Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 16 December 2015*

Case C-476/14

Citroën Commerce GmbH
v
Zentralvereinigung des Kraftfahrzeuggewerbes zur Aufrechterhaltung lauteren Wettbewerbs e.V. (ZLW)
(Request for a preliminary ruling

from the Bundesgerichtshof (Federal Court of Justice, Germany))

(Reference for a preliminary ruling — Consumer protection — Advertisement containing an indication of price — Separate indication of the transfer costs — Concepts of 'offer' and 'price inclusive of taxes' — Obligation under national law to include in the price indicated in an advertisement the additional costs necessarily incurred in connection with the transfer of the vehicle — Whether compatible with EU law — Unfair commercial practice — Invitation to purchase — Material information relating to price))

1. Does EU law contain requirements that are so precise, from the point of view of advertising and the indication of prices, that an advertisement for a car which refers separately to the price for the product, on the one hand, and to the amount of the costs necessarily incurred in transferring that product from the manufacturer to the purchaser, on the other, must automatically be prohibited? That is the issue in this request for a preliminary ruling.

I – Legal framework

A – *EU law*

1. Directive 98/6/EC

2. It is stated in recital 1 of Directive 98/6 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** that 'transparent operation of the market and correct information is of benefit to consumer protection and healthy competition between enterprises and products'.

3. Recital 2 of Directive 98/6 states that 'consumers must be guaranteed a high level of protection'.

* Original language: French.
** OJ 1998 L 80, p. 27.

4. Recital 6 of Directive 98/6 states that 'the obligation to indicate the selling price and the unit 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'.

5. Recital 7 of Directive 98/6 goes on to state that, 'therefore, there should be a general obligation to indicate both the selling price and the unit price for all products …'.

6. It follows from recital 12 that 'Community-level rules can ensure homogenous and transparent information that will benefit all consumers in the context of the internal market'.

7. Article 1 of Directive 98/6 states that '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'.

8. Article 2(a) of Directive 98/6 defines the selling price as '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'.

9. Article 3(4) of Directive 98/6 provides that '[a]ny advertisement which mentions the selling price of products referred to in Article 1 shall also indicate the unit price subject to Article 5'.

10. Article 4(1) of Directive 98/6 states that '[t]he selling price and the unit price must be unambiguous, easily identifiable and clearly legible'.

11. Article 5(1) of Directive 98/6 provides that 'Member States may waive the obligation to indicate the unit price of products for which such indication would not be useful because of the products' nature or purpose or would be liable to create confusion'.

2. Directive 2005/29

12. It follows from recitals 3 and 4 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 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'),*** that '[t]he laws of the Member States relating to unfair commercial practices show marked differences which can generate appreciable distortions of competition and obstacles to the smooth functioning of the internal market. … These disparities cause uncertainty as to which national rules apply to unfair commercial practices harming consumers' economic interests and create many barriers affecting business and consumers. … Such barriers also make consumers uncertain of their rights and undermine their confidence in the internal market'.

13. Recital 6 of Directive 2005/29 states that the latter 'approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm consumers' economic interests and thereby indirectly harm the economic interests of legitimate competitors. In line with the principle of proportionality, this Directive protects consumers from the consequences of such unfair commercial practices where they are material but recognises that in some cases the impact on consumers may be negligible'.

*** OJ 2005 L 149, p. 22.

14. Recital 10 of Directive 2005/29 states that '[i]t is necessary to ensure that the relationship between this Directive and existing Community law is coherent, particularly where detailed provisions on unfair commercial practices apply to specific sectors. ... This Directive accordingly applies only in so far as there are no specific Community law provisions regulating specific aspects of unfair commercial practices, such as information requirements and rules on the way the information is presented to the consumer. It provides protection for consumers where there is no specific sectoral legislation at Community level .... This Directive consequently complements the Community *acquis*, which is applicable to commercial practices harming consumers' economic interests'.

15. Article 1 of Directive 2005/29 states that '[t]he purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests'.

16. 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'.

17. Article 3(1) and (4) to (6) of Directive 2005/29 is worded as follows:

'1. This Directive shall apply to unfair business-to-consumer commercial practices, as laid down in Article 5, before, during and after a commercial transaction in relation to a product.

…

4. In the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.

5. For a period of six years from 12 June 2007, Member States shall be able to continue to apply national provisions within the field approximated by this Directive which are more restrictive or prescriptive than this Directive and which implement directives containing minimum harmonisation clauses. …

6. Member States shall notify the Commission without delay of any national provisions applied on the basis of paragraph 5.'

18. Article 5(1) and (2) of Directive 2005/29 reads as follows:

'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 …'

19. Article 7 of Directive 2005/29 is worded as follows:

‘1. A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

2. It shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

…

4. In the case of an invitation to purchase, the following information shall be regarded as material, if not already apparent from the context:

…

(c) 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;

…

5. 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.’

