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NOTE

From:	Presidency
To:	Working Party on Consumer Protection and Information (Attachés) Working Party on Consumer Protection and Information
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Subject:	Proposal for a Directive on financial services contracts concluded at a distance - Presidency discussion note

Presidency discussion note

19 July 2022

Context

On June 30 2022, the European Commission presented the Proposal for a Directive amending Directive 2011/83/EU concerning financial services sold at a distance and repealing Directive 2002/83/EC ('DMFS proposal'). Six Member States raised the issue concerning the application of the full harmonisation regime for financial services sold at a distance. Following these comments, the Presidency would like to reflect on the scope and application of the new directive. The aim of this document and ensuing debate should clarify in which cases DMFS should apply and how the possible interaction with Member States' national law should be tackled. To facilitate the discussion it seems useful to explore the possible situations where the application of DMFS may be concerned.

The characteristics of the Commission proposal:

- full harmonisation - MS cannot adopt stricter rules
- subsidiary use of CRD (Art. 3(2))
- sole application of sectoral legislation in three subject matters - information requirements, right of withdrawal and adequate explanations (16a, 16b and 16d)
- safety net - as presented by the Commission, the new DMFS should primarily serve as a safety net for consumers who are about to buy - using distance communication channels - those financial services which have currently no own specific rules within European sectoral legislation

This in practice might lead to the following situations - scenarios of application (non-exhaustive list). These scenarios are divided into three basic categories - section A where there is an absence of both EU sectoral rules and national rules, section B where there is only national product legislation (no transposition), and section C where national rules consist of transposed EU sectoral legislation.

Application scenarios

A. “no rules” scenarios

The following scenarios explore situations where the safety net feature has been utilized as intended. No issues from these scenarios should arise, they are depicted for a comprehensive look into possible applications.

Scenario 1 - product has no EU sectoral rules, no national rules

- product not regulated at European level so far, MS adopted no national regulation
- examples: consumer crowdfunding credit (P2P lending), other financial innovations
- DMFS applies (safety net feature)

Scenario 2 - product excluded from EU sectoral rules, no national rules

- product type generally regulated at European level but concrete product excluded from the scope of EU sectoral legislation, MS adopted no national regulation
- examples: consumer credits with amount under EUR 200 or over EUR 75 000 (CCD), mortgage credits secured by non-residential property, interest free mortgages (MCD), some non-life insurances distributed by ancillary intermediaries (IDD)
- DMFS applies (safety net feature)

B. “national rules only” scenarios

Section B explores the conflict between DMFS and national product rules in the light of the change into full harmonization. Currently, rules transposing DMFSD (the directive in force) and national product rules (no transposition) coexist as the directive is of minimum harmonization. Those national product rules set additional rules in response to national specificities. With the change to full harmonization, the transposition of the new DMFS completely overrides national rules. That is to say, national product rules would have to be abolished for cases of financial services contracts concluded at a distance. The level of consumer protection might therefore be lowered.

Scenario 3 - product has no EU sectoral rules, has national rules

- product not regulated at European level, MS adopted national regulation
- examples: some savings and pension products
- DMFS applies (DMFS overriding national rules)

***Scenario 4 - product has no EU sectoral rules, has national rules based on EU sectoral rules***

- product not regulated at European level, MS adopted national regulation based on EU sectoral legislation
- examples: consumer crowdfunding credit (P2P lending)
- DMFS applies (DMFS overriding national, EU-based, rules)

Scenario 5 - product excluded from EU sectoral rules, has national rules

- product type generally regulated at European level but concrete product excluded from the scope of EU sectoral legislation, MS adopted national regulation
- examples: consumer credits with amount under EUR 200 or over EUR 75 000 (CCD), mortgage credits secured by non-residential property, interest free mortgages (MCD), some non-life insurances distributed by ancillary intermediaries (IDD)
- DMFS applies (DMFS overriding national rules)

Scenario 6 - product excluded from EU sectoral rules, has national rules based on EU sectoral rules

- product type generally regulated at European level but concrete product excluded from the scope of EU sectoral legislation, MS adopted national regulation based on EU legislation
- examples: consumer credits with amount under EUR 200 or over EUR 75 000 (CCD), mortgage credits secured by non-residential property, interest free mortgages (MCD), some non-life insurances distributed by ancillary intermediaries (IDD)
- DMFS applies (DMFS overriding national, EU-based, rules)

C. “EU sectoral rules” scenarios

The following scenario explores the conflict between sectoral EU legislation and DMFS.

Scenario 7 - product in scope of EU sectoral rules

- product regulated at European level
- sectoral EU regulation + subsidiary use of DMFS [16c, 16e and other relevant CRD provisions in accordance to Art. 3(2) of the CRD]
- 16a / 16b / 16d of DMFS shall not apply if the subject matter set out in those articles is covered by sectoral legislation

- 16a / 16b / 16d of DMFS shall apply if the respective subject matter set out in those articles is not covered by sectoral legislation

Each piece of EU sectoral legislation is to be checked whether it does cover (“contain rules on”) the subject matter of 16a, 16b and 16d. When a match is found, the sectoral EU rule is applied, if not, then DMFS applies. This process is to be repeated for each of the three Articles (16a / 16b / 16d).

Questions

Member States are kindly invited to reflect on the following questions:

Question 1: Should any other scenario be considered?

Question 2: Do you find any of the above scenarios, mainly in Section B, to bring any challenges with application in practice?

Question 3: How should these potential challenges be addressed in the proposal?

Question 4: In section C, what does it mean for a subject to be “covered” by EU sectoral regulation (i.e. to “contain rules” according to articles 16a (6), 16b (6) and 16d (4) of the proposal)? For example, what set of rules do you see applying when

- 4.1 the set of pre-contractual information in EU sectoral legislation is shorter than the one in art. 16a of DMFS?
- 4.2 only certain pre-contractual information from EU sectoral legislation apply to a concrete product, not the whole set of these information?
- 4.3 the use of the right of withdrawal is explicitly excluded in EU sectoral legislation for a concrete product?
- 4.4 EU sectoral legislation does not cover right of withdrawal at all?
- 4.5 EU sectoral legislation provides for a choice between right of withdrawal and a reflection period?

Question 5: In section C, do you see any other situation (beside those in Q4) where it is not clear what it means for a subject to be “covered” by EU sectoral regulation (i.e. to “contain rules”) and what set of rules is to be applied?