seldia The European Direct Selling Association

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Seldia Position Paper on New Deal for Consumers

Seldia welcomes the New Deal for Consumers and the Commission's intention to update the current EU policy framework by proposing some "targeted" amendments to the current EU rules. We would like to reiterate, once again, that it is essential the proposed amendments remain limited and do not allow for further changes regarding other regulatory provisions, which have reportedly been functioning well for consumers, businesses and public authorities.

Doorstep Selling

Among the proposed provisions, the European Commission has included a provision targeting doorstep selling. More specifically, the Commission has proposed in Article 1 of the proposal on better enforcement and modernisation of EU consumer protection rules that:

"The proposed Directive would not prevent Member States from adopting provisions to protect the legitimate interests of consumers with regard to aggressive or misleading marketing or selling practices in the context of unsolicited visits by a trader to a consumer's home, or with regard to commercial excursions organised by a trader with the aim or effect of promoting or selling products to consumers". The Article further requires that such provisions "are justified on grounds of public policy or the protection of the respect for private life".

In other words, the Commission proposal would allow Member States to restrict or ban aggressive or misleading marketing/ selling in the context of doorstep selling if this can be justified for reasons of public policy or protection of private life. When reading this provision, one can see the Commission's intention to keep a balance between traders engaged in doorstep selling and consumers.

However, we do not think this is the right approach. To begin with, there has been **no factual evidence** presented by the Commission in any of its official documents, which shows that doorstep selling has been an issue of real concern with regard to consumer protection across the EU. No call for legislative intervention in doorstep selling was ever made in any of the Commission's reports on the results of the evaluation of the EU consumer acquis (Consumer REFIT). Even in the impact assessment that accompanies this proposal, there has been no explanation why a legislative intervention (as well as the particular provision) was the policy option chosen by the Commission. The Commission states that doorstep selling was not covered by the impact assessment, since any national restrictions on doorstep selling "have no or very limited cross-border implications", without explaining why this is the case and without presenting any supporting material for this statement.

The Commission proposal indicates in its introductory summary that it "clarifies" Member States' freedom to adopt rules on certain forms and aspects of off-premises sales. However, this is not true as the Unfair Commercial Practices Directive is a full harmonization Directive, not allowing Member States to maintain or adopt more restrictive national measures than those laid down in that Directive. This was also acknowledged by the CJEU in the case C-421/12 of 10 July 2014 (European Commission VS Belgium), in which the Court ruled that "national rules which provide for a general prohibition of practices not listed in Annex I, without requiring an individual analysis whether the practices are 'unfair', are unlawful and contrary to the objective of complete harmonization of the laws of the Member States pursued by the directive".

The Commission has further introduced EU rules in the proposal to enable national restrictions or bans of aggressive or misleading practices in doorstep selling. However, **aggressive doorstep selling is already banned under the Unfair Commercial Practices Directive**: under point 25 of Annex I (blacklist of commercial practices), "personal visits to the consumer's home ignoring the consumer's request to leave or not return" are prohibited. The ban of all misleading practices (as well as aggressive ones) is the cornerstone of the Unfair Commercial Practices Directive and as such, **misleading practices in doorstep selling are already prohibited by the Directive**.

The Unfair Commercial Practices Directive is an important policy instrument that provides an efficient EU framework against unfair commercial practices and has been identified by the majority of consumer associations as a legislative tool that has a positive impact on consumer protection[1]. Allowing for national bans and therefore, deviating from the full harmonization principle of the Directive would seriously compromise its achievements and objectives of boosting the internal market and encouraging cross-border transactions. Allowing for differentiations of national rules will be a step backwards and targeting doorstep selling when there are other sales channels that have raised more problems for the consumers[2] will jeopardise fair competition.

