

QUESTIONNAIRE – SI ANSWERS (26 AUGUST 2022)

Block A – Application of DMFS (scope, full harmonization, definitions)

Part I: The application and usefulness of the safety net

1. Does the DMFS cover well those financial products whose product type is not generally regulated at EU level (i.e. they have also not been specifically excluded)? What products do you see falling into that safety net?

The credit agreements below EUR 200 and above EUR 75 000 are excluded from the scope of CCD but in SI they are included in the scope of the Consumer Credit Act, that transposed CCD provisions. In our opinion, the full harmonization of the DMFS proposal would weaken consumer protection in case the new proposal of CCD would not include the mentioned loans into the scope.

We would like to draw attention to the different systems that could appear with the full harmonization. For example if it comes to the situation, that the excluded credit agreements from CCD, which some MS could include into the national legislation, the DMFS provisions would only apply to the credit agreements concluded at a distance regarding pre-contractual information, right of withdrawal, advisory services, online fairness and enforcement. For other provisions (e.g. assessment of creditworthiness, early repayment, etc), other CCD provisions would apply.

Some products, which are still in development in areas of digital financial services, could fall into DMFS safety net and in our opinion clearer demarcation of included financial services would be needed.

2. Should DMFS' safety net feature also cover those financial products, which are explicitly excluded from the scope of existing sectoral/product specific EU rules? Should the reason for the exclusion matter?*

* A product might be for example excluded because it would not be proportionate (e.g. because it does not bring significant risk for consumer, because the value of contract is so high that is on a near-professional level) or it might be excluded because the legislation wanted to make clear that a certain product is simply not in scope even if it might not even be a financial product at its core (e.g. hiring & leasing, loss adjusting)?

SI is of the opinion, that the DMFS should represent a safety net for all contracts for a financial services, concluded at a distance. As full harmonization is proposed, we are of the opinion that DMFS provisions should not prevail over national provisions that represent higher consumer protection and should keep the possibility for MS to maintain stricter rules in their national legislation.

3. Should the proportionality principle be more taken into account in DMFS despite it being a safety net? For example, should there be some kind of upper/lower limit for its application (value/price threshold, duration of contract etc.)?

In our opinion a set of upper/lower limits could impair the safety net for all financial services.

Part II: The application of the principle *lex specialis derogat legi generali*

4. Do you find appropriate that the DMFS is to some extent applied also to products/services already covered by sectoral legislation (by adding new rules, e.g. 16d, 16e, sanctions)?

In our opinion there could be legal uncertainty regarding using appropriate provisions of DMFS or other sectoral legislation.

5. Does Art. 3(2) of the CRD (together with recitals and rules contained in Art. 16a/16b/16d) provide a sufficiently clear view on what rules are to be used?

In our opinion it is not clear what rules actually apply to specific situations. For example a provision on new withdrawal button. Does this new requirement apply also to the credit agreements included in the CCD or not?

What about provisions regarding pre-contractual information? What if MS added some information requirement to the credit agreements included in CCD (for example in SI there is a requirement *“in the case of a credit agreement with a variable credit interest rate or a credit agreement in which the credit is calculated in a foreign currency, the preliminary information contains a graphic display of the fluctuation of the reference interest rate and the value of the foreign currency in relation to the euro for the last ten years”*). Would this requirement still apply to the credit agreements (concluded at a distance) under the scope of CCD or not? CCD does not have such an obligation and thus it is not covered by sectoral legislation.

Part III: The impact of full harmonisation on the national legal order

6. Does your MS have its own national product regulation for a product or service that would fall into DMFS rules? Have you analysed the compatibility of these rules? What consequences on your national legal framework could the DMFS rules bring?

In SI deferred payments, free of costs and free of interests are regulated by the Consumer Protection Act. If DMFS proposal affects only provisions regarding pre-contractual information, right of withdrawal, online fairness, enforcement there would not be such an effect on other provisions regulating deferred payments. If this is not the case then the full harmonization of the Proposal will weaken consumer protection.

7. In which articles would you like for the MS to have a possibility of maintaining stricter rules in their national legal order?

SI would like for the MS to have a possibility of maintaining stricter rules in their national legal order regarding:

- pre-contractual information (additional information, SECCI form)
- Right of withdrawal

Part IV: Definitions

8. Do you know of any particular product or service as being unclear as to whether or not it falls under the term financial service? If yes, which? Would it be welcome to provide clarification in the recitals?

In our understanding deferred payment for the supply of goods or services, in the event that such a payment postponement is made possible by the supplier of goods or services, without the involvement of third parties, without interest and without costs to be paid for the

postponement, falls under the term financial service. If this is not clear further clarification would be needed.

We would appreciate the inclusion of clarification in the recitals if crypto, crowdfunding and BNPL schemes also fall under the term financial services.

Block B – (New) Chapter IIIa Rules concerning financial services contracts concluded at a distance (Art. 16a to 16e)

9. Are the scale and quality of information requirements set by Art. 16a appropriate and proportionate to the specific (residual) nature of financial services intended to be covered by DMFS?

Generally, we could agree, however we are of the opinion that the recital 17 should clarify which are exceptional cases that shall apply when the pre-contractual information can be provided less than one day prior to the conclusion of the distance contract.

10. Should any of the disclosures laid down in Art. 16a (1) be clarified?

In our opinion, the following disclosures should be clarified:

16a (1f), 16a (1g) and 16a (1s).

SI also suggests to further clarify the Art 16b (5(2)), what are other channels through which the trader may also provide the withdrawal button.

The wording „where applicable“ could be misunderstood and could lead to different interpretation and avoidance of rules.

How do you understand the words „where applicable“ used in letters (h), (n), (o) and (v)?

The use of the wording "where applicable" we understand in such a way that certain information has to be provided in the event that certain circumstance actually exists (e.g. the price was indeed personalised on the basis of automated decision-making, the financial service contains a risk regarding rewarding (recital 19), financial services promote environmental and social objectives (recital 20), there is an obligation of having recourse to an out-of-court complaint and redress mechanism in place).

11. Do you consider layering as suggested in Art. 16a an appropriate way to ensure consumer awareness when using digital communication? Should the rules on layering be further specified? Should there be any red-lines for using layering?

SI is of the opinion that providing information in layers could be misleading, because some information can be hidden. If online interface is used, it must be ensured that the multi-layered information is not designed in such a way that the consumer does not receive all the information.

SI suggests also including point (s) in the list of information, for which is not allowed to be layered.

12. Are you opposed to the introduction of the “withdrawal button” as suggested in Art. 16b? If yes, why?

SI does not oppose to the introduction of the “withdrawal button”, but the proposed solution should be more comprehensive. However the “withdrawal button” should not narrow the possibility of the consumer to withdraw from the contract using other channels (for example through e-mail).

The question arises of how to provide such a button on the online interface (video call) that was used to conclude the contract at a distance and must be permanently available throughout the cancellation period and in some other way the company can still provide such a button.

A single solution and a single” withdrawal button scheme” should also be found for the entire future scope of the Consumer Rights Directive and not only for the financial services contracts, concluded on distance.

13. Do you see Art. 16d and Art. 16e as proportionate, beneficial for consumers and clearly defining obligations imposed on financial service providers?

In our opinion the Art 16e is beneficial for consumers but is not clearly defining obligations imposed on financial service providers. We suggest to cite some examples of measures that Member States shall adopt requiring the trader not to 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, when concluding financial services contracts at a distance. Moreover our suggestion is to cite some examples of structure, design, function or manner of operation of their online interface, that could distort or impair consumers’ ability to make a free, autonomous and informed decision or choice.

Block C – Additional articles to be considered for financial services from CRD/DMFSD

14. Do you consider the proposed list of „CRD articles“ to be applied to financial services appropriate? Should any CRD articles be removed or added from/to the new Art. 3(1b) CRD?

SI suggests to add the Art 15 and Art 27 of CRD to the list of articles, that should apply also to financial services contracts, concluded at a distance.

Article 27 of CRD

Inertia selling

The consumer shall be exempted from the obligation to provide any consideration in cases of unsolicited supply of goods, water, gas, electricity, district heating or digital content or unsolicited provision of services, prohibited by Article 5(5) and point 29 of Annex I to Directive 2005/29/EC. In such cases, the absence of a response from the consumer following such an unsolicited supply or provision shall not constitute consent.

Explanation:

In impact assessment to the DMFS proposal states, that the issue of unsolicited services is sufficiently addressed by the provisions of the Unfair Commercial Practices Directive. But the recital 60 of CRD states that the unsolicited supply of goods or provision of services to

consumers, is prohibited by 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 ('Unfair Commercial Practices Directive') (13) **but no contractual remedy is provided therein, it is necessary to introduce in this Directive the contractual remedy of exempting the consumer from the obligation to provide any consideration for such unsolicited supply or provision (Art 27 of CRD).**

Article 15

Effects of the exercise of the right of withdrawal on ancillary contracts

- 1. Without prejudice to Article 15 of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers (20), if the consumer exercises his right of withdrawal from a distance or an off-premises contract in accordance with Articles 9 to 14 of this Directive, **any ancillary contracts shall be automatically terminated, without any costs for the consumer**, except as provided for in Article 13(2) and in Article 14 of this Directive.*
- 2. The Member States shall lay down detailed rules on the termination of such contracts.*

Explanation:

The Article 6 (7) (second subparagraph) of the existing DMFSD is not specifically transferred to the new chapter of the CRD Directive (2011/83/EU) and the Art 15 of CRD (effects of the right of withdrawal on ancillary contracts) is not among the articles that would apply to financial service contracts concluded at a distance.

According to the Article 1 (1) of the DMFS proposal, which lists the articles of the CRD that would apply also to the financial services contracts, concluded at a distance, the Art 15 of CRD is not included in the mentioned list of articles and thus the Article 15 would not apply to the financial services contracts, concluded at a distance.

On the other hand, the art 1 (2) of the DMFS Proposal changes the point (d) of the Art 3 of CRD as follows (this Directive shall not apply to contracts):

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

In our understanding the new changes to the Art 3(d) of the CRD would mean, that the directive would apply to the financial services, covered by Article 3(1b), although the Art 1(1) of the DMFS proposal includes only listed articles of CRD, that would apply to the financial services contracts, concluded at a distance.

15. Are you missing any articles of the current DMFSD which you would like to add into the Proposal?

Provisions regarding the right of withdrawal on ancillary contracts (Art 6(7)).

Written comments to Presidency questionnaire from Estonian delegation

We thank the Presidency for providing the opportunity to present written comments on the proposal concerning distance marketing of financial contracts. We kindly ask you note that we do not have an official position on the proposal yet and therefore our comments are preliminary.

A.

1. Does the DMFS cover well those financial products whose product type is not generally regulated at EU level (i.e. they have also not been specifically excluded? What products do you see falling into that safety net?

In general we believe that the provision of pre-contractual information and the right of withdrawal, are key consumer rights, which guarantee the possibility for the consumer to make an informed decision and also give a necessary time for the reflection. In this regards, we believe that the provisions of DMFS on these aspects are relevant.

