

DATE: 23 August 2006
TO: DG SANCO (SANCO-B2@ec.europa.eu)
CC: DG MARKT, DG ENTR
FROM: FEDSA
RE: **First consultation on Price Indication Directive 98/6/EC**

This is the response of the European direct selling industry united under the aegis of FEDSA¹ on Communication COM(2006) 325 final of 21 June 2006.

FEDSA welcomes the opportunity to respond to the Commission's questions on the Unit Pricing Directive. Before entering into the discussion on the questions asked by the Commission however it must be stated that FEDSA has no vested interests in any specific product market but generally defends the interest of direct selling as a distribution channel for consumer products. Although some goods have large shares in the direct selling market (namely cosmetics, food and food supplements, household improvement articles, jewelry, books, etc.), effectively all consumer goods that would be subject to rules on price indication of national and European law can be traded.

Question A: Should the derogation in Article 3(2) be maintained?

We would prefer Option 2 and could accept Option 1.

Should however Option 3 be chosen and Article 3(2) be maintained, we believe it is mandatory to clarify the scope of the exemption for sale by auction. Due to a lack of an authoritative notion of 'auction' in EC law it is open to interpretation whether offers by traders to consumers by means of Internet auction platforms would be covered or not.² A general exemption for Internet 'auctions' would unjustifiably favour distance selling over other distribution channels such as direct selling.

Question B: For which products should there be an obligation to indicate the unit price?

We would prefer Option 1 with the important modification however to draw up a non-exhaustive European 'white list' of product categories exempted from the obligation to indicate the unit price while maintaining Article 5(1) to allow Member States to extend this white list to include further products.

Question C: Should specific rules on advertising be maintained in this context?

We have no specific preferences.

Question D: Should the derogation for small retail businesses become permanent? If so, should a European notion of small retail business be introduced? How should this be formulated?

¹ The Federation of European Direct Selling Associations (<http://www.fedsa.eu>)

² A problem that recurs in Article 3(1) 5th indent of Directive 97/7/EC

We prefer Option 1 and would find Option 3 acceptable as the second-best choice.

Direct sellers as micro-enterprises

Direct sellers are mostly private individuals seeking face-to-face contact with consumers to offer and to sell products, away from fixed retail locations. As such they are single-person enterprises with often limited turnover. They would fit into, and indeed undercut, the criteria established by Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium sized enterprises (OJ L 124, 20.5.2003, p. 36) that comes closest to establish an authoritative notion of ‘SME’ in EC law. The Recommendation applies a ‘staff headcount criterion’ and ‘turnover criterion’ combined. The subcategory ‘micro-enterprise’ is defined in Articles 1 and 2(1) and (3) of Title I of the Annex to the Recommendation as “any entity engaged in an economic activity, irrespective of its legal form” that “employs fewer than 10 persons and whose annual turnover and/or annual balance sheet does not exceed two million euro.” Article 51(1) of the proposal for a Directive on payment services in the internal market³ makes a first attempt to use the notion of micro-enterprise in law and we believe a modified Article 6 should adopt this notion too.

Excessive burden of unit pricing

In the out-of-store personal-contact situation that is characteristic for direct selling, unit pricing can be exceptionally burdensome for direct sellers. The existing Directive recognises this situation to the extent that Article 6 expressly mentions itinerant trade as one form of business for whom the obligation of unit pricing can be unacceptably onerous. While indicating the selling price (Article 2(a)) is an indispensable must for direct selling of consumer goods no matter how small the transaction, imposing unit pricing generally is cumbersome and of little or no added value for consumer protection to be required for this distribution channel. This was why a more far-reaching exemption has been seriously considered in the preparatory works for the Directive with a view to exclude all personal in-home sellers – an idea that should be reinvigorated when the current Directive is being updated.

As a result we would advocate a general SME exception in Article 6 referring to the definition of the mentioned Commission Recommendation or at least a reformulation of the ‘itinerant trade’ clause to cover direct selling respectively personal in-home selling generally.

Question E: Should the minimum harmonisation clause be maintained?

We incline to prefer Option 1, that is, to move towards a full harmonisation Unit Pricing Directive with the margin of discretion for Member States that we said above we would favour.

In this context it is important to recall that the minimum harmonisation clause of Article 10 of Directive 98/6/EC always was limited to provisions of national law regarding (1) consumer information and (2) comparison of prices, while the former 129a(3) EC Treaty (now Article 153(5) EC Treaty) on which the Directive is based provides for a constitutional right of Member States to go further than required by secondary law towards what they believe is necessary to protect consumers on their national territory. It is thus compulsory that an amended full harmonisation directive is founded on another legal base than Article 153 EC, preferably Article

³ COM(2005) 603 final of 1 December 2005

95 EC. This would not even change if the proposals recently submitted by the EESC⁴ aiming at re-enforcing the consumer provision would lead to an amendment of the Treaty. As a business stakeholder, we certainly recognise the relevance of price regulation legislation for the internal market to justify this choice.

The respondent

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⁴ OJ C 185, 8.8.2006, p. 71