20. Annex II to Directive 2005/29 lists the Community-law provisions setting out rules for advertising and commercial communication. Article 3(4) of Directive 98/6 is included in that list.

B – *German law*

21. Under the Law against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb, ‘UWG’ ****), unfair commercial practices are illegal if they are capable of causing appreciable harm to the interests of competitors, consumers or other players in the market. ***** Whoever infringes a statutory provision intended, inter alia, to regulate market behaviour in the interests of players in the market engages in an unfair practice. ******

**** Most recently amended by BGBl. 2010 I, p. 254.

***** Paragraph 3(1) of the UWG.

****** Paragraph 4(11) of the UWG.

22. Paragraph 1 of the Regulation on the Indication of Prices (Preisangabenverordnung, 'PAngV'*******) transposed Article 4(1) of Directive 98/6 into German law. It provides that anyone who, on a commercial, professional or otherwise regular basis, offers goods to final consumers or, as a seller, places advertisements carrying an indication of price which are directed at final consumers must indicate the prices payable, including value added tax and other price components.

II – The dispute in the main proceedings, the questions referred and the procedure before the Court

23. The applicant in the main proceedings, Citroën Commerce GmbH ('Citroën Commerce'), is a motor car dealership in Germany. On 30 March 2011, it published an advertisement in a German newspaper for vehicles offered for sale by its branch in the *Land* of Bavaria. The advertisement gave an example of a model described as follows: 'e.g. Citroën C4 VTI 120 Exclusive: [EUR] 21 800 [1]', 'All options included', 'Maximum saving: [EUR] 6 170 [1]'. The superscript '[1]' referred the reader to the following wording written in smaller type at the foot of the advertisement: 'Plus [EUR] 790 transfer costs …'.

24. The Zentralvereinigung des Kraftfahrzeuggewerbes zur Aufrechterhaltung lauteren Wettbewerbs e.V. (ZLW) (Automotive Trade Central Association for the Preservation of Fair Competition) brought an action against the applicant in the main proceedings, on the basis of provisions of the UWG read in conjunction with Article 1 of the PAngV, seeking an injunction requiring the defendant to refrain from placing advertisements for the sale of motor vehicles without indicating the actual final price including the transfer costs necessarily incurred.

25. The court of first instance granted the application made by the ZLW. Citroën Commerce lodged an appeal. The appellate court dismissed the appeal. Citroën Commerce then lodged an appeal on a point of law ('Revision') with the referring court.

26. The referring court explains that, according to its settled case-law relating to the interpretation of Article 1 of the PAngV, it is the final price of the vehicle that must, in principle, be indicated in the advertisement, that is to say, the price including transfer costs, because the public perceives those incidental charges not as an additional cost but, on the contrary, as an integral part of the price. A separate indication of the price is possible only if the consumer has a choice between the two options of collecting the vehicle from the manufacturer's factory or having it delivered to the garage where the sale was concluded, or if it is impossible to foresee what those costs will be. In the case of the advertisement at issue in the case in the main proceedings, neither of those two conditions is fulfilled. The referring court asks whether that line of national case-law is compatible with EU law.

27. It states in this regard that the national law thus interpreted may constitute a measure which is 'more restrictive or prescriptive', within the meaning of Article 3(5) of Directive 2005/29, than those which the Member States could maintain in their legal systems until 12 June 2013.******** After that date, Directive 2005/29 is deemed to have fully harmonised the field in question. The national position on the conditions governing the presentation of prices could then remain in being only in so far as it reflects the state of EU law.

******* Most recently amended by BGBl. 2002 I, p. 4197.

******** I would point out in this regard, however, that the Member States might do so only on condition that they had notified the Commission of those measure (see Article 3(5) and (6) of Directive 2005/29). There is nothing in the documents before the Court to indicate that the Federal Republic of Germany had notified any of the provisions of its national law relevant to the resolution of the dispute in the main proceedings.

28. The referring court asks whether the advertisement published by Citroën Commerce falls within the scope of Directive 98/6 and whether it constitutes an 'offer of a product' for the purposes of that directive. If so, it asks whether the sale price which must be indicated in accordance with Directive 98/6 is to be understood as including the costs necessarily incurred in transferring the vehicle.

29. However, the referring court also raises the question of the applicability of Directive 2005/29 and does not exclude the possibility that the present reference for a preliminary ruling may have to be disposed of on the basis of that directive. If so, it asks whether the price to be indicated in the case of an 'invitation to purchase' within the meaning of Article 7(4)(c) of that directive must be a total price, that is to say, including the abovementioned costs.

