



ON BEHALF OF THE REPUBLIC

The Supreme Court, acting as the court of appeal
the President of the Senate
Hon. Prof. Dr. Höllwerth as Chairman
and the Counselor Hon. Prof. Dr. Brenn, Dr.
Weixelbraun-Mohr, Dr. Kodek and Dr. Stefula as further judges
in the case of the plaintiff [REDACTED] represented by [REDACTED]
[REDACTED], against the defendants 1.) Ly*
GmbH, *, represented by Katharina Kurz, Rechtsanwältin in
Vienna, and 2.) m* GmbH, *, represented by Reif and
Partner Rechtsanwälte OG in Graz, because of
[REDACTED], on the appeals of the first and second
defendants against the judgment of the Higher Regional Court
Vienna as Court of Appeal of
June 27, 2024, GZ 2 R 28/24p-22, with which the judgment of
the Commercial Court of Vienna of 29 November
2023, GZ 12 Cg 24/23h-16, was amended, decided and
upheld:

1. The first defendant's appeal on grounds of
nullity is dismissed.

2. By the way by the way is the
revisions consequence
given.

With regard to the first defendant party, the
The judgments of the lower courts are set aside and the case
is referred back to the court of first instance for a new
decision after the proceedings have been completed.

With regard to the second defendant, the
contested decision is amended to the effect that the judgment
of the court of first instance dismissing the action restored.

3. With regard to the revision
of the first defendant are the costs of the
appeal proceedings further

Procedural costs.

With regard to the appeal of the second defendant, the cost awards of the lower courts are set aside and the court of first instance is ordered to make a new decision on the costs of the proceedings at first and second instance.

The plaintiff is liable to pay the second defendant the amount of EUR [REDACTED] (including [REDACTED] lump-sum fees) within 14 days.

Communitand Development grounds:

[1] L* AG, a public limited company based in Switzerland, operated a shopping community that enabled customers ("members") to acquire benefits (cashbacks and shopping points) by purchasing goods and/or services from L* partner companies. On August 9, 2010, the plaintiff registered as a member of L* AG, which set up a member account for the plaintiff. Later, the plaintiff obtained the position as an intermediary of L* customers ("Marketer"), whereby this marketing program (intermediary network) was operated under the name "Ly*" and is still being operated.

[2] At the beginning of 2018, representatives of L* AG presented the plaintiff with a model in which marketers could participate in "customer clouds" and "enterprise clouds". In the period from 29. 5. 2018 to 8. 3. 2022, the plaintiff purchased discount vouchers (discount vouchers) from L* AG and "Customer Clouds" and

"Enterprise Clouds" at an amount from in total [REDACTED] In this context accepted it the Ly* Agreement for Independent Ly* Marketers as amended in 2017 and the Additional Terms and Conditions for Discount Vouchers as amended in 2017. The plaintiff made the payments to L* AG, which confirmed the respective orders and issued the invoices for them.

[3] From the beginning of 2021, when L* members logged into their member account, a pop-up window appeared with a video message from H* F*, a founder of the L* business model, entitled "I have a gift for you!" promoting the "my* Share Program". The spoken text of the video message reads:

" Hello welcome, for those who don't know me, I'm H F*. Today I have an unexpected gift for you. In 2003 I started a shopping community and a Moneyback with every purchase. And a lot has happened since then, weve connected millions of customers with hundreds of thousands of local and online partners. Millions of dollars in sales have been achieved and millions in cashback for our customers. All of this was made possible by you. Because of your trust, your support, your belief in me and I never forget where I come from, I have a gift for you: every order you place, whether you placed it yesterday or in 2003, will count for free in a special program for you. What's the story behind it? Like all other businesses, we've had a lot of ups and downs. It's been an incredible journey and I've learned a lot along the way. In 2018, I combined all my experience and learnings and founded my*. What if you could get more for your money? What if you could get more value for every purchase you make, no matter where, no matter when. Thanks to my* and the global shopping network, we can offer an exclusive advantage. In more than 50 countries with hundreds of thousands of online and local partners. And every day*

