

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(93) 396 final - SYN 411

Brussels, 7 October 1993

Amended proposal for a

COUNCIL DIRECTIVE

ON THE

PROTECTION OF CONSUMERS IN RESPECT OF
CONTRACTS NEGOTIATED AT A DISTANCE
(DISTANCE SELLING)

(presented by the Commission pursuant to Article 149(3)
of the EEC-Treaty)

EXPLANATORY MEMORANDUM

I. Background

On 7 April 1992 the Commission adopted a proposal for a Council Directive on the protection of consumers in respect of contracts negotiated at a distance (distance selling)¹. This proposal was transmitted to the Council on 9 June 1992.

At the same meeting of 7 April, the Commission also adopted a recommendation on codes of practice for the protection of consumers in respect of contracts negotiated at a distance (distance selling)². The Economic and Social Committee adopted its opinion at its 301st plenary session (meeting of 24 November 1992) acting on the proposal of its rapporteur, Mr Bonvicini³.

The European Parliament on 25 May 1993 adopted a legislative resolution embodying the opinion of the Parliament, acting on the proposal of its rapporteur, Mrs Oomen-Reuften.

Council working parties met on 3 March 1992, 18 September 1992, 13 October 1992, 26 January 1993 and 23 March 1993.

The amended proposal was drawn up taking into account the results of the work of the three institutions.

II. Comments on the amendments

(The figures cited are those of the new numbering scheme).

. . . General recitals

The Parliament, in its amendments to the initial recitals, wanted to highlight more clearly the consumer's right to conduct cross-frontier operations. Recitals 2 and 3 were amended as a result. Amendment No 4 explains why a Community action is necessary.

. . . Recitals and amendments to articles

The amendments to recitals Nos 9, 13, 17, 19, 20 and 21 are explained together with the corresponding articles.

. . . Medicinal products (recital 11)

The Parliament wanted a ban on contract solicitations for the supply of medicinal products which, in one or several Member States, are available only on prescription.

1. OJ No C 156, 23.6.1992.
2. OJ L 156, 10.6.1992.
3. OJ C. 19, 25.1.1993, p. 111.

The problem arose because of differences in legislation between the Member States.

- certain medicinal products authorised in the supplier's state are not authorised in that of the consumer
- a product may be classified as a medicinal product in one Member State but not considered as such in another.

To avoid circumvention of legislation which would prejudice consumer health, it was hence proposed to prohibit the distance selling of medicinal products.

Since this proposal for a directive does not have as its object the regulation of the various aspects of marketing of a product or service (ditto for firearms or gold jewellery?), the Commission does not wish to include such a prohibition in this Directive.

Nonetheless, in order to accommodate Parliament's concerns, a recital has been inserted (No 11) which draws attention to the fact that the Member States have at their disposal several means of intervention either under the provisions of this Directive or under other directives:

- in application of Directive 92/28/EEC¹ on the advertising of medicinal products for human use, a Member State may prohibit numerous forms of advertising. Solicitations and distance selling are forms of advertising.
- in application of the Directive on television broadcasting (89/552/EEC)² which prohibits television advertising for medicinal products available on prescription in the state of origin the the broadcaster.
- Amended Article 17 of this proposal explains the linkage between the proposals contained in this Directive and specific texts concerning "certain aspects of the marketing of products and services".
- Articles 18 (new) enables a Member State to take more protective measures if it so wishes, provided these measures are commensurate with the objectives pursued.
- Finally, it is essential that a Member State should be able to prohibit fraudulent practice originating in another Member State. This is the object of the amended version of Article 14. Naturally, these provisions also apply to pharmaceutical products.

Article 2: definitions

At Parliament's request, several definitions have been amended to specify the scope of this text.

On the whole Parliament considers that the Commission's proposal has made allowance for too many exemptions for individual sectors. This criticism is mainly levelled at Article 3, but has repercussions on the definitions. Hence, Article 2 now specifies that the contracts

1 OJ No L 372, 30.4.1992
 2 OJ No L 298, 17.10.1989

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concerned are those concluded as part of a sales or service provision scheme. This definition makes it possible to exclude operations which are exceptionally or occasionally concluded at a distance. Thus it is no longer the nature of the product (for example foodstuffs) which justifies an exemption, but the mode of distribution.

