

Case C-543/21

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

31 August 2021

Referring court:

Bundesgerichtshof (Germany)

Date of the decision to refer:

29 July 2021

Applicant and appellant on a point of law:

Verband Sozialer Wettbewerb e. V.

Defendant and respondent in the appeal on a point of law:

famila-Handelsmarkt Kiel GmbH & Co. KG

Subject matter of the main proceedings

Consumer protection, inclusion of the deposit in the selling price

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1. Is the concept of ‘selling price’ within the meaning of Article 2(a) of Directive 98/6/EC to be interpreted as meaning that it must include the deposit payable by the consumer when purchasing goods in bottles or jars which are returnable against a deposit?
2. If Question 1 is answered in the affirmative:

Are the Member States authorised under Article 10 of Directive 98/6/EC to maintain a provision which deviates from Article 3(1) and (4) of Directive 98/6/EC, read in conjunction with Article 2(a) thereof, such as that in Paragraph 1(4) of the Preisangabenverordnung (Regulation on the indication of prices; ‘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 formed, or does the approach of full harmonisation pursued by Directive 2005/29/EC preclude that?

Provisions of EU law cited

Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers (OJ 1998 L 80, p. 27)

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 (OJ 2005 L 149, p. 22)

Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (OJ 2019 L 328, p. 7)

Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67)

Provisions of national law cited

Preisangabenverordnung (Regulation on the indication of prices; ‘the PAngV’), Paragraph 1

Gesetz gegen den unlauteren Wettbewerb (Law against unfair competition; ‘the UWG’), Paragraphs 3, 3a, 5a, 8

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant is an association that monitors its members’ interest in ensuring compliance with competition law. The defendant distributes foodstuffs. In a leaflet, it advertised drinks in bottles which are returnable against a deposit

(‘returnable bottles’) and yoghurt in jars which are returnable against a deposit (‘returnable jars’). The deposit was not included in the prices indicated, but was shown by means of the additional words ‘plus € ... deposit’. The applicant 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 flat-rate reimbursement of the costs of a warning notice.

- 2 The Landgericht (regional court) found against the defendant in accordance with the form of order sought.
- 3 On appeal by the defendant, the court ruling on the appeal on the merits altered the judgment of the regional court and dismissed the action. By the appeal on a point of law, for which the court ruling on the appeal on the merits granted leave and which the defendant claims should be dismissed, the applicant seeks the restoration of the judgment of the regional court. The success of the appeal on a point of law hinges on the interpretation of Article 2(a) and Article 10 of Directive 98/6 and on the scope of the full harmonisation intended by Directive 2005/29. The court ruling on the appeal on the merits found that the action was unfounded, stating the following: The applicant is not entitled to injunctive relief pursuant to Paragraph 8(1), first sentence, Paragraph 3(1) and Paragraph 3a of the UWG, read in conjunction with Paragraph 1(1), first sentence, of the PAngV. There are doubts as to whether Paragraph 1(1), first sentence, of the PAngV should continue to be interpreted as meaning that a deposit must be included in the total price to be indicated pursuant to that provision. The action cannot be upheld in any event, because Paragraph 1(4) of the PAngV contains an exception for the case where a refundable security deposit is required in addition to the consideration for the goods or services. It is true that that provision is contrary to EU law and therefore no longer applicable. Nevertheless, it is valid law. It would be incompatible with principles of the rule of law to find against the defendant even though it had complied with that provision. A misleading omission due to a failure to indicate the total price pursuant to Paragraph 5a(2) and (3), point 3, of the UWG does not give rise to entitlement to injunctive relief either. The provision of Paragraph 5a(3), point 3, of the UWG does not apply, due to the overriding rules on the indication of prices in Directive 98/6. Even if that provision were applicable, the outcome could not be any different from what it would be if Paragraph 3a of the UWG were applied, since the defendant had complied with Paragraph 1(4) of the PAngV, a mandatory provision for the defendant. Due to that provision, it is also not possible for the information requirements in Directive 98/6 to be relied on by virtue of the reference in Paragraph 5a(4) of the UWG.
- 4 On the basis of the reasoning given by the court ruling on the appeal on the merits, it is not possible to rule out entitlement to injunctive relief pursuant to Paragraph 8(1), first sentence, Paragraph 8(3), point 2, and Paragraphs 3 and 3a of the UWG owing to an infringement of Paragraph 1(1), first sentence, of the PAngV.