30. Thus faced with a problem in connection with the interpretation of EU law, the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and, by order received at the Court Registry on 27 October 2014, decided to refer the following three questions to the Court for a preliminary ruling under Article 267 TFEU:

'(1) Does an advertisement for a product which indicates the price to be paid for it constitute an offer within the meaning of Article 1 of Directive 98/6?

If the first question is to be answered in the affirmative:

(2) In the case of an offer within the meaning of Article 1 of Directive 98/6, must the selling price to be indicated in accordance with Article 1 and the first sentence of Article 3(1) also include costs necessarily incurred in connection with the transfer of a motor vehicle from the manufacturer to the dealer?

If the first or the second question is to be answered in the negative:

(3) In the case of an invitation to purchase within the meaning of Article 2(i) of Directive 2005/29, must the 'price inclusive of taxes' to be indicated in accordance with the provision governing the first scenario contemplated in Article 7(4)(c) of Directive 2005/29 also include, in the case of a motor vehicle, costs necessarily incurred in connection with the transfer of the vehicle from the manufacturer to the dealer?'

31. The applicant in the main proceedings, the ZLW, the Austrian Government, the Hungarian Government and the European Commission lodged written observations before the Court.

32. At the hearing, which was held before the Court on 30 September 2015, the applicant in the main proceedings and the Commission presented oral argument.

III – Legal analysis

33. First and foremost, it is important to define the scope of the questions addressed to the Court. As counsel for the applicant in the main proceedings observed at the hearing before the Court, the referring court does not seek to determine whether the advertisement at issue in the main proceedings is contrary to Directive 98/6 and/or whether it constitutes an unfair commercial practice prohibited by Directive 2005/29. It seeks to determine the applicable position in EU law in order to ascertain whether its interpretation of national law is compatible with EU law.*********

********* As set out in point 26 of this Opinion.

34. According to the referring court, the advertisement published in the press by the applicant in the main proceedings infringes German law, which requires advertisements to indicate the total price of products, that is to say, so far as concerns the circumstances of the present case, the price including the costs of transferring the vehicle to the dealer's garage, given that these are necessarily incurred.

35. An assessment of the compatibility of the national law with EU law calls, in essence, for answers to two sets of questions. It will thus be necessary, as a first step, to determine which directive governs the conditions under which prices must be indicated in advertising and to define the level of requirement, the community standard, applicable in this regard. To that end, and taking into account the rule of priority contained in Article 3(4) of Directive 2005/29, Directive 98/6 will be examined first. Then, if German law should prove to be more protective of consumers than EU law, it will have to be ascertained, as a second step, whether EU law authorises the Member States to maintain or introduce measures more restrictive than those that it prescribes.

A – *Preliminary remark on the exclusion of Directive 2006/114*

36. It should be stated at the outset that the case in the main proceedings does not fall within the ambit of Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising. ********** The fact that the action was brought not by a consumer protection association but by a group representing the interests of competitors in the automotive sector might have indicated that Directive 2006/114 was applicable, for it is intended, inter alia, to 'protect traders against misleading advertising and the unfair consequences thereof'. *********** None the less, in substance, Directive 2006/114 contains no provision determining the conditions under which prices must be indicated in advertising. ************

B – *The first question, relating to the ambit of Directive 98/6*

37. By its first question, the referring court seeks to ascertain whether the advertisement at issue in the main proceedings may fall within the ambit of Directive 98/6, which Article 1 of the PAngV is intended to transpose. For that to be the case, it is sufficient, according to the referring court, for that advertisement to constitute an 'offer of a product' for the purposes of Article 1 of that directive.

38. The advertisement published by the applicant in the main proceedings may constitute an offer of a product in the broad, everyday sense of that term. In the context of Directive 98/6, however, the concept of 'products offered by traders to consumers', referred to in Article 1 of that directive, must be interpreted within the limits attaching to the purpose of that directive.

39. Thus, conscious as we must remain that the referring court seeks to determine the requirements of EU law with respect to the indication of prices mentioned in advertising, there is no getting away from the fact that this does not represent the main purpose of Directive 98/6. Quite frankly, a whole series of factors lead me to call into question the relevance *ratione materiae* of that directive to the settlement of the case in the main proceedings.

********** OJ 2006 L 376, p. 21.

*********** Article 1 of Directive 2006/114. See also judgment in *Posteshop* (C-52/13, EU:C:2014:150, paragraph 22).

************ Article 3(b) of Directive 2006/114 simply states that, in determining whether advertising is misleading, account is to be taken in particular of any information it contains concerning the price or the manner in which the price is calculated, and the conditions on which the goods are supplied.

40. It is true that the title of Directive 98/6 indicates that the latter is concerned with consumer protection in the indication of prices for products offered to them. None the less, that objective is spelled out in Article 1 of Directive 98/6, which prescribes 'indication of the selling price and the price per unit of measurement of products offered ... to consumers in order to improve consumer information and to facilitate comparison of prices'.

