

Case C-330/23

Request for a preliminary ruling

Date lodged:

25 May 2023

Referring court:

Landgericht Düsseldorf (Germany)

Date of the decision to refer:

19 May 2023

Applicant:

Verbraucherzentrale Baden-Württemberg e. V.

Defendant:

Aldi Süd Dienstleistungs-SE & Co. oHG

38 O 182/22

LANDGERICHT DÜSSELDORF (REGIONAL COURT, DÜSSELDORF)

ORDER

In the case of

Verbraucherzentrale Baden-Württemberg e. V. ...,

applicant,

...

v

ALDI SÜD Dienstleistungs-SE & Co. oHG ...,

defendant,

...

the Eighth Commercial Chamber of the Landgericht Düsseldorf ...

has made the following order:

The proceedings are stayed.

The following questions are referred to the Court of Justice of the European Union for a preliminary ruling on the interpretation of Article 6a(1) and (2) of Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers (OJ 1998 L 80, p. 27; ‘the Price Indication Directive’), last amended by 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 (‘the Omnibus Directive’, OJ 2019 L 328, p. 7):

1. Is Article 6a(1) and (2) of the Price Indication Directive to be interpreted as meaning that a percentage mentioned in an announcement of a price reduction may relate only to the prior price within the meaning of Article 6a(2) of the Price Indication Directive?
2. Is Article 6a(1) and (2) of the Price Indication Directive to be interpreted as meaning that emphasis in advertising which is intended to stress the reasonable price of an offer (such as the description of the price as a ‘Price Highlight’), where it is used in an announcement of a price reduction, must relate to the prior price within the meaning of Article 6a(2) of the Price Indication Directive?

Grounds

A. (Subject matter and facts of the main proceedings)

The applicant is registered on the list of qualified entities pursuant to Paragraph 4 of the Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (Law relating to injunctions in the case of breaches of consumer law and other laws) and has brought proceedings against the defendant in respect of advertising which, in its view, harms consumers’ interests. The defendant is part of the ALDI SÜD group. It is responsible for the group’s external promotional image and each week produces brochures which it publishes in paper form and makes available online. In the brochure it presents, among other things, offers from the group’s product range.

The brochure for the 42nd calendar week (from 17 to 22 October 2022) presented six food items on one ... page, under the heading ‘OUR SIX FRESH CRACKERS REDUCED FOR YOU’, each of which had a white horizontal

rectangle with rounded corners (price tile). Two price indications appeared on the price tiles, a larger one with an asterisk in the middle and a smaller one, which had been struck through, in the lower right corner. Eyecatchers in black, red and gold stripes were superimposed on those price tiles. For 'Rainforest Alliance pineapples' this had the text 'Price Highlight' and for the other food items an indication of a percentage reduction. Below each price tile the following text appeared: 'Last selling price. Lowest price in the last 30 days: ...'. The price indications for pineapples were, for example, '1.49*' and '~~1.69~~' in the price tile and '1.39' at the end of the notice below the price tile. For 'Fairtrade organic bananas, loose', the percentage indication was '-23%' and the three price indications '1.29*', '~~1.69~~' and '1.29'. For a full picture of the page of the brochure, reference is made to Figure 1, which is reproduced after the grounds and is a smaller representation of Annex K 2 without the annotations made by the applicant. For details of the presentation of the two offers at issue, reference is made to Figures 1 and 2. The following explanation is given for the asterisk on a later page of the brochure: 'Please note that these items are available in only limited numbers and may therefore be sold out at certain times during the promotion. All items without decoration. Some items with serving suggestions.'

The price charged for Fairtrade organic bananas in stores of the defendant's group was consistently EUR 1.69/kg from mid-September at least, with the exception of the week from 19 to 24 September when the reduced price of EUR 1.29/kg applied to the bananas. Unit prices for Rainforest Alliance pineapples ranged between EUR 1.39 and EUR 1.79 during the five weeks before the offer commenced (calendar weeks 37 to 42). The price in the week before the offer commenced was EUR 1.69.

