

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(76) 544 final

Brussels, 12 January 1977.

PROPOSAL FOR A COUNCIL DIRECTIVE

to protect the consumer in respect of contracts which have been
negotiated away from business premises

(submitted to the Council by the Commission)

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Explanatory Memorandum

I. Introduction and General Comments on the Directive

1. Where contracts for goods or services are initiated away from business premises of a trader the consumer generally needs special protection. Compared with contracts initiated on traders' business premises, the initiative to negotiate such contracts away from business premises generally stems from the trader and not from the consumer. The trader is usually versed in modern sales methods and in negotiating contracts away from business premises. He can make full preparation for such negotiations and is free to choose the time of his visit.

The consumer who is approached in his home, at his place of work or other similar place (e.g. in a show room, during an excursion) will most often be taken by surprise and be unprepared for a sale. Very often he has no time to give mature reflection as to whether he should acquire the offered goods or service at all or to discuss the matter with anyone.

As distinct from contracts concluded on the premises of the trader, very often the consumer has neither the time nor the opportunity to check before hand, the properties, quality or price of the goods or service offered or other essential conditions of the offer, or to compare the offer with similar offers by other traders.

Thus the element of surprise combined with the stronger bargaining power of the trader often results in the consumer making hasty bargains or accepting obligations which may not always be in his best interests.

The consumer therefore needs greater protection in this field.

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2. This draft Directive aims to provide such a better protection of the consumer in the case of contracts which are negotiated away from business premises of the trader. The need exists not only in the case of contracts concluded at the doorstep or in the home but in all other cases where the consumer, without taking the initiative, is drawn into negotiations at his place of work, in the street, on an excursion or at a show room. In every such case the consumer is in the same psychological position of being unprepared for a transaction and finds it difficult to evade negotiations with the trader.

The need for protecting the consumer is not limited to any specific type of contract for instance contracts for the supply of goods, but extends to all contracts which are initiated by a trader away from business premises.

The draft Directive provides that contracts for which oral negotiations have taken place away from business premises at the initiative of the trader must be made in writing.

The written agreement must contain certain information which is particularly important for the consumer. Furthermore, the consumer has the right to cancel the contract within a period of at least seven days after having signed the agreement. The Directive is intended to ensure a minimum of consumer protection; on certain points, therefore it provides that Member States may, in order to give added protection to the consumer, adopt measures which supplement the requirements of the Directive; e.g. the length of the period of reflection, the question as to a complete prohibition of the sale of certain goods or services away

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from business premises, a system of prior authorization and preventive measures against contracts being falsely dated.

3. For certain types of contracts - especially insurance contracts, consumer credit contracts, contracts relating to the sale of shares, investment funds, etc. or contracts on distance education - a particular consumer protection might be required. Proposals now being prepared by the Commission for submission to the Council in due course will take these particular aspects into account. No separate provision is being made for those particular types of contract in this Directive which therefore will apply to them.

II. Legal situation in the Member States and legal base of the Directive

4. Several Member States of the Community have taken legal steps to protect the consumer against the dangers which may arise from contracts concluded away from business premises.

In Belgium the consumer is given a period of reflection of seven days for hire-purchase sales concluded away from the business premises of the seller, during which time he can cancel the contract.

The contract, which must be in writing, must clearly inform him of this right. If this information is lacking the contract is void (Article 4 of the Law of 9 July 1957 in its version of 8 July 1970).

The Trading Practices Law of 14 July 1971 contains a general prohibition of sales away from the usual business premises of the seller, irrespective as to

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whether they are for cash or on credit. Exceptions may be made only by regulation or by authorization.

In Denmark the general rule is that contracts must be made at a permanent place of business (fast forretningsssted); contracts relating to the supply of goods may not therefore be concluded away from business premises (Article 10 of the Law 212 of 8 June 1966).

In France the Law n° 72-1137 of 22 December 1972 applies to contracts concluded between a trader and a consumer in the consumer's home, at his place of work or at his residence. Contracts coming under this law must be made in writing and must contain certain information (name and address of the trader, place, where the contract is concluded, description of the goods or services, date of delivery, indication of the price, terms of payment). If this information is not provided the contract is void. The consumer has the right to cancel the agreement within seven days; and he must be informed of this right in the contract. The trader may not ask for any money under the contract before the end of the period of reflection.

