

3 February 2020

Joint paper on the interpretation of price reduction rules under the Omnibus Directive

Introduction and original objective behind this provision

The undersigned EU trade associations have closely followed and proactively engaged in the legislative process that led to the adoption of the Directive (EU) 2019/2161 on better enforcement and modernisation of Union consumer protection rules (so-called “Omnibus Directive”).

In particular, this paper addresses a new provision covering the announcement of price reductions¹, which was included in the Omnibus Directive only at a very late stage of the trilogue negotiations, thus without detailed discussion in Council or Parliament, no impact assessment and no recitals to explain the thinking behind the amendment. We are, therefore, seriously concerned that in its present wording, its text can be open to various interpretations when implemented by Member States, with potential far-reaching negative consequences for both online and offline traders if not transposed and interpreted appropriately.

Therefore, it is of utmost importance that the Commission ensures a balanced, clear and harmonised transposition of this provision into the Member States’ national systems, to avoid further fragmentation of the Single Market and the creation of new barriers for cross-border commerce in the Union, if Member States decide to go beyond the minimum level of harmonisation of the law.

The purpose of this paper is to support the work of the European Commission ahead of the transposition workshops that will be organised at the beginning of 2020 and inform Member States about the potential risks for traders if the text is not transposed in a clear and balanced way. We thus call for the adoption of transposition guidelines that clarify the interpretation that needs to be given to Art. 6a as well as its precise scope.

Key points

The joint paper outlines in detail several areas of concern for the co-signatories, namely:

- The need to **clarify the scope of the provision on the announcement of price reductions and ensure legal consistency**, especially with the general regime of Directive 2005/29/EC on Unfair Commercial Practices (UCPD), which applies for practices not explicitly foreseen by the new Art. 6a of the Price Indication Directive (PID).
- The need to **avoid the negative effect of the mechanism set by Art. 6a PID, which could unduly limit traders’ ability to make more than one price reduction action within a (minimum) period of 30 days**, while this is a normal practice in specific periods of the year. For instance, traders announce several price reduction actions within the minimum period of 30 days, such as Singles Day, Black Friday, Cyber Monday, etc., from which consumers can and do benefit.
- The importance for Member States to **aim for a level playing field when transposing the new rule**. This is crucial to reducing the risks of unfair competition within the Union, with diverging rules across Member States, and globally, with EU businesses that would find themselves at a competitive disadvantage compared to non-EU ones, which will not have to comply with the new rule.
- The importance of the **European Commission issuing Transposition Guidance on the amendments to the Price Indication Directive**, in order to avoid misinterpretation of Art. 6a PID and divergent implementation and application, and for Member States to support these guidelines.

All these points are further developed in the following pages.

¹ Directive (EU) 2019/2161, Article 2 Amendments to Directive 98/6/EC introducing a new Article 6a

1. Clarify the scope of the provision and ensure legal consistency

UCPD general regime applies to practices not explicitly foreseen by Art. 6a PID

The undersigned associations would like to emphasize that the overall objective of the new provision that has been introduced in the Price Indication Directive 98/6/EC (PID) should be to avoid that traders artificially inflate prices for products they are selling to consumers by announcing a price reduction that would *de facto* be misleading for consumers.

As this new provision lacks legal clarity, it is of utmost importance to clarify its link to Directive 2005/29/EC on Unfair Commercial Practices (UCPD) and its scope. We would like to stress the fact that the UCPD is a *lex generalis* with a list of always unfair commercial practices (in Annex I), while the PID is a *lex specialis*, with a restricted scope. In particular, Art. 6 PID clarifies the regime of one given practice, but it cannot be interpreted as prohibiting any practice *per se*. If the legislator wanted to prohibit a specific commercial practice, it would have added it to Annex I of the UCPD.

Therefore, the general regime of the UCPD should continue to apply to any practices that are not explicitly targeted by Art. 6a PID. In other words, as there can be several commercial practices related to prices, those should only be governed by the general framework of the UCPD on a case-by-case approach. Art. 6a PID only applies when one and the same trader, who sold a product for a period prior to the sale, claims to reduce his prior selling price, meaning he is maintaining the other modalities and conditions of the prior offer. All other practices having an effect on price settings shall not be considered as included in the scope of this provision, as they are still regulated by the UCPD and the case-by-case approach to control fairness.

Moreover, the concept of "price reduction" is not defined in EU law whereas there are many practices that can lead to a reduction of the selling price (e.g. coupons, 3 for 2 reductions, loyalty programs, etc.). A broad interpretation of "price reduction" by the Member States would mean that the "prior sales price" should be indicated when any of these practices is applied. This would cause a major compliance problem as it would mean that all those practices where a prior reference selling price cannot be displayed would *de facto* be prohibited. Such a broad interpretation would also have a particularly negative impact on SMEs, which would be obliged to invest in expensive and sophisticated stock management software to keep track of all prior prices, also when not relevant or useful for the consumer. Therefore, we are convinced that any commercial practices related to a general price reduction indication such as coupons, loyalty programs, "3 for 2" promotions, etc. should fall out of scope of Art. 6a PID. That is why we advocate for an interpretation of the concept of "price reduction" that is as narrow as possible.