Regulation under national law and under EU law

- 5 According to Paragraph 1(1), first sentence, of the PAngV, anyone who, on a commercial, professional or otherwise regular basis, offers goods or services to 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 (total prices). That provision is a rule designed to regulate market behaviour within the meaning of Paragraph 3a of the UWG (see Bundesgerichtshof (Federal Court of Justice; ‘BGH’), judgment of 14 January 2016 – I ZR 61/14, GRUR 2016, 516, paragraph 12). In so far as it obliges traders to indicate the total prices, including value added tax, when trading in goods, it is based on Articles 1, 2(a), 3 and 4(1) of Directive 98/6/EC (see BGH, judgment of 10 November 2016 – I ZR 29/15, GRUR 2017, 286, paragraph 10). Therefore, the question as to whether the defendant infringed Paragraph 1(1), first sentence, of the PAngV hinges on the interpretation of those provisions of the directive, in particular on whether a deposit payable when purchasing goods in returnable bottles or jars must be included in the total price.
- 6 In accordance with Article 3(1) and (4) of Directive 98/6, any advertisement for the products referred to in Article 1 of Directive 98/6, that is to say, for products offered by traders to consumers, must indicate the selling price where the advertisement – as in the present case – is liable to be regarded by the average consumer as the trader’s offer to sell the product on the conditions mentioned in that advertisement (see judgment in C-476/14, EU:C:2016:527, paragraphs 28 to 30). According to Article 2(a) of Directive 98/6, ‘selling price’ means the final price for a unit of the product, or a given quantity of the product, including VAT and all other taxes. As a final price, it 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 (judgment in C-476/14, EU:C:2016:527, paragraph 37). Whether the selling price within the meaning of Article 2(a) of Directive 98/6 must also include the deposit payable by consumers when purchasing goods in returnable bottles or jars does not follow unambiguously from this and is the subject of Question 1.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 7 According to one view, which was endorsed by the regional court, a deposit forms part of the selling price pursuant to Article 2(a) of Directive 98/6. According to that view, a refundable security deposit within the meaning of Paragraph 1(4) of the PAngV constitutes an unavoidable and foreseeable component of the price, a component that is necessarily payable by the consumer and thus, in accordance with the case-law of the Court of Justice of the European Union, forms part of the selling price within the meaning of Article 2(a) of Directive 98/6. This is not precluded by the fact that the deposit is refunded upon return of the container,

especially since purchasers often spare themselves the cost and effort of returning the container.

