

COMMON POSITION (EC) No 16/2002**adopted by the Council on 19 December 2001****with a view to adopting Directive 2002/.../EC of the European Parliament and of the Council of ... concerning the distance marketing of consumer financial services and amending Council Directives 90/619/EEC, 97/7/EC and 98/27/EC**

(2002/C 58 E/04)

THE EUROPEAN PARLIAMENT AND THE COUNCIL
OF THE EUROPEAN UNION,

also established in the Member State in which the consumer resides.

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

(5) Because of their intangible nature, financial services are particularly suited to distance selling and 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.

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the Economic and Social Committee ⁽²⁾,

(6) This Directive should be applied in conformity with the Treaty and with secondary law, including Directive 2000/31/EC ⁽⁴⁾ on electronic commerce, the latter being applicable solely to the transactions which it covers.

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽³⁾,

(7) This Directive aims to achieve the objectives set forth above without prejudice to Community or national law governing freedom to provide services or, where applicable, host Member State control and/or authorisation or supervision systems in the Member States where this is compatible with Community legislation.

Whereas:

(1) It is important, in the context of achieving the aims of the single market, to adopt measures designed to consolidate progressively 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.

(8) Moreover, this Directive, and in particular its provisions relating to information about any contractual clause on law applicable to the contract and/or on the competent court does not affect the applicability to the distance marketing of consumer financial services of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ⁽⁵⁾ or of the 1980 Rome Convention on the Law Applicable to Contractual Obligations.

(2) 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.

(9) The achievement of the objectives of the financial services action plan requires a higher level of consumer protection in certain areas. This implies a greater convergence, in particular, in non-harmonised collective investment funds, rules of conduct applicable to investment services and consumer credits. Pending the achievement of the above convergence, a high level of consumer protection should be maintained.

(3) 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. 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.

(10) 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 ⁽⁶⁾, lays down the main rules applicable to distance contracts for goods or services concluded between a supplier and a consumer. However, that Directive does not cover financial services.

(4) 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 in other Member States, regardless of whether the supplier is

⁽¹⁾ OJ C 385, 11.12.1998, p. 10 and OJ C 177 E, 27.6.2000, p. 21.

⁽²⁾ OJ C 169, 16.6.1999, p. 43.

⁽³⁾ Opinion of the European Parliament of 5 May 1999 (OJ C 279, 1.10.1999, p. 197), Council Common Position of 19 December 2001 and Decision of the European Parliament of ... (not yet published in the Official Journal).

⁽⁴⁾ OJ L 178, 17.7.2000, p. 1.

⁽⁵⁾ OJ L 12, 16.1.2001, p. 1.

⁽⁶⁾ OJ L 144, 4.6.1997, p. 19.