The applicant considers the advertising for the bananas and the pineapples to be unfair and therefore, by a letter from its lawyer, served formal notice on the defendant and claimed – both unsuccessfully – reimbursement of a lump sum of EUR 243.51 in respect of the costs incurred by it.

At the hearing, the applicant gave clarification that its claim I relates only to the advertising of bananas and supplemented the claim by mentioning bananas expressly. It now claims that the court should:

- I. order the defendant, on penalty of specified measures, to desist from advertising and/or having advertised to consumers the sale of food items with price reductions in the form of a percentage reduction, as occurred in accordance with Annex K2 (bananas ...), if that reduction indicated as a percentage does not refer to the lowest price charged by the defendant in the last 30 days prior to the price decrease;
- II. order the defendant, on penalty of specified measures, to desist from advertising and/or having advertised to consumers the sale of food items with a price reduction as a 'Price Highlight', indicating an earlier price, as occurred in accordance with Annex K 2 (pineapples ...), if the

price described as a ‘Price Highlight’ is higher than the price charged by the defendant in the last 30 days prior to the price decrease;

- III. order the defendant, further, to pay it EUR 243.51 plus interest at a rate of five percentage points above the base rate from the date of commencement of the legal proceedings (1 December 2022).

The defendant contends that the court should:

dismiss the action.

It claims that in the 42nd calendar week a competitor had also offered pineapples (albeit without Rainforest Alliance certification) for EUR 1.49. All other competitors had charged higher prices.

B. (National legal framework)

I. National provisions

1. Preisangabenverordnung (Regulation on the indication of prices, PAngV) of 12 November 2021

‘Paragraph 1 Scope; principle

- (1) This Regulation regulates the indication of prices for goods and services by traders to consumers.

...

Paragraph 3 Obligation to indicate the total price

- (1) Any person who, as a trader, offers goods or services to consumers or, as a provider of goods or services to consumers, advertises with an indication of prices shall indicate the total prices.

...

Paragraph 11 Additional obligation to indicate prices in respect of price reductions for goods

- (1) Any person who is obliged to indicate a total price shall, in the case of any announcement of a price reduction for goods, indicate to consumers the lowest total price applied by it vis-à-vis consumers within the last 30 days prior to the application of the price reduction.

...’

2. Gesetz gegen den unlauteren Wettbewerb (Law against unfair competition, UWG)

Paragraph 1 Purpose of the Law; scope

...

(2) Rules regulating specific aspects of unfair commercial practices shall prevail over the provisions of this Law in respect of the assessment whether an unfair commercial practice exists.

...

Paragraph 2 Definitions

(1) For the purposes of this Law

1. 'transactional decision' means any decision taken by a consumer or other market participant concerning whether, how and on what terms to conclude a transaction, make payment, retain or dispose of goods or services or to exercise a contractual right in relation to goods or services, irrespective of whether the consumer or other market participant decides to act;
2. 'commercial practice' means any conduct of a person for the benefit of his or her own or another undertaking before, during or after the conclusion of a business transaction which is directly and objectively linked to promoting the sale or purchase of goods or services or to the conclusion or performance of a contract concerning goods or services; real property and digital content shall be regarded as goods, while services include digital services and rights and obligations shall also be regarded as services;

...

Paragraph 3 Prohibition of unfair commercial practices

(1) Unfair commercial practices shall not be permitted.

...

Paragraph 5 Misleading commercial practices

(1) A person acts unfairly by using a misleading commercial practice which could cause the consumer or other market participant to take a transactional decision that he or she would not have taken otherwise.

(2) A commercial practice shall be regarded as misleading if it contains untruthful information or other information which is likely to deceive regarding the following circumstances:

...

2. the reason for the purchase, such as the existence of a specific price advantage, the price or the manner in which it is calculated or the terms on which the goods are supplied or the service is provided;

...

Paragraph 5a Misleading by omission

(1) A person also acts unfairly by misleading a consumer or other market participant by withholding from him or her material information,

1. which the consumer or other market participant needs, according to the context, to take an informed transactional decision, and
2. the withholding of which is likely to cause the consumer or other market participant to take a transactional decision that he or she would not have taken otherwise.

