

Opinion of the Economic and Social Committee on the 'Proposal for a European Parliament and Council Directive concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC'

(1999/C 169/15)

On 18 December 1998 the Council decided to consult the Economic and Social Committee, under Article 100a of the Treaty establishing the European Community, on the above-mentioned proposal.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 15 April 1999. The rapporteur was Mr Ataíde Ferreira.

At its 363rd plenary session (meeting of 29 April 1999), the Economic and Social Committee adopted the following opinion with 78 votes in favour, 47 against and nine abstentions.

1. Introduction

1.1. The Commission has long felt the need to regulate the distance marketing of financial services at Community level. The subject has been mentioned in various initiatives, not only by the Commission, but also by the European Parliament and the Economic and Social Committee itself, but circumstances were such that financial services were not included in Directive 97/7/EC of 20 May 1997 on distance selling in general⁽¹⁾.

1.2. The Economic and Social Committee was actually one of the bodies most in favour of drawing up Community rules in this field, given that it had in a way pioneered such an initiative.

1.2.1. Indeed, in its opinion on consumer protection and completion of the internal market of 26 September 1991⁽²⁾, the ESC drew attention to the difficulties encountered by consumers wishing to make cross-border banking transactions⁽³⁾.

1.2.2. In its additional opinion on the same subject⁽⁴⁾, the Committee recognized that it was essential to have common rules to protect consumers in this area and thus welcomed the proposed directive on contracts negotiated at a distance, which included financial services.

1.2.3. Later, in its opinion on the Commission Green Paper on financial services⁽⁵⁾, the ESC was critical of the fact that the Green Paper confined itself to distance selling, but, on that point, took care to emphasize that 'rules would be applied that are equivalent to those laid down in the horizontal directive on contracts negotiated at a distance', albeit adapted to the specific characteristics of financial services and with due regard for the new aspects of selling financial services via information technology or television advertising, especially by unauthorized intermediaries.

1.3. There are factors obtaining at the present time which make the adoption of Community measures in this field a matter of particular urgency. The euro is currently being introduced as a single currency in the EU; we are also seeing a burgeoning of the technological mechanisms and instruments which characterize the Information Society; we already live in an increasingly global economy where national borders, both within and even outside the EU, have less and less significance.

1.4. All these factors are behind an increased desire and need to resort to distance marketing, where the parties involved in cross-border transactions do not deal with each other face to face, even in the business of consumption. And the world of financial services, which forms the basis and essential vehicle for such transactions, is already, and, given the factors described above, will certainly continue to be an area in which the demand, supply, negotiation and conclusion of deals will increasingly happen without the parties involved being physically present, and even without any actual physical transaction taking place.

1.5. The proposal is clearly intended to bring about complete harmonization of the sector in question, that is distance marketing of financial services to consumers.

⁽¹⁾ The decision to exclude financial services from the Directive on distance marketing was taken by the Consumer Affairs Council on 17 May 1995.

⁽²⁾ OJ C 339/06, 31.12.1991.

⁽³⁾ The major study by E. Balate, P. Dejemeppe and M. Goyens, which is annexed to the opinion, drew attention to the lack of binding rules for financial services, especially cross-border transactions, welcoming as an important instrument of progress the then recently submitted draft directive on contracts negotiated at a distance which, at the time, included financial services.

⁽⁴⁾ OJ C 19, 25.1.1993.

⁽⁵⁾ OJ C 56, 24.2.1997.

1.6. The specific characteristics of financial services and their immaterial nature, combined with their acknowledged complexity and importance to consumers, provide justification not only for proposing special provisions which do more than simply echo the general provisions applicable to distance selling, but also for adopting a high level of consumer protection in the areas to be harmonized.

1.7. Bearing in mind the specific characteristics of financial services and the distinctive features of the procedures used in distance marketing, the proposed directive defines a series of objectives which it seeks to achieve. These may be summarized as follows:

1.7.1. To ensure that consumers are given the opportunity to

- a) examine the contract before giving their consent,
- b) compare the offers before making their choice,
- c) withdraw when they have concluded a contract without having been acquainted with the contractual terms and conditions or when the supplier has unfairly induced them to conclude a contract during the reflection period.

1.7.2. To guarantee that suppliers are in a position to

- a) sell without hindrance financial services using a distance selling method,
- b) make the most of the opening up of borders and new technologies,
- c) conclude distance contracts with consumers.

