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**Internal Market and
Consumer Protection**



**The Relation Between the Consumer
Rights Directive proposal and the Area
of Financial Services**

IMCO



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

The Relation Between the Consumer Rights Directive proposal and the Area of Financial Services

IP/A/IMCO/NT/2010-13
PE 451.477

November 2010
EN

This document was requested by the European Parliament's Committee on Internal Market and Consumer Protection (IMCO).

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LINGUISTIC VERSIONS

Original: [EN]

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Manuscript completed in November 2010.

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LIST OF ABBREVIATIONS

- AcP** Archiv für civilistische Praxis
- BB** Betriebs-Berater
- CJEU** Court of Justice of the European Union

1. APPLICATION OF THE PROPOSED DIRECTIVE TO FINANCIAL SERVICES

KEY FINDINGS

- The scope of application of the proposed directive to financial services is not entirely clear when it comes to investment services and to information obligations in off-premises contracts.
- The relationship between investment services, which come under the law related to off-premises contracts, and financial services whose price depends on fluctuations in the financial market outside the trader's control, which are exempted from the law related to off-premises contracts, is unclear and should be clarified.

1.1. Introduction

In October 2008, the Commission has tabled the proposal for a comprehensive Directive on Consumer Rights that is meant to replace four existing directives: the Doorstep Selling Directive 85/577/EEC, the Distance Marketing Directive 97/7/EC, the Unfair Terms in Consumer Contracts Directive 93/13/EEC and the Consumer Sales and Guarantees Directive 1999/44/EC. Two of these directives – Directives 85/577/EEC and 93/13/EEC - apply to financial services. On the other hand, the EU has in the meantime adopted a number of sector-specific directives and regulations in the area of financial services, which work to a large extent with the same or similar protective instruments, in particular with information obligations and withdrawal rights.

The aim of this briefing paper is to explore potential overlaps and inconsistencies between the proposed Consumer Rights Directive and sector-specific law in the area of financial services as well as regulatory gaps that could arise if neither the proposed Consumer Rights Directive nor sector-specific law applies to a given situation in which the consumer should enjoy protection.

Generally speaking, we have to distinguish the scope of application of the proposed Consumer Rights Directive in general and the scope of application of the individual chapters relating to: (1) information obligations, (2) off-premises and distance contracts, (3) consumer sales and guarantees, and (4) unfair contract terms.

1.2. The scope of the proposed directive in general

According to its Article 3 (1), the proposed directive shall apply to sales and service contracts concluded between the trader and the consumer. Article 3 (2) then contains a special provision for 'financial services' and limits the scope of application of the proposed directive to certain chapters and provisions.

1.2.1. Financial services

According to Article 2 (13), 'financial service' means any service of a banking, credit, insurance, personal pension, investment, or payment nature. This definition is comprehensive. It covers all financial services that have been regulated at EU level by sector-specific legislation, including:

- the Consumer Credit Directive 2008/48/EC;¹
- the Payment Services Directive 2007/64/EC;²
- the Cross-Border Payment Regulation (EC) No. 924/2009;³
- the Insurance Directive 2009/138/EC;¹

¹ OJ 2008, L 133/66.

² OJ 2007, L 319/1.

³ OJ 2009, L 266/11.

- Directive 2004/39/EC on Markets in Financial Instruments (MiFiD);² and
- Directive 2002/65/EC on the Distance Marketing of Financial Services.³

Moreover, it covers some types of financial services that have not yet been regulated at the EU level. These are banking services (other than credit and payment services) and personal pension services. Also, some investment services have not been regulated yet since the scope of application of Directive 2004/39/EC is not comprehensive and, in particular, does not cover closed property funds.

1.2.2. The applicable parts

According to Article 3 (2), the proposed Directive shall only apply to financial services as regards certain off-premises contracts as provided for by Articles 8 to 20, unfair contract terms as provided for by Articles 30 to 39, and general provisions as provided for by Articles 40 to 46, read in conjunction with Article 4 on full harmonisation. Thus, Article 3 (2) excludes the application of the general information obligations of Articles 5 to 7 for financial services, apparently relying on the specific information obligations that form part of the sector-specific law related to financial services; the rules on distance contracts (which have never come under the general distance selling regime of Directive 97/7/EC but have been regulated in Directive 2002/65/EC); and – quite naturally – the chapter on consumer goods and guarantees that only covers tangible goods. In other words, the only ‘real’ exception is made for the new Chapter II on information obligations with a caveat related to off-premises contracts.⁴

1.3. The particular scopes of application of the applicable parts

1.3.1. Off-premises contracts

Off-premises contracts are by and large those contracts that are currently dealt with by the Doorstep Selling Directive 85/577/EEC. The main difference is that the proposed Directive extends the situations covered.

