

## **DMFSD review – Finance Watch view on the Council General Approach:**

### **Key points in the final Council text which we disagree with:**

#### **1. We regret that the Council text deleted the Commission proposal on introducing rules on regulating online interfaces (dark patterns)**

We regret that the European Commission proposal to protect consumers from malpractices with regards to online interfaces was deleted in the final Council position on the DMFS rules. As pointed out, for example, by [ESMA in its advice to the European Commission on the Retail Investment Strategy](#) (please see page 42), financial services providers are increasingly using techniques such as [dark patterns](#) that take advantage of behavioral biases of consumers. Dark patterns are deceptive online interface designs (e.g. coloring of decision buttons) that are used to trick people into making decisions that are in the interests of the online business, but at the expense of the user. These practices need to be properly regulated to protect consumers from mis-selling.

**Finance Watch is of the position, however, that further clarifications are needed for the European Commission's proposed provision covering this topic (Article 16e) to make it clear what is covered under this provision.** Finance Watch is of the position that the article should mandatorily cover the prohibition of techniques (e.g. design) to nudge consumers to make certain decisions or purchase certain products over others. Moreover, we would recommend prohibiting any techniques that put consumers under pressure to make certain decisions and prohibit the use of personal data when setting personalized prices. As highlighted by an [IMCO study published on price personalization in November 2022](#), consumers have a negative attitude towards price personalisation as they perceive individually personalised prices as unfair. In addition, the IMCO report shows that price personalisation likely leads to overall consumer detriment.

#### **2. We strongly disagree with the Council position to abolish the requirement in the Commission position to impose fines of a maximum amount of at least 4 % of the trader's annual turnover in the event of a serious cross-border infringement.**

It is important that Article 24 (covering penalties) of the Consumer Rights Directive (CRD) is extended in its entirety to the DMFSD to ensure that there are effective and dissuasive rules on penalties in place to deter providers from not complying with the DMFS rules. As shown in the [EC evaluation study of the DMFSD](#), compliance with the DMFSD was very poor in the past and hence strong rules on penalties are needed to ensure compliance with the rules going forward.

**3. We disagree with the Council position to delete the inclusion of the provision of information about the risk and reward profile of the product in the pre-contractual information.**

Providing consumers with information about the risk and reward profile of a financial services product is important information the consumer needs to be aware of to make an informed decision. Therefore, it is important that, where applicable (i.e. for retail investment products such as life insurance, etc.), this information is provided to the consumer in the pre-contractual information document.

As a minimum, the information which would need to be provided here would encompass a narrative explanation of the risks which are materially relevant to the financial service and the possible maximum loss of capital, including information on whether all capital can be lost. This is a key information about the financial risks associated with certain products and is therefore key information a consumer must know to make an informed decision. This is even more important given that there isn't a right of withdrawal for these types of products, since the products for which this information would be applicable have a price that depends on fluctuations in the financial market.

This type of information also has to be provided to retail investors under other EU product-specific legislation for retail investments, i.e. PRIIPs and MiFID II.

**4. We regret that the Council is proposing to allow Member States to adapt the manner and the extent to which adequate explanations are offered to the circumstances of the situation in which the financial service is offered, the person to whom it is offered and the nature of the financial service offered.**

This is risky because it would lead to an uneven level of protection for consumers throughout Europe. It would leave it to Member States to interpret and determine whether a certain financial service is risky or not, requiring more or less explanations. In addition, it would put consumers at risk of not receiving the explanations they need to make an informed decision when purchasing a financial service if a Member State determines that not all explanations must be provided via certain distance communications channels.

**5. It is regrettable that the Council position allows the trader to provide the pre-contractual information only after the contract has been concluded, if the contract has been concluded at the consumer's request using a means of distance communication which does not enable providing the information in good time before the consumer is bound by the distance contract.**

In order to ensure that consumers are able to make truly informed decisions, they need to receive at least the key information about a product before they are bound by a distance contract. Therefore, in case a consumer concludes a contract using a means of distance

communication which does not enable providing the full information, the trader should at least be obliged to provide the key information (information on costs, risks, etc.) of the pre-contractual information, as proposed for telecommunications in article 16a(2) in the Council proposal, before the conclusion of the contract. If the means of distance communication does not enable the provision of this key information, the trader should not be allowed to conclude a contract with the consumer via this channel as this would only put the consumer at risk of being mis-sold a product due to uninformed decision-making.

- 6. Given the challenges consumers face in the increasingly digitalized retail financial services market, more ambition than what is proposed in the final Council text is needed to ensure that consumers are adequately protected. In our opinion, additional measures are needed, in particular with regards to the regulation of promotions by social media influencers, advertisements of risky products, and the use of personal data.**

**Key points in the Council General Approach that we agree with which should also be included in the EP text:**

- 1. Scope: We welcome that the final Council text preserves the safety net feature of the DMFS, i.e. the application of the Directive when new products appear on the market and are not yet subject to specific regulation and when existing product-specific legislation does not cover, or does not cover sufficiently, the rules established by the DMFSD. We also welcome that the final Council text explicitly clarifies that the scope should also include products that are unregulated because they have been excluded by product-specific legislation.**

- 2. We welcome that the Council text, unlike the EC proposal, allows for Member States to go beyond the DMFSD with regards to pre-contractual information.**

The 2002 Directive allowed the Member States to go beyond the level of consumer protection established at EU level regarding pre-contractual information. As a result, a number of Member States chose to do so. Therefore, it is important to maintain this possibility for the Member States who have used this option to prevent a lowering of the level of consumer protection. In Germany, for example, the national insurance contract law provides special pre-contractual information obligations for specific insurance products that go beyond those provided in the DMFSD.

- 3. We very much welcome that the Council upholds the Commission proposal to**

**introduce a withdrawal button to facilitate the withdrawal from products for consumers and extends it to the whole CRD.**

- 4. We agree with the Council position to extend the right for human intervention to apply not only during the pre-contractual stage but at every stage of the negotiation process and contractual relationship.**

As shown, for example, by [\*a recent study of the Dutch central bank \(De Nederlandsche Bank\)\*](#), in the Netherlands, 2.6 million people aged 18 and over struggle with their digital payments and other banking affairs online. This affects mostly vulnerable groups such as the elderly, people with physical or intellectual disabilities, or those lacking access to the internet. This situation is not limited to the Netherlands but is witnessed across the EU. Therefore, it is important to preserve the use of human intervention to ensure financial inclusion for all vulnerable groups.

- 5. We welcome that the Council text stipulates that where another Union act governing specific financial services does not contain rules on information about the right of withdrawal, the trader shall inform the consumer about the existence or absence of such a right in accordance with the DMFSD.**

It is important that consumers are informed about the existence or absence of a right of withdrawal when concluding distance contracts. Online purchases, in particular, are often quite rushed as the online sales process tends to be fast. Therefore, it is key that consumers purchasing financial services via distance communications channels are informed whether they have this right, including in cases where product-specific information does not contain any pre-contractual information rules concerning the right of withdrawal.