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### **Position paper in the context of the evaluation of Directive 2002/65/EC**

The European Federation of Building Societies (EFBS) is an association of credit and other institutions promoting and supporting the financing of home ownership. Its purpose is to encourage the idea of acquiring home ownership in a Europe that is converging both politically and economically.

The members of the EFBS are specialised credit institutions established in seven Member States of the European Union (DE, AT, RO, SI, HR, CZ and HU). The business of the Bausparkassen is regulated by specific national Bausparkassen Acts. In compliance with the strict legal provisions, the Bausparkassen offer contractual savings schemes to their customers and grant them loans which must be secured by mortgage.

In connection with the European Commission's evaluation of Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services (below: the "Directive"), our position is as follows:

The traditional sale of financial services through a personal approach to the consumer or a personal approach by the consumer, in the simultaneous presence of both parties, is increasingly often supplemented by sale using means of distance communication. A growing number of consumers no longer wish to be restricted to the opening hours of suppliers and intermediaries and opt in favour of obtaining information quickly and easily by electronic means and concluding contracts exclusively by means of distance communication. Against this background, there is an increase in the number of undertakings operating in the financial services sector, which mostly offer a targeted sale using means of distance communication under this Directive, as a supplement to the traditional sale of financial services.

We support the aim of the Directive to strengthen the internal market through consumer protection in the field of the distance marketing of financial services. However, subsequent to the entry into force of this Directive, a number of product-related Directives have been adopted which also relate to distance marketing and lead to questions of demarcation and interpretation. To ensure legal certainty and legal clarity, these issues should be addressed by giving precedence to the product-related Directives.

## **1. Retention and establishment of the model of the reasonably well informed and reasonably observant and circumspect average consumer**

**We ask for it to be stated explicitly in the recitals to the Directive:**

**that the Directive is based on the model of the “reasonably well informed and reasonably observant and circumspect average consumer”.**

### **Justification:**

The subject of the Directive is confined to distance contracts for financial services which are concluded with a “consumer”. Article 2(d) of the Directive defines the “consumer” as “any natural person who, in distance contracts, is acting for purposes which are outside his trade, business or profession”.

With respect to the concept of consumer, the European Court of Justice focuses on a “reasonably well informed and reasonably observant and circumspect average consumer”.<sup>1</sup> This image of a mature consumer acting under his own responsibility is also at the basis of the Directive. For example, recital 3 refers to the right of the consumer to choose between various offers; recital 4 assumes that the consumer “negotiates” distance contracts. Against this background, Advocate General Pitruzzella, in his opinion of 28 March 2019,<sup>2</sup> rightly bases the concept of consumer in Article 2(d) on the model of a “reasonably well informed and reasonably observant and circumspect average consumer”.

On the other hand, some consumer protection associations are calling for a change to the model of consumer to an immature consumer, unwilling to process information and in need of protection. In addition, the results of the study commissioned by the European Commission “Behavioural study on the digitalisation of the marketing and distance selling of retail financial services” focuses in several places on the “vulnerable consumer”, who even when information is made available is unable to take decisions in his own interests. Such a model of the consumer and the resulting regulation and patronising of consumers would pervert consumer protection and be contrary to the principles of the market economy, in which each market participant pursues his interests under his own responsibility.

The model of a “reasonably well informed and reasonably observant and circumspect average consumer” should therefore be retained in order for consumers to be protected from excessive interference in their freedom of choice and at the same time for the responsibility of undertakings not to be extended disproportionately. This model of a “reasonably well informed and reasonably observant and circumspect average consumer” should be established in the Directive in order to ensure a uniform level of consumer protection in the EU.

## **2. Streamlining and adaptation of information requirements**

In connection with the pre-contractual information requirements regulated in Articles 3 to 5 of the Directive, the following amendments and clarifications are necessary in our opinion with regard to

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<sup>1</sup> cf. concerning Directives 2005/29 and 93/13: judgment of 20 September 2017, *Andriuciu and others* (C-186/16, EU:C:2017:703, paragraph 47), and judgment of 8 February 2017, *Carrefour Hypermarchés* (C-562/15, EU:C:2017:95, paragraph 31), judgment of 25 July 2018, *Dyson* (C-632/16, EU:C:2018:599, paragraph 56), judgment of 13 September 2018, *Wind Tre und Vodafone Italia* (C-54/17 and C-55/17, EU:C:2018:710, paragraph 51), judgment of 20 September 2018, *OTP Bank and OTP Faktoring* (C-51/17, EU:C:2018:750, paragraph 78)

<sup>2</sup> Case C-143/18 – *Romano*.

consistency with other provisions in Community legislation and in the light of the restrictions of the distance marketing means of communication:

**a) Clarification of the prohibitive effect of product-related provisions in Community legislation containing pre-contractual information requirements**

**We propose rewording Article 4(1) as follows:**

***“The information requirements pursuant to Article 3 shall not apply where the contract is concluded in connection with a financial service for which product-specific provisions in Community legislation contain regulations on information requirements.”***

**Justification:**

Regarding the relationship between the information requirements under the Directive and the information requirements under other provisions in Community legislation, Article 4(1) of the Directive provides that the requirements under other provisions in Community legislation governing financial services additional to those listed in Article 3(1) will continue to apply in parallel. Such two-fold application of information requirements, due to the large number of product-related Community regulations which have entered into force subsequent to the adoption of the Directive, would lead to a still more extensive information overload for consumers without any additional value.

