Revision of the Directive 2002/65/EC concerning the distance marketing of consumer financial

Preliminary comments from the French delegation on the Commission proposal

***Disclaimer:* Those preliminary comments are without prejudice of any additional comments that French authorities may provide in the future.**

General remark:

As a preliminary remark, French authorities share the opinion that while the existence of a "safety net" contribute to harmonies rules to the benefit of consumers and traders, the Directive's relevance and added value has decreased with the adoption of a number of EU product-specific legislative acts. As regards credits (consumer and mortgage) and investment products, most provisions of DMFSD seem irrelevant as they were all superseded by sectorial legislations. However, as regards payment services, some articles, such as paragraph 3 of Article 3 of DMFSD regarding voice telephony communications, still stands and are still relevant to protect consumers. Moreover, as digital selling of financial services develops rapidly, the Directive provide a useful protection for potential new products which may not exist yet and are not covered by any piece of national nor European regulation.

France does support the objective of the revision of the Directive as explained by the European Commission: to modernize the 2002/65/EC Directive and adapt it to the new reality of the market of distance marketing of financial products, in order to ensure a high level of protection for consumers all over Europe and to foster the cross-border conclusion of financial services sold at a distance. A growing number of unauthorized websites or social media are providing financial services at European scale, which create challenges related to consumers' financial and data protection.

French authorities also support the revision option that was chosen by the European Commission and the legal technique used to adapt the rules of Directive 2002/65/EC: amending the current Consumer Right Directive, creating a dedicated chapter and repealing the current DMFSD address the main concerns identified in the Impact Assessment.

Preliminary detailed comments:

More specifically on Article 16a and 16b of the proposal, France sees pre-contractual information and the right of withdrawal as central elements to enable consumers to understand complex products and to change their mind after having more information on the finance services offered to them. France also believes that the exercise of the right of withdrawal should be easy and accessible, and sees the creation of a withdrawal button as a significant improvement. Furthermore, as far as Article 16d and 16e are concerned, the adoption of measures regarding online fairness seems relevant, as distance selling of products can impair the consumer's ability to fully understand the specificity of the financial service and to make a well-informed decision. These articles are all the more relevant that in the past few years, French authorities in charge of controlling and supervising financial players have seen the rise of new harmful practices aiming at reducing consumer's ability to make free decisions.

Having said that, the French delegation has identified potential problems in the Commission's proposal. As Article 4.2 of the current Directive[1] was not kept in the Commission's proposal, full harmonisation would create a substantial issue, since France has adopted stricter measures in order to tackle harmful unsolicited calling practices in the insurance sector. In particular, the proposal does not differentiate the case where the contract is concluded on the initiative of the consumer from the case where the contract is concluded following cold calling by distributors, which led to different pre-contractual information obligations according to articles 5.1 and 5.2 of the current directive 2002/65/UE. The proposal does not explicitly introduce the obligation for the consumer to conclude the contract only after a minimum period of reflection in the case of unsolicited calling by distributors of financial products, this implying that the sale could occur during the same phone call – whereas it is required under French law to wait for a minimum 24-hours period.

Indeed, France has set a stringent framework stemming from four decisions taken by the French supervision authority since 2016 relating to breaches falling under the scope of DMFSD concerning insurance products, in particular for *(i)* default of provision of written precontractual information in good time before the conclusion of the contract and *(ii)* inaccurate and insufficient information communicated by phone. Therefore, the adoption of the proposal as currently written would thus lead to a reduction of consumer protection, which is not acceptable for the French delegation. Consequently, we suggest to either opt for minimal harmonisation, which is in line with the idea that the new Directive will be a safety net at the European level, or add a paragraph similar to article 4.2, allowing Member States to introduce more stringent provisions in relation to activities considered as a potential threat for consumers.

Improved framework on precontractual information could also embark provisions regarding disclosure to vulnerable consumers – especially for financial products -, at least to require that providers act in the interest of consumers and prevent irresponsible practices.

Paragraph 2 of Article 16a should be redrafted in order to make clear that two agreements from the consumer are needed: one about continuing the conversation and the second one about getting only the information referred to in points a), f), g) and p).

Moreover, the deletion of paragraph 2 of Article 7 of the current directive, according to which Member States may provide that the consumer cannot be required to pay any amount when withdrawing from

[1] « Pending further harmonisation, Member States may maintain or introduce more stringent provisions on prior information requirements when the provisions are in conformity with Community law."

an insurance contract would be a step backward. We suggest to keep this possibility in order to better protect consumers enabling them to fully use their right of withdrawal. In addition, this deletion creates practical questions in terms of amount to be repaid in case of withdrawal (fees…).

Deletion of paragraph 3 of Article 5 is also a step backward in terms of consumers protection as it hampered consumers in a situation of illectronism to receive the contractual information on paper or to change the means of distance communication during the contractual relationship.

Finally, clarifications are needed on the deletion of the current Article 10 on unsolicited communications, in order to check that it is now covered by another piece of legislation. Provisions regarding unsolicited services may also still be useful as it seems that no other harmonized provision on unsolicited services at European level, except for consumer credits where such a provision has been added to its proposal for a reviewed directive adopted by the European Council.

GREEK Comments
Czech presidency – WP 19/7/2022

We welcome the EU initiative for the ***Proposal amending Directive 2011/83/EU concerning financial services contracts concluded at a distance and repealing Directive 2002/65/EC (DMFSD),*** *as these two Directives both share a number of similarities, providing consumers with basic consumer rights, such as the right of withdrawal and the right to obtain pre-contractual information.*

Given that the current Directive 2011/83/EU excludes all financial services from its scope, the main purpose of this proposal is to cross out the overall exclusion of financial services from the scope of Directive 2011/83/EU. Consequently, Directive 2011/83/EU will also apply to financial services concluded at a distance, ensuring consistency with existing policy provisions both in the areas of consumer protection and financial services.

We strongly believe that this preferred option will lead to the repeal of the current legislation without the creation of a new legal instrument, and will provide horizontal consumer rights and rules, introducing the DMFSD relevant rights into Directive 2011/83/EU and ensuring that the safety net feature is safeguarded.

Within this framework, we support in particular the provisions which enable consumers to exercise the right of withdrawal through a withdrawal button, and ensure that consumers who have had less than 1 day to digest the pre-contractual information are reminded about the right of withdrawal after the conclusion of the contract.

It is of our high priority to effectively tackle the enforcement challenges arising from the digital environment and to establish rules covering consumer financial services concluded at a distance. In any case, we are committed to fully implement the proposal once it becomes a Directive.

THE SLOVAK REPUBLIC

The French Presidency with cooperation with the European Commission has prepared for the meeting which took place on 30. June 2022 the presentations of the proposal for a Directive of the European Parliament and of the Council amending Directive 2011/83/EU concerning financial services contracts concluded at a distance and repealing Directive 2002/65/EC. We are pleased to send you below our preliminary position and comments.

The Slovak Republic generally supports the Commission's intention to ensure and increase the level of consumer protection and also generally supports the intention expressed in the proposal with the aim of simplifying and modernizing the legislative framework by repealing the existing DMFSD while including relevant aspects of consumer rights regarding financial services contracts concluded at a distance within the scope of the horizontally applicable Consumer Rights Directive.

On the other hand, we have comment on full harmonization.

We understand that the same high level of consumer protection across the single market is best ensured through full harmonisation. Harmonisation means the rules will be similar for all financial service providers and consumers will be guaranteed the same rights in all EU Member States. But this may cause, in our opinion, problems for some Member States, as the Consumer Rights Directive represents full harmonisation, while the previous Directive 2002/65/EC represents minimal harmonisation. So, the Slovak Republic is of the opinion that in the event of the introduction of full harmonization, problems may arise with certain types of products provided at a distance (such as crowdfunding – P2P lending), and therefore it is necessary to consider whether it would not be appropriate to leave minimal harmonization.

The DMFSD directive creates a safety net in cases where:

(i) a new product appears on the market for which there is no EU legislation yet (e.g. virtual currencies, P2P lending),

(ii) the product-specific legislation does not provide the right(s) established by the Directive (e.g. the right for the consumer to withdraw from the contract within an established time-period is not laid down in the relevant insurance legislations),

(iii) the product-specific legislation creates exemptions and the product falls outside the scope of application.

The safety net was created on the basis of minimum harmonisation, either in the case of the introduction of new products or by establishing product exemptions. Individual Member States have set unregulated products separately in their national regulations, as they form exceptions to the directives or are not yet regulated in general, and therefore it is not appropriate to introduce full harmonization of these products in these cases.

