

DISCUSSION PAPER
ON THE REVIEW OF DIRECTIVE 85/577/EEC
to protect the consumer in respect of contracts negotiated away from business premises
(Doorstep Selling Directive)

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I. INTRODUCTION

The Directive on the protection of consumers in respect of contracts negotiated away from business premises 85/577/EEC¹ ("Doorstep Selling Directive") is one of 8 Directives² covered by the ongoing review of the consumer regulatory framework. It is the oldest Directive under review and has been in application in the Member States for the past 20 years. The review of the consumer acquis is part of the Commission's priority to simplify EU legislation and enhance its quality³.

The purpose of this document is to take stock of the effectiveness of this Directive in the current market place by means of a public consultation. The Commission highlights in this document the main regulatory problems encountered in the field of doorstep selling. The Commission invites Member States and stakeholders to comment on these and inform the Commission of other problems it may not be aware of. The Commission is also eager to gain a better understanding of how doorstep selling has evolved in the past 20 years. In particular, the Commission would like to hear of any perceived regulatory loopholes or failings created by these changes. It also urges Member States and stakeholders to point to any outstanding barriers to the Internal Market, and where possible, to evidence these.

The questions raised in this document focus on issues specific to doorstep selling. Issues which cut across the acquis, such as definitions, are not dealt with in this document unless they concern aspects particular to doorstep selling. Cross cutting issues are dealt with in the consultation launched by the Green Paper on the Review of the Consumer Acquis⁴ which closed on 15 May 2007.

At the time the Directive was adopted, one of the main concerns regarding doorstep selling related to the practices used by rogue traders. These included pressure selling on consumers who are caught unaware and targeting vulnerable consumers, such as the elderly, in their home. This document will not consult on these types of rogue practices. The Unfair Commercial Practices Directive⁵ which must be implemented and applicable in the Member

¹ OJ L 372, 31.12.1985, p. 31.

² Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L 158, 23.6.1990, p. 59; Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29; Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of a right to use immovable properties on a timeshare basis, OJ L 280, 29.10.1994, p. 83; Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4.6.1997, p. 19; Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ L 80, 18.3.1998, p. 27; Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ L 166, 11.6.1998, p. 51; Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7.7.1999, p. 12.

³ The review of the consumer acquis is listed in the Rolling Simplification Programme attached to the Commission's Communication on simplification of 25 October 2005 – Implementing the Community Lisbon programme – A strategy for the simplification of the regulatory environment.

⁴ COM(2006) 744, Green Paper on the review of the Consumer Acquis

⁵ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ("Unfair Commercial Practices Directive"), OJ L 149, 11.6.2005 p. 22.

States later this year⁶ aims at curtailing these types of practices. It will reinforce the protection afforded by the Doorstep Selling Directive by regulating at European level aggressive and misleading commercial practices.

On the basis of the outcome of this consultation on doorstep selling and other consultations on the review of the acquis, including for instance the Green Paper and the consultation on the Distance Selling Directive⁷, the Commission will consider the need for further legislative initiatives in accordance with the better regulation objectives pursued by the Commission in terms of simplification of the regulatory environment⁸.

Doorstep selling is also increasingly referred to as direct selling. This terminology will be used interchangeably in this document.

II. QUESTIONS FOR PUBLIC CONSULTATION

All interested parties who wish to respond to the questions in this consultation document should submit replies to the European Commission by 4 December 2007. Please answer as fully as possible and send your comments (marked “Consultation on the Doorstep Selling Directive”) to either:

European Commission
Directorate-General for Health and Consumer Protection
Unit B2
Rue de la Loi 200
B-1049 Brussels
Belgium
or by e-mail to SANCO-B2@ec.europa.eu.

After the consultation period has ended, the Commission will publish a summary of responses on its website. Responses and comments of interested parties will also be made public on the internet site of the European Commission, unless the sender explicitly requests otherwise. These responses will be fed into the evidence base gathered by the Commission in order to pursue the broader work on the review of the consumer regulatory framework.

