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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

concerning the distance marketing of consumer financial services and  
amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC

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(presented by the Commission)

## EXPLANATORY MEMORANDUM

### Introduction

Directive 97/7/EC of the European Parliament and Council on the protection of consumers in respect of distance contracts was adopted on 20 May 1997<sup>1</sup>. Article 3 of the Directive specifies that it shall not apply to financial services.

In the context of the analysis conducted by the Commission with a view to determining the need for specific measures in this field, the Commission invited all the interested parties to transmit their comments, notably in connection with the preparation of its Green Paper entitled "Financial Services - Meeting Consumers' Expectations"<sup>2</sup>. In the aftermath of consultations in this context, the Commission concluded that there is a need to strengthen consumer protection in this field, as it confirmed in adopting its communication "Financial Services - Enhancing Consumer Confidence"<sup>3</sup>. The Commission decided to present a specific proposal concerning the distance marketing of consumer financial services.

The purpose of this proposal for a directive is to establish a harmonised and appropriate legal framework for distance contracts pertaining to financial services, which takes into account the specific nature of these services. This proposal consolidates and supplements the existing legal framework so as to improve the functioning of the single market while enshrining an appropriate level of consumer protection.

The creation of a single market in financial services has already provided consumers with a wider choice from among a broad range of financial products and services at more competitive prices. Elimination of the exchange risk following the introduction of the Euro, in tandem with the development of new information and communication technologies, will give a fillip to cross-border competition between suppliers of financial services.

However, consumers can only make the most of a single and well-integrated market in financial services if they have the same level of protection, irrespective of their country of residence. Since contracts negotiated at a distance are going to corner an increasing share of the market in financial services, consumer protection in this area has become a Commission priority. Realising this goal will contribute to better integration of the financial markets and hence stimulate economic growth and job creation.

Distance selling, both of products and services - and more specifically financial services - is one of the most tangible and innovative features of the Internal Market, both for large firms, SMEs and consumers.

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

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

<sup>3</sup> COM(97) 309 final, 26.6.1997.

Currently, financial services are mainly offered, proposed and concluded using traditional marketing methods, i.e. "face to face"; however, there is an increasing tendency to use new distance marketing methods - such as the Internet, in most EU countries. These methods are mainly used in the context of domestic markets. However, taking into account the combined effect of the introduction of the Euro and the development of the new technologies cross-border trade in financial services is likely to expand rapidly in the near future, notably by relying on the new opportunities offered by the information society.

In effect, providers of financial services argue that distance selling is the system that offers most potential for development and the one that may benefit most from the opening of frontiers. The business community has long grasped the point and has put in place a development strategy not only within the Community but even on a global scale.

The benefits of the Internal Market both for consumers and suppliers of financial services should be reinforced as a result of the more competitive environment created by the dissemination of the new technologies, leading to a growing range of options and more value for money.

The adoption of divergent or different consumer protection provisions by Member States in regard to the distance selling of consumer financial services would have an adverse effect on the operation of the single market and on competition between firms. Hence it is necessary to introduce common rules at Community level in this area.

In this respect it should be noted that the proposal for a directive does not affect the legal status of existing financial services. The provisions of Community law governing financial services, and more particularly the provisions concerning the information which must be provided to consumers, are unaffected by this proposal for a directive, and therefore will continue to apply to all contracts, whether concluded at a distance or not. This proposal for a directive, for its part, regulates the distance selling of financial services only.

### **Section 1: The background and objectives of the proposal**

1. By comparison with contracts concluded face-to-face, distance contracts are characterised by the fact that both the offer/demand, the negotiations and, finally, the conclusion of the contract take place at a distance, without the simultaneous physical presence, direct or indirect, of the parties to the contract at any time.

The keynote of distance selling is its growing reliance on technology – mainly the telephone, fax, Minitel (in France), and - increasingly today - the growth of networks connecting computers, notably the Internet. These techniques are used both to disseminate, promote and sell products and services on the one hand and, on the other, to elicit the consumer's consent. Consent to the conclusion of the contract, and indeed to its performance, can therefore be given in conditions in which consumers have not had an opportunity to examine the nature and real scope of the service proposed to them, and the full implications of the parties' reciprocal rights and obligations.

Besides, special selling techniques may be applied on this occasion.

2. Three fundamental changes may be noted:

- products and services which previously were not sold at a distance are now being sold at a distance;
- an increasing number of firms directly market their products or services using these new techniques;
- new products and services are being developed as a function of the distance selling context itself, notably in the field of electronic commerce.

Thus, there is a need to promote a Community legal framework designed to regulate the distance marketing of financial services in such a way that the development of new techniques or new services is not frustrated.

3. The purpose of Directive 97/7/EC is to approximate the Member States' provisions and it has three major aims:

- First, in the face of technological developments and the associated climate of legal uncertainty, numerous Member States had either adopted or were in the process of adopting legal instruments to regulate either this selling method or the use of certain technologies. However, the need to ensure freedom of movement for suppliers and consumers is clearly in evidence, bearing in mind the risk that national legislation may obstruct this free movement.
- It is also necessary to ensure legal certainty for consumers and to guarantee that they have the right to choose.

When consumers place orders at a distance, what is the nature of the contracts they conclude? Who is the consumer concluding a contract with? What is taken as evidence in the event of a dispute? How does the contract between the parties take shape?

Moreover, the right to choose means above all giving consumers an opportunity to compare the services offered to them. It also means giving them adequate protection against aggressive selling techniques on the part of suppliers of financial services and against inertia selling.

Finally, it is necessary to create the confidence necessary for the development of distance selling.

4. *Mutatis mutandis* the problem is indisputably the same in the case of financial services. Here too it is important to ensure freedom of movement for consumers, services and suppliers. In this connection it is necessary to ensure that national laws do not obstruct this freedom of movement. It is also important to ensure that consumers will have a level of protection such as to underpin and encourage this freedom of movement, irrespective of the Member State in which they reside. Finally, all economic players must have the necessary confidence to permit the development of this form of commerce, and notably electronic commerce.

5. In the course of adopting Directive 97/7/EC, financial services, which had been included by the Commission both in its initial and in its amended proposal<sup>4</sup> were excluded from the scope of the directive by the Council for two reasons:

- ◆ It was necessary to examine to what extent existing directives in the field of financial services already granted consumers protection similar to the provisions of the distance contracts directive.
- ◆ It was necessary to ensure that due attention was paid to the specific nature of financial services in the provisions of a directive governing distance contracts in this area.

