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ECLI:EU:C:2023:527

JUDGMENT OF THE COURT (Third Chamber)

29 June 2023 (*)

(Reference for a preliminary ruling – Consumer protection – Indication of the prices of products – Directive 98/6/EC – Article 2(a) – Concept of ‘selling price’ – Products sold in returnable containers – National legislation requiring the amount of the deposit to be indicated separately from the selling price)

In Case C-543/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Federal Court of Justice, Germany), made by decision of 29 July 2021, received at the Court on 31 August 2021, in the proceedings

Verband Sozialer Wettbewerb eV

v

famila-Handelsmarkt Kiel GmbH & Co. KG,

THE COURT (Third Chamber),

composed of K. Jürimäe, President of the Chamber, M. Safjan, N. Piçarra (Rapporteur),
N. Jääskinen and M. Gavalec, Judges,

Advocate General: N. Emiliou,

Registrar: S. Beer, Administrator,

having regard to the written procedure and further to the hearing on 19 October 2022,

after considering the observations submitted on behalf of:

– Verband Sozialer Wettbewerb eV, by D. Marquardt, Rechtsanwalt,

- familia-Handelsmarkt Kiel GmbH & Co. KG, by C. Rohnke, Rechtsanwalt,
- the German Government, by J. Möller and A. Hoesch, acting as Agents,
- the European Commission, by B.-R. Killmann and N. Ruiz García, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 February 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(a) and Article 10 of Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers (OJ 1998 L 80, p. 27) and 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 and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22).

2 The request has been made in proceedings between, on the one hand, Verband Sozialer Wettbewerb eV ('VSW'), an association governed by German law whose purpose is to ensure compliance with competition law, and on the other, familia-Handelsmarkt Kiel GmbH & Co. KG ('familia'), a commercial company distributing foodstuffs, concerning whether or not it is necessary to include the amount of the deposit to be paid by consumers in the selling price of goods sold in returnable containers.

Legal context

European Union law

3 Recitals 2, 6 and 12 of Directive 98/6 state as follows:

'(2) ... consumers must be guaranteed a high level of protection; ... the [European] Community should contribute thereto by specific action which supports and supplements the policy pursued by the Member States regarding precise, transparent and unambiguous information for consumers on the prices of products offered to them;

...

(6) ... the obligation to indicate the selling price ... contributes substantially to improving consumer information, as this is the easiest way to enable consumers to evaluate and compare the price of products in an optimum manner and hence to make informed choices on the basis of simple comparisons;

...

(12) ... Community-level rules can ensure homogenous and transparent information that will benefit all consumers in the context of the internal market; ...'

4 The purpose of Directive 98/6, pursuant to Article 1 thereof, is ‘to stipulate indication of the selling price and the price per unit of measurement of products offered by traders to consumers in order to improve consumer information and to facilitate comparison of prices’.

5 Article 2 of that directive provides:

‘For the purposes of this Directive:

(a) *selling price* shall mean the final price for a unit of the product, or a given quantity of the product, including [value added tax (VAT)] and all other taxes;

...’

6 Article 3 of that directive provides, in paragraphs 1 and 4:

‘1. The selling price and the unit price shall be indicated for all products referred to in Article 1 ...

...

4. Any advertisement which mentions the selling price of products referred to in Article 1 shall also indicate the unit price subject to Article 5.’

7 Under Article 4(1) of Directive 98/6, the selling price must be unambiguous, easily identifiable and clearly legible.

German law

8 Paragraph 1 of the Preisangabenverordnung (Regulation on the indication of prices) of 18 October 2002 (BGBl. 2002 I, p. 4197), in the version applicable to the dispute in the main proceedings (‘the PAngV’), entitled ‘Fundamental provisions’, is worded as follows:

‘1. Any person who, on a commercial or business basis or regularly on any other basis, offers goods or services to consumers ..., or who, as a seller, places advertisements carrying an indication of prices, which are directed at final consumers, shall indicate the price to be paid, including VAT and any other price components (total price). ...

...

4. Where a refundable security deposit is required in addition to the price of a product or of a service, the amount of that security deposit shall be indicated separately, in addition to the price of the product or service and a total amount shall not be indicated.

...’

