

Recommendation about the implementation and application of recent amendments to the Price Indication Directive

The recent amendments to the [Price Indication Directive](#)¹ (PID) have led to great confusion among retailers offering products to consumers. We support the aim of the legislator i.e. ensuring consumers are not misled by price reduction promotions that are in practice not a real price reduction. However, the legal text is not clear on many issues and also captures common legal promotion practices that consumers fully understand and from which they benefit. This lack of legal clarity was widely shared among EU Member States and traders, which led to the issuance of the [European Commission guidance on the implementation of the PID](#) (the “EU Commission guidance”).

Unfortunately, EuroCommerce has received concerning signals from many members across Europe about the implementation and application of the new rules and the EU Commission guidance. Therefore, we have formulated a set of recommendations for national legislators and competent authorities, regarding unclear issues where we still see confusion and diverging implementation. It is essential to avoid discrepancies in order for consumers and traders of all sizes to have legal certainty and consistency, and benefit from the Internal Market. If not transposed in a coordinated manner, the points below will significantly increase compliance costs for traders and fragment the single market, which in this case is particularly harmful for online cross-border offerings. **We encourage the Member States to find a common approach among themselves to ensure a harmonized implementation of the PID.**

Recommendations

1. *The PID only applies to goods, and not to services and digital content – Article 1, PID*

EuroCommerce insists Member States to follow the PID and EU Commission guidance and not to apply the PID to services and digital content.

Article 1 - PID

The purpose of this Directive is to stipulate indication of the selling price and the price per unit of measurement of products offered by traders to consumers in order to improve consumer information and to facilitate comparison of prices.

The EU Commission guidance (section 1.1) clearly states that the PID only applies to ‘products’, defined in accordance with EU consumer law² as movable goods, and does not apply to services, including digital services, or to digital content. The guidance also specifies that the UCPD continues to

¹ Article 2 of [Directive \(EU\) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules](#)

² Under the Consumer Rights Directive (“CRD”) (Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22.11.2011, p. 64)), as amended by Directive (EU) 2019/2161, goods are defined as ‘(a) any tangible movable items; water, gas and electricity are to be considered as goods within the meaning of this Directive where they are put up for sale in a limited volume or a set quantity; (b) any tangible movable items that incorporate or are interconnected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions (‘goods with digital elements’);’.

apply with respect to price reduction announcements or other practices promoting price advantages regarding digital content and all kinds of services. This approach has been followed by a number of countries (e.g. **Austria**, **Germany** and the **Netherlands**) and should be followed by all countries implementing the law. Any discrepancies from this line during the transposition poses significant operational challenges on digital service providers, which typically have cross-border/international business models and goes against the scope of the Directive.

2. Interpretation of price comparisons and combination with price reduction announcements

EuroCommerce recommends not to restrict the display of other reference prices beyond the meaning of the PID and the EU Commission guidance as is the case in some EU Member states as Finland.

The EU Commission guidelines expressly acknowledge the right for traders to use other techniques to promote price advantages that are not price reductions, such as price comparisons (which remain subject to the Unfair Commercial Practices Directive³) and state that the traders can show any reference prices in addition to the prior price when the display of the latter is legally mandatory. Provided that such reference prices are clearly explained and do not create confusion to consumers. However, we see diverging national views on this matter.

The **French government** expressly acknowledged the right for traders to display price comparisons. However, this provision seems to unnecessarily restrict the traders' ability to determine its own reference prices and limit them to other traders' prices only (e.g. recommended retail price (RRP) or the average price on an identified segment). The FAQ⁴ provided by the French regulator indicates that a trader may show price comparisons with prices other than it previously applied. As a result, traders are not entitled to display a historical price of the product, such as the launch price or the RRP for their own products, as a reference price for price comparison purposes. In addition, the French government does not recognize the general right for traders to indicate reference prices other than the "prior price" for price reduction announcements. The FAQ specifies that traders are free to choose between a price reduction announcement or a price comparison, thus implying that traders cannot combine them, contrary to the EU Commission guidance.

The **Dutch government** also acknowledged the right for traders to display price comparisons in the draft legislation transposing the PID. However, it limits the traders' right to present a price advantage only with a price they have not previously charged. Examples of this are price comparisons with a competitor's price or an RRP. Therefore, price comparisons with the trader's own previous prices (excluding the required 'prior' price) are not permitted.