Overall we find that the importance of the DMFS has significantly diminished by the introduction of product specific regulation, and we have not much practice about the application of the DMFS, but we still deem it relevant, especially regarding potential new products. At the current time, we believe that this regulation might be still relevant for example in the provision of crowdfunding services, crypto currencies. Also in cases where the EU product specific regulation has not been expanded to the products which have been specifically excluded from the scope. This might in some Member States be the case for example in regards to consumer credits under 200 euros or leasing contracts without the obligation to purchase, which are excluded from the scope of the Consumer Credit Directive.

2. Should DMFS' safety net feature also cover those financial products, which are explicitly excluded from the scope of existing sectoral/product specific EU rules? Should the reason for the exclusion matter?

Our first impression is that DMFS' safety net should also be applied to financial products, which are explicitly excluded from the scope of sectoral/product specific EU rules. However, where a specific right (for example the right of withdrawal) has been excluded from a sector specific act, situation might differ, as these specific exclusions might be foreseen because this right is not suitable for a specific product.

3. Should the proportionality principle be more taken into account in DMFS despite it being a safety net? For example, should there be some kind of upper/lower limit for its application (value/price threshold, duration of contract etc...)?

It is entirely not clear, what is meant by proportionality in this question. We wonder, if a product has been excluded from a sector/product specific act taking precisely proportionality aspects into account, should this also be considered. This question needs further analysis and discussions.

4. Do you find appropriate that the DMFS is to some extent applied also to products/services already covered by sectoral legislation (by adding new rules, e.g 16d, 16e, sanctions)?

We are still analysing this question, since it mostly depends on the financial service or product. However, we consider it important to ensure conformity with other sector specific directives and to clearly delimitate which provisions apply to which acts. Also the content and aim of some of the added rules still needs further analysis.

5. Does art. 3(2) of the CRD (together with recitals and rules contained in art. 16a/16b/16d) provide a sufficiently clear view on what rules are to be used?

In general we support the idea of applying art. 3(2) of CRD to distance contracts for financial services in order for the market participant to understand which rules are applied and to avoid the duplication of information. However, it is not entirely clear what rules are to be used in case of conflicts. It is not unequivocally clear which rules should apply, if the sector specific act has regulated only individual aspects, which could perhaps be based on the assumption that the otherwise valid general regulation of distance contracts would apply in other respects. Or if the sector specific legislation provides different options for achieving a similar goal, which do not exactly match what is in the proposal, for example, the possibility for the Member State to choose between the right of withdrawal or the reflection period. It is crucial that the question of which provisions apply is very clear to all market participants.

6. Does your memberstate have its own national product regulation for a product or service that would fall into DMFS rules? Have you analysed the compatibility of these rules? What consequences on your national legal framework could the DMFS rules bring?

As of now we have yet to analyse whether any financial products or services fall into DMFS' rules considering this is a rather extensive and complicated mapping exercise.

But regarding Consumer Credit Directive, Estonia has extended the regulation of the current directive to credit agreements excluded from the scope of CCD, for example credits of less than 200 euros. Therefore, this could mean that since there is no sector specific regulation at the EU level for such contracts, it would lead to a situation where instead of a rather comprehensive pre-contractual information regulation, the general pre-contractual information obligation provided in the proposal should be applied. However, we understand that this specific concern might be relieved when the new CCD is adopted. This question might nevertheless still remain relevant concerning other credit agreements, for example regarding leasing contracts without the obligation to purchase.

7. In which articles would you like for the memberstate to have a possibility of maintaining stricter rules in their national legal order?

Since this is a rather complicated mapping exercise, we are still analysing this matter. But we think there might be a need for some flexibility regarding the pre-contractual information.

8. Do you know any particular product or service as being unclear as to whether or not it falls under the term financial service? If yes, which? Would it be welcome to provide clarification in the recitals?

In general we find it important that the scope and definition of financial services is defined. For example, we would like it to be clearer, whether crowdfunding, savings and loan associations, crypto assets, account information service providers and credit managers also fall under the term of financial service. Therefore some clarification in the recitals is welcomed.

B.

9. Are the scale and quality of information requirements set by art. 16a appropriate and proportionate to the specific (residual) nature of financial services intended to be covered by DMFS?

At large we find the scale and information requirements set by art 16a appropriate and proportionate.

10. Should any of the disclosures laid down in art. 16a (1) be clarified? How do you understand the words „where applicable“ used in letters (h), (n), (o) and (v)?

The DMFSD article 3(3) point (b) first indent stipulates: „*the subject to the explicit consent of the consumer only the following information needs to be given: the identity of the person in contact with the consumer and his link with the supplier*“. According to the correlation table annexed to the proposal, named provision is regulated by the new article 16a(2) second subparagraph, which in turn refers to art. 16a(1) letters (a), (f), (g) and (p). The 16a(1) point (a) stipulates: „*the identity and the main business of the trader*“. Is the rule of revealing the identity of the person in contact with the consumer left out intentionally? If yes, we would like some explanations in this matter.

Art. 16a(1) letters (n), (o) – We believe the necessity and suitability of these obligations needs further analysing. Although we understand the goals, we must analyse whether the provision of this information in the pre-contractual phase is necessary for the consumer and suitable for the given proposal, as well as reasonably definable for the trader. Additional explanations would be needed in this regard, and how voluminous or comprehensive the corresponding information should be. It should be taken into account that if the amount of information given to the consumer is increased, it may lead to an overabundance of information, as a result of which the consumer may not read the pre-contractual information or miss some of the important information.

Also, in 16a(1) the trader has to provide the information to the consumer, but 16a(4) subparagraph 1 stipulates that information shall be made available to the consumer.

„Where applicable“ meaning – Generally we understand that the obligations in letters (h), (n), (o) and (v) apply only if the given information is relevant in regards to the specific financial product or agreement. However, the words „where applicable“ might need some further clarification in some points taking into account the ECJ judgement C-179/21 as referred in the previous working party meeting.

11. Do you consider layering as suggested in art. 16a an appropriate way to ensure consumer awareness when using digital communication? Should the rules on layering be further specified? Should there be any red-lines for using layering?

In general we find the rules on layering clear. However, we are wondering whether layering might create an opportunity to still hide some relevant information from consumers several clicks away.

12. Are you opposed to the introduction of the „withdrawal button“ as suggested in art. 16b? If yes, why?

Estonia finds it important that consumers could easily use their right of withdrawal, but in the case of the proposed changes, a reasonable balance between different interests should be ensured, taking into account the added value for consumers and the costs incurred by businesses.

Imposing such an obligation on financial service providers might lead to extensive expenses for them. We didn't find a sufficient evaluation in the Commission's assessment report regarding the necessity and added value of the withdrawal button for consumers, nor the anticipated costs specifically related to it. In addition, with the creation of a withdrawal button, there is a risk that the consumer will press the button by accident and will therefore be deemed to have withdrawn from the contract. Therefore questions may arise as to whether the consumer has actually submitted an unequivocal application for withdrawal. Further explanations would also be needed as to how the withdrawal button should work in practice – whether it must work when logged into the website of the financial service provider or how identification works; should the consumer choose which contract to withdraw from or how will the electronic interface differentiate which contract to withdraw from; will there be any mark left after the consumer has pressed the button, etc. At the moment, it is also not clear what the „same electronic interface“ and „another channel“ (art. 16b(5) subparagraph 2) represent. In this regard, further clarifications from the Commission would be welcomed.

It also raises a question why is the obligation to provide a withdrawal button only stipulated in the case of distance contracts for financial services. If it is found that corresponding solution significantly simplifies the exercise of the consumer's right of withdrawal, then the question arises, why isn't this obligation

also stipulated in the case of other distance contracts, for example in the case of sale of goods, which in practice is probably a much more relevant question in terms of the right of withdrawal. Also, if the sector specific legislation of the financial service is applied instead of the regulations on the distance contracts of financial services, where the right of withdrawal is regulated without the requirement of a withdrawal button, financial service providers will be in an unequal position. Therefore, we consider it necessary to carry out further analysis and explanations from the commission regarding the necessity and proportionality of establishing an obligation for traders to provide a withdrawal button. We also think it would be worth considering whether, instead of the obligation to create a withdrawal button, it could still remain as an option for each service provider.

13. Do you see art. 16d and art. 16e as proportionate, beneficial for consumers and clearly defining obligations imposed on financial service providers?

Art. 16d

In general, we think that the Commission's proposal to introduce an obligation for the financial service providers to provide adequate explanations about the services and for the consumer to request human intervention when using an online tool could be beneficial for the consumers. However these changes require additional analysis, especially regarding the alignment of this provision with other instruments.

We would like to indicate that the obligation for adequate explanations can also be found in Mortgage Credit Directive and in the initiative of the new Consumer Credit Directive. In both, the Member States are left with the opportunity to adjust the requirements taking into account specific circumstances, the target group and the nature of the offered product. Therefore, it should be analysed whether the rule of providing adequate explanations planned for distance contracts should be more aligned with them. In doing so, we consider it important to further analyse whether establishing such an obligation in the consumer rights directive only for distance contracts is appropriate.

The wording of the proposed art. 16d(4) also needs to be clarified. It is not clear whether the provision concerns only explanatory obligation or pre-contractual information regulated by art. 16a.

Art. 16e

In general we agree that the consumers should be protected against misleading practices. However, the provision is phrased rather generally, which allows for a broad interpretation and may cause some legal uncertainty. We believe that with such wording it's not uniformly clear how this obligation should be implemented by the Member States and how the supervisory authorities would be able to assess whether the obligation has been violated. To the extent that this provision is included in a harmonised directive, it should be clear what obligations are imposed. Therefore, we consider it necessary to receive additional explanations from the commission so that the legal norm can be defined more precisely.

Clarifications would also be needed in terms of how the proposed regulation relates to other legislation. For example, it is necessary to clarify what effect the provision has in relation to the provisions of the Unfair Commercial Practices Directive, which already prohibit the use of various unfair practices towards consumers.

We would also like the Commission to clarify the reasons for including such an obligation only among the provisions governing distance contracts for financial services. Also, whether the Consumer Rights Directive, which so far governs pre-contractual information requirements and the right of withdrawal, is the appropriate venue for the purpose of such a rule.

C.

14. Do you consider the proposed list of „CRD articles“ to be applied to financial services appropriate? Should any CRD articles be removed or added from/to the new art. 3(1b) CRD?

Estonia can generally support the Commission's choice of provisions, which would be applied to distance contracts for financial services. However, it is still necessary to analyse whether all the provisions of the CRD selected to apply to distance contracts for financial services are justified and whether some other provisions of the CRD should be added. It also requires a more detailed analysis, whether leaving out some of the provisions foreseen in the current DMFSD is justified.

For example, we wonder why it has been considered unnecessary to apply the rule of pre-contractual information becoming part of the contract (CRD art. 6(5)) or additional information obligations to online marketplaces (CRD art. 6a) as they are provided for other distance contracts.

It is also unclear why the CRD art. 27 isn't applied to distance contracts for financial services. Art. 27 exempts the consumer from the obligation to pay for the provision of goods or services not ordered in the case of inertia selling, which is prohibited by the Unfair Commercial Practices Directive. Such a provision is also present in the current DMFSD (art. 9), but the proposal doesn't include this article to CRD. It is questionable why a provision that significantly affects the level of consumer protection has been omitted from the provisions applicable to distance contracts for financial services. Although the prohibition of inertia selling is established in the Unfair Commercial Practices Directive, the latter regulates public law aspects, not contract law aspects.

