Institut für Europäisches Wirtschafts-
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DOOR TO DOOR SELLING – PYRAMID SELLING – MULTI LEVEL MARKETING

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FINAL REPORT

VOLUME I: OUTLINE OF A POSSIBLE APPROACH TO REGULATION

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PREFACE

The study seeks to provide an answer to two questions: (1) whether, and to what extent, is it feasible to adopt a common approach to doorstep and distance selling contracts, (2) whether and to what extent, is it necessary to have European rules on pyramid/snowball systems and multi level marketing? The answer this study gives is based on an extensive comparative analysis of the way in which the Member States have implemented the Doorstep Selling Directive 85/577/EC into national law as well as of the way in which Member States deal with pyramid/snowball systems and multi level marketing.

Numerous colleagues in the Member States have provided invaluable assistance in the completion of the comparative analysis. Geraint Howells produced the report on the United Kingdom. The evaluation of the multi level marketing system made it necessary to analyse this relatively new marketing strategy in detail. This would not have been possible without the invaluable support of multi level marketing companies, national direct selling organisations and their European counterparts. National consumer organisations and the European consumer organisation did their part to promote the consumer point of view. The service of DG XXIV has accompanied us throughout the study with helpful and encouraging comments.

We would like to thank them all.

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Berlin, September 1999

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GLOSSARY OF TERMS[1]

Direct Selling	Direct Selling is the marketing of consumer goods and services directly to consumers in their homes (the homes of friends, at their workplace or similar places away from shops), through explanation or demonstration by a salesperson, for the consumer's use or consumption
Multi Level Marketing	Multilevel Marketing is a form of Direct Selling where Direct Sellers are independent (buy/sell-) dealers who may purchase the company's products at a rebated price for resale or own and the family's use or consumption, resell them to consumers and/or independent dealers and recruit (sponsor) other independent dealers who in turn may recruit additional independent dealers. They receive overrides based upon their own sales (or purchases) of such products as well as upon the sales (or purchases) of independent dealers in their direct recruiting line to the extent defined by the company marketing plan.
Company	= Direct Selling company supplying the consumer products, owning the brand name and utilising a sales organisation
Direct Sellers	= sales people = sales persons = salesmen and saleswomen including the representatives, agents, dealers, managers, distributors and MLM participants.
Representatives	= reps employed Direct Sellers selling in the name of the company and earning salaries which are subject to withholding taxes and social security charges.
Agents	= commission sales people independent Direct Sellers selling in the name of the company and earning commissions
Dealers	independent Direct Sellers buying from the company and selling in their own name to consumers, earning margins.

[1] The definitions are taken from the FEDSA.

Managers	= sales managers independent Direct Sellers in an agent organisation selling to consumers and assisting a number of agents and/or other managers, earning commissions and overrides
Distributors	= dealer-distributors independent Direct Sellers in a dealer organisation buying from the company and selling in their own name to consumers and/or dealers (or other distributors), earning margins and overrides.
Participants	= multilevel marketing (MLM) participants including dealers and distributors.
Independent Contractors	free, independent and self-employed Direct Sellers (agents, managers, dealers, distributors) paying their own expenses and taxes, being responsible for times of illness, unemployment and old age.
Selling	includes contacting of potential customers, explaining and demonstrating products person-to-person or at parties, advising and taking of orders.
Recruiting	Negotiating with an individual to make it join a Direct Selling company's sales organisation by signing a Direct Seller's agreements.
Sponsoring	recruiting in MLM organisation, including the training, motivating and assisting or the independent dealers in the direct recruiting line. A sponsor (usually part of an upline chain) sponsors a new participant (sponsorship) and thereby starts a recruiting line (sponsorline), the downline chain of sponsorships or generations.
Earnings	include salaries of representatives, commissions of agents, margins of dealers, overrides of managers, dealers and distributors, rewards as incentives for Direct Sellers.
Levels	buying and/or selling parties in dealer organisations including the company, distributor, dealer and the final consumer.

PART I. EXECUTIVE SUMMARY

A. Objective

Directive 85/577/EEC (Doorstep Selling Directive) was among the first to be adopted to implement the objectives of the first consumer programme. It sought to protect the final consumer in situations where an element of surprise may lead him to conclude a contract he did not intend to conclude. Directive 97/7/EC[2] (Distance Selling Directive) complements Directive 85/577/EEC[3]. The Doorstep Selling Directive covers contracts which are concluded away from the business premises of the supplier. The same is true for the Distance Selling Directive. However, it is not the fact that the supplier and final consumer meet in an unusual place, but the lack of physical absence of both contracting partners which creates a situation in which the final consumer needs to be protected. Both Directives, together, regulate types of contacts which are different from the ordinary sales transaction at business premises. The difference in style between the two Directives illustrates the progress of consumer policy during the last 15 years. The Distance Selling Directive 97/7/EC seems much more developed in its regulatory approach. Nevertheless, it is true that all the rules on information, the right of withdrawal, performance and redress can be found in rudimentary form in either the Doorstep Selling Directive or in other secondary Community law measures which have been adopted after the Single European Act coming into force.

Therefore the *first* objective pursued here is to test whether it is possible and feasible to develop common rules for both types of consumer transactions, for doorstep selling and distance selling contracts. In doing so, however, all consumer directives (as far as they are relevant) have to be taken into account to provide a full picture of the rights and obligations as they stand today in the field of consumer protection. This task is an attempt to bring the Doorstep Selling Directive up to-date, by comparing it with its new counterpart, the Distance Selling Directive 97/7/EC and by taking into account of other principles of European consumer law.

The *second* objective is more complex, although it is limited to the Doorstep Selling Directive. When this piece of legislation was adopted in 1985, Member States were unable to agree on the need to regulate the direct marketing business as a whole. There were early attempts to extend the scope of the Directive beyond the civil law provisions on the right of withdrawal and to lay down standards on direct marketing. These efforts failed because some Member States expressed their concern about the classical direct selling business (here called 'Single Level Marketing')[4] as such and wanted to avoid the impression that the Directive could be understood as legitimising this form of business. These objections have still not been fully overcome although the Single Level Marketing business seems widely accepted in the European Community now. The situation, however, has changed due to the emergence of a relatively new marketing strategy, termed network marketing or Multi Level Marketing (MLM). There is, as yet no

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2 OJ L 144/19, 04.06.1997.

3 OJ L 372/31, 31.12.1985.

4 Single Level Marketing should not be mixed up with the 'Single Market' concept.

European-wide data on the MLM business available[5]. The only statistics which exist cover the Single and Multi Level Marketing businesses.

STATISTICS 1998
(FEDSA members only)

Year-end conversion rates applied

Countries	Nbr. of Cles	Direct Selling Salesforce			Employees in prod and admin	Sales figures Total sales in million excluding VAT			
		Direct Salespeople	Women %	Part-time %		National currencies		SUS	ECU
Austria	12	12.500	77	56	772	2.327	ÖS	198	169
Belgium	11	11.600	92	80	823	3.301	BEF	96	82
Denmark	5	10.100	63	91	99	221	DKR	35	29
Finland	18	46.100	72	95	250	517	FMK	102	87
France	91	200.000	68	76	3.329	6.900	FF	1232	1051
Germany	27	203.000	90	90	6.360	4.000	DM	2395	2043
Greece	10	134.200	86	80	539	19	DRA	70	60
Ireland	14	9000	70	80	665	17	IR£	24	22
Italy	34	136.000	76	98	2.268	1.558000	LIT	942	804
Luxembourg***	7	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Netherlands	14	30.000	70	80	600	26.000	NLG	138	118
Portugal	6	23.000	82	90	515	9.600	ESC	92	47
Spain	15	112.000	92	91	2.855	97.600	PTA	687	587
Sweden	41	35.000	90	95	1.700	1.041	SKR	129	110
UK	51	430.000	74	95	10.000	835	£	1395	1190
EUR. UNION	**356**	**1.392.600**	**77**	**85**	**30.761**			**7495**	**6399**
Croatia**	11	45.000	80		250	N/A		N/A	N/A
Czech Rep.	5	93.785	N/A	N/A	348	2.346	CZKR	78	67
Hungary	10	107.453	68	88	426	19.074	HUF	88	76
Norway	11	55.000	40	98	209	501	NOK	66	56
Poland	9	280.000	95	90	1.100	650	PLZ	186	158
Russia	8	420.000	75	90	410	N/A	RUR	271	231
Slovakia*	8	92.000	83	97	151	923	SKK	26	24
Slovenia**	13	15.500	89	90	150	6.975	SIT	49	39
Switzerland	31	5.629	48	85	1.074	180	SF	131	112
Turkey	7	325.000	90	90	869	N/A	TRL	110	94
EUROPE	**468**	**2.831.967**	**77**	**88**	**35.748**			**8500**	**7256**

[5] The most recent study has been undertaken by PriceWaterhouseCoopers, Socio-Economic Impact of the Direct Selling Industry in the European Union, Brussels, November 1999. Six Member States have been investigated. Again SLM and MLM have been examined together. It seems, however, as if roughly speaking, two thirds of the turnover made in these countries result from SLM and one third from MLM.

* 1997 figures.

** 1996 figures.

*** The Luxembourg DSA, admitted as FEDSA's 25th member in 1997, was created with a view to improving the restrictive legal environment for direct selling in this country.

Despite its economic importance MLM marketing techniques have been, and still are, criticised for containing elements of the well-known, but usually banned, Pyramid and Snowball Systems. This is because Multi Level Marketing allows, at least in theory, for the erection of an endless ladder of marketing levels. The underlying business strategy is not just based on selling products to final consumers, but aims to turn final consumers into consumers/direct sellers and to make them part of the marketing plan. World-wide operating MLM companies are pushing hard to be recognised as serious businesses.[6] They fight for recognition in the Member States and strongly advocate their approach as a means to combat unemployment, as they claim it provides everybody with a chance to enter the system as a direct seller. Thus, aspects of consumer protection, the danger of geometrical progression and the protection against unfair and misleading business practices become mixed up with social policy objectives. In a market economy everybody should have a chance to set up his own business. In that respect the MLM companies offer new perspectives. Any such person, however, needs information on the business in order to be able to participate in the market. The legislative activities of some Member States show that there are information deficiencies which have to be overcome, because those who are offered a chance to get into business, remain low-income consumers/direct sellers.[7] The new marketing strategy makes it much more difficult to draw a clear cut borderline between the final consumer and the direct seller in the traditional sense. It seems as if a new category of consumers is about to emerge here, which can be covered fully neither by the notion of the final consumer nor by the notion of a direct seller.

Our task is to determine if rules are needed to regulate the marketing strategies of this type of 'door-to-door business', if so, which rules should be adopted and who should these be the addressed to. Such a task requires a clear definition of illegal Pyramid and Snowball Systems and an answer as to whether MLM strategies could be regarded as being legal and if so, under what conditions. The rules to be discussed here may be understood as filling a 'lacuna' which has been left in the original version of the Doorstep Selling Directive.

	Doorstep selling	Distance Selling
Civil law rules	X	X
Marketing practices rules	?	X

B. The Necessity for a Revised and Supplemented Legal Framework

The reasons for reform differ according to the objective concerned. It will have to be demonstrated that there is a need to distinguish on the one hand the amendments to the civil law provisions of the Doorstep Selling Directive so as to correspond to the requirements of the Distance Selling Directive, and on the other hand, the possible regulation of marketing practices such as Pyramid Selling, Snowball System, Multi Level

6 The study prepared on behalf of the Federation of European Direct Selling Associations (FEDSA) by Oppenheimer Wolff & Donnelly LLP with the support of the Amway Corporation, Brussels, March 1999 must be seen in this context.

7 Cf. the figures in PriceWaterhouseCoopers, loc. cit., 135 et seq.

Marketing and Single Level Marketing. This discussion will conclude with the proposal to integrate a completely new section into the Doorstep Selling Directive.

I. The Need to adopt Supplementary Regulation

The starting point for realising the two objectives defined above is the incomplete and outdated Doorstep Selling Directive. It is incomplete because the Directive does not cover trade practices, it is outdated because European Consumer Policy as set out through post Single Act Directives reaches far beyond the original regulatory approach. Achieving the two objectives would therefore involve supplementing the existing approach and adapting it to the needs of today's direct marketing.

II. Coherence between Direct and Distance Selling Marketing Strategies

The traditional direct marketing business, here termed Single Level Marketing, has its roots in the classical 'door-to-door' business. Most of the companies have been in business for decades and are operating at an international level. They have sold their products literally 'at the doorstep', they have rarely approached final consumers at their workplace or in public areas. Today, however, the classical door-to-door business seems to loose importance.[8] The Distance Selling industry has its roots in the mail order business. The new information technologies and most of all, electronic commerce, have paved new ways to do business for established companies, but also for new companies that have emerged in recent years.

However, there is an obvious and well recognised trend all over Europe for companies to use Direct and Distance Selling strategies if they want to approach all possible customers. There are final consumers who buy their products at home-parties and are satisfied.[9] There are, however, other groups of final consumers who would be interested in buying the products but are not willing to deal with direct marketing methods. They may prefer using the new means of communication, e.g. internet. So there seems to be some pressure, in some, but not all, parts of the Single Level Marketing industry to merge their marketing strategies. Conversely the same is true. Mail order firms can no longer be sure that final consumers are loyal to their company. They may try new means of ordering, relying on electronic commerce or on Multi Level Marketing strategies. The latter have developed in the United States and have made their way to continental Europe via the United Kingdom. The Multi Level Marketing industry relies entirely on direct marketing strategies. This is due to the overwhelming importance of recruitment, which is based on direct personal contact with the final consumer who is invited to join the system. There may well be a merging of strategies in the near future when the industry starts to include the new means of communication in their marketing strategy. In fact, at present, all industries combine different means of communication although not in a strategic way. There is a difference depending upon whether a company uses the telephone to get confirmation of a doorstep selling contract or whether a company builds up an in-house marketing strategy which relies on both, making contact directly and making contact at a distance.

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8 Cf. the figures in PriceWaterhouseCoopers, loc. cit. 86 et seq.

9 Cf. the figures in PriceWaterhouseCoopers, loc. cit., 90 et seq.

Supposing these findings are correct, there is a need for the further perspectives of both, the final consumer and the companies, to put the Doorstep and Distance Selling contracts on an equal footing. Let us assume that a company overtly makes use of both marketing strategies. Its representatives would then be obliged to have two types of contracts at hand depending on the marketing strategy used. If the borderline between the two strategies can easily be drawn, if only one marketing strategy is used, the differences between the two legal frameworks might be upheld. But the differences may be dysfunctional when the representatives merge both strategies in concluding one contract. The legal situation is far from clear here and non legally trained representatives, direct sellers or other participants[10] will find themselves in an uneasy situation. The final consumer is in an even more uncomfortable position. In view of the obvious differences between both Directives, the final consumer might be tempted to claim the protection given under the Distance Selling Directive. The clash of interests is obvious. Therefore, there is a strong argument for harmonising the two Directives on the same level. Whether and to what extent such an approach is feasible depends on the concrete issues of consumer information, the right to withdrawal and performance and payment arrangements.

III. Lack of an Appropriate Framework for the New Marketing Strategies

The Member States are struggling hard to get to grips with Multi Level Marketing strategies. Most of them asses the legality of Multi Level Marketing systems within the framework of legislation that prohibits Pyramid Selling or Snowball Systems, no matter whether the criteria are taken from penal, administrative or civil law. There are only two countries in the European Community where specific legislation is devoted to Multi Level Marketing. The UK trading scheme gives a green light to such a marketing strategy as long as certain basic criteria are respected. The background analysis provides a detailed overview of the regulatory approach and its handling by the courts in all Member States, Norway and the United States.

MLM companies who try to market their products Europe-wide face a difficult situation. The legislative approaches chosen in the Member States differ considerably, not only in the choice of penal, administrative or civil law provisions, but also in the application of the respective laws. The attitude taken by the courts/administrative bodies vary from rejection (Germany[11]) via uncertainty (France[12] and Belgium[13]) to confirmation (UK).

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10 The term "participant" is used as a general term for all members of Snowball Systems, Pyramid Selling and Multi Level Marketing companies. We understand the FEDSA terminology so as to cover all persons joining the MLM companies independent of their status as dealer/distributor or direct seller.