In Germany the sale of numerous goods by "itinerant traders" is forbidden (Article 56 of the Gewerbeordnung in its version of 26 July 1900).

Any trader who wishes to sell goods or services away from his business premises must have special prior authorization.

In the case of hire-purchase and similar agreements the consumer has the right to cancel the contract within seven days, irrespective as to whether the contract was concluded on or away from business premises. He must be specifically informed of this right;

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he has to sign the statement given to him in order to confirm that he has received it (Hire-Purchase Law in its version of 15 May 1974).

At present Parliament is discussing a bill which provides for a general right of the consumer to cancel contracts which have been concluded away from business premises following oral negotiations. The consumer must be informed of this right in writing.

In Luxemburg the sale of goods away from business premises is forbidden; exceptions can be authorized by law or by administrative act. (Law of 5 March 1970).

In the Netherlands the law of 7 September 1973 applies to contracts concluded away from business premises. A trader providing goods or services in this way must have a licence. Where the price exceeds 75 florins, the contract must be in writing, failing which it is void. The contract must be registered at the Chamber of Commerce (Kamer van Koophandel en Fabrieken). The consumer may cancel the contract within eight days of registration by so informing the trader in writing.

In the United Kingdom a consumer may cancel a credit agreement made away from business premises within five days of the trader sending him a copy of the agreement (Consumer Credit Act 1974).

Ireland and Italy have no special legal provisions covering contracts away from business premises.

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5. On 14 April 1975 the Council of Ministers adopted a "Preliminary programme of the European Economic Community for a consumer protection and information policy". Paragraphs 24 and 25 of this programme provide, inter alia, that the Commission will make as a priority an investigation into the protection of the consumer against unfair commercial practices in respect of doorstep selling and submit appropriate proposals to the Council.

6. This Directive is based on Article 100 of the EEC-Treaty. The differing laws in the Member States directly affect the establishment and functioning of the Common Market. In fact, the charges imposed on a trader by virtue of these laws differ considerably and thus interfere with free competition within the Common Market. Furthermore, the degree of consumer protection differs from one state to another. Where the consumer has the right to cancel a contract within a given period he is able to free himself from obligations entered into hastily, without fear of economic loss.

As the Directive would require several Member States to amend their legislation, consultation with the European Parliament and the Economic and Social Committee is required (Article 100 paragraph 2 EEC-Treaty).

III. Commentary on individual articles

Article 1

This article defines the scope of the Directive. The Directive covers all contracts between consumers and traders, negotiations for which have been initiated away from business premises and which do not fall under the exceptions provided for in article 2. It also applies to contracts which have been negotiated partly on and partly away from business premises.

The Directive also applies where the consumer engages himself unilaterally without any corresponding obligations of the trader, for instance when ordering a electrical appliance or when binding himself unilaterally to acquire goods or to accept services. Even though a contract has not yet been concluded in these cases, protection of the consumer is necessary, as the unilateral engagement may already affect his interests. These contracts and unilateral engagements are described in this article and thereafter as "doorstep contracts".

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Contracts between two traders or contracts between two consumers are not covered.

The definitions of "consumer" and "trader" have been kept very general to ensure that the Directive has as wide a scope as possible. Since "business premises" include only the permanent place of business of a trader, other premises which are rented for a short time only - such as show rooms, cinemas, restaurants and so on - fall within the scope of the Directive.

Article 2

This article delimits the scope of the Directive outlined in article 1. If the consumer initiates negotiations for a contract (paragraph a), there is not the same element of surprise which is otherwise present in contracts away from business premises. The terms "consumer's initiative" must, however, be related to the initiating of negotiations for an actual contract and not merely the fact that the consumer has come into contact with the trader in some way.

The consumer does not need special protection when he is formally informed of the implications of the contract by a third party (paragraph c). Paragraph d refers to, e.g., applications for or transfers of a mortgage, the granting of easements of right of way, the sale of a piece of land or the transfer of ownership of a flat. Contracts relating, for instance, to the installation of a heating system, the maintenance of a heating oil tank or the repair of a roof are, however, not contracts relating to a right to immovable property.

