

EBA-Op-2019-12

23 October 2019

Opinion of the European Banking Authority on disclosure to consumers of banking services through digital means under Directive 2002/65/EC

Introduction and legal basis

1. In order for consumers to make informed decisions about their financial products and services, they should have access to high-quality information that is provided at the appropriate time, via suitable means, and that explains the features and costs across the lifetime of the product. This applies to the marketing of financial products and services that are marketed and/or sold at a physical meeting between the buyer and seller but even more so when the buyer and seller are not interacting with each other in the same physical location ('distance marketing').
2. Because of their intangible nature, financial services are particularly suited to distance marketing, which is why in the EU, a Directive established in 2002 a legal framework governing the distance marketing of financial services: the EU Directive on Distance Marketing of Consumer Financial Services (2002/65/EC, DMFSD). According to the Directive, when concluding a distance marketing contract, all the contractual terms and conditions and the prior information are required to be communicated to consumers, on a durable medium, and be accessible to them in good time before they are legally bound by any distance contract or offer.
3. In fulfilment of the EBA's objective of contributing to the enhancement of consumer protection and to monitor financial innovations, and by way of executing the EBA's Roadmap on Fintech of March 2018,¹ the EBA has assessed the extent to which the disclosure requirements in EU law are suitable to achieve a maximum level of consumer protection and facilitate the operation of the single market in the EU in an era that has seen such services being increasingly

¹ See <https://eba.europa.eu/-/eba-publishes-its-roadmap-on-fintech>

sold through digital means, which for the purpose of this Opinion is understood as the digital channels through which financial services are marketed, such as the internet or mobile devices.

4. To that end, the EBA conducted a more detailed analysis into disclosure rules, as part of a wider assessment of potential impediments to cross-border financial services, which covered issues arising in the area of consumer protection but also authorisations, licencing and anti-money laundering. The Report concludes inter alia that a review and further harmonisation of the legislative framework on disclosure should be considered and indicates that the EBA would set out more detail in a separate Opinion addressed to the EU Commission.
5. Accordingly, the Opinion develops a number of proposals as to how the disclosure rules should be revised, with a particular focus on the DMFSD. The proposals consist of *general* proposals applicable to any information that is being made available to consumers, such as its timing, the presentation format, and accessibility, as well as *specific* proposals applicable to particular stages of the information to be provided. The proposals are based on the information gathered by the EBA concerning the distance marketing of financial services that fall into the EBA's scope of action – i.e. deposits, payment accounts, payment services, electronic money, and mortgage credit – although the EBA's proposals are potentially suitable for other financial services, too.
6. The EBA's competence to deliver this opinion is based on Article 34(1) of Regulation (EU) No 1093/2010 (the EBA Regulation), as information requirements under the DMFSD relates to the EBA's area of competence.² In addition, Article 9(1)(d) requires the EBA to take a leading role in promoting transparency, simplicity and fairness in the market for consumer financial products or services across the internal market, inter alia by contributing to the development of common disclosure rules. The opinion is also based on Article 9(2), which mandates the EBA to monitor new and existing financial activities and to adopt guidelines and recommendations with a view to promoting the safety and soundness of markets and convergence of regulatory practice, and on Article 9(4), which mandates the EBA to provide advice to the European Parliament, the Council and the Commission on new or innovative financial activities.
7. In accordance with Article 14(5) of the Rules of Procedure of the Board of Supervisors³, the Board of Supervisors has adopted this opinion.
8. The Opinion is addressed to the European Commission for consideration during its pending evaluation of the DMFSD.⁴
9. Given that it is likely to take several years for a revised Directive to be proposed, to enter into force and to apply, national authorities competent for consumer protection and the conduct

² Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

³ Decision adopting the Rules of Procedure of the European Banking Authority Board of Supervisors of 27 November 2014 (EBA/DC/2011/01 Rev4).

⁴ See https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-6079786_en

of financial institutions that are already in the process of amending national disclosure requirements may consider incorporating the proposals set out in this opinion.

General proposals

Scope and consistency of disclosure rules

10. The current DMFSD sets out important disclosure requirements, which have succeeded in bringing about a high-level of protection for consumers considering to buy financial services at a distance. However, consumer detriment has arisen from their ever increasing use of digital marketing channels, such as the internet and mobile devices. As a result, the requirements in the DMFSD should be revised to focus much more on the presentational aspects of disclosure for those channels. This should include rules regarding the form, prominence and timing of disclosure, which should be adapted to the specific product or service, the digital channel(s), and the consumer's device.
11. The disclosure requirements in the DMFSD should be reviewed for potential overlaps and/or inconsistencies with disclosure requirements in other, product-specific Directives and Regulations applicable in the EU, such as those governing payment services, payment accounts, or mortgage credit.

