

## II

*(Preparatory Acts)*

## COMMISSION

**Proposal for a Directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC**

(98/C 385/10)

(Text with EEA relevance)

*COM(1998) 468 final — 98/0245(COD)**(Submitted by the Commission on 19 November 1998)*

THE EUROPEAN PARLIAMENT AND THE COUNCIL  
OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 57(2) and Articles 66 and 100a thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the Economic and Social Committee,

Acting in accordance with the procedure laid down in Article 189b of the Treaty,

- (1) Whereas it is important, in the context of achieving the aims of the single market, to adopt measures designed to progressively consolidate this market and those measures must contribute to attaining a high level of consumer protection, in accordance with Article 129a of the Treaty;
- (2) Whereas, both for consumers and suppliers of financial services, the distance marketing of financial services will constitute one of the main tangible results of the completion of the internal market;
- (3) Whereas, within the framework of the internal market, it is in the interest of consumers to have access without discrimination to the widest possible range of financial services available in the Community so that they can choose those that are best suited to their needs; whereas in order to safeguard freedom of choice, which is an essential consumer right, a certain degree of protection is required in order to enhance their confidence in distance selling;

(4) Whereas it is essential to the smooth operation of the internal market for consumers to be able to negotiate and conclude contracts with a supplier established outside their country, regardless of whether the supplier is also established in the consumer's country of residence;

(5) Whereas the establishment of a legal framework governing the distance marketing of financial services should contribute to promoting the advent of the information society and the development of electronic commerce;

(6) Whereas Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts<sup>(1)</sup>, lays down the main rules applicable to distance contracts for goods or services concluded between a supplier and a consumer; whereas, however, that Directive does not cover financial services;

(7) Whereas, in the context of the analysis conducted by the Commission with a view to ascertaining the need for specific measures in this field, the Commission invited all the interested parties to transmit their comments, notably in connection with the preparation of its Green Paper entitled 'Financial Services — Meeting Consumers' Expectations'<sup>(2)</sup>; whereas the consultations in this context showed that there is a need to strengthen consumer protection in this area; whereas the Commission therefore decided to present a specific proposal concerning the distance marketing of financial services;

<sup>(1)</sup> OJ L 144, 4.6.1997, p. 19.

<sup>(2)</sup> COM(96) 209 final, 22.5.1996.

- (8) Whereas the adoption by the Member States of conflicting or different consumer protection rules governing the distance marketing of consumer financial services would impede the functioning of the internal market and competition between firms in the market; whereas it is therefore necessary to enact common rules at Community level in this area;
- (9) Whereas, given the high level of consumer protection guaranteed by this Directive, with a view to ensuring the free movement of financial services, Member States may not adopt provisions other than those laid down in this Directive in the fields harmonised by this Directive;
- (10) Whereas this Directive covers all financial services liable to be provided at a distance; whereas, however, certain financial services are governed by specific provisions of Community law; whereas those specific provisions continue to apply to those financial services; whereas that applies in particular to provisions governing prior information of the consumer; whereas, however, it is advisable to lay down principles governing the distance marketing of such services;
- (11) Whereas, in accordance with the principles of subsidiarity and proportionality as set out in Article 3b of the Treaty, the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community; whereas it is necessary by also sufficient to enact measures which allow consumers to inform themselves and to consider the proposed contractual terms and conditions, as well as measures to ensure that those rights are respected; whereas it is also appropriate to enact measures to protect consumers against the high-pressure selling of financial services and against certain unsolicited uses of means of distance communication; whereas consumers cannot fully enjoy the rights vested in them by this Directive unless appropriate arrangements are made for settling disputes;
- (12) Whereas contracts negotiated at a distance involve the use of means of distance communication; whereas the various means of communication are used as part of a distance sales or service-provision scheme not involving the simultaneous presence of the supplier and the consumer; whereas the constant development of those means of communication requires principles to be defined that are valid even for those means that are not yet in widespread use; whereas, therefore, distance contracts are to be those the offer, negotiation and conclusion of which are carried out at a distance;
- (13) Whereas a single contract involving successive operations may be subject to different legal treatment in the different Member States, whereas, however, it is important that this Directive be applied in the same way in all the Member States; whereas, to this end, it is appropriate that this Directive should be considered to apply to the first of a series of successive operations, or to the first of a series of separate operations over a period of time which may be considered as forming a whole, irrespective of whether that operation or series of operations are the subject of a single contract or several successive contracts;
- (14) Whereas by covering a service-provision scheme organised by the financial services provider, this Directive aims to exclude from its scope services provided on a strictly occasional basis and outside a commercial structure dedicated to the conclusion of distance contracts;
- (15) Whereas the supplier is the person providing services at a distance; whereas this Directive should however also apply when one of the marketing stages involves an intermediary; whereas, having regard to the nature and degree of that involvement, the pertinent provisions of this Directive should apply to such an intermediary, irrespective of his legal status;
- (16) Whereas the use of means of distance communications must not lead to an unwarranted restriction on the information provided to the client; whereas in the interest of transparency this Directive lays down the requirements needed to ensure that an appropriate level of information is provided the consumer both before and after conclusion of the contract; whereas the consumer must receive, before conclusion of the contract, the contractual terms and conditions so that he can properly appraise the offer and hence make a well informed choice; whereas the contractual terms and conditions may not be unilaterally modified for a period of 14 days in order to give the consumer time for reflection;
- (17) Whereas provision should be made for a right of withdrawal on the part of the consumer, without penalty and without having to furnish grounds, whenever the contract has been concluded by the consumer without his having received, at the time of conclusion of the contract, the contractual terms and conditions applicable to it, or whenever he has been unfairly induced to conclude the contract during the reflection period set out in this Directive;
- (18) Whereas provision should be made for a reinforcement of the right of consumers to withdraw from contracts relating to mortgages, life insurance and personal pension operations;

