

IMPROVING BUSINESS REGULATORY ENVIRONMENT: BARRIERS FACED BY THE DISTANCE SELLING SECTOR

The European Distance Selling Trade Association's
response to the Commission consultation
on how to improve the regulatory environment for business

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I. INTRODUCTION

A) ABOUT THIS PAPER

Legislation can either act as a driving force for innovation and competitiveness or as a brake to the economy in general, when unnecessary and costly regulations are adopted. Legislation is essential to provide legal certainty for businesses and to protect consumers. Nevertheless, decision-makers should be careful to provide an adequate balance between the different interests of stakeholders, avoid red tape, unnecessary burdens and costs, and disproportionate measures. This has been recognised by the European Commission and as a result a “better regulation” initiative has been adopted within the framework of the “Lisbon Strategy”, now reformulated as “growth and jobs”.

As part of this focus on “better regulation”, the Commission launched an on-line consultation in June 2005 asking business to identify particularly burdensome rules and to make suggestions as to how best to simplify them and improve the legal environment for companies in the EU.

The distance selling sector has been recognised as one of the first sectors where the effects of the European Single Market would be manifest. In principle, the Single Market, supported by the new means of communications such as the Internet, should enable goods and services to be freely delivered and provided across the whole European market. Nevertheless, although distance selling companies are highly active and interested in exploring new markets and ways to interact with consumers, they are often faced with many barriers and difficulties.

The European Distance Selling Trade Association (EMOTA) decided to carry out its own survey among the companies member of its national associations to identify the areas and concrete examples of barriers faced by companies when carrying out their activities in their own country or wanting to expand to other countries. This paper compiles the results of this survey and aims to contribute to the Commission’s effort of simplification and clarification of existing EU legislation.

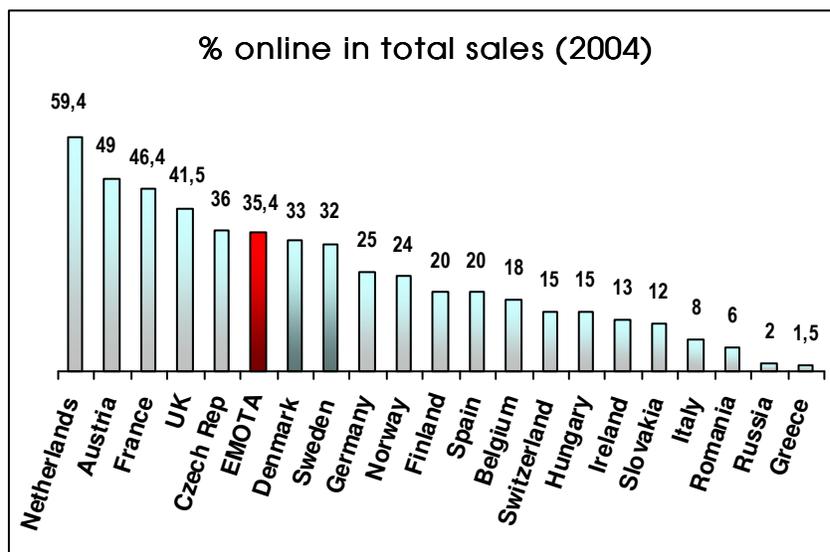
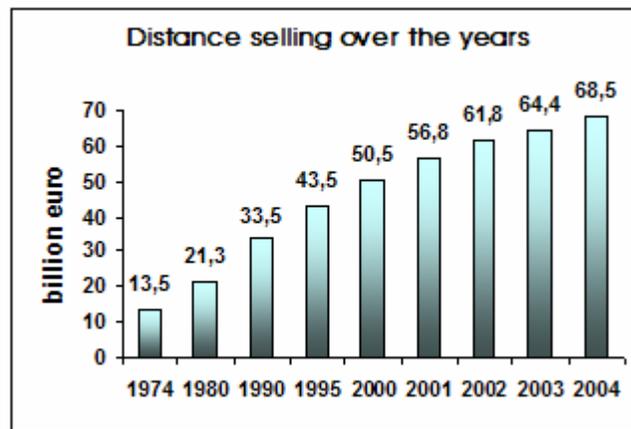
B) ABOUT THE DISTANCE SELLING SECTOR

The mail order sector has evolved from a purely mail driven business where catalogues, orders and parcels were sent and delivered by mail; to a modern distance selling sector encompassing all forms of on-line and interactive means of communication. Today, companies interact with consumers and sell their products using a multi-channel approach that includes a wide range of means of communication such as catalogues, mailings and other printed documents, telephone, mobile phone, the Internet, interactive TV... A consumer today may call to receive a catalogue, look for more information on the website of the company, order over the Internet or the phone and receive the parcel sent through the traditional postal operator or a postal competitor. What all these media have in

common is the element of distance and the fact that company and consumer do not meet face-to-face.

Products and services offered by distance selling companies go from textiles, clothing, plants and electronic goods to insurance and financial services.

On-line is increasingly important in the distance selling sector, in some countries it is rapidly becoming the dominant channel. On-line is helping the distance selling sector and especially new sectors such as food items financial services, airline, theatre or railway tickets to grow. In recent years, sales over the Internet have increased rapidly, multiplying by five in some countries since 2000. On-line sales in 2004 represented in average more than 35% of the more than €68 billion of total distance sales. In 2005, according to estimations, in those countries with the highest Internet penetration, sales online will reach around 70% of total distance sales.



Postal services remain important for the distance selling sector, given the more than 25 billion items sent annually (catalogues, direct mail and parcels). The growth of e-commerce demands precise and rapid fulfilment of orders and reliable delivery of parcels, some of which need to be delivered in the same day or within 24 or 48 hours.

The main piece of legislation regulating our sector is the Distance Selling Directive (97/7)¹. Nevertheless, other pieces of legislation in the field of e-commerce, environment, data protection, consumer credit, postal services, guarantees, unfair commercial practices, etc. are of direct relevance and regulate certain aspects of our trade.

