

## Finance Watch position on the key topics discussed in the trilogues on the review of the Distance Marketing of Financial Services Directive (DMFSD)

1. **There is a need for regulation of online interfaces (dark patterns) in the DMFSD to ensure that consumers are adequately protected against these malpractices that are increasingly used in the online retail financial services market.**

As pointed out, for example, by [ESMA in its advice to the European Commission on the Retail Investment Strategy](#) (see page 42), financial service providers are increasingly using techniques such as [dark patterns](#) that take advantage of behavioural biases of consumers. Dark patterns are deceptive online interface designs (e.g. colouring 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. According to [a mystery shopping exercise published by the European Commission in 2022](#), **97% of the most popular websites and apps used by EU consumers deploy at least one dark pattern.**

Therefore, **we very much welcome that the final EP text, unlike the Council text, preserves the important provision of the European Commission proposal on the regulation of online interfaces (dark patterns)** and that it specifies that the provision should inter alia include the obligation for traders to present different options to consumers in a neutral and non-misleading way. In addition, we would go a step further **and urge policy-makers to include in the final provisions on dark patterns the prohibition of any techniques that put consumers under pressure to make certain decisions and prohibit price optimization practices.**

As shown, for example, in [a recent publication by BEUC](#) on the use of big data and Artificial Intelligence in insurance, **price optimization practices, the use of consumers' behavioural data such as shopping habits or a consumer's individual tolerance for price changes (which provides an indication of a consumer's willingness to pay more), leads to discriminatory and detrimental outcomes for consumers.** A study by the [IMCO Committee published in November 2022](#) also confirms this.

**We welcome that the final EP text contains a recital on price optimisation practices. However, this provision is too weak/ineffective as it only stipulates that a firm must inform the consumer that the price presented to them is personalised on the basis of individual price sensitivity** if the price of a product offer is personalised. Disclosures, however, do not suffice in this instance to adequately protect consumers as many consumers are unlikely to understand what this means and whether the price presented to them

is fair or not. Personalising prices based on someone's willingness to pay more is not fair and always has a negative effect for the consumer. Therefore, instead of just disclosing this practice, this practice should be banned altogether.

The Council has recognised in its proposal that discriminatory price optimization practices may be something that should be regulated. In recital 12 of the Council proposal, it is stated that:

***(12) Other rules on ensuring online fairness as set in other Union acts, such as Regulation 2022/2065/EU of the European Parliament and of the Council, can apply when financial services are contracted at a distance by electronic means. In the interest of ensuring a high level of consumer protection, the Commission should assess how the structure, design, function or manner of operation of online interfaces used by the traders affects the consumers' ability to make a free, autonomous and informed decision or choice. In this context the Commission should look into practices such as timed transactions placed in order to instil a sense of urgency in consumers to speed up the conclusion of a contract and the use of discriminatory price optimization based on individual price sensitivity.***

As mentioned earlier, however, there are already studies showing that these practices are unfair, lead to bad outcomes for consumers and should therefore be regulated. There isn't a need for further research on this matter by the Commission but these practices should instead be regulated as a matter of urgency now.

## **2. There is a need for binding regulatory rules for social media influencer promotions, and a ban for such promotions of risky investment products.**

Influencer marketing in financial services has become widespread across Europe, and it's set to keep getting bigger. According to [research by the International Organisation of Securities Commissions \(IOSCO\)](#), the international standard setter for the regulation of the investment sector, **43% of European financial services firms plan to increase use of influencers as a marketing tool** and **this is the tool** in which financial firms surveyed expect the **highest growth** going forward (please see chart 6 on page 17).

