Reports of Cases

OPINION OF ADVOCATE GENERAL
EMILIOU
delivered on 2 February 2023 [1]

Case C-543/21

Verband Sozialer Wettbewerb eV
v
famila-Handelsmarkt Kiel GmbH & Co. KG

(Request for a preliminary ruling from the Bundesgerichtshof (Federal Court of Justice, Germany))

(Reference for a preliminary ruling – Selling price – Drinks and yogurts sold in returnable containers on which a refundable deposit is charged – National legislation requiring traders to indicate the amount of the deposit separately from the price of the product itself and prohibiting the total amount to be indicated)

I. Introduction

1. When you purchase drinking water, sold in a returnable bottle at a price indicated as, for example, '1 € plus 0,25 € deposit', whereby the deposit of 25 cents is refundable upon the return of the bottle, how much does that drinking water actually cost you?

2. In short, that question lies at the heart of the present case.

3. Verband Sozialer Wettbewerb eV ('the applicant') took the view that famila-Handelsmarkt Kiel GmbH & Co. KG ('the defendant') acted unlawfully when it indicated, as the price for drinks and yogurts sold in returnable containers, the price *not* including the deposit (the amount of which was also stated in the advertisement, only separately). The applicant thus sought, against the defendant, injunctive relief and the payment of a flat-rate sum by way of reimbursement of the costs relating to the warning notice.

4. That action was upheld at first instance but dismissed on appeal. The Bundesgerichtshof (Federal Court of Justice, Germany), the referring court, before which an appeal on a point of law has been brought, is uncertain as to how it ought to interpret the term 'selling price' within the meaning of Article 2(a) of Directive 98/6/EC [2] and, more specifically, whether that term should cover a deposit payable in respect of returnable bottles or jars in which goods such as drinks or yogurts are sold. If the amount of the deposit must be regarded as forming part of the 'selling

[1] Original language: English.

[2] Directive 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).

price', the referring court wonders whether national legislation prohibiting the total amount (composed of the price for the product itself and the deposit for the container) from being indicated can be considered to be a more favourable provision for the consumers' information about the prices and their capacity to compare them, within the meaning of Article 10 of Directive 98/6. If so, the referring court further enquires, in essence, whether such a provision results in a situation in which the consumers are deprived of material information (about the total price) and is therefore, in any event, precluded by the complete harmonisation attained by Directive 2005/29/EC. [3]

II. Legal framework

A. European Union law

5. 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.'

6. In accordance with Article 2(a) of Directive 98/6, '*selling price* shall mean the final price for a unit of the product, or a given quantity of the product, including VAT and all other taxes'.

7. Pursuant to Article 3(1) of the same directive 'the selling price and the unit price shall be indicated for all products referred to in Article 1, the indication of the unit price being subject to the provisions of Article 5 [which provides for exceptions from the obligation to indicate unit price]. The unit price need not be indicated if it is identical to the sales price'.

8. Pursuant to Article 3(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'.

9. Article 10 of Directive 98/6 provides that that directive 'shall not prevent Member States from adopting or maintaining provisions which are more favourable as regards consumer information and comparison of prices, without prejudice to their obligations under the Treaty'.

B. National law

10. It follows from the order for reference that the first sentence of Paragraph 1(1) of the Preisangabenverordnung (German regulation on the indication of prices; 'the PAngV') provides that 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 turnover tax and any other price components (total prices). It also follows from the order for reference that according to Paragraph 1(4) of the PAngV, where a refundable security deposit is required in addition to the consideration for a product, the amount of that security deposit shall be indicated alongside the price for the product and a total amount shall not be indicated.'

[3] Directive 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 (OJ 2005 L 149, p. 22).

III. Facts, national proceedings and the questions referred

11. The defendant distributes foodstuffs. In a leaflet, it advertised drinks in glass bottles and yoghurt in jars, those bottles and jars being returnable against a deposit charged on them at the time of purchase. The deposit was not included in the prices indicated, but was shown by means of the additional words 'plus € … deposit'. The applicant, an association that monitors its members' interests in ensuring compliance with competition law, considers that this is unlawful due to the failure to indicate a total price and has brought an action against the defendant for injunctive relief and the payment of a flat-rate sum by way of reimbursement of the costs associated with the warning notice.

12. The Landgericht (Regional Court, Germany) found against the defendant. However, the court ruling on the appeal dismissed the action.

13. It follows from the order for reference that the second-instance court entertained doubts as to whether the first sentence of Paragraph 1(1) of the PAngV should continue to be interpreted as meaning that a deposit must be included in the total price, adding that the applicant's action cannot be upheld in any event, because Paragraph 1(4) of the PAngV contains an exception (from the obligation to state the total price) where a refundable deposit is charged. The second-instance court also expressed the view that, although that provision is contrary to EU law, it is valid law and it would thus be incompatible with the principles of the rule of law to find against the defendant who complied with that provision.

14. By the appeal on a point of law, lodged with the Bundesgerichtshof (Federal Court of Justice), the referring court, the applicant seeks the restoration of the judgment adopted by the first-instance court.

15. The referring court observes that the first sentence of Paragraph 1(1) of the PAngV is a rule designed to regulate market behaviour within the meaning of Paragraph 3a of the Gesetz gegen den unlauteren Wettbewerb (German law against unfair competition; 'the UWG'). In so far as it obliges traders to indicate the 'total' prices that include value added tax (VAT), that provision is based, according to the referring court, on Article 1, Article 2(a), Article 3 and Article 4(1) of Directive 98/6. Thus, the question as to whether the defendant infringed the first sentence of Paragraph 1(1) of the PAngV hinges on the interpretation of the above provisions of that directive, in particular on the question whether a deposit payable upon the purchase of goods in returnable bottles or jars must be included in the selling price within meaning of Article 2(a) of Directive 98/6.

