

Case C-455/21

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

23 July 2021

Referring court:

Tribunalul Olt (Romania)

Date of the decision to refer:

27 May 2021

Appellant and applicant at first instance:

OZ

Respondent and defendant at first instance:

Lyoness Europe AG

Subject matter of the main proceedings

Appeal lodged by the applicant, OZ, a natural person, with the Tribunalul Olt (Olt Regional Court, Romania) against the civil judgment of the Judecătoria Slatina (Court of First Instance, Slatina, Romania) dismissing his action for a declaration that certain terms of the contract concluded with the respondent/defendant, Lyoness Europe AG, are unfair.

Subject matter and legal basis of the request

An interpretation of Article 2(b) of Directive 93/13/EC is sought pursuant to Article 267 TFEU.

Questions referred for a preliminary ruling

1. Must Article 2(b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be interpreted as meaning that a natural person, who is a mechanical engineer specialising in hydraulic and pneumatic

machinery (who does not engage in trade as an occupation and in particular in the purchase of goods and services for resale and/or in intermediation activities) and who concludes with a commercial company (a seller or supplier) a pre-formulated standard contract under which that natural person is entitled to participate in a shopping community set up by that company in the form of the Lyoness system (a system which promises economic returns in the form of refunds on purchases, commission and other promotional benefits), to purchase goods and services from traders who have a contractual relationship with that company (called ‘Lyoness business partners’), and to act as an intermediary with other persons within the Lyoness system (known as ‘potential loyalty customers’), be regarded as a ‘consumer’ within the meaning of that provision, notwithstanding the contractual term which provides that Swiss law alone is to apply to the contractual relationship between Lyoness and the customer, irrespective of the customer’s place of domicile, in order to ensure effective consumer protection?

2. Must Article 2(b) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be interpreted as meaning that a person who has concluded with a seller or supplier a contract having a dual purpose, namely [where] the contract is concluded for purposes which partly fall within the scope of the trade, business or profession of that person and partly outside, and the trade, business or professional purpose of that natural person is not predominant in the overall context of the contract, can be regarded as a ‘consumer’ within the meaning of that provision?
3. If the answer to the previous question is in the affirmative, what are the main criteria to be applied in determining whether or not the trade, business or professional purpose of that natural person is predominant in the overall context of the contract?

Provisions of EU law relied on

Treaty concerning the Accession of the Republic of Bulgaria and Romania to the European Union.

Article 2 and Article 19(1) TEU.

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Articles 3 and 6.

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Articles 1 to 3, (the ‘directive’).

Provisions of national law relied on

Law No 193/2000 on unfair terms in contracts between traders and consumers, which implements the directive: Articles 1, 2, and 4 to 7, in particular Article 2(1), which defines ‘the consumer’ as any natural person or group of natural persons forming an association who, on the basis of a contract falling within the scope of that law, acts for purposes his outside trade, industrial or manufacturing, artisanal or professional activity’.

Law No 296/2004 establishing the Consumer Code: Articles 1, 3 and 75 to 81, in particular point 13 of the annex thereto, which defines ‘the consumer’ in identical terms to Law No 193/2000.

Law No 134/2010 establishing the Civil Procedure Code: Article 205, which provides, in particular, that the defendant may raise procedural objections in the response; Article 237, which provides that, in order to prepare for consideration of the merits, the court must address the objections raised by the parties or of its own motion; Articles 251 and 255, which provide that there is no obligation to prove what the court must take into account of its own motion and that the court can decide that it is not necessary to prove known and undisputed facts, respectively; and Articles 466, 476, 479 and 480, which govern the appeal proceedings which involve a new ruling on the merits, in law and in fact.

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 9 December 2020, the Judecătoria Slatina (Court of First Instance, Slatina) dismissed the action brought by the applicant, OZ, against the defendant, Lyoness Europe AG, by which it sought, pursuant to Law No 193/2000, a declaration that certain terms contained in the general terms and conditions of the contract and the annexes thereto are unfair, requesting that the defendant be brought before a court at the place of establishment of myWorld Retail Services SRL (formerly SC Lyoness Romania SRL).
- 2 That court held that, under the general terms and conditions of the contract, the defendant and its partners form an international shopping community in which participants are given the opportunity, through joint purchasing and the advantageous terms and conditions obtained, to acquire income in the form of refunds on purchases, commission and other benefits. The goods and services are purchased directly from traders who have a contractual relationship with the defendant.
- 3 Thus, a loyalty customer is entitled to participate in the shopping community set up by the defendant, with the possibility of benefiting from favourable purchasing terms and conditions in the form of refunds on purchases, commission and other price reductions granted by business partners through the defendant, whilst the defendant’s services amount in practice to intermediation and, in part, to calculating of the services of each business partner and ordering Lyoness

vouchers, which make it possible to purchase goods and services from the business partners.

