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COMMERCIAL COURT IN BRUSSELS

No [handwritten:] JC- DC/27 [Jee]

The copies of the original deeds are at the Registrar of the Commercial Court in Brussels

President of the Commercial Court in Brussels

Domiciled as in interlocutory proceedings

Claim to suspend – Pyramid sale

A.R. 2004/7787

In the case of:

The **Non-profit organisation Test-Aankoop**, hereinafter: Test-Aankoop, with registered office at 1060 Brussels, Hollandstraat

Claiming party

Represented by Master P. Vergucht

Lawyer at 1700 Dilbeek, Ninoofsesteenweg 225.

VS

The public limited company **Herbalife International Belgium**, hereinafter: Herbalife, with registered offices at 1000 Brussels, Drukpersstraat 4, with KBO no 0450875596

Defending party

Represented by Master h. Tielemans

Lawyer at 1000 Brussel, Kunstlaan 44.

The Court ruled as follows:

1. **THE PROCEDURE**

1. The claim was instituted by the summons that was served.
2. The parties presented their arguments and closing statements at the public hearing held on September 3, 2004, where after the debate was closed. The Court then started to consider the case.
3. The provisions of the Act of June 15, 1935 concerning the use of languages in court cases have been complied with.
4. The judgement was served after full arguments on both sides.

2. **THE FACTS**

5. The facts relevant to the evaluation of the case can be summarised as follows: Herbalife was founded in Los Angeles, California, USA in 1980. The enterprise develops and sells products for weight management, food supplements and beauty products. These products are available in 59 countries. In Europe, the Herbalife products are sold in, among others, France, Germany, The Netherlands, Belgium, the Scandinavian countries, Italy, Spain, Portugal, Greece, Czech, Poland, Ireland and the United Kingdom. Outside Europe, the Herbalife products are sold in, among others, the United States, Canada, Mexico, Argentine, Venezuela, Japan, Hong Kong, Israel, The Philippines, Australia and New Zealand.
6. The Herbalife products have been sold in Belgium since 1994. A subsidiary was founded in Belgium for this purpose.
7. According to Test-Aankoop, the sales method used by Herbalife is in contradiction with the WMPC. Herbalife argued that it uses a legal “multi-level” sales system.

3. **THE PARTIES CLAIMS**

3.1 The claimant requested the court:

“To declare the principal claim admissible and founded and as such,

To legally rule that the Public limited Company, Herbalife International Belgium, is guilty of violating articles 91, 14° and 99 of the Act concerning market practices and the consumer protection because it incorporated and promote a pyramid system where a consumer or a company, upon payment of a fee, has the opportunity to receive income by either recruiting new consumers or customers to the system or by selling or using the products;

Sentence the Public limited Company, Herbalife International Belgium to pay a penalty of 25,000 Euro for every violation of the order to suspend from the date it was served;

To legally rule that these violations may be established by any bailiff requested to do so;

Sentence the Public limited Company, Herbalife International Belgium to pay the legal fees, including the procedural fees;

Declare the order provisionally enforceable, without prejudice to any appeal, without possibility of suretyship or deposit;

Declare the counter-claim inadmissible, or at least unfounded.”

3.2 Herbalife requested the Court:

“Concerning the principal claim:

- In principal order: Declare the claim unfounded;*
- In secondary order: If a violation is established (quod non), grant (the defending party) a reasonable term to end the violation in application of article 112 WMPC and when applicable, set a maximum amount for the penalty;*
- Concerning the counter claim:*
 - Record the fact that the defending party instituted a counter claim;*

- *Declare the counter claim admissible and founded and to establish that the claimant was degenerating and defamatory about the sales method of (defending party) and thus violated article 95 WMPC;*
- *Prohibit the claimant from making any further degenerating and defamatory comments about the sales method of (defending party) and this subject to payment of a penalty of 25,000 Euro per violation from the date the judgement was served.*
- *To sentence the claimant to pay the legal fees, including the procedural fees.”*

4. THE ADMISSIBILITY

8. Parties does not present any specific grounds for the inadmissibility of the claim. The court can also not see any official reason to declare the claim inadmissible. This is thus admissible.

