seldia The European Direct Selling Association

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Position Paper on a European Sales Law

PRIORITIES OF THE DIRECT SELLING INDUSTRY

Seldia is not opposed to an harmonisation of the European sales law as long as it does not represent an extra-layer of legislation in Member States.

1- Restriction of the scope to B2C contractual relations

Seldia does not support the inclusion of B2B relations into the scope of the Regulation. B2B relations are already dealt with in other forums such as the Stakeholders Platform and regulated under the Vienna Convention. Including B2B in this instrument would create difficulties and confusion. Moreover, freedom of contract should remain the standard in B2B relations. This instrument, if endorsed, should focus on B2C relations where discrepancies are frequent.

SMEs should also remain out of the scope of this European Sales Law, the instrument should apply exclusively to B2C relations and the definition of consumer should strictly encompass natural persons.

2- Limitation of the scope to cross-border trade

The instrument should not be limited to cross-border trade. The amount of cross-border transactions remains insignificant for most direct selling companies that will be reluctant to opt for the European Sales Law. This regime will just represent an extra-layer of legislation that traders will not utilise.

3- Proportionate level of consumer protection

Seldia is not opposed to an harmonisation of European Sales Law that would bring a proportionate level of consumer protection. In this proposal, the Commission established a high level of consumer protection that does not encourage traders to opt for such a regime. Traders will not opt for a regime that does not ensure them a similar level of protection.

4- Limited coverage of contractual aspects

There are no benefits for traders while opting for this regime as the Regulation proposed does not cover all contractual aspects. Recourse to national law provision will thus still be necessary to achieve full coverage of all contract terms.

5- Legal counseling costs will not be avoided

Traders will still have to face costs from the need of interpretation of this 2nd regime even if the aim is to reduce these costs on a global scale while trading cross-border.

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Annex 1/ Comments on the content of the Annex 1 to the proposed Regulation on European Sales Law

INTRODUCTORY PART

Article 1 Objective and subject matter
The scope of the Regulation should include services.

Article 2 (q) Definition off-premises contract
The definition of an off-premises contract as well as other general definitions should be harmonised with previous legislation and particularly with the Consumer Rights Directive. The definition proposed by Consumer Rights Directive is clear and simple; the regulation should resume it.

Article 3 Optional nature
This article provides that parties have to agree on the choice of the optional sales law. However, it is not made clear that the trader is the party that can opt for this regime in B2C relations. The Commission should make this clear.

Article 6 Exclusion of contracts linked to a consumer credit
The exclusion of the possibility of application of solutions provided for in the proposal to a consumer credit contact may discourage market participants to subject good sales to this regime.

Article 7 Parties to the contract
SMEs should remain out of the scope of the Regulation. The scope should be limited to B2C contracts.

Articles 8.2 Agreement on the use of the European Sales Law
The necessity to obtain a separate explicit statement from the consumer for conclusion of a contract under European Sales Law may discourage traders to offer such a regime.

MAIN PART

Article 2 Good faith and fair dealing
This article may create practical issues in countries that are not under a common law regime. These principles of 'good faith' and 'fair dealing' are not applicable in all European legal traditions.

Article 4 Interpretation rule
The rule of the interpretation of the Regulation is rather vague. Autonomous interpretation does not preclude other mandatory rules to apply, such as article 6.2 of Regulation Rome I. The Commission has to clarify the relationship of this instrument with Rome I. Besides, regarding interpretation, national courts will always tend to be influenced by national provisions and precedents in this field.

Article 21 Burden of proof
The fact that the trader bears the burden of proof on information requirement can be a deterrent to opt for this regime. At least, the Commission should include a rule on reversal of the burden of proof at under certain conditions.

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Article 31 §3 Definition of offer
This provision could lead to difficulties in common law countries where stating a price in advertising does not constitute an offer to sell at that price. There are adequate requirements in consumer law that protect

the consumer from unfair and misleading transactions. Provided that the consumer is aware of the price before the contract is completed should be sufficient. The Commission should re-draft this clause.