41. In so doing, the EU legislature did indeed lay down a general obligation (the obligation to indicate both the selling price and the unit price**********), but one confined to cases in which that twofold indication is relevant or, at least, enables the objective of facilitating comparison to be attained more effectively.

42. Although that obligation is not explicitly defined and appears on the face of it to be directed at 'all products offered', an analysis of the lexis employed in Directive 98/6 none the less leads me to conclude that it was intended to apply essentially to so-called consumer 'staples', it being understood that this may include both foodstuffs and non-food products.********** That, in any event, is how I construe the various references made by Directive 98/6 to products sold in bulk,********** the packaging or pre-packaging of products,********** the net weight or net drained weight of products********** and small retail businesses.**********

43. The fact that Directive 98/6 was not intended as a form of framework directive on the indication of prices or advertising generally, but rather as legislation governing the conditions under which prices for products must, in principle, be posted twice where those products are displayed or offered for consumption at a point of sale, is further confirmed by the directive's drafting history.

44. Thus, the explanatory memorandum to the Proposal for a European Parliament and Council Directive on consumer protection in the indication of the prices of products offered to consumers********** refers to a number of concerns in connection with large- and medium-scale distribution practices********** with respect to the labelling of products********** or the development of price scanning using bar codes.**********

45. It is also interesting to note that, although Article 1 of the proposal for a directive was drafted to the effect that indication of the selling price and the unit price was to be stipulated for 'products offered by traders to final consumers', the Commission had added that this was to be the case where the indication of both prices was relevant. It thus recognised that 'there [were] in fact a number of situations in which price comparison does not provide any relevant information to the consumer, notably where products have very different characteristics or where they relate to differentiated consumer needs. This is for example the case with custom products, garments, *motor cars*, furniture and all products where indication of measurement ... does not provide useful information for price comparison purposes'.**********

********** See recital 7 of Directive 98/6.

********** Directive 98/6 replaced Council Directive 79/581/EEC of 19 June 1979 on consumer protection in the indication of the prices of foodstuffs (OJ 1979 L 158, p. 19) and Council Directive 88/314/EEC of 7 June 1988 on consumer protection in the indication of the prices of non-food products (OJ 1988 L 142, p. 19).

********** See recital 7 and Articles 2(c) and 3(3) of Directive 98/6.

********** See recitals 5 and 10 and Article 4 of Directive 98/6.

********** See the second paragraph of Article 4(2) of Directive 98/6.

********** See recitals 9 and 14 and Article 6 of Directive 98/6.

********** COM(95) 276 final of 12 July 1995.

********** Paragraph 20 of the explanatory memorandum refers, in particular, to 'gondolas'.

********** See paragraph 17 of the explanatory memorandum to the proposal for a directive.

********** See paragraph 20 of the explanatory memorandum to the proposal for a directive.

********** Paragraph 27 of the explanatory memorandum to the proposal for a directive. Emphasis added.

46. Thus, because their individual characteristics vary so much, cars are not products for which a price comparison via the posting of information prescribed by Directive 98/6 is immediately relevant to the consumer. To put it more clearly, just as Directive 98/6 is intended to make it easier for the consumer to compare the price of a kilogram of tomatoes (tomatoes being a product which is easily comparable and, in any event, strictly equivalent to tomatoes sold in another shop), so, in the case of products such as cars, the indication of prices in accordance with the conditions described by Directive 98/6 cannot serve such an objective because of the extent to which every vehicle is specific.**********

47. Consequently, the obligation to indicate the selling price and the unit price imposed by Directive 98/6 must be viewed in the context of the objective pursued by the legislature, which is to ensure homogenous and transparent information concerning, in particular, the quantification of products by reference to a uniform system of measures as the basis for calculating the price of those products,********** in order thus to facilitate comparison. The Court did not decide otherwise when it held, in *Commission* v *Belgium*, that 'the purpose of Directive 98/6 is not to protect consumers in relation to the indication of prices, in general or with regard to the economic reality of announcements of price reductions, but specifically in relation to the indication of the prices of products by reference to different units of quantity'.**********

48. I therefore incline to the view, like the Commission, that the primary purpose of Directive 98/6 is not to ensure consumer protection in relation to the indication of prices in general but rather to facilitate the provision of adequate information to consumers, in particular by enabling them to compare prices, where the price of products is indicated by reference to different units of measurement. Adequate information of this kind is required where the same product is sold in variable quantities and packaging types and the consumer has an interest in being able to compare the price of the product in question on the basis of the same unit of measurement.

