Comment & Analysis

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The CJEU decision in Citroën/ZLW: Ready for REFIT?

In July 2016, the Court of Justice of the European Union (CJEU) delivered its judgment in the Citroën/ZLW case.[1] In practical terms, the essence of the judgment is that car sellers are not allowed to advertise a price that does not include all necessary and fixed costs. This in itself is not controversial, which may explain why the judgment so far seems to have caught little attention. However, closer reading reveals that the legal grounds of the judgment are in fact highly surprizing. In my view, the judgment is a misapplication of European law. This commentary explains why, and discusses the consequences of the decision, both at the EU level and in the Netherlands.[2]

I. Facts and preliminary questions

In 2011, car manufacturer Citroën placed an advertisement in a local German newspaper. The advertisement mentioned the price of a "Citroën C4 VTI 120 Exclusive: [EUR] 21.800.[1]" The "[1]" referred to a disclaimer text at the bottom of the page: "Price plus transfer costs of [EUR] 790". This (non-optional) amount of EUR 790 had to be paid by the consumer for transporting the car from the manufacturer to the car dealer.

The advertisement led to a case before the German courts and, in the end, to preliminary questions referred to the CJEU by the German *Bundesgerichtshof*. In short, the *Bundesgerichtshof* asked the CJEU the following questions:

- Is an advertisement in which a price is mentioned an offer in the meaning of the Product Pricing Directive (98/7/EC)?

- If so, should the price in the advertisement according to the Product Pricing Directive include the necessary costs for the transportation of the car to the dealer?

- Should the price of a car, in case of an invitation to purchase in the context of the Unfair Commercial Practices Directive (2005/29/EC), also include the necessary costs for the transportation of the car to the dealer?

II. Applicability of the Product Pricing Directive

First, let us focus on the Product Pricing Directive. This Directive has been part of EU consumer law for quite a few years now. It was established in 1998, and had to be applicable in the EU Member States ultimately as of 18 March 2000. According to Article 1 of the Product Pricing Directive, the purpose of the 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 3.1 of the Product Pricing Directive lays down a specific obligation for traders, which is in line with the Directive's aim: "The selling price and the unit price shall be indicated for all products referred to in Article 1". Selling price is defined as "the final price for a unit of the product, or a given quantity of the product, including VAT and all other taxes".[3] A unit price is, for example, the price per kilogram, liter, meter, or a similar common measuring unit.[4] In principle, the trader is required to indicate the price per measuring unit, unless the measuring unit is not relevant for the consumer in relation to the specific product. Think, for example, of magazines, t-shirts, cars, etc.

So, in short, the Product Pricing Directive is the European legal instrument that ensures that in a supermarket it is indicated what the price per kilo is of, say, a jar of peanut butter. This enables the customer to easily compare the prices of different jars of peanut butter, without having to calculate the price per kilogram for each jar. I always thought that this about summarizes the essence of the Directive. And so did Advocate General Mengozzi in his opinion in *Citroën/ZLW*. He emphasizes that the Product Pricing Directive does not provide rules on pricing in general, applicable to all consumer products:[5]

> "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.
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> 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".

Following this statement, Advocate General Mengozzi elaborately and convincingly argues that the Product Pricing Directive is "not intended as a form of framework directive on the indication of prices or advertising generally".[6] In line with the views expressed by the European Commission in this case, Mengozzi concludes that the Product Pricing Directive is applicable only to products for which measuring units are relevant (such as peanut butter, tomatoes, etc.), and not to products such as cars. As far as I am aware, this view is (or at least: was) *communis opinio*.

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1 CJEU 7 July 2016, Case C-476/14, ECLI:EU:C:2016:527 (*Citroën/ZLW*).

2 An earlier version of the commentary has been published (in Dutch) in issue 2017-1 of the journal *Intellectuele Eigendom en Reclamerecht (IER)*.