(2) The following shall also be regarded as withholding:

1. the hiding of material information,
2. the provision of material information in an unclear, unintelligible or ambiguous manner,
3. the provision of material information in an untimely manner.

(3) In assessing whether material information has been withheld, account shall be taken of the following:

1. limitations of space or time of the medium chosen to communicate the commercial practice, and
2. any measures taken by the trader to make the information available to the consumer or other market participant by means other than the medium chosen to communicate the commercial practice.

...

Paragraph 5b Material information

...

(4) Information which may not be withheld from the consumer on the basis of EU regulations or under legislation implementing EU directives regarding commercial communication including advertising or marketing shall also be regarded as material within the meaning of Paragraph 5a(1).

...

Paragraph 8 Elimination and prohibitory injunction

(1) Where a person engages in an unlawful commercial practice under Paragraph 3 or Paragraph 7, an action to eliminate that unlawful practice may be brought against that person and, where there is a risk of recurrence, an action to obtain a prohibitory injunction. The right to seek a prohibitory injunction exists where such a practice in breach of Paragraph 3 or Paragraph 7 threatens to occur. ...

(3) The rights under subparagraph 1 shall be conferred on:

...

3. qualified entities which are registered on the list of qualified entities pursuant to Paragraph 4 of the Law on injunctions or qualified entities from other Member States of the European Union which are registered on the list of the European Commission provided for in Article 4(3) of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJ 2009 L 110, p. 30), last amended by Regulation (EU) 2018/302 (OJ 2018 L 60I, p. 1).

...?

II. Relevant national case-law

1. As far as is known, no court decisions addressing the issues that are relevant here have been yet delivered thus far Paragraph 11 of the PAngV, which entered into force on 28 May 2022.

[explanation] ...

2. The question as to what consequences are entailed by a possible infringement of Paragraph 11(1) of the PAngV by a trader can be answered on the basis of national case-law to the effect that a commercial practice which infringes Paragraph 11(1) of the PAngV may appear unfair under Paragraphs 5a(1) to (3) and 5b(4) of the UWG with the result that qualified entities like the applicant may take action against the trader concerned on the basis of the UWG.

[explanation] ...

C. (EU law framework)

I. Relevant provisions of EU law

1. Directive 98/6/EC (Price Indication Directive)

‘Article 1 [Scope]

The purpose of this 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.

...

Article 6a [Announcement of a price reduction]

1. Any announcement of a price reduction shall indicate the prior price applied by the trader for a determined period of time prior to the application of the price reduction.

2. The prior price means the lowest price applied by the trader during a period of time not shorter than 30 days prior to the application of the price reduction.

...'

2. Directive 2005/29/EC (Unfair Commercial Practices Directive)

'Article 2 Definitions

For the purposes of this Directive:

...

(d) “business-to-consumer commercial practices” (hereinafter also referred to as commercial practices) means 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;

...

(k) “transactional decision” means any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting;

...

Article 3 Scope

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.

...

Article 4 Internal market

Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive.

...

Article 6 Misleading actions

1. A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:

...

(d) the price or the manner in which the price is calculated, or the existence of a specific price advantage;

...

Article 7 Misleading omissions

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.

3. Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted.

...

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.

...'

II. Interpretation of EU law

1. The interpretation of Article 6a(1) and (2) of the Price Indication Directive raises questions concerning the scope of the rules laid down therein.

That provision, like the Price Indication Directive as a whole, is intended, according to Article 1 and recitals 1 and 2 thereof, to ensure correct and clear information for consumers about the products offered to them. Further clarification of its objective cannot be found in the recitals of the relevant legal acts, which are part of EU law under the second paragraph of Article 296 TFEU, as far as the interpretation of Article 6a(1) and (2) of the Price Indication Directive is concerned. Neither the recitals of the Price Indication Directive nor the recitals of Directive (EU) 2019/2161 ('the Omnibus Directive', by which Article 6a was inserted in the Price Indication Directive) state the reasons for the provision made in Article 6a(1) and (2) of the Price Indication Directive. The drafting history of the provision, in so far as it is evident from the background materials, also does not provide any clarification on the background to the provision (...).