used by millions of satisfied customers. There are large, small and medium-sized companies that have already recognized the potential and are sharing our benefits with their customers. Our white label programs and sports partnerships are also part of this my success story. How can you derive an advantage from this? It doesn't matter if you have to shop or love to shop, now you can derive exclusive benefits. Cashback and Shopping Points, whether you shop online, fill up your car, eat in a restaurant or book your next vacation. You get more for your money and cashback is just the beginning, the real treasure is the my* Benefit Lounge. With your Shopping Points you can get sensational deals and save even more money. The more Shopping Points you have, the more money save. our shopping community today. Welcome to the world's leading Benefit program. Unbelievable, isn't it? Nobody expected such a success in such a short time. But this is just the beginning, because my* will become a multi-billion dollar company. And you can become a shareholder, for free. How does it work? With the my* Share Program. Something big has begun, a new global player is going public. And you, as a Ly* Marketer, can become a shareholder for free. A company that active in more than 50 countries around the globe, that already has millions of satisfied customers, hundreds of thousands of merchants and incredible white labels in sports partnerships. my* International, ready to become a multi-billion dollar company. We have created the perfect game plan to achieve this goal. Our plan is divided into three phases. During the preparation phase, my* will take all necessary steps to prepare for the IPO. The expected launch will place during the Go Public phase, the initial public offering phase. During the expansion phase, my* will utilize the funds received from the planned IPO and implement the committed business plan. Each phase increases the value of the company and you can from this. my* has formed a cooperation with Ly* to increase the number of customers and global sales. In return, Ly* receives 25% of the shares for its marketers. How does it work? With the my* Share Program, a unique and free incentive program exclusively for Ly* Marketers. During the preparation phase you have the opportunity to earn my* Share Points for free.*

or collect m SP. How can you collect m SP? All you have to do is create purchase volume by buying and redeeming Benefit Vouchers. The exact number of m SP available will be displayed during the Benefit Voucher ordering process. So collect as many m SP as possible. The m SP that you have collected by redeeming Benefit Vouchers during the preparation phase can be converted into company shares during the planned IPO. The sensational thing about this is that 50% of these company shares will be available to you personally. And the other 50% will be transferred to the my Share Cloud for you. The cloud is created in monthly Shopping Points Plus volume for you and your entire organization. The more Shopping Points Plus you have, the faster your career will develop. Being behind something this big at the beginning is a once in a lifetime opportunity. So let's build a multi-billion dollar company together. Welcome to my* Share Program. So let's get straight to the point and talk about your gift. I want to thank you for all these years we've spent together. You get my* Share Points for all past orders. Whether it was a deposit, a Discount Voucher, an m Voucher or a Benefit Voucher. But wait, there's more, you also get the opportunity to exchange your incentive programs, for example the Customer Cloud, Infinity and Enterprise programs for my* Share Points. After the preparation phase, your my* Share Points will be converted into company shares and then you will become a shareholder. How can you be a part of this incredible program? It's simple: with the latest my* and Ly* Terms and Conditions. Both are free with our own marketing agency, Ly* Marketing Agency, we also give you the opportunity to earn commissions on your daily purchases. it out: Did you know that billions of dollars are spent every day promoting products and services around the world? Yes, with Ly* you can get a share of this market potential. Ly* is a global marketing agency operating successfully in more than 50 countries worldwide. And it's helping more than five hundred thousand freelancers on the road to success. Thanks to our incredible partnership with my* and the world's leading benefits program, we can offer our Ly* marketers this*

