

European Commission

Directorate General for Health and Consumer Protection

Hearing Door To door selling – Pyramid selling – Multi Level Marketing

15/16, March 2000 Bruxelles

ANALYSIS OF THE WRITTEN SUBMISSIONS PRIOR TO THE HEARING AND STATEMENTS MADE AT
THE HEARING¹

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I. Amending the "Core" of Directive 85/577/EEC

1. General Comments

While industry as well as consumer representatives generally welcome a modification of Directive 85/577/EEC² on Doorstep-Selling, Member State submissions do not see a need for change. They prefer to leave it for the Member States to fill the gaps in the Directive and modernise national laws.

However, most submissions agree with the proposal to adapt the Doorstep Selling Directive 85/577/EEC to Directive 97/7/EC³ on the protection of consumers with respect to distance contracts. There is a certain preparedness to accept that the envisaged modification of Directive 85/577/EEC is necessary and adaptation to the standards provided by Directive 97/7/EC is the best solution.

The two Directives are based on a similar concept (protection of the consumer in the non-stationary commerce), and the interest of the consumer is comparable in both sales situations. Furthermore, in practice there is often a combination of direct and distance selling strategies.

The Bundesarbeitskammer Austria as well as the Nederlands Ministerie van Economische Zaken disagree with the proposed harmonisation. The situations in distant and direct selling are said to be completely different: In the Doorstep Selling Directive, the aspect of surprise plays an important role as it is usually the direct seller who initiates the business contact. However, in the Distance Selling Directive, the lack of information which is caused by the distance between customer and seller is addressed.

2. Modification /Adaptation / Abolition of certain Exemptions to Scope of Application

The submissions discuss the exceptions to the scope of applications. The submissions from the consumer point of view would prefer to remove all exceptions, while the submissions from industry especially criticise the study for proposing to include financial services in the scope of application.

a) Art. 3 (1): 60 ECU Exemption

There was not much discussion about the exemption for contracts with a value of less than 60 Euro.

However, the Bundeskanzleramt Austria as well as the Bundesarbeitskammer Austria consider the exemption unnecessary, as in practice most of the Member States do not exempt contracts under a certain minimum value per se, but only in combination with other requirements, such as contracts on charity occasions, contracts which are immediately performed or contracts normally not concluded on business premises. The Bundesarbeitskammer considers the limit too high if there are no additional requirements for the exemption. FEDSA underlines that the exception has been proven useful for charity direct

² OJ 1985 L 372/31.

³ OJ 1997 L 144/19.

selling activities. The Europäisches Verbraucherzentrum Kiel considers the exception as not really relevant and favours keeping it. Austria, however, which has no exemptions, considers the limit unnecessary and would like to remove it. The Arbeitskreis refers to the good experience in Germany with this exemption and states that a threshold is necessary below which there would be no withdrawal in order to avoid problems.

b) Art. 3 (2) c): Exemption for Rental Contracts

Two statements deal with the exemption for rental contracts. They refer to the problem of certain time sharing contracts which do not fall within the scope of application of the Time Sharing Directive.

The exemption for time sharing contracts has created problems in practice for the consumer organisations. They seek to have included at least those time sharing contracts which do not fall within the scope of application of the Time Sharing Directive 94/47/EC, e.g. contracts for less than 35 months or the sale of timeshare in canal barges. Only contracts for the purchase and lease of immovable goods should be excluded from the scope of application.

c) Exemption for Catalogues

There is only one comment related to the exemption for catalogue sales.

Due to the confusion as to whether the Doorstep Selling Directive or the Distance Selling Directive applies to catalogue sales, FEDSA recommends removing the exemption. The Doorstep Selling Directive should apply if the direct seller and the consumer are simultaneously physically present at the transaction.

d) Art. 3 (2) (d) + (e): Exemptions for Insurance Contracts and Contracts for Securities

The removal of the exemption for financial services has given rise to particularly strong reactions. The submissions of the financial sector disagree with the removal, while those of the consumer sector support the proposal.

The financial services sector underlines the necessity of the exemption. Life insurance contracts are already regulated at European level in Directive 90/619/EEC, Art. 15 which grants the policy holder a right of withdrawal within the first 15 to 30 days. The submissions especially remark that for certain financial services (short time insurance contracts or special funds) a withdrawal period would be unfair (because the policy holder would be insured on a special occasion and could afterwards withdraw from the contract without having to pay the insurance premium) and not practicable (because of the changes in the investment markets and different prices). FEDMA and the Comité Européen Des Assurances propose to wait for a new Directive for financial services. The Nederlands Ministerie van Economische Zaken as well as the UK-Department of Trade and Industry (DTI) recognise no need to remove the exemption.

On the other hand, the more consumer-orientated submissions favour the removal of the exemption for financial services and regard this as a necessary step towards more effective and more consistent consumer protection. The Centro Europeo Dei Consumatori (CEDC) remarks that insurance policies are mainly sold door-to-door and most consumers are ignorant about what they have been sold. The Centro Europeo Dei Consumatori (CEDC) would prefer a single piece of legislation covering all types of financial products. The Finnish

representative refers to the Finnish law under which the policy holder has the right to terminate the insurance at any time without penalty merely by paying the premium for the period which has been covered by the insurance. This rule applies to all selling methods without any distinction. The Verbraucherzentrum Kiel also favours including financial services in the Doorstep Selling Directive in order to reach a higher level of consumer protection. There is no difference between buying a bar of soap or an insurance contract in their view.

e) Art. 3 (3): Contracts concluded upon special request of the Consumer

The possible removal of this exemption has led to criticism from the Gesamtverband der Deutschen Versicherungswirtschaft. It regards the exemption as necessary and argues that there is no difference between a customer who concludes a contract in a business premises or requests a visit of the supplier at home. The consumer is even more free of bias if he has the opportunity to conclude a contract in his own home. FEDSA recommends limiting the exemption to those situations where a consumer made an express invitation with the intention of negotiating the purchase of specified goods or services. The UK-Department of Trade and Industry (DTI) underlines that "unsolicited visits" are now defined under the UK law as "visits which may be made on behalf of the trader i.e. by his sales staff, and also subsequent visits following a first unsolicited visit and a visit following an unsolicited telephone call".