- (11) In the context of the analysis conducted by the Commission with a view to ascertaining the need for specific measures in the field of financial services, 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'. The consultations in this context showed that there is a need to strengthen consumer protection in this area. The Commission therefore decided to present a specific proposal concerning the distance marketing of financial services.
- (12) The adoption by the Member States of conflicting or different consumer protection rules governing the distance marketing of consumer financial services could impede the functioning of the internal market and competition between firms in the market. It is therefore necessary to enact common rules at Community level in this area, consistent with no reduction in overall consumer protection in the Member States.
- (13) A high level of consumer protection should be guaranteed by this Directive, with a view to ensuring the free movement of financial services. Member States should not be able to adopt provisions other than those laid down in this Directive in the fields it harmonises, unless otherwise specifically indicated in it.
- (14) This Directive covers all financial services liable to be provided at a distance. However, certain financial services are governed by specific provisions of Community legislation which continue to apply to those financial services. However, principles governing the distance marketing of such services should be laid down.
- (15) Contracts negotiated at a distance involve the use of means of distance communication which are used as part of a distance sales or service-provision scheme not involving the simultaneous presence of the supplier and the consumer. The constant development of those means of communication requires principles to be defined that are valid even for those means which are not yet in widespread use. Therefore, distance contracts are those the offer, negotiation and conclusion of which are carried out at a distance.
- (16) A single contract involving successive operations or separate operations of the same nature performed over time may be subject to different legal treatment in the different Member States, but it is important that this Directive be applied in the same way in all the Member States. To that end, it is appropriate that this Directive should be considered to apply to the first of a series of successive operations or separate operations of the same nature performed over time which may be considered as forming a whole, irrespective of whether that operation or series of operations is the subject of a single contract or several successive contracts.
- (17) An 'initial service agreement' may be considered to be for example the opening of a bank account, acquiring a credit card, concluding a portfolio management contract, and 'operations' may be considered to be, for example, the deposit or withdrawal of funds to or from the bank account, payment by credit card, transactions made within the framework of a portfolio management contract. Adding new elements to an initial service agreement, such as the possibility of using an electronic payment instrument together with one's existing bank account, does not constitute an 'operation' but an additional contract to which this Directive applies. The subscription to new units of the same collective investment fund is considered to be one of 'successive operations of the same nature'.
- (18) 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.
- (19) The supplier is the person providing services at a distance. This Directive should however also apply when one of the marketing stages involves an intermediary. 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 or her legal status.
- (20) Durable mediums include in particular floppy discs, CD-ROMs, DVDs and the hard drive of the consumer's computer on which the electronic mail is stored, but they do not include Internet websites unless they fulfil the criteria contained in the definition of a durable medium.
- (21) The use of means of distance communications should not lead to an unwarranted restriction on the information provided to the client. In the interests of transparency this Directive lays down the requirements needed to ensure that an appropriate level of information is provided to the consumer both before and after conclusion of the contract. The consumer should receive, before conclusion of the contract, the prior information needed so as to properly appraise the financial service offered to him and hence make a well-informed choice. The supplier should specify how long his offer applies as it stands.
- (22) Information items listed in this Directive cover information of a general nature applicable to all kinds of financial services. Other information requirements concerning a given financial service, such as the coverage of an insurance policy, are not solely specified in this Directive. This kind of information should be provided in accordance, where applicable, with relevant Community legislation or national legislation in conformity with Community law.

- (23) With a view to optimum protection of the consumer, it is important that the consumer is adequately informed of the provisions of this Directive and of any codes of conduct existing in this area and that he has a right of withdrawal.
- (24) When the right of withdrawal does not apply because the consumer has expressly requested the performance of a contract, the supplier should inform the consumer of this fact.
- (25) Consumers should be protected against unsolicited services. 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. 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.
- (26) Member States should take appropriate measures to protect effectively consumers who do not wish to be contacted through certain means of communication or at certain times. This Directive should be without prejudice to the particular safeguards available to consumers under Community legislation concerning the protection of personal data and privacy.
- (27) With a view to protecting consumers, 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.
- (28) Member States should encourage public or private bodies established with a view to settling disputes out of court to cooperate in resolving cross-border disputes. Such cooperation could in particular entail allowing consumers to submit to extrajudicial bodies in the Member State of their residence complaints concerning suppliers established in other Member States. The establishment of FIN-NET offers increased assistance to consumers when using cross-border services.
- (29) This Directive is without prejudice to extension by Member States, in accordance with Community law, of the protection provided by this Directive to non-profit organisations and persons making use of financial services in order to become entrepreneurs.
- (30) This Directive should also cover cases where the national legislation includes the concept of a consumer making a binding contractual statement.
- (31) The provisions in this Directive on the supplier's choice of language should be without prejudice to provisions of national legislation, adopted in conformity with Community law governing the choice of language.
- (32) The Community and the Member States have entered into commitments in the context of the General Agreement on Trade in Services (GATS) concerning the possibility for consumers of purchasing banking and investment services abroad. The GATS entitles Member States to adopt measures for prudential reasons, including measures to protect investors, depositors, policyholders and persons to whom a financial service is owed by the supplier of the financial service. Such measures should not impose restrictions going beyond what is required to ensure the protection of consumers.
- (33) In view of the adoption of this Directive, 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⁽¹⁾ and the scope of the cancellation period in Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services⁽²⁾ should be adapted.
- (34) Since the objectives of this Directive, namely the establishment of common rules on the distance marketing of consumer financial services cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principles of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve those objectives,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Object and scope

1. The objective 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 an initial service agreement followed by successive operations or a series of separate operations of the same nature performed over time, the provisions of this Directive shall apply only to the initial agreement.

⁽¹⁾ OJ L 166, 11.6.1998, p. 51. Directive as last amended by Directive 2000/31/EC (OJ L 178, 17.7.2001, p. 1).