Council of the European Union
General Secretariat

Interinstitutional files:
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Brussels, 14 July 2022

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NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Directive on financial services contracts concluded at a distance - Comments and questions from AT, BE, DE, FR, GR, IE, IT, PT, SK

Proposal Directive amending Directive 2011/83/EU concerning financial services contracts concluded at a distance and repealing Directive 2002/65/EC: Comments Belgium

Preliminary remark: our comments are under scrutiny reservation.

1. Maximum harmonisation

The European legislator has opted for a targeted full/maximal harmonization.

As the scope of the directive is very large and transversal (all financial services), this could imply that national legislation on specific financial services, and information duties on those financial services, could be prohibited.

In this context, Belgium proposes that at least article 4 from the actual directive 2002/65/EG (additional information requirements) would be inserted, and that more clarity would be given on the national competence in regulating certain selling practices (which normally concerns conformity with the unfair practices directive, what is allowed for financial services) and specific national product regulation of certain financial products/services.

2. Information obligation (art. 16a)

- **Art. 16a.1, (b) in fine**

- Belgium suggest to make a distinction which information is to be provided by the trader and which information by the representative of the trader, by analogy with Directive 2002/65/EG (supplier and representative of the supplier) to enhance legal certainty. As in the financial sector many contracts are concluded through intermediaries/agents, it is essential that the supplier, who is the responsible contractual partner can be easily addressed. This precision in the existing directive has to be retaken.

- It is not clear from article 16a.1(b), in fine of the proposal that an email address of the trader on whose behalf the trader is acting has to be provided. It is important that the consumer also has the email address of the actual contracting party. We suggest to add this to the provision.

Text suggestion: *"where applicable, the trader shall also provide the geographical address, identity and <u>email address</u> of the trader on whose behalf he is acting*;

-Concerning the sentence "*all those means of communication provided by the trader shall enable the consumer to contact the trader <u>quickly and communicate with him efficiently</u>*" (own marking), Belgian legislation has a similar provision. We state that in practice there is discussion whether an online contact form is sufficient to meet the requirement of quick and efficient communication and which requirements the contact form should meet (e.g. possibility to add attachments, acknowledgement of receipt with transcript of the content,…) to be seen as sufficient. Can you please clarify this and elaborate on it in the recitals?

- **Art. 16a.2, 2nd indent**

The proposal states that "*<u>Where the consumer explicitly agrees to continue the telephone communications</u>, by way of derogation from paragraph 1, only the information referred to in points (a), (f), (g), and (p) of that paragraph needs to be provided*" (own marking).

This suggests that the consumer implicitly agrees to receive less information by agreeing to continue the telephone communications. This seams a weakening of consumer protection in comparison with art. 3.3, (b) of directive 2002/65/EG that requires an explicit consent to receive less information in the case of voice telephony communications. In the new proposal this explicit consent is no longer necessary and the consumer will receive less information only because of the fact he continuous the telephone communication.

- **art. 16a.4, 1st indent**

The first indent states that the information has to be *made available*. How should this be understood in terms of distance communication? Is, for example, a reference to the website sufficient?

Do we understand correctly that it does not imply an action by the trader?

Subject to further study, Belgium believes that the wording *'provided'* is more appropriate since this implies an action from the trader and not from the consumer. Why has the EC opted here for "made available" instead of "provided".

3. <u>Payment of the service provided before withdrawal (art. 16c)</u>

- **Second indent (art.16.c.2)**

Belgium has reservations on the wording '*without the consumer's prior request'* since this could lead to the risk that the trader could be considered to be in breach with his obligations when he takes the initiative to propose to the consumer to perform the contract.

4. <u>Adequate explanations (art. 16d)</u>

- **First indent**

In contrary to article 16a.5 article 16d does not mention that the burden of proof shall be on the trader. Belgium suggests to add this to art. 16d.1 of the proposal in order to improve consumer protection and legal certainty.

5. <u>Other- new provision</u>

Belgium proposes to maintain the obligation, as appears in article 11 of the actual directive, for MS to provide in (civil) sanctions.

Courtesy Translation

Preliminary Opinion of the German Federal Government

to the

Proposal for a Directive amending Directive 2011/83/EU concerning financial services contracts concluded at distance and repealing Directive 2002/65/EC.

The Federal Government would like to thank for the opportunity for an early opinion on the above-mentioned draft directive. The following statements are made without a detailed discussion of the draft in the Council working group and can therefore only be of a provisional nature. The Federal Government expressly reserves the right to deliver further statements, including in writing.

The German Government supports the objectives pursued by the proposal for a directive to modernise and adapt the right to distance selling of financial services available for the future and to further strengthen consumer protection and the internal market for financial services. However, the following indications are already displayed in advance:

I. Coordination with the Consumer Credit Directive

From the point of view of the government, it makes sense to coordinate with the provisions of the Consumer Credit Directive. In the area of financial services, divergent provisions should only exist where they are objectively justified. Therefore, the Consumer Credit Directive will provide solutions for certain regulatory areas, which should then also be adopted for other financial services.

However, negotiations on the amendment of the Consumer Credit Directive are still ongoing. From the Federal Government's point of view, it is urgently recommended to wait for the outcome of the negotiations there before the substantive negotiations on the present directive are started. This concerns, in particular, the following provisions:

1. Design of the right of withdrawal

The right of withdrawal is essential for consumers and should not be curtailed. However, the design of the right of withdrawal should be reconsidered. The Financial Services Directive and Article 16b(1) of the Proposal link the beginning of the withdrawal period to the fact that the consumer has received the terms of the contract and all the

information contained in a comprehensive catalogue. Errors in the provision of information may result in the withdrawal period never beginning to run and so-called “Eternal Right of Withdrawal”. In order to solve the same problem in consumer credit law, the Council, in its General Approach of 9 June 2022, advocated the introduction of a maximum revocation period of one year and 14 days. The solution developed there should be a model here. According to Article 10(1), such a maximum revocation period shall also apply to goods and services.
In addition, it is proposed that the Directive should also be accompanied by a uniform Union-wide model withdrawal notice for distance contracts on financial services, so that traders across the EU can provide legal information on the right of withdrawal and consumers know what requirements traders have to meet. The Consumer Rights Directive also already provides for such a model cancellation policy in Article 6(4). Within the scope of the previous Directive 2002/65/EC, Germany has provided purely national model withdrawal instructions for the distance selling of financial services. The German delegation is happy to present them in the upcoming negotiations.

2. Day period (Article 16a(3))

Article 16a(3) provides that the pre-contractual information shall be transmitted to the consumer one day before the contract becomes effective. Such a daily period may make the conclusion of contracts for financial services (e.g. insurance) inflexible in certain circumstances. The reminder of the right of withdrawal required in case of non-compliance with the day period contributes to more bureaucracy, not to greater transparency.
The corresponding regulatory proposal for the Consumer Credit Directive has been amended in the General Approach so that the information is (only) to be provided ‘timely’ (in this case Article 10(1)). The aim should be to ensure consistency for both directives.

3. No full adoption of sanctions rules

In line with the Council’s general approach to the revised Consumer Credit Directive, the applicability of Articles 24(3) and 4 of the Consumer Rights Directive should also be excluded as regards financial services. Article 3(1b) should not contain any reference to these two provisions.

II. Coordination with the previous Consumer Rights Directive

The transfer of the repealed provisions of Directive 2002/65/EC into the Consumer Rights Directive can in principle be traced. However, with the exception of the provisions referred to in

Article 3(1b) of the draft, there is no further link with the Consumer Rights Directive, although, in principle, the extension of further advances in the Directive to financial services could be envisaged. This raises questions in various places:

1. Applicability of Article 6a of the Consumer Rights Directive

Do the specific rules for online marketplaces still not apply to (exclusively) financial services? How would such an exception be justified?

2. Application of Article 8 of the Consumer Rights Directive

Article 8 contains special provisions on distance contracts which are not found in that form in Article 16a(2) to (4).

- Why does paragraph 2 not also apply to financial services, even though the Commission proposes to introduce a withdrawal button (on this at once sub III.5)?
- Why is there no provision comparable to paragraph 4 concerning contracts for which there is limited scope for the presentation of the information?
- Does the possibility of paragraph 6 (so-called “confirmation solution”) also apply in relation to financial services?

3. Rules on out-of-business contracts

In its national law, DEU also has rules on financial services concluded outside of business premises. It should be clarified, where appropriate in a recital, that these national rules are not blocked by the new Consumer Rights Directive.