5. THE GROUNDS FOR THE DECISION

9. Herbalife stated that it offers its products via a legal “multi-level” sales method. Test-Aankoop contested this and argued that Herbalife’s sales method is in contradiction with articles 91, 14 ° and 99 of the Market practices Act (hereinafter: WMPC).

10. Article 91, 14° WMPC states:

“The following misleading business practices are under all circumstances considered to be dishonest: “setting up, managing, promoting a pyramid system where the consumers have, upon payment, a chance to receive income from either recruiting new consumers in the system or from the sale or the use of products.”

- Article 99 WMPC states:

“It is illegal to set up, manage or promote a pyramid system where a company, upon payment, has a chance to receive income from either recruiting new companies in the system or from the sale or the use of products.”

The preparational works of article 99 reads as follows¹:

“Art 99 This article prohibits pyramid sales where the participants are companies. A similar prohibition concerning consumers, in execution of Directive 2005/29/EG, is included in article 91, 14° of the bill. It is necessary to extend this prohibition to companies, since, in the view of the fact that the participants can be deemed to perform an economic activity in a sustainable manner and as such not as a consumer, must be considered as a company in the sense of the bill. In these circumstances, the agreement prohibition is threatening the intention of article 91, 14°, so that an elaboration of the prohibition to include systems where the requested participants are companies, is necessary.”

11. The court remarks in advance that the abovementioned provisions in the WMPC uses a broader definition of the prohibited pyramid system than earlier in article 84 WHPC: setting up, managing and promoting a pyramid system is currently prohibited, where the initial intention was only building a network of professional (or not) marketers. Further, the only opportunity to earn a revenue is by either recruiting new consumers or companies in the system than selling or using products, where everyone in the network have an opportunity to benefit from it. It is also important to establish that the implementation of the WMPC would reduce the burden of proof of the claimant and the appreciation margin for the judge is reduced. The prohibition on setting up, managing and promoting a pyramid system was placed on a so-called black list, which includes all circumstances deemed to be dishonest business practices. From this we see that as soon as a system complies with the requirements specified by articles 91, 14° and 99 of the WMPC, this system is deemed to be illegal and there is no reason to check whether or not there is a chance for misleading.
12. The Herbalife sales system is a network, there is no discussion about this and Herbalife confirms this. Within the sellers network of Herbalife there is also clearly a structured

¹ Bill concerning market practices and consumer protection of December 28, 2009, Doc. 52, 2340/001, 26, 76, 78.

hierarchy between the distributors, where the supervisors are authorised to penalise their distributors. In this regard, the administrative guide of Herbalife states that the sponsors “must ensure that the distributors comply with Herbalife’s rules”. In addition to this, it is practically impossible to change sponsors.

In order to become a distributor, a distributor’s contract must be signed and a “starter package” must be bought for 109.60 Eur including VAT. This “starter package”, the so-called “International Business Pack” contains a number of products and lots of advertising material. In addition to this, the distributors must pay an annual administration fee of 9.60 Euro.

Immediately after payment of the abovementioned amounts, the distributor receives a 25% discount on the price charged by Herbalife to private individuals for all products bought by him/her. This means that quite a number of persons who uses Herbalife products will naturally register as a distributor, as Herbalife admitted in its conclusions.

The “International Business Opportunity Manual – Manual for (inter)national business”², which forms the basis for the Herbalife marketing plan, encourages the distributor to purchase as many products as possible on a monthly basis. The discount received by the distributor on the purchase of the product increases proportionally with the monthly purchase volume.

The scale of the volume points and related benefits are reflected on page 29 top left of the Herbalife manual. A number of “volume points” are earned for every purchase. Every time when the distributor reaches a certain ceiling of volume points, this distributor receives a higher discount and hierarchic higher status.

In contradiction to the statements uttered at this hearing, a number of volume points are also earned on the “International Business Pack” as indicated by exhibit 32 of Herbalife.

