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*****II**

RECOMMENDATION FOR SECOND READING

on the Council common position of 19 December 2001 for adopting a European Parliament and Council directive concerning the distance marketing of consumer financial services and amending Council Directives 90/619/EEC, 97/7/EC and 98/27/EC
(12425/1/01 REV1 – C5-0697/2001 – 1998/0245(COD))

Committee on Legal Affairs and the Internal Market

Rapporteur: Maria Berger

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- *** Assent procedure
*majority of Parliament's component Members except in cases
covered by Articles 105, 107, 161 and 300 of the EC Treaty and
Article 7 of the EU Treaty*
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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PROCEDURAL PAGE

At the sitting of 5 May 1999 Parliament adopted its position at first reading on the proposal for a European Parliament and Council directive concerning the distance marketing of consumer financial services and amending Council Directives 90/619/EEC, 97/7/EC and 98/27/EC (COM(1998) 468 - 1998/0245 (COD)).

At the sitting of 17 January 2002 the President of Parliament announced that the common position had been received and referred to the Committee on Legal Affairs and the Internal Market (12425/1/01 REV1 - C5-0697/2001).

The committee had appointed Maria Berger rapporteur at its meeting of 23 September 1999.

It considered the common position and draft recommendation for second reading at its meetings of 18 February 2002, 19 March 2002 and 16 April 2002.

At the last meeting it adopted the draft legislative resolution by 29 votes with 1 abstention.

The following were present for the vote: Giuseppe Gargani, chairman; Willi Rothley, Ioannis Koukiadis and Bill Miller, vice-chairmen; Maria Berger, rapporteur; Paolo Bartolozzi, Ward Beysen, Isabelle Caullery (for Brian Crowley), Bert Doorn, Janelly Fourtou, Marie-Françoise Garaud, Evelyne Gebhardt, Fiorella Ghilardotti, José María Gil-Robles Gil-Delgado, Malcolm Harbour, Heidi Anneli Hautala, Renzo Imbeni (for Carlos Candal , pursuant to Rule 153(2)), Othmar Karas (for Nicole Fontaine), Piia-Noora Kauppi (for The Lord Inglewood), Kurt Lechner, Klaus-Heiner Lehne, Toine Manders, Arlene McCarthy, Manuel Medina Ortega, Reinhard Rack (for Joachim Wuermeling, pursuant to Rule 153(2)), Hannes Swoboda (for François Zimeray, pursuant to Rule 153(2)), Marianne L.P. Thyssen, Rijk van Dam (for Ole Krarup), Rainer Wieland, Matti Wuori (for Neil MacCormick), Stefano Zappalà.

The recommendation for second reading was tabled on 18 April 2002.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

DRAFT LEGISLATIVE RESOLUTION

European Parliament legislative resolution on the Council common position for adopting a European Parliament and Council directive concerning the distance marketing of consumer financial services and amending Council Directives 90/619/EEC, 97/7/EC and 98/27/EC (12425/1/01 REV1 – C5-0697/2001 – 1998/0245(COD))

(Codecision procedure: second reading)

The European Parliament,

- having regard to the Council common position (12425/1/01 REV1 – C5-0697/2001),
 - having regard to its position at first reading¹ on the Commission proposal to Parliament and the Council (COM(1998) 468²),
 - having regard to the Commission's amended proposal (COM(1999) 385³),
 - having regard to Article 251(2) of the EC Treaty,
 - having regard to Rule 80 of its Rules of Procedure,
 - having regard to the recommendation for second reading of the Committee on Legal Affairs and the Internal Market (A5-0122/2002),
1. Amends the common position as follows;
 2. Instructs its President to forward its position to the Council and Commission.

¹ OJ C 279, 1.10.1999, p. 163.

² OJ C 385, 11.12.1998, p. 10.

³ OJ C 177, 27.6.2000, p. 21

Amendment 1
Recital 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.

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; ***the purpose of this directive is therefore to enhance the proper functioning of the internal market, in particular by promoting the free movement of consumer financial services;***

Justification

This amendment stresses the importance of the free movement of financial services.

Amendment 2
Recital 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.

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.

Justification

This is a technical amendment in order to avoid duplication with the proposed new recital 6.a.

Amendment 3
Recital 9

(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.

