



Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 19 December 2013¹

Case C-515/12

‘4finance’ UAB

v

**Valstybinė vartotojų teisių apsaugos tarnyba and
Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos**

(Request for a preliminary ruling from the Supreme Administrative Court (Lithuania))

(Consumer protection — Unfair business-to-consumer commercial practices — Pyramid scheme — Whether consumers must give consideration to enter a pyramid scheme — Whether there is a link between consideration given by new entrants and compensation paid to existing members — Whether the amount of consideration is relevant)

1. Directive 2005/29/EC (hereafter the ‘Unfair Commercial Practices Directive’ or ‘the Directive’)² prohibits, inter alia, pyramid promotional schemes (‘pyramid schemes’). The Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court) (Lithuania) asks three questions concerning the interpretation of the Directive relating to such schemes. It wishes to know whether consumers must give consideration in order for a pyramid scheme to fall within the scope of the Directive. If so, must it be established that the scheme in question is financed by that consideration and is the amount required in order to join a scheme a relevant factor?

Legislation

The Directive

2. Recitals 2 to 6 in the preamble to the Directive explain that establishing a uniform set of rules that improve the functioning of the internal market is a cardinal aim. Recitals 7 and 8 state respectively that the Directive ‘addresses commercial practices directly related to influencing consumers’ transactional decisions in relation to products’ and ‘directly protects consumer economic interests from unfair business-to-consumer commercial practices’. According to recital 11, the Directive ‘creates a high common level of consumer protection’ by establishing ‘a single general prohibition of those unfair commercial practices distorting consumers’ economic behaviour’. Recital 12 states: ‘Harmonisation will considerably increase legal certainty for both consumers and business. Both consumers and business will be able to rely on a single regulatory framework based on clearly defined legal concepts regulating all aspects of unfair commercial practices across the European Union. The effect will be to

¹ — Original language: English.

² — 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).

eliminate the barriers stemming from the fragmentation of the rules on unfair commercial practices harming consumer economic interests and to enable the internal market to be achieved in this area.’ Recital 17 states: ‘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.’

3. Article 1 defines the purpose of the Directive as being ‘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’.

4. Article 2 contains certain key definitions:

‘ ...

- (c) “product” means any goods or service including immovable property, rights and obligations;
- (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;
- (e) “to materially distort the economic behaviour of consumers” means using a commercial practice to appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise;

...

- (h) “professional diligence” means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity;

...

- (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;

...’

5. Article 3 provides, in particular, that the Directive:

‘1. ... 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’.

6. Article 3(9) provides: ‘In relation to “financial services”, as defined in Directive 2002/65/EC, and immovable property, Member States may impose requirements which are more restrictive or prescriptive than this Directive in the field which it approximates’.

7. Article 5(1) of the Directive prohibits unfair commercial practices. According to Article 5(2), a commercial practice is unfair if it is ‘contrary to the requirements of professional diligence’ and ‘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 ...’. Article 5(5) states: ‘Annex I contains the list of those commercial practices which shall in all circumstances be regarded as unfair. The same single list shall apply in all Member States and may only be modified by revision of this Directive’.

8. Articles 6 to 9 are not relevant here. They cover (respectively) misleading commercial practices; misleading omissions; aggressive commercial practices and use of harassment, coercion and undue influence.

9. Point 14 of the ‘black list’ in Annex I to the Directive reads: ‘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.’³

National legislation

10. Under Article 7(22) of the Lietuvos Respublikos nesąžiningos komercinės veiklos vartotojams draudimo įstatymas (Law of the Republic of Lithuania on the prohibition of unfair business-to-consumer commercial practices), a commercial practice is presumed to be misleading and therefore unfair where it takes the form of the establishment, operation or promotion of a pyramid scheme for the distribution of products where consumers are given the opportunity to receive payment primarily for introducing new entrants into the scheme rather than for the sale or consumption of products.