- 8 According to another view, Article 2(a) of Directive 98/6 must be interpreted as meaning that a deposit does not form part of the selling price. Which price components are attributable to the total price is to be determined, in principle, by reference to the point of view of the relevant public, which, for years, has been accustomed to the bottle deposit being indicated separately, in addition to the total price for the goods. The deposit is also not a price component payable as consideration for the product, but, rather, it is a mere security deposit which serves to facilitate the (re-)use of the packaging and which, moreover, does not represent a (permanent) economic burden for the customers. Consumers generally want to know what price they have to pay for the product itself and do not want to have to perform back-calculations to work out the 'true' price. If the deposit were included in the selling price, it would also form part of the basis for the indication of the base price pursuant to Paragraph 2 of the PAngV, that is to say, the indication of the unit price pursuant to Article 3(1) and (4) of Directive 98/6, and it would make it difficult to compare base prices for beverages in different types of returnable packaging that are subject to different deposits.
- 9 The present Chamber considers that the first view is more convincing. It corresponds to the view on Paragraph 1(1), first sentence, of the PAngV previously taken by the Chamber prior to the entry into force of Directive 98/6/EC. The interpretation of Article 2(a) of Directive 98/6 cannot depend on whether consumers in Germany have been accustomed for years, by virtue of the provision made in Paragraph 1(4) of the PAngV, to seeing the bottle deposit indicated separately, in addition to the total price for the goods. Directive 98/6 must be given a uniform interpretation throughout the European Union. The Chamber takes the view that a bottle deposit is an unavoidable and foreseeable component of the price, a component that is necessarily payable by the consumer and constitutes part of the pecuniary consideration for the acquisition of the product concerned (see judgment in C-476/14, EU:C:2016:527, paragraph 37). If a consumer wishes to purchase a beverage in a returnable bottle, the beverage and the packaging are presented to him or her as a single pack within the framework of a single offering, for which consideration consisting of the price of the beverage plus the amount of the deposit must be provided at the checkout. The consumer can purchase the beverage offered in the reusable packaging only together with the bottle. However, he or she will often want to know – inter alia for price comparison purposes, both with regard to competing offerings and with regard to goods sold in non-returnable packaging – what the purchase will cost him or her in concrete terms, that is to say, in total. This applies accordingly to the indication of the base price. This can be easily established on the basis of the total price including the deposit. If the consumer needs to calculate the price per unit of measurement (Paragraph 2(3) of the PAngV), he or she need only bear in mind that the deposit remains the same. The Chamber takes the view, however, that the requirements of price clarity and accuracy under Paragraph 1(7), first sentence, of the PAngV, which is based on Article 4(1), first sentence, of Directive 98/6 (see

also recital 2 of Directive 98/6), require not only the indication of the total price, but also a breakdown of the components of that price in terms of the price of the goods and the amount of the deposit.

- 10 In the event that Article 2(a) of Directive 98/6 is to be interpreted as meaning that a deposit must be included in the selling price, the question arises as to whether the Member States are authorised under Article 10 of Directive 98/6 to maintain a provision that 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, or whether the approach of full harmonisation pursued by Directive 2005/29/EC precludes that. That is the subject matter of Question 2.
- 11 In accordance with Paragraph 1(4) of the PAngV, where a refundable security deposit is required in addition to the consideration for a product or service, the amount of that security deposit must be indicated in addition to the price for the product or service, and a total amount must not be formed. Accordingly, in derogation from Article 3(1) and (4) of Directive 98/6, read in conjunction with Article 2(a) thereof, and Paragraph 1(1), first sentence, of the PAngV, the selling price would not have to include the deposit payable when purchasing goods in returnable bottles and jars. In accordance with Article 10 of Directive 98/6, Member States are not prevented 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 establishing the European Community. Directive 98/6 thus aims to achieve a minimum degree of harmonisation.
- 12 Directive 2005/29 fully harmonises the rules on unfair business-to-consumer commercial practices at EU level. Accordingly, as Article 4 thereof expressly provides, Member States may not adopt stricter rules than those provided for in the directive, even in order to achieve a higher level of consumer protection (judgment in C-261/07 and C-299/07, EU:C:2009:244, paragraph 52; judgment in C-540/08, EU:C:2010:660, paragraph 30; judgment in C-421/12, EU:C:2014:2064, paragraph 55). That principle of full harmonisation was modified by the saving clause in Article 3(5), first sentence, of Directive 2005/29, in the version in force until 6 January 2020. According to that clause, for a period of six years from 12 June 2007, Member States were able to continue to apply national provisions within the field approximated by Directive 2005/29 which are more restrictive or prescriptive than that directive and which implement directives containing minimum harmonisation clauses. With Directive 2019/2161, which entered into force on 7 January 2020, that saving clause, which had already expired on 12 June 2013, was replaced by a new saving clause (see Article 3, point 2, of Directive 2019/2161). This does not in any way change the approach of full harmonisation pursued by Directive 2005/29, including in the version amended by Directive 2019/2161. More restrictive national measures to implement directives aimed at minimum harmonisation cannot be sanctioned under competition law unless another (substantive) saving clause applies.

