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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT

on the implementation of Directive 1998/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of prices of products offered to consumers

PREFACE

The purpose of this Communication is to examine how Member States have implemented Directive 1998/6/EC on consumer protection in the indication of prices of products offered to consumers. It is limited to this question on which public consultation is sought. All interested parties are invited to submit replies to the European Commission by 1 September 2006. Please send your comments (marked "First consultation on price indications directive") to either:

European Commission

Directorate-General for Health and Consumer Protection

Rue de la Loi 200

B-1049 Brussels

Belgium

or by e-mail to SANCO-B2@ec.europa.eu

Responses and comments will be made public on the Internet site of the European Commission, unless the sender explicitly requests otherwise. After the consultation period has ended, the Commission will assess the need for organising a public hearing to further debate the issues raised in this report further.

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(Text with EEA relevance)

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1. INTRODUCTION

All the Member States have adopted national legislative measures transposing the Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers. With the present document, the Commission intends to report on the application of this Directive, as provided by its article 12.

At this stage, however, the Commission does not consider appropriate to put forward any proposal under article 12 of the Directive. In fact, the Commission has no evidence that the current divergences between national laws on price indications raise significant internal market barriers, which would justify a regulatory intervention. This issue will be decided in the light of the consultation.

According to the Directive, a proposal in the field of price indications should take into account, in particular, the experience gained in the application of the Directive by small retail business, regarding *inter alia* technological developments and the introduction of the single currency (recital 14). In order to provide a solid knowledge base to its action, in compliance with the better regulation principles, the Commission has carried out a study, which took place prior to enlargement and limited to the 15 old Member States, aimed to assess the actual impact of the provisions of article 6 and their implementation on small retail businesses, the functioning of the internal market and the overall level of consumer protection[1]. This earlier study usefully highlights various aspects for consultation on the directive.

The Commission intends to consult the interested parties as to the impact of the Directive on the internal market and on the overall level of consumer protection. The annex lists some of the questions that need to be addressed in the review process. On the basis of the outcome of the consultation process, in the light of the result of the ongoing process of review of the consumer acquis, the Commission will consider the need of further legislative initiatives in the field of price indications. The review of the Directive on price indications is consistent with the better regulation objectives pursued by the Commission in terms of simplification of the regulatory environment.

2. THE MAIN PROVISIONS OF THE DIRECTIVE

The main purpose of the Directive is to ensure that the selling price and the price per unit of measurement (unit price) are indicated for all products offered by traders to consumers, in order to improve consumer information and to facilitate comparison of prices. The selling price must be unambiguous, easily identifiable and clearly legible (article 4).

The scope of application of the Directive is limited to products. Although the Directive does not contain a definition of 'products', the term can be interpreted with reference to other

[1] 'Appraisal of Directive 98/6/EC on consumer protection in the indication of unit prices of products offered to consumers', study prepared by EIM Business & Policy Research.

provisions of the acquis[2] as including all movable goods. Therefore, the Directive does not apply to services[3].

The obligation to indicate the selling price and the unit price for all products offered by traders to consumers is of general application. However, article 3(2) of the Directive allows Member States to derogate from this general obligation for products supplied in the course of the provision of a service, for sales by auction and for sales of works of art and antiques. When making use of this derogation, Member States can therefore decide that neither the selling price nor the unit price should be indicated.

Article 3(3) provides that the selling price does not have to be indicated for products sold in bulk, i.e. products which are not pre-packaged and are measured in the presence of the consumer. Since the selling price of these products cannot be determined until the consumer indicates how much of the product is required, only the unit price needs to be indicated.

Under article 3(1), the unit price does not have to be indicated if it is identical to the selling price (e.g. when the quantity of the packaged product equals a single unit of measurement). Moreover, under article 5 Member States can waive the obligation to indicate the unit price of products for which this indication would not be useful because of the product's nature or purpose or would be liable to cause confusion.

