INFORMATION AND ADVISING REQUIREMENTS IN THE FINANCIAL SERVICES SECTOR: Principles and Peculiarities in EC Law

Martin Ebers

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Abstract


1. Introduction

Over the last twenty years, the European Community has created numerous requirements relating to transparency, information and advice in the financial services sector,

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1 Dr. Martin Ebers is Assistant Professor at the Institute for German and European Private Law, Westfälische Wilhelms-Universität Münster, Germany. This article is an expanded, updated version of a presentation held in January 2003 at the Academy of European Law (ERA), Trier (Germany), which was written within the Research Network ‘Uniform Terminology for European Private Law’. The member universities of the network are Torino (co-ordinator), Barcelona, Lyon, Münster, Nijmegen, Oxford and Warsaw. The Research Network is part of the Improving Human Potential (IHP) Programme financed by the European Commission (Contract no. HPRN-CT-2002-00229). The author would like to thank Christopher Dallimore, LL.M., for translating the text from German into English.

2 Regarding the term ‘financial service’, cf. Art. 2(b) Financial Services Distance Marketing Directive 2002/65/EC; Art. 3(1) indent 1 and Annex II Distance Marketing Directive 97/7/EC. See also Udo Reifner, ‘Finanzdienstleistungen und Verbraucherschutz in der Europäischen Harmonisierung’, in Stefan Grundmann
development which surpasses that in any other area of law. From the outset, the European Community decided that information duties provide the most moderate and adequate means of protecting investors and ensuring the function of the internal market.\(^3\) Since 1979, when the ECJ ruled in *Cassis de Dijon*\(^4\) that information rules must be preferred to mandatory rules prescribing substance wherever possible, the ‘information paradigm’ has taken hold not only in traditional sectors of financial services - such as credit, payment, investment and insurance - but has gradually been accepted as a general legal principle in order to offset structural imbalances in all other areas of European Contract Law as well.

Against this background, I will attempt to systematise the requirements governing information and advice imposed on contracts for financial services according to the ‘*acquis* approach’\(^5\) and investigate whether such requirements reflect either a general legal principle or peculiarities of the financial services sector. The following examination focuses on information requirements (section 2), the problem of information overload (section 3) and the requirements for giving advice (section 4). The result will show that core elements for a future system of brokers and financial intermediaries in Europe are clearly emerging (section 5).

The investigation can only be carried out within certain limits. Disclosure requirements,\(^6\) especially the principle of ‘true and fair value accounting’ anchored in European accounting law,\(^7\) will not be considered, nor will recent developments in European

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\(^4\) *Case 120/78, Cassis de Dijon*, [1979], ECR 649, para. 13.


rules on fair trading, \(^8\) the influence of precontractual duties relating to contractual formation and substance\(^9\) or the rule found mainly in the Unfair Contract Terms Directive to draft contractual conditions in plain and intelligible language be examined.\(^10\) Finally, it will not be possible to address the question as to how the information and advising duties in the _acquis communautaire_ are to be implemented by Member States\(^11\) in a way which is ‘effective, proportional and dissuasive’\(^12\).

Examination of this topic requires a uniform terminology. Given the fact that the literature does not employ the notions ‘information’ and ‘advice’ uniformly, I suggest the following distinctions:

- The term ‘to inform’ refers to the mere transfer of facts and prognosis. The party required to provide information must notify the client in a correct, clear and understandable manner of certain circumstances and provide any forecasts on a sufficient factual basis. This process does not suggest that an individual consultation is required. The client or potential client must evaluate the information he receives himself.
- ‘Advice’ does not only mean the information _per se_, but also its professional assessment and recommendation, taking into consideration the customer’s life circumstances and interests. The adviser must obtain information about the client’s

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\(^10\) Arts. 4(2) and 5 Unfair Contract Terms Directive 93/13/EEC. In addition, this rule can also be found in other pieces of EC legislation in various guises; Arts. 3 and 4(2)(b) Package Travel Directive 90/314/EEC; Arts. 3 and 4 Timeshare Directive 94/47/EC; Arts. 28 and 29 Directive 85/611/EEC on undertakings for collective investment in transferable securities (UCITS), recently amended by Directive 2001/107/EC and Directive 2001/108/EC.


individual lifestyle and plans before making his recommendation. The adviser is therefore required to procure information.