III. Innovations compared to previous Directive 2002/65/EC

1. Full harmonisation

The DEU Insurance Contract Law provides for rights of withdrawal for all policyholders and special pre-contractual information obligations for specific insurance products that go beyond those provided here. It should be ensured that these remain in place and that further new ones may be added.

The resulting higher consumer protection should not be called into question.

It should be made clearer in the recitals that full harmonisation with regard to pre-contractual information and rights of withdrawal does not apply to the extent that specific rules exist in sector-specific Union acts. These sector-specific Union acts should be explicitly designated.

2. Subsidiarity (Arts 16a(6), 16b(6), 16d(4))

In principle, the rules on the subsidiarity of the provisions in Articles 16a, 16b and 16d should be welcomed. However, there remain ambiguities for the national transposition legislature (and subsequently for the legal user) as to the scope of this subsidiarity.

Therefore, in the context of a footnote for the article concerned — but at least in a recital — it should be clearly defined which rules from other directives are meant here and how far subsidiarity extends.

It should also be clarified, for example, that the rules on the right of withdrawal under the other Union law as a whole are a priority. The words “on the exercise of” in Article 16b(6) should be deleted, as they allow for the misconception that only the modalities of exercise and not the conditions of the right of withdrawal depend on the specific Union act.

In addition, it is not clear how the subsidiarity regime affects rules in other directives where the national legislature has a leeway for transposition. For example, the Residential Immovable Property Credit Directive leaves it to the Member States to determine whether a contractual reflection period or a right of withdrawal should be introduced (Article 14(6) of that directive). It is necessary to clarify that the new provisions of the Consumer Rights Directive on financial services do not apply in such and comparable cases. In addition, adaptations to other Directives should be considered in so far as they refer to the previous Directive 2002/65/EC.

3. Scope of application

The scope of the second subparagraph of Article 3(1b) does not contain the previous exception in the second subparagraph of Article 1(2) of the previous Directive 2002/65/EC. Why has that exception not been adopted?

4. New information requirements (Art. 16a(1))

From a German perspective, supplementing the information requirements can only be considered if they are of real benefit to the consumer.

The amendments to Article 16a(1)(b) seem appropriate, according to the first review.

With regard to Article 16a(1)(n) and (o), the question arises from this point of view as to what is meant by ‘where applicable’. In any event, according to an actual judgment of the Court of Justice of 5 May 2022, that wording in relation to Article 6(1)(m) of the Consumer Rights Directive means that the information obligation must be fulfilled if the consumer has a legitimate interest in that information (C-179/21, paragraph 41).

Is this wording to be interpreted in the same way in the present proposal?

In addition, the possibility offered by Article 16a(4) to layer certain ‘information’ should be clarified and the term ‘layer’ should be precisely defined. The presentation of information at different ‘layers’ or levels may, in principle, be a useful measure for the effective and user-friendly provision of information from the consumer’s point of view, but may also be detrimental to consumers. For example, there may be a risk that information may be “hidden” by means of long click paths or no longer perceived by the consumer. For this reason, it should be examined to what extent these risks should be addressed, for example, by specifying this regime. It should also be examined whether further information from Article 16a(1) should also be excluded from the possibility of ‘layering’ because of its high relevance for the consumer’s decision.
DEU assumes that this issue of ‘layering’ of consumer information does not only exist in financial service contracts. Why has this legal act been chosen with a sectoral scope?

5. Withdrawal button (Art. 16b(5))

In principle, DEU welcomes the Commission’s proposal to introduce an electronic withdrawal button for distance contracts on financial services. In the context of the negotiations on the draft “Directive amending Directives 2005/29/EC and 2011/83/EU as regards strengthening consumers for the green transition through better protection against unfair practices and better information”, DEU has already made a proposal for the introduction of a withdrawal button — but across sectors for all distance contracts. From the point of view of the Federal Government, an isolated introduction of the withdrawal button only for financial services cannot be justified, especially since there is not even an electronic order button for financial services such as under Article 8(2) of the subpara. 2 of the Consumer Rights Directive. A single solution and a single withdrawal button scheme should therefore be found for the entire future scope of the Consumer Rights Directive.
The withdrawal button proposed by the Commission differs from that proposed by DEU in various respects. In particular, the DEU proposal provides for a two-step procedure allowing for a clear identification of the contract. This may be necessary, in particular for reasons of legal certainty and data economy. DEU is happy to present these differences in one of the next working group meetings.

6. Adequate explanations (Art. 16d)

From the Federal Government’s point of view, it is not clear what regulations should be made by the national legislature. For an error-free implementation of these requirements, they would need to be further clarified.

The proposed rules in paragraphs 2 and 3 with regard to online tools and thus the introduction of consumer rights in online tools and online means of communication, as well as the right to human intervention, are in principle interesting proposals which, as far as we can see, have not been included in any other legal act. The importance of online communication (e.g. via automated tools such as chatbots or robo-advisers or non-automated tools such as live chats) not only in the field of remote financial services, but in general for all consumer transactions on the Internet, is steadily increasing. Nevertheless, from our point of view, it is questionable whether legislation such as Article 16d(2) and (3) is correctly located in a directive limited to the financial services sector.
Furthermore, the meaning and purpose and scope of the subsidiarity rule in paragraph 4 are unclear. According to the current wording, it is unclear whether pre-contractual information obligations in another EU act supersede the explanatory obligations laid down here, or whether this should only apply if the other EU acts not only regulate pre-contractual information obligations, but also the obligation to explain them if necessary. We assume that only explicit explanatory obligations in other EU legal acts shall supersede the application of the rules for advice and online tools in Art. 16d (1) to (3). Is that understanding right?

7. Regulations on online user interfaces (Art. 16e)
In principle, we also welcome the proposed rules on online user interfaces. This strengthens the consumer's freedom of choice and protects him from dark patterns. There will be a similar regime in the future for the specific area of online intermediation platforms under the Digital Services Act.

However, the points referred to under 6 above concerning Article 16d(2) and (3) shall also apply here. Why is such a provision intended to be adopted in that only subsidiary directive? Why should these schemes be limited only to financial services? Is the Consumer Rights Directive, which so far regulates pre-contractual information requirements and rights of withdrawal, the appropriate regulatory location for this purpose?

In any event, where distance financial services are offered via online platforms, the relationship with the Digital Services Act should be clarified.

Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2011/83/EU concerning financial services contracts concluded at a distance and repealing Directive 2002/65/EC
Working Party on CONSUMER PROTECTION AND INFORMATION 19 July 2022
Italian preliminary comments

Italy expresses its support for the strengthening of consumer protection in the financial services sector and the promotion of free circulation of financial services in the single market. At the same time, some observations are to be made. First of all, we would like to underline that our comments, at this early stage of the negotiations, are still preliminary and subject to scrutiny reservation.

- First of all, as multiple Italian national authorities reported us, it is not clear how to interpret the relationship between the future directive and other specific provisions of EU law. In these regards, we would like to have it confirmed that art. 3 par. 2 Directive 2011/83/EU ("CRD") and the art. 16a par. 6, art. 16b par. 6 and 16d par. 4 should be read as stating that whenever a EU sectorial legal instrument regulates a specific financial service, this discipline shall prevail on the one under the present proposal, regardless the existence of an actual "conflict" between the two. We would also like to be confirmed whether the principle of prevailing of *lex specialis* shall apply regardless the means the underlying contract has been concluded. In this regard, recital 13 does not help to clarify the interpretation.

- More in general, as also reported by the Italian authorities in the questionnaires submitted during the preparatory works for the impact assessment, the relevance of the Directive 2002/65/EC ("DMFSD") decreased due to the product specific legislation adopted since 2002. For these reasons, on that occasion, the majority of the Italian authorities indicated the repeal of Directive 2002/65/EC as the preferable option. Nonetheless, having regard to the maintaining of relevance of some provisions of DFMSD in some sector, with the exception of articles 9 and 10 (nowadays irrelevant), we consider questionable the choice of inserting the new discipline in the body of Directive 2011/83/EU ("CRD").

- Furthermore, as recently pointed out on the occasion of the Impact assessment form, it is not clear why a mere revision of Directive 2002/65/EC could not simplify the existing regulatory framework. Indeed, including the new provisions in the body of Directive 2011/83/EU poses various problems for national legal systems, which could then be reflected on the level of consumer protection. Specifically, this inclusion risks leading to confusion on the competent authorities for the enforcement of the aforementioned provisions, since, by recalling some of the provisions of Directive 2011/83/EU, an intertwining of competences is created between generalist and sectoral authorities.
  Therefore, considering the problems it would create, it would be appropriate to reconsider this choice and, if not to completely repeal this discipline, at least keep it separate from Directive 2011/83/EU.

