

COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a
COUNCIL DIRECTIVE

on the protection of consumers in respect of contracts
negotiated at a distance (distance selling)

(presented by the Commission)



EUROPEAN UNION

DELEGATION OF THE EUROPEAN COMMISSION

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EXPLANATORY MEMORANDUM

I GENERAL SITUATION

a) Community policy background

The Community decided in 1972 to institute a specific policy for consumer protection.

The section relating to protection of consumers' economic interests in the preliminary Community programme in this field (Council Resolution of 14 April 1975) already mentioned that the consumer had to be protected "against demands for payment for unsolicited goods and against high-pressure selling methods".

The second programme (Council Resolution of 19 May 1981) incorporated the same wording, adding that a study should also be made of the economic implications for the consumer of "the use of new data-processing and telecommunications technology".

The third programme, referred to as "A New Impetus for Consumer Protection Policy" (Council Resolution of 23 June 1986) stated in section 29 that: "If the common market is to be fully effective, it must be made easier for consumers to buy goods in other countries" and indicated that the Commission would submit proposals for the new systems (videotex, television, telephone) which enable consumers to place orders with their suppliers from their homes.

The fourth Community programme, known as the "Three-year action plan 1990-1992" (COM(90)98 of 3 May 1990) states that:

"To achieve full benefit from the internal market, it is necessary that its citizens be prepared to use that market by purchasing goods and services available anywhere in it.

"Cross-frontier selling by electronic means using television and new communications technology, in addition to existing mail-order business, will stimulate demand for cross-frontier purchasing."

In the section describing the action to be taken, this fourth programme therefore includes the

"Proposal of a directive on distance selling (1990)".

The present text is such a proposal.

This problem has since been discussed in another Community text, the communication (COM(91)41 final) "Towards a single market in distribution". Section 3.2 is headed: "Providing a new set of rules for new forms of distribution without frontiers".

It is stated that:

"An area of obvious potential importance is the small but growing multinational market in distance selling based on new techniques of multilingual publishing, broadcasting and advertising".

b) The economic phenomenon

- New technologies

Selling at a distance increasingly involves the use of new technologies for soliciting custom or for obtaining the consent of the consumer.

The forms of media used in soliciting custom are as follows :

Written media

Unaddressed printed matter
Addressed printed matter
Standard letter
Press advertising
Fax

Auditory media

Telephone with human intervention
Telephone without human intervention (automatic calling machine)
Radio

Visual media

Teletext
Home computer
Minitel, Bildschirmtext

Audiovisual media

Television

Video cassette or video record reader
Picture phone (videophone)

Some of these methods, which are interactive, may be used to record orders. The most recent innovation is the telephone without a human caller: this is a speech computer which records the consumer's enquiry.

Table No 1, in Annex 1 shows the prevalence of certain technologies. Over 95% of households in the Community own a television set.

A marketing technique may involve the use of several technologies. Thus in television selling, the order is placed by computer, telephone or mail but cannot (as yet) be conveyed via the medium used to disseminate the offer. Similarly, a solicitation may make use of several media: a catalogue is often followed by a mailshot and sometimes a telephone call.

Consumers' use of the various methods of ordering is changing very quickly.

The representative of the French trade association, for example, estimates that by 1995 only 25% of orders in his country will be placed by mail.

La Redoute, the leading French distance seller, received 21 million orders in 1990. 27% were made by post; 45% by telephone and 14% by Minitel.

The attached table also shows that there are considerable differences between countries.

Percentage turnover by method of ordering in major distance-selling firms

1990	Belgium	France	Spain	Japan
Mail	89	61.8	75	39.4
Telephone	8.7	22.3	13	56.7
Minitel		9.5		
Others	2.3	6.4	12	3.9

Attention should also be drawn to the increasing importance of credit in distance selling. The attached table shows that in France more than 25% of sales involve credit. In Belgium, the figure is also 25%.

Percentage turnover on distance selling in France from cash and credit sales

	1980	1982	1984	1986	1988	1990
Cash sales	82.8	82.8	79.5	78.9	75.1	73.9
Credit sales	17.2	17.2	20.5	21.1	24.9	26.1

(Source SVPCD October 1991)

- Structure of the market :

The attached table shows the level of sales by mail-order in certain Member States. These figures are provided by the European Mail-Order Traders Association.

The firms belonging to these associations do not represent the entire market. In Belgium, for example, the Association des Entreprises de Vente à Distance (AEVD) estimates that it represents 75% of the market.

Country	Turnover 1990 (mill. ECU)	Share of trade 1990	Share of non- food trade
Germany	14 278	4.2 (1)	4.3
France	5 921	2.5	5.1
Great Britain	5 204	2.8	4.6
Italy	1 026	0.5	1.4
Sweden	1 024	2.8	4.8
Switzerland	1 021	2.6	5.0
Austria	962	3.9	-
Netherlands	823	1.6	2.7
Belgium	580	1.1	1.8
Denmark	532	2.8 (1)	4.8
Finland	460	1.5	2.5
Spain	393	0.005	-

(1) 1989

Source: EMOTA

This table shows that 80% of distance selling of products takes place in only three of the Community countries. For these three countries, this type of sale represents between 4 and 5% of all non-food trade.

The largest distance selling companies in the world are European. As can be seen from the attached table, European and American firms jostle for position in this market.

Ranking of the 13 largest mail-order firms in the world in 1990

Firm	Country	Turnover in million \$	Sector of activity
Otto Versand **	FRG	7 415	General merchandise
Quelle	FRG	6 350	General merchandise
Great Universal stores (GUS)	GB	4 685	General merchandise
Sears, Roebuck & Co	USA	4 300	General merchandise
United Automobile Association Services	USA	4 291	Insurance
J.C. Penney	USA	3 315	General merchandise
Time Warner	USA	2 784	Publishing
Tele-Communications	USA	2 602	Cable
Reader's Digest	USA	1 757	Publishing
La Redoute*	France	1 642	General merchandise
Bertelsmann*	FRG	1 600	Publishing
GEICO	USA	1 572	Insurance
Neckermann	FRG	1 484	General merchandise

* Turnover 1989

** Spiegel turnover included (American subsidiary)

Source: Marketing Logistics INC. 1990

The distance selling firms have already largely taken on a European character. An analysis of the subsidiaries (Table No 2 in Annex 1) of the Otto-Versand and La Redoute groups clearly reveals strategies of establishment throughout the entire Community. Even some of the smaller firms succeed in establishing a presence in virtually all the Member States (Yves Rocher-Damart).

In the long term, strategies of establishment by means of subsidiaries may give rise to problems of market compartmentalisation. A recent study carried out for the Consumer Policy Service showed that some firms were extremely reluctant to send their catalogues to consumers across national frontiers. It is essential to the functioning of the internal market that the consumer should be able to order from a firm outside his country even if that firm has a subsidiary in the country where the consumer is resident. However, only very large firms can pursue a policy of establishing subsidiaries in all the Member States.

c) Necessity for Community legislative action

- Position of the consumer in this type of transaction :

Marketing at a distance is typically a three-stage operation:

- . the consumer receives an offer of a product or service: a written, visual or oral description, an indication of the price and terms etc.;
- . on this basis, he places an order;
- . subsequently, he receives the product or service.

The offer has been conveyed to the consumer by a means of communication at a distance. The consumer has also used such a means of communication to make contact with the trader.

As a result of this two-fold use of remote communication, the consumer and trader are not physically in each others' presence.

The different types of sale may be summarised in the following table:

	Simultaneous presence of consumer/trader	No simultaneous presence of consumer/trader
Commercial premises	Conventional selling	Automated commercial premises
Consumer's home	Door-to-door selling	Distance selling

Some analysts have tried to break down distance selling into several sub-categories: mail-order selling based on an offer issued using a written medium, telephone selling in which all phases of the selling process are carried out by telephone, selling by television etc. Others have taken the view that the use of certain methods such as the telephone or television brings these forms of sale closer to doorstep selling than to mail-order selling.

Detailed study of the problems encountered by consumers shows that the difficulties arising from door-to-door selling are quite different from those involved in distance selling. Selling by television, for example, cannot be compared with doorstep selling, since the consumer can always switch off his set.

While mail remained the principal method of ordering, the order took several days to be conveyed. A mail-order purchase is one which is contemplated for some time beforehand, and by the time delivery is made by the postman, several weeks will have elapsed. Having regard to these delays, the time spent filling out the order form assumes little importance.

Today, purchasing at a distance is much more in the nature of an impulsive purchase, and the customers' demand for speed is much greater.

The act of purchasing is clearly instigated by the product itself and its presentation in the catalogue. However, the method of making an order must not be seen as impeding the process.

- Legislative pressure in the Member States

It is evident from an analysis of the legal provisions of the Member States with regard to contracts negotiated at a distance that there has been strong pressure since 1987 to take legislative action. 1987 was also the year that television shopping arrived in Europe.

It may be observed that the notion of "distance selling" appears for the first time in the Member States' texts in 1987. While this notion had never previously been used in any legislative instrument, it then appeared simultaneously in a Danish text (Chapter 4 of the Law of 23.12.1987) and in a French text (Decree of 3.12.1987). In the same year, Portugal adopted a general law dealing with "mail-order selling", which in fact covers all forms of distance selling.

Belgium

In August 1991, Belgium adopted a law concerning "distance selling". Its definition is very close to that used by the present proposal. It covers goods and services as well as all the means of communication at a distance. The public authorities can, by way of royal decree, take many forms of action for the purpose of its application.

Denmark

Denmark introduced legislation concerning "distance selling" in 1987. In particular, this text provided for a cooling-off period of seven days. It also prohibited telephoning the consumer without his prior consent. A law enacted in June 1990 provided for the display of prices in distance selling.

Germany

In Germany, only the use of Bildschirmtext is covered by a specific law.

On the other hand, there have been major court rulings on telephone marketing, which is prohibited. (Decisions of the Bundesgerichtshof of 1970-1989-1990). The distribution of unaddressed advertising through letterboxes is prohibited by the case law (BGH Judgment of 10.12.1988), if the consumer has made his objection known.

Greece

Greece regulated mail-order selling by a ministerial decision adopted in July 1990. This text was amended in September 1991.

Spain

No national legislation exists in Spain concerning this area, but several regions have legislated in the area of distance selling (Aragon/1989 - Galicia/1988 - Valencia/1986). There are proposals in other regions (Catalonia).

France

There is no general text on distance selling in French law, but regulatory provisions are to be found in several laws, decrees and orders. Thus all types of distance selling are regulated in different ways. (Law No 88/21 of 7.1.1988, Law No 89/421 of 23.6.1989, Law No 87/1008 of 31.12.1989). There is also a law dealing specifically with television shopping.

Ireland

No specific provision exists in Ireland for distance selling. The only relevant provision is the prohibition of inertia selling (Sale of Goods Act 1980).

Italy

The Law of 29.12.1990 implements the Community directive in the matter of door to door selling but extends its field of application to mail-order selling and particularly to sales by television. Italy is in fact the country where this form of selling is most practised. The implementing decree is still under discussion.

Luxembourg

Selling by correspondence is regulated by the Law of 25.8.1983, which provides for a cooling-off period of 15 days after receipt of the goods. Telephone marketing is prohibited by the law on door to door selling. A Grand-Ducal regulation on videotex was adopted in February 1991.

The Netherlands

No specific law on distance selling exists in the Netherlands. The New Civil Code comes into force in January 1992. Inter alia, it makes it illegal to demand more than 50 % of the purchase price of a product in advance.

Portugal

Portugal was the first Member State to legislate in general terms for all forms of distance selling : by Decree-Law No 272/87 of 3.7.1987. This text is very close to the Belgian text. It also provides that the consumer cannot be required to make any payment in advance.

United Kingdom

No legislative provision exists except for inertia selling (Unsolicited Goods and Services Acts 1971-1975). All distance selling is regulated by codes of conduct adopted under the authority of the Office of Fair Trading. There are also several other voluntary provisions relating to the protection of deposits (Mail Order Protection Scheme).

II AIMS

Marketing at a distance will be one of the areas in which the operation of the completed internal market will be most obvious and tangible to consumers.

Free movement of products is virtually complete and the consumer buys the products he finds on traders' shelves. The consumer benefits from free movement of products but is not actively engaged in the process.

Free movement of services is developing much more slowly. The general introduction of mutual recognition is a prerequisite for cross-frontier activity.

Distance selling restores the initiative in cross-frontier purchasing to the consumer. It is the consumer who, on the basis of a cross-frontier proposal, takes the initiative and approaches a firm located in a country other than his own.

Opening of the frontiers in this field means for example the opportunity for a French consumer to purchase from a German catalogue via Minitel, for a Spanish consumer to purchase by mail-order on the basis of an advertisement in the Portuguese press or for a Luxembourg consumer to make a purchase by telephone from a British teleshopping programme.

In certain trade circles, it is asserted that, of all the distribution systems, distance selling is that which can benefit most from open frontiers. The major firms active in this sector have long since understood what is at stake and their development strategy is entirely geared to all the countries in the Community.

The major innovation in this market is the widespread use of new technologies both to offer products or services and to obtain the consumer's order. Among the means used to disseminate the offer are the telephone (telephone canvassing), radio, television and home computers (Minitel, Bildschirmtext).

All the interactive technologies are used to obtain the consumer's agreement: telephone, teletext, computers, audiotext.

An analysis of the use of these new technologies shows that there is a specific form of commercial selling, distance selling, which is descended from the traditional mail-order trade. Those engaged in this sector have been very much aware of this development and several of the national trade associations have changed their names in recent years to include the idea of "distance".

There are two basic trends:

- distance selling is being used for products or services which were formerly not sold in this way (foodstuffs, services);
- more and more firms are marketing their products or services directly by these new methods.

Many Member States have reacted to this technological explosion and the relative insecurity to which it gives rise in legal terms, by enacting rules. A State-by-State analysis of the situation clearly shows that there were scarcely any legislative provisions for this field until 1987 but that the number of texts has increased sharply since. It is the Commission's job to avoid such fragmentation. The Directive therefore proposes a general framework for contracts negotiated at a distance, to be supplemented by self-regulatory measures as proposed by the Recommendation.

The first aim is to provide legal safeguards for the consumer. Today, the consumer may place an order by telephone and be answered by a "voice-response computer". The consumer is hardly aware that he is not communicating with a human being but with a machine. What kind of contract has just been concluded? With whom has the consumer made a contract? What information does the consumer receive? What proofs are there in the event of litigation? What law applies to the contract? What replaces the signature? These legal safeguards will also allow firms to develop their activities throughout the community within an homogeneous framework.

The second aim is to safeguard the consumer's right of choice. The right of choice first of all means that it must be possible not to receive certain types of solicitation of custom such as automatic telephone calls or faxes. There are various ways of establishing the consumer's right to freedom from intrusion and respect for his privacy.

The right of choice also encompasses the quality of the information the consumer receives before the transaction and while it is being carried out. The basic principle is that the use of new technologies must not lead to a reduction in the information provided.

Since the famous mail-order catalogue "Bon-Marché" was first published in 1865, certain traders have allowed the consumer the right to cancel the contract when he receives the goods. The comparative study shows that this practice is more or less generally followed throughout the Community, on a mandatory basis in seven Member States and on a voluntary basis in the other five (see Table No 3 of Annex 1).