3 Article 2(a) Product Pricing Directive.

4 Article 2(b) Product Pricing Directive.

5 Conclusion Advocate General Mengozzi, par. 38-39.

6 Conclusion Advocate General Mengozzi, par. 43.

The CJEU's view is different. The Court decides that an advertisement in which a price is mentioned is an offer in the sense of the Product Pricing Directive. So, according to the CJEU, the scope of application of the Product Pricing Directive is not limited to products for which a price per measuring unit is relevant. Apparently, the Directive is applicable to *any* product offered by a trader. In addition, according to the CJEU it follows from the Directive that the trader should always provide the price including the necessary and fixed costs. It is not sufficient if those costs are provided in a disclaimer: they must be part of the final price.

In my opinion, the CJEU is misapplying the Product Pricing Directive. I have to admit: literal reading of Articles 1 and 3.1 of the Product Pricing Directive does allow room to argue that a trader must always and for all products provide the final price. However, this literal reading is in conflict with the set-up and purpose of the Directive. The Directive provides a detailed set of rules in relation to the measuring unit price of products. It is not meant as a product pricing framework in general.

In addition: if Article 3.1 were to be interpreted literally (as the CJEU is doing in this decision), the conclusion should in fact be that there is an obligation for traders to provide a price in *every* advertisement for a product. In other words: there would be a prohibition to advertise a product without mentioning its price. This cannot reasonably be said to be the objective of the Product Pricing Directive: it is clearly acceptable to advertise a product without mentioning its price, for example to promote the product's properties, or to make consumers aware of the existence of the product.

In any case: according to the CJEU, the European Commission, Advocate General Mengozzi and the *communis opinio* (to which my view adheres) were apparently wrong about the scope of the Product Pricing Directive. As a consequence, the Product Pricing Directive suddenly seems to have a much broader scope of application than I (and perhaps also you) thought.

III. Relation to the Unfair Commercial Practices Directive

The judgment has significant consequences. Not just from the perspective of the Product Pricing Directive, but also for the Unfair Commercial Practices Directive.

Why is this the case? Because the CJEU decides that the Unfair Commercial Practices Directive is not applicable in case of application of the Product Pricing Directive:[7]

> "As regards the applicability of Directive 2005/29, it should be noted that, under Article 3(4) of that directive, in the case of conflict between the provisions of the directive and the other rules of EU law regulating specific aspects of unfair commercial practices, the latter are to prevail and apply to those specific aspects.
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> It is true that Directive 2005/29 applies, in accordance with Article 3(1) of that directive, to unfair business-to-consumer commercial practices, as defined in Article 5 of the directive, before, during and after a commercial transaction in relation to a product. Article 2(d) of the directive defines commercial practices as being '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' (see judgment of 16 July 2015 in Abcur, C-544/13 and C-545/13, EU:C:2015:481, paragraph 73).
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> However, it should be noted that Directive 98/6 governs specific aspects, within the meaning of Article 3(4) of Directive 2005/29, of unfair commercial practices that can be characterised as unfair in dealings between businesses and consumers, namely, in particular, those that relate to the indication, in offers for sale and in advertising, of the products' selling price.
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> In those circumstances, in so far as 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, Directive 2005/29 cannot apply as regards that aspect.
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> Therefore, Article 7(4)(c) of Directive 2005/29 need not be interpreted."

Hence, the CJEU emphasizes that the Unfair Commercial Practices Directive cannot be applied in case of conflict with other, more specific, EU regulations (Article 3.4 of the Unfair Commercial Practices Directive). According to the CJEU, the Product Pricing Directive provides more specific rules in the field of commercial practices, i. e. in relation to the indication of the product selling price in offers for sale and in advertising. As a consequence, the Unfair Commercial Practices Directive is not applicable.

One link is missing in the CJEU's line of argument: the CJEU does not assess whether the Unfair Commercial Practices Directive is indeed in conflict with the Product Pricing Directive. However, comparing the rules of both Directives indeed reveals conflict. The requirement in the Unfair Commercial Practices Directive to provide the final price including all necessary costs applies only in the context of an invitation to purchase (Article 7.4 of the Unfair Commercial Practices Directive). Outside of this context, courts and enforcement authorities have to decide on a case-to-case basis whether or not including certain costs is misleading for the average consumer (Article 7 of the Unfair Commercial Practices Directive). The Product Pricing Directive (in the line of reasoning of the CJEU) does not allow for a case-by-case test: the trader simply has the obligation to provide the final selling price, including all necessary costs. In addition, even in the context of the invitation to purchase in the Unfair Commercial Practices Directive, the requirement to provide the final selling price including all necessary costs is not absolute: the obligation is subject to the specific circumstances and of the medium used.[8]

In practice, these differences are likely to have limited effect. Omitting necessary costs from the price would otherwise also likely be a misleading commercial practice (either in itself, or in the context of the invitation to purchase). However, the Product Pricing Directive does present a more absolute requirement than the Unfair Commercial Practices Directive.