unique opportunity them to use everyday shopping to their advantage. And it's so easy, all you have to do is talk about products and services and you get paid for every sale. You can start your own business by referring clients, merchants and freelancers. The possibilities are endless. How much would you like to earn each month? 500 euros, 5,000 euros or even 50,000 euros? That's up to you. The higher the turnover you generate, the higher your income. So anything is possible. We help you to achieve your personal goals by offering you tools and services that will accompany you on your path to success. How much does it cost? Absolutely nothing. So what you waiting for? Get started today, for free. Listen, with the power of Ly, my* will soon become a multi-billion dollar company. I've decided to this multi-billion dollar company with you. Why? You have your trust in me all these years. And that is why you are now receiving this gift. You will receive my* Share Points for free. Later you can convert them into company shares. This will make you a shareholder. How can you more m Sp? Be active, with us, work us. And if you want, place new orders. In February, you will receive three times as many m SP for every order. All our activities together will increase the value of our company and also your share. Together we are strong. Welcome to my* Share Program."*

[4]

By means of a circular email dated July 16, 2021, the first defendant informed the members who had not yet switched to the my* Share program about the new Benefit program with the following content:

"[...]

You can become a shareholder. And completely free of charge! Instead of being limited to a certain period, a certain country and its national purchasing volume with the Customer Cloud Program, you can shareholder of my International. How? With the my* Share Program.*

You will receive my Share Points (m SP) for all Customer Clouds you participate in and additionally for all orders you placed in the past. It does not matter whether it is*

This can be a deposit, a discount voucher, an m Voucher or even a Benefit Voucher. These my Share Points can be converted into company shares at a later date. This makes you a shareholder, completely free of charge!*

*For more information on this incredible incentive, simply log on to the website and H*F*'s video message."*

[5] The my* Share program is described in a fact sheet as follows:

"my International plans its IPO.*

And you as a Ly Marketer can become a shareholder - completely free of charge! How?*

Thanks to the my Share Program! What is the my* Share Program?*

my has started a cooperation with Ly* to increase its number of customers and partner companies as well as its global turnover. In return, Ly* will receive 25% of the shares in my* International for its marketers.*

The my Share Program was created exclusively for Ly* Marketers and gives them the opportunity to receive company shares free of charge by collecting my* Share Points (m SP). The more m SP a marketer has collected, the more shares they receive.*

The best thing about this is that the marketer can freely dispose of 50% of the shares they receive (Personal m SP Score), while the other 50% are transferred to the my Share Cloud (Cloud m SP Score). The my* Share Cloud generates a monthly volume of Career Points (CP) for the respective marketers.*

[...]

How can marketers collect my Share Points? Marketers receive my* Share Points for ...*

- the purchase of selected products (the exact number of m SP will be displayed in the respective order process).

- the recommendation of new partners for my Shopping Community.*

- previous orders, if they the general Accept terms and conditions of Ly from 2021.*

- the conversion of incentive programs if they

accept the general terms and conditions of Ly from 2021.*

- participation in future promotions (these are defined by Ly).*

my Share Points are part of the my* Share Program, which a free incentive program exclusively for Ly* Marketers. m SP cannot purchased, have no intrinsic value, are not redeemable for cash and do not represent an investment. m SP are directly linked to the ID of the respective Marketer and therefore cannot be transferred.*

[...]"

[6] On 16. 2. 2023, the plaintiff registered for the "my* Share Program". In the course of this, she accepted the Ly* Marketing Agreement as amended in 2021. The plaintiff's contractual partner for this agreement is the first defendant. In addition the plaintiff the General Terms and Conditions (GTC) for my* members as amended in 2021. She agreed to during the registration also , that

"my personal or company-related data, namely first and last name, title, gender, date of birth, e-mail address,

postal address, address coordinates (longitude and latitude),

telephone number(s), fax number, membership ID, account data and data on sales activities (such as sales data, career data, data on incentive qualifications, on my orders placed and on shopping points generated) and, in the case of legal entities, additionally or alternatively, company register number,

company name, date of foundation, tax number, VAT number and homepage, may be passed on by my previous contractual partner to Ly GmbH and taken over by the latter". As a prerequisite for participation in the my* Share program, the cancellation of the previous L* membership was indicated as part of the registration process.*