A further aspect of the right of choice is the prohibition of inertia selling and the principle that failure of a consumer to reply to a solicitation does not constitute agreement.

The third aim is to ensure repayment to the consumer in the case of non-performance of the contract. Consumers who pay in advance for a product or service must be sure that they will recover their money if the product is not delivered or the service not rendered. The American distance selling market currently suffers from widespread fraudulent practice of this type, to such a degree that consumers in the United States have set up a league to combat fraud in telephone selling. On the European market, too, there is malpractice by a number of firms which take advantage of the fact that different regulations apply in different Member States. The risk is particularly important when the firm is difficult to identify and locate. These practices harm the consumer, but also the trade as a whole. The directive therefore includes a provision relating to certain types of payment by card. The Recommendation urges the trade to seek ways of guaranteeing consumers' deposits if advance payment is required.

III REACTIONS

The proposal which is presented is the result of several months of discussion. It has largely taken account of remarks and criticisms made in response to previous versions. Therefore all the opinions received are based on these older projects.

In April 1991, a discussion document was drawn up under the title "Discussion paper for a directive on distance selling". This text was disseminated by two channels:

- . to the trade, via the Committee on Commerce and Distribution, a consultative body which advises DG XXIII;
- . to consumers, via the Consumers' Consultative Council, which advises the Consumer Policy Service.

In the light of all the comments received, a preliminary draft proposal was drawn up in July 1991.

The Committee on Commerce and Distribution and the Consumers' Consultative Council were once again consulted.

In its opinion of 13 September 1991 relating to the discussion document distributed in April 1991, the Committee of Commerce and Distribution argued that the text should be either a recommendation or a

"(limited) framework directive, leaving sufficient room for manoeuvre for traders and their professional associations to work out self-regulatory provisions".

In its final opinion of 16th January 1992 concerning the proposal of July 1991, the CCD stated clearly that : "after careful consideration and discussion of the reasoning behind the draft proposal, the CCD is not convinced about the need for such an all embracing directive . . . and rejects the Commission's arguments" and maintains its opinion of 13th September 1991.

With regard to the Articles, several of which were criticised by the Committee, particularly the provisions concerning the guarantee fund, the national observers, the legal and administrative means of recourse, and the inclusion within the scope of the application of the directive of services such as the reservation of hotel rooms, restaurant tables and other equivalent services.

In its opinion dated the 16th January 1992, the CCD stated that it was in favour of a European code of good practice.

Numerous associations and professional organisations have made their opinions known. Among others, CECD/FEWITA/GEDIS representing the European trade note that a recommendation in the matter of distance selling is sufficient and that a directive seems premature. Moreover, the European Association of Mail order considered that the proposed Directive should be abandoned and that recommendation supplemented by self-regulatory rules would be sufficient.

On the other hand, the European Direct Selling Federation hoped for a maximum amount of harmonisation and welcomed the fact "that the Commission had drafted a text designed to protect consumers in respect of contracts negotiated at a distance".

The Eurochambres and the Comité des Associations Européennes du Commerce de Détail also stated that they were against the draft directive and that they supported CCD's opinion. Several distance selling firms also conveyed their commentaries on the draft directive, criticising several provisions of the draft.

The British "Mail Order Protection Scheme", which is an organisation set up by the advertising profession in Britain for the purpose of safeguarding advance payments, "totally supports the principle of this Directive".

In a very detailed opinion (19 pages) unanimously adopted at its plenary meeting on October 1991, the Consumers' Consultative Council gave full support to the initiative, even though it thought it inadequate in certain respects (lotteries and other promotional techniques were not covered). The opinion particularly emphasised the practical problems encountered by consumers in the conclusion and execution of contracts negotiated at a distance and stressed the existence of cross-frontier fraud.

It welcomed the broad approach of the proposal, which it described as "the only answer for a sector which is constantly changing". It supported the principle of rules applicable to all contracts negotiated at a distance, together with some specific rules applicable to certain types of contract. Finally, the opinion states that

"Experience has shown repeatedly that the adoption of non-compelling measures, such as recommendations, does not afford consumers any guarantee of compliance with the consumer protection principles they contain. Any self-regulatory initiative can only take place in the context of pre-existing regulations and it is precisely this regulatory framework that should be provided by the Directive".

The opinion of the CCC is nevertheless critical of the guarantee fund. The prohibition or restriction of payments in advance appears to it to be a formula which is more protective of consumers.

The experts from the Member States consulted at the end of August all favoured the idea of a Commission initiative in this field, but substantial differences of view emerged, since some States thought the Commission's text did not afford sufficient protection to consumers, while others thought virtually everything could be regulated by codes of good practice.

IV COMMENTARY ARTICLE BY ARTICLE (Directive and Recommendation)

The aims of these instruments (legal safeguards, financial safeguards and right of choice) were discussed in section II.

A general definition of the concept of a "contract negotiated at a distance" is given in the section on the position of the consumer in this type of transaction (Ic). In view of the range of problems arising, it would have been possible to envisage enacting a specific instrument for each means of communication (one instrument for television sales, one for Minitel-type home computers etc.) or instruments for the various types of product or service.

On further consideration, this was seen to be a fragmented approach: it is much simpler to lay down general rules for all forms of distance selling, even if adjustments are required for certain specific cases.

The Directive is therefore structured as follows:

- . Object and definitions (3 articles)
- . Rules governing solicitation (4 articles)
These are general rules applying to all types of solicitation of custom irrespective of the means of communication used.
- . Rules governing contracts (4 articles)
- . Litigation and contract law (3 articles)
- . Final provisions (2 articles)
Standard clauses common to all directives

Since this text is directly linked with the operation of the completed internal market (the internal market in distance selling), the legal basis chosen is Article 100a.

This section of the memorandum is a simple presentation of each article in turn.

Article 1: Object

This article briefly indicates the scope of the instrument. The various terms used are defined in Article 2. Preparatory acts are all the commercial techniques used to convey the solicitation of custom to the consumer. This does not include games and lotteries, although they are frequently used in distance selling, since they are not specific to this form of sale and will probably be regulated separately. Nonetheless, the Recommendation encourages the trade to develop its own rules in this field.

Article 2: Definitions

- A contract negotiated at a distance has three distinctive features, the third being a logical consequence of the first two:
 - . solicitation of custom by a means of communication at a distance;
 - . a response by the consumer using a means of communication at a distance;
 - . the fact that the trader and the consumer are not physically in each other's presence.

If a consumer receives a catalogue but goes to the supplier's premises in order to form a contract, the contract is not concluded "at a distance".

When the consumer signs a long-term contract which is performed in stages, such as subscription to a book club, only the initial contract is covered and not the operations involved in performing it.

- The definitions of the "consumer" and "supplier" are the same as in the directive on contracts negotiated away from business premises (door-to-door selling). These definitions have been validated by various judgements of the Court of Justice, the most recent being the judgement in the DI Pinto case on 14 March 1991.
- A list of the means of communication at a distance which may be used is attached as Annex 1, since a reader who has only the document published in the Official Journal must be able to find out quickly what is to be understood by a means of communication.

"Classified advertising" is not included in this list since as a general rule it concerns only relations between consumers.
- The concept of an "operator" covers television channels, newspapers, postal or telephone services.

- The "solicitation" is made by the supplier. This term has been chosen because of the differences in the meaning of the term "offer" (invitation to treat) in national law.
- The solicitation is one element of an organised selling process. With the information provided by the trader, the consumer must be able to order the product or the service at a distance. For example, a communication designed to set up a meeting or direct a consumer to a shop is not a solicitation within the meaning of this text. For a contract negotiated at a distance to arise, the response from the consumer (the order) must constitute a contractual arrangement. The range of advertising techniques used by small and medium sized enterprises to make themselves known to their consumers are not therefore solicitations within the meaning of this text.

Article 3: Exemptions

As explained in the economic analysis section, the concept of "distance selling" covers sales away from business premises. It is therefore necessary to exclude automatic vending machines located in business premises. The most common example is that of ticket machines in stations or airports. All vending machines which immediately dispense the product to consumers also give rise to a different set of problems.

It has been considered necessary to exclude certain products or services from the scope of this Directive although they may be marketed by distance selling. As a general rule, orders for made-to-measure products represent a considered decision by the consumer.

Services involving a reservation, i.e. a fixed date of performance, are a special case since the trader must make arrangements for execution on the specified date (air tickets, hotel rooms, etc.). A list is attached as Annex 2 to the Directive.

The directive concerning door-to-door sales provides for a derogation for contracts for "foodstuffs or drinks or other goods of current household consumption" (Article 3.2.b). This derogation is repeated here, and is particularly aimed towards home supplies made by small traders. It is extended to services of current consumption. The idea of this exception is to not introduce a supplementary constraint on the suppliers of services who are not obliged by their national legislation to convey to the consumer a written document containing all the indications provided for by Article 10: house maintenance (repairs), personal services (medical services, ...). This exception only of course concerns cases where there is a contract: simply making an appointment with a hairdresser or a doctor is not a contract negotiated at a distance in the sense of this text.

Article 4: Restrictions on the use of certain means of communication at a distance

As stated in recital 8 and in this Article, soliciting of custom must be carried out with due regard for the privacy of the consumer.

This constraint may take two different forms: prior consent or refusal.

Prior consent means that the consumer has given his agreement to the supplier in advance, either directly or using another means of communication.

A major retail outlet may wish to bring its special offers to the attention of its regular customers at intervals using an automatic calling machine. In such cases, on some occasion when the customer makes a purchase, the supplier will ask him to fill out a form with his telephone number indicating that he agrees to receive this sort of telephone call. If a customer should complain, the trader will have no difficulty in proving that the consumer had given his agreement.

Refusal means that it is possible for the consumer to indicate that he no longer wishes to receive certain types of solicitation. Such arrangements exist for mail: the "Mail Preference Service" in the United Kingdom or "Stop Publicité" in France. The consumer conveys his wishes to these bodies. Firms which send material by post consult these lists in order to delete the names of such consumers from their own lists. In March 1991, the representatives of five such national bodies signed an agreement with a view to placing the various systems on a Community-wide basis. The choice between "prior consent" and a "statement of refusal" will depend on the degree of nuisance or intrusion suffered by the consumer. This question of course arises only with regard to solicitations of custom on an individual basis: a consumer can always turn off his radio, change the television channel or not buy a newspaper.

Since systems for refusal already exist and are managed by the trades concerned, such an option is feasible.

Article 5: Presentation

The first two paragraphs of this Article are modeled on part of Article 2 of the Direct Marketing Code of the International Chamber of Commerce, adopted on 1 October 1991. This article, under the heading "Integrity and honesty" states that no direct marketing offer should be represented to the consumer as being a form of market research.

The requirement to indicate that the consumer must pay does not mean that the exact price must be stated. It is not possible to know the cost of a telephone call in advance. On the other hand, it is possible for the consumer to be told whether a call is free, local, long-distance, international or at an added value.

Article 6: Content of solicitations

This Article lists the details which a consumer must be given in order to make a fully informed decision to place an order. Certain media (television, computer, radio) do not enable the consumer to keep a record of the information. This Article is to be read in conjunction with Article 10, concerning information on the content of the contract.

Article 7:

This Article provides for specific rules on : "direct offers to the public for the sale, purchase or rental of products or for the provision of services in return for payment" (Directive 89/552/CEE of 3rd October 1989, Article 1.6).

This directive of 1989 provides for a general rule on the duration of broadcasts for sales by television (Article 18). On the other hand, it does not take a position on the nature of this type of broadcast : advertising or television broadcast. By reason of this fact, all of the rules concerning advertising provided for by the text do not apply to solicitations for television sales. This directive contains 2 articles relating to the protection of minors : Article 16 in the case of advertising, Article 22 in the case of broadcasts.

Article 7 chooses Article 22 in order to respect the choice of the Community legislator when it decided in 1989 not to assimilate advertising and sales by television.

Article 8: Inertia selling

Virtually all the Member States have specific provisions forbidding "inertia selling" "sending of unsolicited goods and services" etc. (See the analysis of the situation in the various Member States.) Nonetheless, such practices exist and it is therefore necessary to make the national rules more precise to ensure that the consumer can keep the product received.

In many Member States, techniques have appeared for selling products or services to the consumer on the basis of a failure to reply:

"If we receive no reply from you, we shall assume that you agree to our proposal".

In order to ensure that consent is not extorted in this way, the Article states that failure by the consumer to reply shall not constitute consent.

Article 9: Performance

This Article is intended to provide a general rule for delivery periods when these are not stipulated. The thirty-day period is customary practice in Europe. In the United States, this provision is included in the federal law on mail-order trading. The laws of the Member States determine the legal consequences of failure to comply with this rule.

Article 10: Information on the content of the contract

Until the time of performance, the transaction may have taken place without any written document.

It is therefore important that the consumer should be properly informed of his rights at the time of performance, and this is the purpose of this Article.

This information must be provided in writing. Unlike many other Community instruments, this text stipulates that the language used shall not be that of the country in which the consumer is resident but that in which his custom was solicited.

A French consumer replying to an advertisement in an English-language newspaper or a German-language teleshopping programme cannot expect to receive all the information in the language of the country in which he is resident. If the medium is disseminated outside its own language area and the consumer decides to place an order, the language rule must not be an obstacle to this type of cross-frontier contract.

Certain services can be supplied at a distance (information, banking data, ...). The consumer does not receive any written document. The invoicing is done by an intermediary of the telecommunication operator. Article 9(2) deals with this particular type of service.

Article 11: Right of withdrawal

In all Member States, there is a period for withdrawal from contracts negotiated at a distance, sometimes referred to as a "money back guarantee". In seven Member States, this period is required by law (see Table No 3 of Annex 1), while in the other five it is left to the discretion of the traders. This practice is widespread in conventional mail-order selling, but not always in the other sectors using the new technologies (television, telephone), and the practice must therefore be made the general rule. Provision must, of course, be made for the cases in which this measure cannot apply, and this is done in section 4.

Article 12: Payment by telephone

A method of payment which is increasingly used in transactions concluded at a distance is payment by quoting the number of a payment or credit card, e.g. over the telephone. (This could be referred to as "cardless payment by card".) This practice is very convenient for the consumer and should not therefore be prevented. It is also the most promising method of payment at a distance.

It is, however, necessary for clear rules to be laid down for liabilities in the event of litigation. Since this is not an electronic method of payment, it is not covered by the Recommendation of November 1988 on electronic payment systems.

The text therefore takes over a provision which is already to be found in the interbank rules of the major card payment systems: the risk of fraud is not borne by the consumer.

Article 13: Judicial or administrative redress

This Article is based on the Directive on misleading advertising (84/450/EEC). However, one point has been added, for the reasons indicated in recital 15: the possibility of cross-frontier legal action by bodies competent to take action against unfair competition or for the protection of consumers. This is the only way of putting an end to malpractice by firms which engage in no activity in their country of origin but operate by making use of the freedom to provide services. While the Brussels Convention (1968) recognises that any consumer who is the victim of malpractice may take action against a firm before the court at the place where the firm has its registered office, this does not happen, since the consumer does not have the necessary financial resources or expertise given the small amount of money at issue. The right to bring an action must therefore also be given to the representatives of consumers' interests and the interests of competitors. These are the only bodies which can act to put an end to malpractice on behalf of the small consumer or small competitor. Nevertheless, certain Member States do not allow this possibility to their associations. That is why this possibility is only available when the State from where the litigation originates (location of the firm) allows this procedure.