IV. Consequences for (legal) practice

What does this judgment mean for (legal) practice? Firstly: so far, price indications in advertisements were usually assessed on the basis of the Unfair Commercial Practices Directive. This happened either on a case-to-case basis from the point of view of the rules on misleading commercial practices, or on the basis of the (stricter) rules in the context of the invitation to purchase. Also in the context of the invitation to purchase, the obligation to provide the final selling price including all necessary costs can depend on the possibilities

7 Par. 42-46 of the judgment.
8 Article 7 Unfair Commercial Practices Directive and CJEU 26 October 2016, Case C-611/14, ECLI:EU:C:2016:800 (*Canal Digital*).

and impossibilities of the medium, and on the other circumstances of the case at hand. With the CJEU's judgment in *Citroën/ZLW*, the scope of application of the Unfair Commercial Practices Directive has been interpreted in a restrictive way. As soon as the commercial practice concerns an offer for a product in the sense of the Product Pricing Directive, the rules of that Directive should be applied. Offers for products, at least as far as the obligation to provide the final selling price is concerned, are no longer subject to the Unfair Commercial Practices Directive. Other types of deception, also in relation to the price, do still fall under the scope of the Unfair Commercial Practices Directive. Think, for example, of an advertisement with a price offer for a product, in which the product displayed cannot be purchased for the price indicated.

Secondly, price offers for *services* do not fall under the scope of the Product Pricing Directive, which deals with "products" only. Hence, price offers for services still fall under the (slightly less strict) regime of the Unfair Commercial Practices Directive, also in relation to the obligation to provide the final selling price.

Thirdly, the Product Pricing Directive is a minimum harmonisation directive.[9] As a consequence, Member States can still impose stricter rules on traders within the scope of application of the Directive. We were no longer used to that: the Unfair Commercial Practices Directive introduced full harmonisation in order to enable companies to use their marketing campaigns throughout Europe, without facing a different level of consumer protection in each Member State. I wonder: did the CJEU realize that its judgment in *Citroën/ZLW* would negatively affect the objective to fully harmonize marketing laws in the European Union?

Finally, I would like to address an issue that is perhaps limited to the Netherlands, but which is nonetheless interesting. In the process of implementation of the Unfair Commercial Practices Directive, the Dutch legislator failed to make an explicit choice as to whether companies can take legal action in the civil courts against their competitors, if those competitors engage in B2C unfair commercial practices. The Unfair Commercial Practices Directive itself provides several indications that this should indeed be possible.[10] Legal action initiated by companies against their competitors is important for businesses, but also for consumers. This is especially the case since consumers generally do not initiate court proceedings and enforcement by the administrative authorities is limited. Although discussion on this issue continues, most Dutch courts assume that companies can indeed successfully initiate legal action against their competitors. However, what about the rules of the Product Pricing Directive? Can companies also take legal action against their competitors on the basis of those rules? The discussion in the Netherlands can start all over again. The result may be that companies can take legal action against their competitors for breaching the rules on the pricing of *services* (on the basis of the Unfair Commercial Practices Directive), but not for breaching the rules on the pricing of *products* (on the basis of the Product Pricing Directive).

V. Enforcement by the Dutch Consumers & Markets Authority

In the Netherlands, the CJEU decision *Citroën/ZLW* plays an interesting role in the enforcement action initiated by the *Autoriteit Consument & Markt* (Dutch Consumers & Markets Authority, ACM). In the recent past, the ACM pressured the travel sector into more transparent pricing, ensuring through enforcement (based on the Unfair Commercial Practices Directive) that travel companies advertise final prices, rather than prices excluding e. g. all sorts of taxes.

