

POSITION PAPER



ESBG response to the European Commission public consultation on Distance Marketing in Financial Services Directive (DMFSD)

ESBG (European Savings and Retail Banking Group)

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I. General Comments

The publication of the European Commission proposal amending Directive 2011/83/EU and repealing Directive 2002/65/EC, follows the public consultation carried out last year. The Distance Marketing in Financial Services Directive (DMFSD) has historically provided a legal basis for the distance selling of financial products and a minimum safety net for consumers, when there is no specific text (for example, when new products are introduced or for products outside the scope of a specific directive).

ESBG supports the scenario chosen by the Commission for its proposal to retain the relevant and still valid elements of the DMFSD by integrating them into a broader directive (the Consumer Rights Directive 2011/83/EU which is not currently concerning financial products) and to make some adjustments. Thus, a specific chapter dedicated to *“Financial services contracts concluded at a distance”* has been added to this directive, making it possible to retain the specificities of the DMFSD.

A number of general articles of the Consumer Rights Directive would also apply to the distance selling of financial products, for example the penalties, but they are much heavier than those currently existing in the DMFSD. The reference to the general articles specifies (article 3 point 2) that if there is a specific act of the Union, (for example a specific directive), it is the provisions of this act which apply for this point, thus bringing precision and valuable legal certainty. We also ask the Commission why the Payment Services Directive 2 is not one of the mentioned specific Union Acts in recital 13. It has also been discussed whether there are conflicting pre-contractual information requirements in the Deposit Guarantee Directive that would solely apply for distance deposit account agreements in the future.

The Commission’s proposal for a directive aimed at modifying the Consumer Rights Directive and repealing the DMFSD, seems to us to retain the advantages (in particular its technical neutrality) and principles of the DMFSD. ESBG members are more concerned with what happens if the scope of the Consumer Rights Directive is updated, which seems to happen frequently. It will be necessary to ensure that the legislative process makes it possible to maintain this balance while avoiding distorting the principle of the minimum safety net for new products, which is the great strength of the current DMSFD.

ESBG is also of the opinion that the review of the DMFSD should be carried out at the same time as the Consumer Credit Directive, to allow the texts to cover everything they need to and not leave room for gaps in the legislation.



II. Specific Topics

Amendments to Directive 2011/83/EU (Article 1 DMFSD Review of 2022)

Incorporation of the existing exemption in Article 1(2) of the EU Distance Marketing Directive for financial services (2002/65/EC) into the revised EU Consumer Rights Directive (2011/83/EU)

The European Commission's proposal to revise the EU Consumer Rights Directive (2011/83/EU) currently envisages an exemption worded as follows in Article 1(1)(a), second subparagraph:

“Where contracts referred to in the first subparagraph comprise an initial service agreement followed by successive operations or a series of separate operations of the same nature performed over time, the provisions referred to in the first subparagraph shall apply only to the initial agreement.”

This provision reflects a corresponding exemption in Article 1(2), first subparagraph of the existing EU Distance Marketing Directive for financial services (2002/65/EC). But Directive 2002/65/EC goes on in Article 1(2), second subparagraph to set out the following, even broader exemption:

“In case there is no initial service agreement but the successive operations or the separate operations of the same nature performed over time are performed between the same contractual parties, Articles 3 and 4 apply only when the first operation is performed. Where, however, no operation of the same nature is performed for more than one year, the next operation will be deemed to be the first in a new series of operations and, accordingly, Articles 3 and 4 shall apply.”

As far as we are aware, this European exception has been implemented in the national law of all Member States, for example in the German law, it can be found in Section 312(5) of the German Civil Code [*Bürgerliches Gesetzbuch*, BGB]). In French law, it can be found in Article L222-3 of the '*Code de la Consommation*'. The European Commission gives no reason for not including it in its current proposal. In particular, no justification for such a deletion is provided in recital 15 of the proposal, in which the European Commission addresses the content of the above, currently applicable exemption. The exemption mentioned above must therefore also be incorporated into the new version of the directive.

Promotional loans

When amending the Consumer Rights Directive (Directive 2011/83/EU) with respect to financial services contracts concluded at a distance, the new Consumer Rights Directive should explicitly state that promotional loans to consumers are totally excluded from the directive's scope. It is necessary to precisely define the promotional loans because they cannot only be loans without any interest or charges or with only insignificant charges. They can be seen as loans granted to a restricted public under a statutory provision with a general interest purpose as in Article 2.2 (i) of the latest version of CCD, on exemption of the scope of this directive.