- At the same time, some of the services mentioned by the Commission as examples of financial services falling in the scope of the DMFSD acting as a "safety net" for unregulated products should not be considered as such. This is the case, in particular, for the activity of commercializing in **diamonds**, as well as in expensive wines, which in

Italy are considered as commercial activities and, as such, they are regulated by the unfair commercial practices framework and they are not subject in any way to the DMFSD.

- Similar concerns regard the activity/operations in **crypto assets**, which, according to recent EBA and ECB statements, at this moment is not subject to any form of regulation and therefore cannot be considered covered by the DMFSD.

- In general, we believe that, since the DMFSD's definition of "financial service" is very broad and subject to interpretation, in order to avoid legal uncertainties it should be clarified in the Directive that a service can only fall under the said definition when it has been identified as "financial" by EU or national legislation. For example, as regards crypto assets, we deem that only when the MiCA Regulation will enter into force, trading in crypto assets will be able to be legally qualified as a financial activity.

- Furthermore, we believe the **extension of specific articles of the CRD** to the financial services should be carefully evaluated. This is the case, for instance, of article 19[1] on the Fees for the use of means of payment. This article prohibits professionals from charging consumers, in connection with the use of certain payment instruments, fees that exceed those incurred by the professional for the use of those instruments. In the field of payment services, a specific rule is set out by Article 62 of the PSD2[2], regulating the charges applicable by the payee, which could overlap with Article 19 of the CRD, causing

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[1] Article 19 "Fees for the use of means of payment" Directive 2011/83/UE (CRD): Member States shall prohibit traders from charging consumers, in respect of the use of a given means of payment, fees that exceed the cost borne by the trader for the use of such means.

[2] Article 62 "Charges applicable" Directive (EU) 2015/2366: "1. The payment service provider shall not charge the payment service user for fulfilment of its information obligations or corrective and preventive measures under this Title, unless otherwise specified in Article 79(1), Article 80(5) and Article 88(4). Those charges shall be agreed between the payment service user and the payment service provider and shall be appropriate and in line with the payment service provider's actual costs.

2. Member States shall require that for payment transactions provided within the Union, where both the payer's and the payee's payment service providers are, or the sole payment service provider in the payment transaction is, located therein, the payee pays the charges levied by his payment service provider, and the payer pays the charges levied by his payment service provider.

3. The payment service provider shall not prevent the payee from requesting from the payer a charge, offering him a reduction or otherwise steering him towards the use of a given payment instrument. Any charges applied shall not exceed the direct costs borne by the payee for the use of the specific payment instrument.

4. In any case, Member States shall ensure that the payee shall not request charges for the use of payment instruments for which interchange fees are regulated under Chapter II of Regulation (EU) 2015/751 and for those payment services to which Regulation (EU) No 260/2012 applies.

5. Member States may prohibit or limit the right of the payee to request charges taking into account the need to encourage competition and promote the use of efficient payment instruments".

difficulties in transposition and enforcement. We therefore suggest to specify that Article 19 shall not apply to payment services covered by the PSD2.

- Among the articles of the CRD that would be extended to financial services, Article 22[3] on **additional payments** requires the express consent of the consumer "to any extra payment in addition to the remuneration agreed upon for the trader's main contractual obligation". In the context of banking services, where specific rules on the form and content of contracts are set out and impose the disclosure of all costs including those related to ancillary services, we do not understand what an "extra payment" would be exactly and how this rule could be applied in practice.

- The sector of financial services is very diverse and sectorial regulations often offer the possibility of more or less strict provisions. The extension of the application of article 4 of the CDR (***Level of harmonisation***) to financial services therefore poses cascading problems for revision of numerous national rules. Is this really the result the proposal wants to achieve?

- More in general, **we express concern about the choice to extend some provisions of the CRD to financial services**, as this choice will raise governance issues at the national level, where so far the supervisory authorities on financial services have never been in charge of the enforcement of this directive. The option of maintaining the DMFSD as an independent and autonomous legal act dedicated to the financial sector would have likely avoided these problems.

- As regards Article 16a, par. 3[4], on **the timeline for the provision of pre-contractual information**, we appreciate the purpose of giving more certainty. However, we are not convinced about the solution proposed, as already mentioned in the CCD negotiate. On the one hand, from a consumer protection perspective, we observe that in the context of distance services it is even more likely that the consumer wishes to conclude the agreement immediately, therefore the purpose of pre-contractual information to allow the consumer a comparison of offers and a careful choice would be substantially missed. Furthermore, from a market practice perspective, in many cases the provision of pre-

[3] Article 22 "Additional payments" Directive 2011/83/UE (CRD): "Before the consumer is bound by the contract or offer, the trader shall seek the express consent of the consumer to any extra payment in addition to the remuneration agreed upon for the trader's main contractual obligation. If the trader has not obtained the consumer's express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment".

[4] Article 16a, par. 3 COM(2022) 204 final: "The trader shall provide the information referred to in paragraph 1 at least one day before the consumer is bound by any distance contract.
When the information referred to in paragraph 1 is provided less than one day before the consumer is bound by the distance contract, Member States shall require that the trader sends a reminder, on a durable medium, to the consumer of the possibility to withdraw from the distance contract and of the procedure to follow for withdrawing, in accordance with Article 16b. That reminder shall be provided to the consumer, at the latest, one day after the conclusion of the distance contract".

contractual information one day in advance might not be suitable in the context of a fully digitalized process. For these reasons, during the negotiations on the CCD review, several concerns were raised about the usefulness and effectiveness of this mechanism and at the end, in the General Approach, that provision was removed, reverting to the text of the current CCD. We suggest maintaining in this Directive a constant alignment with the ongoing negotiation on the CCD, in order to provide a homogenous level of consumer protection.

- Article 16a (4), on the **way of providing pre-contractual information**, introduces the concept of "layering" information, without further explanations. According to recital 22, this technique includes the use of pop-ups or links or the "table of contents approach" using expandable headings that allow the user to read further information details. In our view, as the recitals of the new Directive will not be included in the CRD review, it could be advisable to define in the articles the technique of layering, in order to clarify in what it would consist.

- With reference to the **Withdrawal Button** foreseen in Article 16b (5), we appreciate the purpose of simplifying the exercise of the right of withdrawal in the context of digital transactions. However, we think that it should be carefully assessed whether the additional benefit for the consumer offsets the costs for the traders to implement this new solution. We also notice that, according to this provision, the activation of the withdrawal button should result in an immediate confirmation of the exercise of the right of withdrawal, including the date and time at which it was exercised. In order to protect the consumer from possible typing errors, we suggest to clarify that such provision is without prejudice to the possibility for the trader to introduce electronic steps to request confirmation of the intention to withdraw. Moreover, according to para. 6, the Withdrawal Button would not be applicable where another EU act governing specific financial services contains rules on the exercise of the right of withdrawal (e.g., the CCD). As a result, the exercise of withdrawal could end up to be less simple for that kind of contracts where the right of withdrawal has been considered so important to made them subject to specific legislation. In light of the above, it could be explored the possibility to establish that – where concluded at distance – all contracts for financial services should provide the consumer with a withdrawal button, irrespective of whether they are subject to specific regulation or not.

- With reference to Article 16d ("Adequate explanation"), we notice that a similar rule is provided in the CCD review, with the difference that the CCD text allows Member States to adapt the requirements to the specific circumstances, target audience and nature of the product offered. **We do not see the reason for this difference and suggest, therefore, maintaining in this Directive the flexibility provided by the CCD**.

- As regards Article 16e (**Additional protection regarding online interfaces**), we appreciate the aim of mitigating the risk of cognitive or behavioral biases. Nonetheless, we wonder, on one hand, whether the traders would always be able to design and control the structure and/or operation of the online interface they use to offer their services and, on the other hand, in terms of enforcement, whether the supervisory authority would be actually able to assess the capability of the interface of "distorting or impairing the ability of consumers to make a decision or to make a free, autonomous and informed choice". Therefore, it could be advisable further reflection on this topic, having also regards to the negotiations on Artificial Intelligence Regulation currently ongoing.

- We also have serious concerns about the extension to financial services of Art. 24 on **sanctions**. In fact, currently the infringements of the DMFSD are sanctioned by the public authorities exercising the supervision on the various financial sectors concerned by the Directive (banking, investments, insurance etc.), under the respective sanctioning regime which is different from one another and could be not compatible with the maximum harmonization provisions set out in Art. 24. We wonder whether the confluence of the DMFSD into the CRD allows MS to maintain their current regime. If not, this would seriously impact on the governance and enforcement of the rules on distance selling of financial services and should be carefully reconsidered.