3. Adapting Information Requirements to the Level of Directive 97/7/EC

The study proposes to modify the information practice towards consumers in doorstep sales transactions in two ways: first it adapts the idea of Directive 97/7/EC to provide the information twice to the consumer: once prior to the contract, and once after the conclusion of the contract; second it completes the content of the information by reference to Directive 97/7/EC.

a) Need for a "Double Layer" of Prior Information in Door to Door Business

While industry seems to agree with the proposal, statements of Member State representatives reject the adaptation to Directive 97/7/EC as regards prior information.

FEDSA welcomes the proposal to give the information prior to the conclusion of the contract and refers to its Codes of Conduct. Also Psix, a UK Consultancy, regards it as a matter of good practice and considers it not onerous for companies.

The Nederlands Ministerie van Economische Zaken, however, disagrees with the obligation to furnish the information prior to the conclusion of the contract. It points out that the information prior to the conclusion of the doorstep sales contract would overload the consumer and confuse him. The two layer approach is said to be adequate for the situation of distance selling, but unnecessary in a doorstep sales situation. Moreover, it constitutes an additional burden for the companies. The UK-Department of Trade and Industry (DTI) would prefer to see these requirements as part of a self-regulatory regime.

The Centro Europeo Dei Consumatori proposes to give all the information included in Art. 4 and 5 of the Distance Selling Directive. The supplier should have to prove that he has given all this information to the consumer, otherwise the contract would be void. In addition, the

Centro would prefer to have information about equivalent quality and price of the product if the product is not available and a ban on pre-payment within the first ten days.

b) Incorporation of the Information List in Directive 97/7/EC

The necessity to provide the consumer with more information similar to the Distance Selling Directive has been accepted by almost all submissions.

Only the UK-Department of Trade and Industry (DTI) would prefer a self-regulatory approach. The submissions of the Bundeskanzleramt Austria as well as the Bundeskammer für Arbeiter und Angestellte suggest giving all types of information in writing, instead of distinguishing between information which must be given in a form corresponding to the means of contact, and between information which must be provided in a written form.

c) Provision on Protection of Consumers Privacy in Accordance with Data Protection Directive 95/46/EC

A representative from DG Internal Market pointed out that commercial activities necessarily involve the processing of personal data of consumers. The protection of individuals is included in Directive 95/46/EEC which constitutes an obligation to inform the consumer. The new Directive 85/577/EEC could either make a generic reference to the obligations and rights provided for in Directive 95/46/EEC, or go into more detail. The supplier must declare whether the data collected will be processed and for what purposes; if these personal data are to be disclosed to third parties; and if the data collected in context of the contract will be deleted in case of withdrawal from the contract.

4. Art. 5: Right to Withdrawal

a) Right to commence with the "Conclusion of the Contract" or "Delivery of Goods and Services"

In particular, industry criticises the study's proposal to change the beginning of the period of time from the conclusion of the contract to the receipt of the goods or the performance of the services.

They argue that distance and direct selling differ from each other and that the period for distance selling cannot be transferred to direct selling. In the direct selling field, the products are presented at home for the consumer. There is no necessity to postpone the right of withdrawal until the consumer receives the product because - unlike in a distance sale - he has already been shown the products and knows what he will receive.

However, the Centro Europeo Dei Consumatori underlines the problems which occur in practice and which result from the fact that the consumer often is misled by the sales person and has no chance to make up his own mind. If the right of withdrawal expires seven days after the conclusion of the contract and the company does not deliver the product during this time (the cooling-off period), the consumer has no chance to check and verify both the product and the statements of the salesperson. Problems arise especially with medical products, as it is difficult for the consumer to find out whether the product really has the qualities confirmed by the salesperson. Therefore, it is necessary to ensure that this time

period starts only when the consumers actually have the products in their hands, so to speak, and can form a view.

The Bundesarbeitskammer Austria criticises the different starting points for the period which depend on whether goods are delivered or services are performed. It proposes to let the period begin for all kinds of contracts with the receipt of written notification of the information and the written information about the right of withdrawal.

b) Time Limit of 10 Days

The proposed duration of the period of time (ten days) has been criticised by industry as too long and by the consumer organisations as being too short. Only the Bundesarbeitskammer, Pxis and Eurofinas approve the period of ten days. Eurofinas refers to the different periods in direct and distance selling and the problems which result from these differences for companies who offer both direct and distance selling.

Some submissions reject the proposal and propose instead a period of seven calendar days. They prefer a cooling-off period during which it should be possible for the consumer to receive the products (unlike the French law where the suppliers are not allowed to deliver products before the cooling-off period has expired). In practice, the products are often sent out only after the expiry of the time limit. A longer period is not necessary as the products are demonstrated by representatives at home, and the main aspect is not a product guarantee but a reflection period for the consumer. Industry underlines that for many years, the seven day period has been proven to be successful and has not caused any problems. WFDSA refers to the US laws which provide a three-business-day period. This has become law as a reaction to high pressure sales practices. It works very well in the USA because the reason for withdrawal is mainly high pressure. If the customers are pressured to buy, they cancel the contract very quickly. The ICC also advocates leaving the period as 7 days, be it calendar or working days. The companies have got used to this period. They mainly wait for seven days before delivering the products to the consumer to avoid products being sent back once money has been transferred. If the period were longer, the direct selling companies would have a competitive disadvantage vis-à-vis retail outlets where there is no withdrawal or cooling-off period. The reason for the withdrawal is high pressure sales techniques, on the one side, and the possibility to compare goods and prices, on the other side. A seven day period takes both aspects into account. DSA France argues that the seven day cooling-off period is necessary to respond to consumer protection requirements. However, a longer period would often not be in the consumers' interest, because otherwise they would have to wait for the products ordered in direct selling for ten days.

