

EFAMA's comments on the European Commission's evaluation of the 2002 Distance Marketing of Financial Services

25 June 2019

Part II: Questionnaire for other stakeholders

Questions on relevance

The relevance criterion in the Commission evaluation looks at the relationship between the needs and problems in society and the objectives of the Directive. It also involves considering how far the Directive's objectives correspond to wider EU policy goals and priorities.

As a reminder, the Directive's aims are to:

- 1- harmonise consumer protection across the EU and guarantee a high level of consumer protection, which will generate consumer trust in the distance selling of financial services;
- 2- help consolidate the single market of financial services to ensure the free movement of retail financial services.

Question 1. Have the following developments changed the provision of distance retail financial services since 2002?

(1) Table

	Totally agree	Somewhat agree	Somewhat disagree	Totally disagree	Do not know
The use of internet in the distance marketing and selling of financial services	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The use of new devices such as smartphones	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The profiling of consumers based on personal data	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
New market players such as fintech providers; this includes the use of technology to improve and automate the delivery and use of financial services	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The adoption of product-specific legislation	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The level of competition in your country	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
The level of cross-border competition	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

(2) Please mention any other developments you consider important:

An important development is the focus on privacy of data and the subsequent introduction of legislation such as the GDPR and upcoming legislation such as the ePrivacy Regulation. While obtaining certain information from clients is required based on legislation such as MiFID II, the focus on privacy of data also has an impact on willingness of clients to share information or their understanding as to why certain information is being requested.

While product/sector-specific legislation has had an influence, it was also recognising, to a certain degree, and/or adding more detailed requirements to existing practices. However, products are being made more accessible by the use of new technology.

Also, legislation such as MiFID II, which imposes limitations on fees charged and requires more transparency, is causing changes in the distribution chain and firms are extending their scope of activities in the search for greater fee income.

Question 2. How relevant/up to date do you consider the following parts and provisions of the Directive in the current context?

(1) Multiple choice

	Totally agree	Somewhat agree	Somewhat disagree	Totally disagree	Do not know
The scope of the Directive, i.e. covering banking, credit, insurance, personal pensions, investments and payment services	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The technology-neutral approach of the Directive	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Information to be provided about the provider	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Information to be provided about the financial service and its conditions	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
How information should be provided over the phone	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
The existence of a right of withdrawal for certain services	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Cancellation of payments made through fraudulent use of a payment card	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Ban on unsolicited services	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Ban on unsolicited communications	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

(2) Please explain your responses:

The topics above are all relevant as consumers increasingly use the internet to buy a financial product. However, they are all addressed in sector-specific legislation (e.g. IDD, PSD2) and often in much more detail.

For example, MiFID II, the UCITS Directive and AIFMD contain a lot of requirements about information that must be provided to (potential) clients, including information about the service provider, the services on offer and the relevant financial instruments. Sector-specific legislation also stipulates when, and often how, the required information is to be provided to the (potential) client. This standard, which is comparable to the Directive, applies not only to distance marketing of financial products, but also to all forms of distribution.

Question 3. Are there any issues which the Directive currently does not address but you consider should be addressed?

(1) Multiple choice

- Yes
 No
 Don't know

(2) If you answered "yes", please specify:

Sector-specific legislation is by far more detailed than the DMD. Please refer to our answers to questions 10, 11 and 12.

Questions on effectiveness

The effectiveness criterion in the evaluation considers how successful EU action has been in achieving or progressing towards its objectives.

Question 4. How effective are the following aspects/features of the Directive at ensuring consumer protection and contributing to the completion of the single market?

(1) Multiple choice

	Totally agree	Somewhat agree	Somewhat disagree	Totally disagree	Do not know
The horizontal scope of the Directive, i.e. covering banking, credit, insurances, personal pensions, investments and payment services	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The technology-neutral approach of the Directive	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The level of harmonisation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Information to be provided about the provider	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Information to be provided about the financial service and its conditions	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
How information should be provided over the phone	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
The existence of a right of withdrawal for certain services	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Cancellation of payments made through fraudulent use of a payment card	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Ban on unsolicited services	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Ban on unsolicited communications	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

(2) Please specify:

The subjects mentioned above are effective to a certain extent. However, they are all addressed in sector-specific legislation and very often in much more detail.