In the aftermath of discussions with the European Parliament in connection with the adoption of directive 97/7/EC on 20 May 1997, the Commission made the following statement: "the Commission recognises the importance of protecting consumers in respect of distance contracts concerning financial services and has published a Green Paper entitled "Financial services: meeting consumers' expectations"<sup>5</sup>. In the light of reactions to the Green Paper the Commission will examine ways of incorporating consumer protection into the policy on financial services and the possible legislative implications and, if need be, will submit appropriate proposals"<sup>6</sup>.

6. The following conclusions can be drawn from an examination of the Directives governing financial services:

- ◆ A certain number of principles enshrined by the general directive are not to be found in the existing directives:
  - the written confirmation (on paper or in another durable medium) of the contract – with the exception of consumer credit and life assurance;
  - the right of withdrawal – with the exception of life assurance;
  - the ban on inertia selling;
  - rules governing unsolicited communications;
  - rules that apply when the service is not available;
  - rules designed to establish basic principles governing the resolution of disputes.
- ◆ However, there are various provisions concerning prior and/or *a posteriori* information which must be provided to the consumer. This could lead to a risk of overlapping of the provisions of the sectoral directives and a directive of a "horizontal" nature, concerning distance selling methods, which would include detailed provisions concerning information.

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<sup>4</sup> COM(96) 36 final, 7.2.1996.

<sup>5</sup> COM(96) 209 final, 22.6.1996.

<sup>6</sup> Statement annexed to Directive 97/7/EC, OJ L 144, 4.6.1997, p. 28.

7. From the legal angle, the immaterial nature of financial services is their main characteristic. In effect as a rule financial services will only find material expression in the form of a contract.

This has a certain number of consequences as regards the nature of the provisions governing distance-selling methods of this type of contract.

The specific characteristics of financial services, which result from their particular legal nature, their complexity, the magnitude of the commitments involved, and the financial consequences they can have for consumers, does however appear to justify the introduction of these particular provisions in the field of distance marketing.

8. Following the Green Paper entitled “Financial services: Meeting Consumers’ Expectations”, which triggered a wide debate extending well beyond the problem of distance marketing of consumer financial services, the Commission received more than 140 written contributions from all interested parties.

On 6 November 1996 the Commission organised a hearing attended by over 200 participants representing the interested parties (Member States, representatives of providers of financial services and consumer organisations). The participants confirmed the need to scrutinise a certain number of important questions, including distance selling methods, and also expressed their desire to bolster consumer confidence, to improve consumer protection and to make the Internal Market work.

9. On 17 February 1997, in response to the Green Paper, the European Parliament adopted a resolution<sup>7</sup>, inviting the Commission to present a directive on financial services at a distance within a period of one year.
10. In its opinion on the Green Paper<sup>8</sup> the Economic and Social Committee came to the same conclusion and decided that in the case of financial services sold at a distance the same rules should apply as those laid down in the horizontal directive on distance contracts.
11. On 1 June 1997 the Amsterdam European Council adopted the Action Plan for the Single Market (SCE(97) 1 final, 4 June 1997) and confirmed the need to adopt a directive on distance contracts for financial services, notably with an eye to promoting the development of electronic commerce.
12. On 26 June 1997 the Commission, following up to this widespread consultation process, presented its work programme, including the presentation of a directive on financial services at a distance, in the Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee entitled “Financial services: enhancing consumer confidence”<sup>9</sup>.

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<sup>7</sup> Resolution of the European Parliament on the Commission’s Green Paper on *Financial services: meeting consumer expectations*, No A4-0048/97. Rapporteur: Mrs E. Marinucci.

<sup>8</sup> Opinion of the Economic and Social Committee, OJ C 56, 24.2.1997.

<sup>9</sup> COM(97) 309 final, 26.6.1997.

## Section 2: Subsidiarity

The purpose of distance contracts is to help consumers and firms make the most of the Internal Market. By their nature they pave the way to cross-border transactions.

Hence, there is a need to adopt harmonised rules at Community level. In effect, the legal disparities which might result could prevent consumers and suppliers of financial services from benefiting from the freedom of movement vested in them by the Treaty.

Hence a Community measure is required, *inter alia* with an eye to supplementing, in the field of financial services, the Community legal framework governing distance contracts enshrined in Directive 97/7/EC.

## Section 3: The reasons for a new approach

The Commission started to draft the proposal in spring 1997. An initial preliminary draft was presented in September 1997.

Following consultations with the interested circles, the financial services industry and consumers, as well as the Member States, consulted mainly in the framework of the Bank Advisory Committee and the Insurance Advisory Committee (plus investment services), a new preliminary draft was prepared.

This text was circulated widely among the interested parties and Member States, and again in the framework of consulting the Commission's advisory committees. A certain number of problems were highlighted on this occasion.

The first versions of the preliminary draft provided for the same type of mechanism as the general Directive 97/7/EC on distance contracts, i.e., basically the communication of information prior to conclusion of the contract, the confirmation of this information after conclusion, and the consumer's right to withdraw, with a number of exceptions.

However, four problems were identified that are specific to financial services:

- Financial services are already governed by a certain number of *Community* rules which, in certain cases, contain provisions concerning prior information, and, in a number of cases, provisions on the right of withdrawal (Directive 90/619/EEC on life assurance) or written confirmation (more particularly Directive 90/619/EEC on life assurance and Directive 87/102/EEC on consumer credit). However, the point is that not all-financial services are the subject of such *Community* provisions (for example, mortgage credit). Besides these provisions of Community origin, financial services are in the great majority of cases governed by *national* provisions which apply independently of the way the services are sold (at a distance or face-to-face). The interplay of these texts with the preliminary draft Directive poses a delicate problem.
- It seems to be extremely difficult to establish a list of items of information to be provided in advance which are adapted to the various services covered by this preliminary draft.
- The later *confirmation* of prior information does not, in very many cases, correspond to the contractual realities. This is largely because practically all-financial services consist of immaterial rights and obligations. The only tangible feature is the contract.

Even at a distance, in most cases there will be an instrument possessing evidentiary force which will attest to the existence of a contract between the parties.

- Notably, the right of withdrawal poses a certain number of problems, likewise because of the immaterial or in some cases speculative nature of financial services.

Hence the Commission wanted to propose a Directive whose provisions were attuned to the specific nature of the distance marketing of financial services, taking into account also the particular nature of services of this kind.

#### **Section 4: The principles of the proposal for a Directive**

In order to ensure the distance marketing of financial services without hindrance, consumers must be in a position:

⇒ to examine the contract *before giving their consent*

⇒ to *compare the offers before making their choice*

⇒ to 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.

and suppliers must be in a position:

⇒ to sell without hindrance financial products and/or services using a distance selling method

⇒ to make the most of the Internal Market and notably the new opportunities which electronic commerce offers for the development of cross-border trade in Europe and for the improvement of international competitiveness

⇒ to be in a position to conclude distance contracts with consumers.

