

**Final Report**

**Part I: General Analysis**

Impact of Directive 2002/65/EC concerning the distance marketing of consumer financial services on the conclusion of cross-border financial service contracts between professionals and consumers

**Project No. SANCO/2006/B4/034**

submitted by

Prof. Dr. Udo Reifner

in collaboration with

Dr. Elena F. Pérez-Carillo, PD Dr. Kai-Oliver Knops, Dr. Achim Tiffe and  
Sebastien Clerc-Renaud

institut für finanzdienstleistungen e.V. (*iff*)

Rödingsmarkt 31/33

20459 Hamburg

Tel.: + 49 40 30 96 91 0

Fax: + 49 40 30 96 91 22

Hamburg, October 16, 2008



institut für  
finanzdienstleistungen e.V.

## Executive Summary

- Goal** This report examines the potential impact of divergent national consumer rights to information provision and early withdrawal on the willingness and ability of suppliers and consumers to sell or buy financial products by means of the Internet or other similar means of distance selling. The project evaluates how Directive 2002/65/EC has to date been incorporated into national law, how the different options have been applied by national legislators and which other comparable information rights and duties, arising under existing autonomous national law, have created overlapping or additional barriers to cross-border transactions beyond the scope of the applicable EU regulations.
- Contributions** The project is based on contributions reporting on national provisions in the Member States provided by 27 national legal experts, in the main professors of law, from government reports provided by the European Commission, from a survey of financial service providers, a survey of national associations of financial service providers conducted in the parallel research project and from the views of consumer organisations in all 27 Member States, including consumer ombudsmen. The experts responded to the questions of the research team in three stages. This project focused on the law, while a sister project simultaneously investigated the problems encountered in practice in the cross-border distance marketing of financial services in the EU.
- Legal Problems** All experts, consumer organisations and ombudsmen reported that there was no significant cross-border commerce in the distance marketing of financial services to consumers in the EU. This finding was in line with the comments received from the supplier side. The legal experts were only able to report on a few examples or discussions in their respective countries in which problems concerning the cross-border distance selling of financial services are specifically addressed. Consumer organisations do not show much experience of complaint-handling in this area. Only the French ombudsman reported complaints by foreigners in France relating to investment products. Most interviewed were of the opinion that legal differences are not a major impediment to cross-border sales of this kind. They assume that other non-legal factors, such as language, culture and the nature of the financial services concerned, are more relevant to the limited trade in cross-border financial services to date. Legal problems in relation to information rights involve distance selling in general, rather than cross-border transactions in particular.
- Scope of Regulations** The project focused on legal differences in the law applicable in different countries which might constitute an obstacle to cross-border commerce. The scope of this research was defined by the different sources of diversity in national law in relation to information duties. These duties may stem from (1) regulations using the leeway offered under Article 4(2) of the Directive 2002/65/EC, either to maintain or to introduce additional national information rights, (2) general obligations under contract law to inform consumers or to provide adequate advice, (3) obligations derived from national product-specific regulations, which go beyond those required by existing EU law either (a) because of minimum harmonisation or (b) because of differences in the application of the relevant EU law.
- Article 4(2) Distance Marketing** As far as the scope of Article 4(2) is concerned, about one-fifth of Member States claim that they have introduced additional duties relating to the provision of information, while about two-fifths claim that they have made use of the leeway to maintain additional national information rights. However some Member States, as well as

experts, understand “use” to mean having maintained the “option”, while others understand it more literally. With regard to all information rights applicable to financial services in general, as well as the general information duties provided by special consumer laws or the civil codes, all countries provide for additional information duties, which apply to foreign providers of financial services in the context of distance marketing. The report cites these general duties, in addition to specific duties to provide information.

***Product Specific Information Duties***

Product-specific duties to provide information duties account for most of the existing information-provision duties in EU Member States. Knowledge of duties of that nature in existence under EU law is useful for identifying any additional law existing at national level. For this reason the report first assembles information relating to 49 products or situations in respect of which the EU Directives in credit, insurance, payment systems and investment relevant to this report provide information duties. EU legislation providing for information duties covers the following matters: complaints, contractual changes, cost elements, execution, intermediaries, language, liabilities, litigation, marketing, payments, price parameters, product description, registration, representatives, right of withdrawal, risks, applicable rules, supervision, supplier identification, termination, time periods.

The national reports reveal an even greater range of information rights at national level. The question of whether such rules are “additional” to EU law requires discussion of each of these rules with respect to the relevant EU Directives.

***Article 6(3) Right of Withdrawal***

With regard to the right of withdrawal, one-third of Member States, representing about half of the consumer market, has made use of the leeway in relation to all types of housing finance as defined by Article 6(3), always including both definitions. On the other hand, only three Member States, amounting to more than 20 % of all consumers in the EU, have made use of the option to exclude the right of withdrawal where officials (such as notaries) have been involved. The differences are fairly standardised and do not seem to have the potential to create legal problems.

***Article 6(8) Cancellation***

Most countries report that other rights of early termination exist, either in the form of a cancellation right or indirectly, through nullity or other sanctions. Although there is an overlap, no problems are reported apart from the problem of obligatory motor insurance, which cannot be terminated retroactively. Consumers are generally entitled to choose to exercise the right that is the most favourable to them. This may give way to legal problems.

***Article 11 Sanctions***

Highly specific systems of sanctions are preserved by the open definition of sanctions contained in the Directive for breach of duties to provide information. These range from civil, to administrative to criminal penalties. In addition, different procedures apply, from class action to complaint boards, as well as different court procedures. Differences in sanctions, particularly those derived from non-fulfilment of information rights, may be one of the main sources of legal barriers to cross-border financial services and products. In most cases, this situation entails legal advice costs for suppliers. It may also give rise to uncertainty for consumers, with the result that consumers may prefer to enter into a contract with a supplier from their own country. Differing sanctions and procedures are capable of creating trade barriers.

## Table of Contents

<b>A. Object: Targeted provisions under national law .....</b>	<b>1</b>
I. Regulations governing the distance marketing of financial services in cross-border transactions (Article 20).....	1
1. Scope of the Research.....	1
2. Legal barriers and the lack of cross-border commerce (Article 20 (2)).....	2
II. National legal provisions .....	5
1. Legal perspective .....	5
2. General national regulations .....	6
3. Product-specific information requirements for credit, investment, insurance or payment services .....	7
III. Scope: Regulations under Articles 2 and 6 of the Directive .....	9
IV. Summary of rules to be analysed .....	11
<b>B. Methodology, sources of information and general outcome of the survey .....</b>	<b>12</b>
I. Sources of information on national provisions .....	12
1. Official sources .....	13
2. Legal experts.....	13
3. Consumer organisations.....	14
4. Supplier Side.....	15
5. Ombudsmen .....	16
6. Discussion with stakeholders.....	16
II. Questions and answers.....	16
1. Survey of legal experts .....	16
2. Survey of consumer organisations.....	17
3. Survey of Ombudsmen .....	17
III. Summary of available information .....	18
<b>C. Legal problems associated with national diversity of rules –survey results .....</b>	<b>19</b>
I. Responses from experts and consumer related institutions.....	19
II. Responses from the supplier side – summary of CIVIC report .....	19
III. Some examples of possible problems .....	21
1. Consumer complaints .....	21
2. Concerns voiced by consumer organisations.....	21
3. Risks viewed by consumer organisations .....	22
4. Concerns voiced by suppliers .....	23
IV. Conclusion .....	24
<b>D. EU Regulation on information rights and duties applicable to distance marketing of financial services .....</b>	<b>26</b>
I. Area of application, supplier identification.....	27
II. Representatives and intermediaries.....	29
III. Supervision, register, product description.....	30

IV. Marketing and execution.....	33
V. Price parameter and cost elements.....	35
VI. Risks, Liabilities, Time and Changes of Conditions.....	38
VII. Payments and right of withdrawal .....	40
VIII. Termination, rules, complaints, litigation, language.....	42
IX. Conclusion .....	43
<b>E. Additional information rights (Article 4(2) Directive 2002/65/EC).....</b>	<b>45</b>
I. General use of the leeway .....	45
II. Additional pre-contractual information duties – evidence and problems .....	50
1. Legal form of additional provisions.....	50
2. Additional provisions from general law: good faith and fairness .....	51
3. Additional information requirements for distance marketing only.....	54
4. Hidden “Additional” provisions.....	56
5. Differences stemming from product-specific regulation .....	59
III. Conclusion .....	74
<b>F. Exemption from the Right of Withdrawal (Article. 6(3) Directive 2002/65/EC) .....</b>	<b>76</b>
I. Use of Article 6(3) .....	76
II. Problems arising from the exemption in housing finance.....	79
III. Problems with the exemption concerning use of officials .....	80
IV. Conclusion .....	80
<b>G. Overlap with cancellation rights (Article 6(8) Directive 2002/65/EC) .....</b>	<b>81</b>
I. Overlaps within EU Directives .....	81
II. Problems arising from overlaps at national level.....	82
III. Conclusion .....	85
<b>H. Differences stemming from sanctions and enforcement (Article 11 Directive 2002/65/EC) .....</b>	<b>86</b>
I. Contractual sanctions and remedies.....	86
II. Administrative law sanctions.....	87
III. Criminal law sanctions.....	89
IV. Class actions and other enforcement mechanisms.....	89
V. Conclusion .....	90
<b>I. Summaries of the National Reports in Part II .....</b>	<b>91</b>

### List of Tables

<i>Table 1: Responses to questionnaires</i> .....	18
<i>Table 2: Existing legal problems in cross-border commerce in financial services in general and for distance marketing in particular</i> .....	19
<i>Table 3: Problematic products identified by consumer organisations</i> .....	22
<i>Table 4: Overview of Article 4(2) according to notification under Article 4(3)</i> .....	47
<i>Table 5: Additional national provisions introduced or maintained in individual Member States (experts)</i> .....	48
<i>Table 6: Are there any differences in your law applicable to cross-border financial services compared with the law of other EU Member States? (Question asked to consumer organisations)</i> .....	49
<i>Table 7: Information about the address of the supplier - problems of disclosure under EU law</i> .....	59
<i>Table 8: Information rights on financial services derived from EU Directives</i> .....	66
<i>Table 9: Article 6(3): Responses and expert opinions</i> .....	77
<i>Table 10: Use of the exemptions granted under Article 6(3) according to number of Member States and market size</i> .....	78

### Table of Figures

<i>Figure 1: Distance marketing of financial services - scope</i> .....	2
<i>Figure 2: Possible barriers to the cross-border distance marketing of financial services</i> .....	5
<i>Figure 3: Risks in distance marketing of financial services cross-border according to consumer organisations</i> .....	23
<i>Figure 4: Article 4(2) Additional information duties</i> .....	48
<i>Figure 5: Article 6(3) Exemptions from the right of withdrawal</i> .....	78

## **A. Object: Targeted provisions under national law**

The task of this research is to collect, compare and analyse regulations in the Member States and their impact on the distance marketing of financial services in cross-border transactions. The scope of the research is not objectively defined by its economic or social sphere of application, but by the research question which has the clearly defined purpose of amending and ameliorating the relevant Directive in order to promote an increased volume of cross-border transactions in financial services. Regulations which diverge, which must be applied in cross-border distance marketing of financial services and which (could potentially) create a barrier to the offer of and demand for such services, are to be identified.

### ***I. Regulations governing the distance marketing of financial services in cross-border transactions (Article 20)***

#### **1. Scope of the Research**

The tender document commissioning this project requested examination of “if and how the implementation of Directive 2002/65 has created favourable legal conditions for and therefore encouraged the conclusion of cross-border financial services contracts between consumers and suppliers within the internal market”. This task follows<sup>1</sup> Article 20 of the Directive, which requires the Commission to “analyse and detail the difficulties that are, or might be faced by both consumers and suppliers, in particular arising from differences between national provisions regarding information and right of withdrawal.”

Directive 2002/65/EC provides binding rights to receive and duties to provide pre-contractual information and, with one exemption, a mandatory right of withdrawal for consumers subject to three general restrictive conditions: (1) it applies to financial services and (2) if they are marketed through distance selling. Art. 20 requires (3) a special focus on “cross-border transactions” in the anticipated report from the Commission. The overlapping circles in the diagram below indicate the regulatory areas concerned. Marked with a cross is the area which, according to no 2 of the recitals of this Directive, “constitutes one of the main tangible results of the completion of the internal market” and is thus seen as an area of major interest for the European Union with high potential for future development. The Directive thus expresses the aspiration that financial services will ultimately largely be marketed across borders and that distance selling will become one of its main pillars which, in the diagram below, is represented by the integration of the yellow, brown and blue circles.

---

<sup>1</sup> see letter from the Commission to the informants of the project dated 24 August, 2007

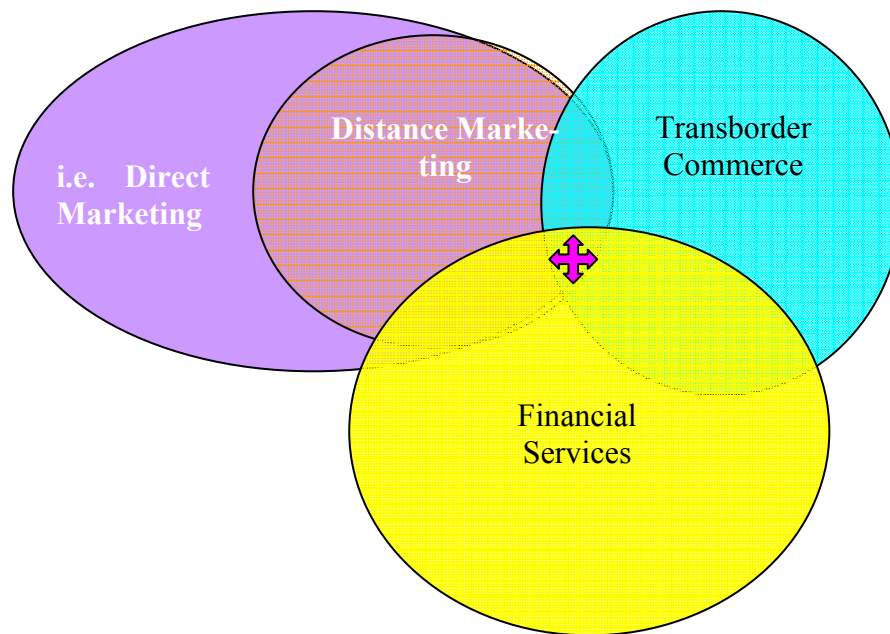


Figure 1: Distance marketing of financial services - scope

## 2. Legal barriers and the lack of cross-border commerce (Article 20 (2))

Article 20(2) of the Directive starts out from the assumption that divergent national regulations in these two areas will create difficulties. This assumption is also core to this research, which has been tasked to identify the regulations concerned.<sup>2</sup> All current data and responses, however, appear to indicate that there have to date been no significant cross-border transactions in the distance selling of financial services. This is supported by the findings of the sister project which states:<sup>3</sup>

“Clearly, there is very little crossborder provision of many consumer financial service products and only a small percentage of EU citizens are involved in cross-border financial transactions, although there seems to be some upward trend, as is indicated by recent Eurobarometer data(see”

This does not contradict the findings of the data collected through the Eurobarometer 65.1 opinion polls of 2006, which reported that between 4 % and 8 % of those interviewed indicated that they had obtained the product in another Member State.<sup>4</sup> As the question covered

<sup>2</sup> This assumption is now repeated in the fourth recital of the Consumer Credit Directive 2008/48/EC which was qualified by the addition by the Council of the words “in some cases” to the initial statement which now reads: (4) “The de facto and de jure situation resulting from those national differences in some cases leads to distortions of competition among creditors in the Community and creates obstacles to the internal market where Member States have adopted different mandatory provisions more stringent than those provided for in Directive 87/102/EEC. It restricts consumers' ability to make direct use of the gradually increasing availability of cross-border credit. Those distortions and restrictions may in turn have consequences in terms of the demand for goods and services.”

<sup>3</sup> CIVIC Consulting of the Consumer Policy Evaluation Consortium (CPEC), Analysis of the Economic Impact of Directive 2002/65/EC concerning the distance marketing of consumer financial services on the conclusion of cross-border contracts for financial services between suppliers and consumers within the Internal Market, Draft Final Report Submitted by Framework Contract Lot 2 – DG SANCO Date: 05 September 2008 p 14

<sup>4</sup> Eurobarometer 60.2 (2004), EU Public Opinion in Europe: Financial Services, Report B., Eurobarometer 252 / Wave 65.1 (2006), Consumer Protection in the Internal Market



all distribution channels, it must be assumed that distance marketing was not significantly represented among the ways in which cross-border activity in financial services took place.

This is in line with the findings of the EU Financial Integration Monitor for 2005.<sup>5</sup> It answers negatively the question of whether there is integration for home loans as well as consumer credit, whereas for savings accounts (“some”) and investment products (“yes”) there is a slightly more positive answer.

One of the main reasons is the continuing limited use of distance marketing practices overall. CIVIC<sup>6</sup> finds on one hand that, among the 37 respondent banks, 65 % used distance marketing but only between 3 % and 5 % of their income came from such practices. Credit cards and savings accounts were named as relatively important in this area, while insurance, mortgage loans and current accounts were seen as less significant in terms of Internet business.<sup>7</sup>

When it comes to cross-border transactions, the sister report<sup>8</sup> reveals that, in line with the comments from the European Banking Industry Committee, the banker associations interviewed denied that cross-border activities in this area were statistically significant.

“Of the 14 national banking associations responding to the survey, only four indicated that they had members conducting cross-border distance marketing. Of these four associations two reported that cross-border distance marketing represented less than 0.1 % of their distance marketing activity (at a national level across all banks) and the other two associations reported that cross-border distance marketing represented less than 1 % of their national activity. Of the 37 banks responding to the survey of companies, only 7 of the 24 operating distance marketing do so on a cross-border basis (30 %); however, some of these companies only passively accept consumers from abroad (for a savings account, most commonly) rather than maintain a proactive cross-border operation. Three of these 7 banks provided estimates of the percentage cross-border distance marketing represented of their total sales of consumer financial services; for one bank direct cross-border sales represented less than 0.1 %, for another bank it was less than 1 % and the last bank marked direct cross-border sales represented less than 5 % of their total sales of consumer financial services. Quite clearly, this is a business strategy that is not actively pursued by the vast majority of retail banks.”

Asked for their expectations in terms of future developments, the most frequent answers were “don’t know” (15 %) and “remain the same” (8 %). Only 2 % expected an increase in the near future.<sup>9</sup>

With regard to financial services, the tender therefore states rightly that “it is known from recent surveys that, while more and more consumers are prepared to purchase financial services at a distance, the number prepared to buy cross-border remains very low”.<sup>10</sup>

These findings have been confirmed by all national experts, consumer organisations and ombudsman institutions in their responses to this survey and concur with the monthly bulletin of the European Central Bank.<sup>11</sup>

“While the euro area banking markets for wholesale and capital market-related activities show clear signs of increasing integration, the retail banking segment has remained more fragmented. In particular, the euro area crosscountry dispersion of bank interest rates, especially of interest rates on consumer loans, has remained relatively high (see Chart 4).”

---

<sup>5</sup> European Commission, Financial Integration Monitor 2005, SEC (2005) 927.

<sup>6</sup> op. cit. p 18

<sup>7</sup> op.cit. p 20

<sup>8</sup> op. cit. p 22

<sup>9</sup> op. cit. p 23

<sup>10</sup> op. cit. 3rd bullet point

<sup>11</sup> Monthly Bulletin 10th Anniversary of the ECB 2008 p 107

The research question in the tender, namely whether the Directive has “encouraged the conclusion of cross-border financial services” has therefore to be addressed with caution.

Non-legal factors explaining the low level of cross-border activity in the distance marketing of financial services dominate opinion in practice.

The ECB cites a number of factors which could be responsible for the absence of development of an integrated retail financial market in general, which point especially to product design. The level of consumer protection is mentioned as one of a number of reasons.

“Differences in bank interest rates can reflect several factors, such as different conditions in national economies (e.g. credit and interest rate risk, size of firms, industrial structure and degree of capital market development), institutional factors (e.g. taxation, regulation, supervision and consumer protection) and financial structures (e.g. degree of bank/capital market financing and competitiveness).”

EBIC<sup>12</sup> supports the assumption that factors such as language and culture play the most important role in impeding cross-border commerce in retail financial services. “The overwhelming majority of distance marketing transactions which are subject to the Directive take place within a single Member State and have no cross-border connection.” It therefore proposes to conduct a study that investigates the impact the Directive has on distance marketing in general.

The sister report to this project points to the continuing low level of activity in the distance marketing of financial services and identifies 16 potential barriers,<sup>13</sup> 13 of which are attributed to the supply side (1-13) and three to the demand side. “Differences in disclosure rules and withdrawal rights” are given less prominence.

The findings of this research mirror this absence of activity. Like the supplier side, neither experts nor consumer organisations, reported a significant number of legal problems, case law or scientific discussions in this area. As the law is closely related to problems arising in practice, especially in the form of court decisions, it depends on the number of disputes that may arise in this area which, again, is a function of the overall number of cross-border transactions in financial services sold at distance. The project offers a tentative answer including hypothetical considerations offered by the national experts predicting future problems.

Full research on the effect of the law on markets would have to combine the factual level of existing cross-border commerce in the distance marketing of financial services and with it the functioning of the internal market given the level of divergent national rules capable of operating as a barrier to this commerce. We have summarised these hypothetical obstacles in the following pyramid. It ranks the obstacles similar to Maslow’s ‘pyramid of needs’, moving from the more social elements of mobilising law to the more legal elements. This research will examine those two on top while those below are beyond its scope.

---

<sup>12</sup> EBIC op.cit. (Fn 3)

<sup>13</sup> 1. Lack of harmonised payment systems, etc.; 2. Problems related to tax; 3. Difficulties in concluding contracts electronically; 4. Need to maintain multiple channels for delivery and communication; 5. Difficulties in debt recovery; 6. Absence of pan-European credit referencing system; 7. National anti-money laundering requirements; 8. Lack of harmonisation of relevant MS legislation or absence of EU legislation; 9. Differences in disclosure rules and withdrawal rights; 10. Inconsistency between regulation of face-to-face and distance selling; 11. Legal uncertainty regarding the applicable law; 12. Lack of understanding of domestic retail financial services markets; 13. Difficulties in marketing in other MS; 14. Differences in language and culture; 15. Consumer preference for own national providers; 16. Absence of information (CIVIC op. cit. p 65)

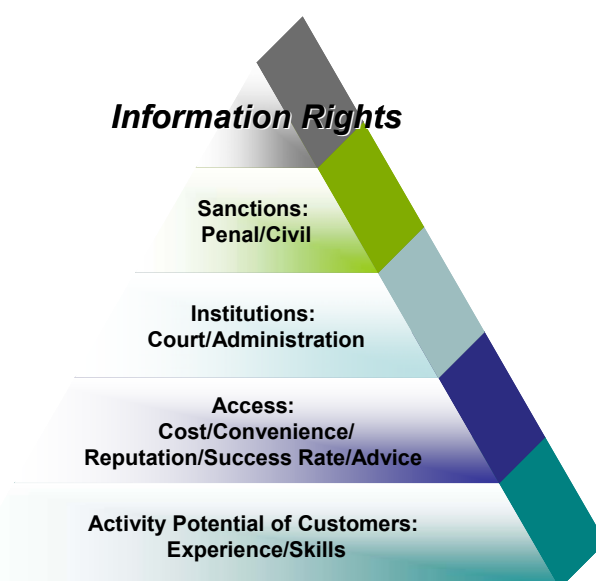


Figure 2: Possible barriers to the cross-border distance marketing of financial services

The absence of cross-border commerce does not, however, render the research superfluous. Scientific standards can be preserved if it maintains a hypothetical approach offering a number of informed and concrete, while theoretical, assumptions as to the obstacles potentially posed by divergent national rules to the functioning of the internal market in the context of cross-border commerce in financial services.

## II. National legal provisions

The present report focuses on differences between the legal provisions of the various Member States.

### 1. Legal perspective

While the more general task of examining “the functioning of the internal market in financial services in the context of the marketing of those services” is left to the sister project with whom this research team collaborates and whose results are complementary,<sup>14</sup> the present report describes the regulations and their impact on cross-border marketing from a legal perspective. Factual barriers, whilst not being the subject of this study, are mentioned when the research finds that their influence is evident. Where the law is encountered as a barrier, the application of the law in practice cannot be ignored. Specific rules (“law in the books”) only amount to a barrier to markets if they have an effect on human behaviour (“law in action”).<sup>15</sup> The question of how far and to what end a regulation is applied is therefore always part of a legal analysis on the impact law has on markets and competition.

In relation to long-term credit relationships, our research, the responses from the market and from consumer organisations, together with past experience, show us that borrowers often tend to reflect critically on their credit contracts after the effect of the transaction impacts on their budget. Under-used consumer rights do not pose barriers to the financial services mar-

<sup>14</sup> No 2 first bullet point of the “Specifications” of the Contract. see reference to the Draft Final Report of this project in fn 3

<sup>15</sup> For this notion see Carrington/King, Law and the Wisconsin Idea, Journal of Legal Education 297 (1997) p 47

ket. However, they give scope for further reflection and – with time - perhaps for further regulation expressly to introduce additional rights of withdrawal.

In some circumstances, consumer rights transpire to be effective if they are used for a purpose other than the intended one. According to the definition of consumer protection in no. 3 (“freedom of choice”) and its implementation through the right of withdrawal contained in no. 23 (“right of withdrawal”) of the recitals of the Directive, this right is seen as a “cooling-off period” to enable consumers to change their mind.<sup>16</sup>

Legal rights that are not used for the purposes for which they were intended may, however, be effective in unexpected ways. If the consumer has not been informed about the (unused) right of withdrawal, the delay for exercising this right does not expire.<sup>17</sup> In such cases, the unlimited right of withdrawal is used to reduce the amount of payments due after cancellation.

On the other hand, effectiveness depends on the kind of sanctions available. If the lender fails in a credit contract to disclose the APR, which may give rise to the risk of a near interest-free credit contract, and if outstanding sums have to be collected through court action which the lender must initiate itself and, thirdly, where judges are most likely to reduce the outstanding amount of credit as a result of this breach of the law, it may be assumed that this information right will be very effective. In these circumstances, the steps from written law to law in action must routinely be taken into account by suppliers from countries where these rights do not exist. In this example, existence of a right to information is a transaction cost to a foreign supplier in identifying these duties and a further cost in obtaining the information, which may even necessitate stocking different forms for use in different markets within the EU.

Conversely, if failure to state the net amount of credit in the credit contract has no sanction at all after the loan sum has been transferred to the borrower, a foreign supplier does not have to bother much about the existence of the obligation to provide that information.

The legal project can verify this hypothesis by asking the national experts about their personal experience. Information bearing on this point will be sourced from the economic research team.

## 2. General national regulations

The project will focus only on “differences between national provisions”.<sup>18</sup> This excludes regulations stemming from the implementation of EU regulations that may also entail overlapping duties to inform or give an additional, and thus overlapping, right of withdrawal.<sup>19</sup>

Instead, all regulations specific to the distance marketing of products and services in cross-border transactions or specific to other forms of marketing should be included as they overlap with these forms of marketing. This includes all regulations specific to the form in which financial or other goods and services are marketed such as internet brokered services or e-

---

<sup>16</sup> for a critical assessment of its practical implications in Germany in long-term contracts see Münchener Kommentar, BGB-Ulmer, 4th ed 2003 before §§312, 312a Note 13 with further literature; Eidenmüller, Juristen-Zeitung 2005 p. 216, 221f; Stürmer, Markt und Wettbewerb über alles? München: Beck 2007, p. 100

<sup>17</sup> see ECJ Volksbank Filder C 412/06 Attorney General, November 21.11.2007; EJC Badenia Neue Juristische Wochenschrift 2005, 3551; ECJ Crailsheimer Volksbank eG Neue Juristische Wochenschrift 2005, 3555; Bundesgerichtshof 26.2.2008 XI ZR 322/03; Bundgerichtshof Wertpapier Mitteilungen 2008 pp 154-158; 2007, 1173-1176; 2007, 200 ff; 114; BKR 2007, p. 325-329; 2007, 225; Neue Juristische Wochenschrift-Rechtsprechung 2007, pp 621-622;

<sup>18</sup> Article 20(2) second sentence

<sup>19</sup> For a discussion of such overlaps see the Belgian report in Part II.

commerce (if, of course, these rules are not prescribed by EU law and thus already harmonised).

Where applicable, the research will also cover regulations requiring pre-contractual information or providing a right of withdrawal in general in consumer, commercial or civil law.

In the national reports we found the following categories of information rights arising under national law:

- Information rights derived from a general duty of fair and full information defined by their objective, namely a fully informed consumer decision. Such rights are mainly present in countries with their own consumer protection law, in which consumer information is dealt with under the general section and where a general clause for the provision of consumer information therefore exists (**information defined by its ends**)
- Information which is intended to serve these general ends, such as price disclosure (**information defined by its means**)
- Information which is hidden in the form of duties to provide advice, where effective advice and care is prescribed mostly in terms of the principle of good faith (**information defined by the duty to advise or to take care**)
- Information which is derived from the “nature of the goods or services for which the contract was concluded” (see Article 4 Directive 93/13/EEC), notably under insurance and investment law, where the service itself is defined by the provision of information which may consist of risk assessment, market data or perpetual advice (**information defined by the nature of the product**)

Such rules are identified where they affect distance marketing, since they must be observed irrespective of the fact that financial services have been marketed at a distance.