- (19) Whereas consumers should be protected against unsolicited sales; whereas consumers should be exempt from any obligation in the case of unsolicited supplies, the absence of a reply not being construed as signifying consent on their part; whereas, however, this rule should be without prejudice to the tacit renewal of contracts validly concluded between the parties;
- (20) Whereas Member States should take appropriate measures to effectively protect consumers who do not wish to be contacted through certain means of communication; whereas this Directive is without prejudice to the particular safeguards available to consumers under Community legislation concerning the protection of personal data and privacy;
- (21) Whereas, with a view to protecting consumers, it is important to make arrangements for resolving disputes; whereas there is a need for suitable and effective complaint and redress procedures in the Member States with a view to settling potential disputes between suppliers and consumers, by using, where appropriate, existing procedures;
- (22) Whereas, as regards consumer access to justice and in particular to courts and tribunals in the case of cross-border disputes, account should be taken of the Communication from the Commission to the Council and European Parliament entitled 'Towards greater effectiveness in the adoption and enforcement of decisions within the European Union' <sup>(1)</sup>;
- (23) Whereas Member States should encourage public or private bodies established with a view to settling disputes out of court to cooperate to in resolving cross-border disputes; whereas such cooperation could in particular entail allowing consumers to submit to extra-judicial bodies in the Member State of their residence complaints concerning suppliers established in other Member States;
- (24) Whereas the Community and the Member States have entered into commitments in the context of the WTO — General Agreement on Trade in Services (GATS) concerning the possibility for European consumers to purchase banking and investment services abroad; whereas the GATS entitles Member States to adopt measures for prudential reasons, including measures to protect investors, depositors, policy-holders and persons to whom a financial service is owed by the supplier of the financial service; whereas such measures should not impose restrictions going beyond what is required to ensure consumer protection;
- (25) Whereas it is consequently necessary to amend Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life insurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC <sup>(2)</sup>, as amended by Directive 92/96/EC <sup>(3)</sup>;
- (26) Whereas, in view of the adoption of this Directive, it is necessary to adapt the scope of Directive 97/7/EC and Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests <sup>(4)</sup>,

HAVE ADOPTED THIS DIRECTIVE:

#### CHAPTER I

#### SCOPE AND DEFINITIONS

##### *Article 1*

##### **Scope**

1. The object of this Directive is to approximate the laws, regulations and administrative provisions of the Member States concerning the distance marketing of consumer financial services.
2. In the case of contracts for financial services comprising successive operations or a series of separate operations performed over time, the provisions of this Directive shall apply only to the first operation, irrespective of whether those operations are deemed by national law to form part of a single contract or individual separate contracts.

##### *Article 2*

##### **Definitions**

For the purposes of this Directive:

- (a) 'distance contract' means any contract concerning financial services concluded between a supplier and a consumer under an organised distance sales or service-provision scheme run by the supplier, who, for the purpose of that contract, makes use of means of distance communication up to and including the time at which the contract is concluded;

<sup>(1)</sup> OJ C 33, 31.1.1998, p. 3.