Facts, procedure and the questions referred

11. ‘4finance’ UAB (‘4finance’) grants small loans to consumers by means of distance contracts. From 26 October 2010 to 15 February 2011, it ran an advertising campaign indicating that anyone registering on its website would receive a credit to his or her bank account for each ‘friend’ introduced by them who then registered on 4finance’s website. The process was as follows. To register consumers had to complete a form on-line and pay a purely nominal registration fee of LTL 0.01. 4finance asked those registering to invite ‘friends’ to register by indicating, in the appropriate space on the webpage, that person’s mobile phone number or email address. Providing that information enabled 4finance to market its small loans to those ‘friends’ who would be invited to register. If that person registered the consumer who had provided his/her contact details received a credit (‘a bonus’) of either LTL 10 or LTL 20).⁴ Following registration the person concerned then acquired the right to apply for a small loan with 4finance, which would be concluded by means of a distance contract.⁵

3 — I understand the words in the English text of the Directive ‘... gives consideration for the opportunity to receive compensation ...’ to mean ‘pays a fee for the opportunity to receive remuneration’. It is important to emphasise that not all language versions of the Directive, including the Lithuanian text, contain the words ‘gives consideration’.

4 — The national court’s file shows that consumers were able to invite up to 50 people per day and no more than 200 people per month.

5 — During the course of the campaign more than 12 223 people registered. Of those, 3 577 applied for credit and 2 868 received credit, some taking out more than one loan. 4finance received approximately LTL 122 in registration fees and it paid out LTL 236 060 in bonuses.

12. The Valstybinė vartotojų teisių apsaugos tarnyba (State Consumer Rights Protection Authority) considered that 4finance had established a pyramid selling scheme giving consumers the right to receive payment primarily for the introduction of new entrants to the scheme rather than for the sale or consumption of products. It therefore issued a decision imposing a fine of LTL 8 000 on 4finance for breach of national legislation prohibiting such schemes.

13. 4finance challenged that decision, seeking an order requiring Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos (the Ministry of Finance) to repay the fine. On 25 October 2011, the first instance court dismissed that application. 4finance then appealed to the Lietuvos vyriausiasis administracinis teismas, which has referred the following questions to the Court for preliminary ruling:

- ‘(1) Must point 14 of Annex I to [the Directive] 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 the Directive? 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 the Directive 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 [at issue in the main proceedings], 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?’

14. Written observations were submitted by 4finance, the Governments of the Czech Republic, Italy, Lithuania and Poland and by the European Commission. No hearing was requested and none was held.

Assessment

Preliminary remarks

15. It is common ground that the main proceedings concern a business-to-consumer commercial practice involving the promotion, sale or supply of products to consumers for the purposes of the Directive.

16. In those proceedings a State authority is seeking to enforce national legislation transposing the Directive. It follows from settled case-law that in its determination the referring court should do whatever lies within its jurisdiction, taking the whole body of domestic law into consideration, with a view to ensuring that the Directive is fully effective and achieving an outcome consistent with that measure's aims.⁶

Question 1

17. By Question 1 the referring court asks whether a consumer must give consideration in order for a pyramid scheme to constitute a misleading commercial practice within point 14 of Annex I.

18. In examining that question it is necessary to address what constitutes a pyramid scheme. Such schemes are described in all of the observations submitted in this case (except those of the Commission⁷), but the descriptions differ.

19. 4finance submits that it operates a legal marketing network, not a pyramid scheme. It considers that a pyramid scheme involves: (i) a type of investment; (ii) fraud linked to the use of the sums invested; (iii) payments made to existing investors by use of funds contributed by new investors; (iv) the promise of an unusually high return; and (v) revenue generated by the number of new investors who enter the scheme rather than by products that are sold.