Besides, it seems necessary, in order to encourage the cross-border marketing of financial services, to lay down total harmonisation rules establishing a high degree of consumer protection in the fields harmonised by the Directive.

However, one has to take into account the legal framework governing financial services, which already exists in Community law. Community rules governing financial services, and more specifically provisions concerning the information to be provided to the consumer, remain unaffected by this proposal for a directive, and therefore continue to apply to all contracts, whether concluded at a distance or not. In other words, when Community rules governing financial services stipulate, for example, the provision of prior information or the transmission of a prospectus, these provisions will continue to apply as they stand. However, in the context of distance marketing of these services, the proposal enshrines the freedom to transmit documents of this type or information on a durable medium, and not necessarily on paper.

Hence the proposal for a directive provides for the following mechanisms:

- First, it is important that consumers have an opportunity to familiarise themselves with the terms and conditions of the contract before signing it, and that suppliers be able to

propose a contract while respecting the other provisions of Community law in force. Thus consumers must have access to the contractual terms and conditions before concluding the contract.

- These terms and conditions must be valid for a certain number of days (reflection period) to allow the consumer to analyse the contract and to think it over, or to compare the offer with other offers. If the offer suits him, he indicates his assent, and, in this case, the contract is concluded. If the contract suits him only in part, he can nonetheless try to negotiate more favourable terms and conditions with the supplier.

In this case, therefore, the contract is not concluded.

If the contract is concluded without the consumer having exercised the right of reflection, he has a right of withdrawal.

This right applies when the contract is concluded before the contractual terms and conditions are communicated to the consumer. In this case, consumers must be free to withdraw once they have become acquainted with the exact contractual terms and conditions.

Consumers must also be free to withdraw if they have been unfairly induced to conclude the contract during the reflection period.

- If the consumer decides to withdraw when performance of the service has already begun, with the consumer's consent, he must indemnify the service provider for the service rendered.
- Besides, there are exemptions in the case of financial services whose price is subject to market fluctuations outside the supplier's control (for example, in the case of securities), both as regards the right of reflection and the right of withdrawal.
- The Directive also contains rules similar to those of Directive 97/7/EC in respect of unsolicited communications and inertia selling.
- Finally, the Directive contains provisions for the settlement of disputes.

## **Section 5: Commentary on the articles**

### **Article 1**

- ◆ Article 1(1) lays down the general objective of the Directive, which is to harmonise Member State rules on the distance marketing of consumer financial services.

This proposal for a Directive is specifically designed only to regulate a method of selling financial services. Hence its provisions in no way regulate the content of such services.

- ◆ Article 1(2) spells out the scope of the Directive. A financial service may in effect involve a series of successive operations, or a series of separate operations over a period of time. This may give rise to different legal interpretations depending on the law of the Member States; in certain Member States these operations may be considered as being the subject of a single contract, whereas in other Member States they may be considered as being the subject of several separate successive contracts. Hence it is important that the provisions of this Directive should not be applied differently depending on the law of the Member States.

Hence this Directive will only apply to the first of a series of successive operations or the first in a series of separate operations performed over a period of time, irrespective of whether these are the subject of a single contract or several separate successive contracts pursuant to national law.

Thus, for example, opening a bank account at a distance constitutes a contract to which the rules of this Directive apply. However, subsequent operations by consumers in connection with this account (transfers, cash withdrawals, etc.) must be considered as constituting operations in performance of this contract, and so they are not subject to the Directive. Similarly, if at a later date the consumer subscribes to a new payment instrument linked to this bank account (such as a debit card or credit card), he will have to conclude a new contract, just as in a face-to-face transaction. The provisions of the Directive must be observed. But subsequent payment operations performed using this payment instrument must be considered as acts in execution of the contract in respect of which the provisions of the Directive are not applicable.

## Article 2

- ◆ Article 2(a) defines the notion of a *distance contract*. This definition is similar to that contained in Directive 97/7/EC. Several criteria must be met:
  - The contract must be concluded between a consumer and a supplier of financial services as defined in Article 2(c) and (d).
  - The contract must be concluded under an organised distance service-provision scheme run by the supplier. This criterion is of a structural nature. The Directive applies only to structured and organised schemes concerning the offer, negotiation and conclusion of distance contracts put in place by suppliers. Hence the Directive does not cover contracts negotiated and concluded at a distance on a purely occasional basis by a supplier and a consumer.
  - The supplier must have used one or more means of distance communication as defined in Article 2(e). In effect, use of one single means of distance communication, or the combined use of several means of distance communication are possible: hence, for example, some of the contacts needed to conclude the contract might be made via Internet or over the phone, while others might be made by mail.
  - The means of distance communication must have been used by the parties up to and including the moment at which the contract is concluded.

- ◆ Article 2(b) defines the notion of financial *service*. This includes, via reference to the relevant directives, all banking, insurance, and investment services intended for consumers. An indicative list of these services is provided in the Annex.
- ◆ Article 2(c) defines the notion of supplier. Within the meaning of this Directive a supplier of a financial service is any natural or legal person who, in his commercial or professional capacity, acts as an intermediary or is the actual provider of the financial service to the consumer. The idea is that the Directive should cover contracts whose various marketing stages (offer, negotiation, conclusion) are liable to be undertaken by different persons.
- ◆ Article 2(d) defines the notion of consumer. This definition is similar to that of Directive 97/7/EC on distance selling and, notably, that of Directive 93/13/EEC on unfair terms. However, the scope has been narrowed so as to circumscribe the *ratione loci* of the Directive. It will only be applicable when the consumer is resident on the territory of the EU.
- ◆ Article 2(e) defines what is to be understood by a *means of distance communication* within the meaning of the Directive. The definition is identical to that of Directive 97/7/EC. The proposal for a Directive does not include an exhaustive list of the means concerned; it opts for a flexible and technologically neutral definition which can be adapted to future technical developments.
- ◆ Article 2(f) defines the notion of *durable medium* - mainly floppy disks, CD-ROMs, hard disks on PCs for storing data transmitted by electronic mail. It must be possible to get the information without any particular action to this effect being required on the consumer's part, and more specifically the consumer must not be required to store the data on his own initiative. Hence, floppy disks or CD-ROMs must be sent to the consumer. The data may also be transmitted by the supplier via e-mail.
- ◆ Finally, Article 2(g) defines the notion of *operator of a means of communication* at a distance within the meaning of Article 10 of the Directive. The wording is identical to that of Directive 97/7/EC.

### **Article 3**

The purpose of Article 3 is to give the consumer a right of reflection before concluding the contract with the professional.