<sup>(2)</sup> OJ L 330, 29.11.1990, p. 50.

<sup>(3)</sup> OJ L 360, 9.12.1992, p. 1.

<sup>(4)</sup> OJ L 166, 11.6.1998, p. 51.

- (b) 'financial service' means any service relating to the activities of credit institutions, insurance companies or investment firms, as referred to in Council Directives 89/646/EEC <sup>(1)</sup>, 93/22/EEC <sup>(2)</sup>, 73/239/EEC <sup>(3)</sup> and 79/267/EEC <sup>(4)</sup>; an indicative list of those services is provided in the Annex;
- (c) 'supplier' means any natural or legal person who, acting in his commercial or professional capacity, is the actual provider of services subject to contracts covered by this Directive or acts as intermediary in the supply of those services or in the conclusion of a distance contract between those parties;
- (d) 'consumer' means any natural person resident in the territory of the Community who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;
- (e) 'means of distance communication' refers to any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the distance marketing of a service between those parties;
- (f) 'durable medium' means any instrument enabling the consumer to store information, without himself having to record this information, and in particular floppy disks, CD-ROMs, and the hard drive of the consumer's computer on which electronic mail is stored;
- (g) 'operator or supplier of a means of distance communication' means any public or private, natural or legal person whose trade, business or profession involves making one or more means of distance communication available to suppliers.

## CHAPTER II

### RIGHTS AND OBLIGATIONS OF THE PARTIES

#### *Article 3*

##### **Right of reflection before conclusion of the contract**

1. Before conclusion of a distance contract, the supplier shall communicate all the contractual terms and

conditions to the consumer in writing or in a durable medium available and accessible to him. The supplier may not unilaterally modify these terms for a period of fourteen days.

The parties may agree on a longer period.

However, consumers may conclude the contract before expiry of the period referred to in the first subparagraph or the agreed period.

The consumer's silence at the end of the reflection period shall not be construed as signifying his consent.

2. The periods referred to in paragraph 1 shall be calculated from the day on which the consumer receives the contractual terms and conditions in writing or in a durable medium available and accessible to him.

3. Without prejudice to paragraph 1, in the case of contracts concerning the financial services referred to in points 5 and 7 of the Annex, when the supplier communicates the contractual terms and conditions to the consumer before conclusion of the contract, any price which depends on fluctuations in the financial market outside the supplier's control shall be established with the consumer's express consent when the contract is concluded.

4. The provisions of paragraphs 1 and 2 shall be without prejudice to the rules of the Member States concerning the conclusion of contracts, and in particular the rules governing the manner in which parties express their consent to the contract.

#### *Article 4*

##### **Right of withdrawal after conclusion of the contract**

1. Where the contract has been concluded at the consumer's request before the contractual terms and conditions have been communicated to him by the supplier, the supplier shall communicate the contract to the consumer in writing or in a durable medium available and accessible to him once the contract has been concluded.

The consumer has a right of withdrawal for 14 days, without incurring any penalty and without having to indicate his grounds. This period shall be extended to 30 days in the case of contracts relating to mortgages, life assurance or personal pension operations.

The withdrawal period shall be calculated from the day on which the consumer receives the contractual terms and conditions.

<sup>(1)</sup> OJ L 386, 30.12.1989, p. 1.

<sup>(2)</sup> OJ L 141, 11.6.1993, p. 27.

<sup>(3)</sup> OJ L 228, 16.8.1973, p. 3.

<sup>(4)</sup> OJ L 63, 13.3.1979, p. 1.

The right of withdrawal shall not apply to contracts concerning:

- (a) the financial services referred to in points 5 and 7 of the Annex, whose price depends on market fluctuations outside the supplier's control;
- (b) non-life insurance policies of less than one month's duration.

2. Where the contract is concluded by the consumer during the reflection period provided for in Article 3 and he has been unfairly induced to do so by the supplier, the consumer shall have a right of withdrawal for fourteen days without incurring any charge or penalty, and without prejudice to his right to seek compensation for the damage he has suffered.

When suppliers communicate objective information to the consumer on prices of financial services that depend on market fluctuations, this shall not be considered as an unfair inducement.

The withdrawal period shall run from the conclusion of the contract.

3. The consumer shall exercise his right of withdrawal by notifying the supplier to this effect in writing or in a durable medium available and accessible to the supplier.