[7] For its previous investments received the

applicant is credited my* Share Points (mSP) as part of the "my* Share Program" as follows:

16. 2. 2023 Credit Ly* Registration (EC1)
20 000.00 mSP

16. 2. 2023 Credit note Ly* Registration (EC2)
1 000.00 mSP

16. 2. 2023 Credit note Ly* Registration
(mVoucher) 18 750.00 mSP

[8] With a value date of April 21, 2023, the second defendant paid the existing credit balance on the purchase account plus interest in the amount of EUR 155.31 to the plaintiff. This credit balance had not used for the purchase of products.

[9] The **plaintiff** sought the (return) payment of EUR 22,250 from the title of unjust enrichment. She made investments with L* AG in the aforementioned amount and received discount vouchers (discount vouchers) and "Customer Clouds" and "Enterprise Clouds" were acquired. These investments used to securitize dummy vouchers. At the beginning of 2021 L* propagated an IPO. Discount vouchers and clouds acquired to date were to be converted into my* Share Points, which subsequently entitle the holder to subscribe to shares. For this purpose, she had to accept the Ly* Marketer Agreement as amended in 2021 and the GTC for my* members as amended in 2021. Subsequently, her member account was switched to my* Share Points and L* AG withdrew from the contractual relationship. In their place, the defendants jointly became the operators of the single member account and the previous business relationship with L* AG transferred to the new contractual partners. In addition

[10] The **defendants** replied they did not have passive legitimacy. The plaintiff was claiming compensation for products it had purchased from L* AG. The plaintiff's contracts with L* AG had not taken over by them. They had also neither received payments from L* AG from the plaintiff nor operated the plaintiff's L* member account or provided services in connection with it. The conditions for an assumption of contract or an assumption of debt were not met. A reversal under the law of unjust enrichment only existed in the relationship of the contracting parties to to take place. Claims for damages were already excluded due to a lack of causality. In fact, the plaintiff had only concluded an independent contract with the second defendant for participation in a free benefit program, which was based on independent general terms and conditions. By bringing the action, the plaintiff had for the first time demanded the termination of the existing contractual relationship with the second defendant on the basis of the GTC for my* members as amended in 2021, to which the second defendant expressly agreed. The existing credit ba [REDACTED] including interest from 5. 4. 2022 until 3. 6. 2022 in the amount of total reimbursed.

[11] The **court of first instance dismissed** the
action to the

its entirety. L* AG had been the plaintiff's only contractual partner up to and including March 2022, which is why the defendants were not entitled to bring an action. The conditions were neither present for an assumption of contract nor for an assumption of debt by the defendants.

[12] The **Court of Appeal** allowed the plaintiff's appeal and amended the contested judgment by granting the claim. In 9 Ob 40/18z, the Supreme Court had ruled with regard to a snowball system pursuant to No. 14 of the Annex to Section 2 UWG in conjunction with Section 27 (2) UWG that only the plaintiff there could assert a claim for repayment from the contractual relationship that was invalid pursuant to Section 879 (1) ABGB in conjunction with No. 14 of the Annex to Section 2 UWG, but that the membership benefits paid out to him in the form of goods or cash benefits were to be deducted from this, while an independent counterclaim by the defendant was not justified. The contractual terms of the agreement between the plaintiff and its original contractual partner, L* AG, were non-transparent within the meaning of Section 6 (3) KSchG and precluded free consent to the contract within the meaning of Section 869 ABGB. In addition, there is a prohibited snowball or pyramid scheme, especially since according to Annex No. 14 of the Annex to Section 2 UWG and Section 879 ABGB, a system is immoral if the consumer has the possibility of obtaining a remuneration that is to be achieved predominantly by introducing new consumers to such a system and less through the sale or consumption of products. The contract between the plaintiff and L* AG was therefore null and void and had to be rescinded with ex-tunc effect pursuant to § 1431 ABGB.

