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Response

of Deutscher AnwaltVerein e. V.

through its Committee on Civil Law

to the

Questions of the European Commission

in the

Discussion Paper

on the Review of Directive 85/577/EEC

To protect the consumer in respect of contracts negotiated away from business premises

(Doorstep Selling Directive)

Members of the Committee:

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Europäische Kommission:

Generaldirektion Gesundheit und Verbraucherschutz
Generaldirektion Justiz, Freiheit und Sicherheit

Europäisches Parlament:

Ausschuss für Binnenmarkt und Verbraucherschutz
Rechtsausschuss

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Ständige Vertretung Deutschlands bei der EU

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Redaktion Juristenzeitung / JZ, Tübingen

Redaktion Monatsschrift für Deutsches Recht / MDR, Köln

Redaktion Neue Juristische Wochenschrift / NJW, Frankfurt a. M.

The Deutscher Anwaltverein (DAV - German Bar Association) is a voluntary Association of German lawyers. The DAV with currently about 61,000 members represents the interests of German lawyers on a national, European and international level.

IV. Main regulatory issues at stake

1. Definitions (Article 2)

Question 1: Do you think that specific issues should be addressed in relation to the current definitions of „consumer" and „trader" in the field regulated by Directive 85/577/EEC? If so, please specify which ones. […].

- Definition "consumer":
    - The definition "consumer" should be extended so as to include partnerships of which all members are consumers and which were formed for a non-commercial purpose. This may seem unnecessary in some jurisdictions on the grounds that partnerships may not have legal capacity in several jurisdictions. In Germany, they do have legal capacity and, accordingly, such a partnership could be a purchaser of goods or services.

Question 2: Are there other notions in need of definition?

- "written form":
    - Article 4 requires "written notice". It should be clarified whether "written" means signed (manually or by electronic signature) or whether a facsimile or printed signature is required and sufficient or whether any form of readable communication is sufficient, whether or not it authenticates its originator.

2. Scope of application (Article 1 and Articles 3 (1) and 3(3))

2.1 Situations in which direct sales arise (Article 1)

Question 3: Are the doorstep situations which are listed at Article 1 of the Directive still up to date?

- Yes

Do they need to be amended, expanded, repealed and/or harmonised in any way to reflect new market realities? Please explain how and to which aspects.

- Situations should be extended to contracts which are entered into in public and/ or publicly accessible establishments (public places, public transport, educational establishment, healthcare establishment, restaurants) where the customer is being appealed to by surprise.

- The Directive should be extended to cases in which the negotiation preparing the conclusion of a contract has taken place in a doorstep situation even if the conclusion of the contract itself does not take place in a doorstep situation. This shall also apply if the negotiation has taken place in a door step situation and the contract is subsequently being concluded via telephone (this case is neither covered by Directive 85/577/EEC nor by Directive 97/7/EEC). According to German law the consumer's right to withdraw from the contract does not apply only in cases where the contract was concluded in a doorstep situation. It would be sufficient, if the conclusion of the contract was affected by the doorstep situation.

- The principles set out in the European Court of Justice's judgements Crailsheimer Volksbank C-229/04, Schulte C-350-03 and Travel VAC, C 423/97 should be introduced into the Directive.

- In Article 1 Section 2 the proviso should be amended to read:

    - "provided that when he requested the visit – the consumer did not know, **and** could not reasonably have known, that …"

Question 4: Have you encountered any problems with the application of Article 1? If so, which problems have you encountered and how do you feel these should be solved?

- Pursuant to Article 1 of the Directive 85/577/EEC the Directive shall apply "*where the visit does not take place at the express request of the consumer*". In practice, traders provoke such express request from the customer to avoid the applicability of the provisions on doorstep situations (e. g. sending of coupons to the customers connected with a participation in an open contest; provoked requests via internet). Provisions should be introduced to prevent such tactics of traders and assuring that "*provoked requests*" of the customers do not exclude the applicability of the Directive 85/577/EEC. Therefore, the exception at the end of section 1 of Article 1 should apply only if the request expressly concerns certain goods or services (for suggested wording see the answer to question 7 below).

- The directive refers to "*contracts under which a trader supplies goods or services*". That clause reads differently in the German version of the Directive. Retranslated into English, the German version refers to "*contracts between a customer and a trader who provides goods and services*". The same wording is used in the German Act for transformation of the Directive. German law therefore has a wider scope as contracts of any kind are submitted under the Directive as long as the trader (generally or inter alia) provides goods and services (even if not in the precise case). It should be clarified whether the nature of the performance promised or the nature of the promisor's business shall be decisive for the applicability of the Directive.

- The meaning of Article 1 Sections (3) and (4) is unclear. Section (3) seems to apply only to non-binding unilateral offers, whilst Section (4) applies to contractual offers. This system is based on the assumption that unilateral offers are not binding. This is not the case in German law. Section (3) should be amended by substituting the words "although the consumer was not bound" by the words "irrespective of whether or not the consumer was bound". Section (4) is then unnecessary and can be deleted.

2.2 Regulatory options restricting the scope of the Directive (Articles 3(1) and 3(3)

2.2.1 Restrictions on the basis of the value of the contract (Article 3(1))

Question 5: Should the regulatory option at Article 3(1) which allows Member States to exclude contracts of a value of less than 60 euros be modified and/or harmonised further? Please explain why and how.

- Exception should be narrowed to contracts of a value of less than 60 euros where the payment is effectuated directly. Even where the value of the contract is small, consumers should not be forced into subsequent negotiations in which they could be obliged to provide personal documents to the trader.