4. Member States shall provide in their legislation that if the price of financial services is fully or partly covered by credit granted to the consumer by the supplier, or by a third party on the basis of an agreement between the third party and the supplier, the credit agreement is cancelled, where the right referred to in paragraph 1 is exercised, without any penalty being imposed on the consumer.

5. The other legal effects and conditions of withdrawal shall be governed by the law applicable to the contract.

#### *Article 5*

##### **Payment for the service provided before withdrawal**

1. Where the consumer exercises his right of withdrawal under Article 4(1), he may be required to pay, without any undue delay, only:

- (a) the price of the financial service actually provided by the supplier, where that price can be determined by the supplier before conclusion of the contract;

- (b) the part of the total price of the financial service covered by the contract on a pro rata basis for the period between the day on which the contract was concluded and the day on which he exercises his right of withdrawal, where the price cannot be determined by the supplier before conclusion of the contract.

2. The supplier shall inform the consumer, before conclusion of the contract, in any way appropriate to the means of distance communication used, of the price or the amount used as a basis for calculating the price which he will be required to pay pursuant to paragraph 1 if he exercises his right of withdrawal.

Unless he can prove that the consumer was duly informed about the price, the supplier may not require the consumer to pay any amount where he exercises his right of withdrawal.

3. The supplier shall, without any undue delay, return to the consumer any sums he has received from him on conclusion of the distance contract, except for the sums referred to in paragraph 1.

#### *Article 6*

##### **Consumer information**

The supplier shall inform the consumer, in a clear and comprehensible manner, of his rights pursuant to Articles 3 and 4, prior to conclusion of the contract, in any manner appropriate to the means of distance communication used.

#### *Article 7*

##### **Communication using a durable medium**

Communication of the contractual terms and conditions provided for in Articles 3 and 4 may be effected in writing or in a durable medium available and accessible to the consumer, notwithstanding any other provision which provides that such communication may only be in writing.

#### *Article 8*

##### **Unavailability of the service**

1. If the financial service which is the subject of the contract is partly or totally unavailable, the supplier shall duly inform the consumer without any undue delay.

2. If the financial service is totally unavailable, the supplier shall, without any undue delay, reimburse any sum paid by the consumer.

3. If the financial service is only partly available, the contract may only be performed with the express consent of the consumer and the supplier.

Failing this, the supplier shall return to the consumer any sums paid by him.

Where the service is only partly performed, the supplier shall return to the consumer all sums relating to the part of the service that has not been performed.

#### *Article 9*

##### **Unsolicited services**

1. Without prejudice to the legal rules of the Member States concerning the tacit extension of contracts, the distance supply of unsolicited financial services to consumers shall be prohibited.

2. Consumers shall be exempt from any obligations in cases of unsolicited supplies and the absence of a response shall not constitute consent by them.

#### *Article 10*

##### **Unsolicited communications**

1. The use of automated calling systems without human intervention (automatic calling machines) or fax machines in marketing financial services at a distance may be authorised only in respect of consumers who have already given their consent.

2. Member States shall take appropriate measures to ensure that communications not solicited by consumers and made with a view to selling distance financial services by means other than those referred to in paragraph 1,

(a) shall not be authorised if the consent of the consumers in question has not been given, or

(b) may only be used in the absence of express prior objection from the consumers.

The measures referred to in the first paragraph shall not entail costs for the consumer.

#### *Article 11*

##### **Imperative nature of the provisions of this directive**

1. Consumers may not waive the rights conferred on them by this Directive.

2. Member States shall provide for appropriate penalties in the event of the supplier's failure to comply with Articles 6 and 10.

In such cases they shall give consumers the right to cancel the contract at any time, without charge or penalties, and ensure that they are compensated for any damage they have suffered without any undue delay. Such compensation may in particular include reimbursement of sums paid by the consumer to the supplier in performance of the contract.

3. Consumers may not be deprived of the protection granted by this Directive where the law governing the contract is that of a third country if the consumer is resident on the territory of a Member State and the contract has a close link with the Community.

### CHAPTER III

#### DISPUTES

#### *Article 12*

##### **Settlement of disputes**

1. Member States shall ensure that adequate and effective complaints and redress procedures for the settlement of disputes between suppliers and consumers are put in place, using existing procedures where appropriate.

2. The procedures referred to in paragraph 1 shall include provisions whereby one or more of the following bodies, as determined by national law, may take action under national law before the courts or competent administrative bodies to ensure that the national provisions for the implementation of this directive are applied:

(a) public bodies or their representatives;

(b) consumer organisations having a legitimate interest in protecting consumers;

(c) professional organisations having a legitimate interest in acting.