(9) In view of the high level of consumer protection ensured by this Directive and the specific sectoral directives, Member States may, in order to promote the free sale, including cross-border sales, of financial services and to protect the consumer in the cross-border purchase of financial services, introduce no provisions in the areas harmonised by this Directive other than those laid down by this Directive.

Justification

Follows from the amendment to Article 4, paragraph 2.

Amendment 4
Recital 9a (new)

9a) The admissibility of restrictions on the involvement of courts, public authorities, or professions exercising public authority in accordance with Recital 36 of Directive 2000/31/EC shall remain unaffected.

Justification

This is to prevent compulsory notarisation under national law from being considered as an inadmissible additional requirement.

Amendment 5
Recital 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

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 ***consequently*** should not be able to adopt provisions other

down in this Directive in the fields it harmonises, ***unless otherwise specifically indicated in it.***

than those laid down in this Directive in the fields it harmonises.

Justification

The proposed requirements to provide information are already very far-reaching and take consumer protection adequately into account. Any additional information requirements would serve only to heighten the existing legal uncertainty - with no significant advantage in terms of consumer protection.

Amendment 6 Recital 13a (new)

(13a) It is not however justified for contracts in respect of which a declaration has been made by the consumer using the services of a civil law notary to be subjected to the provisions of the directive.

Justification

Parliament proposed the above exemption for declarations by consumers certified by a civil law notary in its first opinion on the Commission proposal for a directive. Although the Commission approved the amendment in principle, the Council, regrettably, failed to adopt it.

The exemption is required to prevent mistakes from arising in connection with contracts certified by a civil law notary. As a consequence of the wide-ranging scope of the concepts of 'distance contract', 'financial service' and 'means of distance communication', as defined in Article 2f of the proposal, there is a real danger that certain types of notarised contract would fall within the scope of the directive. There is no call for that to happen. On the contrary, it would serve only to undermine unnecessarily the binding status - quite possibly to the consumer's disadvantage - of contracts concluded using the services of a notary.

Involvement of a civil law notary ensures that the consumer commits himself to a declaration resulting in a contract being concluded only after taking adequate information, receiving legal advice from a legal expert committed to neutrality, and taking time to think the transaction over. The use of a notary's services, as stipulated by Member States for certain legal transactions, thus already represents a particularly effective form of consumer protection. On the other hand, certification by a notary should also provide for the conclusion of binding contracts in the interests of legal certainty. Such contracts provide the basis for the legal certainty of transactions in the property and shareholding markets, and thus for

important investment decisions by individuals and undertakings. The right of withdrawal provided for in the directive is incompatible with such arrangements, since it can give rise to uncertainty, at least at certain stages, concerning the binding status of the contract.

That will in particular apply in situations where protection of the consumer typically is ensured by his or her presence in the course of a consultation on the notary's premises, whereas the supplier is not required to be present in person or otherwise (e.g. notarisation of safeguard rights by the consumer). The consumer-protection mechanisms laid down in the directive are not required in such cases.

An equivalent exemption is also laid down in respect of online transactions as a whole in the E-Commerce Directive 2000/31/EC (Article 1(5d) and Article 9 (2d)).

Amendment 7
Recital 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 extra-judicial 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.

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 ***independent*** extra-judicial 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.

Justification

Conforms to the version adopted at first reading.

Amendment 8
Article 1, paragraph 2b) (new)

2b) Member States may stipulate that the provisions of Articles 3 to 11 shall not apply to contracts where a declaration was made

by the consumer using the services of a civil law notary.

Justification

See justification to first amendment. Amendment 2, by contrast, leaves it to Member State discretion whether or not an exception is made for notarised contracts. That is in order to take into account the legal situation in Member States where there is no profession of civil law notary authorised to issue certifications and discharge consumer protection functions.

Amendment 9
Article 2(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;

"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 ***or acts as an intermediary in the conclusion of a distance contract;***

Justification

This includes intermediaries within the scope of the Directive when they are conducting distance sales, but removes those involved in face-to-face sales.

Amendment 10
Article 2, paragraph 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;

"supplier" means any natural or legal person who, acting in his commercial or professional capacity, is the actual provider of services subject to distance contracts, ***or acts as intermediary in the supply of those services or in the conclusion of a distance contract between those parties;***

Justification

The regulatory purpose of the directive is to protect the consumer from concluding a contract hastily, as can typically happen in distance-selling situations (defined as a selling situation 'without the simultaneous physical presence of the supplier and consumer'). This is thus equivalent to a situation in which the consumer stands in need of the same protection as applies in a door-to-door selling operation, which is why this form of selling is already regulated by the directive protecting the consumer in respect of contracts negotiated away from business premises (85/577/EEC).

