



Digitalisation - Revised provisions regarding the distance marketing of financial services

■ Why does it matter to intermediaries?

Published in the OJ of the EU in December 2023, the revised provisions regarding the distance marketing of financial services aim at modernising the rules established back in 2002 – the **Distance Marketing of Financial Services Directive (DMFSD)** -, strengthening consumer rights and fostering the cross-border provision of financial services in the Single Market.

The 2002 DMFSD applied to intermediaries when distributing insurance/financial products under an organised distance sales/service provision scheme and exclusively via one or more means of distance communication. The revised provisions still apply to intermediaries.

The revised provisions were introduced in an additional chapter of the already existing Consumer Rights Directive (CRD), which protects consumers in all kinds of commercial practices. The new Chapter includes, amongst others, revised provisions on the right to pre-contractual information, the right to withdrawal, to adequate explanations and rules ensuring online fairness. Some articles of the other chapters of the CRD will also apply to financial services sold at a distance. **The revised CRD repeals the 2002 DMFSD (2002/65/EC).**

■ State of play

Some key elements of the revised CRD

Level of harmonisation

Maximum harmonisation (i.e. Member States are not allowed to maintain or introduce national provisions) in general and minimum harmonisation for pre-contractual information obligations: the co-legislators have indeed agreed to preserve the Member States' possibility to apply stricter provisions regarding pre-contractual information, in line with the 2002 DMFSD option given to Member States.

Scope of application – Lex Specialis- safety net

The revised Directive does not amend or modify existing sectoral legislation. In order to ensure legal certainty and that there are no duplications or overlaps, the following is clarified: where other EU legislation relating to specific financial services also provides for pre-contractual information, adequate explanations or a right of withdrawal, the provisions of that sectoral legislation (example: IDD, Solvency II etc.) rather than the provisions introduced by the new Directive will apply, unless otherwise provided in the relevant legislation.

There is also confirmation of the continued application of the "safety-net" feature of the current DMFSD for financial services which are either not covered by EU sector-specific legislation or are excluded from the scope of such legislation.

Financial service contracts concluded in some other manner than at a distance are not covered by the revised Directive. Member States can determine, in accordance with EU law, which rules apply to such contracts, including the application of the requirements set out in the revised Directive to contracts not included in its scope.

Proportionality

Member States are encouraged to take account of the specific needs of micro-, small- and medium-sized enterprises in the application of the rules transposing the revised Directive. The notion of micro, small and medium-sized enterprises, refers to Article 2 of the Annex to Commission's Recommendation 2003/361/EC.

Exercise of the right of withdrawal

The right of withdrawal from distance contracts will be facilitated through an easy to find 'withdrawal function' on the provider's interface. This is designed to raise consumers' awareness of their withdrawal rights. The function must be continuously available during the withdrawal period of the contract.

If pre-contractual information is provided less than 1 day before a consumer is bound by a distance contract, the consumer must be reminded of the withdrawal right between 1 and 7 days after the contract date. If the consumer doesn't receive the pre-contractual information and terms & conditions, the withdrawal period will last until 12 months and 14 calendar days after the contract date. The withdrawal period will not expire if the consumer is not told in a durable medium about the withdrawal right.

EU Member States may provide that consumers cannot be required to pay for withdrawing from an insurance contract.



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Pre-contractual information

All pre-contractual information has to be provided in good time before and not at the same time with the conclusion of the distance contract or any corresponding offer.

There are changes to the rules on information disclosure and a modernisation of the obligations. As mentioned above, Member States are also given the ability to impose stricter national rules in this area. Examples of the modernised approach to provision of information include specific reference to the practice of layering when providing the pre-contractual information by electronic means (i.e. placing certain key elements of the information prominently on the first layer and other detailed parts of the information in accompanying layers). Where the information is layered it must be possible to view, save and print as one single document. The Recitals to the Directive include more guidance on the approach to layering.

Pre-contractual information will need to include information on electronic means of communication, the environmental or social objectives targeted by the financial service, and the consequences of late / missed payments.

Consumers must be told before they are bound by a distance contract if the price was personalised based on automated decision making.

All information should be provided in a durable medium, be easy to understand and in a readable format. The recitals clarify what constitutes "a readable format".