Art. 6a PID should not apply to general discounts

As already suggested by Commission representatives, the provision of Art. 6a PID should not apply in the case of general discounts on all products or for a range of products, for instance when a retailer announces a 20% reduction on all products or when a fashion seller announces a 20% reduction on all jackets in his collection. Such general discounts should be out of the scope, because they are not product-specific, since the reduction applies to all products and refers to the actual selling prices of the products and not to the lowest price in the period prior to the announcement. If Art. 6a was also applied to general discounts, then sellers would always have to quote the reference sales price for each individual product, which - according to paragraph 2 - must be the lowest price in (at least) the last 30 days. This would confuse consumers, as they might not understand which price the 20% discount refers to and it would at the same time involve immense administrative and financial burdens for the seller.

According to the logic of the Price Indication Directive, it should be absolutely clear that Art. 6a PID is not applicable to general discounts, so that sellers do not have to specify the new reference price for each of their products, but can keep the initial selling price on the products on which the reduction will be applicable. The reason for this interpretation of the rule is that retailers do not have to change all price tags in a shop if they apply a 20% discount on all products or a range of products.

Ensure clear distinction between “price reduction” and other reference prices

It should be clarified that Art. 6a PID should only apply in the case of an announcement of a selling price reduction of a product that was already being sold by the trader. In other words, there is a clear differentiation between “prior price” (meaning the prior selling price) and other reference prices such as the “recommended retail price”.

This is, for instance, the case for online outlets. They sell off unsold stocks from major brands, a practice that positively contributes to sustainability. These shops offer goods at significantly discounted prices. They advertise their offer by comparing their very low price with the “recommended retail price”. Such retailers did not previously sell these goods and thus do not have a prior reference selling price as meant in Art. 6a PID.

This is also the case of traders advertising a new product with a “launching price”, when - in the first weeks that a new product is made available on the market by a seller - the seller lets his consumers know that the price is temporarily reduced. Also, in this case, there is no prior selling price available that can be displayed.

Considering that Art. 6a PID makes no reference to the “recommended retail price” or “launching prices”, these practices should not be considered within its scope. They are, of course, regulated by the UCPD.

“Previous price” to be seen in context of particular “advertiser”

The trader, within the meaning of Art. 2. PID corresponds to *“any natural or legal person who sells or offers for sale products which fall within his commercial or professional activity”*. However, the use of the words *“any announcement”* (Art. 6a PID) does not specify the particular type of the advertiser. In the absence of details, the advertiser could, therefore, be the merchant who sells the product to the consumer, or indeed any another operator, such as a franchisor, a group, a network head, etc., who realizes the advertisement/promotional operation on behalf of its network of retailers.

The concept of “previous price” should, therefore, be differentiated according to the type of the advertiser. When the advertiser and the selling merchant are not the same person (e.g. national catalogue for 500 independent stores), it is indeed difficult for the advertiser to inform the consumer about the application of a price charged in the store. Even if he had knowledge of it, the advertiser would not be able to physically indicate on the ad, for example the national catalogue, the prices finally applied by each of the retailers. It should be kept in mind that the ability of independent retailers, which belong to a group structure, to set their own prices is one of key characteristics of that business model.

The initial advertiser should, therefore, be able to refer to the “recommended retail price” (see also above) rather than the actual sales prices in situations where the advertiser is not the same as the final retailer and where the individual retailers offer/offered different prices for the goods advertised by the advertiser.

2. Aim for a level playing field when transposing the new rule

Reduce risks of unfair competition across Europe and globally

The possible interpretation of Art. 6a paragraph 2 as the ability for each Member State to set the duration of its own “prior period” (of at least 30 days), will in our opinion create distortions of competition within the Single Market. This is an unexpected and negative effect of the mechanism introduced by Art. 6a PID. Also, in light of Regulation (EU) 2018/302 on Geoblocking, which is supposed to foster cross-border trade, the fact that countries may implement different prior periods will create exactly the opposite effect, by establishing an unfair playing field where, in some countries, sellers will see their ability to organize promotions limited compared to others. Also, this is not the purpose of the Price Indication Directive, which is a law supposed to protect consumers and not to regulate sellers’ activities. We, therefore, call on the European Commission to promote the implementation of the same prior period of 30 days across all the Union.

From a global perspective, we also want to stress that Art. 6a PID will create an unlevel playing field between the EU and third countries. In fact, only traders located in the Union will have to comply with

the new provision, while players established outside the EU will not be subject to the new obligations. This will inevitably put EU players at a competitive disadvantage.

Recurrent price reduction actions within a 30-day time period & unfair competition

The undersigned associations want to highlight the issue of complying with the new provision when traders have more than one price reduction action within a 30-day period. As we read Art. 6a PID, we are worried that it would have the negative effect of not allowing traders to have more than one price reduction action within a (minimum) period of 30 days. For instance, in specific periods of the year, it is normal practice for retailers to announce several price reduction actions within the minimum period of 30 days such as Singles Day, Black Friday, Cyber Monday, followed by Christmas' announcements of price reductions, from which consumers can and do benefit.

