

EBIC members' preliminary comments on the review of the directive on distance marketing of financial services

1. How the industry views the Directive

The directive does not significantly help the cross-border sale of financial services. Instead, the directive makes distance selling even more complicated to the detriment of the bank and the consumer.

Based on the majority of answers received so far, the Directive has not improved or enhanced the provision of financial services cross-border. Moreover, some countries reported that the Directive imposes exaggerated and ultimately, even from the consumer point of view, counterproductive information obligations. In addition, other countries stressed that the directive did not help to boost cross-border trade in Financial Services because the law of the consumer is applicable for such distance contracts. So, a supplier has to face the risk that the distance contract is subject to foreign law and not to the law he usually uses. This risk can be very serious making the supplier in need of additional legal advice for covering the risk. As a matter of fact, such legal advice is costly and it will be an economical question to decide whether the possible earnings of cross-border distance marketing business are worth entering into cross-border distance contracts.

Some other countries reported that they do not have much experience in distance selling cross-border, considering customer preference for national financial services providers, language and cultural differences as the main barriers to distance selling.

In other countries, such as Spain, the Directive has not been yet implemented. It is therefore difficult to provide any comment in this respect.

2. What are your experiences of distance selling cross-border?

Distance selling cross-border should be distinguished economically from business developing around the borders' between neighbouring countries all over Europe. Another distinction concerns the case when a credit institution is investigating a foreign market with a view to possibly setting up a subsidiary in this country (cross-border 'experimental traffic' with 6 to 12 months duration).

As far as supply of credit is concerned e.g., for lenders, lack of information on the consumer situation and difficulties in debt recovery outside their home country could explain some preference for direct implantation in other Member States rather than cross-border selling. Also, the traditional integrating channels for retail products have been local establishments or intermediaries. The experience has showed that the new distribution channels (particularly on-line facilities) did not make the consumer less dependent on the said traditional channels.

Some countries also reported that due to the anti-money laundering requirements, the bank is not allowed to provide any service to the customer without immediate (close) first contact. Therefore, in their opinion the assumption in the Distance Marketing of financial services that the bank will provide a service via distance without previous contact is questionable.

Furthermore, some countries have stressed that contracts concluded under distance marketing laws are significantly complicated or obstructed by the Directive. Suppliers face substantial and costly legal uncertainty and may feel forced to rely on traditional bricks-and-mortar business, particularly in the lending area, in order to avoid significant withdrawal risks.

As far as pre-contractual matters are concerned, the Directive was using a minimum harmonization approach. Yet, the delay in the implementation of the Directive in some Member States has created uncertainty as regards the law applicable to the contract itself. This uncertainty resulted in operators refraining from developing their cross-border offer of financial services. Discrepancies between pre-contractual and contractual matters constitute an obstacle to the development of cross border activities, although they are certainly not the only ones.

Finally, we would like to refer to the study which the Federal Bureau of German Consumer Organisations has commissioned with IFF Hamburg on implementing methods and efficiency of distance marketing rules in the field of financial services in Germany. The results of this study confirm our comments expressed previously.

3. Any specific legal problem faced

Some unclear and impractical Directive provisions create a threat to legal certainty. The scope of application of the Directive often remains unclear (what exactly is a new financial service?). For instance, do interest prolongations or deferments constitute new financial services, and are they thus relevant under distance marketing regulations?

I. Unclear and inconsistent definitions

Concepts and examples are not sufficiently oriented. The definitions often fail to properly describe the banking reality (e.g. Art. 1 (2) of the directive in connection with Recital 17). The examples named in the Directive should refer more closely to areas relevant to banking practice, particularly lending and deposit operations. The definition of a 'consumer' is uncertain between member states because recital 29 gives discretion for member states to extend the consumer definition to legal entities such as non profit organizations while the definition of 'means of distance communication' could be understood as including point of sale finance where the intermediary and the consumer are both present but the lender is not. The Directive is not intended to extend to this situation and it would be wholly inappropriate for this to be the result.

Also, similar notions are interpreted differently between distance marketing (DM) and distance selling (DS) directives. For instance, the right of withdrawal in DM is unlimited under certain circumstances while in the DS, it is limited to 3 months. Inconsistency exists also regarding the interpretation of the information requirements between the DM and 3 other directives: E-Commerce /directive (2000/31/EC), Insurance Mediation Directive (2002/92/EC) and Door-step Directive (85/577/EEC). For instance, there is different timing for providing general information between the Insurance mediation directive and the DM and different timing for information of the right of cancellation between the Door-step directive and the DM. In the Door step directive, the supplier has to inform the consumer about the right of cancellation precisely at the time of conclusion of the contract (Art 4) while in the DM, the supplier has to do so before the consumer is bound (Art 5 and 3 (1) 3a).