It should therefore be made unambiguously clear that acting as an intermediary does not as such constitute distance trading. The wording used in the Commission proposal for a directive (2000/C 177 E/04) in the definition of the supplier should therefore be used.

Amendment 11 Article 2(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;

"means of distance communication" refers to any means which, without the simultaneous physical presence of the supplier (***or an intermediary or an agent or other representative of the supplier***) and the consumer (***or an agent or other representative of the consumer***), may be used for the distance marketing of a service between those parties;

Justification

This more precisely defines who are to be considered as intermediaries within the scope of the Directive.

Amendment 12 Article 2(g)(i) (new)

2gi) "Credit" includes a loan, current account, bailment or the hiring of goods under a hire or hire-purchase agreement,

the sale of goods under a credit sale or conditional sale agreement, and any other form of financial accommodation.

Justification

There needs to be clarification of precisely what is meant by credit. This brings all forms of credit within the scope of the directive.

Amendment 13
Article 3, paragraph 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 ***Delete***

Justification

Article 3.4. would render the whole objective of the Directive of promoting the cross-border provision of financial services unattainable and would create legal uncertainty. Financial services providers would need to check all 15 different contractual rules, since the concept of information on contractual obligations is a very wide one.

Moreover, the article extends the scope of the derogation on contractual obligations in consumer contracts of Article 3 of the E-commerce Directive to pre-contractual information. This is not only in violation of the E-Commerce Directive but also ignores Parliament's Resolution on E-commerce and Financial Service of October 2001 that reminded Member States that the scope of the agreed derogations to the country of origin principle of the E-Commerce Directive should not be extended.

Amendment 14
Article 6, paragraph 1, indent 1

– either from the day of the conclusion – 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;

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, ***if the consumer has already received the contractual terms and conditions and the information in accordance with Article 5(1) or (2), or;***

Justification

The amendment is intended to clarify the position as regards the period for withdrawal. With a view to ensuring the uniformity of consumer protection provisions in force, the period for withdrawal should not start until the necessary information has been provided.

Amendment 15

Article 6, paragraph 1, second indent

– 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.

– 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.

If the supplier has failed to fulfil the obligations laid down in Article 5, paragraph 1 or 2, the period shall be three months. The period shall begin from the day of conclusion of the contract.

If the information referred to in Article 5 is supplied within this three-month period in accordance with Article 5, paragraph 1 or 2, the 14 or 30 working day period referred to in the first subparagraph shall begin as from that moment.

Justification

An maximum period objectively defined on the basis of Article 6, paragraph 1 of the general

distance selling directive (97/7/EC) is called for. The absence of any such maximum period would lead to legal uncertainty. If the risk of losing the contract is imposed one-sidedly on the credit institutions, distance-selling in banking services will become unattractive and costly. That will not be in consumers' best interests.

Amendment 16
Article 6, 2(a), indent 9 (new)

- to insurance contracts for which a claim is made in the course of the withdrawal period.

Justification

It is believed that this was not the intention of the legislators but an inadvertent result of the wording used. Article 6.2c provides that the right of withdrawal will not apply in "contracts whose performance has been fully completed by both parties at the consumer's express request". The problem with this terminology is that an insurer's performance of the contract is not necessarily completed when he has paid the claim, as the consumer may be able to make additional claims during the remaining period of the policy. For example, if you are involved in a car accident a few weeks after taking out a car insurance policy, your insurance still provides you with cover up to the end of the year.

Amendment 17
Article 6, paragraph 2(c)

(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.***

(c) contracts whose performance has ***begun, with the consumer's agreement, before the end of the 14 day period referred to in paragraph.***

Justification

The meaning of "has been fully completed by both parties" is unclear in the context of credit agreements. Credit providers would expect the right of withdrawal to be lost on payment of monies either to the consumer him/herself or to a supplier in association with the purchase of goods and services by the consumer on credit. The Article should be amended to mirror Article 6(3) of Directive 97/7

Amendment 18
Article 6, paragraph 2 (c)(i)(new)

2ci) Insurance contracts where the Customer has already made a claim and has received a payment from the insurer as a result of the claim.