In **Finland** the law and the guidance of the consumer ombudsman allows alternative reference prices as long as the price information is not misleading. However, while price comparisons to e.g., competitors' offers are straightforward, the guidance is overly complicated for situations in which the seller is willing to show both the prior price as required by art 6a of the PID and the "normal" price or price used immediately before the price reduction.

Finally legislation in neither **Italy** (the draft Legislative Decree implementing the PID), nor **Spain** has expressly acknowledged the right for traders to display price comparisons. While the established caselaw recognized such right, there is no guidance as to whether traders would be entitled to continue displaying price comparisons in the future or show other reference prices in addition to the

³ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive')

⁴ FAQ prepared by the MEDEF (employers' organization) in cooperation with the French Regulator (DGCCRF) that provides guidance on the interpretation of the French provision (article L. 112-1-1 of the French Consumer Code) transposing Article 2 of the Omnibus Directive (<https://www.medef.com/uploads/media/node/0019/100/14563-faq-annoncesreductionprix-medef-31052022.pdf>).

prior price for price reduction announcements.

Such examples of restrictive interpretations (**France, the Netherlands and Sweden**) or lack of guidance (**Italy and Spain**) would ultimately result in a distortion of the good functioning of the Internal Market and in unfair competition, to the advantage of traders established in Member States that opted for a less stringent transposition.

3. General announcement of price reduction by retail chains

EuroCommerce recommends to allow retail chains to indicate which stores are not participating or may have diverging reduced or prior prices in the general announcement of the price reduction.

Retail chains that have multiple stores, run centrally, for example via a franchise or independent retailers, may not have the same discounts or prices in every store for every product. The EU Commission guidance provides that group advertising of price reductions, where central entities plan and advertise price reduction campaigns on behalf of the retailers that distribute their products, are allowed. When necessary, and in order to provide clear and transparent information to consumers to ensure compliance with UCPD, retail chains should indicate in a general price reduction announcement (e.g. leaflet, online) that store x, y, z are not participating in the promotion campaign or apply it differently, and may maintain different prices. For the avoidance of doubt, the individual stores displaying price discounts should be PID compliant.

In **Denmark** for instance, the Danish Consumer Ombudsman allows the general marketing of the chain to use wordings like “Save up to”, “Save between” and “Save at least” when communicating on behalf of the entire chain. In many cases retail chains do not know when individual stores have conducted their own local price reductions and therefore it will be difficult for them to determine whether a store will be part of the campaign or not. It is thus important to use a wording to ensure that consumers are informed that the saving may vary from store to store and then the local store will have to make sure that they clearly indicate the precise saving at their store.

4. Loyalty programmes and personalised price reductions - Guidance section 2.3

EuroCommerce recommends to allow traders to make a distinction between price reductions available to only a defined category of customers and those available to all customers, which fall within the scope of PID. Neither the term “many customers” nor “majority of customers” occurs in the legal text of the PID but only in the guidance. Concrete examples on how to prove that the offer would be useful to avoid creating legal uncertainty for traders and leading to high fines.

The EU Commission guidance states that when a price reduction is “in reality offered/announced to consumers in general” or “potentially all consumers”, article 6a of the PID would apply. However, Section 2.3 Loyalty programmes and personalised price reductions then refers to a campaign offered to “many or the majority of customers”. Such expression lacks clarity and legal certainty.

The **Swedish Consumer Agency** for example indicates that traders should look on how the segmentation is done. If the segment is very broad, it cannot be personalised offers. Even if, for example, only 5 % of a loyalty programme’s members are selected for an offer, this may in practice mean that many are reached by the offer, which is why in practice it would count as having been publicly announced.

The **French legislation** expressly defines the “prior price” as the lowest price in the last 30 days applicable to “all consumers”. The French FAQ further clarifies that this requirement does not apply to promotions reserved to specific categories of consumers (e.g. students, loyalty programme members). The exclusion applies regardless of the number of consumers actually benefiting from the price advantage, as long as the product is available at another price to other consumers. The FAQ also specifies that when the trader advertises a price discount to all consumers who visit the physical or online store during a specific period of time, such offer would fall within the scope of the PID.