- 4 Taking the view that a finding that a term is unfair requires, inter alia, that the complainant be a consumer, and analysing the 2009 General Terms and Conditions (GTC), that court found that the contract was not concluded between a consumer and a seller or supplier since the parties offer each other commission, price reductions and other benefit owing to the shopping community. The contract cannot therefore be examined in the light of Law No 193/2000 since the applicant does not satisfy the conditions for being a consumer.
- 5 The Judecătoria Slatina (Court of First Instance, Slatina) also held that there is no evidence that myWorld Retail Services SRL is related to the defendant company, that it is a division of the defendant company, or that the place of establishment stated is that of a division of the defendant company, and ordered that the defendant be brought before a court at its place of establishment in Switzerland.
- 6 OZ lodged an appeal against the judgment of the Judecătoria Slatina with the referring court, the Tribunalul Olt.

The essential arguments of the parties in the main proceedings

- 7 Firstly, OZ sets out at length his arguments that the defendant, a company established in Switzerland, was correctly brought before a court at place of establishment of myWorld Retail Services SRL in Romania since the latter company, formally Lyonesse Romania, is the defendant's representative in Romania.
- 8 As regards the applicability of Law No 193/2000, OZ claims that the contract which he concluded with the defendant is a contract concluded between a consumer and a seller or supplier, which contains several terms which create, to his detriment and in breach of good faith, a significant imbalance between the rights and obligations of the parties.
- 9 As regards his status as a consumer in the context of the contract at issue, OZ claims that, by the civil judgment under appeal, the court of first instance dismissed his action without in any way examining or assessing his arguments in the application on that point, in breach of his right to a fair hearing.
- 10 Thus, the court of first instance wrongly held that 'by the contract referred to above, the parties offer each other commission, price reductions and other financial benefits through a shopping community' and that, for that reason, OZ is not a consumer.
- 11 In the view of OZ, as is also apparent from paragraph 2 of the preamble to the contract at issue, there is only one shopping community under that contract and that community only has commercial companies as members, that is to say,

LyoneSS Europe AG and the partner companies, which were referred to expressly in the contract as traders and called 'business partners'.

- 12 In addition, the contract at issue excludes association with the shopping community defined in the contract since, as is also apparent from Article 2 of the contract, the contracting parties are, on the one hand, LyoneSS Europe AG and, on the other, the loyalty customer, who, as is also clear from Article 1.1, is the person entitled to participate in the shopping community set up by LYONESS solely for the purpose of purchasing goods and services from the business partners.
- 13 OZ claims that the customer's signature is required both on page 10 of the contract and on the application form and that, as is also apparent from Articles 2.2 and 2.3 of the contract at issue, a loyalty customer within the meaning of the contract can be either a natural person over 14 years of age or a legal person. OZ submits that, under those terms of the contract, it concluded the contract as a customer, a mere natural person, identified by his first name, surname, personal identity number and domicile, which are the identification details of a mere natural person and not of a legal person.
- 14 In the view of OZ, no term of the contract indicates that he offered LyoneSS Europe AG reciprocal commission, price reductions and other financial benefits and the referring court was unable to give a specific indication of the alleged commission, price reductions and other financial benefits granted by him to the defendant.
- 15 As a natural person, he was also unable to offer the defendant any commission, price reduction or other financial benefit since he was not acting for purposes connected with any trade, industrial or manufacturing, artisanal or professional activity within the meaning of Law No 193/2002, which, in any event, cannot be carried on without prior authorisation and obtention of the notices and licences provided for by law, and without being registered or entered in the commercial register.
- 16 OZ adds that neither before the conclusion of the contract at issue nor during the performance thereof did he carry on any economic activity as a seller or supplier within the meaning of the directive or Law No 193/2000, let alone any intermediation activity of the kind covered by the contract at issue, carried on as an occupation.
- 17 He claims that the referring court should make a reference for a preliminary ruling to the Court of Justice.
- 18 The appellant/defendant, LyoneSS Europe AG, represented in Romania by myWorld Retail Services SRL (formerly SC LyoneSS România SRL), contends that the appeal should be dismissed.
- 19 myWorld Retail Services SRL contends, first of all, that although it carries on marketing and advertising activities for the respondent/defendant it does not

constitute a division thereof since it is in fact a limited liability company, established in Romania, which is independent and has its own assets, and which has as its shareholders myWorld International Limited and myWorld Holdings Limited, both of which are organised in accordance with the laws of the United Kingdom and have their registered offices in London.

