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| Full title | <p><i>Kia Picanto</i> case - https://www.reclamecode.nl/webuitspraak.asp?ID=71180&acCode</p> <ul style="list-style-type: none"> - Date: 11/05/2012 - File No: 2012/00088 - Decision: Advertising Code Committee (<i>Reclame Code Commissie</i>) recommendation upheld (changed grounds) - Product/ Service: Motorised transport - Motivation: Misleading Pricing - Medium: Audio-visual media services, digital marketing communication |
| Facts | <p>The contested adverts concerned a television commercial and an advertisement on the website www.kia.nl in which the Kia Picanto was advertised.</p> <p>The TV commercial stated and included in text on the screen: "From/ Vanaf €7.995"</p> <p>The website stated: "Available from € 7.995" (<i>Leverbaar v.a. €7.995</i>)</p> |
| The Complaint | <p>Kia Picanto cannot be purchased for the starting price / entry-level price mentioned in the adverts. There are always costs for making vehicles ready for road-use for a particular owner¹ (or "ready-for-use" car costs – known as "<i>autorijklaarkosten</i>") amounting to c. €700. These costs were not mentioned in the adverts.</p> |
| Defence | <p>In the car industry it is common for advertisers to state an entry level price exclusive of such costs (i.e. ready-for-use car costs such as delivery costs). The consumer is aware of this. Deviation from this pattern would cause confusion among consumers. Currently it is stated that it is a starting price/ entry-level price, there is clearly no question of "ready-for-use" car costs being included.</p> |
| Committee Decision | <p>Judgement/ In the present communications a Kia Picanto is offered "from € 7.995". It has been established that the mentioned price does not include the costs for making vehicles ready for road-use for a particular owner and other (delivery) costs. In the contested adverts no mention is made of the existence of these additional costs. The single designation, "from" does not indicate that this relates to additional delivery costs over which the consumer cannot exercise any influence, and not, for example, additional costs related to the version/ design of the car to be chosen by the consumer.</p> <p>On the basis of the above, the Committee considers there is unclear information regarding the price as referred to in Article 8.2(d)² of the Dutch Advertising Code (NRC). Furthermore, the advertiser has not complied with the obligation to provide essential (i.e. material) information with regard to the price as referred to in Article 8.4(c) NRC. This obligation must include the mention of the full/total (starting) price of the relevant car with the additional, unavoidable costs that will in any case be charged to the customer. If these costs have not already been included in the quoted price, they should clearly stand out in the expression/ communication. Moreover, since the Committee is of the opinion that the expression/ advert can cause the average consumer to take a transactional decision that he would otherwise not have taken (it has not been disputed that the additional costs amount to approximately €</p> |

¹ The ACM in its [FAQ](#) on "ready for road" costs states that: "in the case of car prices in advertisements, the VAT, BPM (*belasting van personenauto's en motorrijtuigen* – car tax), fees, recycling contribution and (unavoidable components of the) ready-for-road-use car costs (*autorijklaarkosten*) must be included in the price. Which components are part of autorijklaarkosten differs per brand. The ACM therefore does not provide an exhaustive list of what avoidable and unavoidable costs are. The main rule is that unavoidable costs are all costs that a consumer must pay before he can drive away. This means all costs that the importer and dealer must make to deliver the car in accordance with the standard. You can think of costs such as transport from factory to dealer, cleaning and brushing the bodywork, delivery, license plates, fees and recycling contribution/ charge.

² Any advertising which contains incorrect/ false information, or information that is unclear or ambiguous for the average consumer in respect of *the price or the way in which the price is calculated, or the existence of a specific price advantage*, and causes or is likely to cause the average consumer to take a transactional decision that he would not have otherwise taken, is considered to be misleading (Art. 8.2 DAC – intro including point d)

700), the adverts are misleading and therefore unfair in the sense of article 7³ NRC. The fact that the advertising method used by the advertiser is customary in the automotive industry does not - in terms of the correctness/ validity of these claims the advertiser - lead to a different opinion.

The decision of the Advertising Code Committee of 27 February 2012

The Committee considers the contested statements to be contrary to the provisions of Article 7 NRC.

Recommended for the advertiser not to advertise in such a way.