3. Member States shall encourage the public or private bodies established for the out-of-court settlement of disputes to co-operate in the resolution of cross-border disputes.

4. Member States shall take the measures necessary to ensure that operators and suppliers of means of distance communication put an end to practices that have been declared to be contrary to this Directive, on the basis of a judicial decision, an administrative decision or a decision issued by a supervisory authority notified to them, where those operators or suppliers are in a position to do so.

#### *Article 13*

##### **Burden of proof**

The burden of proof in respect of the supplier's obligations to inform the consumer and the consumer's consent to conclusion of the contract and, where appropriate, its performance, shall lie with the supplier.

Any contractual term or condition providing that the burden of proof of the respect by the supplier of all or part of the obligations incumbent on him pursuant to this Directive should lie with the consumer shall be an unfair term within the meaning of Council Directive 93/13/EEC <sup>(1)</sup>.

#### CHAPTER IV

#### AMENDMENTS TO DIRECTIVES

#### *Article 14*

##### **Directive 90/619/EEC**

Directive 90/619/EEC is amended as follows:

1. The first subparagraph of paragraph 1 is replaced by the following:

'1. Each Member State shall prescribe that a policy-holder who concludes an individual life-assurance contract shall have a period of between 14 and 30 days from the time when he was informed that the contract had been concluded within which to cancel the contract. This period shall be 30 days in the cases referred to in Article 4(1) and (2) of Directive .../.../EC of the European Parliament and of the Council <sup>(\*)</sup>.

<sup>(\*)</sup> OJ L [Official Journal reference of this Directive].'

<sup>(1)</sup> OJ L 95, 21.4.1993, p. 29.

2. Paragraph 2 is replaced by the following:

'2. Member States need not apply paragraph 1 to contracts of six months' duration or less or in cases in which, because of the situation of the policy holder or the conditions in which the contract was concluded, the holder does not need this special protection. Member States shall indicate in their legislation the cases to which paragraph 1 does not apply. However, where those contracts are concluded in the circumstances referred to in Article 4(1) and (2) of Directive .../.../EC, the policy holder shall have a withdrawal period of 14 days <sup>(\*)</sup>.

<sup>(\*)</sup> OJ L [Official Journal reference of this Directive].'

#### *Article 15*

##### **Directive 97/7/EC**

Directive 97/7/EC is amended as follows:

1. The first indent of Article 3(1) is replaced by the following:

'— relating to financial services to which Directive .../.../EC of the European Parliament and of the Council <sup>(\*)</sup> applies.

<sup>(\*)</sup> OJ L [Official Journal reference of this Directive].'

2. Annex II is deleted.

#### *Article 16*

##### **Directive 98/27/EC**

The following point 10 is added to the Annex to Directive 98/27/EC:

'10. Directive .../.../EC of the European Parliament and of the Council on the distance marketing of consumer financial services <sup>(\*)</sup>.

<sup>(\*)</sup> OJ L [Official Journal reference of this Directive].'

CHAPTER V  
FINAL PROVISIONS

*Article 17*

**Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 June 2002 at the latest. They shall forthwith inform the Commission thereof.

At the time of their official publication, these provisions shall refer to this Directive or shall be accompanied by such a reference. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main laws, regulations or

administrative provisions which they adopt in the field governed by this Directive. In that communication, Member States shall provide a table showing the national provisions corresponding to each article of this Directive.

*Article 18*

**Entry into force**

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.

*Article 19*

**Addressees**

This Directive is addressed to the Member States.

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ANNEX

INDICATIVE LIST OF FINANCIAL SERVICES

1. Acceptance of deposits and other repayable funds
  2. Lending, in particular consumer credit and mortgage loans
  3. Financial leasing
  4. Money transfers, issuing and administering means of payment
  5. Foreign exchange services
  6. Guarantees and commitments
  7. Reception, transmission and/or execution of orders related to, and services in respect of or related to the following financial products:
    - (a) money market instruments
    - (b) transferable securities
    - (c) UCITS and other collective investment schemes
    - (d) financial futures and options
    - (e) exchange and interest rate instruments
  8. Portfolio management and investment advice concerning any of the instruments listed under 7
  9. Safe-keeping and administration of securities
  10. Safe custody services
  11. Non-life insurance
  12. Life assurance
  13. Life assurance linked to investment funds
  14. Permanent health insurance
  15. Capital redemption operations
  16. Individual pension schemes
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