11 See vol. II, part IV B. VI. 2. b).

12 One court has condemned a Multi Level Marketing company under the penal code. This decision has, however, been set aside by the Court of Appeal. An internal official note of the Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes, makes clear that Multi Level Marketing is not covered by the anti-pyramid legislation as long as it complies with the requirements explained in this note. However, the note still recognises a certain risk: "This is why information documents explaining the organisation of the company must not contain systems, schemes or figures which may induce the salesperson to believe that the will earn illusory income through a geometric progression of the number of recruits. Advertising should not motivate recruitment by inducing to believe that earnings are obtained by a mere multiplication of new members".

13 In Belgium there is only one decision on Multi Level Marketing of the court of appeal.

The companies can therefore legitimately expect to receive guidance from the European Community and the Member States in the shaping of their marketing strategies. A harmonised approach could put the marketing strategy into a European framework, thereby balancing the interests of the company to get free access against the final consumers' interests to be protected adequately against abuses.

Little attention has been devoted so far to the role of the final consumer in the Multi Level Marketing strategy. This is all the more astonishing as final consumers become direct sellers from one moment to the next. They do no longer buy to consume, they buy to sell. These 'consumers' switch their role and change their legal status and therewith the rights and duties incumbent upon them. In reality these consumers/direct sellers quite often remain low income-consumers/direct sellers. It seems as if a new legal status is about to be established here, a person who is no (more) a mere final consumer and not (yet) a full trader (direct seller). We deliberately refer to the definition of the direct seller in the FEDSA glossary,[14] although it might well be considered to introduce for the same type of activities the notion of a 'trader'. The status of such a consumer/direct seller must not be a temporary one, it may well last for years, but if the consumer/direct seller succeeds in his business, he is no longer a consumer/direct seller but a direct seller in the proper sense.[15] There are considerable differences in the legislation of the Member States with regard to the degree to which these 'consumers' may still claim protection under the consumer protection laws. The EC legislation restricts the scope of application to the final consumer, the only requirement that the goods or services must be intended for private consumption. Attempts by the Commission to widen the notion of the final consumer beyond such a narrow understanding have not yet gained momentum. The European Court of Justice has confirmed a narrow reading of the consumer law directives.[16] Final consumers who turn into direct sellers do no longer benefit of consumer protection rules. There is a need, however, to find an appropriate definition and to pave the way for a new understanding of the consumer in the direct selling business.

IV. The Consumer/Direct Seller

The ordinary definition of a consumer is as follows: A natural person acting for purposes other than commercial trading. The problem with MLM and Pyramid Selling is that this definition fails to cover the typical problems resulting from the recruitment of consumers as direct sellers. Persons without any commercial knowledge or business experience become direct sellers and must comply with all the responsibilities and obligations of a direct seller. According to the MLM companies, the average income of a direct seller is relatively low.[17] Most of them only work part time or even less, e. g. on a temporary basis (in order to have money for holidays or Christmas). As they are considered direct sellers from the very beginning of their business activities, their activities fall outside the scope of application of most consumer protection provisions (only in rare national exceptions, e. g. in Germany under the Consumer Credit Act if the contract serves to

14 See, vol. II, glossary.

15 Cf. PriceWaterhouseCoopers, loc. cit., 77.

16 Established practice of the ECJ, see judgment, 17.3.1998, Case-45/96 – Dietzinger, ECR 1998, I-1199.

17 Cf. figures on the average income in PriceWaterhouseCoopers, loc. cit, 135 et seq.

establish a business).[18] From a legal point of view they are treated in the same way as owners of big firms with employees and high sales. In fact, many of them are no longer consumers. They purchase products for resale without being real direct sellers. Neither do they have the knowledge nor the energy to build up their own business, instead they remain passive and only desire an additional source of income.

[18] France, Greece and Spain do not restrict their doorstep selling legislation to the final consumer in the sense of EC legislation, see for a detailed analysis vol. II part I A. II. 2.a), however they do not integrate the consumer who is about to establish a new business.

C. Issues to be Addressed and Approach Chosen – the Technical Aspects[19]

I. Methodology

The issues to be addressed have been divided into two categories :

(1) those which concern the possible adaptation of Directive 85/577/EEC to resemble more closely to Directive 97/7/EC, such as the scope of a revised Directive 97/7/EC; possible exemptions; provisions of information to the consumer prior to the conclusion of the contract and during its performance; information about and conditions for exercising the right of withdrawal; requirements regarding the performance of the contract and payment by card. Specific emphasis is placed on the importance and the justifiability of *exemptions* as well as on the shaping of the *right of withdrawal*; and

(1) those which concern both the technical and the new aspects[20], such as judicial and administrative redress; the binding nature of the proposed rules, the interrelationship with other directives (Community rules); the minimal harmonisation clause, consumer information on the proposed rules by Member States and by the business Community and last but not least the feasibility of complaint systems.

In our search for feasible and politically acceptable solutions we have considered

(1) the Member States legislation, which was adopted or revised after the adoption of Directive 85/577/EC on doorstep selling. An in-depth analysis allowed us to obtain a deeper insight not only of the legal provisions but also of the role and importance of these provisions in practice before the courts. As a consequence of this analysis we have been able to discover the degree to which the Directive has led to common rules throughout the Community,[21] and

(2) Directive 97/7/EC on Distance Selling. This Directive had been discussed extensively in the Community and the Member States for more than five years before it was finally adopted. Therefore Directive 97/7/EC provides a solid ground for a comparative analysis of the two Directives. We have taken the relevant provisions of the Distance Selling Directive and tested their feasibility for the regulation of doorstep selling contracts.

II. Civil Law Regulations in the Revised Doorstep Selling Directive

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19 The term is taken verbatim from the tender offer no. XXIV/98/A2/004 under which it had to be examined whether and to what extent the Doorstep Selling Directive may be adapted to the Distance Selling Directive.

20 This term is taken again verbatim from the tender offer no. XXIV/98/A2/004 under which Snowball Systems and Multi Level Marketing had to be examined in order to prepare models for regulation.

21 There is a summary at the end of each point of comparative analysis which provides in table form an overview over all Member States.

The scope of the Directive is determined by the marketing strategy. That is why in principle all sorts of contracts should be covered by the revised Directive so long as the contract is concluded away from the business premises. A clarification would be helpful to avoid litigation over the exact scope of Directive 85/577/EC as it currently stands.[22] The real problems, however, result from the financial services sector which always claims to need special treatment. The report will have to evaluate whether the financial sector can be integrated into the scope of application.

The Distance Selling Directive has laid down three sets of rules: information duties, the right of withdrawal and performance and payment methods. In comparison to this more advanced regulatory approach, the Directive 85/577/EEC seems outdated.

There is no fully developed set of information duties. Information requirements, if there are any, are related to the notification of the right of withdrawal.[23] The Distance Selling Directive draws a clear line between information that has to be given prior to the conclusion of the contract and the information which must be provided during the performance of the contract. This distinction is equally applicable to doorstep selling contracts. The underlying idea fits well into the overall policy of completing the Internal Market. Only an informed consumer is able to take a responsible decision and if he is unable or not in the position to get the necessary information, it is the responsibility of the supplier to provide it.

Fourteen years ago, the Doorstep Selling Directive introduced the right of withdrawal and paved the way for subsequent directives including the Distance Selling Directive, which treats the issue in the most advanced way.[24] The underlying philosophy, however, has changed over the last two decades. It is no longer only about the need to protect the consumer against any unfair and misleading marketing practices, but it includes the idea of using the right of withdrawal as a means to enhance competition. The consumer may withdraw from the contract without any reason and without any penalty. He may have discovered a more favourable offer and simply withdraw from the contract to find better conditions. Again, this concept can be transferred to doorstep selling contracts, although differences might exist due to marketing strategies. A consumer who is contacted away from business premises may well feel surprised, and an internet consumer plays quite an active role. The more the borderlines between the two marketing strategies vanish, the more the differences between the two types of consumers may lose importance. That is why both Directives should apply in principle the same rules.

The Commission has been mandated under the Distance Selling Directive to devote specific attention to the possible differences in the period of the right of withdrawal. However, differences do not exist at the Community level alone. The comparative analysis has demonstrated the broad range of periods and different ways in which the delay is calculated.[25] Therefore any proposal should present pragmatic solutions and should not be confined to the Doorstep Selling Directive alone. It should lay down common rules for all kinds of consumer Directives and provide a solid and reliable basis for consumers and direct sellers.

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22 See vol. II, part II B. I. 2. and 3.

23 See vol. II, part II B. III. 2.

24 See vol. II, part II A. IV.

25 See vol. II, part I A II. 4 a) and b).

Performance and payment methods are, for the first time, the subject of comprehensive EC regulation in the Distance Selling Directive. There is a certain logic to not limiting harmonisation to the formation, conclusion and dissolution of the contract, but to integrate also the performance of the contract. The rules found in Directive 97/7/EC are easily transferable to doorstep selling contracts and may be even used in other contexts.

III. The Common Standard of EC Secondary Law Revisited

Today's consumer protection rules provide for a certain standard which is to be found more or less in all consumer directives: judicial and administrative redress, the binding nature of the directive, the Community rules (more than ever), the minimal harmonisation clause, consumer information about the rules of the directive and the complaints systems. A possible revision of the Doorstep Selling Directive would therefore be rather technical, although well-known standards may be considered afresh. This is true e.g. for the minimal harmonisation clause. If EC law relies on the responsible, maybe the confident consumer, national laws will have to protect the weak consumer.

However, the issues considered here, - mainly the MLM business -, allow us to address new issues and old issues which have not yet or to a limited extent been achieved in EC consumer legislation. The need to review the standard set of rules might be even more striking if a proposal for reform would seriously favour the development of marketing standards along the lines of the "New Approach to technical harmonisation and standards[26]".

There are numerous aspects which have to be considered. The subsidiary liability of the company in case the consumer/direct seller or the direct seller goes out of business and becomes bankrupt, already discussed in the legislative process of Directive 99/44/EC[27] (Consumer Sales) may contribute to compensate for structural weaknesses of MLM. Strongly related is the establishment of a fund to protect consumers against bankruptcy of his contracting partner, as envisage in Directive 90/314/EEC[28] (Package Tours). Pyramid and Snowball Systems may direct the attention to any form of collective redress to get compensation for the losses suffered. The 'New Approach' in private law relations would more than ever require adequate participation of the consumers in the standard making process and means to get the standards reviewed in the courts.

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26 OJ C 136, 04.06.1985.

27 OJ L 171/12, 7.7.1999.

28 OJ L 158/59, 23.6.1990.

D. Issues to be Addressed and Approach Chosen – the "New Aspects"

I. Prohibition of Pyramid Selling and Snowball Systems

There is unanimity in the Member States and in the direct selling industry[29] that Pyramid Selling and Snowball Systems have to be regarded as illegal trading practices. The ways in which the Member States deal with the issue differ considerably though. The analysis demonstrates the variety of the approaches chosen as well as the broad range of criteria that are applied. Member States which rely on penal law sanctions have to face the difficulty that such rules need to be precise and therefore rather narrow. It might be that illegal practices escape the penal law and have to be sanctioned by less restrictive means in administrative law or civil law. In light of the substantial experiences Member States have gained over in recent years there is a need for a relatively broad and flexible provision.

It might be a point of discussion as to how these illegal trade practices should be prohibited. Any proposal has to consider that it is difficult to impose a penal sanction for the violation of a relatively broad and open definition, (and this leaves aside the question whether the European Community is competent to lay down penal law sanctions). Therefore Member States will have to decide on the type of sanctions that follow from a violation of the prohibition. Community law, however, will have to provide appropriate remedies to guarantee compliance with the proposed prohibition. The revised Directive should be brought into line with the remedies already developed in Directives 84/450/EEC[30] (Misleading Advertising), 93/13/EC (Unfair Terms),[31] 97/7/EC (Distance Selling) and 98/27/EC[32] (Transborder Injunctions).

Less attention has been paid in the Member States to the harm that is caused to the participants in these illegal schemes. Participants often lose a substantial amount of money. The point is whether there is, or whether there should be, an opportunity for the participants to claim the money back either individually or by way of collective action. In practice, however, the organisers of these illegal systems will often operate from outside the European Community and will vanish before the participants discover that they have been cheated. Nevertheless, the issue should be addressed and the question tested as to whether the set of remedies to be made available should cover the opportunity to claim compensation.

II. A European Trading Scheme for Multi-Level Marketing – the First Option

The United Kingdom and Ireland provide for a trading scheme which legalises MLM if certain mandatory requirements are complied with. Other countries are considering adopting similar legislation. A European trading scheme would be one possible option

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29 Cf. study prepared on behalf of the Federation of European Direct Selling Associations (FEDSA) by Oppenheimer Wolff & Donnelly LLP with the support of the Amway Corporation, Brussels, March 1999, p. 4.

30 OJ L 250/17, 19.9.1984.

31 OJ L 95/29, 21.4.1993.

32 OJ L 166/51, 11.6.1998.

for setting up a framework in which MLM companies could operate. However, the concrete requirements will certainly be the subject of controversial discussions.

Any approach has to distinguish between the regulatory framework for the trading practice as such and the shaping of the contractual relations between the final consumer, all participants and the company. The first aspect covers the presentation of the MLM strategy on the market. Here criteria have to be set which will enable the distinction between illegal Pyramid Selling and legal MLM systems. The experience gained in the UK and in Ireland (and even more so the regulatory approaches in the United States) provide guidance for possible solutions. The second aspect requires a definition of mandatory requirements regarding the contractual relations between the newcomer and the direct seller. The Scandinavian countries are considering the adoption of legislation which is directed to this second aspect. Any such regulation should be aimed at allowing the final consumer to take a fully informed and responsible decision on whether to join the system. Information prior to the conclusion of the contract as well as information laid down in the contract plays an important role. A right of withdrawal should allow the consumer/direct seller to reconsider a decision he might have taken in a difficult situation.

III. New Approach Type Regulation of Multi-Level Marketing – the Second Option

Whereas a trading scheme would have to define binding legal rules, a "New Approach" type of regulation would have to combine binding rules with non-binding *marketing standards*. The New Approach has been developed in the field of technical standards and regulations, where the Community has adopted a whole set of directives which all follow the same pattern. Mandatory basic requirements, laid down in directives, provide a framework for the elaboration of non-binding technical standards elaborated by the European standardisation organisations. Those companies who comply with the standards have free access to the European market. A certificate of conformity serves as an entry card. Consumer organisations are represented in the elaboration of technical standards through their experts.

So far the European Community has not yet tested whether the 'New Approach' may be appropriate for other fields of regulation, namely trade practices. However, a first step in this direction had been undertaken in the first proposal for a Directive on Electronic Commerce.[33] The committee whose creation was envisaged should advise the Commission on defining areas where the proposed Directive should not apply. For the first time, a Directive would have covered private law issues and granted to the Commission to change its scope of application. However, the revised draft does no longer contain such a provision.[34] One may wonder to what extent the New Approach may be extended to the field of marketing practices. There are Member States in the European Community, where the national standardisation bodies have been charged with the elaboration of standard contracts or addressing specific areas of consumer concern.

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33 OJ C 30/4, 5.2.1999, Article 23 in combination with Article 22 (1).

34 Revised proposal COM (1999) 427 final, 98/0325 (COD) September 1999.

The International Standardisation Institution has recently used this means to adopt rules on environmental marketing.[35]

A number of reasons might support such an extension. New Approach type directives allow for more flexibility. The interplay between binding basic requirements and non-binding standards might be important in a field such as marketing practices where the strategies are subject to constant change. The approach allows for the full integration into the process of the businesses concerned and the exploitation of their competence. Codes of practices would become a useful source of information. The same, however, cannot be said with regard to final consumers and their organisations. It is still one of the main deficiencies that final consumers and their organisations are allowed to participate in the technical standard making but are not given a full legal status. Any extension of the new approach into the field of marketing practices would therefore require the need clearly to define the role and responsibilities of final consumers and their organisations. Such a policy goes along with a recent initiative of the UK Office of Fair Trading to enhance the importance of codes of practices by integrating consumers and their organisations in the drafting process.[36] Again, the proposal for a Directive of Electronic Commerce might pave new ways here.

As marketing practices are strongly related to standard business contracts any search for a possible solution might be guided by the experience drawn from the field of unfair contract terms legislation. The Directive 93/13/EEC[37] grants final consumers the right to challenge standard terms in the court. Such a remedy should be foreseen in a New Approach type solution for MLM. However, there are Member States where final consumers participate in the elaboration of standard terms if they are shaped by trading organisations for a whole sector. If these rights to participate exist, they are not meant to exclude judicial review by the courts. The right to participate and the right to sue are not mutually exclusive, but rather should be complementary. A New Approach type solution for regulating MLM would have to consider unfair terms legislation.

