

**Amended proposal for a European Parliament and Council Directive concerning the distance marketing of consumer financial services and amending Directives 97/7/EC and 98/27/EC <sup>(1)</sup>**

(2000/C 177 E/04)

COM(1999) 385 final — 98/0245(COD)

*(Submitted by the Commission pursuant to Article 250(2) of the EC Treaty on 23 July 1999)*

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 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 251 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 Articles 95 and 153 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 high degree of consumer protection is required in order to enhance consumer 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 because of their intangible nature, financial services are particularly suited to distance selling; whereas the establishment of a legal framework governing the distance marketing of financial services

should increase consumer confidence in the use of new techniques for the distance marketing of financial services, such as 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>(2)</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>(3)</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>(4)</sup>;
- (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, consistent with no reduction in overall consumer protection in any Member State;
- (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, however, it is advisable to lay down principles governing the distance marketing of such services;

<sup>(2)</sup> OJ L 144, 4.6.1997, p. 19.

<sup>(3)</sup> COM(96) 209 final, 22.5.1996.

<sup>(4)</sup> Communication from the Commission 'Financial services: enhancing consumer confidence', COM(97) 309 final, 26.6.1997.

<sup>(1)</sup> OJ C 385, 11.12.1998, p. 10.

- (11) Whereas, in accordance with the principles of subsidiarity and proportionality as set out in Article 5 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;
- (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 prior information needed so as to properly appraise the financial service and hence make a well-informed choice; whereas the supplier must specify how long his offer applies as it stands;
- (16a) Whereas with a view to optimum protection of the consumer, it is important that the consumer should be adequately informed of the provisions of this Directive and of any codes of conduct existing in this area;
- (17) Whereas provision should be made for a right of withdrawal, without penalty and without having to furnish grounds;
- (18) Deleted
- (19) Whereas consumers should be protected against unsolicited services; whereas consumers should be exempt from any obligation in the case of unsolicited services, 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 whenever the law of the Member States permits such tacit renewal;
- (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;

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

(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) Deleted

(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>(1)</sup>;

HAVE ADOPTED THIS DIRECTIVE:

#### Article 1

##### Scope

- (a) 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.
- (b) 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 exclusive use of means of distance communication up to and including the time at which the contract is concluded;
- (b) 'financial service': means any banking, insurance, investment or payment service;
- (b1) 'real estate credit': means any credit, irrespective of any surety or bond attached thereto, mainly intended to permit the acquisition or maintenance of property rights

to a site or to a building to be constructed or under construction, or the renovation or improvement of a building;

- (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 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 addressed personally and specifically to him and which is mainly contained on 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.

#### Article 3

##### Information of the consumer before conclusion of the contract

1. In good time before conclusion of the contract, consumers shall be provided with the following information:

- (a) the identity and address of the supplier and the identity and address of the representative of the supplier in the consumer's country of residence whom he can consult where necessary, if such a representative exists;
- (b) a description of the main characteristics of the financial service;
- (c) the total price of the financial service, including all taxes;
- (d) the arrangements for payment, delivery or performance of the contract;
- (e) the period for which the offer or the price remains valid;
- (f) when the price is liable to vary between the time the information is provided and the time the contract is concluded, an indication of this possibility and particulars allowing the consumer to verify the price at the time of conclusion of the contract;

<sup>(1)</sup> OJ L 166, 11.6.1998, p. 51.

- (g) the cost of using the means of distance communication, where it is calculated other than at the basic rate;
- (h) the existence and duration of a right of withdrawal within the meaning of Article 4 and the conditions and procedures governing its exercise;
- (i) the absence of a right of withdrawal for the financial services referred to in Article 4(1), sentence 2;
- (j) the amount referred to in Article 5(1)(a) or, in the case referred to in Article 5(1)(b), the amount used for calculating the price to be paid by the consumer if he exercises his right of withdrawal;
- (k) where appropriate, the minimum duration of the contract, in the case of financial services to be performed permanently or recurrently;
- (l) information on cancelling the contract;
- (m) the law applicable to the contract, when there is a contractual clause which makes it possible to choose a law other than that of the consumer's place of residence;
- (n) the court having jurisdiction in the event of a dispute, when there is a clause concerning the choice of jurisdiction vesting competence in a court other than that of the consumer's place of residence in the event of a dispute; this provision is without prejudice to the Brussels Convention;
- (o) reference to the supervisory authority on whom the supplier depends, when he is subject to supervision;
- (p) out-of-court complaint and redress procedures.