The proposed Directive would allow for national rules to essentially restrict doorstep selling, only if they are "justified for reasons of public policy or the protection of the respect for private life". **Such an approach however is clearly against the proportionality principle.** We are very concerned over the use of such vague and broad terms as the legal basis to support restrictive measures against a legitimate sales channel. Although we understand the good intentions of the Commission to adopt a balanced approach, we fear this would be used as an opportunity for a number of Member States to restrict doorstep selling as well legislate their national markets the way they want to.

To sum up, a solid and effective legislative framework for unfair commercial practices in every sales channel, including doorstep selling has already been put in place by the Directive. **Adding more rules to enable Member States to place restrictions on doorstep selling will not eliminate any existing or potential rogue traders.** What is more important is to have **better and stronger enforcement** of the current rules in all Member States. One example of enhancing enforcement would be to launch communication and information campaigns for consumers to help them recognise unlawful practices and exercise their legal rights and in this regard, our industry would be very supportive.

Right of Withdrawal

The Commission is considering removing: (a) the right of withdrawal, where the consumer has used the good in a way exceeding what is necessary to establish the nature, characteristics and the functioning of the goods; (b) the duty of the trader to reimburse the consumer before receiving the goods (not just the termination notice, as currently).

We welcome this approach taken by the Commission, as it aims to address the difficulties faced by traders when consumers return products used more than what is possible for a trader to resell. While we agree that the right of withdrawal is beneficial for the consumer, we think that setting out the above mentioned conditions in the legislation strikes the right balance between the rights of the consumers and the rights of the traders and will remove unnecessary costs for many companies and

[1] Study for the Fitness Check of EU consumer and marketing law- Final report Part 1 (Main report)-page 33

[2] According to the results of the Commission's recent public consultation regarding the fairness of commercial practices and contract terms, on the total number of incidents where consumers have been reportedly misled by traders' marketing practices, door-to-door sales account only for 5%, whereas online sales accounted for 18% and shops for 13%.

SMEs that end up with a number of products that cannot be resold anymore. According to the results of the public consultation, costs and disproportionate burden resulted from these situations have been acknowledged not only by the traders but also by consumer organisations and national authorities[3].

A number of problems were identified by a number of business associations and companies in the replies to the online public consultation, such as issues with determining the diminished value as well as recovering this diminished value from the consumer. Those situations do not achieve the necessary balance of rights and obligations between traders and consumers and have created disproportionate burden for businesses.

We also welcome the Commission's proposal that the reimbursement should take place upon having received the returned goods. Currently, the trader needs to compensate the consumer without having inspected the goods first. This can lead/has led to a series of abuses carried out by consumers.

Penalties

The Commission proposal requires that penalties imposed for infringements of EU consumer law must be *effective, proportionate and dissuasive*. Before they decide on the level of penalties, Member States *would need to take into account a number of criteria* listed in the proposal. Concerning widespread infringements, the Commission proposes that Member States should be able to impose a maximum fine at least up to *4% of the annual turnover* in the Member States concerned.

We welcome the approach of the European Commission to lay down a number of factors to be applied by the national authorities before they determine the level of fines. However, this list should incorporate additional elements, such as the level of damage suffered by the consumers as well as the occurrence of several different infringements committed together in a single case.

Concerning harmonized penalties for widespread infringements, it needs to be reiterated that the Commission has failed to prove the correlation between penalties and better enforcement of the EU Consumer legislation. Higher harmonized penalties will not dissuade rogue traders from violating EU consumer law. On the contrary, strong enforcement through, among others, better support of consumer protection authorities (financial aid and increased number of staff), is key to stopping unlawful behaviors. We also do not think that using the annual turnover as the basis for the calculation of fines is the right way forward. In retail, turnover can be high but profit can be low and therefore, the Commission's approach can put a company out of business. Moreover, we do not agree with allowing for more than 4% of the annual turnover (as a maximum fine) if a Member State wishes to do so; this will again allow for differentiation of penalties, will not ensure a level playing field among companies and will not fulfil the Commission's objective of essentially harmonising penalties across the EU.