Article 44 Obligation of the trader in the event of withdrawal
The problematic issue present in the Consumer Rights Directive is solved by the Sales Law. The article 44 § 3 establishes that the trader can withhold the reimbursement until he receives the goods back. The Commission must uphold this provision. However it should be made clear that the seller should have the time and opportunity to accurately check the product before reimbursement to assess any damage or loss caused by the consumer.

In § 4, concerning off-premises contracts the term "by their nature" should be defined in a note to determine which are the goods that can be returned by post or not.

Article 64 Interpretation in favour of the consumer
This article may be a deterrent for businesses to choose the European Sales Law as any term that would be unclear would be interpreted in favour of the consumer. The Commission should re-draft this article adopting a balanced position between both parties in the contract.

Article 69 Contract terms derived from certain pre-contractual statements
Considering pre-contractual statements as automatically included as contract terms provides legal insecurity for traders and could be a deterrent to offer this regime.

Article 74 Unilateral determination by a party
The notion of "grossly unreasonable" determination of the price is ambiguous and could create issues in interpretation. The concept should be clarified.

Article 103 Conformity criteria
Under the point e) the Commission opens the 'Pandora box' by introducing the following wording "as the buyer may reasonably expect to receive;". The wording should not be vague allowing for interpretation. The Commission should delete this wording that would allow consumers to make unjustified claims.

Article 112 Return or replacement
The consumer should not be allowed to make unlimited use of the goods before return or replacement. Consumers should be liable to pay for any use that would cause a damage or loss to the good. The Commission should adapt the wording of article 114 as follows:
"(*2) The buyer is not liable to pay for any use made of the replaced item in the period prior to the replacement, except any loss of damaged directly caused by this use.*"

Article 120 Price reduction
Price reduction should not be a remedy for non-performance. Direct Selling companies terminate the contract and reimburse consumers in most of the cases.

Article 178 & 179 Prescription period
Two periods are proposed by the Commission in the text, a short period of 2 years and a long period of 10 years. The long period seems excessive knowing that in general, European legislations provide for a 6 years period. The Commission should harmonise the prescription delay.

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SELDIA comparative exercise of national consumer law and CESL: Poland, UK and France

Below you find a list of examples where legal provisions in national consumer law are more favorable for the consumer than those included in the proposed Common European Sales Law. The following examples were provided by national member associations of Seldia (European Direct Selling Association) and focuses on the cases of the EU member states Poland, UK and France.

1. Poland

The following are selected examples of Polish law provisions stipulating solutions which are more favourable or more convenient for the consumer, as compared to the solutions proposed in the draft regulation on the Common European Sales Law (the "Regulation") and the limitations stipulated in the Regulation, which enforce the application of domestic law.

- Under Art. 6 item 2 of the preamble to the Regulation, the Common European Sales Law may not be used for contracts between a trader and a consumer where the trader grants or promises to grant to the consumer credit in the form of a deferred payment, loan or other similar financial accommodation. Therefore, a consumer who prefers to conclude a contract involving a consumer credit (in the abovementioned form), has no choice between the law systems (national and European). In such a case the national system of law will be applicable (e.g. Polish law, where there is no limitation similar to the limitation in the Regulation).

- The Regulation excludes the possibility to choose the Common European Sales Law in case of contracts for the performance of services (except for contracts for the performance of related services). Thus, a consumer who would like to conclude a contract for the performance of services is obliged to conclude such contract under the national system of law. Therefore, if a consumer would like to conclude with the same entrepreneur other contracts (apart from a contract for the performance of services, which are not related services), then he/she may prefer the national system of law, e.g. Polish law. It results from the fact that such system will be applicable to each of the concluded contracts. If the consumer selected the Common European Sales Law for one of the contracts, and the domestic law was applicable to another contract, then there would be additional difficulties e.g. with the differentiation of rights enjoyed by the consumer on the basis of particular contracts, the dates for using particular rights, etc.