The consumer organisations favour the option of 14 calendar days. This would meet the standards of some Member States in their implementation of the Distance Selling Directive.

The Netherlands Ministerie van Economische Zaken sees no need to adapt the different cancellation periods.

5. Rules on proper Performance and Advance Payments

This proposal has not lead to any discussion. It already seems to be a common standard of business practice.

6. Minimum or Maximum Harmonisation?

The question of minimum or maximum harmonisation for the "traditional aspects" of Directive 85/577/EEC has been answered by the industry almost unanimously in favour of maximum harmonisation. Only the United Kingdom and the Netherlands opt for no further regulation at all.

The industry prefers maximum harmonisation because consumers are protected more effectively by maximum harmonisation. The Internal Market requires unified rules. Minimum harmonisation leaves the Member States the possibility for different regulations and prohibitions. This leads to legal uncertainties. In particular, cross-border activities are adversely affected by different laws. Partial or total bans on direct selling, as in Denmark and Luxembourg, or other difficulties, such as product-related obstacles and restrictive rules (e.g. the strict cooling-off period in France), would be avoided.

France, however, underlines the importance of keeping the minimum harmonisation due to the different levels of consumer protection and divergent national traditions. The cooling-off period in France is considered a very important element of consumer protection, and the French state does not want to change that.

II. Pyramid Selling and Multi Level Marketing

1. Definition of Illegal Pyramid Systems

All submissions agree that a prohibition on pyramid systems is necessary. Problems arise with the proposed definition of pyramid systems put forward by VIEW. This has been opposed as too wide both by the FEDSA and WFEDSA. The "remuneration related to the sales to final consumers" under which any kind of remuneration shall be related exclusively to the sales of products to final consumers seems to present particular difficulties. The consumer organisations mainly agree with the definition.

There also seems to be an understanding that vertical payments (participant and company) for recruitment as well as payments for the initial investment can be considered as illegal.

- One major problem is whether payments related to the purchase volume of a direct seller (*purchase for own consumption or resale*) should be included. Some maintain that the definition could include within its ambit lawful remuneration systems for direct sellers. Many companies, (especially in the insurance or real-estate sectors) pay a commission for purchases of direct sellers (for their own consumption). There seems to be a need for an additional attraction for the newcomers to make the system work. During the Hearing, FEDSA made clear that the essence of a direct selling business is that the business is developing a network for products for which one feels a personal commitment. The persons who join these systems are likely to be, first of all, consumers. Therefore, the FEDSA Codes of Conduct allow remuneration systems where the remuneration is based on the sales of goods and services to consumers (including the purchases made by other direct sellers for their personal consumption or use) and not primarily on inducing other persons to become direct sellers. This is also the position of WFEDSA which states that if

eighty or more per cent of compensation is based on sales, one cannot have a pyramid scheme. Pyramid schemes are frauds where ninety nine per cent of the revenue generated is not on sales (but e.g. on inventory loading, training fees, headhunting fees). Pyramid schemes do not even reach five per cent in terms of sales to the ultimate consumer. Pyramid schemes are characterised by the financial risk of loss for those involved in the company and by the fact that money earned by the sales people is not based primarily on the sale of the product to the ultimate consumer. The term "primarily" is used to allow low commissions or incentives as a reward for a successful recruitment from time to time. FEDSA only prohibits systems which require the purchase of a minimum number of goods or inventory loading which is inappropriate (unrealistic sales possibilities, market environment, company's product return and refund policy). Dr. Brammsen and Dr. Leible from the University of Bayreuth, Germany suggest allowing a commission for products purchased for the direct sellers' own consumption if the number of the products is restricted to a "consumable" quantity. DSA UK underlines that pyramid systems demand a clear definition which is based on unlawful recruitment. Such a recruitment offence is a system where somebody is rewarded for getting somebody else to make a payment (in cash or for a considerable amount of stock). If a participant has a contract, a right of cancellation and a buy-back guarantee, and the consumers have a right to return the stocks in a reasonable period of time, and the system has no recruitment offence, then there is no necessity for further legislation.

- Several submissions refer to the *particularities of financial services*. One aspect of the definition is to protect direct sellers from inventory loading or stock-taking. Therefore, the combination between a remuneration (commission) and purchases of a recruited direct seller is included. No direct seller shall be subjected to (not even moral) pressure to buy products and invest in the system. Such a pressure may exist if the upline benefits from the purchase volume of the downline. Direct sellers at lower levels are supposed to be prevented from purchasing products, which they actually do not need or at least do not resell immediately. However, in the financial services sector the direct sellers do not buy "products", and there can never be "stocks".
- BEUC adds several negative aspects of pyramid schemes which the definition should address: investment without buy-back guarantee, risk of market saturation, misleading and deceptive marketing practices, misuse of personal relations, more emphasis on expansion of the system than on sales, remuneration not conditional on sales, focus on profit from recruitment.

2. Criteria for Legally Acceptable MLM Systems

a) Consumer/Direct Seller

The introduction of the term "consumer/direct seller" has caused strong reactions. Generally speaking, submissions from consumer interest groups welcome the definition, while the industry disapproves the introduction of such a new category.