Article 14: Contract law

This Article is identical with Article 6 of the Directive on contracts negotiated away from business premises (85/577/EEC).

Article 15: Community rules

The purpose of this Article is to stipulate that where there is a specific instrument which gives more extensive rights to the consumer, that text will apply. For life insurance, Community legislation provides for a cooling-off period of 30 days. This Article indicates that it is the 30-day period provided for in the specific text, and not the seven-day period prescribed in the general text, that applies.

On the other hand, the instruments regulating non-life insurance do not provide for a cooling-off period. In principle, the general rule applies and the consumer is entitled to the cooling-off period mentioned in Article 10. Under paragraph 4 of that Article, however, there is no cooling-off period if the contract has to be performed immediately.

Articles 16 and 17

The usual provisions on transposition.

The Recommendation consists of four sections and an annex

The first section contains a proposal that the minimum set of basic rules represented by the Directive should be supplemented by codes of practice. The Directive lays down general rules applying to all products and services, and for all means of communication. These general rules need to be adapted, in particular to the various means of communication. This can be done by self-regulation in the form of codes of practice. The text stipulates that codes should be drawn up by "trade organisations". This will ensure a high degree of uniformity and wide application of the codes.

The second section sets out the subjects which the Commission thinks should be covered by such codes.

In the third section, the trade associations are asked to ensure proper compliance with these codes by all their members, to reinforce the credibility of this type of code.

In the fourth section, the trade associations are asked to inform the Commission of the existence and content of such codes. This does not imply that the Commission in any way endorses the various codes, but provides the Commission with information on how its Recommendation is being implemented. The Commission will afterward evaluate the impact of this step and will present if necessary new initiatives.

PREVALENCE OF TECHNOLOGIES

COUNTRY	NUMBER OF HOUSEHOLDS IN IN MILLIONS	% OF HOUSEHOLDS WITH			
		TELEVISION	VIDEO CASSETTE READER	TELETEXT INTERACTIVE OR NOT	CABLE
AUSTRIA	2.8	99	42	15	20
BELGIUM	3.9	98	46	17	86
DENMARK	2.3	96	43	30	36
FINLAND	1.9	95	52	26	35
FRANCE	21.1	96	47	19	2
GERMANY	32.8	96	47	14	31
GREECE	3.2	94	38	-	-
IRELAND	1.03	95	53	6	35
ITALY	19.1	97	25	15	-
LUXEMBOURG	0.14	98	59	9	71
NETHERLANDS	5.8	97	49	32	81
NORWAY	1.9	95	57	37	26
PORTUGAL	3.1	94	31	-	-
SPAIN	11.0	98	45	5	-
SWEDEN	3.9	97	68	39	38
SWITZERLAND	2.5	94	51	25	65
U.K.	22.1	97	67	32	2

(-: none or less than 0.5%).

Source: CIT Research 1991 (1991 figures)

reproduced from SPECTRUM, review of the "Independent Television Commission". Autumn 1991.

ANNEX 1
TABLE 2

SUBSIDIARIES OF THE FOUR LARGEST EUROPEAN GROUPS

Country	N° 1 In Europe OTTO VERSAND (FRG)	N° 2 In Europe LA REDOUTE (FR)	N° 3 In Europe QUELLE (FRG)	N° 4 In Europe GUS (GB)
Austria	Kärsten n° 3 Ohler n° 6 3 Pagen Moden Muller n° 1		Quelle n° 2	Gus n° 1
Belgium	3 Suisse n° 1 Unigro n° 4	Redoute Benelux n° 5	Quelle n° 3	
France	3 Suisse n° 2 Blanche Porte n° 4 Becquet n° 10 Vitrine Magique n° 15	La Redoute n° 1 Duscon n° 7 Maison de Valérie n° 8 Vert Baudet n° 12 Cyrillus n° 25	Quelle n° 5	
Germany	Otto n° 2 Schwab n° 6 Heine n° 9 3 Pagen n° 15		Quelle n° 1 Schöpflin n° 7 Peter Holm n° 2	
Italy	CIA n° 5 Uno Nova Helvetica n° 3			
Portugal		La Redoute n° 1		
Spain	Nenta Catalogo n° 1			
United Kingdom	Rainbow Home Shopping	Empire Stores n° 2		Gus n° 1

Source: Libre Service Actualité, 7 June 1990.

The table is to be read as follows:

Rows - the various countries with the rankings;

Columns - subsidiaries of the four largest groups.

Example: Ohler N° 6 on the Austrian market is a subsidiary of OTTO-VERSAND.

COOLING-OFF PERIOD

	NATURE		LENGTH	BASIS
	Mandatory	Voluntary		
Belgium	M		7 working days	Law of 14.7.1991 (Moniteur belge, 29.8.1991) Art. 79 @ 2
Denmark	M		7 days	Law n° 886, 23.12.1987 - Art. 11 @ 2
France	M		7 days	Law 88.21, 6.1.1988 - Art. 1
Germany		V	14 days	
Greece	M		7 working days	Law 1961/91, 3.9.1991 - Art. 31 (7 days from confirmation of order or delivery)
Ireland		V	?	
Italy		V		
Luxembourg	M		15 days	Law of 25.8.1983 - Art. 7
Netherlands		V	8 days	
Portugal	M		7 working days	Decree-Law n° 272/87, 3.7.1987 - Art. 11
Spain		V		specific provisions in certain regions
United Kingdom		V	14 days	

THE SITUATION IN THE MEMBER STATES

Belgium

A "Law on trade practices and on consumer information and protection" was published in the Moniteur Belge of 29 August 1991. The text consists of 124 Articles and will enter into force on 29 February 1992. Articles 77 to 83 form Section 9 under the heading "Distance selling".

Article 77 starts by defining distance selling :

"...Distance selling is selling which occurs without the seller and the consumer being physically in each other's presence and following an offer of sale made as part of a sales system employing a means of communication at a distance".

This definition is very general, covering both products and services and all means of communication at a distance. Nonetheless, the rules laid down in Articles 78 to 82 relate only to sales of products. Provision is made for a Royal Decree on services :

"Article 83 (1) - The king may :
...3) Determine the services or categories of service to be subject to this section".

The extent of which the provisions are to apply to services is thus left to the discretion of the government. Since the law is very recent, no implementing decree has yet been enacted in this area.

Article 78 institutes a cooling-off period of seven working days from the time of delivery and stipulates that the contract is not complete until this period has expired. Seven days must therefore elapse after delivery before the contract is concluded. This is perhaps the most distinctive feature of Belgian law, since it gives the consumer a great deal of latitude: as long as the contract has not been concluded, the consumer can cancel the purchase at any time.

Similarly, since the contract has not been concluded, no deposit or payment of any kind may be demanded of the consumer. This point was discussed at length during the preparatory work, since the initial text prohibited the accepting of advance payments. This prohibition has been relaxed to the extent that payments may be collected by the postman on delivery. Under Belgian law, the trader thus cannot require advance payment or even the payment of a deposit. The consumer is not obliged to pay until seven days after receipt of the goods.

Article 79 (1) deals with the content of the "distance selling offer". Paragraph 2 lists the information to be contained in the document supplied to the consumer at the time of delivery. There are special provisions for the withdrawal clause, which must be printed:

"In bold characters in a box separate from the text on the front of the first page".

If this clause is not complied with, the case is regarded as one in which the goods or services are unsolicited, i.e. a case of "inertia selling". The consumer is "not obliged to pay for the product supplied, nor to return it".

Article 80 states that the burden of proof in disputes is to be borne by the seller, and such proof may not consist of presumptive evidence.

Article 81 seeks to regulate a number of practical problems :

- . If the seller cannot supply the product within the agreed period he must inform the consumer in writing before the period has expired.
- . Products are always sent at the seller's risk.
- . If the consumer withdraws from the contract, no costs or compensation may be demanded except for any costs of collection or return. However, in certain cases (late delivery, lack of information, product not in conformity with the description), such costs may have to be borne by the seller.

Article 76 of the same law on trade practices deals with "inertia selling". The wording of the text is as follows :

Section 8
Inertia selling
Article 76

"It is forbidden to supply any product to a person without prior request and to ask him to purchase this product against payment of its price or alternatively to return it to the sender, even free of charge.

"It is also forbidden to render any service to a person without prior request and to ask him to accept this service against payment of its price.

"The Minister may grant exemptions from these prohibitions for offers made for charitable purposes. The number of the authorisation granted and a statement to the effect that "The recipient is under no obligation either to pay for the goods or to return them" must be legibly, conspicuously and unambiguously marked on the documents relating to the offer.

"In no event shall the addressee be obliged to pay for the service rendered or the product sent nor to return the product sent, even if it has been stated that tacit acceptance of the service or purchase will be assumed."

There are no rules for canvassing by telephone, fax or other means. It should merely be mentioned that the law on doorstep canvassing applies even if the caller has obtained the consumer's agreement in advance by an "offer to call made by telephone".

The question of television selling has been investigated and the Conseil national de la Consommation has rendered an opinion. Under Article 83 of the section on distance selling in the trade practices law, the public authorities can, if they so wish, issue a decree regulating this type of sale.

Denmark

The regulations relating to distance selling in Denmark are laid down in the amended Consumer Contract Act, which is published as the Lovbekendtgørelse n° 886 dated 23 December 1987, and which deals with the regulation of doorstep selling, distance selling and the continuous provision of services, and Bekendtgørelse n° 887, concerning the provision of information on the right to cancel contracts concluded away from business premises. Neither of these instruments is available in an authorised translation. The translations made for the purposes of this review thus have no official standing.

Fundamental principle of the Danish Act

The Danish legislation is based on the fundamental principle that a trader may not, without prior request, contact a consumer in person or by telephone at his residence, place of work, or other place not accessible to the general public, for the purpose of obtaining, immediately or at a later date, an offer or acceptance with a view to the conclusion of a contract, see § 2, subsection 1.

The effect of breaching the principle is that the consumer is not bound by the contract, §3.

Effective protection against receiving unsolicited goods is provided by § 4, which stipulates that where a supplier sends or delivers a product to a consumer without his prior request and where this is not due to an error, the consumer may keep the product free of charge.

There are some exceptions in subsection 2 to the principle laid down in § 2, subsection 1. There is no prohibition on the making of unsolicited offers in person or by telephone regarding the ordering of books, subscriptions to newspapers, magazines and periodicals and the taking out of an insurance policy or subscriptions to rescue or ambulance services. It is also permitted to peddle certain natural products.

The Consumer Contract Act was amended for the purpose of implementing Council Directive 85/577/EEC, and Chapter 4 of the Act, which related to the right to cancel mail-order contracts, was also amended. This amendment was proposed by certain opposition parties. The amendment which was included under this Chapter of the Act refers to offers made and contracts concluded by means of electronic media devices. The regulations were also expanded to cover orders made as a result of lawful contacts by telephone. With this background in mind, the term "mail-order selling" was changed to "distance selling". In the well respected Danish Law Commentary : Karnovs Lovsamling, 12th edition, p 3754, note n° 102, relating to the term "distance selling" states that "electronic media data" should be taken to include tele-tv, teledata and cable services etc.

The right of cancellation in relation to distance selling contracts

Chapter 4, § 10, subsection 1, sentence 1, of the Consumer Contract Act regulates a consumer's right to renounce a contract for goods ordered on the basis of a catalogue or an advertisement, in circumstances where the supplier has offered to deliver the goods which were ordered by the consumer by telephone, letter or other method in writing.

The provisions relating to distance selling also apply if the supplier has, without previous request, contacted the consumer by telephone and the consumer has, during or as a result of this call, ordered goods, or taken out a subscription or insurance policy, see § 10, subsection 1, sentence 2.

The scope of the regulations is restricted to the above situations. Subsection 2 provides that the consumer has the right to renounce the contract in accordance with the specific regulations in §§ 11-13.

Exceptions to the right to cancel

According to §10, subsection 3, the right to cancel does not apply to the purchase of

1. goods which are manufactured or tailored to the individual needs of the purchaser, and
2. foodstuffs or other goods for consumption in the household.

Execution of the right to cancel

In § 11, first subsection, it is stated when, how and against whom the purchaser of goods may invoke this right to cancel the contract. The general rule is that the purchaser may within one week of receipt of the goods, or the first batch of the goods, cancel the contract by returning the goods to the supplier. § 11, subsection 1, also provides for some exceptions to this general rule, see also § 17.

Subsection 2 lays down certain conditions relating to the condition and quantity of the goods at the time they are returned to the supplier, which must be complied with by the purchaser in order for him to maintain his right of cancellation. Subsection 3 relates to circumstances where the seller is obliged to return payment, if any, to the purchaser once the latter has cancelled the contract. Subsection 4 states that costs relating to the return of the goods lie with the purchaser.

§ 12 states when, how and to whom the purchaser must notify a cancellation of a contract in circumstances where the supplier has accepted responsibility for collecting the goods. It is provided that special regulations (some of them stemming from Chapter 3 of the Act relating to contracts concluded away from a trader's business premises) apply to these situations.

§ 12(a) stipulates when the consumer is entitled to cancel in a situation where he takes out a subscription or an insurance policy, see § 10, subsection 1, sentence 2. The general rule is that the consumer may, within one week from receipt of the conditions of insurance, the subscription contract or the first delivery, cancel the contract, see also § 17. It is also provided that special regulations (stemming from Chapter 3 of the Act relating to contracts concluded away from a trader's business premises) apply to these situations.

Obligation of the trader to provide information regarding the right to cancel

§ 13, first subsection, provides that the supplier must, at the time of the delivery of the goods to the purchaser, give clear information in writing on the right to cancel the contract. Subsection 2 provides in relation to the taking out of a subscription or an insurance policy that within three days at the latest after receiving an order by telephone, the supplier must send written confirmation of the contract to the purchaser which must include clear information on the right of cancellation.

Subsection 3 provides that if the abovementioned items of information are not given in accordance with subsections 1 and 2 the consumer is not bound by the contract. Subsection 4 empowers the Minister of Justice to make regulations relating to the form and content of the information. This power has been exercised by the issuing of the aforementioned Bekendtgørelse n° 887, which lays down the technical aspects of when and how the information relating to the cancellation of the contract should be given by the supplier to the consumer. § 1, §§ 4-9 and Annexes 3-6 (prescribing the texts to be used by the supplier in different types of distance selling contracts) are particularly relevant in this regard.

§ 16 of the Act states that the foregoing rules cannot be deviated from in a manner which would be detrimental to the consumer's interests.

§ 9 of the Bekendtgørelse should also be referred to in this regard. (Note : this paragraph contains a typographical error resulting in the omission of § 6 of the Bekendtgørelse as the text mentions only § 1-5.)

Federal Republic of Germany

Distance selling does not yet form a legal category under German law and the term thus has no particular meaning.

In practice four areas are of major concern to consumers:

- The mail-order business
- Unsolicited sending of goods and advertising
- Bildschirmtext (BTX) and
- Teleshopping

The mail-order business is well established. It is built into the civil law system and benefits from consumer protection rules on the clauses of consumer credit contracts. A voluntary right to return the products within 14 days compensates for the lack of a mandatory cooling-off period.