- Under the Regulation, the obligation to provide information when concluding a distance or off-premises contract does not apply, if the price or the total price of the contracts (where multiple contracts were concluded at the same time) does not exceed EUR 50 or the equivalent sum in the currency agreed for the contract price. Under the Polish regulations, the provisions concerning off-premises contracts (including information obligations) do not apply to contracts concluded casually in minor matters of everyday life of the value of the object of the contract not exceeding the equivalent of EUR 10. Therefore, in case of minor contracts concerning the matters of everyday life, the selection of the Polish law will make it possible for the consumer to obtain detailed information on the product and the terms and conditions of sale thereof (which is excluded under the Common European Sales Law).

- Under the Regulation it is possible to evade the consequences of a contract entered into as a result of a mistake within 6 months (after a party learned of the mistake). Pursuant to the Polish law, evasion of the consequences of such mistake may take place within one year from the date of detection thereof. Therefore, if the consumer chooses Polish law, he/she will enjoy a longer period for evasion of the consequences of the declaration of will made as a result of the mistake.

- The Polish provisions of law provide the consumer with statutes of limitations of 10 years. The Regulation stipulates 2-year statutes of limitations (so-called short statutes of limitations) applicable with respect to the claims of any creditor (irrespective of the fact whether this is an entrepreneur or a consumer).

2. United Kingdom

A consumer whose governing law would otherwise be English law, would be unwise to agree to have his contract governed by the proposed European Sales law. His rights are more precisely stated in English law and they are in some important respects more generous in English law than they are in the proposed European Sales law. The following are some examples of the problems.

- ***Statement***
  Article 8.3 states that the proposed European Sales Law can be adopted in full but cannot be adopted in part by the parties.

  Problem
  The problem with the above is that English law has a freedom of contract principle, namely that the parties are free to make what contract they wish. If the parties have decided to adopt, and have expressly agreed to adopt a specified part of the European Sales law, what is the English court to do in the event that this issue comes before the court? Is the court to decide that the specified part of the European Sales law is not part of the contract, *i.e.* that the contract is valid and takes effect without the specified part of the European Sales law? Is the English court then to fill that part of the contract with such terms as English law would imply in the absence of any express agreement of the parties on the matter in question? Is the court to do that, even if the result is the exact opposite of what is stated in the part of the European Sales law which the parties had tried to include by specifying it in their contract?

- ***Statement***
  Article 122 of Annex I creates a 2 year limitation period. The consumer cannot rely on any lack of conformity unless the consumer gives notice of the non-conformity within two years.

  Problem
  Under English law, the general limitation period in contract claims is 6 years (except where the claim is for personal injuries, where the period is three years). Provided the consumer/buyer commences legal proceedings within that limitation period, he is entitled to maintain his claim. He does not have to have given the seller any prior notice of the lack of conformity.

- ***Statement***
  Article 161 of Annex I states that damages are recoverable only for losses which were foreseen or foreseeable.

  Problem
  This provision does not explain what the position is where the *type* of loss was foreseeable but the *amount* of that loss was unforeseeable. English law would generally allow such losses to be recovered in their entirety.

- ***Statement***
  Article 2(c) of Annex I defines "loss" as:
  "Economic loss and non-economic loss in the form of pain and suffering, excluding other forms of non-economic loss such as impairment of the quality of life and loss of enjoyment."
  Later articles on damages all refer to the damages being damages for "loss".

  Problem
  English law is more generous to the buyer/consumer. Suppose the buyer/consumer suffers personal injury (e.g. he loses a leg or he is made blind) caused by the defective product of unsatisfactory quality. In English law, the buyer/consumer can make a claim in contract for pain and suffering. In addition, in English law the buyer/consumer can also claim for the consequent impairment to his quality of life and loss of enjoyment arising from the personal injuries (e.g. his inability to read or see).