49. Directive 98/6 is not therefore the EU-law provision of reference in matters relating to the indication of prices generally for all offers of products. Nor is it intended to serve as a set of general rules governing the conditions under which prices must be indicated in advertising.********** Consequently, it is not the standard against which the compatibility of the national legislation must be assessed.

50. It follows from the foregoing that, Directive 98/6 having as its purpose consumer protection not in the indication of prices generally but in the indication of prices for products offered by reference to different kinds of units of measurement, a national provision interpreted as prohibiting in any circumstances the practice whereby, in an advertisement, a trader refers separately to the price of a vehicle, on the one hand, and to the amount of the costs necessarily incurred in transferring that vehicle to the consumer, on the other, cannot fall within the ambit of that directive.

51. It is precisely because the German provision as interpreted by the referring court does not fall within the scope of Directive 98/6 that it cannot be regarded either as one of the 'more favourable provisions' which the Member States were entitled to maintain or adopt under Article 10 of Directive 98/6, the latter not having fully harmonised the field in question.

********** Particularly because cars have a number of options added to them.

********** See point 60 of Opinion of Advocate General Cruz Villalón in *Commission* v *Belgium* (C-421/12, EU:C:2013:769).

********** Judgment in *Commission* v *Belgium* (C-421/12, EU:C:2014:2064, paragraph 59). See also point 58 et seq. of Opinion of Advocate General Cruz Villalón in *Commission* v *Belgium* (C-421/12, EU:C:2013:769), to which the Court refers, moreover.

********** Indeed, it seems to me that if Article 1 of Directive 98/6 were interpreted as meaning that products are offered as soon as they are advertised, the statement contained in Article 3(4) of that same directive would become entirely superfluous.

52. In this regard, I am once again in full agreement with Advocate General Cruz Villalón's analysis in his Opinion in *Belgium* v *Germany*, in which he argued that 'those more favourable provisions can obviously only be referring to the subject matter of Directive 98/6, namely consumer information relating to standards used as a reference point when calculating product prices so as to facilitate the comparison of prices ... by reference to different systems of measurement'.********** In those circumstances, Article 10 of Directive 98/6 cannot justify the maintenance of the national provision as interpreted by the referring court, for such a provision does not refer to the subject matter of Directive 98/6.**********

C – *The second question, relating to the concept of price within the meaning of Directive 98/6*

53. In the light of the answer which I am proposing that the Court give to the first question raised by the referring court, I shall devote to this question only a few brief arguments in the alternative.

54. The referring court asks the Court whether the price referred to in Articles 1 and 3(1) of Directive 98/6 must include the costs necessarily incurred in transferring the vehicle. Those provisions must be read in the light of Article 2(a) of that directive, which defines the price as 'the final price for a unit of the product, or a given quantity of the product, including VAT and all other taxes'. It is clear from that provision that the final price consists of the price of the product, the VAT and all other taxes.

55. I incline to the view that the transfer costs at issue in the dispute in the main proceedings fall entirely outside the ambit of Directive 98/6, for various reasons.

56. First, the answer to be given to the referring court, which states that the transfer costs could be regarded as having to be included in the 'selling price' of the product within the meaning of Directive 98/6, because they are necessarily incurred, must be that an analysis of the history of Article 2(a) of Directive 98/6 supports the view that this is not what the legislature chose to do, despite having had the opportunity to make that choice explicit in the wording of that directive.

57. Initially, the proposal for the directive********** simply defined the selling price as 'the price for a given quantity of the product'.**********

58. In its amended proposal,********** the Commission proposed that that definition be significantly expanded to say that the final price included 'VAT, all other taxes and the costs of all services which the consumer is obliged to pay for in addition'.********** However, in Common Position (EC) No 60/96 adopted by the Council of the European Union on 27 September 1996 with a view to adopting the directive on consumer protection in the indication of the prices of products offered to consumers,********** the Council did not adopt that wording

********** Opinion of Advocate General Cruz Villalón in *Commission* v *Belgium* (C-421/12, EU:C:2013:769, point 63).

********** See, by analogy, point 64 of Opinion of Advocate General Cruz Villalón in *Commission* v *Belgium* (C-421/12, EU:C:2013:769).

********** See footnote 19 to this Opinion, above.

********** Article 2 of the proposal for a directive. The costs necessarily incurred in transferring the vehicle could readily fall within that category.

********** Amended Proposal for a European Parliament and Council Directive on consumer protection in the indication of the prices of products offered to consumers, COM(96) 264 final of 24 June 1996.