[\*This trend has been accompanied by numerous cases of influencers encouraging consumers to purchase financial services, including very risky investment products such as crypto, with promotional messages which are misleading\*](#) and fail to point out the risks entailed in taking out these products. The reason for this is that these influencers most often do not have the competence to speak about these products and are driven by conflicts of interest, i.e. remuneration by the product provider. Due to the fact that these influencers often have huge amounts of followers, large numbers of consumers are exposed to these misleading

advertisements and in case of purchase, associated product risks. For example, [\*famous celebrities such as Kim Kardashian and French reality TV superstar Nabilla Benattia-Vergara have promoted crypto assets online unregulated and were remunerated for it.\*](#)

As a result, retail investors have lost huge amounts of money, sometimes their entire life savings. Therefore, strong and binding regulation of social media influencer promotions, in particular for risky financial services, is crucial.

**We welcome that the EP text, unlike the Commission and Council proposals, recognizes the need to regulate promotions by social media influencers, however, the proposals in the EP text do not go far enough to adequately protect consumers** and we therefore urge policymakers to be more ambitious on this issue in the trilogues. First of all, the measures in the EP proposal are very high-level, leaving it to Member States to decide which specific measures to adopt to regulate influencer promotions. The proposal mentions mandatory labelling of whether the influencer has the competence to communicate on the financial service and mentioning if there is any remuneration for the advertising as possible measures Member States can take, but these measures are non-binding. **Binding measures providing an appropriate level of harmonized protection for consumers across the EU, however, are needed.**

Secondly, **in cases involving risky financial products, stronger measures are needed than mere labelling of whether the social media influencer has the appropriate competence to promote the product and whether there is any remuneration for the promotion.**

While labelling may help nudge consumers to question the promotion's accuracy, trustworthiness and factualness, additional protections are needed for risky investment products which, as in the case of crypto, can have dire financial consequences for ordinary retail investors. Even with labels, there is a risk that consumers will believe the promotions instead of questioning whether they are non-misleading and/or factually accurate, especially if the social media influencer is someone they like and trust and if the consumer is not very financially literate. Therefore, **there is a need to ban influencer promotions for risky investment products such as crypto instead, as was proposed in an alternative compromise amendment during the IMCO vote on the EP position on the DMFSD on 28 March.**

**In several EU member states there is now a recognition that for risky investment products such as crypto, labelling alone is not enough.** [\*Belgium recently introduced new rules on virtual currencies\*](#) which mandate that mass media campaigns (campaigns disseminated to more than 25,000 consumers) must be notified to the national competent authority (NCA) at least ten days in advance to enable the NCA to intervene, if necessary, before the campaign actually begins. [\*Spain recently issued very similar rules\*](#) to Belgium

and [\*France is currently considering going even further and banning completely all influencer promotions for risky retail investment products\*](#) such as crypto (please see Article 1, Soussection 9 of the French legislative proposal). **The National Assembly's economic affairs committee in France voted on 22 March for a ban.**

**3. There is a need for strong rules on penalties for non-compliance with the DMFSD rules to ensure that there is better compliance with the new rules than was the case with the old rules.**

It is important that Article 24 (covering penalties) of the Consumer Rights Directive (CRD) is extended in its entirety to the new financial services chapter of the CRD (DMFS rules) to ensure that there are effective and dissuasive rules on penalties in place to deter providers from breaching the DMFS rules.

**As shown in the [\*EC evaluation study of the DMFSD\*](#), compliance with the DMFSD has been very poor in the past.** Therefore, strong rules on penalties are needed to ensure compliance with the rules going forward. The EP and Commission texts extend the strong penalties provisions (fines of a maximum amount of at least 4 % of the trader's annual turnover in the event of a serious cross-border infringement) while the Council text does not provide any specifications at all with regards to how high the penalties in case of infringements should be.

**The EP and EC proposals on this matter are reasonable and dissuasive and therefore we strongly urge the co-legislators to adopt them in the final legislative text.**

**4. The final legislative text needs to include a requirement for advertising of consumer credits and retail investment products sold online to include clear and prominent risk warnings.**

**Retail investment and consumer credit products are complex products which involve a lot of potential risk for consumers.** As the example of crypto-assets has shown, consumers can lose substantial amounts of money when they invest in risky retail investment offerings. In the case of consumer credit, mis-selling can lead to over-indebtedness with devastating consequences for consumers, in particular vulnerable consumers who are also severely hit by the cost-of-living crisis.