C) ABOUT EMOTA²

The distance selling sector is represented at European level by the European Distance Selling Trade Association (EMOTA). EMOTA comprises 21 national associations from 20 countries: 17 from the European Union (Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Poland, The Netherlands, Slovakia, Spain, Sweden and the UK) as well as Norway, Russia and Switzerland.

EMOTA's member associations represent more than 2,000 companies employing about 200,000 permanent staff. More than 200,000 are indirectly employed at postal and telecom companies, printers, fulfilment houses and other specialised services.

EMOTA is actively involved in discussions regarding reform of European legislation and in the self-regulation of the sector. As far back as 1992 the EMOTA member association signed the European Convention on Cross-border Distance Selling³ to deal with cross-border trade and complaints. This code of conduct aims to facilitate cross-border distance selling as well as to resolve complaints from consumers, which might derive from such cross-border activities. The Convention was redrafted and brought up to date in March 2002.

¹ Directive 97/7/EC of the European Parliament and of the Council on the Protection of Consumers in respect of Distance Contracts published in the Official Journal L 144, 04/06/1997 P. 0019-0027

² For more information on EMOTA go to <http://www.emota.org>

³ To see the code of conduct go to: <http://www.emota.org/onderwerpen/europe.asp?navid=3&subnavid=1>

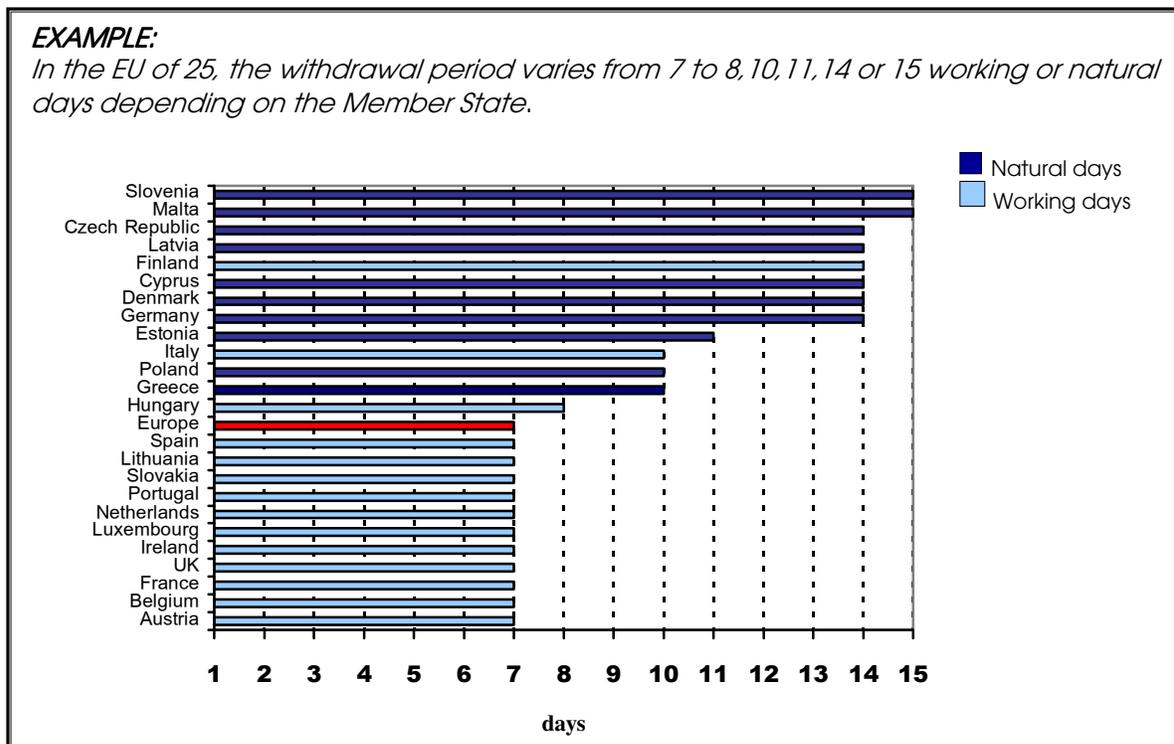
II. BARRIERS FACED BY DISTANCE SELLING COMPANIES

A) GENERAL BARRIERS

Disparities between national regulations

Despite the removal of multiple barriers since the 1992 deadline for the completion of the Single Market, many barriers still exist and new ones continue to appear because of differences in the legislation of the different countries. This is one of the main issues highlighted by the companies participating in the questionnaire. Examples mentioned in areas dealt with in this paper are to a great extent due to these differences or differences in interpretation of the same legislation.

Many of these disparities are due to the minimum harmonisation approach followed by European consumer protection legislation, which leaves the possibility for Member States to adopt more restrictive provisions than those adopted by minimum harmonisation Directives. The consequence of the minimum harmonisation approach has been a re-fragmentation of the national markets within the EU, restricting business activities. An example is the 7 working day period in which the consumer can withdraw from a contract foreseen by the Distance Selling Directive (97/7). In the EU of 25, the withdrawal period varies from 7 to 8,10,11,14 or 15 working or natural days depending on the Member State.



Lack of clarity, transparency and consistency of regulations

The lack of clarity, transparency and consistency of regulation is the second most important barrier mentioned by companies. The main difficulty relates to the differences and uncertainty with regard to the way in which legislation is interpreted in the different countries. This uncertainty increases the investment risk of companies and, especially in the case of smaller companies, acts as a deterrent to initiate business in other countries or to explore other channels or ways to do business in general.

Estonia is mentioned as an example where legislation has changed fast, making the legal environment uncertain. That is probably the case of many new Member States that had to adapt their legislation to the EU *acquis* in a relatively short period of time.

The lack of clarity and transparency, in a number of cases derives from the ambiguity of wording and terms sometimes adopted in European Directives as a consequence of the need to find political agreements in the decision-making process. The lack of a clear wording leads to differences of interpretation in different Member States and to uncertainty for business as to what exactly can or not be done. The vague notion of "own similar goods" in relation to article 13 of the Directive on privacy and electronic communications⁴ regarding unsolicited communications, for example, is likely to create uncertainty and different interpretations in the different Member States.

