



Council of the European Union
General Secretariat

**Interinstitutional files:
2022/0147 (COD)**

Brussels, 31 August 2022

WK 11261/2022 INIT

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NOTE

From:	Delegation of Germany
To:	Working Party on Consumer Protection and Information (Attachés) Working Party on Consumer Protection and Information
Subject:	Directive on financial services contracts concluded at a distance - Non-paper on amending the Consumer Rights Directive 2011/83/EU to introduce a withdrawal button for distance contracts concluded by electronic means

DEU Non-paper

Amending the Consumer Rights Directive 2011/83/EU to introduce a withdrawal button for distance contracts concluded by electronic means

In connection with the Commission's "New Deal for Consumers", which led to the adoption of the Modernisation Directive 2019/2161, the expectation has been expressed in various quarters of simplifying the possibilities for consumers to withdraw from a contract concluded with a trader online and thereby improving consumer protection. Given that Article 8 of the Consumer Rights Directive 2011/83 contains special requirements regarding the conclusion of contracts with a consumer on the Internet via a separate button, it has been argued that a trader making use of this possibility must likewise be obliged to additionally permit the consumer to withdraw from such a contract in precisely the same way. Proponents of this view believe that withdrawing from a distance contract concluded by electronic means should be just as straightforward as entering into it. It is also argued that this would avoid a media discontinuity whereby a consumer could conclude a contract on a website but then be unable to withdraw from it on the same website and thus be forced to do so by other means.

Against this background, the German Federal Government would like to submit a proposal aimed at further developing the possibilities for withdrawing from distance contracts, and would suggest that this issue be discussed during the negotiations on amending the Consumer Rights Directive within the framework of the "Empowering the consumer for the green transition" initiative.

The Federal Government hereby proposes the following provision:

ARTICLE 11A (NEW) CONSUMER RIGHTS DIRECTIVE

FURTHER EXERCISE OF THE RIGHT OF WITHDRAWAL IN DISTANCE CONTRACTS

(1) With respect to distance contracts where it is made possible for the consumer to conclude a contract via a website and the consumer assumes the obligation to pay a price, the trader shall additionally ensure that the consumer can withdraw from the contract on that same website by activating a button or via a similar function.

(2) The button or similar function shall be labelled in an easily legible manner only with the words “withdraw from contracts here” or a corresponding unambiguous formulation. The button shall lead the consumer directly to a confirmation page which

1. invites and enables the consumer to provide information which
 - a) enables his unambiguous identification
 - b) unambiguously identifies the contract to which the withdrawal applies
 - c) enables the confirmation of withdrawal to be sent to him swiftly by electronic meansand
2. contains a confirmation button labelled in an easily legible manner only with the words “withdraw now” or a corresponding unambiguous formulation and which the consumer may activate in order to submit the declaration of withdrawal.

(3) The button and confirmation page shall be permanently available and directly and easily accessible.

(4) The consumer shall be able to store the declaration of withdrawal, submitted by activating the confirmation button or via a similar function, including the date and time of its submission, on a durable medium and in a way that makes it clear that the declaration of withdrawal was submitted by activating the confirmation button or via a similar function.

(5) The trader shall immediately confirm to the consumer the content of the declaration of withdrawal, as well as the date and time of its receipt, on a durable medium.

(6) Where the buttons and confirmation page are not made available in accordance with paragraphs (1) to (3), a consumer may withdraw from the distance contract concluded by electronic means after the end of the withdrawal period in accordance with Article 9(2). The withdrawal period shall then expire [**x days/months**] after the end of the original withdrawal period in accordance with Article 9(2).

Recital 44a (new):

(44a) Where a trader offers the possibility of concluding distance contracts by electronic means via a website, he shall additionally be obliged to enable the consumer to withdraw from such a contract by electronic means via a button on that same website. This obligation aims to enhance the possibilities for consumers to get out of contracts by means of withdrawal. Along with the other available possibilities for submitting the declaration of withdrawal, it should thus be ensured that consumers can withdraw from a contract just as easily as they can conclude it. To achieve this, the trader is to provide a button on the website on which the contract is concluded that indicates the possibility of withdrawal. The button must lead the consumer to a confirmation page where he can provide certain information to identify the contract. If the trader does not make the button and confirmation page available, the withdrawal period is to be extended. The withdrawal period shall then expire [x days/months] after the end of the original withdrawal period in accordance with Article 9(2).

Explanatory notes:

Withdrawing from distance contracts concluded by electronic means can often pose major challenges to consumers. In contrast to the straightforward manner in which such contracts are concluded, withdrawing from them directly via a website has so far often not been possible or is to some extent complicated by the website's design.

The trader's obligations proposed in the draft version of Article 11a are intended to enable consumers to submit declarations of withdrawal for contracts concluded by electronic means in a manner that is similarly straightforward to the submission of declarations to conclude such contracts.