Timing of disclosure

12. The DMFSD requires that providers of banking services (hereafter 'providers') make available to consumers relevant information at an early stage in the buying process, and in particular before the consumer commits to a specific financial product or service. More specifically, Article 3(1) DMFSD requires information to be in good time before consumers are bound by a contract, so as to provide them with the opportunity and ability to act on the information.
13. This is particularly pertinent when financial services are marketed through digital means, given the expedited way in which consumers might be made to proceed swiftly through user interfaces, e.g. via check boxes, radio buttons or similar features. The provisions and definitions in the DMFSD, such as the definition of 'durable medium', are generic and should be reviewed and amended such that they keep track of technological evolution, e.g. are suitable for the marketing via digital means. More details are provided further below.
14. At the pre-contractual stage before the point of sale, the DMFSD provides that the consumer should be provided with information on the supplier, the financial services, the contract and the redress procedures before making a choice. In cases where financial services are marketed via digital means, these issues are, again, particularly important given the speed with which consumers are led, and often encouraged, to make buying decisions. The use of digital means of communications should not result in information that is overly restrictive and, hence, unclear, ambiguous or misleading. A revision of the Directive should take care to spell out explicitly requirements for this marketing channel.

15. For example, the provider should be required not to disguise the relevant information from the consumer or discourage him from seeking clarification from the banking service provider should any of the terms or conditions be not fully understood.

Presentation and format

16. Information to consumers of a potential agreement that will be concluded via digital means should be concise, focused to serve its intended purpose, and presented in a clear and understandable format. This should be done so as to increase the likelihood that consumers notice and understand key information (e.g. on fees and charges, or the right of foreclosure when it comes to credit secured by a mortgage) and what the agreement implies in terms of financial commitment.
17. Providers should be required to draw attention to relevant information and display disclosures prominently. Information should be presented in plain and intelligible language and in a readable font size, which should easily adapt to work on any kind of device. Ideally, providers should also enable the option for consumers to increase the default font size. In addition, most relevant information for consumers should not be displayed in a smaller font size than the rest of the disclosure, in particular charges and withdrawal conditions, if applicable.
18. Without prejudice to any requirements set out in sectoral directives, providers should be required to use at least the official language(s) of the country where they are marketing the service, unless the consumer agrees to use another language. Providers should further be required to use short and direct sentences, key words, boldface, bullet points, comparative tables or other such features so as to highlight relevant information and improve clarity. Legal information should be provided in clear and understandable language and technical jargon should be avoided, whenever possible. Where such use cannot be avoided, a glossary for reference should be available in a visible place. Providers should be aware that incorporating unrelated material into the disclosure also may diminish communication of key messages to consumers.
19. Providers should be required to design disclosure material such that they are noticeable, paying particular careful attention to the size, colour, icons or graphics used to disclose relevant information, as they may affect its prominence in relation to other content displayed in the screen (for instance, information in a colour that blends in with the background is likely to be missed). Where colours are used in the design of mandatory disclosures, such as standardized pre-contractual information, they should not diminish the comprehensibility of the information provided if these are printed or photocopied in black and white.

Provision of information

20. The Directive should make clearer in Article 5(1) how pre-contractual information should be provided on a durable medium, in a way appropriate to the particular device and the specific type of digital communication channel. The providers should check that the delivery mechanism fits the objective of effective disclosure.

21. Information to be disclosed to the consumer through standardized pre-contractual information documents on a durable medium should take into account the practicality of the relevant standardized form, and that it is downloadable in its entirety as a stand-alone document.
22. When access to relevant information is provided through a hyperlink, providers should be required to ensure that hyperlinks are
 - not used in a way that misleads consumers away from the relevant information, for example, by fragmenting the information provided into separate pieces in different locations;
 - noticeable and presented consistently, for example regarding style, prominence, positioning, etc., to ensure that consumers can navigate easily through the additional information available;
 - labelled appropriately to convey the importance, nature, and relevance of the information they refer the consumer to;
 - referring consumers directly to the relevant information on the click-through page; and
 - periodically tested by the providers for proper functioning.
23. Providers should be required to assess the effectiveness of the hyperlinks by monitoring click-through rates and related consumer behaviour, and make changes accordingly as required.
24. Where the length of the information is such that cannot be shown within the display area in its entirety, leading to the implementation of a scrolling mechanism to view different parts of the document, providers should ensure that consumers cannot conclude the contract before scrolling down the entire information to the very end.
25. With regard to scrolling through information, providers should use different techniques to encourage consumers to scroll, including, but not limited to,
 - using text or visual cues;
 - adjusting navigation for scrolling, for example by keeping abreast of empirical research about where consumers do and do not look on a screen while at the same time recognizing and adjusting to any technological limitations on the consumer's device; and
 - using jump-to-section options to enhance long-scrolling.