Directive 85/577/EEC has always applied to financial services, while Member States could exclude insurance contracts and contracts on securities.⁵

In the proposed Consumer Rights Directive, the scope of application of the rules on off-premises contract is being redefined. According to Article 20 (2), the relevant Articles 8 to 19 shall not apply to off-premises contracts relating to:

- (a) insurance;
- (b) financial services whose price depends on fluctuations in the financial market outside the trader's control, which may occur during the withdrawal period, as defined in Article 6(2)(a) of Directive 2002/65/EC; and
- (c) credit which falls within the scope of Directive 2008/48/EC.

These exemptions are broader than the exemptions provided by the old Doorstep Selling Directive, and they are meant to be mandatory, which means that the Member States cannot extend their national legislation on off-premises contracts to these particular types of contract. In fact, most Member States have hitherto excluded insurance contracts in their national law on off-premises contracts,⁶ although some Member States provide for a right of withdrawal in insurance law generally (including non-life insurance), independent from an off-premises situation. One example is Germany.⁷

¹ OJ 2009, L 335/1.

² OJ 2004, L 145/1.

³ OJ 2002, L 261/16.

⁴ See below at 1.3.4.

⁵ Article 3 (2)(d) and (e) of Directive 85/577/EEC.

⁶ See Rott, ‘Die Umsetzung der Haustürwiderufsrichtlinie in den Mitgliedstaaten’, in particular p.134 f. The Consumer Law Compendium mentions ‘at least’ 14 out of 25 Member States.

⁷ § 8 of the Insurance Contracts Act (*Versicherungsvertragsgesetz*, VVG).

Moreover, a number of Member States have not exempted securities contracts from their national doorstep selling legislation,¹ or they have introduced a general right of withdrawal in sector-specific legislation,² which triggers the same questions as to whether the Member States would be precluded to maintain this general right of withdrawal in the light of the total harmonisation that is meant to be achieved by the proposed directive.

Articles 8 to 19 merely apply to all other financial services that are not excluded by Article 20 (2), that is: banking services such as bank accounts, personal pension services, and payment services.

The situation of investment services is not entirely clear. Normally, investment services will relate to products whose price depends on fluctuations in the financial market outside the trader's control, which may occur during the withdrawal period as mentioned in Article 20 (2)(b). Nevertheless, the proposal does not use the term 'investment services' in Article 20 (2)(b). In the context of Article 6 (2)(a) of Directive 2002/65/EC, to which Article 20 (2)(b) refers, a number of types of investment services, including foreign exchange, money market instruments, transferable securities, units in collective investment undertakings, financial-futures contracts, including equivalent cash-settled instruments, forward interest-rate agreements (FRAs), interest-rate, currency and equity swaps and options to acquire or dispose of any instruments referred to in this point including equivalent cash-settled instruments.

However, the exception only applies to financial services whose price depends on fluctuations during the withdrawal period. The situation regarding closed property funds whose prices are more stable, for example, is unclear. One could argue that they are not covered by the exception of Article 20 (2)(b). In the end, the prices of all goods and services are subject to changes in the marketplace without them being exempted from the scope of application of the law on off-premises contracts.

Another residual area of investment contracts may be the services of intermediaries that come at a cost that does not fluctuate on the market.

An interesting observation is that the whole chapter on off-premises contracts does not apply to financial services whose price depends on fluctuations in the financial market outside the trader's control, while in the similar Directive 2002/65/EC on the distance marketing of financial services merely the right of withdrawal is excluded but information obligations apply.³

1.3.2. Unfair contract terms

Unfair contract terms are currently dealt with by Directive 93/13/EEC on unfair contract terms in consumer contracts. This directive applies to contract terms, including financial services. Equally, Chapter V of the proposed Consumer Rights Directive shall apply to "contract terms". No exemptions are made for financial services.

