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EBF position paper on the evaluation of the Distance Marketing of Financial Services Directive

The European Banking Federation is the voice of the European banking sector, uniting 32 national banking associations in Europe that together represent some 3,500 banks – large and small, wholesale and retail, local and international – employing about two million people.

General remarks

The EBF would like to take the opportunity to provide its insights on the current evaluation of the Distance Marketing of Financial Services Directive (DMFSD). We acknowledge that the DMFSD aims at creating a common framework for the distance marketing of financial services, while attaining a high level of consumer protection. We see the relevance of the Directive for the creation of a truly European cross-border market and we recognise that banks across the EU implemented the DMFSD rigorously after its adoption. The Directive and its requirements represent today a consolidated and well-known toolbox for both consumers and providers.

We believe the majority of the requirements in the text of the legislation proved to cope well with any subsequent evolutions both in the market as well as in technology thanks to their flexible nature. We particularly praise the design of the Directive, that by being principle-based rather than rule-based, was able to adapt to evolving use of digital devices and continues ensuring a high level of consumer protection. We are in favour of a technologically neutral legislation and regulatory stability. Before considering a review of the text, we recommend however a sound cost-benefit analysis of the current text given that IT investments and gold-plating practices often result in additional obligation and costs for services providers, without the achievement of clear benefits for consumers.

The EBA recently published an opinion “On disclosure to consumers of banking services through digital means under Directive 2002/65/EC”, which develops a number recommendations on

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disclosure requirements taking into account the increasing use of digital marketing channels for financial services.

The EBA suggests that, given that the revision and entry into force of DMSFD is likely to take several years, *“national authorities competent for consumer protection and the conduct of financial institutions that are already in the process of amending national disclosure requirements may consider incorporating the proposals set out in this opinion”*. Even if the EBA mandate aims at supporting a harmonised interpretation and application of the EU legislation, any application of the EBA opinion at the national level should be subject to the changes of EU Level 1 text. As established by the EU Treaties, any change on the existing EU legislation is subject to the co-decision process. Therefore, in order to avoid different regulations on the very same topic, with the risk of being inconsistent, the application of the recommendations set by the EBA opinion at the national level should be conditional to the changes of Level 1 text, thus the results of the evaluation process of DMFS.

Detailed views

In light of the above, we would like to take this opportunity to provide our comments to the European Commission’s recommendations published (April 2019) as part of the *Behavioural study on the digitalisation of the marketing and distance selling of retail financial services*.

Recommendation 1: *“Ensuring that existing legislation is rigorously enforced to protect consumers and to maintain a level play field for all market actors ”*

We welcome the recommendation, as ensuring that existing legislation is rigorously enforced is a fundamental prerequisite for any evaluation of the Directive.

We also recognise that before considering making changes to the current text, a sound analysis of its implementation is needed. Indeed, possible loopholes or problems arising from the Directive might derive from an incorrect implementation and enforcement of the text by some service providers. As a result, there may be no shortcomings in the text *per se*.

In this context we also call for proper enforcement that prevents gold-plating practices that hinder the creation of the single market. When gold-plating practices are in place, players are unable to compete in equal terms within the EU single market, leading to competition issues.

Moreover, on the basis that the objective of the Directive is to create a harmonised market and overcome fragmentation, gold-plating practices create obstacles to cross-border markets and therefore hamper the overall objectives of the Directive.

Recommendation 2: *"Improve the quality of information provided to costumers when they buy financial products and services online, taking the lessons of the present study into account"*

With regards to the information provided to consumers in distance selling of retail financial services, we believe that the language used in the text of the Directive provides a good example of future-proof text thanks to its flexibility to adapt to the rapid and unpredictable changes of the technologies in the market. In general, the simple, clear and technologically neutral general principles laid down by the Directive offer the advantage of giving professionals room to adjust the provision of information that is relevant for that specific product and that is tailored to the needs of each consumer, while ensuring a good level of consumer protection.

Existing legislation in retail banking already places very prescriptive requirements on information provision for specific products. The prescriptive nature of these rules led to rigid practices that might not always fit the purpose of providing the consumer with qualitative and tailored information that can be adapted to the different media used (phone, tablet, voice assistance, etc) and consequently hinder the technology-neutral approach of such rules. Therefore, we do not see the benefits that additional requirements or guidance could provide. Information format requirement through product specific-legislation present a risk of standardization of information. The obligation for a clear and intelligible information is already requested in product-specific EU legislations and the, Unfair Commercial Practices Directive, also requests to provide material information in a clear an intelligible manner taking into account the limitations of the communication medium. By setting the provision of information at the start of the pre-contractual phase for each product, adaptation to the specificities of the different marketing channels ad the need for fluidity expressed by consumer would be difficult to meet.

To the contrary, additional requirements or guidelines would affect the flexibility that allowed the Directive to remain relevant and adapt to the changes in markets and technology. We strongly caution from bringing the same rigidities that are included in the product-specific legislation into the Distance Marketing Directive. It would instead be more relevant to ensure that information provision is streamlined and duplicated requirements are avoided. We believe that the Commission could drive further harmonisation of the EU regulatory framework without becoming too prescriptive and reduce national gold-plating – in particular introducing limitations for the implementation of form requirements on national level.