2. Information requirements

2.1 Reasons for imposing information duties

There are a number of reasons for imposing an information duty. EC law assumes that there is always a need to inform where a contractual party or potential contractual party is unable, owing to personal circumstances, the specific form of distribution or the contract in question, to properly assess its rights and duties before concluding the contract and to effectively exercise its rights arising under the contract following its conclusion.

Contract-related information duties are particularly relevant in financial services contracts; EC law assumes that the peculiarities of a financial service contract give rise to an increased need for information. Financial services are ‘abstract legal products’ and as such intangible. The services rendered are essentially defined by means of contractual terms and conditions so that it is generally difficult to assess the mutual rights and duties and, in particular, the price-performance ratio. The imposition of information duties can also be justified by other factors, inter alia the duration of the contract, certain risk factors (prognosis regarding the contract’s yield) or other material goals (e.g. a pension plan). In the light of this, EC law imposes information requirements for cross-border payments, securities and insurances, regardless whether it is a business-to-consumer (B2C) or a business-to-business (B2B) transaction:

- Both the Cross-Border Transfers Directive 97/5/EC and the Cross-Border Euro Payments Regulation 2560/2001 apply to all cross-border payments up to an amount of EUR 50,000. As a result, B2B transactions especially between small and medium-sized enterprises (SMEs) are protected as well as B2C transactions.
- The prospectus duties under Directive 85/611/EEC on undertakings for collective...
investment in transferable securities (UCITS)\textsuperscript{16} also aim to protect all investors.\textsuperscript{17} In accordance with Art. 27(1), the investment company must publish both a simplified and full prospectus. Whereas the simplified prospectus should be easily understood by the ‘average investor’ (Art. 28(3)), the full prospectus contains particulars which are mainly relevant for professional investors. This dual protection policy can also be found in the new Investment Services Directive (ISD).\textsuperscript{18} The conduct of business obligations contained in Art. 19 ISD apply both to retail investors and to professional investors. At the same time, Art. 19(10)(c) of the Directive requires that the information duties be tailored to the profile of the investor targeted. For this purpose, Annex II contains rules for the classification of a particular customer as a retail or a professional investor.\textsuperscript{19}

Furthermore, the information duties contained in the Third Non-life Insurance Directive 92/49/EEC are intended to protect not only consumers, but all natural persons, i.e. business, as well.\textsuperscript{20} By contrast, there are no information duties in respect of contracts which insure against ‘large risks’.\textsuperscript{21} Finally, the Insurance Mediation Directive 2002/92/EC applies both to natural and legal persons. However, the information requirements under this Directive do not apply if an insurance contract for large risks is to be arranged.\textsuperscript{22}

By and large, the main goal of information requirements in the financial services sector is not so much the protection of consumers, but - owing to the peculiarities of the financial services - to ensure that all investors are informed enough to make rational decisions.

The credit contract currently is an exception; as the relevant provisions in the Consumer Credit Directive 87/102/EEC only refer to B2C transactions, they focus especially on consumer protection. Finally, information duties specific to forms of distribution are contained in the E-Commerce Directive 2001/31/EC and the Financial Services Distance Marketing Directive 2002/65/EC. Although both Directives cover the whole financial services sector cross-sectionally, they only apply if the financial transaction is concluded by electronic means, i.e. on the basis of distance selling.

2.2 Information contents


\textsuperscript{18} Investment Services Directive (ISD) 2004/39/EC.

\textsuperscript{19} Concerning the whole subject, see Moloney, \textit{supra} note 17, 827 et seq.

\textsuperscript{20} Art. 31(2) Third Non-life Insurance Directive 92/49/EEC.


\textsuperscript{22} Art. 12(4) Insurance Mediation Directive 2002/92/EC.
A number of information requirements in EC law are not ideally attuned. However, there are already indications that this problem is being rectified by the *acquis communautaire*. Regulatory principles, which could be used to develop a European frame of reference, can be found mainly in the Financial Services Distance Marketing Directive 2002/65/EC. Article 3(1) of this Directive distinguishes between information concerning the supplier, the financial service, certain forms of distribution and legal remedies. These four categories can be applied to the entire spectrum of information requirements in EC law.