Moreover, in many cases there is a difference in approach and lack of consistency between different pieces of EU legislation. The issue of unsolicited commercial communications, for example, is dealt within several different EU pieces of legislation, and following different approaches. Article 10 of the Distance Selling Directive⁵ establishes an opt-in regime for automatic calling machines and fax and an opt-out regime for any other means of communication. Article 7 of the E-Commerce Directive⁶ allows unsolicited commercial communications by e-mail if they are clearly identifiable and establishes the obligation of consultation of opt-out registers. Article 10 of the Directive on Distance Marketing of Financial Services⁷ establishes, as the Distance Selling Directive, and opt-in regime for fax and automatic calling machines while leaves free Member States to choose between an opt-in or opt-out regime in relation to other means of communication. Finally, article 13 of the Directive on Privacy and Electronic Communications, mentioned before, establishes an opt-in regime for e-mail marketing (except in the case of obtaining the e-mail address of the consumer in the context of a sale and only for similar goods).

⁴ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) published in the Official Journal L 201, 31/07/2002 P. 0037-0047

⁵ Directive 97/7/EC of the European Parliament and of the Council on the Protection of Consumers in respect of Distance Contracts published in the Official Journal L 144, 04/06/1997 P. 0019-0027

⁶ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) published in the Official Journal L 178, 17/07/2000 P 0001-0016

⁷ Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC published in the Official Journal L 271, 09/10/2002 P 0016-0024

Lack of general information on other markets and on the legislation applicable in other countries

The lack of information on other markets and on the legislation applicable in other countries is specially stressed by small and medium sized companies. SMEs normally have fewer resources and are not able to bear the costs of specialised legal advice or market research. Many times, government websites do not offer clear information about the legislation applicable in those countries and, when it does, it is often just in their own language, making therefore difficult for companies to assess the legislative environment and to decide whether to enter the market based on that and other factors. Our association often receives questions from companies asking about the exact legal situation in a country or whether we can indicate the concrete legislation that in a specific country implements a specific EU Directive.

B) BARRIERS RELATED TO ESTABLISHMENT

Lengthy and bureaucratic procedures, lack of information/transparency and licensing or other requirements needed to obtain government approvals

Many distance selling companies follow the philosophy to develop an international strategy with local implementation, and have therefore chosen to establish subsidiaries in the markets they are operating in, while concentrating some of their activities in the mother company.

The main barriers mentioned by companies willing to establish in other countries are the existence of lengthy and bureaucratic procedures, the lack of information or transparency on the exact procedures to be followed and licensing requirements or other requirements needed to obtain government approvals.

A large Swedish multi-national company doing business in Denmark gave the example of the lack of information about the need for permission from the Danish authorities to be able to carry out the book-keeping for their Danish operation in Sweden. The Danish authorities contacted the company after some years and made the company apply for this permit. Other examples refer to the need to ask for a registration or a licence to provide certain services while in other countries this is not needed. The example of Norway (not EU member but a EEA member) where a company has to register as a financial company to be able to finance travels, which is not necessary in other countries was pointed out.

However, one of the most striking examples we came across is the requirement in Hungarian legislation to have a physical shop in order to be able to carry out distance selling activities in the country. This is not only against the logic of distance selling but it also represents a severe obstacle to any cross-border activities and will keep new entrants from investing in Hungary. Fortunately the Hungarian government is, at the moment, working on a law that will eliminate this requirement.

Prohibition or restrictions on the supply of specific goods/services via distance selling

An example of this is the Polish Pharmaceutical Law, which expressly prohibits the mail order sale of medicines, both prescription and non-prescription ones. With regard to the mail order sale of non-prescription medicaments, this is clearly at odds with the 2003 European Court of Justice ruling in the DocMorris case⁸. In this case, the Court pointed out that a national prohibition on the sale of medicinal products by mail order was a restriction on the free movement of goods. The Court stated that a rule which is likely to have a restrictive effect on the importation of pharmaceutical products is compatible with the Treaty only to the extent that it is necessary for the effective protection of the health and life of humans. It concluded that in the case of non-prescription medicines, the prohibition is not justified, since it is possible that adequate advice and information may be provided. Internet buying may even have certain advantages, such as giving consumers time to think about any question they may wish to ask the pharmacist from home.

C) BARRIERS RELATED TO TAXATION

Different environmental and other taxes

Apart from the existence of different VAT rates, one of the main issues raised by the participants in the questionnaire is the existence of different environmental and other taxes in the different countries.

One of the examples mentioned is a tax specific to Denmark which is based on the number of light bulbs of a product. This makes Christmas decoration in Denmark extremely expensive due to the many small light bulbs that it contains.

Moreover, every country has developed its own system for the management of waste and environmental taxes. In neighbouring countries such as Belgium, the Netherlands and Luxembourg the environmental taxes have a different tariff structure and in the Netherlands, for example, there are no environmental taxes on small presents. In addition, in countries such as Belgium, non-addressed mailings are subject to local tax which varies from region to region and even from city to city (it can be a tax of €1 per mailing in Tournai and €3 in another city). This means that companies have to conclude different separate agreements with every region.

Rules or unjustified limits on which costs are to be considered for tax purposes

An example of this is the limit with regard to the deduction of the advertising costs of a company for tax purposes in Poland. According to Polish legislation, advertising expenditure may be a cost for tax purposes only up to an amount equal to 0.25% of the annual revenue of the company. The restriction does not concern "public advertising" expenditure which can be entirely considered as a cost for tax purposes. According to the official interpretation of this provision, "public advertising" is addressed to an unlimited number of anonymous recipients. Therefore 100 copies of non-addressed

⁸ C-322/01, Deutscher Apothekerverband eV vs. DocMorris NV and Jacques Waterval (2003)

printed advertising is “public advertising” and fully deductible while a mailing to 100,000 or more people is “non-public advertising” subject to a 0.25% revenue limitation. This represents a big obstacle to companies willing to establish themselves in Poland, especially those using direct marketing as their main channel to communicate offers and information on their products or services to consumers.