On a similar note, while we acknowledge the EBA opinion asking for an update of the pre-contractual rules in the DMFSD, we would like to stress that the obstacles to provide information in a way that is consistent to the latest means of communications seems to be more related to product-specific provisions rather than by the provisions in the DMFSD. In particular, such rigid rules, such as paper-form requirements or requiring signatures as proof for the receipt of pre-contractual information for certain products (both of which exist in different member states), do not facilitate accommodation of subsequent developments in technology. Therefore, while the EBA proposed overall principles of streamlining information to allow customers to focus on the most relevant information and to avoid duplications of requirements are welcomed and shared by the banking industry,

we recommend caution from including requirements that are strictly based on a specific medium (e.g. smartphone) and cannot adapt to future developments in technology. In this sense, it is crucial that rules remain principle-based to allow them adapting to unknown future evolutions without requiring legal updated that would, necessarily, always

take place too late to cope with tech advancements. The timing of the EU decision-making process in terms of negotiations, implementation, etc, makes continuous adjustment of legislation in response to changes in technology evolutions of the digital market very difficult. Therefore, ensuring that legislation is principle-based is necessary to allow it remaining relevant to subsequent and potentially rapid technological changes.

Recommendation 3: *"Take measures to protect vulnerable consumers"*

The EBF acknowledges that the Directive ensures a high standard of protection of consumers by creating a harmonised structure for cross-border transactions which involves all the selling phases, from the "pre-contractual" to the "withdraw" phase of the distance contracts.

Given the existing framework, we do not see the need to define a sub-category of consumer as "vulnerable". Firstly, we believe that all consumers are potentially vulnerable and therefore they all deserve the same level of protection. Secondly, we find it difficult to understand which requirements consumers have to comply with in order to fit in this sub-category. Products' infrastructures are already responding to the needs of consumers who require tailored products adapted to their interests and demands (e.g. Socially Responsible Investment). In this context, product-specific EU legislations (such as MiFID, IDD, CCD) request professionals to provide services in accordance with identified consumers' needs and preferences.

Further, we feel that the search for simplicity *per se* as the only option available to the so-called 'vulnerable consumers' could lead to limitations in the range of offers, which in turn is not in the best interest of the customers. Simple, standardised products may not be able to adapt to the specific needs of the customers. It is in the interest of the service provider as well to build simple and easily understandable financial products. The relative complexity is often the consequence of a search for performance, adaptation to a tax framework, or a response to a need expressed by the consumers.

That said, we recognise that digitalisation demands actions to ensure that financial inclusion is guaranteed. In this regard, we note that the rapid evolution of technology calls for an essential role of financial education, to ensure financial and digital literacy and therefore a high level of financial inclusion.

Recommendation 4: *"Ensure that the speed of the purchasing process does not lead to poor consumer decision-making"*

We think that introducing a speed limit to consumers' ability to buy the products would lead to a deterioration in the customer experience and an unlevel playing field compared to other providers outside the regulated banking sector or in different jurisdictions. If consumers are well protected with a sound set of rights (such as the right of withdrawal), artificially establishing a specific minimum duration for them to purchase process would create unfair terms for financial services compared to other products, but would also not support customers' interests. Customers that purchase products online often decide to do

so specifically for the speed and smoothness of such products. Limiting their power to access product offer swiftly may be detrimental to customers' interest, experience and satisfaction. Also, they may be pushed to look at alternative providers that don't have the

same consumer protection requirements (as they are not regulated in the same way), eventually exposing them to more risks. The specific and unique nature of financial services is already taken into account by the good consumer protection framework that is tailored to that specific type of products.

Recommendation 5: *"Increase transparency around personalisation and targeting"*

Personalisation and targeting are intrinsically linked to the processing of data, such targeting practices are already covered by GDPR. We don't see where additional transparency would provide additional benefits. It can even be counterproductive, as it would require provision/ disclosure of additional information, distracting the customer from the information that are mostly important to take the financial decision.

It is worth noting that some product-specific EU legislations (e.g. MiFID or IDD) require adaptation of the service / product to the profile of the customer (e.g. their needs or suitability). Therefore, some sort of targeting is not only necessary, but also required by law.

Recommendation 6: *"Ensure that any tools provided to help consumers during the purchasing process are fit for purpose and designed so that consumers will use them correctly"*

In principle we agree that any tool to help customers purchasing products must be fit for purpose. We recall that product governance arrangements are already in place in several product-specific legislation. Therefore, we recommend refraining from providing additional guidance when it risks creating confusion and inconsistencies with existing legislation.

Recommendation 7: *"Monitor technological developments and design technology-neutral legislation"*

We fully support the efforts towards the development of technology-neutral legislation that is horizontal and sufficiently flexible to protect all consumers irrespective of new technologies or products that may arise in the market. In this context, we recall that it is crucial that regulation targets services and products and not providers in order to prevent regulatory arbitrage and ensure effective consumer protection. It is therefore vital to ensure adherence to the principle 'same services, same risks, same rules, same supervision', in light of digitalisation and the increasing cross-border provision of financial services – not just by banks, but also by third party providers offering only parts of the services.

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About the EBF

The European Banking Federation is the voice of the European banking sector, bringing together 32 national banking associations in Europe that together represent a significant majority of all banking assets in Europe, with 3,500 banks - large and small, wholesale and retail, local and international - while employing approximately two million people. EBF members represent banks that make available loans to the European economy in excess of €20 trillion and that reliably handle more than 400 million payment transactions per day. Launched in 1960, the EBF is committed to a single market for financial services in the European Union and to supporting policies that foster economic growth.

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