Consumer organisations made the following remarks: The Europäisches Verbraucherzentrum Germany proposes a general protection of small traders. A new definition would then no longer be necessary. Consumer/direct seller and the small trader both need protection. The Austrian submissions favour the integration of persons working full time. Both underline the necessity of such a definition, but criticise it as being too narrow. The Centro Europeo Dei

Consumatori, Italy, generally welcomes special protection for direct sellers. Instead of creating a new status which may lead to confusion, it proposes to introduce a kind of "working contract" concluded between the direct seller and the company. This "working contract" shall underline the importance of the decision to become a direct seller and the change of status from a consumer to a direct seller. BEUC requires the position of the new direct seller to be improved and clarified. The distributor, which is considered as a consumer, should benefit from consumer protection legislation. However, instead of "non-commercial level" the notion of "non-professional level" should be referred to.

Opposing submissions argue that giving a special definition of consumers/direct sellers would be unfair towards other branches, as it applies only to a single sector. Furthermore, the term "consumer" has nothing to do with the status itself but with the contract in question (goods or services for personal consumption). The criterion "working hours" for the consumer/direct seller is rejected because it depends on how much the direct sellers work. Especially in the financial services area, direct sellers are trained and instructed; the consequence is that a clear distinction between the consumer and the direct seller is said to exist.

The French DSA rejects the notion of a consumer/direct seller. Instead of diluting the distinction between direct sellers and consumers, there must be a clear threshold for the consumer to become a direct seller. He must sign a formal contract and receive an adequate training offered by the companies. He must be granted a fourteen day cancellation period.

The DSA UK underlines that the protective measures have to be fit for purpose. The direct sellers must be protected from making an imprudent investment in a fraudulent scheme, but they need not to be protected from a business opportunity. Their investment is modest; they have a contract; the earning proposition is not misleading; it is fair, honest and legal; they have a right to withdrawal for a certain period of time to cancel the contract; and any time thereafter, they can send back any unsold goods and be refunded here.

Even opposing submissions accept the need to protect new direct sellers at an early stage and put some on a comparable footing with consumers. The UK-Department of Trade and Industry (DTI) suggests solving the problem by balancing out regulation and education. There will remain a certain business risk with every new business start. Psix favours the Scandinavian and German approach which protects the prospective participant up to the point that he signs the form to join a sales scheme. After that, it is difficult to treat the participants all in the same way, as there are housewives with few business contacts as well as full time participants who may earn a lot of money. These different types demand different sorts of protection. One helpful model could be the German one which distinguishes between professional agents exercising their main profession and persons operating as a side line. The problem which arises here is that there may be persons working part-time in several different schemes. The ICC proposes to differentiate between the purposes of sales. If a direct seller buys a product for his own personal use, he should enjoy all the protection any other consumer enjoys. If, however, he acts professionally indicating that he is in an existing or future commercial activity, he is not a consumer and should not be treated as such.

b) Information and Transparency

The duty to inform direct sellers in a proper way has not led to discussion in the submissions. It is mainly accepted that transparency is necessary due to the complex structure of the business and the inexperience of direct sellers. Only the United Kingdom does not consider a regulatory intervention necessary.

Transparency is regarded as a very important element. In particular, the commission structure and the marketing plan must be clear and comprehensible. This is accepted and strongly supported by the industry which refers to Codes of Practice. The layman must be informed about the extent of the business and the consequences. However, the DSA UK wants to restrict the right of information to the degree that is fit for purpose. As there is only a very modest investment risk, the degree of information on earning expectations and other details does not need to be very high. The Centro Europeo Dei Consumatori proposes correct information is provided not only about the possible earning, but also about the extent of work, that means how many hours a person has to work in order to earn that sum of money. It is suggested to introduce particular information channels at European level to stop pyramids, to provide information about the average income and the rights and duties of the self-employed.

WFDSA refers to the difficulties of average figures and numbers in MLM because of the different types of sales persons. Some sales persons join the system just because they like the product and want to buy it at wholesaler discount; others join the company shortly before Christmas to earn some extra Christmas presents money; others work because they want to buy some expensive goods, or they only join the company for social reasons and recognition.

Psix remarks that the obligation to inform the direct sellers about their right in connection with the bankruptcy of the company leads to the difficulty that the bankruptcy laws are not harmonised. As the law of the country of incorporation applies, the rights can vary from country to country.

Only the time of providing the information has been subject of controversy. BEUC underlines the necessity to give the information before the conclusion of the contract, while Psix argues that providing the information prior to the contractual agreement leads to costs for the companies, because they have to develop information sheets which will be given to potential sponsors.

c) Right to Withdrawal

The right to withdrawal has been accepted in all submissions. Several submissions propose, as a common basis for calculation, calendar days instead of working days.

The Centro Europeo Dei Consumatori proposes to grant an unlimited right to withdrawal if the company violates its other duties (prohibition of entry fee, guidelines and controlling of recruiting). The right to withdrawal for the first 14 days is regarded as too short, in particular in view of tax difficulties and the law. The direct sellers should have the opportunity to discuss the matter with a tax advisor. Brammsen/Leible, however, disapprove of the right to withdrawal without any temporary limit in the event that the information is not given to the direct seller. They argue that problems could arise due to the large number of business transactions. Vorwerk underlines that there exist differences in Multi Level Marketing and other direct selling businesses. In classical direct sales, the new representatives do not have to buy anything, not even their demonstration goods. It would be unnecessary to grant them a right to withdrawal.

d) Number of Levels

The limitation of the number of levels is subject to controversy. While consumer organisations favour the proposal, the industry does not perceive a need for limitation.

