



The European  
Direct Selling Association

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## **SELDIA POSITION ON THE REVISION OF THE 2009 UCPD GUIDANCE DOCUMENT**

Seldia welcomes the Commission's initiative to revise the 2009 Unfair Commercial Practices Directive (hereinafter - UCPD) Guidance Document and praises the increased involvement of stakeholders in the process. Even though the UCPD has worked satisfactorily and has proven to be an effective tool for the authorities to deal with companies that engage in unfair commercial practices, we believe a stricter and more harmonized enforcement of the Directive as well as cooperation between Member States is needed. Therefore, the direct selling industry believes that the planned additions to the Guidance document will help to address certain shortcomings with respect to the implementation of the Directive.

### **General Comments on the Revision of the 2009 UCPD Guidance Document**

The implementation and enforcement of the UCPD in all Member States has proven to be a challenge and the full harmonization objective of the Directive has not fully been achieved yet. Seldia believes that a revised Guidance document has a strong potential to help Member States in the process of the implementation of the Directive by providing appropriate and relevant recommendations and explanations of the interpretation of its provisions.

However, the revised Guidance document by itself cannot solve existing issues in Member States. Seldia trusts that in parallel the European Commission will continue to monitor the application of the Directive and open infringement procedures against those Member States that do not implement it correctly. Against this background, Seldia welcomes the planned Single Market Strategy and its smart EU policy aiming at improving and strengthening implementation and enforcement.

### **Additional Guidance on Annex I – The blacklist of commercial practices**

Seldia welcomes the additional guidance and the inclusion of case law of the European Court of Justice (ECJ) for the purpose of clarifying important aspects of the UCPD, such as the misleading use of the word « free » and the practices which give the false impression that a consumer has won a prize. We believe that this kind of guidance helps Member States in their efforts to protect consumers and to fight against rogue traders.

In particular Seldia welcomes the additional **guidance on pyramid schemes** (UCPD Annex I, point 14).

The ECJ case law, and in particular the recent ruling in C-515/12 « *4finance* » mentioned during the UCPD Workshop of 9 September 2015, is a good point of reference for the interpretation of pyramid schemes as an unfair commercial trade practice. This ECJ judgment provides additional clarification of what constitutes a pyramid scheme and represents an important guidance for national authorities and courts to better understand and enforce the UCPD.

According to the ECJ in *4finance*, a pyramid scheme is deemed to exist when:

- (1) the members of such scheme are required to give financial consideration, regardless of its actual amount, for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products;<sup>1</sup> and
- (2) there is a link between the financial consideration paid by new members and the compensation received by existing members because the funding of the compensation that a consumer may receive depends primarily or mostly on consideration given subsequently by new participants in the scheme.<sup>2</sup>

In a direct selling business, products are sold by distributors to end-consumers, but products are also used by distributors for their own personal consumption. Distributors also have the option of introducing interested persons to the direct selling business. In that case, distributors can obtain compensation not only from their personal sales and own consumption, but also from the sale or consumption of products by persons who they themselves have introduced to the direct selling business directly or indirectly, and who they continue to train, assist and motivate. This compensation is derived only from product sales and not merely from introducing other people.

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<sup>1</sup> See C-515/12 *4finance*, para. 23.

<sup>2</sup> Id. para. 27, 28.