⁽²⁾ OJ L 330, 29.11.1990, p. 50. Directive as last amended by Directive 92/96/EEC (OJ L 360, 9.12.1992, p. 1).

In the case where there is no initial service agreement but the successive operations or the separate operations of the same nature performed over time are performed between the same contractual parties, Articles 3 and 4 apply only when the first operation is performed. Where, however, no operation of the same nature is performed for more than one year, the next operation will be deemed to be the first in a new series of operations and, accordingly, Articles 3 and 4 shall apply.

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 one or more means of distance communication up to and including the time at which the contract is concluded;
- (b) 'financial service' means any service of a banking, credit, insurance, personal pension, investment or payment nature;
- (c) 'supplier' means any natural or legal person, public or private, who, acting in his commercial or professional capacity, is the contractual provider of services subject to distance contracts;
- (d) 'consumer' means any natural person who, in distance 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 which enables the consumer to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information 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 to the consumer prior to the conclusion of the distance contract

1. In good time before the consumer is bound by any distance contract or offer, he shall be provided with the following information concerning:

- (1) the supplier:
 - (a) the identity and the main business of the supplier, the geographical address at which the supplier is established and any other geographical address relevant for the customer's relations with the supplier;
 - (b) the identity of the representative of the supplier established in the consumer's Member State of residence and the geographical address relevant for the customer's relations with the representative, if such a representative exists;
 - (c) when the consumer's dealings are with any professional other than the supplier, the identity of this professional, the capacity in which he is acting vis-à-vis the consumer, and the geographical address relevant for the customer's relations with this professional;
 - (d) where the supplier is registered in a trade or similar public register, the trade register in which the supplier is entered and his registration number or an equivalent means of identification in that register;
 - (e) where the supplier's activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority;
- (2) the financial service:
 - (a) a description of the main characteristics of the financial service;
 - (b) the total price to be paid by the consumer to the supplier for the financial service, including all related fees, charges and expenses, and all taxes paid via the supplier or, when an exact price cannot be indicated, the basis for the calculation of the price enabling the consumer to verify it;
 - (c) where relevant notice indicating that the financial service is related to instruments involving special risks related to their specific features or the operations to be executed or whose price depends on fluctuations in the financial markets outside the supplier's control and that historical performances are no indicators for future performances;
 - (d) notice of the possibility that other taxes and/or costs may exist that are not paid via the supplier or imposed by him;
 - (e) any limitations of the period for which the information provided is valid;
 - (f) the arrangements for payment and for performance;
 - (g) any specific additional cost for the consumer of using the means of distance communication, if such additional cost is charged;

(3) the distance contract:

- (a) the existence or absence of a right of withdrawal in accordance with Article 6 and, where the right of withdrawal exists, its duration and the conditions for exercising it, including information on the amount which the consumer may be required to pay on the basis of Article 7(1), as well as the consequences of non-exercise of that right;
- (b) the minimum duration of the distance contract in the case of financial services to be performed permanently or recurrently;
- (c) information on any rights the parties may have to terminate the contract early or unilaterally by virtue of the terms of the distance contract, including any penalties imposed by the contract in such cases;
- (d) practical instructions for exercising the right of withdrawal indicating, *inter alia*, the address to which the notification of a withdrawal should be sent;
- (e) the Member State or States whose laws are taken by the supplier as a basis for the establishment of relations with the consumer prior to the conclusion of the distance contract;
- (f) any contractual clause on law applicable to the distance contract and/or on competent court;
- (g) which language, or languages, the contractual terms and conditions, and the prior information referred to in this Article are supplied in, and furthermore in which language, or languages, the supplier, with the agreement of the consumer, undertakes to communicate during the duration of this distance contract;

(4) redress:

- (a) whether or not there is an out-of-court complaint and redress mechanism for the consumer that is party to the distance contract and, if so, the methods for having access to it;
- (b) the existence of guarantee funds or other compensation arrangements, not covered by Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit guarantee schemes ⁽¹⁾ and Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor compensation schemes ⁽²⁾.

2. The information referred to in paragraph 1, the commercial purpose of which must be made clear, shall be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, with due regard, in particular, to the principles of good faith in commercial transactions, and the principles governing the

⁽¹⁾ OJ L 135, 31.5.1994, p. 5.