As regards the supplier, the text takes over the definition contained in the recent Directive on unfair terms (93/13/EEC of 5 May 1993)¹.

As regards the definition of solicitation, the text specifies the forms of advertising which constitute solicitations.

Article 3: exemptions

An article that has been made to measure cannot be resold to another consumer. Hence, this type of product cannot benefit from a period of reflection allowing the consumer to change his opinion.

Nonetheless, this difficulty should not lead to total exclusion of these products from the scope of the Directive.

It is on the basis of this line of thinking that Parliament requested that made-to-measure products be withdrawn from Article 3 (general exemption) and transferred to Article 12 (4) (exemption regarding the right of withdrawal).

The same reasoning applies to services with reservation.

The provisions concerning foodstuffs, beverages or other goods intended for current consumption in the household have been harmonised with the Directive on contracts negotiated away from business premises (85/577/EEC)². All the more often, consumers may place orders by telephone in connection with these frequent and regular rounds.

Article 4 (and recital No 9)

Parliament voted two amendments to this article. The Commission has decided to include them.

The first amendment concerns all means of communication at a distance. It simply states that when a consumer has indicated that he does not want to be solicited, this right must be respected. This procedure is generally known as "opting out". It is the consumer who must take the initiative in order not to be solicited.

Parliament wanted to go further as regards four means of communication at a distance - telephones, automatic calling devices, faxes and electronic mail. For these techniques the Parliament wants prior consent. By "prior consent" is understood an agreement given using another means of communication. This may be a special print-out, a contractual term or a reply coupon. This agreement may relate to a long period. This procedure is generally known as "opting in".

1 OJ No L 95 of 21/05/1993

2 OJ No L 372, 31.12.1985

Article 6

Parliament wanted to strengthen information provided to consumers in connection with dissemination or solicitation.

The Commission accepts only two additions:

- mention of the right of withdrawal
This proposal draws inspiration from the idea that the consumer should be informed about his rights as early as possible.
- Indication of VAT costs
In the case of cross-frontier distance selling, the VAT regime applicable is that set out in Directive 91/680/EEC¹ This system is complex, and is an exemption to the general regime. The VAT rate applicable may in certain cases be that of the firm's principal place of business and in other cases that of the consumer's country of residence. This depends on the turnover attained on the territory of the consumer's country of residence: approximately ECUS 100 000.
This regime is transitional and is to be abolished on 31 December 1996. In this event the VAT rate will always be that of the firm's principal place of business.

Article 8 (and recital No 13)

Sometimes the consumer has to pay the full price of the product or service when he places his order. Dishonest firms take the cash and disappear; the consumer is left empty-handed.

The initial proposal adopted by the Commission was to allow self-regulation by professionals in order to establish guarantee systems. Accordingly this provision is contained in the recommendation on codes of practice.

The question of financial security was the most vigorously debated point during the work of the Economic and Social Committee.

In amendment No 30 Parliament wanted the establishment of a guarantee system to be mandated by the Directive. The Commission does not want to go this far, notably in order to leave sufficient room for self-regulation.

Nonetheless, in order to accommodate these demands concerning financial security, the Commission proposes taking over a provision contained in Portuguese law. This text had been adopted by the Environment Committee. It was not put to a vote at Parliament's plenary session for procedural reasons.

This provision allows the consumer who has doubts as to the reliability of a solicitation to choose not to pay until the time of delivery. Such a possibility does not prevent the supplier from proposing advance payment and the consumer from accepting it.

Article 9

A new paragraph has been added to this article for cases in which the supplier cannot provide the product or service ordered, but takes the initiative of supplying an equivalent one. This does not constitute inertia selling within the meaning of this Directive.

Article 11

The amendments to this article must be read in parallel with those to Article 6. The consumer must receive in writing the information set out in Article 6, plus the information referred to in this article.

Article 12 (and recital No 17)

Recital No 17 explains the new Article 12. If the consumer discovers a fault in a product after the end of the period of reflection, he retains his rights to compensation. The existence of a period of reflection does not mean that the supplier is relieved of all liability in the case of failure to meet his commitments. Similarly, the absence of a period for cancellation does not have the effect of preventing the consumer from refusing a product which is delivered in a damaged state.

