



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

3 April 2014*

(Directive 2005/29/EC — Unfair commercial practices — Pyramid promotional scheme — Whether the consideration paid by consumers in order to receive compensation is relevant — Interpretation of the concept of ‘consideration’)

In Case C-515/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania), made by decision of 29 October 2012, received at the Court on 14 November 2012, in the proceedings

‘4finance’ UAB

v

Valstybinė vartotojų teisių apsaugos tarnyba,

Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.L. da Cruz Vilaça, G. Arestis, J.-C. Bonichot (Rapporteur) and A. Arabadjiev, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- ‘4finance’ UAB, by G. Velička, managing director,
- the Lithuanian Government, by R. Janeckaitė, acting as Agent,
- the Czech Government, by M. Smolek and S. Šindelková, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by P. Gentili, avvocato dello Stato,
- the Polish Government, by B. Majczyna and M. Szpunar, acting as Agents,

* Language of the case: Lithuanian.

— the European Commission, by A. Steiblytė and M. van Beek, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 19 December 2013,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Annex I, point 14, of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22).
- 2 The request has been made in proceedings between '4finance' UAB ('4finance') and the Valstybinė vartotojų teisių apsaugos tarnyba (State Consumer Rights Protection Authority) and the Valstybinė mokesčių inspekcija prie Lietuvos Respublikos Finansų ministerijos (the Ministry of Finance) in connection with a fine that was imposed on that company for breach of Lithuanian law prohibiting unfair business-to-consumer commercial practices.

Legal context

European Union ('EU') law

- 3 Recitals 8, 9, 11 and 17 in the preamble to Directive 2005/29 state:
 - (8) This Directive directly protects consumer economic interests from unfair business-to-consumer commercial practices. ...
 - (9) This Directive is without prejudice to individual actions brought by those who have been harmed by an unfair commercial practice. ... Financial services and immovable property, by reason of their complexity and inherent serious risks, necessitate detailed requirements, including positive obligations on traders. For this reason, in the field of financial services and immovable property, this Directive is without prejudice to the right of Member States to go beyond its provisions to protect the economic interests of consumers. ...
- ...
- (11) The high level of convergence achieved by the approximation of national provisions through this Directive creates a high common level of consumer protection. This Directive establishes a single general prohibition of those unfair commercial practices distorting consumers' economic behaviour. It also sets rules on aggressive commercial practices, which are currently not regulated at Community level.
- ...
- (17) It is desirable that those commercial practices which are in all circumstances unfair be identified to provide greater legal certainty. Annex I therefore contains the full list of all such practices. These are the only commercial practices which can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9. The list may only be modified by revision of the Directive.'

4 Article 1 of Directive 2005/29 provides:

‘The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers’ economic interests.’

5 Article 2(d) of that directive provides:

‘For the purpose 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;

...’

6 Article 3(1) of that directive is worded as follows:

‘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.’

7 Article 5 of Directive 2005/29 is worded as follows:

‘1. Unfair commercial practices shall be prohibited.

2. A commercial practice shall be unfair if:

(a) it is contrary to the requirements of professional diligence,

and

(b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

...

4. In particular, commercial practices shall be unfair which:

(a) are misleading as set out in Articles 6 and 7,

or

(b) are aggressive as set out in Articles 8 and 9.

5. Annex I contains a list of those practices which are considered to be misleading in all circumstances. The same single list shall apply in all Member States and may only be modified by revision of this Directive.’

- 8 Annex I of Directive 2005/29, entitled ‘Commercial Practices which are in all circumstances considered unfair’ provides at point 14:

‘Establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products.’

Lithuanian law

- 9 Article 7(22) of the Lithuanian Law on unfair commercial practices (‘the Law’), as applicable to the facts at issue in the main proceedings, provides:

‘A commercial practice shall be presumed to be misleading where it takes the form of the establishment, operation or promotion of a pyramid scheme for the distribution of goods where the consumer is given the opportunity to receive compensation primarily for the introduction of other consumers into the scheme rather than for the sale or consumption of products.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 10 The applicant in the main proceedings, 4finance, is a company that grants, by correspondence, loans of a small amount within a short period. It was ordered by a decision of 28 July 2011 of the Valstybinė vartotojų teisių apsaugos tarnyba (the State Consumer Rights Protection Authority) to pay a fine of LTL 8 000 for breach of Article 7(22) of the Law. It is apparent from that decision that 4finance ran, from 26 October 2010 to 15 February 2011, an advertising campaign by which it gave effect to ‘a pyramid scheme for the distribution of goods by which the consumer is given the opportunity to receive compensation primarily for the introduction of other consumers into the scheme rather than for the sale or consumption of products’.
- 11 That decision was confirmed by a judgment of 25 October 2011 of the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius), and 4finance then brought an appeal against that judgment before the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania).
- 12 As regards the facts alleged against 4finance, the referring court states that that company offered to all new customers a bonus of LTL 20 for every other customer they recruited. In order to become a 4finance customer, the new customer had to pay a registration fee of LTL 0.01 when registering on its website.
- 13 It is in this context that the referring court raises the question, first, concerning the interpretation of Annex I, point 14 of Directive 2005/29 and whether Article 7(22) of the Law is compatible with that provision. It notes in that regard that that provision of Lithuanian law, while faithful to the German and Lithuanian versions of that directive, does not correspond to other language versions of it, such as the Spanish, French and Polish versions. The later versions contain wording, at point 14 thereof, according to which ‘a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers’. The German and Lithuanian versions of that provision make no specific reference to that criterion of the consumer’s giving consideration.
- 14 Secondly, should the Court consider that the consideration paid by a consumer constitutes an essential element for a promotional scheme to be considered a pyramid promotional scheme within the meaning of Directive 2005/29, the referring court asks the Court for an interpretation of the concept of ‘consideration’. It considers that it is important to know, first, whether any amount paid, however