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35 There have been similar efforts in the national standardisation institutions, mainly trying to develop standards for companies who intend to inform the consumers that there products are environmentally more friendly than those of the competitors. The DG XXIV has commissioned a study on environmental advertising which is about to be completed, see in this context, European Commission, Health and Consumer Protection, Outline of a possible Community approach in the area of Green Claims – consultation document, available in the internet, www.europa.int/comm/dg24/policy/developments/envi_clai/index_en.html.

36 See Office of Fair Trading, Raising Standards of Consumer Care, Report on a conference held at New Hall College, Cambridge by the Office of Fair Trading 22 September 1998, February 1999 which was based on Raising Standards of Consumer Care, Progressing beyond codes of practice, A report by the Office of Fair Trading, February 1998 and this context, National Consumer Council, Models of self-regulation, An overview of models in business and the profession, September 1999.

37 OJ L 95/29, 21.4.1993.

PART II. TOWARDS A COMMON CONCEPT FOR DOORSTEP AND DISTANCE SELLING CONTRACTS

A. Object (Article 1)

I. Proposal

The object of this Directive is to approximate the laws, regulations and administrative provisions of the Member States concerning contracts concluded away from business premises between consumer and supplier.

II. Reasons for the Proposal

The proposal brings a revised Directive into line with overall policy of the European Community to complete the Internal Market.

B. Definitions (Article 2)

I. Proposal

For the purposes of this Directive:

1. "Doorstep contract" means any contract concerning goods or services concluded between a supplier and a consumer away from business premises;

2. "Consumer" means any natural person who, in contracts covered by this Directive acting for purposes which are outside his trade, business or profession;

3. "Supplier" means any natural or legal person who in contracts covered by this Directive, is acting in his commercial or professional capacity.

II. Reasons for the Proposal

The term 'doorstep contract' is used as synonym for all contracts concluded away from business premises. "Contracts concluded away from business premises" is widely used in Austria, Denmark, Finland, Greece, Netherlands and Spain[38] and should not be changed. It covers all sorts of contracts concluded away from business premises where both

[38] See vol. II, part I A. II. 1 b).

parties are physically present. That term, however, is not very handy and is often replaced in colloquial language with doorstep selling contracts. Perhaps the shorter version could be maintained.

The notion of consumer and supplier is taken verbatim from the Distance Selling Directive. The terms should be maintained although the regulation of Multi Level Marketing requires a different approach. Here a new definition of the consumer is needed who enters into business. The same is true for his counterpart, the direct seller.[39]

C. Scope (Article 2)

I. Proposal

This Directive shall apply to contracts under which a supplier provides goods or services to a consumer away from business premises, where the contact does not follow an express request of the consumer.

This Directive shall also apply to contracts for the supply of goods and services other than those with regard to which the consumer requested the visit of the supplier provided that when he requested the visit, he did not know or could not have reasonably known, that the supply of those other goods or services formed part of the supplier's commercial or professional activities.

II. Reasons for the Proposal

The scope of the Directive should be extended in order to cover all contracts that are concluded away from business premises. There should be some leeway in order to encompass also contracts where the supplier combines direct and distance marketing strategies. As the Distance Selling Directive is only applicable where the supplier makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded, the revised Directive on Doorstep Selling should come into operation wherever the supplier combines direct selling strategies with Distance Selling strategies.

This is already common practice in the Member States. In Austria, Denmark, Finland, Greece, the Netherlands and Spain, legislation covers all contracts concluded away from the business premises of the supplier.[40] In Italy and Sweden, catalogue sales are within the scope of application.[41] Denmark and Sweden especially mention contracts concluded during telephone conversations.[42] The former Art. 2 (2) shall be maintained, subsection (3) and (4) be deleted. The article as it stands is hardly comprehensible[43] and has not gained importance in the Member States.

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39 See vol. I, part III B. I.

40 See vol. II, part I A. II. 1. b).

41 See vol. II, part I A. II. 1. b).

42 See vol. II, part I A. II. 1. b).

43 See vol. II, part I B. I. 2.

D. Exemptions (Article 3)

I. Proposal

(1) The Member States may provide that this Directive shall apply only to contracts for which the payment to be made by the consumer exceeds a specified amount, not exceeding 60 Euro.

The European Parliament and the Council acting on a proposal from the Commission shall examine and if necessary, revise this amount.

(2) This Directive shall not apply

a) to contracts for the construction, sale and rental of immovable property or contracts concerning other rights relating to immovable property. Contracts for the supply of goods and for their incorporation in immovable parts or contracts repairing immovable property shall fall within the scope of the Directive;

b) to contracts for the supply of foodstuffs and beverages supplied by regular roundsmen.

II. Reasons for the proposal

The Doorstep Selling Directive is much more explicit in setting a time frame for revision of the minimum amount. In the light of the experiences gained, it might suffice to allow a revision in due time.

Foodstuffs and beverages are, however, already covered by the exemption under (1). One might therefore consider to either exempt contracts of minor value or to exempt contracts for the supply of foodstuffs and beverages. All Member States except for Finland and Luxembourg have made use of the exemption for foodstuffs and beverages.[44] The exception for contracts for which the payment does not exceed a minimum amount is often connected with other conditions, e. g. contracts concluded on charity events (Belgium), contracts which are immediately fulfilled (Austria, Germany) or contracts with cash payment (Italy).[45]

However, the extension to 'goods intended for current consumption should be dropped. The same is true for Art. 3 (2) c) of the Directive as these kinds of contract are now covered by the Distance Selling Directive.

Doorstep selling of financial services is becoming more and more important and is expected to increase in several countries.[46] In most of the countries, insurance companies are the predominant users of direct selling strategies. In practice, this has led to a number of problems for consumers. According to consumer organisations, these consist of

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44 See vol. II, part I A. III. 3.

45 See vol. II, part I, A. III. 1.

46 See the EC-Study "Doorstep-Selling and Financial Services" by Verein für Konsumenteninformation, September 15, 1997. In quite a number of countries, doorstep selling of financial services (especially of insurance) is regarded as important, see vol. II, part I, A.III.4

misleading information, false advises and offering expensive products instead of regarding the consumers' needs.[47] Despite these findings, Member States have been reluctant to integrate financial services into the Doorstep Selling Directive.

Only Austria applies the doorstep selling provisions also to securities and insurance contracts, whereas most other countries have made use of the exception.[48] But this does not necessarily mean that consumers are not protected when they conclude an insurance or securities contract at home. In many countries, these contracts are regulated by special acts (Germany, Italy, Netherlands, Spain, United Kingdom). However, the level of consumer protection in these special laws does not always correspond with the level of the doorstep selling acts. In Italy, there is only a right of withdrawal during the first five days and in Germany the consumer can withdraw from the contract if he has not (completely) received all the necessary information about the insurance. The practical relevance of the exception seems very small in Belgium, Denmark, Finland, France, Greece, Portugal where it is quite unusual to market insurance contracts and securities on a door-to-door basis.

Insurance contracts, this is for sure, differ from ordinary sales contracts because they last for a longer period of time and it can hardly be foreseen when performance will be required (e. g. in case of illness). There is no reason to deny the consumers a right of withdrawal. The practical importance of the financial business and the number of problems which have occurred in the past have shown that a solution must be found in order to protect consumers. In most cases the consumer will not be able to rethink his decision in the period of time foreseen in the Doorstep Selling Directive.[49] As insurance contracts are mostly complex and not as easy to understand as ordinary contracts of sales, it would even be just to grant a longer period of time for the right of withdrawal. A precedent is the right of withdrawal for insurance in the Second Life Assurance Directive 90/619/EEC[50] which provides a cooling off period between 15 and 30 days for life assurances. It would also be adequate to the special contractual situation (which is not a unique exchange of performances but a continuos obligation) to provide a cooling-off period.

There is no longer any need to allow Member States to exempt contracts having a direct connection with the goods or services concerning which the consumer requested the visit of the supplier (former Art. 3 (4) of Directive 85/577/EEC). This exception, however, still exists in all Member States except France and Italy.[51]

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47 See the EC-Study "Doorstep-Selling and Financial Services" by Verein für Konsumenteninformation, September 15, 1997 which gives a detailed analysis of the problems and complaints in each country.

48 See vol. II, part I A. III. 4.

49 See the EC-Study "Doorstep-Selling and Financial Services" by Verein für Konsumenteninformation, September 15, 1997, vol. II, part I, A. III. 4.

50 OJ L 330/50, 08.11.1990.

51 See vol. II, part I A. III.5.

E. Prior Information (Article 4)

I. Proposal

(1) In good time prior to the conclusion of any doorstep contract, the consumer shall be provided with the following information:

a) the identity of the supplier and ***the geographical address of his place of business to which the consumer may address any complaints****:*

b) the main characteristics of the goods or services;

c) the price of the goods or services including all taxes;

d) delivery costs; where appropriate;

e) the arrangements for payment, delivery or performance:

f) the existence, the ***conditions and procedures*** *for exercising the right of withdrawal except in the cases referred to in article 6 (3); the consumer must be informed that he loses the right to withdraw from contracts on services when the service has been performed.*

g) the period for which the offer or the price remains valid;

h) where appropriate, the minimum duration of the contract in the case of contracts for the supply of products or services to be performed permanently or recurrently.

i) information on any after-sales services and/or guarantees which are available

j) the conditions for cancelling the contract, where it is of an unspecified duration or a duration exceeding one year

(2) The information referred to in paragraph 1, the commercial purpose of which must be made clear, shall be provided in a clear and comprehensible manner in a form which corresponds to the means used in ***contacting the consumer****, with due regard, in particular, to the principles of good faith in commercial transactions, and the principles governing the protection of those who are unable, pursuant to the legislation of the Member States, to give their consent, such as minors.*

II. Reasons for the Proposal

The revised proposal relies heavily on the respective provision of the Distance Selling Directive. It even reaches beyond Directive 97/7/EC in that the type of information to be provided prior to the conclusion of the contract also includes the four aspects which have to be supplied under Directive 97/7/EC during the performance of the contract only. There is no valid reason for the distinction drawn under the Distance Selling Directive. It might also be in the interest of the supplier to inform fully the consumer immediately and not separate the information to be provided into two categories.

The second paragraph lays down common standards for the supply of all types of information similar to the Distance Selling Directive. However, in order to make sure

that there is ample space for combining distance and direct marketing strategies, the application is not narrowed down to situations in which both parties are physically present. The standards have to be the same whatever the methods are the supplier uses to 'contact the consumer'.

F. Written Confirmation or Information (Article 5)

I. Proposal

The consumer must receive written confirmation or confirmation in another durable medium available and accessible to him of the information referred to Article 4 (1) (a) to (j) in good time during the performance of the contract, and at the latest at the time of delivery where goods not for delivery to third parties are concerned, unless the information has already been given to the consumer prior to conclusion of the contract in writing or in another durable medium available and accessible to him.

In any event the following must be provided ***in written form****:*

¾ *information on the conditions and procedures for exercising the right of withdrawal, within the meaning of article 6, including the cases referred to in the first indent of article 6 (3);*

¾ *the geographical address of the place of business of the supplier to which the consumer may address any complaints;*

¾ *information on any after-sales services and/or guarantees which are available;*

¾ *the conditions for cancelling the contract, where it is of an unspecified duration or a duration exceeding one year.*

II. Reasons for the Proposal

The proposed article is identical to the equivalent provision of the Distance Selling Directive, with one exception. In order to avoid misunderstandings with regard to the second subsection, it should be made clear that the minimum information has to be provided in writing 'in any event'. Otherwise the question might arise as to whether the written form is required only for the information on the conditions and the procedure of the right of withdrawal.

As Directive 85/577/EC only requires the provision of a few types of information, many states have laid down additional requirements. In Belgium, France, Greece and Portugal, the supplier has to inform the consumer about the delivery of the product, including the date and/or other modalities.[52] Some countries (Belgium, Finland, France, Greece, the Netherlands and Portugal) require that the notice must contain information about the

[52] See vol. II, part I A. II. 3. a).

price and conditions of payment.[53] In Portugal, the consumer must be informed about any available after sales service.[54]

G. Right of Withdrawal (Article 6)

I. Proposal

*(1) For any doorstep contract the consumer shall have a period of **ten days** in which to withdraw from the contract without penalty and without having to give any reason. The consumer may only be charged for the direct costs of returning the goods if he exercises his right of withdrawal.*

The period for exercise of this right shall begin:

¾ in the case of goods, from the day of receipt by the consumer where the obligations laid down in article 5 have been fulfilled;

¾ in the case of services from the day of conclusion of the contract or from the day on which the obligations laid down in article 5 were fulfilled if they are fulfilled after conclusion of the contract, provided that this period does not exceed the three-month period referred to in the following subparagraph.

***It shall be sufficient if the notice that the consumer makes use of his right of withdrawal is dispatched before the end of the ten days period**.*

If the supplier has failed to fulfil the obligations laid down in article 5, the period shall be three months. The period shall begin:

¾ in the case of goods, from the day of receipt by the consumer;

¾ in the case of services, from the day of conclusion of the contract

If the information referred to in article 5 is supplied within this three-month period, the ten day period referred to in the first subparagraph shall begin as from that moment.

If the information referred to in article 5 is not submitted within this three-month period, appropriate measures have to be taken by the Member States to ensure that the consumer is protected beyond this period.

(2) Where the right of withdrawal has been exercised by the consumer pursuant to this article, the supplier shall be obliged to reimburse all sums paid by the consumer without deduction. Such reimbursement must be carried out as soon as possible and in any case within 30 days.

(3) Unless the parties have agreed otherwise, the consumer may not exercise the right of withdrawal provided for in paragraph 1 in respect of contracts:

*¾ for the provision of services if performance has begun, with the consumer's agreement, before the end of the **ten day period** referred to in paragraph 1;*

[53] See vol. II, part I A. II. 3. a).
[54] See vol. II, part I A. II. 3. a).

¾ for the supply of goods made to the consumer's specifications or clearly personalised;

¾ for the supply of audio or video recordings or computer software if the sealed packing was opened by the consumer;

(4) The Member States shall provide in their legislation that:

¾ if the price of goods or services is fully or partly covered by credit granted by the supplier, or

¾ if that price is fully or partly covered by credit granted to the consumer by a third party on the basis of an agreement between the third party and the supplier,

¾ the credit agreement shall be cancelled, without any penalty, if the consumer exercises his right to withdraw from the contract in accordance with paragraph 1.

Member States shall determine the detailed rules for cancellation of the credit agreement.

II. Reasons for the Proposal

The adaptation of the right of withdrawal to resemble the much more fully developed requirements laid down in the Distance Selling Directive constitute the second major change.

(1) The idea is to have an identical period of time for both types of contracts. Therefore the Distance Selling Directive should be amended accordingly. The reference to working days should be abandoned and replaced with a binding period of ten days. This approach would succeed in establishing a common legal ground throughout the Internal Market. If there is a readiness to pursue such a proposal it might be feasible to introduce into an amended Directive 97/7/EC a rule similar to Art. 5 (1) second sentence of Directive 85/577/EEC (when the notice has to be dispatched). Most Member States have established a period of 7 days, only in Greece (10 days), Luxembourg (15 days if goods are delivered) and in the Netherlands (10 days) exist longer periods of time.[55] As it is even nationally difficult to determine a "working day" (due to the different public holidays), a pragmatic solution is required. Therefore a longer period of time (10 days) without the qualification "working" is suggested. This would be a possible solution for all consumer directives.

If the consumer is not informed according to the relevant provision the period of withdrawal will be extended to three months. This approach has already been adopted in the Time Share and the Distance Selling Directive.[56] The consumer is not protected, however, if he does not learn of his right of withdrawal within the three months period. Once the period expires, he has lost a right of which he never had any knowledge. In order to ensure that the consumer is protected against any misuse, it is necessary to

[55] See vol. II, part I A. II. 4. a).

