

## INCEPTION IMPACT ASSESSMENT

Inception Impact Assessments aim to inform citizens and stakeholders about the Commission's plans in order to allow them to provide feedback on the intended initiative and to participate effectively in future consultation activities. Citizens and stakeholders are in particular invited to provide views on the Commission's understanding of the problem and possible solutions and to make available any relevant information that they may have, including on possible impacts of the different options.

<b>TITLE OF THE INITIATIVE</b>	Review of the Directive on Distance Marketing of Consumer Financial Services (2002/65/EC)
<b>LEAD DG (RESPONSIBLE UNIT)</b>	DG JUST (E.1)
<b>LIKELY TYPE OF INITIATIVE</b>	Proposal for a directive (revision)
<b>INDICATIVE PLANNING</b>	Q1 2022
<b>ADDITIONAL INFORMATION</b>	<a href="#">Directive on Distance Marketing of Consumer Financial Services</a>

**The Inception Impact Assessment is provided for information purposes only. It does not prejudice the final decision of the Commission on whether this initiative will be pursued or on its final content. All elements of the initiative described by the Inception impact assessment, including its timing, are subject to change.**

### A. Context, Problem definition and Subsidiarity Check

#### **Context**

The Directive on Distance Marketing of Consumer Financial Services aims at ensuring the free movement of financial services in the single market by harmonising certain consumer protection rules governing this area. It applies horizontally to any service of a banking, credit, insurance, personal pension, investment or payment nature. The Directive sets out information obligations to be provided to the consumer prior to the conclusion of the distance contract (pre-contractual information), grants for certain financial services a right of withdrawal to the consumer, and bans unsolicited services and communications from suppliers.

In the [2017 EC Consumer Financial Services Action Plan](#), the Commission undertook to assess whether the distance selling market of retail financial services was still fit for purpose in order to identify the potential consumer risks and business opportunities in this market and, on that basis, decide on the need to amend distance-selling requirements. A [behavioural study](#) published in 2019 looked how consumer behaviours were impacted by techniques used online by retail financial services providers at the advertising and pre-contractual stages.

On the basis of the 2019 Work [Programme](#), the Commission launched a [fully-fledged Evaluation](#) of the Directive whose outcome was published in November 2020. The Commission's [2020 Work Programme](#) lists this Directive under the REFIT Initiatives as subject to a possible revision.

#### **Problem the initiative aims to tackle**

Since 2002, the distance marketing of consumer financial services has changed in light of the **digitalisation** and the commercial practices used online by providers. In parallel, the **legal framework for retail financial services** has **evolved**, including through the development of product-specific legislation or horizontal legislation (e.g. in relation to the banking sector, consumer credit, mortgages, insurance, personal pension, investment products or payment services), thereby reducing significantly the Directive's relevance and added value.

In this context, the Evaluation identified the following main problems:

**1. Effectiveness of the current Directive in protecting consumers is significantly limited** by certain factors:

- (a) Pre-contractual information requirements not adapted to digital environment:** The effectiveness of pre-contractual information as laid down in the Directive has been hampered by the practical limitations in providing the required content in a digital environment (e.g. content not adapted to the consumer's screen, information located where it can be overlooked), in a user-friendly way (presentation and length of information burdensome) and at the right point in time (too close to the actual signature of the contract).
- (b) Right of withdrawal not fully effective:** Some behavioural studies seem to suggest that the way in which the Directive implements this right (ex post opt-out within 14 days, rather than a reflection period ex ante)

might not be the most effective in addressing the risk of consumers being trapped in unsatisfactory contracts. In addition, the Evaluation support study pointed to practices of providers on the ground that were too burdensome for the actual exercise of this right.

- (c) There are **practices creating issues for consumers purchasing financial services at a distance that are not covered by the Directive** such as non-transparent personalisation of offers, display of the offers in a way that exploits consumer behaviour (e.g. pre-ticked boxes), emphasising benefits over costs.

**2. Reduced relevance and added value of the Directive:** Through the progressive introduction of product-specific legislation (e.g. the Consumer Credit Directive or the Payment Services Directive) and horizontal legislation (ePrivacy Directive, General Data Protection Regulation) published after the entry into force of the Directive on Distance Marketing of Consumer Financial Services, the relevance and added value of the Directive's three main features (pre-contractual information, right to withdrawal, ban on unsolicited services & communication) has progressively decreased. Current achievements in consumer protection attained through the Directive are particularly limited. The Directive, due to its horizontal application, was intended to act as a safety net for financial services not covered by product-specific legislation and new unregulated products that may come onto the market. However, in practical terms, it is unclear whether the safety net has been deployed on the ground (see, for instance, the [case](#) study on virtual currencies). Thus, the added value of the Directive represented by the safety net feature has not proved significantly useful in real terms.

**3. Cross-border transactions of financial services have remained limited:** One of the aims pursued by the Directive is to foster the cross-border provision of financial services. However, more than 15 years since the Directive has been transposed by Member States, the cross-border dimension of purchasing of financial products has remained limited. According to a Special Eurobarometer on Financial Products and Services (2016), only 7% of respondents had purchased financial products and services in another EU Member State during the course of 12 months. The reasons behind the low level of cross-border transactions are multiple. They may stem either from the Directive's own legal framework (e.g. certain definitions of the Directive might be unclear – 'distance contract', 'in good time') thus making it harder for financial providers to provide services across borders, or from the interactions and overlaps with other product-specific or horizontal legislation (problem 2 above), or from external factors (e.g. natural obstacles such a language and culture or policy-induced obstacles such as different tax regimes among Member States).

#### **Basis for EU intervention (legal basis and subsidiarity check)**

Consumer protection in financial services is a shared EU competence. The legal basis considered likely would be Article 114 of the Treaty on the Functioning of the European Union (TFEU), with due regard to Article 169 TFEU.