Article 12(3) was rewritten by taking over the provisions of Directive 87/102/EEC on consumer credit¹, which were merely referred to in the earlier version. The idea is to enhance the transparency of Community texts - to avoid references to other texts, which complicates reading.

Article 12(4) contains the exemptions which were removed from Article 3. Indeed there is no good reason why the provisions concerning inertia selling (Article 9) or payment by card (Article 13) should not also be applied to services with reservation.

Article 12(1) sets out the procedures for implementing the period of reflection in the case of services. The problem is when this right begins to run.

Pursuant to the theory of contract law a contract is concluded once the supplier has taken cognisance of the consumer's consent.

A consumer has a catalogue beside him. On the basis of this catalogue he puts through an order at 10 p.m. using a home computer. The order is recorded by the supplier's computer. The contract is concluded when the supplier has taken cognisance of this order. In this specific case, it would be the following morning at 8 a.m. (if the next day is a working day).

If the order concerns a product, the period of reflection begins in when the consumer receives the merchandise.

If the order concerns a service, the period of reflection commences when the consumer receives a confirmation from the supplier accepting the contract, accompanied by a minimum of information as provided for in Article 11. If the consumer already has at his disposal all the information, he will only receive the document confirming his order.

Accordingly, the period begins to run when the consumer has received "documentation informing him that the contract has been concluded". This wording is taken over from the Community life assurance directive which states that the period begins "from the time [the policy-holder] was informed that the contract had been concluded"²

1 OJ No L 42, 12.2.1987, p. 48.

2 OJ L 330, 29.11.1990, p. 50.

Article 14 (and recital No 19)

Article 14(2) concerns the mutual recognition of legal action by professional or consumer associations. This mutual recognition is limited to the countries which recognise this type of action.

The mention of the firm's state of origin is interpreted as meaning the state to which the consumer sends his order. It often happens that a consumer receives solicitations apparently originating in the Netherlands or Hungary. This is simply because the firm has used the technique of "re-mailing"; rather than mailing the letters in its country of origin, it ferries them by lorry to a country in which the rates are cheaper (Netherlands, Hungary). When tens of thousands of letters have to be mailed, this procedure rapidly pays its way. The decisive criterion for the consumer is the country to which he sends his order.

Article 14(2) was amended to empower courts to order the discontinuation of solicitations. As regards Article 14 (3), it is now specified that consumers or professionals may also individually address themselves to the self-regulatory bodies.

Article 15 (and recitals Nos 20 and 21)

The Parliament wanted a reference in the body of the Directive to the existence of a recommendation designed to supplement the Directive by codes of practice. This is the objective of recital No 20.

It also wanted the consumer to be informed of the existence and content of these codes. This is the objective of recital 21 and Article 15.

Article 17

Article 17 was amended on the basis of work by the Council on the linkage between this text and specific texts relating to individual sectors.

The directives emanating from the Consumer Policy Service are general texts which cover numerous sectors of activity. However, the subject may also be covered in a specific text.

For example, there is a Directive on general product safety. This does not mean that texts relating to specific products must steer clear of safety aspects.

There is a Directive on misleading advertising. This does not mean that certain specific texts cannot contain provisions relating to advertising.

These examples could be multiplied.

With a view to clarifying the relationship between general and specific texts, a paragraph has been added indicating that it is the provisions of the specific texts which are applicable.

Article 18

The Council's work reveals that the Member States want to be able to keep certain provisions concerning consumer protection.

Most of the directives relating to consumption are floor-level directives. A Member State may take more protective measures provided they are commensurate with the objective pursued.