If not covered by other legislation there is room for improvement regarding new market players (e.g. IT companies).

Questions on efficiency

When deciding whether to introduce a sector-specific regulation, the EU faces the challenge of balancing the potential benefits of the regulation against its potential costs. In the case of the Distance Marketing of Financial Services Directive, these costs include direct costs incurred by the financial service providers on compliance and administration, the national authorities' enforcement costs and the costs incurred by other businesses involved in distributing these services.

Question 5. How would you rate the costs resulting from the Directive?*(1) Multiple choice*

	Very costly	Somewhat costly	Not costly	Do not know
Information to be provided about the provider	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Information to be provided about the financial service and the conditions attached	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
How information should be provided over the phone	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The existence of a right of withdrawal for certain services	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Cancellation of payments made through fraudulent use of a payment card	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Ban on unsolicited services	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Ban on unsolicited communications	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

(2) Please explain your responses.

The costs incurred in complying with requirements relating to the above-mentioned topics are difficult to attribute solely to the Directive as our members also have to adhere to requirements laid down in product-specific legislation that address similar topics. We have therefore indicated 'somewhat costly' and 'do not know'. However, the costs related to adhering to the product-specific legislation would result in the indication 'very costly'.

Question 6. To what extent are these costs generated by the Directive rather than by product-specific legislation?

As mentioned in our answer to question 5, the costs are mostly generated by sector-specific legislation rather than by the Directive. Also without the Directive most of the costs would in any case be incurred due to other European or national requirements.

Question 7. How would you rate the following benefits of the Directive?

(1) Multiple choice

	Very beneficial	Somewhat beneficial	Not beneficial	Do not know
Information to be provided about the provider	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Information to be provided about the financial service and the conditions attached	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
How information should be provided over the phone	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
The existence of a right of withdrawal for certain services	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Cancellation of payments made through fraudulent use of a payment card	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Ban on unsolicited services	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Ban on unsolicited communications	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

(2) Please explain your responses.

We are of the opinion that the benefits of the Directive have diminished over time due to the implementation of a large volume of sector-specific legislation.

Question 8. To what extent are these benefits generated by the Directive rather than by product-specific legislation?

We are of the opinion that the benefits of the Directive have diminished over time due to the implementation of sector-specific legislation.

Question 9. Overall, do the benefits of the Directive outweigh its costs?

(1) Multiple choice

- Yes
- No
- No opinion/Don't know

(2) Please specify:

See our answers to questions 5 and 6.

Question 10. Are there any areas in the Directive where there is room for simplification or reduction of costs? Please specify:

Simplification can be achieved by referring to sector-specific legislation as mentioned in our response to question 11. In particular, financial services are subject to such a large volume of detailed rules that there is a fundamental question whether they need also to be subject to this Directive.

Questions on coherence

The evaluation of coherence involves looking at how well different actions work together. Since the adoption of the Directive, several product-specific pieces of legislation have come into force, covering consumer credit, mortgages, payment accounts, payment services, insurance products and investment products. Other pieces of legislation interacting with the Directive include general consumer protection rules on unfair commercial practices and unfair contract terms, and those pertaining to the e-commerce framework and data protection.

