

Response to the Directive on Distance Marketing of Consumer Financial Services consultation

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Part II: Technical questions on the specific value added of the provisions of the Directive compared to other legal acts

Q1. Considering the overlap with sector specific legislation, based on your experience, how often are the articles on pre-contractual information stemming from the Directive applied or enforced with regard to the following financial services?

Please explain how the articles on pre-contractual information stemming from the Directive are still applied or enforced, providing the situation when it was applied or enforced:

Insurers comply with the information requirements of the Directive on Distance Marketing of Consumer Financial Services (DMD). The DMD is, however, of little benefit to consumers, as well as being burdensome and costly for insurers that must comply with information requirements from various sources of EU regulation, such as the DMD and the Insurance Distribution Directive (IDD). Depending on the market, there may also be additional national regulatory requirements to be observed.

Most information requirements in the DMD are obsolete as a result of more recent product specific legislation, such as the IDD.

According to Articles 3 and 4 of the DMD, potential customers must be provided with a wide range of product and company-related information prior to the conclusion of an insurance contract. Additional information requirements also apply as a result of more recent European regulations (eg the IDD, the Packaged Retail and Insurance based Investment Products (PRIIPs) Regulation and the Solvency II Directive), which have recently been expanded by comprehensive disclosure requirements addressing sustainability issues. However, due to overlaps and differences in national implementation, the regulations are neither consistent nor compatible and can therefore be interpreted differently.

In addition, the large amount of pre-contractual information generally contradicts its actual purpose: namely to provide the customer with a clear and transparent product description and thus a sound basis for decision-making.

Deletion of the obsolete information requirements of the DMD and focus on essential details in the form of standardised product information documents (such as the Insurance Product Information Document (IPID)) would be welcome. Language, presentation and scope of these documents are tailored to the needs of customers when buying insurance products. They make it easier to compare various products and help customers to make well-informed decisions.

Any further necessary information obligations — in the event of a complete repeal of the DMD — should be included in sector-specific regulations (eg for the insurance sector to the IDD).

In accordance with Article 5 (1) of the DMD, all the necessary information and contract terms must be provided to the customer on paper or on another durable medium. However, the further development of digital marketing and distribution channels should be taken into account by a final technology-neutral design of the provisions. The communication of information in support of a distance contract on paper is outdated, especially when contracts are concluded by digital means. The requirement for information to be transmitted in paper form as standard should therefore — in order to achieve uniform rules — also be deleted in the IDD and the PRIIPs Regulation.

Also, the requirement to provide information on a “durable medium” (Article 5 (1) of the DMD), is not in line with these developments, since it remains unclear under which circumstances a website can comply with this criterion. Indeed, recital 20 of the DMD provides that “durable mediums include in particular floppy discs, CDROMs, DVDs and the hard drive of the consumer's computer on which the electronic mail is stored, but they do not include Internet websites unless they fulfil the criteria contained in the definition of a durable medium”. It should, therefore, be in alignment with Article 23 of the IDD that, in its paragraph 5, provides for a specific rule enabling distributors to make information available on personalised websites or websites that fulfil certain conditions.

An example of technological development enhanced by the Covid-19 crisis are video conference applications. It enables participants to create an environment similar to a face-to-face encounter, where it is possible to share and review documents together and eventually electronically sign them, in a secured network. Future legislation should therefore provide for an equal treatment of video conferences and face-to-face contacts, where a contract concluded by means of video conference would not be considered concluded by distance.

Q2 Considering the overlap with sector specific legislation, based on your experience, how often are the articles on the right of withdrawal stemming from the Directive applied or enforced with regard to the following financial services?

Please explain how the right of withdrawal stemming from the Directive is still applied or enforced, providing the situation when it was applied or enforced:

In relation to the withdrawal right, Insurance Europe maintains its view, as in its response to the roadmap consultation (<https://www.insuranceeurope.eu/publications/2378/response-to-ec-roadmap-on-distance-marketing-of-financial-services-dmd/>) on the difficulties with an ex ante reflection period. This should be avoided because such a change of approach would be detrimental and not relevant especially where certain types of compulsory insurance demand the immediate performance of the contract, which is incompatible with an ex ante approach.