- 13 In accordance with Article 3(1) of Directive 2005/29, the field approximated by Directive 2005/29 within the meaning of the first sentence of Article 3(5) of Directive 2005/29 (old version) applies to unfair business-to-consumer commercial practices, as laid down in Article 5 of that directive, before, during and after a commercial transaction in relation to a product. Article 2(d) of Directive 2005/29 defines commercial practices as any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers. This also includes, in principle, the indication of the selling price in advertising (see judgment C-476/14, EU:C:2016:527, paragraph 43), including a (possible) deposit.
- 14 There are conflicting views on whether Article 10 of Directive 98/6 and the full harmonisation pursued by Directive 2005/29, taking into account the first sentence of Article 3(5) of Directive 2005/29 (old version), permit the maintenance of Paragraph 1(4) of the PAngV. According to one view, Paragraph 1(4) of the PAngV falls within the field approximated by Directive 2005/29. Accordingly, the provision could be maintained only in accordance with the first sentence of Article 3(5) of Directive 2005/29 (old version), that is to say, only in so far as it is a provision which, in accordance with Article 10 of Directive 98/6, goes beyond the minimum approximation established by Article 3(1) and (4) of Directive 98/6, and, moreover, only until the end of the transitional period on 12 June 2013. According to that view, since that date has passed, the first sentence of Article 3(5) of Directive 2005/29/EC (old version), that is to say, the full harmonisation pursued by Directive 2005/29, precludes the provision made in Paragraph 1(4) of the PAngV (KG, WRP 2018, 226, 229 [juris, paragraph 65]). According to the opposing view, Paragraph 1(4) of the PAngV falls outside the scope of Directive 2005/29, and, consequently, the first sentence of Article 3(5) of Directive 2005/29 (old version) does not preclude the maintenance of Paragraph 1(4) of the PAngV (Oberlandesgericht Köln (Higher Regional Court, Cologne; ‘OLG Cologne’), GRUR-RR 2020, 384, 385 [juris, paragraph 40]). The present Chamber considers that the first view is more convincing. The opposing view proceeds on the assumption that the provision made in Paragraph 1(4) of the PAngV also pursues environmental-policy objectives that fall outside the scope of Directive 2005/29 (OLG Cologne, GRUR-RR 2020, 384, 385 [juris, paragraph 40]). The Chamber takes the view that this is not the case.
- 15 The provision made in Paragraph 1(4) of the PAngV was created in 1997 in response to the Chamber’s decision in ‘Flaschenpfand I’ (Deposit on Bottles I) (BGH, GRUR 1994, 222). The legislature took the view that the requirement to indicate the final price as the sum of the price of the beverage and the amount of the deposit leads to reusable containers being placed at a visual disadvantage vis-à-vis non-reusable containers, which appear to be cheaper at first glance. Under the new regime, the consumer is able to compare the price of the content without difficulty. This is also in line with environmental-policy efforts to implement and promote reusable containers.