[13] For the question, whether the
plaintiff

concession claims against the defendants, it on the existence of an assumption of contract. Such an assumption was to be affirmed. The entire conduct of the defendants was to be understood in such a way that they presented themselves as the new contractual partners of the plaintiff, especially since they used the plaintiff's membership data, provided access to its membership account, provided the requirements for participation in the "my* Share Program" and managed the Ly* vouchers. As a result of the registration process, the plaintiff also received my* Share Points (mSP) from the defendants, which were later to be converted into my* shares. The defendants therefore held the plaintiff's investments and thus took over all of the plaintiff's membership benefits. The plaintiff therefore had to assume that the mVouchers and the EC1 and EC2 balances had been converted into mSP and that L* AG had transferred the framework agreement to the first and second defendants.

[14] The ordinary appeal is admissible because there is no case law of the Supreme Court on the question of the defendant's legitimacy as a defendant due to the transfer of concession claims against L* AG to the first and second defendants.

[15] The defendants' **appeals** against this decision are aimed at restoring the judgment of the court of first instance dismissing the action.

[16] In its **response to the appeal**, the plaintiff requests that the defendant's appeal be dismissed or, in the alternative, that it be dismissed.

[17] The appeals are admissible and - with regard to the first defendant in the sense of the subsidiary application for annulment - also justified.

Regarding the alleged nullity, defectiveness and irregularity of the file:

[18] (1) As the Supreme Court has examined, the asserted grounds for nullity as well as the defects in the appeal proceedings and discrepancies in the file alleged in connection therewith do not exist.

[19] The supplementary findings derived by the Court of Appeal from Exhibit ./V and from the plaintiff's photo collage in Exhibit ./AY regarding the advertising of the my* Share program exclusively with from Ly* and my*, to confirm the conversion of purchase credits. purchase credit into my* Share points by the first defendant and the conversion of (purchase) credits, units and distributions from clouds in the course of the mSP deal are no separate relevance. The vouchers and units acquired by the plaintiff

Clouds:

[20] **2nd** L* vouchers (with different names) were part of a business model of L* AG in the years 2018 to 2022 that was based on a cashback system. Customers (members) of L* AG were able to receive discounts and rebates of cashbacks and discount vouchers (vouchers or shopping points) when making purchases from partner companies.

[21] "L* Discount Vouchers within the meaning of the Additional Terms and Conditions for Discount Vouchers as amended in 2017 could be purchased by L* Marketers, who received Shopping Points that could be redeemed at L* Partner Companies.

[22] "L* Customer Clouds" and "L* Enterprise Clouds" were issued at different times with different terms and were able to download from

marketers. With these cloud participations, participants were promised a potential financial gain for their deposits through participation in sales based on the purchases made by L* members in a specific country or from specific project companies . were used for this purpose at "Enterprise Clouds", the profits generated in individual project companies of the my* group of companies or my* Enterprise Ltd are converted into Shopping Points and the resulting Shopping Points volume is distributed pro rata to the cloud participants in the form of Shopping Points.

[23] The Cashback System was previously operated by L* AG and later by my* International Ltd. The new benefit program (my* Share Program from 2021) is also operated by my* International Ltd and is processed and implemented in Austria by my* Austria GmbH (second defendant).

[24] Ly* Marketers were and are - in contrast to mere customers (members) - intermediaries who broker purchases from partner companies as part of the respective benefit program and receive remuneration (cashbacks and shopping points) in return. The agent network was previously operated by L* AG. Since 2021, it has been operated by Ly* Marketing Agency Ltd, with Ly* GmbH (first defendant) the contractual partner of the Ly* Marketers in Austria.

The requirements for a contract transfer:

[25] **3.1** With regard to the defendant's legitimacy as a party, the plaintiff relies on the assumption of a contract by the defendant with regard to the of her at of L* AG acquired "Investments" (vouchers and clouds).