Advertising law:

Unsolicited sending of goods and advertising is an endless source of consumer complaints and litigation. Here questions on the applicability of the German advertising law arise. Criminal law may come into play in cases where the firms operate outside Germany, although usually in vain.

No special rules in this area are laid down in German law, so solutions have to be found in civil law rules and rules on unfair marketing practices. The sending of unsolicited goods is unlawful in principle. There is an exception only if two prerequisites are fulfilled. The first is that the addressee is informed that he has no duty to send the goods back, and secondly, that the goods only have an insignificant value.

With regard to direct mail advertising, the Jurisprudence is based on the general clauses of the act prohibiting unfair competition (UWG). By virtue of this, the courts are in a position to deal with social changes without the intervention of the legislator.

There are two general clauses enacted in the UWG:

- s.1: the "major" general clause, which prohibits unfair practices and,
- s.3: the "minor" general clauses, prohibiting misleading advertising.

However, the UWG can only be invoked by the firms and organisations concerned. In 1965, the scope was extended to consumer organisations and businesses which have the right to seek injunctions.

As mentioned above, the application of the UWG means the application of the case law based on the general clauses of the UWG.

In one case concerning direct mail advertising, the Bundesgerichtshof (Federal High Court) made a decision in which it took a very critical approach with regard to mailbox advertising. Mailbox advertising is unlawful when a person fixes a label to his letterbox which reads that he wishes to receive no advertisements or leaflets, and that those failing to respect his wishes will be prosecuted.

The BGH gave the claimant in this case the right to seek an injunction against a firm whose distributors had engaged in direct mailbox advertising despite a label on the mailbox to the contrary. Whilst it was, however, considered that such case law would not be applicable to the distribution of mass advertising by the postal service, the situation has also changed in this respect since 1 July 1991. The new "General conditions of supply of service" of Deutsche Bundespost, adopted under an act amending the Poststrukturgesetz, provide that the postal service will henceforth respect "opting-out labels" on mailboxes.

According to the Federal High Court (BGH) in the Telefonwerbung cases I-III (Telefonwerbung I, BGH 19/6/1970 NJW 1970, 1738/Telefonwerbung II, BGH 8/6/1989 NJW 1989, 2820/Telefonwerbung III, 8/4/1989 NJW 1990, 359) it is quite clear that advertising by telephone is unlawful, because it is considered to be unfair competition if it is made without the prior consent of the recipient of the telephone call.

The decision was based on the general right to privacy. The stricter approach taken for telephone advertising rather than for mailbox advertising is justified by the fact that printed matter can be thrown away without being read, whereas a telephone advertisement must at least be partially heard, before the person called is able to decide whether he wishes to continue the telephone call or not. This is the basis of the decisions: the freedom to make one's own decision and not the extent to which one takes note of a particular advertisement.

Bildschirmtext (BTX):

The most important new technique of distance selling in Germany is BTX, because it permits direct communication between the contracting parties in contrast with teleshopping, where the consumer must use the telephone or write a letter.

In the field of BTX, a new piece of legislation has been enacted, the Staatsvertrag für Bildschirmtext (18 March 1983, revised version 1991).

With regard to the applicability of the Staatsvertrag a distinction must be made between mass communication and individual communication. Mass communication is mainly subject to the Staatsvertrag. Individual communication is subject to the rules of German civil law. So long as an individual supplier and an individual consumer have not entered into contractual negotiations, all the rules of the BTX-Staatsvertrag apply, which means that the supplier is obliged to indicate his name and address on the screen, to show whether he is merely supplying information or advertising, and to clearly state at which point in time the consumer is entering into individual communication for which he must pay (Article 5).

The Staatsvertrag obliges suppliers from outside Germany to indicate in their title the name and the address of a BTX-agent. This BTX-agent must however be domiciled in the Federal Republic of Germany. The Staatsvertrag therefore puts the BTX-agent on an equal footing with the supplier. This is an approach which could place the BTX-agent in a difficult situation if he is held responsible for a service which the supplier has provided from abroad.

This obligation to be domiciled in the Federal Republic does however create difficulties under EC law, because under EC law, a supplier is given a right to choose whether he wants to make use of his right of establishment and settle in another Member State, or whether he relies on his freedom to provide services, and supplies his service from outside the Federal Republic (Article 59 EEC Treaty).

The German Staatsvertrag regulates the conditions under which a supplier of services has access to television facilities. The Staatsvertrag is of importance for distance selling because it lays down rules on the admissibility of advertising which must be observed by the suppliers. The principle of separation between broadcasting and advertising is laid down in section 8 of the Staatsvertrag. It is also part of the federal law on unfair competition (case law based on section 1 UWG).

In one case concerning BTX, it arose that a provision in the Staatsvertrag, under which advertising had to be labelled "W" did not apply to the electronic mailbox.

A user had to actually see the advertisement on the screen, before he was able to decide whether he wished to take note of it or not. This situation has since changed. An advertisement can now be deleted, without first being seen on the screen. Under these circumstances it is doubtful whether advertising in a BTX system still constitutes unfair competition. To use the "delete" button of a computer is the technical equivalent of throwing away paper.

Therefore in principle, the filling of an electronic mailbox with advertising may be lawful where the user is able to block his electronic mailbox from advertising (the equivalent of a label on a mailbox).

Teleshopping

Similar problems with regard to access to television facilities for BTX arose when teleshopping was introduced as a method of distance selling. A decision had to be made as to whether the television set could be and should be used as a marketing instrument.

Teleshopping is not yet subject to new legislation. It is regulated by the existing telecommunications law, thereby widening the meaning of the term "broadcasting" in the context of Article 5 of the German Basic Law.

Article 5 covers the information element of broadcasting but does not cover teleshopping. Similarly, information reports have the benefit of constitutional protection whereas advertising does not. In practice, the constitution has been interpreted in a manner which adapts Article 5 to the needs of the broadcasting stations.

With regard to limits on the freedom to broadcast, the question arises whether teleshopping can be regarded as a permitted form of broadcasting. Advertising and information broadcasting must be kept separate.

Teleshopping should therefore bear a label which makes it easy to distinguish it from other broadcasting services.

The Länder have not pursued this path. They treat teleshopping as a permitted programme form and place it within the concept of advertising. The limits on the extent of permitted shopping are taken from the relevant Länder legislation, the Federal legislation (section 1 UWG), the Staatsvertrag and the EEC Directive.

The following rules apply: "Advertising must be kept separate from the rest of the programme and must be identified by way of an acoustical signal and an optic label. Advertising must not exert influence on the rest of the programme, only block advertising is allowed and it may constitute no more than 20% of the daily broadcasting time".

Exceptions to the rules are provided for where particular broadcasting services are sponsored. In practice, however, labelling has not proved to be very efficient (a solution could be to devote a specific channel to teleshopping in order to exclude any overlapping with permitted broadcasting).

However, as currently practised, teleshopping creates problems because it violates the principles of separation by mixing editorial and advertising elements.

Legal aspects of distance selling

The crucial element to be noted with regard to new communication techniques using the television screen as a medium between a seller and a purchaser lies in its transformation as a marketing instrument.

The consumer has to rely on the statements presented to him by the supplier to advertise the product. However, the presentation of the product is generally interpreted as an "invitatio ad offerendum" i.e. an invitation to treat which does not bind the supplier.

With regard to the conclusion of the contract, different problems arise where both parties are not present at the same time. The moment of receipt is important because from that moment the offer becomes effective and it also defines the deadline in respect of which the consumer may be entitled to withdraw his offer. Therefore, as long as the offer has not reached the supplier, the consumer has an opportunity to withdraw.

The Landgericht Bielefeld in 1990 insisted that the supplier of standard contract terms is under a legal obligation to inform the consumer of the costs of the product or service he wishes to order. This decision has given rise to the criticism that it was excessive to require a supplier to give full information on the costs in his standard contract terms. A recent amendment of the Staatsvertrag follows the interpretation made by the Landgericht.

A further question of liability arises where a consumer telephones the number on the screen and engages in direct telephone contact with the broadcasting station which is working on behalf of the supplier. If such a person leads the consumer to believe that he is authorised to give competent information concerning the product but in fact is not, the supplier will be bound to the consumer on the basis of what has been negotiated between the consumer and the broadcasting station.

Another delicate question is whether the broadcasting station can be held liable in the case of the supplier being declared bankrupt or suchlike.

German law contains the right to withdraw from doorstep selling contracts. There has been some discussion on the applicability of this law to the new techniques of communication. An extension of the doorstep selling law in this respect was rejected in a parliamentary debate, because the law was deemed to regard legal transactions concluded by phone as less dangerous for consumers.

Mail-order firms and the teleshopping industry have conferred on consumers a voluntary 14 days' right to withdraw from contracts. However, this has been found not to work very well in practice. The situation could only be clarified by a statutory obligation, as in Austria, where a seven-day cooling-off period is under consideration.

Greece

The principal form of distance selling currently practised in Greece is mail-order by advertisement and direct marketing. No form of teleshopping exists in Greece as yet, but a public videotex system will shortly commence operating.

Greece transposed the Community Directive concerning contracts negotiated away from business premises into domestic law by Ministerial Decision F159 of 16 July 1990, which included some provisions on distance selling, and which has now been repealed and replaced by Law No 1961/91 dated 2 September 1991. This law is of horizontal effect, providing for the general protection of consumers' interests, and represents the first legislative attempt to provide such general protection in Greece.

The text of the Ministerial Decision concerning contracts negotiated away from business premises and contracts negotiated at a distance has been repeated in the new Law of 1991 in an amended form. Chapter 6 of the Law deals with such agreements concluded "outside the trading place" specifically in Article 31:

"In the case that a contract has been concluded from a distance (by correspondence, telephone, telegram or in another way) the supplier is also obliged to compile the documents provided for in Article 29 and send them together with the contract renunciation form to the consumer. The renunciation time-limit provided for in Article 30 runs from the time the consumer has received the document".

The documents referred to in Article 29 are as follows:

- a) a copy of the contract, which must contain the full name, trading name and address of the supplier (a box number is insufficient); the date and place of contracting; a description of the goods; delivery and payment terms; the rate of real interest and maximum interest (where applicable); the tax registration number of the supplier, and
- b) a specimen contract renunciation form.

In addition, Article 29 provides that any such contract which fails to inform the consumer of his right to renounce a contract is rendered invalid.

The text also provides that the provisions of the Chapter do not apply to a contract the price of which does not exceed 12 000 drachmas (53 ecus), nor to contracts relating to property, the supply of food or other goods for current domestic consumption which are frequently or regularly supplied.

Article 30 reinforces the right to renounce the contract within the cooling-off period and provides that such right may be exercised by sending notice to the supplier within 10 working days from receipt of the contract unless a longer period is provided for.

It may be observed that the new Law does not make any provision with regard to the sending of unsolicited goods, although there had been an implicit provision in the previous Ministerial Decision to the effect that if the goods were sent to the consumer without previous request, the contract would be "declared in favour of the consumer", indicating that he need not pay the price. There are also no provisions in the law regarding the sending of unsolicited mail and the right of refusal, nor for a mail-order bonding scheme. There are no mailing or telephone preference services operating in Greece at present.

Spain

Since the Constitution was adopted in 1978, the division of legislative powers between the State and the Autonomous Regions has given rise to a great deal of discussion and case law.

In the field of consumer protection in respect of distance selling, the situation is roughly as follows.

- When a region has enacted legislation, that legislation applies to the extent that it is in conformity with the national legal provisions.
- When a region has no specific legislation, national legislation applies.

It is therefore necessary to study both the regional and the national legislation.

Spain consists of 17 regions (15 mainland regions plus the Canary and Balearic Islands).

- Six regions have specific legislation for consumer protection, and of these four use the expression "distance selling".

The definitions given in these four laws are of interest:

Aragon

Article 31 of the Law of 5 October 1989 regulating commercial activity (Law No 9/1989) gives the following definition:

"Distance selling transactions are those in which the offer is made by the seller to the buyer using any means of communication, the buyer being asked to place his order at a distance, using the same or another means of communication, and in general terms all types of sale which do not involve the presence of the buyer and seller."

Article 32 - Among the provisions for distance selling is the requirement that offers must be clear and complete, containing at least

- information making it possible to identify the firm making the offer;
- a description of the product or service offered;
- the prices and terms of payment;
- the guarantees, time limits for dispatch, and any costs to be borne by the consumer.

Catalonia

Article 11 of the preliminary draft law regulating domestic trade, published in July 1991, is worded as follows:

"Distance selling means all sorts of commercial retail selling accomplished by an order initially conveyed between two persons by any means of communication without their being physically in each other's presence, or by any means of social communication and electronic transmission which indicates how consumers should place their orders".

Article 12 - All distance selling offers must contain the following information in a clear and unambiguous form.

-
- b) The product or service offered must be described in quantitative and qualitative terms, as must the mode of use, so that it can be easily identified.
 - c) The total price to be paid must be in conformity with Article 8 of this law, the expenditure must be shown separately from the costs of carriage, if these are borne by the consumer, and the refund arrangements must be indicated.
- ...
- d) The cooling-off period within which the consumer may return the product and recover the deposit he has paid must not be less than seven days.

Article 13

.....

13.2 - The sale of a product or the rendering of a service which has not been previously requested by the consumer or user is prohibited in all circumstances.

Galicia

Article 32 of the Law of 20 July 1988 regulating commercial activities (Law No 10/88) defines distance selling as follows:

"Distance selling means all forms of retail selling in which the trader offers consumers an opportunity to place orders by mail, telephone or any other means of graphic or audiovisual communication for products offered for sale in catalogues, magazines, periodicals, newspapers or other means of communication."

Valencia

Distance selling is defined by Article 23(1) of the Law of 29 December 1986 regulating trade and commercial establishments:

"For the purposes of this Law, distance selling means the system of distribution consisting in offering products for sale by mail and asking the consumer to order by mail, telephone or another means of communication."

Section 4 of the same Article states that:

"Products or samples may not be sent for commercial purposes to the home of any person who is not a trader without proof of a request by that person. If items are so sent, the recipient shall be under no obligation to pay for, keep or return them."

At national level, there is a business ethics code for distance selling.

It includes the following provisions:

Chapter IV: arrangements for performance of orders

"In order to ensure maximum customer satisfaction with the manner in which their orders are fulfilled, firms must comply with the following rules:

"4.5 Return and refund:

....

"Conditions for the return of the ordered items for exchange or refund must be stated in the offer and in the delivery order showing the standard terms of sale or by all other means convenient to the firm."

France

The concept of a "contract negotiated at a distance" entered French law by virtue of a Ministerial Order of 3 December 1987 on price information for the consumer.

Article 14 of this text is worded as follows:

Article 14

"The price of any product or service proposed to the consumer using a means of communication at a distance must be precisely indicated to the consumer, by any means admissible as proof, before the contract is concluded.

"Means of communication at a distance within the meaning of this Order are all means enabling the consumer to order a product or request a service while at a place other than those in which customers are normally received.

"Means of communication at a distance include, in particular, electronic data transmission, telephone, video transmission, mail and the distribution of printed matter."

Distance selling is regulated by Law No 88-21 of 6 January 1988. This text was originally concerned with television selling but also contains general provisions applying to all distance selling.

The trade association of mail-order and distance selling traders (SVPCD) has drawn up a "code of practice" setting out the main ethical rules by which firms engaging in this type of distributive trade are expected to be guided.