[56] See vol. II, part I A. IV. 1.

oblige the Member States to take appropriate measures. It is on them to decide whether such contracts should be void or whether the right of withdrawal should be extended indefinitely. Most Member States regard such contracts as void (Belgium, France, Luxembourg, the Netherlands, Portugal and Spain). Several treat this as unenforceable by the supplier (Denmark, Finland, Greece, Ireland, Luxembourg, Sweden and the United Kingdom), which means that the supplier is bound by the agreement whereas the consumer may decide to rescind the contract.[57] Austria, Germany and Italy provide for the extension of the period of time to one month in Austria and Germany and to sixty days in Italy.[58] If this period expires, the contract is valid regardless of whether the consumer has in that time been informed about his rights or not.

(2) Most States have opted for a re-transfer of the mutual obligations after the withdrawal of the contract. Only Finland and Italy have set a time limit for the supplier to return the payment to the consumer (30 days). If the supplier fails to return the payment within this period, he has to pay an additional amount of one tenth of the purchase price of the goods in Finland.[59]

(3) Although only few Member States (Belgium and Italy) have restricted their scope of application with the consequence that the consumer may not cancel contracts for services already provided, in most states (except for Sweden which grants the consumer expressly the right to reclaim his payment) the supplier is not obliged to return payment after having provided the service.[60] The exemption for goods manufactured individually exists in Denmark.[61]

H. Performance (Article 7)

I. Proposal

(1) Unless the parties have agreed otherwise, the supplier must execute the order within a maximum of thirty days from the day following that on which the consumer forwarded his order to the supplier.

(2) Where a supplier fails to perform his side of the contract on the grounds that the goods or services ordered are unavailable, the consumer must be informed of this situation and must be able to obtain a refund of any sums he has paid as soon as possible and in any case within 30 days.

(3) Nevertheless, Member States may lay down that the supplier may provide the consumer with goods or services of equivalent quality and price provided that this possibility was provided for prior to the conclusion of the contract or in the contract.

57 See vol. II, part I A. II. 3. c).
58 See vol. II, part I A. II. 3. c).
59 See vol. II, part I A. II. 6. a).
60 See vol. II, part I A. II. 4. d).
61 See vol. II, part I A. II. 4. d).

The consumer shall be informed of this possibility in a clear and comprehensible manner. The cost of returning the goods following exercise of the right of withdrawal shall, in this case, be borne by the supplier, and the consumer must be informed of this. In such cases the supply of goods or services may not be deemed to constitute inertia selling within the meaning of article 9 ***of the Distance Selling Directive****.*

II. Reasons for the Proposal

One may wonder whether Art. 7 as here proposed fully concerns direct selling strategies. The overall idea is to provide common rules for both forms of marketing, distance and direct marketing which might increasingly be used together for the same categories of products and services.

I. Payment by Card (Article 8)

I. Proposal

Member States shall ensure that appropriate measures exist to allow a consumer:

¾ *to request the cancellation of a payment where fraudulent use has been made of his payment card in connection with distance contracts covered by this Directive;*

¾ *in the event of fraudulent use, to be credited with the sums paid or to have them returned.*

II. Reasons for the Proposal

So far, payment by cards in doorstep contracts is the exception to the rule. Again business practice might change and common rules are needed for distance and doorstep selling contracts.

PART III. THE NEW ASPECTS

A. Towards a Definition of "Pyramid Selling" and "Snowball Systems"

I. Preliminary Remarks

Most countries have adopted a definition for illegal Pyramid Schemes.[62] Two approaches to restrict network distribution systems have to be distinguished, however. Some countries start with a broad understanding of Pyramid Schemes. They consider all illegal network systems as Pyramid Schemes.[63] Others countries restrict the definition to 'traditional'[64] Pyramid Systems. Marketing practices falling outside the scope of this definition, however, may be regarded as "illegal practices".[65]

Attention should be devoted to the terminology applied. For pragmatic reasons we refer to the FEDSA glossary. Terms used such as dealer, direct seller, participant etc. correspond to the glossary.

II. Proposal for a Prohibition of Pyramid Selling, Snowball Systems and Chain-letter Systems

1. A system under which a person gives any valuable consideration and receives the right to sell goods, services or rights of participation, and can legitimately expect to receive an advantage from recruiting other persons into this system where such recruitment is unrelated to the sale to final consumers who do not have to have to purchase in order to join the system, shall be prohibited. This prohibition covers in particular:

a) systems in which the participants receive a bonus for introducing a new participant into the system;
b) systems in which the participants receive a commission related to the initial investment (e. g. starter kits, training courses) which the new participant whom they have introduced undertakes;
c) systems in which the participants receive a commission related to the continuos purchases of the new participants whom they have introduced in the system.

2. A scheme which is not centrally organised and in which there exists no central beneficiary is prohibited unless the consideration is of minor value.

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62 Austria, Belgium, Denmark, France, Germany, Ireland, Italy, Netherlands, Norway, Portugal, Spain, Sweden, United Kingdom and the United States.

63 Belgium, Ireland, Italy, Netherlands, United Kingdom, United States.

64 See below, 5. (Recruiting other Participants) and 6. (Any Possible Advantage for Recruitment unrelated to the Sales to Final Consumers).

65 Denmark, Finland, France, Germany, Spain.

III. Paragraph 1: Pyramid Selling and Snowball Systems

1. System

First, the scheme has to be described in a way which makes clear that it is organised and contains some fixed structures.

In the Member States, different terms are used in order to designate the scheme as such. In some Member States, the term already describes the nature of the scheme, for instance in Austria "profit expectation system[66]" and in Belgium "chain-selling method[67]". The meaning of most terms used in other Member States (e. g. in Greece "agreements[68]", in Portugal and Spain "procedure[69]") is the same: they all employ wide terms to show that there is a scheme which is regulated and managed.

The term will cover Pyramid Selling as well as Snowball Systems, i.e. business structures as well as games of chance. Therefore, any terminology related to business (e.g. in Germany "business activity[70]", in Italy "sales operations and structure[71]") should be avoided. The commercial character of systems, which operate more as a 'game' and where nothing is sold but where there is an offer of the "opportunity to participate in the system itself" which has no objective value, may be challenged. The commercial character is the subject of a critical review. This problem has been discussed in Germany[72] after the Supreme Court[73] decided to regard chain-letter systems which are not centrally organised by a particular person as mere private games. The term "plan" used in many US states laws (e. g. in Alabama, Arizona, Georgia, Idaho, Kentucky, Maryland and Texas) envisages a system which does not operate spontaneously but is organised and contains a certain structure. Chain-letter systems which are handed over from one person to the next while the person at the highest level quits the system after having received the entry fee from the newcomer, are not covered. Also in the United Kingdom, chain letters are excluded where they do not have a central beneficiary.[74]

2. Giving any Valuable Consideration

It is proposed to use a wide term, which does not only include paying money but also any other consideration (e.g. goods).

The term laid down in the Austrian penal law "stake[75]" can be used for payments whose counter-performance[76] depends upon a chance and only covers Snowball Systems. The

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66 See vol. II, part III B. I. 1 a).
67 See vol. II, part III B. II 1 a).
68 See vol. II, part III B. VII.
69 See vol. II, part III B. XIII a) (Portugal) and XIV 1. b) (Spain).
70 See vol. II, part III B.VI 1. a).
71 See vol. II, part III B.IX.
72 See vol. II, part III B.VI.1. a) (H. Otto, wistra 1997, 84).
73 BGH, September 29, 1986, vol. II, part IV B. 3. a).
74 See vol. II, part III B.XVI. 2. a).
75 See vol. II, part III B. I. 1. a).
76 There is no literal translation of Gegenleistung'. The overall idea is the synallagmatic character of contracts, which is based on a mutual exchange of performances, usually 'products for money'.

term "payment[77]" in the Austrian commercial law or in the Greek law, as well as "price[78]" used in Spain, refers to the payment of money. A more comprehensive terminology exists in the Netherlands. The obligation of the participants is described as "handing over goods or entering into an obligation".[79] These two obligations are included in the neutral term "giving any valuable consideration" foreseen in several US states laws (e. g. Arkansas, Colorado, Michigan).

There exist two possibilities concerning the time when the payment is made and two possibilities concerning the person who receives the payment.

- The payment can either be an initial investment i.e. the participant pays a certain amount of money for entering the system and receives a starter kit, brochures or any other material or participates in training courses and seminars. A payment made in order to participate in the system ("entry fee"), indicates that profit is made by geometric progression which is considered typical of Pyramid Systems. Companies/promoters, who intend to do serious business offer some sort of counter-performance[80] for the initial payment (e. g. information, starter kits) in order to avoid being put on the same footing as Pyramid Systems. The counter-performance alone, however, is not enough to render the system legal. It has been shown in the US case law[81] that several companies have made more profit with their own participants by selling them expensive starter kits or offering them training courses than by sales of their products to final consumers. In any case, companies should not make a profit from within the system.

- Other companies do not require any initial investment but require a subsequent investment, e. g. an obligation to purchase a stock of goods regularly (in order to keep the licence) or an investment on special occasions (for advancing to a higher position). However, a subsequent investment can also be the normal process of a sales transaction: the final consumer buys a product from the participant who himself purchases this product and pays the price to his company. As this is also considered an investment, US state laws, in particular, exempt payments of the participants based upon sales to final consumers who are not purchasing in order to participate in the scheme (e. g. see the definitions of California or Hawaii). This is quite a common business transaction and should not be prohibited. However, it is not necessary to make an exception for these payments, as they are not covered by the overall definition, but only by this element.

The money can either be paid to any other participant of the system (vertical payment) or to the company/promoter[82] (horizontal payment).

- The vertical payment is called "head-hunting fee" and is paid for recruitment. This kind of profit-making contains an element of chance as the participants can only regain the invested money by finding new participants. It depends on chance and

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77 See vol. II, part III B. I. 1. b) (Austria) and VII (Greece).
78 See vol. II, part III B.XIV. 1. b).
79 See vol. II, part III B.XI. a).
80 Cf. explanation in fn. 43.
81 See vol. II, part III B. XVII. 3 .
82 Promoter means any person who organises a snowball system in form of a game.

especially on the position in the hierarchy, whether the participants make profit or lose their investment. Vertical payments should be declared illegal.[83]

- The horizontal payment can be made for numerous reasons. The company/promoter can demand a payment for entering the system, for administration (e.g. an annual administration fee), starter kits or information brochures, training courses, products. A company/promoter shall be prohibited from making most of its profits by selling to its own system ("inventory loading") or training its own recruits for payment. However, there are also cases in which the payment is only of minor value (e.g. an administration fee) and the participant receives an adequate counter-performance which serves his business purposes (e.g. products, brochures) and is granted a buy-back guarantee[84]. Therefore the element "giving any valuable consideration" alone does not suffice to distinguish between illegal and legal schemes. Especially US states laws (see the laws of Idaho, Illinois) exclude payments for starter kits and information material furnished on a non-profit basis. Such business practices should not be excluded from the definition *per se*. There are better ways and means available in subsequent elements of the proposed definition, to draw a borderline between legal and illegal schemes. If the legality of entry fees should not be bound to a counter-performance, a less intensive means of regulation would be to prohibit any payment before expiry of the participant's right of withdrawal.

Therefore, the term "giving any considerable valuation" should be interpreted in a broad sense the consequence being that any kind of payment from the participant, either in the very beginning or in the course of his business activities to either the company/promoter or any other participant is covered.

3. Receives the Right to sell Goods, Services or Rights of Participation

The definition shall be understood to encompass Pyramid Selling as well as Snowball Systems. The difference between these two schemes is that a person joining a Pyramid Scheme receives goods for his payment, while a person participating in a Snowball Scheme only receives the right to participate (licence). In other words, the counter-performance to the payment of the participant is either goods, services or the right to participate in the system.

Some countries (Austria[85], Portugal[86], Spain[87]) only mention the delivery of goods or supply of services. It is difficult to argue that Snowball Systems are also covered, unless the "right to participate" is not regarded as a commercial service. This point has arisen in Germany and has caused different reactions.[88] Parts of the German doctrine define commercial services as services of a monetary value and reject the commercial character of the "right to participate" as it grants only a chance.

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83 In France, for instance, any payment to another participant is prohibited, see vol. II, part III B. 1. a).

84 That means he receives at least 90 % of the purchase price.

85 See vol. II, part III B. I. a).

86 See vol. II, part III B. XIII. a).

87 See vol. II, part III B. XIV. 1. b).

88 See vol. II, part III B. VI. 2. a).

There are laws which simply leave open what the participant directly receives for his investment (as it is in several US states laws, e. g. Alabama or Michigan, the same is true for Austrian penal law[89] and the Netherlands[90]). Any reference to some sort of counter-performance makes clear, however, that the system offers two possibilities which have to be distinguished: direct and indirect counter-performance.

- A direct counter-performance is supposed to exist if the participant receives either the products of the company or something else which is connected to the business (e. g. a starter kit, information, training courses). The product can be either goods, services or also the right to participate in the system (licence). Usually the participant pays a certain sum to the company/promoter and receives something in return to resell. Such a transaction may occur at the very beginning, when the participant just enters the system and makes an initial investment, or subsequently when the participant intends to keep his position or advance to a higher level and therefore invests in the system. The continued right to sell the products (whatever they are) of the company or a stock of products must likewise be understood as counter-performance.

- Secondly, the participant receives financial advantages for recruiting new participants. as an indirect counter-performance. Whereas the first possibility follows the payment automatically, the second one is contingent, because it depends upon chance. Snowball systems have combined both possibilities: the licence is worth nothing but only a means to make a profit with the second possibility.

This requirement can also be met by company engaging in legal activities. However, the term "right to sell goods, services or rights" is only one element of a more complex definition. The main characteristic of Pyramid Selling and Snowball Systems is the connection between the profit (promised by the company/promoter or expected by the participant) and the recruitment. This is the element which distinguishes legal from illegal practices.

4. Can legitimately expect (to make Profit)

This element of the definition shows the motivation of the participant to enter the system. It does not concern the direct advantages resulting from the system (goods, services or rights) but rather indirect advantages. The term 'legitimate expectations' already appears in Directive 85/374/EEC on product liability,[91] Directive 92/59/EEC on product safety[92] and Directive 99/44/EEC on consumer goods and associated guarantees.[93]

There are two ways to define the way of profit-making. One can either describe the actual process in an objective way (e. g. the profit is made by ...), or in a subjective way either by referring to the claims of the company/promoter (e. g. profit is promised) or to the motivation of the participants (e. g. hope, expectation).

89 See vol. II, part III B. I. a).
90 See vol. II, part III B. XI. 1. a).
91 OJ L 210/29, 7.8.1985.
92 OJ L 228/24, 11.8.1992.
93 OJ L 171/12, 7.7.1999.

- The objective description determines how profit is made in the system and therefore only covers systems which **really** make a profit out of recruitment. This method is used in Italy, Portugal and Spain.[94] Problems arise when the objective situation and the subjective motivation clash, e. g. if profit is actually made by selling the products, but the company/promoter claims and the participant believes that high profits are easily achievable by mere recruitment of new participants. In order to protect the participant in a more comprehensive way, it might be better to refer to the expectations that made the final consumer join the system.

- Several Member States (Austria, Belgium, Germany, Greece, the Netherlands and the United Kingdom) describe the situation in a subjective way, either from the point of view of the company/promoter (Austrian commercial law, Germany, Greece) or from the participant's perspective (Austrian penal law, Belgium, the Netherlands, United Kingdom).

- In order to comply with the above mentioned EC directives a different approach should be selected. The motivation of the participant for entering into any agreements should be examined on a normative basis. His expectations play a role in so far as they are legitimate. That means that the participant must have reasons to believe that he can make a profit. These reasons will mainly result from promises or profit claims of the company/promoter. The notion of legitimate expectations aims at balancing out the two perspectives and putting them into on overall perspective. Here business practices, as such, as well as the legislator's objectives come into play.

5. Recruiting other Persons into this System

The direct seller must encourage other persons to enter the system as new participants. Thus, the progression of the distribution network is part of the definition of Pyramid Systems. Recruiting, however, is not an illegal act per se. The proposed definition emphasises the connection between recruitment and profit which is further spelt out in order to draw a demarcation line between legal and illegal practices.

