

A legal and empirical investigation into the direct selling industry's advocacy in the EU

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Valorisation Addendum

1 Social Relevance of the Research

A study looking into the legal and empirical aspects of how an organised interest group influences the European legislature –the originator of approximately 80% of laws within the European Union– has societal relevance in two main respects.

From a democratic perspective, the research helps to increase lobbying transparency by providing insight into this cross-section of the European political system. In this sense, the enquiry reveals how a particular advocacy group strives to maximise its benefits against competing interest groups and the extent to which it manages to realise its interests. In other words, the study elucidates the way lobbying manifests itself in European legislation governing a certain industry sector, raising questions of democratic representation, social justice and morality. While lobbying usually has a negative connotation, in case the representation of interest groups is balanced it may actually result in legislative output that is more widely accepted. The example brought forward in this study for such balanced representation of interests from a consumer- and industry perspective is the Consumer Rights Directive, an act that represents a number of political compromises and concessions but is nonetheless acceptable for both consumers and the industry. On the other hand, imbalance of lobbying entails the risk of distortion, resulting in legislation that favours only one interest group and disadvantages other, less vocal or organised interests, as was the case with the largely industry-proposed European pyramid scheme definition.

From a policy perspective, the dissertation offers recommendations in each area it assesses.

While the Consumer Rights Directive was found to strike a good balance between consumer- and industry interests in general, it may be questionable whether it will manage to liberalise trade between Member States at the intended level. Save where otherwise provided by the Directive, the maximum harmonisation nature of this piece of legislation should provide the legal basis for the abrogation of national protectionist measures restricting direct selling and electronic trade, yet considerable changes have not been observed in the national regimes in this respect since the entry into force of the Directive.

In terms of MLM de-regulation and the European pyramid scheme definition, the area of unfair competition law that has been somewhat distorted by the direct selling industry lobbying, several recommendations have been made. While the industry's present position is that the pyramid scheme regulation is appropriate and does not need revision, this study suggests that the current norm is incomplete; not only is it very generic and ambiguous, its scope has also been narrowed down to B2C transactions. As a

result, it is incapable of catching the vast majority of pyramid promotional schemes that are masqueraded as legitimate MLMs, which are per definition B2B structures wherefore it does not offer protection to small businesses that may be defrauded by scammers. In conclusion, it is recommended that tighter rules and specific safeguards be put in place to reduce the grey area between legitimate MLMs and fraudulent schemes in which pyramids and questionable market practices can proliferate. To that end, the scope of the pyramid definition should be extended to B2B schemes and a clear set of rules should be introduced instead of the current ambiguous and generic pyramid scheme regulation. *In concreto*, high entry fees and inventory loading should be prohibited, outrageous and unsubstantiated earnings claims should be expressly outlawed, a buy-back policy and requirements of customer sales (to ensure that sales are predominantly outside the scheme) need to be put in place.

Direct selling industry self-regulation in Europe is part of a global trend that raises industry standards through market integration, but it is also a comprehensive response given to a general morality deficit, placed in the context of an increasingly harmonised economic and legal environment. As an agent of European harmonisation, the direct selling industry's Codes of Conduct have been found to have played a key role, especially before the entry into force of the Unfair Commercial Practices Directive and the Consumer Rights Directive, in complementing European consumer law. While there are no longer considerable gaps to fill in terms of the consumer *acquis*, the body of law governing transactions between businesses (between direct selling companies and between direct selling companies and direct sellers) is in need of supplementation. The ambiguous anti-pyramid statute of EU law is –to some extent– complemented in its scope by direct selling private regulation, as the industry Codes provide direct sellers protection through the provision of specific safeguards that EU law falls short of, particularly in the field of unfair competition law. In this respect, it is suggested that the industry Codes be viewed as a pool of sector-specific knowledge that the European legislators could avail themselves of as a basis for the revision of the pyramid scheme regulation.

From a societal perspective, the entrepreneurship campaign of the industry raises policymakers' and the general public's awareness of the field as well as of direct selling as an opportunity to make extra income. On the other hand, however, the campaign is geared towards serving the industry's interests in both advertising the industry as well as in creating an opportunity for the industry to build bridges with politicians. In that respect, the industry lobby was criticised for not addressing two key areas: the opportunities network marketing offers for immigrants and the promotion of better regulation for SMEs. It is therefore recommended that the economic potential that network marketing holds for the sharply rising number of immigrants, even those less skilled, be

explored. Studies suggest that the underlying reasons for immigrants becoming engaged in network marketing is a positive environment, self-efficiency and the desire for opportunities, which, accelerated by human capital, is positively related to financial performance outcomes.⁷⁹⁷ Furthermore, lower qualified migrants, even those who do not speak the host country's language and are disadvantaged on the employment market, can start their direct selling businesses and operate within their own cultural enclaves in the host country successfully.

