

Ref: Distance marketing of consumer financial services – review of EU rules

Link to consultation: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13048-Distance-marketing-of-consumer-financial-services-review-of-EU-rules_en

BETTER FINANCE response to the Consultation on Distance marketing of consumer financial services

About BETTER FINANCE

BETTER FINANCE, the European Federation of Investors and Financial Services Users, is the public interest non-governmental organisation advocating and defending the interests of European citizens as financial services users at the European level to lawmakers and the public in order to promote research, information and training on investments, savings and personal finances. It is the one and only European-level organisation solely dedicated to the representation of individual investors, savers and other financial services users.

BETTER FINANCE acts as an independent financial expertise and advocacy centre to the direct benefit of European financial services users. Since the BETTER FINANCE constituency includes individual and small shareholders, fund and retail investors, savers, pension fund participants, life insurance policy holders, borrowers, and other stakeholders who are independent from the financial industry, it has the best interests of all European citizens at heart. As such its activities are supported by the European Union since 2012.

Introduction

Directive 2002/65/EC on Distance Marketing of Consumer Financial Services ('Directive') lays down rules on three key areas (pre-contractual information; right of withdrawal; ban of unsolicited services) concerning the distance marketing of consumer financial services. Any service of a banking, credit, mortgage, insurance, personal pension, investment or payment nature falls under the scope of Directive whenever the financial service is purchased at a distance.¹

The Directive aims at promoting the free movement of financial services in the single market by harmonising consumer protection rules governing this area. The Directive sets out a list of information items concerning the financial service that the consumer should receive before the distance contract is concluded.²

The Directive applies horizontally across all EU legislation in the field of financial services, as long as the product-specific legislation (e.g. Consumer Credit Directive or Mortgage Credit Directive) or horizontal legislation (e.g. the General Data Protection Regulation) does not provide specific and more detailed rules. In this regard, the Directive is considered to contain a 'safety net', in the sense that in the absence of present or future rules regulating the issues covered by the Directive, the latter will apply. Whereas the Directive had

¹ As reported by the EU Commission in the consultation webpage: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13048-Distance-marketing-of-consumer-financial-services-review-of-EU-rules_en

² Ibid.

clear value added when it entered into force, many of its substantial elements have been taken over by sectoral legislation that has been adopted afterwards, e.g. in the context and aftermath of the financial crisis.³

In the 2017 EC Consumer Finance Action Plan, the Commission undertook to monitor the distance selling market of retail financial services in order to identify the potential consumer risks and business opportunities in this market and, on that basis, decide on the need to amend distance-selling requirements. In this context, a behavioural study was conducted: Behavioural Study on the digitalisation of the marketing and distance selling of retail financial services. On the basis of the Commission's 2019 Work Programme, the Commission launched an evaluation of the Directive. The evaluation found that the Directive has been partially effective in increasing consumer protection and is still of limited effectiveness in promoting the cross border delivery of financial services. While the Directive's objectives are still relevant, it is unclear to what extent it contributes to address the current challenges consumers face when purchasing a financial service at distance i.e. online or off premises. In particular, it found that digitalisation exacerbated some aspects not fully addressed by the Directive.⁴

The Adjusted Commission 2020 Work Programme listed the Directive as subject to a "regulatory fitness" exercise. In this context, the Commission will carry out an impact assessment to see whether and if so, how, to revise the Directive.⁵

This public consultation is an opportunity for consumers, retail financial services professionals, national authorities and any other interested stakeholders to give their opinions on how they think the Directive is functioning. The results of this consultation will help the Commission when drafting the Impact Assessment and assessing the Directive.⁶

The consultation consists of two short questionnaires. The first (set out in Part I) is aimed at the general public. The second (set out in Part II) is for other stakeholders such as associations, authorities and financial services providers.⁷

The public consultation will be available in all 24 official languages of the EU. Shortly after the close of the consultation, the Commission will publish a summary of the contributions received.⁸

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

BETTER FINANCE Feedback

Part II: Technical questions on the specific value added of the provisions of the Directive compared to other legal acts

This part is aimed at obtaining replies from experts and/or practitioners in the field (financial services providers, associations, authorities, academics). If you are a member of the general public, replies to Part I are enough and you do not need to reply to the forthcoming questions.

1. Considering the overlap with sector specific legislation, based on your experience, how often are the articles on pre-contractual information stemming from the Directive applied or enforced with regard to the following financial services?

	On a daily basis	Often	Rarely	Never
Consumer credits (including credit cards)	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Mortgages	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Insurance products (e.g. car, home insurance etc.)	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Payment accounts	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Investment products (e.g. shares, bonds or funds)	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Payment services (such as money transfer services)	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Personal pension products	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Please explain how the articles on pre-contractual information stemming from the Directive are still applied or enforced, providing the situation when it was applied or enforced:

First, we would like to underline that it is difficult to find a unilateral response when it comes to identifying overlaps of the distance marketing directive and the horizontal legislation due to specific differences of the implementation of EU directives and the application of national legislations. Therefore, differences among member states may occur in terms of overlaps and effectiveness of the Distance Marketing Directive. However, these differences do not undermine the usefulness of the Directive and the advantages in terms of consumer protection if the Directive will be updated. BETTER FINANCE provides examples and evidence gathered from its national member organisations located in Belgium, Germany, the Czech Republic and Spain.

The Articles of the Directive on Distance Marketing of Financial Services may be applied in case of problematic products sold by distance (over the Internet or by phone). For example, this takes place in case of cross-selling when consumer credit products mortgages which are sold to consumer together with other products such as payment protection insurance. Cross-selling of financial products can result in the purchase of products that consumers do not necessarily want or need and that entail additional fees and charges. Payment protection insurance may exclude or impose restrictive conditions on particular claim (e.g., many clients in the Czech Republic wrongly presume that maternity leave is covered as sickness by this insurance). Another example of miss-selling is the cross-selling of credit cards when the client makes a request for a credit card, unknowingly she/he is purchasing other products linked with the credit card (i.e., credit card's credit is one of the most expensive types of credit).

In the case of Belgium, all financial service providers follow the directive and are monitored by FSMA.

Looking at Germany, the directive has strongly been enforced on online distribution of insurance products during the last decade. Recent circumstances as the pandemic have entailed an additional push in the application of the Directive.

2. Considering the overlap with sector specific legislation, based on your experience, how often are the articles on the right of withdrawal stemming from the Directive applied or enforced with regard to the following financial services?

	On a daily basis	Often	Rarely	Never
Consumer credits (including credit cards)	<input checked="" type="checkbox"/>			
Mortgages			<input checked="" type="checkbox"/>	
Insurance products (e.g. car, home insurance etc.)		<input checked="" type="checkbox"/>		
Payment accounts			<input checked="" type="checkbox"/>	
Payment services (such as money transfer services)			<input checked="" type="checkbox"/>	
Personal pension products		<input checked="" type="checkbox"/>		

Please explain how the right of withdrawal stemming from the Directive is still applied or enforced, providing the situation when it was applied or enforced:

Our Belgian member organisation confirm that that there are relatively few cases for enforcing right of withdrawal from long-term products. Short-term loans and roll over credit cards are much more subject to the article on the right of withdrawal.

On the contrary, our German member consider that, in Germany, the directive has strongly been enforced in the area of online distribution of insurance during the last decade.

Finally, according to the experience of our Spanish Member, the right of withdrawal seems to rarely overlap with sector specific legislation for the product categories.

3. Considering the overlap with sector specific legislation, based on your experience, how often is the article on unsolicited services of the Directive applied or enforced with regard to the following financial services?

	On a daily basis	Often	Rarely	Never
Consumer credits (including credit cards)		<input checked="" type="checkbox"/>		
Mortgages			<input checked="" type="checkbox"/>	
Insurance products (e.g. car, home insurance etc.)		<input checked="" type="checkbox"/>		
Payment accounts		<input checked="" type="checkbox"/>		
Investment products (e.g. shares, bonds or funds)		<input checked="" type="checkbox"/>		
Payment services (such as money transfer services)			<input checked="" type="checkbox"/>	
Personal pension products		<input checked="" type="checkbox"/>		

Please explain how the article on unsolicited services stemming from the Directive is still applied or enforced, providing the situation when it was applied or enforced:

In the case of Belgium, store credit (instead of financial institution) is more often the ground for contention. A purchase of goods may result in a credit line, insurance contract, automatic payment, etc, which often turn out to be misunderstood or unsolicited.

On the contrary, in the Spain it has been observed that the article on unsolicited services seems to overlap on daily basis with the horizontal specific legislations.

4. Considering the overlap with sector specific legislation, based on your experience, how often is the article on unsolicited communication of the Directive applied or enforced with regard to the following financial services?

	On a daily basis	Often	Rarely	Never
Consumer credits (including credit cards)			X	
Mortgages			X	
Insurance products (e.g. car, home insurance etc.)		X		
Payment accounts			X	
Investment products (e.g. shares, bonds or funds)			X	
Personal pension products		X		

Please explain how the article on unsolicited communication established by the Directive is still applied or enforced, providing the situation when it was applied or enforced:

According to our Belgian Member, far less unsolicited publicity is dispersed, though still present. Hence rarely, rather than never.

On the contrary considering Germany, the directive seems to be enforced more on a regular basis. Looking at the German market of pension products, these products are often linked with additional insurances like disability caused by illness (not by accidents). In consequence premiums are higher and the bundling of these two classes of risk coverage entails more complex and multi-layered contracts which is not in the interest of the consumers.

As before, In Spain it has been observed that there are more overlaps with specific legislation compared with the other member states.

5a. How useful is the ‘safety net’ feature of the Directive (i.e. the application of the Directive in those instances when new products appear on the market and are not yet subject to specific regulation and when the product specific legislation does not cover, or does not cover sufficiently, the rules established by the Directive) for the following financial services?

	Very useful	Useful	Not useful	Irrelevant
Consumer credits (including credit cards)	X			

Mortgages		X		
Insurance products (e.g. car, home insurance etc.)	X			
Payment accounts	X			
Investment products (e.g. shares, bonds or funds)		X		
Payment services (such as money transfer services)	X			
Personal pension products	X			

Please explain

5b. Can you provide concrete examples when you applied the rules of the Directive since they went beyond the rules covered by specific financial services legislation (e.g. the right of withdrawal for payment accounts contracted at a distance)?

As mentioned above, these rules seem to be applied in case of purchase of product resulting in automatic opening of an account, credit or insurance. However, new service providers or some type of products may escape national regulation; thus a European wide umbrella regulation is required.

However, in the case of Insurance based pension products in Germany the application of the Safety net feature seems to be irrelevant as the Insurance Distribution Directive (IDD) already covers these aspects.

5c. Can you provide concrete examples when you applied the rules of the Directive for products which are exempt from the product specific legislation (e.g. payday loans, which are a type of credit agreement, contracted at a distance and are below EUR 200)?

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5d. Can you provide concrete examples when you applied the rules of the Directive for new products that appeared on the market before product-specific legislation was enacted (e.g. virtual currencies bought at a distance)?

Our Belgian member confirms that rules of the Directive apply for certain new products such as eCurrencies and unregulated investment loans which appeared on the market before product specific legislation was enacted.

6. Has the application and enforcement of the articles of the Directive progressively diminished due to the entry into application of subsequent product or horizontal legislation?

- × **Yes**
- No
 - Don't know

Please explain

According to our Belgian Member, as subsequent product or horizontal legislation came into force, it seems that less deviation might occur. In Belgium, the twin peaks approach seems to have worked well.

7. Would the repeal of the Directive lead to:

	Yes	No	Don't know
Regulatory gaps leading to an unlevel playing field (e.g. undue competitive advantage for financial providers in Member States that would provide a less protective framework)	X		
Lower consumer protection in those areas which are not as yet covered by product specific or horizontal legislation (e.g. pre-contractual information for consumer loans below EUR 200)	X		
Increased difficulties for cross-border trade	X		
A reduction of administrative burdens for Member States (e.g. reduction of costs for supervision of the obligations stemming from the Directive)		X	
A reduction of regulatory costs for financial service providers (e.g. less compliance costs related to pre-contractual information obligations stemming from the Directive)		X	
None of the above since in practice the Directive scope of application has lost most of its relevance		X	

Please explain

From general point of view, the repeal of the directive could bring an increase of regulatory costs as local regulations diverge, through increased administrative burdens. The purpose of creating a level playing field is to minimise divergence and therefore burdens/costs, while offering maximum protection to financial services users.

However, according to our Czech member, the repeal of the Distance Marketing directive would not lead to strong regulatory gaps across member states and an increase of difficulties for cross boarder trade. Also, due to the specificities of the Czech market, the repeal of the directive could reduce regulatory costs of financial service providers.

8. The Directive bans unsolicited services and communications from suppliers when such services or communications lack the consumer's consent. However, over time, through the introduction of product specific and horizontal specific legislation, in particular Directive 2002/58/EC (e-Privacy), Directive 2005/29/EC (unfair business-to-consumer practices) and Regulation (EU) 2016/679 (General Data Protection Regulation), the bans established by the Directive have lost their relevance. Should the revision of the Directive lead to the repeal of the current articles (Articles 9 & 10) concerning unsolicited supplies and unsolicited communications?

- Yes
- No**
- Don't know

Please explain

While it may appear that these articles lost relevance, **they continue to offer a safeguard for new instruments that are not covered by national law.** In contrast, the language of the articles may benefit from an update to encompass such new products & practices. Thus, this update would clarify that these are articles are meant to broaden the scope in order to address those areas that are missing in the product specific language.

In addition, despite all the existing horizontal legislations mentioned above the industry always seeks to find new possibilities for implementing unsolicited services and communications by their distribution channels. According to our German member, online distribution is in an over-arching phase of full “take off”. That is why the supervisory authorities at the European and national level should have a constant and close look on all distribution activities by an empirical research program (following to the new “value for money” supervisory approach) enhancing pressure on the product providers and distributors by using the strict application of the “product oversight and governance requirements” (like article 25 IDD).