Promotional loans to consumers are already excluded from the scope of the Consumer Credit Directive. The Mortgage Credit Directive leaves it up to Member States to decide whether to apply the provisions of the Mortgage Credit Directive to promotional loans to consumers for the purpose of buying residential property. German lawmakers, for example, have stipulated that the requirements of mortgage credit law for consumers only apply to a very limited extent to property promotional loans to consumers and almost all the rules governing mortgage loans to consumers, especially the right of withdrawal, do not apply to property promotional loans to consumers.

The reason for this different treatment is that, in the course of drawing up and implementing the above directives, both European and national lawmakers rightly saw no need to apply the directives' provisions when granting promotional loans to eligible consumers. Nor did they wish to make the granting of promotional loans to consumers more difficult. The background to this is that promotional loans serve to promote economic, social and environmental policy objectives. They are granted under national public promotional programmes on terms that are officially set and more favourable than usual market conditions and are therefore subject to national state supervision anyway.

Moreover, applying the directive to non-competitive promotional loans would impose further requirements over and above the eligibility criteria that already exist and thus generate a significantly higher administrative burden, which would then lead either to a reduction in the funds available to consumers or to an increase in the cost of promotional loans. This would ultimately place an unreasonable burden on low-income consumer groups, who are particularly deserving of the funding and who in the worst-case scenario would no longer be able to benefit from state promotional programmes.

On top of that, promotional loans granted at a distance cannot be equated with other financial services extended at a distance. It is not the case that the banks granting the promotional loans are soliciting customers, but the consumers themselves who are highly interested in benefiting from the state subsidy. For this reason alone, they will be familiar with their contractual partner and will have informed themselves extensively about the promoted product with the help of the publicly accessible eligibility criteria. There is consequently no need for information and explanation requirements or a right of withdrawal under distance selling law.

With all this in mind, there is no need to make promotional loan agreements concluded at a distance subject to (additional) consumer law requirements for distance selling. There is therefore every justification for excluding such loans from the scope of the directive.

Should the above arguments for totally excluding promotional loans not be taken on board, the loans should at least be exempt from the right of withdrawal from distance selling contracts.



Information requirements for distance contracts for consumer financial services (Article 16a)

In Article 16a (1) of the proposal, the European Commission essentially transfers the list of pre-contractual information from Article 3 et seq. of the current EU Distance Marketing Directive for financial services (2002/65/EC) to the EU Consumer Rights Directive (2011/83/EU). We consider the newly included points (n) and (o) to be alien to the system, however. These require;

“(n) where applicable, a brief description of the risk-reward profile;” and

“(o) where applicable, information on any environmental or social objectives targeted by the financial service;”

In particular, the possible description of a “risk-reward profile” is not distance-selling (i.e. distribution-related) information but specific product-related (content-related) information which, if relevant for a specific product, should be required under the relevant product-specific directive irrespective of the distribution channel. As a general principle, distribution-specific EU distance-selling legislation should not be used as a “dumping ground” for content that is product-specific and distribution-channel unrelated and, as such, belongs in the relevant product-specific EU directive. The two new elements in Article 16a(1)(n) and (o) of the Commission proposal – which, moreover, are worded vaguely and are non-specific – should therefore be deleted.

List of Information

In Article 16a (1) p), the European Commission proposal on the list of information essentially uses the current wording of Article 3(1)(3) (“concerning the distance contract”), point (a)¹ of the EU Distance Marketing Directive for financial services (2002/65/EC) for point (p) on the consumer’s right of withdrawal in the list of pre-contractual information in Article 16a (1). But the new wording envisaged in Article 16a (1) p) of the Commission proposal² does not go far enough inasmuch as it no longer refers to the provision on “payment of the service provided before withdrawal” (previously set out in Article 7(1) of the EU Distance Marketing Directive 2002/65/EC and now in Article 16c (1) of the Commission proposal). (For the differences in wording, please see the two footnotes, in which the above two provisions are quoted.) To make the new provision in Article 16a(1)(p) of the Commission proposal comprehensible and consistent with the current provision in Article 3(1)(3)(a) of the EU Distance Marketing Directive for financial services