16. Observing that an affirmative answer to that question would, in principle, preclude the national rule laid down in Paragraph 1(4) of the PAngV, the referring court notes that the latter could still be maintained if it were considered to be a more favourable provision as regards the consumers information on and comparison of prices, that the Member States are allowed to adopt under Article 10 of Directive 98/6. The referring court nevertheless doubts whether the national rule is in any event precluded by Directive 2005/29, which has attained complete harmonisation and precludes adoption of national rules even when those rules are more favourable to consumers.

17. 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?

If Question 1 is answered in the affirmative:

(2) 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 consideration for a product, the amount of that security deposit must be indicated in addition to the price for the product, and a total amount must not be [indicated], or does the approach of full harmonisation pursued by [Directive 2005/29] preclude that?'

18. Written observations have been submitted by the applicant, the defendant, the German Government, as well as the European Commission. Those parties also presented oral argument at the hearing that took place on 19 October 2022.

IV. Analysis

19. I will start my analysis by making preliminary comments on the purpose and broader context of the deposit-refund schemes (A). I will then set out the arguments which, in my view, lead to the conclusion that the term 'selling price', within the specific meaning of Article 2(a) of Directive 98/6, must be interpreted as *not* including a refundable deposit charged to the consumer when he or she purchases goods sold in returnable containers (B). That conclusion makes the second question referred moot. That being said, should the Court not follow my suggestion regarding the first question, I shall set out the reasons which lead me to consider that a national provision, such as Paragraph 1(4) of the PAngV, must be considered to be a more favourable provision as regards consumer information and comparison of prices within the meaning of Article 10 of Directive 98/6, the maintenance of which is not precluded by the complete harmonisation attained by Directive 2005/29 (C).

A. Preliminary remarks on deposit-refund schemes

20. It follows from the order for reference that the drinks and yogurts in question in the main proceedings are sold in returnable glass containers on which a deposit is charged. That deposit is refundable once the containers are returned.

21. Generally, deposit-refund schemes constitute tools to incentivise consumers to return the containers once empty, for further use or recycling, rather than simply throwing them away. [4]

[4] See, to that effect, judgment of 14 December 2004, *Commission* v *Germany* (C-463/01, EU:C:2004:797, paragraph 76) and recital 4 of Directive (EU) 2018/852 of the European Parliament and of the Council of 30 May 2018 amending Directive 94/62/EC on packaging and packaging waste (OJ 2018 L 150, p. 141) ('Directive 2018/852'). For an overview, see *A European Refunding Scheme for Drinks Containers*, European Parliament, 2011, p. 12 et seq. and, more recently, and specifically related to plastics, *Environment Ministers' commitments on plastics. National-level visions, actions and plans announced at the 2022 OECD Council at Ministerial Level (MCM)*, June 2022, ENV/EPOC(2022)14.

22. That tool of circular economy is certainly not new. The OECD Database of Policy Instruments for the Environment cites, as the oldest example identified, the 1799 Irish scheme encouraging the return of soda water containers, and that database itself contains, as the oldest system registered therein, the Oregon bottle bill from 1971. [5]

23. In the context of that database, a deposit-refund scheme has been defined as a system that places 'a surcharge on the price of potentially polluting products' that is refunded 'when pollution is avoided, by returning the products or their residuals.' [6]

24. It should be further stressed that as possible waste, the containers are subject to EU legislation comprising, previously, Directive 85/339/EEC on containers of liquids for human consumption [7] and, currently, the Packaging and Packaging Waste Directive [8] or the Single-Use Plastic Directive. [9] Since those directives refer to deposit-refund (or deposit-return) schemes as possible tools that the Member States can put into place in order to meet their obligations defined in that context, they acknowledge impliedly the capacity of those schemes to contribute effectively to the minimisation of the environmental impact of the waste. [10] The same was acknowledged expressly in the 13th recital of Council Directive 91/157/EEC on batteries and accumulators containing certain dangerous substances. [11]

25. That said, when the Member States put deposit-refund schemes into place, they must remain mindful of the requirements flowing from, inter alia, the rules on the free movement of goods. In that context, certain aspects of the Danish and German schemes have been held incompatible with them in the past. [12]

26. With those elements of broader context in mind, it follows from the case file that Paragraph 1(4) of the PAngV, which is at issue in the main proceedings, was introduced in 1997 to encourage a system of reusable and recyclable containers (and to ensure better comparability of prices in the context in which a refundable deposit is charged). The referring court explains that that occurred in response to its judgment 'Flaschenpfand I' of 1993. I understand that, in that

5 Policy Instruments for Environment, OECD, Database, 2017, p. 8.

6 Ibid. As that source states, deposit-refund schemes do not concern only containers for drinks but may also cover other objects such as lead-acid batteries or scrapped tyres.

7 Council Directive of 27 June 1985 on containers of liquids for human consumption (OJ 1985 L 176, p. 18), repealed by European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (OJ 1994 L 365, p. 10) ('Packaging and Packaging Waste Directive').

8 Packaging and Packaging Waste Directive, as amended by Directive 2018/852 referred to in footnote 4 above.

9 Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment (OJ 2019 L 155, p. 1).

10 See, in particular, the 7th, 8th and 10th recitals, as well as Article 5(2) of Council Directive 85/339, referred to in footnote 7 above; Article 5(1)(a) of the Packaging and Packaging Waste Directive, referred to in footnote 7 above, as amended; and point (a) of the third subparagraph of Article 9 of the Single-Use Plastic Directive, referred to in footnote 9 above.

11 Council Directive of 18 March 1991 on batteries and accumulators containing certain dangerous substances (OJ 1991 L 78, p. 38), repealed by Directive 2006/66/EC of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/157/EEC (OJ 2006 L 266, p. 1).