Justification

As currently worded, Article 6 will allow a consumer to make a claim against an insurance policy, then withdraw from the contract and still have the right to almost all of the premium paid. The insurer's performance of a contract is not necessarily completed when the claim has been paid, but when cover expires at the end of the contract. Because premium calculations are based on the assumption that the totality of the insurance premium charged will be available to meet the cost of claims during the contract period, this could mean insurers are left with inadequate funds to meet claims.

Amendment 19
Article 6, paragraph 2, point c b (new)

(cb) consumers' declarations made using the services of a civil law notary.

Justification

See justification to first amendment. There are no objective grounds for allowing the right of withdrawal in the case of notarised contracts. Consumers receive legal advice and have time for reflection where acts are notarised prior to the conclusion of the contract. There is consequently no need for consumers to be allowed the option of withdrawing following the conclusion of the contract without giving any reasons or without there being any reasons, i.e. merely on the basis that they no longer wish to abide by the contract. In addition, allowing a right of withdrawal in such cases unnecessarily calls into question the definitive nature of notarial acts and therefore legal certainty in important areas of civil law and legal transactions. Moreover, it further undermines the principle of the observance of contracts (pacta sunt servanda) underlying the laws of the Member States governing contracts.

The derogation provided for in Article 6(3) for certain types of credit does not cover all

possible notarial forms of contract which might fall within the scope of the directive. In particular, it is not clear whether transactions for securing of credit, for example encumbrance of real property or mortgages, in respect of which declarations are witnessed by a notary are covered by the derogation. Clear provisions should therefore be laid down, which are based not on the type of legal transaction, but on the way in which transactions are effected.

Amendment 20
Article 6, paragraph 3

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

3. The right of withdrawal shall not apply to credit to a consumer for the purchase or transformation of the private immovable property he owns or aims to acquire, secured either by a mortgage on immovable property or by a surety commonly used in a Member State.

(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.

Justification

The code of conduct signed on 5 March 2001 by five European consumers' associations and six European credit-providers' associations under Commission auspices on pre-contractual information to be given to consumers by lenders offering home loans lays down (in Article 2) the operative definition of a home loan (cf. Commission recommendation 2001/193/EC). In the interests of coherent and consistent law-making, only credit provided in accordance with that definition should be excluded from the right of withdrawal. In the interest of creating a harmonised European internal market in financial services Member States should not be left any margin of manoeuvre in the matter of exceptions to the right of withdrawal. Were different national variations on exceptions to the right of withdrawal to develop, that would

result in variations in costs structures in the credit sector, to the detriment of consumers. Any national variations in implementation could, moreover, be tantamount to fundamental obstacles to cross-border operations in financial services. In order to avoid increases in the cost of home loans to the detriment of the consumer, action should be taken to ensure that home loans are uniformly exempted from the right of withdrawal across Europe by reason of the need to match their refinancing to their maturity.

Amendment 21
Article 6, paragraph 3(b)i) (new)

3bi) Where declarations have been made by consumers using the services of a civil law notary.

Justification

See justification to Amendments 1 and 3. Amendment 2, by contrast, leaves it to Member State discretion whether or not an exception is made for notarised contracts. That is in order to take into account the legal situation in Member States where there is no profession of civil law notary authorised to issue certifications and discharge consumer protection functions.

Amendment 22
Article 6, paragraph 4

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

Justification

Fits in the context of maximum harmonisation whereby the European consumer, wherever resident, can always count on the same protection.

Amendment 23
Article 7, paragraph 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.

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 **paragraphs 1 and 5**. This period shall begin from the day on which the supplier receives the notification of withdrawal.

Justification

The principle of the article is that all sums properly due to the consumer should be returned by the supplier without undue delay. The exception to that will be all sums properly due to the supplier which will include not only those covered by paragraph 1 but also paragraph 5.

Amendment 24 Article 9

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:

Without prejudice to Member States provisions on the tacit renewal of distance contracts, when such rules permit tacit renewal, **and except where the consumer has previously consented in writing to make payments under a recognised deferred payment arrangement**, Member States shall take the necessary measures to:

Justification

There is a risk that the current wording of Article 9 will prevent insurers from carrying out “automatic renewals” in cases where a customer has already given written consent for such payments to be made.

Amendment 25 Article 13, third paragraph

3. Member States shall take the measures necessary to ensure that operators and suppliers of means of distance

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.*

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.