To this end, the professional must transmit a draft contract to the consumer in writing or via another durable medium including all the contractual terms and conditions. These terms and conditions must remain valid for a period of 14 days. The draft contract may take the form of a paper document, a faxed text, or again an email text or a floppy disk file, for example.

During this period, consumers will therefore be able to examine the rights and obligations incumbent on them if they sign and easily compare the different commercial proposals made to them.

However, the consumer may conclude the contract before expiry of the statutory or negotiated period.

The parties are nonetheless free to agree on a longer period or negotiate other conditions.

However, the financial products referred to in points 5 and 7 of the Annex are products whose prices are liable to fluctuate and are outside the supplier's control. For products subject to such price fluctuations, it is not possible to communicate to the consumer a price which the professional could commit himself to adhering to for a period of 14 days. But it is possible to communicate the terms of the contract which do not fluctuate, the price of the services being communicated to the consumer on an indicative basis. This price is fixed with the consumer's consent on the day the contract is concluded.

Finally, these provisions are without prejudice to the Member States' civil law rules governing the conclusion of contracts and the expression of consent, in particular the theory of the *invitatio ad offerendum*, which has been developed in particular in German and English law.

#### **Article 4**

- ◆ Article 4(1) concerns cases in which the consumer has not first waited to receive the contractual terms and conditions before concluding the contract.

Consumers must be free to conclude the contract without being obliged to wait until they have first received the contractual terms and conditions. Hence, for example, consumers may take out an insurance policy and obtain immediate coverage.

Once the contract has been concluded - by definition, without the consumer's having access to the contractual terms and conditions binding on the parties at the time of consent - it is up to the supplier to transmit a copy of the contract to the consumer. This contract may take the form of a paper document, a faxed text, or an e-mail text or floppy disk file, for example.

However, in this event, the consumer may not have been fully informed or he may have misjudged the scope of the parties' obligations on the basis of the information furnished to him, and will not be enlightened until he has actually received the contract - or again he may have changed his mind. Not having benefited from the reflection period, he must be free to withdraw.

The withdrawal period varies, however, with the nature of the contract concluded by the consumer:

- the normal period is 14 days;
- this delay is extended to 30 days for mortgage loans, life assurance and operations pertaining to personal pensions.

Moreover, the right of withdrawal does not apply to:

- non-life insurance contracts of very short duration (one month), where the consumer can quickly back out, allowing him, in case of dissatisfaction, to seek another supplier;
- the financial products referred to in points 5 and 7 of the Annex, whose price is liable to market fluctuations, so as to avoid speculative manoeuvres concerning such products.

- ◆ Likewise, the consumer must be free to withdraw when the contract has been concluded during the reflection period, i.e. after his receiving the contractual terms and conditions, if he has been unfairly induced to conclude the contract by the supplier or the intermediary.

The unfair inducement referred to here must not be confounded with the Member States' rules governing unfair competition between professionals. The unfairness must be assessed from the consumer's perspective and not from that of the professionals *inter se*.

- ◆ The consumer exercises his right of withdrawal in writing or using another durable medium, accessible to and at the disposal of the supplier.
- ◆ When the main contract is accompanied by a credit agreement with the same supplier or a third party on the basis of an agreement between the supplier and this third party, exercise of the consumer's right of withdrawal in respect of the main contract must have similar effects in respect of the accessory contract.

This provision is similar to Article 6(4) of Directive 97/7/EC.

### Article 5

When the consumer exercises his right of withdrawal, he may be required to pay a certain amount to the supplier.

This amount corresponds to:

- the price of the service rendered by the supplier between the time of conclusion of the contract and withdrawal, when this price can be determined at the time of conclusion of the contract. Hence, before signing the contract, the consumer will know precisely what he has to pay if he withdraws.

Example: the consumer takes out a mortgage loan. The supplier provides that the amount due in the event of withdrawal shall be 100 euros, corresponding to a service effectively provided by the supplier on the date of withdrawal, for example the cost of obtaining an expert assessment of the property.

- when this price cannot be determined by the supplier before conclusion of the contract - mainly because this price depends on the number of days during which the service will be rendered - the supplier must indicate an amount on the basis of which the price of withdrawal can be calculated, as a function of the part of the total price of the contractual service on a pro rata basis for the period that has elapsed between the time the contract was concluded and the time the consumer exercises his right of withdrawal.

Example: the consumer takes out a car insurance policy on 1 January; he cancels it on 13 January. The insurer cannot determine in advance the exact cost of the service, which is a function of the number of days of coverage. An amount based on the daily rate must therefore be communicated to the consumer, who can then precisely calculate the cost of withdrawal, before signing the contract.

It should be noted that, in this way, *if the service has been rendered in its entirety before exercise of the right of withdrawal* it will not effectively be possible for the

consumer to cancel and hence circumvent paying for a service that has actually being fully provided to him.

Consumers must be informed in advance of the price to be paid, or of the basis of which the price to be paid will be calculated.

The burden of proof that the consumer has been informed and has given his consent lies with the consumer. Unless he can prove this the supplier will not be able to require the consumer to pay anything.

Besides, the supplier must refund the consumer in respect of any sums paid in advance, except for the price of the service rendered before exercise of the right of withdrawal.

### **Article 6**

The supplier must inform the consumer, in a clear and comprehensible manner, using any means adapted to the means of distance communication used between the parties, of the existence and scope of the right of reflection and right of withdrawal vested in the consumer pursuant to Articles 3 and 4.

### **Article 7**

One of the aims of this Directive is to permit the conclusion of contracts using new technologies without these technologies actually creating a hindrance.

A certain number of texts – notably Directive 87/102/EEC on consumer credit and Annex 2 to Directive 92/96/EEC on life assurance – require a written document, in the sense of a document in writing on a paper substrate. This makes it exceedingly difficult to conclude certain contracts at a distance.

Article 7 provides for a derogation from the rules prescribing a written document on a paper substrate in the case of distance contracts, specifying that contractual terms and conditions may be communicated in writing on paper or any other durable medium, such as a floppy disk, CD-ROM or via electronic mail.

### **Article 8**

Certain financial services, notably futures, may sometimes be totally or partially unavailable at the time of performance of the contract. This applies for example in the case of an instruction given by a consumer to purchase a certain number of shares at a fixed price, for example in the case of an increase in capital on the part of a company quoted on the stock exchange, when the supplier accepts this instruction but cannot, on the ordained date, acquire the specified number of shares.

In these circumstances, what matters is that consumers should be informed by the supplier about the unavailability.

If the services are totally unavailable, the sums paid over by the consumer to purchase the products must be reimbursed. If, however, the services are only partly available, the contract may be executed provided the two parties give their consent.