Where the negotiations between the parties have been made entirely in writing the consumer has sufficient time to consider all the implications of his engagement (paragraph b). The directive does not apply to contracts in which the consumer has only to pay a small sum (25 units of account), which excludes, inter alia, small daily doorstep sales such as milk and bread. It is clearly inappropriate to require such contracts to be made in writing and to remain in suspense during the cooling-off period.

Article 3

Article 3 requires the contract to be drawn up in writing so that the consumer can clearly see the content and implications of his engagement.

This provision is also intended to ensure that the consumer can study the conditions of the contract after the trader has gone before he decides whether he will continue with the contract or exercise his right of cancellation.

Article 4

This article completes the provisions of article 3.

Its object is to ensure that the consumer is aware of the implications on his rights and obligations. The copy of the written agreement which is handed to the consumer should enable him to consider with greater ease the content of the contract during the cooling-off period.

Article 5

As the requirement of a written agreement is the main principle of providing complete information for the consumer, the consequences of non-fulfilment must be strict.

The most effective sanction to ensure that the contract is made in writing, that the written agreement contains all the required information and that the consumer is given a copy of the written agreement, is for the contract to be void if the above conditions are not fulfilled.

Article 6

This article provides for the consumer's right of cancellation. In those Member States where a right of cancellation is already in existence, different solutions have been adopted as to whether the contract is considered to have been concluded after the period of reflection has expired or at the moment where the agreement was signed. The wording of article 6 permits both interpretations.

In any case the consumer is entitled to a period of reflection of at least seven days within which he can decide whether he wants to make use of his right. The signing of the contract by the consumer was chosen as the earliest starting-point of this period as it represents the first concrete, visible action taken by the consumer.

The Member States still have the possibility of choosing a later point in time to mark the beginning of the period.

Paragraph 3 indicates that after effective exercise of the right of cancellation, the consumer is not bound by any commitment resulting from the contract itself (compare, however, article 8 regarding the cancellation of a contract which has been executed in full or in part).

Article 7

In those Member States where a right of cancellation is already in existence, experience has shown that many consumers either do not know how they can cancel the contract they have signed or are averse to writing letters.

Although it is up to the Member States to prescribe how the right of cancellation is to be exercised, a form such as shown in the Annex to this Directive to be annexed to the written contract or form a detachable part of it may help the consumer.

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Article 8

This article deals with the revocation of contracts which have already been executed in full or in part before the consumer has exercised his right of cancellation.

The consumer should not be inhibited in the use of this right by having to pay considerable costs for the revocation or by having eventually to pay large sums of money for the temporary use of the goods.

It can be said generally that the more a contract is executed the greater are the psychological barriers which prevent the consumer from cancelling it. It therefore seems necessary to exempt him from paying for normal use during the cooling-off period.

The provision does not of course prevent the trader from demanding payment for any damage done to the goods during that period an action which exceeds "normal use".

Article 9

This article is also intended to prevent as far as possible the creation of a fait accompli before the expiry of the cooling-off period so as to influence the consumer not to exercise his right of cancellation. The consumer still retains the right during such period to pay the contract price in full or in part if he so desires.

The provision of Article 9 does not prevent a trader from asking the consumer to pay a deposit where such a payment is required under national law.

The prohibition of the signing of negotiable instruments or the taking of such documents during the cooling-off period is intended, in particular, to remove from the consumer the fear that his cheque or other similar document will still be presented and so bind him to the contract which he has given notice to cancel.

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Article 10

There are often disputes as to whether the negotiations for a contract conducted away from business premises were initiated by the consumer or whether these negotiations have been partly oral and partly in writing. Without Article 10 (a) + (b) the provisions concerning the right to cancel may not be applied, because the consumer himself is most likely unable to prove that the initiative stemmed from the trader or that oral negotiations have taken place.

Article 11

Article 11 (a) is designed to ensure that the consumer is not prevented from exercising his right of cancellation by being obliged to pay a sum of money to the trader.

The object of Article 11 (b) is to prevent the contracting out by the trader of the general rule of law as to jurisdiction.