Board of Appeal

The objections (i.e. appeal)

The Board summarises these as follows:

The decision cannot stand in so far as the Committee has ruled that Kia does not provide any information on the existence of additional costs on its website. On the homepage of this website a link to the price and specification list is included under the heading "*Rij belastingvrij*". It is also possible to click on the tab "Prices and specifications" at the top of the page, after which the visitor arrives at a web page where again in various places a link is made to the price and specification list. This list is a PDF file that visitors can download and print. This file clearly shows that there are additional costs and what they are. In this way, Kia clearly provides sufficient essential (material) information on its website in order to enable the consumer to make an informed transactional decision. The average consumer who is looking for a new car will want to be well informed by the dealer and also search for relevant information about the car he intends to buy. The most appropriate way to do this is the Kia website. This consumer will not overlook the price and specification page. Pursuant to ECJ EC 12 May 2011, IER 2011/49 (Consumers Ombudsman / Ving⁴), it is permissible to make use of starting prices in advertisements, even if it concerns an invitation to purchase.

The appeal response

The objections have been refuted in a reasoned/ justified way

The verbal hearing

Kia states at the meeting that the appeal also applies to the Committee judgement with regard to the contested television commercial. Kia states that the way in which it advertises does not deviate from the manner of advertising by other car brands. Other car manufacturers also mention starting prices/ entry-level prices in television commercials without including the fixed, unavoidable additional costs. This is a common way of communicating in the market. For the average consumer it is clear that the starting price refers to the price of the car as such and that there are several additional costs, including the common/ general and customary/ usual "ready-for-use" car costs.

The Judgement of the Board

1. Contrary to what appears to follow from the notice of appeal, the appeal, as communicated by Kia in the meeting, also relates to the Committee's Decision with regard to the TV commercial. In connection with this, Kia sent several television commercials to the Board prior to the meeting, which were forwarded by the Secretariat to the Respondent and on which the Respondent responded in substance. On the basis of the
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³ Advertising must not be unfair. Advertising is considered to be unfair if it contravenes the requirements of professional diligence, and if it materially distorts or is likely to materially distort the economic behaviour of the average consumer reached, or targeted, as regards the product. Misleading and/or aggressive advertising is considered to be unfair in all cases.

⁴ Using 'entry-level prices/ starting prices', i.e. indicating the price 'as from' a specific minimum amount, is permitted if the final price cannot '*reasonably be calculated in advance*' due to the nature of the product. Case C-122/10 Konsumentombudsmannen/Ving Sverige AB, Judgment of 12 May 2011, para. 64 <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-122/10> A travel agency indicated prices 'as from' for given flights and travel packages. The Court ruled that the UCPD does not rule out the use of entry-level prices, as long as the information provided meets the Directive's requirements, taking into account the circumstances of a real case. It held that: 'A reference only to an entry-level price may, therefore, be justified in situations where the price cannot reasonably be calculated in advance, having regard, inter alia, to the nature and characteristics of the product.'

foregoing, the Board will also consider the Committee Decision regarding the television commercial and on what Kia argues against in appeal.