Question 6: Is the current threshold adequate taking into account the present reality of the direct selling market

- Yes

2.2.2 Derogation from Article 1(2) on solicited visits (Article 3(3))

Question 7: Should the regulatory option at Article 3(3) which allows Member States to derogate from the provisions on solicited visits at Article 1(2) be modified and/or harmonised further across the EU? Please explain why and how.

- The option should be maintained. However, a regulation of the burden of proof would be appropriate

  (1) In Article 1(1) the wording suggests that the consumer must prove that the visit does not take place at his request; this would mean proof of a negative.; Therefore, and to implement the above suggestion in respect of question 3) the last two lines of Article 1 (1) should be amended to read

  "except where the visit took place at the express request of the consumer for demanding presentation or the offer of specified goods or services."

  (2) In Article 1(2) the consumer should have to prove that he could not reasonably have known.

  (3) If a Member State exercises the option under Article 3(3), the proof required for Article 1(2) would not be available in respect of connected goods or services.

Question 8: What is your practical experience of the application of the exclusion (or where applicable the inclusion) of solicited visits from the scope of the Directive and in order to improve legal certainty and consumer protection, should the Directive be extended to all solicited visits?

- A visit by the seller/contractor may be a service and indispensable. It should not be penalised. An extension to solicited visits could lead to disadvantages for the consumers as traders could – even at the consumer's request – refuse visiting the consumers to exclude the strict provisions of the Directive 85/577/EEC. The Directive should therefore not be so extended. However, the trader should bear the burden of proof that he has been invited by the consumer and that that invitation has taken place on the consumer's own initiative. The burden of proof should be clarified (see above).

3. Specific exemptions - Article 3(2)(a)

Question 9: Do the current exemptions need to be modified in the light of new market developments or interpretation problems? Please explain.

- The Directive should clarify to what extent the exemption shall apply. For example, shall the exemption also apply to loans granted for a contract related to immovable property? Shall the exemption apply to investments in real estate funds?

Question 10: Does the interaction of this Directive with the Timeshare Directive need to be clarified further?

- No

4. Written notice of right of cancellation – Article 4

Question 11: Can Article 4 be improved, in particular, with respect to the modalities for providing notice? If so, how?

- Trader should be obliged to inform the consumer about the exact date on which the right to renounce expires. The mere information about the duration of the cooling off period leads to the result that the consumer must calculate when the period ends. Consumers might therefore miss the renunciation date. Alternatively, the trader should be obliged to state the duration of the cooling off period and the exact date on which the period commences running.

- The trader should be obliged to inform the consumer how to withdraw from the contract/ what the consumer must do to assure that the withdrawal is effective. The trader should have the possibility of ensuring sufficient information on these requirements by handing out to the consumer a form which the consumer only needs to sign if he/she wants to withdraw from the contract. Otherwise, consumers might be overburdened if they are obliged to draft a letter of withdrawal themselves. The burden to write such withdrawal itself could restrain consumers from withdrawing.

- The Directive should specify that the trader's notice must be given in writing, e. g. on a piece of paper. It should further be pointed out that such notice may only be given by durable media if the negotiations have taken place in the same way.

- Language: A clause should be introduced into the Directive 85/577/EEC obliging the trader to use a clear and understandable language. In addition to that it should be regulated that the notice must be given in the language of the country the contract is being concluded in and/or the language in which the negotiations leading to the contract have been carried out.

- The notice should also be required to inform the consumer of the consequences of renunciation.

- The consequences of a failure to give sufficient notice should be harmonised among member states.

5. Right of withdrawal – Article 5

Question 12: Do the rules concerning the exercise of the right of withdrawal and its consequences need to be clarified in the field of doorstep selling; if so which aspect(s) should be treated differently from the field of distance selling and why?

- Please see above, Question 11, bullet point 2.

The regulations applying to doorstep and distance selling should be harmonised among themselves as much as possible. The same applies to the consequences of a failure to comply with these regulations.

6. Interaction with other consumer protection legislation

Question 13: Does the interaction of this Directive with the Distance Selling Directive need to be clarified further?

- Please see above, Question 3, bullet point 3: In cases where negotiations take place in doorstep situations and in which the contract is subsequently concluded via telephone or other devices subject to the Distance Selling Directive the consumer should have the protection of both Directives. Preferably, the rules applying to doorstep and distance sales should be harmonised among each other as much as possible.

Question 14: Is there scope for further harmonisation of this directive with the Distance Selling Directive?

- Definitions of the terms "*consumer*" and "*trader/supplier*" should be harmonised. Currently both directives provide for different definitions; these differences are not justified. Identical definitions should be incorporated.

V. Issues which are not currently regulated at European level

1. Time restrictions on doorstep selling

Question 15: Do you feel necessary to introduce at European level restrictions on hours during which direct sellers can make visits to a customer's home

- No. Living habits and daylight times vary among the Member States.

2. Ban on payments during the cooling off period

Question *16: Do you think that the introduction in Belgium and France of restrictions or bans on payments (and other types of consideration) during the cooling off period was necessary for consumer protection and has been workable for traders? Do you think that similar restrictions or bans on advance payments should be or should not be introduced at European level? Why?*

- Restriction should be introduced at European level. Where consideration has already been provided, the foreseeable complications of sending goods back and demanding refund of monies paid could discourage a consumer from exercising his or her right of renunciation even if the consumer – in fact – is interested in avoiding the contract. In countries where an omission of sufficient notice regarding withdrawal rights leads to the prolongation of the cooling off period, such restriction would further work as an incentive for the trader to inform the consumer correctly and comprehensively to assure that the consumer provides its consideration.

[VI. Bans on sales]

VII. Other issues

Question 17: Is/are there any other issue(s) or area(s) that requires to be explored further or addressed at EU level in the context of the doorstep selling Directive?

- The burden of proof should be harmonised (see the answer to Question 7 above).