We are also still considering, whether the extension of the penalties provision (art 24) should be extended, at least in full, also to financial services, as our view is that Member States should be left enough flexibility to regulate sanctions in a way that is most suitable for their legal systems. The types of sanctions used should not be prescribed outside the scope of article 83 of the TFEU.

Keeping this in mind, it would be preferable that the referral to specific types of sanctions or types of proceedings would be avoided. Also, there should be enough flexibility to take into account the gravity of the breach and vary the sanctions accordingly (to apply the *ultima ratio* principle).

15. Are you missing any articles of the current DMFSD which you would like to add into the Proposal?

We are still analysing this question, but initially, there are already some provisions which might be weighed.

It would also need analysing whether these DMFSD articles should be added to the proposal, or further clarifications should be provided why they're excluded:

- art. 1(2) subparagraph 2;
- art. 3(2);
- art. 3(3) point (b) fourth indent;
- art. 10.



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NOTE

From:	Delegations
To:	Working Party on Consumer Protection and Information (Attachés) Working Party on Consumer Protection and Information

Subject:	Directive on financial services contracts concluded at a distance - Replies to the questionnaire from EE, FI, FR, HR, IE, IT, PT, SI, SK
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QUESTIONNAIRE – Replies from IT

Block A – Application of DMFS (scope, full harmonization, definitions)

Part I: The application and usefulness of the safety net

1. Does the DMFS cover well those financial products whose product type is not generally regulated at EU level (i.e. they have also not been specifically excluded)? What products do you see falling into that safety net?

As already stated in our previous comments, we would prefer “financial services” to be regulated in the DMFS only to the extent that they are already qualified as such by a national or an EU piece of legislation and we therefore suggest amending the definition of “financial services” accordingly. Otherwise, on the one hand, there would be a risk of undermining legal certainty. On the other hand, there would also be the risk of blurring the boundaries of the area of supervision and responsibility of the sectoral national authorities, which could be held accountable for the failure to supervise services, whose financial nature is uncertain *ex ante*.

As to the products we see falling into the safety net, for example, we believe that they could include credit agreements under EUR 200 and other consumer credits excluded from the scope of the CCD. Given the fact that some crowdfunding services have been made subject to EU financial regulation, we also deem possible to include into the safety net the crowdfunding products currently excluded from the scope of the EU legislation.

On the contrary, we believe that crypto assets are not in the scope of the DMFS, as it has been made clear by recent EBA¹ and ECB² statements, at least until the MiCA Regulation enters into force, unless a national legislation already qualifies such products as financial services. The same is true for diamonds and expensive wines, which in Italy are considered as commercial products and, as such, they are not subject in any way to the DMFS. In order to avoid similar misunderstandings, it would be appropriate to delete the above-mentioned references from the explanatory memorandum.

2. Should DMFS’ safety net feature also cover those financial products, which are explicitly excluded from the scope of existing sectoral/product specific EU rules? Should the reason for the exclusion matter?

In our view the DMFS could cover financial services explicitly excluded from the scope of existing sectoral/product specific EU rules, to the extent that they are recognized as “financial services” in accordance

¹ See, for instance, “EU financial regulators warn consumers on the risks of crypto-assets”, march 2022, ESA 2022 15, ESMA, EBA, EIOPA. In particular, at p. 2, it is stated that: “Absence of protection: the majority of crypto-assets and the selling of products or services in relation to crypto-assets are unregulated in the EU.2 In these cases you will not benefit from the rights and protections available to consumers for regulated financial services, such as complaints or recourse mechanisms.”

² See, for example, “Virtual Currency Schemes”, European Central Bank, Frankfurt am Main, 2012 and “A deep dive into crypto financial risks”, Alexandra Born and Josep M. Vendrell Simón, available at https://www.ecb.europa.eu/pub/financial-stability/macprudential-bulletin/html/ecb.mpbu202207_1~750842714e.en.html, where it is argued that: “[a]ppropriate regulatory, supervisory and oversight frameworks need to be implemented urgently, before stablecoins become a risk to financial stability. Financial stability risks from stablecoins in the euro area are currently still limited. However, if growth trends continue at their current pace, this may change in the future. Existing stablecoins need to be brought into the regulatory perimeter with urgency. In the EU, the European Commission’s proposed Markets in Crypto-assets (MiCA) Regulation marks a significant milestone. It is a bespoke regime for the issuance and provision of services related to stablecoins and other crypto-assets and seeks to regulate the crypto-asset ecosystem in a holistic and comprehensive manner, for example by specifying that only e-money institutions and credit institutions are allowed to issue stablecoins and setting authorisation and prudential requirements for crypto-asset service providers. It should be implemented as a matter of urgency.”

with national or EU law (see above answer to question 1). On the opposite, products which are not financial in nature, such as hiring or operational leasing, should be excluded from the “safety net”.

3. Should the proportionality principle be more taken into account in DMFS despite it being a safety net? For example, should there be some kind of upper/lower limit for its application (value/price threshold, duration of contract etc.)?

The intention to give continuity to the horizontal approach of the legislation is commendable, as to allow a "safety net" function of the provisions with respect to new services. However, even in the light of what emerged in the first two meetings, the choice of the European Commission to include this legislation in the context of Directive 2011/83/EU (CRD) does not fully satisfy the parameter of the necessity of the proportionality principle. Indeed, this choice could lead to critical issues and important adaptation costs for national legal systems. It follows that the choice to include the legislation in question in the context of Directive 2011/83/EU (CRD) can hardly be configured as the "mildest means" for the intended objectives.

Besides, we think it would be difficult to set any limits that are adequate for all the kind of services included into the scope, taking into account the cross-sectoral nature of the Directive and the multiplicity of products that could fall into the scope of the Directive, even in the future.

*Part II: The application of the principle *lex specialis derogat legi general**

4. Do you find appropriate that the DMFS is to some extent applied also to products/services already covered by sectoral legislation (by adding new rules, e.g. 16d, 16e, sanctions)?

No, in our opinion the DMFS should not apply to products/services covered by sectoral legislation. As we already pointed out in our previous comments, we are of the view that whenever an EU sectoral legal act regulates a specific financial service, this discipline shall in any case prevail on the one under the present proposal, regardless the existence of an actual “conflict” between the two.

As regards the new rules introduced in the DMFS covering aspects not regulated by sectoral legislation, we would also be skeptical about their application to harmonized products/services. In fact, the EU legislator has already carried out an assessment on what to regulate and on the level of harmonization to be adopted for each sectoral legislation. In this perspective, if the DMFS were to apply to products/services already regulated by sectoral legislation, it would undermine the choices made by the legislator in each sector, for example, by imposing a harmonized sanctioning regime where the sectoral legislation opted instead for leaving to MS the task to provide for appropriate sanctions which must be effective, proportional and dissuasive³.

5. Does Art. 3(2) of the CRD (together with recitals and rules contained in Art. 16a/16b/16d) provide a sufficiently clear view on what rules are to be used?

No. As we pointed out in our previous comments, we find unclear the interplay between Art. 3(2) of the CRD and the rules contained in Articles 16a par. 6, art. 16b par. 6 and 16d par. 4. In particular, it is not clear whether they should be read as stating that whenever a EU sectoral 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 and whether the principle of prevailing of *lex specialis* shall apply regardless the means the underlying contract has been concluded. It would be preferable to specify that, whenever a sectoral legislation exists, the DMFS does not apply, even in the case where it would complement the sectoral provisions, in order to respect the decisions taken explicitly or implicitly by the sectoral legislator.

³ See Directive 2008/48/CE (CCD), recital 47 and art. 23; Directive 2014/17/EU (MCD), recital 76 and art. 38(1); Directive 2015/6/EU (PSD2), recital 99 and art. 103(1); Directive 2014/92/EU (PAD), art. 26(1).

Part III: The impact of full harmonisation on the national legal order

6. Does your MS have its own national product regulation for a product or service that would fall into DMFS rules? Have you analysed the compatibility of these rules? What consequences on your national legal framework could the DMFS rules bring?

Yes. For instance, this is the case with the financial sector, the personal pension sector and the banking sector⁴. The approach envisioned in the proposed DMFS revision would mean that the national safety net rules would probably have to be disapplied entirely where they overlap with the revised Directive, in particular where they refer to the pre-contractual information for financial services provided to consumers at a distance. Nevertheless, the same national general rules could continue to apply to non-consumer customers and to agreements concluded in person.

7. In which articles would you like for the MS to have a possibility of maintaining stricter rules in their national legal order?

The areas where an overlapping with national rules seems more likely are the pre-contractual information⁵ and adequate explanations⁶ (respectively, Article 16a and Article 16d).

With regard to Article 24 (*Sanctions*), rather than allowing MS to maintain stricter rules in their national legal order, we would prefer it to be removed from the text of the Directive, for the reasons already explained in our previous comments and summarized below under question 14.

Part IV: Definitions

8. Do you know of any particular product or service as being unclear as to whether or not it falls under the term financial service? If yes, which? Would it be welcome to provide clarification in the recitals?

In our opinion there are products that should not be included in the scope (please see answer to question 1) but we doubt that a clarification in the recitals would be enough in this respect, since any explanations would be non-exhaustive by definition, given the safety net character of the Directive. Hence, we would rather suggest to streamline the definition of “financial services” as proposed above.

Block B – (New) Chapter IIIa Rules concerning financial services contracts concluded at a distance (Art. 16a to 16e)

9. Are the scale and quality of information requirements set by Art. 16a appropriate and proportionate to the specific (residual) nature of financial services intended to be covered by DMFS?

Given the residual nature of the proposal, it is particularly complex to assess the suitability of information requirements with reference to any possible products/services falling into the safety net, including those that might come to the market in the future.

This being said, we wonder, for example, whether the information requirements in the DMFS would be suitable for crypto-assets, given the particular nature of such products, which is strongly influenced by the underlying technology. More in general, we deem unclear whether – after the approval of MiCAR – there will be some

⁴ With specific regard to the banking sector, for instance, see Testo unico bancario (d.lgs. 385/1993), Titolo VI, Capo I; delibera CICR 4 marzo 2003, sezione II; Provvedimento della Banca d'Italia 29 luglio 2009, Sezione II, par. 2 (Guide pratiche), par. 6 (consegna copia del contratto), par. 8.2 (TAEG).

⁵ For instance, see *infra*, footnote nr. 4.

⁶ For example, see Sezione XI delle Disposizioni di Trasparenza (Provvedimento della Banca d'Italia del 29 luglio 2009), with reference to the explanations that must be provided to the customer in the event of a simultaneous offer of other contracts together with a loan (par. 2-bis).

room left for applying the DMFS to crypto-assets, given the apparently different nature of the pre-contractual information provided in this Directive with respect to the white paper envisaged in the MiCAR.

10. Should any of the disclosures laid down in Art. 16a (1) be clarified? How do you understand the words „where applicable“ used in letters (h), (n), (o) and (v)?