20. The Czech Republic considers that the essence of such schemes is that each consumer pays for entry knowing that he will receive compensation derived from subsequent consumers who join the scheme. There is no added value but simply a redistribution of resources. Italy submits that in such schemes the products are of secondary importance and are merely a pretext for recruiting other consumers to the scheme: the scheme itself is of primary importance. Lithuania observes that there is no definition of the term 'pyramid scheme' in the Court's case-law but considers it to be clear from a number of studies that a fundamental element of such schemes is that there is a link between the advantage received by the consumer (the compensation or payment) and the fact that he invites new entrants to join the scheme. It is that link which determines whether such schemes are legal or illegal. Poland takes the view that the essence of a pyramid scheme is that gains or profit depend on payments by persons at lower levels in the pyramid structure rather than on the sale of products.

21. Point 14 of Annex I to the Directive sets out a cumulative and exhaustive list of those elements that must be established in order for the prohibition in Article 5(1) of the Directive to apply to pyramid schemes. Fraud is not listed. Nor is there any indication that the return or payment awarded to existing members who invite new recruits to join a scheme must be of (at least) a certain value. Schemes using a pyramid promotional technique without those particular features listed by 4finance, but where all the elements listed in point 14 of Annex I are present, constitute misleading commercial practices and are thus unfair for the purposes of Article 5(5) of the Directive.

22. Obviously, pyramid schemes can be pernicious, promising high returns in a short period of time for doing nothing other than paying an entry fee and recruiting new participants who do the same, thus encouraging consumers to invest on the basis of false or unrealistic expectations. However, the amount of the return in comparison to the entry fee or the speed at which gains arise are not amongst the elements set out in point 14 of Annex I. They are also therefore irrelevant when determining whether a particular scheme is prohibited.

⁶ — Case C-177/10 *Rosado Santana* [2011] ECR I-7907, paragraph 50 and the case-law cited.

⁷ — See the study commissioned by the European Commission by Micklitz, Monazzahian and Rößler, *Door to door selling – Pyramid selling – Multilevel marketing*.

23. However, the referring court correctly draws attention to an unfortunate disparity between the different equally authentic linguistic versions of the Directive. Most include giving ‘consideration’ for the opportunity to receive compensation as one of the elements of a pyramid scheme.⁸ However, in the Bulgarian, German, Greek, Hungarian, Lithuanian, Slovenian and Swedish texts a requirement to ‘give consideration’ is not clearly expressed. The Lithuanian and German texts (mentioned by the referring court) state, respectively; ‘piramidės pobūdžio skatinimo sistemos sukūrimas, naudojimas ar reklamavimas, kai vartotojui suteikiama galimybė gauti atlygį visų pirma už kitų vartotojų įtraukimą į tą sistemą, o ne už produktų pardavimą ar naudojimą’ and ‘Einführung, Betrieb oder Förderung eines Schneeballsystems zur Verkaufsförderung, bei dem der Verbraucher die Möglichkeit vor Augen hat, eine Vergütung zu erzielen, die hauptsächlich durch die Einführung neuer Verbraucher in ein solches System und weniger durch den Verkauf oder Verbrauch von Produkten zu erzielen ist’. Thus, in those language versions of the Directive payment by the consumer (‘consideration’) for participation in a scheme is not specified as being a required feature of a pyramid scheme. However, in other language versions (for example, those in French, Polish and Spanish, also examined by the referring court) it is an essential feature.

24. 4finance submits that the payment of LTL 0.01 required to register was not made in exchange for the possibility of receiving compensation, but merely to identify the consumer in question. That fee was the smallest possible charge that could be required so as to ensure that 4finance had reliable information identifying the person registering. Because the charge was made by online transfer it gave 4finance access to details of the forename, surname, identification number and account number of the person concerned as well as other personal data essential for the grant of credit at a distance.

25. Italy considers that there must be an economic act by a consumer and that, if no consideration is given, there is no such act. Poland submits that consideration is an essential element of a pyramid scheme. To interpret the Directive otherwise would extend its scope and hinder the development of the internal market whilst failing to enhance consumer protection. Lithuania takes the view that whether a consumer gives consideration for joining a pyramid scheme cannot be a decisive factor. It considers that if the definition of pyramid selling were linked to giving consideration for entry, the scope of the prohibition would be unnecessarily restrictive.