### **3. Product-specific information requirements for credit, investment, insurance or payment services**

In the area of information rights and the right of withdrawal, a vast body of law exists which has much narrower scope than legislation in relation to financial services in general. It is only applicable to a specific financial product or service. This arises from the consumer protection principle that the different categories and social functions of retail financial services require a different form and level of protection. For example, investment services have been seen as more risky than savings, pension schemes are attributed with publicly desirable social effects while shareholding is seen as less critical, consumer credit has different implications from mortgage loans or payment services, while insurance contracts face specific new information rights following a reduction in supervision by the state.

These regulations apply irrespective of the fact that these products are sold via distance marketing practices and across borders. Three groups of regulations can be identified:

- services harmonised already under mandatory EU law (see the overview under D),
- national regulations based on a Directive allowing national legislators to opt for regulations more favourable to consumers,
- areas not yet harmonised under EU law but subject to recommendations, for example mortgage loans.

While the first category does not fall within the scope of the present research, because harmonisation has already diminished the differences between national legislation, experts and national governments mostly assume that the second and third category of regulations do not

fall under the duty to disclose additional regulations. It is therefore questionable whether they also fall under Article 20(1).

Article 20(1) states that “the Commission shall examine the functioning of the internal market in financial services in respect of the marketing of *those services*.” It further asks for identification of problems arising from “differences between national provisions regarding information and right of withdrawal”.

In their responses to the first questionnaires, nearly all experts understood *those services* as being those specific to distance marketing and therefore focused on rules which are specific to distance marketing. This view also prevails in the responses of national authorities with regard to their duty under Article 4(3). Only the UK cited information rights linked to products and not to the form of marketing.

Member States have adopted the same approach in the way they have implemented the Directive. Most countries regulate these information rights without reference to other information duties. Only a few reproduce the text of Article 4(2). Under Article 4a of Greek Act no 2251/1994 or the Romanian Government Ordinance Law 399/2004, Art. 6, the wording of the Directive has been reproduced: “The provisions of paragraph 3(a) shall apply without prejudice to particular provisions governing financial services which contain prior information requirements additional to those listed in paragraph 3(a).”<sup>20</sup> Latvia has regulated under its Law no 1037, Art. 15 as follows: “The service provider shall, in addition to the information referred to in paragraphs 6, 7, 8 and 9 of these Regulations, also provide the information required by other legislation regulating the provision of financial services.” Art. 67-bis(3) of the Italian Consumer Code states that rules deriving from the system of admission for financial services as well as rules deriving from banking law, financial law, insurance law, payment system rules or from social security rules or pension schemes are not overruled by this legislation if not expressly stated. The Polish expert assumes that product-specific information rights should be applied according to the principle of *lex specialis*.

Article 4(2) uses a very broad definition when it allows “provisions on prior information requirements when the provisions are in conformity with Community law.” This could comprise all national financial services information rights which are not confined to “non-distance selling” and which extend to any form of distribution. We however assume, that recital no 34, which states “the objectives of this Directive, namely the establishment of common rules on the distance marketing of consumer financial services”, requires a narrower interpretation.

No Member State has yet attempted to harmonise and unify rights to the provision of information across product boundaries and, furthermore, information rights remain largely restricted to their own specific area of application at EU level. The purpose of the study, in addition to the task set by Article 20(2) of the Directive, is focused on “the impact of Directive 2002/65/EC”.<sup>21</sup> It is required to facilitate the task of the Commission to “amend and/or further harmonise the information and right of withdrawal provisions in Community legislation concerning financial services and/or those covered in Article 3.” It therefore sets the task of finding out what kind of regulation is possible within the framework of Directive 2002/65/EC. Distance marketing in another country is seen as a form of supply needing more protection than other forms of supply. No 12 of the recitals of the Directive states: “The consultations in this context showed that there is a need to strengthen consumer protection in this area. The Commission therefore decided to present a specific proposal concerning the distance market-

---

<sup>20</sup> As this clause is literally taken from the Directive there is even doubt that it has a special meaning within national law.

<sup>21</sup> Article I.1 of the Special Terms and Conditions

ing of financial services.” Article 20(2) did therefore not seem to intend to deregulate product-specific consumer information only where these products are offered at a distance. If product-specific information rights relating to specific products were to vary according to the way they are marketed, this would have the effect of increasing the variety of regulations. Where dangers inherent in distance marketing are concerned, the Directive sets common standards which add to existing information rights.

Notwithstanding this interpretation, the research team has endeavoured to cover as much national regulation as possible in order to identify any additional national form of regulation. Two additional questionnaires and requests to the national experts raised these questions. In order to support their work, *iff* sent an overview of information rights derived from EU Directives in all areas to the national experts to assist them to find and identify additional information rights in their own country. We managed to obtain a significant amount of additional regulations which are now set out in the national reports in the second part.

### **III. Scope: Regulations under Articles 3 and 6 of the Directive**

The focus of national regulations to be identified and analysed is defined by the task, set out in Article 20(2) and is cited in the tender, of examining the two options made available to national legislators in relation to pre-contractual information provision and the right of withdrawal. Although the Directive provides essentially mandatory regulations that “Member States should not be able to adopt provisions other than those laid down in this Directive in the fields it harmonises”<sup>22</sup> it gives some leeway where “specifically indicated”.<sup>23</sup> The Directive views its own success in achieving harmonisation as partial when it describes the process of harmonisation in this area as “pending”<sup>24</sup> and expresses its intention “to amend and/or further harmonise the information and right of withdrawal provisions in Community legislation concerning financial services and/or those covered in Article 3.” (Article 21(2)) It also expresses the view that such differences in national law create “difficulties that are, or might be faced by both consumers and suppliers” (Article 21(1)).

This does not concern all existing differences. The Directive itself acknowledges the necessity of preserving certain differences in national law. It acknowledges existing differences under national law in Article 3(2), where principles protecting minors must be observed “pursuant to the legislation of the Member States”, or refers to differences in the factual situations within individual Member States in Article 3 (1) (4b), where duties to provide information depend for example on the “existence of guarantee funds”. The Directive also uses a number of open legal notions like “relevant for” (Article 3 (1) (1a)), “similar” (Article 3 (1) (1d)) or refers to “main characteristics” (Article 3 (1) (2a), which give some leeway to national legislators to define what would be “relevant” or “similar” within their national context. This kind of legislation has led most national legislators simply to transpose this openness into national law, leaving it to the courts to work out the specifics as they arise in practice. As the courts have their own inherent system of harmonising the law through unified interpretation structured within their own hierarchy, the power of the European Court of Justice, which actively monitors transposition of and compliance with the Directive,<sup>25</sup> will create the necessary convergence of legal interpretation.

---

<sup>22</sup> Recital no 13; see also Article 21(1) of the Directive

<sup>23</sup> No 13 op.cit.

<sup>24</sup> “Pending the achievement of the above convergence” (No 9 of the recitals); “Pending further harmonisation” (Article 4(2))

<sup>25</sup> see ECJ C141/06 (Commission ./ Spain) OJ C 96 of 28.4.2007; C127/06 (Commission ./ Luxembourg) OJ C 108, 06.05.2006

For the purposes of this research, which has been tasked to underpin the considerations for the search for more harmonised legislative solutions for an internal market in the distance selling of financial services, the Directive has left two important areas for divergent national legislation by applying the minimum harmonisation principle to pre-contractual information under Article 4(2) and providing for an opt-out model for national legislation under Article 6(3).

The two leeways have the following wording

- Article 4(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.
- Article 6(3): Member States may provide that the right of withdrawal shall not apply to:
  - (a) any credit intended primarily for the purpose of acquiring or retaining property rights in land or in an existing or projected 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(1).



**IV. Summary of rules to be analysed**

<b>Object of research</b>	<b>Other areas not included</b>
<b>Legal rules</b>	Factual barriers
<b>Pre-contractual information and the right of withdrawal</b>	Other binding regulations contained in this Directive
Original <b>national provisions</b>	EU Regulations together with national provisions implemented to fulfil the obligations imposed by other EU Directives (see Art. 4 no 1 "Where there are provisions in the Community legislation governing financial services which contain prior information requirements additional to those listed in Article 3(1), these requirements shall continue to apply.")
<b>Financial services</b> ("any service of a banking, credit, insurance, personal pension, investment or payment nature" (Art. 2 (b)))	Other goods and services
<b>Distance marketing</b> ("any contract concerning financial services concluded between a supplier and a consumer under an organised distance-sales or service provision scheme run by the supplier, who, for the purpose of that contract, makes exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded;" (Art. 2 (a)))	Door-to-door sales, marketing through outlets, shops etc. either in the host country or in the country of origin or via brokers etc.
<b>Product-specific regulations</b> will be reported by means of examples in order to indicate the potential harmonisation in product regulations for cross-border distance marketing of financial services	Legal rules concerning pre-contractual information rights and a right of withdrawal on a purely national level for certain products not required by EU law. Examples are mortgage loans, certain insurance contracts, investment products, retirement pension schemes etc.
Regulations concerning <b>pre-contractual information rights</b> and the <b>right of withdrawal</b> as mentioned in Article 4(2) and 6 of the Directive	i.e. contractual information, early repayment, cancellation

## **B. Methodology, sources of information and general outcome of the survey**

### ***I. Sources of information on national provisions***

The empirical methodology of the legal research is based on comparative law.<sup>26</sup> The main task was to analyse national regulations governing pre-contractual duties to provide information and the right of withdrawal as they apply to the distance marketing of financial services in cross-border transactions. The research team therefore required access to information largely available only in the languages of the individual EU Member States and subject to interpretation based on the institutions, jurisprudence and general legal cultures of those states.

Given the limitations on this study, the research team was reliant on the expertise of specialists in the individual legal environments concerned. While this additional input was of considerable value, the researchers were dependent on the attitudes, experience and judgment of those specialists.

This is typical of most comparative legal research projects. In order to monitor any resulting problems of accuracy and reliability, comparative research uses a variety of sources which should be independent from each other.

The project used five different sources, whose contradictions and similarities will be evaluated subsequently:

- (1) Official statements from the national governments (Government Notification to the European Commission) including responses to a questionnaire by the Commission.
- (2) Legal experts from each single Member State
- (3) Consumer organisations based in all Member States including BEUC
- (4) Consumer ombudsman institutions in 7 Member States
- (5) Supplier organisations and individual banks and insurance companies interrogated in the parallel economic project conducted by CIVIC

The objective was to obtain a reasonably consistent picture of both the regulations in force in each country and information about how these regulations are applied and what impact they may have on cross-border transactions in the distance marketing of financial services. In addition, the research team itself consists of legal experts who have already conducted research in Germany and abroad on legal and factual problems in relation to this Directive in particular and on information rights applicable to financial services in general for the German government in 2004.

In addition, *iff* received feedback on its interim report from the Commission and a very detailed position paper from the European Banking Industry Committee (EBIC)<sup>27</sup> which has been taken into account in this report.

---

<sup>26</sup> B. Jaluzot, *Méthodologie du droit comparé. Bilan et prospective*, in: *Revue internationale de droit comparé* 2005, S. 29-48; V. V. Palmer, *From Lerotholi to Lando: Some Examples of Comparative Law Methodology*, *American Journal of Comparative Law* 53 (2005), S. 261-290.

<sup>27</sup> EBIC Position Paper on the Interim Report on the Legal Impact of Directive 2002/65/ on the Distance-Marketing of Consumer Financial Services, 13 June, 2008 pp 1-8 (cited hereinafter as EBIC 2008); as well as EBIC Position on the Draft Final Report on the Legal Impact of Directive 2002/65 on the Distance Marketing of Consumer Financial Services August 1, 2008

The focus and reliability of the sources vary. While official sources give a consistent picture of the regulations themselves, academic and practising legal experts may have a better grasp of the application of these regulations and the problems arising from them. Consumer organisations and consumer ombudsmen as well as the supplier side, on the other hand, can contribute a partisan view of the effectiveness of this legislation, and which loopholes or overregulation they fear. Finally, our own experience from the most populous Member State in the European Union enables a better understanding of the inconsistencies of which we were already aware in terms of contents and the very existence of regulations which are expected to be homogenous. Contradictions may not always be due to false information and may arise from different interpretations of the law or the scope of its application. The existence or otherwise of active consumer organisations may significantly affect the application of the same rules in one Member State compared with another, and enforcement of the law by a specialist consumer law administrative body in Scandinavia or through collective actions in Italy (from 2009 on), France or Germany, may be very different from that imposed through individual court procedures elsewhere.

## 1. Official sources

The Directive itself imposes mandatory obligations for Member States to provide information to the European Commission on regulations in this area.

1. Under Article 21(3) of Directive 2002/65/EC, the Commission obtains information from the governments of a majority of countries on “national law which they adopt in the field governed by this Directive together with a table showing how the provisions of this Directive correspond to the national provisions adopted”.
2. Under Article 4(2) of the Directive the “Member States shall communicate to the Commission national provisions on prior information requirements under paragraphs 1 and 2 of this Article when these requirements are additional to those listed in Article 6(3).”
3. Under Article 6(4) “Member States making use of the possibility set out in paragraph 3 shall communicate it to the Commission.”

While information under item 1 concerns implementation of the Directive in areas not directly relevant to this research and was consequently not available to the research team, the other two sets of information were given to the research team in the form of a table summarising the results. It contained information from all 27 Member States on the use of the leeways under Articles 4(2) and 6(3).

In addition, six Member States added an English version of their respective legislation to the files, which was similarly available to the research team. The research team also had access to the answers given to a special questionnaire distributed by the European Commission to Member States, to which 15 responses were available. Questions 3a and 4a asked for the specific background of “taking advantage of the option to introduce or maintain” “excluded” provisions under Articles 4(2) and 6(3) of the Directive respectively.

This information provided valuable information as to the official opinions of the governments on a total harmonisation approach in the context of their national legal cultures but was of limited value in relation to the questions of cross-border commerce.

## 2. Legal experts

The main source of information for this project was therefore the information and opinions gained from legal experts resident in their respective Member States.

Three criteria were significant in the selection of experts:

1. Qualification as a lawyer, ideally demonstrated through publications and/or research in consumer or commercial law.
2. Knowledge of both the regulations and legal practice in the country on which s/he is reporting.
3. Reliability as a partner of the research team, commitment to the subject and willingness both to complete the questionnaire with care and to answer additional questions where the researchers find that some questions have been misunderstood or some answers remain incomplete.

*iff* was able to draw on its network of banking law experts, which had been involved over a long period in providing information for the Handbook on German and European Banking Law,<sup>28</sup> the second edition of which is now with the publishers. Other researchers were known to *iff* from several legal research projects conducted for the European Commission, as well as from research networks on financial services law. Thus, even small countries were represented by their own legal experts. Thirteen experts were professors in law from universities, two came from central banks, ten were practising lawyers and one expert was from a public consumer ombudsman institution. All are qualified lawyers. The list of experts is annexed (Annex 1).

In order to maximise responses, *iff* accepted responses in four languages: English, German, French and Italian. The enormous amount of materials cited could not be translated for the purposes of this research and researchers had to rely on materials provided in English translation and their own knowledge of foreign languages. The main source remains the expertise of the national experts.

The questioning of the experts was done in five stages:

1. Selection of the experts and first e-mail and telephone contact explaining the project
2. Final selection of 27 experts from all EU Member States.
3. First Questionnaire
  - Mailing the electronic questionnaire
  - Telephone calls and e-mails to collect the responses
  - Evaluation of the responses
4. Second Questionnaire
  - Mailing and feedback
  - Telephone calls and e-mails to complete second feedback
5. National Reports
  - Interim report and Model national report
  - Writing of 27 national reports
  - Sending these reports for confirmation and completion

### 3. Consumer organisations

The second source was consumer organisations. Consumer organisations employ lawyers who monitor consumer law. Unlike other legal experts, these lawyers have direct access to cases which may arise in practice. Most have complaints boards and deal with individual complaints, primarily out of court. Consequently, they become aware of legal problems much earlier than the legal community as a whole, especially in cases which are of no financial interest for lawyers and which normally are not brought to court. In order to attract the interest of the

---

<sup>28</sup> Derleder/Knops/Bamberger (eds) Handbuch zum deutschen und europäischen Bankrecht, Springer: Heidelberg 2004 (Handbook on German and European Bank Law)

public, they also monitor legislation and try to predict consumer problems in order to demonstrate their competence in this area and to attract clients with potential consumer claims.

Obtaining the opinion of consumer organisations on the use of EU legislation is not as rewarding as one might assume. Consumer organisations have limited staff and few resources enabling them to respond. It may indeed be seen as a major achievement by this project that 39 consumer associations and European Consumer Centres covering 27 EU Member States have responded and given their views. The table of participating organisations is annexed as Annex 2.

The existence of the network of consumer centres supported by the European Commission was most helpful. They specialise in dealing with consumer problems in the context of cross-border transactions. It may be assumed that all such consumer centres affiliated to national consumer organisations would have the necessary information. *iff* was, in addition, able to persuade other organisations in countries not participating in this programme to take part in the survey.<sup>29</sup> But in spite of the high coverage and the willingness of the consumer organisations to respond, the results are not truly informative. As they unanimously report that they have no experience with complaints, even in the more general area of the distance selling of financial services, still less concerning cross-border commerce, we could obtain only a few opinions and no facts.

The parallel project conducted by CIVIC, which questioned the supplier side, was closer to practice since it included suppliers who claimed to conduct cross-border business. But, as the EBIC statement confirms, in this area there is also little or no experience of such commerce. We do not believe that the division of labour between CIVIC and *iff* as between the supplier and the consumer side could have biased the outcome of this research.<sup>30</sup> With regard to the facts investigated, both sides came to the conclusion that these facts do not exist at present and will probably not exist in the near future. As most consumer organisations lack experience in international problems in this area, they suggested that if national problems were involved, we could partly test this hypothesis, although the outcome would be likely to be negative. Even at national level, existing information rights as well as the right of withdrawal do not appear to present problems to consumers. On the contrary, it was even mentioned that the approach of this Directive to the right of withdrawal was preferable to the approaches of other Directives.

#### 4. Supplier Side

The perspective of the supplier side was covered by means of a survey of financial service providers; and a survey of national associations of financial service providers conducted in the parallel research project by CIVIC, whose results have been incorporated into this report to the extent that they have a bearing on the legal aspects. CIVIC held a group meeting with EBIC and the CEA Group, and interviewed 6 national financial service associations and 18 individual financial service providers. An additional survey of national associations of financial service providers provided additional data on how the implementation of Directive 2002/65/EC has impacted on the industry. These two surveys were drafted using the feedback from stakeholders and following a discussion with EBIC and CEA concerning the terminology and appropriate wording of the questions. The questionnaires were first circulated through the EU level associations (i.e. EBF, ESBG, EAPB, EACB, EMF, EFBS, Eurofinas/Leaseurope, and CEA), which distributed them further among their national associations. These national associations were encouraged to fill in the “Questionnaire of Associations” as

---

<sup>29</sup> *iff* collaborates closely with BEUC.

<sup>30</sup> For this critique see EBIC op.cit. p 2

well as to target members involved in distance marketing and ask them to fill in the “Questionnaire of Companies” as financial service providers. Additionally, providers of financial services were identified through the Van Dijk databases containing information on financial service providers, and were then contacted by means of a direct email.<sup>31</sup>

In addition, *iff* received detailed responses on its interim as well as its draft final report from EBIC, together with additional information and the view of the European Banking and Insurance Committee on the legal questions they presented

## **5. Ombudsmen**

Another source was the consumer complaint boards (Ombudsmen) organised in the FinNet Network. As most consumer ombudsmen had no experience in this area, we received answers from only seven consumer ombudsmen from France, Germany, Sweden, Italy, Latvia, Portugal and Greece and, of these, only the French ombudsman could offer a positive response to the questions itself.

## **6. Discussion with stakeholders**

*iff* has met with its project partner, CIVIC Consulting. It was agreed that, in addition to the core task of obtaining evidence from national experts, *iff* would concentrate on consumer associations, European Consumer Centres and similar institutions, while CIVIC Consulting would contact suppliers.

The expected outcome of the project was discussed with the Commission on several occasions in Brussels and the interim findings were presented orally at a meeting of the Member States on this issue.

Since the beginning of the project, five meetings were held in Brussels with the Commission in August 2007, November 2007 and January 2008. Another bilateral meeting took place with CIVIC in February 2008 in Berlin. At that stage CIVIC reported that the response rate was still rather low and scattered. Two more meetings involving all project participants were held on 6 and 7 March, 2008 in Brussels at the premises of the European Commission. The Draft final report from CIVIC was received on 5 September, 2008. Comments from the Commission received for the Draft Final Report were received on 23 April and after delivery of the Final Report on 28 July, 2008. *iff* also received a quite detailed position paper on its interim report dated 13 June, 2008 and a similar comment on the Draft Final Report on 1 September 2008 from EBIC as well as comments on the Draft Final Report from a German, Hungarian and Belgian consumer organisation. All have been taken into account when drafting this final report.

## **II. Questions and answers**

### **1. Survey of legal experts**

The questionnaire prepared for the legal experts and the consumer organisations was produced in an electronic format enabling all information to be assembled in a spreadsheet. This format enables the information to be collated so that the answers for all 27 countries can be compared by question or by country (see Questionnaire in Annex IV).

Due to the resources available for the 27 countries, with at least two different respondents for each, the questionnaire had to be short and open in order to secure a high response rate.

---

<sup>31</sup> For the numbers of this survey see below under B. II. 4

The questionnaire has six sections. It begins with personal data to identify the respondent. It continues with asking and specifying which legislation and literature the project would like to name and send over, before asking questions on the general legal structure in which the targeted provisions are embedded. The second part concerns scope of application, the third investigates the regulations concerning the conclusion of the defined contract and the relationship between regulations as to special and general information provision, while the fourth focuses on the content of the information required, followed by questions on regulations governing the right of withdrawal.

The questionnaire was pre-tested first in Germany and then with experts in Denmark, Latvia and Ireland in October 2007. The revised questionnaire was then agreed with the Commission and subsequently sent out.

In a second survey, we contacted all legal experts again and asked them clear questions which had been previously communicated to the Commission.

## **2. Survey of consumer organisations**

The questionnaire for consumer organisations focused on what kind of material these organisations would provide for consumers and its contents. It also sought information on consumer problems. The questionnaire was split into five parts, covering estimates of the size of the existing market, known cross-border problems and the relevant case law. It identified risks and potential legal problems and, finally, the information provided to consumers by independent organisations.

After sending the questionnaire to the initial batch of consumer associations in every EU Member State in December 2007, and subsequently to all European Consumer Centres (ECC-Net) specialising in providing information on cross-border shopping in January 2008 with the support of the European Commission, 36 responses covering 26 EU Member States have been received.

## **3. Survey of Ombudsmen**

The questionnaire for ombudsmen asked two main questions concerning the existence of consumer complaints and the existence of relevant jurisprudence.

All but the French consumer ombudsman replied that there were no complaints in the area of cross-border commerce in financial services, and an absence of problems in the narrower area of cross-border distance marketing commerce in financial services.

The French ombudsman reported complaints relating to financial investments by foreigners in France, especially in relation to enforcement of orders, subscription, redemption and marketing of UCITS, the operation of financial instruments, and custody account keepers, but refused to provide details since his office was bound by a duty of confidentiality as to the contents of the complaints. Since our question covered all cross-border commerce and since all complaints were made in France by foreigners, we assume that the complaints did not in fact concern distance marketing.

The German Ombudsman cited a decision of the Dresden Court of Appeal (20.06.2007, 8 U 328/07), which required a German licence from a Swiss financial services provider who wanted to market financial services in Germany, a decision which does not concern the scope of this research but indicates that other more direct barriers may exist.<sup>32</sup>

---

<sup>32</sup> As Switzerland is not part of the EU but is a signatory to treaties which provide for similar rights, this case is not typical.

In general we would say that this part of the survey has merely confirmed the non-existence of complaints but did not provide additional information on the issue itself.

### **III. Summary of available information**

*iff* contacted 163 stakeholders and experts in all Member States with two different questionnaires followed by an additional questionnaire. We received 65 completed questionnaires in the first instance and responses to all questionnaires sent out with additional questions generated by the evaluation of the responses to the first questionnaires. Excluding the survey of Consumer ombudsmen (8 %), which was initially not intended since there was little feasibility for complaints, the response rate was 82 %. In both surveys, 100 % of the Member States were covered.<sup>33</sup>

*Table 1: Responses to questionnaires*

	<b>Legal Experts</b>	<b>Consumer Organisations</b>	<b>Official Notifications</b>	<b>Ombudsman /Supervisor</b>	<b>Banks /Insurance<sup>34</sup> Companies</b>	<b>Supplier Associations</b>
Asked	35	44		84		
Received	27	38	23	7	37/32	14/16
MS involved	27	27	23	7		

<sup>33</sup> The answers given by the experts to the questionnaires, including the answers to the follow-up questionnaire, are available to the Commission in a separate document in the form of a matrix in which the information is sorted according to questions and Member States.

<sup>34</sup> Figures from CIVIC op.cit. p 9



## C. Legal problems associated with national diversity of rules – survey results

The focus of this research, “to analyse and detail the difficulties that are, or might be faced by both consumers and suppliers, in particular arising from differences between national provisions regarding information and right of withdrawal” (Article 20), is split into two possible answers: existing difficulties (“are faced”) and possible difficulties (“might be faced”).

### I. Responses from experts and consumer related institutions

The responses received by the research team from the 27 Member States, involving independent comments from over 60 experts in theory and practice, provide a clear answer. At present, there is no practical experience of consumer-related legal problems in case law, in political discussion, in legal literature, or reported by the institutions dealing with complaints.

We employed a number of strategies to prompt the experts to recall cases or discussions on the subject but, as these results were unanimous notwithstanding, we took the view that it would be pointless to document the detailed responses.

In their answers to the question, the legal experts, as well as the consumer organisations we approached, reported unanimously that they had no evidence that legal differences in the regulation of the distance selling of financial services across borders could be seen as a major obstacle to existing commerce. All explained this lack of evidence by the still insignificant level of transactions in this area.<sup>35</sup> They also considered that this was the main reason why no specific legal discussion or case law in this area could be detected. There was also no significant number of consumer complaints.

Table 2: Existing legal problems in cross-border commerce in financial services in general and for distance marketing in particular

	Legal experts (distance marketing only) (N=27)	Consumer organisations (all cross-border commerce) (N=38)	Ombuds Institutions (all cross-border commerce) (N=7)
Insignificant cross-border sales in general	100 %	less than one percent = 11 % none = 33 % no answer = 56 %	100 %
No specific legal problems	100 %	100 %	85 %
Have heard of problems	15 %	64 %	14 %
Problems imaginable		83 %	
No complaints		100 %	85 %
Leaflets		19 %	0 %
Heard of jurisprudence	0 %	3 %	

### II. Responses from the supplier side – summary of CIVIC report

As far as the supplier side is concerned, we must rely partly on the results of the sister project conducted by CIVIC, which consulted the supplier side, and partly on two specific statements from EBIC to iff.

<sup>35</sup> This is also in line with the Interim report of the sister project p: 10: “Clearly, there is very little cross-border activity of many consumer financial service products and only a small percentage of EU citizens are involved in cross-border financial transactions, although there seems to be an upward trend, as is indicated by recent Eurobarometer data (see Table 3)”

Among the 16 main barriers to the distance marketing of cross-border financial services surveyed and discussed in CIVIC's Reports,<sup>36</sup> two were linked to the Distance-Marketing Directive in Financial Services.<sup>37</sup>

Barrier no 8 concerns diverging national rules in general and their impact on cross-border commerce.<sup>38</sup> Bankers' organisations in particular voiced criticisms on this point. "A lack of harmonisation of national law and regulation across EU ... is also mentioned prominently in all our surveys and cases. It does not prevent indirect cross-border supply through establishment but it is one of the major reasons why there is such limited direct cross-border supply."<sup>39</sup>

This statement concerns national law within the scope of all "Directives of the FSAP" and highlights supplier side concerns that consumer protection and product design continue to vary substantially from one MS to another.

With regard to the answers concerning the pre-contractual information rights and the right of withdrawal, only a few bankers' associations and individual banks cited these divergences as a major barrier.

CIVIC concludes:

"This barrier is really a subset of barrier 8 (differences in national law and regulation) but since these rights are substantially affected by the DMD, they merit further discussion. Our survey results and case studies do not suggest that this is a major barrier to cross-border supply, whether indirectly via establishment or directly. In the case of direct marketing these barriers require some additional marketing materials to be supplied on a MS specific basis, adding some additional cost to suppliers. In case that there is a lack of clarity regarding the applicable law, this may create uncertainty for the supplier whether disclosure rules and withdrawal rights apply that are required under the law and regulation of the consumer's MS, or that of the MS where the service is marketed and concluded. Like other elements of barrier 8 disclosure and withdrawal rules limit the provision of cross-border distance marketing, since retail financial services products must be tailored to each individual national domestic markets. This barrier also limits the extent to which economies of scale can be realised from the marketing and distribution of retail financial services into domestic markets in several MS. This barrier is also an obstacle to the supply of harmonised retail financial service products into several EU Member States."