- 16 Directive 2005/29 does not expressly exclude provisions on environmental protection from its scope. According to Article 3(3) thereof, the directive is without prejudice to Community or national rules relating to the health and safety aspects of products.
- 17 The Chamber considers that the opposing view cannot successfully rely on Article 3(3) of Directive 2005/29. Even if, in line with that view, a provision were to fall outside the scope of Directive 2005/29 just because – in addition to aspects relating to the transparency, clarity and comparability of selling prices – it was also based on health and safety aspects of products, Paragraph 1(4) of the PAngV would not meet that requirement. The environmental-protection aspect pursued by the promotion of a reusable packaging system does not concern health and safety aspects of products. In that respect, the third sentence of recital 9 of Directive 2005/29 refers by way of example to alcohol, tobacco or pharmaceuticals. Accordingly, the provision in Article 3(3) of Directive 2005/29 concerns direct health risks associated with the products. Such risks are not apparent in the case of products which are returnable against a deposit. According to the opposing view, another reason why Paragraph 1(4) of the PAngV should not come within the scope of Directive 2005/29/EC is that, in accordance with Article 3(4) thereof, Directive 98/6/EC itself falls outside the scope of Directive 2005/29/EC in the first place. The Chamber does not consider this to be correct.
- 18 Article 3(4) of Directive 2005/29 provides that, in the case of conflict between the provisions of that directive and other EU rules regulating specific aspects of unfair commercial practices, the latter are to prevail and apply to those specific aspects. According to the opposing view, that provision is intended to give priority to the rules of Directive 98/6 in the field of price indications for goods. Article 3(5) of Directive 2005/29 (old version) is (was) not relevant, because it is limited to the ‘field approximated by this Directive’, and that field is not affected as far as the scope of the conflict-of-law rule of Article 3(4) of Directive 2005/29 is concerned. Therefore, provisions which are more favourable as regards consumer information and comparison of prices within the meaning of Article 10 of Directive 98/6 are still permissible in the field of price indications for goods. That priority, which exists at least in principle, is confirmed in Directive 2005/29 by the fact that only the indication of the unit price pursuant to Article 3(4) of Directive 98/6 is referred to in Article 7(5) of Directive 2005/29, read in conjunction with Annex II thereto, as a material information requirement laid down in EU law. It follows, by *a contrario* reasoning, that the application of Article 7 of Directive 2005/29/EC is ruled out in relation to all other obligations concerning the indication of the prices of goods. This cannot be accepted.
- 19 The scope of Article 3(5) of Directive 2005/29 (old version) was not restricted by Article 3(4) of Directive 2005/29. A conflict within the meaning of Article 3(4) of Directive 2005/29 can only be considered at all if the (conflict-of-law) rule comes within the field approximated by Directive 2005/29 within the meaning of the first sentence of Article 3(5) of Directive 2005/29 (old version). Rather, the two provisions exist alongside one another and regulate different fields: Article 3(4) of

Directive 2005/29 concerns the relationship between provisions of EU law (see judgment in C-54/17 and C-55/17, EU:C:2018:710, paragraph 59); Article 3(5) of Directive 2005/29 (old version) regulates the relationship between EU law and national law. Accordingly, even in the event that Article 10 of Directive 98/6 were a rule which took precedence over the provisions of Directive 2005/29 in accordance with Article 3(4) thereof, national provisions adopted to implement Article 10 of Directive 98/6 which are more restrictive or prescriptive than the provisions of Directive 2005/29 in accordance with the first sentence of Article 3(5) thereof (old version) could have been maintained only until 12 June 2013. Irrespective of that, there are doubts as to whether Paragraph 1(4) of the PAngV is a provision which is more favourable as regards consumer information and comparison of prices within the meaning of Article 10 of Directive 98/6. The Chamber takes the view that it is not. On the contrary, it is a rule that makes it more difficult for consumers to obtain information and compare prices, because it requires consumers themselves to calculate the actual price to be paid.

Need for a ruling from the Court of Justice

- 20 The questions referred are material to the decision to be given. If Article 2(a) of Directive 98/6 is to be interpreted as meaning that a deposit must be included in the selling price, and the divergent provision made in Paragraph 1(4) of the PAngV is impermissible in view of Article 3(4) and (5), first sentence, of Directive 2005/29 (old version), read in conjunction with Article 10 of Directive 98/6, then Paragraph 1(4) of the PAngV would not preclude the assumption of an infringement of Paragraph 1(1), first sentence, of the PAngV. However, the court ruling on the appeal on the merits was right to assume that Paragraph 1(4) of the PAngV could not be interpreted in conformity with the directive as permitting the obligation to indicate a total price including a deposit. National courts are required to interpret national law using recognised interpretative methods and, to the fullest extent possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive (see third paragraph of Article 288 TFEU). That obligation to interpret national law in conformity with EU law concerns all provisions of national law, whether adopted before or after the directive in question (see judgment in C-760/18, EU:C:2021:113, paragraphs 65 and 68). However, the obligation on national courts to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law that is *contra legem* (see judgment in C-760/18, EU:C:2021:113, paragraph 67).
- 21 According to those principles, it would not be possible for Paragraph 1(4) of the PAngV to be interpreted in conformity with the directive. On the basis of its wording and the scheme, purpose and legislative history, the provision unambiguously stipulates that, in derogation from Paragraph 1(1), first sentence, of the PAngV, a total amount which includes the amount of a deposit is not to be