### **Article 9**

The purpose of Article 9 is to prohibit the distance supply of financial services without the consumer's prior consent. A similar ban is contained in Directive 97/7/EC.

Article 9 also enshrines the principle that the consumer's silence may not be construed in such cases as constituting consent to the conclusion of a contract.

This article in no way prohibits the tacit renewal of contracts concluded with the validly expressed consent of the consumer.

### **Article 10**

Pursuant to the principles enshrined by Articles 8 and 10 of the European Convention on Human Rights of 4 November 1950, consumers are entitled to protection of privacy, notably as regards peace of mind in respect of certain communication techniques which are particularly intrusive. Hence, Member States are required to adopt rules to this end, in line with the obligations imposed on them by Directives 97/7/EC on distance contracts and 97/66/EC on the processing of personal data and the protection of privacy in the telecommunications sector.

Article 10 provides for two main mechanisms designed to protect consumers against unsolicited communications - one requiring active measures on the part of the consumer, the other not - depending on the type of means of distance communication in question:

- In the case of automated calling systems without human intervention and faxes, the consumer's prior consent is required. Hence the supplier may not contact the consumer using these techniques without the consumer's prior consent.
- As regards the other means of distance communication, Member States are free to choose between a system providing that the consumer must first indicate his consent or a system in which the consumer must indicate *in advance* that they do not wish to be contacted, notably by using so-called "Robinson" lists. Otherwise, suppliers are free to contact the consumer; hence the latter's prior agreement is not required.

This rule has the same rationale as Article 10 of Directive 97/7/EC on distance contracts and Article 12 of Directive 97/66/EC on the processing of personal data and the protection of privacy in the telecommunications sector.

### **Article 11**

- ◆ Article 11(1) provides that consumers may not waive the rights vested in them by the national measures transposing the Directive.
- ◆ Article 11(2) provides that Member States shall enact appropriate sanctions in the event of infringements by the supplier of the obligations incumbent on him pursuant to Articles 6 and 10. The idea here is to counter practices that exploit the consumer's ignorance or disregard his right to privacy.
- ◆ The purpose of Article 11(3) is to guarantee that the rights vested in the consumer under this Directive cannot be set aside because the law applicable to the contract is that of a third country. However, the contract must have a close link with the territory of one or more Member States. Directives 93/13/EEC on unfair terms and 97/7/EC on distance contracts in particular contain similar provisions.

This provision differs from those established by Article 5 of the Rome Convention in three respects: it does not apply if the law of a third country is applicable to the contract, whereby the Rome Convention makes no distinction as to whether the applicable law is that of a third country or not; it applies criteria that are different from those defined in Article 5(2) of that Convention; finally, it prescribes that the applicable rules cannot be waived, whereas Article 5 of the Convention leaves this question open.

## **Article 12**

- ◆ Article 12(1) provides that adequate and effective complaints and redress procedures must be put in place for the settlement of disputes between consumers and suppliers. These procedures may rely on existing procedures, including court procedures, administrative procedures and out-of-court procedures.
- ◆ Pursuant to paragraph 2, these procedures must also enable public bodies, consumer organisations and professional organisations to take action before the courts or competent administrative bodies with a view to enforcing the provisions of the Directive.

These two paragraphs enshrine principles similar to those contained in other consumer protection directives, notably Directives 93/13/EEC and 97/7/EC.

- ◆ The purpose of paragraph 3 is to facilitate the out-of-court resolution of cross-border disputes, by inviting the out-of-court dispute settlement bodies to work together. One potential domain of co-operation concerns the consumer's freedom to seek redress before the out-of-court dispute settlement body in his country of residence, which would then contact its opposite number in the supplier's state, so that the consumer himself does not have to institute proceedings in another Member State.
- ◆ Pursuant to paragraph 4 Member States must adopt the necessary measures to ensure that operators and suppliers of means of communication, when they are in a position to do so, terminate practices which infringe the provisions adopted under this Directive.

This obligation is also enshrined in Article 11(3)(b) of Directive 97/7/EC in respect of all other products and services. It was thought desirable to ensure its application in the framework of this Directive as well.

However, this obligation applies only when such intervention is feasible in practice; for example - it is possible to disconnect a telephone line but it is not technically possible to isolate a class of letters out of all letters received by the postal service.

It should be noted that the obligation on operators and suppliers of the means of distance communication to terminate practices that infringe the Directive must result from a court decision, an administrative order or an order issued by a monitoring authority, and addressed to them.

- ◆ The purpose of paragraph 5 is to add the title of this Directive to the Annex to Directive 98/27/EC of the European Parliament and the Council of 19 May 1998 on injunctions for the protection of consumers' interests.

## **Article 13**

The burden of proof of compliance with the obligation to inform consumers and the consumer's consent to conclude the contract and, where appropriate, its performance lies with the supplier.

Directive 97/7/EC contains a similar provision.

The point is that it is up to the party which is familiar with the selling technique to demonstrate that it has fulfilled its obligations.

Finally, the Directive contains a reference to the unfair terms mechanism provided for in Directive 93/13/EEC.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission<sup>10</sup>,

Having regard to the opinion of the Economic and Social Committee<sup>11</sup>,

Acting in accordance with the procedure laid down in Article 189b of the Treaty<sup>12</sup>,

- (1) Whereas it is important, in the context of achieving the aims of the single market, to adopt measures designed to progressively consolidate this market and those measures must contribute to attaining a high level of consumer protection, in accordance with Article 129a of the Treaty;
- (2) Whereas, both for consumers and suppliers of financial services, the distance marketing of financial services will constitute one of the main tangible results of the completion of the internal market;
- (3) Whereas, within the framework of the internal market, it is in the interest of consumers to have access without discrimination to the widest possible range of financial services available in the Community so that they can choose those that are best suited to their needs; whereas in order to safeguard freedom of choice, which is an essential consumer right, a certain degree of protection is required in order to enhance their confidence in distance selling;
- (4) Whereas it is essential to the smooth operation of the internal market for consumers to be able to negotiate and conclude contracts with a supplier established outside their country, regardless of whether the supplier is also established in the consumer's country of residence;
- (5) Whereas the establishment of a legal framework governing the distance marketing of financial services should contribute to promoting the advent of the information society and the development of electronic commerce;