¹ This provision of the EU Distance Marketing Directive for financial services (2002/65/EC) reads as follows (our underlining added): *“(1) In good time before the consumer is bound by any distance contract or offer, he shall be provided with the following information concerning: (...) (3) the distance contract: (a) the existence or absence of a right of withdrawal in accordance with Article 6 and, where the right of withdrawal exists, its duration and the conditions for exercising it, including information on the amount which the consumer may be required to pay on the basis of Article 7(1), as well as the consequences of non-exercise of that right;”*

² The new provision in Article 16a(1) of the Commission proposal reads as follows (our underlining added): *“(1) Before the consumer is bound by a distance contract, or any corresponding offer, the trader shall provide the consumer with the following information, in a clear and comprehensible manner: (...) (p) the existence or absence of a right of withdrawal and, where the right of withdrawal exists, its duration and the conditions for exercising it including information on the amount which the consumer may be required to pay, as well as the consequences of non-exercise of that right;”*



(2002/65/EC), the wording of Article 16a(1)(p) of the Commission proposal needs to explicitly refer to the new provision in Article 16c (1) of the Commission proposal and be worded as follows (the necessary addition is underlined):

“(p) the existence or absence of a right of withdrawal and, where the right of withdrawal exists, its duration and the conditions for exercising it including information on the amount which the consumer may be required to pay in accordance with Article 16c (1), as well as the consequences of non-exercise of that right;”

Pre-contractual information

Article 16a (3), sentence 1 of the Commission proposal requires pre-contractual information to be provided to the consumer at least one day before the conclusion of the contract. If the information is not provided on time, the company must inform the consumer about his right of withdrawal one day at the latest after the contract has been concluded (Article 16a (3), sentences 2 and 3 of the Commission proposal).

It is neither reasonable nor practicable to oblige companies to inform consumers on a durable medium about their right of withdrawal and the procedure for withdrawing in accordance with Article 16b of the proposal if pre-contractual information is provided less than one day before the conclusion of the contract. Apart from the fact that, if documents are sent by post, for example, the company has no way of knowing exactly when the contract was concluded by the consumer upon receipt of the declaration of acceptance, this requirement flies totally in the face of CJEU case law. The CJEU (judgment of 07.08.2018 - C-485/17, para 44, for example) assumes in its established case law that the consumer is reasonably well-informed and reasonably observant and circumspect. Such a consumer can be expected to read a contract, including the description of the right of withdrawal. There is therefore no need to draw attention to the right of withdrawal again. All the more so given that the company will not necessarily know precisely when the contract was concluded. In addition, the right of withdrawal is printed in the contract and the consumer has already taken note of it.

The existing requirement that pre-contractual information must be provided “in good time” should therefore be retained. Introducing an interval of one day between the provision of pre-contractual information and the conclusion of the contract (Article 16a (3), sentence 1 of the proposal) is also artificial and arbitrary, in our view. Customers who want to read through the pre-contractual information at their leisure already have the opportunity to take it home with them or have it sent to them in advance and arrange a separate date for concluding the contract. Consumers who feel sufficiently informed and want, or need, to conclude the contract quickly and without fuss, on the other hand, would be unnecessarily held up by the planned new requirement. Consumers will in future be faced with the problem that they will have to wait one day for their product. This will not be understood by our customers and in no way increases the level of consumer protection. Moreover, according to recital 3 of the proposed directive, the aim is to ensure that [...] consumer confidence in distance selling increases. Based on current practice - namely that customers can quickly conclude financial services at a distance without complications and with sufficient information - this measure would



possibly achieve the opposite effect and counteract technological progress, while at the same time providing little increased consumer protection.

Furthermore, it must be ensured that the planned (modified) integration of the EU Distance Marketing Directive for financial services (2002/65/EC) into the EU Consumer Rights Directive (2011/83/EU) does not lead to a contradiction between product-specific and distribution-specific EU regulations.

Additional information on the right of withdrawal in accordance with Article 16a (3) of the Commission proposal will also serve no useful purpose if no right of withdrawal exists, such as for contracts whose performance, at the express request of the consumer, has already been fully completed by both parties before the consumer exercises their right of withdrawal (Article 16b (2) (c) of the Commission proposal). There is therefore also a need for clarification on what would happen in this particular situation.

We welcome Article 16a (4) stressing that information has to be made available, although it should not contradict the CCD and MCD, and any sector-specific legislation should have precedence. This should be the harmonised approach of the whole directive. This is important to prevent any legal cases (see Case C 375/15 making available vs. providing information).