1.3.3. General provisions of Articles 40 to 43

Articles 40 to 43 deal with the Committee on unfair contract terms in consumer contract, with enforcement, penalties and the imperative nature of the provisions of the proposed directive. Thus, they are of an accessory nature and do not establish any new substantive law beyond the areas of off-premises contracts and unfair contract terms. They can be skipped for the purposes of this briefing paper.

¹ For example: Austria, Belgium, Germany, Luxemburg, and the United Kingdom. The Consumer Law Compendium mentions 'at least' 13 out of 25 Member States.

² France and Italy.

³ See Article 6 (2)(a) of Directive 2002/65/EC.

1.3.4. General information obligations

One interesting question relates to the information obligations that apply to off-premises contracts, according to Article 9 of the proposed directive. According to Article 9(a), the trader shall provide, among other things, the information referred to in Articles 5 and 7. This would mean that where those financial services that are not entirely excluded by Article 20 (2), that is: banking services, personal pension services, payment services, and some investment services, are agreed upon in an off-premises situation, Chapter II on information obligations applies although it is not mentioned by Article 3 (2). The consequences will be discussed in the second part of this briefing paper.

2. THE INTERACTION WITH OTHER EU LEGISLATION ON FINANCIAL SERVICES

KEY FINDINGS

- The interaction between the proposed Consumer Rights Directive and other EU legislation on financial services is not optimal in the area of off-premises contracts. Some overlaps would occur, as well as some regulatory gaps. In the area of unfair contract terms, no problems are envisaged.
- Overlaps between the rules on off-premises contracts and specific legislation on financial services may occur with the information obligations of the Payment Services Directive 2007/64/EC.
- Regulatory gaps may occur with respect to non-life insurance, where there will be few information obligations and no right of withdrawal.
- Regulation of issues concerning off-premises contracts and unfair contract terms that relate to financial services contracts should occur in the general framework of the proposed Consumer Rights Directive.

2.1. Introduction

Under the aspect of better regulation, overlaps between the proposed Consumer Rights Directive and sector-specific legislation related to financial services should be avoided. At the same time, regulatory gaps should be avoided as well, and this is the intention of the Commission, as recital (11) confirms. Where regulatory gaps should be filled, the remaining question could be whether this should be done with the proposed Consumer Rights Directive or in sector-specific legislation.

2.2. Off-premises contracts

2.2.1. Avoiding overlaps and regulatory gaps

The protective instruments of the proposed rules on off-premises contracts are information obligations and the right of withdrawal. The purpose of both instruments is to enable consumers to make an informed purchasing decision.¹ With regard to information obligations, one issue should be mentioned: Article 9 lists a number of items of information to be given, including those items that are mentioned in Articles 5 and 7. Thus, although the chapter on information obligations does not apply to financial services, according to Article 3 (2), it does apply through the backdoor when it comes to off-premises contracts.

2.2.1.1. Credit contracts

Credit contracts that have come under the old Doorstep Selling Directive are now excluded. However, far-reaching information obligations and also a new right of withdrawal have been introduced by the Consumer Credit Directive 2008/48/EC. Thus, no regulatory gap arises where Directive 2008/48/EC applies. It should however be remembered that the scope of application of Directive 2008/48/EC is severely restricted. For example, it does not apply to mortgage-secured credit that has caused many problems leading to the ECJ cases of *Heininger*,² *Schulte*,³ *Crailsheimer Volksbank*,¹ and *Hamilton*.²

¹ On this function of the right of withdrawal see Günter Reiner, 'Der verbraucherschützende Widerruf im Recht der Willenserklärungen', *Archiv für civilistische Praxis* 203 (2003), p. 1, at p 9 f.

² ECJ, judgment of 13/12/2001, case C-481/99 (*Heininger*), [2001] ECR I-9945.

³ ECJ, judgment of 25/10/2005, case C-350/03 (*Schulte*), [2005] ECR I-9215.

Therefore, Article 20 (2)(c) only relates to credit contracts that fall into the scope of application of Directive 2008/48/EC. To all other credit contracts, the new provisions on off-premises contracts apply, which is important to avoid a regulatory gap.