PT welcomes the Commission's initiative.

The Commission's proposal is a step forward towards a legislative response to the growing digitalisation of financial services.

This proposal is more ambitious than some sectorial legislation in the financial services sector, especially when the contract is concluded through digital channels.

I. General remarks

PT welcomes the work done by the Commission to ensure an equivalent level of consumers' protection, namely by establishing a remission to provisions of the Consumer Rights Directive (CRD), similar to those laid down under the current Distance Marketing of Financial Services Directive (DMFSD). Notwithstanding, a more ambitious approach should be followed in relation to some aspects covered by this review.

As a preliminary remark, we think that the possibility of applying the rules laid down in the current proposal to all contractual stages that make use of means of distance communication, even if the contractual process is not exclusively conducted at a distance, deserves further discussion. For instance, in some situations, although products and services are not marketed exclusively at a distance, the pre-contractual stage occurs exclusively through digital channels, and it is important to ensure that consumers benefit from the same level of protection. This is particularly relevant when the applicable sectorial legislation does not establish a specific regime for the commercialization of such products through digital channels.

Other general remark refers to the importance of introducing in the proposal other specific rules regarding the commercialization of financial products and services through digital channels. These provisions should stem from the recommendations included in:

(a) The European Banking Authority (EBA) Opinion on disclosure to consumers of banking services through digital means under Directive 2002/65/EC (EBA-Op-2019-12);

(b) The Joint ESAs Report on Digital Finance (ESA 2022 01).

Bearing in mind the aforementioned Opinion, this review should encompass the following recommendations:

(a) In relation to the provision of information, "*where the length of the information is such that cannot be shown within the display area in its entirely, 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*" (Recommendation 24);

(b) As to pre-contractual information, "*when providing such information through digital means, providers should be required to move away from pre-ticked box approach as a mean to obtain evidence of the consumer's understanding and consent*" (Recommendation 32). This provision is particularly important when considering tying and bundling practices, as further explained.

Considering the Joint ESAs Report on Digital Finance, this review should introduce a provision in order to ensure that traders, when advertising retail financial products and services through digital channels, are required to clearly label the promotional nature of the communication, in order for marketing messages to be clearly identifiable.

This review is also an opportunity to address, at least, some of the consumer protection's issues stemming from online tying and bundling practices. For this purpose, in order to ensure that consumers exercise active and informed consent, traders should be expressly prohibited from using procedures through which the consumer is, by default, buying additional or ancillary products or services. Additionally, when products or services are offered during the pre-contractual process, these offers should be clearly framed and presented separately from the information about the main underlying product.

II. Specific comments

(a) Definitions – *Article 2*

The possibility of introducing definitions for 'online interfaces' and 'online tools' should be dully considered, since these concepts are essential to a proper application of Article 16d, (2), and Article 16e of the current text.

For this purpose, the definition of "online interface" established under Regulation (EU) 2018/302 could be considered (*"any software, including a website or a part thereof and applications, including mobile applications, operated by or on behalf of a trader, which serves to give customers access to the trader's goods or services with a view to engaging in a transaction with respect to those goods or services").* A definition is also provided by the Digital Services Act, which states that an *"online interface"* is *"any software, including a website or a part thereof, and applications, including mobile applications".*

In this respect, it should also be noted that, like its current counterpart provision in DMFSD, the proposal of the new Article 16a, (1), (m) of CRD mentions "*any specific additional cost for the consumer of using the* ***means of distance communication****, if such additional cost is charged*". DMFSD includes a definition of means of distance communication, but the proposal to amend CRD does not. Therefore, we propose to introduce a definition of "means of distance communication" in the CRD.

(b) Definition of initial service agreement followed by successive operations – ***Article 3, (1b), second paragraph***

In this regard, PT has noticed that, while the first paragraph of Article 3, (1b), of the Proposal has an exact correspondence with Article 1, (2), first paragraph of the DMFSD, the second paragraph of the latter was removed:

"*In case there is no initial service agreement but the successive operations or the separate operations of the same nature performed over time are performed between the same contractual parties, Articles 3 and 4 apply only when the first operation is performed. Where, however, no operation of the same nature is performed for more than one year, the next operation will be deemed to be the first in a new series of operations and, accordingly, Articles 3 and 4 shall apply."*

In this context, PT requests the Commission to clarify the rationale behind the deletion of this provision.

(c) Transparency of information requirements – ***Article 16a***

(i) In relation to Article 16a, (1), of the Proposal, we consider, in a preliminary note, that this provision could also set information requirements for situations when multiple providers are involved in a contract concluded at a distance. More specifically, consumers should be clearly informed of the areas of intervention of each provider. This information is essential to identify the provider responsible for a specific action, allowing consumers to properly direct their withdrawal right, submit a complaint or recourse to an alternative dispute resolution mechanism. For example, the provision to consumers of this information is particularly relevant when different types of products are marketed together (e.g., credit and insurance products), since, in such cases, the provider and the respective competent authority in relation complaints' handling are not the same.

(ii) In accordance with the current drafting of Article 16a, (1), (c), "*if different from the address provided in accordance with point (b), the geographical address of the place of business of the trader, and, where applicable, that of the trader on whose behalf he is acting, where the consumer can address any complaints*". In addition to this requirement, we consider that traders should provide consumers with information on the possibility of submitting a complaint through digital channels, whenever this possibility is available.

(iii) In addition, it should be established that traders are required to make available the withdrawal button in the same page (or, at least, accessible directly from it) used to conclude the agreement, so that the consumer does not have to spend time browsing the site looking for the specific subpage where the withdrawal button is made available.

(iv) We do not understand the reasoning for not including, in the proposal of the new article 16.º-A, a provision similar to the one in article 3/1/4/b) of DMFSD, which foresees that the information provided to the consumer must include information regarding "*the existence of guarantee funds or other compensation arrangements, not covered by Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit guarantee schemes and Directive 97/9/EC of the*

European Parliament and of the Council of 3 March 1997 on investor compensation schemes".

(v) The proposed drafting of Article 16a, (3), is very similar to the initial text presented in the context of the Consumer Credit Directive (CCD) review.

The Commission is certainly aware that the aforementioned proposal was subject to an intense scrutiny by Member States leading to its revision.

The final compromise text reverted the proposed drafting to a text very similar to the one currently in place under the Consumer Credit Directive (Directive 2008/48/EC).

The obligation imposed to the trader of providing the information, referred to in paragraph 1 of number 3 of Article 16a, at least one day before the consumer is bound by any distance contract seems excessive and may hamper the speed and convenience of the commercialization of financial products and services through digital channels. On the other hand, there could also be situations where, due to the complexity of financial services and products, the duty to provide information to the consumer up to at least one day before the consumer is bound by any distance contract is inadequate. The time frame might simply be too short.

Moreover, PT considers that the derogation foreseen in the second paragraph of this provision maintains the problem already identified (i.e., consumers often receive pre-contractual information at the same time they sign the contract). The disclosure of information to consumers, in a timely manner (i.e., giving the consumer enough time to assess the contract terms and conditions and their adequacy to his needs, interests and objectives), is an important aspect to strength the decision making process. Additionally, in our opinion, the right of withdrawal is not an equivalent or efficient mechanism to prevent consumers' detriment in this context.

It is understandable that the current time frame foreseen in article 3, (1), of DMFSD ("in good time") might be, in some circumstances, difficult to interpret, due to its fluid nature. However, it is flexible enough to cover the diversity of types of financial services contracts (from simple to complex and should be interpreted accordingly).Therefore, PT favours an alignment between the current proposal and the Council General Agreement of Article 10, (1), second paragraph of the CCD review:

"*Such pre-contractual information shall be provided to the consumer* ***<u>in good time</u>*** *before he or she is bound by any credit agreement or offer*."

(vi) Although Article 16a, (5), establishes the burden of proof by the professional, that the information duties in relation to the consumer were complied with, there is no clear indication of who has the burden of proof that the consumer granted consent to enter into the distance agreement (which, according to the current wording of Article 15 of DMFSD, can be imposed on the professional by legislation of the Member-States).

(d) Right of withdrawal – ***Article 16b***

The Proposal does not include a similar provision to the one established in Article 6, (3), of DMSFD. Although the rationale behind this absence is clear in Article 6, (3), (a) and (b) (these provisions do not make sense considering the rules on the right of withdrawal established by the Mortgage Credit Directive), PT deems important to clarify the reasons why the provision established under paragraph (c) of this Article was not maintained in the Proposal.