formed. It may be left open whether – as assumed by the court ruling on the appeal on the merits – the provision of Paragraph 1(4) of the PAngV would not be applicable under those circumstances. It may also be left open whether – as also assumed by the court ruling on the appeal on the merits – a provision which is not applicable because it is contrary to EU law nevertheless remains valid and could be relied on by the advertiser. The provision of Paragraph 1(4) of the PAngV would infringe Paragraph 5a(2) and (4) of the UWG and would be void in so far as it stipulates that a total amount is not to be formed from the price for a product (the product price) and the amount of a refundable security deposit (the amount of the deposit).

- 22 In accordance with Paragraph 5a(2), first sentence, of the UWG, a person acts unfairly where, in a specific factual context, taking account of all the circumstances, he or she withholds from the consumer material information that the consumer needs, according to the context, in order to take an informed transactional decision (point 1) and the withholding of that information is likely to cause the consumer to take a transactional decision that he or she would not have taken otherwise (point 2). In accordance with Paragraph 5a(2), second sentence, of the UWG, it is also to be regarded as withholding when the person concerned hides material information (point 1), provides material information in an unclear, unintelligible or ambiguous manner (point 2) or provides material information in an untimely manner (point 3). In accordance with Paragraph 5a(4) of the UWG, information which must not be withheld from the consumer on the basis of EU legislation or under legislation transposing EU directives on commercial communication including advertising and marketing is also to be regarded as material within the meaning of subparagraph 2.
- 23 Even in so far as Paragraph 5a(4) of the UWG does not refer to provisions of EU law, but to the legal provisions enacted to implement them, Paragraph 5a(4) of the UWG does indeed transpose Article 7(5) of Directive 2005/29. In accordance with that provision, information requirements established by EU law are material. Therefore, an insufficient transposition into German law of a provision of a directive within the meaning of Article 7(5) of Directive 2005/29 does not preclude the application of Paragraph 5a(4) of the UWG (see BGH, GRUR 2018, 438, paragraph 28). In that context, contrary to the view taken by the court ruling on the appeal on the merits, it makes no difference whether the national transposition provision contains a deliberate gap (see BGH, GRUR 2018, 438, paragraph 20) or – as may be the case in the present dispute – expressly provides for a rule that deviates from a directive. In both cases, the national transposition provision deviates so clearly from the directive that an interpretation in conformity with the latter is not possible. This makes no difference to the conflict with the statutory provision in Paragraph 5a(4) of the UWG stipulating that the information requirements established in directives are to be treated as material.
- 24 The Chamber takes the view that the information requirements governed in Article 3(1) and (4) of Directive 98/6 are such material information requirements pursuant to Article 7(5) of Directive 2005/29 and thus also pursuant to