D) BARRIERS RELATED TO CONSUMER LEGISLATION

Differences in distance selling legislation in the different countries

The Distance Selling Directive (97/7) is one of the main pieces of legislation regulating the distance selling sector at EU level. The aim of the Distance Selling Directive was to provide a common minimum level of harmonisation of consumer protection with regard to distance contracts. Nevertheless, as a result of the minimum harmonisation approach followed by the Directive, Member States introduced more restrictive provisions when implementing the Directive into their national legal systems. Therefore the differences between the different member states continue to exist.

The differences in right of withdrawal periods in the different Member States already mentioned, is one example of this. Another example is the obligation to bear the costs of return of a product by the company in Finland. Finland and Germany were the only two countries where this legal obligation existed. Germany has recently changed its legislation and now companies have the possibility to charge consumers for the cost of returning the goods.

Different information requirements and differences in the way this information has to be given to consumers

Complying with different information requirements and differences in the way this information has to be given to consumers -which is partly the result of the minimum harmonisation approach in the consumer protection field- is another issue raised by companies in the questionnaire. In some countries such as Belgium, for example, the legislation states the format (in bold, distinctive lettering, in a separate frame...) and even the exact text to be used to give customers the information on the right of withdrawal. If this standard clause is omitted the good or service is considered to be supplied without the preliminary request of the consumer and therefore he/she does not have to pay or send back the product or service to the company.

In two neighbouring countries such as Belgium and the Netherlands the information that has to be included in a catalogue or in advertising are strongly different. Consumer Credit legislation in Belgium requires more formalisms and to obtain much more information from the consumer than in the Netherlands. Moreover, every country has a different system and different rules, procedures and processes with regard to who can give information to be able to check the credit worthiness of customers.

Other practices like sales below cost are not allowed in every country and different rules and legislation applies with regard to discounts and rebates in the different countries. In Belgium the legislation on rebates, the sales and presales period is much more restrictive than in all the neighbouring countries. During the Belgian presales

period a company cannot announce price reductions while this restrictions do not exist in other countries.

Too many information requirements

Another problem faced by distance selling companies is the obligation to comply with too many information requirements. Companies do not only have to comply with a series of information requirements contained in the Distance Selling Directive (97/7), but also with a series of information requirements in the field of data protection, guarantees, consumer credit, environment, commercial practices,... This represents a big burden for companies and is translated into an increase in the prices of products. Although companies acknowledge the right of consumers to be informed, there should be a balance between informing the consumer and overloading him/her with information so that he/she is not able anymore to distinguish really relevant information.

EXAMPLE:

In 2002 our German member association identified more than 50 different pieces of information a company has to apply to a commercial advertisement. Not all originate from the distance selling directive. Some refer to environmental issues or consumer credit. A group of company lawyers constructed this example standard newspaper ad for a mobile phone and a washing machine. It is hard to focus on the goods!! 90% of the space is taken by the additional information.

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Minutenpreise - Hauptzeit	Mo-Fr. 7-20 h	Mo-Fr. 8-17 h	Mo-Fr. 8-18 h
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Inland ins Festnetz/D2-Netz	0,10/0,20	0,10/0,20	0,10/0,20
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Inland ins Festnetz/D2-Netz	0,20/0,25	0,20/0,25	0,20/0,25
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Best.-Nr. 19 17 919



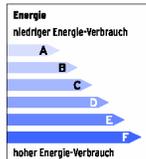
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Wasserschutz-System (Lässt nichts überlaufen. Außerdem werden nur VDE-geprüfte Zulaufschläuche verwendet)



Energie-Effizienzklasse: A (niedriger Energieverbrauch) bis G (hoher Energieverbrauch)
Energie-Verbrauch: kWh pro Waschprogramm (ausgehend von den Ergebnissen der Normprüfung für das Programm „Baumwolle 60°C“). Der tatsächliche Energieverbrauch hängt von der Art der Nutzung des Gerätes ab.
Waschwirkungsklasse: A (besser) bis F (schlechter)
Schleudereffizienzklasse: A (besser) bis F (schlechter). Die Schleudereffizienz ist für Sie von großer Bedeutung, wenn Sie zum Trocknen Ihrer Wäsche normalerweise einen Wäschetrockner benutzen. Wird Wäsche, die in einer Waschmaschine der Schleudereffizienzklasse A geschleudert wurde, in einem Wäschetrockner getrocknet, so wird dieser weniger als halb so viel Energie verbrauchen und damit auch weniger als halb so hohe Betriebskosten verursachen als wenn die Wäsche in einer Waschmaschine der Schleudereffizienzklasse G geschleudert wurde. Die zusätzlichen Kosten für das Trocknen von Wäsche, die in einer Waschmaschine der Schleudereffizienzklasse G geschleudert wurde, liegen in der Regel um ein Vielfaches über den Stromkosten für das Waschen.
Schleuderdrehzahl: in U/min. **Füllmenge:** in kg. **Wasserverbrauch:** in Liter. **Geschätzter Jahresverbrauch eines Vier-Personen-Haushalts:** Durchschnittlicher Energie- und Wasserverbrauch ausgehend von 200 Standardprogrammzyklen „Baumwolle 60°C“, ausgedrückt als „geschätzter Jahresverbrauch (Standardprogrammzyklen, Baumwolle 60°C) eines Vier-Personen-Haushalts“. **Werte:** ermittelt nach Norm EN 60456 im Standardprogramm Baumwolle 60°C und EN 60456/11

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E) BARRIERS RELATED TO DATA PROTECTION

Different requirements or interpretation of the same rules from Data Protection Authorities in different countries

The existence of differences in interpretation and/or practices was identified by the Commission's report on the implementation of the Data Protection Directive (95/46)⁹ as one of the issues that was causing difficulties in the Internal Market. This is confirmed by the answers of the questionnaire and seems to be a problem also in relation to the rules with regard to e-mail marketing established by the more recent Directive on Data Protection in the Electronic Communications sector (2002/58/EC)¹⁰. Different rules and accepted practices on how to get consent from consumers to be able to use their address exist in the different countries. In Lithuania, for example, for direct marketing rules require opt-in with "specific and informed consent", which does not necessarily mean in written, while in other countries a written consent from the consumer is necessary. Moreover, every country also has different rules about the data that has to be archived and for how long, for example with regard to the invoice payment history of a client.