Not all national definitions of Pyramid Systems are based on a progression of the network system. The German legal text[95] defines it as "induce non-merchants to purchase goods (...) by promising special advantages in the event they induce others to conclude such transactions (...)". Therefore Germany regards any system which aims to progress in the number of customers as a Pyramid. The customers do not necessarily become part of the system, they can remain consumers and only recruit new customers. The same situation exits in Greece[96], Portugal[97] and Spain[98]. German courts have not interpreted the law in a uniform way. Most of them, however, tend to restrict the prohibition to the progression of customers (progressive Kundenwerbung).[99] A minority of courts has a broader understanding and includes the progression of the network by recruiting new direct sellers on the basis that the direct sellers are also customers of the

94 See vol. II, part III B. IX. (Italy), XIII. a) (Portugal) and XIV. 1. b) (Spain).
95 See vol. II, part III B. VI. 1 a.
96 See vol. II, part III B. VIII.
97 See vol. II, part III B. XIII a. "au público".
98 See vol. II, part III B. XIV 1 b.
99 See vol. II, part III B. VI 2 b (4) Herbalife, (7) NSA GmbH Öko Filtersysteme, (9) Herbalife.

company because they purchase the products.[100] The Belgian definition of "vente en chaîne" covers both options: a network of direct sellers (sentence 1) and a network of customers (sentence 2).

Most of the national legal orders put the emphasis not on the progression of the customers but on the direct selling network. The legal provisions in Austria mention "participants"[101], in Belgium a "réseau de vendeurs"[102], in France the "recrutement en chaîne d'adhérents ou d'affiliés"[103], in Ireland "persons who become participants"[104], in Italy "new distributors"[105], in the Netherlands "participants enter into the transaction"[106] and in the United Kingdom "introducing participants to a trading scheme"[107].

A typical feature of a Pyramid System is that members do not only purchase the products, goods or participation rights but also encourage others to do the same. In contrast to an ordinary customer in a standard consumer transaction who only buys the products, a person involved in a Pyramid System tries to make profit by recruiting others. Even if he formally stays outside the company and remains a customer, he seeks to make a profit and also raises the profit level of the company. Therefore, the definition should encompass schemes which try to progress their own distribution network.

6. Any Possible Advantage for Recruitment unrelated to Sales to Final Consumers

We will first explain why this element should play such an eminent role in any quest for an appropriate definition and then develop our understanding of the element.

a. Explanation for the Key Function for the Definition

The above mentioned elements of the definition can be met by companies which operate either legally or illegally. In order to determine the main difference between (illegal) Pyramid Systems and (legal) Multi Level Marketing systems, the characteristics of the Pyramid System have to be given.

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100 See vol. II, part III B. VI 2 b (3), (5) AVS Agentur- und Verlagsservice, (6) NSA GmbH Öko Filtersysteme.

101 See vol. II, part III B. I 1 a.

102 See vol. II, part III B. II 1.

103 See vol. II, part III B. V. 1 a.

104 See vol. II, part III B. VIII.

105 See vol. II, part III B. IX.

106 See vol. II, part III B. XI. 1 a.

107 See vol. II, part III B. XVI. 2 a.

The countries have developed either in their anti-pyramid law or in their case-law (different) criteria for Pyramid schemes. There may be some overlapping between the criteria. They have to be presented together as every country has its own points of concern. In general, the following requirements are referred to:

- (1) Investment

  Some companies demand an investment from the recruit without granting a buy-back guarantee. Such a practice may have detrimental effects on consumers as they have to invest in the system by either paying an entry fee or purchasing large stocks of goods. This criterion must be seen in the context of "harm to consumers".

  The Norwegian Ministry of Justice has expressed its concerns about such practices in its interpretation of the anti-pyramid law.[108] The Belgian[109] and American[110] courts consider the criterion to be a typical feature of Pyramid schemes. In the Dutch Explanatory Memory[111] as well as in France[112] and in the Italian draft law[113] concerning the anti-pyramid provision the aspect of investment is mentioned particularly in context of Pyramid Systems.

  In Spain, this practice is regarded as illegal but does not constitute a Pyramid System.[114]

- (2) Market Saturation

  The problem of market saturation is of particular relevance in Germany, e.g. in the decision of the BayObLG[115] and has also been considered in Belgium[116] and the United States[117]. Market saturation is important because direct sellers could suffer if they have to invest by purchasing products and then are not able to resell them.

- (3) Aleatory elements

  Austria[118] and Germany[119] take into account whether the profit of a system (or the loss) depends upon chance (aleatory element) or not. If a profit in a system exclusively (or at least mainly) results from recruiting activities and not (or much less)

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108 See vol. II, part III B. XII. 1 b.
109 See vol. II, part III B. II. 2 (3) Amway.
110 See vol. II, part III B. XVII. 3 (3) Koscot and (4) Amway. The same criterion (investment) has played a role in the Ger-Ro-Mar decision (1). Ger-Ro-Mar has not been considered a Pyramid but an illegal system.
111 See vol. II, part III B. XI. 1 b.
112 See vol. II, part III B. VI. 1.a.
113 See vol. II, part III B. IX.
114 See vol. II, part III B . XIV. 1. a.
115 See vol. II, part III B. VI. 2 b (4) Herbalife
116 See vol. II, part III B. II 2 (3) Amway.
117 See vol. II, part III B. XVII. 3. (3) Koscot.
118 See vol. II, part III B. I. 2. a.
119 See vol. II, part III B. VI. 2. (5).

from the sales of products to final consumers, the business activities of the participants are considered to concentrate on the recruitment of new participants. While the former might be able to realise a profit with recruitment, the latter will have difficulties when the market is already saturated. By mere chance (and not effective work) a profit may be made.

- (4) Progression of the System is more important than the Sales of Products

  Some systems put much emphasis on the progression of the system and less on the sales of products to final consumers. This practice may lead to the effect that the company makes a profit mainly with its own direct sellers. It is very common in the so-called purchasing co-operatives. Problems may arise if not only the company but also the direct sellers themselves make a profit within the system. Here direct sellers receive a remuneration not (only) by sales to customers outside of the system but also by transactions into the network (e.g. entering of new participants, investment by the participants). People may be attracted by the perspective of making a profit by encouraging other participants invest into the system. As direct sellers are bound by the distribution system, there may be a psychological pressure to purchase goods, eg. by the sponsor of a downline.

  The very same criterion plays a role in the Belgian L.P.C. in Art. 84[120] and in the Irish Explanatory Memorandum[121]. Recruitment as a primary activity is mentioned in the Italian draft legislation ("economic incentive merely based on the act of recruiting rather than on promoting the sales")[122] as well as in the Irish legislation in Art. 3 of the Pyramid Selling Act[123]. "Profit inside the chain" is regarded a typical characteristic of Pyramid Systems by the French Ministry of Economics and Finances[124].

- (5) Connection between Remuneration and Geometrical Progression of the System

  Almost similar to (4) is the remuneration related to the progression of the network. The recruiting activities become more important than the sales of products to final consumers. In that respect there is no difference between (4) and (5). However, in (5) emphasis is put on the possible advantages for the participants whereas in (4) emphasis is put on the advantages of the system.

  France[125], Ireland[126], Italy[127], Norway[128] and the United Kingdom[129] take the remuneration system into consideration for the evaluation of network systems. In

120 See vol. II, part I II B. II. 1.
121 See vol. II, part III B. VIII 1. a.
122 See vol. II, part III B. IX.
123 See vol. II, part III B. VIII. 1. b.
124 See vol. II, part III B. VI. 1. a.
125 See vol. II, part III B. VI. 1. a.
126 See vol. II, part III B. VIII. 1. a.
127 See vol. II, part III B. IX.
128 See vol. II, part III B. XII. 1. b.
129 See vol. II, part III B. XVI. 2. a.

Ireland, Italy and the United Kingdom the requirement is met if the remuneration "mainly" results from recruiting activities.

Points (1) Investment, (3) Progression of the System more important than the Sales of Products to Consumers and (4) Connection between Remuneration and Progression of the System have in common that the profit (either by the company or by the participants) is made within the system. The connection between the advantages and the progression of the system without any relation to retail sales seems to constitute the main distinctive feature between Pyramid Systems and legally operating schemes. It refers directly or indirectly to profits resulting from recruitment. Participants are attracted to introduce other persons into the system with the effect that the progression of the network could become more important than actual retail sales. This element can be found in many national legislative measures and case law, either as a distinction between Pyramid and Multi Level Marketing Systems or between legal and illegal systems. The national laws spell out the connection in different ways (e. g. by the term "condition[130]" in Austria and Greece, "resulting from[131]" in Belgium, "in the case that[132]" in Germany, "based on[133]" in Italy or "depends on[134]" in the Netherlands, Portugal and Spain). All these terms have in common that there must be a causal link between remuneration and recruitment.

b. Interpretation of the Criterion[135]

The different kinds of remuneration which are connected directly or indirectly to the recruitment are now presented and discussed. Causation may take different forms and must be restricted in order not to reach beyond the objective, which is to prohibit Pyramid systems.

The evaluation differs from country to country. Some States only prohibit a direct link between the recruitment and the (financial) compensation (narrow point of view). Other countries have a broader understanding of the causation and include an indirect payment for the recruitment. There are four approaches:

- (1) Compensation for Recruiting (headhunting fee)

  The company can offer a financial advantage to a participant who recruits new participants. There is a direct relation between the progression of the system and the profit obtained by the participants. Recruiting becomes a source of making a profit. As a consequence, the participants will try to recruit as many new participants as possible in order to receive the benefits.

  An advantage for the mere recruitment has been regarded as a typical element of Pyramid Systems in the French anti-pyramid law[136], in the German case law[137], Irish

130 See vol. II, part III B. I. 1. b) (Austria) and VII. (Greece).
131 See vol. II, part III B. II. 1. a).
132 See vol. II, part III B. VI. 1. a).
133 See vol. II, part III B. IX.
134 See vol. II, part III B. XI. 1 a) (Netherlands), XIII a) (Portugal) and XIV 1. b) (Spain).
135 See chart Recruiting and Compensation.
136 See vol. II, part III B. V. 1. a (Art. L 122-6 no. 2 as amended by the Law 95/96).
137 See vol. II, part III B. VI. 2 b (6) NSA GmbH Öko Filtersysteme.

legal definition (payment for the admission to the scheme)[138], in the Italian draft law[139], the Dutch legal definition of Pyramid Games[140], North Carolina anti-pyramid law[141] and in the United Kingdom[142]. This practice is based on a direct connection between the act of recruitment and the remuneration.

A headhunting fee in the form of a remuneration based on the number of members of the downline is considered illegal (but not a main feature for a Pyramid System) in Finland.[143]

- (2) Compensation for the Initial Investment

  Another form of remuneration is a commission on the initial investment which the recruit undertakes by buying a starter kit, information material or participating in training courses. Such a payment can be considered a "hidden head-hunting fee" because it is paid in direct connection with the recruitment. Even if there is no contractual obligation to buy a starter kit or any other equipment, it is actually necessary in order to become a successful direct seller. Recruiting becomes a source of profit because the sponsor receives a remuneration for a transaction which normally every recruit has to or at least will undertake. Profit is made within the system.

  The compensation of initial investment is regarded a criterion for Pyramid Systems by countries which have developed a broader understanding of the link between recruitment and remuneration, especially in Germany by the Court of Appeal of München[144], Ireland[145], in the Italian draft law[146] and in the US states anti-pyramid laws[147].

  In France and in Finland any commission for the initial investment of the recruit is prohibited, but not regarded as a Pyramid System.[148]

- (3) Compensation for Goods purchased for Own Consumption

  Another possibility is to grant a remuneration for goods purchased by the recruit for his own consumption. There is neither legal obligation for a recruit to consume the companies' products, nor is it necessary in order to sell the products to final consumers. However, there is often moral pressure to use the products of the company.

  There is only an indirect connection between the remuneration and the recruitment, because the remuneration does not follow directly the act of recruitment. However,

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138 See vol. II, part III B. VIII. 1 a.
139 See vol. II, part III B. IX.
140 See vol. II, part III B. XI. 1 a.
141 See vol. II, part III B. XVII. 2. g.
142 See vol. II, part III B. XVI. 2 b.
143 See vol. II part III B. IV. 2 (1) Bestline Products.
144 See vol. II, part III B. VI. 2 b (6).
145 See vol. II, part III B. VIII. 1 a.
146 See vol. II, part III B. IX.
147 See vol. II, part III B. XVII. 2 f.
148 See vol. II part III B. IV. 2. (3) Network Investment.

there is still a causal link between both elements as the profit raises the more new direct sellers a person recruits.

The problem which arises here can be explained as follows: most recruits are recruited among the customers of a sponsor. They have, thus been purchasing the products for their own consumption and the sponsor has received the trade margin and a commission. Once they changed their status from consumers to direct sellers, the same remuneration may become illegal because now it is connected to the recruitment. However, the prohibition can be justified. The direct sellers shall not be given the impression that profit is made within the system but has to be made with sales to customers outside the system.

Only the American F. T. C. had to deal with this issue so far. The F. T. C. held that a remuneration system which is related to the purchase volume of a recruit constitutes one essential element of illegal Pyramid Schemes.[149] All other countries have not yet examined whether or not 'own consumption' shall become part of the legal evaluation. Such a practice may lead to difficulties because it could end up in "inventory loading" of the products. It should be regarded as running counter to fair marketing practices even if it is considered to be outside the definition of a Pyramid Scheme.

- (4) Commission for Product Orders

Remuneration may also be indirectly related to recruitment. In order to evade the scope of application of anti-pyramid statutes, some companies have changed their remuneration system so that bonuses are no longer tied to recruitment but rather to purchases made by recruits. All that matters is the amount of products the participant himself and his downline recruits purchase. They do not receive a fee for recruiting new participants, but rather a commission on their product orders, regardless of whether they actually sell these product to final consumer or not. They are requested to invest a lot of money and buy large stocks of goods in order to keep their position or to advance to a higher level. In an indirect way, they are also motivated to recruit new participants. As the purchase amount of the whole downline is taken as the yardstick, it is easier to reach the requested figure of purchase volume with a large downline. The effect of this remuneration system is the same as in the "head-hunting remuneration system". First, the participants are motivated to recruit more and more

149 See vol. II part III B. XVII. 3. (5) In Omnitrition the court made the following two statements: (1)".. Omnitrition produced no evidence of enforcement for its 70 % rule. It merely states that, in order to further place orders IMA's must 'certify that they have sold 70% of the product they previously ordered. There is no evidence that this 'certification' requirement actually serves to deter inventory loading. Importantly, the requirement can be satisfied by*non-retail sales* to a supervisor's own downline IMA's. This makes it less likely that the rule will effectively tie royalty overrides to sales to ultimate users as *Koscot* requires." and (2) "In addition, plaintiffs have produced evidence that the 70 % rule can be satisfied by a distributor's personal use of the products. If *Koscot* is to have any teeth such a sale can not satisfy the requirement that sales be to "ultimate users" of a product." The logic of *Koscot* and *Omnitrition* would seem to be consistent with the view that sales to a distributor's downline, or to the distributor himself, could qualify as sales to ultimate users if they are limited to quantities that the purchasers could reasonably be expected to actually consume. In that case, one might assume that no inventory loading would occur. However, the second of the two quotations above from *Omnitrition* excludes that conclusion.