However, we regret that the pre-contractual information in Article 16a is cumbersome both in terms of the number of information to be produced and in terms of the procedure. Indeed, the moment of the delivery of pre-contractual information becomes very regulated³, as in the proposed revision of the consumer credit directive. We have the same reservations as for the DCC: we do not see the interest of the consumer in this increase in the procedures, when:

- the pre-contractual information is given at the right time and at the latest before the consumer is bound by contract; and that
- the existing right of withdrawal is clearly mentioned in the pre-contractual information and in the contract.

Right of withdrawal from distance contracts for financial services (Article 16b)

The European Commission's proposed revision of the right of withdrawal essentially simply transfers the right of withdrawal currently set out in the EU Distance Marketing Directive for financial services (2002/65/EC) to Articles 16b and 16c of the (new) EU Consumer Rights Directive (2011/83/EU). This approach does not fully meet the needs of the European internal market.

With the planned (modified) integration of the EU Distance Marketing Directive for financial services (2002/65/EC) into the EU Consumer Rights Directive (2011/83/EU), the exceptions to the right of withdrawal currently provided for in Article 6 (3) of the EU Distance Marketing Directive for financial services (2002/65/EC) must also be transferred to the new EU Consumer Rights Directive.



There are nevertheless shortcomings in the approach taken by the Commission proposal in the following respects. The (more recent) EU Consumer Rights Directive (2011/83/EU), to which the provisions of the (outdated) EU Distance Marketing Directive for financial services (2002/65/EC) on the right of withdrawal are now to be transferred, already rightly contains (e.g. in Article 6 (4)⁴ and Article 10⁵) a number of new elements of a modern and up-to-date withdrawal concept which also reflects the case law of the Court of Justice of the European Union. But the European Commission has (without any explanation) failed to include these elements in Articles 16b and 16c of its proposal for the area of distance marketing of financial services.

Time limit on the right of withdrawal

In its case law, the Court of Justice of the European Union (CJEU) has pointed out on several occasions in the past that certain limits must apply to the protection accorded to the consumer by the right of withdrawal and that the consumer's right of withdrawal does not give unlimited protection.⁶ In this context, the CJEU further emphasises that the expiry rules, in particular, for the right of withdrawal are "appropriate measures" with respect to aspects of consumer protection and legal certainty.⁷ European lawmakers implemented this CJEU case law in 2011 in Article 10 of the EU Consumer Rights Directive (2011/83/EU), which is now to be extended to cover financial services sold at a distance. Article 10 provides for a maximum time limit of 12 months for the right of withdrawal instead of the regular 14 days in the event of "omission of information on the right of withdrawal". The article reads as follows:

"Article 10 Omission of information on the right of withdrawal

(1) If the trader has not provided the consumer with the information on the right of withdrawal as required by point (h) of Article 6(1), the withdrawal period shall expire 12 months from the end of the initial withdrawal period, as determined in accordance with Article 9(2).

(2) If the trader has provided the consumer with the information provided for in paragraph 1 of this Article within 12 months from the day referred to in Article

⁴ This reads "(4) The information referred to in points (h), (i) and (j) of paragraph 1 may be provided by means of the model instructions on withdrawal set out in Annex I(A). The trader shall have fulfilled the information requirements laid down in points (h), (i) and (j) of paragraph 1 if he has supplied these instructions to the consumer, correctly filled in."

⁵ This reads "Article 10 Omission of information on the right of withdrawal (1) If the trader has not provided the consumer with the information on the right of withdrawal as required by point (h) of Article 6(1), the withdrawal period shall expire 12 months from the end of the initial withdrawal period, as determined in accordance with Article 9(2). (2) If the trader has provided the consumer with the information provided for in paragraph 1 of this Article within 12 months from the day referred to in Article 9(2), the withdrawal period shall expire 14 days after the day upon which the consumer receives that information."

⁶ See the CJEU judgement in the case of *Annelore Hamilton v. Volksbank Filder eG* of 10 April 2008, Ref.: C-412/06; publicly available at [EUR-Lex - 62006CJ0412 - EN - EUR-Lex \(europa.eu\)](https://eur-lex.europa.eu/lexuris/ui/show.do?uri=LEXIS-ADV:62006CJ0412-EN).