3. France

Le vingt-huitième régime optionnel prévu dans le projet de la Commission européenne ne pourra trouver, en France, une application sans difficultés.

Du point de vue du principe de l'intelligibilité des lois, l'application du régime optionnel peut être perçu comme portant atteinte à ce principe dans la mesure où la coexistence de plusieurs régimes de droit contractuel serait de nature à positionner le consommateur dans une situation où il sera difficile, pour lui, de déterminer quelles dispositions qui lui seront applicables.

En termes d'application technique de ce régime dans l'ordre juridique français, il semblerait que son application puisse porter atteinte au droit primaire en mettant à mal le dispositif de protection pénale prévu par les lois françaises en cas de non respect de certaines dispositions protectrices du consommateur. En effet, l'article L. 121-28 du Code de la consommation prévoit que : « *Toute*

infraction aux dispositions des articles L. 121-23, L. 121-24, L. 121-25 et L. 121-26 sera punie d'une peine d'emprisonnement d'un an et d'une amende de 3750 € ou de l'une des deux peines seulement ». « Les personnes physiques déclarées coupables encourent également à titre de peines complémentaires l'interdiction, suivant les modalités prévues par l'article 131-27 du Code pénal, soit d'exercer une fonction publique ou d'exercer l'activité professionnelle ou sociale dans l'exercice ou à l'occasion de l'exercice de laquelle l'infraction a été commise, soit d'exercer une profession commerciale ou industrielle, de diriger, d'administrer, de gérer ou de contrôler à un titre quelconque, directement ou indirectement, pour leur propre compte ou pour le compte d'autrui, une entreprise commerciale ou industrielle ou une société commerciale. Ces interdictions d'exercice peuvent être prononcées cumulativement ».

L'application du vingt-huitième permettrait ainsi à un professionnel de s'écarter de ces dispositions pénales et, dans la mesure où les institutions européennes ne peuvent légiférer directement en matière pénale, aucune disposition ne sera de nature à permettre le respect du dispositif de protection pénale susvisé.

Dans la mesure où le professionnel pourra, sans courir le risque de se voir pénalement sanctionné, s'écarter de certaines dispositions protectrices du droit de la consommation, il sera alors naturel pour le consommateur d'opter pour le régime prévu par le droit national. Car en effet, le non respect du formalisme imposé aux professionnels pour l'édiction de leurs bons de commande est pénalement sanctionné et entraîne mécaniquement l'annulation du contrat en France tel que cela est prévu par les articles développés ci-dessous. L'article L. 121-23 prévoit que : « *Les opérations visées à l'article L. 121-21 doivent faire l'objet d'un contrat dont un exemplaire doit être remis au client au moment de la conclusion de ce contrat et comporter, à peine de nullité, les mentions suivantes :*
1° Noms du fournisseur et du démarcheur ;
2° Adresse du fournisseur ;
3° Adresse du lieu de conclusion du contrat ;
4° Désignation précise de la nature et des caractéristiques des biens offerts ou des services proposés ;
5° Conditions d'exécution du contrat, notamment les modalités et le délai de livraison des biens, ou d'exécution de la prestation de services ;
6° Prix global à payer et modalités de paiement ; en cas de vente à tempérament ou de vente à crédit, les formes exigées par la réglementation sur la vente à crédit, ainsi que le taux nominal de l'intérêt et le taux effectif global de l'intérêt déterminé dans les conditions prévues à l'article L. 313-1 ;
7° Faculté de renonciation prévue à l'article L. 121-25, ainsi que les conditions d'exercice de cette faculté et, de façon apparente, le texte intégral des articles L. 121-23, L. 121-24, L. 121-25 et L. 121-26 ».

L'article L. 121-24 prévoit que : « *Le contrat visé à l'article L. 121-23 doit comprendre un formulaire détachable destiné à faciliter l'exercice de la faculté de renonciation dans les conditions prévues à l'article L. 121-25. [Articles R. 121-23 à R. 121-26, reproduits ci-dessous]. Un décret en Conseil d'Etat précisera les mentions devant figurer sur ce formulaire. Ce contrat ne peut comporter aucune clause attributive de compétence. Tous les exemplaires du contrat doivent être signés et datés de la main même du client* ».