The obligation to indicate the unit price can also be waived by Member States, for a transitional period, if it were to constitute an excessive burden for certain small retail businesses, because of the number of products on sale, the sales area, the nature of the place of sale, specific conditions of sale where the product is not directly accessible to consumers or certain forms of business, such as certain types of itinerant trade (article 6). This derogation cannot apply to the unit price of products sold in bulk by these businesses.

Finally, the Directive provides that Member States may limit the maximum number of prices to be indicated (article 4), in order to ensure that the transparency of the system is ensured during the introduction of the euro (recital 13).

A minimum harmonisation clause is contained in article 10 of the Directive, whereby Member States are not prevented from adopting or maintaining provisions which are more favourable as regards consumer information and comparison of prices, if compatible with the Treaty.

3. THE REGULATORY OPTIONS

3.1. The general obligation and its limits

The general obligation to indicate selling and unit prices can significantly improve the ability of consumers to evaluate and compare prices and make informed market choices on the basis of simple comparisons, thus fostering competition between undertakings and products. However, for some categories of products the indication of the selling and unit prices may prove impossible or not useful, since their price might only be determined through a

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2 E.g. article 2 of Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

3 The transposition measures enacted by several Member States, however, are also applicable to services: this is the case of Belgium, Germany, Luxembourg, Portugal, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia.

negotiation process, or because they cannot be easily compared with other products of the same kind. For this reason, the Directive allows Member State not to apply the general obligation in article 3(1) to products supplied in the course of the provision of a service (e.g. the price of shampoo provided in the course of hairdressing), sales by auction and sales of works of art and antiques.

Only France and Finland have decided not to use the possibility to exempt these products from the general obligation to indicate the selling and unit prices. In Sweden the statutory exemption is limited to products sold by auction and similar procedures. In Hungary, products sold at auctions are only exempted from the obligation to indicate the selling and unit prices when the starting auction price is specified in the auction notice. Belgium excludes products supplied in the course of the provision of a service and those sold through public procedures. Polish legislation provides that the price of goods can be included in the price of a service: this means that no obligation exists to indicate separately the selling and unit prices of goods supplied in the course of a service. In Luxembourg, the exemption for works of art and antiques is only available if these products carry a clear indication, which allows for their identification on a price list which must be exposed in the shop and accessible to consumers. The remaining Member States have fully used the derogation.

3.2. The unit price: cases of exclusion

The Directive acknowledges that for certain products the obligation to indicate the unit price would not be useful or would be liable to cause confusion, for instance when indication of the quantity is not relevant for price comparison purposes, or when different products are marketed in the same packaging (recital 10). For this reason, article 5(1) allows Member States to waive the obligation to indicate the unit price for these products.

All Member States have exempted certain goods from the obligation to indicate the unit price. The vast majority of Member States have identified some categories of products for which the unit price does not need to be indicated. Swedish law does not contain a list of exempted products but provides that the unit price needs not be indicated if, due to the nature or the purpose of the product, it can be assumed that this indication would not be relevant or is likely to cause confusion. The Maltese and Polish legislations do not list categories of exempted products, but empower the competent authorities to waive the general obligation to indicate the unit price. Finally, the transposition measures enacted by Cyprus, Latvia and Lithuania draw up short open lists, giving examples of products for which the obligation is not applicable.

Member States have selected categories of goods exempted from the general obligation to indicate the unit price according to widely diverging criteria. Most national transposition measures waive the obligation for products which comprise an assortment of different items sold in a single package, echoing the example given in the preamble of the Directive. The indication of the unit price is also generally deemed unnecessary for goods marketed in quantities below certain thresholds (ranging from 5g or 5ml in Cyprus and Lithuania to 100g or 100 ml in Luxembourg). Several Member States have exempted some or all products sold through automatic distributors and vending machines. In the United Kingdom and Estonia , products pre-packaged in a constant quantity offered for sale from a vending machine are exempted from the obligation to indicate the unit price under the national provisions transposing article 6 of the Directive.