In our understanding, letters (h), (n), and (o) should be interpreted in the sense that when the price was personalised on the basis of automated decision-making, when the consumer financial service concluded at a distance includes a risk-reward profile and when the financial service pursues an environmental or social objective, respectively, the information indicated in letters (h), (n) and (o) shall be provided. On the contrary, we find unclear the wording “where applicable” with reference to ADR (letter v), considering that the EU legislative framework already provides for a general right to have recourse to out-of-court redress mechanisms.

Moreover, we would suggest clarifying the meaning of the following provision: “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”.

Furthermore, with reference to the communication of the information, we do not understand the reason why the provision of the DMFS according to which “The supplier shall fulfil his obligation under paragraph 1 [of Article 5 of the DMFS] immediately after the conclusion of the contract, if the contract has been concluded at the consumer's request using a means of distance communication which does not enable providing the contractual terms and conditions and the information in conformity with paragraph 1” has been removed, while the correspondent provision has been maintained in the CCD proposal (and General approach – art. 10, par. 7). An alignment of the two pieces of legislation would be appropriate.

11. Do you consider layering as suggested in Art. 16a an appropriate way to ensure consumer awareness when using digital communication? Should the rules on layering be further specified? Should there be any red-lines for using layering?

We are not opposed to layering, to the extent that it is regulated in a way to avoid abuses. In addition, as stated in our previous comments, we would welcome a clarification in the articles about what the layering would consist in.

12. Are you opposed to the introduction of the “withdrawal button” as suggested in Art. 16b? If yes, why?

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 make 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.

13. Do you see Art. 16d and Art. 16e as proportionate, beneficial for consumers and clearly defining obligations imposed on financial service providers?

With reference to Article 16d (“Adequate explanations”), we notice that a similar rule is provided for 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, it would be appropriate to provide further clarification on this provision and ensure the coordination with the negotiations on Artificial Intelligence Regulation, currently ongoing⁷.

Block C – Additional articles to be considered for financial services from CRD/DMFS

14. Do you consider the proposed list of “CRD articles” to be applied to financial services appropriate? Should any CRD articles be removed or added from/to the new Art. 3(1b) CRD?

First of all, we believe that the extension of art. 4 CRD (*Level of harmonisation*) to financial services contracts concluded at a distance should be reconsidered. The sector of financial services is very diverse and sectoral regulations often offer the possibility of more or less strict provisions. The extension of the application of art. 4 CRD to financial services therefore poses cascading problems for the revision of numerous national rules. In this respect, it should be borne in mind that one of the main objectives of the present proposal is to provide a “safety net” for unregulated financial services contracts concluded at a distance and not to redefine the system of governance of the financial sector, which should be a more gradual process. The approach of minimum harmonization, paired with an interpretation of the principle of *lex specialis* (Art. 3(2) of the CRD, together with recitals and rules contained in Art. 16a/16b/16d) in the terms indicated in the previous comments, appears to be the only possibility to safeguard the level of protection of consumers obtained in the national legal orders. On the other hand, the problems with the level of harmonization would be of lesser importance if the reading of the principle of *lex specialis* indicated by Member States such as Italy was accepted, meaning that the principle of specialty operating “by subject matter” and not “by content”, as explained above in nr. 5.

We also have serious concerns about the extension to financial services of Art. 24 on sanctions. In fact, currently the infringements of the DMFS 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 DMFS 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.

Furthermore, as already pointed out, there would be an overlap between Article 19 CRD on the Fees for the use of means of payment with a specific rule set out in Article 62 of the PSD2, regulating the charges applicable

⁷ In particular, see, in the version of the second compromise, recital 8 [“Without prejudice to powers provided under Regulation (EU) 2019/1020, and where relevant and limited to what is necessary to fulfil their tasks, the market surveillance authorities shall be granted full access by the provider to the documentation as well as the training, validation and testing datasets used for the development of the high-risk AI system, including, where appropriate and subject to security safeguards, through application programming interfaces (‘API’) or other relevant technical means and tools enabling remote access”] and art. 52(3) [“3. Users of an AI system that generates or manipulates image, audio or video content that appreciably resembles existing persons, objects, places or other entities or events and would falsely appear to a person to be authentic or truthful (‘deep fake’), shall disclose that the content has been artificially generated or manipulated.”]

by the payee, causing difficulties in transposition and enforcement. We therefore suggest to specify that Article 19 shall not apply to payment services covered by the PSD2. As regards Article 22 on additional payments, 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.

15. Are you missing any articles of the current DMFS which you would like to add into the Proposal?

Yes, art. 4(2) DMFS, concerning “additional information requirements” and stating that: “2. 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.” This would allow MS to the level of protection of consumers obtained in the national legal orders and signify the shift to a minimum harmonization approach in this area.

QUESTIONNAIRE – Replies from FR

Block A – Application of DMFS (scope, full harmonization, definitions)

Part I: The application and usefulness of the safety net

1. Does the DMFS cover well those financial products whose product type is not generally regulated at EU level (i.e. they have also not been specifically excluded)? What products do you see falling into that safety net?

French legal provisions stemming from the DMFSD currently apply to crypto-assets (defined as “jetons” as per the monetary and financial code) and to some insurance products, not already covered at EU level.

In the same spirit, the interaction between the Market in Crypto Assets Regulation, recently negotiated by the Parliament and the Council (MiCA) and the DMFSD shall be carefully assessed:

- The final MiCA compromise agreed between co-legislators, corresponding to the Commission proposal, requires that crypto-asset service should be considered ‘financial services’ in the DMFSD, in case the criteria of that Directive are met. Similarly, where marketed at distance, the contracts between crypto-asset service providers and consumers should be subject to the DMFSD as well, unless MiCA expressly states otherwise. (Recital 55 of the MiCA regulation)

- The reference in Article 16ter(2)(a) to the MiCA large definition of crypto-assets, that allows under DMFSD commission proposal for an exemption to providing consumers a right of withdrawal is too broad : such exemption shall not benefit neither financial instruments using crypto-assets, as expressly stated in recital 3 of the MiCA regulation, neither small issuers of general crypto-assets, as stated in recital 16 of the MiCA regulation. Besides, such DMFSD broad crypto-asset exemption to a consumer right of withdrawal shall not apply to offerors of general crypto-assets other than asset-reference tokens and e-money tokens as MiCA precisely adds such provision, under Article 12 and Recital 22.

Furthermore, MiCA introduces an exemption – notably in terms of authorisation - for crypto-asset service providers established outside the Union when the provision of such services are at the exclusive initiative of the client established or situated inside the Union, with EU regulated withdrawal rights not being applicable for those cases for instance, as well as all other DMFSD provisions. We therefore ask the Commission to specifically list all financial services where such “reverse solicitation” exemptions exist under EU law and to assess potential risks for consumer protection in that regard, in line with DMFSD requirements.

2. Should DMFS’ safety net feature also cover those financial products, which are explicitly excluded from the scope of existing sectoral/product specific EU rules? Should the reason for the exclusion matter ?*

* A product might be for example excluded because it would not be proportionate (e.g. because it does not bring significant risk for consumer, because the value of contract is so high that is on a near-professional level) or it might be excluded because the legislation wanted to make clear that a certain product is simply not in scope even if it might not even be a financial product at its core (e.g. hiring & leasing, loss adjusting)?

We consider that there would be an issue of consistency if DMFS’s rules apply to financial products that the European legislators have explicitly decided to exclude from the scope of existing sectoral/product specific rules. For the sake of simplicity, the reason for the exclusion does not matter. Moreover, regarding those products which are excluded from the scope of sectorial EU rules, Member States can decide to extend the rules of the product-specific EU rules to them or to apply a more stringent national legal framework.

3. Should the proportionality principle be more taken into account in DMFS despite it being a safety net? For example, should there be some kind of upper/lower limit for its application (value/price threshold, duration of contract etc.)?

One of the main purposes of the revision of DMFSD is to ensure that rules are simple and easy to apply both for professional and consumers, and that exclusions are limited to products that are already regulated at the UE level or that the EU legislators have decided to exclude from the scope of sectorial regulations. For the sake of clarity, we are not in favour of the introduction of a proportionality principle in the DMFS, whose purpose is to be a safety net.

Part II: The application of the principle *lex specialis derogat legi general*

4. Do you find appropriate that the DMFS is to some extent applied also to products/services already covered by sectoral legislation (by adding new rules, e.g. 16d, 16e, sanctions)?

The new rules set in Article 16d, 16e, and other articles from the Directive 2011/83/UE which would be applicable to financial services, should be considered fundamental rights for consumers, applicable in any case. Consequently, we do not oppose that these articles apply to products/services already covered by sectoral legislation. However, we believe that articulation between EU product regulations and the amended CRD should be made clear to avoid any legal ambiguity.

5. Does Art. 3(2) of the CRD (together with recitals and rules contained in Art. 16a/16b/16d) provide a sufficiently clear view on what rules are to be used?

Yes.

Part III: The impact of full harmonisation on the national legal order

6. Does your MS have its own national product regulation for a product or service that would fall into DMFS rules? Have you analysed the compatibility of these rules? What consequences on your national legal framework could the DMFS rules bring?

A specific national legal framework has been set for crowdfunding platforms (before the adoption of the EU regulation) and for insurance contracts.

7. In which articles would you like for the MS to have a possibility of maintaining stricter rules in their national legal order?

We would prefer to have a possibility of maintaining stricter rules in our national legal order in the entire new chapter III b, or, a minima, in article 16a (precontractual information) and article 16b (right of withdrawal).

Part IV: Definitions

8. Do you know of any particular product or service as being unclear as to whether or not it falls under the term financial service? If yes, which? Would it be welcome to provide clarification in the recitals?

The examples quoted by the commission (investment in wine and in diamonds) are not clear whether or not it falls under the definition of a “financial service”. A clarification and criteria should be added in the recitals.

Block B – (New) Chapter IIIa Rules concerning financial services contracts concluded at a distance (Art. 16a to 16e)

9. Are the scale and quality of information requirements set by Art. 16a appropriate and proportionate to the specific (residual) nature of financial services intended to be covered by DMFS?

Yes. Nevertheless, paragraph 2 of Article 16a does not clearly indicate 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).

10. Should any of the disclosures laid down in Art. 16a (1) be clarified? How do you understand the words „where applicable“ used in letters (h), (n), (o) and (v)?

We suggest to add that the precontractual information should be given in a language understood by the consumer.

11. Do you consider layering as suggested in Art. 16a an appropriate way to ensure consumer awareness when using digital communication? Should the rules on layering be further specified? Should there be any red-lines for using layering?

As explained in recital 22, we generally agree that layering is indeed useful for providing clear and useful information to consumers, especially using “table of contents” display that helps consumers identify precise pieces of information they might want to consult.

We insist on the need to ensure that such organization of precontractual information is at the end beneficial for consumers and does not lead to unwanted drawbacks. Specifically, we consider it necessary that the consumer is able to get the whole pre-contractual information, as easily as possible. Hence, read-lines include having to multiply clicks when accessing pre-contractual information. Notably, it shall be made clear that layering should not allow the professional to present the pre-contractual information on different pages of its website. Furthermore, we fully support giving at all times the possibility for the consumer to access, download and save all the pre-contractual information in one stand-alone document. Therefore, amending recital 22 and article 16a(4) in that spirit could be appropriate.