12 Judgments of 20 September 1988, *Commission* v *Denmark* (302/86, EU:C:1988:421); of 14 December 2004, *Radlberger Getränkegesellschaft and S. Spitz* (C-309/02, EU:C:2004:799); and of 14 December 2004, *Commission* v *Germany* (C-463/01, EU:C:2004:797). Moreover, in a context of national legislation and practice related to a deposit-refund scheme, judgment of 9 June 2021, *Dansk Erhverv* v *Commission* (T-47/19, EU:T:2021:331) concerns the legality of Commission Decision C(2018) 6315 final of 4 October 2018 concerning State Aid SA.44865 (2016/FC) – Germany – Alleged State aid to German beverage border shops, and is subject to an appeal in a pending case C-508/21 P.

judgment, the referring court held that to advertise soft drinks in a bottle subject to a deposit, without the deposit being mentioned and without the total price being stated was incompatible with the PAngV. [13]

27. To recall, Paragraph 1(4) of the PAngV imposes on traders the obligation to state the price for the product itself *and* the amount of the deposit, when a deposit is charged, while prohibiting the total amount from being indicated.

28. I will thus now turn to the first question referred in order to examine whether, aside from constituting an incentive to participate in the effort of recycling and reuse, the deposit charged on containers for drinks and foodstuffs must be considered to form part of the 'selling price' within the meaning of Article 2(a) of Directive 98/6. If that is the case, the amount of the deposit would have to be incorporated into the 'selling price' which, pursuant to Article 3(1) of Directive 98/6, must be indicated, together with the 'unit price', for the products sold to consumers. Such a conclusion would also be relevant for any advertisement that mentions the 'selling price', a matter that is subject to Article 3(4) of that directive.

B. Does a deposit charged on returnable containers for drinks and yogurts form part of the 'selling price'?

29. According to Article 2(a) of Directive 98/6, '*selling price* shall mean the final price for a unit of the product, or a given quantity of the product, including VAT and all other taxes'. The examination of the wording of those terms (1), read in the light of the specific objectives pursued by Directive 98/6 (2) as well as the environmental objectives followed by other instruments of EU law (3) lead me to conclude that the deposit amount cannot be considered to form part of the 'selling price' within the meaning of that provision.

1. The wording of Article 2(a) of Directive 98/6

30. I shall explain below that a deposit charged on certain containers that must be refunded to the customer upon the return of the container does not constitute a 'tax' (a). I will then turn to the further qualifications that the Court attributed to the concept of 'selling price' when it described the elements that fall under that concept as being, in principle, unavoidable components that constitute the pecuniary consideration for the acquisition of the product concerned (b).

(a) The deposit at issue is not a 'tax'

31. I note, first, that the deposit at issue cannot be considered to be a 'tax', which is an element mentioned expressly in Article 2(a) of Directive 98/6 as being a component that must be included in the 'selling price'.

32. This is simply because the proceeds of a tax normally constitute a source of public revenue without there being any supply provided as consideration. Yet, none of those features are present when it comes to a deposit such as the one at issue in the main proceedings.

[13] BGH 14 October 1993, I ZR 218/91. That judgment is available at https://research.wolterskluwer-online.de/document/bdbc1eba-d26c-4ffc-915c-2a5b764acf6b.

33. Subject to verification by the referring court, it would appear that the proceeds from the collection of the deposit at issue in the main proceedings never reach the public treasury. Moreover, as will be explained in more detail below, the deposit can be seen as consideration given for the container, charged with the understanding that it will be refunded upon its return.

34. More precisely, it seems to be in the inherent nature of the deposit at issue in the main proceedings (and also of similar deposits more generally) that – at the very moment when it is charged – the seller (or even a broader category of traders) undertakes the obligation to accept the return of the container on which the deposit was charged and refund the amount of the deposit to the customer (or, in fact, to anybody who returns the container). In that respect, the German Government explained that the traders' obligation to accept the container back and refund the deposit is not limited in time.

35. For those reasons, I hold the view that the deposit at issue cannot be considered to be a 'tax'.

36. With those clarifications, I will turn to the specific qualifications made by the Court in the context of Article 2(a) of Directive 98/6 which I have already mentioned above and which aim to determine whether a given component of the price may be viewed as 'final'.

(b) Is the deposit at issue a final component of the price?

37. Beyond the express inclusion of taxes in the concept of 'selling price', as set out in Article 2(a) of Directive 98/6, that directive does not contain any further indication regarding the precise scope of that term, apart from the fact that the selling price is the 'final price'.

38. When interpreting those terms in *Citroën Commerce*,[14] a case much commented upon by the parties to the present proceedings, the Court held, in paragraph 37 of that judgment, that 'as a final price, the selling price must necessarily include the unavoidable and foreseeable components of the price, components that are necessarily payable by the consumer and constitute the pecuniary consideration for the acquisition of the product concerned.'

39. *In casu*, the purchaser had to pay the costs of transferring a purchased vehicle from the manufacturer to the dealer on top of the purchase price that was indicated in an advertisement. That advertisement also mentioned the costs of the transfer, but, as in the case in the main proceedings, those costs were mentioned separately. In that context, the Court emphasised that the consumer was indeed required to pay those costs which were, in contrast to, in particular, possible costs for delivering the vehicle to a place of the consumer's choosing, unavoidable and foreseeable.[15] Based on those elements, the Court concluded that they should have been included in the selling price of the vehicle and not separately.[16]

40. In order to assess whether the same conclusion can be reached vis-a-vis a refundable deposit, I will apply the test which the Court set out in paragraph 37 of *Citroën Commerce*, recalled in point 38 above, which appears, on a closer look, to encapsulate two main criteria that determine

[14] Judgment of 7 July 2016, *Citroën Commerce* (C-476/14, EU:C:2016:527) ('*Citroën Commerce*').

[15] In that fashion, the Court arguably meant to contrast those unavoidable costs with the price of possible optional services. Such optional services were at issue in *Vueling Airlines* to which the Court referred. See *Citroën Commerce*, paragraphs 38 to 40, as well as judgment of 18 September 2014, *Vueling Airlines* (C-487/12, EU:C:2014:2232, paragraph 37) ('*Vueling Airlines*').

