European Commission
Directorate-General Employment and Social Affairs
Rue de la Loi 200
B-1049 Brussels

21 March 2007

Dear Sir/Madam,

Re: Green Paper “Modernising labour law to meet the challenges of the 21st century”

FEDSA\(^1\) is a federation of trade associations representing the direct selling industry in Europe.

We are writing to you on behalf of a sector of retail trade whose operation and economic success crucially depends on flexible and independent direct selling salespeople. In order to reconcile this flexibility with the flexicurity agenda of the European Commission, we wish to comment on the labour law Green Paper that raises some questions of concern.

While we welcome the broad debate on labour issues launched by the Green Paper for the implementation of the Lisbon agenda, we feel compelled to provide you with insights into the specific concerns of our sector of trade. Past experiments in national law have demonstrated that direct selling is vulnerable to a form of legislative intervention that generalises over the full spectrum of occupational activities. By responding to the Green Paper we wish above all to warn against a simplistic endorsement of legal concepts of labour law aiming to bring as many economic sectors under the tutelage of labour legislation. This, we fear, could potentially be disastrous for direct selling. But we admit that this point needs to be explained.

Salespeople active in direct selling practice commerce are mostly small-scale and often part-time, but independent and not subject to the constraints of labour law. This is so because most salespeople in the direct selling industry are fundamentally entrepreneurs. Direct selling has always been that way and would not be feasible differently. Indeed, it is necessary to emphasise that independence and self-employment in direct selling is not the result of ‘outsourcing’ or ‘restructuring’ of our trading sector, but one of its main traits of character since its origins.

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\(^1\) The Federation of European Direct Selling Associations (http://www.fedsa.eu)
With a view to flexicurity it is worthy of note that direct selling includes in its broad scope life-long learning enabling people to acquire new skills, re-introduction policies encouraging people to enter or to re-enter the labour market and mechanisms allowing for gradual changes between activity-inactivity. Direct selling is an example of present-day flexicurity. Indeed, many of those unemployed and detached from the labour market have found that becoming a direct seller is an activity that can aid in the development of skills that eventually could lead to employment in another sector or to full-time entrepreneurship.

In our response to the Green Paper we have limited our observations to chapter 4.b) (“Uncertainties with regards to the law”) and answers to questions 7 and 8. Bearing in mind the large amount of feedback the Green Paper is likely to attract and the difficulties to process this amount of information, we have prepared a summary response containing the key messages we wish to communicate about ourselves and the status of direct sellers. We hope this makes it easier to comprehend the points we wish to make.

Thank you very much in advance for considering our observations in the formulation of your policies. Should you wish further information about our sector of trade, our Brussels office is available to provide this.

Yours faithfully,

[Signature]

John P. Higson,
Chairman

Enclosures:
- FEDSA summary response to the Green Paper
- Excerpt from the Perulli study on direct selling
- FEDSA statistics on direct selling in Europe
DATE: 19 March 2007
TO: DG EMPL (empl-labour-law-green-paper@ec.europa.eu)
CC: DG MARKT, DG ENTR
FROM: FEDSA
RE: Modernising labour law to meet the challenges of the 21st century

This is the summary response of the European direct selling industry united under the aegis of FEDSA\(^2\) on Communication COM(2006) 708 final of 22 November 2006, hereinafter referred to as: ‘the Green Paper.’

**Summary Response**

**Direct selling trade**

- Direct selling is Europe’s largest provider of independent, micro-enterprise,\(^3\) business opportunities. It is a *marketing method* for the distribution of goods and services to consumers and thus a form of *retail trade*. Being only a channel of distribution, direct selling is not, and never has been, defined as a concept of labour.

- Low entry thresholds, a significant element of part-time activity and a high percentage of women entrepreneurs mark this business sector, which has *no discrimination* of age, gender, ethnicity or disability. Additionally, there are *no required levels of education*, experience or financial resource, and training is given by established direct selling organisations. As such, direct selling meets a demand for income opportunity, skill development, and self-directed economic activity on a temporary or permanent basis that cannot be addressed through regular employment.

- Direct selling attracts people seeking the opportunity for *self-employment and these are the main characteristics of the sector*. It is not the result of recent-day restructuring, outsourcing or subcontracting, but inherent to the operation of a distribution network from its origins. Self-employment is therefore indispensable for the very existence of direct selling.

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\(^2\) The Federation of European Direct Selling Associations (http://www.fedsa.eu)

\(^3\) As defined in Articles 1 and 2(1) and (3) of Title I of the Annex to Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium sized enterprises (OJ L 124, 20.5.2003, p. 36).
- Direct selling companies trade in a **vast variety of products** with significant market shares in cosmetics and personal care, household products, wellness products, utilities, fashion articles, food and drink, household improvement as well as financial services.