This barrier is classified as "significant" on a scale from "less" to "very significant".<sup>40</sup>

Further, given the clear and unanimous reaction of our experts, we have to conclude that, in answer to the basic research question as to barriers to commerce in the area of this Directive, there is insufficient evidence that legal diversity may have a direct effect on the level of distance marketing of financial services across the borders of the Member States.

In the Statement of the European Banking Industry Committee which includes information for France and Italy the conclusions are drawn as in this report, when EBIC states:

---

<sup>36</sup> DG SANCO Analysis of the Economic Impact of Directive 2002/65/EC concerning the distance marketing of consumer financial services on the conclusion of cross-border contracts for financial services between suppliers and consumers within the Internal Market Interim Report Submitted by CIVIC Consulting of the Consumer Policy Evaluation Consortium (CPEC) Framework Contract Lot 2 – DG SANCO Date: 25 February 2008 p. 57 ff; Draft Final Report Submitted by Framework Contract Lot 2 – DG SANCO Date: 05 September 2008

<sup>37</sup> The survey of individual companies covers 19 of the 27 Member States with 36 banks responding, the survey of bankers' associations covered 14 Member States (p 79).

<sup>38</sup> op. cit. p 57

<sup>39</sup> op. cit. p 77

<sup>40</sup> op. cit. p 88.

“EBIC fully supports the conclusions:

- The volume of cross-border distance marketing of financial services is very low
- There are no significant legal barriers to cross-border distance marketing and so differences between the legal regulation between Member States cannot be said to impede the cross-border distance marketing of financial services.
- Any legal problems in relation to information rights are not specific to cross-border distance marketing of financial services”
- Non-legal factors such as language and culture are barriers which are far more relevant”.<sup>41</sup>

### **III. Some examples of possible problems**

Although consumer organisations overall did not report problems, there was some anecdotal evidence suggesting that access to foreign suppliers, whether through distance marketing or some other means, remains problematic where consumers take the initiative.

#### **1. Consumer complaints**

- “A Danish consumer was unable to open a bank account in the UK.”(ECC Denmark)
- “Only solvent people with a good knowledge of terms and conditions can shop for financial services abroad” (Czech SOS)
- “A consumer made some investment with an Austrian company. He came to us because he lost his confidence, because the supplier did not seem to have an official address in Hungary. We contacted our Austrian colleagues. We have no more information.” (ECC Hungary)

#### **2. Concerns voiced by consumer organisations**

The following table reports problems which consumer organisations assume to be problematic if financial services are marketed in their country but originate in another.

---

<sup>41</sup> EBIC Position on the Draft Final Report on the Legal Impact of Directive 2002/65 on the Distance Marketing of Consumer Financial Services August 1, 2008 p 9

Table 3: Problematic products identified by consumer organisations

Host Country	Financial Services	Country of Origin
Austria	“Consumer credit to refinance credit”	no indication
Belgium	“Bank account and mortgage loans Life insurance”	France, Italy UK, The Netherlands
Denmark	“Bank accounts”	UK
France	“Insurance (e.g. complementary health insurance)”	Germany
Germany	“Mortgage loans”	France
Greece	“Bank account”	France
Luxembourg	Credit card service linked with a revolving loan from a supermarket	Belgium
Ireland	“Cross-border mortgage products”, travel insurance, car insurance, current accounts, risky investments; pension schemes”	no indication
Spain	Credit cards; PayPal	UK
Sweden	Investment	Portugal, UK, Greece
UK	Insurance Investment  Brokered money transfer	France Belgium, Luxembourg, Spain Luxembourg

The following issues were reported

- “*Credit cards*: cancellation and information problems; *Electronic Money transfers*: lack of information about commissions and double charge problems; *Escrow services*: consumer protection policy unclear and insufficient.” (ECC Spain)
- “*Unsolicited services* from a French bank”; “*New fees* without consent; unclear information about the service” (ECC Luxembourg)
- “Denied or underpaid claims (*insurance*); refusal to provide service or higher prices due to consumer’s place of residence (*banking and insurance*); eligibility for tax relief/incentives (*pension and investment schemes*); poor customer service (general). (ECC Ireland)
- “German consumers did not benefit from French jurisprudence refunding high pre-payment charges.” (ECC France/Germany)

Of 36 consumer organisations, only two reported a case involving a foreign supplier.

### 3. Risks viewed by consumer organisations

The following chart shows how often potential risks have been named by consumer organisations in the survey.

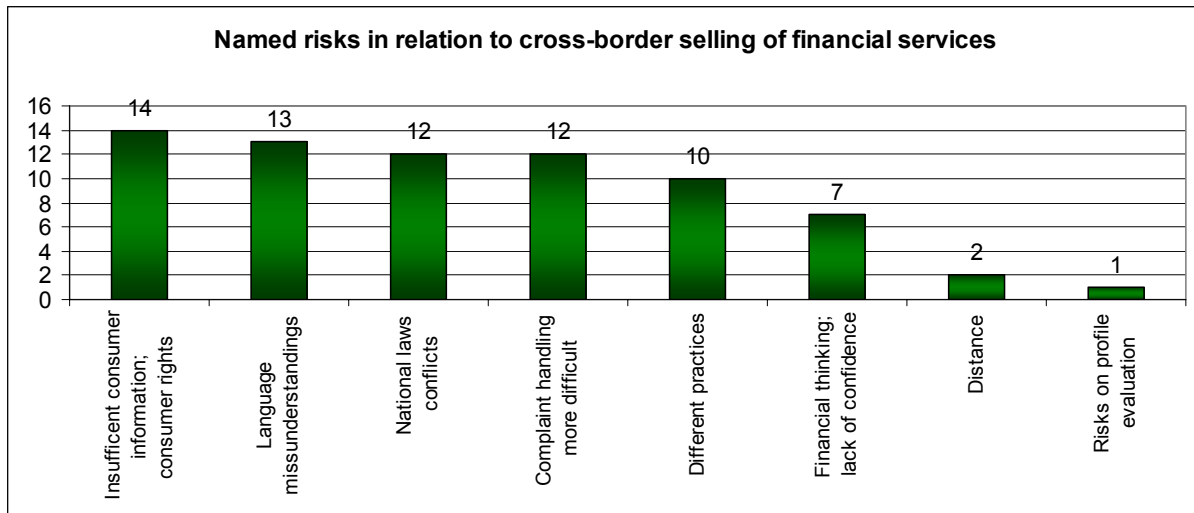


Figure 3: Risks in distance marketing of financial services cross-border according to consumer organisations

As far as the law is concerned, ECC France mentioned that Germany had a right of withdrawal in mortgage loans that differed from the position in France, while ECC UK pointed to the specific advantages of section 75, Consumer Credit Act 1974, which provides additional legal protection in the purchase of goods or services costing £100 or more using a credit card. It provides that the credit card company is jointly responsible with the supplier if the goods are faulty or misdescribed or if the service provided is unsatisfactory, a right which does not flow from the Consumer Credit Directive and which is not common in other Member States. In addition, differences in taxation were mentioned (Czech Republic, Germany) and ECC Ireland mentioned that “consumers are more protected in respect of credit card payments in other Member States.”

When asked about legal barriers under national law which could impede cross-border commerce in financial services, the following areas were named:

- MIFID Directive (Czech Republic);
- taxation of shares and gains (Aktiebeskatningsloven and Kursgevinstbeskatningsloven.) (Denmark),
- differing periods in waiving rights, tax regulations, mandatory terms (Hungary).

#### 4. Concerns voiced by suppliers

In its case study, CIVIC cited some supplier concerns relating to the legal situation in distance marketing.

- A barrier indicated, though not recognised to be a prohibitive obstacle to market entry, is the fact that legislation on electronic contracts has not been implemented similarly in each Member State. For example, some countries (such as the UK) allow an electronic contract to be a valid substitute for a written contract; however, in Germany consumers need to conclude their contract by mailing in a hard copy.<sup>42</sup>
- Another bank noted the difficulty in determining relevant legislation in cross-border situations. On examination, many pieces of legislation are ambiguous as to their scope in relation to entities which are not authorised within the jurisdiction to which the legislation applies. This is compounded by the lack of clarity and consistency in defini-

<sup>42</sup> Case Study First bank – Benelux CIVIC op. cit. p 26

tions of entity and institution types, across jurisdictions. While in some instances this can be attributed to the fact that legislation was written before the advent of cross-border activity, the bank also noted that more recent EU legislation can also be deficient in this regard. The bank in question spent significant time and financial resources obtaining legal advice in relation to the above.

- A third bank emphasised different conventions for example about writing addresses which are written in many ways in different countries (e.g. whether the number comes before or after the street)
- Instead a Nordic bank held terms and conditions (e.g. information disclosure, withdrawal rights etc) for products that can go across markets as consistent. A possible barrier was seen only in local regulations placed on product marketing (e.g. price).
- An Austrian bank's concern was focused on the different ways financial services contracts have to be signed when concluded via the Internet. But its critique was not on the differences between national legislations but with regard to the Austrian Banking Act which specifies that only a distance contract is valid if a customer signs with an electronic signature while only a limited number of people have electronic signatures. Using a written signature instead and sending it by post with a copy of their ID card/passport, etc. does not encourage large numbers of direct customers. Consumer protection laws aiming to ensure that all consumers have received the relevant advice and documents, and that the consumers demonstrate an understanding of the financial service product requires a considerable amount of information that cannot be provided over a distance means and therefore must be delivered in person. The bank is also concerned that married couples are excluded since the law requires the presence and identification of both parties involved.

The conclusion from the examples provided in the in-depth-interviews with bankers are as follows: "The most significant barriers were related to: complications in concluding distance contracts at all (due primarily to anti-money laundering legislation as well as requirements for a high level of advice and consultation to be given on more complicated products, which is difficult to provide via distance channels); language differences; consumers' preference for local providers or a physical presence; large and significant differences in national legislation."

#### **IV. Conclusion**

The surveys of the consumer and supplier sides, as well as the opinions expressed by the legal experts, show unanimously two separate areas which do not as yet significantly overlap: cross-border commerce in financial services not using distance marketing tools, and distance marketing of financial services within national boundaries. While all stakeholders can identify a number of obstacles for either one or the other, little or no evidence can be produced of barriers which affect exclusively the use of distance marketing in cross-border commerce in financial services.

Consequently, information rights and the right of withdrawal derived from Directive 2002/65/EC, as well as national legislation with the same scope of application, are not yet seen as a significant problem for cross-border commerce. If all the anecdotal evidence concerning the distance marketing of financial services in general is eliminated, the main concern seems to be insecurity. For the supplier side this means insecurity as to whether different information requirements may exist in the targeted Member State, in which the requirement as to advice and form of signature may play a role; for the consumer side it involves insecurity as to whether the foreign contract contains provisions which they do not expect.

As far as legal barriers are concerned, more regard is given to differences in tax law and money laundering law than to consumer law. Within consumer law, differences in rules concerning the product such as including the provision of advice are seen as more important than differences in pure information requirements.

## D. EU Regulation on information rights and duties applicable to distance marketing of financial services

Analysis presupposes a compilation of national rules applicable to commerce regulated under EU law. This task is quite easy to achieve in the few countries where, for example, the wording of the Directives is more or less literally adopted by special consumer legislation. In smaller countries or countries where the level of use of financial services has not yet necessitated major national legislation, it can easily be established that there is no national law other than that imposed by EU Directives. But for the majority of countries, which are more or less the pacesetters and models for EU law, this does not apply.

For these countries this task has therefore still to be achieved. As the notifications show, the necessity of providing the national regulations in a form adapted to the harmonisation approach of EU evaluation has not yet been recognised. An example does exist in Germany, where the Ministry of Consumer Affairs commissioned research to compile all information rights existing in the context of financial services in a comprehensive form so that it could be compared to the EU regulations as well as to the regulations of other Member States. This research, which classified information rights in financial services from more than 35 different laws and regulations into 69 Articles, is documented in the Annex and below.<sup>43</sup>

In order to be able to compile as much as possible from the additional rights identified in the national reports, *iff* first compiled the information rights in financial services from EU Directives and sent it to the national experts for use in their evaluation of national law..

In the following table we have sorted all information rights to pre-contractual information derived from the indicated EU Regulations on financial services which also apply to the distance marketing of financial services in cross-border commerce. We ordered these duties according to different factual situations in which financial services are marketed, designed and priced.

The categories we used were derived from a multi-step approach, in which all pre-contractual information rights were first put into a two-dimensional matrix. One dimension was defined by the EU Directives on Retail Financial Services<sup>44</sup> and if different products, sizes of transactions or situations led to different information rights, it was split into a corresponding number of additional categories. We thus came to 49 categories.

In the second dimension, we first used categories commonly known in all financial services regulations. Whenever a new information right emerged which did not fit into these categories we added a new category, so that all information rights were finally sorted into 132 different categories. Since these categories were often specific to one product only, most cells remained empty. In a third step, we attempted to combine categories to form a wider category until a comprehensive overview of pre-contractual information duties, which were at least similar to each other, was achieved. By putting this material into a separate table for each category we were able further to diminish the number of empty cells by simply deleting those containing no information. The categories were named as follows:

1. Area of Application , Supplier Identification
2. Representatives and Intermediaries

---

<sup>43</sup> D.IX page 43

<sup>44</sup> We used the classification provided by Institut für Deutsches und Internationales Bank- und Kapitalmarktrecht <http://www.uni-leipzig.de/bankinstitut/service/eurecht.php?&topic=Bankaufsicht> and added the Insurance Directives. A page formerly available on the EU website offering an overview of all Directives was no longer retrievable. The official EU Law site at <http://eur-lex.europa.eu/en/index.htm> is not adapted to the generation of that type of summary.



3. Supervision, Register, Product Description
4. Marketing and Execution
5. Price Parameter and Cost Elements
6. Payments and Right of Withdrawal
7. Risks, Liabilities, Terms and Contractual Changes
8. Termination, Rules, Complaints, Litigation, Language

### ***I. Area of application, supplier identification***

<b>Directive</b>	<b>No</b>	<b>Area of Application</b>	<b>Supplier Identification</b>
<b>Distance-Marketing of Financial Services</b>	<b>2002/65</b>	a) Distance marketing of Financial Services (voice telephony communication excluded) b) Voice Telephony Communication	identity of supplier  a) main business supplier geographical address  any other geographical address relevant
<b>Electronic Commerce</b>	<b>2000/32</b>	Any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means (fax, telephone) (98/48) a) consumer b) except when otherwise agreed by parties who are not consumers	a)+b) the name of the service provider;  the geographic address at which the service provider is established;  the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner;  the professional title and the Member State where it has been granted,  where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of the sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment(29).
<b>Door-to-Door Sales</b>	<b>85/577</b>	"door step selling"	
<b>Financial instruments</b>	<b>2004/39</b>		the investment firm and its services
<b>Prospectus</b>	<b>2003/71</b>		information concerning the issuer in the case of legal persons, their names and registered offices
<b>Prospectus Regulation</b>	<b>809/2004</b>		the identification of the issuer
<b>Presentation of investment</b>	<b>2003/6</b>		the name of the legal person responsible for its production.
<b>Investor-Compensation</b>	<b>97/9</b>		
<b>Retirement Provision</b>	<b>2003/41</b>	Old Age Pension	brief particulars of the situation of the institution/ current level of financing of their accrued individual entitlements (on Demand)

<b>Directive</b>	<b>No</b>	<b>Area of Application</b>	<b>Supplier Identification</b>
<b>Direct Insurance</b>	<b>92/49</b>	Risk Insurance	
<b>Life Assurance</b>	<b>2002/83</b>	Life Insurance	name of the undertakings and its legal form name Member State and address in which the head office is situated
<b>Insurance Mediation</b>	<b>2002/92</b>	Insurance Brokerage	
<b>Payment Services a) Low Value</b>	<b>2007/64</b>	Low-value payment instruments and electronic money	
<b>b) Single</b>	<b>2007/64</b>	Single payment transactions	
<b>c) Frame</b>	<b>2007/64</b>	Framework contracts	the name of the payment service provider, the geographical address of its head office any other address, including electronic mail address, relevant for communication with the payment service provider
<b>d) Individual</b>	<b>2007/64</b>	Individual payment transactions within framework contracts	
<b>Consumer credit a)</b>	<b>87/102 + 90/88</b>	Credit contracts	
<b>b) Overdraft</b>	<b>87/102 + 90/88</b>	for the granting of credit in the form of an advance on a current account	
<b>Consumer credit (2008) a) Advertising</b>	<b>2008/48</b>	Advertising	
<b>b) Pre-Contractual</b>	<b>2008/48</b>	Pre-contractual information	the identity of the creditor geographical address of the creditor
<b>c) Pre-Contract. Overdraft</b>	<b>2008/48</b>	Overdraft	the identity of the creditor geographical address of the creditor
<b>d) Credit</b>	<b>2008/48</b>	Credit agreements	The identities geographical addresses
<b>e) Overdraft</b>	<b>2008/48</b>	Credit agreements in the form of overdraft facilities	the identity of the creditor geographical address of the creditor

**II. Representatives and intermediaries**

<b>Directive</b>	<b>No</b>	<b>Representative/Auxiliaries Related-Company</b>	<b>Intermediary/Substitute</b>
<b>Distance-Marketing of Financial Services</b>	2002/65	a) identity of the representative of the supplier established in the consumer's Member State of residence geographical address relevant for the customer's relations with the representative	a) when the consumer's dealings are with any professional other than the supplier, the identity of this professional./ the capacity in which this professional is acting vis-à-vis the consumer/ geographical address relevant for the customer's relations with this professional b) the identity of the person in contact with the consumer/his link with the supplier
<b>Presentation of Investment</b>	2003/6	the name and job title of the individual who prepared the recommendation	
<b>Life Assurance</b>	2002/83	where appropriate, name Member State and address of the agency or branch concluding the contract	
<b>Insurance Mediation</b>	2002/92	whether he has a holding, direct or indirect, representing more than 10 % of the voting rights or of the capital in a given insurance undertaking  whether a given insurance undertaking or parent undertaking of a given insurance undertaking has a holding, direct or indirect, representing more than 10 % of the voting rights or of the capital in the insurance intermediary  he shall, at the customer's request provide the names of the insurance undertakings with which he may and does conduct business  the names of those insurance undertakings	identity  he gives advice based on the obligation in paragraph 2 to provide a fair analysis  he is under a contractual obligation to conduct insurance mediation business exclusively with one or more insurance undertakings.  he is not under a contractual obligation to conduct insurance mediation business exclusively with one or more insurance undertakings and does not give advice based on the obligation in paragraph 2 to provide a fair analysis.
<b>Payment Services c)</b>	2007/64	the geographical address of its agent or branch established in the Member State where the payment service is offered,	
<b>Consumer Credit (2008) b) – e)</b>	2008/48		if applicable, the identity of the credit intermediary involved geographical address of the credit intermediary involved

**III. Supervision, register, product description**

<b>Directive</b>	<b>No</b>	<b>Supervision/Register</b>	<b>Product Characteristics</b>
<b>Distance-Marketing of Financial Services</b>	2002/65	a) the particulars of the relevant supervisory authority trade register in which the supplier is entered registration number or an equivalent means of identification in that register	main characteristics of the financial service b) other information is available on request and of what nature this information is
<b>Electronic Commerce</b>	2000/32	- where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register; - where the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority; - as concerns the regulated professions: - any professional body or similar institution with which the service provider is registered,	
<b>Door-to-Door Selling</b>	85/577		include the other essential terms of the contract
<b>Financial instruments</b>	2004/39		financial instruments and proposed investment strategies
<b>Prospectus</b>	2003/71	in the case of legal persons, their names and registered offices	essential characteristics of the securities to be offered to the public or to be admitted to trading on a regulated market
<b>Prospectus Regulation</b>	809/2004		the type of the securities class of the securities and amount of the securities in respect of which admission to trading is sought, provided that these elements are known at the time of the publication of the notice the intended time schedule of the offer/admission to trading
<b>Presentation of Investment</b>	2003/6	Where the relevant person is an investment firm or a credit institution, Member States shall require that the identity of the relevant competent authority be disclosed.	

<b>Retirement Provision</b>	2003/41		the rights and obligations of the parties involved in the pension scheme the target level of the retirement benefits, if applicable the level of benefits in case of cessation of employment (on Demand)
<b>Life Assurance</b>	2002/83		definition of each benefit and option  Indication of the nature of the underlying assets  for unit-linked policies, definition of the units to which the policies are linked  means of calculation and distribution of bonuses  indications of surrender and paid-up values and the extent to which they are guaranteed
<b>Insurance Mediation</b>	2002/92	the register in which he has been included, the means for verifying that he has been registered	at least specify, in particular on the basis of information provided by the customer, the demands and the needs of that customer as well as the underlying reasons for any advice given to the customer on a given insurance product
<b>Payment Services a) Low Value</b>	2007/64		main characteristics of the payment service, including the way in which the payment instrument can be used, liability, charges levied and other material information needed to take an informed decision as well as an indication of where any other information and conditions specified in Article 42 are made available in an easily accessible manner;
<b>b) Single</b>	2007/64		a reference enabling the payer to identify the payment transaction  where appropriate, information relating to the payee; the amount of the payment transaction in the currency used in the payment order  the reference enabling the payee to identify the payment transaction where appropriate, the payer and any information transferred with the payment transaction; the amount of the payment transaction in the currency in which the funds are at the payee's disposal
<b>c) Frame</b>	2007/64	the particulars of the relevant supervisory authorities  the particulars of the register provided for in Article 13 or of any other relevant public register of authorisation of the payment service provider and the registration number, or equivalent means of identification in that register	a description of the main characteristics of the payment service to be provided
<b>Consumer credit (1987/90/98) b) Overdraft</b>	87/102 + 90/88		credit limit

<b>Consumer credit (2008)</b>	<b>2008/48</b>		
<b>a) Ads</b>			the total amount of credit;
<b>b) Pre-Contract</b>	<b>2008/48</b>		the type of credit the total amount of credit and the conditions governing the drawdown
<b>c) Pre-Contract Overdraft</b>	<b>2008/48</b>		the type of credit; the total amount of credit
<b>d) credit</b>	<b>2008/48</b>	where applicable, the name and address of the competent supervisory authority.	the type of credit the total amount of credit and the conditions governing the drawdown
<b>e) overdraft</b>	<b>2008/48</b>		the type of credit; the total amount of credit and the conditions governing the drawdown

**IV. Marketing and execution**

<b>Directive</b>	<b>No</b>	<b>Marketing</b>	<b>Execution</b>
<b>Distance-marketing of financial services</b>	2002/65	b) commercial purpose of the call	
<b>Electronic commerce</b>	2000/32	<p>a)+b) commercial communications which are part of, or constitute, an information society service comply at least with the following conditions:</p> <p>the commercial communication shall be clearly identifiable as such;</p> <p>the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable;</p> <p>promotional offers, such as discounts, premiums and gifts, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions which are to be met to qualify for them shall be easily accessible and be presented clearly and unambiguously;</p> <p>promotional competitions or games, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.</p> <p>unsolicited commercial communication: clearly and unambiguously as such as soon as it is received by the recipient.</p>	<p>a)+b) the different technical steps to follow to conclude the contract;</p> <p>whether or not the concluded contract will be filed by the service provider and whether it will be accessible;</p> <p>- the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means,</p> <p>- the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.</p>
<b>Financial instruments</b>	2004/39		<p>execution venues that investment firms provide appropriate information on their order execution policy</p>
<b>Prospectus</b>	2003/71	all information concerning the offer to the public or the admission to trading on a regulated market disclosed in an oral or written form, even if not for advertising purposes, shall be consistent with that contained in the prospectus	
<b>Prospectus regulation</b>	809/2004	<p>a statement that a prospectus or base prospectus has been published and where it can be obtained</p> <p>if the prospectus or base prospectus has been published in a printed form, the addresses where and the period of time during which such printed forms are available to the public</p>	

Directive	No	Marketing	Execution
		if the prospectus or base prospectus has been published in electronic form, the addresses to which investors shall refer to ask for a paper copy	
<b>Retirement provision</b>	2003/41		the annual accounts and the annual reports statement of investment policy principles
<b>Payment Services b) Single</b>	2007/64		the maximum execution time for the payment service to be provided
<b>c) Frame</b>	2007/64		<p>the maximum execution time for the payment services to be provided</p> <p>the form of and procedure for giving consent to execute a payment transaction</p> <p>a reference to the point in time of receipt of a payment order as defined in Article 64 and the cut-off time, if any, established by the payment service provider</p> <p>the manner in and frequency with which information under this Directive is to be provided or made available</p> <p>where applicable, the means of communication, including the technical requirements for the payment service user's equipment</p>
<b>d) Individual</b>	2007/64		provide explicit information before individual payment transactions on the maximum execution time
<b>Consumer credit (2008) e) overdraft</b>	2008/48		<p>the precise period to which the statement of account relates</p> <p>the amounts and dates of draw downs the balance from the previous statement, and the date thereof</p> <p>the new balance</p> <p>the dates and amounts of payments made by the consumer</p> <p>the borrowing rate applied</p> <p>any charges that have been applied</p> <p>where applicable, the minimum amount to be paid</p>



## V. Price parameter and cost elements

Directive	No	Price Parameter	Additional Cost
<b>Distance-marketing of financial services</b>	2002/65	<p>total price to be paid by the consumer to the supplier for the financial service</p> <p>a) price depends on fluctuations in the financial markets outside the supplier's control and that historical performances are no indicators for future performances</p>	<p>possibility that other taxes and/or costs may exist that are not paid via the supplier</p> <p>a) any specific additional cost for the consumer of using the means of distance communication, if such additional cost is charged</p>
<b>Electronic commerce</b>	2000/32	<p>2. In addition to other information requirements established by Community law, Member States shall at least ensure that, where information society services refer to prices, these are to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.</p>	
<b>Financial instruments</b>	2004/39		costs and associated charges
<b>Life assurance</b>	2002/83		general information on the tax arrangements applicable to the type of policy
<b>Payment services b) Single</b>	2007/64	<p>where applicable, the actual or reference exchange rate to be applied to the payment transaction.</p> <p>a breakdown of the amounts of such charges (see add. cost iff) where applicable, the exchange rate used in the payment transaction by the payer's payment service provider or a reference thereto, when different from the rate provided in accordance with Article 37(1)(d), and the amount of the payment transaction after that currency conversion</p> <p>where applicable, the exchange rate used in the payment transaction by the payee's payment service provider, and the amount of the payment transaction before that currency conversion the credit value date</p>	<p>all charges payable by the payment service user to his payment service provider and, where applicable, the breakdown of the amounts of any charges</p> <p>the amount of any charges for the payment transaction payable by the payer and, where applicable,</p> <p>the amount of any charges for the payment transaction payable by the payee and, where applicable, a breakdown of the amount of such charges;</p>
<b>c) Frame</b>	2007/64	<p>where applicable, the interest and exchange rates to be applied or, if reference interest and exchange rates are to be used, the method of calculating the actual interest, and the relevant date and index or base for determining such reference interest or exchange rate;</p>	<p>all charges payable by the payment service user to the payment service provider and, where applicable, the breakdown of the amounts of any charges</p>

Directive	No	Price Parameter	Additional Cost
<b>d) Individual</b>	<b>2007/64</b>	<p>where applicable, the exchange rate used in the payment transaction by the payer's payment service provider, and the amount of the payment transaction after that currency conversion and, where applicable, a breakdown thereof, or the interest payable by the payer</p> <p>provide explicit information before individual payment transactions... on the charges payable by the payer and, where applicable, a breakdown of the amounts of any charges.</p>	the amount of any charges for the payment transaction
<b>Consumer credit (1987/90/98)</b> <b>a) General</b>	<b>87/102 + 90/88</b>	<p>a statement of the annual percentage rate of charge</p> <p>a statement of the conditions under which the annual percentage rate of charge may be amended</p>	<p>a statement of the cost items referred to in Article 1a (2) with the exception of expenditure related to the breach of contractual obligations which were not included in the calculation of the annual percentage rate of charge but which have to be paid by the consumer in given circumstances</p> <p>statement identifying such circumstances</p>
<b>b) Overdraft</b>	<b>87/102 + 90/88</b>	<p>the annual rate of interest</p> <p>the conditions under which these may be amended</p> <p>any change in the annual rate of interest or in the relevant charges</p>	
<b>Consumer credit (2008)</b> <b>a) Ads</b>	<b>2008/48</b>	<p>the annual percentage rate of charge</p> <p>total cost of the credit to the consumer ;</p> <p>the borrowing rate, fixed or variable or both, particulars of any charges</p>	statement identifying such circumstances
<b>b) Pre-contract</b>	<b>2008/48</b>	<p>the annual percentage rate of charge</p> <p>the total amount payable by the consumer</p> <p>the borrowing rate, the conditions governing the application of the borrowing rate and, where available, any index or reference rate applicable to the initial borrowing rate, as well as the periods, conditions and procedure for changing the borrowing rate; if different borrowing rates apply in different circumstances, the above-mentioned information on all the applicable rates;</p>	<p>where applicable, the charges for maintaining one or several accounts recording both payment transactions and draw downs, unless the opening of an account is optional, together with the charges for using a means of payment for both payment transactions and draw downs, any other charges deriving from the credit agreement and the conditions under which those charges may be changed;</p> <p>the interest rate applicable in the case of late payments</p> <p>where applicable, the existence of costs payable by the consumer to a notary on conclusion of the credit agreement;</p> <ul style="list-style-type: none"> <li>- the arrangements for its adjustment</li> <li>- any charges payable for default</li> </ul>
<b>c) Pre-contract overdraft</b>	<b>2008/48</b>	<p>the annual percentage rate of charge, illustrated by means of representative examples mentioning all the assumptions used in order to calculate that</p>	<p>the interest rate applicable in the case of late payments</p> <p>the arrangements for its adjustment</p>

