

WORKING DOCUMENT OF THE EUROPEAN COMMISSION

**SUMMARY OF RESPONSES TO THE
CONSULTATION ON THE PRICE INDICATION DIRECTIVE
(COM (2006) 325 final)**

1. 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 article 3(2) would be repealed altogether and Member States would be free to determine whether the unit price of these products should be indicated under article 5(1).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.

Responses to this question show a widespread consensus amongst Member States and stakeholders that there is no need to indicate (either) the selling or the unit price for products supplied in the course of a provision of a service, in sales by auctions and for works of art and antiques. Whereas in principle Member States and stakeholders are not concerned by what legislative / technical solution is the most appropriate to achieve this result, the vast majority of responses show a preference for keeping the derogation in Art 3(2) unchanged.

To support this position a number of Member States maintain that the current system has not given rise to particular problems or concerns. Some consider the derogation necessary to guarantee the flexibility that Member States need in order to address national / market specificities. One Member State suggests that the derogation should be kept only for products sold at an auction, without the possibility of departing from the obligation of indicating the selling and the unit price for art and antiques and products supplied in the course of a provision of a service.

Stakeholders seem to have similar views as the Member States, but appear to be more open to the different solutions presented by the Commission. The fact that most countries have made use of the derogation seems to constitute an additional argument to support the exclusion of certain categories of goods from the obligation to indicate the unit price. Two trade associations call for the extension of the scope of the derogation to additional categories of goods relevant to their sector (e.g. food and drink vending machines on business premises, hospital or other institutions, jewellery and furs etc.).

One chamber of industry and commerce suggests that the exclusion from the scope of the Directive of certain goods would have a harmonizing effect in the Member States, reduce the administrative burden and simplify matters for businesses operating in several EU Member States.

2. 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.*

Overall Member States feel that the Directive should have a more uniform implementation in the EU. They remain, however, divided on which of the options proposed in the public consultation would best achieve this result. A majority of Member States considers the introduction of common criteria for the implementation of Art 5(1) to be the most appropriate solution to ensure a more uniform application of the Directive across the EU while keeping the possibility of waiving at national level the obligation of indicating the unit price for certain type / categories of products, in order to address national specificities.

Some responses favour the idea of establishing positive or negative lists of products for the purpose of clarifying when unit price indication would be necessary. These replies nevertheless give a stronger preference to the adoption of a negative list. Main criticisms towards both solutions relate to the lack of flexibility of a list-based system. Member States are seriously concerned by the practical difficulties of drawing up exhaustive product lists (risks of omissions) and of keeping them up to date. One Member State indicates that, while its national law implementing the Directive explicitly contemplates the possibility of introducing a positive list of products subject to unit price requirements, this has not been achieved yet due to the difficulties of drawing up such a list in an exhaustive manner.

While most consumer stakeholders do not have a specific opinion on this point, those who have responded support the introduction of a clear set of criteria and / or guidelines indicating the specific products for which unit pricing may bring added value to consumers, in particular in cross-border situations. Only one consumer association supports the adoption of a negative list, while another response suggests a compromise solution including a general definition of the products and services to which the price indication obligation would apply, with an additional article indicating cases of exclusion and under what circumstances an exclusion should be allowed.

Business stakeholders did not show a strong interest in this question either. The majority of their responses favour the adoption of criteria to guide the Member States in the implementation of Art. 5(1). One of them would welcome the adoption of criteria together with leaving a margin of appreciation for Member States. One business association suggests that, instead, a positive exhaustive list of products would increase legal certainty in favour of businesses. Another supports the idea of a negative "white" list of products that are exempted combined with the possibility for Member States to add to such a list.

Three business stakeholders maintain that there are no reasons to change the current system.

3. 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.