********** See Article 2(a) and (b) of the amended proposal.

********** OJ 1996 C 333, p. 7.

and simply proposed that the selling price should mean 'the price for a unit of the product or a given quantity of the product',********** although it went on to say later in the draft directive that 'the selling price and the unit price shall relate to the final price of the product *under the conditions laid down by the Member States*'.**********

59. Subsequently, the European Parliament adopted an amendment to the effect that the reference in the amended proposal to 'costs of all services which the consumer is obliged to pay for in addition' should be reinstated.********** However, the final version of Article 2(a) of Directive 98/6 contains no such reference. In my view, this shows how difficult it is to reach agreement on a more precise legislative definition of the concept of price and of its various components.

60. Secondly, it should be noted that, when defining the concept of 'price' within the meaning of Directive 98/6, the legislature mentioned taxes, not costs. Once again, this was not a neutral choice. A quick examination of a sample of different language versions serves to confirm the 'public' nature of those taxes. The Spanish version refers to 'todos los demás impuestos', the Italian version to 'ogni oltra imposta', the English version to 'all other taxes', and the German to 'alle sonstigen Steuern einschließt'. Within the meaning of the Court's case-law, a tax is a pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally********** and levied by the State or by a public body. Transfer costs being charged by the motor vehicle manufacturer, they cannot be classified or treated as a 'tax' within the meaning of Article 2(a) of Directive 98/6.

61. At all events, taking into account the purpose of Directive 98/6 as outlined above, I remain convinced that, in the final analysis, such transfer costs fall outside the ambit of that directive. Moreover, that finding is perfectly logical if one takes the view, as I do, that that directive applies essentially in contexts where the products offered, so-called 'staples', are made immediately available, as they are in the case of small retail businesses or large- and medium-scale distribution outlets.**********

62. Since the outcome of my analysis is that Directive 98/6 is not relevant to the resolution of the dispute in the main proceedings, it is appropriate to turn now to an analysis of Directive 2005/29.

D – *The third question, relating to the concept of price within the meaning of Article 7(4)(c) of Directive 2005/29*

63. Directive 2005/29 is devoted to unfair commercial practices. It contains a number of references to the conditions governing communications from traders to consumers which may involve an indication of the price of the product. In particular, Article 7(4) of that directive lists the information which is regarded as material and may not be omitted, hidden or presented in such a manner as to deceive the consumer when a 'transactional decision' within the meaning of Directive 2005/29 is taken.

********** See Article 2(a) of Common Position No 60/96.

********** See Article 4(2) of Common Position No 60/96. Emphasis added.

********** See Amendment 11 of the Decision on the common position adopted by the Council with a view to adopting a directive of the European Parliament and of the Council on consumer protection in the indication of the prices of products offered to consumers, doc. A4-0015/97 (OJ 1997 C 85, p. 26).

********** See in particular, so far as concerns the concept of a tax having an effect equivalent to a customs duty, judgments in *Bakker Hillegom* (C-111/89, EU:C:1990:177, paragraph 9) and *Kernkraftwerke Lippe-Ems* (C-5/14, EU:C:2015:354, paragraph 88 and the case-law cited).

********** To be absolutely clear, my analysis does not support the inference that, because of shortcomings in Directive 98/6 as regards the definition of 'final price', the price of a litre-bottle of milk and the amount of the costs which the distributor charges to the consumer for having delivered the bottle to the shop can be posted separately. The costs at issue in the dispute in the main proceedings are entirely different, being more akin to the costs of delivering a product which cannot be said to be a staple. In any event, Directive 98/6 does not detail the conditions under which the final price must be indicated.

64. The price 'inclusive of taxes' forms part of that material information and the referring court asks the Court whether that concept, as defined in Article 7(4)(c) of Directive 2005/29, must be interpreted as meaning that it includes the costs necessarily incurred in transferring a motor vehicle from the manufacturer to the consumer. Before analysing that provision, however, I shall begin my analysis with two sets of preliminary remarks.

1. Preliminary clarifications

65. On the one hand, I should point out that the purpose of Directive 2005/29 is to approximate the laws of the Member States relating to unfair commercial practices, including unfair advertising, which directly harm consumers' economic interests and thereby indirectly harm the economic interests of legitimate competitors.********** It has fully harmonised the field in question,********** with the result that the Member States are not, in principle,********** authorised to introduce or maintain stricter rules than those provided for in Directive 2005/29, even in order to achieve a higher level of consumer protection.**********

66. On the other hand, I would point out that, under Directive 2005/29, unfair commercial practices may take two forms. They may thus be in the guise of misleading actions (Article 6) or misleading omissions (Article 7). Because the referring court makes explicit reference to the concept of an 'invitation to purchase', which is expressly mentioned only in Article 7 of Directive 2005/29, it assumes that the commercial practice of the applicant in the main proceedings falls within the category of misleading omissions. Moreover, as that court does not, at this stage, seek a specific classification of Citroën Commerce's conduct in the light of Directive 2005/29, there is no need to depart from that premiss in this Opinion.