III. CURRENT REGULATORY FRAMEWORK

The Directive aims at protecting consumers in respect of most contracts negotiated away from business premises. The Directive covers, for instance, contracts entered into during an unsolicited visit by a trader to a consumer's home or place of work and contracts entered into during an excursion organised by the trader away from his business premises. The basis for protection stems from the fact that the consumer is caught off guard in an environment which

⁶ Deadline for implementation 12 December 2007

⁷ COM(2006)514 final

⁸ See Communication from the Commission to the Council and the European Parliament of 16 March 2005 on Better Regulation for Growth and Jobs in the European Union (COM(2005) 97 final) and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 25 October 2005 on Implementing the Community Lisbon programme: a Strategy for the Simplification of the regulatory environment (COM (2005) 535 final). The review of the consumer protection acquis features in the Simplification Rolling Programme annexed to this latter Communication”.

is not a traditional retail environment and is often unable to compare the quality and price of the offer with other offers.

This Directive, being the first of its kind in the field of consumer protection, had what would be viewed nowadays as limited ambitions. Essentially, the main rights and obligations under the Directive are the provision of a written notice of the existence of a right of withdrawal to consumers and the right of withdrawal itself. This withdrawal period must be of not less than seven days from receipt by the consumer of the written notice of his right to cancel the contract.

The Directive, being a minimum harmonisation directive like the other seven directives under review, does not prevent Member States from adopting, or maintaining, more favourable provisions to protect consumers in the field which it covers. Member States have relied extensively on this minimum harmonisation clause at Article 8 of the Directive.

IV. MAIN REGULATORY ISSUES AT STAKE

Unlike sectors such as Timeshare, where the Commission has a body of evidence to suggest that sector specific reform is required urgently, the direct selling sector generally raises concerns which cut across the consumer regulatory framework. This is due mainly to the fact that the Directive's core function is limited to the provision of a right of withdrawal. This having been said, the extensive reliance on the minimum clause and the flurry of case law emanating from the European Court of Justice, as well as the Commission's regular contacts with stakeholders, indicate that a review of the Directive appears to be necessary and timely.

As mentioned previously, this consultation document will focus on sector specific issues. The Commission wishes to collect the Member States and stakeholders' views on the application of the Directive and its suitability for new market conditions. However, submissions on problems which have not been raised in the questions are also welcome for the Commission to understand better direct selling as it exists today.

1. Definitions (Article 2)

The Directive defines the terms "consumer" and "trader". The lack of coherence of the different definitions currently used in the eight directives under review is discussed at some length in the Green Paper on the review of the acquis. It is therefore unnecessary to consult on this issue in the context of this document. Nevertheless, the Commission is interested in hearing of issues relating to these notions specific to the field of doorstep selling. For example, the Commission is aware that some Member States have broadened the definitions of "consumer" and "trader" when transposing the Directive. Stakeholders may also wish to comment on the influence on daily business of European court cases such as the *Crailsheimer Volksbank EG* case⁹, in which the Court rules that, where a third party intervenes in the name of a trader in the negotiation or the conclusion of a contract, the Directive will apply whether or not the trader is aware of the fact that this contract has been negotiated away from business premises.

9 C-229/04

Question 1: Do you think that specific issues should be addressed in relation to the current definitions of “consumer” and “trader” in the field regulated by Directive 85/577/EEC? If so, please specify which ones. *Please note that the general issue of defining "consumer" and "trader" is being considered in the Green Paper on the review of the acquis. Therefore only issues specific to doorstep selling are relevant to this consultation.*

Question 2: Are any other notions in need of definition?

2. Scope of application (Article 1 and Articles 3(1) and 3(3))

2.1. Situations in which direct sales arise (Article 1)

Article 1 lists the situations in which direct sales arise. At the time the Directive was adopted, the most common situations of direct sales were sales made during unsolicited visits by the trader to the consumer's home or work place or sales made during an excursion organised by the trader. However, even at the time the Directive was transposed, several Member States extended the protection of the Directive to other situations. For instance, certain Member States felt that contracts which were entered into in certain public places (e.g. the street, fairs) require similar protection to that offered by the Directive and introduced provisions to this effect. Similarly, some Member States have extended protection to contracts negotiated in a doorstep situation but concluded subsequently on business premises. Finally, some Member States have extended the protection of the Directive to all types of solicited visits which, according to some stakeholders, have become more and more common over the last few years (see point 2.2.2 below).

The Commission therefore wishes to establish whether stakeholders feel that, 20 years on, the scope of the Directive still responds to the protection needs of consumers in situations where contracts are negotiated away from business premises, whilst providing a level playing field for business.