Consumer organisations consider the, theoretically, unlimited number of levels a danger for the transparency of the system. They regard a limitation as an important mechanism to make the system transparent.

Industry, however, refers to the practical consequences of the proposal. A limitation would prevent direct sellers at lower levels from building their own downlines and becoming sponsors. Their business activities would only consist of making sales without having the opportunity to recruit others. Therefore, it would not be possible for them to leave their own downline and build a new one at a higher level, because the remuneration of the higher levels depends on the sales of the lower levels. They would not agree to lose a level in the upline because that means that they would have to start from the beginning by recruiting and making sales. In highly regulated structures where the task of the upline is clearly defined as training, sponsoring, supervising and instructing the downlines, a limitation could not work. Additionally, it is doubtful whether a limitation of levels guarantees transparency. Transparency is said to be reached by visual or descriptive presentation of the system.

e) Remuneration related to the Sales to Final Consumers

The arguments against this proposal are more or less the same as those against the definition of Pyramid Systems. The remuneration here is exclusively related to sales to final consumers. The AgV, Germany considers this element necessary to distinguish between legal sales network systems and illegal pyramid systems. The direct sellers would not be attracted any longer to make a profit by sales within the systems, thus using their influence to make others purchase goods without any chance to resell them. However, as stated above, the proposal might be changed towards a more liberal approach, which accepts the practice of the remuneration systems to pay commissions for purchases inside the system, allowing for the consumption of the direct sellers up to a certain amount.

Another problem which arises has been mentioned by Psix: The term "remuneration" could also include trade margins. The proposal must therefore be clarified in so far as trade margins are not covered.

f) Buy-Back Guarantee

The buy-back guarantee is generally accepted by all submissions. However, the buy-back guarantee is not said to be relevant for financial services. As there is no sale and resale, a direct seller cannot keep the products which he returns to the company upon leaving the system.

FEDSA proposes to restrict the buy-back guarantee temporarily to products (including promotional material) bought during the preceding twelve months. Industry wants to limit the reimbursement to 90 % of the original price (less remuneration that the seller has already received). They argue that it is difficult to prove whether the value of the products has actually decreased. The proposal could cause misunderstandings as to whether the company has to take back damaged or expired products.

g) Entry Fees / Initial Investment

The consumer-related submissions partly consider this proposal to be not broad enough. Due to their practical experience, problems often arise with useless material and training courses.

They would prefer a general prohibition of entry fees, which includes fees for information material and other equipment. An annual administrative fee would be allowed, however, the Centro Europeo Dei Consumatori Italy wants to limit the fee to 25 Euro. The Bundeskanzleramt while agreeing with the proposal, is, nonetheless, quite sceptical about whether such a rule could prove to be successful in practice.

Industry underlines the importance of training seminars and information material for the newcomer. As the recruits are mainly laymen without any professional experience, it is necessary to instruct them and provide them with the material they need to start their business. The value received by the participant, instead of an arbitrary amount, should serve as a criterion for the propriety of investment in training. FEDSA proposes to supply the information material and offer training seminars either free of charge or at a reasonable price. Discretion in setting administrative fees would be acceptable.

h) Obligation to Make Own Sales

The proposal is rejected by industry, whereas it has not provoked much reaction from consumers. The Bundeskanzleramt Austria regards the obligation as a necessary tool to prevent the development of structures in which some participants (at the higher levels) make a profit exclusively through the sales of other participants (at the lower levels). The AgV, Germany also welcomes the proposal and suggests developing fix limits as in the United Kingdom (50 %).

Citigroup considers this proposal from the aspect of inventory loading. The concern is that one direct seller is being promoted by selling products to a lower level seller and not to a final consumer. As there is no inventory loading in the financial services area, there is no necessity to make "outside" sales. Another argument is that the higher levels have other tasks than sales' activities. It is their task to train, motivate and supervise the system. Psix notes that the proposal would make buying clubs illegal as there are no sales to final consumers. Brammsen/Leible do not consider the proposal useful in order for protecting direct sellers.

i) Recruiting

The way that customers and potential new direct sellers are contacted and recruited is mentioned as a point of concern in several consumer-related submissions. The industry also seems to be prepared to comply with the proposal, at least in principle.

In practice, consumers might feel lured by misleading advertising. Sometimes, the sales methods are aggressive, and there is a severe moral pressure to buy because of the personal relationship between the customer and the direct seller. For these reasons, the protection of the consumer's private sphere is an important issue for consumer organisations. Several submissions demand that the term "privacy" be specified. The International Chamber of Commerce offers a possible solution in its Codes which state: "Any contact should be made in a reasonable manner and during reasonable hours to avoid intrusiveness. A direct seller should discontinue a demonstration or sales presentation upon the consumer's request."

Psix mentions the problem of independence of direct sellers. More control by the company of the direct sellers makes them more dependent and brings into question their self-employed status. However, it is agreed that guidelines with respect to the obligations should be developed by the companies. Brammsen/Leible criticise the proposal as too broad. They also

propose to develop guidelines for companies and controlling measures in order to prevent unfair recruiting practices.

j) Internal Control of the System

There is a general agreement that inventory loading and controlling measures are necessary.

AgV, Germany expressly welcomes the proposal for controlling measures vis-a-vis companies, and to make the delivery of goods dependent on the demonstration of an order form signed by a customer to help restrict inventory loading. Furthermore, the ten consumer rule (The participants have to prove that they have sold the products to at least 10 different final consumers in the previous period of business in order to receive a commission related to their sales) is considered an adequate and effective means to restrict sales within the system.

Psix proposes the 70 % rule established by Amway as an adequate means to prevent inventory loading, but disagrees with the ten consumer rule because it is said to encourage the falsification of retail sales receipts. Psix makes clear that it would cost the companies much time and resources to contact retail consumers and verify that the orders really have been made.