However, as regards:

- the services covered by Directive 92/49/EEC, and without prejudice to Article 43 of that Directive, only the information referred to in (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), and (p) must be provided;
- the services covered by Directive 92/96/EEC, and without prejudice to Article 31 and Annex 2 of that Directive, only the information referred to in (c), (e), (f), (g), (j) and (o) must be provided;
- the financial services covered by Directive 85/611/EEC, and without prejudice to Articles 27 to 35 and 44 to 47 and Annexes A and B of that Directive, only the information referred to in (g), (i), (m), (n), (o) and (p) must be provided;
- the financial services covered by Directive 89/298/EEC, and without prejudice to Articles 7 to 18 and 21 of that Directive, only the information referred to in (g), (i), (m), (n), (o) and (p) must be provided;
- the services covered by Directive 93/22/EEC and, without prejudice to Article 11 of that Directive, only the

information referred to in (e), (f), (g), (h), (i), (j), (m), (n), (o) and (p) must be provided.

2. The information referred to in paragraph 1, whose commercial purpose must be clearly apparent, must be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used and must in particular comply with the principles of fairness in commercial transactions and the principles that govern the protection of persons who are legally incapable pursuant to national law, such as minors.

3. Deleted

4. Deleted

#### Article 3a

#### Communication of the contractual terms and conditions and of the prior information

1. The supplier must communicate to the consumer all the contractual terms and conditions on paper or on a durable medium, including the information referred to in Article 3(1), presented in a clear and comprehensible manner, once the contract has been concluded.

2. The supplier shall be exempt from this obligation when the contractual terms and conditions and the information referred to in Article 3(1) have been provided to the consumer prior to conclusion of the contract on paper or on another durable medium.

3. The choice of medium shall be determined by agreement between the parties.

#### Article 4

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

1. Member States shall provide that consumers have a right of withdrawal of 14 to 30 days, depending on the nature of the financial services concerned, without having to indicate grounds and without penalty:

(a) when the contractual terms and conditions and the information referred to in Article 3(1) have been provided to the consumer prior to conclusion of the contract, in compliance with Article 3(a)(2), from the date of conclusion of the contract;

(b) when the contract has been concluded at the express request of the consumer before the contractual terms and conditions and the information referred to in Article 3(1) have been communicated to him, from the date of receipt of these particulars or the last of such particulars, in compliance with Article 3(a)(1).

When the supplier complies with the withdrawal period provided for by the legislation of the Member State in which he is established, he shall not be bound by a different period in the Member State in which the consumer resides.

1(a) The right of withdrawal shall not apply to contracts concerning:

- (a) foreign exchange services;
- (b) the reception, transmission and/or execution of orders related to, and services in respect of or related to the following financial products:
  - money market instruments;
  - transferable securities;
  - OCITS and other collective investment schemes;
  - financial futures and options;
  - exchange and interest rate instruments whose price depends on fluctuations in the financial market outside the supplier's control;
- (c) non-life insurance for a period of less than two months;
- (d) contracts whose performance has been fully completed before the consumer exercises his right of withdrawal.

1(b) In the case of real estate credit, Member States may provide that the consumer may not rely on the right of withdrawal when:

- with his consent, the amount borrowed has been transferred to the seller of the property or to his representative;
- when a notarial act relating to the real estate credit to which he is party has been validly and regularly recorded.

However, in the case of credit funded by bonds secured against real estate, Member States may provide that the consumer shall not benefit from the right of withdrawal provided for in paragraph 1.

2. Without prejudice to the right of withdrawal, when the consumer has been unfairly induced by the supplier to conclude the contract, this contract may be annulled, with all the attendant legal consequences in terms of the law applicable to the contract, without prejudice to the consumer's right to seek compensation for the harm he has suffered under national law.