⁽²⁾ OJ L 84, 26.3.1997, p. 22.

protection of those who are unable, pursuant to the legislation of the Member States, to give their consent, such as minors.

3. In the case of voice telephony communications:

- (a) the identity of the supplier and the commercial purpose of the call initiated by the supplier shall be made explicitly clear at the beginning of any conversation with the consumer;
- (b) subject to the explicit consent of the consumer only the following information needs to be given:
 - the identity of the person in contact with the consumer and his link with the supplier,
 - a description of the main characteristics of the financial service,
 - the total price to be paid by the consumer to the supplier for the financial service including all taxes paid via the supplier or, when an exact price cannot be indicated, the basis for the calculation of the price enabling the consumer to verify it,
 - notice of the possibility that other taxes and/or costs may exist that are not paid via the supplier or imposed by him,
 - the existence or absence of a right of withdrawal in accordance with Article 6 and, where the right of withdrawal exists, its duration and the conditions for exercising it, including information on the amount which the consumer may be required to pay on the basis of Article 7(1).

The supplier shall inform the consumer that other information is available on request and of what nature this information is. In any case the supplier shall provide the full information when he fulfils his obligations under Article 5.

4. Information on contractual obligations, to be communicated to the consumer during the pre-contractual phase, shall be in conformity with the contractual obligations which would result from the law presumed to be applicable to the distance contract if the latter were concluded.

Article 4

Additional information requirements

1. Where there are provisions in the Community legislation governing financial services which contain prior information requirements additional to those listed in Article 3(1), these requirements shall continue to apply.

2. Pending further harmonisation, Member States may maintain or introduce more stringent provisions on prior information requirements when the provisions are in conformity with Community law.

3. Member States shall communicate to the Commission national provisions on prior information requirements under paragraphs 1 and 2 of this Article when these requirements are additional to those listed in Article 3(1). The Commission shall take account of the communicated national provisions when drawing up the report referred to in Article 20(2).

4. The Commission shall, with a view to creating a high level of transparency by all appropriate means, ensure that information, on the national provisions communicated to it, is made available to consumers and suppliers.

Article 5

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

1. The supplier shall communicate to the consumer all the contractual terms and conditions and the information referred to in Articles 3(1) and 4 on paper or on another durable medium available and accessible to the consumer in good time before the consumer is bound by any distance contract or offer.

2. The supplier shall fulfil his obligation under paragraph 1 immediately after the conclusion of the contract, if the contract has been concluded at the consumer's request using a means of distance communication which does not enable providing the contractual terms and conditions and the information in conformity with paragraph 1.

3. At any time during the contractual relationship the consumer is entitled, at his request, to receive the contractual terms and conditions on paper. In addition, the consumer is entitled to change the means of distance communication used, unless this is incompatible with the contract concluded or the nature of the financial service provided.

Article 6

Right of withdrawal

1. The Member States shall ensure that the consumer shall have a period of 14 calendar days to withdraw from the contract without penalty and without giving any reason. However, this period shall be extended to 30 calendar days in distance contracts relating to life insurance covered by Directive 90/619/EEC and personal pension operations.

The period for withdrawal shall begin:

— either from the day of the conclusion of the distance contract, except in respect of the said life assurance, where the time limit will begin from the time when the consumer is informed that the distance contract has been concluded, or

— from the day on which the consumer receives the contractual terms and conditions and the information in accordance with Article 5(1) or (2), if that is later than the date referred to in the first indent.

Member States, in addition to the right of withdrawal, may provide that the enforceability of contracts relating to investment services is suspended for the same period provided for in this paragraph.

2. The right of withdrawal shall not apply to:

(a) financial services whose price depends on fluctuations in the financial market outside the supplier's control, which may occur during the withdrawal period, such as services related to:

- foreign exchange,
- money market instruments,
- transferable securities,
- units in collective investment undertakings,
- financial-futures contracts, including equivalent cash-settled instruments,
- forward interest-rate agreements (FRAs),
- interest-rate, currency and equity swaps,
- options to acquire or dispose of any instruments referred to in this point including equivalent cash-settled instruments. This category includes in particular options on currency and on interest rates;

(b) travel and baggage insurance policies or similar short-term insurance policies of less than one month's duration;

(c) contracts whose performance has been fully completed by both parties at the consumer's express request before the consumer exercises his right of withdrawal.