2.2.1.2. Insurance contracts

The situation is similar with life insurance contracts in respect of which Member States could apply the European doorstep selling provisions of Directive 85/577/EEC if they wished to do so. The new Directive 2009/138/EC provides for comprehensive information obligations and also a right to cancellation.³

In contrast, the Insurance Directive does not confer equivalent rights on consumers in the case of non-life insurance that would substitute his or her protection under the law on off-premises contracts. Little information has to be given, and no right of cancellation exists.⁴

In terms of coherence with other EU legislation, it is also worth pointing out that insurance contracts are not excluded from the scope of application of Directive 2002/65/EC on the distance marketing of financial services. All information obligations apply to insurance contracts, and even the right of withdrawal is only excluded for insurance contracts related to travel and baggage insurance policies or similar short-term insurance policies of less than one month's duration, see Article 6 (2)(b) of Directive 2002/65/EC.

Thus, the complete exemption of non-life insurance from the scope of application of the law on off-premises contracts leaves a regulatory gap.

2.2.1.3. Financial services whose price depends on fluctuations in the financial market outside the trader's control

As far as information obligations for financial services whose price depends on fluctuations in the financial market outside the trader's control are concerned, the political decision is not to confer a withdrawal right on the consumer to avoid his or her speculating at the trader's expense.⁵ Unlike under the law related to the distance marketing of financial services, however, the trader is also not subject to any information obligations under off-premises contract law, although these contracts are particularly risky for the consumer.⁶

The MiFID Directive 2004/39/EC does not fill this gap entirely since it may not cover all financial services whose price depends on fluctuations in the financial market outside the trader's control. In particular, it does not apply to closed property funds whose distribution at the doorstep has caused immense problems in Germany and which may or may not fall under Article 20 (2)(b).⁷ Thus, in order to fill a regulatory gap that would arise otherwise, Article 20 (2)(b) of the proposed directive should be limited to the right of withdrawal and therefore moved into Article 19 (2).

2.2.1.4. Other investment contracts

As mentioned above, the remaining investment contracts that are related to financial services whose price does not depend on fluctuations in the financial market outside the trader's control are within the scope of application of the proposed rules on off-premises contracts. There appears to be no other overlap with other EU legislation.

¹ ECJ, judgment of 25/10/2005, case C-229/04 (*Crailsheimer Volksbank*), [2005] ECR I-9273.

² ECJ, judgment of 10/4/2008, case C- 412/06 (*Hamilton*), [2008] ECR I-2383.

³ See Articles 183, 185 and 186 of Directive 2009/138/EC.

⁴ See Articles 183 and 184 of Directive 2009/138/EC.

⁵ See COM(1998) final, p 14, for distance contracts.

⁶ On this issue in the law related to the distance marketing of financial services see Peter Rott, 'Die Umsetzung der Richtlinie über den Fernabsatz von Finanzdienstleistungen im deutschen Recht', *Betriebs-Berater* 2005, p.53, at p 60.

⁷ See *supra*, at para. 1.3.1.

2.2.1.5. Personal pension services

Personal pension services are a growing market in the EU due to the withdrawal of the state from fully guaranteeing pensions, and it is a market in which consumers are inexperienced.¹ Pension services have not undergone sector-specific regulation at EU level. They are only covered by Directive 2002/65/EC on the distance marketing of financial services, which obviously does not apply to off-premises situations. Thus, it is crucial to apply the protective instruments for off-premises contracts of the proposed Consumer Rights Directive in order to avoid a regulatory gap.

2.2.1.6. Payment contracts

For payment contracts, the Payment Services Directive 2007/64/EC has introduced extensive information obligations that are mandatory in contracts between payment service providers and consumers, see Articles 37 (individual contracts) and 41 (framework contracts) of Directive 2007/64/EC. In contrast, no right of withdrawal exists. Thus, one could consider exempting payment contracts from the information obligations of Article 9 of the proposed directive, while the right of withdrawal and those information obligations that relate to the right of withdrawal should apply. Generally speaking, it is however unlikely that payment contracts are concluded in an off-premises situation.

2.2.1.7. Banking contracts

Banking contracts other than the specific contracts mentioned in paragraphs 2.2.1.1. to 2.2.1.5. above, in particular banking contracts related to bank accounts, have not been specifically regulated at EU level so that no overlap occurs. They continue to be included in the rules on off-premises contracts, and this is important given recent practices of banks to address potential customers at public places such as railway stations.