- Direct selling provides **competition to large retailers** and opens a distribution channel for new and novel products that, because of lack of brand name or other reasons, are not found on supermarket shelves. Direct selling brings retailing to local communities by local residents and, therefore, its revenues stay in these local communities.

**Direct selling and direct sellers**

- Direct sellers pursue their activity not in order to participate in the labour market but to practise commerce. They are thus not “outsiders” of labour but “insiders” of trade.

- Direct sellers pursue their independent activity in order to develop entrepreneurial skills and are able to develop their working schedule according to their needs and wishes in a flexible way. They are not interested in a dependent, employment status, but rather in an independent, self-employed environment.

- Direct sellers can be either natural or legal persons who are members of the distribution system of a direct selling company. They sell, facilitate or assist in the sale of products of that company away from business premises, typically in the consumer’s home, or the home of another consumer or at the consumer’s place of work.

- Direct sellers can stay in the network of one or several member companies as long as they wish, and they earn income according to the time and sales efforts they wish to devote to their activity.

- The situation of direct sellers is neither “precarious” nor “informal.” Direct sellers do not operate in a grey area of labour law but in the clarity of trade law. Their rights and obligations are not only addressed through existing commercial and trade law, but also through the codes of conduct of direct selling companies and industry trade associations, as well as through their contracts with direct selling companies.

- Many direct sellers sell products of more than just one company and apply their skills to their advantage for a multitude of partners.

- Direct sellers bear certain, albeit limited, entrepreneurial risks and their incomes are dependent on the efforts they invest in and direct their businesses.

**Direct selling and flexicurity**

- Direct selling teaches business skills. It often helps to make inactive people active and allows people employed in other sectors to tap a second source of income. Direct selling so injects a spirit of entrepreneurship in the population.
• Direct selling is indiscriminate. It enables all people irrespective of age, gender, ethnicity or disability to earn extra income. The large numbers of female direct sellers make it particularly useful to teach business skills to women.

• Direct selling entrepreneurship encourages life-long learning enabling people to acquire new skills. Its side benefit can also be to help people to enter or to re-enter the labour market and allowing for gradual changes between activity-inactivity. In this way, direct selling makes an important contribution to promote flexicurity.

• Direct selling is flexible to adapt to the life-styles of the men and women active in the sector with phases of high and low activity. The liberties of direct selling allow balancing family life and professional activity. In particular it provides an entry-gate for women seeking a professional activity.

• Direct selling provides income earnings opportunities for the mature market, thus enabling those who had reached retirement age to supplement their retirement benefits and enjoy a life-style during their senior years they might not otherwise enjoy.

Economically dependent work and direct selling

• The notion of economically dependent work relies on a single principal/single source of income combination. But, as an issue for labour regulation, it also tacitly includes as a third criterion, which is that the self-employed person earns his/her living from this activity. This criterion would exclude the large number of direct sellers whose activity is not aimed at replacing or substituting employment. More than half of direct sellers engage in direct selling activity as a way of supplementing existing income from other household sources.

• Linked to the issue mentioned in the previous paragraph one has to observe that the notion of economically dependent work lacks so far a suitable definition of ‘earning.’ Earnings from one source may look as a situation of dependence, but might not at all mean dependence. Thresholds of income might become an indicator to distinguish supplementary [family] income from principal [family] income.

• Although it is the case that some direct sellers are able to replace entirely ordinary employment income with income from direct selling activity, for most direct sellers, the supplementary income earned from direct selling activity is not intended to replace ordinary employment income or provide a full replacement income on its own.
In EC law, there is no particular direct sellers Regulation or Directive in force. The Commercial Agents Directive\(^4\) may apply to some direct sellers depending on the nature of the contractual relationship with the direct selling company and the activities they undertake on behalf of the company. The proportion of direct sellers qualifying as commercial agents will vary from company to company and from Member State to Member State. We take note that the Commission does not seem to wish to amend the Directive which, twenty years after its adoption, still provides for useful solutions.

National law already extensively regulates the relationship between direct sellers and companies. These national laws may represent appropriate solutions for the respective markets, but they do not necessarily provide useful models for EU legislation.

Most Member States’ legislation has preferred to retain the ability of direct sellers to operate as independent contractors, with maximum flexibility to determine their own hours of operation, sales methodology, levels of commitment and resource investment, etc. This has overall proved to be most favourable solution for the promotion of direct selling and for the benefit of direct sellers.

Past experience of regulating the sector teaches that interfering in the independent status of direct sellers had devastating effects in terms of loss of business opportunities for the salesforce and direct selling companies alike. The German experiment of 1999-2000, in particular, provides a telling example (see p. 9 below).

Therefore, the alternative to the independent status is not dependent employment or a “third way” in-between the notion of employer and employee, but no employment at all.