12. Are you opposed to the introduction of the “withdrawal button” as suggested in Art. 16b? If yes, why?

We believe that the introduction of the withdrawal button is a good measure to increase consumer protection.

13. Do you see Art. 16d and Art. 16e as proportionate, beneficial for consumers and clearly defining obligations imposed on financial service providers?

We do not oppose to articles d and e. We believe aligning Article 16e wording with the wording of Article 2”a of Digital Services Act (see 3 column table).

Block C – Additional articles to be considered for financial services from CRD/DMFSD

14. Do you consider the proposed list of „CRD articles“ to be applied to financial services appropriate? Should any CRD articles be removed or added from/to the new Art. 3(1b) CRD?

Article 8 paragraph 6 could be added.

15. Are you missing any articles of the current DMFSD which you would like to add into the Proposal?

As Article 4.2 of the current Directive 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 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.

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 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.

QUESTIONNAIRE – Replies from HR

Block A – Application of DMFS (scope, full harmonization, definitions)

Part I: The application and usefulness of the safety net

1. Does the DMFS cover well those financial products whose product type is not generally regulated at EU level (i.e. they have also not been specifically excluded)?

DMFS provides for adequate protection of consumer rights in such cases.

What products do you see falling into that safety net?

Taking into consideration the rapid digitalization which results in creating new, more complex products as well as simpler and more rapid procedure, it is difficult to address the specific products covered by the safety net provided by this Proposal. Generally speaking, it encompasses savings products, payment services (partially) as well as products excluded from the application of the CCD.

2. Should DMFS' safety net feature also cover those financial products, which are explicitly excluded from the scope of existing sectoral/product specific EU rules?

DMFS' safety net will cover financial products that are explicitly excluded from the scope of existing sectoral/product specific EU rules, as they are nevertheless financial products and will fall into the safety net.

Should the reason for the exclusion matter? *

Reason for the exclusion should not matter as DMFS should be a safety net, guaranteeing a level protection no matter the circumstances and taking into account that avoidance of potential detriment to consumer is the overall goal.

*** A product might be for example excluded because it would not be proportionate (e.g. because it does not bring significant risk for consumer, because the value of contract is so high that is on a near-professional level) or it might be excluded because the legislation wanted to make clear that a certain product is simply not in scope even if it might not even be a financial product at its core (e.g. hiring & leasing, loss adjusting)?**

Giving the fact that existing sectoral/product specific EU rules deal in detail with consumer protection as well, the fact that a certain product type has been excluded from the scope or that the rules to be applied are narrowed to ensure at least some level of protection, does not mean that there should not be general set of rules concerning consumer rights, horizontally applied in all cases where existing sectoral/product specific EU rules are missing or have been excluded.

3. Should the proportionality principle be more taken into account in DMFS despite it being a safety net? For example, should there be some kind of upper/lower limit for its application (value/price threshold, duration of contract etc.)?

For the rules set out in DMFS the proportionality principle should not be taken into consideration as the focus should be on consumer protection and the "safety net"

characteristic. DMFS should be perceived as a product safety net, but also as regulatory safety net, ensuring that if there are no rules or if there are no such rules (as prescribed by DMFS), the provisions of DMFS will be applied to ensure level consumer protection in the union.

Part II: The application of the principle *lex specialis derogat legi generali*

4. Do you find appropriate that the DMFS is to some extent applied also to products/services already covered by sectoral legislation (by adding new rules, e.g. 16d, 16e, sanctions)?

We find it appropriate to set horizontally applicable consumer protection rules that would supplement existing sectoral legislation. We see DMFS as a consumer protection starting point (to ensure consumer protection in case there are no rules) but also as an ending point (if there are consumer protection rules defined by sectoral legislation but they do not cover DMFS topics).

5. Does Art. 3(2) of the CRD (together with recitals and rules contained in Art.16a/16b/16d) provide a sufficiently clear view on what rules are to be used?

Art. 3(2) of the CRD clearly states that If any provision of CRD conflicts with a provision of another Union act governing specific sectors, the provision of that other Union act shall prevail and shall apply to those specific sectors. The focus is on the conflict of provisions so if there is a specific single rule already existing e.g. providing a consumer with description of the main characteristics of the financial service that is prescribed by article 20 of the Directive (EU) 2016/97 of the European parliament and of the Council of 20 January 2016 on insurance distribution (IDD) the rule of DMFS article 16a, paragraph 1, point f should not apply. On the other hand, there is no such rule prescribed by IDD as the one in DMFS article 16a, paragraph 1, point h (where applicable, that the price was personalised on the basis of automated decision-making), so in that case DMFS should be applied. In this respect it would be prudent to consider the necessity of paragraphs 6 of articles 16a and 16b and paragraph 4 of article 16d. It is important to point out the fact that the price was personalised on the basis of automated decision-making could be argued to be already disclosed to the consumer under article 13, paragraph 2, point f of the GDPR (the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject) but that information is contained within privacy notice, communicated in time when personal data are obtained, not at time before the consumer is bound by a distance contract (as set out in DMFS). Also, although the content of the provision is similar there is no conflict as GDPR communicates the existence of automated decision-making while DMFS narrows the field to the personalization of the price on the basis of automated decision-making price.

Part III: The impact of full harmonisation on the national legal order

6. Does your MS have its own national product regulation for a product or service that would fall into DMFS rules? Have you analysed the compatibility of these rules? What consequences on your national legal framework could the DMFS rules bring?

There are detailed national product regulation for a product or service that would fall into DMFS rules based on EU legal framework. DMFS will in that sense widen the applicable regulation by adding on rules that are not covered by national product regulation, but also widen the competence scope of supervisory authorities.

7. In which articles would you like for the MS to have a possibility of maintaining stricter rules in their national legal order?

DMFS should be a starting point, thus national regulation should be able to apply stricter rules in any case. Although CRD is full harmonization directive, DMFS' minimum harmonization characteristics should be preserved to ensure legal certainty.

Part IV: Definitions

8. Do you know of any particular product or service as being unclear as to whether or not it falls under the term financial service? If yes, which? Would it be welcome to provide clarification in the recitals?

Crowdfunding is an example of the service that falls under the term of financial service but giving its nature the applicability of DMFS is questionable. Another example would be leasing. There is a dispute among legal scholars and practitioners whether leasing should be considered as a financial service in accordance to Article 2, point 12 of Directive 2011/83/EU. Given that leasing agreements with an option to purchase goods or services are included in the scope of the Proposal for a Directive of the EP and of the Council on consumer credits, it seems that these services should fall under credit services, however considering specific nature of the leasing services HR is of the opinion that definition of financial services needs to be amended to specifically address leasing as special type of financial services.

Block B – (New) Chapter IIIa Rules concerning financial services contracts concluded at a distance (Art. 16a to 16e)

9. Are the scale and quality of information requirements set by Art. 16a appropriate and proportionate to the specific (residual) nature of financial services intended to be covered by DMFS?

Scale and quality of information requirements set by Art. 16a are appropriate and proportionate to inform the consumer on circumstances that are crucial in order to deliver an informed decision on purchase of the financial service or product.

10. Should any of the disclosures laid down in Art. 16a (1) be clarified? How do you understand the words „where applicable“ used in letters (h), (n), (o) and (v)?

Disclosure in Art. 16a (1) n, related to description of the risk-reward profile should be defined in more detail to include information on possible maximum loss of capital and whether all capital can be lost in accordance to recital 19.

Phrase „where applicable“ indicates that the rule shall apply if the situation described by the rule exists, e.g. if the price was personalised on the basis of automated decision-making the rule applies and if not the rule doesn't apply.

11. Do you consider layering as suggested in Art. 16a an appropriate way to ensure consumer awareness when using digital communication? Should the rules on layering be further specified? Should there be any red-lines for using layering?

We consider layering as suggested in Art. 16a, paragraph 4 an appropriate way to increase the possibility of consumer engagement when using digital communication. In that respect nothing can ensure awareness as it is a subjective matter of each consumer.

We suggest to further specify that:

- Irrespective of the fact that the information is layered the possibility to see the whole set of the information, should not be limited to printing but should also include the possibility to view the information in a single document on the screen.
- As the document containing information can be presented on the screen, there is a possibility it could be presented in black and white. Therefore, it is suggested to add “presented” when defining printing and photocopying of the information that are in colour.

Red-line for using layering that defines information that can't be layered should also include point (n) as the risk of loss should not be layered.

12. Are you opposed to the introduction of the “withdrawal button” as suggested in Art. 16b? If yes, why?

We welcome the introduction of the “withdrawal button”. However, meaning of the obligation to ensure an "instant" confirmation notice to the consumer that the right of withdrawal has been exercised („*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,...*”) needs to be further explained.

The possibility to withdraw from the contract with just one click can cause situations where the consumer unintentionally clicks such button, either because he clicked on that option by mistake or because he did not expect that the mere selection of that option is enough to withdraw from the contract.

Article 3, paragraph 3, point d of the Directive 2002/65/EC regulates that the consumer must be informed on the "*practical instructions for exercising the right of withdrawal...*" In order to avoid unintended withdrawal from the contract, we suggest defining a process in which, after selecting the button, the consumer would get a display of his contract with a question whether he is sure he wants to withdraw from the contract.

13. Do you see Art. 16d and Art. 16e as proportionate, beneficial for consumers and clearly defining obligations imposed on financial service providers?

We see Art. 16d and Art. 16e proportionate and beneficial for consumers but suggest to define in more detail what is meant by “structure, design, function or manner of operation of online interface that could distort or impair consumers’ ability to make a free, autonomous and informed decision or choice”.

Block C – Additional articles to be considered for financial services from CRD/DMFSD

14. Do you consider the proposed list of „CRD articles“ to be applied to financial services appropriate?

We propose adding Article 6a to list of „CRD articles“ applied to financial services concluded at a distance. Although there are not many examples of financial services being offered on online marketplaces, in such cases consumer needs to be informed of the counterparty (whether the service provider is a trader or not) and whether the consumer rights stemming from Union consumer protection law apply to the contract.

Should any CRD articles be removed or added from/to the new Art. 3(1b) CRD?

No.

15. Are you missing any articles of the current DMFSD which you would like to add into the Proposal?

We suggest to consider adding DMFS:

- last sentence of the Recital 17 of the Directive 2002/65/EC in full: *Adding new elements to an initial service agreement, such as a possibility to use an electronic payment instrument together with one's existing bank account, does not constitute an "operation" but an additional contract.*

Article 1, paragraph 2, subparagraph 2 - *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 (Information to the consumer prior to the conclusion of the distance contract) and 4 (Additional information requirements) 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*

- Article 3, paragraph 1- 1. *In good time before the consumer is bound by any distance contract or offer, he shall be provided with the following information concerning: ...*

- Article 5, paragraph 3 - *In addition, the consumer is entitled to change the means of distance communication used, unless this is incompatible with the contract concluded or the nature of the financial service provided.s*

Block A – Application of DMFS (scope, full harmonization, definitions)

Part I: The application and usefulness of the safety net

1. Does the DMFS cover well those financial products whose product type is not generally regulated at EU level (i.e. they have also not been specifically excluded)? What products do you see falling into that safety net?