Too restrictive Data Protection legislation

Another concern of companies is that data protection legislation or at least the way in which data protection legislation is applied in their countries is too restrictive.

In January 2005 in Italy a questionnaire was sent to all households asking whether they wanted to receive publicity at home or not. Only those people who sent the questionnaire back saying: "yes, I want to receive publicity" can be contacted by companies (those who did not answer at all cannot be contacted). As a result, since 1 July 2005, it is no longer possible to use telephone books as a public source to gather postal addresses to send out sales offers. Only people who have given their express permission to receive commercial communications by mail or telephone can be contacted. This is less than 200,000 people. The people who have given their consent are indicated through a symbol next to their name in the phonebook. This is much more restrictive than the existing EU legislation and it constitutes a barrier for companies wishing to enter into the Italian market, since it is quite difficult to find addresses to be used to send their catalogues or mailings and start a business in Italy.

Companies also experience problems to get address information from the municipality or other national official resources (ex. State register in Belgium). This means that companies are not able to verify the address data through official sources and therefore it is more difficult to verify data when a customer asks for a credit to finance his/her purchase. Moreover, in some countries such as the Czech Republic, although Robinson List (list with the name and details of those who do not wish to be contacted for direct marketing purposes) exist, it is not allowed to transfer or share these lists, making for companies more complicated to check whether a person does not want to

⁹ First report on the implementation of the Data Protection Directive (95/46/EC) (COM (2003) 265 final)

¹⁰ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) published in the Official Journal L 201, 31/07/2002 P. 0037-0047

receive commercial communications and in this way comply with their legal obligations. There should be a balance between protecting personal data and allowing companies to comply with their obligations and be able to develop their business.

Too burdensome procedures or problems that make the transfer of data difficult or costly

In the questionnaire, companies complain about the difficulty to contact the public administration in some cases and on the complex and bureaucratic proceedings with regard to the registration of data.

A company mentioned the case of Finland and a long discussion they had with the authorities of this country with regard to the possibility to treat customer Finish customers' calls in Estonia. The view of the Finnish authorities was that this was not in accordance with the privacy legislation. Nevertheless, at the same time Finnish retailers were using the same information when servicing their Finnish credit card holders from Finland visiting their shop in Tallinn. Eventually the authorities accepted the point of view of the company but this had delayed the process and incurred in costs for the company.

F) BARRIERS RELATED TO ENVIRONMENTAL LAW

The existence of different collection system in the different countries has made very difficult to establish cross-border schemes limiting the possibilities of companies to establish efficient systems or to sell electronic goods cross-border.

Directive 2002/96 on Electronic Waste¹¹ establishes in article 5.2 that when supplying a new product, distributors shall be responsible for a one-to-one take back system. For reasons of efficiency and practicality, for its operations in both Belgium and the Netherlands, a company decided to operate its logistics from a single point in the Netherlands. According to Council Regulation 259/93 on the supervision and control of the shipments of waste¹², a company must apply for an authorisation to be able to transport waste across borders. The request for an authorisation is different in each Member State. For example, in the Netherlands the caution money is €450, while in Wallonia it is €12,500. The application for an authorisation in the Netherlands is for free, while in Belgium it costs €250. Moreover, the cross-border distribution of these goods has to be announced three days in advance, which makes impossible for this company to provide a 24 hour delivery service to its customers. As a result the company has either to renounce to any possible efficiency gains or to renounce to 24 hour delivery, which makes it less attractive and competitive for consumers in relation to other companies offering that service or traditional retail shops.

Member States have adopted very different systems with regard to the recycling of electronic goods and as a result there are different taxes, different systems of payment and contribution to the different schemes and even differences in the way these costs

¹¹ Directive 2002/96/EC of the European Parliament and the Council of 27 January 2003 on waste electrical and electronic equipment (WEEE) published in the Official Journal L 37, 13/02/2003 P. 0024-0038

¹² Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community published in the Official Journal L 30, 06/02/1993 P. 0001

are presented to the consumer (included in the total price of through a visible fee). This creates problems for companies operating in several countries.

G) BARRIERS RELATED TO CUSTOMS

A company raised the issue that when, for example, they have a warehouse in Belgium that is only used to store for a limited period of time stock, which is reserved for sales in the Netherlands and is coming from suppliers outside Belgium, the company has to do all the customs, sales, tax and statistical reports even though not a piece of that stock is sold in Belgium. This implies a lot of bureaucracy and time for no transaction at all.

This point was also confirmed by another company that has recently established a hub warehouse in the Czech Republic intended to serve the central European region. In this case, each country served by the warehouse is required to make customs, tax and statistical reports in the Czech Republic, which means a considerable multiplication of bureaucracy.

H) TECHNICAL BARRIERS

With regard to technical barriers, the main issues raised are the difficulties faced because of different national standards, testing and certification rules. Different national standards still exist in the different countries. One company selling household appliances gave us the example of gas appliances such as cooking plates and stoves. City gas in the Netherlands and in Belgium has different gas pressure and as a result it is not possible to use Dutch gas appliances in Belgium.

With regard to testing and certification rules, some companies complained about having to stop the sale of goods several times because of the testing requirements of government organisations. This refusal of Member States to apply the principle of mutual recognition is also confirmed by a recent infringement case against France. In this case French authorities refused to recognise tests checks and controls carried out by recognised organisations in the Slovak Republic and seized the products (plant protection products) imported from the Slovak Republic¹³.

The existence of different legislation with regard to labelling was also mentioned in the answers to the questionnaire. One example is the Covenant on the Fire Safety of Nightwear in the Netherlands. According to this legislation adult nightwear should have a label warning the consumer that the nightwear is not fireproof.