III. Standardisation as a Means of Regulating MLM

1. Preface

The submissions, even if they address standardisation as a means of regulating MLM, appear to suffer from a certain lack of understanding of the New Approach type of regulation and its application to marketing practices. The New Approach has been developed in the field of technical standards and regulations, where the Community has adopted a whole set of directives which all follow the same pattern. Mandatory basic requirements, laid down in directives, provide a framework for the elaboration of non-binding technical standards elaborated by the European standardisation organisations. Those companies who comply with the standards have free access to the European market. A certificate of conformity serves as an entry card. Consumer organisations are represented in the elaboration of technical standards through their experts. Most of the submissions do not seem to fully understand what the New Approach really means and what its adaptation to marketing practices would require.

The obvious need to explain the inner structure of the New Approach and how it could be applied to marketing practices has been, at least, partially met at the Hearing. The whole morning session of the second day was devoted to the question 'Can standardisation provide a means of regulating MLM? It seems fair to conclude that all participants of the meeting agreed that the Hearing was a useful opportunity to improve the level of information and the understanding of what is behind the idea to transfer New Approach type regulation from the field of technical standards to marketing practices. Such a consensus could not overlook the still existing disagreement on the feasibility of such a regulatory method in the field of marketing practices. However, the Hearing has considerably improved the intellectual environment between all parties concerned, including the Member States. The Commission received cautious backing in its policy to initiate pilot projects on standardising marketing practices. Whether or not standardisation becomes a successful way of regulating marketing practices will largely depend on the outcome of the pilot projects; more specifically on

whether and to what extent counter-arguments and reservations voiced during the Hearing may be overcome.

2. The search for the appropriate regulatory technique: voluntary codes of conduct/binding legislation and New Approach

The major issue of the written submissions as well as the statements during the Hearing was the choice of the appropriate regulatory tools. The appropriateness of New Approach type regulation in the field of marketing practices was voiced by all Member States during the Hearing. Most of them had not provided written submissions prior to the Hearing. Consequently, for them the Hearing was the first opportunity to give an initial reaction, sometimes of a personal nature, sometimes semi-official and sometimes merely covering certain aspects. It has to be recalled, however, that the Member States differ considerably in the degree to which they favour a specific regulatory approach. Here the submissions and statements demonstrate a quite heterogeneous picture which becomes even more disjointed when taken with the positions of industry and consumers.

Several submissions prefer Codes of Conduct to regulation at European level, such as those of the EU Committee of the American Chamber of Commerce in Belgium and the Nederlands Ministerie van Economische Zaken. Industry involved does not regard voluntary codes of conduct as the only means of coming to grips with multi-level marketing. Sometimes there is even a certain willingness to have a closer look at the deficiencies of codes of conduct. Psix criticises the codes of conduct for not being concrete enough in their terminology. A similar argument has been put forward by FEDMA, though rejected by the EU Committee of the American Chamber of Commerce in Belgium. This issue came up again in the Hearing when the UK representative made a strong intervention in favour of codes of conducts, although the UK Office of Fair Trading published a quite critical review of compliance with UK codes of conducts in 1998. However, at present, the UK system is under review to improve the application of codes of conduct. The key issue here will be the elaboration of the so-called core principles as Mr. Berry, UK DSA underlined. If a code meets the core principles, it will gain the support of the UK government and the Office of Fair Trading and be able to carry a sign of approval. This sign of approval will attach to material produced by companies. That is the way it should be at the European level. The Spanish representative pointed to Spain's strategy plan which boosts self-regulation and participatory self-regulation. The pros and cons of codes of conducts are subject to a study commissioned by DG Health and Consumer Protection which will be ready by June 2000. The EU Committee of the American Chamber of Commerce in Belgium asked whether the study intends to distinguish between self-regulation and voluntary regulation and whether new regulatory options may emerge.

The written submissions have shown a certain preference for binding regulation rather than for the so-called "New Approach", the argument being that binding provisions are more effective than non-binding marketing standards. This is true for the Bundesarbeitskammer, Austria; Bundeskanzleramt, Austria; Centro Europeo Dei Consumatori; Europäisches Verbraucherzentrum, Germany and also FEDSA in its second statement. During the Hearing the vast majority of the Member States expressed their willingness to have at least a closer look at new forms of combined binding and non-binding regulation as did industry speakers. The most outspoken intervention from here came from WFDSA, which favours combining a prohibition of pyramid selling and industry codes of conducts for MLM. However, WFDSA pointed to new regulatory initiatives in New South Wales granting the Australian DSA quasi judicial power to sue on behalf of the government for violations of the code, even against non-

members. The intervention of Mr. Dailley, from the French DSA, was very much in line with such reasoning. In France an approved contract has been drawn up under the auspices of the French Anti Fraud Ministry (Ministère pour la Répression des Fraudes) and a bipartisan commission monitors the proper application of the rules. Here again the search for new solutions becomes clear, somewhere in between binding and non-binding regulation.

The most important point, however, concerned the feasibility of the “New-Approach” type regulation in the field of marketing practices. Only two of the written submissions had an intensive and more detailed look at a ‘New Approach’ in marketing practices. BEUC supported the idea of testing New Approach regulation in the field of marketing practices. However, it disagreed that standardisation and the European standardisation institutions were the appropriate bodies to develop marketing practices and standard contracts. PSIX Consulting discussed the possible impact of the New Approach on marketing practices in some detail. Thus, there was clearly occasion in the Hearing to get a fuller view on how the participants see the New Approach type of regulation fit for marketing practices. It has to be emphasised that all participants joined the meeting in order to get a fuller picture of what standardisation could mean and whether or not it could be used to regulate marketing practices. They came relatively open-minded. Member States showed nevertheless a certain reticence regarding a new type of regulation at a level below binding legislation. This attitude is mainly of the Scandinavian countries as well as for the United Kingdom. These are all countries which have a certain tradition in dealing with codes of conducts (in case of the UK) or guidelines developed by the Ombudsmen in the Scandinavian countries, as a means to implement binding legislation.