Therefore, introducing an obligation to include a warning in advertising about the possible financial risks of taking out a retail investment and consumer credit product is important. Advertisements are a powerful tool to push/motivate consumers to purchase a product. Therefore, including **a risk warning would be important as it would be a nudging**

**measure (behavioural finance) to stimulate consumer's reflection before taking out these risky products**, countering overconfidence and the optimism bias which consumers exhibit when purchasing a financial service.

For the same reasons, policymakers agreed to mandate such a risk warning in advertising in the Consumer Credit Directive (CCD) review and the DMFS rules should be aligned with the CCD review in this regard.

**The EP position mandates a risk warning for consumer credit and retail investment product advertising online and we urge policymakers to adopt it in full in the final legislative text of the DMFSD.**

- 5. The final revised DMFSD rules need to maintain the possibility for Member States to go beyond the DMFSD requirements with regards to pre-contractual information to prevent a watering down of consumer protection in those Member States where national rules are more stringent.**

**The DMFSD rules currently in force have allowed Member States to go beyond the level of consumer protection established by the DMFSD with respect to pre-contractual information.** As a result, a number of Member States chose to do so and now have more stringent rules than those laid down by the DMFSD at national level. **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.

**Therefore, we urge the co-legislators to adopt the Council proposal on this provision since it, unlike the EC and EP proposals, allows for Member States to go beyond the DMFSD with regards to pre-contractual information.**

- 6. It is important that the original scope of the DMFSD is preserved, including the application of the DMFSD when existing product-specific legislation does not cover, or does not cover sufficiently, the rules established by the DMFSD.**

It is key that the DMFS rules continue to apply in cases where existing product-specific legislation does not cover or not cover in a sufficient manner the rules in the DMFSD to ensure that the original purpose of the directive to act as a safety net is preserved. The purpose of the safety net feature in this regard is to ensure that basic minimum protections that are relevant for all financial services exist to adequately protect consumers.

Therefore, it is key that Article 16d which requires firms to provide adequate explanations about a product to consumers, including information about the specific effects the product may have on the consumer such as the consequences of payment default or late payment by the consumer, is applied to all financial services products where product-specific legislation does not cover or not cover sufficiently, rules on adequate explanations.

**It is regrettable that the EP and European Commission proposals stipulate that the requirements on adequate explanations under the DMFS rules do not apply if the product is covered by existing product-specific legislation which contains ‘rules on the information to be provided to the consumer’.** This could be interpreted as meaning that the rules on the provision of adequate explanations do not apply if the product is in scope of product-specific legislation that contains rules on pre-contractual information. Pre-contractual information and providing consumers with adequate explanations are very different things, however. Pre-contractual information contains written general information about the product while the rules on adequate explanations include the provision of information regarding the specific financial impacts the product has on the consumer. This kind of information can only be provided through interaction of the consumer with the provider and is key information a consumer needs to be able to make an informed choice when purchasing a financial services product. For example, a financial service may have material impacts on the financial well-being of a consumer and therefore the consumer needs to be informed about the financial effects the product can have on her or him.

Therefore, it is important that the Council wording is adopted in the final legislative text which says: ***‘Where another Union act governing specific financial services contains rules on the adequate explanations to be provided to the consumer, only rules on the adequate explanations of that Union act shall apply to those specific financial services, unless provided otherwise in that act’***

- 7. To ensure the same high level of consumer protection is upheld across the EU, Member States should not be allowed to adapt the adequate explanations requirements, as proposed by the Council.**

**The proposal of the Council would allow Member States to adapt the manner and the extent to which adequate explanations are offered to the circumstances in which the financial service is offered, the person to whom it is offered and the nature of the financial service offered.**

This proposal is risky, however, 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.