At a certain purchase volume level, the distributor’s discount could be 42% and the distributor becomes a Senior Consultant.

² See exhibit 1 bundle Test-Aankoop

The distributor can also do a single order for a value of 1,000 volume points and is therefore automatically eligible to a discount of 42% on this order.

In case 4,000 volume points per months are acquired or 2,500 volume points in two following months, the distributor is eligible to become supervisor, whereby profit will be [*ignored*] on the own sales plus profit through granting of “Royalty Overrides” this is a percentage of 1% to 5% on the business volume of three “success levels” under the regarding supervisor.

As a supervisor gathers a bigger amount of volume points by the sale under his network, he may stand for a special status, in raising order: “World Team”, “TAB Team”, “Global Expansion Team”, “Millionaire Team”, and the “Presidents Team”, whereby on top of the before mentioned “Royalty Overrides” a production bonus can be earned as well on the distributors placed below him. These bonuses are acknowledged over the whole of the down going organization volume of the supervisor. In addition the supervisors are promised other advantages as an exchange, like Cartier watches and travels to far destinations.

13. Following this it means that the members of the Herbalife sales network acquire their income in five ways:

- Profits out of direct sale, this is the difference between the buying price of the Herbalife products and the sales price to the consumer. This direct profit is between 25% en 50%;
- Profits out of indirect sale, this is the difference on how much a sponsoring distributor pays for the products and how much the “down line”- distributors in the organization pay for this to the last mentioned one. This profit out of the indirect sale varies between 8% and 25%. Also if the down line distributors buy the products directly at Herbalife, the sponsoring distributor is enjoying this profit;
- Monthly earnings out of Royalty Overrides, this is the profit of 5% from the sale of all supervisors until three levels deep into the organization of the beneficiary of the profit;
- Monthly production bonuses of 2% to 7% on the whole of the down going organization volume of the Supervisor, or saying this differently, the points gathered from the turnover

of the through the beneficiary sponsored sponsors up until the third generation;

-Year bonuses, being a bonus which Herbalife acknowledges to their “Top Achievers” as recognition for their outstanding performances.

The overview of this “pyramidal” structure you can find on page 25 of the “handbook for international business”.

14. This overview shows that according to the judgment of the court, the distributor in the sales network of Herbalife can get more profits out of the indirect profit payments, Royalty Overrides and production bonuses who are calculated over the sale of products by the under their in the network situated distributors as by the profits out of the direct sale of products to the consumer. The [extension structure] prioritizes therefore the extension of the network.

This is also shown in the booklet “Work at home – Dare to succeed – How to start – Handbook of success 3 where on page 9 the following monthly incomes (in addition to the profits of the own client base) are provided for the sales to distributors:

-For ten distributors: 2,417 euro;

-For 30 distributors: 9,325 euro:

-For 90 distributors: 34,539 euro.

On page 8 of the same booklet out of the sales of products to consumers the following amounts are provided:

-10 clients: 495.78 euro

-30 clients: 991.57 euro

-100 clients: 4,957.87 euro.

The provided incomes out of the distribution network are therefore significantly higher as the provided incomes from the same amount of clients. With other words: there is a chance of a compensation which is derived primarily from delivering

³ See part 2 bundle Test-Sale

new distributors into the system then out of the sale or the usage of the products. And this happens against payment, as the distributor is obliged to first buy the “Beginners parcel”, named the “International business Pack”.

Finally it shows that the interest of the “recruiting and/or duplication” also from the booklet “Work from home” where is stated:

“ A second way of profits at Herbalife is the recruiting or duplication of persons. This is at first sight an under estimated system of financial gain, but in fact maybe even more important than the profit on the direct sale.” (The court underlines.)

15. Out of the through Herbalife announced evolution of the distributors since the creation of Herbalife in Belgium until 2011 shows that (to the extent that these figures are matching with reality, which is not proofed by Herbalife) the distributors stayed after 2006 on more or less the same amount and in the years 2005, 2006 and 2009 there were more distributors who resigned than that there were more distributors who registered.