Justification

Fits in the context of maximum harmonisation whereby the European consumer, wherever resident, can always count on the same protection.

EXPLANATORY STATEMENT

In the light of the full and detailed Commission communication accompanying the Common Position, it is not my intention to reiterate in detail here the response given to Parliament's first reading amendments, but only to highlight the main areas of agreement and divergence.

1) Maximum or minimum harmonisation?

The original European Commission draft and the opinion delivered by the European Parliament were based on the principle of maximum harmonisation. Under this principle, all rules applying in this area would have been definitively laid down by European legislation, and Member States would not have had the option of maintaining or introducing more stringent consumer protection provisions. At its meeting in Luxembourg, the Council, on the other hand, agreed by a majority to support the principle of minimum harmonisation, which would have allowed Member States to maintain or introduce more stringent consumer protection provisions in respect of almost all the provisions of the directive in question. In the course of consultation, a solution has, however, been found which your rapporteur and the Commission regard as acceptable. The directive is now essentially, and in almost all areas, based on the principle of maximum harmonisation, and only provides in a small number of cases for Member States to be able to maintain or introduce additional rules.

Those cases are as follows. With regard to prior information, Member States may maintain or introduce requirements additional to those set out in the harmonised list given in Article 3, if such provisions are in conformity with Community law and only 'pending further harmonisation' (Article 4(2)). Such additional requirements must be notified to the Commission if they go beyond the additional requirements laid down in Community legislation on financial services. The Commission has to take account of national provisions notified to it in drawing up the report referred to in Article 20(2). It is also required to ensure that information on such national provisions is made available to consumers and suppliers.

The Common Position now provides for definitive harmonised rules on the right of withdrawal. In particular, in the case of life insurance and personal pensions, it no longer allows the option of a period for withdrawal of between 14 and 30 days, but lays down a uniform period of 30 calendar days. For all other financial services, a uniform period for withdrawal of 14 calendar days applies. There are also definitive rules on the method for calculating such periods. The only scope allowed Member States is that, in addition to the right of withdrawal, they may provide that the enforceability of distance contracts relating to investment services is suspended for the same period. The list of financial services to which the right of withdrawal does not apply (Article 6(2)) is not essentially a definitive one, but is defined in relatively precise terms. Member States are allowed latitude in only two cases referred to in Article 6(3). They may provide that the right of withdrawal will not apply to: any credit intended primarily for the purpose of acquiring or retaining property rights in land or in an existing or planned building, or for the purpose of renovating or improving a building (real estate loans), or any credit secured either by mortgage on immovable property or by a right related to immovable property (mortgage loans). Further differentiation results from the fact that any Member State which, at the time of adoption of the directive, allows consumers resident in that Member State a right to reflection time may maintain that right. Again, Member States must inform the Commission if they apply these options. The Commission is

required to pass on this information to the European Parliament and the Council and make the information available to consumers and suppliers who request it. These exceptions to the principle of maximum harmonisation, which are not worthy of support in themselves, pose a problem notably for smaller suppliers of financial services. However, the requirement for the Commission to make information on differences in national provisions available to such suppliers reduces the costs and expense in particular for smaller suppliers.

The fact that Member States are allowed options in respect of protection against unsolicited communications gives rise to other provisions the implications of which for suppliers in future are difficult to calculate. Apart from certain forms of telecommunication (automated calling systems without human intervention and fax), for which the consumer is required to opt in, either opt-in or opt-out systems may be applied by the Member States to all other means of distance communication.

Article 15 on the burden of proof also deviates from the principle of maximum harmonisation. It provides that Member States may stipulate that the burden of proof in respect of fulfilment of the supplier's obligations to inform the consumer and the consumer's consent to conclusion of the contract and, where appropriate, its performance, may be placed on the supplier. In this case, moreover, there is no obligation to notify the Commission and no requirement for the Commission to make such information available to consumers and suppliers.

With regard to the degree of harmonisation, it should, finally, be noted that, whilst full account has not been taken of the principle of maximum harmonisation sought by Parliament, the exceptions have been kept as small as possible given the original positions of the Member States and, in particular, that the requirement to inform suppliers reduces the burden particularly on smaller suppliers and increases transparency.