III. Review

Work of the Economic and Social Committee

Essential points in the ECS opinion

Commission reply

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| 3.3 Retention of national provisions more favourable to consumer | Accepted. Article 18 |
| 3.7 Include in the recitals a reference to certain elements in the recommendation, notably financial risks | Accepted. Recital No 20 (recommendation) and 13 (financial risks) |
| 3.8 Guarantee consumer information on codes of practice | Accepted. Recitals Nos 20 and 21, Article No 15 |
| 4.3 Respect the consumer's privacy | Accepted. Recital No 9 and Article No 4 |
| 4.4 System of financial guarantee (penalty) | Protected (see comments on Article 8) |
| 4.6 Information to be provided in the language of the consumer's country | Rejected. The Commission retained its initial proposal (Article 11: in the language used in the solicitation). |

Number	Amended text	Accepted by the Commission	Included (New numbering)
1	Recital No 2	Yes	Recital No 2
2	Recital No 2	Yes	Recital No 2
3	Recital No 2	Yes	Recital No 3
4	Recital No 2	No	
5	Recital No 3	Yes	Recital No 4
6	Recital No 14	Yes	Recital No 17
7	Recital No 16	No	
8	Recital No 16	Yes	Recital No 20
9	Recital No 16	Yes	Recital No 21
35	Recital No 16	No	
10	Article No 1	Yes	Article No 1
11	Article No 2	Yes	Article No 2
12	Article No 2	Yes	Article No 2
13	Article No 2	Yes	Article No 2
14	Article No 3	Yes	Article No 3
15	Article No 4	Yes	Article No 4
16	Article No 4	Yes	Article No 4
17	Article No 5	Yes	Article No 5
18	Article No 5	Yes	Article No 5
19	Article No 6	Yes	Article No 6
36	Article No 6	No	
20	Article No 7	Yes	Article No 7
21	Article No 8	Yes	Article No 9
22	Article No 8	Yes	Article No 9
23	Article No 8	Yes	Article No 9
24	Article No 10	Yes	Article No 11
34	Article No 11	Yes	Article No 12
27	Article No 11	Yes	Article No 12
28	Article No 11	Yes	Article No 12
37	Article No 11	Yes	Article No 12
29	Article No 11	Yes	Article No 12
30	Article No 11	No	
31	Article No 13	Yes	Article No 14
32	Article No 15	Yes	Article No 15
33	Article No 15	Yes	Article No 18

The above table shows that the Commission accepts 30 out of the 35 amendments voted by Parliament.

Amendment No 4 repeats provisions already contained in other recitals.

Amendment No 7 calls for an effective system of dealing with cross-frontier complaints.

In the absence of a corresponding article, it has had to be omitted. Amendments Nos 35 and 36 concern medicinal products and call for the prohibition of all distance selling of such products. See the comments on this point with regard to recital No 11.

Amendment No 36 concerns the creation of a guarantee fund. See the comments on Article 8.

COUNCIL

At its first reading, the Council working party asked for a certain number of editorial clarifications. These changes have been incorporated.

The rest of the Council's work concerned the directive's scope and in particular the question of assurances. The Commission disseminated a working document in March 1992. This amended proposal incorporates the proposals contained in the working document.

Amended proposal for a Council Directive on the protection of consumers in respect of contracts negotiated at a distance (distance selling)¹

(93/C)

COM 93

(Submitted by the Commission on 1993, pursuant to Article 169(3) of the EEC Treaty

¹ OJ No C 156, 23.06.1992, p. 14

INITIAL PROPOSAL

AMENDED PROPOSAL

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 Commission,

In cooperation with the European Parliament,

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

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"²;

Having regard to the opinion of the Economic and Social Committee,¹

1. Whereas measures must be taken for the gradual establishment and consolidation of the internal market; 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 the free movement of goods and services affects not only the business sector but also private individuals; whereas it implies that consumers should be able to have access to the access goods and services of a Member State on the same terms as the local population;
3. Whereas cross-frontier distance selling could be one of the main tangible results of the completion of the internal market

1 OJ No C19 of 25/01/93

2 COM(91) 41, 11.3.1991

7:

for consumers, as noted inter alia in the communication from the Commission entitled 'Towards a single market in distribution'¹; whereas it is indispensable for the proper functioning of the single market that consumers should be able to apply to a business outside their country, even if it has a branch in the consumer's country of residence;

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;
 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 policy¹ 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 1986² states in paragraph 33 that the Commission will present proposals regarding the use of new
4. 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; whereas Community measures are needed in this field;
 5. unchanged.
 6. unchanged.

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 policy³ 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)⁴; 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;
- 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]; whereas the
- 7. unchanged.
- 8. unchanged.
- 9. 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 the consumer's right to freedom from intrusion in respect of certain particularly invasive means of communication should be recognised; whereas provision should be made for certain restrictions on the use of such means; whereas all matters relating to the collection, storage, and processing of

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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 advertising¹;

personal data fall under Council Directives No .../.../EEC and No .../.../EEC of ... [on the protection of individuals in relation to the processing of personal data and the protection of privacy];

10. unchanged.