3. Member States may provide that the right of withdrawal shall not apply to:

(a) any credit intended primarily for the purpose of acquiring or retaining property rights in land or in an existing or projected building, or for the purpose of renovating or improving a building; or

(b) any credit secured either by mortgage on immovable property or by a right related to immovable property.

This paragraph shall be without prejudice to the right to a reflection time to the benefit of the consumers that are resident in those Member States where it exists, at the time of the adoption of this Directive.

4. Member States making use of the possibility set out in paragraph 3 shall communicate it to the Commission.

5. The Commission shall make available the information communicated by Member States to the European Parliament and to the Council and shall ensure that it is also available to consumers and suppliers who request it.

6. If the consumer exercises his right of withdrawal, he shall, before the expiry of the relevant deadline, notify this following the practical instructions given to him in accordance with Article 3(1)(3)(d) by means which can be proved in accordance with national law. The deadline shall be deemed to have been observed if the notification, if it is on paper or on another durable medium available and accessible to the recipient, is dispatched before the deadline expires.

7. This Article does not apply to credit agreements cancelled under the conditions of Article 6(4) of Directive 97/7/EC or Article 7 of Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis ⁽¹⁾.

If to a distance contract of a given financial service another distance contract has been attached concerning services provided by the supplier or by a third party on the basis of an agreement between the third party and the supplier, this additional distance contract shall be cancelled, without any penalty, if the consumer exercises his right of withdrawal as provided for in Article 6(1).

8. The provisions of this Article are without prejudice to the Member States' laws and regulations governing the cancellation or termination or non-enforceability of a distance contract or the right of a consumer to fulfil his contractual obligations before the time fixed in the distance contract. This applies irrespective of the conditions for and the legal effects of the winding-up of the contract.

Article 7

Payment of the service provided before withdrawal

1. When the consumer exercises his right of withdrawal under Article 6(1) he may only be required to pay, without any undue delay, for the service actually provided by the supplier in accordance with the contract. The amount payable shall not:

- exceed an amount which is in proportion to the extent of the service already provided in comparison with the full coverage of the contract,
- in any case be such that it could be construed as a penalty.

2. Member States may provide that the consumer cannot be required to pay any amount when withdrawing from an insurance contract.

3. The supplier may not require the consumer to pay any amount on the basis of paragraph 1 unless he can prove that the consumer was duly informed about the amount payable, in

conformity with Article 3(1)(3)(a). However, in no case may he require such payment if he has commenced the performance of the contract before the expiry of the withdrawal period provided for in Article 6(1) without the consumer's prior request.

4. The supplier shall, without any undue delay and no later than within 30 calendar days, return to the consumer any sums he has received from him in accordance with the distance contract, except for the amount referred to in paragraph 1. This period shall begin from the day on which the supplier receives the notification of withdrawal.

5. The consumer shall return to the supplier any sums and/or property he has received from the supplier without any undue delay and no later than within 30 calendar days. This period shall begin from the day on which the consumer dispatches the notification of withdrawal.

Article 8

Payment by card

Member States shall ensure that appropriate measures exist to allow a consumer:

- to request cancellation of a payment where fraudulent use has been made of his payment card in connection with distance contracts,
- in the event of such fraudulent use, to be re-credited with the sums paid or have them returned.

Article 9

Unsolicited services

Without prejudice to Member States provisions on the tacit renewal of distance 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 distance communication techniques shall require the consumer's prior consent:

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

⁽¹⁾ OJ L 280, 29.10.1994, p. 83.

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.

Article 11

Sanctions

Member States shall provide for appropriate sanctions in the event of the supplier's failure to comply with national provisions adopted pursuant to this Directive.

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

These sanctions must be effective, proportional and dissuasive.

Article 12

Imperative nature of this Directive's provisions

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

2. Member States shall take the measures needed to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-member country as the law applicable to the contract, if this contract has a close link with the territory of one or more Member States.

Article 13

Judicial and administrative redress

1. Member States shall ensure that adequate and effective means exist to ensure compliance with this Directive in the interests of consumers.

2. The means referred to in paragraph 1 shall include provisions whereby one or more of the following bodies, as determined by national law, may take action in accordance with 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 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 14

Out-of-court redress

1. Member States shall promote the setting up or development of adequate and effective out-of-court complaints and redress procedures for the settlement of consumer disputes concerning financial services provided at distance.