Above all, a mandatory pre-contractual cooling-off period for customers is not necessary in view of the possibility to withdraw from a contract after it has been concluded. In particular, policyholders sometimes need insurance cover quickly (eg in the case of mandatory motor third party liability or travel insurances), so they would not be served by a mandatory cooling-off period.

Q3 Considering the overlap with sector specific legislation, based on your experience, how often is the article on unsolicited services of the Directive applied or enforced with regard to the following financial services?

Please explain how the article on unsolicited services stemming from the Directive is still applied or enforced, providing the situation when it was applied or enforced:

The article on unsolicited services stemming from the DMD in relation to financial services is outdated due to more recent legislation. For details see Question 8.

Q4 Considering the overlap with sector specific legislation, based on your experience, how often is the article on unsolicited communication of the Directive applied or enforced with regard to the following financial services?

Please explain how the article on unsolicited communication established by the Directive is still applied or enforced, providing the situation when it was applied or enforced:

The DMD's article on unsolicited services is also outdated due to more recent legislation. For details see Question 8.

Q5a. How useful is the 'safety net' feature of the Directive (i.e. the application of the Directive in those instances when new products appear on the market and are not yet subject to specific regulation and when the product specific legislation does not cover, or does not cover sufficiently, the rules established by the Directive) for the following financial services?

Please explain

The DMD of course has a general safety net feature, for instance by enabling identification of suppliers not covered by specific regulation. This does not, however, remove the need to review DMD in view of subsequent regulation, such as the IDD and subsequent technological developments. The "safety net" feature is — at least for the insurance industry — generally not necessary. When new insurance products come onto the market, there is already sufficient regulation for this, both sector-specific and cross-sector.

The IDD already provides for comprehensive requirements for the sale of all insurance products, in particular diverse information obligations, as well as the standardised information document for non-life insurance products, the IPID. Additional customer protection regulation is provided specifically for insurance-based investment products and pension products by Solvency II, the PRIIPs and the Pan-European Personal Pensions Product (PEPP) Regulation. Within the product oversight and governance (POG) requirements (Article 25 of the IDD), insurance undertakings, as well as intermediaries which manufacture any insurance product for sale to customers, must maintain, operate and review a process for the approval of insurance products, before they are marketed or distributed to customers. As part of the POG process, the product manufacturer must assess whether the product remains consistent with the needs of the identified target market and whether the intended distribution strategy (eg distribution via distance marketing) is appropriate.

Insofar as individual provisions are laid down in the DMD alone, their necessity should be reconsidered, to avoid information overload for the consumer. Some of these are typical information already featured in general terms and conditions (eg information according to Article 3 (1) (1) (d) on entries in the public register). Other requirements, such as the indication of the language in which conditions and information are written (Article 3 (1)(3)(g)), are already dispensable due to their self-evidence. Any provisions that remain necessary — eg the right of withdrawal — are an exception and should be revised and transferred over for inclusion in sector-specific regulation. This would also make it possible to do justice to the different financial services sectors currently grouped together without distinction by the DMD.

Q5b. Can you provide concrete examples when you applied the rules of the Directivesince they went beyond the rules covered by specific financial services legislation (e.g. the right of withdrawal for payment accounts contracted at a distance)?

Article 5 (1) of the DMD, which provides that the supplier shall communicate to the consumer all the contractual terms and conditions and the information requirements before the consumer is bound by any distance contract or offer, goes beyond Article 23.7 and 30.5, §3 of the IDD that provides that the information can be provided immediately after the conclusion of the contract, making no difference between a contract that has been concluded at the consumer’s request (inbound) or by direct marketing (outbound). Indeed, there is no need nor added value in communicating all the contractual terms and conditions to the consumer before the consumer is bound by any distance contract or offer, since, where the right of withdrawal applies, consumers are sufficiently protected. It should therefore be permitted, in all circumstances, to communicate the contractual terms and conditions immediately after the conclusion of the contract.

Q5c. Can you provide concrete examples when you applied the rules of the Directivefor products which are exempt from the product specific legislation (e.g. payday loans, which are a type of credit agreement, contracted at a distance and are belowEUR 200)?