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<sup>10</sup> O J C

<sup>11</sup> O J C

<sup>12</sup> O J C

- (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>13</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>14</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;
- (8) Whereas the adoption by the Member States of conflicting or different consumer protection rules governing the distance marketing of consumer financial services would impede the functioning of the internal market and competition between firms in the market; whereas it is therefore necessary to enact common rules at Community level in this area;
- (9) Whereas, given the high level of consumer protection guaranteed by this Directive, with a view to ensuring the free movement of financial services, Member States may not adopt provisions other than those laid down in this Directive in the fields harmonised by this Directive;
- (10) Whereas this Directive covers all financial services liable to be provided at a distance; whereas, however, certain financial services are governed by specific provisions of Community law; whereas those specific provisions continue to apply to those financial services; whereas that applies in particular to provisions governing prior information of the consumer; whereas, however, it is advisable to lay down principles governing the distance marketing of such services;
- (11) Whereas, in accordance with the principles of subsidiarity and proportionality as set out in Article 3b of the Treaty, the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community; whereas it is necessary by also sufficient to enact measures which allow consumers to inform themselves and to consider the proposed contractual terms and conditions, as well as measures to ensure that those rights are respected; whereas it is also appropriate to enact measures to protect consumers against the high-pressure selling of financial services and against certain unsolicited uses of means of distance communication; whereas consumers cannot fully enjoy the rights vested in them by this Directive unless appropriate arrangements are made for settling disputes;

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<sup>13</sup> OJ L 144, 4.6.1997, p. 19.

<sup>14</sup> COM(96) 209 final, 22.5.1996.

- (12) Whereas contracts negotiated at a distance involve the use of means of distance communication; whereas the various means of communication are used as part of a distance sales or service-provision scheme not involving the simultaneous presence of the supplier and the consumer; whereas the constant development of those means of communication requires principles to be defined that are valid even for those means that are not yet in widespread use; whereas, therefore, distance contracts are to be those the offer, negotiation and conclusion of which are carried out at a distance;
- (13) Whereas a single contract involving successive operations may be subject to different legal treatment in the different Member States, whereas, however, it is important that this Directive be applied in the same way in all the Member States; whereas, to this end, it is appropriate that this Directive should be considered to apply to the first of a series of successive operations, or to the first of a series of separate operations over a period of time which may be considered as forming a whole, irrespective of whether that operation or series of operations are the subject of a single contract or several successive contracts;
- (14) Whereas by covering a service-provision scheme organised by the financial services provider, this Directive aims to exclude from its scope services provided on a strictly occasional basis and outside a commercial structure dedicated to the conclusion of distance contracts;
- (15) Whereas the supplier is the person providing services at a distance; whereas this Directive should however also apply when one of the marketing stages involves an intermediary; whereas, having regard to the nature and degree of that involvement, the pertinent provisions of this Directive should apply to such an intermediary, irrespective of his legal status;
- (16) Whereas the use of means of distance communications must not lead to an unwarranted restriction on the information provided to the client; whereas in the interest of transparency this Directive lays down the requirements needed to ensure that an appropriate level of information is provided the consumer both before and after conclusion of the contract; whereas the consumer must receive, before conclusion of the contract, the contractual terms and conditions so that he can properly appraise the offer and hence make a well informed choice; whereas the contractual terms and conditions may not be unilaterally modified for a period of 14 days in order to give the consumer time for reflection;
- (17) Whereas provision should be made for a right of withdrawal on the part of the consumer, without penalty and without having to furnish grounds, whenever the contract has been concluded by the consumer without his having received, at the time of conclusion of the contract, the contractual terms and conditions applicable to it, or whenever he has been unfairly induced to conclude the contract during the reflection period set out in this Directive;
- (18) Whereas provision should be made for a reinforcement of the right of consumers to withdraw from contracts relating to mortgages, life insurance and personal pension operations;

- (19) Whereas consumers should be protected against unsolicited sales; whereas consumers should be exempt from any obligation in the case of unsolicited supplies, the absence of a reply not being construed as signifying consent on their part; whereas, however, this rule should be without prejudice to the tacit renewal of contracts validly concluded between the parties;
- (20) Whereas Member States should take appropriate measures to effectively protect consumers who do not wish to be contacted through certain means of communication; whereas this Directive is without prejudice to the particular safeguards available to consumers under Community legislation concerning the protection of personal data and privacy;
- (21) Whereas, with a view to protecting consumers, it is important to make arrangements for resolving disputes; whereas there is a need for suitable and effective complaint and redress procedures in the Member States with a view to settling potential disputes between suppliers and consumers, by using, where appropriate, existing procedures;
- (22) Whereas, as regards consumer access to justice and in particular to courts and tribunals in the case of cross-border disputes, account should be taken of the Communication from the Commission to the Council and European Parliament entitled “Towards greater effectiveness in the adoption and enforcement of decisions within the European Union”<sup>15</sup>;
- (23) Whereas Member States should encourage public or private bodies established with a view to settling disputes out of court to cooperate to in resolving cross-border disputes; whereas such cooperation could in particular entail allowing consumers to submit to extra-judicial bodies in the Member State of their residence complaints concerning suppliers established in other Member States;
- (24) Whereas the Community and the Member States have entered into commitments in the context of the WTO - General Agreement on Trade in Services (GATS) concerning the possibility for European consumers to purchase banking and investment services abroad; whereas the GATS entitles Member States to adopt measures for prudential reasons, including measures to protect investors, depositors, policy-holders and persons to whom a financial service is owed by the supplier of the financial service; whereas such measures should not impose restrictions going beyond what is required to ensure consumer protection;
- (25) Whereas it is consequently necessary to amend Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life insurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC<sup>16</sup>, as amended by Directive 92/96/EC<sup>17</sup>;
- (26) Whereas, in view of the adoption of this Directive, it is necessary to adapt the scope of Directive 97/7/EC and Directive 98/27/EC of the European Parliament

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<sup>15</sup> OJ C 33, 31.1.1998, p. 3.

<sup>16</sup> OJ L 330, 29.11.1990, p. 50.

<sup>17</sup> OJ L 360, 19.12.1992, p. 1.

and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests<sup>18</sup>,

HAVE ADOPTED THIS DIRECTIVE:

## **CHAPTER I - Scope and definitions**

### **Article 1: Scope**

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

### **Article 2: Definitions**

For the purposes of this Directive:

- (a) "distance contract" means any contract concerning financial services concluded between a supplier and a consumer under an organised distance sales or service-provision scheme run by the supplier, who, for the purpose of that contract, makes use of means of distance communication up to and including the time at which the contract is concluded;
- (b) "financial service" means any service relating to the activities of credit institutions, insurance companies or investment firms, as referred to in Council Directives 89/646/EEC<sup>19</sup>, 93/22/EEC<sup>20</sup>, 73/239/EEC<sup>21</sup> and 79/267/EEC<sup>22</sup>; an indicative list of those services is provided in the Annex;
- (c) "supplier" means any natural or legal person who, acting in his commercial or professional capacity, is the actual provider of services subject to contracts covered by this Directive or acts as intermediary in the supply of those services or in the conclusion of a distance contract between those parties;
- (d) "consumer" means any natural person resident in the territory of the Community who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;
- (e) "means of distance communication" refers to any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the distance marketing of a service between those parties;

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<sup>18</sup> OJ L 166, 11.6.1998, p. 51.