26. The Commission submits that unfair practices are within the Directive’s scope if they are of a commercial nature. When a consumer gives consideration to enter a scheme he is engaged in a commercial transaction which is therefore covered by the Directive.

27. It is settled case-law that where there is a divergence between the various language versions of an EU text, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.⁹ Accordingly, the need for a uniform application and interpretation of EU legislation makes it impossible to consider one version of the text in isolation, but requires that it should be interpreted on the basis of both the real intention of the legislator and the aim the latter seeks to achieve, in the light, in particular, of the versions in all languages.¹⁰

28. In my view a pyramid scheme exists for the purposes of point 14 of Annex I only where consumers give consideration in order to enter such scheme.

29. That interpretation of point 14 of Annex I is confirmed by an examination of its context and purpose.

8 — Namely the Czech, Danish, Dutch, English, Estonian, Finnish, French, Italian, Latvian, Maltese, Polish, Portuguese, Romanian, Slovak and Spanish texts.

9 — Case 283/81 *CILFIT and Others* [1982] ECR 3415, paragraphs 18 to 20, Case C-449/93 *Rockfon* [1995] ECR I-4291, paragraph 28, and Case C-1/02 *Borgmann* [2004] ECR I-3219, paragraph 25.

10 — Case C-569/08 *Internetportal und Marketing* [2010] ECR I-4871, paragraph 35 and the case-law cited. See, more recently, Case C-89/12 *Bark* [2013] ECR, paragraph 36.

30. Article 3(1) of the Directive states that it applies to unfair business-to-consumer commercial practices. A pyramid scheme is such a practice.

31. Where a practice falls within the black list set out in Annex I, it ‘shall’ (in the words of Article 5(5)) ‘in all circumstances be regarded as unfair’. There is no need to conduct an assessment under Article 5(2) to establish whether the practice in question is contrary to professional diligence and if it would distort the economic behaviour of the average consumer for the purposes of that provision. Annex I contains a list of those practices which are considered to be misleading in all circumstances. That obviously includes any practice that is a pyramid scheme within point 14 of the Annex. The black list practices are deemed automatically to constitute unfair commercial practices that are prohibited under Article 5(1).¹¹

32. The Directive prohibits the use of a commercial practice to ‘appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise’.¹² A ‘transactional decision’ is defined as ‘any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment ... for, retain or dispose of a product or to exercise a contractual right in relation to the product ...’.¹³ The Directive is thus concerned with whether the consumer’s ability to make an economic decision in his best interests is impaired by the practices employed by the business concerned. Those two definitions imply that the Directive is concerned with those practices that require consumers to give consideration (i.e. to pay a fee) rather than situations where there is no such economic commitment. A definition which includes consideration is consistent with protecting consumers when they take decisions relating to their economic interests. In the absence of consideration, identifying the economic behaviour that requires protection under the Directive would be uncertain.

33. Lithuania submits that requiring consumers to give consideration to enter a pyramid scheme restricts the scope of the prohibition in point 14 of Annex I. That would undermine the effect of Article 3(9) and would be inconsistent with the aims of the Directive.

34. I disagree.

35. Article 3(9) allows the Member States to introduce more stringent requirements for financial services. A requirement that consumers must give consideration to join a pyramid scheme, whatever its subject matter, has no impact whatsoever on the Member States’ powers to introduce more prescriptive measures concerning financial services.

36. It is true that including consideration as a necessary element for a scheme to be covered by point 14 of Annex I narrows the scope of application. However, I do not consider that such an interpretation undermines the aims and objectives of the Directive.