In the 'Guidance on the interpretation and application of Article 6a of Directive 98/6/EC of the European Parliament and of the Council on consumer protection in the indication of the prices of products offered to consumers', Commission Notice 2021/C-526/02, published on 29 December 2021, the Commission explained how, in its – non-binding (see Commission, loc. cit., bottom of p. 131; see also Court of Justice of the European Union, judgment of 13 December 2012 – C-226/11, *Expedia Inc v Autorité de la concurrence and Others* (paragraph 24 et seq.)) – view, the provision is to be applied. In the Guidance it is stated (see Commission, loc. cit., middle of p. 135.):

‘Accordingly, the price reduction must be presented using the indicated “prior” price as reference, i.e. any indicated percentage reduction must be based on the “prior” price as established in accordance with Article 6a.

- For example, where the price reduction announcement is “50% off” and the lowest price in the 30 previous days was EUR 100, the seller will have to present EUR 100 as the “prior” price from which the 50% reduction is calculated, despite the fact that the last selling price of the good was EUR 160.’

The applicant considers this view to be correct and asserts that it is consistent with the purpose pursued by Article 6a(1) and (2) of the Price Indication Directive to present the advertised price advantage as transparently as possible. This aspect is also regarded as at least worthy of consideration in the legal literature (...).

The defendant, on the other hand, considers the Commission’s view to be incorrect. It is able to rely on the commentaries from legal literature already cited above under B II 1, which point out that this provision merely establishes an additional obligation to provide information but does not include any rules on the design of the advertising (...).

Question 1 seeks to resolve this disputed point.

The applicant further asserts that advertising statements which present the price offered as particularly reasonable should likewise refer to the lowest price in the last 30 days as established in accordance with Article 6a(2) of the Price Indication Directive and derives this understanding of the provision from its purpose of preventing price swings. The answer to this question is the subject of Question 2.

2. By contrast, the interpretation of the rules of the Unfair Commercial Practices Directive which may be applicable seems to be clear. Reference can be made in this respect to the presentation of the relevant national case-law above under B II 2, in which account has already been taken of the EU legislation concerning the specific application of the Unfair Commercial Practices Directive – for which national courts and tribunals are ultimately responsible – and its interaction with the rules of the Price Indication Directive.

D. (Proposed decision)

In the view of the Chamber, both questions should be answered in the negative.

On the basis of its wording, Article 6a(1) and (2) of the Price Indication Directive regulates only when and under what conditions (under Article 6a(1) of the Price Indication Directive in the case of any announcement of a price reduction) what information is to be provided (the prior price as established in accordance with Article 6a(2) of the Price Indication Directive). The manner in which that information is to be provided, on the other hand, is not laid down either in Article 6a or elsewhere in the Price Indication Directive. This distinguishes that

provision from the rules contained in the Price Indication Directive governing the indication of the selling price and the unit price, which, under the first sentence of Article 4(1) of the Price Indication Directive, ‘must be unambiguous, easily identifiable and clearly legible’.

Against this background, the applicant’s view regarding Question 1, in respect of which it is able to refer to the Commission and which is expressed in the Commission’s Guidance to the effect that the prior price as established in accordance with Article 6a(2) of the Price Indication Directive must be used as the reference in all circumstances for the calculation of the price advantage, is not consistent with the regulatory approach taken in the Price Indication Directive, which, save for a few exceptions, simply specifies when the consumer is to be provided with what information. It therefore seems more appropriate to the Chamber to answer the question whether the information prescribed by the Price Indication Directive was duly provided to the consumer by reference to Articles 6 and 7 of the Unfair Commercial Practices Directive, which regulate this subject, unless specific aspects relating to the provision of information are regulated in the Price Indication Directive, which is not the case for the area covered by Article 6a thereof. It is not therefore ruled out that in a specific case the indication of a percentage which does not refer to a prior price as established in accordance with Article 6(2) of the Price Indication Directive is unfair. However, the unfairness would not result solely from the fact that such a percentage is mentioned, but on the basis of a consideration of the overall design of the advertising having regard to the requirements set out in Articles 6 and 7 of the Unfair Commercial Practices Directive.