Paragraph 5a(4) of the UWG. The Chamber takes the view that material information requirements within the meaning of Article 7(5) of Directive 2005/29, and thus also pursuant to Paragraph 5a(4) of the UWG, can be inferred from not only Article 3(4) of Directive 98/6, but in particular also from Article 3(1) thereof. According to Article 7(5) of Directive 2005/29 (Paragraph 5a(4) of the UWG), information requirements established by EU law in relation to commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II, are to be regarded as material. It is true that the list in Annex II mentions only the obligation to indicate the unit price in any advertising indicating the selling price of the products (Article 3(4) of Directive 98/6/EC, Paragraph 2(1), second sentence, of the PAngV) and not the obligation – at issue in the present case – to indicate the selling price when offering products (Article 3(1) of Directive 98/6/EC, Paragraph 2(1), first sentence, of the PAngV). However, the latter obligation is also an information requirement established by EU law in relation to commercial communication. Since the list contained in Annex II is non-exhaustive, the fact that that obligation is not expressly referred to in that list does not preclude it from being categorised as material (see BGH, judgment of 28 March 2019 – I ZR 85/18, GRUR 2019, 641, paragraph 32).

- 25 The prohibition on the withholding of the selling price of a product, as laid down in Article 7(1) and (5) of Directive 2005/29, in conjunction with the list in Annex II thereto (Paragraph 5a(4) UWG), is not superseded by the obligation under Article 3(1) of Directive 98/6 (Paragraph 2(1), first sentence, of the PAngV) to indicate the selling price of a product, because there is no conflict in that respect. It is true that the Court of Justice of the European Union has ruled that the aspect relating to the selling price referred to in an advertisement such as that at issue in the main proceedings is governed by Directive 98/6, and Directive 2005/29 does not apply as regards that aspect, in accordance with Article 3(4) of Directive 2005/29 (see judgment in C-476/14, EU:C:2016:527, paragraphs 44 and 45). However, the Chamber understands those statements as meaning that they relate only to the conflict between Article 3(1) and (4) of Directive 98/6 and Article 7(4)(c) of Directive 2005/29, which was at issue in the proceedings underlying that judgment, and that the applicability of Directive 2005/29 is not excluded if there is no conflict with a provision of Directive 98/6. The question as to whether there is a conflict within the meaning of Article 3(4) of Directive 2005/29/EC must be examined in relation to specific provisions (see judgment in C-632/16, EU:C:2018:599, paragraphs 32 to 41; judgment in C-363/19, EU:C:2020:693, paragraphs 55 to 62).
- 26 In so far as Directive 2005/29 integrates, via Article 7(5) thereof, the provisions of Directive 98/6, there is no conflict. In that respect, the directives complement each other (on the complementary relationship between Directive 2005/29 and Directive 2001/83, see judgment in C-544/13 and C-545/13, EU:C:2015:481, paragraph 78). This also follows from the fact that the reference in Article 7(1) and (5) of Directive 2005/29, read in conjunction with the list contained in Annex II thereto, to Article 3(4) of Directive 98/6 would have no scope of application if Directive 2005/29 were not applicable from the outset with regard to

the aspects governed in Article 3(4) of Directive 98/6. Nothing to the contrary results from the Chamber's decision in 'Hörgeräteausstellung' (Hearing aid display) (judgment of 10 November 2016 – I ZR 29/15). In that decision, the Chamber proceeded on the assumption that the claim for injunctive relief asserted was justified neither on the grounds of an infringement of Paragraph 1(1), first sentence, first situation, of the PAngV and Article 3(1) of Directive 98/6 (BGH, GRUR 2017, 286, paragraphs 7 to 12) nor from the point of view of withholding material information within the meaning of Paragraph 5a(2) of the UWG, Article 7(1) of Directive 2005/29 (BGH, GRUR 2017, 286, paragraph 15). It justified the latter – referring to judgment C-476/14 (EU:C:2016:527, paragraphs 44 and 45) – on the ground that Directive 98/6 takes precedence over Directive 2005/29 in accordance with Article 3(4) thereof. Accordingly, the primacy of the provisions of Directive 98/6 precluded a claim for injunctive relief based on an infringement of the provision of Paragraph 5a(3), point 3, of the UWG, which serves to transpose Article 7(4)(c) of Directive 2005/29. Since the provisions of Directive 98/6 were not infringed, a claim for injunctive relief based on an infringement of the provision of Paragraph 5a(4) of the UWG, which serves to transpose Article 7(5) of Directive 2005/29, was also out of the question.