2. Member States shall, in particular, encourage the bodies responsible for out-of-court settlement of disputes to cooperate in the resolution of cross-border disputes concerning financial services provided at distance.

Article 15

Burden of proof

Without prejudice to Article 7(3), Member States may stipulate that 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, can be placed on 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 of 5 April 1993 on unfair terms in consumer contracts ⁽¹⁾.

Article 16

Transitional measures

Member States may impose national rules which are in conformity with this Directive on suppliers established in a Member State which has not yet transposed this Directive and whose law has no obligations corresponding to those provided for in this Directive.

Article 17

Directive 90/619/EEC

In Article 15(1) of Directive 90/619/EEC the first subparagraph shall be replaced by the following:

'1. Each Member State shall prescribe that a policyholder who concludes an individual life-assurance contract shall have a period of 30 calendar days, from the time when he was informed that the contract had been concluded, within which to cancel the contract.'

⁽¹⁾ OJ L 95, 21.4.1993, p. 29.

*Article 18***Directive 97/7/EC**

Directive 97/7/EC is hereby amended as follows:

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

‘— relating to any financial service to which Directive 2002/.../EC of the European Parliament and of the Council of ... concerning the distance marketing of consumer financial services (*) applies.

(*) OJ L ...’;

2. Annex II shall be deleted.

*Article 19***Directive 98/27/EC**

The following point shall be added to the Annex to Directive 98/27/EC:

- ‘11. Directive 2002/.../EC of the European Parliament and of the Council of ... concerning the distance marketing of consumer financial services and amending Council Directives 90/619/EEC, 97/7/EC and 98/27/EC (*).

(*) OJ L ...’.

*Article 20***Review**

1. Following the implementation of this Directive, the Commission shall examine the functioning of the internal market in financial services in respect of the marketing of those services. It should seek to analyse and detail the difficulties that are, or might be faced by both consumers and suppliers, in particular arising from differences between national provisions regarding information and right of withdrawal.

2. Not later than 31 December 2003 (*) the Commission shall report to the European Parliament and to the Council

on the problems facing both consumers and suppliers seeking to buy and sell financial services, and shall submit, where appropriate, proposals to amend and/or further harmonise the information and right of withdrawal provisions in Community legislation concerning financial services and/or those covered in Article 3.

*Article 21***Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than ... (**). They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field governed by this Directive together with a table showing how the provisions of this Directive correspond to the national provisions adopted.

*Article 22***Entry into force**

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

*Article 23***Addressees**

This Directive is addressed to the Member States.

Done at ...

For the European Parliament

The President

For the Council

The President

(*) Forty-two months after the entry into force of this Directive.

(**) Two years after the entry into force of this Directive.

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

1. The Commission forwarded to the Council on 19 November 1998 a proposal for a Directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services and amending Council Directives 90/619/EEC, 97/7/EC and 98/27/EC.

The European Parliament gave its opinion at first reading on 5 May 1999.

The Economic and Social Committee gave its opinion on 29 April 1999.

The Committee of the Regions decided not to give an opinion.

2. The Commission forwarded its amended proposal to Council on 23 July 1999.
3. The Council, on 19 December 2001, adopted its Common Position in accordance with Article . . .

II. OBJECTIVE

The purpose of the Directive is to set a legal framework for the distance marketing of consumer financial services that promotes the functioning of the internal market and establishes at the same time a high level of consumer protection. In doing so it complements the existing sectoral provisions on financial services and, in particular, fills a vacuum left by the general Directive on the distance marketing of consumer goods.

III. ANALYSIS OF THE COMMON POSITION

The Common Position achieved after long and very difficult discussion represents a careful and very sensitive balance of concerns and interests with the result of:

- a high level of harmonisation of information requirements in Article 3,
- the possibility for Member States of maintaining or introducing more stringent information requirements, in conformity with Community law, ensuring at the same time a maximum of transparency,
- a very far-reaching harmonisation of the right of withdrawal, payment of the service, unsolicited services, unsolicited communications, redress, etc.,
- providing for the possibility of amending or further harmonising the provisions of the Directive in the light of experience gained,
- clarifying the relation of this Directive to the e-Commerce Directive.