[16] *Citroën Commerce*, paragraph 41. I understand that, due to the specifics of the case, it was uneccesary for the Court to examine the last element of the test set out in paragraph 37 of the judgment, as recalled in point 38 of this Opinion, on the question of whether the cost at issue constitutes the pecuniary consideration for the acquisition of the product concerned.

whether a given cost must be considered to form part of the 'final', and thus, 'selling' price: it must (i) constitute pecuniary consideration for the acquisition of the product concerned and (ii) be unavoidable, because it is necessarily and foreseeably payable by the consumer.

(i) Is the deposit at issue pecuniary consideration for the acquisition of the product concerned?

41. First, I do not think that there is any doubt that the deposit such as that at issue is *pecuniary* in nature.

42. Second, subject to the respective national law, it would appear that, between the purchase of the product and the return of the container, the consumer not only acquires ownership of the product but also ownership of the container and can, in principle, dispose of it at will. In that respect, although I agree with the defendant and the German Government that the acquisition of the container is not the primary purpose of the purchase and that the consumer bears no specific interest for it, I consider that that ancillary acquisition cannot be avoided because the container and the product sold in it form a whole, as the applicant and the Commission in essence argue.

43. That being said, it would appear that, subject to the respective national law, when the consumer 'returns' the container and the trader 'refunds' the deposit, what happens in legal terms is that the trader (re)purchases the container, as he or she is unconditionally obliged to do. That obligation may, moreover, not be limited to the containers of the products bought from that specific trader. The obligation to 'refund' the deposit thus appears to be an obligation to buy the containers presented to the trader for the price that is specified by law or otherwise.

44. It could therefore be argued that, in contrast to what happens with packaging where no deposit applies, the application of a deposit-refund scheme transforms the packaging into goods in their own right, with autonomous economic value that can be distinguished from the economic value of their content.

45. Those considerations may prompt the argument that the containers do not constitute 'products offered by traders to consumers' within the meaning of Article 1 of Directive 98/6 to which the 'selling price' under Article 2(a) of that directive attaches.[17] That would then lead to the conclusion that the deposit cannot be considered to be a component of the 'selling price' within the meaning of that directive, because it is not consideration for the acquisition of the *product concerned* but rather consideration for the ancillary acquisition of the *container*.

46. However, besides being somewhat cumbersome, that construct does not sit well with the simple fact, already mentioned, that the acquisition of the containers and the goods contained therein cannot be dissociated, neither due to the obvious practical reasons, nor, subject to any specific national law, from the legal perspective. For those reasons, I am of the view that a deposit should be considered as constituting a part of the pecuniary consideration for the acquisition of the goods that are offered by traders to consumers within the meaning of Directive 98/6.

47. Nevertheless, it remains to be determined whether the costs associated with a deposit must be considered as 'unavoidable'.

[17] I recall that, pursuant to Article 1 of Directive 98/6, the purpose of that directive 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'. Emphasis added.

(ii) Is the deposit at issue an unavoidable component of the price?

48. There has been much discussion between the parties to the present proceedings as to whether a deposit can be considered an unavoidable part of the price. That discussion, in essence, revolved around the conundrum raised by the elusive nature of the deposit which, at the time of the purchase, *cannot but* be paid by the consumer, even though it can be reimbursed thereafter upon the return of the container.

49. The applicant and the Commission argue that the relevant moment should be the time of purchase since it is at that moment that the consumer must pay the total sum to acquire the product at issue. Moreover, the Commission pointed to several scenarios whereby the container is not returned, meaning that the amount of the deposit is not claimed back. More precisely, the Commission made reference to a situation where a tourist may purchase such a product and then leave the national territory, thus foregoing chance to reclaim the deposit. It further pointed out that the container may be lost or broken, or even the fact that the consumer may simply decide to keep it and use it for other purposes, such as to store homemade jams.

50. In my view, the Commission is perfectly correct to suggest that some of the containers subject to a deposit may find a new life, so to speak, or may otherwise be deviated from the path to (immediate) reuse or recycling for which they were destined. It may certainly be the case that one decides not to return certain containers (and thus foregoes the possibility to redeem the deposit), be it glass jars which one intends to use for homemade strawberry jam or aluminium containers, initially filled with beer, which one may keep as a dear souvenir from a summer music festival. We may also occasionally travel out of the country, forgetting or simply not having the time to return a container on which a deposit applies, or we may inadvertently drop and break a glass bottle which could have been returned and used again but which, unfortunately, never will be.

51. That said, I would argue that those are not the *typical* situations that one associates with the fate of containers subject to a deposit once emptied. In that regard, the German Government explained at the hearing that, in 2019, 96% of plastic containers subject to a deposit were returned[18] which shows, at least as regards that Member State, a strong tendency on the part of the consumers to participate in the effort of reuse and recycling (irrespective of what the 'competing' alternatives may be, for example, throwing those containers away, keeping them for practical use or sentimental reasons, breaking them inadvertently, or forgetting about them altogether). It would thus appear that in the vast majority of cases, the costs associated with a deposit are, *in fine*, avoided.

52. Moreover, irrespective of the exact percentage rate of returns of containers, I consider that what matters the most in the present context is that the deposit *can*, as a matter of principle, be refunded and is *supposed to be*.

53. The situation involving a refundable deposit differs fundamentally from a situation involving costs related to the transfer of a vehicle as in *Citroën Commerce*, in which the criterion of 'unavoidability' appears to have played a crucial role.

[18] I observe that a return rate of 98,5% of refillable bottles is stated in *Awareness and Exchange of Best Practices on the Implementation and Enforcement of the Essential Requirements for Packaging and Packaging Waste, Final Report*, European Commission, DG ENV, 3 August 2011, p. 80, point 5.1.2., available at https://ec.europa.eu/environment/pdf/waste/packaging/packaging_final_report.pdf.