In a number of cases, the list of exempted products also includes products sold individually for immediate consumption (i.e. ice creams), complete ready meals composed of different products, concentrated or dehydrated foodstuff to which water and/or other ingredients must be added before consumption, products sold by the unit and special sales at a reduced price of foodstuff whose sell-by date is getting near. Denmark, Finland, Estonia and Slovakia have explicitly excluded that the unit price be indicated for individually sold products which cannot be divided up without altering their quality or nature and for which there is no requirement to indicate the net content.

Other exemptions are more specific. For instance, Danish law excludes non pre-packaged rolls and cakes; Estonia exempts chocolate figure and surprise eggs, as well as early fresh vegetables, culinary herbs sold in pots, breath fresheners and chewing gum. Finland exempts chocolate eggs, decorative sweets and bakery and confectionary products. In the Netherlands, Estonia and Slovenia, the unit price needs not be indicated for products used in window-dressing. Poland excludes flowers and plants, live animals, non-pre-packaged foodstuff which is sold by the item and goods customarily sold in big quantities, as well as goods offered for sale outside the business premises or at a special fair and goods whose selling price is below 4 zloty. Greece excludes cosmetics, perfumes and toiletry; beverages and chewing tobacco are exempted in Germany; finally, Spain excludes wines and spirits with a controlled denomination of origin or a typical geographic indication.

3.3. The unit price: positive lists

In order to facilitate the application of the rules by the traders and the competent authorities, Member States may draw up a list of non-food products or categories of products for which the obligation to indicate the unit price remains applicable, as provided by article 5(2) of the Directive.

Only a few Member States have used the possibility to establish a list of non-food products or categories of products to which the obligation to indicate the unit price remains in any case applicable, in accordance to article 5(2). France, Belgium and Luxembourg have enacted extensive positive lists on non-food products. Denmark and Finland have lists which encompass both food and non-food items. Estonian legislation provides that the unit price must be indicated as the item price for paper napkins, tissues and diapers, sanitary towels, panty liners and tampons. Finally, Austrian legislation does not contain a list of non-food products which still have to carry the unit price, but empowers competent authorities to designate these products.

4. THE DISPLAY REQUIREMENTS

The Directive stipulates that the selling price and the unit price must be unambiguous, clearly identifiable and clearly legible (article 4). In particular, the selling price and the unit price must represent the final price (respectively of a unit and of a given quantity) of the product, inclusive of VAT and all other taxes (article 2).

All Member States have implemented article 4 of the Directive correctly and a number of them have introduced in their national legislation additional specifications as to pricing methods and indications. Denmark, Finland, Sweden and France stipulate that any indication should create no uncertainty about the products to which products the price applies. Spanish law provides for selling and unit prices to be placed in the same visual field, while Greece

requires them to be the same size. In Luxembourg, restaurants, bars and all establishments serving food and beverages should indicate the selling price inclusive of service.

Article 4 is intended to provide consumers with homogeneous and transparent information. However, the Directive acknowledges that the transparency of the envisaged system of price indication could be jeopardised by the transition to the euro, because consumers may be confronted with several price tags for the same product. For this reason, article 4(1) allows Member States to provide that the maximum number of prices to be indicated be limited.

Only a few Member States introduced limitations in accordance with article 4(1), namely France, Italy and Luxembourg. These limitations were only applicable during the transitional period when the euro was introduced. In particular, Italy made an exception for small retailers; Luxembourg set a specific date when all price indications had to be changed from the local currency into euros; France provided that the selling price should be indicated both in the national currency and in euros, while the unit price had to be indicated in the national currency until a specific date and in euros afterwards.

At the moment, no rules limiting the maximum number of prices to be indicated appear to be in force in any of the Member States, although it cannot be excluded that as new countries adopt the euro they may decide to enact specific regulations to deal with this issue. It is worth noting that France, Malta and Poland introduced rules whereby identical produces sold at the same price and displayed together can bear a single indication of the selling and unit prices. These rules, however, allow – rather than impose – a limitation of the maximum number of prices to be indicated.

5. ADVERTISING

The obligation to indicate the unit price applies also to any advertisement which mentions the selling price of products covered by the Directive, as specified by article 3(4). This provision has not given rise to any particular transposition problem. It is worth noting, however, that the United Kingdom has chosen to waive the obligation to indicate the unit price for advertisements which is broadcast on TV, shown in a cinema or inside a small shop.