Finally, hire purchase and conditional sale credit facilities combining the supply of goods and the supply of credit. It has been suggested that the Distance Selling Directive might apply to such contracts. Clarification would be welcome to ensure that it is only the Distance Marketing Directive which applies to this type of credit.

II. Extensive information obligations

The information requirements are too complex. The result is an information overload of the consumer with a risk to confuse him rather than to clarify matters. For instance in Germany, a long booklet (27 pages) with all relevant information is delivered to the customer before concluding a contract concerning a current account combined with a savings account and a securities account including the relevant business conditions.

The overly long list of information obligations (Art. 3 of the directive) is on the one hand unsuited to the sale of financial services in contrast to general distance marketing because a financial product cannot be grasped or examined within the EU withdrawal period like any other previously unseen physical merchandise. On the other hand, this list is likely to cause information overload for the consumer.

Often imprecise descriptions of individual information obligations (e.g. Art. 3 (2) f of the directive: ‘the arrangements for payment and for performance’) can give rise to interpretation problems or to diverging interpretations.

Furthermore, conditions applying to existing business relationships should be significantly eased or reduced with regard to the ‘consumer information package’.

No appropriate distinction has been made between essential and non-essential information, particularly with regard to violations of information obligations and their legal consequences.

No appropriate distinction has been made between simple information about the right of withdrawal and actual legal instructions regarding withdrawal.

Finally, it appears seriously difficult to comply with the current information requirements. There is no legal certainty regarding which formulation the industry has to choose in order to sufficiently fulfil its duties particularly in Germany. Indeed, the German legislator has not only implemented the directive but has also created in addition a standard form of information sheet as a sample. However, in the closer past, there had been some court cases saying that this sample was void (OLG Hamm 15 March 2007/ Az 1 W 1/07 or LG Halle 13 May 2005/ 1 S 28/05)). Consequently, credit institutes who had made use of the legislator’s samples did not fulfil information duties according to the German implementation. In contrast, in other court cases it was said, that the entrepreneurs using the standard form sufficiently complied with the requirements (LG Münster 24 August 2006/ 24 O 96/06). It remains questionable, how credit institutes under these circumstances shall be able to interpret the provisions correctly.

III. Right of withdrawal

Delaying the onset of the period of withdrawal when information obligations are violated (Art. 6 (1) of the directive) is, at least for slight information errors, an overly strict/too sweeping legal consequence.

For instance, the customer could draw down a loan, benefit from the 14 day right of withdrawal and then withdraw from the credit agreement, leaving the creditor to pursue the customer to recover funds/interest on drawn balances. Obviously, this would lead to increased costs for the creditor. If the right of withdrawal were to apply to Lease and Hire Purchase then financial institutions will not be able to release goods until the 14 day period has expired. Institutions cannot have a situation where the customer collects a car from the dealer on day one and returns it on day 13. The car is now second-hand and will have depreciated by a considerable amount. Also, this provision will not benefit consumers who will be annoyed if they have to wait for the 14 day period to expire. In Ireland, waiving the right of withdrawal in the context of a credit agreement is a common practice by consumers as legislated for by the Consumer Credit Act, 1995.

Furthermore, under Article 6(2) (c) of the Directive, the right of withdrawal does not apply to contracts ‘whose performance has been fully completed by both parties at the consumer’s express request before the consumer exercises his right of withdrawal’. In the context of a credit agreement, this is difficult to interpret and we believe that it should be made clear that the consumer loses his right to withdraw if the credit has been advanced at the request of the consumer or with the agreement of the consumer. This is an issue which is specific to credit and an example of why we consider that credit should be excluded from the scope of the Directive and a holistic approach should be taken to the regulation of credit.