54. It is perhaps for that reason that much of the discussion in the present case revolved around the issue of whether the costs associated with a refundable deposit are avoidable or not. However, in the context of the present case the discussion about which of the two possible moments in time (the purchase of the product or the return of the container) is more relevant for such an assessment risks becoming somewhat circular. The criterion of 'unavoidability' of the cost was helpful in the context of *Citroën Commerce*, allowing, in my view, the Court to emphasise that the transfer costs at issue did not concern an *optional* service chosen by the consumer.[19] Those terms are, however, less helpful in the present circumstances which, in my opinion, can be efficiently assessed through the term 'final', which characterises the 'selling price' within the meaning of Article 2(a) of Directive 98/6 and which appears directly in that provision.

55. To my mind, what defines the deposit-refund scheme is the fact that the deposit constitutes a part of the price that may (and perhaps indeed is expected to) be refunded to the consumer. This changes the situation quite radically when it comes to the question whether the price paid by the consumer is final compared to the situation when no deposit-refund scheme applies. In other words, and as the defendant and the German Government in principle argue, the fact that the deposit may very well be an unavoidable element of the price at the time of the purchase should not cloud its intrinsic nature as a refundable element of the price which thus means that it may not be a component of the price that is ultimately borne by the consumer.

56. Those considerations thus lead me to conclude that a refundable deposit cannot be considered to form part of the 'selling price' within the meaning of Article 2(a) of Directive 98/6. That finding is further corroborated by the specific objectives that that directive pursues to which I shall turn below.

2. Objectives pursued by Directive 98/6

57. The purpose of Directive 98/6 is, pursuant to Article 1 thereof, '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.'

58. Accordingly, Article 4(1) of that directive provides that 'the selling price and the unit price must be unambiguous, easily identifiable and clearly legible.'

59. It follows more specifically from Article 3(1) of Directive 98/6 that the traders have to indicate the selling price and the unit price for all products covered by Directive 98/6.[20] Furthermore, pursuant to Article 3(4) thereof, any advertisement which mentions the selling price is to also indicate the unit price.

[19] See above, point 39 and footnote 15. I recall that in *Citroen Commerce*, the Court referred to its previous judgment in *Vueling Airlines* in which it had distinguished between, on the one hand, the unavoidable and foreseeable items included in the price of the air service which are to be specified as elements of the final price, and, on the other hand, the price supplements relating to services that are neither compulsory nor necessary for the air service itself (such as the carriage of luggage), within the meaning Article 23(1) of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3).

[20] The obligation to indicate the price per unit of measurement being subject to some exceptions such as, pursuant to the last sentence of Article 3(1), when 'it is identical to the sales price.'

60. Although the substantive scope of that directive is arguably rather broad when it comes to the products covered by it,[21] it presents a special significance in a context in which the consumer is offered products in variable quantities and packaging types and therefore has an interest in being able to compare the prices on the basis of the same unit of measurement.[22] Indeed, as the Court recalled, with the adoption of that instrument, the EU legislator intended not 'to protect consumers in relation to the indication of prices, in general …, but specifically in relation to the indication of the prices of products by reference to different units of quantity.'[23]

61. That said, and as noted by the referring court, when the consumer is presented with one 'total selling' price, he or she is well informed as to what that purchase will cost in concrete terms.

62. At this juncture, I would like to come back to the argument of the applicant, endorsed by the Commission at the hearing, featuring a consumer who only has one euro at his or her disposal. In the applicant's initial example, that consumer was, to be more precise, a child who, as I understand it, could be mistakenly led to believe that it is possible to buy his or her favourite drink costing 89 cents only to discover that this is not so, due to the obligation to pay a deposit of an additional 25 cents.

63. I must say that I am entirely sympathetic to the disappointment that that little customer is likely to experience when presenting the chosen drink to the cashier for payment, only then to discover that '€0.89+€0.25 deposit' means that it costs more than one euro, thus meaning that he or she will unfortunately not be able to buy it.

64. However, I would first point out that the usual benchmark that guides the Court's interpretation of provisions of consumer law is that of a reasonably well informed consumer and not that of a vulnerable consumer such as a child.[24] Second, I note that the arguable benefit of straightforward information about the total price of a given product must, at any rate, be assessed against the disadvantages that arise for the consumers and his or her capacity to easily compare prices of products sold under a deposit-refund scheme and those that are not, or those to which deposits of different amounts apply. In other words, the manner in which the price is indicated for each product considered in isolation should not hamper the comparability of the prices of the products considered as a whole.

65. Viewed in that broader context, when the deposit is included in the selling price, there is a risk that consumers may make flawed comparisons between the prices charged for different products given that some of them may be subject to a refundable deposit, while others may not and because different deposit values may apply depending on the type of container or product.[25] It follows from the order for reference that such considerations (together with the environmental ones) prompted

[21] That is attested by the fact that in *Citroën Commerce*, the Court applied Directive 98/6 to the indication of the price in an advertisement related to a *vehicle*. The position to the contrary was set out in Opinion of Advocate General Mengozzi in *Citroën Commerce* (C-476/14, EU:C:2015:814, 'Opinion in *Citroën Commerce*', point 50).

[22] Opinion in *Citroën Commerce*, point 48. See also Opinion of Advocate General Cruz Villalón in *Commission* v *Belgium* (C-421/12, EU:C:2013:769, point 63).

[23] Judgment of 10 July 2014, *Commission* v *Belgium* (C-421/12, EU:C:2014:2064, paragraph 59).

[24] See, to that effect, recital 18 of Directive 2005/29 and, for example, judgment of 3 February 2021, *Stichting Waternet* (C-922/19, EU:C:2021:91, paragraph 57 and the cited case-law).