<sup>19</sup> OJ L 386, 30.12.1989, p. 1.

<sup>20</sup> OJ L 141, 11.6.1993, p. 27.

<sup>21</sup> OJ L 228, 16.8.1973, p. 3.

<sup>22</sup> OJ L 63, 13.3.1979, p. 1.

- (f) “durable medium” means any instrument enabling the consumer to store information, without himself having to record this information, and in particular floppy disks, CD-ROMs, and the hard drive of the consumer's computer on which electronic mail is stored;
- (g) “operator or supplier of a means of distance communication” means any public or private, natural or legal person whose trade, business or profession involves making one or more means of distance communication available to suppliers.

## **CHAPTER II - Rights and obligations of the parties**

### **Article 3: Right of reflection before conclusion of the contract**

1. Before conclusion of a distance contract, the supplier shall communicate all the contractual terms and conditions to the consumer in writing or in a durable medium available and accessible to him. The supplier may not unilaterally modify these terms for a period of fourteen days.

The parties may agree on a longer period.

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

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

2. The periods referred to in paragraph 1 shall be calculated from the day on which the consumer receives the contractual terms and conditions in writing or in a durable medium available and accessible to him.
3. Without prejudice to paragraph 1, in the case of contracts concerning the financial services referred to in points 5 and 7 of the Annex, when the supplier communicates the contractual terms and conditions to the consumer before conclusion of the contract, any price which depends on fluctuations in the financial market outside the supplier's control shall be established with the consumer's express consent when the contract is concluded.
4. The provisions of paragraphs 1 and 2 shall be without prejudice to the rules of the Member States concerning the conclusion of contracts, and in particular the rules governing the manner in which parties express their consent to the contract.

### **Article 4: Right of withdrawal after conclusion of the contract**

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

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

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

The right of withdrawal shall not apply to contracts concerning:

- (a) the financial services referred to in points 5 and 7 of the Annex, whose price depends on market fluctuations outside the supplier's control;
  - (b) non-life insurance policies of less than one month's duration.
2. Where the contract is concluded by the consumer during the reflection period provided for in Article 3 and he has been unfairly induced to do so by the supplier, the consumer shall have a right of withdrawal for fourteen days without incurring any charge or penalty, and without prejudice to his right to seek compensation for the damage he has suffered.

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

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

3. The consumer shall exercise his right of withdrawal by notifying the supplier to this effect in writing or in a durable medium available and accessible to the supplier.
4. Member States shall provide in their legislation that if the price of financial services is fully or partly covered by credit granted to the consumer by the supplier, or by a third party on the basis of an agreement between the third party and the supplier, the credit agreement is cancelled, where the right referred to in paragraph 1 is exercised, without any penalty being imposed on the consumer.
5. The other legal effects and conditions of withdrawal shall be governed by the law applicable to the contract.

#### **Article 5: Payment for the service provided before withdrawal**

1. Where the consumer exercises his right of withdrawal under Article 4(1), he may be required to pay, without any undue delay, only:
- (a) the price of the financial service actually provided by the supplier, where that price can be determined by the supplier before conclusion of the contract;

- (b) the part of the total price of the financial service covered by the contract on a pro rata basis for the period between the day on which the contract was concluded and the day on which he exercises his right of withdrawal, where the price cannot be determined by the supplier before conclusion of the contract.
2. The supplier shall inform the consumer, before conclusion of the contract, in any way appropriate to the means of distance communication used, of the price or the amount used as a basis for calculating the price which he will be required to pay pursuant to paragraph 1 if he exercises his right of withdrawal.

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

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

#### **Article 6: Consumer information**

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

#### **Article 7: Communication using a durable medium**

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

#### **Article 8: Unavailability of the service**

1. If the financial service which is the subject of the contract is partly or totally unavailable, the supplier shall duly inform the consumer without any undue delay.
2. If the financial service is totally unavailable, the supplier shall, without any undue delay, reimburse any sum paid by the consumer.
3. If the financial service is only partly available, the contract may only be performed with the express consent of the consumer and the supplier.

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

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

### **Article 9: Unsolicited services**

1. Without prejudice to the legal rules of the Member States concerning the tacit extension of contracts, the distance supply of unsolicited financial services to consumers shall be prohibited.
2. Consumers shall be exempt from any obligations in cases of unsolicited supplies and the absence of a response shall not constitute consent by them.

### **Article 10: Unsolicited communications**

1. The use of automated calling systems without human intervention (automatic calling machines) or fax machines in marketing financial services at a distance may be authorised only in respect of consumers who have already given their consent.
2. Member States shall take appropriate measures to ensure that communications not solicited by consumers and made with a view to selling distance financial services by means other than those referred to in paragraph 1,
  - (a) shall not be authorised if the consent of the consumers in question has not been given, or
  - (b) may only be used in the absence of express prior objection from the consumers.

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

### **Article 11: Imperative nature of the provisions of this Directive**

1. Consumers may not waive the rights conferred on them by this Directive.
2. Member States shall provide for appropriate penalties in the event of the supplier's failure to comply with Articles 6 and 10.

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

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

## **CHAPTER III - Disputes**

### **Article 12: Settlement of disputes**

1. Member States shall ensure that adequate and effective complaints and redress procedures for the settlement of disputes between suppliers and consumers are put in place, using existing procedures where appropriate.
2. The procedures referred to in paragraph 1 shall include provisions whereby one or more of the following bodies, as determined by national law, may take action under national law before the courts or competent administrative bodies to ensure that the national provisions for the implementation of this directive are applied:
  - (a) public bodies or their representatives;
  - (b) consumer organisations having a legitimate interest in protecting consumers;
  - (c) professional organisations having a legitimate interest in acting.
3. Member States shall encourage the public or private bodies established for the out-of-court settlement of disputes to co-operate in the resolution of cross-border disputes.
4. Member States shall take the measures necessary to ensure that operators and suppliers of means of distance communication put an end to practices that have been declared to be contrary to this Directive, on the basis of a judicial decision, an administrative decision or a decision issued by a supervisory authority notified to them, where those operators or suppliers are in a position to do so.

### **Article 13: Burden of proof**

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

Any contractual term or condition providing that the burden of proof of the respect by the supplier of all or part of the obligations incumbent on him pursuant to this Directive should lie with the consumer shall be an unfair term within the meaning of Council Directive 93/13/EEC<sup>23</sup>.