¹³ See Commission press release IP/05/864 of 7 July 2005, <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/864&format=HTML&aged=1&language=EN&guiLanguage=en>

I) BARRIERS RELATED TO ON-LINE

Uncertainty as to the law applicable or other legal requirements

Many companies have doubts with regard to the law that would apply to their online operations or their website. Although the E-Commerce Directive¹⁴ establishes the country of origin principle with regard to information society services, it does not prejudice the consumer protection provisions of the Brussels Regulation¹⁵. The Brussels Regulation implies that a contract concluded over a website with a consumer could be brought before that consumer's own national courts, in particular, if the contract was preceded by a specific invitation addressed to him or by advertising. Under the Rome Convention on applicable law¹⁶ (currently under review), such a court would then be able to apply at the least mandatory local law notwithstanding any choice of law by the parties (when the company has specifically and directly solicited the consumer in his/her country). The definition and what is to be considered a mandatory rule is not clear and can include a variety of consumer protection provisions such as those of the national distance selling legislation.

As a result of this any company wishing to target consumers in another EU country needs to make a detailed assessment and understand a series of different detailed requirements specific to that country's legislation. Moreover, because of the reasons explained above it may be extremely difficult to anticipate (in advance) what rules would and what rules would not be considered mandatory under the provisions of the Rome Convention. This generates uncertainty for companies, especially for SMEs, and acts as a deterrent to companies from communicating consumer offers on a cross-border basis within what should be an internal market. Moreover, the legal developments pointing towards accessibility as sufficient to found jurisdiction¹⁷ raise even a higher degree of uncertainty for those companies marketing or selling over the Internet. The fact that a consumer can access a website anywhere in the world would mean that companies may be subject to legal liabilities in any country from where a consumer access its webpage.

Another of the issues mentioned by companies is the different requirements and interpretation on what can be done, for example with regard to e-mail marketing in different countries. The existence of different permission rules for storing and mailing to customers in the different EU countries was also pointed out by some companies.

Lack of interoperability between e-platforms

Another technical problem mentioned refers to the lack of interoperability between e-platforms. This means that e-platforms cannot understand and integrate fully into each

¹⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) published in the Official Journal L 178, 17/07/2000 P 0001-0016

¹⁵ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters published in the Official Journal L12 16/01/2001 P 0028

¹⁶ 1980 Rome Convention on the law applicable to contractual obligations (consolidated version) published in the Official Journal C027, 26/01/1998 P 0034-0046

¹⁷ See for example the Yahoo! case. In 2001, a Paris court directed Yahoo! to stop French visitors from accessing auctions of Nazi memorabilia. Yahoo! has an operation in France and a website directed at French visitors: www.yahoo.fr. However, the French court's order was directed at the US website operated in the US: www.yahoo.com

other so that, for instance, there is only one shopping basket and a website that appears to the consumer. At the moment if, for example, you buy a custom shirt in the website of a company and a standard size pullover at another's website a customer cannot match them in the same shopping basket.

J) BARRIERS RELATED TO DISTRIBUTION AND POSTAL SERVICES

Different standards and sorting requirements

The existence of different standards and sorting requirements between the different postal operators is one of the problems faced by distance selling companies in relation to distribution and postal services. Every postal organisation has its own different bar codes for the sorting process and their specific services. For example, in the Netherlands to get certain discount you can send and prepare bulk mail in a specific form while other countries have other systems. This represents a burden for companies, which need to adapt their logistics to these special services in the different countries.

Monopoly situation of the traditional postal operator

Problems are also faced by distance selling companies because of the monopoly situation of the traditional postal operator in some countries. According to the provisions of Directive 2002/39 on the further opening to competition of postal services¹⁸, Member States can decide to keep the monopoly of traditional postal operators for correspondence under 100g (50g from January 2006). In Denmark, like in many other countries, the letter product is a monopoly product while free competition exists in the parcels sector. The pricing of letter products in Denmark is several times more expensive while parcel price is competitive with other markets. For distance selling companies this means that building a customer file sending offers and sales promotions by letter to enlarge the distance selling business in Denmark is close to impossible, thus reducing free competition and the entrance of other distance selling companies in the Danish market.

Other example of the obstacles faced by distance selling companies derived from the *de facto* monopoly situation of some traditional postal operators refers to Poland. The Polish postal office does not provide for discounts based on volume. It nevertheless, offers a reduced price for sending parcels using cash on delivery (paid when they are delivered) as compared to parcels which may be paid at a later date (ex: via instalments). As a result, sending the same parcel may cost a different price, depending only on whether the post office processes the payment.

¹⁸ Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services published in the Official Journal L176, 05/07/2002 P.21

K) BARRIERS RELATED TO PAYMENTS

Discriminatory and too high banking and credit card fees

The existence of discriminatory and too high banking and credit card fees is one of the problems mentioned by distance selling companies in relation to payments. With regard to discriminatory banking fees a company told us that in the Netherlands, as foreign owner of a bank account, each transaction costs €0.95, while for resident firms the cost is only €0.20.

The issue of interchange fees with regard to credit cards is a well know issue. Back in 2002, the European Commission looked at VISA's interchange fees and decided, after some changes were made, to allow the system to stand. Nevertheless, this has continued to be a point of concern to distance sellers and retailers in general and following changes to the EU competition rules in 2004, some Member States have decided to launch a detailed investigation into these interchange fees. For example, in October 2005, the Office of Fair Trading (OFT) in the UK decided that there was a case with regard to VISA's fees and issued a statement of objections. The OFT is concerned that these fees are too high and that, because they are not separately negotiated and banks cannot compete with each other on the fee, they are anti-competitive.

Moreover, distance sellers have also experienced problems because of the refusal of credit card companies to accept credit cards issued in other countries in the context of a sale of a good or service on the Internet. Although credit card companies explain this as a way to fight against fraud, it constitutes a barrier for consumers and companies willing to do transactions across borders.

Banking charges on international payments

In spite of the existing Regulation 2560/2001 on cross-border payments in euro¹⁹, the issue of banking charges on international payments seems to continue being a problem. A company told us that when certain banks (especially in Germany and the UK) saw that the shipper was a foreign company, from time to time; it happened that they surcharged customers for "international transactions". This may act as a disincentive for customers to buy goods cross-border and benefit from the best available prices and offers.