(1) Information about the supplier
Many Directives stipulate party-related information duties, which provide the recipient with specific information about his contractual partner, including his legal form (and, where applicable, his registration) and geographical address. In the case of security transactions, the issuer’s assets and liabilities, financial position, profits and losses as well as his prospects must also be provided.

(2) Information about the product
In addition, EC law also imposes comprehensive duties pertaining to product description. The party obliged to provide information must clearly explain the main characteristics of the financial service, disclose the total price, including all taxes and related fees, point out the duration of the contract, outline specific additional costs and risks and present the arrangements for payment and performance.

(3) Information duties specific to forms of distribution
If the contracting parties have decided on a certain form of distribution in view of the particular ‘dangers’, the provider must take account of an increased need for information. For example, in the case of distance selling the costs for the consumer of using the means of

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distance communication and any limitations on the duration of the information’s validity must be disclosed. If the contract is concluded by electronic means, the E-Commerce Directive 2001/31/EC also stipulates information concerning the various technical steps required to conclude the contract, as well as the technical means for identifying and correcting input errors before the order is placed.

(4) Information about legal remedies
The duties to instruct parties on their legal rights represent a fourth category. Such duties require the recipient of information to be informed about his existing rights pertaining *inter alia* to withdrawal and cancellation of the contract, access to an out-of-court complaint and redress mechanism for the consumer and the existence of guarantee funds or other compensation arrangements.

A critical evaluation of information duties is beyond the declared scope of this investigation. Above all, there must be greater coherence between the general information duties and information duties specifically related to distribution forms. In particular, the Financial Services Distance Marketing Directive causes frictions. Although this Directive only applies to distance marketing, Art. 3(2) imposes not only information duties specifically in relation to media suitable for distance marketing, but also more comprehensive general information duties: e.g. the duty to describe the main characteristics of the financial service and the total price, including all related fees, charges and expenses, and all taxes paid via the supplier. This means that enterprises offering distance financial services may be subject to more comprehensive product description requirements than those selling their products by conventional means. This technique of regulation is unconvincing. Since the Financial Services Distance Marketing Directive solely applies to distance marketing, the Directive should contain only those provisions which respond to the specific need for information in distance marketing.

27 Art. 4(1)(d), (e) Distance Marketing Directive 97/7/EC; Art. 3(1)(2)(g) Financial Services Distance Marketing Directive 2002/65/EC.

28 Art. 4(1)(h) Distance Marketing Directive 97/7/EC; Art. 3(1)(2)(e) Financial Services Distance Marketing Directive 2002/65/EC.

29 Art. 10(1)(a) E-Commerce Directive 2000/31/EC.

30 Art. 4 Doorstep Selling Directive 85/577/EEC; Arts. 3(1) and 4, indent 1, in conjunction with Annex I Timeshare Directive 94/47/EC; Arts. 4(1)(f) and 5(1)(2) Distance Marketing Directive 97/7/EC; Arts. 3(3)(a), (c)-(f) and 3(4) Financial Services Distance Marketing Directive 2002/65/EC; Art. 10 Investor Compensation Schemes Directive 97/9/EC; Art. 36 in conjunction with Annex III A.a. 13, 15, 16 Life Assurance Directive 2002/83/EC; Art. 31(1) Third Non-life Insurance Directive 92/49/EEC.

2.3 The time to provide information

In compliance with EC law in general,32 directives regulating the financial services sector differentiate between information which must be supplied before33 or after34 the conclusion of the contract. This distinction concerning the time when information must be provided is of great importance. Whereas precontractual information duties influence the potential client’s decision-making process, i.e. whether to conclude contract in the first place, postcontractual information duties aim to ensure that the client can exercise his contractual rights adequately. The national legislator (and, in the future, the Community legislator as well) should therefore take account of the different protective purposes which underpin the distinction between pre and postcontractual information requirements when setting ‘effective, proportional and dissuasive’ sanctions.

3. The problem of information overload

Increasing the amount of information usually has a counterproductive effect on the decision-making process; a greater amount of information does not necessarily guarantee an informed and therefore better decision.35 If overloaded with information, the average recipient is often incapable of processing information adequately and might therefore make the wrong choice. Consequently, information should always be concise and precise, clear and exact and provided in a ‘succinct’ manner. However, it is only possible to reduce information overload in financial services contracts up to a certain point. The more complex the contract, the more detailed the information on the service has to be in order to make a qualified choice possible.