2. Material information relating to price in the context of an invitation to purchase

67. A commercial practice constitutes a misleading omission if, 'in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, in order to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise'.**********

********** Judgment in *Ving Sverige* (C-122/10, EU:C:2011:299, paragraph 21).

********** See judgments in *VTB-VAB and Galatea* (C-261/07 and C-299/07, EU:C:2009:244, paragraph 52); *Plus Warenhandelsgesellschaft* (C-304/08, EU:C:2010:12, paragraph 41); *Mediaprint Zeitungs- und Zeitschriftenverlag* (C-540/08, EU:C:2010:660, paragraph 27); *Citroën Belux* (C-265/12, EU:C:2013:498, paragraph 20); *RLvS* (C-391/12, EU:C:2013:669, paragraph 33); and *Commission* v *Belgium* (C-421/12, EU:C:2014:2064, paragraphs 55, 61 and 64); and order in *Cdiscount* (C-13/15, EU:C:2015:560, paragraph 34).

********** Unless express authorisation is given by Directive 2005/29 itself: see Article 3(9) of Directive 2005/29 and judgment in *Citroën Belux* (C-265/12, EU:C:2013:498, paragraphs 21 to 24).

********** See order in *Cdiscount* (C-13/15, EU:C:2015:560, paragraph 34 and the case-law cited).

********** Article 7(1) of Directive 2005/29. Article 7(2) of the same directive defines another form of misleading omission, whereby a trader hides or provides in an 'unclear, unintelligible, ambiguous or untimely' manner such material information as referred to in Article 7(1) and this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. The advertisement at issue in the dispute in the main proceedings would be more likely to fall within this second category of misleading omission, assuming that giving separate indications of the price of the vehicle and the amount of costs necessarily incurred in transferring the vehicle, referred to in a footnote, amounts to providing material information in an unclear manner. Once again, however, this is not the issue with which we are concerned today.

68. An invitation to purchase is a specific form of advertising attached to which is a stricter obligation to provide information under Article 7(4) of Directive 2005/29.********** It is defined in Article 2(i) of Directive 2005/29 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'.********** The Court has inferred from this that that provision 'd[id] not require the indication of a final price'.**********

69. However, in the case of an invitation to purchase, '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'********** is regarded as material information.

70. According to the strict wording of the question raised, the referring court is simply seeking an interpretation of the concept of 'inclusive of taxes'. *Mutatis mutandis*, the same conclusion must be drawn here as has already been drawn in relation to the interpretation of the concept of 'all other taxes' in the context of Directive 98/6, for, once again, a swift analysis of the language versions serves to confirm the public nature of the reference to 'taxes'. The Spanish version refers to 'el precio, incluidos los impuestos', the Italian version to 'il prezzo comprensivo delle imposte', the English version to 'the price inclusive of taxes', the German version to 'der Preis einschließlich aller Steuern und Abgaben', and the Portuguese version to '[o] preço, incluindo impostos e taxas'.

71. I am not therefore convinced that the costs necessarily incurred in transferring the vehicle can be interpreted as having to be included in a price 'inclusive of taxes' within the meaning of Article 7(4)(c) of Directive 2005/29.

72. At all events, the scope of the question raised must be broadened. Rather than focusing on the concept of 'price inclusive of taxes', we must attempt to identify the scheme of Article 7 of Directive 2005/29 in order better to define the extent of the obligations arising from it with respect to the indication of prices.

73. In so doing, we shall see in the first place that Article 7(4)(c) of Directive 2005/29 refers not only to the price inclusive of taxes but also to 'the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges'. It is apparent from the structure of the text of that provision that the latter contemplates all price components and that the wording of Article 7(4)(c) of Directive 2005/29, read as a whole, clearly seems to contemplate as distinct items the price or the manner in which it is calculated, on the one hand, and the other components of the price such as freight charges, on the other. Be that as it may, there is nothing in the abovementioned Article 7(4)(c) to indicate that the price is meant to include freight costs and must be indicated as a final, total value.

74. In the second place, it must also be held that the omission of material information such as the price as defined in Article 7(4)(c) of Directive 2005/29 does not in any case constitute, as such, an unfair commercial practice, for it will always be necessary to carry out an analysis case by case********** of the impact of that omission on the consumer's

********** See point 22 of my Opinion in *Ving Sverige* (C-122/10, EU:C:2011:47).

********** Emphasis added.

********** Judgment in *Ving Sverige* (C-122/10, EU:C:2011:299, paragraph 36).

********** Article 7(4)(c) of Directive 2005/29.

********** See, in general, judgments in *Ving Sverige* (C-122/10, EU:C:2011:299, paragraphs 51, 58, 59 and 73), and *Commission* v *Belgium* (C-421/12, EU:C:2014:2064, paragraph 56), and order in *Cdiscount* (C-13/15, EU:C:2015:560, paragraphs 38 and 39).