⁷ See for details the CJEU judgement of 10 April 2008, Ref.: C-412/06, mentioned in the above footnote, as well as more generally on the issue the most recent decision to refer by the XI Civil Court of Appeal of the German Federal Court of Justice (BGH) of 31 January 2022 (BGH ref.: XI ZR 113/21, 144/21, 196/21, 215/21, 228/21, 279/21 and 304/21; published (in German only), inter alia, in WM 2022, 420 et seq.); the BGH is submitting to the CJEU in seven cases (of car financing through general consumer loan agreements) the question of whether Article 14 of the EU Consumer Credit Directive 2008/48/EC is to be interpreted as permitting national courts, in the event of special circumstances going beyond the mere passage of time to deny the consumer an invocation of their validly exercised right of withdrawal as abusive or fraudulent with the consequence that the consumer is not entitled to the beneficial legal consequences of a withdrawal.



9(2), the withdrawal period shall expire 14 days after the day upon which the consumer receives that information.

A corresponding maximum period of 12 months and 14 days, after which, at the latest, the consumer's right of withdrawal will expire, must therefore now also be enshrined (for the area of financial services sold at a distance) in Article 16b of the Commission proposal. The current deliberations in Parliament and the Council on the revision of the EU Consumer Credit Directive also envisage a corresponding time limit on the right of withdrawal.

Need for statutory model instructions on withdrawal

To avoid disputes about the precise content and details of the information on the right of withdrawal that companies have to provide to consumers, European lawmakers in 2011 introduced a provision regulating the details of this information in Article 6 (4) of the EU Consumer Rights Directive (2011/83/EU), which is now intended to be extended to cover financial services sold at a distance. The provision reads as follows:

“(4) The information referred to in points (h), (i) and (j) of paragraph 1 may be provided by means of the model instructions on withdrawal set out in Annex I(A). The trader shall have fulfilled the information requirements laid down in points (h), (i) and (j) of paragraph 1 if he has supplied these instructions to the consumer, correctly filled in.”

Annex I, Part A of the EU Consumer Rights Directive (2011/83/EU) accordingly sets out statutory model instructions on withdrawal, which the company can use to provide the consumer with the relevant information, and which serve as a counterpart to the statutory model withdrawal form for consumers in Annex I, Part B of the directive. When the EU Consumer Rights Directive (2011/83/EU) is extended to cover financial services sold at a distance, as now envisaged by the European Commission, corresponding model instructions must also be included in Article 16b. This will not only result in a high degree of legal certainty and thus make an important contribution to the coherence of the legal order. It would also be illogical to treat legal relationships between consumers and companies differently with respect to the right of withdrawal depending on the subject matter regulated by one and the same directive. That being said, there ought to be a reference in the templates in Annexe I (A) and (B) to clearly state that the use of these templates is only optional for the professional.

Withdrawal period

The EU Consumer Rights Directive (2011/83/EU), which is now intended to be extended to cover financial services sold at a distance, currently stipulates in Article 6 (1)(h) in conjunction with Article 10 (1) that the beginning of the (14-day or, in the absence of withdrawal information, a maximum of 12-months and 14-day) withdrawal period will be linked to the due provision of the withdrawal information (as such). By contrast, the new mechanism for financial services sold at a distance is designed in Article 16b (1)(b) of the Commission proposal in such a



way that not only information about the right of withdrawal as such (in accordance with Article 16b (1) (b) in conjunction with Article 16a (1) (p) of the Commission proposal) but, in addition, the entire, more extensive catalogue of pre-contractual information in accordance with Article 16a (1) (a) to (v) and (2) to (4) of the Commission proposal has to be provided before the withdrawal period starts to run at all.

There is no objective justification for this disparity in the design of the right of withdrawal (between that for non-financial services and that for financial services sold at a distance), especially given the – now virtually unending – catalogue of items listed in Article 16a (1) (a) to (v) of the Commission proposal. According to the European Commission’s explanatory memorandum for the envisaged integration of the EU Distance Marketing Directive for financial services (2002/65/EC) into the EU Consumer Rights Directive (2011/83/EU), in the section “*Consistency with existing policy provisions in the policy area*”, one of the main reasons for the proposed integration is to ensure “*consistency with existing policy provisions both in the areas of consumer protection and financial services*”.