On the other hand, the Proposal also doesn't include a similar provision to the one established in Article 6 (6) of DMSFD. Moreover, the Proposal does not establish rules regarding the procedure that the consumer must follow in order to exercise his right of withdrawal. We can only find a reference to such exercise in paragraph 3 from Article 16b of the Proposal, that establishes that the consumer "*shall have exercised his right of withdrawal within the withdrawal period (…)* ***if the communication concerning the exercise of the right of withdrawal is sent***". This provision appears insufficient and should be further densified, in order to ensure legal certainty regarding the procedure to be followed by the consumer.

(e) Adequate explanations – ***Article 16d***

In our opinion, this provision should clearly establish that Member States shall ensure that traders are required to provide adequate explanations / assistance to consumers, for the entire duration of the contract (and not only, as it seems to be intended, at the pre-contractual stage).

We consider that this provision may benefit from some improvements, namely:

(i) The list of explanations presented should be minimal, we suggest the introduction of "at least". For this purpose, Article 16d,(1), last sentence, of the Proposal should be adjusted accordingly ("The explanations shall include, at least, the following elements: (…)")

(ii) To include in the list of elements that must be taken into account in the context of the explanations, "the contracting process". For this purpose, an additional subparagraph should be included in Article 16d,(1), between subparagraph (b) and (c), with the following requirement: "*If possible, the various stages of the contracting process, as well as the necessary documents for the conclusion of such process*".;

(iii) To establish that the tools used to provide explanations/assistance must be appropriate to the complexity of the product/service, the information being provided and the contracting process.

An additional paragraph should be introduced in Article 16d,(2), in order to ensure the adequacy of the means of communication used by traders when recurring to the online tools (such as live chats, chat bots, roboadvice, interactive tools or similar approaches). More specifically, the following should be added:

"*Member States shall ensure that traders are required to use these online tools in a proportionate manner, especially considering the complexity of the services provided and, thereby, guaranteeing an adequate assistance to consumers.*"

(f) Additional protection regarding online interfaces – ***Article 16e***

This regime could also be improved, namely by introducing illustrative list of examples. For this purpose, the following recommendations in the EBA Opinion should be considered:

(i) The possibility for the consumer to change the font size defined by default,

(ii) The information about the risks, costs, etc. associated with the product/service is not presented with a font size smaller than that adopted in the remaining information or

(iii) The recommendations regarding the use of hyperlinks.

(g) Consistency with other Union policies

A clarification should also be introduced on what regards the national legislation that do not result from European legislation which should continue to apply, since these provisions: (i) do not contradict the rules established under DMFSD (or other European sectorial legislation); and (ii) ensure a higher level of consumer protection.

(h) Ban on unsolicited services and communications – ***Articles 9 and 10 of DMFSD***

We understand the explanations provided by the Commission (Commission Staff Working Document Impact Assessment Report), according to which the Articles concerning the ban on unsolicited services and communications **are nowadays irrelevant**, namely considering that:

i. In relation to the ban on unsolicited communication, the e-Privacy Directive and the General Data Protection Regulation apply horizontally, thus also covering unsolicited communication in the area of financial services;

ii. With regard to the ban on unsolicited services, the Unfair Commercial Practices Directive already prevents this practice by traders.

However, we consider that these provisions remain relevant, by providing clarity and legal certainty to i. market operators, ii. consumers and iii. supervisory authorities. Moreover, similar provisions remain relevant in sectorial legislation (*e.g.*, Article 70, (1), (b) of PSD 2 (Directive (EU) 2015/2366) and Article 17 of the new CCD).

In this context, we propose to maintain a ban on unsolicited services and communications. For instance, the ban on unsolicited services could be ensure by remission to Article 27 of CRD in the list established in Article 3(1b).

III. Conclusive remarks

(a) Cross border provision of services

As a preliminary remark, a problem that should be consider and that arises from the growing commercialization of financial services at a distance is the provision of cross-border services. In particular, it is not always clear where the provision of the service takes place, which raises problems in terms of the identification and allocation of responsibilities between supervisory authorities. The Directive should better clarify these situations.

Please consider the findings included in the ESAs Report on Cross-border Supervision of Retail Financial Services, in particular the need to consider:

(i) Reinforcing the harmonisation of Level 1 provisions governing the marketing and sale of services and products, especially in the banking sector, and to clearly set out 5 and allocate responsibilities between the home and host CAs with regard to the application of consumer protection and conduct of business provisions;

(ii) Providing more clarity on when activities carried out through digital means fall under passporting (either within the remit of the FPS or of the ROE) due to the lack of definition of cross-border provision of financial services and in the light of the continuous growth in the digitalisation of financial services.

More recently, in the Joint Report on Digital Finance, the ESAs highlighted this concerned, stating that: "*it is not always clear whether activities carried out through digital means were falling within the remit of the FoS or of the RoE. The ESAs believe that the lack of a clear definition of the cross-border provision of financial services leaves the door open for a range of interpretations that could result in protracted and unsuccessful discussions between NCAs and/or between*

NCAs and financial institutions as to the applicable regulatory requirements and supervisory powers, and also give rise to confusion for customers".

(b) Consent for the use of other means of distance communication and no additional costs

The proposal to amend CRD does not include an article similar to the current Article 10 of Directive 2002/65/E, regarding unsolicited communications. At the very least, the maintenance of the general principles foreseen in paragraphs 2 (consent as requirement for the use of other means of distance communication by the professional) and 3 (no additional costs entailed by the use of other means of communication) of Article 10 of DMFSD, regarding unsolicited communications, should be considered.

Ireland's Comments on Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2011/83/EU concerning financial services contracts concluded at a distance and repealing Directive 2002/65/EC

13 July 2022

General Comments

- Ireland welcomes the proposal for a Directive amending Directive 2011/83/EU concerning financial services contracts concluded at a distance and repealing Directive 2002/65/EC. We would like to acknowledge and thank the Commission for work completed to date on the proposal.
- Ireland supports, in principle, the proposal to apply certain articles from the Consumer Rights Directive (CRD) to consumer financial services sold at a distance and the development of a new Chapter on financial services sold at a distance to be included in the CRD. However, we would need time to review and complete a mapping exercise to assess implications or inconsistencies with other legislation.
- Ireland is supportive of the proposal to include modernised articles from the Distance Marketing of Financial Services Directive (DMFSD) in a new chapter in the CRD and the continued function of the Directive as a safety net for financial services that are not covered by product specific legislation.

Consistency with Consumer Credit Directive (CCD)

- Ireland notes that the Consumer Credit Directive (CCD) is currently in Trilogues and that there is likely overlap between that Directive and the proposal for a Directive on distance selling of financial services contracts e.g. the Council position on the CCD states that the pre-contractual information should be provided *"in good time"* whereas the Distance Selling Directive states that pre-contractual information be provided *"at least one day before the consumer is bound by any distance contract."*.
- How does the Presidency plan on maintaining consistency across the two Directives while CCD is still in Trilogues and subject to change?
- Ireland would ideally like to see the final text and outcome of the CCD Trilogues before proceeding with the amendments to the CRD and repealing of the DMFSD in order to ensure consistency across the two files. Alternatively, we would like to know what approach will be taken to discussing areas where similar text was discussed and amended in the Council approach on that file.

Harmonisation

- Ireland queries the need for full harmonisation in this Directive and how this Directive would apply with other product specific Directives that are not full harmonisation.
- Full harmonisation would require Ireland to conduct a mapping exercise across the various Directives, national transposing measures, including pieces of product specific legislation in order to find the gaps where Ireland's consumer protection would be lessened as a result of full harmonisation. This would be a time-consuming exercise and if required, we would be grateful to know the time that will be available to do so.
- From an initial mapping exercise, Ireland has identified a number of areas where country-specific provisions were included in our transposition process that were not part of the original 2002 Directive on Distance Marketing. We would like to know whether full harmonisation would require such provisions to be set aside. For example, these include:

- More granular provisions on how the notice of cancellation is properly given by the consumer and various timeframes associated with the various methods of notification (e.g. email, regular post, registered post, etc.)
- Provisions on certain related contracts to be automatically cancelled as a result of the consumer cancelling the primary contract. This applies to areas where the consumer has a primary contract with the trader but the trader has outsourced some elements of the overall contract to a third-party.
- More granular provisions on the supplier having to return a deposit/security to the consumer when the consumer has cancelled the contract within the withdrawal period.