**In addition, to ensure that the provision on adequate explanations is properly enforced, the EP proposal should be adopted which specifies that with regards to the compliance with this Article, the burden of proof shall be on the trader.**

**8. To ensure that consumers can make informed decisions when purchasing financial services via distance selling channels, it is key that the trader has to provide the pre-contractual information always before the conclusion of the 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, **we regret that the Council text allows the pre-contractual information to be provided after the conclusion of the contract in case a consumer concludes a contract 'using a means of distance communication which does not enable providing the full pre-contractual information'**

**The trader should at least be obliged to provide the key elements (information on costs, risks, etc.) of the pre-contractual information before the conclusion of the contract, as proposed for telecommunications in article 16a(2), in the Council proposal.** 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.

**9. There is a need for an obligation to include information about any environmental or social objectives as well as the risk-reward profile of the financial service in the pre-contractual information provided to consumers.**

**Information about the risk-reward profile of a financial product** is important for the consumer to be aware of to make an informed decision.

As a minimum, such information should encompass a brief 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 key information a consumer must receive as losing money could have substantial impacts on their overall economic and financial well-being.** This information also has to be provided to retail investors under other EU product-specific legislation for retail investments, i.e. PRIIPs



and MiFID II and should also be included in the DMFSD to ensure that consumers receive this key information for retail investment products that come to the market that are not yet covered by product-specific legislation. **This is even more important given that there isn't a right of withdrawal for these types of products.**

With regards to **information about any environmental or social objectives targeted by the financial service**, there is a growing interest of investors in the impacts of their financial products on both the environment and society while sustainability risks are increasingly recognised as financially material risk for companies and thus will impact returns on investments products (see for instance a recent [report](#) by the OECD). For example, with the transition to a carbon-neutral economy, transition risks could have a financial impact on investment products (as certain investments will become stranded). Investments will also be impacted as companies are exposed to very tangible physical risks stemming from climate change which are already materializing in some regions of the world. ESG considerations are therefore increasingly embedded across the financial services regulatory framework, incl. SFDR, MiFID II, and the IDD.

**10. It is important that consumers purchasing a financial service online have the right for human intervention, not only to receive adequate explanations about the product at the pre-contractual stage but also during the entire contractual relationship with the trader.**

As shown, for example, by [a recent study of the Dutch central bank \(De Nederlandsche Bank\)](#), many vulnerable consumers in particular are dependent on human assistance for their banking operations, both at the pre-contractual and contractual relationship phases.

The study shows that 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 digital skills or access to the internet. Anecdotal evidence shows that this situation is not limited to the Netherlands but is witnessed across the EU. Therefore, **it is important to preserve the possibility of human intervention to ensure financial inclusion for all vulnerable groups.**

**11. The EP proposal to not apply the DMFSD in instances where 'services are provided on a strictly occasional basis and outside a commercial structure' would risk leaving consumers unprotected and should therefore not be adopted in the final legislative text.**

This proposal would put consumers at risk for several reasons. The formulation of this pro-



positional creates legal uncertainty as it is not clear what is meant with 'services provided on a strictly occasional basis and outside a commercial structure'

Recital 16 provides an example stating that it could encompass 'contacting an existing consumer to amend or extend a contract by distance means'. Applying the exemption under those circumstances could put consumers at risk, however, if these contract changes affect the key features of the product such as the price and risk. A change to these characteristics could make the product unsuitable and/or unaffordable for an existing consumer and therefore it is important that DMFSD provisions such as providing the consumer with pre-contractual information, adequate explanations and a right of withdrawal from the product are provided to the consumer in such instances.

In cases of contract extensions, the provision of the DMFSD requirements are also key. A consumer's circumstances may have changed since the consumer first took out the contract. Therefore, reminding the consumer of the product's terms and conditions and providing them with oral explanations with regards to the specific effects the product has on their financial situation is key to enable the consumer to make an informed decision about whether to extend the contract or not.

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