When considering the appropriateness of Article 1, it is also important to consider whether its wording is clear. For instance, the exact meaning of "excursion" may need clarifying, as would suggest the Travel Vac case¹⁰ in which the European Court of Justice ruled that an invitation from a trader to a tourist complex away from the town where the consumer is staying, and different from the town where the trader had his registered office, amounted to an excursion under Article 1(1).

Question 3: Are the doorstep situations which are listed at Article 1 of the Directive still up to date? Do they need to be amended, expanded, repealed and/or harmonised in any way to reflect new market realities? Please explain how and on which aspects.

Question 4: Have you encountered any problems with the application of Article 1? If so, which problems have you encountered and how do you feel these could be solved?

¹⁰ C-423/97

2.2. Regulatory options restricting the scope of the Directive (Articles 3(1) and 3(3))

2.2.1. Restrictions on the basis of the value of the contract (Article 3(1))

The Directive currently stipulates that Member States can choose to exclude contracts of a value of less than 60 euros from the scope of the Directive. Member States have made use of this option in different ways: some have not exercised it at all, however, amongst those who have, most have opted for thresholds of under 60 euros. Poland, for instance, has fixed the threshold at 10 euros whereas Belgium has set it at 50 euros. This consultation provides a good opportunity to assess the appropriateness and effects of this regulatory option and its different implementations. The Commission is particularly interested in hearing whether stakeholders feel that contracts under a certain value should be excluded from the protection of the Directive in all Member States and/or whether a single threshold should be used evenly across the EU, rather than leaving it up to Member States to set this threshold at national level.

Question 5: Should the regulatory option at Article 3(1) which allows Member States to exclude contracts of a value of less than 60 euros be modified and/or harmonised further? Please explain why and how.

Question 6: Is the current threshold adequate taking into account the present reality of the direct selling market?

2.2.2. Derogation from Article 1(2) on solicited visits (Article 3(3))

Article 1(2) of the Directive sets out the situation where visits of a trader at the request of the consumer are covered by the Directive, i.e. where the consumer was supplied with the goods or services other than those concerning which the consumer requested the visit, provided that when he requested the visit, the consumer did not know, or could not reasonably have known, that the supply of those other goods or services formed part of the trader's commercial or professional activities. A practical example can be that of a wine seller who is solicited by a consumer to organise a wine-tasting session at the consumer's home. If the wine seller also supplies olive oil or cheese during the wine-tasting session, the question may then arise whether the consumer could reasonably have known that the supply of olive oil or cheese formed part of the wine seller's activity. Depending on the answer to this question of interpretation – which may vary from one Member State to the other – the sale at the consumer's home of that olive oil or cheese may or may not be covered by the Directive and therefore the consumer may or may not be protected by a withdrawal right.

Another example resulting from the difficulty in interpreting the condition of the consumer requesting the visit of the trader, may relate to "home parties" which are considered to be solicited sales in some countries but can be regarded as unsolicited sales in other countries, depending on the way the party is organised and the invitation is made.

In addition to the legal uncertainty resulting from the difficulty in interpreting the derogation on solicited visits on a case by case basis, Article 3(3) offers the possibility for Member States to derogate from this rule for goods or services having a direct connection with the goods or services concerning which the consumer requested the visit. The concept of "direct connection" may also give rise to various interpretations.

National implementations concerning solicited visits vary considerably as a consequence of the regulatory option at Article 3(3) and national extensions of the scope of the Directive, resulting in regulatory fragmentation across the EU. The Commission is keen to establish whether this derogation needs to be revised to ensure coherence across the EU and respond to possible changes in the direct selling industry. The Commission is aware, for instance, of calls in certain Member States to extend the protection offered by the Directive to all solicited visits which seem to be more common nowadays.

Question 7: Should the regulatory option at Article 3(3) which allows Member States to derogate from the provisions on solicited visits at Article 1(2) be modified and/or harmonised further across the EU? Please explain why and how.

Question 8: What is your practical experience of the application of the exclusion (or where applicable the inclusion) of solicited visits from the scope of the Directive and in order to improve legal certainty and consumer protection, should the Directive be extended to all solicited visits?

3. Specific exemptions (Article 3(2))

The Directive lists different types of contracts which are exempted from the Directive's provisions. Extensive use of the minimum clause has been made to raise the level of consumer protection nationally. The picture at European level is therefore fairly fragmented. For instance, the exemption for contracts concluded on the basis of a trader's catalogue does not appear to have been transposed in two thirds of Member States, whereas the exemptions concerning immovable property and insurance contracts have proved more popular. Despite a preference of Member States for certain exemptions, it is worth pointing out that no exemption has been implemented by all Member States.