At present, EC law appears to adopt two strategies in order to combat the problem of information overload.

(1) Reducing information complexity by standardising

32 In particular, precontractual information duties can be found in Art. 3(1) Timeshare Directive 94/47/EC, Arts. 3, 4(1)(a) and 4(2) Package Travel Directive 90/314/EEC, Art. 4(1) Distance Marketing Directive 97/7/EC and Art. 10 E-Commerce Directive 2000/31/EC. Information duties which can still be satisfied following the conclusion of contract are laid down, e.g., in Art. 5 Distance Marketing Directive 97/7/EC and Art. 4(1)(b) Package Travel Directive 90/314/EEC.


The first strategy attempts to reduce information complexity by standardising it. One example for this concept is the Consumer Credit Directive 87/102/EEC, which requires information on the annual effective interest rate as a succinct formula. Standardising information offers the advantage that the recipient has immediate access to all relevant information; the recipient can see immediately the information which is crucial for his decision. On the other hand, one should also consider the possible disadvantages of standardising precontractual information. Unlike contracts for goods, services - in particular financial services - are intangible products constructed via the medium of law. Moreover, financial services contracts are particularly sensitive products, since in their case it is often impossible to draw a clear dividing line between information duties on the one hand and substantive, product-related provisions on the other. From this point of view, reducing complexity by standardising the ‘precontractual stage’ could also infringe party autonomy, because information - or standardised information - about the substance of the service owed may also determine the substance of the contract itself. Therefore, the relationship between precontractual information duties and substantive regulation of financial services contracts should be carefully considered.

Ultimately, the only way of avoiding an unnecessary restriction of product variety is to transform information instead of reducing it. This strategy is mainly recommendable where most of the customers make their ‘purchases’ or ‘sales’ through financial intermediaries - as is usual on the European securities and insurance markets.

(2) Transforming information complexity: The multi-level system in the financial services sector

EC law builds on these market peculiarities. A specific solution is provided in the financial services sector, which is based on a multi-level system of disclosure, information and advice requirements. The most elaborate version at present is found in capital market law.

At the first level, security issuers must publish a detailed technical prospectus containing all required information which ‘is necessary to enable investors and their investment advisers to make an informed assessment of the assets and liabilities, financial position, profits and losses, and prospects of the issuer and of the rights attaching to such securities’. The relevant audience of this information are professional investors and financial intermediaries. The issuer may confine himself to publishing only standard


38 However, according to the Prospectus Directive 2003/71/EC the prospectus is to contain at least a summary ‘conveying the essential characteristics of, and risks associated with, the issuer, any guarantor and the securities . . . To ensure easy access to this information, the summary should be written in non-technical language and normally should not exceed 2 500 words in the language in which the prospectus was originally drawn up’ (recital 21 of the Directive); see further Art. 5(2), Annex I (1) and Annex IV.
information and is not obliged to take the individual investor into account. This kind of ‘market-orientated view’ is particularly reflected in the fact that the issuer is not obliged to provide investors with specific information or advice during the precontractual phase. At the next level, information aimed at the understanding and expectations of professional investors has to be transformed. In this regard, especially the revision of the UCITS Directive 85/611/EEC by the UCITS amending Directive 2001/107/EC has introduced a new prospectus regime. In order to address non-professional investors and their ability to process information, the issuers have to publish - in addition to a full prospectus - a simplified, investor-friendly prospectus which delivers key information about the investment in a clear, concise and understandable way. 39 Whereas the simplified prospectus should always be offered to subscribers before the conclusion of the contract, the full prospectus is to be supplied to subscribers only upon request. 40 Finally, at the third level the investors have to be advised under certain circumstances.

4. Duties to provide advice

In EC law, duties to provide advice were originally drawn up for the investment services sector. 41 They have also been established in Insurance Law by the recent Directive on insurance mediation. 42 Moreover, the possible imposition of a duty to provide advice in relation to consumer credits is currently being considered. 43 Overall, one can already discern some key elements for a future European law on mediation.

4.1 Legal basis for the activity of financial intermediaries

4.1.1 Investment Services Directive (ISD) 2004/39/EC

According to applicable law, the former Directive on investment services 93/22/EC only extended to banks and investment firms that market their own products. ISD 93/22/EC did not apply to mere mediation. Therefore, intermediaries were not permitted to pursue their activities throughout the EU. 44 The new ISD 45 now indicates a new tendency in this regard.