Instead of the current provisions of Article 4(1) of the Directive, it should therefore be clarified that product-specific provisions in Community legislation on information requirements prohibit the applicability of the information requirements under the Directive.

**Alternatively, we propose in any case amending Article 4(1) as follows:**

***“The information requirements pursuant to Article 3 shall not apply for the conclusion of consumer loan contracts and other financial services agreements made in connection with a consumer loan.”***

If establishing a general precedence of product-specific provisions were to be considered to go too far, precedence of the provisions in Community legislation in the field of consumer law should in any case be explicitly regulated.

The Consumer Credit Directive<sup>3</sup> and the Mortgage Credit Directive<sup>4</sup> contain, for the law governing consumer loans as a whole, comprehensive product-specific lists of pre-contractual information requirements, which also provide in each case for particular information for the field of distance marketing. These Directives regulate the information requirements finally, as more specialised regulations for consumer loans, which is explicitly enshrined in Article 14(7) and (10) of the Mortgage Credit Directive.

For the entire field of the law governing consumer loans, explicit clarification in this Directive should lead to all information requirements for a consumer loan and for agreements made in connection with

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<sup>3</sup> Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.

<sup>4</sup> Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010.

a consumer loan (in particular agreements on ancillary services, interest rate adjustments in the context of a current consumer loan contract or the provision of collateral for a consumer loan) being governed exclusively by the Consumer Credit Directive or the Mortgage Credit Directive.

## **b) Extension of the possibility for post-contractual information**

### **1st variant:**

The Directive should be amended as follows:

**In Article 3(1), the introductory sentence should be supplemented as follows:**

*"In good time before the consumer is bound by any distance contract or offer, **or in any case after the conclusion of the contract pursuant to Article 5(1)**, he shall be provided with the following information concerning:"*

**Article 5(1) should  
be deleted without replacement.**

**Article 5(2) should be amended as follows:**

*"The supplier shall fulfil his obligation under **Article 3(1) no later than** immediately after the conclusion of the contract, ~~if the contract has been concluded at the consumer's request using a means of distance communication which does not enable providing the contractual terms and conditions and the information in conformity with paragraph 1.~~*

### **Justification:**

Before concluding a distance contract for a financial service, the consumer needs a sufficient basis of information in line with effective consumer protection. For this purpose, it is necessary for the consumer to be informed of the key contents in brief, comprehensible and clear form. On the other hand, it is necessary to take into account the consumer's wish for simple, rapid conclusion of the contract and the technical restrictions arising from the use of means of distance communication.

Article 5(1) of the Directive provides that in principle the consumer, in good time before entering into a contractual commitment, must receive all the contractual terms and conditions and the information referred to in Article 3(1) on a durable medium. Article 5(2) provides that it suffices for the contractual terms and conditions and the pre-contractual information to be made available immediately after conclusion of the contract, if the contract has been concluded at the consumer's request using a means of distance communication which does not enable providing the contractual terms and conditions and the corresponding information.

Since the consumer opting for conclusion of a distance contract is usually interested in concluding a contract rapidly and simply, it should be sufficient for the conclusion of each distance contract to forward the contractual terms and conditions and pre-contractual information to the consumer immediately after conclusion of the contract. For example, in the case of conclusion of a contract by Smartphone, consumers are not particularly interested in studying in depth the entire list arising from Article 3(1) of the Directive before concluding the contract by Smartphone.

The practical difficulties involved in the pre-contractual display and making available of all the information listed pursuant to Article 3(1) of the Directive in text form on conclusion of a distance contract would increase still further in the future due to the European Accessibility Act<sup>5</sup> published in the Official Journal of the European Union on 7 June 2019.

In the proposed post-contractual supply of the contractual terms and conditions and the information pursuant to Article 3(1) in text form, the consumer would be sufficiently protected by the possibility of withdrawal existing pursuant to Article 6 of the Directive.