Article 3(4) impose a specific content for advertising of consumer products which will need to be coordinated with the general rules in Directive 2005/29/EC on unfair commercial practices. Article 7(1) of the Directive stipulates that a commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. Article 7(5) further clarifies that information requirements established by EC law in relation to commercial communication including advertising or marketing shall be regarded as material. Article 3(4) of the Directive on price indications is expressly quoted in Annex II of the Directive on unfair commercial practices: therefore, failure to indicate the unit price in the advertising of consumer products covered by the Directive on price indications will entail per se a breach of the Directive on unfair commercial practices.

The Commission is aware that the lack of convergence in the scope of application of the national transposition measures may entail that some advertisements for certain categories of products could be subject to the obligation to indicate the unit price only in some Member

States but not in others. The Commission intends to verify whether this circumstance is likely to hinder the objectives of market integration and consumer protection pursued through the full harmonisation of the rules on unfair commercial practices at EU level.

6. SMALL RETAIL BUSINESSES

The Directive acknowledges that for some small retail businesses the obligation to indicate the unit price might sometimes represent an excessive burden, because of the number of products on sale, the sales area, the nature of the place of sale or the form of the business itself (e.g. certain types of itinerant trade). For this reason, article 6 allows Member States to waive the obligation to indicate the unit price for goods sold by these businesses, other than products sold in bulk. This waiver is only allowed for a transitional period, to be determined by Member States.

Several Member States have opted to implement the derogation for small retail businesses envisaged by article 6 of the Directive. However, the criteria selected by national legislators to define the scope of application of this derogation are not convergent. The majority of Member States considers the total sales area and identifies a threshold below which the obligation to indicate the unit price is no longer applicable. The relevant thresholds range from 50 m^2 in Greece to 500 m^2 in Slovenia.

Some Member States have chosen to exclude the obligation to indicate the unit price for shops where customers are served over the counter (as opposed to self-service outlets): this is the case, for instance, of the Netherlands, Slovakia and Greece (in the latter case, only for pre-packaged food and drinks). In France the derogation is only available for non self service retail outlets with a sales area not exceeding 120 m^2.

Austria exempts sole traders with up to nine employees and traders operating in the form of a business with up to 50 employees. Traders with up to five full time employees are also exempted in the Netherlands. The Irish transposition measures waive the obligation for premises in which the trader does not make use of equipment for printing shelf labels or for point of sale scanning. Specific derogations also exist in the Netherlands for products marketed at the homes of regular customers, in vehicles or at a street or water market.

Itinerant traders are exempted from the obligation to indicate the unit price in Austria, Ireland and Luxembourg. The United Kingdom only exempts itinerant traders when offering bread made up in a prescribed quantity or any products pre-packaged in a constant quantity. In Estonia, this exemption is available for pre-packaged goods of identical volume or weight, offered or sold in a mobile shop, kiosk or a street stall.

Finally, the Maltese legislation does not grant derogation directly, but empowers the competent administrative authority (the Director of Consumer Affairs) to determine the conditions under which small retail businesses or other categories of traders may be exempted from the obligation to display the unit price when this would prove excessively onerous.

Denmark, Finland, Sweden, Hungary, Latvia, Lithuania and Poland have chosen not to enact specific rules aimed at small retail businesses. Belgium, Italy, Portugal and Spain initially implemented an ad hoc regime for small retail businesses, but decided not to renew it once the transitional period foreseen for the introduction of the euro had expired. Cyprus has recently amended national legislation to eliminate the derogation.

According to the Directive, Member States can only waive the obligation to indicate the unit price for products sold by small retail business for a transitional period. However, the Czech Republic is the sole Member State whose implementing legislation quotes a precise expiry date for this derogation, namely 1 May 2014. In Greek law, the duration of the exemption is defined with reference to the wording of the Directive: thus, the obligation to indicate the unit price is waived pending Community re-examination of the issue pursuant to article 12. The German transposition measures mention the transient nature of the exemption, without specifying for how long it will be available. The remaining Member States do not appear to mention that the derogation is only granted for a transitional period, though some of them have expressly clarified that it is not intended as a permanent derogation.