[26]

3.2 Under Austrian law, an assumption of contract is a uniform legal transaction by which the entirety of all reciprocal rights and obligations are transferred and the party assuming the contract (new party) takes the place of the party withdrawing from the obligation (old party). The new party takes over the entire contractual legal position of the old party without changing the content or legal identity of the previous contractual obligation (see RS0032623). The new party must assume the contractual relationship in the situation in which it currently itself, whereby the level of knowledge of the new party is irrelevant (2 Ob 164/12z; 5 Ob 190/19f). The scope of the assumption of the contract depends on the agreement between the parties (*Thöni* in *Fenyves/Kerschner/Vonkilch* , Klang³ § 1406 ABGB Rz 71). The new party assumes the entire contractual legal position of the old party in accordance with the agreement (see *Lukas/Geroldinger* in *Kletečka/Schauer* , ABGB-ON^{1.01} § 1406 Rz 17). The old party is subsequently liable neither for previous nor for later claims or expectancies of the remaining party. The assumption of the contract also leads to the transfer of the entire legal framework relationship in the sense of the unity theory, i.e. also the contract-related rights of organization (see 4 Ob 355/97b; *Ertl* in *Rummel* , ABGB³ § Section 1406 para. 2). If the entire contractual legal position is transferred, the transfer also includes secondary claims of the remaining party against the old party. On the one hand, this corresponds to the recognizable interest of the old party in being exempted from the exchange of services after the transfer of the contract and, on the other hand, that of the remaining party, who generally only has to deal with the new contractual partner and not partly with the old party, partly with the new party.

[31] In addition, should Marketer free for all

previous orders of Discount Vouchers, mVouchers or even Benefit Vouchers as well as mSPs for their Customer, Enterprise and Infinity Clouds. After the preparation phase, these mSPs were then also to be converted into my* company shares. The aforementioned cloud participations were designated as incentive programs that could be converted into mSP. The "conversion" of incentive programs into mSPs was to take place by accepting the Ly* Marketing Agreement as amended in 2021 and the GTC for my* members as amended in 2021.

[32] **4.3** The decisive factor for the members of the (future) my* Share Program was therefore the acquisition of mSPs, which were to be linked to future remuneration and a future shareholder position.

About the cloud investments:

[33] **5.1** It is established that the clouds acquired by the plaintiff, which were participation rights of the marketers from participation in the respective Incentive Program, were "converted" into mSP.

[34] "Conversion" of these rights can only be understood from a reasonable perspective according to the recipient's horizon as meaning that they should continue to have an effect in the exchanged MSP. This is also consistent with the structure of the Ly* model. While the cashbacks were paid as part of the respective benefit program following the ordering of goods or the redemption of vouchers, the marketers' cloud revenue shares were also dependent on future revenues of the project companies and thus on future orders placed by my* members with partner companies, and therefore forward-looking.

[35] Through the switch to the new
my* share

Program should thus the rights from the existing
Cloud investments on the new my* Share Program
transferred and converted into mSP. After the preparation
phase, a conversion into company shares (shareholder rights)
should finally take place.

[36] This process, in which a certain (permanent)
obligation (cloud participations) is initially transferred
unchanged to a new legal entity and subsequently a mutually
agreed restructuring of the reciprocal rights and obligations
takes place (mSP participations and shareholder
participations), is the transfer of an existing business
relationship to a new legal entity and does not preclude
qualification as a transfer of contract. Contrary to the view of
the defendant, the transfer of the obligation is not dependent
on whether the payments made by the plaintiff to L* AG were
transferred to the acquiring company or whether the financial
relationships between the companies concerned were
regulated in another way.

[37] **5.2** With regard to the cloud investments in
question (revenue shares) are
the prerequisites for the transfer of the
underlying obligations to the defendant or one of the
defendants - if the necessary agreements are in place - are
generally met.

