



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 07.02.1996
COM(96)36 final COD 411

**COMMISSION OPINION
pursuant to Article 189b(2)(d) of the EC Treaty on
the European Parliament's amendments to the Council's common
position concerning the**

**proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE**

on the protection of consumers in respect of distance contracts

**AMENDING THE COMMISSION PROPOSAL
pursuant to Article 189a(2) of the EC Treaty**

I. BACKGROUND (CO-DECISION PROCEDURE)

- On 7 April 1992 the Commission presented a proposal for a Directive and adopted a recommendation concerning the protection of consumers in respect of contracts negotiated at a distance (COM(92) 11 of 20.5.92 - SYN 411) OJ No C 156, 23.6.92.
- The proposal was transmitted to the Council on 9.6.92 and to the Parliament by Council on 17.6.92.
- Opinion of the Economic and Social Committee: 24.11.92
- Opinion of Parliament at first reading - 26.0.93. Parliament adopted 35 amendments. The Commission accepted 30 of them and integrated them into its amended proposal.
- Amended proposal: COM(93) 396 of 7.10.93. OJ No C 308, 15.11.93
- Adoption of the common position: 29.6.95. OJ No C 288, 30.10.95
- Commission opinion on the common position: 7.7.95 (Document SEC (95) 1158 COD 411)
- Parliament vote, second reading: 13.12.95
31 amendments adopted.

II. SUBJECT OF THE PROPOSAL

With the development of new technologies (television, fax, minitel) traditional "mail order selling" has become "distance selling". The directive provides a legal framework for all these selling techniques.

The proposal is a framework directive covering products, services and all distance communication techniques. It is accompanied by a recommendation (ref 92/295/EEC) urging professionals to satisfy the minimum requirements of the directive in the form of codes of practice.

III COMMISSION OPINION ON THE EUROPEAN PARLIAMENT'S AMENDMENTS

Amendments accepted by the Commission

The Commission can accept 21 of the 31 amendments adopted by Parliament. The numbering used is that of Parliament's final document (EP 165 649). The amendments that are not mentioned (6, 7, 17, 18, etc.) are those rejected by Parliament.

Amendment No 1 (recital 12)

This amendment contains three different ideas:

- The use of the right of withdrawal should be free of charge for consumers. This part of the recital corresponds to Parliament's amendment 15.
Hence the Commission proposes maintaining the first part of this amendment.
- The consumer's customary rights concerning defective products. This part of the recital corresponds to amendment 21. The Commission does not accept amendment 21 (see explanation below) and hence has not accepted this part of the recital.
- Method of calculating the periods. The point of such harmonisation is debatable.
Hence the Commission does not accept this third part of the amendment.

Amendment No 3 (new recital)

This recital introduces amendment 35.

Amendment No 4 (new recital)

This recital introduces amendment 36.

Amendment No 5 (Article 2.1)

This amendment introduces an important detail concerning the scope of the directive: the directive's provisions apply to the overall contract and not to the successive operations deriving from it.

The Commission accepts this amendment in a slightly different wording than the one in the amended proposal.

Additional comment concerning this article: the definitions of supplier are different in the English and French texts (reference to commercial capacity in the English version).

Amendment No 8 (Article 3.1, fourth indent)

This amendment abolishes the exemption provided for in the common position. Thus it reintroduces contracts concerning immovable property into the scope of the Directive.

Amendment No 9 (Article 3.2)

Parliament amended the introductory part of Article 3(2) (Articles 4 and 7.2). The idea of this amendment is that the particulars provided for in Article 4 should also be given to consumers in the case of tourist services. The Commission supports this idea. This is why a new Article 3.3 has been introduced which covers tourist services. To show clearly that there is no cooling - off period in this domain, subsection 4.1.f has also been amended.

However the Article's wording also concerns the other exemption contained in this paragraph, i.e. supplies delivered by regular roundsmen. The Commission considers that it is not possible to lay down the information requirements contained in Article 4 for this very specific form of distribution.

As regards supplies by regular roundsmen, it is proposed that the text of the common position be simplified and that the exact wording of the Directive on contracts away from business premises be used.

Amendment No 12 (Article 4.1.i)

This amendment provides for consumer information in regard to long-term contracts. The Commission accepts the amendment, but in the wording already contained in Article 5 of the common position.