[25] The German Government explained that, as regards the domestic products, different deposit amounts of 2, 3, 8, 15 or 25 cents apply depending on the type of container. The total price of those products may thus differ even when they are sold in the same quantities. Moreover, that government further explained that imported products may not be subject to a deposit or a different value of such deposit may apply for those products.

the national legislature to adopt Paragraph 1(4) of the PAngV – the provision at issue in the main proceedings – since the legislature was concerned about the visual disadvantage faced by products sold under a deposit-refund scheme because those products appear more expensive.

66. Moreover, I recall that, as a general rule, Directive 98/6 imposes the obligation to indicate not only the selling price but also the price per unit of measurement. Incorporating the amount of the deposit into the selling price may, in my view, create confusion about the way in which such price per unit of measurement has been established. It is all the more concerning, to my mind, that that price is the most straightforward tool for the consumer to compare prices of products sold in different quantities.

67. Those considerations of the objectives pursued by Directive 98/6 confirm, in my view, my previous conclusion to the effect that the deposit cannot be considered to form part of the 'selling' price within the meaning of Article 2(a) of Directive 98/6.

68. I consider that the same is true when it comes to the environmental objectives to which deposit-refund schemes are linked in the first place, as I will explain in more detail below.

3. The broader environmental context of Directive 98/6

69. Deposit-refund schemes are, above all, tools of environmental policy in so far as they aim to incentivise consumer participation in reuse or recycling in order to decrease the negative environmental impact of the waste. They are acknowledged, expressly or impliedly, in that capacity by the EU legislation, as already briefly noted in Section A of this Opinion.

70. To recall, an express acknowledgment to that effect was made in the 13th recital of Directive on batteries and accumulators containing certain dangerous substances. [26]

71. Moreover, Directive 85/339 on containers for human consumption [27] (now repealed) stated, in Article 5(2) thereof, that 'where a deposit system is used, Member States shall take appropriate steps to ensure that the consumer is clearly informed of the amount of the deposit.' The proposal having led to that directive makes it clear that the Commission examined the suitability of the introduction of common rules that would be more specific and constraining and would relate, inter alia, to the development of the deposit-refund schemes. That proposal even suggested the symbol 'R' be indicated on the containers concerned, but that suggestion was not taken on board in the adopted directive, [28] later repealed by the Packaging and Packaging Waste Directive, as already noted. [29]

[26] Referred to in footnote 11 above. 'Whereas recourse to economic instruments such as the setting up of a deposit system may encourage the separate collection and recycling of spent batteries and accumulators'. That instrument was repealed by Directive 2006/66/EC, referred to in footnote 11, which does not contain any specific mention of deposit-refund schemes. See its Article 8 on 'Collection schemes'.

[27] Referred in footnote 7 above.

[28] See draft Article 7(2)(a) of the Proposal for a Council Directive on containers of liquids for human consumption, COM/81/187 final (OJ 1981 C 204, p. 6) and point 9 of the Explanatory Memorandum of that proposal.

[29] Referred to in footnote 7 above.

72. The Commission's proposal, having led to the adoption of the Packaging and Packaging Waste Directive, acknowledges the efforts made by some Member States to tackle the environmental problem caused, in particular, by the use of single-use containers, and points to deposit-refund schemes introduced, or to be introduced, in some of the Member States. [30]

73. However, the initial version of the directive in question did not contain any reference to the deposit-refund schemes, [31] which seems to reflect the difficulties posed by some of those schemes as regards compliance with the rules on the free movement of goods, [32] an aspect to which I referred earlier in this Opinion. [33]

74. That changed nevertheless with the amendments made to Article 5 of that directive by Directive 2018/852. [34] Article 5(1)(a), as amended, currently provides that 'deposit-return schemes' are among the measures that the Member State may adopt in order to meet their obligation 'to encourage the increase in the share of reusable packaging placed on the market and of systems to reuse packaging in an environmentally sound manner and in conformity with the Treaty …'.

75. Furthermore, since 2018, it follows from point 5 of Annex IVa to the Directive on Waste, [35] as well as from point (a) of the third subparagraph of Article 9(1) of the Single-Use Plastic Directive, adopted in 2019, [36] that the deposit-refund schemes are recognised as means that the Member State may use in order to, in essence, reduce or prevent the generation of waste.

76. Those more or less recent instruments of EU law in the field of packaging and waste thus show that the deposit-refund scheme has been perceived by the EU legislature as a tool that can effectively contribute to the long-term mitigation of the negative environmental impact, with the modalities being left, subject to the compliance with the Treaty, to the Member States.

77. The prohibition to indicate the total amount of the price for a product sold under a deposit-refund scheme, as provided for under Paragraph 1(4) of the PAngV, may be considered as a method which aims, as the defendant in essence submits, and as the German Government explained at the hearing, to draw the consumer's attention to the fact that the given container can be recycled or reused. In that way, the consumers may be encouraged to choose such products that are considered to be more environmentally friendly. However, that message may be weakened if the total price is indicated because that way of indicating the price risks blurring the information that a deposit-refund scheme applies at the first place.

30 Proposal for a Council Directive on packaging and packaging waste, COM/92/278 final, paragraphs 1.3, 1.6 and 3.2. Similar references were included also in the Explanatory Memorandum to the proposal having led to the adoption of Directive 85/339, referred to in footnote 28, p. 6 to 7.

31 See Article 7 of the initial version of that directive on 'Return, collection and recovery systems'.

32 Proposal COM/92/278 referred to in footnote 30, p. 8, point 4.1. The proposal refers to the 'Danish case', arguably pointing to judgment of 20 September 1988, *Commission* v *Denmark* (302/86, EU:C:1988:421), referred to at p. 4, point 1.6 of the proposal.

33 See point 25 of the present Opinion.

34 Referred to in footnote 4 above.

35 Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, as amended (OJ 2008 L 312, p. 3). See also Recitals 29 and 30 of Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC on waste (OJ 2018 L 150, p. 109) that introduced Annex IVa into the Directive on Waste.