1.8. To achieve these ends, the proposed directive lays down the following guiding principles:

- a) the consumer must be familiar with the terms and conditions of the contract before signing it,
- b) there must be a guaranteed reflection period during which the consumer can analyse the contract and compare the offer made with others on the market,
- c) there must be an established right of withdrawal within a reasonable period, in cases where the two preceding provisions are not respected,
- d) the consumer has a right to be clearly informed of the rights mentioned in the foregoing paragraphs,
- e) a complete ban on unsolicited communications and pressure selling of financial services, without the prior and express consent of the consumer,
- f) the binding character of all these rights and the rigorous penalization of commercial practices in contravention thereof,

g) the obligation to establish appropriate and effective complaints and redress procedures for the settlement of disputes arising in this field, particularly within the scope of Directive 98/27/EC of 19.5.98 (injunctions),

h) a clear inversion of the burden of proof in favour of the consumer with regard to compliance, by the supplier, with obligations to provide information and the consumer's consent to conclude the contract and its performance.

2. General Comments

2.1. The Committee feels that measures to harmonize the distance marketing of contracts are necessary and welcomes the Commission's initiative in coming forward with the present draft directive (COM(1998) 468 final, of 14 October 1998), which was long overdue.

2.2. While recognizing that transposing the directive is likely to pose problems and require some adjustments to the structure and operation of the financial institutions concerned, the Committee nevertheless feels that the entry into force of the single currency on 1 January 1999 will help to smooth the necessary adjustments. It therefore suggests that the three-year deadline for completion of transposition (until 30 June 2002, Article 17(1)) be shortened by a year and set at 30 June 2001.

2.3. The Committee accepts that the scope of the present draft directive is restricted to the form in which the financial services mentioned are marketed, deliberately excluding all other aspects to do with the content of such services, which will continue to be governed by existing Community rules, and that it applies solely to transactions between professionals or suppliers and 'any natural person (...) who (...) is acting for purposes which are outside his trade, business or profession' (Article 2(d)).

2.3.1. However, the Committee feels that the Commission's aims in proposing the present directive will only be achieved if its scope is limited to situations in which the marketing of financial services makes exclusive use of distance communication techniques. The definition of 'distance contract' (Article 2(a)) should reflect this recommendation.

2.3.2. Any overlap with other consumer protection directives should be avoided. These directives should be made compatible with each other.

2.4. Apart from Articles 57(2) and 66, the draft directive refers only to Article 100a on the establishment of the internal market as its legal basis.

Although mention of these legal bases is preceded by the words 'in particular' and there is a reference in passing to Article 129a in the first recital, the ESC feels that express mention should be made of Article 129(3)(b) of the Treaty (Article 153 of the Amsterdam Treaty, which comes into force on 1 May 1999) in the list of legal bases given in the first paragraph of the proposal.

2.5. From this, the Commission should draw an important conclusion with regard to the type of harmonization proposed for the directive by introducing a 'minimal clause', similar to the one in Directive 97/7/EC, to reflect what is enshrined in Treaty Article 129a(5). This would give the Member States the scope to define more stringent protective measures, in line with the tradition of Community rules in this area, without detracting from the high level of consumer protection established by the directive.

2.6. The Committee accepts that the scope of the directive is limited to financial services concluded 'under an organized distance sales or service-provision scheme run by the supplier' and therefore excludes occasional or chance transactions by operators without an organized scheme (Article 2(a)).

However, for reasons of fundamental legal certainty, the Committee feels that the directive must give a precise definition of both (a) what is meant by 'an organized scheme' for the purposes of this directive, and (b) at what point transactions cease to be regarded as occasional or chance, thereby obliging the supplier to actually set up 'an organized distance sales or service-provision scheme'.

2.7. Still on the subject of definitions, the Committee feels that the draft directive does not define what is meant by 'unfair inducement' (Article 4(2)) in terms of what is permissible.

It is in the very nature of a system of law that illegal practices are defined within that system. In a directive designed to bring about total harmonization on such an important point as this one, with serious implications for the right of withdrawal and the obtaining of compensation, it does not seem acceptable that an underlying concept, i.e. the illegal practice of 'unfair inducement', is not precisely described in Community law.