Amendment No 13 (Article 5.1)

The consumer must receive "written confirmation" of the various particulars required for the proper performance of the contract. The discussions on this point show that the term "written" is not always interpreted in the same way: if a document is provided by electronic mail and stored in the memory of the consumer's PC, is this a written document? On the other hand, if this information appears on the computer screen but is not stored in memory (as is the case with the French minitel) the consumer does not have this information permanently at his disposal.

In order to eliminate this ambiguity between "written" and "paper medium", the Commission proposes inserting the notion of "durable medium" not at the end of the paragraph 1 but in the body of this paragraph.

Amendments 15, 16, 41 and 42 (Article 6.1, 6.2, 7.2)

These amendments provide that the consumer shall be granted a cooling off period of seven days calculated as working days, that he may not charged supplementary costs and that in the case of advance payments, reimbursement should be made within 30 days.

Amendment No 37 (Article 6.3 - second indent)

This amendment is a rewording of the text of the common positions.

Amendment No 24 (Article 7.3)

This amendment introduces the idea of the consumer's prior consent before receiving a substitute product. This notion of substitute product (a product which is slightly different to one ordered) is controversial.

Amendment No 29 (Article 10.2)

This amendment simplifies the text of the common position by removing the reference to "individual communications". This notion is too vague to be operative. Is a mailshot in a few million copies or a telephone call made at random an individual communication?

Amendments No 30 (Article 11.2) and 31 (Article 11.3a)

These amendments render mandatory the provisions of these two Articles: actions brought by consumer organisations at national level and the burden of proof.

Amendment No 32 (Article 13)

This amendment simplifies the common position's provision by removing a long list which would inevitably generate practical problems of application. It is wiser to stick to general principles.

Amendment No 33 (Article 15.1)

The amendment proposes reducing the time limit for transposition to two years. Since the Commission's proposal was published in 1992, six years will have elapsed (mid-1998) between publication of the proposal and its transposition.

Amendment No 35 (Article 15a)

The idea behind this amendment is to stipulate the provision of information on existing codes of practice in the domain of distance selling contracts. This amendment was already presented at the first reading and taken up by the Commission in its amended proposal. It was not accepted by Council, notably because of the wording. The Commission accepts this amendment but with a different wording, in order to clarify the distribution of roles in the dissemination of the information.

Amendment No 36 (Article 15b)

This amendment is designed to establish out-of-court systems for dispute resolution by trade and professional associations. The Commission accepts the amendment but in a different wording (it is not possible to prescribe that the "Member State shall draw up a complaints system on a self-regulatory basis.")

Amendments rejected by the Commission

- Amendment No 2 (recital 16)

This amendment states that codes of practice are of major importance in the interests of consumer protection. This grandiloquent wording adds nothing to the substance of the text of the recital, which defines the relationship between the Directive and the Recommendation.

- Amendment No 10 (Article 4.1a)

This amendment proposes adding the supplier's address to the list of particulars which must be communicated to the consumer before conclusion of the contract. The Commission had already rejected this amendment at the first reading. This requirement is very impracticable for certain technologies and, moreover, is not essential for consumers. When the consumer orders a product via his PC (using email) does he have to know the precise address of the supplier?

- Amendment No 11 (Article 4.2)

This amendment is designed to protect persons who are legally unable to give their consent. This provision is part of Belgian law and was proposed by Parliament at first reading. The Commission accepted this amendment in its amended proposal. However, Council's work showed that this provision touched an important aspect of civil law in the Member States: the capacity to conclude a contract. In application of the subsidiarity principle, the Commission considers that this matter should be left to each Member State.

- Amendment No 14 (Article 5.1 - second indent)

The purpose of Article 5.1, indent two, is to inform the consumer of the supplier's place of business to which the consumer may address any complaints. This is one item of information which the supplier must provide to the consumer. The

amendment simply indicates that this place of business must be the "most appropriate". This wording adds nothing to the article's substance and the text of the common position is clearer.

- **Amendment No 19 (Article 6.3 - fourth indent)**

This article provides that there shall be no cooling off period for audio or video recordings, disks or computer software. The amendment proposes adding CD-ROMs and CD-Is. The amendment is unacceptable for at least two reasons:

- CD-Is and CD-ROMs are compact computer disks and are therefore covered by the generic definition provided by the article
- if CD-Js or CD-Ks are invented tomorrow, they will not be covered by this exemption.