Secondly, as revealed by empirical research into direct selling corporate interest representation, the promotion of entrepreneurship should call for concrete action in the field of the consolidation of tax rules, i.e. the Commission proposal (COM (2001) 582) regarding the establishment of a common consolidated corporate tax base (CCCTB) to improve the legislative environment of small businesses (direct sellers) especially.

2 Audience Besides Academic Community

An audience that could be particularly interested in the results of this research is that of European policymakers. The enquiry into a particular interest group's advocacy actions may help increase politicians' understanding of the potential as well as the risks of lobbying from the perspective of democratic representation. Furthermore, the analysis of the extent to which the normative framework governing the direct selling industry was influenced by various interest groups can contribute to a more informed evaluation thereof and, potentially, the revision and/or more efficient enforcement of certain norms.

Naturally, the direct selling industry and, in particular, its lawyers and lobbyists can benefit from the findings of the thesis. The analysis contained in the legislative enquiry can serve as a compass in a multitude of strategic issues such as the problem of trade liberalisation, the pyramid scheme regulation or the entrepreneurship dossier. The criticism directed at the industry is hoped to be constructive in that it might not serve the industry's short-term interests at all, but may well contribute to improving the industry's advocacy from a substantial perspective and, more importantly, the critique is meant to encourage the quest for the right response to the inherent morality deficit that the network marketing industry has constantly battled with. On the other hand, the empirical research of the industry's lobbying techniques reveals both the successful aspects as well as the systematic flaws of the sector's Brussels advocacy, which may thus

⁷⁹⁷ Fu Dai, *A Model of Network Marketing Business Entrepreneurial Performance*, 2012, p. 24.

be the basis for the implementation of corrective measures aimed at the increase of lobbying efficacy.

Lastly, lawyers, public affairs professionals of other sectors, as well as the general public may also take an interest in the dissertation. By referring to the results of this thesis, the audience can acquire general knowledge about the interests that have shaped particular fields of European law, how interest groups aim to influence policymakers and what advocacy techniques are used to that end.

3 Publication of the Research Results

Firstly, the present research is published as a book by Maastricht University's printer Datawyse in preparation for the public defence of the thesis.

Furthermore, drafts of some parts of this thesis have been published in the last few years on the Social Sciences Research Network (Maastricht European Private Law Institute Research Paper Series) in order to elicit comments.

The section on the bans on payment and the bans on sales has been published in the article entitled 'The (In)compatibility of Direct Selling Trade Barriers with EU Law' which discussed the conflict of interest between the liberalisation of trade as regards the direct selling industry and Member States' freedom to impose stringent regulations in order to favour consumers' economic interests. The paper assesses direct selling trade barriers' compatibility with European law, and in particular, the fundamental freedoms of the internal market and the relevant secondary law regulating consumer protection, fair trading law and the provision of services.

It is envisaged to publish further parts of the thesis as articles after the defence has taken place.

4 Innovativeness of the Research

While an increasing number of research projects are aimed at studying lobbying in the European Union, the present work is the only one (to the author's knowledge) that provides a comprehensive overview of the direct selling industry's advocacy towards Brussels policymakers.

In this respect, the study's innovative nature is twofold. Firstly, from the perspective of legal research, the novel element is the detailed analysis of the specific interests, posi-

tions and legislative proposals that have been put forward by the direct selling industry in the course of its advocacy activities within the context of competing interests and the assessment of the extent to which these interests have materialised in legislative output, thereby shaping the norms of European private law and policy.

The second innovation concerns the systematic exploration of the direct selling industry's lobbying methods in the Brussels political arena from a political sciences perspective. It is the first overarching (albeit not representative) empirical research that has been carried out to examine and analyse the –at times hidden, or at least less visible– means through which the industry's various forms and organisations of interest representation attempt to influence policymakers.

In summary, this PhD maps both the substantial as well as the technical aspects of the direct selling advocacy in Brussels, contributing to the current literature and aiming at increasing the openness of the European decision making process.

5 How will this/these valorisation plan(s) be shaped

The research results may be offered to European policymakers and, in particular, to the European Commission, in order for legislators to be able to gain a better understanding of the actual impact of lobbying on overall legislative- and policy outcomes, as well as the implications for the democratic representation thereof. The paper could contribute to the mapping of areas where European law could be revised or better implemented.

Findings of the study can be made available to lawyers, lobbyists and public affairs consultants both within as well as outside the direct selling community. The paper provides a unique and valuable overview of the state of affairs of the direct selling industry's government affairs professionals, reflecting on both the positive aspects as well as on areas where there is room for improvement. On the other hand, advocacy experts outside the direct selling industry may also take away important findings from the research in terms of the efficient division of labour between lobbying actors and the role national trade associations could and should play in European interest representation.

The analysis may provide the basis of future research into how the distorting effects of lobbying may be reduced on a systematic level and what new types of checks and balances could be put in place to increase the transparency and democraticness of the “Brussels lobbyocracy”.