2) Individual aspects in respect of which the Common Position adopts the substance of the European Parliament's position or which may overall be regarded as positive (not in order of importance)

- reference in recital 1 to Article 95 and Article 153 of the Treaty and the commitment to contribute to attaining a high level of consumer protection;
- recognition that a high level of consumer protection is important from the point of view of consumer confidence in distance selling (recital 3);
- clarification of the relationship to the directive on electronic commerce (recital 6) and to substantive provisions of legislation on financial services (recitals 7 and 14 and Article 4(1));
- clarification that the directive and its provisions on information on contractual clauses (Article 3(1)(3)(f)) are without prejudice to Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (Brussels II) or the Rome Convention (recital 8);
- requirement for further convergence of substantive provisions (recital 9);
- precise, clear definitions in respect of contracts relating to successive operations or separate operations of the same nature performed over time and defining of the initial service agreement (recitals 16 and 17 and Article 1(2));
- the definition of durable mediums is largely in line with that called for by Parliament at first reading (recital 20 and Article 2(f));

- the directive applies to all consumers. The restriction to consumers ‘resident in the territory of the Community’ criticised by Parliament has been dropped. Member States may also apply the directive to non-profit organisations or future entrepreneurs;
- the list of information to be provided prior to the conclusion of the contract includes all the points called for by Parliament and, in some cases, goes further than the latter;
- the provision regarding a compulsory cooling off period has been dropped. The supplier must specify how long his offer applies as it stands.
- the right of withdrawal is not unconditional, and there are only exceptions for specific products;
- with regard to the right of withdrawal, a uniform period of 14 calendar days has been laid down, compared with the 30-day period requested by the European Parliament. The Commission draft originally provided for a seven-day period and included many further restrictions. Directive 97/7/EC on distance contracts also provides only for a seven-day period. A 14-day period therefore seems acceptable. In the case of life insurance and personal pensions, a uniform period of 30 days applies (previously 14-30 days);
- provisions on the consequences of withdrawal (contracts attached – Article 6(7), Article 7) are in line with Parliament’s demands;
- provisions applying to reversed transactions and cases where services are not available have been dropped. This was not called for by the plenary, but was sought by the Legal Affairs Committee on account of the incalculable effects on Member States’ civil law;
- provisions allowing cancellation of payments and re-crediting of consumers with sums paid in the event of fraudulent use of payment cards have been included, as called for by Parliament (Article 8);
- the substance of the provisions on unsolicited services is in line with Parliament’s proposals (Article 9);
- the same applies to judicial and administrative redress, including action by organisations (Article 13) and out-of-court settlement of disputes; recital 28 refers specifically to FIN-NET;
- the inalienable nature of consumer rights, and the requirement for Member States to ensure that the application of the directive is not restricted by the application of the law of a non-member country if a close link exists with one or more Member States;

3) Individual aspects which, from the point of view of the European Parliament, should be criticised

- the possibility referred to above of choosing between opt-in and opt-out systems for unsolicited communications. This is qualified by recital 26, which states that ‘This Directive should be without prejudice to the particular safeguards available to consumers under Community legislation concerning the protection of personal data and privacy.’ Since these provisions are currently being revised, the legal position cannot properly be assessed;
- Directive 2000/31/EC on electronic commerce stipulates that service providers which send unsolicited commercial communications by electronic mail must regularly consult and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register;
- position of the European Parliament concerning the data protection directive in the telecommunications package (Cappato report): for advertising via fax, SMS or automated calling systems as well as for email addresses obtained in the course of business with

- customers, the rule must be that the prior consent of those concerned is required;
- the exception sought by Parliament for contracts made with the assistance of a notary public has not been included by the Council in the Common Position;
 - as regards exceptions relating to the right of withdrawal, contracts providing immediate cover in the case of certain non-life insurance policies have not been taken into account.

Conclusions

It should be acknowledged that the Common Position meets Parliament's demands to an unusually high degree. Where divergence from Parliament's position has been unavoidable in order to enable agreement to be reached within the Council, the differences have been kept as small as possible in terms of their scope and effects. Given the urgent need for Community legislation on the distance marketing of financial services, the priority should now be the swift entry into force of the version currently proposed. The prospects in respect of any second reading amendments are extremely uncertain in view of the narrow majority situation on the issues concerned within the European Parliament itself and the fragile compromise in the Council. In the view of the rapporteur, the delay which the conciliation procedure would involve is a more significant factor than the vague chance of minimal improvements which might possibly be achieved in the course of conciliation.

The rapporteur therefore recommends that the Common Position be adopted without amendments.