L'article L. 121-25 prévoit que : « *Dans les sept jours, jours fériés compris, à compter de la commande ou de l'engagement d'achat, le client a la faculté d'y renoncer par lettre recommandée avec accusé de réception. Si ce délai expire normalement un samedi, un dimanche ou un jour férié ou chômé, il est prorogé jusqu'au premier jour ouvrable suivant. Toute clause du contrat par laquelle le client abandonne son droit de renoncer à sa commande ou à son engagement d'achat*

est nulle et non avenue. Le présent article ne s'applique pas aux contrats conclus dans les conditions prévues à l'article L. 121-27 ».

L'article R. 121-3 prévoit que : « *Le formulaire détachable destiné à faciliter l'exercice de la faculté de renonciation prévu à l'article L. 121-25 fait partie de l'exemplaire du contrat laissé au client. Il doit pouvoir en être facilement séparé. Sur l'exemplaire du contrat, doit figurer la mention : "Si vous annulez votre commande, vous pouvez utiliser le formulaire détachable ci-contre"* ».

L'article R. 121-4 prévoit que : « *Le formulaire prévu à l'article L. 121-24 comporte, sur une face, l'adresse exacte et complète à laquelle il doit être envoyé. Son envoi à cette adresse dans le délai de sept jours prévu à l'article L. 121-25 a pour effet d'annuler la commande sans que le vendeur puisse invoquer une erreur dans le libellé de ladite adresse, telle qu'elle figure sur le formulaire détachable, ou un défaut de qualité du signataire de l'avis de réception, à cette adresse, de l'envoi recommandé exigé par l'article L. 121-25 pour la dénonciation du contrat* ».

L'article R. 121-5 prévoit que : « *Le formulaire prévu à l'article L. 121-24 comporte, sur son autre face, les mentions successives ci-après en caractères très lisibles :*
1° En tête, la mention "Annulation de commande" (en gros caractères), suivie de la référence "Code de la consommation, articles L. 121-23 à L. 121-26" ;
2° Puis, sous la rubrique "Conditions", les instructions suivantes, énoncées en lignes distinctes : "Compléter et signer ce formulaire" ; "L'envoyer par lettre recommandée avec avis de réception" (ces derniers mots doivent être soulignés dans le formulaire ou figurer en caractères gras) ; "Utiliser l'adresse figurant au dos" ; "L'expédier au plus tard le septième jour à partir du jour de la commande ou, si ce délai expire normalement un samedi, un dimanche ou un jour férié ou chômé, le premier jour ouvrable suivant" (soulignés ou en caractères gras dans le formulaire) ;
3° Et, après un espacement, la phrase :"Je soussigné, déclare annuler la commande ci-après", suivie des indications suivantes, à raison d'une seule par ligne : "Nature du bien ou du service commandé...". "Date de la commande...". "Nom du client...". "Adresse du client...".
4° Enfin, suffisamment en évidence, les mots :"Signature du client..." ».

L'article R. 121-6 prévoit que : « *Le vendeur ne peut porter sur le formulaire que les mentions prévues aux articles R. 121-4 et R. 121-5, ainsi que des références d'ordre comptable* ».

Il est important de rappeler que le non respect de ces dispositions est sanctionné par les peines prévues à l'article L. 121-28 susmentionné.

Il doit être précisé qu'en droit français l'application du principe selon lequel nulle infraction pénale ne peut servir d'objet à un contrat entraîne automatiquement l'annulation de celui-ci. Ainsi la Cour de cassation a prononcé la nullité d'un contrat ne respectant pas les dispositions de l'article L. 121-23 (*Cass. 1ère Civ., 2 oct. 2007, Bull. civ. 1, n° 316*).

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