behaviour and the transactional decision taken by him. It is clear from the wording of Directive 2005/29 that such an analysis will also take into account the particular context********** of the commercial practice in question, as well as the limitations of space or time forming an integral part of the medium of communication used.**********

75. The Court has thus previously held that '[t]he extent of the information relating to the price will be established on the basis of the nature and characteristics of the product, but also on the basis of the medium of communication used for the invitation to purchase and having regard to additional information possibly provided by the trader. A reference only to an entry-level price in an invitation to purchase cannot therefore be regarded, in itself, as constituting a misleading omission'.********** In so doing, the Court left to the referring court the task of ascertaining whether the omission of the detailed rules for calculating the 'final price' had prevented, or was likely to prevent, the consumer from taking an informed transactional decision.**********

76. Consequently, even if the Court were to consider that transfer costs such as those at issue in the dispute in the main proceedings should be included in the 'price inclusive of taxes' referred to in Article 7(4)(c) of Directive 2005/29, the fact would remain that a national provision interpreted as meaning that it imposes an absolute prohibition on invitations to purchase which refer separately to the price of the products and the amount of the costs necessarily incurred in transferring them would go beyond the level of protection afforded by Directive 2005/29 because that provision would have the effect of penalising the omission of the material information in question (that is to say, the price including any costs necessarily incurred) generally, in cases where the directive requires a case-by-case assessment of the specific consequences of that omission on the consumer's transactional behaviour before the commercial practice in question can be classified as 'unfair'.**********

77. In those circumstances, the German legislation as interpreted by the referring court has the effect, in fact, of establishing a commercial practice as being regarded as unfair in all circumstances; however, such practices are exhaustively listed in Annex I to Directive 2005/29, Article 5(5) of which explicitly provides that that annex 'may only be modified by revision of [that] directive'.**********

78. It follows from all of the foregoing considerations that Article 7(4)(c) of Directive 2005/29 must be interpreted as meaning that the material information relating to price need not, in the context of an invitation to purchase and whatever the circumstances, take the form of a total final price including not only the price of the product but also all the other components of the final price that will have to be paid by the consumer. In any case, the unfairness of a commercial practice in connection with the indication of price in an invitation to purchase, as defined in Article 7(4)(c), must be assessed case by case. Directive 2005/29 therefore precludes a national provision interpreted as imposing a general prohibition on, without providing for a case-by-case assessment of the unfairness of, the separate reference, in an advertisement, to the price of the vehicle, on the one hand, and to the amount of the costs necessarily incurred in transferring that vehicle, on the other.

********** Article 7(1)(2) and (4) of Directive 2005/29. See also judgment in *Ving Sverige* (C-122/10, EU:C:2011:299, paragraphs 55, 58 and 73).

********** Article 7(3) of Directive 2005/29. See also judgment in *Ving Sverige* (C-122/10, EU:C:2011:299, paragraph 66).

********** Judgment in *Ving Sverige* (C-122/10, EU:C:2011:299, paragraphs 68 and 69).

********** Judgment in *Ving Sverige* (C-122/10, EU:C:2011:299, paragraph 71).

********** See, by analogy, paragraphs 39 to 41 of order in *Cdiscount* (C-13/15, EU:C:2015:560).

********** See, by analogy, paragraphs 38 and 39 of order in *Cdiscount* (C-13/15, EU:C:2015:560).

IV – Conclusion

79. In the light of all the foregoing considerations, I propose that the Court's answer to the questions referred by the Bundesgerichtshof (Federal Court of Justice) should be as follows:

(1) A national provision interpreted as prohibiting in any circumstances the practice whereby a trader, in an advertisement, gives separate indications of the price of a vehicle, on the one hand, and the amount of the costs necessarily incurred in transferring that vehicle to the consumer, on the other, cannot fall within the ambit 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, the purpose of which is to protect consumers not as regards the indication of prices in general but as regards the indication of the prices of products offered by reference to different kinds of units of measurement.

(2) Article 7(4)(c) of Directive 2005/29/CE 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') must be interpreted as meaning that the material information relating to price need not, in the context of an invitation to purchase and whatever the circumstances, take the form of a total final price including not only the price of the product but also all the other components of the final price that will have to be paid by the consumer. In any case, the unfairness of a commercial practice in connection with the indication of price in an invitation to purchase, as defined in Article 7(4)(c), must be assessed case by case. Directive 2005/29 therefore precludes a national provision interpreted as imposing a general prohibition on, without providing for a case-by-case assessment of the unfairness of, the separate reference, in an advertisement, to the price of the vehicle, on the one hand, and to the amount of the costs necessarily incurred in transferring that vehicle, on the other.