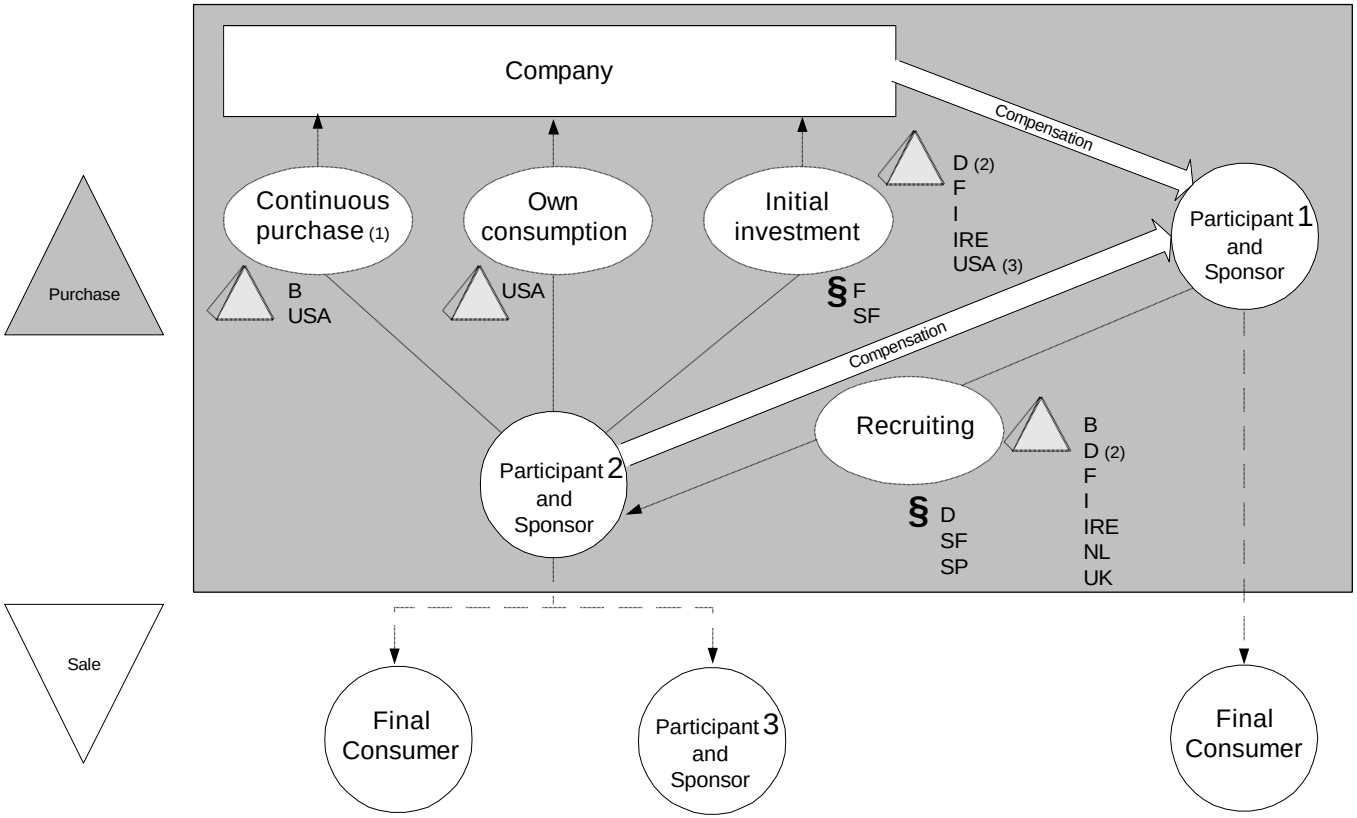
new participants in order to raise their amount of purchases. Second, profit is not made with sales to final consumers but rather from sales within the system.

- (5) Commission for Sales of Products to Consumers

  The prohibition of a connection between the remuneration and the recruitment has to be restricted in the sense that this relation is only prohibited if the remuneration is unrelated to the sales to final consumers who purchase goods for their own consumption. To include such a remuneration would overstep the purpose and objective to the proposed definition.

Recruiting and Compensation

Advantages for recruiting unrelated to the sales to final consumers



§ Prohibited under the respective national legal systems

Legend:

Qualification as a pyramid scheme

(1) See Part III. A. II.6.b. (4).
(2) See Part III. A. II.5.
(3) Several US-States, see Part III.A. II.6.b. (1), (2).

IV. Paragraph 2: Chain-letter Systems without a Central Beneficiary

Chain letter systems are often not organised centrally by one person but distributed and developed by a momentum of their own. There is no company or promoter who manages and leads the system and can be held responsible for it, but all the participants make the system run. In most cases, a stake of minor value (e. g. chocolate or a small sum of money) is required. It would not be right to put them in the same category as Pyramid Selling and Snowball Systems, on the other hand, they produce the same effect: a geometric progression based on profit by recruitment.

Considerations to exclude such systems from the general prohibition on pyramid schemes exist in several countries. The United Kingdom has exempted chain-letter systems without a central beneficiary from the scope of application of their anti-pyramid laws.[150] In Denmark, the court has denied the illegal character of a Snowball System which was based on private relations[151]. As chain-letter systems commonly are operated by distributing the letters to friends or relatives, they would not be prohibited, either. The German Supreme Court has also denied the commercial character of a chain-letter system.[152] Other countries prohibit chain-letters in particular (France, Norway, Sweden), however, it is unclear whether only centrally organised systems are covered or also decentralised ones. In Florida and Indiana, there is a minimum amount (100 $) fixed for Pyramid Selling and Snowball System as well as chain-letter systems.

Chain-letter systems are based on the expectation of profit-making by a geometrical progression. Only by finding new participants is there a chance of receiving advantages of any kind. The aleatory element remains, as the game is based upon chance. However, as there is no central organisation by someone who makes a profit from others running the system, it can not be compared with Snowball and Pyramid Systems in which only the promoter (being at the first level) has nothing to risk and receives payment from each recruit. On the other hand, the participants of a chain-letter systems invest in these systems and risk losing their investment. If the stake is only of minor value, the dangerous effect is not similar to the risks of Snowball Systems and Pyramid Selling. There is neither a large investment required nor is the investment to benefit mainly one person. Therefore it should only be prohibited, if the effects and risks are equal to those of Pyramid Selling and Snowball Systems, i.e. if a large investment is required.

V. Sanctions

The systems defined above are prohibited. There are no sanction mechanisms foreseen in that proposal. The Member States have adopted different sanctions methods. It should be for them to decide on sanctions for these systems.[153]

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150 See vol. II, part III B. XVI. 2 a).

151 Ostre Landsret, March 10, 1999, see vol. II, part IV B. III. 2.

152 BGH, September 29, 1986, see vol. II, part IV B. VI. 2 a).

153 For further information see part IV. A.

B. Towards a Regulation of Multi Level Marketing - First Option

I. Preliminary Remarks

There is a need to develop a new terminology for the regulation of Multi Level Marketing. First and foremost a definition is required of the consumer who seek business opportunities. The same is true for his counterpart, the person with whom the consumer enters into contractual relations. For pragmatic reasons we refer to 'direct sellers' in the meaning given to the term by the FEDSA glossary and the notion of 'participant' which covers the consumer/direct seller as well. Such an approach might facilitate the interaction between the European legislator, the industry and the consumers. In the long run, one might well re-consider the terms and come to the conclusion that a genuine European terminology is more appropriate.

II. Consumer/Direct Seller

1. Proposal

Consumer/direct seller: Any individual who seeks business opportunities as an independent salesperson in a Multi Level Marketing company and who operates his business on a non-commercial level, e. g. low income, part time, hobby.

2. Reasons for the Proposal

After having joined a Multi Level Marketing company, the new participant loses his status as consumer and automatically becomes a consumer/direct seller. In consequence, the consumer protection regulations are no longer applicable, instead, he is responsible in a position as direct seller towards the consumer. As mostly laymen (housewives, persons without business experiences) are recruited, the new status does not correspond to their real position. Most of them only work part time or on casual basis. They only spend little time with their business activities and earn a minor income.[154]

In order to grant them the adequate legal protection they actually need, there are two possible solutions.

One possibility is to set higher standards as regards the information which must be given to the direct sellers in advance of their business activities. They must receive information about their new status, the obligations which are connected with this status, the rights and the business perspectives.

A further reaching solution is to include this kind of direct sellers in the notion of "consumer". Having this proposition in mind, the Norwegian Ombudsman, as well as the Swedish Market Court, have acknowledged that some direct sellers must be put at the same level as the consumers. The Norwegian proposal is to consider direct sellers who

[154] Cf. in more detail, PriceWaterhouseCoopers, loc. cit.

participate in MLM on a hobby basis as consumers.[155] According to the Swedish Market Court (Holiday Magic), the position of the direct sellers towards the company is similar to the position of consumers, their need to be protected is also the same as that of a consumer.[156]

As the position of the MLM salespersons does not, however, correspond to the position of final consumers who purchases goods for their own consumption, the term "consumer/direct seller" is used. This combination gives effect to the fact that elements of the consumer as well as of a direct seller exist. An exact definition of the consumer/direct seller is difficult and depends on the point of view: one criterion could be the income, another one could be the time spent with the business activities or the duration of the business. The main aspect is in any case that the consumer/direct seller is different from the usual direct seller as well as from the final consumer. He founds his own business but does not progress and invest, instead he remains passive, using his business only as an opportunity. The consumer/direct seller enters a Multi Level Marketing scheme because he wants to do business. The main distinctive element of a normal direct seller is the extent of his business. The consumer/direct seller works only part time, or on special occasions, makes most of its profit by selling to friends or relatives, has not organised his business affairs and has no commercial equipment, e. g. an office, secretary, computer, account books. He considers his activities as an additional occupation which does not play a dominant role in his life.

III. System

1. Limitation of the Number of Levels

a) Proposal

The total number of marketing levels of participants should be limited so as to guarantee transparency of the marketing system.

b) Reasons for the Proposal

The recruiting structure of Multi Level Marketing companies in theory makes it possible that an infinite number of levels are developed. A sponsor (first level) entices several new consumers/direct sellers (second level), who also become sponsors and recruit consumers/direct sellers (third level) on their own. If they in turn start to introduce new consumers/direct sellers, a fourth level develops and so on. In practice, the amount of levels is restricted to the number of interested persons and of the market which would otherwise become saturated. However, some companies have in fact established downlines with more than 10 levels. The large amount of different levels favours a kind of intransparency which is present in the system of Multi Level Marketing. There is the risk that the position of the individual and the connections between the levels are unclear and can rarely be explained by the company itself. In order to prevent the intransparency of the system on the one side, and to leave the companies a private area

155 See vol. II, part III B. XIII. Norway 3.

156 See vol. II, part III B. XV. Sweden 2.

to develop a recruiting structure on the other side, the levels should be reduced. A reasonable figure to consider might be about five levels.

The limitation of recruiting levels proposed above differs from the Spanish regulation which restricts the number of sales levels to one. In Spain, there must only be one distributor between the consumer and the company. The distributor purchases the goods directly from the company and sells them to the final consumers. For example, it is not allowed to distribute products through the sponsor to his downline. This sales practice is not a specific Multi Level Marketing practice, but also exits in Single Level Marketing systems. By purchasing the products through a network of sellers, the product becomes more expensive for the direct sellers at the lower levels. As they operate on the same market with the other direct sellers at higher levels, they have fewer chances to sell the same products for a higher price.

The proposal to restrict the recruiting levels, however, tries to establish transparency in the recruiting system. If the number of recruiting levels is not restricted, an endless chain of downlines could be established, at least in theory. The companies could lose control over their own system, and it remains unclear for newcomers where exactly their position in the system is.

2. Remuneration related to the Sales to Final Consumers

a) Proposal

Any kind of remuneration shall be related exclusively to the sales of products to final consumers.

b) Reasons for the Proposal

In Single Level Marketing companies, a remuneration is paid in the form of a trade margin, i.e. the difference between the purchase and the retail price. Systems which have two structures, the recruiting and the sales structure, such as Multi Level Marketing or Pyramid Selling, also need to compensate for the sponsoring activities. Sponsoring activities are e. g. recruiting of new direct sellers offering training courses, managing the downline by demonstrating new products and sales techniques and motivating the recruits. Pyramid schemes link remuneration directly with the recruitment: a commission is paid either for the mere recruitment (head-hunting fee) or on the initial purchase which the subsequent recruit has to make (starter kit, training courses, company information). In a more indirect way, several network companies (e. g. Omnitrition[157] in the United States) have paid a commission on purchases made by subsequent recruits rather than on their sales of products to customers. If a remuneration is already granted for the purchases, the direct seller may be led to buy large stocks of goods recklessly with a view to resale for the purpose of receiving a commission, although the prospects for this are uncertain. They risk not being able to sell the products and thereby losing their

[157] See vol. II, part IV B. XVII 3.

investment. The company, on the other hand, makes its profit from its own network instead of genuine sales to customers outside the system.

Most countries have prohibited this connection between remuneration and recruitment. In several countries this prohibition is restricted to a profit which is obtained predominantly from recruiting rather than sales activities (Belgium[158], Italy[159]), which means that it is possible to receive a payment for recruitment as long as it is of a minor extent compared to sales. Other countries, however, do not allow any payment for recruiting activities (France[160], Netherlands[161], Spain[162]). As a positive regulation, the Spanish law states that the remuneration must be obtained exclusively from sales instead of recruitment.

In order to prevent financial attractions leading to excessive recruitment, financial advantages for the participants should only depend on their own sales or the sales of their downline[163]. This is the only way to ensure that remuneration is paid for effective business - the sales to final consumers which however does not exclude that higher levels in the schemes obtain a remuneration (i.e. percentage) from such sales.

3. Buy-back Guarantee

a) Proposal

If a participant leaves the system, the companies shall buy back any unsold and saleable products or stock and pay the participant's original net cost. If the companies can prove that the value of the products has decreased they can demand a deduction of no more than 10 % of the corresponding price. The right of redemption expires after a period of two years beginning from the time when the products or stock was purchased.

b) Reasons for the Proposal

One of the main distinctive criteria between illegal and legal distribution schemes is that illegal systems make their profit from their participants instead of customers. In order to operate on a legal basis, the companies will offer the participants a right of redemption if they decide to leave the system and have to return the purchase price. In principle the participant shall receive the price which he has paid. However, if the company can prove that the value has decreased (e.g. cosmetics), they can keep a deduction of not more than 10 % of the corresponding price. The right to return the products or stock shall expire after two years. The period begins at the time when the participant has purchased the products or stock. This serves to guarantee that the companies do not have to expect to take back goods after many years.

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158 See vol. II, part IV B. II 1 a).
159 See vol. II, part IV B. IX.
160 See vol. II, part IV B. V 1. a).
161 See vol. II, part IV B. XI 1 a).
162 See vol. II, part IV B. XIV 1. b).
163 See vol. I, part. III A. III. 5. And 6., where the arguments are more fully developed.

The buy-back guarantee has played a role in Belgian (Amway[164]) as well as in United States (Amway[165]) case law. It is required in the French penal law (Art. L122-6), as well as in Spain (even if the obligation is restricted to obligatory minimum purchases). All five US states[166] which have specific Multi Level Marketing laws require the company to repurchase stock returned by participants against a payment of at least 90 % of the original price if the products are in a marketable and re sellable condition. The Direct Selling Association in Germany is the only organisation which provides a 100 % buy-back guarantee during the first six months[167], the buy-back guarantee (90 %) is also part of the Federal European Direct Selling Associations' Codes of Conduct.[168]

The buy-back guarantee of the company should not be restricted to obligatory minimum purchases because there can also be a "moral" obligation to purchase a certain amount of products and the participants should be protected in this situation as well.

4. Entry Fee

a) Proposal

The companies may not demand any kind of entry fee from the participants. They can charge for starter kits, training courses, information material or any other equipment necessary for the direct seller as long as there is no obligation to purchase and the companies sells them at the purchase price.

b) Reasons for the Proposal

Companies who do not fall within the scope of the definition of the prohibited Pyramid Selling, could still make profit from within the system by demanding entry fees[169] or selling obligatory initial equipment. This should be prevented, but on the other hand the companies must have the possibility to sell starter kits or other material in order to inform, instruct and train the new participant. If they have to sell the equipment at the purchase price, they can not profit from the recruits on this basis. The stock is also subject to the buy-back guarantee mentioned above.

Regulation concerning entry fees differ from Member State to Member State. In Spain[170] only material may be sold to the recruits and the payment may not exceed a certain sum. In the United Kingdom there is a limit for the purchases during the first week to £200.[171]

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164 CA Brussels, September 18, 1998, see vol. II, part IV B. II. 2.

165 See vol. II, part IV B. XVII. 3.

166 Georgia, Louisiana, Maryland, Massachusetts, Puerto Rico and Wyoming.

167 See the Code of Conduct of the Arbeitskreis Gut beraten – zu Hause gekauft no. 3.6.

168 See the FEDSA (Federation of European Direct Selling Associations) Code of Conduct towards Direct Sellers, no. B.g.

169 Entry fee means any payment by a person entering a distribution system.

170 See vol. II, part III B. XIV. 1 a).

171 See vol. II, part III B. XVI. 2. c).

In France, fees are only prohibited if they are paid to another participant (hidden head-hunting fee).[172]

5. Controlling Measures by the Companies

a) Proposal

The companies are obliged to take appropriate measures to control their marketing system. In order to prevent inventory loading, the participants shall only receive products from the company after sending an order form completed in by a final consumer. The participants have to prove that they have sold the products to at least 10 different final consumers in the previous period of business in order to receive a commission related to their sales.

b) Reasons for the Proposal

Effective controlling instruments are necessary to supervise a system which is principally based upon a progression of participants and where the participants are working as independent salespersons acting on their own. As the structure of the company has the form of a pyramid, it is important to prevent pyramid mechanisms from existing. There are two main problems which the recruiting structure creates: inventory loading and selling into the system.