11. Whereas a Member State may ban in the general interest the marketing on its territory of certain goods and services through contracts negotiated at a distance; whereas this ban should comply with Community rules; whereas such bans are already foreseen, notably in regard to medicinal products, under Directives 89/552/EEC and 92/28/EEC.¹.

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;

12. unchanged.

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

1. OJ No L 299, 19.9.1984 and OJ No L 113, 30.4.1992

13. Whereas advance payment poses a problem of financial security for the consumer; whereas in contrast to contracts concluded in business premises the consumer assumes a greater risk as regards the suppliers' reliability; whereas the consumer should have the opportunity of paying only on performance; whereas this possibility does not prevent the professional from also proposing advance payment;

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;

14. unchanged.

11a Whereas it is necessary to prescribe a time limit for performance if this is not specified at the time of ordering;

15. unchanged.

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;

16. unchanged.

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

17. 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 premises¹ is to be amended later to ensure harmonization, in particular of the method for calculating the period during which the contract may be cancelled;

consumer when making use of it must be limited to the charges for return; whereas that right must be without prejudice to the application of the consumer's customary rights with particular regard to the receipt of damaged goods or services or goods and services not corresponding to the description in the offer of such goods or services; whereas Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises⁽¹⁾ is to be amended later to ensure harmonisation, 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 activities¹;

18. Whereas this Directive should not prejudice the free movement of lawful radio and television broadcasts, as guaranteed by Article 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 activities (2);

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,

19. 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 supplier's state of origin.

1. OJ No L 372, 31.12.1985, p. 31.
1 OJ No L 298, 17.10.1989, p. 23.

(1)
(2)

20. Whereas Commission recommendation (92/295/EEC)⁽³⁾ on codes of practice for the protection of consumers in respect of contracts negotiated at a distance stipulates that it is desirable that the minimum binding rules contained in the existing Directives should be supplemented by voluntary self-regulatory arrangements in the form of codes of practice;

21. Whereas it is important, in the interests of optimum consumer protection, for consumers to be informed of the provisions of this Directive and the existence and content of the codes of practice in this field.

22. Whereas there is a risk that, in certain cases, the consumer may be deprived of protection under this Directive by designating the law of a non-Member country as the law applicable to the contract; whereas provisions should therefore be included in this Directive designed to avert this risk;

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;

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 solicitations with a view to the conclusion of such contracts 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 as part of a sales or service provision scheme;

(3) OJ No L 156, 10.12.1992, p. 21.

- 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.

- 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.

Where a contract has to be fulfilled by successive acts of performance or a series of separate operations over a period of time, the provisions of this Directive shall apply only to the overall contract, if it has been negotiated at a distance.

unchanged.

- "supplier" means a natural or legal person who, for the transaction in question, acts in his commercial or professional capacity.

unchanged.

unchanged.

- "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].

- "Contract solicitation" means any communication at distance, whether public or personalised, including all the necessary elements to enable the recipient to enter directly into a contractual commitment.

Forms of advertising that do not include all the elements necessary for the consumer to enter directly into a contractual relationship are not considered as contract solicitations.

- "Order" means the expression by the consumer of his intention to enter into a contractual commitment.

unchanged.

Article 3

Article 3

Exemptions

Exemptions

This Directive shall not apply to:

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;]

- automatic vending machines,
- automated commercial premises,
- to contracts for the supply of foodstuffs, beverages or other goods intended for current consumption in the household and supplied to the home by distributors making frequent and regular deliveries.

Article 4

Article 4

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

Restrictions on the use of certain means of communications 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

Member States shall take the measures necessary effectively to protect consumers

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.]

who have indicated that they do not wish to be solicited against such soliciting, without prejudice to the other safeguards available to the consumer under Community legislation concerning the protection of personal data and privacy.

The means of communication listed below shall be used only with the prior consent of the consumer:

- facsimile machine (fax)
- electronic mail
- telephone
- automatic calling units

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 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 the principles governing the protection of minors and those who are unable under the law of the Member States to give their consent.
2. unchanged.
3. Any contract solicitation must state without any ambiguity whether 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.