Directive	No	Price Parameter	Additional Cost
		<p>rate</p> <p>the borrowing rate; the conditions governing the application of that rate, any index or reference rate applicable to the initial borrowing rate, the charges applicable from the time the credit agreement is concluded, and, where applicable, the conditions under which those charges may be changed;</p>	<p>any charges payable for default</p>
<b>d) Credit</b>	<b>2008/48</b>	<p>the annual percentage rate of charge</p> <p>the total amount payable by the consumer, calculated at the time the credit agreement is concluded;</p> <p>the borrowing rate, the conditions governing the application of that rate and, where available, any index or reference rate applicable to the initial borrowing rate, as well as the periods, conditions and procedures for changing the borrowing rate and, if different borrowing rates apply in different circumstances, the above-mentioned information in respect of all the applicable rates;</p>	<p>where applicable, that notary's fees will be payable;</p> <p>where applicable, the charges for maintaining one or several accounts recording both payment transactions and draw downs, unless the opening of an account is optional, together with the charges for using a means of payment for both payment transactions and draw downs, and any other charges deriving from the credit agreement and the conditions under which those charges may be changed;</p> <p>the interest rate applicable in the case of late payments as applicable at the time of the conclusion of the credit agreement, any charges payable for default; the arrangements for its adjustment</p> <p>any charges payable for default</p>
<b>e) overdraft</b>	<b>2008/48</b>	<p>- the annual percentage rate of charge</p> <p>- the total cost of the credit to the consumer, calculated at the time the credit agreement is concluded;</p> <p>- the borrowing rate, the conditions governing the application of the borrowing rate and, where available, any index or reference rate applicable to the initial borrowing rate, as well as the periods, conditions and procedure for changing the borrowing rate; if different borrowing rates apply in different circumstances, the above mentioned information on all the applicable rates</p>	

**VI. Risks, Liabilities, Time and Changes of Conditions**

<b>Directive</b>	<b>No</b>	<b>Risks and Liability</b>	<b>Term/Changes</b>
<b>Distance marketing of financial Services</b>	2002/65	<p>a) where relevant notice indicating that the financial service is related to instruments involving special risks related to their specific features or the operations to be executed</p> <p>a) the existence of guarantee funds or other compensation arrangements</p>	<p>a) limitations of the period for which the information provided is valid</p> <p>a) minimum duration of the distance contract</p>
<b>Electronic commerce</b>	2000/32	the technical means for identifying and correcting input errors prior to the placing of the order;	
<b>Financial instruments</b>	2004/39	appropriate guidance on and warnings of the risks associated with investments in those instruments or in respect of particular investment strategies,	investment firms to notify clients of any material changes to their order execution arrangements or execution policy
<b>Prospectus</b>	2003/71	risks associated with the securities risks associated with the issuer and any guarantor	
<b>Investor compensation</b>	97/9	the provisions of the provisions of the investor-compensation scheme or any alternative arrangement applicable amount scope of the cover	
<b>Retirement provision</b>	2003/41	<p>the financial, technical and other risks associated with the pension scheme</p> <p>the nature and distribution of those risks</p> <p>where the member bears the investment risk, the range of investment options, if applicable, and the actual investment portfolio as well as information on risk exposure and costs related to the investments (on Demand)</p>	any relevant information regarding changes to the pension scheme rules
<b>Life assurance</b>	2002/83		term of contract
<b>Payment services c) Frame</b>	2007/64	<p>the liability of the payer in accordance with Article 61, including information on the relevant amount</p> <p>where applicable, a description of steps that the payment service user is to take in order to keep safe a payment instrument and how to notify the payment service provider for the purposes of Article 56(1)(b);</p> <p>if agreed, the conditions under which the payment service provider re-</p>	<p>if agreed, information that the payment service user will be deemed to have accepted changes in the conditions in accordance with Article 44, unless he notifies the payment service provider that he does not accept them before the date of their proposed date of entry into force</p> <p>the duration of the contract</p>

<b>Directive</b>	<b>No</b>	<b>Risks and Liability</b>	<b>Term/Changes</b>
		<p>serves the right to block a payment instrument in accordance with Article 55</p> <p>how and within what period of time the payment service user is to notify the payment service provider of any unauthorised or incorrectly executed payment transaction</p> <p>the liability of the payment service provider for the execution of payment transactions in accordance with Article 75</p> <p>the conditions for refund in accordance with Articles 62 and 63</p>	
<b>d) Individual</b>	<b>2007/64</b>		the debit value date or the date of receipt of the payment order
<b>Consumer credit (2008)</b>	<b>2008</b>		if applicable, the duration of the credit agreement;
<b>a) Ads</b>			
<b>b) Pre-contract</b>	<b>2008</b>	a warning regarding the consequences of missing payments; where applicable, the sureties required	the duration of the credit agreement
<b>c) Pre-contract overdraft</b>	<b>2008</b>		the duration of the credit agreement
<b>d) Credit</b>	<b>2008</b>	a warning regarding the consequences of missing payments	
		the sureties and insurance required, if any	the duration of the credit agreement
<b>e) Overdraft</b>	<b>2008</b>		the duration of the credit agreement

**VII. Payments and right of withdrawal**

<b>Directive</b>	<b>No</b>	<b>Payment</b>	<b>Right of Withdrawal</b>
<b>Distance-marketing of financial services</b>	2002/65	a) arrangements for payment and for performance	the existence or absence of a right of withdrawal and its duration  the conditions for exercising it, including information on the amount which the consumer may be required to pay on the basis of Article 7(1), as well as the consequences of non-exercise of that right  a) practical instructions for exercising the right of withdrawal indicating, inter alia, the address to which the notification of a withdrawal should be sent b) conditions for exercising it, including information on the amount which the consumer may be required to pay
<b>Electronic commerce</b>	2000/32		
<b>Door-to-door selling</b>	85/577		the name and address of a person against whom that right may be exercised
<b>Life assurance</b>	2002/83	Means of payment of premiums and duration of payments on the premiums for each benefit	Arrangements for application of the cooling-off period
<b>Payment services c) Frame</b>	2007/64		withdrawal of such consent in accordance
<b>d) Individual</b>	2007/64	reference enabling the payer to identify each payment transaction where appropriate, information relating to the payee the amount of the payment transaction in the currency in which the payer's payment account is debited or in the currency used for the payment order	
<b>Consumer credit (1987/90/98) a) General</b>	87/102 + 90/88	a statement of the amount, number and frequency or dates of the payments	
<b>b) Overdraft</b>	87/102 + 90/88	total amount of these payments	
<b>Consumer credit (2008) a) Ads</b>	2008/48	the total amount payable by the consumer and the amount of the instalments  in the case of a credit in the form of deferred payment for a specific good or service, the cash price and the amount of any advance payment	

Directive	No	Payment	Right of Withdrawal
<b>b) Pre-contract</b>	<b>2008/48</b>	<p>the amount, number and frequency of payments to be made by the consumer</p> <p>in the case of a credit in the form of deferred payment for a specific good or service and linked credit agreements, that good or service and its cash price</p>	<p>the existence or absence of a right of withdrawal</p>
<b>c) Pre-contract overdraft</b>	<b>2008/48</b>	<p>the amount, number and frequency of payments to be made by the consumer and,</p> <p>the right of early repayment, and, where applicable, information concerning the creditor's right to compensation and the way in which that compensation will be determined in accordance with Article 16</p> <p>where applicable, an indication that the consumer may be requested to repay the amount of credit in full at any time;</p>	
<b>d) Credit</b>	<b>2008/48</b>	<p>the amount, number and frequency of payments to be made by the consumer</p> <p>in case of a credit in the form of deferred payment for a specific good or service or in the case of linked credit agreements, that good or service and its cash price</p> <p>the right of early repayment, the procedure for early repayment, as well as, where applicable, information concerning the creditor's right to compensation and the way in which that compensation will be determined</p>	<p>the existence or absence of a right of withdrawal;</p> <p>the period during which that right may be exercised and other conditions governing the exercise thereof, including information concerning the obligation of the consumer to pay the capital drawn down and the interest in accordance with Article 14(3)(b) and the amount of interest payable per day;</p>
<b>e) Overdraft</b>	<b>2008/48</b>	<p>an indication that the consumer may be requested to repay the amount of credit in full on demand at any time;</p>	<p>conditions governing the exercise of the right of withdrawal from the credit agreement;</p>

**VIII. Termination, rules, complaints, litigation, language**

Directive	No	Termination	Law/Language/Litigation/Complaints
<b>Distance-marketing of financial services</b>	2002/65	<p>a) any rights the parties may have to terminate the contract early or unilaterally by virtue of the terms of the distance contract, including any penalties imposed by the contract in such cases</p>	<p>a) the Member State or States whose laws are taken by the supplier as a basis for the establishment of relations with the consumer prior to the conclusion of the distance contract</p> <p>a) any contractual clause on law applicable to the distance contract</p> <p>a) which language, or languages, the contractual terms and conditions, and the prior information are supplied</p> <p>a) on competent court</p> <p>a) whether or not there is an out-of-court complaint and redress mechanism for the consumer the methods for having access to it</p>
<b>Electronic commerce</b>	2000/32		<p>a reference to the applicable professional rules in the Member State of establishment and the means to access them;</p> <p>b) the languages offered for the conclusion of the contract.</p> <p>Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider indicates any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically.</p> <p>Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.</p> <p>Paragraphs 1 and 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications</p>
<b>Door-to-door selling</b>	85/577	traders shall be required to give consumers written notice of their right of cancellation	
<b>Retirement provision</b>	2003/41	<p>the appropriate information on the benefits which are due and the corresponding payment options</p> <p>the arrangements relating to the transfer of pension rights to another institution for occupational retirement provision in the event of termination of the employment relationship (on demand)</p>	



Directive	No	Termination	Law/Language/Litigation/Complaints
<b>Direct insurance</b>	92/49		the law applicable to the contract where the parties do not have a free choice, or the fact that the parties are free to choose the law applicable and, in the latter case, the law the insurer proposes to choose,  the arrangements for handling policyholders' complaints concerning contracts including, where appropriate, the existence of a complaints body, without prejudice to the policyholders' right to take legal proceedings
<b>Life insurance</b>	2002/83	means of terminating the contract	Law applicable to the contract  the arrangements for handling complaints, where appropriate, the existence of a complaints body
<b>Payment services a) Low value</b>	2007/64		the procedures allowing customers and other interested parties to register complaints about insurance and reinsurance intermediaries and, if appropriate, about the out-of-court complaint and redress procedures
<b>c) Frame</b>	2007/64	the right of the payment service user to terminate the framework contract and any agreements relating to termination in accordance with Article 44(1) and Article 45	any contractual clause on the law applicable to the framework contract and/or the competent courts  the language or languages in which the framework contract will be concluded and communication during this contractual relationship undertaken  the out-of-court complaint and redress procedures available to the payment service user
<b>Consumer credit (1987/90/98) b) Overdraft</b>	87/102 + 90/88	of the procedure for terminating the agreement	
<b>c) Pre-contract overdraft</b>	2008/48	the conditions and procedure for terminating the credit agreement	
<b>d) Credit</b>	2008/48		whether or not there is an out-of-court complaint and redress mechanism for the consumer and, if so, the methods for having access to it

## IX. Conclusion

The table could be used to evaluate the impact these EU regulations have on distance marketing. Instead the present research is focused on *additional* national law. But in order to assess what is additional, the above table of EU information rights should be compared with a similar table of national information rights.

We have had to rely on the expertise of experts from the Member States concerned. We have drawn conclusions from this material, which is also presented here. As indicated above, it would be difficult to conceive of the scale of a study covering all 27 Member States, identifying all duties under national law to provide pre-contractual information in relation to any financial services product marketed at a distance cross-border, which are not based on implementation of the EU Directives concerned here, and which may stem from specific statutes, case law, general clauses on informational duties and advice, enforceable under administrative, penal and private law.

The reports from Germany, UK, Austria, France, Portugal and Spain in particular reveal the great variety of such information rights in Member States specific to certain financial products, while others provide an overview. For Germany, a separate research project suggests that all information duties existing in German legislation are contained in 69 articles, which could be ordered according to the products concerned.

Apart from this German work no Member State has yet consolidated all the rules governing financial services information into a single piece of legislation,<sup>45</sup> or attempted to publish them in a coherent manner. The Draft Common Frame of Reference for European Contract Law, which is intended to summarise national private law in the European Union and which has been partly built into Consumer Law, will not contain a special section on financial services. These have been excluded from the general rules concerning the provision of services in Part C. (Article IV. C. – 1:102). Also, the section on loans (Part F) is still missing<sup>46</sup> There are, however, general rules on information duties which would also apply to financial services under Chapter 3 of the second book. In this chapter much attention is given to distance marketing;<sup>47</sup> a special Chapter 5 deals with the common elements of the Right of Withdrawal in the Member States.

---

<sup>45</sup> The UK (investment) as well as the Danish (payment services) Financial Services Laws contrary to their denominations are specific to certain products only and do not cover the whole area.

<sup>46</sup> see v. Bar/Clive/Schulte-Nölke, (eds) Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR) Munich 2008 The EU sponsored CoPEL Network “will deliver a proposal for the "Common Frame of Reference" (CFR) for European contract law as described both in the Commission's Action Plan (COM [2003] 68 final) and the Commission's Communication on 'European Contract Law and the Revision of the Acquis: The Way Forward' (COM (2004) 651 Final) of 11 October 2004.” Press Release of the European Commission (<http://www.responsible-credit.net/index.php?id=1980&viewid=40955>)

<sup>47</sup> Articles II.-3:103 to 3:107 and 3:201 contain general rules specific to distance marketing.

## E. Additional information rights (Article 4(2) Directive 2002/65/EC)

Article 4(2) of Directive 2002/65/EC allows for greater pre-contractual information rights and a higher degree of consumer protection than is laid down in the Directive.

### I. General use of the leeway

The Directive distinguishes between two forms of supplementary provisions: (1) those stemming from existing rules which Member States may “maintain” (hereafter referred to as “maintained”) and (2) those introduced on incorporation of this Directive (hereafter referred to as “introduced”). While we asked for both alternatives in the expert survey, the official notification of the Member States to the Commission under Article 4(3) of the Directive provides information primarily on newly introduced rights.

- One Member State (UK) reported existing and newly introduced rules which go beyond the scope of distance marketing.
- Five Member States (Austria, Finland, Hungary, Ireland, Portugal) reported existing and newly introduced rules on additional information in distance marketing of financial services.
- Ten Member States (Luxembourg, Bulgaria, Cyprus, Czech Republic, Denmark, Germany, Lithuania, Luxembourg, Poland, Slovenia) only reported rules on distance marketing which had been newly “introduced” or denied that such rules had been “introduced”.
- Seven Member States (France, Italy, Latvia, Romania, Malta, Slovakia and Sweden) communicated that they had incorporated a clause giving leeway to other information rights

As a result, seven countries reported that they had “not introduced additional provisions in relation to the pre-contractual information requirements” while three lacked the relevant information and the remaining 17 gave evidence of either their willingness to use this leeway or cited practical examples.<sup>48</sup> The examples of information rights that go beyond those implemented by the Directive does with one exception (UK) not contain information on general product-specific information rights.

The following overview summarises the official information and juxtaposes it to the opinions expressed by the experts. The differences stem from the fact that most Member States notify the non-existence of additional newly introduced information rights while some Member States and all the experts include information rights that existed prior to the implementation of the Directive but not specific to distance marketing of financial services. Some inconsistencies in the responses are explained here:

- As the Directive itself allows maintenance of existing regulations, the experts tend to take the view that, although these rights existed prior to the Directive, they need not be checked for compliance with Article 3 of the Directive. But in these cases “maintained rights” are not “additional” because the Directive incorporated them into Article 3.
- The judgement whether a national rule goes beyond the Directive depends on a legal judgement. For example, the Directive requires disclosure of the geographical address

---

<sup>48</sup> This result has been derived from the different wording the 23 responses use to define their understanding of Article 4(2) (i.e. “introduced/not introduced”, “have”, “have made use/have not made use”). The interpretations thus ranged from a very broad understanding in the UK to a very narrow one in France.

of the supplier. Article 5(1)c) of the E-Commerce Directive 31/2000/EC, however, adds “the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner”. The word “details” gives space for interpretation for the national legislator. He can either overtake this word into national legislation or the notion can be transposed by filling it out with very specific obligations.

- Austria, and the UK characterise such information rights, which go beyond other directives such as Directive 2002/92/EC, Directive 97/9/EC or even a Commission Recommendation 2004/384/EC concerning investment services and insurance brokers, as “additional” to those imposed by this Directive. Finland, on the other hand, also categorises rules implementing the Directive as “introduced”. Germany cites only provisions going beyond the scope of the Directive as additional, and not covered by Article 4(2) although the scope of Article 4(2) is the same as the scope of this Directive in general. Portugal instead counts provisions as additional if they have been implemented under another Directive. Others give citations and classify this law as “additional”.
- There is also a conflict between statutes and secondary legislation. In the UK report, we find that both government and expert assert that the UK has made use of the leeway of Article 4(2). However, the expert states: “The factors listed in the UK’s Financial Services Distance Marketing Regulations 2004, Schedules 1 & 2, which apply to distance marketing of non-FSA regulated services (credit and so called ‘gap’ contracts) are the same as those indicated in Directive 2002/65/EC Article 3. Similarly, the distance marketing provisions of the FSA’s Conduct of Business Sourcebooks stipulate the matters listed in the Directive.”

Table 4: Overview of Article 4(2) according to notification under Article 4(3)

<i>Member State</i>	<b>Notification under Article 4(3) (August 2007)</b>		<b>Expert Opinion (April 2008)</b>		<i>Market in Mio</i>
	<i>Introduced</i>	<i>Maintained</i>	<i>Introduced</i>	<i>Maintained</i>	
Austria	Yes		No	Yes	8.2
Belgium	No		No	Yes	10.5
Bulgaria	No		No	No	7.4
Cyprus	No		No	No	0.8
Czech Republic	No		No	No	10.3
Denmark	Yes		No	No	5.5
Estonia	Not avail.		No	No	1.4
Finland	Yes		No	Yes	5.5
France	No	Yes	No	No	60.5
Germany	Yes		Yes	Yes	82.5
Greece		Yes	No	No	11.1
Hungary	Yes		No	No	10
Ireland		Yes	No	Yes	4.1
Italy		Yes	No	No	58.7
Latvia		Yes	No	No	2.3
Lithuania	No		No	Yes	3.5
Luxembourg	No		No	No	0.5
Malta		Yes	No	Yes	0.4
Netherlands	Not avail.		No	No	16.5
Poland	No		No	No	38.5
Portugal	Yes		No	No	10.5
Romania		Yes	No answer	No answer	22.5
Slovakia		Yes	No	No	6.5
Slovenia	No		No	No	2
Spain	Not avail.		Yes	Yes	43.2
Sweden	No	Yes	Yes	Yes	9
United Kingdom	Yes (unclear)	Yes	Yes	Yes	60.5

Table 5: Additional national provisions introduced or maintained in individual Member States (experts)

Additional Provisions	Member States
Introduced	4
Maintained	10
Not introduced	23
Not maintained	17
Neither	17
Both	4
Total	27

The overall picture drawn by both experts and officials of the application of Article 4(2), shows that existing differences are not due to Article 4(2) but reflect differences in the application of different Directives. What remains will be described below. When asked the general question of whether they assume that there are differences in national laws in this area, consumer organisations for the most part indicated that they have neither the experience nor the knowledge to respond.

**Article 4(2): Additional Information Duties**  
 Official Notification and Expert Survey  
 by States and EU-Population in %

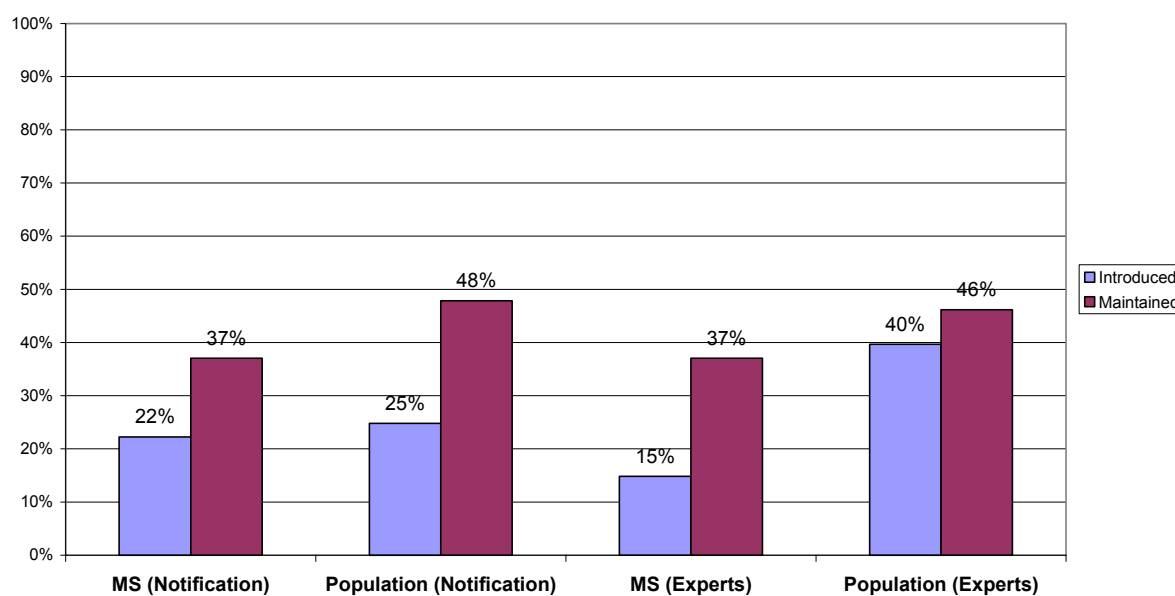


Figure 4: Article 4(2) Additional information duties

Table 6: Are there any differences in your law applicable to cross-border financial services compared with the law of other EU Member States? (Question asked to consumer organisations)

Member State	Statement	Country	Statement
CZECH REPUBLIC	Probably.	HUNGARY	Special area of law and cross-border selling, we forward to ECC.
DENMARK	Don't know.	IRELAND (Cons. Ass. of Ireland)	Not aware.
FRANCE -(GERMANY)	Yes.	ITALY (ADICONSUM)	Don't Know.
GREECE	Don't know	ITALY (ALTROCONSUMO)	Don't know.
HUNGARY	No.	LUXEMBOURG	Don't know.
ICELAND	Don't know	MALTA	Don't know.
IRELAND	We have not compared Statutory Instruments 853/2004 and 63/2005 (Irish transposition of Directive 2002/65/EC) with the implementation in other Member States	NETHERLANDS (ECC)	Don't know.
ITALY	Don't know.	NORWAY	Yes.
LATVIA	No.	POLAND	Don't know
LITHUANIA	Don't know.	PORTUGAL	Don't know
AUSTRIA (ECC)	Don't know.	ROMANIA	No.
BELGIUM (CRIOC- OIVO)	Don't know.	SLOVAKIA	No.
BELGIUM (Test Achats)	Don't know.	SLOVENIA	No.
CYPRUS	Don't Know.	SLOVENIA (International Cons. Research Institute)	No.
CZECH REPUBLIC (SOS - C.P.O.)	The MIFID has not been implemented in Czech legal framework yet.	SPAIN	Yes, but we have not many rates to compare.
DENMARK (Forbrugerradet)	"Pengeinstitutankenævnet". tax rules on stocks resp. bonds. (customized to Denmark and penalties	SPAIN (ADICAE)	Do not know.
ESTONIA	Don't know	SWEDEN (ECC)	Don't know.
FINLAND	Don't know	THE NETHERLANDS (ECC)	Don't know.
FINLAND (The Finnish Cons. Ass.)	Do not know. - Within the time fixed we cannot clear up the differences.	UK	Yes.
GERMANY (VZBV)	Do not know in detail but obvious	UK (Which?)	Insurance Mediation Directive.

We therefore conclude:

1. The majority of Member States state that they have made use of Article 4(2).
2. Statistically, about one-third, covering 39 % of consumers within the EU, claims having *introduced* additional provisions with the implementation of the Directive. The expert survey provides evidence of this for only four Member States. The difference is due to the way the questions in the official survey were asked, in that they also covered the intention to introduce additional rights. We therefore assume that 4 is closer to reality at present.
3. As to the question of how many countries have *maintained* rules going beyond the Directive the following conclusions can be drawn.

- a. At least 7 Member States, covering 21 % of EU consumers, have introduced a general rule modelled on the leeway in the Directive that allows maintenance of such rules irrespective of whether they currently exist. We therefore cannot conclude that rules that fall under Article 4(2) truly exist.
  - b. If all rules applicable to the cross-border distance marketing of financial services are taken into account with the only exception of those derived from EU Directives, the majority of Member States with their own financial services legislation, as opposed to the new accession states which have merely enacted EU law, qualify. If only provisions count as falling under Article 4(2) if they are specific to the distance marketing of financial services, there was no evidence of additional information duties in Member States, which indicated that they did not make use of the leeway offered by Article 4(2)
  - c. With regard to the official notifications, where it was indicated that the Member State did introduce additional rules after the Directive had come into force, and where no comment in relation to existing rules was made, we assume that at least 15 of the 27 EU Member States and 60 % of the population within the Internal Market are reported as having rules which go beyond the Directive.
4. The effect of the newly introduced law under Article 4(2) is minimal. Existing law is more significant.

## ***II. Additional pre-contractual information duties – evidence and problems***

The information duties laid down by national law are detailed in Part II in the National Reports. In this part we summarise this information, which has been communicated by the experts.

### **1. Legal form of additional provisions**

Depending on their infrastructure for monitoring financial services and consumer protection, Member States employ differing forms of rules which, in the continental legal tradition, may be attributed either to public or private law. The following basic models arise:

- Specific legislation which, in principle, adopts the wording of the Directive
- Legal rules introduced into general private law integrating financial services with other services (i.e. civil code, consumer code)
- Decrees (by the Ministry of Finance etc) in Portugal
- Codes of Conduct (Financial Services Authorities) encouraged for example by Article 16 of the E-Commerce Directive

The first category<sup>49</sup> is linked to the Directive itself and is therefore stable and only likely to change when the Directive itself changes. Countries which opt for this form, usually do not provide for any additional national rules.

The majority of countries which incorporate these rules into their general codes have less coherent regulation in that some aspects are dealt with in another more general context. Whether it concerns products or marketing practices depends on the focus of this legislation. If products are the focus, as is the case in most countries (such as Germany, UK, Austria, France), only a minimal number of rules apply directly to distance marketing. Only where a specific

---

<sup>49</sup> Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Greece, Hungary, Italy, Luxembourg, Malta, Poland, Romania, Slovakia, Slovenia



Financial Services Law<sup>50</sup> is enacted will common standards be defined for all financial services products alike.<sup>51</sup>

## 2. Additional provisions from general law: good faith and fairness

Additional provisions may stem from general principles of law and therefore be left to jurisprudence, in which legal reasoning and legal culture is still highly diverse across the EU and depend on the traditions, functions and economic and political development of the country concerned.

There are three main legal cultures in Europe as far as contract law is concerned.

Firstly, there are countries which have a Civil Code, including the French Code Civil, the Austrian ABGB and the German Bürgerliches Gesetzbuch.

The second group includes the Baltic countries where, instead of a unified civil code, there are separate but quite general contract codes. As far as consumer law is concerned, these codes have the same level of abstraction as the civil codes.

Common Law countries, notably the UK and Ireland, start from a case law tradition, so that EU law must be introduced through specific rules or legislation, and may take the form of a code of conduct as in Ireland. This is because “case law” cannot be amended as such.

The differences are important to the formulation of a response to the question of the extent to which information rights are specific or general. Since “information” and especially “advice” (which necessarily incorporates the requisite information, adding explanation and investigation) have become so prominent in a service society, they arise increasingly in the general sections of the civil codes.

The newly regulated Article 311 al. 2 (pre-contractual duties), together with Article 241 second sentence (duty of care) of the German Civil Code, are examples how far information rights enter into the general parts of civil law.

This tendency towards information rights provision in the context of general legal principles runs counter to the detailed information rights prescription in EU Directives. Courts can no longer assume that the consumer is well-informed if the regulated information is supplied properly. They find themselves constrained to identify which kind of information would have been necessary to produce the desired outcome of “informed consumer choice”. Instead of a means-test, there is a test of the achievement of the objectives of the information rules.

Modern consumer codes accelerate this development. Half of the Member States have used EU regulation to build up a specific consumer code, consumer protection code or consumer rights code. This is true for Austria, Bulgaria, the Czech Republic, Estonia, Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovakia, Slovenia, and Spain.

While some of these codes put together existing EU Consumer Protection Directives in a more technical way, others have used this system to build up a code that has a similar structure to the civil code, with general rules in the first part and specific rules in the special parts. As consumer information is seen as the most general and most accepted cornerstone of consumer law, it may come as no surprise that general information duties arise.

---

<sup>50</sup> UK and the Danish financial services law are no examples because they focus either on investment products or payment cards

<sup>51</sup> iff developed a general law of this nature for the German Ministry of Consumer Affairs in 2004; the UK expert reports that the FSA is working towards such a solution.