N/A

Q5d. Can you provide concrete examples when you applied the rules of the Directivefor new products that appeared on the market before product-specific legislation was enacted (e.g. virtual currencies bought at a distance)?

In the case of new insurance products, it is not necessary to resort to the DMD. The IDD is already designed to be future proof, so that appropriate safeguards are also in place for new products. Within the POG requirements (Article of the 25 IDD) insurance undertakings, as well as intermediaries which manufacture any insurance product for sale to customers, must maintain, operate and review a process for the approval of insurance products, before they are marketed or distributed to customers. As part of the POG process, the product manufacturer must assess whether the product remains consistent with the needs of the identified target market and whether the intended distribution strategy (eg distribution via distance marketing) is appropriate.

Q6 Has the application and enforcement of the articles of the Directive progressivelydiminished due to the entry into application of subsequent product or horizontal legislation?

- Yes
- No
- Don't know

Please explain

Yes. A risk of information overlaps has resulted from the introduction of specific regulation. Digitalisation has also made DMD more difficult to apply.

The provisions of the DMD have been largely superseded and rendered redundant by the entry into force of subsequent — product and horizontal — legislation. The contents of the individual sets of rules — with regard to information obligations — are not coordinated with each other, which leads to many overlaps and duplications. This in turn leads to legal uncertainties in implementation and also offers no added value for consumers. On the contrary, they are exposed to a wealth of information which is contrary to the actual purpose of the information: ie to provide the consumer with a good product overview as a basis for decision-making.

Insurance Europe is therefore in favour of repealing the DMD concerning the distance marketing of consumer financial services as an independent set of rules, which would also be in line with the better regulation agenda. Insofar as individual provisions are not dispensable (eg the right of withdrawal), they should be revised and transferred over for inclusion in sector-specific regulations (for the insurance industry, this would be to the IDD).

Q7 Would the repeal of the Directive lead to:

	Yes	No	Don'tknow
Regulatory gaps leading to an unlevel playing field (e.g. undue competitiveadvantage for financial providers in Member States that would provide a lessprotective framework)		X	
Lower consumer protection in those areas which are not as yet covered by product specific or horizontal legislation (e.g. pre-contractual information forconsumer loans below EUR 200)		X	
Increased difficulties for cross-border trade		X	
A reduction of administrative burdens for Member States (e.g. reduction of costsfor supervision of the obligations stemming from the Directive)		X	
A reduction of regulatory costs for financial service providers (e.g. less compliance costs related to pre-contractual information obligations stemmingfrom the Directive)		X	
None of the above since in practice the Directive scope of application has lostmost of its relevance	X		

Please explain

Insurance Europe maintains the view expressed in its submission to the roadmap consultation, that difficulties on cross border trade is likely to be the result of natural obstacles (eg language, consumer preference etc) rather than due to legislative hindrances. Overlapping regulation may also be more challenging for foreign suppliers to apply than for domestic suppliers.

A level playing field is important and should of course be given due consideration when the DMD is reviewed, for instance in situations where it is not clear if a supplier is covered by specific regulation. See also answer to Question 6.

Q8 The Directive bans unsolicited services and communications from suppliers when such services or communications lack the consumer's consent. However, over time, through the introduction of product specific and horizontal specific legislation, in particular Directive 2002/58/EC (e-Privacy), Directive 2005/29/EC (unfair business-to-consumer practices) and Regulation (EU) 2016/679 (General Data Protection Regulation), the bans established by the Directive have lost their relevance. Should the revision of the Directive lead to the repeal of the current articles (Articles 9 & 10) concerning unsolicited supplies and unsolicited communications?

- Yes**
- No
- Don't know

Please explain

Yes, the provisions in the DMD on unsolicited services and communications (Articles 9 and 10) are redundant and do not require transferred to sector-specific or horizontal regulation if the DMD is repealed. Adequate safeguards are provided elsewhere, such as in the EU legislative acts mentioned in the question and at national level.

Insurance Europe is the European insurance and reinsurance federation. Through its 37 member bodies — the national insurance associations — it represents insurance and reinsurance undertakings that account for around 95% of total European premium income.