Robo-advice

The new Directive establishes the right of consumers to request human intervention on sites that display automated (AI) information tools like robo-advice or chatbots, so that they can better understand the effects of the contract on their financial situation. This is similar to provisions introduced in the revised Consumer Credit Directive in relation to creditworthiness assessments conducted using automated processes.

Dark patterns

Additional protection for consumers from dark patterns (i.e. a user interface designed to deceive or nudge users into making unintended and potentially harmful choices) is introduced. Member States must take measures to limit the use by financial services providers of dark pattern marketing techniques to influence consumers' choices. Again, Member States are also given the ability to impose stricter national rules in this area.

Extension of some CRD rules to financial services

Certain other provisions from the CRD will also apply to financial services distance contracts. These include provisions on **inertia selling, additional payments, enforcement, and reporting.**

Review

A **review clause** is added to the revised Directive inviting the Commission to submit a report on the application of this Directive by 31 July 2030.

■ BIPAR's position / key messages

Together with its members, BIPAR has been active during the legislative process that led to the provisional agreement of the revised Directive. BIPAR's key recommendation to EU legislators was to ensure clarity regarding the prevalence of sectoral rules over the rules laid down in the revised Directive. In other words, to ensure that the revised Directive provisions do not duplicate the provisions of other EU texts applying already to the sector.

Prevalence of sectoral rules

As mentioned above, the revised Directive ensures that its provisions do not duplicate the ones of other EU texts applying already to the insurance (distribution) sector such as the IDD (prevalence of sectoral rules), and in particular as far as the right to pre-contractual information, the right to withdrawal and the right to adequate explanations are concerned.

This is an important principle for our sector that BIPAR focused on during the EP and Council readings of the text. This means that the revised provisions will apply to the insurance (distribution) sector **only to a limited extent**, i.e. when the IDD, MiFID II, PEPP, Solvency II and other existing EU text applying to our sector do **not** contain similar rules to the revised ones regarding the right to pre-contractual information, the right to withdrawal and the right to adequate explanations (for example, when concluding an insurance contract **at a distance**, an intermediary will only have to comply with the IDD precontractual requirements and not with the ones of the revised Directive). Other provisions will apply to intermediaries where appropriate, such as for example the new rules on online interfaces.

Scope

The revised rules do not apply to services provided on a strictly occasional basis and outside a commercial structure dedicated to the conclusion of distance contracts (see Recital 16). This is something BIPAR also requested during the legislative procedure. This is however not reiterated in the articles of the Directive, something BIPAR had called for.



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Contracts concluded via telephone

In the revised Directive, in the case of telephone communications (Article 16a 2), the identity of the trader and the commercial purpose of the call initiated by the trader shall be made explicitly clear at the beginning of any conversation with the consumer. The trader shall also notify the consumer when the call is or may be recorded. If the consumer explicitly agrees, the trader may only provide the information regarding the identity of the trader, main characteristics of financial services product, total price and taxes to be paid by the consumer and the right of withdrawal. The trader shall inform the consumer of the nature and the availability of any other information.

BIPAR's other messages during the discussions:

- **Scope:** The revised rules should not apply to off-premises financial services contracts, and it should not apply to services provided on a strictly occasional basis and outside a commercial structure dedicated to the conclusion of distance contracts.
- **Proportionality:** the principle should be introduced in the Directive as its all-encompassing scope covers the entire financial sector which means that it applies to large institutions and SMEs alike.
- **Withdrawal button/function:** it should be made possible in the electronic interface to confirm that the button has not been pushed by mistake or by accident by the consumer. This is a very substantial move, which can have significant and negative consequences for consumers, such as for example the risk of being uninsured.

■ Next steps

The revised CRD with its new chapter on the distance marketing of financial services, entered into force on the 18 December 2023. From that day, Member States have 24 months to transpose the Directive into national law and a further 6 months to implement it. The Commission will publish a report on the application of this Directive by 31 July 2030.

■ Links

- [Directive of 23 September 2002 concerning the distance marketing of consumer financial services](#)
- [Revised Directive as regards financial services contracts concluded at a distance](#)
- [Commission's Recommendation 2003/361/EC](#)