To the discount vouchers (Discount Voucher) and
mVoucher:

[38] **6.1** For the acquisition of mSP by the plaintiff, a
distinction had to be made between the clouds (incentive
programs) it had previously acquired on the one hand and
vouchers on the other.

to distinguish.

[39] **6.2** Marketers who switch to the new "my* Share Program" should be credited a certain number of mSPs for vouchers "ordered" in the past. However, it is not sufficiently clear from the explanations of this new program how mSP should be acquired. While the vouchers are said to "converted" into mSP, marketers should "receive" mSP for vouchers ordered.

[40] Insofar as purchased vouchers have already been redeemed before the switch to the new model and no further claims are outstanding, these are purchase transactions that have already been finally settled. According to the findings made in this regard, the plaintiff's orders on which the action is based were processed by L* AG. In this respect, an assumption of contract is ruled out.

[41] Insofar as purchased vouchers not yet been fully processed, it remains questionable whether any resulting claims still outstanding at the time of the switch (e.g. credit balances or refunds) should be substituted by the receipt of mSP, or whether these earlier "orders" should only be taken into account as a kind of bonus and thus independently of outstanding claims from the vouchers in terms of value in the form of mSP. In this context, it is established that the plaintiff received the credit balance on her purchase account back from the second defendant in April 2023.

[42] **6.3** With regard to the vouchers acquired by the plaintiff, the question of the transfer of the resulting reciprocal rights and obligations from L* AG to the defendant or one of the defendants can therefore not yet be conclusively answered.

On the assumption of the contract by the first defendant:

[43] **7.1** In the event of a takeover of a contract, the decisive factor for the question of the legitimacy of the claimant is which company manages the mSP. It follows from the findings that the first defendant is the plaintiff's contractual partner in this respect, namely on the basis of the Ly* Marketing Agreement as amended in 2021.

[44] If the conditions were met, the first defendant therefore assumed the contract.

[45] **7.2** As already mentioned, a transfer of contract requires an agreement between the transferor and transferee on the transfer of the reciprocal rights and obligations arising from the contractual obligation from the old party to the new party as well as the - at least conclusive - consent of the remaining contracting party.

[46] **7.3** Such an agreement between L* AG and the first defendant as well as the plaintiff's consent to the transfer of its investments "converted into mSP" exists here.

[47] The new my* Share program was the redesign of the purchasing and investment model previously operated L* AG. H* F* was the inventor and mastermind of this model, who promoted it in the name of L* AG and on its behalf. The conversion of the previous L* model to the my* Share program was also communicated by H* F* to customers and marketers and advertised by him as an information carrier. Customers and marketers had to gain the impression that H* F* was redesigning and reorganizing the previous model with the new my* Share program and that the participating companies associated with L* were not involved.

companies, in Austria namely the , are intentionally involved in this. The validity of this assumption also results from the fact that the general terms and conditions of these two companies as amended in 2021 were precisely adapted to the new business model and the defendants also participated in the implementation of the new model. There can be no doubt that the companies involved acted in unison to transfer the investments converted into mSP from L* AG to the first defendant.

[48] Plaintiff willingly made the switch to the new my* Share program and expressly agreed during the new registration process that all

business data, including her member account data and the data on the purchased incentive programs and shopping points were transferred from the previous contractual partner (L* AG) to the first defendant and taken over by the latter. Thus, not only personal data as such, but the entire business relationship from the investments converted into mSP was transferred to the first defendant. In addition, in order to participate in the my* Share program, the previous L* membership had to be terminated as part of the registration process.

[49] **7.4** Contrary to the view of the defendant, there is no reason to doubt the transfer of the obligations arising from the plaintiff's investments converted into mSP to the first defendant.

The second defendant:

[50] **8.1** According to the findings, the contractual partner of Ly* Marketer in Austria (since 2021) is the first defendant. The second defendant is also not the operator

of the new my* Share program, but only processes it in Austria, which also pointed out in the GTC for my* members as amended in 2021.