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.

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

4. Deleted

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

#### Article 5

##### **Performance of the contract and payment of the service provided before withdrawal**

-1. The supplier may not commence to perform the contract before expiry of the time limit provided for in Article 4(1) without the consumer's express consent.

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

- (a) a lump sum corresponding to the price of the financial service effectively provided by the supplier before exercise of the right of withdrawal, independently of the moment of withdrawal;
- (b) or, when the cost of the financial service effectively provided by the supplier depends on the time at which the right of withdrawal is exercised, an amount enabling the consumer to calculate the price to be paid on a pro rata basis for the period between the day on which the contact was concluded and the day on which he exercises his right of withdrawal.

In either (a) or (b), the amount payable may not be such that it could be construed as a penalty.

2. Unless he can prove that the consumer was duly informed about the price, in conformity with Article 3(1)(j), 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 and no later than 30 days, 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

Deleted

#### Article 7

Deleted

#### Article 8

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

1. Without prejudice to the rules of civil law of the Member States pertaining to the non-performance of contracts, if the financial service which is the subject of the contract is partly or totally unavailable, the supplier shall, without any undue delay, inform the consumer to this effect.

2. If the financial service is totally unavailable, the supplier shall, without any undue delay and no later than 30 days, 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 express agreement, the supplier shall without any undue delay and no later than 30 days, return to the consumer any sums he may have paid.

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, without any undue delay and no later than 30 days.

#### Article 8a

##### Payment by card

Member States shall take appropriate measures to ensure that:

- consumers can request the cancellation of a payment in the case of fraudulent use of their payment card in transactions falling within this Directive;
- in the case of fraudulent use, the amounts paid are credited or that the consumer is reimbursed.

#### Article 8b

##### Return of original documents

In the event of the consumer exercising his rights pursuant to Article 4(1) or in the cases provided for in Article 8, the consumer shall, without any undue delay, return to the supplier any original contract document bearing the supplier's signature communicated to him on conclusion of the contract.

#### Article 9

##### Unsolicited services

Without prejudice to the legal provisions of the Member States on the tacit renewal of contracts, when such rules permit tacit renewal, Member States shall take the necessary measures to:

- prohibit the supply of financial services to a consumer without a prior request on his part, when this supply includes a request for immediate or deferred payment;
- exempt the consumer from any obligation in the event of unsolicited supplies, the absence of a reply not constituting consent.

#### Article 10

##### Unsolicited communications

1. The use by a supplier of the following techniques shall require the consumer's prior consent:

- automated calling systems without human intervention (automatic calling machines);
- fax machines.

2. Member States shall ensure that means of distance communication other than those referred to in paragraph 1, when they allow individual communications

- (a) shall not be authorised unless the consent of the consumers concerned has been obtained or
- (b) may only be used if the consumer has not expressed his manifest objection.

3. The measures referred to in paragraphs 1 and 2 shall not entail costs for consumers.

4. In the case of telephone communications, the identity of the supplier and the commercial purpose of the call shall be made explicitly clear at the beginning of any conversation with the consumer.

5. Member States shall provide for appropriate penalties in the event of the supplier's failure to comply with Article 10.

They may provide for this purpose notably that the consumer may cancel the contract at any time, free of charge and without penalties.

#### Article 11

##### Imperative nature of the Directive's provisions

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

#### Article 12

##### Judicial and administrative redress

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. Deleted

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 12a

#### Out-of-court redress

Member States shall encourage bodies established with a view to the out-of-court settlement of disputes to cooperate in the resolution of cross-border disputes.

#### 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>.

#### Article 14

#### Directive 90/619/EEC

Deleted

#### 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 (\*) applies.

(\*) OJ L ...’

2. Annex II is deleted.

#### Article 16

#### Directive 98/27/EC

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

- ‘10. Directive .../.../EC of the European Parliament and of the Council on the distance marketing of consumer financial services (\*)

(\*) OJ L ...’

#### 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.

<sup>(1)</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29.