The ACM has now turned to the car sector. Already prior to the CJEU's decision in *Citroën/ZLW*, the ACM requested information from the major car brands about their pricing policies. After this request was made, *Citroën/ZLW* confirmed that car sellers are indeed obliged to provide final prices, including all necessary and fixed costs. This ends the common practice in the Netherlands to provide an entry level price of a car, without mandatory car preparation fees, registration fees and recycling fees. These costs were often either provided in small print, or were not provided at all.[11]

VI. Can the ACM actually enforce the rules of the Product Pricing Directive?

In principle, it does not really matter for the automotive sector whether the ACM enforces on the basis of the Unfair Commercial Practices Directive, or on the basis of the Product Pricing Directive. In the end, both Directives would require the car seller to provide the final selling price of a car.

However, the ACM may actually be facing a problem when enforcing on the basis of the Product Pricing Directive. In the Netherlands, the Product Pricing Directive has been implemented in the *Besluit Prijsaanduidingen Producten* (Dutch Product Pricing Decree). This legislation was written under the assumption that the Product Pricing Directive deals with prices per unit at the point of sale, and not with pricing in general. As a consequence, the Dutch implementation legislation does not provide a general obligation to provide a final selling price. Article 3.1 of the Dutch Product Pricing Decree establishes that "A seller offers a product, or a sample through which a product is offered, as far as the sample or product is available on the spot, only for sale if it is accompanied by the designation of the selling price and the price per unit."[12] Hence, the Dutch legislation merely deals with offering products available at the point of sale (or: the place where the sample is provided). This does not include advertising.

Still, there is an obligation for EU Member States (including their courts) to interpret their national laws in line with EU law. The question therefore is: can the Dutch Product Pricing Decree be interpreted in line with the Product Pricing Directive? Or would that constitute an (unlawful) *contra legem* interpretation?[13] I can imagine that this will be a point of

9 Article 10 Product Pricing Directive.
10 See e. g. Section 8 of the Directive's Preamble.
11 Already in 2014, the self-regulatory Advertising Code Committee had decided (on the basis of the Unfair Commercial Practices Directive) that car prices had to include all necessary and fixed costs. Board of Appeal of the Advertising Code Committee, file 2012/00088, IER 2013/18 (*Kia Picanto*).
12 Orginal text (in Dutch): "Een verkoper biedt een product, dan wel een monster met gebruikmaking waarvan een product wordt aangeboden, voor zover dat product of monster ter plaatse aanwezig is, slechts te koop aan indien het voorzien is van een aanduiding van de verkoopprijs en de prijs per meeteenheid."
13 CJEU 16 June 2005, Case C-105/03, ECLI:EU:C:2005:386, ECR 2005, p. I-05285 (*Pupino*), par. 47: "The obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law ceases when the latter cannot receive an application which would lead to a result compatible with that envisaged by that framework decision. In other words, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*. That principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision."

discussion if the ACM should decide to impose a fine on the basis of the Dutch Product Pricing Decree.

VII. Conclusion

In my view, the CJEU *Citroën/ZLW* decision is a mistake, which sooner or later needs to be corrected. This could happen in a decision of the CJEU in another case, or as part of the REFIT (Regulatory Fitness) program by the European Commission. In the meantime, this judgment makes it significantly more complicated to decide what rules apply in what circumstances, what the legal basis is for those rules and whether enforcement of those rules can be successful. ■

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Advertising as a source of terms - At the crossroads between contract and consumer law

I. Introduction

The influence that advertising has on contemporary society is undeniable. Its importance transcends the original boundaries of its area of activity to boldly assume a position as a sort of "magical wise woman-cum-mother of our time",[1] with a presence in and hold over a multitude of aspects of people's lives.

Within a legal context, advertising was seen until a few decades ago as an alien phenomenon in respect of the general theory of Contract Law and, in particular, to its content. The incidents produced by eventual discrepancies between advertising and reality – as a result of a contract – were commonly resolved through the notion of pre-contractual liability.[2]

The reason why advertising – or, more correctly, the information advertised – remained on the margin of contractual terms stems from a voluntarist concept of contracts.[3] This notion has been gradually whittled away, not only in the area of consumer contracts but also in other specific (non-consumer) ones, allowing terms to be extended in order to include the information advertised.