Lack of pan-European standards on mobile and electronic payments

Other issues mentioned referred to the lack of pan-European standards on mobile and electronic payments. Nearly every country or bank has its own system and this makes it very difficult for distance selling companies.

Specific legislation applicable with regard to distance selling payments

In some countries such as Belgium, distance sellers are not allowed to demand any payment before the expiration of the seven day withdrawal period foreseen in the

¹⁹ Regulation (EC) No 2560/2001 of the European Parliament and of the Council of 19 December 2001 on cross-border payments in euro published Official Journal L344 , 28/12/2001 P. 0013-0016

distance selling legislation. This may be especially detrimental in those cases of sales of products/services of a small value (a few euros) because in the case of non-payment companies are likely to bear the loss since undertaking any actions to enforce payment would probably be more costly than the good/service itself.

L) OTHER BARRIERS

A couple of companies have mentioned problems with producers and distributors of goods, especially with regard to house appliances. It seems that some producers have different model numbers in the different countries for the same appliance. Companies had problems because when this happens, if for example an appliance with a Dutch model number is broken in Belgium, the official repair service in the country refuses to repair the appliance because they claim that they do not know that model number and that therefore they do not have any technical information or spare parts for that model. They do not repair it under guarantee and not even if they are paid for it.

Companies have also reported that a lot of foreign vendors require having a delivery address or physical presence to be able to purchase goods abroad (especially in the UK and Germany).

III. COMPLIANCE COSTS

In the questionnaire we also asked companies to provide us with an estimation of the costs their company incurred to comply with the obligations established by legislation (extra staff, cost of legal advice or external consultancy, extra time...) as well as an estimation of the percentage of those costs that were the result of those barriers mentioned in their answers to the questionnaire.

It often seems difficult to give an estimation of company's compliance costs because many companies have internalised and built them in their routines and set ups. Moreover, not all companies seem to consider exactly the same factors when estimating compliance costs. A company, for example, told us that it estimated its compliance costs in several hundred thousand euros, but that if it would take into account the fact that for two countries such as Belgium and the Netherlands it had to do considerable different catalogues and mailings, this cost would be of several million euros.

Although smaller companies have a smaller total figure with regard to compliance costs, this sometimes represents a considerable percentage of their budget, since they also manage smaller budgets and their activities abroad are more limited than in the case of bigger companies. This makes us conclude that SMEs will be the most benefited from a simpler and transparent legal framework and from the elimination and the barriers that still exist.

With regard to the percentage of these compliance costs, companies, in average, considered that they could be reduced in around 40% or 50% if all these barriers mentioned would not exist.

IV. CONCLUSIONS

More than 10 years after the deadline for completion of the Internal Market, obstacles within the Internal Market continue to exist. Most of the companies that participated in the survey underlined the need of a local reliable partner to carry out business in another country. This, to a certain extent is due to the existence of differences in legislation and lack of knowledge on the business practices and transparency with regard to the interpretation of the laws applicable in a specific market.

As recognised by the Commission in its Communication on “European Contract Law and the revision of the *acquis*: the way forward”²⁰, the differences between national implementing laws deriving from the use of minimum harmonisation in consumer protection Directives is one of the problems of existing legislation. Minimum harmonisation has failed to provide for full dissolution of trade barriers in the Internal Market. Differences in legislation between the different Member States still exist, in many cases they have just been set at another level.

EMOTA and the distance selling sector support a shift of EU consumer protection legislation from minimum harmonisation to full harmonisation. Nevertheless, full harmonisation should balance the interest of both consumers and businesses and leave enough room for the latter to differentiate themselves in the market. If we look at the air travel sector, the fact that a company offers extra services (ex: free drinks, meals) does not mean that the law should made the offer of these services compulsory for all companies. In the same way, that a distance selling company decides to offer 14 days of right of withdrawal or pay for the returns of the consumer should not mean that every company should be legally obliged to do so. These and other extra services offered have an impact in the final price. It should be up to the consumer to decide whether price or other factors are important for him and decide whether he/she prefers to use a low cost company or not. Companies should be able to establish their own strategies to differentiate themselves in the market and in this way provide more choice for consumers.

With regard to the approach followed in relation to consumer protection legislation, it is also important to point out the apparently existing belief that more consumer protection equals to more information requirements. This represents a big burden to companies and does not benefit the consumer, who overloaded by information is not able to distinguish really relevant information (a consumer is likely to read one or half a page with information but will not probably read five pages of information).

Confidence and mutual recognition are essential for the good functioning of the Internal Market. Some of the examples mentioned by companies with regard to technical barriers and more specifically, with regard to the failure of Member States to recognise tests and controls made by other Member States, points out to the lack of confidence among Member States. The creation of a framework for better co-operation on enforcement between Member States should help to increase confidence and eliminate some of the existing barriers resulting from the reluctance of some Member States to apply the mutual recognition principle.

²⁰ COM(2004) 651 final of 11 October 2004

The promotion of e-commerce is key for the achievement of the new Commission strategy for growth and jobs. The potential of e-commerce to jumpstart distance selling sales, both in country and cross-border is huge. Consumers will also benefit from the development of e-commerce because they will see an increase of their choice of goods and services. Nevertheless, legal certainty is essential for the development of e-commerce and for all distance selling companies in order to have the confidence to continue to expand consumer services and increase consumer choice. This is especially important for small and medium size companies. The development the information technologies has potentially provided small companies with the means to open new markets so far only accessible to bigger companies. The country of origin principle established in the E-Commerce Directive aimed at providing companies with the necessary legal certainty. Nevertheless, contrary to the stated objective of the Commission to support the development of e-commerce we see that new Commission proposals undermine that legal certainty provided by the E-Commerce Directive. The recent proposal for a Regulation on Rome I²¹, for example, broadens the scope of application of the law of the country of the consumer beyond those cases where the consumer has been actively targeted by a company. As a consequence of these companies, especially SMEs, would probably decide to restrict their trading and limit its activity to those consumers established in their country and refuse to even passively²² conclude any contract with any consumer in any other Member State. This will also limit the capacity of consumers to look for, compare and benefit from the best offers reducing their choice.