In this regard, the French **Commission for Consumer Protection (CPA)** considers that the operations

provided to consumers who hold a loyalty membership by a trader and who, after receiving specific registration data, give to the member of the loyalty programme access to preferential prices, do not constitute a price comparison message and should not meet the requirements of Article 65 of the CPA. It is therefore in this case not required to have the label or brochure indicating the previous price.

5. Perishable goods – Guidance section 4.1 (Art. 6a, paragraph 3)

Article 6a - PID

3. Member States may provide for different rules for goods which are liable to deteriorate or expire rapidly.

To achieve the highest level of harmonisation, EuroCommerce recommends all Member States to exempt at least all products with an expiry date of less than 30 days on the date of sale.

The requirement to display the lowest price in at least 30 days is of little relevance for products with a short shelf life that may need to be discounted more often in order to sell them faster due to approaching expiration dates.

While the PID does not define “goods which are liable to deteriorate or expire rapidly”, the EU Commission guidance specifies that compliance with the objective criteria is to be assessed on a case-by-case basis and gives examples, such as fresh food and drinks with short expiry limits. The **French and Dutch legislators** consider that fresh flowers are another example of goods with a short expiration date, while **Portugal** limited to agricultural products. In addition, the **German legislator** stated that goods with a short “remaining” shelf life would fall under the exemption even though they are generally not easily perishable (e.g. hard pasta with a remaining shelf life of 10-15 days (or less) would fall under such exception).

The target of EU the directive were initially non-food products that where partly misleadingly promoted during ‘Black Fridays’ by individual actors.

Food Prices have a different dynamic than non food prices. They change much faster because of

- changing seasons
- multiple ingredients and suppliers in different regions/continents
- maturity/ripening within days or even hours in ware houses/stores
- inflation in current crises caused by
 - interruption of supply chains
 - energy prices/shortage
 - drought/lack of water
 - changes in farming strategies
- Consumers check prices for their personal food basket several times a week if not daily and therefore
 - cannot be easily misled by promotions
 - have no interest in the price of a food product that was valid 30 days ago

This approach, permitted by the PID, serves a threefold purpose which would ultimately benefit consumers: increase promotions, reduce waste and, finally, promote sustainability.

6. Sale of good after a period of interruption – Guidance section 4.2

EuroCommerce recommends, specifically in the case of seasonal goods, to leave it up to the trader to set the reference period, as per the EU Commission guidance

Article 6a - PID

4. Where the product has been on the market for less than 30 days, Member States may also provide for a shorter period of time than the period specified in paragraph 2.

The EU Commission guidelines set out specific rules applicable to goods that the trader offers again after a period of interruption, such as in the case of goods that were temporarily out of stock or in case of seasonal goods. The guidelines specify that the trader can choose to set a longer period of time as the reference period for setting the prior price, provided that (i) the goods have been offered

for sale for a total of at least for 30 days during that reference period, and (ii) the ‘prior’ price indicated is the lowest price in the whole reference period. We see that in some cases Member States have diverged from this approach which is allowed under the legal text. However, this is causing unnecessary fragmentation of the single market as the Unfair Commercial Practices Directive will already apply. Fixing a strict minimum period during which the goods had to be offered for sale during the reference period is therefore in our view a disproportionate intervention which will only make business operations more complex without clear benefits to consumers.

7. Progressive price reductions - Guidance section 4.3

EuroCommerce recommends to interpret a progressive time reduction in time i.e. this week 10% off, the second week 25% off, the third week 50% off, etc.

EuroCommerce believes the examples are too prescriptive. A progressive price reductions in time now seems to be connected to percentage of the reduction i.e. 10%, 20%, 30% etc. This is however not what the legal text says:

Article 6a - PID

5. Member States may provide that, when the price reduction is progressively increased, the prior price is the price without the price reduction before the first application of the price reduction;

The legislator and competent authorities should avoid a harmonisation of progressive reductions across the EU, as traders may feel forced to follow the 10, 20 ,30% rule. It is up to the trader to decide which progressive reduction it wants to give. According to our information, in **Lithuania** this had led to the wrong interpretation which risks to lead to divergent implementation.

Contact:

Ilya Bruggeman - +32 496 29 91 24 – bruggeman@eurocommerce.eu

Transparency Register ID: 84973761187-60