Generally speaking, the interpretation of Article 3(2)(a) seems to have generated the most problems in practice. The Commission will illustrate certain of these in this section. It will, by way of example, refer to several European Court of Justice cases relating to this exemption. It will however set questions which are common to all the exemptions. In particular, the Commission would like to hear from stakeholders of any practical problems encountered with the exemptions and whether the exemptions need updating in any way.

3.1 Immovable property contracts - Article 3(2)(a)

The exemption at Article 3(2)(a) provides that contracts for the construction, sale and rental of immovable property and rights in immovable property are exempted from the scope of the Directive.

In the Travel Vac case, the European Court of Justice was asked to clarify whether this exemption applied to timeshare. The Court ruled that the exemption did not apply and therefore both the Timeshare Directive and the Doorstep Selling Directive could apply to a single transaction. It also ruled that the Directive applied to the provision of a set of tourist services whose value is higher than that of the right to use the immovable property.

This exemption has also raised the question of whether a credit agreement secured on immovable property could come within this exemption. The European Court of Justice in the Heining¹¹ case ruled against this view and clarified that such an agreement was subject to the rights and obligation in the Directive, including the right of withdrawal. The Court was asked to rule again on this exemption and its interaction with financial products in the Schulte¹² case. The Court in this case clarified that the exemption did apply to immovable property contracts even where these contracts are only "a component of an investment scheme financed by a loan for which the negotiations prior to the conclusion of the contract were held in a doorstep-selling situation, both as regards the purchase of immovable property and the loan agreement serving solely to finance that purchase".

Finally, a fairly similar exemption exists in the Distance Selling Directive, although rental is treated differently. In the context of the recent consultation on distance selling, several stakeholders have argued that it is not clear whether or not renovation works fall within the scope of the exemption.

Question 9: Do the current exemptions need to be modified in the light of new market developments or interpretation problems? Please explain.

Question 10: Does the interaction of this Directive with the Timeshare Directive need to be clarified further?

4. Written notice of right of cancellation - Article 4

Article 4 of the Directive provides that traders must give consumers written notice of their right of withdrawal. It also sets out when this notice is to be given but leaves it up to the Member States to lay down the form of the notice and the consequences of failure to provide the notice. Like most of the Directive, Article 4 has therefore been drafted in such a way that it gives Member States leeway in implementing it. Most issues arising from Article 4 are better addressed in the context of the consultation launched by the Green Paper. Indeed, it is difficult not to touch upon issues which cut across the acquis when considering Article 4.

Stakeholders may nevertheless find it useful to comment here on the consequences of failure to provide written notice. Indeed, this issue has been discussed specifically by the European Court of Justice in the context of direct selling in the Heining case, which provides that

¹¹ C 481/99

¹² C 229/04

Member States cannot impose a time limit on the starting point of the right of withdrawal, where no written notice of the existence of the right has been given under Article 4. A similar issue is currently the subject of a request for a preliminary ruling by the European Court of Justice in the pending *Hamilton v Volksbank Filder* EG¹³ case. In this case, the issue at stake is the possibility for Member States to impose a time limit expiring one month after full performance of the contract even though a defective notice of the existence of the right of withdrawal has been given to the consumer.

Stakeholders may also wish to comment on the modalities for providing notice in the context of direct selling legislation. For example, stakeholders may want to comment on the timing for giving notice or argue in favour or against of the notice being provided in a "durable medium", such as is the case in the Distance Selling Directive and the Distance Marketing of Financial Services Directive¹⁴.

Question 11: Can Article 4 be improved, in particular with respect to the modalities for providing notice? If so, how?

5. Right of withdrawal - Article 5

Article 5 sets out the right of withdrawal for the consumer. It provides a minimum period of 7 days from the day the consumer is informed in writing of the existence of his right of withdrawal. It is up to the Member States to set the modalities for exercising the right of withdrawal. Nevertheless, the Directive does, as a minimum standard, set a dispatch rule.