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:

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.

- the identity of the supplier;
- the main characteristics of the product or service;
- the price and quantity of any transport charges, and VAT charges, if not included;
- the payment, delivery and performance arrangements;
- right of withdrawal for the purposes of Article 11;
- 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 7

Contract solicitation by television

In the case of solicitation by television, the presentation within the meaning of Article 5 of this Directive must observe the provisions of Directive 89/552/EEC. Compliance with the provisions of that Directive and of the present Directive must not hamper freedom of radio and television broadcasts.

If the full contents of the contract solicitation within the meaning of Article 6 is not displayed on screen and if the consumer so requests, the supplier must ensure that this information is conveyed in writing.

Article 8

Financial security

No payment may be required of the consumer before delivery of the product or performance of the service.

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

Inertia selling

1. unchanged.
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 without having to make any payment to do as he pleases with them unless there has been an obvious mistake; in the latter case he shall merely hold them at the disposal of the supplier for a reasonable period and provided the nature of the product or service so permits, and no inconvenience is caused to the consumer.
3. unchanged.
4. This Article shall not apply to goods supplied free of charge, such as samples or promotional gifts provided it is made clear that they are completely free of charge with no obligation for the consumer.
5. If the supplier cannot supply exactly the same product or service as that specified, but instead supplies a product or service of the same quality and price, such action shall not constitute inertia selling within the meaning of this Article, provided that the consumer may return the substitute product if he is dissatisfied and that he is clearly informed in writing of his right to do so.

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

Performance

If no time limit for performance is stipulated in the contract solicitation, performance must begin not more than 30 d. after the order 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 installments;
- 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.

Article 11

Information on the content of the contract

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

- the information referred to in Article 6;
- name and address of the supplier's most appropriate place of business for the consumer;
- payment arrangements, including credit terms, or terms for payment by installments;
- arrangements for exercising the right of withdrawal within the meaning of Article 12;
- other contractual conditions such as those relating to guarantees.

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 rescinded 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.

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 means of communication shall be obliged to indicate to the consumer, on demand, the location of the supplier's most appropriate place of business for the consumer and the amount of the costs incurred by that service.

Article 11

Article 12

Right of withdrawal

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.

1. For any contract negotiated at a distance, the consumer shall have a period of not less than seven working days starting from the receipt of the product or service in which he may cancel the contract and return the product in its original condition 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.

In the exercise on this right, the period of seven working days shall begin:

- for products, from the date of receipt by the consumer;
- for services, without prejudice to the provisions of paragraph 4 of this Article, when the consumer receives documentation informing him that the contract has been concluded.

In the case of performance in stages, this period begins on receipt of the final installment.

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

2. unchanged.

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/EEC¹ on consumer credit shall apply.]

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, in the following cases:

- where the credit has been provided directly by the supplier of the product or service;
- where the credit has been provided by a lender, on the basis of prior agreement with the supplier of the product or service under which the moneylender has provided the credit to the supplier's client for the purposes of acquiring goods or services provided by the latter.

4. The present Article shall not apply to:

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.

- services, if performance has begun before the end of the period of seven working days;
- 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;
- made-to-measure products or clearly personalized products;
- services with reservation as listed in Annex 2;
- unless otherwise stipulated, to products:

¹ OJ No L 42, 12.2.1987, p. 48.

- * which can be immediately reproduced
- * for personal hygiene
- * which by reason of their nature cannot be returned or are liable to deteriorate rapidly.

5. This Article shall be without prejudice to the consumer's customary rights, with particular regard to the receipt of defective products or services or products or services not corresponding to the description given in the offer for such products and services.

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

Payment by card

If the holder 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 holder'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

Article 14

Judicial or administrative redress

1. unchanged.
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.

recognized by the Member State of the conflict, to take legal action and/or bring complaints before a competent administrative body in the company's state of origin, if this State allows actions of this kind.

- 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.

- 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. They shall also empower them to order discontinuation of solicitation. This injunction may also be addressed to any operator of a means of communication at a distance.
- 4. [English version unchanged.]