For example, Article L.111-1 of the **French** Consumer Code imposes a general duty to provide pre-contractual information concerning the essential characteristics of the service, which is defined by its ends and not by its means.

«Tout professionnel vendeur de biens ou prestataire de services doit, avant la conclusion du contrat, mettre le consommateur en mesure de connaître les caractéristiques essentielles du bien ou du service »

“Each professional seller or service provider must put the consumer in the position of knowing the essential characteristics of goods or services before the contract is concluded.”

Art. 5(3) of the Italian Consumer Code provides for a legal duty

“to give without regard to from where they may stem adequate and clearly understandable information adapted to the means of communication which also takes into account the way the contract will be concluded as well the characteristics of the industrial sector, in order assure that the consumer is fully informed.”

**Belgium** and **Poland** report that their consumer law has been developed within the framework of competition law.

On the other hand, **Denmark, Germany, the Netherlands, Sweden, the UK** and **Cyprus** use their general civil or contract codes and have special laws concerning consumer protection. In Germany, a prominent scholar (Canaris) claims that the civil code has become a consumer code since. According to Article 13 of the Code, the consumer is the typical contractor after the 2002 reform.

Where consumer contract law is seen as an important basis of civil law, the tendency towards a general information right for consumers defined by its ends is ever more visible.

A key article of the German law (in line with EU law) can be seen in Article 31 Wertpapierhandelsgesetz (Law on Commercial Papers) which summarises the general jurisprudence derived from good faith when it states:

„(2) (Ein Wertpapierhandelsunternehmen) ist ferner verpflichtet, ...seinen Kunden alle zweckdienlichen Informationen mitzuteilen, soweit dies zur Wahrung der Interessen der Kunden und im Hinblick auf Art und Umfang der beabsichtigten Geschäfte erforderlich ist.“

“A supplier also has the obligation ... to provide his client with all information necessary to preserve the interests of the client and with respect to the form and scope of the envisaged transaction.”<sup>52</sup>

In **Finland**, a general information obligation that concerns all businesses is established in chapter 2 section 1 of the Consumer Protection Act. All marketing which fails to include information needed for the protection of consumers' safety is considered to be unfair.

General clauses of good faith also play a prominent role in private law. This applies in both Germany and Austria, but has also influenced the legal system in Eastern Europe.<sup>53</sup> Case law based on good faith has established a duty to advise consumers; under Article 241(2) German Civil Code it is defined as “care of the interest of the other party.” This includes a duty to provide pre-contractual information as developed over a long period by **German** jurisprudence, based on the principle of *culpa in contrahendo*. Article 311(2) N. 2 CC now gives the

<sup>52</sup> See Article 19(IV) Directive 2004/39/EC (MiFiD) “When providing investment advice or portfolio management, the investment firm shall obtain the necessary information regarding the client's or potential client's knowledge and experience in the investment field relevant to the specific type of product or service, his financial situation and his investment objectives so as to enable the firm to recommend to the client or potential client the investment services and financial instruments that are suitable for him.”

<sup>53</sup> see Reifner, (1999) “Good Faith”: Interpretation or Limitation of Contracts? The Power of German Judges in Financial Services Law, in: Brownsword, R/Hird N.J./Howells, G. Good Faith in Contract, Ashgate:Dartmouth pp269 - 310

judge the duty to investigate whether additional information duties are required because of the nature of the contract. The same is true in Austria and may also arise under the Fairness Doctrine in **UK Common Law**, although these rules tend more to be the province of state agencies (FSA, OFT) than the court system. In the FSA's Principles for Business Handbook, Principle 7 states that "A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading".

A similar rule is also present under part 4 of article 6.163 of the Civil Code of **Lithuania**, which provides that "the parties must disclose to each other all information known to them, which has substantive importance for the conclusion of the contract."

Art. 4:20 of the **Dutch** Financial Markets Supervision Act (Wet op het financieel toezicht, Wft) requires that a financial services provider comply with what is essentially a general information duty, both prior to the conclusion of the contract and for its duration. This is further specified in the Decree on the Supervision of Market Conduct of Financial Firms (Besluit gedragstoezicht financiële ondernemingen, Bgfo).

Under **Austrian** contract law, the contracting partners are obliged to protect each others' interests as soon as they enter into negotiations.

These principles of pre-contractual information duties have now been summarised in Article II.-3:301 ff of the **Draft Common Frame of Reference**<sup>54</sup> as a model law which claims to represent the core of European private law in this area.

It states that "the business has the duty to disclose to the other person such information concerning the goods or services to be supplied as the other person can reasonably expect, taking into account the standards of quality and performance which would be normal under the circumstances" and, with regard to consumers (Article II.-3:102), "to provide such material information as the average consumer needs in the given context to take an informed decision on whether to conclude a contract." The principle of "complete information" in Article II.-3:102(1) comprises (paragraph (2)) "the main characteristics of the goods or services, the identity and address, if relevant, of the business, the price, and any available right of withdrawal" as well as "peculiarities related to payment, delivery, performance and complaint handling, if they depart from the requirements of professional diligence".

Distance marketing is classified as one of the situations that put the consumer "at a particular disadvantage"(Article II.-3:103(1)), and which requires additional information as to "... delivery charges, taxes and other costs, ... the terms of the contract, the rights and obligations of both contracting parties, ... and redress procedures". They must therefore be "confirmed in textual form" (Article II.-3:106(3)). However, additional special information duties in distance marketing "take precedence over the general information duties under paragraph (1)." These concern "(a) the technical steps which must be followed in order to conclude the contract, (b) whether or not a contract document will be filed by the business and whether it will be accessible, (c) the technical means for identifying and correcting input errors before the other party makes or accepts an offer, (d) the languages offered for the conclusion of the contract, (e) any contract terms used." Article II.-3:106 (1) requires "clear and precise information" and special rules may require storage in a "durable medium" (2).

These rights and duties are very similar to the information rights contained in the EU Directive and therefore reflect the aspects of legislation governing the provision of information that have already been harmonised. By their nature, however, they go further. Like the national consumer legislation referred to above, they are developing as general legal principles and, if

---

<sup>54</sup> op.cit (Fn 46)

enacted in national law, they will create additional information duties which may go beyond the scope especially of the product-specific information duties contained in European financial services law.

Due to the absence of large-scale cross-border commerce, which is reflected in the lack of case law, there is no evidence of these legal principles in most national legal provisions relating to the operation of the Directive (see the Austrian report). It is, however, possible that such evidence will become available in the future. If Article 4(2) were abolished, this would not prevent the courts from requiring more information to be provided if they deemed it necessary in order to fulfil these principles, and especially to meet the obligation of good faith or fairness.

### 3. Additional information requirements for distance marketing only

A number of countries<sup>55</sup> have claimed that they made use of the leeways. But as these statements partly express intentions, and partly express legal reservations or refer to examples covered by other Directives, the statistics do not show whether there are indeed additional information requirements. The following examples are taken from the national reports (Part II) where more information on this legislation can be found. They have been declared “additional” by the national experts – a judgement which in the reported cases is shared by the research team. Anyhow, as the “additional” quality may be derived from its diversity or maybe only partial, each example can of course be discussed and different classifications are possible.

Below are some examples of divergent information requirements which have been analysed by the national experts. However, it remains unclear whether these are merely a result of differing interpretations of the Directive and the duties it imposes, or whether they express a willingness to provide additional information:

**(Address)** Austrian case law relating to § 5c KSchG must be taken into account, such as OGH 23.9.2003, case no 4 Ob 175/03v, under which the “address” the supplier must communicate must be the name of a street plus a house number. A mere post-office box (P.O. Box) is not enough, as the consumer must be able to go to the place and talk to representatives of the provider in person. Furthermore, the consumer must have an address at which process may be served.

**(Authorisation)** Lithuania requires the supply of information on the financial scheme’s authorisation: Para 4 of Part 6 of Article 36 of the Law on Protection of Consumer Rights specifies the particulars of the relevant authorisation authority to be indicated i.e. address, telephone, fax numbers, electronic mail, and website addresses of the supervisory authority. Also, the Article referred to above requires indication of the date of issuance of the licence of the supplier.

**(Change of Contract Terms)** Under Article 312 b, 312 c German BGB, read in conjunction with Article 1(1) No. 6 of the German Information Decree, a provider must disclose whether it can replace or change the item ordered. Although this is obviously not a rule designed for financial services, legal doctrine holds in the context of the general rules that it is also an information duty applicable to financial services (as this is merely an administrative rule, however, it may have this wide application by virtue of a mistake). German law requires disclosure of “penalties” without the additional specification of the Directive “in such cases” as

---

<sup>55</sup> see Table 5: Additional national provisions introduced or maintained in individual Member States (experts) page 48

provided by Article 3(4) (c) of the Directive. This may even have been omitted unintentionally.

**(Disabled)** In relation to information provided, Spanish law 22/2007 (Art 7.2) specifies that it must be expressed in such a way as to guarantee the rights of disabled persons to universal accessibility to the information.

Information rights must respect the principle of responsibility and fairness and the principle of protection of persons who have not the capacity to enter into contractual relations (Article 43.b(4) CPA Slovenia)

**(Duration)** Article 8/1 of the General Portuguese Consumer Protection Law - Law no 24/96, requires indication of the “duration” of a contract in general and not only of the “minimum duration”

**(E-Commerce extended)** Germany has extended the requirement of the E-Commerce Directive to the distance selling of goods and services in general, and Article 1(1) No. 4 of the Information Decree states that the provider must inform the consumer of “how the contract will be concluded”. This may, as the Romanian expert writes, also be the case in that country.

**(Efficiency of Information)** Chapter 6 a, section 5 of the Finnish Consumer Protection Act (KSL) obliges provision of information prior to the conclusion of a contract. The information shall be supplied in a manner suitable for the means of distance communication used, clearly, comprehensibly and in a manner that makes clear the commercial purpose of the information.

The Act of the Governor of the Bank of Greece 2501/2001 contains a provision specific to internet transactions (paragraph E). For bank transactions through the internet, banks must design the provision of information in such a way that the aim of this Act is achieved, either through immediate provision of information through the internet or by an alternative means of provision of the information (referral to a specific employee of the bank, telephone number etc).

**(Guarantee Funds)** In Sweden the supplier must provide consumers with information on all existing guarantee funds or guarantee arrangements, while the Directive states that information must only be provided on the existence of guarantee arrangements not covered by Directive 94/19/EC and Directive 97/9/EC).

**(Guarantee Schemes)** In some countries, information rights and duties under the E-Commerce Directive, in particular in relation to addresses given for the various guarantee schemes, go beyond the provisions of the Distance Marketing Directive, but also apply to voice telephony and non-electronic mail.

**(Insolvency)** In Lithuania the provider must inform the consumer if it is subject to bankruptcy or liquidation procedures. Where the capital of the legal entity is referred to, the authorised share capital and paid-up share capital must be stated.

**(Language)** Article 9 Portuguese Decree Law nr. 95/2006 states that, where the consumer is Portuguese, the pre-contractual information, the terms of the distance contract and all other communications relating to the contract must be in the Portuguese language unless the consumer accepts the use of another language. This goes beyond Art. 3(1)/3 g of the Directive, which does not require specific consent of the consumer to the use of another language.

**(Receipt)** Article 29 Portuguese Decree-law no. 7/2004. The consumer must confirm and acknowledge receipt. Only after such confirmation is the order considered to be effective.

**(Redress Schemes)** In Regulation 5 (1)(d) Subsidiary legislation 330.07 of Malta the information required in relation to redress schemes is more detailed than that required by the Directives: (i) details regarding the procedure for lodging a complaint to the supplier and the

contact details of the office responsible for complaints; (ii) that the Consumer Complaints Manager offers an out-of-court complaint mechanism for the consumer who is a party to the distance contract, the contact details of the relevant office and the methods for gaining access to it; (iii) the existence of any other out-of-court redress mechanism available to the consumer and methods for gaining access to it; and (iv) any compensation schemes or other compensation arrangements or guarantee funds as may be applicable.

**(Right of Withdrawal)** Art. 83 quater of the Belgian Unfair Trade Practices Act [inserted by art. 11 of the 24 August 2005 Act]. Article 83 requires that the consumer must also be informed of the consequences of not exercising a right of withdrawal (Article 83 quater (e) Unfair Trade Practices Act).

Spanish Law 22/2007 (Art 7.3.a) underlines that the consumer must be informed that he or she will not have such a right where both parties have asked for full performance of the contract.

**(Risks)** Some risks specific to financial services are set out in Article 7(1) 2 c of Spanish Law 22/2007, such as a lack of or limited liquidity, the possibility that sums deposited will not be returned in full, the possibility that price increases for the service may occur.

**(Storage)** The French Loi pour la Confiance dans l'Economie Numérique (Law on Confidence in E-Commerce) of June 2004 includes an obligation on the part of the supplier to store contracts for services with a value exceeding 120 Euros and concluded online for a period of 10 years.

The Irish Regulations impose more stringent requirements on the method of communication of the "prior information". Reg. 6(3) determines that prior information must be provided in a way that it is "at all times accessible to the consumer" and permits the Consumer to STORE it in a durable way. In contrast, Art. 5 determines solely that the prior information shall be communicated to the consumer "on paper or on another durable medium available and accessible to the consumer". The conclusion that could be drawn from this distinction is that providing prior information on a website would be permissible under the Directive but not under the Irish Regulations.

**(Telephone)** In Poland there is a question in practice of whether the insurance company is obliged to read aloud the general conditions of the contract on the telephone to the consumer in order to comply with the information requirements. Insurance companies, which offer the opportunity to listen to the general conditions of insurance by phone, are required to inform that the phone call may last up to two hours.

#### 4. Hidden "Additional" provisions

As EU Directives<sup>56</sup> must always be transposed into national private law between suppliers and consumers, it may sometimes be difficult in practice to assess whether certain national legislation is already harmonised by EU law. Such identification is not problematic where Member States structure their law according to the EU Directives. However, Member States which already have such regulations and which may even have been a model for EU regulations, will not implement large parts of it through new and explicitly connected legislation. In such cases, the very process of its genesis will mean that national law will not readily identify its origins. On the other hand, the new rules may deviate from the newly introduced wording of the Directive. The Austrian expert describes this process as follows:

---

<sup>56</sup> According to Eur-Lex, the website on European legislation, the EU has passed 16,792 legal acts which are currently in force. There are 53 Directives specifically designed for banking (14) and insurance (39). Another 41 Directives concern the economic interests of consumers, including problems involving financial services.

“Art. 8 and 9 of Directive 2002/65/EC resemble Art 8 and 9 of the Directive 97/7/EC on the protection of consumers in respect of distance contracts and have already been transposed into national law in the course of the implementation of the Directive 97/7/EC. The corresponding national provisions are: Payment by card - § 31a KSchG (slightly adapted) Unsolicited services - § 32 (1) No 5 KSchG, § 864 (2) ABGB. Art 10, 13, 15 and 19 of the Directive 2002/65/EC didn't need to be transposed either; Austrian law was already in accordance with them. Unsolicited communications - § 107 TKG 2003, § 62 WAG 2007, § 75 Abs 4 VAG (slightly adapted) Judicial and administrative redress - §§ 28 ff KSchG Burden of proof - § 6 Abs 1 No 11 KSchG; for the rest see Law on distance marketing of Financial Services (Bundesgesetz über den Fernabsatz von Finanzdienstleistungen an Verbraucher (Fern-Finanzdienstleistungs-Gesetz – FernFinG))”

Similar information on the scattered distribution of rules concerning these questions can be found in the answers from Belgium, Cyprus, France, Germany, Ireland, Netherlands, Portugal, Spain, Sweden, UK. The laws cited are the Civil Code, Contract Codes, Consumer Protection Codes, Price Disclosure Law, Bank Supervisory Acts, Money and Finance Laws and even the Social Security Code or Code on Insurance Law, Payment Services, Credit and Investment.

Harmonised rules will thus be partly hidden in the body of national law. This has been the case for example with the UK Consumer Credit Act, which was a model for the first EU Consumer Credit Directive, and with the German Standard Contract Term Law, which seems to have served as a model for the corresponding EU Directive.

This explains why, in the official notification process, most Member States failed to indicate whether they had made use of the leeway given by Article 4(3) of the Directive by *maintaining* existing information rights going beyond the provisions of the Directive. Similarly, the national experts interviewed characterised a number of rules as “additional” which are covered by information rights derived from other Directives. In a second and third round of communication we therefore summarised the most important EU Regulations as reproduced above under DI.

The national reports therefore still contain a number of information duties which can either directly or by way of interpretation be attributed to rights in existing, overlapping EU Directives, notably in the E-Commerce Directive, which define information rights either by their ends or in a very general way. In this case, it is questionable whether a national, more detailed rule is only the implementation of a more general rule contained in a Directive or the requirement of additional information.

Directive 2002/65/EC requires for example provision of the supplier's “geographical address”, Directive 2000/31/EC asks in addition for disclosure of “details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner”.

The existence of “a guarantee fund or other guarantee arrangement different from those not covered by Directive 94/19/EC and Directive 97/9/EC” is required by the E-Commerce Directive as well as some insurance and capital market Directives in a broader form and follows its patterns. Some countries now require the additional disclosure of telephone and fax numbers. For instance, supplier's telephone number: Finland (Section 6 of Chapter 6a of the CPA), Lithuania (Art. 36 of the Law on Protection of Consumer's Rights), Spain (Art. 7 (1) of the Law 22/2007), Sweden (Chapter 3 § 3 of the Distance and Doorstep Sales Act (2005:59); Supplier's fax numbers, Spain (Art. 7 (1) of the Law 22/2007). In other countries this is required by the courts. In Germany, Art. 1(1) No. 3 BGB-InfoV requires the “address at which the supplier can be served with legal process”. In some countries there is a debate about whether the requirements for information concerning the fax number and e-mail address

means that all providers must use fax and e-mail or if such duties are obsolete if they do not dispose of such facilities.

Such regulations are in fact only “details” of national law which Directive 2000/31/EC requires to be identified.

Article 3(3) (g) requires that language be indicated. The experts from Portugal and Lithuania assumed that their national rules prohibiting the use of a foreign language are additional rules. However, no. 31 of the recitals, together with use of the singular in this article, does not exclude one language alone. This rule can also be addressed as an “information duty”. This would mean that to be obliged to make clear that only a given language will be used would fall within Article 4(2), which is obviously not the case.

Such difficulties may be behind the problem of legal uncertainty voiced by suppliers if they have no representation in the host Member State and no legal advisors who are knowledgeable about this law. When they are confronted with national information requirements they have to assess whether these duties are the same as in their own country. This will be the case if these rights are derived from harmonised law, which again makes it necessary to have full knowledge of the scope of application as well as the contents of these Directives which underlies the national regulation.

The problem of transaction costs in obtaining the necessary legal information becomes more significant if Directives are taken into account regulating overlapping product-specific pre-contractual information rights. This is already obvious from the juxtaposition of such rights in the above-mentioned table. The following table gives an example of different rules as they relate only to the address of the provider under the Distance Marketing Directive, which is applicable only to consumers and all forms of distance communication, while the E-Commerce Directive applies to all citizens but excludes non-electronic mail and voice telephony.



Table 7: Information about the address of the supplier - problems of disclosure under EU law

	<b>Name</b>	<b>Geographical Address</b>	<b>Other</b>
Distance Marketing Directive	Art. 3(1) (a) the identity and the main business of the supplier	Art. 3(1)(a), the geographical address at which the supplier is established and any other geographical address relevant to the customer's relations with the supplier;	
E-Commerce Directive	Art. 1(a) the name of the service provider; Article 6 (b) the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable	1. In addition to other information requirements (b) the geographical address at which the service provider is established	(c) details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner; (d) where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register
Consumer Credit Directive 2008	Article 5 (b) the identity	Article 5 (b) and the geographical address of the creditor as well as, if applicable, the identity and geographical address of the credit intermediary involved	

These problems of course would not fall within Article 20(2).

## 5. Differences stemming from product-specific regulation

The legislative material on product-specific information duties under national law are documented in the national reports. It contains the following areas.

- Information rights for products in respect of which harmonisation is still pending, such as mortgage loans and information rights applicable to guarantors
- Information rights concerning products which have a long history in national legislation governing disclosure, that existed before the EU regulations concerned and there-

fore contain more national legal provisions such as those governing insurance and shares.

- Information rights which are more detailed than those designed by the Directive

#### a) Examples by products

We have reproduced some examples taken from the large variety of information rules that are presented in the national reports. For details on each country we ask the reader to refer to Part II of the report. In this part we aim to show the structure and relation of product-specific regulations at national level with regard to the information rights applicable to distance marketing. We have chosen the UK report as one example. Another example is the overview of selected countries below, in which the German example in particular documents more exhaustively the wide variety of existing product- and sector-specific information rights which have not yet all been harmonised and where harmonisation has a much greater impact than distance marketing requires.

For products regulated by the British FSA, detailed conduct of business rules in the relevant handbooks establish specific product-related disclosure requirements for all transactions (distance and non-distance). As noted above, the FSA regulates most of the commonly available consumer finance products in the UK (current, savings and deposit accounts, investments, insurance, mortgages, pensions, e-money), but it does not regulate consumer credit unless that credit is secured by way of a first charge mortgage. Despite the policy of moving towards “principles-based” regulation, the Handbooks still contain detailed rules regulating the marketing and provision of financial services, including intermediary services.

##### (1) First charge mortgages

Some of the key provisions<sup>57</sup> are the following:

MCOB 2.2 restates in the form of a rule the high-level principle (7) that requires firms to “communicate information in a way that is clear, fair and not misleading” (MCOB 2.2.6 & 2.2.6A). MCOB 2.2.3 prescribes the terminology that firms must use in communications with a customer when referring to 4 key concepts (‘early repayment charge’, ‘higher lending charge’, ‘lifetime mortgage’ and ‘home reversion plan’.)

MCOB 3.6 prescribes the form and content of non-real time financial promotions. It requires such promotions to include the name and address of a firm or its representative (3.6.1), fees and price information for the mortgage in a standardised form (3.6.17, 3.6.22, 3.6.23, 3.6.25) and a prominent display of a required risk statement (3.6.1.13). This provision also sets out standards for comparative claims and statements (3.6.3); prescribes the use of particular terms and their equivalents (“overdraft”, “interest free”, “no deposit”, “pre-cleared”, “gift” “early repayment charge”, “higher lending charge”, “lifetime mortgage”) (3.6.8 & 3.6.9); and requires prominent disclosure of product tie-ins (3.6.11) and of any APR that varies according to the client’s circumstances (3.6.25).

MCOB 4.4 specifies the Initial Disclosure Requirements that apply when a firm first makes contact with a customer to whom it will be likely to provide advice or personalised information. Rule 4.4.1, which concerns contacts that are initiated by some means other than the telephone, requires the firm to “(a) establish with the customer whether it will provide advice or information; (b) establish with the customer how much he will pay or, alternatively, the basis

---

<sup>57</sup> The rules applicable to first charge mortgages can be found in the Mortgage and Home Finance Conduct of Business Handbook (MCOB) available at: <http://fsahandbook.info/FSA/html/handbook/MCOB>.

on which the firm will be remunerated, where appropriate” and (c) provide an Initial Disclosure Document (or a Combined Initial Disclosure Document where the firm anticipates providing more than one service), which provides information about the firm, including its status as FSA regulated, and about the “scope and nature” of the firm’s services. Rule 4.4.7 specifies the information that must be provided at the start of a call when the firm’s first contact is by telephone (name of the firm, scope of its services, whether the firm provides advice or information and that written confirmation of the information will follow).

MCOB 5 regulates the information (the Key Facts Illustration) that firms must provide to a customer prior to the customer’s application for a particular home finance contract. The information provided should generally conform to the requirements of high level principle 7 (“clear, fair and not misleading”). More specifically, the information must clearly set out (a) the features of the mortgage, any linked deposits, any linked borrowing and any tied products; and (b) the price. MCOB 5 specifies in some detail both the form (including matters such as layout, font, order, use of logos, et cetera) and the content of this information on the assumption that consistent presentation of information will facilitate comparative shopping by consumers. MCOB 5.6.16, 5.6.17 and 5.6.18 set out prescribed paragraphs of text that must be provided. Other required information must be presented in the form of a personalised illustration of how the costs and features of the mortgage reflect customers’ requirements in terms of the amount, duration and nature (repayment or interest only) of the loan and the value of the property to be secured (e.g. 5.6.6, 5.6.9)

MCOB 6 regulates the information that must be provided when a firm makes an offer. Once again, the firm is required to provide a personalised illustration of the costs and features of the contract as well as standard paragraphs of information and the provisions of this rule set out in detail the specific modifications that must be made to the information set out in MCOB 5. In addition, because these mortgages are generally exempted from cancellation rights (an exercise of the option under Article 6(3) of the Directive), the FSA regulations impose enhanced disclosure requirements on the offer document for all regulated mortgage contracts (MCOB 6.4.11 <http://fsahandbook.info/FSA/html/handbook/MCOB/6/4>). Thus, for all putative sales of a regulated mortgage contract, whether distance or non-distance, the conduct of business rules (MCOB 6.4.11) state that:

"A firm must ensure that the offer document contains a prominent statement: (1) of the period for which the offer is valid; (2) explaining, where the regulated mortgage contract contains features, such as additional unsecured borrowing facilities, which could result in the customer borrowing more money, that where such features are used, the amount of the customer's debt will increase; (3) explaining when any interest rate change on the regulated mortgage contract takes effect. This statement must be used, for example, to explain cases where an annual review system is used; (4) explaining the consequences that might arise from the customer not entering into the regulated mortgage contract, including any fees that the customer has paid which will not be reimbursed; (5) explaining that once the regulated mortgage contract is concluded there will be no right of withdrawal; and (6) explaining that although no right of withdrawal exists the customer will have a right to repay the regulated mortgage contract in accordance with the terms of the regulated mortgage contract."

## (2) Insurance

The EU regulates information duties for insurance under Direct Insurance 92/49, Life Assurance 2002/83 and Insurance Mediation 2002/92. Payment Protection Insurance has not been specifically regulated at EU level.

Detailed rules as to pre-contractual disclosure in relation to insurance in the UK can be found in the new Insurance Conduct of Business Sourcebook (ICOBS)

ICOBS 5 concerns identification of client needs and provision of advice. Rule 5.1.2 imposes an enhanced suitability duty on a firm that arranges payment protection insurance -- to "take reasonable steps to ensure that the customer only buys a policy under which he is eligible to claim benefits". In support of this duty, 5.1.2(2) requires a firm that is arranging a payment protection policy to disclose any parts of the cover that do not apply to the consumer so that the consumer can make an informed decision about whether to proceed with the transaction.

ICOBS 6.1 provides general rules allocating responsibility for product disclosure between insurers and insurance intermediaries (ICOBS 6.1.1, 6.1.2, 6.1.3, 6.1.4) and sets out a general standard for the provision of prior information in relation to insurance contracts: "A firm must take reasonable steps to ensure a customer is given appropriate information about a policy in good time and in a comprehensible form so that the customer can make an informed decision about the arrangements proposed" (ICOBS 6.1.5). ICOBS 6.1.13 deals with price disclosure where insurance is connected to the sale or supply of other goods and services.

ICOBS 6.2 requires firms to provide timely pre-contractual disclosure of the consumer's cancellation rights.

### (3) Consumer credit

The old Consumer Credit Directive will soon be replaced by the new Consumer Credit Directive 2008/48. As the UK has the most advanced consumer credit market, much of what has now been harmonised at EU level is derived from its experience. The additional information requirements at EU level, such as those regarding advertising and the prescribed box are at present "additional" to existing EU law but will soon form part of its harmonised provisions.

Consumer credit regulators in the UK have a long history of creating information rights that purport to protect consumers. The Consumer Credit Act 1974 makes provision for disclosure before the formation of credit contracts and the Consumer Credit (Disclosure of Information) Regulations 2004, SI 2004/1481, the Consumer Credit (Agreements) (Amendment) Regulations 2004, SI 2004/1482 and The Consumer Credit (Advertisements) Regulations 2004 SI 2004 No.1484 establish detailed rules prescribing the form and content of the information to be disclosed for consumer credit contracts. However, distance contracts are excluded from the scope of the Consumer Credit (Disclosure of Information) Regulations 2004 SI 2004/1481 (Reg. 2(b)) and pre-contractual (prior information) disclosure is excluded from the scope of the Consumer Credit (Agreements) (Amendment) Regulations 2004, SI 2004/1482.

The Consumer Credit (Advertisements) Regulations 2004 SI 2004 No.1484 impose requirements on the form and content of advertisements for credit and these requirements apply to distance and non-distance contracts alike. There are detailed regulations about the presentation of the price/cost of credit, including provisions governing the term "typical APR", see Regulation 8 and Schedule 1 which governs the calculation and disclosure of the total charge for credit and the APR.

In addition, Regulation 9 sets out restrictions on the use of the following terms and their equivalents: "overdraft"; "interest free" "no deposit", "pre-approved"/ "loan guaranteed", "gift/present"; and regulation 7 provides detailed prior information requirements for the form and content of advertisements where the credit may be subject to security, especially where a loan may be secured on a debtor's home.

The Banking Code also establishes standards for the provision of prior information about credit (cards, loans and overdrafts). As of October 2008, these standards will require that important information about unsecured loans (and savings) is presented in the form of a summary box on pre-sale information.