- Inventory loading: Participants should be prevented from purchasing stocks of goods without being able to sell them. It is therefore important to control their purchase orders. The Amway company has established a so-called 70 % rule which states that the participants can only order goods if they have sold at least 70 % of the goods ordered in the previous month (or business period). The Federal Trade Commission has acknowledged this rule as an adequate means to prevent inventory loading.[173] However, there are an additional 30 % of the products which may not be sold. Another possibility which protects the participants in a better way and is easier to control is to admit product orders only upon an order form filled in and signed by a final consumer. The participant then only purchases products from the company which he has already sold to a final consumer. This measure prevents participants from purchasing large stocks of goods without being able to resell them.

- Selling into the system: Moreover, it shall be guaranteed that a company makes its profit from sales to final consumers rather than from sales within the system. Amway has introduced a 10 final consumer rule according to which a commission is only paid if the participant can prove that he has made sales to at least ten different final consumers. If, however, any kind of remuneration is exclusively related to the sales of products to final consumers,[174] a 10 final consumer rule would constitute an additional means to enlarge the business activities of direct sellers.

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172 See vol. II, part III B. V. 1. a).

173 Federal Trade Commission, May 8, 1979, vol. II, part III B. XVII. 3.

174 See, vol. I, part III B.II.2.

The Federal Trade Commission in the United States[175] as well as the Belgium Court of Appeal[176] have determined that these rules serve to prevent the dangerous aspects resulting from the recruiting structure. In the Omnitrition case[177], the Court of Appeal has explained its statement and determined that it does not suffice just to have internal marketing practices rules, but to control their compliance and avoid any form of circumvention: "*Amway* found as matter of fact that these policies were enforced by Amway and more importantly, that the rules *in fact* served to encourage retail sales and prevent 'inventory loading' by Amway distributors. Omnitrition has distribution rules modelled on Amway's (the buy-back rule, the 70 % rule and the ten-consumer rule are meant –*H.-W.M.*). However, the existence and enforcement of rules like Amway's is only the first step in the pyramid scheme inquiry. Where, as here, the distribution program appears to meet the *Koscot* definition of a pyramid scheme, there must be evidence that the program's safeguards are enforced and actually serve to deter inventory loading and encourage retail sales. In Amway, the ALJ made that crucial finding of fact, after full trial..... Our review of the record does not reveal sufficient evidence to establish as a matter of law that Onmitrition's rules *actually* work."

Seen against the US legal background there is a rule needed under which MLM companies are obliged to control the safeguards here proposed. The compliance with those rules as well as any other regulations must be controlled by regular spot checks or any other appropriate means.

6. Obligation to make an Own Sales

a) Proposal

Every participant in the hierarchy shall be required to make a substantial part of his income by his own sales of goods or services to final consumers.

b) Reasons for the Proposal

In general, the participants in a Multi Level Marketing company can be divided into those who only sell the products to final consumers (direct sellers) and those who recruit other participants (sponsors). The tasks of sponsors are finding new participants, training and motivating them. If a sponsor becomes very successful, he can reach a higher position in the hierarchy which is connected with more responsibility. The higher he rises in the hierarchy, the less time he spends on his own sales to final consumers. In order to prevent sponsors making most of their money from the efforts of others (sales of their downline) it is necessary in the United Kingdom that a participant proves that 50% of

175 Federal Trade Commission, May 8, 1979, vol. II, part III B. XVII. 3.

176 CA Brussels, September 18, 1998, see vol. II, part III B. II. 2.

177 United States Court of Appeals, Ninth Circuit, nos. 94-16577 and 94/16478, Webster v. Omnitrition International, Inc., 79 F.3d 776 (1996).

qualifying purchases are accounted for by sales to final consumers in order to advance to a higher level.[178]

IV. Civil Law Regulations

1. Pre-contractual Obligations

a) Proposal

Prior to any contractual agreements on distributorship, the company has to provide the participant with the following information:
the name of the company, address of the branch offices in the country and judicial status of the company as well as the date from which the company first operated
- *description of the products and services*
- *the status of a direct seller including information on tax law and his obligations towards final consumers*
- *the participant's liability for defective or dangerous products towards the final consumer*
- *the company's liability for defective or dangerous products*
- *the price which the participant has to pay in order to get the product or sell the service*
- *possible other expenses for the participant*
- *sales transactions*
- *the buy-back guarantee*
- *the remuneration system including examples with an average income*
- *the participant's profit including examples with an average income*
- *the participant's rights in connection with bankruptcy of the company*
- *the right to withdrawal from the agreement*

The information shall be provided in a clear and comprehensible manner and in writing or confirmed in another durable medium available and accessible to the participant. The companies must distribute this information to the participant without charge.

b) Reasons for the Proposal

A participant in a Multi Level Marketing system does not remain in his passive role as a final consumer, but becomes active in business activities. His status changes from that of a final consumer to that of a consumer/direct seller, although commonly he has no commercial or business experience, as most of the recruits are laymen. It is very important to provide them with the necessary details before they enter into any obligation.

The Scandinavian countries and Germany, in particular, put much emphasis on information.[179]

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[178] See vol. II, part III B. XVI. 2. c).

- Company: This includes name, address and the status of the company as well as the products which are offered. As many Multi Level Marketing companies operate world-wide, the participants must know exactly who they can address and where their nearest office is situated. It is also important to know how long the company has been operating on the market. Previous UK legislation required that the company informs the consumer/direct seller about when the company entered the market. In order to be able to sell the products, they must be supplied with the necessary information about the goods or services.

- Status of a direct seller: The consumers must be aware that they change their legal status if they become consumers/direct sellers. They become subject to different tax regimes and obligations towards their customers. In practice, it has been noted, especially by the Scandinavian Ombudsmen, that there is a lack of information regarding the obligations of a direct seller.[180] This information can be essential because the consumers/direct sellers are no longer protected by consumer laws, but now have to comply with the consumer regulations towards their customers.

- Liability: The participants must be informed of what happens if a product is defective or dangerous or even causes harm to the customers.

- Price of the product and other expenses: In order to see the costs connected with the business activity, the participants must be informed about the price they themselves have to pay when they purchase products from the company in order to resell them to the customers. They should also know which other expenses may be incurred, e.g. an annual administration fee.

- Business Proceedings: The participant must know how a sales transaction is made, i.e., whether he concludes the contract with the customer as agent for the company or in his own name. If he himself concludes the contract, he must first contact a customer and can only order the goods once the order form has been filled in and signed by the customer.

- Buy-back guarantee: The participants must know that they can return saleable goods to the company when they leave the business and are repaid the purchase price minus a handling fee not exceeding 10 % of the price. Stipulations preventing consumers/direct sellers from claiming back their investment should be prohibited.

- Remuneration system and profit: In practice, it is very important that there is adequate and correct information about the remuneration system. There are two ways of earning money: (1) by selling the products to final consumers (trade margin) and (2) by developing and training downlines (commission on the sales of the downline). The calculation of the remuneration is complicated as the remuneration depends on the type of product as well as on the amount of the participant's own sales and the sales of his downline. The practice has shown that most consumers/direct sellers earn relatively little money from their own sales and act only as direct seller without sponsoring a downline. However, the companies have, in the

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179 See vol. II, part III B. III. (Denmark), VI (Germany) XII. (Norway) and XV. (Sweden).

180 See vol. II, part III B. III. b) (Denmark), XII. 3. (Norway) and XV. 1. a) (Sweden).

past, always tried to attract new participants with claims of high profit and putting the emphasis on the recruiting business. To prevent misleading statements concerning the likely extent of profit, the companies are required to explain the remuneration system in detail and need to provide examples. Any statements concerning profit must be related to the average income of the participant. Moreover, the participant has to be informed about the "10 final consumer rule" which restricts the possibility of receiving commissions on the sales of the downline.

- Rights in connection with bankruptcy: The participants will have to know which measures can be undertaken in case the company becomes insolvent.

- Right to withdraw from the agreement: The company must inform the participants that they can withdraw from the contract of dealership within a period of 14 working days. Any shorter period of time is inappropriate given the complexity of the recruit's new status in connection with the business activities.

Provision of this information will to some extent compensate for the lack of commercial knowledge or business experience. It corresponds with problems which have arisen in practice due to participants being misled or uninformed. In order to clarify the complex system of different levels, two different structures (sales and recruiting) and a complicated remuneration system, it is necessary to provide the participants with all the information they need to make the system clear and transparent. The final consumers must understand the system and their future position before entering a Multi Level Marketing company.

- Form of the prior information: The final consumer must have the opportunity to understand the information and to consider the implications with care. As the information contains many different aspects and also serves as a basis for the subsequent contract, it must be in writing or in any other durable medium.

- Cost: The companies must not be allowed to profit from providing this information.

2. Contractual Obligations

a) Proposal

1. The contract shall include the information given prior to the agreement, the name and address of both contracting parties, the date and place of signature. The information about the right of withdrawal must be separate from any other information and printed in bold types.

2. The information must be handed over to the participant at the time of the conclusion of the contract.

3. The contract must be in writing and signed by both parties.

b) Reasons for the Proposal

It is necessary that the information is part of the contract. The company might consider providing a model contract including all the necessary details.[181]

Most states have no rules regarding the obligation to provide information to new recruits. Instead, they concentrate on the business strategies and the distinction between Pyramid Selling and Multi Level Marketing. The Scandinavian countries[182], as well as the United Kingdom[183], have adopted a different approach: they protect the participants with the help of a better information system. If the participants are well and correctly informed and the system becomes clear and transparent to them, they know what is expected from them and which rights they have.

Name and address of the company as well as the date are decisive factors for the right of withdrawal. If the participant wants to leave the business he must know exactly until when he can cancel the contract and to whom he must send the cancellation.

The contract contains important information and serves as a form of evidence. Therefore it must be in writing.

3. Right of Withdrawal

a) Proposal

The participant shall have the right to withdraw from the contract without penalty during a period of 14 working days.

If the company has failed to provide the information about the right of withdrawal, there shall be no time limit on the period for withdrawal.

b) Reasons for the Proposal

The consumer enters into a wide-ranging obligation by becoming a consumer/direct seller. His whole status changes and he is supposed to build up his own business. It is therefore necessary that he is granted a right to re-consider his decision.

The company should be penalised if it does not provide the necessary information about the right of withdrawal. If the period of time for withdrawal was extended, it would not correspond to the need to protect the participant. The subject matter of the contract is not only a product, but also running a whole business which is connected with many obligations.

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181 See as a possible guideline under part III B. III. 1 and 2.

182 See vol. II. part III B III, IV, XII, XV.

183 See vol. II, part III B XVI.

4. Recruiting

a) Proposal

The company shall guarantee that the privacy of final consumers is respected when contacting them. Final consumers shall not be influenced by misleading statements or aggressive recruiting methods.

b) Reasons for the Proposal

Practice has shown that the benefits of recruiting others have become "incentives" where the participants have been influenced by high profit claims and descriptions of an easy way of making profit. In several cases the companies have advised the participants to use telephone contacts.[184]

Especially the Scandinavian countries,[185] as well as Germany,[186] have reacted and strongly opposed these marketing practices. This proposal complies with the FEDSA codes of conduct according to which the company and direct sellers shall not use misleading, deceptive or unfair recruiting practices.[187]

5. Liability of the Company - Guarantees

a) Proposal

A final consumer may exercise the rights given to him under the applicable national legislation which gives effect to Directive 99/44/EC against the company, in case the participant goes out of business or becomes bankrupt.

b) Reasons for the Proposal

There are two reasons which could be brought forward to undermine the subsidiary liability of the MLM companies. They are both linked to the legal status of the final consumer's contracting partner, the participant. First, there is an annual rate of 10 to 15 % of new participants who leave the company, - in financial services the rate is even higher. Second, 80 to 85 % of the consumer/direct sellers do not earn more than 500 Euro monthly. These two figures which have been provided by the MLM industry indicate the fluctuation in the sales force as well as their limited earnings prospects. The

184 See the Herbalife case, OLG München, July 6, 1995, vol. II, part III B. VI. 2. b).

185 See vol. II, part III B. IV. 2 (Finland), XII. 3. (Norway) and XV. 2. (Sweden).

186 See vol. II, part III B. VI. 2. b).

187 See FEDSA Codes of Conduct towards Direct Sellers B.b.

typical consumer/direct seller[188] is therefore a hybrid person - he is no longer a consumer as he is seeking business opportunities, however, he is often untrained and the money he makes out of his business is more like pocket money than real income. The final consumers' counterpart is therefore quite different from big business. Legally, however, the consumer/direct seller is treated like any other direct seller.

If the final consumer concludes a contract with the participant he runs a risk which is much higher than in any other ordinary form of sales contract. The high rate of those who enter the system and later leave may lead to situations where his contracting partner, the consumer/direct seller is no longer in business. Directive 99/44/EC, however, provides for a minimum limitation period of two years. The only chance for the consumer to enforce his rights is if he is to be entitled directly to approach the company. The same is true where the participant goes 'bankrupt'.[189] The more practical questions would then be when and by whom the bankruptcy must be determined. One might therefore consider obliging MLM companies to establish funds similar to the package tour industry, as provided for in Directive 90/314/EEC.[190]

A subsidiary liability of the company would compensate for the relative economic weakness of the independent contractor. Self-employment takes on a form in the MLM business which makes it necessary to reconsider the sharing of liabilities, at least in the two situations covered by this proposed provision.

C. Towards a New Approach Type Regulation of Multi Level Marketing - the Second Option

I. Basic Mandatory Requirements for the Establishment and Management of Multi Level Marketing Systems

1. Proposal

MLM systems shall be shaped with due regard to the principles of good faith and the prohibition of misleading advertising and sales promotion in market transactions, in particular

¾ MLM systems shall be set up so as to guarantee full transparency of the organisational structure. Appropriate measures have to be taken to permit the return of unsold goods,

188 Cf. *A. St. Brodie*, Self-Employment Dynamics of the Independent Contractor in the Direct Selling Industry - A thesis submitted in partial fulfilment of the requirements of the University of Westminster for the degree of Doctor of Philosophy, manuscript unpublished, 1999.

189 We set aside the differences between a legal person who may go bankrupt and a final consumer who become insolvent.

190 OJ L 158/59, 23.6.1990.

¾ *MLM systems shall fully inform all participants about their rights and duties; more specifically participants shall be informed about their status and their prospective earnings,*
¾ *MLM systems shall provide clear, intelligible and reviewable remuneration systems and be exclusively bound to turnover of purchases by final consumers,*
¾ *MLM systems shall determine the responsibilities of the company to monitor and enforce the principles of good faith and the prohibition of misleading advertising at all levels, especially to avoid inventory loading*

2. Reasons for the Proposal

The establishment of a Multi Level Marketing system must be guided by general legal principles. Directive 84/450/EEC[191] provides a safe legal instrument throughout the Community to stop misleading and deceptive forms of advertising. There is no general rule on fair trading practices at the EC level. However, Art. 4 of Directive 97/7/EC requires any information to be supplied in a clear and comprehensible manner in a way appropriate to the means of distance communication used, with 'due regard to the principles of good faith in commercial transactions'. The same concept could be selected as a baseline for the regulation of Multi Level Marketing systems. It would allow for a flexible handling of those trade practices that are not misleading in the sense of Directive 84/450, but require some form of control. It is by way of this rule that the privacy of the participants can be guaranteed and all forms of enticement excluded.[192]

The legal principles may be broken down into four main aspects: (1) the MLM structure, (2) the recruiting process, (3) the transparency of the remuneration system, (4) the monitoring and enforcement responsibilities.