- **Amendment No 20 (Article 6.3 - fifth indent)**

This amendment proposes that the cooling off period shall not apply to books taken out of their original wrapping. It seems that book selling systems (book clubs) already allow the consumer to have a look. Hence accepting this amendment would be a step backward by comparison with existing trade practices.

- **Amendment No 21 (Article 6a new)**

The purpose of the amendment is to explain that the cooling off period applies without prejudice to the consumer's statutory rights if the product is defective or damaged. This amendment was adopted by Parliament at first reading and accepted by the Commission in its amended proposal. However the Commission does not propose taking it up again. This is because Council's work showed that this point does not concern distance contracts specifically but, rather, general rules governing the guarantee and/or after-sales services. The Council will be examining this subject in the context of the follow-up to the Green Paper on guarantees. Hence it would not be wise to address this issue at this stage.

- **Amendment No 25 (Article 7a new)**

This amendment indicates that the Member States must observe the provisions of Directive 89/552/EEC (television without frontiers). This adds nothing to the substance, since Member States are bound by all other directives as a matter of course.

- **Amendment No 40 (Article 10.1)**

This amendment concerns telephone calls. It stipulates that the professional must provide his identity and his objectives at the beginning of the telephone conversation.

By adopting this amendment, Parliament clearly indicated that it was in favour of an opt-out system (as regards telephone solicitations).

The Commission considers that it is pointless to add this amendment to the common position:

- Article 4.2 already states:
"The information referred to in paragraph 1, the commercial purpose of which must be made clear, shall be provided in a clear and comprehensible manner in any way appropriate to the means of communication at a distance used ..."
This means that in the case of telephone calls the caller must indicate his identity (Article 4(1)(a)) and the reasons for his call (Article 4(2)).
- Article 10.2 also states that telephones can only be used provided there is no clear objection from the consumer.
- The wording of this amendment (use of the term "prior consent") would only make it more difficult to understand the directive's other provisions.

Amendment No 34 (Article 15(4))

The amendment proposes that the Commission submit a report two years after the date of transposition. The Commission considers that this time limit is too short and that it would be preferable to abide by the more traditional period of three years.

Amended proposal for a

EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

on the protection of consumers in respect of distance contracts

(PRESENTED BY THE COMMISSION PURSUANT TO

ARTICLE 189a(2) OF THE EC TREATY)

Council common position

Recital 12

12. Whereas the consumer is not able in concrete terms to see the product or ascertain the service provided before concluding the contract; whereas provision should be made, where it is appropriate, for a right to withdraw from the contracts; whereas it is for the Member States to determine the other conditions and arrangements following exercise of the right of withdrawal;

Second amended proposal for the Commission

Recital 12

12. Whereas the consumer is not able in concrete terms to see the product or ascertain the service provided before concluding the contract; whereas the consumer should be offered the possibility of cancelling the contract after returning the product or service; whereas if this right is to be more than formal the costs borne by the consumer when exercising it must be limited to the charges for return;

Recital 16 a (new)

16 a. Whereas it is important, in the interests of optimum protection of consumers, that they be informed in a satisfactory manner about the provisions of this Directive and about the existence and content of codes of practice in this domain;

Recital 17a (new)

17a. Whereas it is important, in order to ensure that consumers are protected, to establish an efficient system for handling cross-border complaints;

Article 2, point 1

1) "distance contract" means any contract concerning goods or services concluded between a supplier and a consumer as a consequence of an organised distance sales or service-provision scheme of the supplier, using, for this contract, exclusively one or more means of communication at a distance up to the conclusion of the contract and including the conclusion on the contract itself;

Article 2, point 1

1) "distance contract" means any contract concerning goods or services concluded between a supplier and a consumer as a consequence of an organised distance sales or service-provision scheme of the supplier, using, for this contract, exclusively one or more means of communication at a distance up to the conclusion of the contract and including the conclusion on the contract itself; *where a contract has to be fulfilled by successive acts of performance or a series of separate operations over a period of time the provisions of this Directive shall apply only to the overall contract, when this has been negotiated at a distance.*

Article 3(1)(fourth indent)

concluded for the construction and sale of immobile property or relating to other immobile property rights, except for rental.