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 An advertising campaign was launched by familia for drinks and yoghurts in glass bottles and jars, respectively, by means of a leaflet in which the amount of the deposit relating to those containers was indicated by the additional words ‘plus: EUR ... deposit’.

10 Considering that such advertising, in so far as it did not indicate the total price, including the deposit, of the goods which were the subject of that advertisement was illegal, VSW brought an action before the Landgericht Kiel (Regional Court, Kiel, Germany) seeking, inter alia, the cessation of the advertising at issue. That court having upheld the action, familia brought an appeal before the Oberlandesgericht Schleswig-Holstein (Higher Regional Court, Schleswig-Holstein, Germany), which upheld that appeal and varied the judgment under appeal.

11 VSW then brought an appeal on a point of law before the Bundesgerichtshof (Federal Court of Justice, Germany), which is the referring court. That court considers that the outcome of the dispute depends on the interpretation, in particular, of Article 2(a) of Directive 98/6.

12 That court observes that the first sentence of Paragraph 1(1) of the PAngV, in that it obliges traders to indicate the total price of products for sale, including VAT, is designed to transpose into German law Article 1, Article 2(a), Article 3 and Article 4(1) of Directive 98/6. It takes the view, however, that the answer to the question as to whether the amount of the deposit payable by consumers when purchasing goods in returnable glass bottles or jars must be included in the selling price, within the meaning of Article 2(a) of that directive, does not clearly follow from that.

13 Recognising that the interpretation of that provision must be uniform throughout the European Union and therefore independent of the fact that German consumers, under Paragraph 1(4) of the PAngV, are accustomed to the amount of the deposit relating to glass bottles and jars being indicated separately, the referring court relies on the judgment of 7 July 2016, *Citroën Commerce* (C-476/14, EU:C:2016:527, paragraph 37), in order to find that that amount constitutes an unavoidable and foreseeable component of the selling price, within the meaning of Article 2(a) of Directive 98/6, which must be borne by the consumer and constitutes a part of the pecuniary consideration for the purchase of the product concerned. It observes in that regard that the consumer can purchase the drink in the reusable packaging only with that packaging and that he or she must know what such a purchase costs in total, including for the purposes of comparing prices.

14 That court adds that the adoption of Paragraph 1(4) of the PAngV was determined by the German legislature's view that the obligation to indicate the final price of a product as the sum of the price of that product and the amount of the deposit was visually disadvantageous to reusable packaging compared with disposable packaging. That provision is thus intended, first, to enable consumers to compare the price of products without difficulty and, second, to encourage the use of reusable packaging as an environmental policy measure.

15 In those circumstances, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is the concept of “selling price” within the meaning of Article 2(a) of [Directive 98/6] to be interpreted as meaning that it must include the deposit payable by the consumer when purchasing goods in bottles or jars which are returnable against a deposit?

(2) If Question 1 is answered in the affirmative:

Are the Member States authorised under Article 10 of [Directive 98/6] to maintain a provision which deviates from Article 3(1) and (4) of [Directive 98/6], read in conjunction with Article 2(a) thereof, such as that in Paragraph 1(4) [of the PAngV], in accordance with which, where a refundable security deposit is required in addition to the [price of] a product, the amount of that security deposit must be indicated in addition to the price [of] the product, and a total amount must

not be [indicated], or does the approach of full harmonisation pursued by Directive 2005/29/EC preclude that?’

Consideration of the questions referred

The first question

16 By this question, the referring court asks whether Article 2(a) of Directive 98/6 must be interpreted as meaning that the concept of ‘selling price’, laid down in that provision, includes the amount of the deposit payable by the consumer when purchasing goods in returnable containers.

17 As regards the literal interpretation of the provision in question, the wording of Article 2(a) of Directive 98/6 defines the concept of ‘selling price’ as ‘the final price for a unit of the product, or a given quantity of the product, including VAT and all other taxes’.

18 In the first place, as the Advocate General observed in points 31 to 35 of his Opinion, the deposit cannot be treated in the same way as a ‘tax’, within the meaning of Article 2(a) of Directive 98/6, since the amount of the deposit does not have any of the characteristics of a tax, namely it is not a source of public revenue and it involves the provision of consideration.