37. The Directive seeks to prohibit commercial practices directly related to influencing consumers’ transactional decisions in relation to products and to protect their economic interests from unfair business-to-consumer commercial practices,¹⁴ within the context of creating a high level of consumer protection throughout the territory of the European Union.¹⁵ Recitals 12 and 17 also make it clear, however, that the legislator wished to increase legal certainty, an essential element for the functioning of the internal market,¹⁶ for consumers and businesses alike, in particular by identifying those commercial practices, such as pyramid schemes, which are in all circumstances unfair.

11 — See also Case C-391/12 *RLvS* [2013] ECR, paragraph 33.

12 — Article 2(e).

13 — Article 2(k).

14 — See respectively recitals 7 and 8.

15 — Recital 11.

16 — Case C-428/11 *Purely Creative* [2012] ECR, paragraph 45.

38. In compiling the black list, contained in Annex I, of commercial practices that in accordance with Article 5(5) ‘shall in all circumstances be regarded as unfair’, the legislator presumably intended to single out the practices that were the most clearly heinous. It should be remembered that this directive effects full harmonisation¹⁷ and that Member States cannot derogate from the black list: it can only be modified by revision of the directive itself.¹⁸ There is no case-by-case examination of whether a practice that falls within one of the points in Annex I *in fact* satisfies one of the tests for what constitutes an unfair commercial practice laid down in Article 5(2) and (4). A black list practice is ipso facto prohibited in all Member States.

39. It seems to me that, where – as here – there is a disparity between the linguistic texts, those factors militate in favour of taking as authoritative the version that requires the presence of more, rather than fewer, elements before a particular practice is automatically blacklisted because it falls within one of the points in Annex I. A practice that is not automatically blacklisted can still be outlawed, if a case-by-case examination shows that it falls foul of one of the individual tests of what constitutes an unfair practice contained in Article 5. Such a reading does not therefore undermine the objective of ensuring a high level of consumer protection. It does, on the other hand, contribute positively towards creating legal certainty as to what will be caught by the black list in Annex I.¹⁹

40. Accordingly, I am of the opinion that, for a scheme to fall within the definition in point 14 of Annex I, it is necessary that a consumer gives consideration in order to join the scheme in question.

Question 3

41. Questions 2 and 3 are closely linked. By those questions the referring court asks whether it is necessary to establish a connection between the consideration given by new recruits and the compensation paid to existing members (Question 3) and, if so, whether the amount of such consideration is relevant (Question 2). In replying to the national court, it seems more logical to deal with the questions in that order.

42. The referring court explains that in determining the main proceedings, it needs to know whether it is relevant that the consideration given upon joining the scheme at issue was relatively small (LTL 0.01) in comparison to the bonus paid for successfully introducing new recruits (between LTL 10 and 20). Thus, in Question 3 it asks, first, whether a commercial practice is misleading within the meaning of point 14 of Annex I if compensation is paid by the scheme operator primarily for the successful introduction of new recruits rather than for the sale or consumption of products. Second, is the extent to which such compensation is financed by consideration given upon joining a scheme a relevant factor?

43. 4finance submits that a pyramid scheme cannot exist where compensation paid derives from the resources of the enterprise concerned rather than from the consideration given by new members. The Czech Republic considers that there must be a link between consideration given upon joining a scheme and payments made to existing members for introducing new recruits and that the consideration should be sufficient of itself to guarantee the scheme’s operation. Italy, Lithuania and Poland and the Commission take the view that it is not necessary to demonstrate any link of that nature for the purposes of point 14 of Annex I.

44. Unfortunately, the wording of point 14 of Annex I is not the same in all linguistic versions of the text.

¹⁷ — See recitals 5 and 6.

¹⁸ — Article 5(5).

¹⁹ — As to the difficulties created if there is *no* requirement for consideration, see point 31 above.

45. Thus, of the texts examined by the referring court (emphasis added in all the quotations that follow), the Lithuanian and German versions state that, in a pyramid promotional scheme, the consumer receives compensation ‘*primarily for*’ the introduction of other consumers into the scheme rather than for the sale or consumption of products.²⁰ I shall label these versions the ‘no relative condition’ versions.