Overall, Member States seem to acknowledge the importance of indicating the unit price in advertising. The majority of responses, however, show a clear reluctance to accept an amendment to the Directive on this point. Those Member States who do not oppose repealing Art 3(4) are equally divided on the two options proposed by the Commission. Two Member States specifically indicate that no changes are needed since the interaction between Art 3(4) of the Directive and Art 7(5) of the Unfair Commercial Practices Directive ("UCP") seems to be a workable solution: the experience with UCP should show at a later stage whether improvements in one, or both, Directives are needed.

Some other Member States clearly reject this solution alleging that using the transactional decision test of UCP would generate uncertainty and would result in an excessive burden for national authorities.

A significant number of business stakeholders did not show any interest in this question. Two business associations and two consumer associations have indicated that Art 3(4) should be kept in its present form. One of these consumer associations maintains that repealing Art 3(4) and using UCP would lower the level of consumer protection. The other stakeholders are almost equally divided between the two proposed options.

Some business associations (also in the context of the public consultation for the review of the acquis), in support of the repeal of Art 3(4) and the application of UCP, maintain that price indication should not apply to food advertising in the media given that this practice promotes only specific products from various product ranges. It argues that the obligation is an extra cost which is not beneficial for consumers since they would not be able in any event to compare prices vertically (between products offered in different nominal quantities) or horizontally (between products from different producers). These price comparisons would only be possible on the business premises with unit price indication on the shelf.

4. 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.

A majority of Member States favour the idea of either eliminating the derogation for small retail businesses or extending it for a limited period of time only. Most countries agree that the unit price constitutes valuable information for consumers and some responses even suggest that the latter are more acutely in need of complete price information when they purchase from small retail businesses. Member States acknowledge the additional burden on small retail businesses to comply with the Directive. They point at technological solutions as the most appropriate means of easing this burden over time. In the meantime, the burden on small retail businesses is still viewed as reasonable and proportionate.

Member States in favour of eliminating or limiting the derogation have stressed the need to develop a common definition of small retail business including both quantitative (e.g. based on square meters or number of employees) and qualitative criteria (e.g. over the counter sales, products that need shop assistance / advice from sales personnel, small branches of bigger distributors etc.). At the same time responses warn about the extreme difficulty of drawing a common (and non arbitrary) definition of small retail business capable of taking into account the existing legal and factual diversity in the Member States.

A few Member States favour the exclusion of small retail businesses from the scope of application of the Directive or a "permanent derogation" (i.e. a variation of option 3).

This line is, however, supported by the vast majority of business stakeholders. In both cases, the main reasons would be the excessive burden imposed on small retail businesses by this obligation and the allegation that consumers do not benefit from unit pricing information when purchasing from small retailers.

Consumer stakeholders point in the opposite direction and support the elimination of the derogation. One big consumer association considers that scientific market evidence shows that the majority of small retailers in the EU-15 approve of the obligation to indicate unit pricing and that unit pricing is regarded as an additional burden only by a minority of small retailers.

5. 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.

The vast majority of Member States are against a fully harmonized regime for price indication and would rather leave the current minimum harmonization system untouched. Several Member States mention the fact that there is no evidence that national differences form significant market barriers and point to the risk that maximum harmonization would lower the level of consumer protection. One Member State observes that divergences in national systems are not significant.

Some Member States have indicated that they would consider full harmonization if the results of the public consultation were to show that this step is necessary for the correct functioning of the internal market or under the assurance that this would not decrease the level of consumer protection. One response proposes to keep minimum harmonization, while reducing at the same time the discretion that Member States currently have under Art 10.

Consumer associations seem slightly more willing to switch to a full harmonization regime based on the fact that Art 10 is superfluous, given that Member States have not used the possibility to introduce stricter rules, or under the condition that the actual level of consumer protection does not decrease. One consumer stakeholder indicates that there are no reasons to change and that, in order to switch to a maximum harmonization system, the Commission would have to change the legal basis of the Directive from Art 153 to Art 95 TEC based on evidence clearly suggesting problems in the functioning of the internal market.

Business stakeholders largely support keeping the present system for similar reasons as Member States and consumer associations.