#### (4) Investment

With regard to pensions, investments and other financial products that are not consumer credit, mortgages or FSA regulated insurance, the rules set out in parts 2.2 (prior information disclosure rules are all based on the MiFID Directive.

Examples of additional information can instead be found in the Austrian report. In addition to the requirements of Art 28 of the Directive 85/611/EEC as amended by Directive 2001/107/EC, Article 6 (1) Investmentfondsgesetz (InvFG) rules are linked to attachments A and E providing that the full prospectus, required to be published for investment funds, must include information on shareholders who directly or indirectly control the managing company as well as information on the contract between management company and depositary. Concerning derivatives, there must be an explicit and typographically highlighted note on the risk associated with derivatives.

§ 7 (1) Austrian Immobilien-Investmentfondsgesetz (ImmoInvFG) (attachments A and C) copies Article 6 (1) Investmentfondsgesetz (InvFG) and defines the information a prospectus for immovable property investment funds must contain.

According to § 14 Kapitalmarktgesetz (KMG) attachment D, prospectuses on investment in immovable property must include additional information on the nature, number, costs of maintenance, lettable square footage of immovable property that is invested in as well as principles of buying, selling and managing the property etc.

## 6. Differences in selected Member State

Although Part II of this Report summarises additional information requirements for each Member State, we have extracted and explained some of the situations which are more likely to be able to impact upon the Internal Market by way of barriers to the distance marketing of financial services for certain countries.

#### (1) Austria

In **Austria** additional information requirements derive both from general principles of contract law and from various national laws concerning specific financial products.

- General requirement imposed on distance selling to consumers (imposed by Court decisions): the supplier must communicate the name of a street plus a house number. A mere post-office box (P.O. Box) is not enough, as the consumer must be able to go to the address and talk to representatives of the provider in person. Furthermore the consumer must have an address at which process may be served effectively. This may coincide with the requirement of a “geographical address” under Art 3.1 of the Directive, but it is more specific.

Product-specific information requirements: Among the most striking features, as explained in the main national report, are the following:

- Investment services must report on controlling shareholders of companies (Investment Funds), and special risks (derivatives). Special information is required in relation with investment in real estate (such as nature of the property, cost of mainte-

nance, square footage for rentable space, etc.) Also, special information about investment policy is required.

- Furthermore, § 9 Standes- und Ausübungsregeln für Personalkreditvermittler (Personalkreditvermittlerverordnung) obliges personal loan intermediaries to communicate in their business premises, shop windows and leaflets the maximum provisions claimable for the mediation of personal loans pointing out explicitly that these amounts are the maximum. This regulation might be –in our view- applicable to intermediaries offering products on the Web, with a view to selling in Austria.
- According to § 5 (3) Verbraucherkreditverordnung the consumer must be informed prior to the signing of the credit agreement of the consequences of early repayment of the credit sum in terms of costs and interest.
- In connection with consumer credit, the Austrian Oberster Gerichtshof (OGH - Supreme Court) has stressed that the transparency requirement concerning general terms and conditions [§ 6(3) KSchG based on Art 5 of the Directive 93/13/EEC] is only met when the vocabulary used is comprehensible for consumers. Provisions such as “die Kosten der Wiederveranlagung zum Geldmarktsatz” (“the costs of re-investment at the money market rate”), which the average person may not understand, have already been held not to be comprehensible, as “Geldmarktsatz” (“money market rate”) is a technical term in the field of bank management and not part of common knowledge (OGH 5.6.2007, case No 10 Ob 67/06k). This stipulation would apply, in our view, to distance marketing devices such as web pages which are not translated in their entirety into the German language.
- In relation to insurance, § 1a (2) Versicherungsvertragsgesetz (VersVG) states that, where the prospective insured submits his offer, the insurance company is obliged to explain to him that the contract is not yet binding and that there is no coverage before the certificate of insurance or any other declaration of acceptance has been issued by the insurance company. Also, as stated in the Austrian Report, § 9a Versicherungsaufsichtsgesetz (VAG) has transposed Art 31 of the Directive 92/96/EEC into national law and exceeds European provisions to the extent that it requires information confined by the Directive to life insurance for provision of indemnity insurance/direct insurance. Furthermore, according to § 75 (2-3) Versicherungsaufsichtsgesetz (VAG) consumers who are interested in unit-linked or index-linked life insurance are asked about their knowledge of and experience in speculation in securities.

## (2) Belgium

**Belgium** has notified the Commission that it has not introduced additional duties to provide information. To the extent that the sanctions for breach of the duty to inform about the consequences of non-execution of the right of withdrawal are very harsh, it may be arguable that it amounts to a significant additional duty, and an obstacle to foreign suppliers. Also, anti-money laundering legislation imposes requirements related to the identification of customers that may limit the ability of new market entrants.

Belgian law also imposes general duties under competition law concerning distance marketing which go beyond the Directive. The most visible divergence is the requirement to provide an identification number. However, it must be conceded that that requirement entails minimal cost and expenditure for a foreign company seeking to provide financial services in Belgium.

## (3) Bulgaria

Bulgaria did not officially use the leeway offered by 4(2). However there is a small exception: Article 9 (3) Distance Marketing of Financial Services Act could be pointed to as an additional national requirement, as it regulates the supplier's obligation to provide additional information at the consumer's request.

#### (4) Denmark

The **Danish legislator** has not made use of the leeway given by Art. 4(2) of Directive 2002/65/EC with respect to distance selling. However, there are some requirements which may be derived from the Distance Selling and E-Commerce Directives that may cause problems as they do not derive from this Directive:

- § 13 (1)(3) of the Consumer Agreement Act and § 34e (1)(6) of the Insurance Agreement Act specifically state that information must be provided on the commencement of the right of withdrawal period.
- § 13(1)(8) of the Consumer Agreement Act and § 34e (1)(13) of the Insurance Agreement Act state that the businesses must provide consumers with information on the existence of *any* guarantee fund or other guarantee arrangement (the Directive states that information is only to be provided on the existence of guarantee arrangements not covered by Directive 94/19/EC and Directive 97/9/EC).

#### (5) Germany

The **German example** shows at least 17 different laws from administrative and civil law in the form of laws, decrees or codes of conduct.<sup>58</sup> Accordingly, the sanctions vary greatly. As information duties are the core of financial services in a market society, legislators always react with obligations of that nature, as they have in the current credit crisis, where the approach has been to examine the need for additional consumer information on the risks inherent in mortgage loans.

Bank Law (KWG); Code of Conduct Mortgage Loans; Decree on Admission of Shares (BörsZulV); Decree on Brokers and Building Promoter (MaBV); Decree on Civil Information Duties (BGB-InfoV); Decree on Sales Prospectus (VerkProspVO); Insurance Contract Law (VVG); Insurance Information Decree (VVG-Info\_VO); Insurance Supervision Act (VAG); Investment Act (InvG); Law on Building Societies (BauSparkG); Law on Commerce (GewO); Law on Commercial Papers (WpHG); Law on Mortgage Banks (HypBankG); Law on the Certification of Private Pension Fund Products (AltZertG); Law on the Stock Exchange (BörsG); Price Disclosure Decree (PAngVO)

In addition, standard contracts contain the promise to provide additional information and advice.

As Germany is still a country which tries to codify scattered laws, for example incorporating consumer law into the Civil Code in 2002 and insurance law into the *Versicherungsvertrags-gesetz Reform* (reform of legislation governing issuance of insurance policies) of 2008, it may be assumed that the diversity of legislation containing such rules is even greater in countries where laws remain individual and associated with the circumstances from which they originated.

The following table also shows 13 different financial product definitions, which the legislator applies in an attempt to cover the thousands of different products created each year. Both

---

<sup>58</sup> The table of contents for a German report summarising all relevant product-specific regulation in this Member State is annexed at Annex V.

products and supervisory law can again be integrated into the four main categories of financial services: investment, credit, insurance and payment services.

Although it may be assumed that, as the following table indicates, many of these information duties need not be so specific, because definitions and regulations double and treble when new problems arise, and the legislator tends to react quickly, there are, in any event, significant differences to be addressed in regulation with regard to other factors, notably the involvement of consumers (credit), the size of the transaction (credit and payment services), the purpose of the transaction (investment, pensions) and the distribution of risks (insurance, investment).

For that reason, these information rights, which must be applied irrespective of the form in which the underlying financial services are marketed, will always show different emphases, scope and contents. While interest rates are predominant in credit information, risks are more important in investment information. Insurance law, which concerns the most abstract financial services, necessitates more sophisticated product descriptions.

The contents of these information duties can be found in the national reports for which this structure may be of assistance. In the German report, the law to which this table relates has been reproduced and provided with English language headings. We were obliged to leave the 69 articles, each of which may have up to an entire page of information duties, in the German original.

We do not assume that these information rights can be seen as specific obstacles to the distance marketing of financial services across borders, since they affect any cross-border commerce, irrespective of the form of its marketing.

In the future, these areas will certainly have to be harmonised yet further, although significant progress has been achieved with the existing Directives on retail finance. As the research for the German Ministry of Consumer Affairs shows, however, development of a general structure of information rights is required first, in which clear definitions of the major financial services, basic sanctions, a general definition of the purpose of information and its relation to advice as well as the restrictions stemming from specific marketing practices such as distance marketing, e-commerce and door-to-door sales, or the use of intermediaries, are defined in general so that product-specific regulations can be built into them. A general Financial Services Information Directive could thus influence the coherence of national regulations in this area.

Table 8: Information rights on financial services derived from EU Directives

Area	Product	Contents	Law
<b>CREDIT</b>	<b>All Credit</b>	§21 Definition of the Annual Percentage Rate of Charge	§ 6 Abs. 1 PAngV, § 492 Abs.2 Civil Code (BGB))
		§22 Calculation of the Annual Percentage Rate of Charge	§ 6 Abs. 2 und Abs. 5 Price Disclosure Decree (PAngV)
		§23 APRC Calculation with Special Forms of Credit	§ 6 Abs. 3, 4, 7-9 Price Disclosure Decree (PAngV)
	<b>All Consumer Loans</b>	§24 Definition Consumer Loan	§§ 491 Abs. 1 und 2, 492 Abs.1a, 507 Civil Code (BGB)
		§25 Contractual Information	§ 492 Abs. 1, 1a S. 1, Abs. 3 und 4 Civil Code (BGB)
		§26 Sanctions if not provided	§ 494 Civil Code (BGB)
	<b>Credit Broker-</b>	§36 Definition and general Information Duties	§ 655 b Civil Code (BGB)



Area	Product	Contents	Law
	<b>age</b>		
	<b>Mortgage Loans</b>	§27 Right of Withdrawal	§ 495 Civil Code (BGB)
		§28 Information Duties with Mortgage Loans	§§ 15, 16 Law on Mortgage Banks (HypBankG)
		§29 General Information Duties	Code of Conduct Mortgage Loans, Recommendation (Annex I)
		§30 Personalised Information	Code of Conduct Hypothekenkredite Verhaltenskodex, EU Empfehlung (Anhang II)
		§31 Additional Information with Combined Savings- and Loan Systems (Bauspardarlehen)	§ 5 Abs. 3 Law on Building Societies (BausparkG)
	<b>Instalment Credit</b>	§32 Contractual Information in Instalment Credit	§ 502 Abs. 1+2 Civil Code (BGB)
		§33 Sanctions for Non-Compliance	§ 502 Abs. 3 Civil Code (BGB)
	<b>Overdraft</b>	§34 Information Duties	§ 493 Abs. 1, S. 2 Civil Code (BGB)
		§35 Ongoing Information	§ 493 Abs. 1 S. 3-5, Abs. 2 Civil Code (BGB)
<b>INVEST-MENT</b>	<b>General</b>	§37 Information on Guarantee Schemes	§ 23a Bank Law (KWG)
	<b>Commercial Papers</b>	§38 Duty to inquire for fair and good Advice	§ 31 Abs. 2 Law on Commercial Papers (WpHG)
		§39 Advice	§ 32 Law on Commercial Papers (WpHG)
		§40 Prospectus with Term Contracts	§ 37d Abs. 1 Law on Commercial Papers (WpHG)
		§41 Sanctions for Non-Compliance	§§ 37d Abs. 4-6, 37 b Law on Commercial Papers (WpHG)
	<b>Investment-funds</b>	§42 Information when Advertising	§ 124 Abs. 1 S. 1 Investment Act (InvG)
		§43 Written pre-contractual Information	§ 121 Investment Act (InvG)
		§44 Sales Prospectus	§ 42 Investment Act (InvG)
		§45 Information on Administration Fees	§ 41 Abs. 2 S. 3 Investment Act (InvG)
		§46 Right of Withdrawal	§ 126 Investment Act (InvG)
	<b>Shares</b>	§47 General Information	§ 13 Decree on Admission for Shares (BörsZulV)
		§48 Liability for incorrect Information in a Stock Exchange Prospectus	§ 44 Law on Stock Exchange (BörsG)
		§49 Information on the Issuer	§ 5 Decree on Sales Prospectus (VerkProspVO)
		§50 Information on the Business of the Issuer	§ 7 Decree on Sales Prospectus (VerkProspVO)
	<b>Private Old Age Pension Schemes</b>	§51 Pre-Contractual Information from the Supplier	§ 7 Law on the Certification of Private Pension Fund Products (AltZertG)
		§52 Ongoing Information	§ 7 Abs. 4 Law on the Certification of Private Pension Fund Products (AltZertG)
	<b>Employer Old Age Pension Schemes</b>	§53 Pre-contractual Information Duties of the Supplier	§§ 10a Abs. 1 S. 3, 113, Annex D Section III Insurance Supervision Act (VAG)
		§54 Ongoing Information	115 Abs. 3 und Abs. 4, Anlage D Section III No 2 Insurance Supervi-

Area	Product	Contents	Law
			sion Act (VAG)
	<b>Investment Brokerage</b>	§55 General Duties of Investment Brokers	§ 10 Abs. 2 Nr. 2 and Abs. 3 Nr. 5 – 7 Decree on Brokers and Building Promoter (MaBV) in connection with § 11 Nr. 2 MaBV i.V.m. § 34c Abs. 1 Nr. 1 lit. b) Law on Commerce (GewO)
<b>INSUR-ANCE</b>	<b>General Duties</b>	§56 Information on Contract Terms	§ 10 Insurance Supervision Act (VAG)
		§57 General Information Duties	§ 10a Insurance Supervision Act (VAG)
		§58 Pre-Contractual Information for Consumers	Annex D Section 1 Insurance Supervision Act (VAG)
		§59 Duty of the Consumer to Contradict insufficient and incorrect Information	§ 5 a Insurance Contract Act (VVG)
		§60 Ongoing Consumer Information	Annex D Section II Nr. 1 Insurance Supervision Act (VAG)
		§61 Brokerage/Intermediary	Art. 12 Abs. 1 bis Abs. 3, Art. 13 Abs 1 EU Dir.)
	<b>Life- and Accident Insurance</b>	§62 Pre-Contractual Information Duties	Insurance Supervision Act (VAG) Annex D Section II No 2
		§63 Right of Withdrawal	§ 8 Abs. 4-6 Insurance Contract Act (VVG)
		§64 Additional Annual Information	Insurance Supervision Act (VAG) Annex D Section II Nr. 3
	<b>Health Insurance</b>	§65 Additional pre-contractual Information	Insurance Supervision Act (VAG) Annex D Section II No 3
		§66 Additional annual Information	Insurance Supervision Act (VAG) Annex D Section II No 4
<b>PAY-MENT SERVICE</b>	<b>All</b>	§67 General Information	§ 675a Civil Code (BGB)
	<b>Funds Transfer</b>	§68 Client Information	§ 12 Civil Code Decree on Information Duties (BGB-InfoV)
		§69 Money Transfer on Bank Account	§ 676f S. 2 Civil Code (BGB)

## (6)Greece

Greece has not specifically made use of the leeway given by Art. 4(2) of Directive 2002/65/EC with respect to distance selling. However, specific provisions concerning the obligation of suppliers to provide consumers with information prior to the conclusion of a contract are contained in regulations developing financial services and also in professional Codes of Conduct. For instance, the Act of the Governor of the Bank of Greece 2501/2001 contains a provision specific to internet transactions (paragraph E). According to this provision, banks must define how they will, in their Internet and distance selling of banking services, fulfil their information duties under that Act. The mechanisms foreseen are the immediate provision of information through the internet or by an alternative means of information provision (referral to a specific employee of the bank, telephone number etc).

Greece also shows some sector-specific specialities, derived from implementation of different EU laws: Greek Law 3606/2007 implemented Directive 2004/39 of the European Parliament and of the Council of 21 April 2004 on financial instruments markets. Its Art 25 “repeats” the provisions of art.19 of that Directive. Comparing these provisions to the obligations contained

in art.3 of Dir 2002/65 one can see some differences, i.e. under art.19 information must be clear, fair and not misleading, whereas under Dir 2002/65 information must be clear and comprehensible with due regard to the principles of good faith in commercial transactions.

#### (7)Hungary

**Hungary** has not taken up the leeway offered by Art 4.2 of Directive 2002/65/EC. However, a deeper look into Hungarian regulations on private law, as is explained in greater detail in the report from this Member State, shows that requirements concerning the form of the contract used for services in the financial sector may constitute a difficulty for non-Hungarian suppliers. Some telecommunication devices (forms and standard letters with or without an addressee for the purpose of direct business acquisition, advertisements published in press products with an order form, catalogues and fax) satisfy the requirements of written form defined under Article 38 (2) of the Civil Code of 1960. However, other telecommunications instruments (such as the telephone, automatic calling machines, radio, video telephone, videotexts (microcomputer with a screen) with keyboards or touch screens, an internet website, electronic mail (email), and television) do not satisfy these formal requirements of written form.

Further, this Member State imposes information requirements linked to certain financial services and products:

- Act LX of 2003 on insurance institutions and insurance business. ‘Article 37 (1): Before concluding insurance contracts, insurance intermediaries - unless otherwise provided by law - shall disclose the following information..., c) whether the insurance intermediary has an influential share in the insurance institution, d) whether the insurance institution or its parent has an influential share in the insurance intermediary, e) the person to be held liable for any damage caused in his capacity as an insurance intermediary.
- Article 166 (1): Before a life assurance contract is concluded - with the exception of net risk life assurance policies that contain no savings elements, which are offered by the financial institution in connection with the financial services it provides, or where the sum insured is less than one million HUF - the insurance company and the insurance intermediary shall assess customer demand or shall interview the client in order to ascertain the needs and requirements of the client. (2) Unless otherwise provided by law, before a life assurance contract is concluded, insurance companies and insurance intermediaries must furnish the policyholder with easily intelligible, clearly written and detailed information that is verifiable and documented (...). The insurance company’s obligation to supply information to policyholders shall apply during the term of the contract with respect to any changes in the above-specified information apart from the particulars of dependent insurance intermediaries (...). (5) Where insurance services are provided through electronic commerce, insurance companies and insurance intermediaries shall be required to provide unlimited easy access for the client to information through electronic channels. If the insurance company's declaration of acceptance is endorsed by a qualified certificate defined in Act XXXV of 2001 on electronic signatures, the insurance company shall be required to provide unlimited easy access for the client to the information specified in paragraph (2) through electronic channels. (...) (7) Unless otherwise prescribed by law, before concluding a contract, the insurance company shall obtain a statement from the client, supported by sufficient evidence, to the effect that he has received the information specified in paragraphs (2) and (3). In the statement, the client shall also state any other information received in connection with the insurance policy in question prior to concluding the contract. (8) If the insurance company's declaration of acceptance is endorsed by a stamp, certification note or a seal, the insurance company shall post the information

sheet containing the information specified in paragraph (2) at the place of contracting. (9) Once a life assurance contract has been concluded - other than net risk life assurance policies with no residual rights attached, supplementary insurance against disability resulting from an accident or sickness covered under the life assurance branch - the insurance company shall provide written information to the policyholder at least once a year on the service value of the life assurance policy, its current cash surrender value and the amount of any surplus yield to be refunded. (10) In connection with an inflation escalation clause in an insurance contract, the client is to be clearly informed concerning the components to which the inflation escalation clause pertains. The insurance company shall be required to emphasise the existence of inflation escalation clauses, including the rights of the client relative to such clauses. (11) As regards unit-linked life assurance policies, the insurance company must provide the contracting party with access to information on the placement of investments, to wit, the cross rate of the various investment forms used to cover the contracting party's investment, the types of each form of investment and the current value of the contracting party's investments. The form and content requirements regarding the information to be supplied to clients in connection with unit-linked life assurance policies shall be decreed by the minister. (12) If a medical examination of the prospective policyholder is required for the conclusion of an insurance contract - life assurance and non-life insurance alike - the insurance company must inform the client of his/her right to obtain the results of such tests and examination pursuant to Act CLIV of 1997 on health care.

- Annex 10 of Act LX of 2003 contains a very detailed list (reproduced in the national report) of advice to be given to clients such as: (...)11) name and address of the department of the insurance company that handles consumer complaints, facilities for lodging complaints with the consumer protection authority or with reconciliation bodies, information about the judicial process; 12) in respect of the branch offices of third-country insurance companies, in addition to what is laid down in this Annex, the country where legal disputes are settled, description of the material and procedural provisions and the language of such proceedings; 13) list of the organisations to which the insurance company is entitled to disclose client data pursuant to Articles 153-161 and 165 of the Insurance Act; 17) tax laws relating to life assurance contracts, 18) for life assurance contracts, the amount to be retained by the insurance company from the premium paid in by the policyholder if the contract is cancelled by the policyholder within thirty days.
- Government Decree 227/2006 (XI. 20) Korm. on payment services and electronic payment instruments. 'Article 15 (1) Any contract for the issue of an electronic payment instrument must contain the following information: a) description and mode of use of the electronic payment instrument, including any limitation on amounts or the number of transactions and the method of their modification, b) where the holder must have specific technical equipment for using the electronic payment instrument, then the description and method of use and the required technical characteristics of such equipment, c) the period within which the payments made with the bank card or payment orders given through the electronic payment device are debited from or credited to the client's account from the time of notification of the issuer or, if the client does not have an account at the issuer, the period applicable to the payment order, d) the reporting obligation of the client (holder) defined under Article 16(2), the method of reporting and the necessary data, e) the obligations and liability of the issuer and the client (holder), also including all the rules of behaviour generally expected of the client (holder) in the specific situation which must be complied with in relation to the

electronic payment instrument and the personal identification code or any other identification method required for its use, f) the method and deadline for lodging any complaint in relation to specific transactions of the client (holder) and the method and deadline for managing the complaints, as well as notification of the client (holder) about the legal remedy options in the form of a list, g) for electronic payment instruments suitable for use abroad the method of calculation of the exchange rate applicable to the conversion of the foreign currency into the currency of the bank account or, for credit cards, into the currency of the credit, h) The interest, commissions, fees and expenses charged, also including regular expenses, i) the method of interest calculation applicable to the bank account covering the use of the bank card and loans drawn down from the credit facility attached to the credit card, as well as the value date if it is different from the booking date, j) the notification obligation about the transactions performed with the electronic payment instrument in the form of a bank account statement or, if there is no bank account, a turnover statement, issued by the issuer with the contents, method and frequency in compliance with the applicable regulations.'

The financial institutions Act CXII of 1996 on credit institutions and financial enterprises provides for the following information rights:

- Article 203 (3): The financial institution must publish the following in the form of announcement in the customer area of its premises, and where services are also provided by electronic commerce, by way of electronic communications in easily accessible format: a) standard service agreement, also containing the standard contract conditions, b) the contract terms and conditions for financial services and auxiliary financial services (transactions) offered for customers, c) rates of interest, service fees, and other costs charged to the customers, default interests and the method of computation of interests.
- Article 204 (1): Credit institutions must provide deposit holders with readily intelligible information concerning the important issues that affect deposit holders with regard to the Fund and foreign deposit-guarantee institutions and, in the event of participation in such, the voluntary deposit guarantee and institutional protection funds specified in Chapter XX; thus, for example, the types of deposits covered by the Fund; the extent of coverage; and - when deposits are frozen or the credit institution has been liquidated - the conditions for compensation payments under Article 101 (1) as well as the procedure required for obtaining the coverage.'

#### (8) Ireland

**Ireland** has officially taken up the leeway of Art 4(2)

As explained in the national report relating to this Member State, the Irish Regulations impose stringent requirements on the method of communication of "prior information". Reg. 6(3) determines that prior information must be provided in a way that is "at all times accessible to the consumer" and permits the Consumer to STORE it in a durable way. In contrast, Art. 5 of Directive 2002/65/EC determines solely that the prior information shall be communicated to the consumer "on paper or on another durable medium available and accessible to the consumer". The conclusion that could be drawn from this distinction is that providing prior information on a website would be permissible under the Directive but not under the Irish Regulations.

In relation with general obligations for Pre-Contractual Information in Financial Services, the sellers of financial products have a duty of care vis à vis their customer which includes a requirement to provide information on the financial product that enables the customer to assess the financial product with a view to his own personal circumstances. Mis-selling claims

against a financial service provider can arise based on the general tort of breach of duty of care. The type of information required depends entirely on the type of product AND the circumstances. Having said this, case law that would establish particular information duties in respect of particular financial products does not so far exist in Ireland.

- Also, the Financial Regulator issued the Consumer Protection Code ("CPC") in August 2006. This Code establishes inter alia pre-contractual information requirements vis à vis consumers (which term includes incorporated bodies with an annual turnover of EUR 3m or less) on investment products. It requires for example that a so called "Key Features Document for Trackers" be issued to the consumer before he signs an application for the product.
- Further, the Consumer Credit Act 1995 contains explicit provisions in respect of dealings with consumers prescribing the contents when advertising and offering certain financial contracts as well as the information that needs to be provided before such contracts are concluded. These agreements are contracts of loans (including overdraft facilities and housing loans), hire-purchase agreements and consumer-hire agreements. Common features of these information duties are the obligation to inform the consumer in writing of his right of withdrawal and to provide certain financial information such as the APR, any applicable charges and fees and the cash price of any goods or services to be acquired. This information can, to a certain degree, be provided within the contract document.
- Furthermore, Art. 45 of the EC (Life Assurance) Framework Regulations 1994 (SI 360/1994) as amended by the EC (Life Assurance) Framework (Amendment) Regulations 2004 (SI 543/2004) impose minimum information and disclosure requirements for life assurance contracts and include a 30 day cooling off period within which a policy may be cancelled. The EC (Non-Life Assurance) Framework Regulations 1994 (SI 359/1994) as amended also include certain information requirements, which insurance undertakings must disclose to policyholders when a non-life insurance contract is being effected.

#### (9) Italy

**Italy** has not officially made use of the leeway offered by Art 4.2; although, according to its official notification, a later notification may take place.

Some conflict has been identified by experts between Directive 2002/65/EC and the Italian implementation and interpretation of other EU Directives. The source of this conflict lies in Art 67-bis(3) of the Consumer Code, which states that rules derived from the system of admission of business activities in the fields of financial services as well as rules deriving from bank law, financial law, insurance law, payment system rules or from social security rules or pension schemes are not overruled by this Consumer Code if not expressly stated.

The expert points to the notable contradiction between provisions on execution of services made by the MiFID Directive (implemented in Legislative Decree no. 164 of 2007, which amended Legislative Decree no. 58 of 1998). MiFID allows customers to acquire services without there being any requirement for the investment company to provide information. In distance marketing, the supplier must give exact preliminary information on the financial service and related instruments (Art. 3, § 1, no. 2, lett. a, c, and Directive 2002/65/CE). MiFID significantly lowers the level of customer protection.

#### (10) Lithuania

The legislator in **Lithuania** has made use of the leeway given by Art. 4(2) of Directive 2002/65/EC with respect to distance selling; and for certain financial products.

The provisions of Article 36 of the Law on Protection of Consumer Rights of the Republic of Lithuania establishes the requirements for provision of financial services under distance contracts. Parts 5-13 of Article 36 of the Law on Protection of Consumer Rights sets out the information to be provided to Consumers before conclusion of the distance contract (irrespective of the type of the financial service). In addition to data required by the Directive, the provisions of Para 1 of Part 6 of Article 36 of this Law requires that supplier's telephone, fax numbers, electronic mail, and web site addresses be given: i.e. Para 1 of Part 6 of Article 36 reads as follows: "1) the service supplier's business name, head office (address), telephone, fax numbers, electronic mail, web site addresses, the register in which the data about this legal entity are accumulated and stored, code of the legal entity, as well as the data about the main business of the service supplier".

Other information requirements over and above those imposed within the Directive are a consequence of the need to supply information on the financial scheme's authorisation: Para 4 of Part 6 of Article 36 of the above Law specifies which particulars of the relevant authority must be given i.e. address, telephone, fax numbers, electronic mail, and website addresses of the supervisory authority. Further, this paragraph requires provision of the date of issuance of the licence to the supplier.

General obligations for pre-contractual information in financial services if also applicable to distance selling contracts. Service providers are subject to general obligations imposed by other legal acts, over and above those deriving from the Directive. Notwithstanding that they relate to the incorporation of the requirements imposed by other EU legislation, they must also be taken into account in the cross-border distance trading of consumer financial services, i.e.: Supplier's legal status, authorised share capital and paid-up share capital must be indicated as:

- Article 2.44 of the Civil Code of Lithuania establishes: "The documents of the legal entity used in relations with third parties (letters, invoices, sale documents, etc.) must show the following: (1) name of the legal entity; (2) legal status of the legal entity; (3) head office of the legal entity; (4) code of the legal entity; (5) register, where the data on the legal entity is collected and stored".
- If the legal entity is subject to bankruptcy or liquidation procedures, this information must also be given in the documents set out in Part 1.
- If the legal entity is VAT payer, the VAT payer code must also be indicated in documents set out in Part 1.
- If the capital of the legal entity is mentioned in the documents set out in Part 1, the authorised share capital and paid up share capital must be indicated.

