

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

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Summary

This dissertation is made up of legal and empirical research into the direct selling industry's advocacy in the European Union. In the context of the European pluralistic democracy or, somewhat pejoratively, the Brussels "lobbyocracy", the thesis intends to increase lobbying transparency by mapping how a particular interest group strives to influence European law in an effort to maximise its benefits. The research entails relevant findings at a macro level, from the perspective of democratic representation, as well as at a micro level, offering policy recommendations in each assessed policy field and thereby hoping to contribute to better regulation.

The first part of the analysis is a legal enquiry, looking at the substantial aspects and concrete areas of European law and policy that the direct selling industry aims to influence. Secondly, the research looks at the advocacy techniques from a political sciences perspective, mainly in the framework of the rational choice theory, assessing what aspects of political power the industry lobby targets and the degree of institutional access achieved through various advocacy actions.

The legal enquiry into the direct selling industry lobby focuses on key aspects of direct selling industry interests vs. other societal interests. It introduces the four main lobbying dossiers for the direct selling industry: the harmonisation of consumer law governing off-premises consumer contracts and trade liberalisation; the field of unfair competition law that draws the distinction between legal multi-level marketing (MLM) and illegal pyramid schemes; the role of industry self-regulation; and, lastly, the promotion of entrepreneurship. Each of these chapters describes the interests behind the respective advocacy strategies, assesses the extent to which lobbying has shaped or is trying to shape European legislation, reflects thereupon from a societal perspective and, consequently, entails policy recommendations.

Negotiations leading up to the adoption of the Consumer Rights Directive were an opportunity for the direct selling industry to advocate trade liberalisation and the abrogation of protective national measures through maximum harmonisation and the modernisation of consumer contract law governing direct selling in the EU. Testing the constitutional waters of the EU, intense political battles surrounding the adoption of the Directive clearly indicated the struggle between the industry-backed Commission ambitiously striving to codify the European consumer *acquis* on the one hand and, on the other hand, the Member States and consumer movements that were opposed to the dramatic redistribution of regulatory power and the reduction of consumer rights in more generous jurisdictions. The conclusion was a political compromise that permitted full harmonisation on a more reduced terrain than originally intended, bringing only electronic commerce and off-premises contracts under its scope. For the direct selling industry this meant an increased –but not the hoped-for full– liberalisation of trade and

a more up-to-date legal framework. All in all, the industry lobby's success concerning this dossier was rather moderate, partly because of the constitutional issues the initiative raised that went far beyond the scope of direct selling advocacy; also because of the political compromises that had to be struck between consumer movements and the industry; and, lastly, because of the strategic malfunctions within the industry lobby that the research has shed light upon, such as the lack of discipline amongst the industry's lobbyists or the strikingly low level of national direct selling trade associations' participation in the overall advocacy strategy.

While aspirations to influence the Consumer Rights Directive resulted in moderate achievements for the industry, direct selling advocacy was found to have been most successful in achieving industry interests in a very specific terrain: multi-level marketing de-regulation and the European pyramid scheme definition. Drawing the distinction between legitimate MLMs and illegal pyramid schemes, this area of unfair competition law is of pivotal importance for the direct selling industry. In general, the clearer and tighter the rules governing pyramid schemes are, the easier it is to distinguish legitimate businesses from frauds. The wording of the current European pyramid scheme definition –as enshrined in the Unfair Commercial Practices Directive– was proposed and advocated for by the concentrated and well-organised industry lobby in a political arena where opposing interests were not very vocal at the time. Although, naturally, the industry is content with the current wording and leaves no stone unturned to oppose the revision thereof, it was concluded that the inappropriateness of the present pyramid scheme definition simply begs for improvement from a societal perspective. Namely, the present European pyramid scheme definition is an ambiguous provision that fails to offer ample legal protection to potential victims, such as small businesses, who join these schemes (which are usually disguised as legitimate MLMs and as such are based on B2B contractual relations), since its scope of application is restricted to B2C relations. Sadly, only the most amateur scammers base their schemes on B2C relations, however, which means that victims of sophisticated frauds are left without civil law protection. The conclusion is that, due to its limited scope, obscurity and lack of clear guidelines, the current European pyramid scheme regulation leaves significant room for questionable marketing practices to flourish and fraudsters to proliferate.

The third dossier dealt with industry self-regulation and its role in shaping European law. The direct selling industry is one of the few sectors that established a world-wide voluntary normative framework governing its members' commercial conduct. Two areas of the industry's self-regulation have been examined. Firstly, as part of a global trend that raises industry standards through market integration, giving a comprehensive response to a general morality deficit and thereby attempting to pre-empt government

intervention as a response to discrepancies. And, secondly, as an agent of European harmonisation, complementing statutory law. It was found that, with the evolution of European law, the role self-regulation plays in complementing statutory law has decreased. However, it still offers some, but not necessarily sufficient, complements to the European pyramid definition.

Although not a legislative lobbying dossier, the promotion of entrepreneurship is dear to the direct selling industry as a sector that aims to provide opportunities for small businesses to sell products of the parent company for extra profit. Entrepreneurship promotion is crucial for the industry in addressing the compromised industry reputation and building alliances with European policymakers who see entrepreneurship as the tool to combat the global economic crisis. The industry's entrepreneurship advocacy is undoubtedly a successful PR endeavour but was criticised from a societal perspective for a multitude of reasons. Firstly, at the level of thematic choices, it is doubtful whether the cleverly planned and executed lobbying actions serve any other interests than those of the direct selling industry. Secondly, the strategy largely ignores the highly relevant correlations between network marketing and low-skilled immigrants, an issue that is high on the current political agenda. Furthermore, the dossier fails to address legislative issues, namely those concerning the establishment of a more harmonised economic environment for SMEs.

Based on the case-studies of the lobbying dossiers as well as on overarching –but not fully representative– empirical research conducted with the participation of various actors of direct selling lobbying, the second main part of the dissertation examines the advocacy techniques of various industry actors (European and national trade associations, corporate- and third party lobbying) from a political sciences perspective. In terms of institutional access, it was discovered that the industry advocacy tends to have the largest influence on the European Commission, mainly thanks to the lobbying efforts of the European trade associations and individually lobbying multinational corporations that are in the best position to provide this supranational institution with information on the aggregated European interests of the industry. There appeared to be less access to the European Parliament and especially to the Council, due to the fact that the present labour division within the direct selling industry advocacy cannot rely on its national trade associations' efficient lobbying, and thus renders it incapable of fulfilling its full potential.

All in all, the research may be viewed as offering insight into the substantial and technical aspects of strategic interest representation in the European Union through the mapping of an important, albeit deeply controversial, advocacy group's political strategy and organisational structure.