In this incorporation of advertising into the content of the contract, we should stipulate the cause and scope of its binding nature, as well as its interaction with the sources of contractual terms. We will discuss this, in that order.

II. Causes of the abidingness of advertising

The cause through which the information advertised is included in the content of a contract cannot be established *a priori* as it depends on the factual basis on which advertising is presented. Interpretation of the facts determines the legal effectiveness of advertising, meaning that a single, unambiguous solution cannot be proposed. It is therefore appropriate to speak of the "causes", in plural, of abidingness.

From the perspective of traditional contract formation theory, which states that agreement is an essential requirement of a contract that is made when one party accepts the offer made by the other,[4] two hypotheses are possible: that advertising constitutes an offer or else that it represents an earlier stage, an invitation to treat (*invitation ad offerendum*, *offre de pourparlers*, etc). We will be considering these two alternatives and their consequences in a moment, in order to subsequently justify the binding nature of advertising where it does not entail a contract offer.

I would firstly like to clarify that the following analysis is not restricted to contracts entered into with consumers, given that the contractual effectiveness of advertising has been recognised beyond this context.[5]

1. Offer and invitation to treat

Advertising may be considered an offer if, in a specific case, it meets the requirements that it demands. Otherwise, it should be framed within an earlier stage, as a mere invitation to treat,[6] with which the negotiations of a contract commence.[7]

An offer is aimed to result in a contract and should contain the essential elements thereof: a proposal with intention to become legally bound made by the offeror (which, together with the acceptor's intention shall constitute the required agreement) that contains terms which are sufficiently specific and not provisional.[8] The contract will be deemed to be formed through its simple acceptance.

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1 M Vargas Llosa, *La civilización del espectáculo* (Alfaguarda 2012) p 34.

2 J I Font Galán, "Publicidad comercial y contrato con consumidores. Conexiones funcionales y normativas: sustantivación obligacional e integración contractual de las ofertas promocionales y publicitarias", in M Rebollo Puig/M Izquierdo Carrasco (eds), *La defensa de los consumidores y usuarios* (Iustel 2011) p 1159.

3 A criticism to an overarching role of intention may be found, in respect of English Law in several works of P S Atiyah, *An introduction to the Law of Contract* (Clarendon Press 1995) pp 180-181; "Misrepresentation, Warranty and Estoppel" in *Essays on Contracts* (Clarendon 1996), pp 277-288 and 300-302; "The Binding Nature of Contractual Obligations. The Move from Agreement to Reliance in English Law and the Exclusion of Liability relating to Defective Goods", in D Harris and D Tallon (eds), *Contract Law Today. Anglo-French Comparisons* (Clarendon Press 1989) pp 30-33; and *The rise and fall of freedom of contract*, (Clarendon Press 1979), pp 771-778.

4 G Treitel, & E Peel, *The Law of Contract* (Sweet & Maxwell 2011) § 2-001 (p 8).

5 This is evident in the case of the reformed § 434 (1) 3 BGB. It is also an evolution perceived in the case law of certain jurisdictions such as Spain, as from *STS* 1ª (Decision of the Spanish Supreme Court, Section 1) 14.6. 1976 (J Civ 1976, 196). In France, cases with coinciding factual backgrounds have been resolved on the basis of «*non-conformité*», which assumes a breach of a term, see G Venandet et al, *Code Civil* (Dalloz 2016) "Art. 1604", pp 2180-2186.

6 Cf L Díez-Picazo, *Fundamentos del Derecho Civil Patrimonial*, I (Thomson Civitas 2007), p 383; M Pino Abad, "Comentarios a los artículos 61 y 65. La relevancia negocial de la publicidad comercial: integración publicitaria del contrato celebrado por consumidores", in M Rebollo Puig/M Izquierdo Carrasco (eds), *La defensa de los consumidores y usuarios* (Iustel 2011) p 1112 (note 9).

7 J C Menéndez Mato, *La Oferta Contractual* (Aranzadi 1998) p 91.

8 The European common core in respect of the definition of an offer is well defined in Art. 2:201 PECL.