41 Art. 11 ISD 93/22/EEC (see Art. 19 new ISD 2004/39/EC).

42 Art. 12(2), (3) Insurance Mediation Directive 2002/92/EC.


44 See the explanatory memorandum of the Proposal for a new ISD, COM(2002) 625, pp. 28 et seq.

45 ISD 2004/39/EC.
The directive states that investment advice should be recognised as an autonomous financial business in its own right.\textsuperscript{46} Therefore, all entities (including natural persons) providing investment advice will be subject to the sole supervision of the authority in their home state. They will be able to conduct business on a cross-border basis with clients throughout the EU.\textsuperscript{47}

4.1.2 Insurance Mediation Directive 2002/92/EC

The Directive on insurance mediation already introduced a similar provision allowing insurance intermediaries to pursue their activities and provide their services freely throughout the EU. The scope of the Directive on insurance mediation extends to ‘each activity of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contracts or of assisting in the administration and performance of such contracts’.\textsuperscript{48} On the other hand, there is no insurance mediation if these activities are undertaken by an insurance company or an employee of an insurance company acting under the responsibility of the insurance undertaking.\textsuperscript{49}


In the future, the Commission also intends to create uniform framework conditions for the credit-granting facility and brokering of consumer credit in Europe by means of the new Consumer Credit Directive. This proposal aims for maximum harmonisation and draws the scope of the Directive rather broadly by means of the term ‘credit intermediary’ in Art. 2(2). It includes all agents who are delegated to sign on behalf of the creditor, credit brokers who are self-employed working under their own names and - in special cases - suppliers of goods or providers of services.

4.2 Professional qualification of financial intermediaries

EC law secures the professional qualification of financial intermediaries by means of a licensing and supervisory procedure: investment firms must satisfy minimum standards in order to be admitted, during the course of which professional qualifications and expertise are also tested.\textsuperscript{50}

In the insurance sector, professional qualification will be ensured by establishing national registers of insurance intermediaries throughout the EU and making registration a

\textsuperscript{46} Recital No. 3 and Annex I, Section A (5) ISD 2004/39/EC.
\textsuperscript{47} See the explanatory memorandum of the ISD Proposal, COM(2002) 625, p. 29.
\textsuperscript{48} Art. 2(3)(1) Insurance Mediation Directive 2002/92/EC.
\textsuperscript{49} Art. 2(3)(2) Insurance Mediation Directive 2002/92/EC.
\textsuperscript{50} Art. 9 ISD 2004/39/EC.
necessary condition for conducting business.\(^{51}\)

Finally, according to the Proposal for a new Directive on Consumer Credit, Member States must ensure that creditors and credit intermediaries apply for registration, and that their activities are subject to inspection or supervision by an institution or official body.\(^{52}\) The examination ensures that intermediaries satisfy the requirements pertaining to information and advice imposed by the Directive.\(^{53}\)

4.3 Duty to avoid and provide information about conflicts of interests

According to Art. 18 ISD 2004/39/EC, conflicts of interests are to be avoided. Whereas the former ISD did not have any explicit requirements to disclose existing or potential conflicts of interests to clients,\(^{54}\) the new ISD relies heavily on disclosure of conflicts. Art. 12(1) of the Insurance Mediation Directive also imposes extensive information duties on the intermediary to inform the client whether he is advised on the basis of a fair analysis or whether the intermediary is under a contractual obligation to conduct insurance mediation business exclusively with one or more insurance undertakings. A similar disclosure requirement is currently being planned with regard to credit intermediaries. According to Art. 29(a) of the Proposal for a Directive on Consumer Credit, the credit intermediary ‘indicates in an advertising documentation intended for clients the extent of his powers, in particular whether he works exclusively with one or more creditors or as an independent broker’.

4.4 The standard of advice: Best advice or adequate advice?

EC law has not yet clarified the standard of advice expected. In accordance with the rule ‘know your customer’, Art. 19(4) ISD requires that an investment firm, when providing investment advice or portfolio management, ‘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’. On this basis, the investment firm must conduct its business activities in ‘the best interests of its clients’ (Art. 19 (1)).