small, may be regarded as consideration and, secondly, whether payment of a nominal amount, such as that at issue in the main proceedings, is sufficient for the scheme to be prohibited. It notes in that regard that the sum of LTL 0.01 paid to the accounts of 4finance by a new customer would be the lowest amount technically transferable, that the sole purpose of the transfer is to allow exact identification of that customer to enable the conclusion of a credit agreement and that the contributions thus paid funded only to a very limited extent the bonuses paid through the promotional mechanism.

15 It is in the light of those considerations that the Supreme Administrative Court of Lithuania decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- ‘1. Must point 14 of Annex I to Directive 2005/29/EC ... be interpreted as meaning that establishing, operating or promoting a pyramid promotional scheme is to be regarded as a commercial practice that is in all cases misleading only where the consumer has to pay in order to receive compensation primarily for the introduction of other consumers into the scheme rather than for the sale or consumption of products?
2. If it is necessary for the consumer to give consideration for the right to receive compensation, is the amount of the consideration given by the consumer for the opportunity to receive compensation primarily for the introduction of other consumers into the scheme rather than for the sale or consumption of products relevant for the purpose of recognition of the pyramid promotional scheme as a misleading commercial practice under point 14 of Annex I to [Directive 2005/29/EC]? May payments by consumers which are of a purely nominal amount, and which are made in order for the consumers to be identified, be regarded as payments for the opportunity to receive compensation for the purpose of point 14 of Annex I to the directive?
3. Must point 14 of Annex I to [Directive 2005/29] be interpreted as meaning that, in order for a pyramid promotional scheme to be recognised as a misleading commercial practice under that point, it matters only that the compensation is paid to the consumer already in the scheme primarily because he has introduced other consumers into the scheme rather than for the sale or consumption of products, or is the extent to which the compensation paid to participants in the scheme for the introduction of new consumers is financed by contributions of the new members nevertheless also of importance? In the case under consideration, must compensation paid to the participants in the pyramid promotional scheme who joined it earlier be financed entirely or to a large extent by the contributions of the members who are fresh entrants into the scheme?’

The questions referred for a preliminary ruling

- 16 By its questions, which it is appropriate to examine together, the referring court asks the Court to rule on the conditions under which a system of trade promotion can be considered a ‘pyramid promotional scheme’ within the meaning of Annex I, point 14, of Directive 2005/29 and, therefore, is prohibited in all circumstances.
- 17 It is apparent from the reference for a preliminary ruling that Article 7(22) of the Law constitutes a faithful transposition of the German and Lithuanian versions of Annex I, point 14 of Directive 2005/29. However, according to the referring court, that latter provision specifies, in several of its other language versions, an additional condition for a pyramid promotional scheme to be prohibited, according to which ‘the consumer gives consideration’ in order to be able to benefit from the scheme. That court asks whether point 14 requires the consumer to be obliged to give such consideration. If so, it asks whether any sum, regardless of the amount, must be regarded as consideration within the meaning of point 14.