2.2.2. The best place for regulation

Off-premises contracts have triggered legislative responses since they create particular problems for consumers, namely the risk of being taken by surprise and of therefore making an uninformed decision,² as well as the risk of being put under undue psychological or even physical pressure. These problems are by no means sector-specific. In the negotiations for the Consumer Credit Directive 2008/48/EC, the Commission had initially proposed a special provision related to doorstep selling of credit.³ At the time, this proposal was rejected by the European Parliament with reference to the special regime concerning doorstep selling.⁴ It would be strange to turn the argument around now when off-premises contracts are regulated anew.

Should overlaps arise in the future with further legislation related to those financial services that have not yet undergone comprehensive legislation, conflict clauses can be introduced then as it was done in Article 14 (5) of the Consumer Credit Directive. There, the right of withdrawal under doorstep selling law was excluded for cases in which the withdrawal right under the Consumer Credit Directive applies. Thus, the trader only has to take into account one set of rules.

¹ See, for example, Wolfram Lamping, 'Verbraucherkompetenz und Verbraucherschutz auf Wohlfahrtsmärkten: neue Herausforderungen an eine sozialpolitische Verbraucherpolitik', Vierteljahreshefte zur Wirtschaftsforschung 3/2009, pp 44 ff.

² See recital (4) of Directive 85/577/EEC.

³ Article 4 of the Commission's proposal for a Directive on consumer credit, COM(2002) 443 final of 11/9/2002, OJ 2002, C 331 E/200.

⁴ See the legislative resolution of the European Parliament, A5-0224/2004, Amendment 64, and the explanation of the amended proposal by the Commission, COM (2004) 747, at 4.3.6

2.3. Unfair Contract Terms

2.3.1. Avoiding overlaps and regulatory gaps

Chapter V concerning consumer rights against contract terms protects consumers by declaring unfair terms void.

Overlaps with sector-specific provisions concerning contracts related to financial services are automatically avoided by Article 30 (3) of the proposed directive, which would succeed Article 1 (2) of the current Unfair Contract Terms Directive 93/13/EEC.

According to these provisions, unfair contract terms law does not apply to contract terms reflecting mandatory statutory or regulatory provisions that comply with EU law. Here, it should first be noticed that all sector-specific consumer law related to financial services is mandatory law.¹ This means that where a trader of financial services includes a term in a contract with the consumer that copies such mandatory law, the respective contract term is exempted from the unfairness control of Chapter V. Chapter V only applies to terms that deal with matters not covered by the mandatory law and to such issues of financial services that have not been regulated at EU level yet, either because the type of financial services has not yet undergone regulation at EU level at all – such as banking services – or because the sector-specific directive does not cover the specific issue. For example, the Consumer Credit Directive does not deal comprehensively with the post-contractual phase.

On the other hand, the financial services industry has made frequent appearance as defendant in unfair contract terms litigation, and consumer associations have succeeded in many cases. Indeed, the indicative list in the annex to Directive 93/13/EEC includes a regulation of interest variation clauses, for example, and therefore clearly intends to regulate financial services. They are also included in Annex III of the current proposal where they are explicitly mentioned, for example, in nos. 2, 3 and 4. It would leave a great regulatory gap to exclude financial services from the scope of application of Chapter V. Special characteristics of financial services can be dealt with within the unfairness test, as it is provided for in Annex III no. 2, 3 and 4 of the proposed Consumer Rights Directive.

2.3.2. The best place for regulation

The variety of contract terms that are unfair or that can be unfair under the particular circumstances of the case at hand is so great that the issue should be regulated at a general level, namely in Chapter V of the proposed Consumer Rights Directive. In fact, the issue of the right place for regulating unfair contract terms related to sector-specific areas was already touched upon during the negotiation of the Consumer Credit Directive, and at the time the Commission had proposed to amend the Unfair Contract Terms Directive 93/13/EEC instead of integrating rules on unfair terms into the Consumer Credit Directive.²

¹ See, for example, Article 12 (1) of Directive 2002/65/EC, Article 30 (1) of Directive 2007/64/EC or Article 22 (2) of Directive 2008/48/EC.

² Article 15 of the Commission's proposal for a Directive on consumer credit, COM (2002) 483 final.

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