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<sup>23</sup> OJ L 95, 21.4.1993, p. 29.

## **CHAPTER IV – Amendments to Directives**

### **Article 14**

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

Directive 90/619/EEC is amended as follows:

- (1) The first subparagraph of paragraph 1 is replaced by the following:

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

\* OJ L [Official Journal reference of this Directive].”

- (2) Paragraph 2 is replaced by the following:

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

\* OJ L [Official Journal reference of this Directive].”

### **Article 15**

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

Directive 97/7/EC is amended as follows:

- (1) The first indent of Article 3(1) is replaced by the following: "relating to financial services to which Directive ../../EC of the European Parliament and of the Council\* applies.

\* OJ L [Official Journal reference of this Directive].”

- (2) Annex II is deleted.

## **Article 16**

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

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

“10. Directive .../.../EC of the European Parliament and of the Council ... on the distance marketing of consumer financial services\*.

\* OJ L [Official Journal reference of this Directive].”

## **CHAPTER V – Final provisions**

### **Article 17**

#### **Transposition**

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

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

2. Member States shall communicate to the Commission the text of the main laws, regulations or administrative provisions which they adopt in the field governed by this Directive. In that communication, Member States shall provide a table showing the national provisions corresponding to each article of this Directive.

### **Article 18**

#### **Entry into force**

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

### **Article 19**

#### **Addressees**

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament

The President

For the Council

The President

**Indicative list of financial services**

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

## IMPACT ASSESSMENT FORM

### THE IMPACT OF THE PROPOSAL ON BUSINESS

with special reference to small and medium-sized enterprises (SMEs)

#### **Title of proposal:**

Distance marketing of consumer financial services modifying Directives 90/619/EEC, 97/7/EC and 98/27/EC

#### **Reference number:**

COM(1998) 468 final

#### **The proposal**

1. Taking account of the principle of subsidiarity, why is Community legislation necessary in this area and what are its main aims?

Distance selling of products and services, including financial services, and in particular electronic commerce offer enormous opportunities for trading within the Single Market, to the benefit of enterprises, SMEs and consumers. It is currently offered and concluded primarily at domestic level. However, taking into account the combined effect of the introduction of the Euro and technological developments, it is anticipated that cross-border trading could expand rapidly, notably by making use of the new opportunities offered by electronic commerce and the Information Society.

The benefits of the Single Market for both consumers and suppliers should be enhanced, given the increased competitive environment created by the extensive use of new technologies, and therefore improved the choice and value of money that should result. However, such benefits can only come about if consumers and suppliers can place their trust in the underlying regulatory framework.

The Commission has decided to prepare a proposal for a directive on distance contracts of financial services, following adoption of the Council and European Parliament directive on "the protection of consumers in respect of contracts negotiated at a distance" (general distance selling Directive), Directive 97/7/EC of 20 May 1997, the scope of which did not include the financial services sector, following a decision by the Council in 1995 to exclude this. In consequence of this exclusion, the Commission invited interested parties to express their opinion, and issued to this effect a Green Paper on "Financial services": meeting consumers' expectations" in May 1996. Following this consultation, the Commission decided to prepare a specific proposal on distance contracts concerning financial (i.e. banking, insurance, investment) services.

The need for such a directive has been confirmed by the Amsterdam Summit, which included this issue in the "Action Plan for the Single Market" of 1 June 1997. These questions also have been reflected in a number of Commission Communications, in particular "A European Initiative in Electronic Commerce" of 16 April 1997 and "Financial Services: Enhancing Consumer Confidence" of 26 June 1997.

The proposal aims at establishing a common basis for the conditions under which distance contracts of financial services are offered/demanded, negotiated and concluded, thus reducing the risk of divergent national approaches to the detriment of a sound development of the Single Market while at the same time establishing fundamental rights for consumers in this area.

### **The impact on business**

#### 2. Who will be affected by the proposal?

Financial service suppliers which market financial products and/or services using means of communication at a distance, as well as the operators and suppliers of such means of communication.

New technologies could give rise to the creation of new firms specialised in certain of these techniques (e.g. Internet) or enable small suppliers to market their financial services and/or products directly.

#### 3. What will businesses have to do to comply with the proposal?

Some Member States (France and Italy, for example) already have, or are in the process of having, specific laws covering all forms of distance selling of financial services. In the vast majority of Member States, there are specific provisions concerning financial services and/or products, which usually apply irrespective of the method of selling used (at a distance or face-to-face). However, the present proposal does not intend to affect the existing national and EC framework regulation concerning financial services. The provisions already in place at EC level, in the field of financial services, and in particular those concerning consumer information continue to apply, irrespective of the method of selling used.

This proposal sets out principles governing the marketing method of distance selling. Its structure specifies in particular: (i) the right of the consumer to receive in advance all contractual terms and conditions; and (ii) the principle that the contractual terms and conditions thus offered should hold firm for a given period of time ("warming-up"). In case of (a) conclusion of the contract without the consumer having received the contractual terms and conditions or (b) unfair inducement by the supplier to conclude a contract during the reflection period, the consumer benefits from the possibility of withdrawal from the contract against *pro rata* payment of the service rendered but without payment of penalties.

The proposal also determines the conditions applicable in case a financial service/product is partially or totally unavailable. Furthermore, it includes provision against inertia selling and regulating unsolicited communications. It finally includes provisions governing legal action by professional and consumer organisations to ensure the correct implementation of the directive.

4. What economic effects is the proposal likely to have?

- on employment
- on investment and creation of new businesses
- on the competitive position of businesses

The text establishes Community rules which will facilitate the use of new technologies in distance selling. This may lead to these techniques being used more often by consumers in the internal market and consequently may have the effect of increasing employment and investment in these activities. The cross-border possibilities may lead to an intensified competitiveness in retail business.

5. Does the proposal contain measures to take account of the specific situation of small and medium-sized firms (reduced or different requirements, etc)?

The key measure – providing consumers with all the relevant contractual conditions – is not of a nature to indicate any need for differentiation according to the size of the enterprise providing financial services.

## **Consultation**

6. List the organisations which were consulted about the proposal and outline the main views

Since July 1997, the Commission has consulted consultative bodies (BAC, IC, Consumer Committee), interested parties (financial services sector, consumer/user organisations) and national experts (meetings on 22 September 1997 and on 21 January 1998) on preliminary drafts.

The Commission services in charge (DG's XV and XXIV) have received several opinions and views on the drafts from financial service federations and associations (banking, insurance, etc.), consumer/user organisations, other professional associations and operators of means of communication.

The majority of these opinions have recognised the necessity of community action in the matter of contracts negotiated at a distance; the opinions of financial industry have in particular emphasised the need for a level playing field.