Yes, it is a useful safety net.

e.g. products outside the scope of the consumer credit such as consumer credit loans under 200e and the distance selling of virtual currencies. This Directive will also provide a safety net for products which have not yet been developed or placed on the market and which may not be covered by any existing product-specific legislation or regulation.

It would be useful to receive an information note or clarify in a recital what financial services products are considered as falling within the safety net.

2. Should DMFS' safety net feature also cover those financial products, which are explicitly excluded from the scope of existing sectoral/product specific EU rules? Should the reason for the exclusion matter?*

*** A product might be for example excluded because it would not be proportionate (e.g. because it does not bring significant risk for consumer, because the value of contract is so high that is on a near-professional level) or it might be excluded because the legislation wanted to make clear that a certain product is simply not in scope even if it might not even be a financial product at its core (e.g. hiring & leasing, loss adjusting)?**

In principle, the DMFS should apply to financial products which are explicitly excluded from the scope of sectoral legislation, as it is a more basic level of coverage.

It is unclear whether consumer credit loans under 200e would be exempt from information requirements and the withdrawal period. This could represent a gap in protection for the consumer if the DMFS does not apply to these products. It is often vulnerable customers that may avail of these types of credit and "payday" loans so the safety net feature of DMFS seems appropriate for the products specifically excluded from sectoral legislation.

It would be useful to receive an information note or clarify in a recital what financial services products are considered as being outside of product specific EU rules and whether or not they would be captured within the DMFS safety net or are also excluded from DMFS. Having this information would allow Ireland to address this question more effectively.

3. Should the proportionality principle be more taken into account in DMFS despite it being a safety net? For example, should there be some kind of upper/lower limit for its application (value/price threshold, duration of contract etc.)?

The existing system seems to have worked well to date as DMFS is not too onerous so there does not appear to be a need for caps/thresholds. If caps were to be introduced for financial services products, they may be better placed in the product specific legislation. Given the horizontal nature of the DMFS Directive, it would not be straightforward to develop a cap threshold that could apply equally to credit, investments, payment services or insurance products.

If caps were to be included in DMFS, they would need to be reviewed on a regular basis.

Part II: The application of the principle *lex specialis derogat legi general*

4. Do you find appropriate that the DMFS is to some extent applied also to products/services already covered by sectoral legislation (by adding new rules, e.g. 16d, 16e, sanctions)?

It seems appropriate that in the absence of any particular provision in sectoral legislation that the “Adequate Explanations” outlined under 16d apply.

It seems appropriate that “Additional protection regarding online interfaces” under 16e apply in the absence of any specific sectoral legislation. However, we would query how “*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*” will work in practice given that this Directive is Full Harmonisation.

The numerical titles of the existing Articles 16(a) to Article 16(e) in the Consumer Rights Directive and the proposed additions of Articles 16a to 16e under Chapter IIIa to include provisions from DMFS would benefit from being further distinguished from each other in order to avoid any confusion.

5. Does Art. 3(2) of the CRD (together with recitals and rules contained in Art. 16a/16b/16d) provide a sufficiently clear view on what rules are to be used?

As mentioned above, it would be useful to receive an information note or clarify in a recital what financial services products are considered as being outside of product specific EU rules and whether or not they would be captured within the DMFS safety net or are also excluded from DMFS.

Part III: The impact of full harmonisation on the national legal order

6. Does your MS have its own national product regulation for a product or service that would fall into DMFS rules? Have you analysed the compatibility of these rules? What consequences on your national legal framework could the DMFS rules bring?

We would need 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 review, 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.

7. In which articles would you like for the MS to have a possibility of maintaining stricter rules in their national legal order?

As above, we have identified some differences between our transposition process that were not part of the 2002 Directive on Distance Marketing. We would need to conduct a full mapping exercise to see how our national legal order interacts with this proposal and whether we would wish to maintain stricter rules.

In principle however, we believe that Member States should have the ability to introduce or maintain measures that provide a greater level of consumer protection. This is particularly relevant given that the DMFSD applies to financial services which are not otherwise provided for, and only when they are sold at a distance. A strict rule preventing Member States from introducing measures could lead to a very fragmented application of rules across similar products and within products depending on how they were sold.

Some solutions which were discussed at the Working Party meeting in July included:

- Adding a caveat to A4 that Member States could maintain measures which provided higher consumer protection;
- Adding a reference to national measures when referring to *lex specialis* in A16a(6) and other similar paragraphs.

Part IV: Definitions

8. Do you know of any particular product or service as being unclear as to whether or not it falls under the term financial service? If yes, which? Would it be welcome to provide clarification in the recitals?

We have not come across issues in this regard. From review of the impact assessment and other relevant papers, products such as wine, whiskey, and diamonds could be viewed as investments and could potentially be considered as a financial service product. Clarification on these types of products would be welcome in the recitals.

Block B – (New) Chapter IIIa Rules concerning financial services contracts concluded at a distance (Art. 16a to 16e)

9. Are the scale and quality of information requirements set by Art. 16a appropriate and proportionate to the specific (residual) nature of financial services intended to be covered by DMFS?

The information requirements seem appropriate and are generally in line with information requirements in other legislation.

10. Should any of the disclosures laid down in Art. 16a (1) be clarified? How do you understand the words “where applicable” used in letters (h), (n), (o) and (v)?

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

What is meant by business? Is it “financial services activity” or the product being provided to the consumer?

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

This seems clear in that the consumer should be informed if the price was personalised based on automated decision-making.

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

This may need further clarification as firms may decide not to inform the consumer of the risk-reward profile. How does a firm decide whether to provide a risk-reward profile to the consumer or not?

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

This would likely apply to “green” products and information requirements related to the Commission’s Sustainable Finance Package and associated legislation.

(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.*

Consumers should be informed of the possibility of recourse where it exists. Given the cross-border nature of financial services, consumers should be informed which specific body/bodies they can access for recourse.

11. Do you consider layering as suggested in Art. 16a an appropriate way to ensure consumer awareness when using digital communication? Should the rules on layering be further specified? Should there be any red-lines for using layering?

There is a balance to be struck between key information being provided in an upfront manner and the customer not being overloaded with information, while also not allowing gaps for FS firms to try and “coerce” consumers via the format of how the information is presented.

Information that is presented “upfront” should take precedence over any contradictory clauses that are “layered” beneath as this would be deliberately misleading.

12. Are you opposed to the introduction of the “withdrawal button” as suggested in Art. 16b? If yes, why?

The withdrawal button is a good idea for contracts concluded at a distance. However, it seems counterintuitive that the withdrawal button will only be a requirement for contracts concluded at a distance, which are not governed by sectoral legislation. If it is deemed useful it should be in the main body of the Union Law and not just on the periphery.

For example, we understand that some products are scoped out of product specific legislation because they do not merit as much consumer protection and yet they will have enhanced consumer protection under this legislation e.g. high value consumer loans.

The withdrawal button should not be buried or hidden away and should be easily accessible to the consumer. The withdrawal button should also be viewable across laptops, smartphones, etc.

13. Do you see Art. 16d and Art. 16e as proportionate, beneficial for consumers and clearly defining obligations imposed on financial service providers?

Regarding Article 16e, we would query how “*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*” will work in practice given that this Directive is Full Harmonisation.

Should technical standards be developed to define what is an acceptable structure, design, function, or manner of operation of an online interface? Also, should these standards be applied to contracts beyond financial services?

Block C – Additional articles to be considered for financial services from CRD/DMFSD

14. Do you consider the proposed list of „CRD articles“ to be applied to financial services appropriate? Should any CRD articles be removed or added from/to the new Art. 3(1b) CRD?

Possibly Article 27 on Inertia Selling (see below).

15. Are you missing any articles of the current DMFSD which you would like to add into the Proposal?

Article 9 on Unsolicited Services and Article 10 on Unsolicited Communications. It would be useful to include these provisions (or similar) in the updated proposal given that this Directive acts as a safety net. This could be included as an amendment to Article 27 on Inertia Selling in the CRD.

QUESTIONNAIRE - Replies from FI

Block A – Application of DMFS (scope, full harmonization, definitions)

Part I: The application and usefulness of the safety net

1. Does the DMFS cover well those financial products whose product type is not generally regulated at EU level (i.e. they have also not been specifically excluded)? What products do you see falling into that safety net?

Our analysis is still underway. At this stage, we have identified guaranties and third party pledges and crowdfunding service provision for business regarding facilitation of granting loans that exceeds the threshold in Article 1 (2)(c) of Crowdfunding Regulation (EU) 2020/1503 as national examples of product types which would be covered by DMFS (and for which national legislation exists). However, the proposed information requirements included in Art 16 a fail to adequately take into account their specific features.

For example, our national rules on guaranties and third party pledges include an obligation for the lender (trader) inform a private guarantor (consumer) of the debts and incidental costs that the guaranty covers, the principles under which repayment can be required of the guarantor and the other circumstances that are of relevance as regards the status of the guarantor. Furthermore, before the guaranty is given, the lender shall inform a private guarantor of those other obligations of the debtor and other circumstances relating to the ability of the debtor to pay as can be deemed to be of interest to the guarantor.

2. Should DMFS' safety net feature also cover those financial products, which are explicitly excluded from the scope of existing sectoral/product specific EU rules? Should the reason for the exclusion matter?*

* A product might be for example excluded because it would not be proportionate (e.g. because it does not bring significant risk for consumer, because the value of contract is so high that is on a near-professional level) or it might be excluded because the legislation wanted to make clear that a certain product is simply not in scope even if it might not even be a financial product at its core (e.g. hiring & leasing, loss adjusting)?

Finland favors an approach where, if a certain product or service is excluded from the scope of product-specific legislation concerning similar products or services (such as consumer credit agreements under EUR 200 or above EUR 75 000), Member States are given the option to nationally apply either the product-specific legislation or the DMFS to these products, whichever they deem more appropriate.

3. Should the proportionality principle be more taken into account in DMFS despite it being a safety net? For example, should there be some kind of upper/lower limit for its application (value/price threshold, duration of contract etc.)?

Upper/lower limits as described here are hard to include in a piece of horizontal legislation, such as the DMFS. The scope of the DMFS is wide, and any attempt at listing thresholds and values for all the products and services within the scope is a nigh impossible task.

Part II: The application of the principle lex specialis derogat legi general

4. Do you find appropriate that the DMFS is to some extent applied also to products/services already covered by sectoral legislation (by adding new rules, e.g. 16d, 16e, sanctions)?

Finland considers the suggested approach itself appropriate (DMFS complementing product-specific legislation), but some individual formulations in the relevant Articles are unclear.

5. Does Art. 3(2) of the CRD (together with recitals and rules contained in Art. 16a/16b/16d) provide a sufficiently clear view on what rules are to be used?

No, the wording of the current proposal is not sufficiently clear, especially regarding situations where information requirements and/or right of withdrawal are included in product-specific legislation, but are not as comprehensive as in the proposal. Additionally, some rules, such as the price regulation of telephone communication according to Art. 21, would be sensible to apply to financial services regardless of the method of delivery (i.e. distance/vis-à-vis).

Part III: The impact of full harmonisation on the national legal order

6. Does your MS have its own national product regulation for a product or service that would fall into DMFS rules? Have you analysed the compatibility of these rules? What consequences on your national legal framework could the DMFS rules bring?