16.

Furthermore the most purchases were performed against a discount percentage of 25% and 35%, which shows that Herbalife is getting the biggest part of her profit out of the distributors who don't make a high monthly turnover and who most likely resign after less than a year, which is shown in the rotation figures of the distributors. Not only is the majority of the profit achieved as well as the greatest profit, considering the fact that for this group the discount percentages are the smallest.

Following the foregoing shows that it is a lot more profitable for a supervisor to sell to a distributor, rather than selling directly to a consumer. On top of the profit margin of 25% the supervisor who sells to a distributor gains as well royalties on the sales of the distributor and the sales of the distributor count for the volume points of the supervisor. This is obviously not the case with a direct sale to the consumer.

16. Herbalife argues that (just like Amway and referring to the ‘Amway decree’) the products are sold by the methods of direct sales whereby they are sold to the end consumer by independent entrepreneurs, in particular their distributors, without using

⁴ Document no.3 Test-Aankoop

fixed locations or utilizing retailers or wholesalers.”

This is like comparing apples with oranges.

First of all, Herbalife confuses the terms ‘distributor’ and ‘consumers’. Sometimes the distributors are ‘consumers’, yes even ‘members’, other times the distributors are ‘retailers’.

The fact that the distributors are no consumers is shown from ‘The Distributorship Agreement’ of Herbalife which clearly stipulates:

1. “The distributor will manage his/her own company, sell Herbalife products against cash payment, do his/her own promotion and act completely in accordance with the rules, instructions, policy stipulations and procedures which have been recorded and are amended on a regular basis, including that which is described in the Herbalife International Business Opportunity handbook (hereafter referred to as the Herbalife Career Book).
2. The distributor is an independent entrepreneur (in every aspect, including taxes and otherwise) and is not an employee, equal a representative or agent of Herbalife international Belgium N.V. /S.A., or of any other Herbalife units or of any other Herbalife distributor. Considering that he/she is an independent entrepreneur, Herbalife assumes s that he/she will register at the Belgian Chamber of Commerce, ensures a VAT- number and he/she is obligated to report this to Herbalife and meet the obligations of the Belgian social insurances for independent entrepreneurs.”

From this agreement follows that all distributors in the network of Herbalife, without exception, are independent entrepreneurs and thus should be considered as such. Nowhere in the documents is it shown that ‘people who buy for 500 volume points are consumers’ and neither do the documents show that ‘people who buy less than 2,000 volume points are consumers who, to a limited degree, will sell products to family and neighbors’ as Herbalife claims in its conclusion.

⁵ See Document 1 Test-Aankoop: page 13

⁶ Sic

17. Herbalife argues incorrectly that they don't have the burden of proof as to the sales to the end consumer but Test-Aankoop does. After all, it is Herbalife which argues in the conclusion that its products "just as with Amway" are sold to end consumers. Obviously, Herbalife has to prove this and not Test-Aankoop.

In accordance with articles 870 of the Judicial Code and 1315 of the Civil Code, the party who introduces a certain fact will have to deliver evidence of that. This evidence of facts can be done by any legal means. The uncertainty or doubt that will remain after the taking of evidence needs to be considered against the one who has the burden of proof (Cassation, September 17, 1999, Decree Cassation, 1999, 1119). The mere claims by a party in their own case do not constitute evidence. The acceptance of such one-sided claims, without those having been supported by other data or suspicions, dismisses the rules of the burden of evidence (cassation, April 17, 1989, Decree Cassation, 1988 – 89, 947 – 949).

Contrary to what Herbalife is arguing, this case does not show that the distributors are selling to the end consumers. In an attempt to answer the question of the court after the debates in regard to the number of sales to the end consumer had been reopened, a part of the distributors is described as consumers and this on the basis of the number of purchased "volume products". Obviously, this is not serious.

The document showed that all the distributors are actually "trader" who are contractually obligated to conform to the independent status.