Article 15
Information

The Member States and the organisations concerned shall ensure that the consumer is informed of the provisions of this Directive and of the existence and content of codes of practice in this field.

Article 14
Binding nature

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

Article 16
Binding nature

- 1. The consumer may not waive the rights conferred on him by this Directive under national law.
- 2. Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract.

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 17

Community rules

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

When a specific Community rule contains provisions that regulate only certain aspects of the marketing of products and services, it is these provisions which shall apply with respect to these aspects of marketing.

Article 18

Minimal clause

Member States may introduce or maintain, within the domain covered by this Directive, more stringent provisions compatible with the Treaty, in order to secure a higher level of consumer protection.

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 19

Implementation

unchanged.

Article 17

Article 20

This Directive is addressed to the
Member States.

unchanged.

ANNEX 1

ANNEX 1

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

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)

- unaddressed printed matter
- addressed printed matter
- standard letter
- press advertising with order form catalogue with order form
- small advertisements
- 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
- facsimile machine (fax)
- television (teleshopping)
- video cassettes

ANNEX 2

ANNEX 2

Services with reservation within the meaning of Article 3:

Services with reservation within the meaning of Article 12:

- transport;
- accommodation;
- catering;
- entertainment.

- transport;
- accommodation;
- catering;
- entertainment.

It may not be possible to deal with these questions in the context of the proposal for a Directive on the protection of personal data and privacy in the context of the public digital telecommunications networks and hence they must be treated in this proposal.

2 Articles 6 and 7 extend to some degree the obligation to provide information as to the content of the contract solicitation, notably by television. While this requirement might give rise to some additional costs to firms, one cannot in all fairness argue that firms using a specific and particularly attractive means of communication should be exonerated from providing certain basic information which is generally required.

Moreover, this cost - if any - is alleviated by the new provision in Article 7(2) which takes into account possible difficulties in displaying all the information on screen.

3 The new Article 8 prohibits the vendor from requiring payment before delivery of the product or performance of the service. All this provision does is prohibit advance payment as a one-sided delivery condition; an advance payment by common agreement is always acceptable. At any rate, requests for advance payment are by no means current practice in all distance selling sectors. Thus a large proportion of firms operating in this domain will not be affected by this provision.

Among the forms of distribution where advance payment is still demanded, there are a number in which consumers need greater financial security (small ads with order forms, direct mailing, telephone shopping). Thus these firms will have to change their commercial practices. Small firms will not be seriously affected, but they may experience cash-flow problems.

As regards the consumer's financial security, no voluntary codes of conduct in this area at European level have been sent to the Commission since publication of its Recommendation of 7 April 1992.

4 As regards the ban on inertia selling, the new Article 9 makes it easier for the firms affected. If the supplier is not able to provide exactly the same product or service as the one ordered, but supplies a project or service of the same quality and at the same price, this is not considered to be inertia selling for the purpose of this Article, provided the consumer is free to return the substitute product if he is not happy with it and provided that this is communicated in writing to the consumer.

SUPPLEMENTARY IMPACT ASSESSMENT FORM

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) - amended proposal

This impact form supplements the form contained in Document COM(92) 11 final - SYN 411 of 20 May 1992 (p. 87).

In the light of a certain number of amendments proposed by the European Parliament, the Commission has presented an amended proposal whose terms have been strengthened in ways that may have implications for certain firms.

1 The new Article 4 provides that prior consent of the consumer who is "solicited" using certain means of communication (fax, electronic mail, telephone, automatic calling units), is required. In the wake of the Parliament's debates on this issue, the Commission considers that for these particularly invasive techniques greater protection of consumer privacy is needed. The principle of simply "opting out" by adhering to a "Robinson list" (as provided for in regard to other techniques under Article 4, paragraph 1) does not guarantee adequate protection in this respect. Moreover, even where "Robinson lists" already exist they do not cover all the techniques in question (the only case that includes the telephone is the United Kingdom). Establishment, management and financing of such lists poses enormous problems which could considerably add to firms' costs. Even if systems like this could be established at national level in certain Member States, it is hard to see how they could cope with the growing number of cross-border transactions.

Moreover, only a small proportion of firms in this sector currently base their commercial activity on these techniques. These firms will have to change their selling techniques and this may in certain cases lead to extra costs.

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