36 Referred to in footnote 9 above.

78. Such considerations taken from the external (environmental) context of Directive 98/6 thus constitute an additional element that, in my view, confirm my previous conclusion according to which the amount of the deposit cannot be considered to form part of the 'selling price' within the meaning of Article 2(a) of Directive 98/6.

79. In the light of the foregoing, I suggest that the Court should provide a response to the first question to the effect that Article 2(a) of Directive 98/6 must be interpreted as meaning that the term 'selling price' laid down therein does not include a refundable deposit charged on returnable containers in which products are offered to consumers.

C. In the alternative: the prohibition on indicating a 'total' price constitutes a more favourable provision that improves information on, and facilitates the comparison of, prices

80. If the Court decides not to follow my proposed reply to the first question and concludes that the deposit does form part of the 'selling price' within the meaning of Article 2(a) of Directive 98/6, then an answer should be provided to the referring court's second question, whether Paragraph 1(4) of the PAngV could be maintained as a 'more favourable provision' within the meaning of Article 10 of Directive 98/6 (1) and, if that is the case, whether the possibility of maintaining it would nevertheless be precluded by the complete harmonisation attained by Directive 2005/29 (2).

1. Is the national rule at issue a 'more favourable provision' within the meaning of Article 10 of Directive 98/6?

81. I recall that Article 10 of Directive 98/6 permits the adoption of national measures that are 'more favourable' 'as regards consumer information and comparison of prices'. Thus, should the deposit at issue be considered to form part of the 'selling price', the prohibition on including it in the selling price provided for by Paragraph 1(4) of the PAngV could still be considered compliant with Directive 98/6 if it constitutes such a 'more favourable' measure.

82. The referring court is of the view that the national provision at issue is not more favourable for consumers because it obliges them to calculate the total price themselves. This view is shared by the Commission.

83. I certainly agree that the national rule at issue makes it necessary for the consumers to add both of the figures at issue together in order to ascertain the total amount of the price to be paid. That being said, a deposit system makes an arithmetical exercise unavoidable in any case, whether the deposit is included in the selling price or not. More importantly, to view the necessity to add up two figures as being less favourable to the consumers embraces, in my view, an incorrect premiss when it comes to the objectives pursued by Directive 98/6. In that respect, and by reference to my observations made in point 64 of this Opinion, it does not follow from that directive that the EU legislature sought to shield the (reasonably well informed) consumer from the necessity to add up two figures when that becomes necessary. Rather, Directive 98/6 rests on the idea that, for such reasonably well informed consumers, the comparison of the prices should be easy. That objective must thus be kept in mind also in a specific situation when a deposit-refund scheme applies. For the reasons I already explained above, that objective is best served by a rule such as the one which follows from Paragraph 1(4) of the PAngV.

84. In that respect, I would refer to the observations made in Section B.2 of this Opinion, in which I explained that the optimal fulfilment of the objective to improve information on prices for consumers, as well as their capacity to compare them, is ensured when the total amount of the price including the deposit is *not* indicated.

85. Indeed, indicating the total amount including the deposit may make things more complicated when it comes to comparing the prices of various products and, moreover, may create confusion as regards the establishment of the price per unit of measurement. Thus, should the deposit be considered to form part of the selling price, in my view the same arguments apply to support the conclusion that not indicating the total amount is more favourable, within the meaning of Article 10 of Directive 98/6, than *indicating* it.

86. That said, when adopting 'provisions which are more favourable' within the meaning of Article 10 of Directive 98/6, the Member States must respect their obligations flowing from other provisions of EU law.[37] In that context, the referring court expressed doubts as to whether the national provision at issue, even if it is considered to be 'more favourable', can be maintained or whether that is precluded by the complete harmonisation attained by Directive 2005/29. I shall turn to that last aspect of the present case below.

2. The national rule at issue and Directive 2005/29

87. As already mentioned, by its second question, the referring court invites the Court to clarify whether the provision in Paragraph 1(4) of the PAngV is precluded by virtue of the complete harmonisation under Directive 2005/29. Although the wording of that question does not reveal a more precise reason for the referring court's doubt, I understand, based on the arguments developed in the order for reference, that the referring court considers it possible that the national rule at issue results in an omission of information that must be considered 'material' within the meaning of Directive 2005/29, in violation of what that directive requires in the context of advertisement.

88. It also ought to be noted that the order for reference elaborates on the relevant features of Directive 2005/29, which indeed, has brought about complete harmonisation,[38] and dwells also on the relationship between that directive and Directive 98/6. In that context, the referring court observes that Directive 2005/29 does not allow for derogating national measures, even when they are adopted as 'more favourable' on the basis of Article 10 of Directive 98/6, save when they enter the scope of one of the express exemptions provided for by Directive 2005/29, none of which, according to the referring court, applies in the present circumstances.

[37] I recall the 'without prejudice to their obligations under the Treaty' proviso in Article 10 of Directive 98/6.

[38] See, for example, judgment of 10 July 2014, *Commission* v *Belgium* (C-421/12, EU:C:2014:2064, paragraph 55 and the case-law cited).

89. While I acknowledge the depth of the referring court's analysis, I do not consider it necessary to engage with it in full because its usefulness is, as far as I understand the referring court's doubts, premised on the view that Paragraph 1(4) of the PAngV derogates from the requirement set out in Directive 2005/29 to provide to the consumer 'material' information about the price of the products offered. [39]

90. However, as I will explain below, I do not think that that premiss is correct.

91. The referring court appears to base its doubts as to the compatibility with EU law of the national prohibition to indicate the total price particularly on Article 7(5) of Directive 2005/29. That provision classifies as 'material' information requirements that apply in the context of advertising and which are set out in other instruments of EU law the non-exhaustive list of which is given in Annex II to Directive 2005/29. [40] That list refers, inter alia, to Article 3(4) of Directive 98/6, which requires, in principle, the unit price to be provided in any advertisement that also mentions the selling price. The referring court observes that the obligation to provide information about the selling price of products offered to consumers laid down in Article 3(1) of Directive 98/6, although not strictly required by Article 3(4) of that directive, should also be considered to be material.