Finally, the absence of a time limit to the right of withdrawal (“eternal” right of withdrawal) in the case of any information error causes significant legal uncertainty for providers of financial services. In Germany e.g. the period of withdrawal is unlimited if only one information requirement of minor importance for the consumer decision is not fulfilled (e.g. the information about the dispute resolution scheme is missing). It should not be however in our opinion in the spirit of the reflection period concept to allow a consumer to withdraw from a contract years later because a small item of information was omitted in the beginning. This fact indeed sidesteps the Directive's function of achieving legal peace. An automatic expiry of the right of withdrawal, after conclusion of contract, should be instituted. The distance selling directive 97/7/EC for goods and services solved this problem of legal uncertainty in its Art. 6 (1) sentence 4 and 5 very sensibly:

"If the supplier has failed to fulfil the obligations laid down in Article 5, the period shall be three months. The period shall begin: in the case of goods, from the day of receipt by the consumer, in the case of services, from the day of conclusion of the contract." This kind of provision is missing in the DM directive.

IV. Legal problems related to minimum harmonization clauses

Minimum harmonization is a problem because the provider cannot rely on the directive itself so he will have to check the relevant national law of other member states before entering those markets. For banks and especially small and medium ones, the application of the consumer law will generate high costs related to additional legal advice.

In addition, member states have interpreted differently some major concepts:

In France, the notion of ‘durable medium’ is interpreted very strictly and includes only CD-Rom. Also, a law has restricted the validity of electronic signatures of legal acts (loi n° 2004-575 du 21 juin 2004). This exception applies to private legal acts (sous seing privé) involving securities. For these legal acts, electronic signatures are not considered as valid.

Another difficulty concerns the period of withdrawal. The French government has e.g. decided to maintain the prohibition for the lender to transfer the money to the consumer before 7 days (length of the period of withdrawal in face to face operations). As a consequence, for distance selling of consumer credit, French lenders have now “two” periods of withdrawal within the 14 day period: 7 days during which it is not possible to transfer money plus 7 days.

In Greece, the legislator has adopted stricter and more demanding rules than the ones established by the Directive.

a. According to Article 4a, par. 3 (a) Law 2251/1994, any distance contract is nullified in favour of the consumer, if the consumer is not informed, before he is bound by any distance contract, in a clear and comprehensive manner in any way appropriate to the means of distance communication used, with due regard, in particular, to the principles of good faith in commercial transactions. The nullity of any distance contract ipso jure is not provided for by the Directive (Articles 3 and 11), which provides for the possibility of the consumer to cancel the distance contract.

b. According to Article 4a, par. 5 (a) Law 2251/1994, any distance contract is nullified in favour of the consumer, if the supplier does not communicate to the consumer all the contractual terms and conditions and the information referred to in Article 3, par. 1 and 4 of the Directive. The nullity of any distance contract ipso jure is not provided for by the Directive (Articles 5 and 11), which provides for the possibility of the consumer to cancel the distance contract.

c. According to Article 4a, par. 5 of Law 2251/1994, the cases provided for by Article 6 par. 3 of the Directive, i.e. (a) any credit intended primarily for the purpose of acquiring or retaining property rights in land or in an existing or projecting building, or for the purpose of renovating or improving a building or (b) any credit secured either by mortgage on immovable property or by a right related to immovable property or (c) declarations by consumers using the services of an official provided that the official confirms that the consumer is guaranteed the rights under Article 5, par. 1 of the Directive), are not exempted from the right of withdrawal, while according to Article 6, par. 3 of the Directive, such discretion is provided for. The Greek Legislator did not make use of the possibility provided for in Article 6, par. 3 (a), (b) and (c) of the Directive.

d. According to Article 4a, par. 13 of Law 2251/1994, the burden of proof in respect of the supplier's obligations to inform the consumer and the consumer's consent to conclusion of the contract and, where appropriate, its performance, is placed on the supplier, while according to Article 15 of the Directive, such discretion is provided for.

e. According to Article 4a, par. 4 of Law 2251/1994, the provisions of Article 4a, par. 3 (a) apply only if other provisions do not exist in national legislation about financial services, which impose additional information requirements. The Directive provides for such discretion in Article 4, par. 2: "Pending further harmonisation, Member States may maintain or introduce more stringent provisions on prior information requirements when the provisions are in conformity with Community law".

4. What is the potential for growth? What products may be suitable for cross-border distance selling?

The industry aspires to the development of a true cross-border market. Actually, some contracts concluded under distance marketing laws, which are becoming more and more common in our era of e-commerce, are growing in popularity.

Consequently, there is a potential in growth if the current problems raised by the application so far of the directive are solved in a constructive manner. At the present time, savings accounts (?) were mainly cited as suitable for cross-border distance selling because in this case, the need of advice is cut down.