46. In contrast, the French has ‘percevoir une contrepartie *provenant essentiellement* de l’entrée d’autres consommateurs dans le système plutôt que de la vente ou de la consommation de produits’ and the Spanish ‘la oportunidad de recibir una compensación *derivada fundamentalmente* de la entrada de otros consumidores en el plan, y no de la venta o el consumo de productos’. The English aligns with these versions, as it speaks of 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’. I shall label these versions the ‘relative condition’ versions.²¹

47. This Directive is intended to introduce full harmonisation; and the black list practices in Annex I are *ipso facto* prohibited.²² Yet there is a clear split, between no relative condition versions and relative condition versions. In those circumstances, how should the Court proceed?

48. Put shortly, an approach that follows the ‘relative condition’ versions makes a clear economic link between reward to existing members and recruitment of new members. It is a restrictive reading of the text. That accords well with the principle (to which I have subscribed in answering Question 1) that the black list in Annex I should be read restrictively. Because it is restrictive, it also leaves more space for creative marketing. ‘Creative’ does not necessarily equate to ‘unfair’. And there is always a safety net, inasmuch as a case-by-case assessment under Article 5(2) or Article 5(4) should lead to a creative practice that *is* unfair being prohibited. Payments in kind rather than in cash can, if necessary, be evaluated at their cash equivalent (for the consumer) when making the assessment.

49. As against that, an approach that follows the ‘no relative condition’ versions has the merit of simplicity. National courts would not be required to evaluate what proportion of the compensation received as a reward for recruitment derives from what the new recruits pay (be it through an initial joining fee, be it by way of later payments). They would not need to ask, on a case-by-case basis, ‘what does “derived *primarily from*” mean?’ – and listing in Annex I is meant, precisely, to avoid the need for such a case-by-case analysis. The meaning that different national courts in different Member States gave to those words might well vary. That would undermine uniformity of approach; and lack of uniformity does not improve the functioning of the internal market.²³ A ‘no relative condition’ approach may also (perhaps) be more apt to prevent avoidance through schemes that mask their operations by using payments in kind rather than cash.

50. After some hesitation, I consider that a reading that endorses the ‘relative condition’ versions better accords with the way that I have approached answering Question 1. I therefore conclude that, for a pyramid scheme to fall within point 14 of Annex I and therefore be prohibited under Article 5(1) of the Directive, it is necessary to demonstrate that the compensation paid to existing scheme members is derived primarily from the consideration given by new recruits.

51. Should the Court reach a different conclusion, I offer the following additional observations. These address the possible argument that the ‘no relative condition’ approach may lead to an unjust result in certain cases, because legitimate operations as well as scams might be caught.

20 — See point 22 above.

21 — I have chosen these labels on the basis of whether the text does, or does not, include the condition that the compensation received by existing members should ‘relate’ to (or derive from) what is brought in by the entry of new recruits.

22 — See my comments at point 31 above in relation to the first question.

23 — See Article 1 of the Directive.

52. I recall that where one of the cumulative conditions laid down in point 14 of Annex I is not present, an operation will not be caught by that provision. Thus, for example, if consideration is not required in order to enter a particular scheme, the prohibition will not apply.

53. However, suppose an operator wishes to charge an entry fee in order to cover his administrative costs (for example, readers pay an entry fee on joining a book club and receive a book voucher if they recruit new members to the club). Would that be prohibited? I think not, because there would be no pyramid structure.