Next Steps

- Ireland looks forward to continuing work with the Commission and the Czech Presidency on this Directive.

Preliminary Comments – AUSTRIA

Article 1

Amendments to Directive 2011/83/EU

Directive 2011/83/EU is amended as follows:

(1) Article 3 is amended as follows:

(a) the following paragraph (1b) is inserted:

'(1b) 'Articles 1 and 2, Article 3(2), (5) and (6), Article 4, Articles 16a to 16e, Article 19, Articles 21 to 23, Article 24(1), (2), (3) and (4) and Articles 25 and 26 shall apply to distance contracts concluded between a trader and a consumer for the supply of financial services.

Article 24 (2)(3) and (4) should not be made applicable to distance contracts for financial services. Member states should be able to choose which sanctions they want to apply – as long as these sanctions are effective, proportionate and dissuasive. Member states should not be forced to introduce fines for any infringement of the new Chapter IIIa.

The Austrian sanctions system is based on civil sanctions. As this is highly effective there is no justification to change that.

Moreover we want to point out, that provisions like that were also included in the commission proposal on consumer credit but were deleted in the general approach (see document 10053/22).

Where contracts referred to in the first subparagraph comprise an initial service agreement followed by successive operations or a series of separate operations of the same nature performed over time, the provisions referred to in the first subparagraph shall apply only to the initial agreement.

(b) in paragraph 3, point (d) is replaced by the following:

'(d) for financial services, not covered by Article 3(1b).'

(2) The following Chapter is inserted:

'CHAPTER IIIa

RULES CONERNING FINANCIAL SERVICES CONTRACTS CONCLUDED AT A DISTANCE

Article 16a

Information requirements for distance contracts for consumer financial services

1. Before the consumer is bound by a distance contract, or any corresponding offer, the trader shall provide the consumer with the following information, in a clear and comprehensible manner:

   (a) the identity and the main business of the trader;

(b) the geographical address at which the trader is established as well as the trader's telephone number and email address; in addition, where the trader provides other means of online communication which guarantee that the consumer can keep any written correspondence, including the date and time of such correspondence, with the trader on a durable medium, the information shall also include details of those other means; all those means of communication provided by the trader shall enable the consumer to contact the trader quickly and communicate with him efficiently; where applicable, the trader shall also provide the geographical address and identity of the trader on whose behalf he is acting;

(c) if different from the address provided in accordance with point (b), the geographical address of the place of business of the trader, and, where applicable, that of the trader on whose behalf he is acting, where the consumer can address any complaints;

(d) where the trader is registered in a trade or similar public register, the trade register in which the trader is entered and the registration number or an equivalent means of identification in that register;

(e) where the trader's activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority;

(f) a description of the main characteristics of the financial service;

(g) the total price to be paid by the consumer to the trader for the financial service, including all related fees, charges and expenses, and all taxes paid via the trader or, when an exact price cannot be indicated, the basis for the calculation of the price enabling the consumer to verify it;

(h) where applicable, that the price was personalised on the basis of automated decision-making;

(i) where relevant notice indicating that the financial service is related to instruments involving special risks related to their specific features or the operations to be executed or whose price depends on fluctuations in the financial markets outside the trader's control and that historical performances are no indicators for future performances;

(j) notice of the possibility that other taxes and/or costs may exist that are not paid via the trader or imposed by him;

(k) any limitations of the period for which the information provided is valid;

(l) the arrangements for payment and for performance;

(m) any specific additional cost for the consumer of using the means of distance communication, if such additional cost is charged;

(n) where applicable, a brief description of the risk-reward profile;

(o) where applicable, information on any environmental or social objectives targeted by the financial service;

We would like to point out that "Regulation 2019/2088 on sustainability- related disclosures in the financial services sector" and "Regulation 2020/852 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088" contain similar information obligations. It should be examined whether point o is consistent with that Regulations and whether a duplication of the information requirements is necessary.

(p) the existence or absence of a right of withdrawal and, where the right of withdrawal exists, its duration and the conditions for exercising it including information on the amount which the consumer may be required to pay, as well as the consequences of non-exercise of that right;

In our opinion the last part of point p ("as well as the consequences of non-exercise of that right") should be deleted. It is obvious what the consequences of not exercising the right of withdrawal are.

(q) the minimum duration of the distance contract in the case of financial services to be performed permanently or recurrently;

Since a minimum duration is not required for all financial services performed permanently or recurrently point q should begin with "where applicable" (see Article 6 para 1 point p CRD).

(r) information on any rights the parties may have to terminate the contract early or unilaterally by virtue of the terms of the distance contract, including any penalties imposed by the contract in such cases;

(s) practical instructions for exercising the right of withdrawal indicating, *inter alia*, the address or email address to which the notification of a withdrawal should be sent and for financial contracts concluded by electronic means, information about the existence and placement of the withdrawal button, referred to in Article 16d;

(t) any contractual clause on law applicable to the distance contract and/or on competent court;

We are not sure if point t is necessary because for most consumer contracts both the law applicable and the competent court are determined by EU regulations and cannot be modified by contract.

(u) in which language, or languages, the contractual terms and conditions, and the prior information referred to in this Article are supplied, and furthermore in which language, or languages, the trader, with the agreement of the consumer, undertakes to communicate during the duration of this distance contract;

(v) where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it.

2. In the case of telephone communications, the identity of the trader and the commercial purpose of the call initiated by the trader shall be made explicitly clear at the beginning of any conversation with the consumer.

Where the consumer explicitly agrees to continue the telephone communications, by way of derogation from paragraph 1, only the information referred to in points (a), (f), (g), and (p) of that paragraph needs to be provided.

The trader shall inform the consumer of the nature and the availability of the other information referred to in paragraph 1 and shall provide that information when fulfilling obligations under paragraph 3.

The reference to paragraph 3 is not appropriate because paragraph 3 requires the trader to provide (all) the information referred to in paragraph 1 at least one day before the consumer is bound by any distance contact. This is contrary to the second subparagraph of paragraph 2 which limits the information requirements to certain points.

The third subparagraph should instead be worded along the lines of Article 5(2) of the current DMFSD ("immediately after the conclusion of the contract").

3. The trader shall provide the information referred to in paragraph 1 at least one day before the consumer is bound by any distance contract.

When the information referred to in paragraph 1 is provided less than one day before the consumer is bound by the distance contract, Member States shall require that the trader sends a reminder, on a durable medium, to the consumer of the possibility to withdraw from the distance contract and of the procedure to follow for withdrawing, in accordance with Article 16b. That reminder shall be provided to the consumer, at the latest, one day after the conclusion of the distance contract.

The timeframe should be set by "in good time" (see Article 3(1) of the current DMFSD), not by a fixed period of time ("one day"). "in good time" is more flexible and can be interpreted depending on the type of financial service which is important as so many different types of financial services are within the scope of this Directive.

We doubt that the second subparagraph has any benefit for the consumer. In fact the "reminder"-obligation could be more confusing than useful. According to this text, the reminder could be "sent" (e.g. via E-Mail) immediately after the conclusion of the contract (perhaps at the same time as other information) which means that the "reminder" would not be particularly noticed by the consumer.

Moreover we want to point out, that a provision like para 3 was also included in the commission proposal on consumer credit but was deleted in the general approach (see document 10053/22).

4. The information referred to in paragraph 1 shall be made available to the consumer on a durable medium and laid out in a way that is easy to read, using characters of readable size.

Except for the information referred to in paragraph 1, points (a), (f), (g), and (p), the trader shall be permitted to layer the information where it is provided by electronic means.

In case the trader decides to layer the information, it shall be possible to print the information referred to in paragraph 1 as one single document.

Where colours are used to provide the information referred to in paragraph 1, they shall not diminish the comprehensibility of the information if the key information document is printed or photocopied in black and white.

The information referred to in paragraph 1 shall be made available upon request in an appropriate format to consumers with a visual impairment.

It should be examined whether the last subparagraph is consistent with Directive (EU) 2019/882 on the accessibility requirements for products and services.

5. As regards compliance with the information requirements laid down in this Article, the burden of proof shall be on the trader.

6. Where another Union act governing specific financial services contains rules on the information to be provided to the consumer prior to the conclusion of the contract, only the pre-contractual information requirements of that Union act shall apply to those specific financial services, unless provided otherwise in that act.

It would be desirable to list in a recital all those specific financial services (and the respective Union acts) to which Article 16a does not apply – or at least most of them. In addition the remaining types of fiancial services to which Article 16a currently does apply should also be enumerated oder listed demonstratively.