The discrepancies described above in the area of right of withdrawal requirements totally undermine the desired consistency. In practice, the mechanism chosen by the European Commission in Article 16b(1)(b), together with the currently envisaged ability to withdraw for an unlimited period of time in the event of information not being duly provided (see above), will give rise to a “withdrawal wild card”, enabling a consumer to withdraw from a contract unilaterally at any time for an unlimited period of time if only a single element of the list in Article 16a (1) (a) to (v) can be contested. As a result, the withdrawal period, which was intended as a cooling-off period, is degenerating into a unilateral (and in practice often mis-used) instrument for withdrawing from the contract. This is misconceived consumer protection and has nothing to do with the concept of the empowered consumer cited by the Commission in its proposal. There is consequently an urgent need, also in the newly added area of financial services sold at a distance, to link the duration of the withdrawal period – as in the current version of the EU Consumer Rights Directive (2011/83/EU) – solely to the receipt of the information on withdrawal and to the accuracy of the withdrawal information as such.

Withdrawal Button (Article 16b)

According to Article 16b(5) the credit institution shall make available a button through which customers can declare their withdrawal. Such a measure would not increase consumer protection compared to the current directive, according to which customers can declare their withdrawal in writing or on another durable medium available and accessible to the recipient. In addition, many technical changes will need to be made, such as where to find the button during the withdrawal period and the legal aspect, such as proof of clicking on the button and when, will need to be established. There will also be a differentiated treatment of the implementation of this right according to the nature of the product purchased online by the consumer. The consumer could be “lost” between a withdrawal button for a financial product sold remotely covered by the future directive 2011/83/EU and consumer credit, for example, also sold remotely benefiting from a right of withdrawal which would apply without having recourse to this button.



Therefore, this proposal - especially due to the considerable costs of development and IT infrastructure - is not proportionate and should therefore be deleted.

Priority of the Mortgage Credit Directive (2014/17/EU) (16b (6))

Article 16b (6) of the Commission proposal envisages generally giving priority to product-specific rights of withdrawal under other EU legal acts, with the right of withdrawal in the Commission proposal serving as a fallback mechanism.

When it comes to the Mortgage Credit Directive (2014/17/EU), this priority of application is not clear. The Mortgage Credit Directive leaves it up to Member States to decide whether to apply either a reflection period or a right of withdrawal to consumer mortgage credit agreements. In some Member States, for example, lawmakers opted for a right of withdrawal and specified details in national implementing legislation. The Mortgage Credit Directive, by contrast, sets out no specific rules for exercising the right of withdrawal. Logically, however, the priority of application should also apply to rights of withdrawal from a mortgage credit agreement, so legal clarification is needed. European lawmakers consciously included an optional exception in the Mortgage Credit Directive: this (conscious) decision must not be reversed by the general rules of the DMFSD, which are intended to serve as a fallback solution.

Irrespective of this, it would be desirable in the interests of avoiding confusion to either spell out the primacy of application in Articles 16a (6) and 16b (6) of the Commission proposal in more detail by including an exhaustive list of which “other” Union acts are meant by the Commission, or, if this proves to be difficult and the list becomes quickly out of date (sectorial texts are constantly evolving), it could be better to clarify the wording of Article 16 b (6): “Where another Union Act governing specific financial services contains rules on ~~the exercise of~~ the right of withdrawal **or equivalent or if the right of withdrawal is subject to national implementation of another Union Act**, ~~only the right of withdrawal rules of that Union Act shall apply~~”..

Adequate Explanations (Article 16d)

Neither the currently applicable EU Distance Marketing Directive for financial services (2002/65/EC), nor the EU Consumer Rights Directive (2011/83/EU) (into which the distance marketing requirements for financial services are now to be integrated) contain a legal obligation to provide “adequate explanations”, however these obligations have been introduced in Article 16d. It is expressly specified that if there is a specific act of the Union, (for example a specific directive), it is the provisions of this act which apply for this point. To justify the introduction of such an obligation, the European Commission essentially refers in recital 13 of its proposal to the requirements to this effect that already exist in the EU Mortgage Credit Directive (2014/17/EU). At the same time, however, the conflict of laws provision in Article 16d (4) of the Commission proposal specifies that “adequate explanations” about a financial service sold at a distance should not be provided if “*another Union act governing specific financial services contains rules on*



the information to be provided to the consumer prior to the conclusion of the contract”.