Due to its horizontal application, the Directive is intended to act as a 'safety net' for financial services not covered by product-specific legislation and new unregulated products that may enter the market. This safety net feature can only be achieved through an EU instrument that is applicable across the entire range of different types of financial services.

As highlighted in the Commission's [Digital Finance Strategy EU](#), digital innovation is expected to grow, thus increasing the cross-border provision of financial services.

## **B. Objectives and Policy options**

This initiative aims at ensuring a framework for the distance marketing of financial services that is future proof, protects consumers in a digital environment, delivers a level playing field and reduces unnecessary burden for financial service providers. Several policy options will be assessed:

0) **The baseline scenario (no policy change):** current efforts to raise providers' and consumers' awareness of their duties and rights would be maintained, combined with coordinated enforcement via the Consumer Protection Cooperation network. The Court of Justice case law will continue to clarify aspects of the existing rules and have a harmonising effect as to their interpretation, within the existing scope of the Directive;

1) **Repeal of the Directive:** since 2002, product-specific as well as horizontal legislation has been introduced, thereby reducing the importance and relevance of the Directive. A case in point is the Directive's article concerning unsolicited communications, which has been voided of any relevance by subsequent legislation (ePrivacy Directive, the GDPR). In this light, and considering that the pre-contractual information articles and the right to withdrawal do not fully address the digital dimension, it could be considered to simply repeal the Directive. In addition, the use and application of the safety net feature of the Directive has not proved to be significant. The resulting gaps from such a repeal might not be major. By removing the Directive, the issue of overlaps between the Directive and the other legislation will also be solved (problem 2).

2) **Repeal of the Directive but moving the still relevant parts, once modernised, under another horizontal legislation:** The Evaluation found that the Directive's articles on information and on the right of withdrawal are still partially effective and relevant (e.g. in the area of personal pension). Against this background, it could be

envisaged that these articles be modernised and introduced in other horizontal legislation, such as the Consumer Rights Directive, which currently does not cover financial services, or in other product-specific legislation, such as a revised Consumer Credit Directive whose scope of application might be broadened.

3) **Comprehensive revision of the Directive:** one of the outcomes of the Evaluation was that the Directive may still be relevant due to its potential use as a safety net. Thus, when the current product-specific legislation does not cover, or does not cover in sufficient detail, the provisions contained in the Directive, the latter acts as a fall-back legislation and provides a wide safety net to the consumer (e.g. current regulations in the area of personal pension do not provide a right of withdrawal to consumers). This is also relevant for any future legislation in the area of distance marketing, whose level of consumer protection in the three areas of the Directive is lower, and/or for products that are still unregulated. By revising these three areas and introducing other features (e.g. rules on personalised advertising, on robo-advice, on the use of digital identities), the safety net feature of the Directive would expand, thereby rendering it more effective and future proof.

### C. Preliminary Assessment of Expected Impacts

#### Likely economic impacts

The likely economic impact depends on which policy option is chosen: the possible repeal of the Directive would lead to simplification and reduced burdens for financial service providers in national markets, in particular in those areas, such as personal pensions, which are covered by the Directive and not by the product-specific or horizontal legislation. A streamlining and modernization of existing rules (e.g. on information requirements) would also lower costs and simplify corporate practices, particularly for those operating across borders. The impact assessment will carefully assess the economic impacts of the policy options.

#### Likely social impacts

The initiative may help to increase consumer trust in and uptake of financial services marketed and/or sold through digital/online channels. This will also support the digital transition in society at large.

#### Likely environmental impacts

The initiative is not expected to have a substantial environmental impact.

#### Likely impacts on fundamental rights

Any legislative or non-legislative action will be in accordance with Article 38 of the Charter of Fundamental Rights, which requires the Union to ensure a high level of consumer protection.

#### Likely impacts on simplification and/or administrative burden

The impact on administrative burdens would also depend on the chosen policy option: if the Directive is simply repealed (option 1), providers will be subject to less EU rules. While similar rules might in some cases exist in the product-specific legislation, this would still be a simplification of the legal framework. If rules are modernised (option 2 & 3), there will be initial costs. However, the streamlining of existing rules (e.g. on information requirements) will also lower costs and simplify corporate practices, particularly for those operating across borders. The impact assessment will carefully assess options for simplification and reduction of administrative burden.

### D. Evidence Base, Data collection and Better Regulation Instruments

#### Impact assessment

An impact assessment will be prepared to support this initiative.

#### Evidence base and data collection

Substantive research is already available in a number of areas relevant to the review. The impact assessment will rely primarily on the information and evidence gathered in the context of the 2019 Behavioural study on the digitalisation of the marketing and distance selling of retail financial services, the **REFIT evaluation published in 2020** as well as on a support study to be carried out for the impact assessment.

The impact assessment will also draw on recent studies and research on the product-specific legislation (e.g. [Evaluation of the Consumer Credit Directive](#)), Eurostat statistics, Consumer Scoreboard data, the public consultation for the REFIT evaluation and structured consultation with stakeholders.

Further data will be collected through the upcoming public consultation on the Retail Investment Strategy and the accompanying Retail Investment Study.

#### Consultation of citizens and stakeholders

The Commission will consult stakeholders and the general public through an open **public consultation**, the launch of which will be announced on the Commission's public consultations portal (<https://ec.europa.eu/info/consultations>).

Business organisations, consumer representatives/organisations and national authorities will also be consulted through targeted consultations, bilateral meetings and through existing expert groups, including the Financial

Services User Group.

**Will an Implementation plan be established?**

In order to address implementation issues and improve future application, if relevant, an implementation plan will be established to help Member States transpose and implement any possible legislative changes.