In accordance with article 12 of the Directive and its preamble, the Commission has carried out a study to assess the impact of the Directive, with particular reference to the application of price indication requirements by small retail businesses. The study identified the potential barriers for small retailers to indicate the unit price, which may arise from pricing instruments and methodologies. In particular, manual pricing systems adopted by small retailers with preference over computerised systems might entail an additional burden to calculate, modify and indicate the unit price. While new technologies become rapidly available, high costs, insufficient turnover and complexity of the systems make the smallest retailers unlikely to reap the potential benefits of these developments.

There appears to be evidence, however, that this burden might not be excessive vis-à-vis the consumer protection aims pursued by the Directive. The study carried out by the Commission shows that only a substantial minority (39%) of small retail businesses in the fifteen old Member States regards unit pricing as a burden for small retailers. The majority of small retail businesses in the fifteen old Member States agree with a unit price indication for all retail stores, regardless of their size. Retailers that already indicate the unit price are keener to have unit pricing obligatory for all retailers than enterprises who benefit from the derogation.

The Commission does not consider the gathered evidence as conclusive, in the light of a possible revision of the Directive. First of all, the study had to be conducted on a standard definition of small retail businesses (0-20 employees), whereas – in the absence of a harmonised notion at Community level – the definitions of small retailers in the national legal systems of the Member States are rather diverging. Secondly, the study did not cover the new Member States, where smaller retailers may face specific problems (although, as it was mentioned above, four of them have decided not to make use of the possibility of derogation in article 6).

7. CONCLUSIONS

The Directive did not give rise to any major transposition problems in any of the Member States. It has been implemented by all Member States, though in some cases after the date set by article 11(1) - that is 18 March 2000. The study carried out by the Commission shows a wide agreement that the Directive has contributed to increase the protection of consumer economic interests, although the actual extent of its impact remains unclear.

The Directive allows Member States a remarkable level of discretion when drafting their transposition measures. Several articles introduce open regulatory options for national legislators: as a result, national laws implementing the Directive are for some aspects

significantly diverging. This is not always the case, however: for some provisions, the vast majority of Member States have adopted the same normative solutions at national level.

As a result of this discretion, Member States have not relied extensively on the minimum harmonisation clause in article 10, whereby they can adopt or maintain provisions which are more favourable as regards consumer information and comparison of prices than those contained in the Directive. In the light of a possible revision of the Directive, the Commission intends therefore to consider whether there is a need to maintain the minimum harmonisation clause in article 10.

As far as the possibility to waive the obligation to indicate the unit price of products for which this indication would not be useful because of their nature or purpose, the transposition checks reveal a very fragmented scenario: while some categories of products are exempted in most Member States, there are a number of quite specific exceptions, which are not always readily justifiable under the wording of article 5(1). This creates an unwelcome inequality in the level of consumer protection across Europe, which may require further guidance as to what products or categories of products may be subjected and/or exempted from the obligation to indicate the unit price.

Finally, as it was mentioned above, the Commission intends to hear the view of the interested parties on the application of article 6, with particular reference to its impact on the commercial activity of small retail businesses. The Commission welcomes particularly any submission on the continuing need for the temporary derogation provided in the Directive and/or the opportunity to introduce a European definition of small retailers in the legislation.

Annex

QUESTIONS FOR CONSULTATIONS

Question A: Should the derogation in article 3(2) be maintained?

Option 1: It could be argued that the indication of the unit price for the products mentioned in article 3(2) is not relevant to enable consumers to make informed choices on the basis of simple price comparisons. In fact, most Member States have excluded these products from the scope of application of national transposition measures. France and Finland, which have not used this possibility, enacted positive lists of product categories to which the obligation to indicate the unit price remain applicable: as a result, in most cases the unit price of the products indicated in article 3(2) will not need to be indicated even in these countries. Therefore, it could be appropriate to exclude these products from the scope of application of the Directive and eliminate the derogation.