Yes, Finland has national rules in place for products/services falling into the scope of the DMFS. Some of them are based on existing EU rules, the scope of which has been nationally extended, such as our national consumer credit legislation and certain provisions in our insurance legislation. Others, for example rules concerning guaranties and third-party pledges, as well as crowdfunding for business that is not in the scope of the Crowdfunding Regulation ((EU) 2020/1503), are of purely national origin.

We are still analyzing the compatibility of the proposal with our prevailing legislation, but have already identified a couple of spots where full harmonization could bring about undesired consequences. These include:

- *consumer credit agreements: loans below EUR 200 and above EUR 75 000 are excluded from the scope of the CCD, but we have nationally extended the scope of CCD-based provisions on right to information to cover consumer credit loans regardless of sum. Full harmonization would prevent us from requiring the creditor to provide the consumer with full price information (e.g. APR) as outlined in the CCD. To restrict the amount of information the consumer is to be provided with would weaken consumer protection. It could also be*

problematic for traders to provide consumers with different data sheets depending on whether the agreement in question is within the scope of the CCD or not.

- *Peer-to-peer lending: In Finland, peer-to-peer lending facilitated by an intermediary platform is within the scope of provisions through which the CCD is transposed. However, it is unclear whether such peer-to-peer lending is within the scope of the CCD, as both the borrower and the lender are consumers. If peer-to-peer lending falls outside the scope of the CCD, only the information requirements proposed here would seem to apply to them. As these requirements are not as extensive as CCD requirements, this would create an unwelcome discrepancy in consumer protection. While several Member States have supported the introduction of a separate piece of legislation on crowdfunding for consumer credit agreements, the process will inevitably take years to complete and is not an adequate solution in the short run.*
- *Information requirements for pension products: Pension products are not considered insurance –based investment products according to Art. 2, paragraph 1, point 17 of the IDD. Nevertheless, the IDD-based information requirements for insurance-based investment products nationally apply to pension products in Finland. For the sake of clarity and consumer protection, we are keen to maintain things the way they are.*
- *Crowdfunding for business: The scope of the Crowdfunding Regulation ((EU) 2020/1503, Art. 1 (2)) sets a threshold for crowdfunding projects above which the Regulation does not apply. It is, however, possible to regulate facilitation of granting of loans (Art. 2 (1)(a)(i)) above the said threshold nationally. For reasons of investor protection, Finland applies the rules of the Regulation also to crowdfunding projects exceeding the threshold. Therefore, both pre-contractual requirements and the withdrawal right remain the same as in the Crowdfunding Regulation even for these projects. Full harmonization would create threshold-based differences in both pre-contractual requirements (info to clients) and withdrawal right (including the button that is not required in the Crowdfunding Regulation). The same firm may provide both services, but would need to follow two different legal frameworks for comparable products. At the same time, customers/consumers would lack comparability between different offers of the same character and possibly get less information to aid when considering*

financing a crowdfunding project. The withdrawal right for projects within the threshold of the Crowdfunding Regulation is four (4) days and applies to non-sophisticated investors. For those projects above the threshold, a 14-day withdrawal right would apply under the CRD and it would cover consumers (non-sophisticated investors as well as those sophisticated investors who are natural persons and carry out investments purely for the purposes of personal life). The Crowdfunding Regulation for business serves this purpose better. For the sake of investor protection and for better calibration, we prefer keeping things the way they are.

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7. In which articles would you like for the MS to have a possibility of maintaining stricter rules in their national legal order?

Article 16a

Part IV: Definitions

8. Do you know of any particular product or service as being unclear as to whether or not it falls under the term financial service? If yes, which? Would it be welcome to provide clarification in the recitals?

In Finland, guaranties and third-party pledges are interpreted as falling within the scope of the current DMFSD, and we expect this to be the case even with the eventual introduction of the new DMFS. However, a clarification in the recitals would be welcome. Block B – (New) Chapter IIIa Rules concerning financial services contracts concluded at a distance (Art. 16a to 16e)

9. Are the scale and quality of information requirements set by Art. 16a appropriate and proportionate to the specific (residual) nature of financial services intended to be covered by DMFS?

The scale and quality of requirements in Art. 16a are mostly appropriate and proportionate, save for a few points that we would like to highlight:

- *The proposed deadline for the delivery of information to the consumer is undesirable, as it enables traders to replace the timely delivery of information with a reminder of withdrawal. This would not improve consumer protection, as the existence or absence of the right of withdrawal is already included in the pre-contractual information. It would also increase the administrative burden of traders without much benefit. The deadline provision should be deleted from the Proposal, in line with the similar provision in the Commission's Proposal for CCD.*
- *Art. 16a should include a requirement for traders to provide the information in a way appropriate to the means of distance communication used. Such a requirement is currently included in Art 3 (2) of the DMFSD.*
- *The trader should actively provide the consumer with the required information instead of merely making it 'available', as currently proposed. This has been a priority for the Finnish Competition and Consumer Authority.*
- *"Information on any environmental or social objectives targeted by the financial service" in point (o) of Article 16 a raises questions. How does it comply with Sustainable Finance Disclosure Regulations and Taxonomy or with the future CSDR? Is the purpose to cover services and products that are not already covered by the EU sustainable finance legislation already in force or soon to be enacted? How would consumers benefit from information not based on any commonly set principles against which to weigh the objectives and verify their fulfillment? Are there any concrete examples of products point (o) could refer to?*

10. Should any of the disclosures laid down in Art. 16a (1) be clarified? How do you understand the words „where applicable“ used in letters (h), (n), (o) and (v)?

We understand “where applicable” to refer to the possibility to exclude information with this epithet, if it is not relevant for the specific product or service provided. Reversely, all the information

required in all the other lettered subparagraphs should, in our understanding, be provided to the consumer, even when it does not seem particularly relevant in the context of a specific product or service within the scope of the DMFS.

11. Do you consider layering as suggested in Art. 16a an appropriate way to ensure consumer awareness when using digital communication? Should the rules on layering be further specified? Should there be any redlines for using layering?

As it stands, layering is a commonly employed method of delivering information to consumers. As the information requirements pertaining to financial services can be difficult to depict at a glance when using distance communication methods, the use of layering is an appropriate way of meeting the information requirements set for services within the scope of the DMFS. However, any layering solutions should secure that the consumer cannot enter the agreement without viewing all the required information.

12. Are you opposed to the introduction of the “withdrawal button” as suggested in Art. 16b? If yes, why?

We are not opposed to the introduction of a withdrawal button, but are, for the time being, open to discuss other alternatives as well, while remaining supportive of the idea that withdrawing from a contract should be as easy as entering it. Moreover, we consider important not to weaken the consumer’s right to withdraw from the contract via other channels

13. Do you see Art. 16d and Art. 16e as proportionate, beneficial for consumers and clearly defining obligations imposed on financial service providers?

We support the objectives of Articles 16d and 16e, as it is important to acknowledge and adjust to the increasing use of online tools, while maintaining the possibility to human intervention when

deemed necessary by the consumer. Protection regarding online interfaces in order to guarantee balanced decision-making circumstances for the consumer is also a goal we endorse. However, further elaboration of the individual requirements set for the trader is necessary to create functional and enforceable rules. Specifics that should be addressed more closely at least in recitals include the timing of the required explanations and eventual human intervention, as well as a broad description of features that could constitute a breach of Art. 16e.

Block C – Additional articles to be considered for financial services from CRD/DMFSD

14. Do you consider the proposed list of „CRD articles“ to be applied to financial services appropriate? Should any CRD articles be removed or added from/to the new Art. 3(1b) CRD?

- *Article 8 (6) should apply to contracts on financial services concluded at a distance. From a consumer protection viewpoint, it is important to allow Member States the option to require a confirmation in accordance with 8 (6).*
- *Article 15 (effects of the right of withdrawal on ancillary contracts) is not among the Articles which would apply to financial service contracts concluded at a distance. Preliminarily, we consider it logical to treat ancillary contracts in the same way regardless of their subject matter and apply Article 15 to distance contracts on financial services as well.*
- *Article 21: Finland preliminarily considers it would be more practical and effective to apply this to financial services contracts regardless of whether they are provided at a distance or not.*

15. Are you missing any articles of the current DMFSD which you would like to add into the Proposal? *An article similar to Art. 3 (2) of the current DMFSD, requiring traders to provide any information in a clear and comprehensible manner in any way appropriate to the means of distance communication.*

**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
Presidency Questionnaire to Member States – 29 July 2022
PT written comments
August 2022**

QUESTIONNAIRE

Block A – Application of DMFS (scope, full harmonization, definitions)

Part I: The application and usefulness of the safety net

- 1. Does the DMFS cover well those financial products whose product type is not generally regulated at EU level (i.e. they have also not been specifically excluded)?
What products do you see falling into that safety net?***

Since we are still analysing the Commission's proposal, our comments are **preliminary** at this stage.

As this analysis is not possible these rules should be **flexible enough to cover a wide range of distinctive financial products and services** (some of which we may not even be contemplating, at this stage), but also because this framework should be **future proof**.

Therefore, it is most important to understand if the rules laid down in this proposal are sufficient and adequate **to ensure an effective consumer protection (i.e., to ensure the safety net function)**, when these financial products and services, not generally regulated at EU level, are marketed through distance means of communication.

2. Should DMFS' safety net feature also cover those financial products, which are explicitly excluded from the scope of existing sectoral/product specific EU rules? Should the reason for the exclusion matter?¹

As a preliminary comment, we consider that financial products and services expressly excluded from the EU sectorial legislation's scope of application could be covered by the safety net established under the present proposal.

Although the exclusion of financial products and services from the EU sectorial legislation's scope of application resulted from a proportionality assessment made in relation to the rules established by such sectorial legislation, that assessment should not prevent the application of the DMFS' safety net. The aim of the rules laid down in the DMFS is to guarantee a 'minimum' level of consumer protection when the financial products and services are marketed through distance means of communication (i.e., when consumers' detriment might be more significant).

In relation to those circumstances when the contract's value is significantly high, we consider that those contracts should not be excluded from the DMFS' scope of application. Nevertheless, the main criteria for including or excluding a given contract under the DMFS' scope of application should be the definition of "consumer" and "financial service", as established by Article 2 of the CRD, and not the amount of the contract.

Otherwise, in relation to products and services that are not financial services at their core, the DMFS' safety net should not apply, since this framework aims to establish specific and adequate rules for the commercialisation of financial products and services.

Therefore, the DMFS' safety net should cover those financial products and services expressly excluded from the EU sectorial legislation's scope of application.

¹ A product might be for example excluded because it would not be proportionate (e.g. because it does not bring significant risk for consumer, because the value of contract is so high that is on a near-professional level) or it might be excluded because the legislation wanted to make clear that a certain product is simply not in scope even if it might not even be a financial product at its core (e.g. hiring & leasing, loss adjusting)?