Accessibility and effectiveness of the information

26. The requirements under Article 5(1) of DMFSD should clarify explicitly that providers are required to allow information to be downloadable, so that consumers may store it in their own device for future reference.
27. Disclosure is effective when consumers are encouraged to pay attention to the information provided, are effectively enabled to interpret it, and are willing to incorporate it in their decision-making process. Therefore, when drafting, reviewing and simplifying product information and literature via digital means, providers should be required to take into account the interests, objectives, characteristics and financial capability of the target market for the product or service in question. To that end, providers should be required to test the information with said target market to assess how the information is understood and used by consumers, and to take necessary steps to mitigate any problems identified. t.⁵
28. In order to improve the effectiveness of disclosure, providers should be required better to communicate with consumers when concluding contracts via digital means, by considering not just the required message, but the best means of communicating that message, based on the type of financial product or service, the respective stage in the marketing and sales process.
29. To that effect, providers should be required to use behavioural insights to create effective product and service information, and should include communications to consumers as an integral part of the product or service design process.
30. Providers should be required to use communication means that are proportionate to the complexity of services provided, such as live chats, chat bots, Q&As, infographics, guides, interactive tools or similar approaches, to ensure that consumers are adequately assisted in their interaction and commercial relationship with the firm in the digital environment.

Monitoring effectiveness

31. Providers should be required to monitor the design and prominence of relevant disclosures by analysing consumer behaviour, for example by gathering feedback from consumers, monitoring their activities and following up on complaints to ensure their effectiveness in the commercialisation of retail banking products and services through digital means. The provider should take the results of the monitoring into account to decide on potential changes required.

⁵ For more detail, see EBA Guidelines on Product Oversight and Governance (EBA/GL/2015/18) at <https://eba.europa.eu/regulation-and-policy/consumer-protection-and-financial-innovation/guidelines-on-product-oversight-and-governance-arrangements-for-retail-banking-products>

Specific proposals

Advertisements

32. Complementarily to relevant provisions on advertisements contained in a number of Directives, the DFMSD should be amended so that, when advertising retail banking products and services through digital means, providers are required
- not to disguise the promotional nature of the communication;
 - to ensure that information is presented in a way that is clear and not misleading;
 - to avoid exaggerating the benefits of financial products or services; and
 - to ensure disclosure of a product's risks should have equal prominence as information on a product's benefits, in particular with regard to font size and colour.

Pre-contractual information

33. The DFMSD requires providers to make available pre-contractual information such that they enable consumers to assess whether the product is appropriate for their needs and financial situation.
34. When providing such information through digital means, providers should be required to move away from a pre-ticked box approach as a means to obtain evidence of the consumer's understanding and consent.
35. In order to reduce the risk of the consumer failing to consider key information, in particular information on fees and charges, such information should be required to be highlighted, framed and contextualised effectively within the display screen, and presented upfront.
36. Providers should be required to use boxes, pop-ups, simulations and similar means for the purpose of drawing the consumer's attention and to increase their understanding of product risks.
37. Providers should be required to ensure that information is easily accessible and understandable so as to allow consumers to enter into an active and informed consent, for example by presenting key information in a clear and prominent manner, separately from the complete suite of information that is being provided, and in a format that is clearly linked to any 'click-to-buy' button that the provider may have used, so that the information cannot be overlooked by the consumer.
38. Providers should be prohibited from using pre-ticked boxes through which the consumer is, by default, being opted into buying additional or ancillary products or services. Where such products or services are offered during the contracting process, these should be clearly framed

and presented separately from the information about the main underlying product. Instead, providers should ensure that consumers exercise active and informed consent.

39. Providers should periodically review their pre-contractual information to ensure that its content and format are kept simple and easy to understand.

Right of withdrawal

40. Providers should be required to set up a dedicated space with their digital banking services to make consumers aware of their right of withdrawal, and to enable them easily to exercise their right of withdrawal from the relevant contract.
41. Such space should be accessible to the consumer and located on the provider's home page or main menu on a permanent basis.
42. The procedure to exercise the right of withdrawal should not be more burdensome than the procedure to sign the contract.

Complaints handling procedures and alternative dispute resolution (ADR)

43. Complimentarily to existing requirements applicable to Member States under Directive 2013/11/EU for the setting up of Alternative Dispute Resolution Regimes (ADR), providers should set up a dedicated space with their digital banking services enabling consumers to exercise with ease their right to complain, and to be informed on alternative ADR procedures with which the provider complies.
44. This information should explicitly explain the steps to be followed, e.g. who the consumer should contact first, and should provide direct links to ADR webpages.
45. In addition, where more than one provider is involved in the provision of the banking service, the provider(s) should clarify to which provider(s) a complaint should be addressed and in respect of which provision(s) in the contract.
46. Such space should be accessible to the consumer and located on the provider's home page or main menu on a permanent basis.

Post-sale information

47. When communicating through digital means, providers should be required to ensure that the consumer pays attention to important communications after the sale of the product, such as statements of changes to terms, conditions, fees or charges, and other forms of communication, unawareness of which could be detrimental to consumers.
48. Where appropriate, providers should be required to do so by using instant communication channels, such as emails, Short Message Service (SMS) or push notifications, including the

seeking of prior consent by the consumer. Consumers should be able to opt out of these communication channels.

49. The DFMSD, and Article 5(3) in particular, should be reviewed to assess the merit of amending that provision in order to ensure that, where a contract has been signed via digital means, the terms of the contract should specify the extent to which the consumer can switch to a non-digital provision of the service and, if so, under what conditions.

This opinion will be published on the EBA's website.

Done at Paris, DD Month YYYY

[signed]

[José Manuel Campa]

Chairperson
For the Board of Supervisors