In particular: Commercial Agents

We do not subscribe to the statement in the Green Paper where it cites the Commercial Agents Directive as an example “how Internal Market rules can closely resemble aspects of labour law” (p. 12). In our view the Directive is an example for a workable solution in the B2B dealings between a commercial agents and a principal and is clearly intended to remove such dealings from any labour law context. We find it therefore in a way confusing that the Directive is mentioned in the Green Paper and would hope that a follow-up Commission Communication would clarify that it is not part of the labour law and flexicurity agenda of the Commission.

Employment in direct selling companies

- Notwithstanding that the independence and entrepreneurial classification of direct sellers is critical to the business model and success, the direct selling industry does also provide significant levels of employment in the European Union. For example, factory workers in production units manufacturing the products direct sellers are selling. They are distributed in logistic centres managed by the administrative staff of direct selling companies. The jobs of these employees (estimated at 30,000 across Europe) depend on the flexibility of the salespeople who, by generating revenues for themselves, and sustaining the people in direct selling companies. This direct and indirect contribution of the direct selling industry to employment of factory workers, logistics workers and administrative labour is further augmented by the demand for professional labour from the services sectors such as advertising, marketing, legal, tax, accounting, product design and testing, management services, media and public relations. Application of labour law concepts to entrepreneurial direct sellers and the relationship between such direct sellers and direct selling companies which would decimate the direct selling industry would also unintentionally and drastically reduce overall high-value employment in the EU which is currently being provided directly and indirectly by direct selling companies.
After all that has been stated above, we are responding as follows to Questions 7 and 8 of the Green Paper:

7. Is greater clarity needed in Member States’ legal definitions of employment and self-employment to facilitate bona fide transitions from employment to self-employment and vice versa?

The EC Treaty neither contains a clear definition of employment – see Articles 39, 137 EC – nor a definition of self-employment.

Member States have their own historically developed definitions of employment/self-employment. Therefore, it is difficult to rationalise these definitions as each Member State has determined various forms of employment and self-employment based on different applicable standards and cultural specificities and values. Thus a distinction and clarification in the area of employment / self-employment as well as economically dependent work in the European Union should remain in the competence of every Member State.

8. Is there a need for a ‘floor of rights’ dealing with the working conditions of all workers regardless of the form of their work contract? What, in your view, would be the impact of such minimum requirements on job creation as well as on the protection of workers?

On an EC level a definition of a ‘floor of rights’ seem to be not only impossible but also not recommendable. Employees and self-employed create fundamentally different relationships one governed by labour and the other by commercial and/or trade law. Creating common rights would create confusion in the aforementioned relationships.

The respondent

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**Excerpt from Perulli study**<sup>5</sup> (p. 84; emphasis added):

A report drawn up in Germany by a group of associations operating in the commercial sector and the Chambers of Commerce Association has suggested that the introduction of these amendments has had negative effects and that they brought about the sudden termination of many self-employment contracts or jeopardised their extension. The report includes the following examples to illustrate this situation:

a) **Commercial agent in the capital goods sector** A commercial agent had worked for a medium-sized mechanical engineering company for many years. In 1999, in the wake of the legislative reform, the engineering company terminated the representative’s contract for fear that it would have to pay his social security contributions. This stemmed from the fact that the agent had been working very closely with the company; he had even rented a small office on company premises from which he managed his principal’s whole distribution system. The agent had explicitly requested this close cooperation so that he could deal more effectively with customers’ enquiries. With his further qualification as a mechanical engineer he was even able to take account of customers’ requests in planning.

b) **Direct selling** The regulations concerning what is termed “false self-employment” led to considerable uncertainty among the sales representatives of the Federal Direct Selling Association’s member companies, causing a significant decline in turnover. For instance, a large family business, employing sales representatives to distribute cleaning equipment and fully fitted kitchens, even had to cut back its production as a result of losing many of its sales representatives due to the climate of uncertainty. Although amended several times, the after-effects of these reforms are still being felt.

c) **Non-distribution sectors** Self-employed persons in the building, construction and advertising sectors, freelance contributors to the media and data processing experts complained about the withdrawal or cancellation of orders and the failure to extend contracts. So great was the principals’ fear of the contractual relationships being classed as false self-employment and that they would be liable to pay large social security contributions, they terminated the relationships, despite the fact that there was a good chance these would not be classified as false self-employment. However, there was considerable uncertainty regarding the legal position.

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## Direct Selling in Europe: 2005 figures

<table>
<thead>
<tr>
<th>Countries</th>
<th>Nbr of salesforce</th>
<th>Direct Selling Salesforce</th>
<th>Employ. in prod. &amp; admin.</th>
<th>Sales figures in million € excl. VAT</th>
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<td>N° of direct sellers</td>
<td>% women</td>
<td>% part-time</td>
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(*) : 2004 figures - (**) : 2003 figures