To avoid this negative limitation of price actions caused by Art. 6a, the "prior price" referred to should be the lowest "full" price practiced in the last 30 days, thus excluding promotion actions that lasted for a short period of time, such as one or some days around Black Friday, from the reference price.

We thus strongly recommend the European Commission to clarify, in its Guidance, that "prior price" and "lowest price" in Art. 6a paragraphs 1 and 2 do not include other explicit short-time promotional actions with reduced prices that took place in the last 30 days, but shall only refer to the lowest "regular price" in that period. This approach would also have the positive effect of reducing the risk of unfair competition between EU traders and global competitors which are *de facto* allowed to have as many price reductions as they want (see paragraph above). Consumers will also ultimately benefit from this approach, as they would be able to profit from more EU actions.

Furthermore, it should also be clear that the same announcement of price reduction repeated the day(s) after the first announcement should not be seen as a new, different price reduction announcement.

Support uniform and pan-EU application of paragraphs 3 and 5

Art. 6a PID also leaves it open for Member States to have different rules in specific cases. First, paragraph 3 gives Member States the possibility to adopt different rules for goods which are liable to deteriorate or expire rapidly. We consider this paragraph essential in the fight against food waste. Second, paragraph 5 states that EU countries may provide that, when the price reduction is progressively increased, the prior price is the price without price reduction before the first application of the price reduction. Progressively increased price reduction is a commonly used promotional method in sales. The sale starts, for instance, with a 40% reduction and increases progressively to 70% during the sales period. We are convinced that all traders in the EU should be able to benefit from this logical rule, especially because of sustainability considerations.

Hence, we call on the European Commission to recommend all Member States to introduce Art. 6a paragraph 5 PID in their national legislation systems, as well as to coordinate in terms of rules for goods deteriorating/expiring rapidly. This should be seen in the perspective of promoting sustainability and avoiding further fragmentation of the Single Market, which would create new barriers to cross-border trade.

In that perspective, it should also be absolutely clear that the minimum character of the Price Indication Directive, which allows Member States to introduce more stringent provisions to protect consumers (gold plating), is only applicable on price reduction announcements as meant in Art. 6a PID and not on other price reduction indications that fall in the scope of the UCPD. Moreover, the maximum character of the UCPD does not allow Member States to introduce more stringent provisions.

As we are convinced that only a fully harmonized Single Market can unleash its full cross-border potential, we strongly advise the Commission, despite the minimum character of Art. 6a PID, to call on Member States for full harmonization and discourage them from introducing more stringent and diverging provisions.



3. Commission should issue Transposition Guidance to cover the amendments to the Price Indication Directive

The co-signatories want to stress the importance of having clear Transposition Guidance from the European Commission on Art. 6a PID on price reductions. In view of the planned update of the Commission Guidance on the Consumer Rights Directive and on the Unfair Commercial Practices Directive (UCPD), guidance on this specific article should also be included (e.g. in the UCPD Guidance).

We, therefore, call on EU Member States to attend the important European Commission's transposition workshops starting in February 2020, in order to avoid misinterpretation of Art. 6a PID and divergent implementation and application.

The undersigned EU trade associations stand ready to support the European Commission and Member States in the process of transposing the Omnibus Directive into national legislations. For any questions on our contribution, please reach out to us.

About Ecommerce Europe

[Ecommerce Europe](#) is the sole voice of the European Digital Commerce sector. As a result of [joining forces with EMOTA](#), Ecommerce Europe now represents, via its 23 national associations, more than 100,000 companies selling goods and services online to consumers in Europe. Ecommerce Europe acts at European level to help legislators create a better framework for online merchants, so that their sales can grow further.

About Independent Retail Europe

Established in 1963, [Independent Retail Europe](#) is the European association that acts as an umbrella organisation for the main groups of independent retailers in the food and non-food sectors. We represent retail groups characterised by the provision of a support network to independent SME retail entrepreneurs; joint purchasing of goods and services to attain efficiencies and economies of scale, as well as respect for the independent character of the individual retailer. Our members are groups of independent retailers, associations representing them as well as wider service organizations built to support independent retailers. Independent Retail Europe represents 25 groups and their 380.980,00 independent retailers, who manage more than 757.000 sales outlets, with a combined retail and wholesale turnover of more than 1 trillion euros. This represents a total employment of around 6.5 million persons.

About EuroCommerce

[EuroCommerce](#) is the principal European organisation representing the retail and wholesale sector. It embraces national associations in 31 countries and 5.4 million companies, both leading global players such as Carrefour, Ikea, Metro and Tesco, and many small businesses. Retail and wholesale provide a link between producers and 500 million European consumers over a billion times a day. It generates 1 in 7 jobs, providing a varied career for 29 million Europeans, many of them young people. It also supports millions of further jobs throughout the supply chain, from small local suppliers to international businesses. EuroCommerce is the recognised European social partner for the retail and wholesale sector.