## **2nd variant:**

**If the proposal set out above is considered to be too far-reaching, the Directive should in any case be amended as follows:**

**In Article 3(1), the introductory sentence should be supplemented as follows:**

*"In good time before the consumer is bound by any distance contract or offer, **or in any case after the conclusion of the contract pursuant to Article 5(1)**, he shall be provided with the following information concerning:"*

**Article 5(1) should  
be deleted without replacement.**

**Article 5(2) – as the new paragraph 1 – should be amended as follows:**

*"The supplier shall fulfil his obligation under **Article 3(1) no later than immediately after the conclusion of the contract, if the contract has been concluded at the consumer's request using a means of distance communication which does not enable providing the contractual terms and conditions and the information in conformity with paragraph 1.** In this case, the supplier shall communicate at least the information pursuant to Article 3(3) on paper or on another durable medium available and accessible to the consumer in good time before the consumer is bound by any distance contract or offer."*

## **Justification:**

If the general renunciation of pre-contractual information suggested above, which so far is established only as an exception in Article 5(2), were to be seen as too far-reaching, it should be possible in any case, for the conclusion of all distance contracts, to communicate prior to the contract only the five items of information referred to in Article 3(3) and also to inform the consumer immediately after conclusion of the contract.

So far Article 3(3) has provided that in the case of conclusion of contracts by telephone, the supplier only has to supply the five key items of information referred to in that paragraph prior to conclusion of the contract. If, in the case of conclusion by telephone, these five items of pre-contractual information are considered to be sufficient from the consumer protection point of view, conclusion of distance contracts other than by telephone should also be possible on the basis of these five items of pre-contractual information.

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<sup>5</sup> Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services.

In any case, the possibility of a pre-contractual communication of the five key items of information pursuant to Article 3(3), instead of the pre-contractual supply of all the information listed under Article 3(1) in text form, should be extended to the conclusion of all distance contracts.

### **c) Restriction of the list under Article 3(1) to key information**

The list of information in Article 3(1) of the Directive should be reviewed and streamlined, taking into account the negative effects of an information overload. Since, according to the evaluation of Article 3(3), the five items of information listed there are considered to be key, the necessity for the other information listed in Article 3(1) should be critically called into question. This applies in the case of transactions without a foreign connection, for example for the pre-contractual information under Article 3(1)(3)(g) with regard to the information “in which language, or languages, the contractual terms and conditions, and the prior information referred to in this Article are supplied, and furthermore in which language, or languages, the supplier, with the agreement of the consumer, undertakes to communicate during the duration of this distance contract”.

## **3. Amendments in connection with the consumer’s right of withdrawal**

### **a) Fixed time limit on the right of withdrawal**

#### **1st variant:**

**We propose supplementing Article 6(1) by the following fourth sentence.**

***“The period for withdrawal shall end no later than 12 months after the expiry of the original period for withdrawal in accordance with the first sentence, even if this period has not previously started to run in accordance with the third sentence.”***

#### **Justification:**

If the consumer was not appropriately informed in connection with the conclusion of a distance contract for financial services, the period for withdrawal should be extended. In order in this case, after the period of one year, to achieve legal certainty for both parties with regard to the effectiveness of the concluded contract, a limitation of the period to one year should be introduced. This one-year time limit should be uniform in all Member States – as in the case of the time limit of 14 calendar days pursuant to Article 6(1), first sentence, during which, with proper information, a withdrawal can be declared.

Provision is made for a corresponding expiry of the right of withdrawal after one year for example in the Consumer Rights Directive.<sup>6</sup>

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<sup>6</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance.

**2nd variant:**

**Alternatively, we propose supplementing Article 6(1) by the following fourth sentence:**

***“Member States may establish a period after which the right of withdrawal expires even if the time limit for withdrawal in accordance with the third sentence has not started to run.”***

**Justification:**

If the fixed period of one year after expiry of the ordinary period for withdrawal of 14 days based on the Consumer Rights Directive, suggested above, is not desired, the Member States – by way of analogy with the Mortgage Credit Directive – should, for reasons of legal certainty for the parties to the contract, be allowed scope to introduce a time limit for the end of the right of withdrawal and to avoid withdrawal from the contract for financial services being declared after years or even decades.

**b) Clarification of the prohibitive effect of product-related provisions in Community legislation containing a right of withdrawal**

**1st variant:**

**We propose supplementing Article 6(2) by the following new point (a):**

*“The right of withdrawal shall not apply to:*

- a) Contracts concluded in connection with financial services, for which product-specific provisions in Community legislation contain regulations on the right of withdrawal.”**

**Justification:**

In accordance with the relationship between information requirements under the Directive and information requirements under other provisions in Community legislation (cf. above under 2(a)), a further clarification is also needed in relation to the consumer’s right of withdrawal to the effect that product-specific provisions in Community legislation on rights of withdrawal prohibit the applicability of the provisions on the right of withdrawal under this Directive.

**2nd variant:**

**Alternatively, we propose in any case supplementing Article 6(2) by the following new point (a):**

*“The right of withdrawal shall not apply to:*

- a) Financial services which are a consumer loan or are agreed in connection with a consumer loan.”**

**Justification:**

If establishing a general precedence for product-specific provisions suggested above is considered too far-reaching, in any case precedence of the provisions in Community legislation in the field of the law governing consumer loans should be regulated.