Question 11. To what extent is the Directive coherent with other EU legislation:

(1) Multiple choice

	Very coherent	Somewhat coherent	Somewhat incoherent	Very incoherent	Do not know
Consumer Credit Directive (CCD)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Mortgage Credit Directive (MCD)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Payment Accounts Directive (PAD)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Payment Services Directive (PSD)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Insurance Distribution Directive (IDD)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Market in Financial Instruments Directive (MiFID)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Undertakings for the collective investment in transferable securities Directive (UCITS)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Key information documents for packaged retail and insurance-based investment products Regulation (PRIIPS)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Prospectus Regulation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Alternative investment fund managers Directive (AIFM)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Unfair Commercial Practices Directive (UCPD)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Unfair Contract Terms Directive (UCTD)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
General Data Protection Regulation (GDPR)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
ePrivacy Directive (EPD)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
e-commerce Directive (ECD)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Geo-blocking Regulation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

(2) For each of the legal acts listed above, please specify in which respect(s) you consider it is coherent or not with the Directive:

The Distance Marketing Directive (DMD) was adopted in 2002 and has remained unchanged in most of its parts since then. Article 3 stipulates what information must be communicated to the consumer prior to the conclusion of the distance contract.

However, detailed sectorial legislation applies to investment funds, fund managers, asset managers and fund distributors, which makes the general statements in Article 3 somewhat redundant and incomplete. The specific rules were either already underway or were introduced / revised in reaction to the financial crisis of 2008.

For UCITS, which are accessible to all kinds of investors, a new disclosure regime was introduced in 2009. The UCITS key investor information document (KIID) is designed to provide the investor with important information about the fund in non-technical language.

Alternative investment funds (AIFs) sold to retail investors are subject to the requirements of the PRIIPs Regulation, which ensures that investors get adequate pre-sale information e.g. on costs and the fund's risk profile. The Alternative Investment Fund Managers Directive (AIFMD) completes this approach for professional investors, which are more sophisticated and therefore need less detailed information before they invest into a fund.

Fund distributors must comply with the disclosure provisions of the Markets in Financial Instruments Directive (MiFID), which was substantially revised in recent years.

Overall and where possible, the fund and asset management industry asks for consistent disclosures in order to avoid investor confusion and in order to avoid additional costs for incoherent systems that have to be implemented.

Article 4(1) of the DMD states that where there are provisions in Community legislation governing financial services that contain prior information requirements additional to those listed in Article 3(1) DMD, these requirements shall continue to apply. In cases where the specific rules apply, we argue for the specific rules to always take precedence over the general law. This could increase legal certainty. We do not see any added value in repeating sectorial provisions within the DMD. This approach would also be compliant with the idea of a single rulebook for financial products and services.

As regards Article 4(2) of the DMD, which states that pending further harmonisation, Member States may maintain or introduce more stringent provisions on prior information requirements when the provisions are in conformity with Community law, we think that this contravenes the aim of harmonised rules for cross-border distribution for investment funds. This statement was relevant in 2002, but given that today detailed disclosure requirements are defined at EU level, this paragraph can be removed.

Question 12. Given that the Directive applies to different products, does it bring any additional value compared to product-specific legislation? Please give details for your answer.

We refer to our answer to question 11. In our view, sectoral rules should prevail. If there remain areas where the sectoral rules do not prevail, the DMD rules must be meaningful and consistent with other legislative requirements.

Question 13. Are you are aware of any contradictions/overlaps/inconsistencies/missing links between the Directive and national legislation? If so, what are they?

We are aware of overlaps between the Directive and national legislation and therefore the benefits of the Directive are diminished over time due to implementation of sector-specific legislation. We consider the accumulation of legislation, directives and regulations (all with different timelines) a risk.

Questions on EU added value

In any policy initiative, the Commission must consider whether there is added value in tackling certain issues at EU level or whether it would be better for them to be dealt with by the Member States.

Question 14. In your view, what is the added value delivered by the Directive and its implementation, over and above what could reasonably have been expected from national legislation in the Member States alone?

(1) Multiple choice

	High added value	Medium added value	Low added value	Do not know
Better consumer protection	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Better functioning of the single market	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Legal clarity	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Help in addressing cross-border problems	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

(2) Please explain your responses.

See above.

Question 15. Any other issues: Are there any other issues not covered by the above questions that you feel might require action at EU level? What would be your preferred solution to the identified issue??

No.

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