2.7.1. The Committee therefore strongly recommends, not just for legal reasons but also in the interests of equality and certainty, that it should not be left to the discretion of the Member States to determine what is meant by 'unfair inducement', but rather that a precise description by given in the directive of what constitutes such practice.

2.7.2. The Committee feels that consideration should be given to including, under the concept of 'unfair inducement', the common practice of advertising or promotional material being intermingled with the contractual conditions. The two things should be clearly separate.

2.8. The Committee feels that the term 'durable medium' needs to be defined more precisely, and recommends including a more technical and exhaustive definition based on the elements mentioned in previous ESC opinions, namely the opinion on electronic signatures⁽¹⁾, the opinion on Safe use of the Internet⁽²⁾ or the (draft) opinion on certain aspects of electronic commerce in the internal market⁽³⁾.

2.9. As regards the right of withdrawal, the draft directive provides no clear definition of whether it is receipt of the consumer's communication by the supplier which counts, and if so, whether receipt by the supplier must be within the period allowed for exercising the right, or whether it is enough for the right to be exercised within the period even if a communication to that effect is received later (Article 4(1), (2) and (3)).

Bearing in mind that there is no uniform interpretation for such cases in the Member States, with case law showing a variety of decisions, the Committee recommends that the question of communicating the right of withdrawal be clearly explained so as to avoid doubts about interpretation.

2.10. As regards the nature and definition of the periods of time laid down in various provisions of the proposal, the Committee feels that the periods laid down for exercising the right of withdrawal (14 days or 30 days — Article 4(1) and (2)), should not be fixed, but should be taken as a minimum which can be extended by the Member States if they consider this necessary to afford greater consumer protection.

2.11. The Committee also feels that the nature of the period should be clearly stated in the proposal, i.e. whether the days are to be counted consecutively, or whether it is only working days, not counting Sundays and public holidays, and what is to be done if the last day of the period falls on a Sunday or a public holiday.

2.12. The Committee also feels that in each case where the phrase 'without any undue delay' is used, which appears in various binding provisions (Articles 5(1) and (3), 8(1) and 11(2), second paragraph), a maximum period should be stipulated, e.g. 'within 48 hours' or 'within a maximum of five days', to avoid uncertainty.

(1) OJ C 40, 15.2.1999.

(2) OJ C 214, 10.7.1998.

(3) CES 457, 29.4.1999.

2.13. It is essential that consumers should have confidence, access to information and simple, non-judicial, inexpensive means of redress in the event of disagreement with foreign service suppliers.

2.13.1. The ESC therefore stresses the need for the Commission and the Member States to ensure the rapid development of cross-border consumer redress mechanisms such as those which could be provided by a network of national consumer protection agencies or ombudsmen who would act as conduits and arbitrators in the event of dispute.

3. Specific comments

3.1. Article 1(1) — Given that the concepts of 'approximating' laws and 'harmonizing' laws are different, the Committee feels that if the Commission were to opt for total harmonization, the Article should read 'to harmonize the laws, regulations and administrative provisions...'.⁽¹⁾

3.2. Article 1(2) — Bearing in mind the difficulty of making a strict distinction between single contracts and successive contracts, the Committee feels that the directive should refer to 'each new individual and separate contract'.

3.3. Article 2(a) — The definition of 'distance contract' should contain the word 'exclusive' before the words 'use of means of distance communication...':

3.4. Article 3 — the wording should be tightened up as follows:

3.4.1. In point 1, a new paragraph should be added as follows:

'Until the consumer accepts the contract, no payment, in any form whatsoever, may be demanded by the supplier.'

3.4.2. Delete the redundant phrase 'with the consumer's express consent'.

3.5. Article 4 — should be amended as follows:

3.5.1. (Does not apply to English version).

3.5.2. In the second paragraph of point 1, rewrite the first words as 'The consumer then has a right of withdrawal...'

In indent (b) of Article 4(1), consideration should be given to the case of non-life insurance policies 'taking effect immediately', as allowing withdrawal in such cases may constitute abuse of rights.

3.5.3. Although not including them in the list of exclusions to the right of withdrawal, the Committee feels that an explicit reference is required in the preamble of the directive to portfolio management services and investment advice with regard to the financial products referred to in points 5 and 7 of the Annex, specifying that although contracts constituting a mandate for individualized management of financial products may always be revoked in general terms, this does not imply withdrawal from contracts concluded, under mandate, in connection with the financial products referred to in points 5 and 7 of the Annex.