Article 16b

Right of withdrawal from distance contracts for financial services

1. The Member States shall ensure that the consumer shall have a period of 14 calendar days to withdraw from a contract without penalty and without giving any reason.

The period for withdrawal referred to in the first subparagraph shall begin from one of the following days:

(a) the day of the conclusion of the distance contract,

(b) the day on which the consumer receives the contractual terms and conditions and the information in accordance with Article 16a, if that is later than the date in point (a) of this subparagraph.

2. The right of withdrawal shall not apply to the following:

(a) consumer financial services whose price depends on fluctuations in the financial market outside the traders control, which may occur during the withdrawal period, such as services related to:

– foreign exchange;

– money market instruments; transferable securities;

– units in collective investment undertakings;

– financial-futures contracts, including equivalent cash-settled instruments;

– forward interest-rate agreements (FRAs);

– interest-rate, currency and equity swaps;

– options to acquire or dispose of any instruments referred to in this point including equivalent cash-settled instruments. This category includes in particular options on currency and on interest rates;

– crypto-assets as defined in [*Article 3(1)(2) of Commission Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/193 24.9.2020 COM(2020) 593 final*].

(b) travel and baggage insurance policies or similar short-term insurance policies of less than one month's duration;

(c) contracts whose performance has been fully completed by both parties at the consumer's express request before the consumer exercises his right of withdrawal.

3. The consumer shall have exercised his right of withdrawal within the withdrawal period referred to in paragraph 1 if the communication concerning the exercise of the right of withdrawal is sent or the withdrawal button referred to in paragraph 5 is activated by the consumer before that period has expired.

4. This Article shall be without prejudice to any rule of national law establishing a period of time during which the performance of the contract may not begin.

5. Member States shall ensure that, for distance contracts concluded by electronic means, the trader provides a possibility to use a withdrawal button in order to facilitate the consumer's exercise of the right of withdrawal. Such button shall be clearly labelled with the words 'Withdraw from Contract' or a corresponding unambiguous formulation.

The withdrawal button shall be placed in a prominent manner and permanently available during the entire withdrawal period on the same electronic interface as the one used to conclude the distance contract. In addition, the trader may also provide the withdrawal button through another channel.

> The requirement that the withdrawal button "shall be placed ... on the same electronic interface as the one used to conclude the distance contract" could be too narrow because this could mean that the consumer has to click again through all the pages leading to the conclusion of the contract.

The trader shall ensure that the activation of the withdrawal button results in an instant confirmation notice to the consumer that the right of withdrawal has been exercised, which shall include the date and time of the exercise of the right of withdrawal. Confirmation of the exercise of the right of withdrawal shall be provided by the trader to the consumer on a durable medium.

> If the activation of the withdrawal button has to result in an instant confirmation notice to the consumer that the right of withdrawal has been exercised, the button could be activated by mistake which would result in an immediate withdrawal. It should be possible to demand confimation after the withdrawal button was activated e.g. by confirming a question like "do you really want to withdraw from the contract?"

6. Where another Union act governing specific financial services contains rules on the exercise of the right of withdrawal, only the right of withdrawal rules of that Union act shall apply to those specific financial services, unless provided otherwise in that act.

Referring to “rules on the exercise of the right of withdrawal” seems to be too narrow. Instead it should be only necessary that the Union act contains any rules on the right of withdrawal – regardless of whether this also includes rules on how to exercise it. It should be enough that the Union act deals with the questions whether or not the consumer has a right of withdrawal. This understanding is confirmed by recital 13 which specifically mentions Article 14(6) of Directive 2014/17/EU which does not contain a mandatory right of withdrawal. In fact member states can choose between a right of withdrawal and a a reflection period before the conclusion of the credit agreement.

Not only regarding Articel 16a (6) but also regarding Article 16b (b) it would be desirable to list in a recital all those specific financial services (and the respective Union acts) to which Article 16b does not apply – or at least most of them. In addition the remaining types of fiancial services to which Article 16b currently does apply should also be enumerated oder listed demonstratively.

Article 16c

Payment of the service provided before withdrawal

1. Where the consumer exercises the right of withdrawal under Article 16b, the consumer may only be required to pay, without any undue delay, for the service actually provided by the trader in accordance with the distance contract. The amount payable shall not:

   (a) exceed an amount which is in proportion to the extent of the service already provided in comparison with the full coverage of the distance contract;

   (b) in any case be such that it could be construed as a penalty.

2. The trader may not require the consumer to pay any amount on the basis of paragraph 1 of this Article unless the trader can prove that the consumer was duly informed about the amount payable, in conformity with Article 16a(1), point (p). However, in no case may the trader require such payment if the trader has commenced the performance of the contract before the expiry of the withdrawal period provided for in Article 16b(1) without the consumer's prior request.

3. The trader shall, without any undue delay and no later than within 30 calendar days, return to the consumer any sums the trader has received from him in accordance with the distance contract, except for the amount referred to in paragraph 1. This period shall begin from the day on which the trader receives the notification of withdrawal.

4. The consumer shall return to the trader any sums he or she has received from the trader without any undue delay and no later than within 30 calendar days. This period shall begin from the day on which the consumer withdraws from the contract.

Article 16d

Adequate explanations

1. Member States shall ensure that traders are required to provide adequate explanations to the consumer on the proposed financial services contracts that make it possible for the consumer to assess whether the proposed contract and ancillary services are adapted to his or her needs and financial situation. The explanations shall include the following elements:

   (a) the required pre-contractual information;

(b) the essential characteristics of the proposed contract, including the possible ancillary services;

(c) the specific effects that the proposed contract may have on the consumer, including the consequences of payment default or late payment by the consumer.

We have doubts if the obligation to provide adequate explanations is appropriate for all types of contracts falling within the scope of the Directive – especially in view of the fact that this Directive is aimed at future developments and does not contain a value threshold. We believe that this provision requires further consideration.

2. Paragraph 1 shall also apply to explanations provided to the consumer, when using online tools such as live chats, chat bots, roboadvice, interactive tools or similar approaches.

It is unclear why para 2 is considered necessary. Why should para 1 not be applicable when using online tools? Moreover the meaning of the terms "live chats", "chat bots", "roboadvice" and "interactive tools" should be defined or at least adressed in a recital.

3. Member States shall ensure that, in case the trader uses online tools, the consumer shall have a right to request and obtain human intervention.

We are not convinced that the right to request human intervention is appropriate for all types of contracts falling within the scope of the Directive. As already stated with respect to para 1 it should be considered that this Directive is aimed at future developments and does not contain a value threshold. Since future developments might be specifically designed to be executed without human intervention this provision could impose a disproportionate burden that is not justified by the needs of consumers. Therefore we believe that also para 3 requires further consideration. Apart from this we are not sure about the relevance of the wording "in case the trader uses online tools". Are cases without human intervention possible in which the trader does not use online tools? If yes, why are these cases treated differently?

4. Where another Union act governing specific financial services contains rules on the information to be provided to the consumer prior to the conclusion of the contract, paragraphs 1 to 3 of this Article shall not apply.

Our understanding of this provision is that it refers to the same Union acts as Article 16a(6). Is this correct?

Article 16e

Additional protection regarding online interfaces

Without prejudice to Directive 2005/29/EC of the European Parliament and of the Council[1] and Council Directive 93/13/EEC[2], Member States shall adopt measures requiring that traders, when concluding financial services contracts at a distance, do not use the structure, design, function or manner of operation of their online interface in a way that could distort or impair consumers' ability to make a free, autonomous and informed decision or choice.

It is unclear what specific measures need to be taken here by the Member States. What specific behaviors are to be prohibited? Recital 27 is not helpful but only repeats the wording of Article 16e. As this Directive is fully harmonised this provision should be much more precise.

Article 2

Transposition

1. Member States shall adopt and publish by [*24 months from adoption*] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

   They shall apply those provisions from [*the date after 24 months from adoption*].

   When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions in national law which they adopt in the field covered by this Directive.

Article 3

Repeal

Directive 2002/65/EC is repealed with effect from [*24 months from adoption*].

References to the repealed Directive shall be construed as references to Directive 2011/83/EU, as amended by this Directive, and shall be read in accordance with the correlation table set out in the Annex to this Directive.

Article 4

Entry into force

This Directive shall enter into force on the twentieth day following its publication in the *Official Journal of the European Union*.

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1 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ L 149, 11.6.2005, p. 22).

2 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29).

Article 5

Addressees

This Directive is addressed to the Member States.