19 In the second place, as a final price, the selling price must necessarily include the unavoidable and foreseeable components of that price, which are necessarily payable by the consumer and constitute the pecuniary consideration for the acquisition of the product concerned (judgment of 7 July 2016, *Citroën Commerce*, C-476/14, EU:C:2016:527, paragraph 37).

20 A product in a returnable container cannot be purchased without that container and, as a result, the amount of the deposit constitutes an ‘inevitable component of the selling price’. However, the return of the container by the consumer to a point of sale confers on that consumer the right to reimbursement of the amount of the deposit.

21 Thus, in so far as the consumer is entitled to require the seller or another trader to take back the returnable container and to reimburse him or her for the amount of the deposit paid, that amount is not ‘necessarily’ payable by the consumer and, consequently, cannot be regarded as being ‘final’ within the meaning of Article 2(a) of Directive 98/6.

22 If the consumer does not, on his or her own initiative, return a container subject to a deposit, so that the amount relating thereto, once paid, becomes a definitive economic burden for that consumer, the fact remains that, as the Advocate General stated in points 52 and 55 of his Opinion, the deposit-refund scheme implies that that amount may, as a matter of principle, be refunded, and is deemed to be.

23 It follows that the amount of the deposit payable by the consumer when purchasing a product in a returnable container does not constitute a part of the selling price, within the meaning of Article 2(a) of Directive 98/6, as interpreted by the case-law cited in paragraph 19 above.

24 That finding is not called into question by paragraph 38 of the judgment of 7 July 2016, *Citroën Commerce* (C-476/14, EU:C:2016:527), in which the Court held that the costs of transferring a vehicle from the manufacturer to a trader-vendor, necessarily incurred by a consumer, form a component of the selling price, within the meaning of Article 2(a) of Directive 98/6. Indeed, such costs, which are additional to the price of that vehicle and are necessarily payable by the consumer, without the consumer being able to recover them subsequently, must be distinguished

from the amount of a deposit such as that at issue in the main proceedings, which, as has been pointed out in paragraph 21 above, must be refunded to the consumer when the returnable container is given back.

25 The finding made in paragraph 23 above is, moreover, corroborated by the objectives pursued by Directive 98/6, set out in Article 1 thereof, read in the light of recital 6 of that directive, namely to improve consumer information and to facilitate the comparison of the selling prices of products offered by traders to consumers with a view to enabling them to make informed choices. In that regard, as stated in recital 12 of Directive 98/6, the purpose of that directive is to ensure homogenous and transparent information that will benefit all consumers in the context of the internal market. In addition, in accordance with Article 4(1) of the same directive, read in the light of recital 2 thereof, the selling price of products offered to consumers must be unequivocal, easily identifiable and clearly legible, so that that information is precise, transparent and unambiguous.

26 Given, first, that some of those products may be subject to a deposit while others may not, and, second, that deposits of different amounts may apply depending on the type of container, the inclusion of the amount of the deposit in the selling price of the product entails a risk, for consumers, of making inaccurate comparisons in that regard.

27 By contrast, the indication of the amount of the deposit separately, in addition to the selling price of the product in a returnable container, enables consumers to evaluate and compare the prices of a product and to make informed choices on the basis of simple comparisons, in accordance with the objectives pursued by Directive 98/6, recalled in paragraph 25 above, and in compliance with the requirement of transparency and the absence of any ambiguity in those prices, set out in recital 2 of that directive.

28 In that context, an average consumer who is reasonably well informed and reasonably observant and circumspect is able to add together the price of the product and the amount of the deposit in order to determine the total amount he or she is required to pay on the date of purchase (see, by analogy, judgment of 4 October 2007, *Schutzverband der Spirituosen-Industrie*, C-457/05, EU:C:2007:576, paragraph 27 and the case-law cited).

29 In the light of the reasons set out above, the answer to the first question is that Article 2(a) of Directive 98/6 must be interpreted as meaning that the concept of ‘selling price’ laid down in that provision does not include the amount of the deposit payable by the consumer when purchasing goods in returnable containers.

The second question

30 In view of the answer to the first question, there is no need to answer the second question.

Costs

31 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 2(a) of Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers

must be interpreted as meaning that the concept of ‘selling price’ laid down in that provision does not include the amount of the deposit payable by the consumer when purchasing goods in returnable containers.

[Signatures]

* Language of the case: German.