Option 2: It is also possible to maintain that – since Member States remain free under article 5(1) to waive the obligation to indicate the unit price of products for which this indication would not be useful – there is no need to exclude these goods from the scope of application of the Directive. Article 3(2) would be repealed altogether and Member States would be free to determine whether the unit price of these products should be indicated under article 5(1).

Option 3: A third alternative would be to keep the derogation in its present form.

Question B: For which products should there be an obligation to indicate the unit price?

Option 1: Member States have taken different views as to which products do not need to carry the indication of the unit price, since such indication would not be useful because of the products' nature and purpose or would be liable to create confusion. Although this could be justified to a certain extent taking into account national specificities, there is arguably a clear need to provide some guidance. For instance, it would be possible to enact at European level an indicative or exhaustive list of product categories for which the indication of the unit price is not necessary. If such an exhaustive list is established, article 5(1) could be repealed.

Option 2: An alternative option would be to establish at European level a list of products or categories of products to which the obligation to indicate the unit price is applicable. Such positive list would in fact define the exact scope of application of the Directive and eliminate any legal uncertainty for consumers as well as undertakings. If such list were enacted, article 5 could be repealed.

Option 3: a third possibility would be to elicit the criteria Member States must take into account when implementing article 5(1). This would limit the wide discretion enjoyed by Member States, without leading to the elimination of article 5.

Question C: Should specific rules on advertising be maintained in this context?

Option 1: It could be argued that the Directive 2005/29/EC on unfair business to consumers commercial practices ensures that consumers are adequately protected against any advertising which could mislead them as to the price of products. If so, article 3(4) could be repealed. In

this case, the competent national authorities will have to assess whether advertisements mentioning the selling price – but not the unit price – of products covered by the Directive on price indications are likely to affect the economic behaviour of the average consumers, inducing them to take a transactional decision they would not have taken otherwise.

Option 2: If the indication of the unit price in advertising is considered in any case essential to ensure a high level of consumer protection, article 3(4) could be repealed and a corresponding provision could be added to the black list of practices which are always considered unfair under the Directive 2005/29/EC. However, in order to ensure an even application of the black list, a core list of products should be identified, for which the omission of the unit price in advertising would always be considered unfair.

Question D: Should the derogation for small retail businesses become permanent? If so, should a European notion of small retail business be introduced? How should it be formulated?

Option 1: The Directive allows Member States to waive the obligation to indicate the unit price for small retail businesses only for a limited period of time, to be specified in national legislation. A first option would be to exclude altogether small retail businesses from the scope of application of the Directive. However, such option rests on the assumption that the obligation to indicate the unit price of consumer goods constitutes an excessive burden for such undertakings. At the moment, the Commission has no evidence that this is the case: both the outcome of the study and the choice operated by many Member States who have not made use of the derogation rather suggest that said obligation represents an additional burden, though not excessive or disproportionate. If small retail businesses are to be excluded from the scope of application of the Directive, a precise European definition of such undertakings could be developed in order to ensure legal certainty.

Option 2: It could be argued that the indication to indicate the unit price does not constitute an excessive burden for small retail businesses. If so, the derogation in article 6 could be disposed of altogether.

Option 3: Finally, the possibility of derogation contained in article 6 could be further extended for a defined period, with a view to re-assessing in the future whether technical developments ease the burden faced by small retail businesses in order to indicate the unit price. Also in this case, it could be necessary to identify the period when the derogation would remain available as well as the undertakings which could benefit from it.

Question E: Should the minimum harmonisation clause be maintained?

Option 1: It could be argued that, since Member States have hardly made any use of the possibility to introduce or maintain more stringent consumer protection rules in the domain harmonised by the Directive, there is scope to move towards a fully harmonised regime for price indications, thus combining a high level of consumer protection with full market integration.

Option 2: The elimination of the clause in article 10 would reduce the discretion of Member States when implementing the Directive. Moreover, at this stage the Commission has no

conclusive evidence that existing divergences in national laws on price indications for consumer goods create significant internal market barriers and discourage cross-border trade.