54. The word ‘pyramid’ appears in all language versions of the Directive apart from the German which uses the term ‘*Schneeballsystems*’ and, in order to fall within point 14 of Annex I, the scheme at issue must have a pyramid structure.²⁴

55. The words ‘pyramid promotional scheme’ are not defined in Article 2 of the Directive. In the observations submitted to the Court, such schemes are described in a variety of ways.²⁵ The minimum common criteria that emerge from those descriptions are that: (i) such schemes obtain income from new recruits; (ii) payments are made to existing members; (iii) those payments are financed from the contributions of those new recruits rather than from the sale of products; and (iv) those joining the scheme more recently (at the lower levels) are less likely than those at the higher levels (the existing members) to realise a gain, because in order for every member of the scheme to make money, there would need to be an endless supply of new recruits.

56. Taking those common criteria into account, it seems to me that in order to demonstrate that the operation at issue constitutes a pyramid, there must be multiple levels with the operator at the apex²⁶ and there should be a cumulative recruitment of new members increasing exponentially. Unlike the ancient stone structures – the pyramids of Ancient Egypt – the trajectory is downwards, from the apex towards the base of the pyramid, rather than upwards, from the foundations to the top. Such a view, which focuses upon the element that makes such schemes a scam, is consistent with the Directive’s objective of achieving a high level of consumer protection. The core income of the business is derived from the sequential membership fees, rather than from the marketing of goods or services that are supplied to consumers.

57. It is of course for the referring court to determine the facts in the main proceedings. From the explanation set out in the request for a preliminary ruling, it would seem that the scheme operated by 4finance does not have a pyramid structure for the purposes of point 14 of Annex I.

Question 2

58. By its second question the referring court asks whether nominal consideration requested in order to identify consumers who join a pyramid scheme constitutes ‘consideration’ for the purposes of point 14 of Annex I.

24 — The word *Schneeballsystems* (‘snowball systems’) covers the same type of scam caught by ‘pyramid scheme’ in all other language versions of the Directive. The fact that the cumulative addition of new members emanates from the operator at the centre instead of a vertical trajectory from the apex of a pyramid does not appear to me to be significant; and I do not consider the German text therefore seeks to identify a different phenomenon from other language versions.

25 — See points 18 to 20 above.

26 — For the *schneeball*, the operator would be at the centre and there would need to be multiple rings extending outwards.

59. I agree with the position of the Commission, Italy, Lithuania and Poland that it follows from a literal interpretation of the Directive that there is no provision for any minimum amount of consideration and that such an amount cannot be inferred. The wording of point 14 of Annex I is (on this point at least) clear. The expression ‘gives consideration’ does not require the consumer to pay a certain amount for joining a pyramid scheme.²⁷

60. The reasons why a business establishing such a scheme requires consideration to be given (for example, as here, to obtain reliable information relating to those registering in order to conclude a credit agreement) is not a relevant factor for the purposes of the Directive.

61. Furthermore, to read into point 14 of Annex I a requirement that a consumer must give some minimum consideration would be at variance with the Directive’s purpose of full harmonisation and its aims of uniformity and legal certainty.²⁸

62. It follows that any sum, however small, constitutes consideration for the purposes of the Directive.

Conclusion

63. Accordingly, I am of the opinion that the Court should answer the questions referred by Lietuvos vyriausiosios administracinės teisės apeliacinės instancijos teisėjų kolegijos to the following effect:

Point 14 of Annex I to Directive 2005/29/EC (the ‘Unfair Commercial Practices Directive’) should be interpreted as meaning that:

- a pyramid promotional scheme exists within the meaning of that provision where a consumer gives consideration in order to join such a scheme;
- in ascertaining whether the elements laid down in point 14 of Annex I exist in any particular case it must be established that the scheme at issue has a pyramid structure in so far as it consists of different levels with the operator at the apex and there is a cumulative recruitment of new members increasing exponentially. In making that determination it is necessary to demonstrate that the compensation paid to existing scheme members is derived primarily from the consideration given by new recruits;
- any sum, however small, constitutes consideration for the purposes of the Directive.

27 — See, for example, the Court’s approach in *Purely Creative*, cited in footnote 16 above, paragraphs 30 and 34.

28 — See point 2 above.