However, two questions remained pending. The first has already been raised in the written submission of the PSIX Consulting and can be summed up as follows: Although participants consider the option to be sound in theory (except Greece, which explicitly supports the new initiatives), all other Member States, as well as representatives from the direct marketing business, expressed concern that standardisation might be slow in practice, as slow and onerous as law-making, and might therefore end in results which do not extend beyond codes of conducts. The same is true for the amendment of existing legislation and/or standards. At the very least, there was agreement that developing codes of conduct can be as cumbersome and time-consuming as law-making or standards making. However, the representatives from CEN underlined the consensus driven nature of the standardisation process. Where there is consensus on the need to standardise, an agreement could be found within 10 to 12 months. On the other hand, Eurocommerce feared that standardisation might inherit the weakness of the two systems (the threat of a detailed regulation and the weaknesses of soft law). The second question relates to the horizontal nature of the New Approach in regulating marketing practices. In particular, representatives from the direct selling business have raised concern that the New Approach type of regulation in the area of marketing standards is not a sectoral issue. Therefore, they urged the Commission to consider much broader consultation with cross-sectoral bodies and bodies which represent other sectors: EU Committee of the American Chamber of Commerce in Belgium and WFDSA, respectively.

These questions revolve around the ‘why’ or ‘why not’ of a New Approach type of regulation in the field of marketing practices. Once this threshold is passed, the following factors should be monitored: who might be in charge of the standardisation; whether it should be the standardisation bodies or similar but competent national bodies, such as the Consumer Ombudsmen or the Office of Fair Trading; and once the main responsibilities have been clarified, who else should participate in standardisation ? There were no statements in the written submissions on the appropriate body for standardisation. In view of the reluctance of

the Scandinavian countries which trust in their Ombudsman system, Dr. Hoffmann, DG SANCO, raised the question whether the Ombudsman could be the national representative for standardisation within CEN. CEN confirmed that this was indeed possible.

Standardisation integrates all parties concerned, including consumers. The role of consumer organisations had not really been considered in any of the submissions. Only Psix consulting and FEDSA in its second statements mentioned the role of consumer organisations; however, they opposed any extended participation. Again, there was an urgent need to consider more closely the role of consumers in standardisation. Dr. Hoffmann, DG SANCO made clear that from an organisational point of view it is not a democratic process by which codes of conduct are established, thereby drawing a direct line to consumer participation in standards making. Mr. Dailley, DSA France, however, reported from the French process of code making where consumers are directly involved, at least in the field of direct selling and a similar situation seems to exist in Spain, as FEDMA underlined. Outside these two interventions, quite a number of representatives of the direct selling business expressed concern about an extension of the consumers' participation as requested by Prof. Micklitz. Mr. De Jongh, CEN, referred to ANEC, the consumer representative organisation which participates on a daily basis in all CEN structures. There was a certain reluctance as to whether and to what extent consumer organisations may endanger the consensus driven process and slow down standardisation or similar forms of private rule making.

Two further issues on the transferability of New Approach type regulation came up in the course of the Hearing: the presumption of conformity and judicial review. FEDSA had already underlined the need to specify the presumption of conformity in its written submission. For EU Committee of the American Chamber of Commerce in Belgium, standardisation is only one means to demonstrate compliance and that there are other means to demonstrate legality. Standardisation may achieve harmonisation only in respect to the scope of the marketing standards themselves. It will not achieve a presumption of legality for a company doing business or a marketing practice, in and of itself. It is entirely conceivable that an illegitimate scheme seeks to comply with marketing standards. Dr. Rosso, Centro Europeo Dei Consumatori, made the same point though from a different angle. Her point was cross-border enforcement, in the event the supplier does not comply with the marketing standards. Dr. Hoffmann, DG SANCO and Prof. Micklitz referred to Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests as a means to improve cross-border enforcement. However, there were quite a number of statements referring to the need for guaranteeing effective judicial review. There existed some uncertainty of how such a system of judicial control would look like.

3. Minimum binding legislation and maximum New Approach type regulation combined

There is only one submission which deals expressly with the harmonisation of Multi Level Marketing by way of combining traditional and new legislative approaches. Brammsen/Leible opt for a maximum harmonisation like Directive 86/653/EEC on Self Employed Commercial Agents due to the uniformity of the market conditions and the equal chances for competition in the EC. However, they suggest combining self-regulation with binding minimum harmonisation rules. The Community rules would be the minimum regulation; an expert commission from representatives of all branches concerned would develop further rules which would be binding for the companies. National regulations going beyond these standards would not be applicable if a company observes the standards developed by the expert commission.

Again the question of whether there should be minimum or maximum harmonisation was more fully discussed during the Hearing. The direct selling business argued strongly in favour of maximum harmonisation. The issue arose, once Ms. Lattelma from the Ministry of Justice in Finland expressed her concern about whether marketing is the kind of phenomenon which is truly international or whether marketing has to take into account some national features which are based on national traditions and cultural heritage. Dr. Hoffmann, DG SANCO, referred instead to the growing international character of marketing, however, admitted that national particularities might call for a waiver, a well-known means of standardisation, as Mr. Schultz from CEN explained. Mr. K. Bressler, International Chamber of Commerce found it horrific to imagine the existence of 15 or - at a later stage after the EC enlargement - 25 national codes all developed on the basis of mandatory requirements and all providing for a different set of rules. Dr. Hoffmann, DG SANCO explained that national marketing standards shall not become the rule. The pilot projects which should be initiated by DG SANCO and put into the hands of AFNOR, BSI and DIN should be seen as an exploratory exercise. For further standardisation, CEN should be given a mandate to elaborate a European standard on marketing.