I Contract formation

The concept of distance is difficult to define. The distance referred to in the Law of 6 January 1988 is geographical distance, and telephone selling is thus included.

1. The catalogue

The catalogue must be written in French even if it relates only to foreign products (Article 1 of the Law of 31 December 1975 on the use of the French language).

It must contain a description of the product and a definition of the nature of the contract. The price must be stated before the contract is concluded (Order of 3 December 1987 on the provision of price information to the consumer). If the firm offers a discount, both prices must be indicated. For credit sales, the offer must comply with Law No 78-22 of 10 January 1978.

The catalogue must also state what stocks are available.

2. Inertia selling

Inertia selling is prohibited. The consumer must keep the object with a view to returning it, but is not obliged to send it back (Article R 40-12 of the Penal Code).

The text is worded as follows:

Article R.40

"The following shall be punished by imprisonment for a period of ten days to one month and a fine of FF 1 200 to FF 3 000 or by one of these penalties only:

"..... 12 (Decree No 61-138 of 9 February 1961, Article 1)
'Persons who, without any prior request from the addressee, have sent him any object accompanied by an intimation that he may accept it on payment of a stipulated price or return it to the sender, even if the object can be returned without cost to the addressee'".

3. Telephone canvassing

Telephone canvassing is regulated by Article 1-II of the Law of 23 June 1989. It is incorporated as Article 2 bis into Law No 72-1137 of 22 December 1972 (on consumer protection in respect of canvassing and doorstep selling).

This article is worded as follows.

Article 2 bis
(Law No 89-421 of 23 June 1989, Article 1-II)

"Following an approach by telephone or by any comparable technical means, the trader must provide the consumer with confirmation of the offer made. The consumer shall not be bound except by his signature. He then benefits from Articles 1 and 3, paragraph 1, of Law No 88-21 of 6 January 1988 on the operations consisting of television advertising with an offer of sale and known as 'teleshopping'".

Any firm using this technique must send the consumer confirmation of the offer it has made him.

4. Mail

There is no legislation regulating the distribution of advertising material via letterboxes. The consumer may use the "Stop publicité" system: to do so, he need only write to the trade association of mail-order and distance selling traders. He can also ask the post and telecommunications service to remove his name from the lists derived from the telephone directories which are marketed by France Telecom. He will then be placed on a suppression list - the "orange list".

5. Advertising by fax

The same type of list exists for fax and is known as the "saffron list". This list is provided for by Article 10 of Law No 89-1008 of 31 December 1989.

This text contains the following provisions:

Article 10

"Natural or legal persons may indicate that they do not wish to be canvassed by telex or fax by having their names placed on a public register of persons who are unwilling to receive such communications. Inscription in this register shall be free of charge.

"Arrangements for the organisation and operation of the register mentioned in the preceding paragraph and for the penalties for failure to comply with this Article shall be laid down by decree".

6. Teleshopping (television selling)

In French law, the expression "teleshopping" (téléachat) is used for selling by television.

France is the only Community country to have a special law in this area: Law No 88-21 of 6 January 1988. Article 2 of this Law relates specifically to teleshopping and stipulates:

"In the month following enactment of this Law, the Conseil Supérieur de l'Audiovisuel shall make rules for the scheduling, by the radio and television broadcasting services authorised under the terms of Law No 86-1067 of 30 September 1986 on freedom of communication, of broadcasts wholly or partly devoted to the presentation or promotion of objects, products or services offered directly for sale."

The scheduling rules were therefore laid down by a decision of the independent audiovisual media authority on 4 February 1988. These rules apply to television broadcast by radio waves. Although broadcast by radio waves, the channel CANAL + is not covered by these regulations but is covered by the Law. Programmes of this type are prohibited on the two public channels (A2 and FR3).

The minimum length of such a programme is 15 minutes, the maximum duration being 90 minutes per week. The programmes must be broadcast within specified times (between 8.30 and 11.30 a.m. and at night, once the channel's other programmes have ended).

Article 2

"Teleshopping programmes on television services distributed by terrestrial broadcasting or satellite shall last not less than 15 minutes and in total shall not exceed 90 minutes per week. They may be broadcast only between 8.30 and 11.30 a.m. or at night after the end of the other programmes of the channel, and may not be broadcast on Sundays."

The programme presentation and content are also regulated (special announcement, no interruption by advertising spots).

Article 4

"Teleshopping programmes shall be clearly announced as such and, on television, shall be programmed in dedicated screens, without any possibility of interruption, in particular by advertising screens. They shall be so presented that they cannot be confused with other programmes and may not be the subject of trailers or preparatory programmes."

Teleshopping practice differs from catalogue selling in that the make and name of the manufacturer may not be mentioned on the air. At most, they may be indicated on the contract.

Article 7

"The make, the name of the manufacturer or distributor of an object or product and the name of the party rendering a service offered for sale shall not be shown, mentioned or indicated on the airwaves or be advertised or published in connection with the programme by any other means. The make, if appropriate, shall be stated at the time of the order, as must the name of the manufacturer or the distributor providing the guarantee."

Infringement of any of these rules is punished by a fine of between FF 6 000 and FF 500 000.

Article 3-II (Law of 6 January 1988)

"II. Any de jure or de facto manager of a radio or television service as defined in Article 2 of this Law who schedules a programme infringing the rules made pursuant to this same Article and has it broadcast or distributed shall incur a fine of FF 6 000 to FF 500 000."

7. Automatic calling machines

New regulations for this means of communication are under consideration.

The working party of the Conseil National de la Consommation has delivered an opinion and made recommendations on automatic calling machines (on 15 March 1990). The recommendations are as follows.

"Conclusion

"The Working Party, being aware of

- the need to follow closely the development of these systems;
- the immediate European environment and the discrepancies in the regulations applying within it;
- the limitations of self-regulatory measures, which cannot be applied to potential 'cowboys',

recommends that the Government should devise regulatory measures in this area with the aim of:

- giving the consumer a right of refusal;
- imposing a strict framework on the use of such techniques: content of the messages, identification, liability etc.;
- encouraging self-regulatory measures to fill out the details of this framework.

"It also urges the Government to promote discussion of these matters at Community level."

The texts were submitted for opinion to the members of the CNC at its plenary meeting on 3 July 1990 and were unanimously approved by both sections.

8. Selling by Minitel

Selling by Minitel is covered by Article 43 of the Law of 30 September 1986, which instituted a system of prior announcement.

Article 43

"The requirement for prior announcement applies to the following:

... Advertising material distributed by the services mentioned in this Article must be presented as such.

"The service supplier is required to make known to the users:

1. The items mentioned in Article 37 of this Law
2. The rates applying if there a charge for the service

...."

Section V.2 of the Circular of 17 February 1988 (implementing Article 43 of the Law) regulates Minitel sales advertising:

"Under the terms of Article 43 of the Law of 30 September 1986, advertising material shall be presented as such, i.e. announced by a visual or audible signal.

"It shall comply with the laws, regulations and trade practices applying."

Apart from this text, there is no specific regulation of selling by Minitel.

II Performance of the contract

A distinction must be made between the order and the obligations of the parties.

A The order

The order pertains both to contract formation and to contract performance. The contract is formed on the date of the order.

If the order is sent by post, the relevant date is that on which the consumer posts it.

If the order is placed by telephone or by electronic data transmission, the sale is concluded at the moment of the call.

If the customer hands in the order at a catalogue station, the relevant date is the date on which he does so.

The order form must contain certain information, especially with regard to price. It must indicate whether or not the delivery costs are included in the price.

If the consumer is a minor, the order form must be signed by his legal guardian.

Once the sale has been concluded, obligations arise for the parties.

B Obligations

1. Seller's obligations

The seller must deliver an object which corresponds to that ordered by the customer. If the object does not correspond to the order, the consumer may demand a new delivery, an exchange or cancellation of the order and the refund of any moneys paid.

The seller must deliver the object ordered within a reasonable period. If delivery does not take place in good time, the buyer may avail himself of Article 1610 of the Civil Code:

Article 1610

"If the seller fails to deliver within the time agreed between the parties, the purchaser may, at his own discretion, apply for rescission of the sale or an order for possession, if the delay is caused solely by the seller."

A court ruling of 13 December 1973 introduced the concept of a "reasonable period" within which delivery must take place (civ 3e, 10 avril: Bull III, n 274, p. 198).

In the event of non-delivery, the seller must reimburse the buyer if stocks are exhausted. If the package was dispatched but not delivered, he must provide proof that this is the case and send a second package if he cannot provide such proof.

The seller must respect the buyer's right to return the goods. Article 1 of the Law of 6 January 1988 grants the buyer the right to return goods within seven clear days.

Article 1

"In all distance selling transactions, the buyer of a product shall have a period of seven clear days from delivery of the order within which he may return the product to the seller for exchange or reimbursement, without incurring any penalty other than the cost of return."

Any seller who refuses a buyer this right incurs a fine, which is laid down in Article 1 of Decree No 88-539 of 5 May 1988.

2. Buyer's obligations

The buyer must take delivery of the item and pay for it. Payment may be made at different times. The buyer has a choice of various modes of payment.

The two modes which give rise to problems are payment "cash on delivery" (he may be obliged to pay for the entire order when he has received only part) and payment by credit or debit card (risk of theft, use of the number without the owner's consent, in which case the seller must reimburse the customer).

The customer may also pay by cheque or charge card, in which case he does not benefit from the seven-day period prescribed by the instrument on consumer credit.

The place of contract formation is regulated by Article 46 of the Civil Procedures Code.

It is either the place of delivery or the buyer's place of residence.

Ireland

The practice of distance selling operates in Ireland on a significantly lesser scale than in the United Kingdom and there are no methods of distance selling existing in Ireland which do not exist in the United Kingdom. There is also a great deal of similarity between Irish and British law, particularly in the area of contract law, which is the area most central to distance selling. Little legislation has been enacted on contract law and the rules and principles which comprise and shape contract law in Ireland do not in the main radically differ from those developed by the English Judiciary at Common Law. There are the same judge-made requirements as to formation of contract, notice and other such rules on interpretation of ambiguous clauses as exist in the law of the United Kingdom, together with the acceptance of the doctrine of fundamental breach.

Substantive rules as a means of protecting consumers are now contained in three pieces of legislation, the Consumer Information Act 1978, Sale of Goods Act 1980 and the Data Protection Act 1988, each of which mirrors similar legislative provisions in the United Kingdom.

The 1980 Act contains the only provision in Irish law which relates specifically to distance selling. Section 47 of Part VI of the Act deals with the subject of the sending of unsolicited goods, or "inertia selling", and essentially states that a person who receives such goods may keep them without payment in the following circumstances :

- a) at the end of six months, provided the consumer has not unreasonably prevented the supplier from collecting them (during this period the consumer should not use the goods and should take reasonable care of them); or
- b) 30 days after the consumer gives written notice to the sender of the fact that goods are unsolicited, the name and address of the consumer and the place where the goods can be collected.

It may be an offence to demand payment for unsolicited goods in such a way as to imply that the sender has a right to payment. It is also an offence to threaten legal action or other dire consequences without reasonable cause.

The 1980 Act also lays down certain mandatory provisions relating to consumer transactions and defines the fairness and reasonableness of contract terms by reference to certain criteria in the Act's schedule.

The Consumer Information Act 1978 provides protection for consumers against deceptive sales practices and renders it an offence of strict liability to apply a false trade description to any goods. The Act also contains a general clause prohibiting advertisements in relation to the supply or provision of goods, services or facilities in the course of or for the purposes of a trade, profession or business if it is likely to mislead and thereby cause loss, damage or injury to members of the public to a material degree.

The 1978 Act also established the Office of Director of Consumer Affairs, who has certain supervisory, informative and enforcement responsibilities in respect of both the 1978 Act and the 1980 Act. The Director may take action by way of prosecution or otherwise in respect of contracts which infringe the legislative rules. Consumers will now have a more effective means of enforcing their legislative rights under a new small claims courts system recently established by the Courts Acts 1991 on the lines of that operating in the United Kingdom, albeit on a pilot scheme basis for the time being.

The Data Protection Act 1988, giving effect to the Council of Europe Data Protection Convention, is very similar in scheme to that of the 1984 UK legislation. The Act gives a right to every individual irrespective of nationality or residence to establish the existence of personal data, to have access to any such data relating to him and to ensure that the data kept are collected fairly, are accurate and up-to-date, are kept for lawful purposes and are not used or disclosed in any manner incompatible with those purposes.

The Act also requires both data controllers and processors to protect the data they keep, and imposes on them a special duty of care in relation to the data subjects. For the purposes of the Act, the word data means information in a form in which it can be processed automatically, and applies to data regarding an individual only and not a corporation. The Act does not extend to personal information kept on manual files but does apply to information kept on every kind of computer.

The Act establishes the office of Data Protection Commissioner, who is appointed by the Government and whose essential function is to supervise and monitor the working of the Act. The Irish Act opts for a system of selective registration under which only certain selected categories of persons have to register. The particulars to be included in the register include the purposes for which the personal data is kept or used, description of the data and the persons to whom the data may be disclosed.

As regards specific provisions in the legislation relating to distance selling, the following points should be noted:

- 1) In the definitions, direct marketing is defined as including direct mailing.
- 2) In relation to subject rights, an individual has the right to have his details removed on written request from a direct marketing list within 40 days.
There is no mailing preference service available in Ireland as yet, but such a service is being actively considered by the industry.
- 3) In relation to registration, those whose business consists wholly or mainly of direct marketing are among those who have to register their particulars in the public register described above.

The Irish Act envisages self-regulation through the development of sectoral codes of practice and there is provision in the Act for such codes to be given the force of law. No such codes have yet been adopted but the Data Protection Commissioner has selected direct marketing as one of two sectors for initial attention in this regard and has had a number of preliminary meetings with the Irish Direct Marketing Association to discuss the possibility of their adopting such a code of practice in their sector.

Italy

The Law of 29 December ("Community Law 1990"), passed by the Parliament in order to clear "the backlog in the implementation of Community law" from which Italy still suffers, provided for powers to be delegated to the government to implement a large number of Directives within a year by means of "decreti delegati" (ministerial orders).

In the field of consumer protection, Article 41 is concerned with implementation of Directive 84/450/EEC (misleading advertising) and Article 42 provides for an order implementing Council Directive 85/577/EEC, stipulating that this order is to regulate not only contracts negotiated away from business premises but also certain forms of distance selling ("selling by television or other means of audiovisual communication").

With a view to exercising these delegated powers, the government has prepared a preliminary draft order, which was discussed at a meeting with the trade and consumer organisations on 13 June 1991. The purpose of this preliminary draft, as formulated in Article 1, is to regulate contracts negotiated away from business premises and mail-order sales, but Article 8 provides that:

"The right of withdrawal shall also apply to sales by television or by other means of audiovisual communication, including sales by means of data processing and electronic data transmission systems". (Doorstep selling and certain forms of distance selling are thus dealt with together in the same text.) This right obtains for a period of seven days (Article 5).

The concern of the Italian Parliament and government is all the more understandable since there has been an upsurge in selling by television in Italy, which is unmatched in any other European country. There are several hundred commercial television stations, most of which are small stations with a local audience, operating entirely without supervision. (This "Wild West" was not brought under control and a full inventory ordered until Law No 233 - the "MAMMI Law" - was enacted on 9 August 1990. The inventory should be complete by the end of 1991, but the rules do not include any provisions for television selling.)

