods where their own products are the cheaper of the two.

The ECJ agreed with the advocate general that “comparing rival offers, particularly regarding the 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.”

The Court reached the same conclusion with regard to the frequency of comparisons. The ECJ stated that the number of comparisons falls within “the exercise of his (the advertiser’s) economic freedom” and that “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.” The ECJ also referred to the second recital in the preamble to 1997 Directive which states that comparative advertising must help to demonstrate objectively the merits of the various comparable products. According to the ECJ, such objective comparison “implies that the persons to whom the advertising is addressed are capable of knowing the actual price difference between the products compared and not merely the average differences between the advertiser’s prices and those of its competitors.”

b. Discrediting or Denigration by Showing the Logo of the Competitor

The advocate general agreed with the Commission and the defendant that the showing of the logo and/or the store of the competitor did not necessarily denigrate the competitor according to article 3a(1) lit e. Denigration does not result from the identification of the competitor but from the kind of identification which is made. If the identification is made in a denigrating way, it does not matter whether the name alone is stated, nor if the logo and the store are shown as well. On the other hand, if the identification is made without denigration, the identification does not become outlawed only because the store and the logo are shown.

64. In this sense already BAUMBACH & HEFERMEHL, *supra* note 4, § 1 no. 367e; KÖHLER & PIPER, *supra* note 42, § 2 no. 53; BGH WRP 1999, p. 414, 416; Tilmann, *Richtlinie vergleichende Werbung* [Directive on Comparative Advertising], GRUR 1997, p. 790, 797; OGH ÖBl 1995, p. 164.

Therefore the advocate general concluded that the comparative advertisement in question did not violate article 3a(1) lit e.

The ECJ again followed the opinion of the advocate general: “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.” The ECJ deduced this from the fifteenth recital in the preamble to Directive 97/55 which states that “the 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.”

The decision of the ECJ is convincing. If the comparison were restricted to average prices the whole rationale for comparative advertising would—as the ECJ pointed out—be defeated. Neither the advertiser nor the consumer would benefit from such a rule. The advertiser would be prevented from attracting more buyers as he could not show that he offers cheaper products than a competitor. And the consumer would not be better off because he would be prevented from learning where he can buy the product at the cheapest price.

IV. CONCLUSION

For most European countries the 1997 Directive on Comparative Advertising has triggered major changes in their law. But there are still open questions concerning the interpretation of this Directive.⁶⁵ The holding of the ECJ in *Pippig vs. Hartlauer* has clarified some of them. The decision of the ECJ to prohibit stricter national requirements for comparative advertising is an important step towards a harmonized European unfair competition law. Nevertheless one has to face the fact that stricter national standards remain possible for misleading advertising concerning the business-to-business relationship and, in some cases, for unfair commercial practices under the 2005 Unfair Commercial Practices Directive.

65. Cf., e.g., a new preliminary ruling concerning the question of when a comparative advertisement takes unfair advantage of a trade mark or trade name of a competitor and is therefore prohibited by the Directive. This preliminary ruling was enacted by the BGH, compare its resolution form 12/2/2004 (I ZR 273/01, *available at* www.bundesgerichtshof.de).

As Spink and Petty⁶⁶ have noted, although the 1984 Directive on misleading advertising as amended by the 1997 Directive on comparative advertising brings the “EU law (of comparative advertising) slightly closer to US policy,” yet “clear blue water will still divide the two jurisdictions.” And probably a small stream still divides the national unfair competition laws in the Member States. Advertisements which are allowed in the United States will probably still be regarded as denigration of a competitor’s product in some European countries and American enterprises acting internationally will still have to adapt their advertisements to the European legal environment.

66. Spink & Petty, *supra* note 24, at 866; similar Bornkamm, *Entwicklungen der Rechtsprechung im Wettbewerbsrecht—Vergleichende Werbung [Developments in Competition Law]*, in Schwarze (ed.), *supra* note 42, at 134, 143.