3.6. Articles 3(3) and 4(1) fourth para. — The Committee feels that the reference to points 5 and 7 of the Annex may be too limiting, and should instead be phrased in more general terms, referring to 'all financial services in which, by their nature, it is not materially possible to exercise the rights of reflection or withdrawal, such as those mentioned in points 5 and 7 of the Annex.'

3.7. Article 7 — The Committee feels, in line with an earlier opinion⁽²⁾ that where the 'durable medium' does not offer sufficient guarantee of reliability or security, Member States should be given the option to require communication in writing in the cases referred to in the directive⁽³⁾.

3.7.1. Alternatively, and if it proves impossible to produce an unambiguous and exhaustive definition of 'durable medium', the Committee recommends making it obligatory, within a reasonable period of time (8 days), to confirm in writing the communication sent via a 'durable medium' as long as receipt of this has not been acknowledged, even though the import of the communication would take effect as soon as it was received via a 'durable medium', unless the consumer could prove that he had never received it. In the latter case, the import of the communication would only take effect once written confirmation was received.

3.8. (Does not apply to English version)

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⁽¹⁾ Although the Explanatory Memorandum speaks of 'harmonization', Article 1 uses the term 'approximate'. The two concepts do in fact differ, as can be seen in Filiali Osman, 'Codification, Unification, Harmonisation du Droit en Europe' and Antoine Jeammaud, 'Unification, Uniformisation, Harmonisation: de quoi s'agit-il?' in 'Vers un Code Européen de la Consommation', p. 11 and 35 (Bruylant, 1998).

⁽²⁾ Cf. Opinion OJ C 40, 15.2.1999 on electronic signatures.

⁽³⁾ Note that the various language versions differ here.

3.9. Article 10 — The Committee feels there is no justification for allowing each Member State to decide between the options given in Article 10(2).

It feels that there should be a clear and unequivocal imposition of the system referred to in indent (a), i.e. unsolicited communications shall not be authorized if the consent of the consumers in question has not been given.

3.10. Article 11(2) — The section about penalties in the event of failure to comply with Articles 6 and 10 should form a separate Article.

3.11. Article 11(3) — The term 'close link' should be clearly defined in Article 2 with the same sense as the term 'closer connection' used in the Rome Convention. As a separate issue, consideration should be given to the desirability of using the same terminology, especially as a different term is used in other texts, notably Article 6 of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

3.12. Article 12 — The Committee feels that the Commission — without prejudice to the provisions of the Brussels and Lugano Conventions — should consider the possibility of including a provision on the competence of the courts which, in the case of a cross-border dispute, would allow the consumer to choose between taking legal action in the national courts of the country in which he resides or in the national courts of the country in which the supplier is domiciled or has its headquarters, while any legal action against the consumer should always be undertaken through the courts of the country where the consumer is resident.

3.13. Lastly, the Committee feels that the directive should provide for periodic assessment of implementation, as is the case with a number of Community directives⁽¹⁾.

⁽¹⁾ An example is Directive 89/552/EEC, 3.10.89, Article 26: 'Not later than the end of the fifth year after the date of adoption of this Directive and every two years thereafter, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive and, if necessary, make further proposals to adapt it to developments in the field of television broadcasting.'

Brussels, 29 April 1999.

The President
of the Economic and Social Committee
Beatrice RANGONI MACHIAVELLI

APPENDIX

to the ESC Opinion

The following points from the section opinion were amended by the Plenary Assembly, but received at least a quarter of the votes cast.

Point 2.2

'The Committee calls on suppliers of financial services to implement the provisions of the directive voluntarily as soon as possible, in advance of the deadline of 30 June 2002.'

Result of vote

For: 74, against: 43, abstentions: 8.

Point 2.8

'Bearing in mind the need to provide detailed advance information and a reflection period, as well as the expensive refinancing conditions for suppliers, the Committee is of the opinion that the suggested periods laid down for exercising the right of withdrawal appear to be sufficient and should be implemented in all Member States.'

Result of vote

For: 75, against: 48, abstentions: 5.

Point 2.11

'The Single Market requires that service suppliers should be able to operate throughout the EU on the basis of their home country of origin rules rather than face 15 different sets of national rules which would fragment the market, raise costs and prices and inhibit consumer choice.'

Result of the vote

For: 71, against: 59, abstentions: 2.