2. It is assumed/ accepted that both the contested television commercial and the website must be regarded as an invitation to purchase as referred to in Article 8.4 of the Dutch Advertising Code (NRC). Pursuant to the provisions under c of this article, the following essential information must be provided with an invitation to purchase: *"the price including 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, and, where applicable, all additional freight, delivery or postal charges or, where these charges/costs cannot reasonably be calculated in advance, the fact that such additional charges/costs may be payable"*. This provision implements Article 7(4) of Directive 2005/29/EC, which stipulates in the context of misleading omissions that (among other things) the information referred to above is essential insofar as this is not already apparent from the context. The Board understands/ considers on the basis of the above, also in light of the EU Commission "Guidance on the implementation / application of Directive 2005/29/EC on unfair commercial practices", that the invitation to purchase must include a "total price"; i.e. a price in which all costs are included to the extent that these costs: 1) can be determined in advance/ beforehand; 2) are unavoidable; and 3) are not apparent from the context of the advertisement. If these requirements are met, it should be assessed whether the advertisement entices or may entice the average consumer to make a decision on a transaction which he would otherwise not have made if he had known the total price. (If so, this constitutes a misleading omission)
 3. It is not disputed that the prices in the contested advertisements repeatedly exclude the "ready-for-use" costs and various other costs. In any case, as the Board understands, this relates to a large part (about €700) of the costs on which the consumer cannot exercise influence and are always due/ payable, thus fixed and unavoidable costs. Kia explained at the meeting how these costs have been compiled. In addition, the Board has found that Kia partly determines these costs by model on a standard amount as they see fit (such as "ready-for-use" costs and delivery packages), while apparently there are also cost elements related to government regulations (such as administrative charges and disposal contribution i.e. recycling charges). As there are no indications to the contrary, the Board assumes that all these costs are known at the time the advertisement is published. On the basis of what is stated under Point 2, Kia should therefore have included these costs in the price, which it did not.
 4. It is not clear from the TV commercial that additional costs are due/ payable. As far as the contested internet advert is concerned, this is different insofar as it is ultimately possible to find out via hyperlinks that these costs are due and how high they are, but the Board is of the opinion in the present case that it cannot be said that the information about the obligatory additional fixed costs are sufficiently apparent from the context of the communication. The fact that there is a starting price/ entry-level price (i.e. "from...") does not lead to a different judgement. The Committee rightly considered that the mere designation 'from / vanaf' cannot be interpreted as referring to the additional costs over which the consumer cannot exercise any influence. Instead, there is clearly an indication that refers to the cheapest version of the corresponding advertised model, regardless of the additional costs involved in the purchase of this model.
 5. The Board agrees with the Committee's Judgement that, because the adverts do not contain "total prices", the reasonably well informed and reasonably observant and circumspect consumer is enticed or may be enticed to make a transactional decision that he would not have taken if there had been such prices. After all, the fixed and unavoidable additional costs are considerable and therefore lead to a significantly higher purchase price than the sales price stated in the advert. It cannot be excluded that the intended consumer – who may be aware of the fact that when purchasing a new car certain standard costs are due but cannot be deemed to know that these fixed and unavoidable costs for the advertised car are at least approximately € 700 - would have
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opted for a different model or cheaper version if he had previously known those costs. On the basis of the foregoing, there is an omission as referred to in Article 8.3(c)⁵ NRC in connection with Article 8.4(c)⁶ NRC. The Board therefore considers the adverts to be unfair in the sense of article 7⁷ NRC and will uphold the judgement of the Committee, with some change of grounds.

6. In response to the express claim by Kia to the fact, as has been sufficiently demonstrated, that other car manufacturers do not mention "total prices" in similar/ comparable expressions/ adverts on television and on the internet in which the fixed and unavoidable costs are included, the Board considers that apparently there is a situation where there is a misconception within the relevant industry regarding information obligations that apply to the adverts mentioned here if there is an invitation to purchase. On the basis of the above, this cannot lead to the conclusion that there is a permissible commercial practice nor detract from the fact that Kia should be recommended to stop advertising in such a way.
7. The Board also assumes that the industry will take notice of this ruling and will subsequently adjust its advertising on television and the internet. In view of this and in order not to put Kia unnecessarily in an unfavourable position than other car manufacturers, the Board will set a period within which Kia must comply with the recommendation, whereby a period of nine months is reasonable for the Board. The Board will ascertain that the recommendation must have been followed within this period.
8. It is therefore decided as follows.

The decision of the Board of Appeal

The Board:

Confirms/ upholds the decision of the Committee that the contested advertisement is contrary to the provisions of Article 7 NRC, with change of grounds. The Board recommends Kia not to advertise in such a way no later than nine months after the date of this decision.

Rules: NRC art. 7; NRC art. 8.4(c)

⁵ Art. 8.3 NRC: Advertising is also regarded as misleading if it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves the following: c. Omitting, keeping hidden, or providing in an unclear, unintelligible, ambiguous or untimely manner – essential information which the average consumer needs - in order to make an informed transactional decision.

⁶ Art. 8.4 NRC: In the case of an invitation to purchase in advertising, which does not relate to a distance contract or off-premises contract, the following essential (i.e. material) information must be provided: c. the price including 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/costs cannot reasonably be calculated in advance, the fact that such additional charges/costs may be payable.

⁷ Art. 7 NRC: Advertising must not be unfair. Advertising is considered to be unfair if it contravenes the requirements of professional diligence, and if it materially distorts or is likely to materially distort the economic behaviour of the average consumer reached, or targeted, as regards the product. Misleading and/or aggressive advertising is considered to be unfair in all cases.