There has so far been no follow-up to the Government's preliminary draft: there is thus no specific regulation at present for distance selling. The provisions applying are therefore those of the Civil Code and case law. They may be outlined as follows.

1. Definitions

The Civil Code does not refer to the "consumer" but only to the "buyer". However, the difference between a purchase made in the course of an occupational activity and a purchase made for a use unconnected with such activity may be very important in court rulings when the point at issue is the application of the rules of good faith in the negotiation (Article 1337), the interpretation (Article 1336) and the performance (Article 1375) of contracts.

The "contract negotiated at a distance" is also undefined, even though distance may be important as a source (or contributory cause) of factual error, thereby rendering the contract void under certain conditions (Articles 1427 et seq.).

2. Solicitation

With regard to soliciting for the sale of securities, Law No 216 of 7 June 1974 (which set up the National Stock Exchange Supervisory Commission - CONSOB) and Law No 77 of 23 March 1983 (which introduced investment trusts to Italy) provided for rules governing all "public solicitation for saving" (including advertising).

All contract solicitation is covered by Article 1337 of the Civil Code, which is worded as follows:

"During the negotiation and formation of the contract, the contracting parties must act in good faith". (This "pre-contractual" responsibility may give rise to liability for damages and interest.)

On the other hand, there are no rules in the Civil Code to safeguard the consumer's privacy against solicitation by telephone or by means of data transmission systems, and Article 660 of the Penal Code, which creates an offence of "Molestie Telefoniche" (creating a nuisance by telephone) could apply only in extreme cases.

3. Right of withdrawal

With regard to the sale of securities, Article 18 of Law No 216/1974 stipulates that:

"The validity of contracts signed as a result of canvassing is suspended for a period of five days. During this period, the consumer, without incurring any penalty, may intimate by telegram that he is withdrawing from the contract."

For any other sale, there is the possibility of "annullamento" or "risoluzione" (voidance or rescission), but there is no right of "ripensamento" (withdrawal). Under Article 1427 of the Civil Code, the buyer may ask for a contract which has already been concluded to be declared void if there has been an "essential" error: according to Article 1428 (sections 2 and 3) errors are "essential" if they concern the quality of the object to which the contract relates or the identity or status of the seller (these are conditions which may well be satisfied in distance selling). It should be emphasised that, in this connection, Article 1431 refers to contract "circumstances" and to the "status of the contracting parties" as a basis for establishing whether the seller could be "aware of the error". Court rulings may thus attach great importance to the (non-occupational) "status" of the buyer/consumer and to the place where the contract was concluded (distance selling) in order to establish that the error was an essential one and that the seller could be aware of it.

It should also be mentioned that, given the lack of legislative rules, certain trade bodies have established voluntary supervision systems.

- The AIDIM (Italian Direct Marketing Association) has established a "Code" for telemarketing.
- The ANVED (Italian Distance Selling Association) has drawn up a "Code of business ethics for distance and mail-order selling", infringement of which may in theory lead to expulsion (following a decision by a disciplinary board). This Code also provides for a right of withdrawal, within a period of seven days from receipt of the product.
- The IAP (Self-Regulatory Advertising Standards Institute) includes in its "Self-regulating code for the advertising industry" specific rules requiring fuller information (Article 18) for advertising in connection with mail-order selling and prohibits all advertising in connection with the sending of unsolicited goods (Article 19). The "Codes" and supervisory procedures of the trade bodies are obviously binding in civil law on their members only.

Luxembourg

Luxembourg law contains one legislative provision concerning distance selling. This is Article 7 of the Law of 25 August 1983 on legal protection of the consumer, and is worded as follows:

"Article 7 - In contracts concluded by correspondence between a supplier who is a trader and a final consumer who is a private individual, the latter may, within seven days of the order or the commitment to purchase and within fifteen days of receipt of the goods, withdraw from the contract by means of a registered letter with a form for advice of receipt. Any clause in the contract by virtue of which the customer renounces his right of withdrawal shall be null and void.

"In the event of any dispute with regard to the date of order or commitment to purchase or of the date of receipt of the goods, the burden of proof shall be borne by the supplier/trader".

The distinctive feature of the Luxembourg legislation is the institution of two periods for withdrawal from the contract:

- . 7 days from the order or commitment to purchase;
- . 15 days from receipt of the goods.

This withdrawal must be notified in writing by means of a registered letter with a form for advice of receipt. Under Luxembourg law, the contract is formed when the consumer returns the order form, but the sale is finalised when the second cooling-off period has expired.

The text also states that any contract clause which would have the effect of invalidating the right to withdrawal, even with the consumer's consent, is null.

Finally, the text reverses the burden of proof in all matters concerning the dates of the order, the commitment to purchase or receipt of the goods.

When this bill was under discussion, the government was considering a system of administrative authorisation of traders seeking orders by correspondence. This proposal has been dropped.

Canvassing by telephone is prohibited, but the manner in which this prohibition is imposed is somewhat indirect. Article 8 of the Law of 5 March 1970 on hawking states that:

"It is prohibited to solicit retail or wholesale orders from persons who do not trade in goods ...".

Solicitation by telephone, and apparently also the use of fax to approach consumers, are not permitted.

"Article 14-1 - Contracts concluded in contravention of this Law are null. However, only a final consumer who is a private individual may avail himself of this provision."

It may thus be deduced that a contract concluded as a result of a telephone call (solicitation) from the trader may be rendered void if the consumer so requests.

Article 16 nonetheless lays down penal sanctions for infringement of Article 8 (one to seven days' imprisonment and a fine of Lfrs 2 000 to Lfrs 30 000).

The Law of 25 August 1983 does not define the terms "contracts concluded by correspondence" (Article 7) and "contracts concluded by home canvassing" (Article 8). It may be deduced that a contract concluded by a call made on the trader's initiative is covered by Article 8 and a contract concluded by a call made at the consumer's initiative is covered by Article 7.

Luxembourg law has no provisions for inertia selling.

The Law of 27 November 1986 "regulating certain trade practices and penalties for unfair competition" includes provisions which make it possible to bring actions against unfair advertising and render all intermediaries involved in its dissemination responsible. Article 18 reads as follows:

"Article 18 - All commercial advertising promoting an act which is to be regarded as an act of unfair competition within the meaning of this Law is prohibited.

"Only the advertiser may be held responsible for this infringement.

"However, if the latter is not domiciled in the Grand Duchy, the injunction proceedings may also be brought against the publisher, printer or distributor of the disputed material and against any person who contributes to its effects."

Luxembourg also has detailed regulations on videotex (Grand-Ducal Regulation of 29 October 1986 on the public videotex service) dating from 8 November 1986. This text also covers electronic mailboxes. In this context, it is possible to establish "closed groups of users" (Article 5.3). Article 5.3.32 states that "before including a user in his closed group or groups, the supplier must, however, have obtained that user's explicit consent".

The Netherlands

I Selling by telephone (telemarketing)

There are no specific legal provisions with regard to distance selling by telephone in the Netherlands.

The industry itself, however, has adopted a code concerning telemarketing, the so-called "Telemarketing Code". This code contains rules regarding the use of telephones, protecting consumers against misleading information provided over the telephone. For example:

"The person who initiates the phonecall must introduce himself and say on whose behalf he is calling. He must also mention the reason for the conversation.

"When the call is not convenient for the consumer at that particular time, the conversation must be ended immediately.

"Information about the goods and services offered by phone has to be clear and exact and the consumer has to be informed of his rights and obligations.

"The agreement made over the telephone has to be confirmed in writing and the consumer has the right to cancel the transaction within seven days after the receipt of the confirmation."

Companies which belong to the Dutch "Postorderbond" are bound by their membership to the rules of the "Telemarketing Code".

Telemarketing is a "booming business" in the Netherlands. Last year (1990) total sales in telemarketing reached a level of 2.2 billion Dutch guilders.

Selling by telefax is not yet practised on a large scale. Selling between business and consumer is rare, mainly because most consumers do not own a telefax. In business to business communication the use of telefax is growing. However, there have been complaints about the misuse of the telefax, especially concerning unsolicited junkmail.

II Selling by videotex (videoshopping)

In the Netherlands there have been some experiments with videotex. Since 1980 it has been possible to shop from home.

The best-known system is Videotex Nederland (Videotex NL). It was established in 1988. It is the first large-scale open videotex system which is operational all over the Netherlands. It has been established to function as an umbrella organization for all videotex systems in the future and is therefore partly financed by the Dutch Department of Economic Affairs. In March 1991 the total number of consultations was 411 000, four times as many as in March 1990.

There is also no specific legislation concerning videoshopping in the Netherlands, probably because it has so far not taken place on a very large scale, and in practice there has therefore been no demand for legislation as yet.

The Dutch "Postorderbond", however, has developed a code concerning advertising by way of videotex. This code contains a rule which guarantees that the consumer has the right to return the goods within seven days after the transaction without any further obligations.

III Selling by television

The "Mediawet 1987" is the law concerning radio and television programmes. Some of its rules concern advertisement on TV (Dutch advertising code). For example: "The advertisements may not take longer than 5% of the total transmission time. Commercials must be recognisable and separated from the other programmes. They may not interrupt a programme and are prohibited on Sundays".

The national broadcasters are not allowed to send out commercials, only the "Stichting Etherreclame", a separate legal person, has this right.

Cable suppliers are not allowed to send out commercials which do not comply with the above-mentioned conditions, unless the messages are not specifically meant for the Dutch public.

Neither the "Stichting Etherreclame" nor the cable suppliers can be held responsible for delivery or quality of the products.

The "Direct Marketing Institute" in the Netherlands expects television selling to become an important selling tool over the next years.

IV Selling by mail

Nowadays consumers can use all kinds of new media to order goods from a mail-order company, for example telephone, personal computer, etc., but also by way of direct response advertising by mail, which means that the advertisement is published in the paper and the consumer can call a telephone number or send back a coupon. Another form is "direct mail", i.e. all mail that tries to attract the attention of the addressees.

In Holland there are about 350 mail-order houses. Most of them still use the catalogue but a few houses have introduced new ordering systems such as automatic voice-response computers or videotex services. Most distance selling transactions concern non-food sales, however at present about 15 000 to 20 000 households in the Netherlands buy foodstuffs at a distance and this figure is expected to rise quickly in the coming years as well as the volume of direct response advertising by mail and direct mail.

V Legal aspects and distance selling in summary

At present, no specific legal provisions are available with regard to distance selling in the Netherlands. In principle, the existing rules for legal transactions and sales contracts based on the more classical form of sale are applicable to distance selling methods.

Rules of Dutch contract law are laid down in Books 3 and 6, Title 5 of the New Civil Code, which will replace the old books of the Civil Code on 1 January 1992.

Consensus between the contracting parties is essential for a contract, which has to be declared in a written, verbal or electronic way. The contract is concluded once the offerer acknowledges the acceptance, or could reasonably have acknowledged the acceptance.

Legal conditions for the establishment of a valid contract under Dutch law are:

- having the capacity to conclude a contract
- a defined subject
- a lawful case
- consensus between the contracting parties.

When dealing with distance selling it is not always easy to determine whether these conditions are fulfilled.

Selling by telephone, television, videotex or mail-order means that an agreement is made between seller and consumer to deliver goods or to render a service.

The distinctive features of most distance selling methods are that the transaction is paperless and that the parties are not physically present during the process of concluding the contract. Nevertheless, the contract can be agreed upon and legally exists, according to the rules of contracting law, without parties being physically in each other's presence.

The consumer, having less knowledge of a product or service, is entitled to be correctly informed about the contents of the product or service.

The new section of the New Civil Code seeks to protect the consumer, as the weaker party in the process of contracting. The provisions cover matters such as delivery, price, risk and time and place of delivery. In consumer sales, the risk will transfer from the seller to the consumer at the moment of delivery "de facto".

Article 26 of the New Civil Code contains a provision about payment in advance. Normally the payment has to be made at the time and place of delivery. In consumer transactions there can be a request for payment in advance. This however can never be more than 50% of the total price of any goods. The Netherlands is the only Member State which has such a provision in its Civil Code.

A derogation in standard terms which is disadvantageous for the consumer is regarded as unfair and can be annulled. There is also a list of standard terms which are definitely regarded as unfair to the consumer (black list) and a list of terms presumed to be unfair (grey list).

Another form of protection of the consumer concerns unsolicited goods. A consumer who receives these goods has the right to keep them or to return the goods at the expense of the seller.

It is very difficult for a consumer to prove that, for example, the wrong quantity of goods has been delivered. Similarly, the problem of proving that the product has not been delivered is not an easy one to solve.

To determine who bears the burden of proof, Dutch law applies the principle: "The party who asserts a fact has to prove it" (Article 177 of the Code of Civil Procedure [RV]). This provision, however, also allows the judge the option of disregarding this rule. If its effects are unfair, parties are in principle free to stipulate who bears the burden of proof. For the consumer who uses distance selling methods, it means that he will have the burden of proof when he disputes a delivery which was not ordered, unless the supplier and the consumer have agreed otherwise, which will not often be the case.

The fact that the consumer as contracting party has no influence at all on the outcome of the electronic transaction makes it even more difficult to provide evidence. He may actually be right, but since he bears the burden of proof, he may be unable to produce the required evidence and may therefore fail in his legal action.

In January 1992, rules on consumer sales (Section 7.5 of the New Civil Code) and general conditions laid down in the NCC will give the consumer some means of protection. Articles 6: 236-238 (black and grey list) are only applicable to contracts with the consumer as contracting party. These provisions were specifically drawn up to give the consumer more protection. In some cases the Supreme Court has already pre-empted these articles by applying Section 6.5.3.

General rules on misleading advertising are set out in the New Civil Code, which is adjusted to the restrictions and prohibitions laid down in the minimum EEC Directive on misleading advertising, which gives a minimum standard of protection. Member States are entitled to have a higher standard of consumer protection in their national legislation.

Selling by telephone is not regulated under Dutch law. In order to protect the consumer against aggressive sales methods the law on door-to-door sales came into force in 1975. On 3 July 1989 this law was changed due to the obligations laid down in the EEC Directive on contracts negotiated away from business premises. One of the essential elements of this law is the fact that the agreement concluded between both parties has to be in writing and that each party has to receive a copy. If this condition is not fulfilled, the contract will not be valid.

The consumer is also entitled to a cooling-off period of eight days in which he can decide whether or not to undo the bargain.

During the adjustments to the directive, selling by telephone was not included in the rules. The legislator thought that the pressure put on the consumer to buy goods or services in the case of selling by telephone was less than for door-to-door sales. The telemarketing industry, however, has developed a code of conduct for telephone contracts.

In order to control the use of personal data and its registration, movement and storage, the Privacy Act (Wet Persoons Registratie) came into being in the Netherlands in 1990. It gives the individual the right to inspect and correct the data registered about him and the right to know to which persons or organisations data are given. It is forbidden to make use of this data for purposes other than that for which they were registered. Control of the proper implementation of the Act is the responsibility of an independent institute, the "Registratiekamer" (Registration Chamber).

Portugal

Portugal appears to have been the first Member State of the Community to introduce general regulations for all forms of distance selling. The basic text on protection of Portuguese consumers is Law No 29/81 of 22 August 1981.