MLM companies claim to be different from illegal Pyramid Selling, although the marketing system is at least in theory open to geometrical progression. Their key argument is that there is no evidence in business practice for such an assumption. However, the buy-back guarantee has been introduced to indicate to all participants that they join a system in which the responsibilities are clearly defined and where there is a reasonable chance to get out of business if so desired. Although the buy-back guarantee has certainly contributed to improving the reputation of the MLM industry, there are still a number of open questions calling for a satisfactory response. Ten and more levels are not apt to give a clear cut picture of the organisational structure. The MLM industry here has to face the critique that an overarching number of marketing levels might bring the marketing strategy closer to Pyramid Selling. The only way out seems to be to reduce the number of marketing levels. This might be a major issue for discussion in the development of *marketing standards.*

(1)Recruiting is the most sensitive issue of the MLM systems. It constitutes the basic element of the whole marketing strategy. The brochures and information leaflets are largely devoted to explaining to newcomers their earning prospects if they manage to build up their own downlines. There is a lot of pressure on the participants of the

191 OJ L 250/17, 19.9.1984.

192 Cf. FEDSA Code of Conduct towards consumers , 2.12. Respect of Privacy, 2.13. Fairness; and FEDSA Code of Conduct Towards direct sellers, C.a. (Principle) and C. b. (Enticement).

system to recruit new participants. Direct incentives, such as head-hunting fees are forbidden, but indirect incentives remain valid. As the first contact usually takes place at the final consumer's home or at home parties, privacy has to be respected. Some countries devote much attention to the protection of the private sphere. There is a direct link to Directive 97/7/EC where so-called "cold calling" (an unsolicited approach including by telephone) is liberalised, but only if 'there is no clear objection form the consumer'. Consideration No. 17 binds the 'clear rejection' to the protection of privacy under the European Convention on Human Rights and Fundamental Freedoms. All Member States prohibit enticement and undue annoyance. In this regard the FEDSA Code is in line with the case law of several Member States as well as guidelines from the Scandinavian Ombudsmen.[193]

(2) There is ample evidence that the remuneration system lacks transparency. This is mainly due to the remuneration system itself where the sponsor not only receives the trade margin of his own sales, but also from the sales of all participants in his downline. MLM companies should take appropriate measures to improve the transparency by providing the newcomer with clear and comprehensible information which could be based on a set of examples. These examples should include the present experience that 80 to 85 % of the participants of the MLM systems are only consumers/direct sellers, i.e. they earn less than 500 Euro monthly.[194] This is all the more important as exorbitant earnings perspectives may bring the MLM systems closer to games of chance, especially when it is bound to "little effort - high rewards" advertising.

(3) The companies have to monitor the MLM system in order to make sure that the safeguards which have been built in to keep the system distinct from illegal pyramid sales remain effective. The companies alone develop the marketing strategies, they make all the documents and information available which the newcomer needs to start his business. It is therefore the company and the company alone which remains responsible for the MLM system as a whole. The company has to take appropriate steps to secure that the general principles are respected. There might be the need to make random tests and to guarantee that there is no inventory loading.

II. Basic Mandatory Requirements for the Shaping of the Contractual Relationship between the Participant and the Company/direct seller

1. Proposal

The rights and duties under the contract shall be shaped with due regard to the legitimate expectations of the parties concerned, in particular:

- *Prior to the conclusion of the contract the participant receives clear, intelligible and reviewable information on the company, the products and services, his rights and duties under the contract and his earnings perspectives,*
- *The information shall be in writing or in a durable medium available and for free,*

193 See vol. II, part III. B. III. 1. a) and XII. 3.

194 Cf. PriceWaterhouseCoopers, loc. cit., 135 et seq.

¾ *There shall be a written agreement signed by the parties which contains all information which is given prior to the agreement,*
¾ *The participant shall be given an unconditional and free right to withdraw 14 days from entering into the agreement,*
¾ *Companies shall be subject to a subsidiary liability for defective products in case the final consumer may not be fully compensated by his contracting partner.*

2. Reasons for the Proposal

If companies who rely on MLM systems want to stay in business they have to make sure that the new participant is provided with all information he needs to take a well informed and responsible decision as to whether he wants to leave his status as a final consumer and become a participant of the marketing system. Such a policy is very much in line with the overall philosophy on which the Internal Market is built. Information is needed prior to decision taking and even once the decision has been taken. Otherwise the autonomy of the participant would not be respected. The information must be given prior to the contract and laid down in writing in the agreement between the parties.

Maintaining and strengthening the autonomy of the participant requires the establishment of a right of withdrawal from the contract for a period of at least 14 days. Such a delay might help the participant to reconsider his decision and to rethink whether he really wants to change from a final consumer into a consumer/direct seller. Such a right of withdrawal only exits in the United Kingdom and Ireland. The MLM companies only grant the participant a right of withdrawal similar to the minimum period of the Doorstep Selling Directive, that means within a period of one week.

Due to the structure of the MLM business there is a need to make the company liable in case the participant goes out of business or becomes bankrupt.[195]

III. Elaboration of *Marketing Standards* on the Basis of the Basic Requirements through the European Standardisation Institutions

1. Proposal

The European Standardisation Institutions CEN/CENELEC shall elaborate in co-operation with the MLM industry concerned and the consumer organisations the following non-binding documents:
¾ *marketing standards on the MLM system,*
¾ *marketing standards on the contractual relation between the participant and the company/sponsor,*
¾ *a standard sheet to guarantee the availability and accessibility of information prior to the conclusion of the contract,*
¾ *a standard contract which lays down the rights and duties of the consumer/direct seller and the direct seller.*

[195] See the reasoning under part III. B. III. 5.

2. Reasons for the Proposal

The overall idea is to have a standard set of documents which helps to improve the transparency of the MLM industry. Standard conditions for the companies' behaviour as well as for the shaping of the contractual relationship between a participant and a company/sponsor provide a certain level of minimum protection for all who join the system or who simply purchase products from one of the participants. Companies who may want to go beyond that level of protection are invited to do so. There is no need to take the '*marketing standards*' as the only given standards.

IV. The Role of the Commission and of the Standing Committee 83/189/EEC

1. Proposal

The European Commission mandates the European Standardisation Institutions after Consultation with the Standing Committee 83/189/EEC.

2. Reasons for the Proposal

Pursuant to the new approach type Directives, the European Commission has to break down the mandatory requirements into a mandate which has to be implemented by the European Standardisation Institutions. The Member States have their voice in the standing committee 83/189/EEC[196] and thus support the Commission in the shaping of the mandate. It might be useful to consider the engagement of an EC consultant to CEN/CENELEC for trade practices.

V. The Right of Consumer Organisation to participate in the Elaboration of the *Marketing Standards*

1. Proposal

Consumer organisations are entitled to participate in the elaboration of marketing standards.

2. Reasons for the Proposal

The success or failure of *marketing standards* will largely depend on whether the rules developed within the standardisation organisation are politically acceptable to final consumers all over the Community. That is why the participation of their representatives

196 OJ L 109/8, 26.4.1983.

must be assured. It will be for the consumer organisations to designate the appropriate experts.

The EC proposal on Electronic Commerce encourages Member States and the Commission to elaborate codes of conduct. For the first time, however, consumer associations shall be involved in the drafting and implementation of such codes in so far as they may be concerned.[197] The proposal here paves the way for a new understanding of the role of consumer organisations in standard making which reaches beyond the New Approach type Directive where such explicit reference is missing. The proposed solution pushes the development one step further, at least as far as the future role of consumer organisations is concerned. The proposal presented combines the 'New Approach' type regulation with the proposal on Electronic Commerce and grants consumer organisations a firm legal position.

VI. Presumption of Conformity = Presumption of Legality

1. Proposal

MLM companies who are willing to subscribe to the marketing standards and integrate them into their business strategy in terms of trade practices and contract making benefit from the presumption of legality.

2. Reasons for the Proposal

MLM companies which comply with the requirements laid down in the *marketing standards* must be rewarded for their efforts to respect the law. That is why the presumption of legality seems to be justified. However, as the *marketing standards* are not binding and only contain recommendations they can only constitute a presumption which may be rebutted. The companies which subscribe to the *marketing standards* have to face the risk that the rules may be challenged in the courts of the Member States.

Consumer organisations shall be given an explicit right to bring provisions of the *marketing standards* as applied by particular companies to court. In this way the *marketing standards* should be treated like standard contract terms. The fact of their participation in the elaboration of standard terms does not prevent the same consumer organisations bringing conflicting issues to the courts. Such a control mechanism would set incentives to have the rules of the *marketing standards* constantly improved.

A mechanism must be foreseen to guarantee that Standing Committee 83/189/EEC is kept informed about possible judgements taken in Member States courts. The details of the consumer organisations' right to redress as well as the procedure which has to be developed to secure necessary amendments of the *marketing standards* will be discussed in Part IV.

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[197] OJ 1999 C 30/12, 5.2.1999. The rights have even been strengthened in the revised proposal, loc. cit., September 1999.

PART IV. COMMON RULES FOR THE TECHNICAL AND THE NEW ASPECTS

A. Judicial or Administrative Redress (Article 1)

I. Proposal

(1) Member States shall ensure that adequate and effective means exist to ensure compliance with this Directive in the interests of consumers.

(2) The means referred to in paragraph 1 shall include provisions whereby one or more of the following bodies, as determined by national law, may take action under national law before the courts or before the competent administrative bodies to ensure that the national provisions for the implementation of this Directive are applied:

a) public bodies or their representatives

b) consumer organisations having a legitimate interest in protecting consumers

c) professional organisations having a legitimate interest in acting.

(3)Any decision taken in the Member States courts or competent administrative bodies on marketing standards shall be reported to Committee 83/189/EEC. The Commission shall take appropriate steps to make the decisions available to the public.

(4)The Commission shall evaluate the need for collective compensation claims and report to the European Parliament and the Council on the feasibility of a Community-wide solution two years after the coming into force of the revised Directive.

(5) ***The burden of proof*** *concerning the existence of prior information, written confirmation, compliance with time-limits or consumer consent* ***is placed*** *on the supplier.*

(6) Member States may provide for voluntary supervision by self-regulatory bodies of compliance with the provisions of this Directive and recourse to such bodies for the settlement of disputes to be added to the means which Member States must provide to ensure compliance with the provisions of this Directive.

II. Reasons for the Proposal

Rules on judicial and administrative redress are common in the more developed directives on consumer protection. However, the rules need to be more clearly shaped in so far as the rights of consumer organisations are concerned. Member States should be obliged, as a minimum standard, to provide consumer organisations with the right to sue. Member States would then have to decide who else should benefit from such a right, trade organisations and/or public authorities. In the Scandinavian countries, the

Consumer Ombudsman is entitled to initiate legal proceedings.[198] In Belgium, Germany, Greece, Luxembourg, the Netherlands, Portugal and Spain, consumer organisations have the right to sue.[199] Any violation of the doorstep selling act is punished with a fine in France, Portugal and Spain.[200]

If the Commission chooses to make use of the second option,[201] i.e. if MLM is put under the regime of the New Approach, there will be a need to keep the standing committee informed about decisions taken by national courts/administrative bodies. Independent of the approach chosen, however, there is a need to get to grips with collective damages and to study whether the adoption of common rules for collective compensation claims might be feasible.

The rules on the burden of proof should be made mandatory and Directive 97/7/EC be amended accordingly. There has already been comprehensive discussion in the legislative process of the Distance Selling Directive. If the supplier combines the two marketing strategies, the consumer needs even higher protection as he might no longer know what sort of information he has received, when, and by what means. The reversal of the burden of proof will oblige the supplier to make sure that the consumer really receives the information which should enable him to take a responsible decision.

B. Binding Nature (Article 2)

I. Proposal

(1) The consumer may not waive the rights conferred on him by the transposition of this Directive into national law.

(2) Member States shall take the measures needed to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-member country as the law applicable to the contract if the latter has a close connection with the territory of one or more Member States.

II. Reasons for the Proposal

Both provisions belong to the standard set of rules in secondary Community legislation on consumer protection. There is no room for the parties to contract out the rights given under the Directive. These rights have two functions to fulfil - to give full effect to Community law and to provide effective legal protection. An individual consumer might well be better off without the level of protection foreseen in the proposal, he still has to observe the role entrusted to him by Community law. He has to make sure that

198 See vol. II, part I A. II. 9.
199 See vol. II, part I A. II. 9.
200 See vol. II, part I A. II. 9.
201 See part III C.

Community law rules are applied and are used to keep the 'constitutional charter' of the European Community alive.

C. Community Rules (Article 3)

I. No Proposal but some Considerations

The respective provision of the Distance Selling Directive runs as follows:

(1) The provisions of this Directive shall apply insofar as there are no particular provisions in rules of Community law governing certain types of distance contracts in their entirety.

(2) Where specific Community rules contain provisions governing only certain aspects of the supply of goods or provision of services, those provisions, rather than the provisions of this Directive, shall apply to these specific aspects of the distance contracts.

II. Reasons from Refraining for Making a Proposal

In theory, it might be possible to adopt the approach chosen in the Distance Selling Directive and to secure the primacy of those directives which regulate doorstep selling contracts either in 'their entirety' or with regard to 'specific aspects'. However, any decision should take into account the set of directives the revised Doorstep Selling Directive could and should exempt. The debate in the legislative process of the Distance Selling Directive focused on insurance (Directive 90/619/EC on Life Insurance as amended by 92/96/EEC,[202] 88/357/EEC as amended by 92/49/EEC Non-Life Insurance)[203] and to a lesser extent on the interrelationship with Directive 87/102/EEC as amended by 90/88/EEC on Consumer Credit,[204] to Directive 90/314/EEC on Package Tours[205] and the Directive 94/47/EC on Timesharing.[206]

Whether financial services (insurance, credit, banking, etc.) should be exempted from the scope of the revised Doorstep Selling Directive, is a matter to be decided by politics. Insurance is a fertile ground in which one can see that extensive lobbying might delay the development of consumer protection rules but does not bring the reform movement to a halt. The result is rules which are similar though not identical, which create confusion in the minds of consumers and undermine the shaping of common rules for the same type of business. There is ample reason to believe that the best way forward, not only for consumers but also for the supplier, might be the availability of common rules. The intended revision of the Doorstep Selling Directive might be an opportunity to stop the

202 OJ L 360/1, 9.12.1992.
203 OJ L 228/1, 11.8.1992.
204 OJ L 61/14, 10.3.1990.
205 OJ L 158/59, 23.6.1990.
206 OJ L 280/83, 29.10.1994.

exemption policy and to submit financial services as a whole to the general rules provided for by the revised Doorstep Selling Directive.

The situation is less difficult with regard to package tours and timesharing. Both directives lay down rules for a specific type of contract, whereas the two directives under consideration here define rules for a specific mode of the conclusion of the contract. This mode or rather these two forms - doorstep and distance communication - may be used in all sorts of consumer transactions whatever the goods or the services are. That is why neither the Directive on package tours nor the Directive on timesharing should be exempted from the scope of application of either the doorstep or Distance Selling Directive.

D. Minimal Clause (Article 4)

I. Proposal

Member States may introduce or maintain, in the area covered by this Directive, more stringent provisions compatible with the treaty, to ensure a higher level of consumer protection.

II. Reasons for the Proposal

Such a provision belongs to the standard set of secondary Community legislation in the field of consumer protection. The minimum level policy should be maintained, although important differences in the Member States legislation might subsist even after the transformation of the revised Doorstep Selling Directive.

E. Consumer Information (Article 5)

I. Proposal

Member States shall take appropriate measures to inform the consumer of the national law transposing this Directive.

II. Reasons for the Proposal

The provision belongs to the standard set of provisions in secondary Community law on consumer protection. One may wonder to what extent such a rule grants the consumer an individual right of information which might be violated by the Member States. However, there is a strong need to increase the information policy of the Member States with regard to secondary Community legislation.

F. Complaints Systems (Article 6)

I. Proposal

The Commission shall study the feasibility of establishing effective means to deal with consumers' complaints in respect of doorstep selling. Within two years after the entry into force of this Directive the Commission shall submit a report to the European Parliament and the Council on the results of the study, accompanied if appropriate by proposals.

II. Reasons for the Proposal

The direct marketing industry has a strong tradition in consumer complaints handling outside the courts. The numerous dispute settlement procedures available in the Member States (in Denmark the "Forbrugerklagenaevnet", in Finland the "Consumer Claims Office", in Greece the "National Consumer Council", in the Netherlands arbitration bodies and in Portugal the "Centro de arbitragem de conflictos de consumo") should be reviewed against the criteria set out in by the Commission in 1998.[207] Such an attempt might contribute to the development of common standards for voluntary complaints handling. It would be more than ever necessary to undertake such a review in order to know if and how the different schemes work in practice. The integration of a provision similar to the Distance Selling Directive would support the attempts of the Commission and the European Parliament to improve the access to justice for consumers.

[207] See, Recommendation 98/257/EC OJ 1998 L 115/31.