Article 12

The experience in some Member States has shown that the provisions relating to the right of cancellation are very frequently avoided by inserting an earlier date than that when the agreement was made.

The period of reflection available to the consumer is thus shortened or even completely eliminated. The Member States are therefore invited to adopt appropriate measures in order to stop practices of this kind. Two methods of achieving this goal, which seem to have proved effective in France and the Netherlands are suggested as alternatives.

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Article 13

As already indicated, there is a general ban on consumer contracts made away from business premises in Denmark and in Luxemburg. In several other Member States certain goods or services may not be sold away from business premises. The present article does not change this situation, but is intended to leave to Member States the right to maintain these provisions or to introduce them where they do not yet exist.

A trader wishing to sell goods or services away from premises must have prior authorization in the Netherlands, in Germany and in Luxemburg. These provisions are not affected by the Directive.

Furthermore any Member State may, if it so wishes, establish such a system of prior authorization or licensing.

THE COUNCIL OF THE EUROPEAN COMMUNITIES

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

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament,

Having regard to the Opinion of the Economic and Social Committee,

Whereas it is a common form of commercial practice in the Member States for the negotiation of a contract or a unilateral engagement between a trader and a consumer to be initiated away from the business premises of the trader, and whereas such contracts and engagements are already the subject of legislation in the Member States;

whereas any disparity between such legislation may directly affect the functioning of the common market; whereas it is therefore necessary to approximate laws in this field;

whereas the Preliminary Programme of the European Economic Community for a consumer protection and information policy^{*} provides inter alia under paragraphs 24 and 25 that appropriate measures be taken to protect consumers against unfair commercial practices in respect of doorstep selling;

whereas the special features of contracts negotiated away from the business premises of the trader are that as a rule it is the trader who initiates the negotiations for contracts for which the consumer is unprepared or does not expect; that the consumer is often unable to compare the quality and price of the offer with other offers; that this surprise element generally exists not only in contracts made at the doorstep, but

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* O.J. n° C 92, 25.4.1975

also in any other form of contract initiated by the trader away from business premises;

whereas consumer protection will be augmented by providing that contracts which are initiated by the trader away from his business premises must be in written form and contain certain essential provisions;

whereas the consumer should be given a right of cancellation within at least seven days of the signing of the contract in order to enable him to study the obligations arising thereunder;

whereas appropriate measures should be taken to ensure that the consumer is informed of this period of reflection and that this period should not be shortened by any provision in the contract;

whereas goods and services provided during this period of reflection should be at the risk of the trader subject to the return of the goods where possible;

whereas to protect consumers against abuses relating to certain goods or services Member States may prohibit the negotiating of contracts away from business premises for these goods or services;

HAS ADOPTED THIS DIRECTIVE :

Article 1

1. This Directive shall apply to contracts between a consumer and a trader, and unilateral engagements by a consumer towards a trader, negotiations for which have been initiated away from business premises.

Such contracts and engagements are hereinafter referred to as "doorstep contracts".

2. For the purpose of this Directive :

- "consumer" means a natural person who in transactions covered by this Directive acts otherwise than in a commercial or professional capacity;
- "trader" means a natural or legal person who in the exercise of a commercial or professional activity concludes contracts with consumers;
- "business premises" mean the permanent place of business at which a trader exercises his commercial or professional activity as well as stalls at fairs and markets.

Article 2

This Directive shall not apply to :

- a) contracts which have been negotiated exclusively at the initiative of the consumer;
 - for the purposes of this paragraph the ordering of catalogues, patterns, samples and similar items, a request by the consumer for a visit or demonstration, and participation in an event organised by the trader shall not be considered as initiating negotiations;
- b) contracts which have been negotiated solely in writing;
- c) contracts which are concluded before a court, notary or other person who is under duty to inform both contracting parties of their rights and obligations;
- d) contracts relating to immovable property or any rights thereto.

e) contracts under which the price payable by the consumer does not exceed twenty-five European units of account;

European unit of account means the unit of account as defined by Commission Decision 3289/75/ECSC of December 18, 1975.

