



25 May 2023

## **JOINT STATEMENT**

### **ON THE REVIEW OF THE DISTANCE MARKETING OF FINANCIAL SERVICES DIRECTIVE**

The European Financial Services industry has been closely monitoring the ongoing legislative developments subsequent to the proposal put forward by the European Commission (EC) in order to amend Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights (hereinafter referred to as Consumer Rights Directive [CRD]) and to repeal Directive 2002/65/EC.

We ardently support the principle of attaining a high-level consumer protection, as well as the “safety net” feature that the new upcoming Distance Marketing of Financial Services Directive (hereinafter: DMFSD) seeks to preserve and further enhance. We welcome the provisions stipulating the prevalence of product-specific legislative texts over those set out in the DMFSD (*lex specialis*), particularly with reference to information requirements, in the same vein that sectoral legislation should prevail even when such provisions are not identical to those contained in the DMFSD. Nevertheless, we have identified the following crucial points, which are worthy of attention and due consideration.

#### **◆ Scope of application and *lex specialis***

Careful consideration should be paid before applying horizontal rules for financial services to services that explicitly fall within the scope of EU financial legislation, which contains no provision on the right of withdrawal or the conditions to exercise it, pre-contractual information or adequate explanations, as it is provided by recitals 13 d and 13 e along with Article 11 a of the Council’s General Approach document.

We should be mindful of any unintended consequences could occur due to the application of certain DMFSD rules in such cases, because these DMFSD provisions might prove to be incompatible with sectoral specific services, thereby entailing confusion and legal uncertainty. **Reintroducing rules for these financial services through the “door” of the DMFSD, otherwise already being governed by a specific text, would not be in line with the EU better regulation principles.**

In particular, the parameter of not including the right of withdrawal nor the means of using the withdrawal button in the sector- specific rules, has been already reviewed by the EU legislators in great detail, thus these products are assessed appropriate so to be exempted from these provisions. One illustrative example is the revised Consumer Credit Directive, which does not provide for a withdrawal button or a similar function.

Besides, in some regards, the newly proposed DMFSD rules could be interpreted as stricter than existing sectoral provisions, an aspect that also runs the risk of contradicting with the EU better regulation principles.

#### ◆ **Online withdrawal function**

The European Commission, among other proposals, introduced the “withdrawal button” as an additional means of enabling consumers to exercise their right of withdrawal. Even though the wording suggested in the European Parliament’s Report has been differentiated to “*online withdrawal function*”, the salient issues for the European Financial Services industry remain the same as those already identified under the notion of “withdrawal button”.

It is of utmost importance to grant financial services providers with sufficient room for manoeuvre so that they can assess and develop suitable IT solutions as well as adequate technical modalities for withdrawal features, with an interface that is reasonable for consumers and appropriate for the nature of business, the specific product and the type of distribution. By designing regimes being bespoke to the business model, the purpose of preserving the feature of technological neutrality is being enhanced as well.

Should an online withdrawal function be retained in the legal text, it needs to be clarified that this provision will not apply to services that are governed by EU sector-specific rules, and especially when they already contain provisions on the right of withdrawal. The rules set out in the sector- specific European legislation regarding the right of withdrawal shall be the ones applicable to those specific financial services.

The introduction of the withdrawal button will require and then lead to structural and operational re-arrangements as well as significant IT costs for financial services providers. Given that the "button" will be among other existing options, traders will have to manage other various channels of withdrawal. This would be very complex from an operational point of view insofar as the withdrawal button would require a case-by-case management of this button. In principle, as no impact assessment (evidence-based) has been conducted so far, there is no evidence showcasing that merely a feature, such as the online function of button would enable consumers to withdraw by electronic means from a contract in a rather simple and rapid manner.

Concerning the legal implications, we seek to underscore that the traders will bear the burden of proof when it comes to prove that they have duly informed the consumer, in addition to when particularly the use of withdrawal button occurred by extracting the relevant dates.

Against this background, we seek to reiterate that 24 months for the transposition period are of the essence, notably when it comes to implementing the withdrawal "tool".

#### ◆ **Reminder of the right of withdrawal**

We believe that such reminder linked to consumer's right to withdraw showcases no added value and it should be removed, especially taking into consideration that the possibility to withdraw is already mentioned not only to the pre-contractual information, but also to the contract itself. Concerning the burden of proof in the context of the pre-contractual information, it is questionable how this requirement would work in practice. We argue that should be sufficient if the trader proves the fact that a reminder has been sent to the contact details shared by the consumer, in order to ascertain compliance with such obligation.

#### ◆ **Perpetual right of withdrawal**

We are wary of Article 16b paragraph 1 subparagraph 3 of the European Parliament's Report, as this provision could potentially introduce a perpetual right of withdrawal, in case that no information has been provided regarding the right to withdraw or if the consumer argues that this information was never received.

We are in favour of the fact that unconditional and definitive expiry of the withdrawal period within 12 months and 14 days after the conclusion of the contract should be applied. The period during which this right could be exercised should eventually expire, irrespective of whether or not information on the right of withdrawal has been given or received. This

approach strikes a fair balance between consumer protection and legal certainty of transactions. It also appears entirely consistent with the exercise of the right of withdrawal in the Consumer Rights Directive (CRD), as well as in line with national general civil law principles/doctrines.

◆ **Extension of DMFSD provisions to Consumer Rights Directive**

We expressly disagree with the extension of DMFSD provisions to the whole spectrum of the Consumer Rights Directive (notably Article 11a on withdrawal button or similar function in the Council's General Approach and EP report) as it primarily goes beyond the European Commission's proposal, which was put forward and ultimately sought to review rules which governs merely the financial services sector.

◆ **Guaranteeing the level-playing field**

A main area of concern relates to the issue of level-playing field emerging out of the newly- introduced paragraph 6a of Article 16a of the EP's Report, with regard to the financial services concluded at a distance on a strictly occasional basis, on the one hand, and those provided by banks, on the other hand, given that the latter strive to digitally interact with duly authenticated consumers (those in logging mode) for security purposes. In that respect, we express our sincere concerns because this provision is likely to breach the equal treatment between actors, favoring for instance FinTech companies. For the latter ones, financial services concluded at a distance seem to be ancillary compared to non-financial goods or services, which constitute the core of their business activity.

In similar vein, the obligation to maintain the information available regarding the right to withdraw during the entire withdrawal period on the same online interface, as the one used in order to conclude the distance contract, might create an uneven playing field with other market actors providing financial services. The argument lies upon the provision that this obligation shall not apply when the trader changes a platform or when the rights and obligations of the trader are transferred to another entity.

◆ **Online advertising**

We would suggest that the provisions enshrined in Article 16e related to the regulation of online advertising should be deleted as this subject is already covered by the Unfair Commercial Practices Directive (Articles 5 para.3, 6 para.2(a), 7 para. 5).