18. The Herbalife sale system deviates from the Amway sales system in regard to several other points as well:

- contrary to the Amway system in which there is no contractual relation between the distributor and a down line distributor or downliner who has been sponsored by him (the downliner becomes a distributor of Amway and buys his projects directly from the latter), with Herbalife, there is a relationship between a distributor and his downliner whom he sponsors (the downliner buys the products from his sponsor and is not allowed to change sponsor);

- With the Amway sales system, the distributor is obligated to at least sell and deliver 70% of the products that he bought during a month in order to qualify for the acquisition of the commission and the distributor has to sell to at least 10 different end consumers in a month in order to enjoy a bonus which will qualify for determining the reimbursement.

Even though the documents show that these rules should apply to all the distributors, in the conclusion Herbalife acknowledges that they only use the “70% rule” and the “10 consumers rule” for the “supervisors, these are the so-called “sponsored distributors” who amounts to about 15% of all the distributors. According to Herbalife, the 70% rule serves to make sure that the distributors are not harmed. Nevertheless, according to the 70% rule, one does not only need to sell to the end-users, but it is sufficient to sell to the sponsoring distributor. It is also sufficient to list the same 10 consumers each month who have made a minimal purchase to meet this condition and they can still function as sponsoring distributor. Even though the “sponsoring distributor” might not be harmed, the underlying distributors obviously still run that risk. After all, there is no ‘protection rule’ for them.

In addition, to acquire the status of sponsoring distributor “supervisor”⁷, one needs to at least buy goods for €4,000 per month to be able to still enjoy the bonuses of the sales of the underlying distributors. Contrary to as Herbalife makes it appear, someone doesn’t become a “supervisor” on the basis of sales in the past, but for a starter it is sufficient to buy for €4,000. After all, the “Handbook towards success” explicitly states that it concerns “initial investments”, excluding the start package, the so-called “international business back”.

- With the Amway sales system, the purchasing prize of the products is the same for everybody regardless of the number of products that are purchased. However, with Herbalife, there are volume discounts, in the sense that the products become cheaper as the purchasing volume for a certain distributor is a larger (whereby the purchasers of the distributors which are ‘sponsored’ are taken into account).

⁷ See document 2 Test-Aankoop package “Handbook towards success” page 10.

With the Amway sales system a distributor who recruits another distributor into the network receives no benefit from the mere expansion of the network that results from it and this distributor does not receive any compensation for such recruitment, neither by way of a commission on any membership fee or on the starter set, nor on goods purchased by someone down the line. More importantly the court has already noted that the ‘sponsor’ of a new distributor receives volume points on the ‘International Business Pack’ which the new distributor is required to purchase⁸. In addition, payments at Herbalife are in the first instance calculated on purchases, whether these are by sponsored distributors or end-consumers does not make any difference to Herbalife. Moreover, Herbalife cannot even answer the question by the court as to how many of its products are eventually sold to an end-consumer (see above).

19. In the opinion of the court the aforementioned differences between the Herbalife sales system and that of the Amway sales system are of such significance that they materially turn the Herbalife sales system into a system which is inconsistent with Articles 91, 14 and 99 of the WMPC. Especially the fact that the distributors at Herbalife also benefit from the purchase of products from other distributors (difference in purchase price between the sponsor and distributor which he sponsors, royalties, bonuses) sets it substantially apart from the Amway sales system, as well as the fact that at Amway bonuses are supposed to be earned based on sales to the end-consumer and that this is not shown at Herbalife. Indeed the aforementioned provisions of the WMPC emphasise the sale or the use of the goods. In the system of Herbalife it is the purchase of goods which forms the basis of payment of the distributors and in particular that of the sponsors and not the sale or use of goods. The “supervisors” apparently seek to expand the hierarchical network, by recruiting lower placed salespeople to realize profit from products purchased by these salespeople, rather than to drive sales to end-consumers.

20. In order to obtain the goods at a fair price with a view to using them the consumer has to become a distributor. The consumer thinks that he needs the products by Herbalife, and thinks it necessary to join the system to avoid paying unreasonably and unjustifiably much for the products.