The conversion value in national currency to be adopted shall, as from 31 December of each year, be that of the last day of the preceding month of October for which European unit of account conversion values are available in all the Community currencies;

The Council shall, on a proposal from the Commission, examine every three years and, if necessary, revise the amount specified in European units of account in this paragraph, having regard to economic and monetary movement in the Community.

Article 2 bis

This Directive does not preclude the adoption at Community level of specific provisions on certain types of contract which might contain obligations in respect of contracts negotiated away from business premises and which would derogate from the obligations contained in this Directive, particularly those covering :

- consumer credit
- home-study courses
- moveable assets
- insurance contracts.

Article 3

1. The Member States shall take the necessary measures to ensure that doorstep contracts are made in writing .
2. The doorstep contract shall in particular contain the following information :
 - name and address of the contracting parties ;
 - a description of the goods or service forming the subject matter of the contract ;
 - a time-limit of delivery of the goods or supply of the service;
 - the price ;
 - the terms of payment ;

- notice of the right of cancellation enjoyed by the consumer, which shall be set apart from the main text of the contract and must contain the name and address of the party against whom the right of cancellation may be exercised.

Article 4

1. The consumer must sign the doorstep contract in his own hand.
2. A copy of the doorstep contract must be given to the consumer on the signing thereof or forwarded to him immediately thereafter.

Article 5

A doorstep contract shall be void if the provisions of articles 3 and 4 have not been complied with.

Article 6

1. The consumer shall have a right of cancellation by giving the trader notice within a period of not less than seven days after signature by the consumer of the doorstep contract in accordance with the procedure laid down by national law. It shall be sufficient if the notice is dispatched before the end of the period.
2. The Member States may, however, fix a later date from which the period shall begin.
3. The serving of notice to the trader shall have the effect of releasing the consumer from any contractual obligation .
4. The consumer may not renounce his right of cancellation.

Article 6 bis

Where the services concern a direct insurance other than a life assurance, and where immediate cover of risks is agreed, the provisions of Article 6 shall not apply if the consumer so requests.

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Article 7

The Member States shall take the necessary measures to ensure that a separate cancellation form corresponding to the model annexed to this directive is handed to the consumer when he signs the doorstep contract in order to facilitate the exercise of his right of cancellation.

Article 8

1. If the consumer exercises his right of cancellation, any payments made must ^{be} reimbursed and any goods received must be returned at the expense and risk of the trader.
2. The consumer shall not be required to pay for normal use of the goods during the period mentioned in article 6.
3. The Member States may make provision for supplementary requirements relating to the consequences of the cancellation.

Article 9

Except for any payment of a deposit required under national law, the trader shall be forbidden to require the consumer before expiration of the period mentioned in article 6.

- a) to make full or partial payment of the contract price or to provide any other kind of payment or any surety; or
- b) to sign a bill of exchange, cheque or other kind of negotiable instrument or, for the trader, to take such a document.

Article 10

In case of dispute :

- a) as to whether a doorstep contract has been negotiated exclusively at the initiative of the consumer; or
- b) whether a doorstep contract has been negotiated solely in writing,

the burden of proof shall lie with the trader.

Article 11

Contractual provisions which :

- a) require the consumer to pay some form of compensation if he exercises his right of cancellation; or
- b) provide that a court other than that normally competent to hear such a case shall have jurisdiction,

shall be void.

Article 12

1. The consumer shall not be hindered in or stopped from exercising his right of cancellation because of a false statement as to the date of conclusion of the doorstep contract.
2. To this end, the Member States shall provide that :
 - a) the doorstep contract be dated by the consumer in his own hand or
 - b) the doorstep contract be registered with an appropriate body.

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Article 13

Member States may prohibit the initiation of negotiations by a trader for doorstep contracts generally or in relation to certain goods or services only or may subject them to prior authorization.

Article 14

1. The Member States shall bring into force the measures necessary to comply with this Directive within eighteen months of its notification and shall forthwith inform the Commission hereof.

2. The Member States shall ensure that the texts of the main provisions of national law which they adopt in the field covered by this Directive are communicated to the Commission.

Article 15

This Directive is addressed to the Member States.

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A N N E X

Model of the "cancellation form"

I hereby declare that I am cancelling the contract
for (description of the goods or service)
amounting to (price)
signed (date)

Name
Address
Date

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