Furthermore, under general Civil Law in Lithuania there exists a general duty of disclosure. Article 6.163, Part 4 of the Civil Code of Lithuania provides that, "the parties to a contract must disclose to each other all information known to them, which is of material importance to the conclusion of the contract".

Financial Services are regulated under the Law on Protection of Consumer Rights of the Republic of Lithuania, which imposes additional information duties in relation to specific financial sectors and/or products (consumer credit, insurance contracts, pension funds, etc.). The following examples may illustrate this kind of regulation:

Insurance: Pre-contractual disclosure requirements on insurance contracts which require cross-border suppliers to comply with information duties that go beyond the Directive. The

Law on Insurance of the Republic of Lithuania defines the information to be disclosed to the policyholder prior to conclusion of insurance contracts in Articles 78 and 99 of the law. (please see the national report for this Member State). It should be noted that Article 99, Part 5 of the Law on Insurance requires information in the Lithuanian language and allows other languages only upon request of the policyholder and by agreement with the insurer.

Investment. Additional information requirements are related to the information of the policyholders on life assurance relating to the investment funds, when the policyholder bears the investment risks. According to the Regulations governing this area, as adopted by the Insurance Supervisory Authority of the Republic of Lithuania, the insurer, or his or her representative must provide information to the person seeking to conclude an endowment life assurance contract. The information must be provided in writing or in such other form as requested by the Insured. The information must include a description of the investment policies intended by the (in accordance with the minimum requirements set out by the Regulations).

#### (11) UK

In the UK, for products governed by the FSA, detailed conduct of business rules in the relevant handbooks set out disclosure requirements for all transactions relating to specific products. The FSA regulates most of the commonly available consumer finance products in the UK but it does not regulate consumer credit unless that credit is secured by way of a first charge mortgage. The rules tend to be quite detailed.

### **III. Conclusion**

As far as the scope of Article 4(2) is concerned, about one-fifth of Member States report that they have introduced additional duties relating to the provision of information, while about two-fifths claim that they have made use of the leeway to maintain additional national information rights.

Additional information includes details of the address of the provider/supplier, authorisation and licensing schemes, conditions for exercise of the right to vary contractual terms, form of information to meet the needs of disabled people, duration of the contract, general effectiveness of the information, details of guarantee funds and guarantee schemes, whether the provider is subject to any insolvency procedure, language to be used, receipts, details of redress schemes or the right of withdrawal, risks involved, the way information is to be stored and disclosure requirements in the context of telephone calls.

With regard to the information rights applicable to financial services in general, as well as the general information duties provided by specific consumer legislation or the relevant civil code, most countries have created at least the basis for a jurisprudence that may provide for additional information duties in the future, and these will then apply to foreign providers of financial services in the context of distance marketing.

Product-specific duties to provide information account for most of the existing information provision duties in EU Member States. They can be grouped into information as to complaints procedures, contractual variation, costs elements, execution of the contract, intermediaries, language, liabilities, litigation, marketing, payments, price parameters, product description, registration, representatives, right of withdrawal, risks, applicable rules, supervision, supplier identification, termination, time periods. There are about 50 products or situations in respect of which regulations in relation to credit, insurance, payment systems and investment incorporate duties as to the provision of information.

The question of whether such rules are “additional” to EU law depends on the interpretation of EU law. Most differences stem from more detailed regulation in one Member State or an-



other than is provided for by the Directives. Others concern the form of the information, or certain special target groups.

## **F. Exemption from the Right of Withdrawal (Article. 6(3) Directive 2002/65/EC)**

Article 6(3) Directive 2002/65/EC<sup>59</sup> gives Member States the right to exclude the right of withdrawal in the distance marketing of housing loans which are either defined by the purpose or the form of the security required. They normally overlap. Thus loans designed for the purchase of property or home improvement, or secured by a mortgage, can be excluded.

In addition, Member States may, if they guarantee the right under Article 5(1), exclude contracts concluded using the services of an official, meaning usually a notary.

### ***I. Use of Article 6(3)***

The exemption under Article 6(3) is well defined and understandable. It may not be surprising that the answers from government officials and our experts as evaluated from the second round of the survey come to the same conclusions.

---

<sup>59</sup> Member States may provide that the right of withdrawal shall not apply to: (a) any credit intended primarily for the purpose of acquiring or retaining property rights in land or in an existing or projected 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(1). This paragraph shall be without prejudice to the right to a reflection period for the benefit of the consumers resident in those Member States where it exists, at the time of the adoption of this Directive.

Table 9: Article 6(3): Responses and expert opinions

<i>Member State</i>	<b>Notification under Article 6(4) (August 2007)</b>		<b>Expert Opinion</b>		<i>Market in Mio</i>
	<i>(c) “Services of an Official”</i>	<i>Housing Credit (a,b) (* own def.)</i>	<i>(c) “Services of an Official”</i>	<i>Housing Credit (a,b)</i>	
Austria	No	No	No	No	8.2
Belgium	No	Yes	No	Yes	10.5
Bulgaria	No	Yes	No	Yes	7.4
Cyprus	No	No	No	No	0.8
Czech Republic	No	No	No	No	10.3
Denmark	No	Yes	No	Yes	5.5
Estonia	Not Avail.	Not avail.	No	No	1.4
Finland	No	No	No	No	5.5
France	No	Yes*	No	Yes	60.5
Germany	No	No	No	No	82.5
Greece	No	No	No	No	11.1
Hungary	No	No	No	No	10
Ireland	No	Yes	No	Yes	4.1
Italy	Yes	No	Yes	No	58.7
Latvia	No	No	No	No	2.3
Lithuania	No	Yes*	No	Yes*	3.5
Luxembourg	Yes	Yes	Yes	Yes	0.5
Malta	No	No	No	No	0.4
Netherlands	No	Yes	No	Yes	16.5
Poland	Yes	Yes	No	Yes*	38.5
Portugal	No	Yes	No	Yes	10.5
Romania	Yes	Yes	Not avail.	Not avail.	22.5
Slovakia	No	No	No	No	6.5
Slovenia	No	No	No	No	2
Spain	Not avail.	Not avail.	Yes	Yes	43.2
Sweden	No	Yes*	No	Yes	9
United Kingdom	No	Yes	No	Yes	60.5

The expert opinion and the responses agree. In order to obtain at least one complete picture, we have taken information from the expert survey and completed the outstanding responses from Member States, on the assumption that there will be no difference in the future. The table shows that about one-third of Member States, which is also about one-third of the market in terms of population, has made use of the opportunity to exclude housing loans, while only four Member States, or 24 % of the market, have excluded financial services where officials have been involved.

Table 10: Use of the leeways granted under Article 6(3) according to number of Member States and market size

	Official Notification	Expert Survey
<b>Housing</b>		
excluded	10	11
Included	12	15
Total	22	26
<b>Use of Official</b>		
excluded	4	3
Included	21	24
Total	25	27

The diagram below shows the numbers in the form of percentage of population and numbers of Member States.

**Article 6(3): Exemptions from the Right of Withdrawal**  
**Services of an Official and Housing Credit**  
**Official Notification and Expert Survey**  
**by States and EU-Population in %**

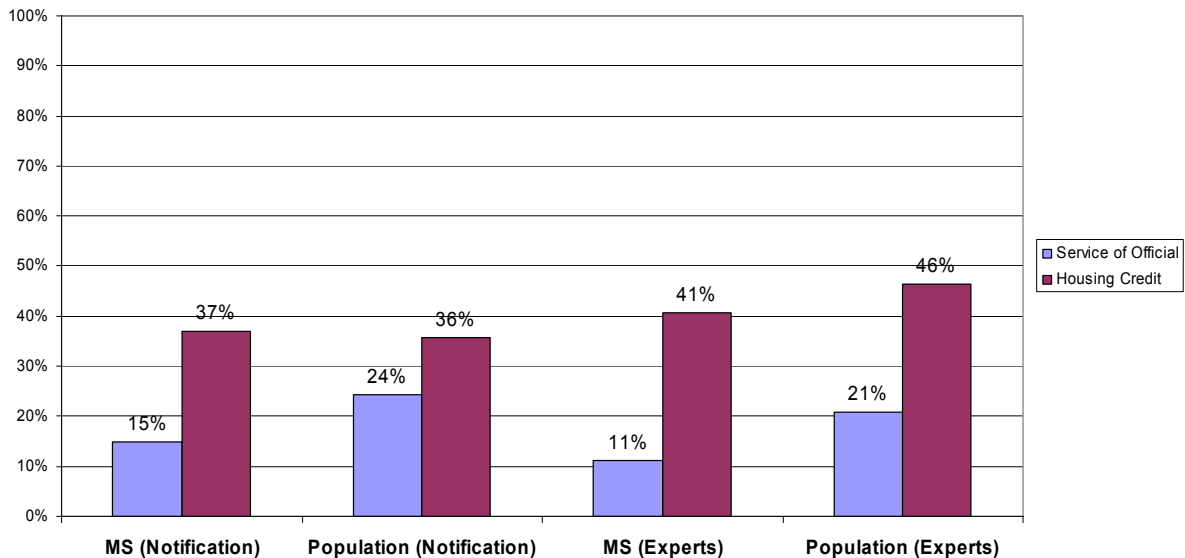


Figure 5: Article 6(3) Exemptions from the right of withdrawal

We therefore conclude:

- One-third of Member States, representing about half of the consumer market has made use of the exemption concerning all kinds of housing finance as defined by Article 6(3), always including both definitions.
- On the other hand, only three Member States, amounting to more than 20 % of all consumers in the EU, have made use of the possibility of excluding the right of withdrawal where officials have been involved. However, given that the use of officials in housing finance is often mandatory, both categories overlap, so that Member States which have excluded financial services in the area of housing may in fact also indirectly exclude contracts concluded through the use of the services of officials (mainly notaries).

## **II. Problems arising from the exemption in housing finance**

The fact that two-thirds of Member States provide for a right of withdrawal in relation to loans related to all forms of real property certainly poses a problem for suppliers from the minority of states which have no experience of this right in their home country, but which are faced with the formalities and problems associated with its execution in practice. As the right of withdrawal can also be exercised by consumers at a later date in cases where suppliers have made errors in dealing with the formalities, there is a risk for suppliers of involvement in legal action in the host country when trying to foreclose. On the other hand, for suppliers based in a Member State which provides for this right, its absence in another Member State cannot be seen as a barrier.

If a right of withdrawal were therefore mandatory for mortgage loans in all Member States, it would extend this burden to all suppliers alike. From the consumer perspective, there has been considerable reluctance to buy mortgages across borders because a mortgage is an important part of their lives. A right of withdrawal makes such decisions easier, since consumers are able to withdraw in due course.

These arguments do, however, apply to the question whether a right of withdrawal is a barrier to access to mortgage loans in general. It is not specific to cross-border commerce. It should be easy for suppliers to establish which countries do not provide for this right. Compared with the lack of harmonisation in mortgage loans in general in the EU, which has already been subject to a number of Commission reports, including on the problem of the many different forms of securities, early repayment charges and information rights, the right of withdrawal does not seem to be a significant legal barrier.

The barrier could arise instead within countries which allow for a right of withdrawal, because the Directive provides two overlapping definitions for these loans, which different countries have implemented in a rather scattered form.

While some countries, such as Bulgaria, Luxembourg or Romania, use the wording of the Directive, others have quite complicated definitions of the scope of application.

Some are quite sophisticated, using purpose, object and form and requiring considerable knowledge of national legislation, while others use more simple language, which is accessible to foreign providers.

**France:**<sup>60</sup> the definition is built onto qualifications such as (1) private or professional use (2) acquisition of property or its permanent use (3) acquisition of parts or shares of an investment fund which provides for the same purposes (4) for cost related to its construction, repair, amelioration or maintenance (5) if these costs are higher than those fixed by the last paragraph of Article L. 311-3; and (5) loans for the acquisition of real property for the afore-mentioned purposes.

**Portugal:** d) credit agreements for the purchase, construction, conservation or improvement of immovable property; e) credit agreements secured by a right in immovable property

**Sweden:** 3. credit which is associated with a mortgage on immovable property, leasehold right or occupancy right, or which is associated with corresponding rights in buildings which do not belong to the immovable property. Financial Services (distance marketing) Regulations 2004, Art. 11 £1)1 (d) a contract under which a supplier provides credit to a consumer and the consumer's obligation to repay is secured by a legal mortgage on land; g) a restricted-use credit

---

<sup>60</sup> 1° Pour les immeubles à usage d'habitation ou à usage professionnel d'habitation : a) Leur acquisition en propriété ou en jouissance b) La souscription ou l'achat de parts ou actions de sociétés donnant vocation à leur attribution en propriété ou en jouissance; c) Les dépenses relatives à leur construction, leur réparation, leur amélioration ou leur entretien lorsque le montant de ces dépenses est supérieur à celui fixé en exécution du dernier alinéa de l'article L. 311-3; 2° L'achat de terrains destinés à la construction des immeubles mentionnés au 1° ci-dessus. (trans. UR)

agreement (within the meaning of the 1974 Act) to finance the purchase of land or an existing building, or an agreement for a bridging loan in connection with the purchase of land or an existing building.

**UK:** a contract under which a supplier provides credit to a consumer and the consumer's obligation to repay is secured by a legal mortgage on land;

g) a restricted-use credit agreement (within the meaning of the 1974 Act) to finance the purchase of land or an existing building, or an agreement for a bridging loan in connection with the purchase of and or an existing building.

If the definition of scope of application were be harmonised beyond the very open formulation of the Directive, it could benefit all suppliers from both categories of countries (those without and those with a right of withdrawal), providing certainty as to whether their product is covered by this right or not.

### ***III. Problems with the exemption concerning use of officials***

As only a small minority of Member States makes use of this leeway, its impact on cross-border commerce in the distance marketing of financial services has probably no significant effect on the operation of the market. The definitions are quite clear and do not pose a problem. The question is more whether consumer organisations still share the assumption that the involvement of a notary is always a guarantee of a high standard of reflection and information. There is some concern where notaries work exclusively for one supplier that they may have their own vested interests.

### ***IV. Conclusion***

Nine Member States, representing about half of the consumer market, have made use of the leeway concerning all kinds of housing finance as defined by Article 6(3), always including both definitions. On the other hand, only three Member States, amounting to more than 20 % of all consumers in the EU, have excluded the right of withdrawal where officials have been involved.

The absence of a right of withdrawal in mortgage loans is not seen as a barrier to foreign suppliers, but may persuade consumers not to buy loans of that type from them.

There are differences in the definition of the scope of application. While some countries use the wording of the Directive, others have created their own definitions using purpose, object and form and requiring considerable knowledge of national legislation. As far as the involvement of notaries is concerned, the use or non-use of this leeway overlaps with the mortgage leeway where notaries are most used. Differences here play a more or less insignificant role.

## **G. Overlap with cancellation rights (Article 6(8) Directive 2002/65/EC)**

Article 6(8) of the Directive states that the “provisions of this Article (concerning early withdrawal, *iff*) are without prejudice to the Member States' laws and regulations governing the cancellation or termination or non-enforceability of a distance contract or the right of a consumer to fulfil his contractual obligations before the time fixed in the distance contract. This applies irrespective of the conditions for and the legal effects of the winding-up of the contract.”

Two-thirds of Member States report that there are no conflicts between the right of withdrawal and other rights of early cancellation or termination of a distance marketing contract in financial services. The conflicts reported by the remaining third of Member States are partly due, as the Italian expert points out, to existing differences in rights of withdrawal and termination already contained in EU Directives. These rights to cancellation, termination and withdrawal in EU Directives, which may also apply to the distance marketing of financial services, are enumerated above under DI 7 and 8.

### **I. Overlaps within EU Directives**

Article 6(7) of this Directive addresses the problem arising where application of the right of withdrawal to credit contracts under Article 6(4) Directive 97/7/EC or in the Time Share Directive 94/47/EC is given priority over the right arising under Article 6 of this Directive. On the other hand, it extends this right to contracts attached to the financial service as reflected in the amendment of Article 3(1) Directive 97/7/EC in Article 17 of this Directive. This problem has also been addressed in recital no 34 of Directive 2008/48/EC on Consumer Credit and led the EU Regulator to model this new right on the right of withdrawal in Directive 2002/65/EC as last amended by Directive 2007/64/EC. However, Article 14(5) of Directive 2008/48/EC gives priority to Directive 2002/65/EC.

The repercussions of these conflicts in rights are reflected in a sophisticated system of rules of conflict, as for example regulated under Article 312a German BGB in relation to door-to-door sales, Article 312d(5) BGB in relation to distance marketing contracts and Article 312e(3)2 BGB in relation to e-commerce contracts. In addition, Article 6(4) of Directive 97/7/EC uses the word “cancellation” and leaves the details of its regulation to the Member States. The conflict between a national right of withdrawal in credit contracts, which several countries have enacted before the new consumer credit directive comes into force has, as outlined above, preoccupied the German courts as well as the European Court of Justice.<sup>61</sup>

In addition to legal rights of withdrawal, there are also a number of contractual rights of withdrawal, to which for example Annex III a.13 of Directive 2002/83/EC refers.

In addition, the solutions are sometimes not seen as satisfactory at the national level. This has led a number of experts to the conclusion that, in the event of conflicting rights of early cancellation and withdrawal, the judge should apply the doctrine most favourable to consumers.

---

<sup>61</sup> ECJ Volksbank Filder C 412/06 Attorney General, November 21.11.2007; EJC Badenia Neue Juristische Wochenschrift 2005, 3551; ECJ Crailsheimer Volksbank eG Neue Juristische Wochenschrift 2005, 3555; Bundesgerichtshof 26.2.2008 XI ZR 322/03; Bundesgerichtshof Wertpapier Mitteilungen 2008 pp 154-158; 2007, 1173-1176; 2007, 200 ff; 114; BKR 2007, p. 325-329; 2007, 225; Neue Juristische Wochenschrift-Rechtsprechung 2007, pp 621-622

## **II. Problems arising from overlaps at national level**

Among the problems identified, the question of compulsory motor vehicle insurance may be worth mentioning. Since some countries, of which Poland is an example, treat the right of withdrawal as a right of revocation, which has the effect of retroactively dissolving the contract, it may come into conflict with another principle regulated at EU level in the form of the five Directives on motor vehicle insurance.<sup>62</sup> Article 3(1) Directive 72/166/EC requires that “each Member State shall ... take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance.”

Retroactive dissolution of an insurance contract may contradict this principle. The Polish expert states that the Polish legislator has responded by limiting the effect of early termination to future coverage. There may therefore be a loophole in the Directive. While obligatory insurance is covered by the Directive (see Article 2(b)) only, short-term insurance for less than one month (Article 6(2)(b)) and life insurance (Article 7(2); 6(1)) have received special attention. As the right of withdrawal does not define legal consequences of withdrawal, retroactive effects which interfere with the requirements of obligatory insurance are possible and may need to be harmonised.

The remaining problems all find solutions under national law which are compatible with the goal of European harmonisation.

- Countries like **Greece**, which have opted for literal implementation, merely introduce Article 6(8) into their national law (Article 4a(6)(f) Act 2251/1994 as amended).
- **In Germany**, overlaps in both time and contents are discussed, but only one author<sup>63</sup> assumes that rights of cancellation in relation to distance selling have priority over the right of withdrawal under consumer credit legislation. Similarly, the rights cited in Article 6(8) (termination, cancellation or non-enforceability of a distance contract or the right of a consumer to fulfil contractual obligations before the time period specified in the distance sales agreement) are not negated or affected by the right of cancellation.
- **In France**, the Consumer Code differentiates precisely between the different kinds of services and selling systems. The provision of financial services to a consumer in the context of a distance communication system is governed by a special subsection. The expert provides information on potential overlap with the rules that govern door-to-door sales (“régime de démarchage”) in Article L. 343-1 Monetary and Finance

---

<sup>62</sup> First Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability. Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles.; Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles. Fourth Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC. Fifth Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005 amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles (Text with EEA relevance)

<sup>63</sup> MünchKommBGB-Wendehorst, 5th edn 2007, § 312c ref 154



Code.<sup>64</sup> But since the personal contact required in door-to-door sales normally excludes distance marketing we assume that this does not overlap.

- **In Bulgaria**, the expert reports legislation which responds to complaints concerning the burden of proof placed on the supplier of financial services and the lack of means of evidence. Paragraphs 2 and 3 in Article 18, which refer to Article 293 in Section II, Chapter XII, of the Commercial Law, governing commercial transactions and their legally enforceable written form, and also to the Law on Electronic Documents and Electronic Signatures,<sup>65</sup> are a response to EU legislation on Electronic Commerce and Electronic Signature. It basically uses the leeway offered by Article 15 of the Directive 2002/65/EC and responds to its minimum requirements under paragraph 2.
- **In Austria**, the expert sees a certain overlap with the right to terminate a contract if the information duties are not fulfilled. If the obligations stemming from articles 83 no. 3 § 1, 2° and 3° (pre-contractual information), 83 no. 4 (information in voice telephony communication), and 83 no. 5 (confirmation of the information in a durable medium) have not been complied with, the consumer has the right to terminate the contract by registered letter. He can terminate the contract free of charge and without any penalty within a reasonable period from the moment he was aware or should have been aware of the infringement [art. 83 octies § 2 Unfair Trade Practices Act as inserted by art. 15 of the 24 August 2005 Act]
- **In Belgium**, there is some discussion in the literature of the exact relationship between this sanction and the right of withdrawal.<sup>66</sup>
  - If certain information has not been provided, the consumer appears to have both a right of withdrawal and a right to terminate the contract (cf. art. 83 no. 8), and the modalities for exercise of these rights differ considerably. For the right of withdrawal, no registered letter is needed, nor is it stated that the consumer must act within a reasonable period of time. Indeed, the Heininger case

---

<sup>64</sup> Art. L. 343-1. - Le démarchage en vue d'opérations sur le marché à terme n'est autorisé que dans les limites et sous les conditions prévues par le présent chapitre sans préjudice du régime spécifique des fonds communs d'intervention sur les marchés à terme. Constitue une activité de démarchage au sens du présent chapitre, le fait de se rendre habituellement, soit au domicile ou à la résidence des personnes, soit sur leurs lieux de travail, soit dans les lieux ouverts au public et non réservés à de telles fins, en vue de conseiller une participation à des opérations sur ce marché ou de recueillir des ordres à cet effet, quel que soit le lieu où les ordres d'opérations ou le contrat liant le donneur d'ordre à celui qui les a recueillis ou exécutés ont été passés ou conclus. Sont également considérés comme acte de démarchage, les offres de services faites ou les conseils donnés, de façon habituelle, en vue des mêmes fins, dans les lieux mentionnés à l'alinéa précédent, par l'envoi de tout document d'information ou de publicité, ou par tout moyen de communication.

<sup>65</sup> (1) In the case of distance contracts for financial services, the supplier shall be obliged to prove that he has: 1. fulfilled his obligations to inform the consumer; 2. respected the periods referred to in Article 12, para. 1 or 2; 3. Received the consumer's consent to conclusion of the contract and, where appropriate, to its performance during the withdrawal period. (2) In order to prove the provision of pre-contractual information, as well as of any statements made under this Act, Article 293 of the Commerce Act shall apply, and for electronic statements, the Electronic Document and Electronic Signature Act. (3) The pre-contractual information, as well as the statements made by telephone, other means of distance voice communication, videophone or electronic mail, shall be recorded with the other party's consent and shall have probative value for the ascertainment of the circumstances contained therein. (4) Any term or condition in a distance contract for financial services providing that the burden of proof of the respect by the supplier of his obligations incumbent on him pursuant to this Act should lie with the consumer shall be null and void. (5) To the distance contract for financial services, Articles 143 - 148 of the Consumer Protection Act shall also apply.

<sup>66</sup> See R. Steennot "Artikel 83 octies WHPC" in *Artikelsgewijze commentaar handels- en economisch recht*, Antwerpen, Kluwer; E. Terry, "Consumentenbescherming bij financiële diensten op afstand", in *Actualia vermogensrecht*, Brugge, Die Keure, 2005, 519-558

seems to imply that Member States may not impose a maximum time limit for withdrawal when certain information has not been provided.

- There may also be a factual overlap to the extent that the right of cancellation *ex nunc* may make the right of withdrawal superfluous in cases where it coincides with a lack of appropriate information about it.
- When the consumer exercises the right of withdrawal, there are detailed provisions on what can be charged to the consumer and, under certain conditions, the supplier will be able to charge the consumer for the financial service actually provided. Art. 83 no. 8 Unfair Trade Practices Act deals with the right to terminate the contract and states only that the consumer may ‘terminate free of charge and without any penalty’. However, it is unclear whether that implies that the consumer does not have to pay for the services already provided. ‘Termination’ under Belgian law only works prospectively and not retrospectively, so that normally there will be no obligation to undo what has already been performed.
- **In the Netherlands**, the period in which a consumer continues to have a right of withdrawal starts upon receipt of the relevant information from the supplier. If the supplier fails to provide that information, the consumer’s right to exercise the right of withdrawal subsists in theory for an unlimited period of time.<sup>67</sup> However, where the supplier has failed to provide the relevant information and a (very) long time has elapsed since conclusion of the contract, the consumer’s right of withdrawal may be excluded by the doctrine of “abuse of rights” (*misbruik van recht*) or the doctrine of equity (*redelijkheid en billijkheid*).<sup>68</sup> More generally, a consumer’s right of withdrawal could be based on the provisions of general contract law, notably Art. 6:228 and Art. 6:265 of the Dutch Civil Code, although the applicability of these provisions is not self-evident. (See Schaub (2006), 412-413).
- **For Poland**, the expert recommends clarification of the relationship between Art 6.1 of the Directive and the national rules on Compulsory Motor Insurance. Poland introduced a reform of the Compulsory Motor Insurance Act to take account of Article 6(8) of the Directive. If the right of withdrawal is exercised, the contract is deemed not to have been concluded and the consumer is free from obligations. To that extent, the withdrawal has a retroactive effect.<sup>69</sup> This conflicts with the Act on Compulsory Insurance which uses the term “termination” of a contract, a much broader concept that includes the effects of the “right of withdrawal”. In order to guarantee insurance coverage for motor vehicle accidents, the newly amended Act provides that early termination cannot have retroactive effect in Articles 28 and 31. This involved amendment of the general rules on insurance.<sup>70</sup>
- **In Spain**, Art. 71 Decreto Legislativo 1/2007, of 16 November provides that, when the supplier has failed to comply with his duty to provide information as to the Consumer’s right of withdrawal, the period for exercise of such a right is 3 months (Book

---

<sup>67</sup> (See Hijma&Valk (2004), 60).

<sup>68</sup> See Bartels&Sander (2004), 82 and Schaub (2006), 412.

<sup>69</sup> Article 16c(2) of the Act (following Art 6.1 of the Directive) confers on consumers the right to withdraw from a distance contract for insurance by giving notice in writing within 30 days of the date of conclusion of the contract or the date on which subjectively and objectively important factors are confirmed using a data medium, if this is a later date.

<sup>70</sup> Article 33 of the Act on Compulsory Insurance lists exhaustively the cases in which motor vehicle liability insurance contracts may be terminated.

2, Title I) ; Art 85.3 on unfair clauses Book 2, Title II, precludes the validity in financial services contracts of clauses of indeterminate duration allowing the provider unilaterally to make modifications, provided that information is given to the consumer in advance and that the consumer is recognised as having the right to rescind or terminate the contract without notice. However, Art 93 C of this consolidated Law (also within Book 2°, but now under Title III, chapter I) specifically excludes application of General Consumer Law on Distance Selling of Financial Services under Title III.

### **III. Conclusion**

The information provided does not support the view that national diversity might present a barrier to foreign suppliers in this area. Most of the problems indicated are resolved in practice and, in most cases, the consumer has a choice. It would of course obviously be easier for suppliers if the right of cancellation, which is mostly only addressed in a very general way in EU Directives, were harmonised. But as these rights are mostly general rights arising from contract law, harmonisation could probably only be achieved through development of a general European contract law. In fact the coexistence of rights of early cancellation with the right of withdrawal does not pose a problem.

There may be a conflict between the Directive and compulsory motor insurance, as outlined above. This relates to the absence of a definition of legal consequences of withdrawal, and the retroactive effect of exercise of that right could in principle conflict with provision for obligatory insurance. There is a potential need for harmonisation in this area.

The remaining problems all find solutions under national law which are compatible with the goal of European harmonisation.

## H. Differences stemming from sanctions and enforcement (Article 11 Directive 2002/65/EC)

Under Art. 11 of the Directive, “Member States shall provide for appropriate sanctions in the event of the supplier's failure to comply with national provisions adopted pursuant to this Directive. They may provide for this purpose in particular that the consumer may cancel the contract at any time, free of charge and without penalty. These sanctions must be effective, proportional and dissuasive.”

While only one type of sanction, namely cancellation of the contract, is expressly mentioned, the Directive asks for effective, proportionate and dissuasive sanctions, leaving their form and nature to the Member States. The Directive does not impose any harmonisation in this area.