- 18 Finally, the referring court asks the Court whether classification as a pyramid promotional scheme requires it to be established that the compensation a consumer can receive is financed, partly or primarily, by the consideration given subsequently by other consumers.
- 19 It should be recalled that, according to the settled case-law of the Court of Justice, the need of uniform application and of uniform interpretation of an act of EU law makes it impossible to consider one language version of the text in isolation, but requires that measure to be interpreted on the basis of both the real intention of its author and the aim that the latter seeks to achieve, in the light, in particular, of the versions in all the languages (see Case C-569/08 *Internetportal und Marketing*, EU:C:2010:311, paragraph 35 and the case-law cited).
- 20 In that regard, it should be noted that the prohibition of pyramid promotional schemes is based, in all language versions of Annex I, point 14 of Regulation 2005/29, on three common conditions. First, such a promotion is based on the promise that the consumer will have the opportunity of making a commercial profit. Next, the realisation of that promise depends on the introduction of other consumers into the scheme. Finally, the greater part of the revenue to fund the compensation promised to consumers does not result from a real economic activity.
- 21 It is common ground that, when there is no effective economic activity to generate enough revenue to fund the compensation promised to consumers, such a promotion scheme is necessarily based on the economic contribution of its participants, since the opportunity for a member of that scheme to receive compensation depends essentially on the fees paid by additional members.
- 22 Such a scheme can only be a ‘pyramid’ in the sense that its sustainability requires the subscription of an ever increasing number of new participants to fund the compensation paid to existing members. It also means that the most recent members are less likely to receive compensation for their participation. That scheme ceases to be viable when the growth in membership, which should theoretically tend to infinity in order for the scheme to continue, is no longer sufficient to fund the compensation promised to all participants.
- 23 It follows from the foregoing that the recognition of a ‘pyramid promotional scheme’ within the meaning of Annex I, point 14 of Directive 2005/29 requires, first, the members of such a scheme to give financial consideration.
- 24 That interpretation is supported by the purpose of Directive 2005/29, which, according to recital 8 in its preamble, ‘directly protects consumer economic interests from unfair business-to-consumer commercial practices’ and which, according to Article 1, provides ‘a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers’ economic interests’ (Case C-206/11 *Köck* EU:C:2013:14, paragraph 29 and the case-law cited). As the Advocate General observed at point 32 of her Opinion, without financial consideration from the consumer, it would be difficult to identify the economic behaviour that requires consumer protection under that directive.
- 25 In addition, the wording of most of the language versions of Annex I, point 14 of Directive 2005/29 confirms that consideration given by the consumer is a constituent element of a pyramid promotional scheme within the meaning of that provision.
- 26 As to the question whether any sum paid by a member of a promotional scheme must be viewed, regardless its amount, as consideration within the meaning of Annex I, point 14 of Directive 2005/29, it should be noted that that provision does not provide for any minimum amount in the language versions that mention the existence of financial consideration given by the consumer (see, by analogy, Case C-428/11 *Purely Creative and Others* EU:C:2012:651, paragraph 30). Furthermore, the objective of providing greater legal certainty in the identification of unfair commercial practices, referred to in recital 17 in the preamble to Directive 2005/29, would not be ensured if the Member States could

decide what amounts are to be regarded as financial consideration. Accordingly, the concept of consumer consideration includes any financial contribution from the consumer, regardless of the amount.

- 27 Secondly, it necessarily follows from paragraphs 20 to 22 of the present judgment that classification as a 'pyramid promotional scheme' within the meaning of Annex I, point 14 of Directive 2005/29 requires the existence of a link between the consideration given by new members and the compensation received by existing members.
- 28 That interpretation is confirmed by the wording of most language versions of Annex I, point 14 of Directive 2005/29, from which it is apparent that the funding of the compensation that a consumer may receive depends 'primarily' or 'mostly' on consideration given subsequently by new participants in the scheme.
- 29 Contrary to what the Lithuanian Government maintains, such an interpretation of Annex I, point 14 of Directive 2005/29 does not prejudice the objective of ensuring a high level of consumer protection.
- 30 In that regard, it should be noted that the practices prohibited under Article 5 of that directive are divided into two categories.
- 31 First, Annex I of Directive 2005/29 includes the commercial practices which are, in all circumstances, unfair and which, therefore, do not require a case-by-case assessment against the provisions of Articles 5 to 9 of that directive. Secondly, the practices which are not listed in that annex may be declared unfair after a case-by-case examination of their characteristics, having regard to the criteria set out in those Articles 5 to 9 (*Purely Creative and Others* EU:C:2012:651, paragraph 45, and *Köck* EU:C:2013:14, paragraph 35).
- 32 It follows from this that only those commercial practices that are most harmful to consumers are subject to an absolute prohibition, but that a practice not covered by Annex I to Directive 2005/29 may nevertheless be prohibited where a specific and concrete assessment leads to the conclusion that it is unfair within the meaning of Articles 5 to 9 of that directive.
- 33 In the present case, it is apparent from the request for a preliminary ruling that, under the promotional scheme system established by 4finance, the bonuses paid to existing members were funded only to a very small extent by the financial consideration required from new members. In such a scheme, it seems that the second condition set out in paragraph 27 of the present judgment is not met. If that is the case, which it is for the referring court to ascertain, that scheme could not, therefore, be subject to a prohibition on the basis of Annex I, point 14 of Directive 2005/29.
- 34 Having regard to all the foregoing considerations, the answer to the questions referred is that Annex I, point 14 of Directive 2005/29 must be interpreted as meaning that a pyramid promotional scheme constitutes an unfair commercial practice only where such a scheme requires the consumer to give financial consideration, regardless of its amount, for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products.

Costs

- 35 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Annex I, point 14, of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), must be interpreted as meaning that a pyramid promotional scheme constitutes an unfair commercial practice only where such a scheme requires the consumer to give financial consideration, regardless of its amount, for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products.

[Signatures]