The above considerations apply *mutatis mutandis* to Question 2. It concerns, to an even greater extent than Question 1, the lawfulness of advertising methods widely used for the announcement of a price reduction, which, in the absence of specific regulation of those aspects in the Price Indication Directive, must be assessed by reference to the differentiated requirements set out in the Unfair Commercial Practices Directive.

E. (Relevance to the decision and explanation of the [effects of the possible answers to the] questions referred [on the outcome of the proceedings])

The outcome of the action depends on the answers to the questions referred for a preliminary ruling. The action is admissible, but well founded in its entirety only if the questions referred were to be answered as proposed by the applicant, that is to say, in the affirmative.

- I. The action is admissible. [explanation] ...
- II. The substance of the heads of claim depends on the answers to the questions referred.
 1. If Question 1 was to be answered in the affirmative, the head of claim at I would be well founded.

[explanation] ...

2. If, on the other hand, Question 1 was to be answered in the negative, the head of claim at I would be unfounded.

[explanation] ...

3. The head of claim at II would be well founded if Question 2 was to be answered in the affirmative. [explanation] ...

4. If, on the other hand, Question 2 was to be answered in the negative, the head of claim at II would be unfounded.

[explanation] ...

F. (Appropriateness of the reference)

It seems appropriate to make use of the possibility available under the first and second paragraphs of Article 267 TFEU to stay the proceedings at first instance and to refer the questions, which are relevant to the decision, to the Court of Justice of the European Union for a preliminary ruling.

[explanation] ...

WORKING DOCUMENT

Reproduction of images

Figure 1

Montag, 17.10. bis Samstag, 22.10.

UNSERE 6 FRISCHE-KRACHER FÜR DICH REDUZIERT.

**DEUTSCHLANDS
BESTER
PREIS!**



Große Früchte

Verpackungsmilch von ALDI+
unverpackt

Rain forest Alliance Ananas
Ursprung: Costa Rica, Klasse I, Stück

Preis-Highlight
1.49 €69
Letzter Verkaufspreis, Niedrigster Preis der letzten 30 Tage: 1.39



Verpackungsmilch von ALDI+
Verpackung recyclebar

Ernte aus DEUTSCHLAND

-28%
0.99 €39
Letzter Verkaufspreis, Niedrigster Preis der letzten 30 Tage: 0.99

Bio-Karotten
Ursprung: Deutschland, Klasse I, 1-kg-Beutel



NATUR LIEBLINGE Heidelbeeren
Ursprung: Peru/Südafrika, Klasse I, 500-g-Packung, kg-Preis 6.66

-25%
3.33 €44
Letzter Verkaufspreis, Niedrigster Preis der letzten 30 Tage: 3.39

**BIS ZU
-28%
SPAREN.**



GUT bio

FAIRTRADE

Fairtrade Bio-Bananen, los e
Ursprung: Dominikanische Republik/Ecuador/Peru, kg-Preis

-23%
1.29 €69
Letzter Verkaufspreis, Niedrigster Preis der letzten 30 Tage: 1.29



-21%
1.49 €89
Letzter Verkaufspreis, Niedrigster Preis der letzten 30 Tage: 1.75

Champignons braun
Ursprung: siehe Etikett, Klasse I, 400-g-Schale, kg-Preis 3.73



Bio-Trauben hell & dunkel, kernlos
Ursprung: Italien, Klasse II, 400-g-Packung, kg-Preis 4.23

-15%
1.69 €99
Letzter Verkaufspreis, Niedrigster Preis der letzten 30 Tage: 1.69

 Mehr auf aldi-sued.de/frischekracher

Figure 2



Figure 3



...

WORKING DOCUMENT