If a closer look is taken at the content of this requirement, it becomes apparent that, under the conflict of laws rule in the Article 16d (4) of the Commission proposal, “adequate explanations” in accordance with Article 16d do not have to be provided about:

- financial instruments covered by the EU Markets in Financial Instruments Directive (2014/65/EU) (since in that directive, “information to be provided to the consumer prior to the conclusion of the contract” [within the meaning of Article 16d(4) of the Commission proposal] can be found, inter alia, in Article 24 ff);
- credit agreements covered by the EU Mortgage Credit Directive (2014/17/EU) (as in that directive, “information to be provided to the consumer prior to the conclusion of the contract” [within the meaning of Article 16d(4) of the Commission proposal] can be found, inter alia, in Article 14);
- credit agreements covered by the EU Consumer Credit Directive (2008/48/EC) (as in that directive, “information to be provided to the consumer prior to the conclusion of the contract” [within the meaning of Article 16d(4) of the Commission proposal] can be found, inter alia, in Article 6);
- accounts covered by the EU Payment Accounts Directive (2014/92/EU) (as in that directive, “information to be provided to the consumer prior to the conclusion of the contract” [within the meaning of Article 16d(4) of the Commission proposal] can be found, inter alia, in Article 4); and
- payment services covered by the EU Payment Services Directive (2015/2366/EU) (as in that directive, “information to be provided to the consumer prior to the conclusion of the contract” [within the meaning of Article 16d(4) of the Commission proposal] can be found, inter alia, in Article 40 et seq.).

We understand that the Commission aims to align the requirements of the distance selling of financial products with what exists elsewhere, for example in consumer credit or mortgage credit, but we do not approve of the introduction of this new regulatory obligation, which contributes more to overloading the consumer with information which is not necessary, while the industry is vehemently demanding a reduction in the amount of information intended for the consumer (not to hide information, but because “too much information kills information”). In addition, some distance selling media do not support too much text (e.g. smart phones).

Regarding the intervention by a person of the credit institution in Article 16d (3) it is not clear to us from the proposed Directive in which cases the intervention of a person has to be offered. We would like to see a clarification that the possibility of human intervention must only be offered if the respective online tool (live chats, chatbots, robo-advice, interactive tools or similar approaches) can no longer help the consumer, otherwise the technological progress that is to be achieved by such programmes would be thwarted.



Regarding the pre-contractual information in Article 16d(1a), the principle of pre-contractual information requirements is retained. It is expressly stated in paragraph 4 that if there is a specific act of the Union, (for example a specific directive), the provisions of this act have to be applied for this point instead of Article 16d, paragraphs 1-3. It is a good and expected precision which give legal certainty.

In any event, if European lawmakers see a need for explanations about certain products previously unregulated under EU law, these can, under EU law, only be based on the content of the product (as such) and not on the distribution channel. The requirements of Article 16d of the Commission proposal should therefore be deleted in their entirety.

Fees for the use of means of payment (Article 19 of the Consumer Rights Directive)

Article 19 of the Consumer Rights Directive is as follows:

“Member States shall prohibit traders from charging consumers, in respect of the use of a given means of payment, fees that exceed the cost borne by the trader for the use of such means.”

Article 1 of the Commission proposal, amending the Consumer Rights Directive, amends Article 3 to include such fees in the scope. But does this only include payment instruments set out in the PSD2, or also something else? It would be good if the Commission could clarify this point.

Enforcement and Penalties (Articles 23 and 24 of Consumer Rights Directive)

To maintain the well-functioning national transposition, we recommend either

- to remain with the current penalties, which do not provide for an administrative penalty, or
- to link penalties only to the failure to provide information on the right of withdrawal, because this is the essential component of consumer protection. For failure to provide the other items under Article 16a, an administrative penalty does not seem proportionate.



About ESBG (European Savings and Retail Banking Group)

ESBG represents the locally focused European banking sector, helping savings and retail banks in 18 European countries strengthen their unique approach that focuses on providing service to local communities and boosting SMEs. An advocate for a proportionate approach to banking rules, ESBG unites at EU level some 900 banks, which together employ 650,000 people driven to innovate at 50,000 outlets. ESBG members have total assets of €5.7 trillion, provide €1 trillion in corporate loans, including to SMEs, and serve 150 million Europeans seeking retail banking services. ESBG members commit to further unleash the promise of sustainable, responsible 21st century banking.

Our transparency ID is 8765978796-80.



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