Sanctions are a crucial instrument for ensuring the effectiveness of information rights and other rights vested in consumers by virtue of the Directive and national measures for adoption and implementation. Sanctions are also one of the elements to be taken into account when setting up operations for the distance- and cross-border selling of financial services. However, as matters stand at present, it is our view that financial service providers aiming to sell in the various Member States are likely to encounter difficulties in relation to enforcement.

We have grouped the various types of sanctions into contractual, administrative fines and criminal sanctions. Our team has extracted and analysed the experts' responses and provided a few examples illustrating the disparity of contractual remedies, administrative fines, and even criminal offences derived from infringement of national adoption and implementation measures of Directive 2002/65/EC. Even within these three general groups of sanctions, we have found that there is no uniformity in the quality, level and nature of enforcement mechanisms.

### I. Contractual sanctions and remedies

In relation to contractual remedies, consumers are granted different rights, and there are different systems of notification of the breach/alleged breach of the suppliers' information duties in the different Member States. Moreover, the consequences of a breach are different in scope, timing and intensity depending on the national legal system in which consumers acquire products and or services.

In certain countries, such as **Belgium**, non-fulfilment of duties to provide information generates a right of termination, which must be exercised by a letter in which the consumer explains his or her reasons. The consumer can terminate within a “reasonable time from the time when he or she was aware (or should have been aware) of the infringement”. As mentioned above,<sup>71</sup> if certain information has not been provided, the consumer in Belgium seems to have both a right of withdrawal (in accordance with the Directive) and a right to terminate the contract. The modalities for exercise of either one or the other differ considerably. For instance, the exercise of the right of withdrawal does not require a registered letter, there are no time limits and the consumer may be charged certain sums.<sup>72</sup>

---

<sup>71</sup> See for this problem the text above at Fn 66, page 83

<sup>72</sup> Suppliers will be able to charge the consumer for the financial service actually provided. Art. 83 octies Unfair Trade Practices Act, dealing with the right to terminate the contract, only states that the consumer can ‘terminate free of charge and without any penalty’. However, it is unclear whether that implies that the consumer does not have to pay for the services already provided as ‘termination’ under Belgian law only works prospectively and not retrospectively.

In **Finland**, the relevant consequences are expressly linked to breach of information duties (over and above cancellation) in certain financial services operations such as loans: details of any loan agreement may not be passed on to a collection agency if the consumer has not been supplied with the essential pre-contractual information. Both creditors and collection agencies must comply with the requirements of good collection practice.<sup>73</sup>

In **Latvia**, under art 11 of the Directive and sections 28 and 29 of the Consumer Rights Protection Law, consumers are able to request different types of remedies: appropriate reduction of the price, rectification of the failure to conform to the provisions of the contract free of charge, or compensation for the consumer's expenses in rectifying the failure, revocation of the contract and repayment to the consumer of the amount paid, or provision of another product or service in conformity with the provisions of the contract.

Other countries impose certain restrictions on the right of termination.

For instance, **Austria** has additional requirements before imposing sanctions for breach of information rights. The duty to provide information is seen in terms of its objectives.<sup>74</sup> Thus, if the lack of information does not have the effect of misrepresentation, penalties may not arise.

The **Irish** expert reports that the leeway offered by the Directive to exclude spot transactions, travel or baggage insurance or insurance contracts for cover of less than 1 month and housing loans is used to exclude the consumer's right to cancel distance contracts of that nature in Reg. 12 and 13 of SI 853/2004.

**Italian** law, similar to Austrian law, establishes that the contract is null and void in a number of cases, such as when the supplier fails to comply with pre-contractual information duties, but only if this breach has the effect of falsifying significantly the description of the financial service's characteristics.

In **Slovenia**, upon breach of information duties by the supplier, the consumer may withdraw from a contract but is subject to submitting this intention in writing to the seller within fifteen days of signing the contract. In Spain, there is a right to cancel, but there is a discussion as to its scope, i.e. whether any type of infringement gives way to cancellation or only those which are also sanctioned by administrative laws.

Some countries do not report specific rules (Romania, Cyprus, Sweden, and Hungary).

The consequences of a breach are different in scope, timing and intensity depending on the national legal system in which consumers acquire products and or services. This may constitute a trade barrier.

## **II. Administrative law sanctions**

Public control over infringements relies on the competence of the authorities to impose fines as deterrents. Notwithstanding the context of infringement of duties imposed by national implementation measures derived from Directive 2002/65/EC, we have found many different types, procedures and amounts for fining suppliers.

---

<sup>73</sup> The creditor must ensure, before handing the loan over to a collection agency, that the provisions of the law were fulfilled during the creation of the debt. Collection agencies may not begin debt recovery if the legality of its origin is under doubt. If there is reason to suspect the debt's legality, collection cannot commence before its lawfulness has been ascertained.

<sup>74</sup> For this distinction see above page 6

Some differences relate to injunctive measures and to capacity to file injunctive actions against suppliers that are in violation of national implementation provisions. Below are some examples of the most striking divergences:

- **In Austria**, there is injunctive relief against suppliers in violation of national provisions implementing Directive 2002/65/EC to the detriment of consumers' or competitors' interests. Such a relief can be filed by interest groups such as Wirtschaftskammer Österreich, Bundeskammer für Arbeiter und Angestellte and Österreichischer Gewerkschaftsbund; and/or by consumer organisations such as Verein für Konsumenteninformation.
- **In Denmark**, acts violating the collective interests of consumers may be prohibited by court order. Action may be taken by the ministerial consumer agency.
- **In Luxembourg**, upon request of certain organisations, the court may issue an order to stop any act infringing the provisions of the law. Publication of the court's decision may be ordered at the expense of the party in breach. In the event of breach of the order, a fine from € 251 to € 50,000 may be imposed on the supplier.

There are other material differences in the amount of fines for infringement:

- **Greece** imposes particularly high fines for breaches that damage consumers' interests in the area of the distance selling of financial services. Fines of between € 1,500 and € 1,000,000 are imposed by the Minister of Development, (these can be trebled when 3 fines are imposed upon the same supplier).<sup>75</sup> Additional fines are imposed of up to € 5,000 if the supplier does not respond in writing to the complainant; or of up to € 50,000 where the same behaviour has been noted in the past. Also, under certain circumstances and in the event of repeated infringements, the activities of the supplier of financial services can be suspended for up to 12 months.
- In **Italy**, fines of between € 5,000 and € 50,000 may be imposed; in cases of serious and repeated breach, these may be doubled. Fines may be accumulated and are proportional to the damage.
- In **Lithuania**, suppliers in breach of their duties under national law implementing 2002/65/EC are subject to fines amounting from 1000 to 5000 litas (€ 290 to € 1,470); in aggravating circumstances, higher fines may be imposed, though they may never exceed 3 % of the supplier's gross annual income.
- In **Portugal**, infringements committed by a legal entity can give rise to fines of from € 2,500 to € 1,500,000; and those committed by an individual from € 1,250 to € 750,000. Additional penalties may be applicable (such as loss of economic benefit, suspension of practising licences for up to 3 years, prohibition against assumption of corporate functions in companies providing financial services for up to 3 years, publication of the penalty in a widely distributed newspaper).
- In **Slovakia**, under section 24 of Act 250/2007 (Sanctions), fines may be imposed of up to SKK 2,000,000 (€ 60,000) on providers, sellers, importers or suppliers. In the event of repeated breaches (within 12 months) the amount can rise to SKK 5,000,000 (€ 150,000).
- In **Sweden**, businesses whose marketing violates good market practice or is unfair to consumers or businesses may be prohibited from continuing with the marketing or taking any similar measure. This prohibition may be issued against employees of the

---

<sup>75</sup> Article 13a par.2 of Law 2251/94

business concerned or another person acting on behalf of the business and any other person who has otherwise materially contributed to the marketing. Further, a business (an employee, a person acting on behalf of the business) whose marketing fails to provide information of particular importance to consumers may be ordered to provide such information.

- In **Austria**, insufficient information concerning transactions in securities may lead to fines of up to € 50.000. In addition, any violation of FernFinG makes the supplier liable for damages under the general law of torts.

These varieties of fines, damages, etc are complex and constitute trade barriers.

### **III. Criminal law sanctions**

Some Member States impose criminal law sanctions in relation to non-fulfilment of certain duties derived from the Directive and /or national measures for its adoption and implementation. We mention a few, and note that also there are clear divergences in this area.

- **Belgium's** Unfair Trade Practices Act provides for criminal sanctions in cases of infringement of its provisions, including the provisions on the distance selling of financial services (cf. art. 102, no. 6 Unfair Trade Practices Act). Criminal proceedings for infringement of the Act are, however, rare.
- **Danish** legal entities can be made liable under chapter V of the Criminal Code.
- In the **UK**, breaches of certain provisions of the Regulations transposing Directive 2002/65/EC are criminal offences. These Regulations provide for personal criminal liability on the part of certain officers or members of a corporate body who are responsible for the commission of such offences, and gives the enforcement authorities power to prosecute offenders.
- In **Ireland**, penalties range from fines of € 300 to imprisonment for up to 12 months.

Different law sanctions in relation to non-fulfilment of certain duties may impose a trade barrier.

### **IV. Class actions and other enforcement mechanisms**

Supervision, control and enforcement constitute the playing field entered by distance sellers of financial services. Experts have reported and we have analysed various models of supervision and enforcement in the Member States. Below are some examples which demonstrate existing disparities.

- In **Belgium**, consumer associations are able to apply for an injunction. Article 98 of the Unfair Trade Practices Act authorise consumer associations to initiate injunction proceedings. This right is exercised by Test Achat at national level. Competitors may also file an action for an injunction when other sellers fail to comply with the Unfair Trade Practices Act.
- In **Italy**, consumer associations are authorised to submit complaints to the competent supervisory authority and the legal authorities. Supervisory authorities must then require parties subject to their supervision to cease or not to commence practices adverse to national implementation measures. A class action has been introduced but according to Art. 36 of legislative decree no. 116 of 25 June 2008, the Italian legislator has postponed the entry into force of the legislation on class actions until 1 January 2009.

- In **Latvia**, the Consumer Rights Protection Centre<sup>76</sup> applies for an administrative penalty where the supplier or service provider does not end the breach or does not perform specific activities to rectify the impact of violation of the provisions of national regulations regarding the conclusion of distance contracts.
- In **Lithuania**, the supplier of financial services must examine the consumer's complaints free of charge and respond within 30 days. If the response does not satisfy the consumer or is not provided within 30 days, the consumer has the right to appeal to the Board of Consumer Complaints (the consumer's appeal to the Board does not result in removing or restricting the consumer's right to appeal to the court). The Board has the remit to act on its own initiative to control the observance of the requirements of national implementation measures, and must also obtain the information and documents required for analysis of the infringements and make investigations. It may appeal to the court. Further, public consumer associations in the Republic of Lithuania may lodge court actions at a consumer's request or on its own initiative.
- In **Slovakia**, supervision and control is performed by the various competent authorities in accordance with specific legal provisions:
  - Slovak Trade Inspection investigates practices of providing loans to consumers under Act no. 266/2005 Coll.
  - The Ministry of the Economy has a separate department regarding the protection of consumers and the European Consumer Centre.
  - Complaints to supervisory authorities may be submitted by consumers and by consumer associations and other legal entities established for the purposes of consumer protection

As we have shown, we have also found great disparities in the area of supervision and redress and a need for further national disclosure and /or harmonisation in order to further the EU Internal Market and to create a level playing field.

## **V. Conclusion**

Highly specific systems of sanctions are preserved by the open definition of sanctions contained in the Directive for breach of duties to provide information. These range from civil, to administrative to criminal penalties. In addition, different procedures apply, from class action to complaint boards, as well as different court procedures. Differences in sanctions, particularly those derived from non-fulfilment of information rights, may be one of the main sources of legal barriers to cross-border financial services and products. In most cases, this situation entails legal advice costs for suppliers. Also, it may give rise to uncertainty for consumers as the results of a Member State's sanctions against a provider from another Member State may be the source of legal and procedural doubts. The result may be that entering into a contract with a supplier from the consumer's home country would be preferred over entering into a contract with a foreign supplier. Different sanctions and procedures are thus likely to create trade barriers.

---

<sup>76</sup> Body competent in accordance with Consumers Rights Protection Law (Section 25, Part 10) and Administrative Violations Code (Section 215.4) to proceed before the Courts or to impose fines (administrative liability) in cases of violation of National Laws for the distance selling of services



## I. Summaries of the National Reports in Part II

<b>Austria</b>	<p>The legal position in Austria is relatively complex, not least because of the complex interaction of duties to provide information set up at different levels (general obligation to protect the interests of your contractual partner, consumer-related information requirements, product-specific financial information provisions). This gives rise to a nuanced and flexible system of duties to provide information, constructed around the nature and manner of the transaction, the product or the likely consumer segment.</p> <p>As a breach of the duty to provide information routinely leads to claims for damages, and may entail cancellation of the contract, suppliers must have in-depth knowledge of the Austrian legal position. This involves not only identification of the relevant statutes but detailed reference to individual product-specific provisions as well as cognizance of significant case law. Foreign suppliers intending to make distance sales of financial services in Austria from abroad may have major difficulties grasping these legal facts as no consistent list of provisions has yet been compiled. Moreover, the requirements are subject to amendment or addition at any time as a result of legal decisions. Foreign suppliers are therefore bound to take legal advice, a service that means high expense and will affect profitability.</p> <p>In conclusion, Prof. Gruber reports that it is difficult for suppliers to meet the high number of information requirements, while consumers may find the mass of information provided highly confusing.</p>
<b>Belgium</b>	<p>Belgium has notified the Commission that it has not introduced additional duties to provide information. The duty to inform of the consequences of non-execution of the right of withdrawal may suggest that there is a significant additional duty in this area at least, since the sanctions for not complying with this duty are very harsh. This may pose an obstacle to foreign suppliers.</p> <p>Belgian law also imposes general duties under competition law concerning distance marketing which go beyond the Directive. The most visible divergence is the requirement to provide an identification number. This, however, entails minimal cost and expenditure for a foreign company seeking to provide financial services in Belgium. Belgian legislators do not require the identification number to be issued by a Belgian authority. If a country does not recognise the number, the provider can no doubt manage without it. The experts report that limited attention is paid to the specific problem of cross-border selling. The fact that most financial websites only allow existing clients to conclude contracts electronically is an issue that is discussed in the literature. This is most often not possible for new clients. This is not due to legal problems but to practical problems.</p> <p>As far as Article 6(8) is concerned, in the specific case where insufficient information as to the right of withdrawal is given, Belgian law offers two different solutions. The right under Belgian law to cancel the contract without incurring any costs may well supersede the right under the Directive providing for early withdrawal. A foreign provider may thus face harsher sanctions in Belgium than elsewhere.</p>
<b>Bulgaria</b>	<p>The expert and the national notification process agree that Bulgaria has not made use of the leeway offered by the Directive. Only Article 9 (3) of the Distance Marketing of Financial Services Act could be said to amount to an additional national requirement as it regulates the supplier's obligation for additional information at the consumer's request. Bulgaria therefore appears not to present legal obstacles to foreign suppliers in the distance marketing of financial services.</p>
<b>Cyprus</b>	<p>Cyprus has introduced the Directive in a literal form. The expert and the national notification process agree that no use has been made of the leeway offered by the Directive. Cyprus does not therefore appear to present legal obstacles to foreign suppliers in the distance marketing of financial services.</p>
<b>Czech Republic</b>	<p>The legislator has not made use of the leeway allowed by the Directive in Arts 4(2) and 6(3). Legal impediments to offering distance sales in this market do not therefore exist for suppliers in this area. There are no direct barriers created either by the right</p>

	of withdrawal or by information rights. However, experts report indirect obstacles (tax-related) to the cross-border distance selling of financial services.
<b>Denmark</b>	<p>There are no direct barriers created either by the right of withdrawal or by information rights. However, experts report indirect obstacles (tax-related) to the cross-border distance selling of financial services.</p> <p>Rules governing the taxation of private pensions favour placement of investments through Danish service providers, as they allow for investments by private individuals in pension schemes operated by pension funds to be deducted from the personal income of the investor. Taxation takes place at the time the pension investment is returned to the pensioner. Investment funds may be Danish or foreign. However, in order for the investment to be deductible, the investment fund must follow all Danish tax rules applicable to the investments. In practice, this has the effect that no foreign investment funds operate in the Danish market, and that Danish pension investors do not place their investments in other Member States. The EU Commission is currently investigating the possibility of instigating an Article 230 EC procedure against Denmark in this matter.</p> <p>This situation renders the cross-border selling of financial services more difficult and points to the fact that there are practical barriers beyond the scope of the Directive.</p>
<b>Estonia</b>	Estonia has implemented the Directive without any additional national information duties and therefore poses no obstacle for foreign suppliers.
<b>Finland</b>	The legislator has probably not made use of the leeway allowed by the Directive in Art. 4(2) and certainly not by Art. 6(3). Even if the provision of telephone number and e-mail address were seen as additional, this would not present an obstacle to foreign suppliers.
<b>France</b>	<p>As far as the information duties in relation specifically to the distance marketing of financial services are concerned, France has no different rules from those regulated in Art. 4(2) of the Directive. As far as the right of withdrawal is concerned, France has made use of the leeways as described in Art. 6(3) extending it to car insurance. France indicates no overlaps with regard to Art. 6(8).</p> <p>Notwithstanding this legal situation, it may still be difficult for foreign suppliers to understand French regulations on the distance marketing of financial services. France uses a multi-level system:</p> <p>On a general level, France considers consumer contracts and product-specific legislation in the same way as the general rules applicable to consumer information. Suppliers are bound by these general rules, irrespective of the form in which the services are marketed.</p> <p>On the specific level of distance marketing, rules derived from specific legislation for consumers (Consumer Code) exist. This is the basis for all other regulations.</p> <p>In addition France has introduced a number of rules which regulate the conditions under which electronic forms are equal to written forms.</p> <p>On a product-specific level, additional specific regulations apply to insurance and payment law.</p> <p>A foreign supplier would have to look at consumer law in general and then at product-specific legislation to find out which other information duties have to be complied with. This especially applies to rules concerning the description of the product.</p>
<b>Germany</b>	<p>In the view of the experts and in accordance with the position taken by government, Germany has a system in which legal duties to provide information are based on judicial precedent governing principles of good faith. This gives rise to rules which are highly specific in terms of both circumstances and products and which are not reflected in legislation. Moreover, there is a limited number of variables in terms of the detail of pre-contractual information.</p> <p>Foreign suppliers have to contend with German case law, which is difficult to obtain. They are primarily at risk of claims for damages. Moreover, competition between product-specific provisions and provisions relating to distance marketing are</p>

	<p>not uniformly resolved. Additional details to be taken into account in Germany may be overlooked, and indeed no consistent list has been compiled to date for foreign suppliers.</p> <p>The legal position in Germany is highly complex, not least as a result of the intricacies of the bundle of duties relating to information provision at various levels. They give rise to considerable costs in terms of legal advice, which may be given on a product-specific basis and not apply equally to all financial products.</p>
<b>Greece</b>	<p>Greek legislation follows a practice of rather literal implementation of Directives. Thus, overlaps, if any, will derive from EU legislation. Examples provide evidence that there are no significant cross-border barriers to the marketing of financial products. Deviations stem from some general definitions which give more freedom to the authorities to develop additional information if the “aim of the Act” requires it.</p> <p>There is no extensive legal literature or jurisprudence on the distance selling of financial services in Greece. Both language and the restricted familiarisation of Greek consumers with electronic means offer a possible explanation.</p>
<b>Hungary</b>	<p>The incorporation of the Directive into the Hungarian legal system imposes barriers to the Internal Market only to the extent that there is a lack of a clear definition of financial services. There is also confusion about the definition of “written form” as stated in the Civil Code. This should be unified to make Hungarian law conform to Community regulations. The Commission could use its power granted by the Directive to request detailed information on new acts envisaged by the Hungarian Parliament or the regulators.</p>
<b>Ireland</b>	<p>As far as the requirements of information are concerned, Ireland, similar to Germany and Austria uses a more open and flexible system with general clauses that give room for a purely national interpretation of the law. This requires a foreign provider to invest more time and effort in studying the specific implementation of such rules in Ireland than would be required in another country where regulation is more formalised.</p>
<b>Italy</b>	<p>Italy has no legal obstacles to the cross-border marketing of financial services. The Italian expert, however, points to obstacles which go beyond this level.</p> <p>Firstly, the Italian report points to overlaps or contradictions at European level between Directive 2002/65/EC and any other product- or service-specific directive. Contradictions with legislation on the right to withdrawal in other sectors (e.g. distance contracts and contracts negotiated outside the place of business, with a ten-day period) are apparent. The right of withdrawal allows the consumer to consider the contract carefully. A longer period to exercise this right would be appropriate for contracts involving financial services. The consumer could thus acquire the necessary information to make a well-informed decision.</p> <p>The Italian expert considers that development does not appear to hinge on EU or national legislation. e-banking can be taken as an example. According to the expert opinion it is used by people with a high level of education, with good financial knowledge and computer skills, as well as by businesses. Low / average levels of education, low / average levels of financial knowledge and low / average computer skills are seen as the real obstacles to the spread of financial service marketing across borders in the internal market. The challenge is to raise levels of financial capability and computer skills.</p> <p>Against that, EBIC reports.</p> <p>“that there are also increasing numbers of very young people and migrants making use of online banking. EBIC considers that modern customer interfaces make e-banking accessible to the entire population. Indeed, the number of Internet transactions using credit cards and performing one-off credit transfers has increased significantly in recent times. In 2007, over 60 million one-off credit transfers were performed online in Italy. This figure represents an increase of 28.3 % on 2006 and 12 % of the total credit transfers performed in 2007. In the same period, the total number of online credit card operations reached 28 million which represents an increase of 40 % on 2006. It is suggested that one of the reasons for this increase in online electronic payments and transfers is the fact that a customer signature is no longer required to</p>

	<p>execute distance marketing transactions.”</p> <p>Another problem is the language barrier. If the marketing is not in Italian, the low knowledge of foreign languages compounded by lack of understanding of technical terminology in Italy constitutes a major obstacle for suppliers.</p> <p>There is also a widespread fear of IT and misuse of electronic means of identification, especially where transactions involve the investment of money. Training in personal finances, as well as language and computer skills, could be an answer. Computer-based transactions need to be made more secure. The expert proposes independent financial consultants or financial brokers operating at European level to help potential clients in cross-border transactions.</p>
<b>Latvia</b>	<p>Latvia’s legal system and transposition of the Directive do not seem to pose particular problems to foreign sellers in relation to the specific questions set in this national report. However, there are other aspects, such as supervision and sanctions, which are specific to Latvia and could create market barriers. According to art 11 Directive and sections 28 and 29 of the Consumer Rights Protection Law, consumers are able to request different types of remedies for infringement of national implementation measures: price reduction; rectification, compensation, revocation of the contract and repayment to the consumer of the amount paid; as well as provision of another product or service in conformity with the provisions of the contract.</p> <p>Lack of tradition, language problems and other metadata elements could be the main barriers, if any, and they lie beyond the scope of this study.</p>
<b>Lithuania</b>	<p>Foreign providers of financial products are confronted with general information duties which are fairly detailed in contract and consumer protection laws. Lack of experience of distance marketing of financial services and lack of information on the sanctions which apply under Lithuanian law may pose barriers to foreign providers.</p> <p>In particular, the obligation to use the Lithuanian language in insurance contracts may be an obstacle. There is also a general clause from which national courts may deduce unforeseeable additional information duties.</p>
<b>Luxembourg</b>	<p>Legal impediments to distance marketing do not, therefore, exist for suppliers in this area. Luxembourg legislation closely relates to EU law and refrains from introducing many national specifics. As one of the major businesses in Luxembourg is the offer of banking services to foreigners, Luxembourg must obviously demonstrate that it provides European conditions for its customers. It thus also offers known and harmonised conditions to foreign providers.</p>
<b>Malta</b>	<p>Malta has implemented the information duties quite literally but has implemented very concrete duties concerning the Consumer Complaints Manager and access to that office, so that this information seems to be rather specific. Maltese law does not make access by foreign suppliers problematic unless the detailed information with regard to the existence and access to the Consumer Complaints Manager is seen as an obstacle.</p>
<b>Netherlands</b>	<p>Additional information requirements may be derived from a service provider's general duty of care. Such traditional private law requirements and the contents of a general duty are not easily understood or identified by a foreign provider. As the general right of withdrawal is partly based on provisions of general contract law, the application of doctrines such as the abuse of rights (misbruik van recht) or equity (redelijkheid en billijkheid) may hinder its exercise and national interpretation may give general EU law a national character. More harmonisation of information rights would be of benefit to cross-border commerce.</p>
<b>Poland</b>	<p>There are no significant barriers to foreign sellers. Poland has largely incorporated EU Law literally. There are no direct legal problems in terms of additional information rights that could pose a barrier to foreign suppliers. However, competition law may be a source of additional information rights in the future, in the same way as the newly introduced class action has been. Some problems arise in the application of the law. The introduction of standard contract terms into contractual relationships via telephony in Polish law is being considered. The effects on the duty to maintain coverage through motor vehicle insurance in circumstances of early termination under the right of withdrawal is another problem.</p>

<b>Portugal</b>	<p>Portugal has not made official use of the leeway in Article 4(2) of the Directive. But as Portugal also puts emphasis on the requirement that foreign suppliers should use the Portuguese language both in advertising and in contractual matters, it goes beyond the informational approach inherent in the Directive, where the use of the language must be disclosed. While modern Portuguese rules appear to allow use of another language if there is consent, and would at least come close to the informational approach, older legislation still in force clearly requires use of the Portuguese language.</p> <p>Portugal has, however, a vast body of rules which only requires documentation for products intended for the Portuguese market. Although that does not prevent cross-border selling, it generates extra work and cost. As there seems to be a different income tax regime applicable to life insurance when the insurance company is established in Portugal or outside the country, the information about this should be part of the description of the main characteristics of these financial services. The problems which could arise for foreign suppliers are therefore linked less to the information duties than to the restrictions on the trade itself which would need either to be removed or be subject to additional disclosure.</p>
<b>Romania</b>	<p>No barriers have been reported. However, in our view the main barrier could be of a practical nature, namely lack of tradition in this sector.</p> <p>Extensive consumer education needs to be developed in Romania, at least in relation to the existence and safety of Financial Services contracted online, and the possibility for consumer organisations further to organise and develop collective actions. These programmes, if duly supported by officials and ministries, would ease the access of foreign financial services to the Romanian market.</p>
<b>Slovakia</b>	<p>Slovakia has not made use of the leeway under Article 4(3), but has used the leeways as allowed by Art. 6(3).</p> <p>Slovakia does not pose any problems in this respect for foreign providers.</p>
<b>Slovenia</b>	<p>Legal impediments to offering distance sales in this market do not exist for suppliers in this area.</p>
<b>Spain</b>	<p>Spain has not officially made use of the right to introduce additional pre-contractual information. However, the consolidated version of The General Law on Consumer and Users Protection clarifies information rights, introduces sanctions for breach of information duties which relate to general Consumer Law and have been mentioned earlier in this paper (details fall beyond the scope of this report).</p> <p>Financial services regulations, including the new Law on Mortgage Markets, reinforce information duties, including the need not only to provide supplier details but also to open an interactive communication system. They also provide model contracts.</p> <p>Transposition Law 22/2007 introduces a number of special features. For example, suppliers as defined in Art 2 (1) (which will in fact be most financial services suppliers) are subject to administrative supervision and if they breach law 22/2007, they may be in infringement of and subject to sanctions which are not obvious from a simple reading of the main Law incorporating the Directive.</p> <p>In terms of details of the provider's representative, additional information is required beyond geographical address.</p> <p>Special protection for disabled people is required in relation to marketing that is targeted at this group. It is unclear how this will be applied to distance marketing. In any case, such group-specific regulations may be an obstacle for foreign providers, who may not even know that their clients are disabled.</p> <p>Also to be mentioned is that, through the application of general consumer law, the withdrawal period is extended (following non-compliance with information duties on the part of the provider) to 3 months.</p> <p>Spain points to a number of product-specific rights which are applicable.</p>
<b>Sweden</b>	<p>The additional information indicated in Sweden may be in line with the E-Commerce Directive so that in the end no information duties may exist in Sweden which are not already harmonised by EU law. There seem to be no specific obstacles through additional national law in Sweden.</p>

<b>United Kingdom</b>	<p>Information rights in the UK can stem from legislation and from rules such as the FSA Conduct of Business Rules. These rules are relatively flexible and may change much more quickly than the law. For foreign suppliers, it may seem difficult to find out which rules are in existence and which are directly applicable. However, the FSA provides considerable advice and assistance to financial firms and all of the rules are easily accessible on the Internet. It is possible that the plethora of rules is a barrier to foreign suppliers (although there is no evidence of this claim) and that harmonisation of all information rights for each product would help foreign suppliers to market their products in the UK. Since the purpose of many of the detailed rules is to standardise the information that consumers receive, one should question whether this remedy (harmonisation) would result in more divergence in the presentation of important information and in turn whether any such consequence would reduce whatever level of consumer protection that disclosure rules may provide. Unfortunately it does not appear that the current state of empirical knowledge of the effects of financial services regulation on consumers and on markets for retail financial products provides a sound basis for answering these questions.</p>
-----------------------	---