[51] With regard to the second defendant, it is only established that the latter used the purchase credit balance in the plaintiff's purchase account in the amount [REDACTED] which is not (yet) available for the purchase of products was paid out to the plaintiff on April 21, 2023. Even - according to the defendant's submission this was due to a "separate contract" between the plaintiff and the second defendant and not to an internal cooperation and division of tasks between the two defendants, it does not follow that the second defendant was involved in the assumption of the contract in connection with the acquisition of mSP.

[52] **8.2** In the absence of a recognizable assumption of the contract by the second defendant, its passive legitimacy for the asserted claims must be denied.

Result:

[53] **9.1** Since there is no assumption of the contract by the second defendant, the claims asserted against it must be dismissed. Therefore, the judgment of the court of first instance was to be restored to this extent, in support of the second defendant's appeal.

[54] **9.2** In relation to the first defendant, the requirements for a transfer of contract are fulfilled with regard to the cloud holdings. However, a final decision on this is not yet possible.

[55] It was established that in the period from 29. 5. 2018 to 8. 3. 2022 the plaintiff received discount vouchers (discount vouchers) from L* AG and "Customer Clouds" or "Enterprise Clouds" at an amount from in total

[redacted] and - after switching to the my* Share program -
 received mSP for their previous investments, namely in each
 case on 16. 2. 2023 [redacted] mSP for Ly*
 registration EC1, 1,000 mSP for Ly* registration EC2 and mSP
 [redacted] for mVoucher. These findings can be
 0
 It is not clear which amounts paid by the plaintiff were
 attributable to the individual acquisition transactions. It also
 needs to be clarified whether the EC1 and EC2 investments are
 "enterprise clouds".

[56] **9.3** With regard to the vouchers purchased by the
 claimant (she received the mSP for mVouchers), it has not
 been clarified whether these mVouchers discount vouchers
 within the meaning of the Additional Terms and Conditions
 for Discount Vouchers as amended in 2017, and whether and to
 what extent there were still outstanding claims (e.g. credit
 balances or refunds) from the vouchers purchased by the
 claimant at the time of the switch to the my* Share program.
 In this case, it is questionable whether the open claims were
 substituted by the receipt of mSP, or whether the mSP
 credited to [redacted] by replaced the [redacted] previous claims.
 "orders" should be taken into account as a kind of bonus in
 terms of value. It will also have to be clarified whether the
 credit balance repaid to the plaintiff in April 2023 resulted
 from the mVouchers she purchased.

[57] **9.4** Finally, without specific findings on the form
 of participation and its structure, the invalidity of the
 underlying acquisition transactions or the investment model
 alleged by the plaintiff cannot be assessed. The statements of
 the Court of Appeal in 9 Ob 40/18z regarding the snowball
 system pursuant to no. 14 of the Annex to Section 2 UWG in
 conjunction with

§ Section 27 (2) UWG took place without any specific reference to
 facts

and without any certain connection to the acquisition transactions to be assessed here. Contrary to the assumption of the Court of Appeal, there are also no indications the conclusion of a framework agreement by the plaintiff.

[58] **9.5** As a result of the secondary deficiencies in the findings referred to above, the decisions of the lower courts in respect of the first defendant were to be set aside and the court of first instance was to be ordered to make a new decision after supplementing the proceedings and expanding the factual basis.

The decision on costs:

[59] **(10)** With regard to the proceedings against the first defendant, the reservation of costs is based on Section 52 ZPO.

[60] With regard to the second defendant, the decision on the costs of the appeal proceedings is based on §§ 41, 50 ZPO. With regard to the decision on the costs of the proceedings at first and second instance, reference is made to recent case law, according to which the decision on costs can be ordered by the first instance in complex proceedings (RS0124588 [T13]; 6 Ob 157/23s; 9 Ob 51/24a).

Supreme Court Vienna,
22 January 2025 Dr. H ö l
l w e r t h

The head of the business department
is responsible for the correctness of
the copy: