

The Consumer Voice in Europe


DISTANCE MARKETING OF FINANCIAL SERVICES

BEUC Position Paper



Contact: Anna Martin– financialservices@beuc.eu

BUREAU EUROPÉEN DES UNIONS DE CONSOMMATEURS AISBL | DER EUROPÄISCHE VERBRAUCHERVERBAND
Rue d'Arlon 80, B-1040 Brussels • Tel. +32 (0)2 743 15 90 • www.twitter.com/beuc • www.beuc.eu
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Why it matters to consumers

With BigTech companies and newcomers (FinTechs) entering financial markets, the sale and marketing of financial service products, such as consumer credit, insurance and current accounts, is increasingly moving online and new products constantly appear on the market, promoted through different channels such as social media. At the same time, traditional distance marketing techniques such as cold calling, are still used to lure the most vulnerable consumers, such as the elderly, into purchasing complex or costly financial service products. Consumers need an updated framework that protects them, no matter which financial product they are buying. This requires a strong consumer protection framework for financial services which is fit for the digital age.

Summary

The European Commission has proposed to repeal the existing Distance Marketing of Financial Services Directive (DMFSD) and to instead integrate relevant, updated provisions into the Consumer Rights Directive (CRD).

BEUC welcomes this proposal as it takes into account the new challenges consumers face when engaging with firms promoting and selling financial products digitally but suggests several improvements. These include in particular:

- **Extending the scope** of the proposal beyond distance contracts so as to ensure that this new horizontal safety net also applies to all financial services offered off-premises.
- **Maintaining all relevant provisions of the DMFSD** as regards for instance the right of withdrawal for insurance and pension products.
- Ensuring that the **level of harmonisation does not lead to reduced consumer protection** at national level.
- **Adding provisions on comparison tools, robo-advisors and advertising** in the financial services chapter, particularly when it comes to the use of social media to promote high-risk products such as crypto assets.
- **Moving the proposed provisions on the withdrawal button** to the general chapter of the CRD to ensure that consumers can benefit from them for all distance contracts for the provision of goods and services falling in the scope of the CRD and **adding a cancellation button for all goods and services.**

Introduction

With BigTech companies and newcomers (FinTechs) entering financial markets, new financial products are coming onto the market at an increased pace and are increasingly offered online.

The current crisis with rising inflation and high volatility on financial markets highlights the importance of a horizontal protection framework for financial products not yet covered by product-specific legislation, such as buy-now-pay-later credits, peer-to-peer lending and investment in cryptoassets. Cryptocurrencies have experienced a sharp decline in value in 2022, with consumers often losing several thousand euros. Buy-Now-Pay-Later schemes have attracted many vulnerable consumers trying to cope with a steep increase in prices for energy, food and other essential needs. This calls for high levels of protection in horizontal legislation to provide effective safeguards for new financial products entering the market.

While some of these products might soon be covered by product-specific legislation (e.g. Consumer Credit Directive, Markets in Crypto-Assets Regulation), others might be left out of their scope and new products could exploit loopholes left in product-specific legislation.

A horizontal safety net containing a general set of consumer rights and protections remains therefore highly relevant. The Commission proposal to integrate and update the Distance Marketing of Financial Services Directive (DMFSD) within the Consumer Rights Directive (CRD) is thus a very good starting point. Some parts of the CRD will apply to financial services and in addition a dedicated chapter on financial services is foreseen.

This paper outlines BEUC's views on how to further improve this new proposal. Chapter I analyses the scope of the proposal and explains why it must be extended. Chapter II compares the DMFSD with the new proposal to ensure that none of the relevant provisions are lost. Chapter III looks at possible ways to improve the financial services chapter, and Chapter IV proposes moving the withdrawal button to the general chapter to extend its application and creating a cancellation button for all goods and services.

1. Wider scope

The Commission has proposed that the CRD would act as the horizontal safety net in the absence of sector-specific regulation (*lex specialis* prevails). This chapter explains, why the scope must be extended to all off-premises contracts.

The CRD applies to most consumer contracts, including distance, on and off premises contracts. However, the Commission has proposed that for financial services the scope is limited to distance contracts.

The scope must be extended to all off-premises contracts for financial services. Consumers are in a particularly vulnerable situation as regards off-premises contracts which give rise to a considerable number of complaints. In Germany, complaints about doorstep sales of financial services accounted for 12% of overall complaints received by the network of consumer associations (Verbraucherzentralen). Examples of doorstep selling include credit cards sold in shopping centres or at airports; group insurance policies sold to individual consumers via associations they are part of; and classic doorstep selling which includes

the sale of goods and services in a bundled offer with a credit agreement but also insurance/investment products sold by “financial advisors” at the consumer’s home. These situations are similar to cold calling, where consumers are not prepared for purchasing a financial service and thus in a more vulnerable situation.

2. Keeping all elements of consumer protection

The Commission proposal generally fulfils the objective of integrating the existing provisions of the DMFSD into the CRD without lowering the level of consumer protection.

However, some elements have been lost during the shift to the CRD and must be reintroduced. In addition, the existing DMFSD allows Member States to adopt a higher level of consumer protection than the minimum prescribed by the Directive. This possibility must be maintained for financial services since national market conditions might require targeted solutions.

a. Missing elements from the DMFSD in the financial services chapter

Some elements on pre-contractual information and the right of withdrawal present in the DMFSD have not been included in the new Commission proposal.

Pre-contractual information

The new proposal foresees an updated list of pre-contractual information which brings several improvements (e.g. contact information, information whether the price has been personalised, description of the risk-reward profile and information about environmental and social objectives).

However, some provisions have been deleted which could still be relevant for the consumer:

- The contact of the representative of the trader in the consumer’s Member State of residence. This can facilitate communication between the consumer and the trader and, for instance, avoid language barriers (*former Article 3(1) b*).
- Information on guarantee funds or compensation arrangements (*former Article 3(4) b*). This information can be important where guarantee funds go beyond the minimum legal requirements, such as for overnight deposit accounts or insolvency protection of insurance policies.

The obligation to ensure consistency between the information provided in pre-contractual information and the contract itself must be reintroduced and strengthened (*Article 3(4)*). As shown in an anonymous shopping exercise by BEUC’s Austrian member Arbeiterkammer, pre-contractual information is often inconsistent in itself and with the contract signed thereafter.¹ To allow consumers to make an informed decision based on contractual information, this information must be defined as an integral part of the contract to guarantee that the conditions included in it will apply in practice.

¹ https://www.arbeiterkammer.at/service/presse/Praxistest_Beratung_von_Konsumkredit_in_Wien_01.pdf

The consumer must be entitled to receive upon request pre-contractual information on paper (*Article 5 (3)*). This is especially important for consumers using other forms of distance communication than the internet (e.g. telephone or post²) This right should therefore be kept, at least “upon request”.

On sanctions, Article 11 of the current DMFSD foresees that Member States “may provide for this purpose in particular that the consumer may cancel the contract at any time, free of charge and without penalty.” This is an adequate sanctioning mechanism to compensate for the failure to provide complete pre-contractual information and should be thus re-introduced via Article 16a.

Right of withdrawal

The Commission proposal rightly maintains the existing provisions of the current DMFSD on the right of withdrawal applying to financial services.

Nevertheless some elements have also been deleted. While for most life insurance, Article 186 of Solvency II Directive now applies as regards cancellation of contracts, for personal pension products no sector-specific legislation applies. Yet, the current Commission proposal to update Solvency II suggests a wider scope exemption for smaller undertakings. To ensure that the current rule offering a prolonged right of withdrawal of 30 days continues to apply for personal pension products and life insurance offered by smaller undertakings, this provision (*of the former Article 6(1)*) must be reintroduced.

Article 7 (2) of the current DMFSD foresees that “Member States may provide that the consumer cannot be required to pay any amount when withdrawing from an insurance contract.” This provision must be maintained as it is an effective way to enable consumers to use their right of withdrawal. As shown in a case sanctioned by the French Prudential Supervision and Resolution Authority, consumers are still pressured into insurance contracts over the phone. In the case in question (French insurance distributor SGP), contracts were concluded on average after 4 minutes and 44 seconds which does not allow consumers to be adequately informed about the contractual conditions and different insurance options. The commercial nature of the call was not systemically communicated by the salesperson and consumers were told that the decision to sign the contract was not final, based on the fact that no premium was payable during the first month.³

b. Possibilities for Member States to require higher levels of consumer protection

The DMFSD gave Member States the possibility to go beyond the level of consumer protection established at EU level by introducing national provisions. Several Member States have used this option, which means that the Commission proposal to move now to maximum harmonisation would reduce consumer protection in several Member States. For example, Article 16a on pre-contractual information foresees in its second paragraph some rules on telephone communication. In France, since April 2022, there is new national legislation on phone calls from insurers and insurance intermediaries which France should

² According to the Commission impact assessment (p. 105), out of all distance contracts, 26% are concluded over the phone and 10% by post.

³ <https://acpr.banque-france.fr/sites/default/files/media/2018/03/12/20180312-sanction-sgp.pdf>

be able to maintain.⁴ In Luxembourg, unsolicited commercial communication by phone is forbidden unless the consumer previously agrees to it. These examples show that full harmonisation at EU level in the area of financial services would harm consumers if this was at the expense of higher protection standards at national level. Member States must be able to maintain such national rules. In addition, rules at EU level should be strengthened to reinforce the level of consumer protection throughout the EU's Single Market.

Moreover, the current DMFSD foresees explicitly several situations where Member States can introduce more stringent provisions:

Pre-contractual information

The current DMFSD allows Member States to maintain and introduce more stringent provisions on precontractual information (*former Art. 4*). This possibility was used for instance to require that consumers receive information in the national language, as foreseen for example in Bulgaria and Portugal⁵, and should thus be maintained.

Right of reflection

Several Member States currently give consumers a right of reflection, in addition to a right of withdrawal,. This right allows consumers to reflect whether to sign a contract before signing it. Article 6 (3) of the DMFSD explicitly allows Member States to introduce such a right of reflection. This provision should be maintained, as a right of reflection gives consumers several additional benefits.

As noted in the Commission's Evaluation Study on the Distance Marketing of Financial Services Directive⁶, behavioural studies show that the right of withdrawal may not be sufficient to protect consumers from unwanted contracts (e.g. because of status quo bias, loss aversion and regret avoidance). Consumers will be better protected if there is at the same time an "opt-in" approach, *i.e.* they can decide if they want to sign the contract after a cooling off period.

c. Application of Article 27 on inertia selling

Article 27 on inertia selling should also apply to financial services to safeguard the current level of protection.

The DMFSD contained an article on unsolicited communications (Article 9) which has been replaced via the Unfair Commercial Practices Directive (as an amendment to the DMFSD) by an article on inertia selling containing similar wording as Article 27 of the CRD on inertia selling. As the DMFSD will be repealed, this new wording as amended in the DMFSD via the UCPD will be repealed, too. To safeguard these provisions, Article 27 of the CRD should be added to the list of articles applying to financial services. Examples of inertia selling in financial services include personalised credit cards (or deferred debit cards) sent to the consumer without prior request and unsolicited increases of an overdraft facility.

⁴ <https://www.quechoisir.org/billet-du-president-demarchage-en-assurance-victoire-contre-les-pratiques-toxiques-n99172/>; <https://www.quechoisir.org/billet-du-president-demarchage-en-assurance-une-directive-europeenne-cheval-de-troie-du-retour-en-force-des-pratiques-toxiques-n102108/>

⁵ Evaluation Study, p.28.

⁶ Evaluation study, p. 77.

3. Further improvements

The Commission proposal introduces into the Consumer Rights Directive a specific chapter dedicated to financial services. This chapter includes rules on pre-contractual information, the right of withdrawal, an obligation to provide adequate explanations on financial products and new protections against so-called “dark patterns” (using an online interface to make it difficult for consumers to make free, autonomous and informed decisions or choices). BEUC suggests reinforcing the article on adequate explanations and in addition introducing rules on comparison tools and robo-advisors, as well as on advertising.

a. Reinforcing adequate explanation rules

The Commission proposal foresees that consumers receive an adequate explanation on the proposed financial services contract. While the proposal itself is good, the timing of when the consumer receives this explanation (e.g. one day ahead, as foreseen for pre-contractual information), and how the explanation is documented, must be clarified to ensure sound enforcement of the provision. The European Parliament made several proposals in this regard in the framework of negotiations on the Consumer Credit Directive which could serve as a blueprint.⁷ The proposal must also clarify that the rules on adequate explanation apply to all financial services, whereas the current proposal (recital 13) indicates that this provision should not apply to financial services for which sector-specific legislation includes rules on information to be provided. This rule shall be narrowed down to sector-specific legislation where rules on adequate explanations are included.

b. Comparison tools and robo-advisors

Well-designed comparison tools can help consumers to compare offers. For instance, BEUC’s French member UFC Que Choisir has a comparison tool covering payment protection insurance.⁸ Conversely, commercial comparison tools often mislead consumers. A study by our German member vzbv found that most tools dedicated to financial services do not allow for a comprehensive or objective comparison (see blue box below).⁹

To identify themselves as a comparison tool or robo-advisors, the tool providers should be obliged to fulfill a certain number of criteria as outlined in the Payment Accounts Directive (Article 7). These criteria would ensure that comparison tools and robo-advisors act independently and provide accurate, transparent and updated information. If comparison websites and robo-advisors are unable to fulfil these criteria, they should be obliged to identify themselves as financial product brokers or sellers.

⁷ Link EP position on CCD once available

⁸ <https://www.quechoisiresemble.fr/comparateur-assurance-emprunteur/>

⁹ https://www.vzbv.de/sites/default/files/downloads/2017/05/26/1317_vzbv_vergleichsportale_2017_05_19.pdf

In addition, “comparison” tools or robo-“advisors” which are *de facto* operating as online marketplaces, as they cooperate with financial services providers and offer consumers the possibility to sign a contract directly via their website, should comply with Article 6a of the CRD on online marketplaces. Article 6a foresees, for example, the obligation to make general information about the ranking parameters available or the obligation to identify themselves as a trader. For this reason, Article 6a should be added to the list of articles applying to financial services.

Comparison tools misleading consumer choice

A study conducted by BEUC’s German member vzbv shows that an objective comparison based on comparison tools is impossible due to their poor quality.

The study analyses the five most used comparison tools in Germany for financial services such as current accounts, consumer credit and car insurance.

The study shows that:

- Results are incomplete: those product providers not cooperating with the platforms are not listed;
- There is no clear distinction between advertising and ranked offers;
- Ranking criteria are not explained transparently;
- There is no guarantee that data is regularly updated.

Additional information on the study can be found [here](#)

c. Rules on advertising

Be it famous football players nudging consumers to invest in crypto-assets, or a video with music stars suggesting that Buy-Now-Pay-Later credits can lead to social achievement, advertising for financial products is everywhere. What is almost always missing is clear information about the risks associated with the financial product.

Rules on advertising should also contain a list of unfair practices which are always prohibited. For example, advertising by the trader, or a third party acting on behalf of the trader (e.g. a social media influencer), which suggests that success, social achievement, or an improved financial situation can be acquired thanks to the financial product, should be banned. This is particularly important to tackle misleading advertising and fraudulent practices in crypto markets. The European Supervisory Authorities (EBA, EIOPA and ESMA) recently issued two warnings highlighting that crypto currencies are a high-risk investment for consumers, which was confirmed by a massive decline in value in the first half 2022.¹⁰

¹⁰<https://www.eba.europa.eu/esas-warn-rising-risks-amid-deteriorating-economic-outlook>,
<https://www.eba.europa.eu/financial-innovation-and-fintech/publications-on-financial-innovation/crypto-assets-esas-remind-consumers-about-risks>

Banning advertising for crypto investments

In Spain, the Ministry of Consumer Affairs has banned advertisements for gambling and betting from the sports environment and prevents celebrities and other public figures from using their image as a lure. BEUC Spanish member Asufin has asked for the ban to extend to crypto investments. In fact, once the ban for gambling and betting was effective, crypto advertisements quickly took their place. More information is available [here](#).

4. Withdrawal and cancellation buttons for all goods and services

The proposal to introduce a withdrawal button is very welcome but we consider that there is no reason for it to be limited to financial services. Thus, BEUC recommends that this requirement should be moved to the general chapter of the CRD to allow consumers to benefit as early as possible from a wider application of these provisions to all goods and services. This move would also clarify that these provisions apply to all financial services, including those already covered by *lex specialis* on the right of withdrawal. In addition, a cancellation button allowing a consumer to terminate a contract should be added for all goods and services, including financial services.

a. Extension of withdrawal button to all goods and services

The exercise of the right of withdrawal from distance contracts can be in some cases burdensome for consumers and even discouraged by the deceptive design of the interfaces of some traders' websites (so-called "dark patterns"). Consumers would benefit from a tool, such as the proposed withdrawal button, to make it easier for them in practice to exercise their rights.

The proposal to repeal the DMFSD and to integrate relevant, updated provisions into the CRD would only introduce a withdrawal button for distance contracts in the financial services sector. However, we encourage the European Parliament and the EU's Council of Ministers to expand the scope of this welcome initiative also to other sectors (by moving the relevant provision to the general part of the CRD, with a horizontal scope of application).

While the recently announced Digital fairness fitness check on EU consumer law¹¹ will include the evaluation of the CRD also in relation to the withdrawal of contracts, the idea for a withdrawal button is quite straightforward and should not require an in-depth evaluation. Instead of waiting for the results of the Fitness Check, which are only foreseen in 2024, the DMFSD proposal creates a great opportunity to tackle this issue already now and allow consumers to benefit from it much earlier.

¹¹ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law_en

b. Withdrawal button design

The design of the withdrawal button should be fine-tuned to facilitate its implementation.

The withdrawal button should not only apply to goods and services purchased online, but all types of distance contracts (e.g. also contracts concluded over the phone). For consumers, there is no clear-cut separation between the online and offline world. A purchase can start offline, in a shop or on the phone, and then a confirmation of the purchase is sent via e-mail.

The objective of the withdrawal button is to make it as simple as possible for a consumer to exercise their right of withdrawal. Conversely, searching for the button on a website, or even worse hidden in an online interface where a login is required, does not make it easy for consumers to withdraw. To overcome this barrier, the following changes in the design should be foreseen:

- Consumers should receive the button directly in the confirmation e-mail which is sent for most distance purchases of goods and services.
- In addition, a withdrawal button should be available on the website in a prominent and easily accessible position, without the need for an additional login to access the button.

In the process of using the withdrawal button, e.g. when the consumer fills in relevant information, there should be precise information about the consequences of making use of the button:

- Information about possible costs of withdrawal.
- Information about the absence of the right of withdrawal for specific types of goods and services.
- Information about the next steps (need to reimburse money e.g. when withdrawing from a credit agreement, need to send back a good).

To ensure compliance with these new rules, several enforcement mechanisms should be foreseen:

- The burden of proof should be on the trader when the existence of the button is questioned.
- There needs to be an effective sanctioning mechanism in case consumers cannot easily access the button. A good way forward would be to apply the rules prolonging the right of withdrawal in case of incomplete information.
- The provider should be also obliged to keep the button active after the formal end of the withdrawal period as in some cases (e.g. incomplete contractual information in case of financial services) the period gets extended. There could be a conflict of interest if the trader can decide when to de-activate the withdrawal button.

c. Cancellation button

For consumers, it is often easy to subscribe a contract e.g. for an insurance, but traders can make it unnecessarily difficult to terminate the contract. For example, it can be difficult for consumers to find the right address to send the termination notice. To facilitate the cancellation of a contract, the German Government has introduced a cancellation button which allows consumers to terminate a contract in the same way as subscribing to a

contract. The German cancellation button rules¹² apply since 1st July 2022 for all consumer contracts, except financial services. This exemption was justified by the exemption of financial services from the scope of German horizontal consumer legislation (based on the scope exemption of financial services from the Consumer Rights Directive).

Based on the German example, the French Government made a legislative proposal¹³ in July 2022 to introduce a cancellation button for all consumer contracts, including financial services. Other countries might follow.

To ensure a high level of consumer protection in all Member States and facilitate the implementation for traders across borders, the CRD should include a cancellation button for all contracts, including financial services. This can be implemented by indicating that where a consumer has a right under relevant Union or national law to cancel the contract, the trader must provide a cancellation button, following the same rationale as the withdrawal button (see point b).

END

¹² https://www.gesetze-im-internet.de/bqg/_312k.html

¹³ https://www.assemblee-nationale.fr/dyn/16/textes/116b0019_projet-loi#