Data protection is a very important issue for the distance selling sector. Our business depends to a great extent on access to data and on the confidence of consumers that data being used adequately. The examples mentioned for our companies in relation to data protection point out to the need for a balance between the consumers' right for protection of his/her data and legitimate business interests such as checking the identity of a consumer, preventing fraud or sending offers to consumers. Too restrictive legislation on this field may make difficult for companies to comply with its legal obligations and moreover, it may result in an obstacle to the development of distance trade.

The approach followed in relation to some environmental issues such as Electronic Waste has had as a result the existence of very different systems in the different Member States. In the example mentioned in this paper, this approach has revealed itself as a barrier to the exploitation of synergies and the establishment of more efficient systems for the collection of old appliances in border regions.

Reliable, affordable and market-oriented postal services are critical for the distance selling sector to be able to face the challenge of even more demanding consumers. The growth of e-commerce demands precise and rapid fulfilment of orders and reliable delivery of parcels, some of which need same day or delivery within 24 or 48 hours. Competition in the postal sector is likely to improve the efficiency of postal services and boost new more innovative solutions tailored to the needs of the market, helping also

²¹ Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) (COM (2005)650 final) of 12 December 2005

²² Passive selling would result from a consumer visiting a website, without having been specifically targeted via for example banners, links or other promotions to consumers in their country, and as a result the consumer decides to conclude a transaction with that company.

our sector to be more competitive. Nevertheless, competition is only likely to emerge if legal certainty as to the definitive date for the full opening of the postal market is provided. 2006 will be an important year, since the Commission is due to present a proposal either confirming the date of 2009 as the date of full opening of the postal market or proposing other further steps.

Finally we would like to point out to the barriers faced by our companies when deciding to establish a subsidiary in a Member State. To this regard, the proposal for a Services Directive²³ and the administrative simplification measures that it contains is an important step in the right direction. The original proposal represents a real effort to cut red tape. Allowing companies to have rapid and simple access to crucial information or the possibility to fulfil all procedures and formalities by electronic means represents a very positive step forward. The obligation of Member States to assess the compatibility of legal requirements in place, especially in relation to the principle of proportionality is also very much welcomed by our sector.

²³ Proposal for a Directive of the European Parliament and of the Council on services in the internal market (COM (2004) 2 final)

V. RECOMENDATIONS

Following the examples and comments of this paper, we would like to contribute to the Commission's efforts on better regulation and simplification with the following list of recommendations:

1. Companies sometimes face problems because of the differences or uncertainty as to the way in which legislation is interpreted in the different countries. To this respect, a wider use and publication of guidance documents by Member States and, when appropriate, the European Commission, clarifying how specific legislation or provisions are to be understood/interpreted may help to provide more legal certainty for business.
2. The lack of information on the legislation applicable and transposing measures in other European countries is specially stressed by small and medium sized companies. To this respect and taking into account the already existing obligation of Member States to communicate transposing measures to the Commission, the Commission may consider the possibility of creating a single European portal where information about applicable legislation in the different EU countries may be obtained. This would be especially useful for SMEs and companies considering the possibility to expand their activities to other countries.
3. The minimum harmonisation approach followed in European consumer protection policy has had as a result the existence of 25 different legal frameworks in the 25 Member States. Consumer policy should move from a minimum harmonisation to a full harmonisation approach that balances both the interests of consumers and companies and leaves the latter enough room to follow their own commercial approach.
4. Where possible, Regulations rather than Directives should be promoted. Regulations are directly applicable while Directives have to be implemented into national law, often having as a result different provisions (in the case of minimum harmonisation directives), differences in interpretation in the different Member States or delays in its transposition, creating uncertainty for economic operators.
5. While we recognise the right of consumers to be informed, there should be a balance between informing and overloading consumers with information. Companies and consumers suffer the consequences of too many information requirements (more expensive goods, difficulties to distinguish really relevant information...). There should also be more flexibility with regard to the way to give this information so that commercial communications can be adapted to the communication means used (it is not the same to have a TV or radio advertising than a mailing).
6. Consistency among the different Commission proposals should be further promoted. The Commission should avoid having proposals that undermine the principles established in other pieces of legislation/proposals (ex: Rome I proposal in relation to the E-Commerce Directive)

7. Bureaucratic and too burdensome reporting procedures should be avoided. These only result in a lost of time and efficiency for companies.
8. The use of impact assessment before the adoption of Commission proposal should be further promoted so that there is a clear picture with regard to the burdens and benefits that the proposal is likely to create.
9. There should be a focus on enforcement of existing rules rather than the creation of new ones. Free riders are not likely to enforce neither old nor new rules, which at the end only result in new burdens to legitimate businesses. An emphasis on enforcement should also create the necessary confidence between Member States to apply the principles of mutual recognition and country of origin.
10. The Commission should confirm as soon as possible the date for the full opening of the postal market. Legal certainty is necessary for competition to develop. Market opening will boost innovation in the sector and is likely to benefit distance sellers and end consumers.
11. With regard to Data Protection policy a more balanced approach between the right of consumers to privacy and the access to data for legitimate purposes should be promoted. Too restrictive data protection legislation may result in a barrier for the development of the distance selling sector and in companies having difficulties to comply with other legal obligations.
12. The Commission should have a closer look at the approach that until now has been following with regard to environmental policy. The result has been the existence of many different national/regional systems and to some extent a fragmentation of the Internal Market. If companies are prevented from trying to organise more efficient and less costly systems as a result of European legislation (ex: with regard to electronic waste) then, a new approach on this field may be considered.

EUROPEAN DISTANCE SELLING TRADE ASSOCIATION (EMOTA)

rue Wiertz 50/28
1050 Brussels (Belgium)
T. +32 2 401 61 95
F. +32 2 401 68 68
E. info@emota.org
<http://www.emota.org>