CENTRE DE DROIT
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Unfair competition

The promotion of online cryptoasset trading courses

Par Yannick Caballero Cuevas le 17 October 2022

What could Kim Kardashian, Nabilla and the Swiss Federal Supreme Court possibly have in common ? Not much, a priori. However, the promotion of online trading courses and cryptoactives concerns all three. The first two have been fined, one for promoting a website offering online trading courses, the other for promoting a cryptoasset. Both failed to inform their subscribers that they were being remunerated for their publication by the companies in question. For its part, the Swiss Federal Supreme Court recently considered a similar case in ruling 6B_538/2022.

In April 2018, Émilie – resident in the canton of Thurgau – registered on the platform of foreign company B. Inc. This platform offers the sale of training courses for currency and cryptocurrency trading. Members of this training program can also engage in product marketing and be remunerated according to an internal remuneration plan by recruiting new members. In order to participate in this plan, Émilie advertises to various people, including Marc. Marc denounces the case to SECO.

Subsequently, SECO lodged a criminal complaint against Emilie with the Public Prosecutor's Office of the Canton of Thurgau. She was accused of participating in a pyramid scheme and providing inaccurate and misleading information.

Following opposition to the Public Prosecutor's criminal order, the Bezirksgericht sentenced Émilie to a suspended fine and a fine for violation of the law against unfair competition (UWG). However, on appeal, the Obergericht of the canton of Thurgau acquitted her. According to the Thurgau court, the objective elements of art. 3 al. 1 let. b LCD had not been met. Moreover, it left open the question of whether an illegal snowball system was involved. Furthermore, he concluded that the subjective elements of the offence had not been met.

Referred to by the Swiss Federal Prosecutor's Office (MPC), the Federal Supreme Court begins by pointing out that Art. 23 UWG imposes a criminal penalty on anyone guilty of unfair competition, in particular within the meaning of Art. 3 UWG. Unfair practice means giving inaccurate or misleading information about oneself, one's company, one's goods or one's sales methods, or giving third parties an advantage over competitors (art. 3 al. 1 let. b UWG). The practice of distributing bonuses or granting benefits which depend on the recruitment of other people by the purchaser, rather than on the sale or use of the goods or services, is also considered unfair (art. 3 al. 1 let. r UWG). The perpetrator must act intentionally within the meaning of art. 12 of the Swiss Criminal Code. Subsequently, the Federal Court refers to

mistake as to the facts (art. 13 PC) and mistake as to the unlawfulness (art. 21 PC). The latter is excluded when the perpetrator knows – on the basis of his or her own assessment – that his or her conduct is contrary to the legal order. If the perpetrator suspected or should have suspected the legality of his or her action, or if he or she knows that a regulation exists but does not inform himself or herself sufficiently, the error is considered avoidable. Whether the error was avoidable is a question of law, whereas whether the perpetrator knew that his conduct was contrary to the legal order is a question of fact.

In this case, the program participants would have been specifically prepared for discussions on the legality of the business model. A legal opinion from a law firm was circulated among the participants. As a result, the Obergericht found Emilie to be factually incorrect. In addition, she assumed that the business model was economically sustainable, since competing products existed, and that remuneration was paid as in a commission system. As a result, Emilie's awareness did not extend to all the objective elements of the offence. As she was not fully aware of or willing to participate in a pyramid scheme, intent was lacking at the time of the facts. However, the MPC does not explain how the Obergericht's assessment of the facts was untenable in terms of arbitrariness. Indeed, it confines itself to arguing how the other means of evidence should have been assessed by the Obergericht. The Federal Court therefore dismisses the appeal.

This ruling highlights a commercial practice that has become fairly widespread on social networks, particularly with the advent of finfluencers. Practices vary, but the general idea is, on the one hand, to sell training courses and, on the other, to form a community that promotes both training courses and certain cryptoactives on social networks. The latter can lead to pump-and-dump practices, or the dissemination of false or misleading information on social networks. Foreign authorities are warning of these risks, as is the case with the French Autorité des marchés financiers.

In conclusion, it's one thing to participate in a pyramid scheme ; it's quite another to be aware of it. As this ruling demonstrates, participants are not necessarily aware that they are taking part in such a scheme. But who is to blame ? The individual participant, or the corporate beneficiary ? In both cases, the question of intent is inescapable. What's more, these commercial practices are generally set up by foreign companies, via social networks. These aspects complicate criminal proceedings against the company.