- 20 It is in no way controlled by the respondent/defendant, nor does it hold any special power of attorney to represent the latter in court proceedings.
- 21 On the substance, myWorld Retail Services SRL contends that OZ cannot be regarded as a consumer.
- 22 In fact, the relationship between Lyoness Europe AG and the members of the Lyoness loyalty scheme, which includes the appellant, is a commercial business relationship.
- 23 In accordance with the operating principle of the Lyoness scheme, the appellant carries on his economic activity independently and systematically, combining his corporate and financial resources and engaging in commercial activities in order to obtain gains in the form of passive income.
- 24 According to myWorld Retail Services SRL, membership of the Lyoness loyalty scheme is free of charge and the member's subsequent activity within that scheme is not subject to payment of any sum. Therefore, the contractual relationship between the members of Lyoness and the respondent entails no cost and possible damage to a member cannot be quantified. The sums of money deposited by members represent advances on their future purchases and their only obligation is to use those sums through the loyalty programme, that is to say make their purchases from Lyoness' business partners. The advances on purchases do not represent the equivalent value (price) of goods or services delivered/supplied by Lyoness.
- 25 The goods and services are purchased by the members directly from the business partners of Lyoness Europe AG, so that the legal relationship arises directly between those business partners and the members of the Lyoness scheme.
- 26 myWorld Retail Services SRL contends that the activity of the Lyoness loyalty scheme does not involve the manufacture, importation or marketing by the respondent of goods for members of the Lyoness scheme. The Lyoness loyalty scheme, together with its members, creates a shopping community for the purpose of obtaining mutual benefits. The appellant enjoyed the benefits of membership of the Lyoness loyalty scheme, consisting of refunds on his own purchases, benefits drawn from purchases from all referred members – the friendship bonus – and benefits linked to partner status.
- 27 At the time the contracts were concluded, the appellant acted with a view to carrying on activities generating additional and passive income and not with a view to obtaining mere discounts.

- 28 myWorld Retail Services SRL maintains that under the contract ‘every customer enjoys the benefit of “cashback on every purchase” and every party to that economic activity is given the opportunity, through active referral marketing, to create additional income, and to develop that activity into a core business’ and ‘... the customer must deal independently with the taxation of the earnings and commission earned, the necessary payments of insurance contributions and personally present the other supporting documents within the relevant deadlines; [for] this purpose, the customer is to submit to the competent tax authorities, within the deadline prescribed by law, declaration 201 “declaration on foreign income, code 14.13.01.13/7”’.
- 29 Furthermore, the status of members of the Lyonesse scheme as traders has already been declared by final decision of the Curtea de Apel București (Court of Appeal, Bucharest, Romania) of 2014, which ruled on an action brought by a member of the Lyonesse scheme. The Tribunalul București (Bucharest Regional Court, Romania) ruled to the same effect in another case in 2016.
- 30 As regards the request for a preliminary ruling, myWorld Retail Services SRL contends that there is no need to refer the case to the Court of Justice since the defendant/respondent is a Swiss company and, in the alternative, the request seeks in reality to settle the substance of the case.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 31 The referring court states that, in order to determine whether or not a contractual term is unfair, it is necessary to examine, in particular, whether the applicant is a consumer.
- 32 It adds that the directive does not specify the types of contracts to which it applies, but defines them by reference to the capacity of the contracting parties, according to whether or not they are acting for purposes relating to their trade, business or profession, since the system of protection implemented by the directive is based, as is also apparent from the judgment of 30 May 2013, *Asbeek Brusse and de Man Garabito* (C-488/11, EU:C:2013:341), on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge and this leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms.
- 33 In context of the present action, the Tribunalul Olt will have to carry out a two-stage analysis, namely ascertain the applicant’s status as a consumer, and then decide on the applicable law: either Swiss law or Romanian law transposing Directive 93/13/EEC. Only subsequently, depending on the Court of Justice’s response, will it be able to assess the content of the terms alleged to be unfair.
- 34 In the view of the referring court, OZ has the status of a consumer even though he benefits from trade reductions from certain traders who have a contractual

relationship with the respondent/defendant. What is important is that he is a party to an agreement under which he acts for purposes outside his trade, industrial or manufacturing, artisanal or professional activity.

- 35 In addition, the contractual term declaring that Swiss law is applicable may also be analysed from the point of view of its potentially unfair nature.

WORKING DOCUMENT