In contrast to this provision, the Directive on insurance mediation does not require

\(^{51}\) According to Art. 3(3) in connection with Art. 4 Insurance Mediation Directive 2002/92/EC, registration requires that intermediaries possess appropriate knowledge and ability, as determined by the home Member State of the intermediary.


\(^{54}\) See Art. 11(1), indent 6 ISD 93/22/EEC.
‘best advice’, but ‘adequate advice’. The standard of advice depends on the actual conduct of the intermediary. If the insurance intermediary informs the customer that he is giving his advice on the basis of a fair analysis, he is obliged, according to Art. 12(2), ‘to give that advice on the basis of a sufficiently large number of insurance contracts available on the market, to enable him to make a recommendation, in accordance with professional criteria, regarding which insurance contract would be adequate to meet the customer’s needs’. On the other hand, if an intermediary acts on behalf of one or more insurance undertakings, he is only obliged to recommend an insurance contract which is adequate for the client on the basis of the product lines which he is mediating.

Finally, the Proposal for a Consumer Credit Directive states that ‘the creditor or the credit intermediary shall seek to establish, among the credit agreements they usually offer or arrange, the most appropriate type and total amount of credit taking into account the financial situation of the consumer, the advantages and disadvantages associated with the product proposed, and the purpose of the credit’. This phrasing suggests that the intermediary does not have to provide an ‘adequate advice’ but to recommend the best products sold or mediated by him.

4.5 Documenting the advice

An important question is whether the advice is to be recorded in a protocol. Advice protocols can be useful in two respects. On the one hand, it can increase the quality of the advice by reproducing its contents. This ensures that important criteria for the decision are not overlooked. On the other hand, the protocol can sort out any evidential problems where it is alleged that the duties to provide advice have been infringed.

Up to now, directives have specified different documentation requirements. The ISD does not require any documentation of individual advice. However, Art. 12(3) of the

55. For details see Ebers, supra note 31. This is also a result of the genesis of the Directive. During the legislative process, other formulations were discussed - inter alia the principle of ‘best advice’ (cf. amendment 41 in the report of rapporteur L. Berenguer Fuster for the Committee on Economic and Monetary Affairs of the European Parliament of 29 March 2001; PE 295.997). In this respect, the Insurance Mediation Directive therefore lays down lesser requirements than the ISD.

56. Emphasis added.


59. Whether this legal situation will change owing to the new ISD is uncertain. The Committee of European Securities Regulators (CESR), which will exercise decisive influence over the ‘technical rules’ owing to the new comitology procedure, has already published conduct-of-business rules for retail investors and for the inter-professional market; cf. CESR, A European Regime of Investor Protection: The Harmonization of Conduct of Business Rules, April 2002 (CESR/01-014d). According to these rules, the investment firms will at least keep records of investor profiles (Rule 68). Where an investment firm receives an order which might be considered unsuitable for the customer, the ‘investment firm may transmit or execute the order only if the customer nonetheless confirms his intention to proceed with the transaction in writing or by telephone and recorded, and provided that such confirmation contains an explicit reference to the warning received’ (Rule 75).
Insurance Mediation Directive states that, prior to the conclusion of the contract, the intermediary must specify in writing the requirements and needs of the customer and explain why he has given the advice in question to the customer. Art. 6(2) of the Proposal for a New Consumer Credit Directive requires that the consumer receive all information either on paper or another durable medium before the conclusion of the credit agreement. However, it is not stipulated in detail whether the wishes and needs of the customer must be recorded as well.

4.6 Open questions

4.6.1 The unsolved triangular relationship: Financial services provider - financial intermediary - customer

At the European level, it has not been possible to reach any consensus on liability for the conduct of a third party. Such efforts have already failed in the run-up to the enactment of the Commercial Agents Directive 86/653/EEC, and the issue was not seriously addressed when enacting the Insurance Mediation Directive in the interests of effectively transposing the Financial Services Action Plan.60

EC law therefore pursues a concept of liability which mainly concentrates on the relationship between the financial intermediary and the customer. The question to what extent the provider of financial services is responsible for the conduct of the intermediary is largely ignored. This development clearly manifests itself in the Insurance Mediation Directive. In order to avoid the question about responsibility, the Directive lays down independent duties to inform and advise which not only brokers but all intermediaries (i.e. agents who represent one or several companies) must fulfil in relation to the policy-holder before the conclusion of contract.61 If the intermediary breaches this duty, then, according to the conception of the Directive, the intermediary himself and not the insurance company is liable for the loss caused thereby. In order to ensure that the policy holder is protected from the potential insolvency of the intermediary, the latter is also obliged to take out a professional indemnity insurance.62