An instrument implementing this text has been enacted: Decree-Law No 272/87 of 3 July 1987 on doorstep selling (Chapter I), mail-order selling (Chapter II) and inertia selling (Chapter III).

1. Mail-order selling

Chapter II of the Decree covers not only mail-order selling but also all forms of distance selling.

This Chapter consists of five articles with the following content.

1) Definition

Article 8 of the Decree seeks both to define distance selling and to delimit the scope of the instrument.

The first paragraph of the text is worth reproducing in full.

Article 8

Definition and scope

"1. For the purposes of this text, mail-order selling means the mode of retail distribution in which the consumer is offered the facility of placing an order by post, telephone or any other means of communication for goods or services presented in catalogues, magazines, newspapers, printed matter or via any other graphic or audiovisual media."

2) Content of the offer

Article 9 emphasises the need for the offer to be clear and to contain certain items.

It contains a list of items which it is mandatory to include in the offer made to the consumer.

Article 9

Content of the offer

"1. Offers for mail-order sales shall be clear, complete and so worded that there can be no doubt as to the nature, characteristics and price of the goods or services or about the terms of payment.

"2. In accordance with the foregoing paragraph, the offer shall include:

- a) a description of the goods or services, indicating those characteristics which are necessary to enable them to be fully identified;
- b) the price of the goods or services and the mode and terms of payment;
- c) any other charge to be borne by the consumer;
- d) the period within which the goods will be dispatched or performance of the service begun, from the date of receipt by the seller of the consumer's request;
- e) the guarantee and after-sales service arrangements, when justified by the nature of the goods;

f) the name, address and details permitting identification of the selling firm and an indication of the place to which the consumer may address orders or requests for information; indication of a post-office box alone or any other indication which does not allow the seller or his representatives to be immediately located is not permitted.

"3. For the purposes of the foregoing paragraphs, general advertising which does not include any specific proposal for the purchase of goods or the rendering of a service is not regarded as an offer of sale."

3) Form and content of the contract

Article 10 requires the seller to give the consumer a document containing the items mentioned in Article 9 (section 1). This document is not required when the order form is an integral part of the medium used for the sales offer (section 2). The contract must be in writing when the sum to be paid is Esc 9 000 or more (section 3). This figure was increased to Esc 20 000 (i.e. 115 ecus) by an Order of 20 June 1991.

Article 10

Form, content and value of the contract

"1. Once the consumer has notified the seller of his acceptance of the offer, the latter shall, either before or at the time of dispatch of the goods or rendering of the service, provide him with a document containing the items mentioned in the foregoing Article. These items must correspond with the terms of the initial offer.

"2. The document mentioned in the preceding paragraph is not required when the order form is an integral part of the medium used for the sales offer.

"3. In mail-order sales, contracts in the sum of Esc 20 000 or more shall always be made in writing."

4) Withdrawal from the contract and obligation to provide information

This right and obligation are regulated in Articles 11 and 12. Article 11 gives the consumer the right to withdraw from the contract subject to certain conditions.

Article 11

Right to withdraw from the contract and obligation to provide information

"1. The consumer may withdraw from the contract within seven working days following receipt of the goods.

- "2. Before conclusion of the contract, the consumer must be informed in writing by the other contracting party of the right mentioned in the preceding paragraph.
- "3. The time limit mentioned in paragraph 1 may be extended by agreement between the parties.
- "4. Mail-order sales are subject to the provisions of Article 4 (4) to the effect that the right to withdraw from the contract cannot be renounced and that the exercise of this right may not give rise to penalties, and to the provisions of Article 6 stating that advance payment may not be demanded and stipulating the nature of any such payment."

Article 4

- "4. Clauses by which the right stipulated in the preceding paragraph are renounced shall be void, as shall clauses providing for indemnities or penalties of whatever nature in the event of the consumer's exercising his rights."

Article 4 (4) makes it virtually impossible for the buyer to renounce this right.

Article 6

Advance payment

- "1. No payment may be demanded from the consumer before receipt of the goods or performance of the service.
- "2. Any sum paid by the consumer before expiry of the periods mentioned in Article 4 is regarded as proof of the contract and as an instalment on the agreed price."

Article 12

Mode of withdrawal from the contract

"Subject to agreement between the parties as to the mode and consequences of exercising the right to withdraw from the contract, the provisions of Article 5 apply, mutatis mutandis, to mail-order sales."

II. Inertia selling

Two articles of the Decree regulate this type of practice.

- 1) Article 14 defines and prohibits inertia selling.

Article 14

Definition and prohibition of inertia selling

- "1. Trade practices in which a consumer's failure to reply to an offer or proposal made to him are considered as tacit acceptance may not be used to promote retail distribution of goods or services.

"2. The consumer shall in no case incur any obligation as a result of the practices mentioned in the preceding paragraph even if the offers or proposals expressly stated that failure to respond within a certain time would be regarded as tacit acceptance."

- 2) Article 15 is concerned with non-solicited goods. A consumer who receives a product which he has not ordered or requested may keep it free of charge.
If he returns it, he is entitled to reimbursement of the costs of doing so.

Article 15

Unsolicited goods

"1. Without prejudice to Article 62 of Decree-Law No 28/84 of 20 January 1984, the addressee receiving a product which has not been requested or ordered or which does not represent the performance of some valid contract is not required to return it or pay for it but may keep it free of charge.

"2. If, notwithstanding the provisions of the preceding paragraph, the addressee returns the product, he is entitled to reimbursement of the return costs within 30 working days of his doing so."

United Kingdom

Current distance selling practices in the United Kingdom reflect an increasingly large proportion of sales of goods and services taking place at a distance. Whilst traditional distance selling techniques such as mail-order remain popular, the industry is taking advantage of modern technology to develop new selling methods, and the use of videotex and teleshopping is becoming more prevalent. It is of interest to note that the turnover of the catalogue mail-order trade constitutes more than 3 % of the total retail trade in the UK. It is also relevant to note that the growth of distance selling transactions has been encouraged by the increased availability of credit cards and debit cards.

Legal regulation of distance selling transactions in the UK consists in the main of the basic principles of English contract law at common law. Consumer transactions are also generally subject to legislative rules particularly in the area of consumer credit and financial services, but the notable feature of the current regulation of distance selling is the amount of "soft" law in the form of self-regulatory codes of practice which dominate this field. The matter is further complicated by the large number of organisations involved in the self-regulatory process.

An important point to note in respect of these codes of practice is that some are issued subject to specific statutory authority and have the force of law, although most of them are non-binding, but may well be referred to by the courts as representing good practice. Many of the codes have been introduced in co-operation with the Director-General for Fair Trading, who has a duty under the Fair Trading Act 1973 to encourage trade associations to prepare and disseminate codes of practice. Part 3 of the 1973 Act gives the Director-General of Fair Trading a general power to act against any person carrying on business who persists in conduct detrimental to the interests of, or is unfair to, consumers. The Director-General has powers of investigation, and may seek assurances from businesses that they will refrain from the conduct giving rise to the complaints, and he may ultimately bring proceedings in the restrictive practices court or in the county court, as may be required. The traders' associations operating codes of practice which were drawn up in consultation with the Office of Fair Trading will generally report to the Director-General on an annual basis on the operation and effectiveness of the codes.

Consumer distance selling contracts at common law require for their validity the basic components of offer, acceptance, consideration and intention of the parties to contract. Advertisements by distant sellers are in fact classified as invitations to treat, which invite offers. When a consumer places an order, he is making an offer to the supplier who, in the context of distance selling techniques, usually accepts the offer by the act of dispatching the goods. The terms of the contract are normally agreed between the parties but there are some terms implied by Statute. The Sale of Goods Act 1979 implies conditions into consumer contracts that the seller has the right to sell the goods; that the goods must, if they are sold by description, correspond with that description; that the goods are merchantable and fit for the purpose as is reasonable to expect having regard to their description and circumstances of the case; that the goods must be reasonably fit for a required purpose which had been made known to the seller; and that where goods are sold by sample, they must correspond with that sample.

Goods can only be rejected by the consumer after delivery if any of the aforementioned conditions have been broken or if there is an express right to do so in the contract. The Code of Practice of the Mail-Order Traders' Association recommends its members to supply goods on approval for 14 days, and in general, consumers are given the benefit of this recommendation subject to their returning the goods undamaged.

The Consumer Credit Act 1974 provides for a five-day cooling-off period in respect of consumer credit agreements and the Consumer Protection (cancellation of contracts concluded away from business premises) Regulations 1987 provides for a seven-day cooling-off period for other contracts but only where the contract was preceded by oral representations made in the debtor's presence, thus not applying to "pure" distance sales.

The Unfair Contract Terms Act 1977 restricts the effectiveness of contract terms which seek to exclude or limit liability for breach of contract or negligence. Liability for personal injury or death caused by negligence can never be excluded and liability for other loss similarly caused can only be excluded if it is reasonable to do so. A supplier who deals under standard written contract terms is not entitled to restrict or exclude liability for breach of terms, for example, by changing the mode of performance of the contract in a distance sales transaction.

Advertising as an important feature of distance selling is regulated both by legislation and codes of practice. The Trade Descriptions Act 1968 renders it an offence of strict liability in the course of a trade or business to apply a materially false trade description to goods. The Consumer Protection Act 1987 prohibits misleading price indications in advertisements and requires consumers to be provided with the aggregate sum required to be paid by them including all ancillary charges.

Codes of Practice in this area such as the British Code of Advertising Practice 1988 contain a general rule that advertisements should be legal, decent, honest and truthful as well as non-exploitative of consumers' lack of knowledge and experience. The British Code of Sales Promotion Practice 1990 applies the same rule to promotional goods.

The consumer is required to be given accurate details of price, quality, and terms of business, as well as facilities to enquire and inspect goods.

Direct marketing by mail and telephone are two particularly common methods of distance selling in the UK. The Unsolicited Goods & Services Acts 1971 and 1975 provide that a person who receives unsolicited goods can treat them as an unconditional gift at the expiration of six months from their receipt when the seller has made no attempt to retrieve them, or when a period of 30 days has expired from the date on which the consumer notified the supplier that they are unsolicited goods. It is a criminal offence to demand payment for such goods. The relevant codes of practice require mailing lists to be accurate, up-to-date, and

confidential. A mailing preference service exists whereby members of the public can submit personal applications indicating their wish to be included or excluded from current mailing lists. This "MPS Consumer File" is maintained and applied by members of the service to all consumer lists. Those persons who wish to have their names excluded are placed on a suppression list as opposed to having their names deleted entirely.

There is little provision in UK law regulating the marketing of goods and services through unsolicited telephone calls except in the area of the financial services industry. Under § 56 Financial Services Act 1986, there are restrictions amounting in effect to a ban on cold calling whether by telephone or personal visit. Investment agreements made as a result of such solicitations are rendered unenforceable, but there are exceptions to the rule. The Branch Systems General Licence Conditions under which private telephone systems operate in the UK provide that a subscriber must comply with a written request from a person who wishes not to receive further marketing calls.

No telephone preference service as yet exists but it is being actively considered by the industry at present. The direct marketing industry's codes of practice have provisions regarding telephone marketing to the effect that calls should be honestly made and within reasonable hours, that no high pressure sales tactics should be used nor should solicitation occur under the guise of a survey or research. The identity of the caller and purpose of the call should be made clear and a seven-day cooling-off period should apply to oral contracts formed in this manner. The recipient of the call should be entitled to terminate the call at any point.

The issue of payments in distance sales transactions has also been the subject of self-regulatory control. In the UK, there has been a considerable increase in the use of credit cards and direct debit payment cards. The Mail-Order Protection Scheme Code of Practice prohibits "forward trading", that is, the use of prepayments to finance other orders received. The scheme may require from advertisers an indemnity in the form of a stakeholders account until the goods are dispatched, or a bank guarantee. The scheme also offers an indemnity to consumers who lose their money through the insolvency of the seller and where the advertisement required payment in advance. In relation to payment by credit card, such method of payment creates a three-way contract between consumer, supplier and card issuer: under 575 Consumer Credit Act 1974, a consumer can equally claim against the card issuer in the event of a breach of contract, which is particularly useful in the case of the suppliers' insolvency. However, liability in such a case is limited to cases where each single item exceeds £ 100.

The general rule at common law regarding delivery of goods is that unless a time is agreed upon in the contract, there is an implied term that delivery should take place within a reasonable time. The Mail Order Protection Scheme requires advertisers to state the delivery period, which should not exceed 28 days, and that in the case of undue delay, the consumer should be notified of this fact and be given the right to cancel the contract. Risk of damage or loss of goods should usually rest on the seller according to the Mail Order Traders' Association Code of Practice.

Various mechanisms exist for the handling of complaints by consumers relating to distance selling. Formal litigation is possible immediately but the contracts may provide that settlement by arbitration or otherwise must first be attempted. The Consumer Arbitration Agreements Act 1988 provides that an arbitration agreement is enforceable only if the consumer agrees to submit to arbitration after the dispute has arisen. Usually disputes are adjudicated in the County Courts. Claims with a value of less than £ 1 000 fall within the jurisdiction of the Small Claims Court, which operates informal procedures.

Generally, the industry's codes of practice contain provisions for the independent investigation of complaints of breaches of codes of practice. The advertiser will usually be asked to amend, or withdraw the offending advertisement. Formal reprimands may be issued and, ultimately, a member expelled.

Proposal for a
COUNCIL DIRECTIVE

on the protection of consumers in respect of contracts
negotiated at a distance (distance selling)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission¹,

In cooperation with the European Parliament²,

Having regard to the opinion of the Economic and Social Committee³,

1. Whereas measures must be taken for the gradual establishment of the internal market by 31 December 1992; whereas the internal market is to be an area without internal frontiers within which the free movement of goods, persons, services and capital is assured;

2. Whereas cross-frontier distance selling could be one of the main tangible results of the completion of the internal market for consumers, as noted inter alia in the Communication from the Commission entitled "Towards a single market in distribution"⁴;

3. Whereas the development of new technologies is multiplying the means available to consumers to have knowledge of the offers being made everywhere in the Community and for placing orders; whereas there is a need to introduce a minimum set of common rules, before each Member State takes different or diverging measures to protect consumers, with negative repercussions on competition between businesses in the single market;

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4 COM(91) 41, 11.3.1991.