Article 3(2)

2. Articles 4, 5 and 6 and Article 7(1) and 2 shall not apply:

- to contracts for the supply of foodstuffs, beverages or other goods intended for current consumption supplied *to the home of the consumer, to his residence or to his workplace* by regular roundsmen.
- contracts for the provision of services with respect to accommodation, transport, catering or leisure, where the supplier undertakes, when the

Article 3(1)(fourth indent)

Deleted

Article 3(2) and (3)

2. Articles 4, 5, and 6 and Article 7(1) shall not apply:

- to contracts for the supply of foodstuffs, beverages or other goods intended for current consumption supplied by regular roundsmen.
- 3. Articles 5, 6 and Article 7(1) shall not apply to:
 - contracts for the provision of services with respect to accommodation, transport, catering or leisure, where the

contract is concluded, to provide these services at a specific date or within a specific period.

supplier undertakes, when the contract is concluded, to provide these services at a specific date or within a specific period.

Article 4(1)

1. In good time prior to the conclusion of any distance contract, the consumer shall be provided with the following information:

- a) the identity of the supplier;
- b) the main characteristics of the goods or services
- c) the price of the goods or services including all taxes;
- d) delivery costs, where appropriate;
- e) the arrangements for payment, delivery or performance;
- f) the existence of a right of withdrawal, except in the cases referred to in Article 6(3);
- g) the cost of using the means of communication at a distance where it is calculated at other than the basic rate;
- h) the period for which the offer or the price remains valid.

Article 4(1)

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- a) the identity of the supplier;
- b) the main characteristics of the goods or services
- c) the price of the goods or services including all taxes;
- d) delivery costs, where appropriate;
- e) the arrangements for payment, delivery or performance;
- f) the existence of a right of withdrawal, except in the cases referred to in *Article 3(3) and Article 6(3)*;
- g) the cost of using the means of communication at a distance where it is calculated at other than the basic rate;
- h) the period for which the offer or the price remains valid
- i) *the conditions under which the contract may be annulled when it is one of indefinite duration or of a duration of more than one year.*

Article 5(1) first sentence

1. The consumer must receive written confirmation of the information referred to in Article 4(1)(a) to (f), in good time during the performance of the contract and at the latest at the time of delivery, where goods are concerned, unless the information has already been given to the consumer prior to conclusion of the contact in writing or on another *durable medium available to him*.

Article 5(1) first sentence

1. The consumer must receive written confirmation or confirmation in another *durable medium available* to him of the information referred to in Article 4(1)(a) to (f), in good time during the performance of the contract and at the latest at the time of delivery, where goods are concerned, unless the information has already been given to the consumer prior to conclusion of the contact in writing or on another durable medium.

Article 6(1) first sentence

1. For any distance contract the consumer shall have a period of not less than seven days in which he may withdraw from the contract without penalty, without giving any reason.

Article 6(1) first sentence

1. For any distance contract shall have a period of not less than seven *working days* in which he may withdraw from the contract without penalty, without giving any reason. *The only costs payable shall be the direct return costs where appropriate.*

Article 6(1) last sentence

If the information referred to in Article 5 is supplied within this three-month period, the consumer shall from that moment have available the seven-day period referred to in the first paragraph.

Article 6(1) last sentence

If the information referred to in Article 5 is supplied within this three-month period, the consumer shall from that moment have available the seven-day *working* period referred to in the first paragraph.

Article 6(2)

2. Where the right of withdrawal has been exercised by the consumer pursuant to this Article, the supplier shall be obliged to reimburse the sums paid by the consumer. Such reimbursement must be carried out as soon as possible.

Article 6(2)

2. Where the right of withdrawal has been exercised by the consumer pursuant to this Article, the supplier shall be obliged to reimburse the sums paid by the consumer *free of charge, except for direct return charges, where appropriate*. Such reimbursement must be carried out as soon as possible and *in any case within 30 days*.

Article 6(3) second indent

– for the supply of goods or services the price of which is dependent on fluctuations in the financial market which cannot be controlled by the supplier.

Article 6(3) second indent

for transactions concerning movables and other goods or services the price of which is *influenced by the fluctuations in the financial market and/or exchange rates and/or prices derived from them which cannot be controlled by the supplier*

Article 7(2)

2. Where a supplier fails to perform his side of the contract on the grounds, that the goods or services ordered are unavailable, the consumer must be informed of this situation and must be able to obtain a refund of any sums he has paid as soon as possible.