⁸See document 38 of the Herbalife bundle

In other words, in order to gain access to a price that is acceptable to the consumer he has to become a distributor and pay the impermissible entry price (i.e. a price that is 25% higher than the price he has to pay as participant for products which he may not even need or which he did not intend to purchase) separate of any intention to start an independent trading enterprise. The consumer is in a way forced to become an independent distributor to then purchase the goods in the context of his enterprise and 'use' the goods as a consumer.

21. This way Herbalife entices people who, due to their economic and social limitations, are easily influenced by ostensible benefits held up by the 'International Business Opportunity Manual, a Manual to engage in (international) business' after which they largely quit within a year, as demonstrated by the figures. The fact that entry into the system as a distributor does not in fact satisfy a genuine capacity and desire for responsible entrepreneurship is after all evident by the high distributor turnover, within a year 50% of them drop out and are replaced and only the sponsors of these distributors (the "fulltime" salespeople as they are referred to in the conclusion of Herbalife) make money directly or indirectly and therefore obviously remain stable. This cannot and should not be allowed to be the aim of independent entrepreneurship.

22. The Herbalife system therefore contravenes articles 91, 14 and 99 of the WMPC. It is therefore appropriate to order Herbalife to cease this practice as specified in the order part.

23. Herbalife requests secondarily to grant it a reasonable timeframe in applying article 112 of the WMPC and have any damages subject to an upper limit. A fine of 5,000 Euro per established breach from two months after the date this ruling appears satisfactory. In any case the court limits the total sum in forfeitable fines to 250,000 Euro.

24. As a counterclaim Herbalife offers that the Test Purchaser has commented on Herbalife in a denigrating defamatory way regarding the sales method of Herbalife and as such has breached Article 95 of the WMPC. Aside from assessing the admissibility of this counterclaim, the court considers it that it is difficult to blame the Test Purchaser for informing consumers by way of her publications and press releases of the illegal sales practises by Herbalife in the opinion of the Test Purchaser (and now also the court).

25. Given the above the remaining arguments are not relevant to rule on this matter.

6 **COSTS**

26. Applying the Royal Decree of October 26, 2007 in establishing the administration of justice fee referred to in Article 1022 of the Judicial Code and in establishing when the date referred to in Articles 1 to 13 in the Act of April 21, 2007 regarding the recoverability of fees and costs associated with legal representation takes effect the base amount (non-monetarily assessable action) amounts to 1,320 Euro.

7 **ORDER PART**

On the basis of the above considerations the court rules as follows.

It declares the claim by the plaintiff as valid and founded to the following degree:

The court states that Herbalife is in breach of Articles 91, 4 and 99 of the Act regarding market practises and consumer protection because it has established, managed or promoted a pyramid scheme, whereby the consumer or a business stands to make money which is more likely the result of introducing new consumers or businesses into the scheme than from the sale or use of products. The court orders cessation of this breach and thus of the Herbalife pyramid scheme whereby a consumer or an business stands to make money which is more likely the result of introducing new consumers or businesses into the scheme than from the sale or use of products.

The court orders Herbalife to pay a fine of 5,000 Euro for each breach that is established from two months after the date of this ruling. The court sets the maximum of the forfeitable fines at 250,000 Euro.

The orders Herbalife to pay the costs estimated by Test Aankoop to amount to 1,320 Euro in court costs plus 192.88 Euro in summons fees.

The court rules this verdict immediately enforceable, notwithstanding legal recourse and without collateral.

Ordered and ruled as such by Ms. Natalie Swalens, Judge in the Civil Court of Brussels, sitting in for the Chairman, who is legally prevented, presiding as in summary proceedings, assisted by Ms. Martine Vanden Eycken, registrar, in the public chamber of cessation orders, room E of the Civil Court in Brussels on
[stamp:] 11-23-2011

[signature]
Ms. Natalie Swalens

[signature]
Ms. Martine Vanden Eycken

[stamp:] *PRESENTED ON*

11 -28 - 2011
NO REGISTRATION REQUIRED
THE RECIPIENT *BEX J.*
[initials]