Right of Redress Against Unfair Commercial Practices

The Commission proposal would require Member States to provide for individual remedies when consumers are victims of unfair commercial practices. According to the proposal, *as a minimum, the contractual remedies provided by the Member States should include the right to contract termination, while the non-contractual remedies should include at least the right to compensation for damages*.

[3] According to the Commission Report on the summary of the results of the online public consultation, 7 of 16 consumer associations and 10 of 16 MS authorities also acknowledged that traders may face burden due to these rights

We welcome the right for consumers to have individual remedies when unfair commercial practices take place. This will ensure more fair competition between traders and businesses and will strengthen consumer protection. However, we are skeptical about the choice of the minimum remedies made by the Commission.

Concerning contractual remedies, the Commission has proposed as a minimum the contract termination, however it is to be noted that there are less extreme measures, such as the price reduction (discount of the price) which is already provided for by certain Member States and which is not included in the proposal as a minimum right.

Another issue that needs to be clarified is which Directive will apply when an unfair commercial practice leads to non-conformity of goods to a contract: will it be the Sales Directive or the Unfair Commercial Practices Directive?

With regard to non-contractual remedies, it is not clear what kind of "damages" the Commission envisages to cover. Since the provision sets out minimum consumer rights, only material damages should be covered by the proposal (so anything other than the loss of time or physical harm). This should be clarified in the text of the proposal.

Collective Redress

The Commission has presented a proposal aiming to introduce EU rules for collective redress across Member States. While we understand the intention of the Commission to safeguard collective consumer rights at an EU level, **we have serious concerns over the provisions of this proposal as well as the lack of important safeguards** that were already outlined in the 2013 Commission Recommendation.

First of all, we regret the fact that the Commission, instead of focusing on strengthening and enforcing the current alternative redress mechanisms that can provide quick and cheap redress, such as the ADR or ODR, has opted for an approach that encourages more litigation and increases legal complexity.

The proposed EU collective redress would not replace but instead co-exist with current national rules on collective redress, leading to potential overlaps, confusion and increased legal uncertainty. In addition, while the proposal aims to ensure that profit entities such as law firms are excluded from the scope of qualified entities entitled to represent consumers in collective actions, it leaves room for possible abuses: a law firm can potentially ask a qualified entity (potentially even one that the law firm helped to create or fund) to initiate a collective redress action.

Mass litigation can be further encouraged by the lack of criteria determining when a collective redress action can be brought to court. Recital (18) states that "in representative actions for redress the court or administrative authority should verify at the earliest possible stage of the proceedings whether the case is *suitable for being brought as a representative action*, given the nature of the infringement and characteristics of the damages suffered by consumers concerned." However, no definition or criteria determining what can be considered as suitable appears in the proposal.

And while the intention of the Commission is to safeguard consumer rights through appropriate compensation, one cannot understand the reasoning behind the Commission's provisions on the "small individual loss" award: if this case is won by the qualified entity, the money will not go to consumers but instead "to a public purpose serving the collective interests of consumers".

In addition, on the case of "small individual loss", Member States will be prohibited from requiring that the qualified entity has a mandate from consumers to initiative a representative action. The opt-in

principle recognized as one of the safeguards of the 2013 Commission Recommendation is now replaced by an opt-out principle, removing from the consumer the right to freely decide whether he/she wants to take part in the proceedings or not.

Apart from the opt-in principle, a number of other key safeguards outlined in the Recommendation and recognized by the Commission as key factors that can limit abuses, are unfortunately missing from the proposal. For example, the loser pays principle which is essential to preventing plaintiffs from bringing frivolous claims, a ban on punitive damages as well as a ban on contingency fees are not included in the legislative proposal. Last but not least, according to the proposed rules, a previous settlement agreed between traders and consumers for a certain claim would not bring closure to the case (settlement finality) and a number of other claims stemming from the same practice could still be made against the trader.