Article 7(2)

2. Where a supplier fails to perform his side of the contract on the grounds, that the goods or services ordered are unavailable, the consumer must be informed of this situation and must be able to obtain a refund of any sums he has paid as soon as possible, *and, in any case, within 30 days*.

Article 7(3)

3. *Nevertheless Member States may lay down* that the supplier may provide the consumer with goods or services of equivalent quality and price provided this possibility was provided for prior to conclusion of the contract or when the contract was concluded or when the consumer was informed of the unavailability of his order. The cost of returning the goods following exercise of the right of withdrawal is, in this case, the liability of the supplier, and the consumer must be informed of this. In such cases the supply of goods or services may not be deemed to constitute inertia selling within the meaning of Article 9.

Article 7(3)

3. *Nevertheless, it may be stipulated* that the supplier must provide the consumer, *with his prior consent*, with goods or services of equivalent quality and price provided this possibility was provided for prior to conclusion of the contract or when the contract was concluded or when the consumer was informed of the unavailability of his order. The cost of returning the goods following exercise of the right of withdrawal is, in this case, the liability of the supplier, and the consumer must be informed of this. In such cases the supply of goods or services may not be deemed to constitute inertia selling within the meaning of Article 9.

Article 10(2)

2. Member States shall ensure that means of communication at a distance, other than those referred to in paragraph 1, *which allow individual communications* may be used only where there is no clear objection from the consumer.

Article 11(2)

2. The means referred to in paragraph 1 *may include* provisions whereby public bodies or their representatives or consumer organisations having a legitimate interest under national law in protective consumers or professional organisations having a legitimate interest may take action under national law before the courts or before the competent administrative bodies to ensure that the provisions of this Directive are applied.

Article 11(3)(a)

3. a) Member States *may stipulate* that the burden of proof concerning the existence of prior information, written confirmation or compliance with time-limits or the consumer's consent can be placed on the supplier.

Article 10(2)

2. Member States shall ensure that means of communication at a distance, other than those referred to in paragraph 1, may be used only where there is no clear objection from the consumer.

Article 11(2)

2. The means referred to in paragraph 1 *shall include* provisions whereby public bodies or their representatives or consumer organisations having a legitimate interest under national law in protective consumers or professional organisations having a legitimate interest may take action under national law before the courts or before the competent administrative bodies to ensure that the provisions of this Directive are applied.

Article 11(3)(a)

3. a) Member States *shall stipulate* that the burden of proof concerning the existence of prior information, written confirmation or compliance with time-limits or the consumer's consent can be placed on the supplier.

Article 13

1. *The provisions of this Directive shall apply in so far as there are not particular provisions in rules of Community law governing certain types of distance contracts in their entirety.*

2. *Where specific Community rules on goods or services contain provisions governing aspects concerned with:*

- information prior to conclusion of the contract,*
- written confirmation of the prior information,*
- right of withdrawal,*
- inertia selling,*
- judicial or administrative redress,*
- restrictions on the use of means of communication at a distance,*
- payment by card,*
- performance of the contract,*

such provisions shall apply solely to distance contracts in respect of the aspects covered.

Article 15(1)

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than *three* years after it enters into force. They shall forthwith inform the Commission thereof.

Article 13

1. *The provisions of this Directive shall be without prejudice to the application of specific rules to certain techniques or to certain goods or services governed by other Community rules.*

2. *Where a specific Community rules contain provisions governing only certain aspects of the marketing of goods and services, these provisions shall apply to these specific aspects of the contract.*

Article 15(1)

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than *two* years after it enters into force. They shall forthwith inform the Commission thereof.

Article 15(4)

4. No later than *six* years after the entry into force of this Directive the Commission shall submit a report to the European Parliament and to the Council on the implementation of this Directive, accompanied if appropriate by a proposal for the revision of this Directive.

Article 15(4)

4. No later than *five* years after the entry into force of this Directive the Commission shall submit a report to the European Parliament and to the Council on the implementation of this Directive, accompanied if appropriate by a proposal for the revision of this Directive.

Article 15a. (new)

Consumer information

Member States shall ensure that:

- consumers are informed of the provisions of this Directive;
- the trade and professional organisations inform consumers of the existence and content of their codes of practice.

Article 15b (new)

Complaints system

Member States shall encourage branch and professional organisations to prepare complaints systems on the basis of self-regulation.

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