A. EUROPEAN PARLIAMENT'S AMENDMENTS

1. Amendments accepted by the Council

The Council incorporated in the Common Position, in full, partly or in principle, the following amendments:

Amendment 2 (improve the wording of recital 3): taken over with a slight redrafting,

Amendment 3 (improve the wording of recital 5): taken over with a slight redrafting,

Amendment 4 (no reduction in consumer protection): accepted in recital 8,

Amendment 7 (delete mentioning that some measures are sufficient): accepted in recital 36,

Amendment 10 (modify recital 16): accepted in part in recital 21,

Amendments 11 and 18 (regarding recitals on right of withdrawal): taken account of in recital 24 and Article 6,

Amendment 12 (delete recital 18): accepted,

Amendment 13 (refer to services): accepted in recital 25,

Amendment 14 (add new recital): accepted in recital 23,

Amendment 43 (delete last part of Article 1(2)): accepted,

Amendment 45 (delete mention of organised systems): accepted in Article 2(a),

Amendment 19 (delete reference to residence): accepted in Article 2(d),

Amendment 21 (prior information):

The Council accepted to a large extent in Article 3(1) and (2), added a number of supplementary issues and restructured the provision for reasons of clarity. Paragraph 4 of this Article added an important provision on the coherence between the information in the precontractual phase and the presumed applicable law (see Article 3(4) below),

Amendments 38, 39, 22, 48, 49 and 50 as well as 11 (right of withdrawal): Accepted to a large extent in Article 6 with cross references in Article 3(1)(3a) and (3)(b), last indent, and recital 24 (see also Article 6 below),

Amendment 23 (payment of service): accepted with changes of the wording in Article 7,

Amendment 20 (durable medium): accepted in principle in recital 20 as well as in Articles 2(f) and 5(1),

Amendment 27 (unsolicited services): accepted in part in Article 9.

2. Amendments rejected by the Council

Amendment 57 (add a new paragraph 1a to Article 1) and *Amendments 40 and 44* (add a new paragraph 20 to Article 1). The Council felt like the Commission that this would weaken consumer protection.

Amendment 25 (incomplete services): rejected as the issue is in practice irrelevant,

Amendment 26 (send back documents to the supplier): rejected because considered inappropriate in practice.

B. NEW PROVISIONS OR ELEMENTS INTRODUCED BY THE COUNCIL

Recitals

Recital 6: clarification regarding the e-Commerce Directive.

Recital 7: clarification regarding sectoral directives and non-harmonised elements.

Recital 8: clarification regarding international private law.

Recital 9: clarification regarding further harmonisation and consumer protection.

Recital 17: clarification regarding initial service agreements.

Recital 20: clarification regarding durable mediums.

Recital 22: clarification regarding information requirements.

Recital 24: reference to the situation where the consumer has expressly required the performance of the contract.

Recital 29: reference to non-profit organisations.

Recital 30: clarification regarding Member States, such as D and A, the legal systems of which include the concept of 'invitatio ad referendum'.

Recital 31: clarification regarding the choice of language.

Article 1(2)

This text modifying the Commission proposal makes the subject of initial and successive services and operations much clearer.

Article 2(b)

Changed in the spirit of the European Parliament's amendment.

Article 3(3)

Necessary adoption of information requirements to voice telephony.

Article 3(4)

Necessary clarification to ensure transparency for the consumer regarding pre-contractual information about contractual obligations. The law applicable to the contract at this stage can, in the view of the Council, only be the one presumed by the provider as being applicable. In case of conflict, the rules of international private law have to determine the applicable law.

Article 4

This Article allows Member States to maintain or introduce a higher level of consumer protection and given the conditions to be respected (paragraph 1, paragraph 2, last part, paragraphs 3 and 4).

Article 5

The obligations for the supplier regarding the communication of the contractual terms and conditions have been rendered more stringent and more effective.

Article 6

This Article determines the right of withdrawal in a comprehensive, precise and, at the same time, flexible way, taking account of existing Community legislation, specific situations in Member States and the particularities of certain financial services.

Article 7

This text on payment of services has been restructured and in some respects clarified and completed (in particular paragraph 5).

Article 11

The Council preferred a separate provision on sanctions with wording following precedents in other directives.

Article 16

This Article on transitional measures is designed to cover the period until the transposition of this Directive.