4. Whereas paragraphs 18 and 19 of the Annex to the Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy⁵ point to the need to protect the purchasers of goods or services against demands for payment for unsolicited goods and against high-pressure selling methods;

5. Whereas the Communication from the Commission to the Council entitled "A new impetus for consumer protection policy" and approved by the Council Resolution of 23 June 1986⁶ states in paragraph 33 that the Commission will present proposals regarding the use of new information technologies enabling consumers to place orders with suppliers from their homes;

6. Whereas the Council Resolution of 9 November 1989 on future priorities for relaunching consumer protection policy⁷ calls upon the Commission to give priority to the areas referred to in the Annex to the Resolution; whereas that Annex refers to "new technologies involving teleshopping"; whereas the Commission has responded to this Resolution by adopting a three-year action plan for consumer protection policy in the EEC (1990-92)⁸; and whereas that plan provides for the adoption of a Directive;

7. Whereas contracts negotiated at a distance involve the use of one or more means of communication at a distance and whereas the ongoing evolution of these means of communication does not allow an exhaustive list to be compiled but requires the definition of principles valid even for those that are still little used; whereas it is necessary to establish clearly the difference between advertising and solicitation; whereas there is solicitation from the time the consumer possesses the elements necessary to contract;

5 OJ No C 92, 25.4.1975, p. 1.

6 OJ No C 167, 5.7.1986, p. 1.

7 OJ No C 294, 22.11.1989, p. 1.

8 COM(90) 98, 3.5.1990.

8. Whereas the principles set out in Articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 apply; whereas all matters relating to the collection, storage and processing of personal data fall under Council Directives No ... and No ... of [on the protection of individuals in relation to the processing of personal data and the protection of privacy]⁹; whereas the consumer's right to freedom from intrusion should be recognized and provision made for possible restrictions on the use of certain means of communication and in particular restrictions deriving from the above Directives;

9. Whereas the consumer's custom is solicited via a variety of means of communication; whereas such solicitations must be clearly identified as commercial propositions; whereas this information must comply with the other relevant Community rules, in particular Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising¹⁰;

10. Whereas the use of such technologies must not lead to a reduction in the information provided to the consumer; whereas it is therefore necessary to determine the information that is required to be sent to the consumer whatever the means of communication used;

11. Whereas the promotional technique involving the sending of a product or the provision of a service to the consumer in return for payment may not be permitted without a prior request from or the explicit agreement of the consumer;

Whereas it is necessary to prescribe a time limit for performance if this is not specified at the time of ordering;

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10 OJ No L 250, 19.9.1984, p. 17.

12. Whereas information disseminated by certain electronic technologies often has an ephemeral character insofar as it is not received on a permanent medium; whereas the consumer must therefore receive written notice of the content of the contract and of all information necessary to its proper performance, not later than at the time of the delivery of the good or the supply of the service;

13. Whereas the consumer is not able to see in concreto the product or ascertain the service provided at the moment when his custom is solicited; whereas the consumer should be permitted to cancel the contract after receiving the product or service; whereas, if this right is to be more than formal, the costs borne by the consumer when making use of it must be limited to the charges for return; whereas Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises¹¹ is to be amended later to ensure harmonization, in particular of the method for calculating the period during which the contract may be cancelled;

14. Whereas this Directive should not prejudice the free movement of radio and television broadcasts, as guaranteed by Articles 59 and 60, third paragraph, of the EEC Treaty, nor the application of the rules of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States, concerning the pursuit of television broadcasting activities¹²;

15. Whereas non-compliance with this Directive may harm not only numerous consumers but also competitors; whereas there is therefore a need for provisions permitting trade and consumer organizations to monitor its application in transborder transactions; whereas to the extent authorized by the legislation of the Member States concerned, these organizations should also be allowed to act in the State from where the conflict originates,

11 OJ No L 372, 31.12.1985, p. 31.

12 OJ No L 298, 17.10.1989, p. 23.

HAS ADOPTED THIS DIRECTIVE:

Article 1

Object

The object of this Directive is to approximate the laws, regulations and administrative provisions of the Member States concerning contracts negotiated at a distance between consumers and suppliers and the soliciting of custom and preparatory acts with a view to such contracts.

Article 2

Definitions

For the purposes of this Directive:

- "Contract negotiated at a distance" means any contract concerning a product or service concluded after solicitation of custom by the supplier:
 - without the supplier and the consumer being simultaneously present and
 - using a means of communication at a distance to convey the contract solicitation and the order.

This concept does not include arrangements, orders, agreements or individual acts of performance within an overall contract, in particular a contract to be performed by a series of separate operations over a period of time.

- "Consumer" means a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession.
- "Supplier" means a natural or legal person who, for the transaction in question, acts in his commercial or professional capacity, and anyone acting in the name or on behalf of a supplier.
- "Means of communication at a distance" means any method permitting the exchange of the information required for the negotiation and conclusion of a contract between a consumer and a supplier not in the presence of one another; a non-exhaustive list of the means covered by this Directive is contained in Annex 1.
- "Operator of a means of communication" means any public or private natural or legal person making the various means of communication at a distance available to suppliers and/or consumers.
- "Contract solicitation" means any communication at a distance including all the necessary elements to enable the recipient to enter directly into a contractual commitment, simple advertising being excluded.
- "Order" means the expression by the consumer of his intention to enter into a contractual commitment.

Article 3

Exemptions

This Directive shall not apply to:

- automatic vending machines,
- automated commercial premises,
- made-to-measure products,
- services with reservation (a list of the services in question is attached as Annex 2),
- contracts for the supply of:
 - . foodstuffs, beverages or other goods intended for current consumption in the household;
 - . services for current consumption;

Article 4

Restrictions on the use of certain means
of communication at a distance

Member States shall take the necessary measures to ensure that means of communication at a distance are used to solicit custom from consumers only under conditions of fair competition and with due regard for the consumer's privacy, particularly pursuant to Article 17 of Directive .../.../... [concerning the protection of individuals in relation to the processing of personal data and privacy in the context of the public digital telecommunications networks].

Article 5

Presentation

(1) Member States shall take the necessary measures to ensure that all contract solicitations shall be designed and presented in such a way as to comply with the principles of good faith in commercial transactions, and those for the protection of minors.

- (2) All contract solicitations shall make their commercial purpose clear.
- (3) Where the cost of using a means of communication at a distance to place the order or perform the service must be borne by the consumer, he shall be informed of this fact if it is not evident.

Article 6

Content of contract solicitations

At the time when his custom is solicited, the consumer shall be provided with clear and unambiguous information in any way appropriate to the means of communication, comprising in particular:

- the identity of the supplier;
- the main characteristics of the product or service;
- the price and quantity of any transport charges if not included;
- the payment, delivery and performance arrangements;
- the period for which the solicitation remains valid.

Article 7

Contract solicitation by television

In the case of solicitation by television:

- the presentation within the meaning of Article 5 of this Directive must exclusively observe the provisions relating to the protection of minors in Article 22 of Directive 89/552/EEC;
- the supplier must ensure that the information set out in Article 6 is conveyed in writing no later than the moment when direct contact is made between the supplier and the consumer.

Article 8

Inertia selling

- (1) Member States shall take appropriate steps to ensure that consumers are not supplied with products or services which they have not ordered beforehand and asked either to purchase them or to return them, even at no cost.
- (2) These steps shall at least include a provision to the effect that if products or services have been so supplied the consumer shall have the right to do as he pleases with them unless there has been an obvious mistake, in which case he shall merely hold them at the disposal of the supplier for a reasonable period and provided their nature so permits.
- (3) Failure to reply shall not constitute consent.
- (4) This Article shall not apply to the sending of samples or promotional gifts provided it is made clear that they are completely free of charge with no obligation for the consumer.

Article 9

Performance

If no time limit for performance is stipulated in the contract solicitation, the order shall be performed not more than thirty days after it is received by the supplier.

Article 10

Information on the content of the contract

- (1) Not later than at the time of delivery, the consumer shall receive the following information in writing and in the language used in the contract solicitation:

- the identity of the supplier and the address of one of his places of business;
- main features of the product or service;
- price and quantity;
- payment arrangements, including credit terms, or terms for payment by instalments;
- right of withdrawal within the meaning of Article 11;
- arrangements for exercising this right.

Where a contract is open-ended, and in particular if it is to be performed by means of repeated operations, the conditions under which it can be terminated must be indicated.

- (2) Paragraph 1 shall not apply to services supplied directly by telematic means, precisely the performance of which is effected by the use of means of communication at a distance, when they are supplied only on one occasion. Nevertheless, the operator of a technique of communication shall be obliged to indicate to the consumer, on demand, the location of the supplier.

Article 11

Right of withdrawal

- (1) For any contract negotiated at a distance, the consumer shall have a period of not less than seven days starting from the receipt of the product or service in which he may cancel the contract without penalty. The only costs payable shall be the direct return charges, if appropriate.

For services, this period shall begin when the consumer receives documentation expressing the explicit agreement of the supplier.

(2) The consumer must be able to provide a document as evidence of return.

(3) Where a product or service is purchased on credit, Member States shall provide for cancellation of credit agreements concluded with the supplier when the right of return is exercised; if the credit has not been provided directly by the supplier, Article 11 of Council Directive 87/102/EEC¹³ on consumer credit shall apply.

(4) The present Article shall not apply to:

- services, if an essential part of performance is begun or should have begun before the end of the seven day period;
- transactions concerning securities and other products or services the price of which is dependent on fluctuations in the financial market which cannot be controlled by the supplier;
- contracts concluded in the form of an authenticated document;
- unless otherwise stipulated, to products:
 - . which can be immediately reproduced;
 - . for personal hygiene;
 - . which by reason of their nature cannot be returned.

Article 12

Payment by card

If the owner of a payment card questions the validity of any operation in which the number of the card has been recorded without presentation or electronic identification of the means of payment, the operation shall thereby be cancelled. The supplier's bank account shall then be debited and the owner's account shall be recredited as quickly as possible, without prejudice to any claim for damages in the event of an operation's being disputed improperly.

Article 13

Judicial or administrative redress

- (1) Member States shall ensure that adequate and effective means exist to enforce compliance with this Directive in the interests of consumers and competitors.
- (2) To this end, Member States shall make provision, among others, for trade and consumer organizations which can, according to their national legislation, demonstrate a legitimate interest in the matter, to be entitled, if it is recognized by the Member State of the conflict, to take legal action and/or bring complaints before a competent administrative body.
- (3) Member States shall, as necessary, empower the courts and/or administrative authorities, in the event of litigation, to require the supplier to provide proof, in particular of the content of the solicitation, the existence of a prior request, the consumer's consent and compliance with time limits.
- (4) This Directive shall not exclude voluntary supervision of compliance with its provisions by self-regulatory bodies and recourse to such bodies by the persons or organizations referred to in paragraph 2, if procedures involving such bodies exist in addition to the court or administrative procedures referred to in this Article.

Article 14

Binding nature

The consumer may not waive the rights conferred on him by this Directive.

Article 15

Community rules

Nothing in this Directive shall preclude the application of provisions specific to techniques, products or services under other Community instruments.

Article 16

Implementation

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 31 December 1994.

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

Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field governed by this Directive.

Article 17

This Directive is addressed to the Member States.

Done at Brussels,

For the Council
The President

ANNEX 1

Examples of means of communication at a distance covered by this Directive:

unaddressed printed matter

addressed printed matter

standard letter

press advertising with order form

catalogue

telephone with human intervention

telephone without human intervention (automatic calling machine, audiotext)

radio

videophone (telephone with screen)

videotex (microcomputer and television screen, with keyboard or touch screen)

electronic mail

fax (facsimile machine)

television (teleshopping)

ANNEX 2

Services with reservation within the meaning of Article 3:

transport;

accommodation;

catering;

entertainment.

IMPACT ASSESSMENT FORM

THE IMPACT OF THE PROPOSAL ON BUSINESS
with special reference to small and medium-sized
enterprises (SMEs)

Title of proposal: Protection of consumers in respect of contracts
negotiated at a distance (distance selling)

Reference number: SPC/171/91 Rev. 4

The proposal

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

Traditional mail-order selling involves the use of a catalogue to present the products and a letter to order them. The proliferation of new technologies (telephone, television, computer) has completely transformed this activity, which will in future increasingly be conducted on a cross-frontier basis. It is necessary to establish a minimum Community base before each Member State adopts its own legislation, which might hinder the functioning of the internal market.

The Communication "Towards a single market in distribution has already stated (p.17):

"Because of the multinational character of the market the principle of subsidiarity may lead to the conclusion that if some sort of regulatory framework is needed, then it should from the outset be at Community level."

In this communication, the Commission advocates the development of self-regulatory systems provided they are accepted by all parties concerned. Consequently, the proposal for a directive is accompanied by a Recommendation which is specifically aimed at establishing codes of practice.

The main aims are to ensure legal safeguards for the consumer and his right of choice in contracts negotiated at a distance.

The impact on business

2. Who will be affected by the proposal?

Firms which market products and services using means of communication at a distance and the operators of such means of communication.

Traditional mail-order selling is carried out by a fairly limited number of firms. New technologies could give rise to the creation of new firms specialised in certain of these techniques (television, Minitel) or enable small producers to market their products directly (particularly by home delivery).

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

Six Member States already have general laws covering all forms of distance selling (Portugal, Greece, Denmark, Belgium, Luxembourg and France).

In the other Member States, there are provisions giving partial coverage.

The provisions of the present text mirror provisions contained in national laws. In certain Member States, some of these provisions or similar provisions are found in the codes of conduct of trade associations. These codes apply only to the members of the associations.

The directive fixes certain minimum conditions regarding the presentation, the content of a solicitation and the written information on the contract which must follow. The directive fixes the period for delivery at 30 days, unless otherwise agreed, and provides for a period of at least 7 days within which the right of withdrawal may be exercised. The directive also provides that professional and consumer organisations will, if it is allowed by the Member State of the conflict be able to take legal action to ensure the correct implementation of the directive, and that the reversal of the burden of proof will be possible in appropriate cases.

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 have particular effects on 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 transborder 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.)?

There is no differentiation according to the size of the business. However, some activities which are excluded from the scope of the directives' application, particularly the supply of day-to-day household goods and services, are usually engaged in by small businesses.

Consultation

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

In April 1991 a discussion document was drawn up under the title "Discussion paper for a Directive on distance selling". This text was disseminated by two channels :

- . to the trade, via the Committee on Commerce and Distribution, a consultative body which advises DG XXIII;
- . to consumers, via the Consumers' Consultative Council, which advises the Consumer Policy Service.

In the light of all the comments received, a preliminary draft proposal was drawn up in July 1991. This text was disseminated through the same channels.

In its opinion of 13 September 1991 on the discussion paper, the Committee of Commerce and Distribution argued that the text should be either a recommendation or a :

"(limited) framework Directive leaving sufficient room for traders and their professional associations to work out self-regulatory provisions".

The CCD in its opinion of 16 January 1992 based on the draft proposal for a directive of July 1991, criticised several articles and stated clearly that :

" *the CCD is not convinced about the need for such an all embracing directive ... and rejects the Commission's arguments*".

Several professional associations, including CECD/FEWITA/GEDIS, Eurochambres, European Association of Mail order and the Liaison Committee of Retail Trade Associations expressed themselves as not being in favour of the proposed directive, based on the texts presented during the second half of 1991. This was also the opinion of the other professional associations in the trade sector and of individual trade firms, particularly those in distance selling, who maintained that the provisions of the text should simply be contained in codes of practice.

The SPC received about 50 opinions on the two documents (Discussion Document and Draft Directive, 1991 versions). These opinions came from consumer associations, professional associations other than those involved in distance selling, different operators of means of communication (televisions, newspapers, etc.), the banks and firms in the tourism sector.

The large majority of those opinions recognised the necessity of community action in the matter of contracts negotiated at a distance and were not totally opposed to the draft directive. The principle criticism rested on the financial safeguard systems (guarantee funds), a subject which is now dealt with by the recommendation.

Taking account of the discussions and comments, following the distribution of the first draft of July 1991, the Commission also presents the text of a recommendation, which is intended to promote codes of practice in the matter of distance selling and indicate the points which can be dealt with by these codes.

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DOCUMENTS

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