Annex I – Agenda of the Hearing

Annex II – List of organisations participating at the Hearing

ANNEX I

HEARING
DOOR TO DOOR SELLING - PYRAMID SELLING -
MULTI LEVEL MARKETING

Centre de Conférences A. Borschette

36, rue Froissart - Brussels

15 + 16 March 2000

A G E N D A

AGENDA

15 MARCH - WEDNESDAY Morning Session

Chairman : Dr Dieter Hoffmann - Head of Unit - DG Health and Consumer Protection

- 9.30 (1) **Welcome + Introduction**
- 9.45 - 10.10 (2) **Presentations by Industries concerned**
- 10.10 - 10.50 (3) **Amending the "core" of Directive 85/577/EEC**
- Modification /Adaptation/ Abolition of certain exemptions to scope of application
- Article 3(1) - Lift 60 ECU Exemption ?
 - Article 3(2)(a) - Lift exemption for rental contracts ?
 - Article 3(2)(c) - Lift exemption for catalogues ?
 - Article 3(2) d + (e) - Lift exemption for insurance contracts and contracts for securities ?
- 10.50 - 12.00 Adapting information requirements to the level of Directive 97/7/EC
- Is there a need for a "double layer" of (prior) information in door to door business - Compare Art. 4 of 85/577/EEC with Articles. 4 & 5 of Directive 97/7/EC
 - Regarding the information list in Directive 97/7/EC Article 4 (and possibly Article5)
 - should this list be incorporated into Directive 85/577/EEC together with a provision on protection of consumers privacy in accordance with the Data Protection Directive 95/46/EC ?
 - Right of Withdrawal - Article 5
 - Should this start with "conclusion of the contract" or with "delivery of goods and services" ?
 - Should there be a sector/Community wide time limit of 10 days (without taking into account working days, holidays etc.) ?
- 12.00-12.30 Rules on proper performance and advance payments (possible alignment with Articles 7 & 8 of Directive 97/7/EC)
- LUNCH BREAK -**

Afternoon Session

Chairman : Dr. Dieter Hoffmann

(4) **How to approach the grey area between "Pyramid Selling" and "Multi Level Marketing"**

14.30 - 16.00

Definition of illegal pyramid selling - detailed comments, on the definition suggested in the study (alternative proposals in writing from participants are welcome)

16.00 - 17.30

- Criteria for legally acceptable MLM systems
- proper information for candidates
 - right to withdrawal after signing up
 - number of distribution levels
 - remuneration only related to sale of goods
 - "buy-back" guarantees
 - entry fees
 - internal control of the system

16 MARCH - THURSDAY Morning Session

Chairman : Dr. Dieter Hoffmann

10.00- 13.00

(5) **Does standardisation provide a means of regulating MLM?**

- How might essential requirements be defined ?
- Who could establish the standards (existing standardisation bodies - new agencies) ?
- Which stakeholders might be involved ?

- END OF HEARING -

LIST OF PARTICIPANTS

- 1) European Commission :
 - DG Health + Consumer Protection
 - DG Competition
 - DG Internal Market
 - DG Employment
 - DG Enterprise
- 2) Institut für Europäisches Wirtschafts- und Verbraucherrecht – VIEW
- 3) European Committee for Standardisation « CEN »
- 4) Europäisches Verbraucherzentrum – Kiel
- 5) Danish National Consumer Agency
- 6) Instituto Nacional del Consumo – Spain
- 7) Consumer Agency – Finland
- 8) Centro Europeo dei Consumatori – Bolzano
- 9) DG du Commerce et de la Concurrence – Portugal
- 10) Instituto do Consumidor – Portugal
- 11) Swedish Consumer Agency
- 12) Federation of European Direct Selling Association « FEDSA »
- 13) Vorwerk + Co – Germany
- 14) International Chamber of Commerce « ICC »
- 15) German Direct Selling Association
- 16) French Direct Selling Association
- 17) UK Direct Selling Association
- 18) World Federation of Direct Selling Association «WFDSA »
- 19) Federal Chancellery – Austria
- 20) Federal Ministry of Justice – Austria
- 21) Ministry of Economic Affairs – Belgium

- 22) Ministère des Finances – Direction Consommation – France
- 23) Ministry of Justice – Finland
- 24) Ministry of Development (Secretary General of Commerce) – Greece
- 25) Ministero Industria – Pres. Cons. - Dipart. Politiche Comunitarie - Italy
- 26) Ministère des Classes Moyennes – Luxembourg
- 27) Ministerie van Economische Zaken – Netherlands
- 28) Department of Trade and Industry – United Kingdom « DTI »
- 29) Permanent Representation of Greece to EC
- 30) Permanent Representation of Ireland to EU
- 31) Comité européen des Assurances
- 32) Fédération bancaire de l'UE
- 33) European Cosmetic Toiletry + Perfumery Association « COLIPA »
- 34) Federation of European Direct Marketing « FEDMA »
- 35) Gesamtverband der Deutschen Versicherungswirtschaft
- 36) EU Committee of American Chamber of Commerce
- 37) EUROCOMMERCE
- 38) European Association of Directory Publishers
- 39) EUROFINAS LEASEUROPE
- 40) BIPAR – International Federation of Insurance Intermediaries
- 41) Citigroup
- 42) DIN Deutsches Institut für Normung
- 43) University of Bamberg – Germany

END