The obligation set out in the draft version of Article 11a is applicable to traders whenever consumers are permitted to conclude contracts by electronic means. In order for this obligation to apply to the trader, it makes no difference whether the conclusion of the contract is permitted via a website operated by the trader himself or – as is the case with intermediary platforms, for example – via a website operated by a third party. In both cases, the trader has to ensure that the consumer can submit a declaration of withdrawal in accordance with the draft version of Article 11a. If the conclusion of the contract is made possible on a website not operated by the trader himself, the trader must therefore contractually oblige the third party, as the operator of the external website, to enable the submission of a declaration of withdrawal.

The trader's obligation under the draft version of Article 11a is limited to contracts between traders and consumers in which the consumer is placed under an obligation to pay; this follows from Article 8(2) of the Consumer Rights Directive.

The draft version of Article 11a is intended to expand the withdrawal options available to consumers. It should not, however, restrict or preclude the submission of declarations of withdrawal by other means; this is clear from the stipulation "additionally" in paragraph 1.

The draft version of Article 11a(2) specifies the trader's obligation and provides for a two-tier procedure for submitting the declaration of withdrawal:

In accordance with the draft version of Article 11a(2) sentence 1, the trader must first make available a button or a similar function with the words "withdraw from contracts here", which then leads the consumer to another page labelled as the "confirmation page". Information other than "withdraw from contracts here" is only permitted if the information provided is equally unambiguous. It should also be noted that any deviating information must make it equally clear that activating the withdrawal button does not itself constitute a declaration of withdrawal, but that it merely initiates the withdrawal process. In any event, the wording should make it clear to consumers that, upon activating the button, they can still provide further information before the declaration of withdrawal can be submitted.

In order for a contract to be terminated by means of a declaration of withdrawal, the declaration must be designed in such a way that the recipient can identify who is declaring their withdrawal and to which contract the withdrawal refers. Thus, in accordance with the draft version of Article 11a(2) sentence 2 no. 1, the confirmation page must invite the consumer to enter the information necessary for this and enable him to do so. The consumer must be able to provide the information necessary to enable his own identification (point a) as well as the unambiguous identification of the contract (point b). To identify the consumer, their name and address would typically be necessary. To identify the contract, the trader may request customer, order or contract numbers. Furthermore, according to point (c), the consumer must be able to provide information that will enable the trader to swiftly send the confirmation of withdrawal by electronic means (generally an email address) under the draft version of Article 11a(5).

The draft version of Article 11(a)(2) sentence 2 no. 1 thus ensures that the consumer can provide the information necessary to specify his declaration of withdrawal to a sufficient extent, in particular with regard to the contract to which the withdrawal refers. The purpose of limiting the information to be requested is to prevent situations where the trader requests further data on the confirmation page that the consumer cannot readily provide and that are not even necessary in order to unambiguously identify the contract, thus making it more

difficult to withdraw from the contract in a simple and straightforward manner. At the same time, the request for information aims to comply with the principle of data minimisation as set out in Article 5(1)(c) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC. According to the draft version of Art. 11a(2) sentence 2 no. 2, there must be a button on the confirmation page which the consumer can use to submit the declaration of withdrawal. This confirmation button must be labelled with the words “withdraw now” or a corresponding unambiguous formulation.

According to the draft version of Article 11a(3), the two buttons and the confirmation page must be “permanently available and directly and easily accessible”. With regard to the button, this generally means being available on the homepage of the website. Consumers must therefore be able to access the two buttons, as a rule consecutively, at any time without first having to log in to the website. Temporary technical inaccessibility due to maintenance work, however, is not considered relevant in this respect. The “directly and easily accessible” requirement is based on Article 6a(1)(a) of the Directive.

The draft version of Article 11a(4) is intended to ensure that the consumer can already document the submission of the declaration of withdrawal. This might take the form of a downloadable summary of the content of the declaration of withdrawal submitted through activation of the withdrawal button, including in particular the date and time at which the button was activated.

The trader’s obligation to provide confirmation under the draft version of Article 11a(5) refers to the receipt of the declaration of withdrawal by the trader. Immediate confirmation on a durable medium can take place automatically in electronic business transactions.

The draft version of Article 11a(6) essentially contains a sanctioning provision. If the buttons and confirmation page are not provided in accordance with paragraphs 1 to 3, a consumer may withdraw from a contract for which those buttons are supposed to be provided without observing the initial withdrawal period. Traders who do not make such arrangements must accept a withdrawal submitted to them by the consumer even after the expiry of the original withdrawal period. The period then expires **[x days/months]** after the end of the original withdrawal period in accordance with Article 9(2). A milder form of sanction would not appear to be equally effective. While in the case of Article 8(2) of the Consumer Rights Directive the trader has an incentive to provide the button referred to therein in order to confirm the conclusion of the contract (as a contract with the consumer would otherwise not be validly

concluded), such an incentive is lacking in the “reverse” scenario of withdrawal which is at issue here. Thus, a trader who fails to comply with the legal requirement of providing the consumer with a simple and straightforward possibility of withdrawal is to be sanctioned by allowing the consumer to withdraw from the contract at a later time.