Issues relating to the right of withdrawal which exists in three consumer Directives (Timeshare Directive, Distance and Doorstep Selling Directives) have been comprehensively raised in the context of the Green Paper. The new proposed Timeshare Directive provides for a withdrawal period of 14 calendar days. Therefore, the Commission does not propose to discuss this issue in detail in this paper. Nevertheless, it encourages stakeholders to raise any aspect which has been particularly relevant in the sector of direct selling. For example, time limits for the exercise of the right of withdrawal may raise some comments (see also section 4 above on Article 4). The moment at which the withdrawal/cooling off period starts may also require some comments resulting from experience in the direct selling sector.

Question 12: Do the rules concerning the exercise of the right of withdrawal and its consequences need to be clarified in the field of doorstep selling; if so which aspect(s) should be treated differently from the field of distance selling and why?

6. Interaction with other consumer protection legislation

This consultation document has already, in the context of section 3.1., raised the issue of the interaction of this Directive with the Timeshare Directive. Parallels are also often made between the Directive on Doorstep Selling and the Directive on Distance Selling. In the case of distance sales, a consumer is put at a disadvantage through lack of access to the

¹³ C 412/06

¹⁴ Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ L 271, 9.10.2002, p. 16.

goods/services before conclusion of the contract. In direct sales, the consumer is weakened because he is not in a business environment and is often caught unaware when the sale is made. Despite these differences, both Directives are concerned with sale methods. Some Member States have therefore chosen to transpose the Directives in a single piece of legislation to draw on their common features. The direct selling industry has also drawn to the Commission's attention the fact that, increasingly, direct sellers rely on distance means of communication to foster and maintain the relationship they have created with a customer through face to face contact away from retail premises ("repeated transactions"). The Commission is interested in hearing whether stakeholders feel that there is scope for further harmonisation between both Directives. Obviously, the answers to these questions will need to be considered in conjunction with the responses to the Green Paper consultation.

Question 13: Does the interaction of this Directive with the Distance Selling Directive need to be clarified further?

Question 14: Is there scope for further harmonisation of this Directive with the Distance Selling Directive?

V. ISSUES WHICH ARE NOT CURRENTLY REGULATED AT EUROPEAN LEVEL

1. Time restrictions on doorstep selling.

The Commission feels it is worth mentioning the introduction in Belgium, Hungary and Slovakia, of time restrictions during which direct sellers can make visits to a consumer's home. In light of the new Unfair Commercial Practices Directive¹⁵ which already prohibits in particular aggressive practices, the Commission wishes to gather stakeholders' opinion on such provisions.

Question 15: Do you feel necessary to introduce at European level restrictions on the hours during which direct sellers can make visits to a consumer's home?

2. Ban on payments during the cooling off period

Another comment that the Commission feels is worth making concerns the introduction in Belgium and France, of bans on payments or any other types of consideration during the cooling off period. The Commission wishes to gather stakeholders' opinion on such provisions and on the way they have been applied in these Member States.

Question 16: Do you think that the introduction in Belgium and France of restrictions or bans on payments (and other types of consideration) during the cooling off period was necessary for consumer protection and has been workable for traders? Do you think that similar restrictions or bans on advance payments should be or should not be introduced at European level? Why?

¹⁵ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005, O.J. L149/22 of 11.6.2005

VI. BANS ON SALES

The Commission recognises that, at present, Member States have introduced very divergent national bans as far as non hazardous products are concerned. Examples of these include the ban on the direct selling of cosmetics in Austria or of semi-precious stones in Belgium and Germany. However, the issue of bans on direct sales is not regulated by the Directive. The European Court of Justice body of case law concerning national bans on sales in the direct selling sector made it clear that this issue was better addressed in the context of the application of the principle of free movement of goods (Articles 28 and 30 of the Treaty in particular), rather than in the context of the doorstep selling legislation per se. Furthermore, national measures introducing sales bans on the direct selling of specified products have to be notified to the Commission in accordance with Directive 98/34 of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations.

This consultation will therefore not tackle this issue which is also being addressed, to a certain extent, in the work on the implementation of the Unfair Commercial Practices Directive. This maximum harmonisation Directive will have a liberalising effect on the market by creating a level playing field for all actors across the European Union.

VII. OTHER ISSUES

In this document stakeholders are consulted on a number of issues that have been identified as important in the context of reviewing the Directive. As previously suggested, the Commission welcomes information and suggestions on any other matter deemed to be pertinent and relevant to overall objectives of the review of this Directive.

Question 17: Is/are there any other issue(s) or area(s) that requires to be explored further or addressed at EU level in the context of the doorstep selling Directive?