The consequences this entails becomes clear with regard to German law. According to the traditional understanding, the agent (of one or several companies) differs from the broker because, as the representative of the insurer, he merely acts as a person employed to perform


61 Art. 12(1)-(3) Insurance Mediation Directive 2002/92/EC. The only exception applies to employees of an insurance company, who were expressly excluded from the scope of the Directive; Art. 2(3) Insurance Mediation Directive 2002/92/EC.

62 According to Art. 4(3) Insurance Mediation Directive 2002/92/EC, the intermediary must take out professional indemnity insurance (alternatively, a comparable guarantee) covering against liability arising from professional negligence, for at least EUR 1,000,000 applying to each claim and in aggregate EUR 1,500,000 per year for all claims. The intermediary can only be released from the obligation to take out professional indemnity insurance if such insurance or guarantee is already provided by an insurance undertaking on whose behalf the intermediary is acting or for which the insurance or reinsurance intermediary is empowered to act or such undertaking has taken on full responsibility for the intermediary’s actions.
the obligation of the insurance company (Erfüllungsgehilfe; § 278 BGB). Therefore, according to the case law of the Federal Court of Justice (Bundesgerichtshof), the insurance agent has not been subjected to any of his own duties to inform or advise. Whereas the insurance broker is obliged to issue the best advice to the customer and is generally liable himself in the case of incorrect advice, the agent must simply pass on general information in the name of the insurance company (without having to provide advice). If the customer is incorrectly informed or advised by an insurance agent, then, as a rule, the agent is not liable but only the insurance company.

This situation will change once the transposition period has ended on 15 January 2005 at the latest. Since the Insurance Mediation Directive provides for separate information duties for the intermediary, the traditional distinction between the insurance broker and the insurance agent in Germany will have to be abandoned. The extent to which future EC legislation will follow the lead of the Insurance Mediation Directive ultimately depends on whether it is possible to achieve a European consensus about the liability for the conduct of third parties.

4.6.2 Execution only: Dispensing with information and advice

Finally, the question must be addressed as to whether dispensing with customer information and advice is permissible.

All information - and, in particular, advice which is tailored to the individual needs of the customer - is connected to higher costs for the provider. Since the beginning of the 1990s, a number of discount enterprises have been set up which aim to provide their services under especially favourable rates of commission but without the duty to provide advice. Such companies merely offer to carry out the customer’s order (‘execution only’) and refuse to provide any further advice. In this respect it must be clarified whether and, if so, to what extent the customer can waive his rights to information and advice under EC law in order to take advantage of a discount transaction. EC law now appears to have found an answer at least in the case of services relating to securities. The new ISD provides an express exception for execution-only dealing: Insofar as investment firms are providing investment services that only consist of execution and/or the reception and transmission of client orders with or without ancillary services to provide those investment services to their clients, the investment firms can dispense with collecting required information under certain circumstances in accordance with the ‘know your customer’ rule.

It remains to be seen to what extent this solution will also be accepted in other financial services, particularly in the field of insurance policies.

5. Outlook

Concerning this and the following, see Annemarie Matusche-Beckmann, ‘Probleme bei der Abgrenzung des Versicherungsagenten vom Versicherungsmakler’, Versicherungsrecht (1995), 1391 et seq. (with further references to case law) as well as Peter Reiff, ‘Die Haftung des Versicherers für Versicherungsvermittler’, Recht und Schaden (1998), 89 et seq.

Art. 19(6) ISD 2004/39/EC.
This brief survey of the *acquis communautaire* has illustrated that information duties anchored in the area of financial services to a large extent can be classified under the existing EC law. Nevertheless, peculiarities in the financial services sector exist since these contracts display increased complexity in comparison to the usual contract for the sale of goods and the problem of information overload is solved differently from other contracts.

The focal point is not the reduction of information by standardisation but the principle of transforming information by the financial intermediary providing advice. In this respect as well, EC law appears to have developed key elements for a future system of financial intermediaries in Europe. However, some time will pass before these elements make up a coherent system.