92. I understand those concerns of the referring court as implying that, in the context of those considerations, the selling price should mean the 'total price', which includes the deposit and therefore, to the extent that Paragraph 1(4) of the PAngV prevents that specific information from being given *as such* to consumers, it may be at odds with the requirement to provide them with material information (about the price) pursuant to Article 7 of Directive 2005/29.

93. In order to address the referring court's doubts, I note, first, that it follows from Article 7(1) of Directive 2005/29 that material information is, in general, information 'that the average consumer needs, according to the context, to take an informed transactional decision and [whose omission] thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.'

94. Second, I observe that the 'price inclusive of taxes' is included in Article 7(4)(c) of Directive 2005/29 [41] among six types of information considered as 'material' in the context of an 'invitation to purchase'. [42]

[39] I note that the assessment in the light of Directive 2005/29 is typically conducted vis-à-vis a specific commercial practice voluntarily adopted by a trader, or vis-à-vis national legislation prohibiting, in all circumstances, a specific conduct, allegedly beyond what the harmonised rules of Directive 2005/29 allow. By contrast, the referring court's second question invites the Court to assess the compatibility, with that directive, of a statutory requirement to the effect that may, according to that referring court's doubts, result in an unfair commercial practice. That being said, I consider such an assessment to be justified because if the Member States were allowed to require traders to adopt behaviour amounting to an unfair commercial practice within the meaning of Directive 2005/29, that would deprive that directive of its practical effect.

[40] Article 7(5) of Directive 2005/29 states that 'information requirements established by Community law in relation to commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II, shall be regarded as material.'

[41] Article 7(4)(c) classifies as material information 'the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable.'

[42] Article 2(i) of Directive 2005/29 defines 'invitation to purchase' as 'a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase'. See on that concept, judgment of 12 May 2011, *Ving Sverige* (C-122/10, EU:C:2011:299, paragraph 28).

95. Third, it is true that the Court held in *Deroo-Blanquart* that 'the overall price of the product, and not the price of each individual component, is considered to be material information', and that Article 7(4)(c) of Directive 2005/29 thus 'obliges the trader to indicate to the consumer the overall price of the product concerned.'[43] *In casu*, the trader indicated the overall price of a computer equipped with pre-installed software, offered to consumers as a package, but did not state the respective components of the price. The Court held that the failure to indicate separately the prices for the computer and the price for the software did not constitute a misleading commercial practice within the meaning of Directive 2005/29.

96. I understand the dictum about the overall price being material information, made in *Deroo-Blanquart*, as impliedly referring to situations in which the consumer is only provided with the different components of the price which makes it difficult for him or her to understand the actual price of the product. As such, I do not consider that it is fully transposable to the present circumstances because, for the reasons I explained in the previous part of this Opinion, due to the fact that it is refundable, a deposit can hardly be compared to a price to be paid for software installed in a computer or for any other item presented in a combined offer.

97. Moreover, I am of the view that the relevant question to ask in the present context is not whether the prohibition to state the total amount of the price leads to an omission of 'material information' but whether that is the effect of Paragraph 1(4) of the PAngV, considered as a whole. I recall that that provision, besides containing that prohibition, sets out the obligation to indicate the price for the product *and* the amount of the deposit.

98. I would further recall that, as also highlighted by the Court in *Deroo-Blanquart*,[44] in accordance with recital 14 of Directive 2005/29, material information refers to *key items* of information which the consumer needs in order to make an informed transactional decision.

99. In those circumstances, I am of the view that the indication of the price, composed of two (clearly) stated and linked elements such as '€0.89+€0.25 deposit' provides the consumer not only with the information on the total price to be paid at the moment of the purchase, which can be easily established by the average consumer who is reasonably well-informed and reasonably observant and circumspect,[45] but also with the equally important information that the product is being sold under a deposit-refund scheme which has the specific economic and environmental implications that I described above.

100. Lastly, I recall that, for a practice to be considered unfair within the meaning of Article 5(2) of Directive 2005/29, it must, inter alia, lead to material distortion of the economic behaviour of consumers which, as follows from Article 2(e) of Directive 2005/29, is understood as an appreciable impairment of the consumer's ability to make an informed decision causing him or her to take a transactional decision that he or she would not have taken otherwise.

101. In contrast to that, it follows from the order for reference that Paragraph 1(4) of the PAngV was adopted to *enhance* the consumers' capacity to make informed decisions based on a better comparability of prices. It also results from the assessment conducted in the previous part of the present Opinion that indicating the deposit separately and not stating the total price contributes to the fulfilment of the objectives pursued by Directive 98/6 to improve consumers information and facilitate the comparison of prices. In those circumstances, I fail to see how the national

[43] Judgment of 7 September 2016, *Deroo-Blanquart* (C-310/15, EU:C:2016:633, paragraph 46) ('*Deroo-Blanquart*').

[44] *Deroo-Blanquart*, paragraph 48.

[45] That being the benchmark set by Directive 2005/29 pursuant to recital 18 thereof.

provision at issue could, per se, have the effect of requiring traders to engage in conduct that will result in an impairment of consumers' capacity within the meaning of Article 2(e) of Directive 2005/29.

102. In the light of the above, I therefore propose that the Court reply to the second question referred to the effect that Directive 2005/29 does not preclude a national provision such as Paragraph 1(4) of the PAngV, pursuant to which, where a refundable deposit is required in addition to the consideration for a product, the amount of that deposit must be indicated in addition to the price for the product, and a total amount must not be stated.

V. Conclusion

103. In the light of the foregoing, I suggest that the Court answer the questions referred by the Bundesgerichtshof (Federal Court of Justice, Germany) as follows:

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

should be interpreted to the effect that

the term 'selling price' laid down therein does not include a refundable deposit charged on a returnable container in which products are offered to consumers.