3. ***Should the proportionality principle be more taken into account in DMFS despite it being a safety net? For example, should there be some kind of upper/lower limit for its application (value/price threshold, duration of contract etc.)?***

PT considers that all legislation – European and national – should be proportionate. Notwithstanding, **we have reservations in relation to the possibility of setting limits’ to the application of the DMFS’ safety net.** This approach may lead to totally **emptying the scope of application of these rules, namely if service providers resort to “engineering” the value or price of services or the duration of the contract, so as to circumvent the thresholds that would trigger the applicability of the provisions of the CRD.**

The setting of such limits may also lead to difficulties in the application of the framework established under DMFS. For instance, the presented criteria (value / price threshold or the duration of the contract) may not be adequate to the wide range of financial products and services in relation to which this framework will be applicable.

Part II: The application of the principle *lex specialis derogat legi generali*

4. ***Do you find appropriate that the DMFS is to some extent applied also to products/services already covered by sectoral legislation (by adding new rules, e.g. 16d, 16e, sanctions)?***

The EU sectorial legislation should always prevail over the rules established under DMFS.

In our view, **this is the only approach that ensures that the specificities of financial products and services covered by EU sectorial legislation is fully considered,** since such legislation results from a detailed and comprehensive analysis and discussion by experts on those matters, as well as a specific impact assessment regarding pre-contractual information and possible rights of withdrawal.

Nevertheless, as a preliminary remark, we could be open to hear arguments that would

justify the application of some of the DMFS' requirements to financial products services covered by sectorial legislation, but only when / provided that:

- (a) The marketing of those products and services through distance means of communication is not specifically regulated in the sectorial legislation; and
- (b) A cross-sectorial impact assessment of the application of DMFS rules is undertaken.

5. Does Art. 3(2) of the CRD (together with recitals and rules contained in Art. 16a/16b/16d) provide a sufficiently clear view on what rules are to be used?

As previously mentioned, PT is still assessing this matter; hence, **our comments are still preliminary.**

PT deems essential to **clarify the DMFS' scope of application and how the rules currently being discussed will interact with the sectorial legislation.**

In our view, the EU sectorial legislation should always prevail over the rules established by this proposal. For example, if the EU sectorial legislation excludes the possibility of the consumer to exercise a right of withdrawal, including those situations when a choice is given to MS to establish a right of withdrawal and / or a reflection period, the DMFS' safety net should not apply.

Although the current wording of Articles 16a, (6), 16b, (6) and 16d, (4), as well as Articles 3,(2), and 25 of the CRD, are coherent with this interpretation, we are open to amend these provisions in order to better clarify what rules are to be used.

Part III: The impact of full harmonisation on the national legal order

6. Does your MS have its own national product regulation for a product or service that would fall into DMFS rules? Have you analysed the compatibility of these rules?

What consequences on your national legal framework could the DMFS rules bring?

In line with our previous comments, we have **reservations in advancing for a full harmonisation of the rules concerning financial services sold at a distance**. Indeed, we consider that national rules should be able to continue to supplement the ones which will now be foreseen in the CRD for financial services sold at a distance. Preventing Member-States to do so could reduce the current level of protection that many consumers enjoy today.

For example, in Portugal, consumers benefit from a set of rights regarding the provision of pre-contractual information, when opening an account or setting up a deposit (e.g., this information includes the provision of a standardised information sheet). These rights derive from our national framework and not from the transposition of a Union act). Taking into account the proposed approach – i.e., full harmonization of the rules concerning financial products and services sold at a distance – this more protective framework would be replaced by the ‘minimum’ protection requirements established by CRD. Hence, if this approach is adopted, it will reduce the level of protection that consumers enjoy today, particularly when, taking into account the mean of commercialisation, such protection is particularly relevant to prevent consumers’ detriment.

7. In which articles would you like for the MS to have a possibility of maintaining stricter rules in their national legal order?

Please note our comments are **preliminary**, since we are still assessing this proposal.

As previously mentioned, PT **has reservations regarding the full harmonisation regime** proposed by the Commission.

National sectorial legislation should remain applicable even in relation to products and services that are not covered by EU sectorial legislation and, thus, fall within the DMFS’ scope of application.

Among other considerations against the proposed maximum harmonisation regime, the following arguments should be thoroughly considered:

- (a) The lack of regulation of a given financial product or service, at European level, means that providers do not benefit from the passport regime. In this case, the national legislator should be able to decide the level of consumers' protection that is appropriate, especially because, in this particular case, national markets are at stake and not the European internal market.
- (b) In some cases (as the one described in relation to the previous question), if MS are not allowed to maintain national rules, it may result in a reduction of consumer protection when the product / service is commercialised *via* distance communication means; and
- (c) It would be incongruent to have national rules applicable specifically to a product / service when the product is sold in person and those rules will cease to apply in the cases when the same product / service is sold *via* distance communication means.

Part IV: Definitions

8. Do you know of any particular product or service as being unclear as to whether or not it falls under the term financial service? If yes, which? Would it be welcome to provide clarification in the recitals?

Although PT is still analysing in relation to which products or services the rules established in this proposal may apply, we consider particularly important to clarify the definition of 'financial service', as defined by Article 2, (12) of the CRD. Our concerns are specifically related with the definition of 'investment', in the terms referred by this provision.

For instance, when a consumer acquires a Non-Fungible Token (NFT) (i.e., a crypto-asset excluded from the Markets in Crypto-Assets Regulation – MiCA), it is not clear for us if the DMFS' safety net should apply, since it is debatable if this a financial product (at its core).

Therefore, we are open to support the introduction of clarification in the Recitals, in this regard.

Block B – (New) Chapter IIIa Rules concerning financial services contracts concluded at a distance (Art. 16a to 16e)

9. Are the scale and quality of information requirements set by Art. 16a appropriate and proportionate to the specific (residual) nature of financial services intended to be covered by DMFS?

In general and as a preliminary remark, the information requirements set by Article 16a seem appropriate and well proportionate. Notwithstanding, we consider that this provision should follow a similar structure as the one presented by the Article 3 of the DMFSD, currently in place, namely by distinguishing the different information requirements by different categories ('the supplier', 'the financial service', 'the distance contract' and 'redress').

Additionally, attending the DMFS' safety net purpose, we consider this provision could be further developed, namely by:

- (a) Requiring that, whenever multiple providers ("traders") are involved in a contract concluded at a distance, consumers be informed of the areas of intervention of each provider. For example, as to bundling practices, a financial institution may offer consumers financial products and services (e.g., a consumer credit and an insurance product, in relation to the latter acting as an intermediary) and non-financial products and services (e.g., beneficial conditions if the consumer also acquires a telephone, a tablet or a computer).

This information is essential for consumers in order to identify the provider responsible for each product or service marketed (or specific action). In addition, it

allows consumers to properly direct the right of withdrawal and submit a complaint (to the provider / the national competent authority, in the latter, the NCA might be different according to the nature and characteristics of the product or service being commercialised) or recourse to an alternative dispute resolution mechanism.

(b) Apart from the information requirement laid down in Article 16a,(1),(c), **traders should also provide consumers with information regarding the possibility of submitting a complaint through digital channels**, whenever this possibility is available.

(c) A provision similar to the one in Article 3,(1),(4),(b) of the DMFSD should be introduced. Therefore, the pre-contractual information requirements should 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’.

10. Should any of the disclosures laid down in Art. 16a (1) be clarified? How do you understand the words „where applicable“ used in letters (h), (n), (o) and (v)?

We are still analysing this proposal and, therefore, our comments are **preliminary**, at this stage. We have some reservations regarding the disclosure requirements set by Article 16a, (1), in particular our concerns focus on the requirements laid down in paragraphs h), n), o) and v) of the said Article.

Also, as a **preliminary remark**, in what refers to the expression “where applicable”, we understand it as referring to those situations when it is not possible or it does not make sense, in accordance with characteristics of the service/product, to provide such information taking into account the nature or the characteristics of the product or service being marketed.

11. Do you consider layering as suggested in Art. 16a an appropriate way to ensure consumer awareness when using digital communication? Should the rules on layering be further specified? Should there be any red-lines for using layering?

As noted before, **our comments are preliminary.**

We are open to support building on a layering approach, allowing the structure of information to be presented in layers attending to its relevance. Layering could be used to display general information, fostering the consumers understanding of such information 'at a glance', being followed by more detailed and specific elements. Additionally, layering could be used to improve financial literacy, by including glossaries with terms and definitions, interactive videos and presentations.

Notwithstanding, we consider that the proposed layering approach should be **further developed** in order to ensure that the information necessary for the consumers' decision-making process is sufficiently prominent and easily understandable.

12. Are you opposed to the introduction of the "withdrawal button" as suggested in Art. 16b? If yes, why?

Even though we still have a **scrutiny reservation** on this regard, PT is supportive of the introduction of the 'withdrawal button' (Article 16b), since the procedure to exercise the right of withdrawal should not be more burdensome than the procedure to sign / conclude the contract.

In fact, its introduction seems to be adequate to:

- (i) Make consumers aware they have a right of withdrawal; and
- (ii) Ensure consumers are able to easily exercise such right.

Additionally, it should be established an obligation for traders 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.

13. Do you see Art. 16d and Art. 16e as proportionate, beneficial for consumers and clearly defining obligations imposed on financial service providers?

As a general remark, **we propose the introduction of definitions for ‘online interfaces’ and ‘online tools’, since these terms are essential for an adequate and proper application of Article 16d, (2), and Article 16e of the Proposal.**

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 of ‘online interface’ is also provided by the Digital Services Act, stating that an ‘online interface’ is *‘any software, including a website or a part thereof, and applications, including mobile applications’.*

Additionally, we propose for these provisions to be further developed, namely by:

- (a) In relation to Article 16d:
 - (i) The list of explanations presented should be minimal, hence we suggest the introduction of ‘at least’ in Article 16d, (1), last sentence: ‘The explanations shall include, **at least**, the following elements: (...)’.
 - (ii) The list should include information regarding the process necessary to conclude the contract. For this purpose, an additional subparagraph should be added to Article 16d, (1), more precisely between the subparagraphs (b) and (c), stating the following:

'Where applicable, the various stages of the process necessary to conclude the contract, as well as the documents that must be made available by consumers to the trader for that purpose'.

- (iii) It should be established that the tools used to provide explanations / assistance to consumers should be proportionate to the complexity of the product or service, the provided information and the process to conclude the agreement.

For this purpose, an additional paragraph should be introduced in Article 16d, (2):

'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.'

- (b) As to Article 16e, we propose introducing an illustrative list of examples, in line with the ***'EBA Opinion on disclosure to consumers buying financial services through digital channels'*** (EBA-Op-2019-12):

- (i) The possibility for the consumer to modify the font size defined by default;
- (ii) The information on risks, costs and other relevant aspects for the decision making process should be presented, at least, in the same font size of the remaining information;
- (iii) The recommendations on the use of hyperlinks.
- (iv) Implementation of a scrolling mechanism, where the length of the information is such that cannot be shown within the display area in its entirety. Providers should ensure that consumers cannot conclude the contract before scrolling down the entire information to the very end;

- (v) When providing pre-contractual 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. This provision is particularly important when considering tying and bundling practices.
- (vi) Providers should present and frame the information related to the banking product or service they are selling separately from information about additional or ancillary products or services (e.g. an insurance contract).

Block C – Additional articles to be considered for financial services from CRD/DMFSD

14. Do you consider the proposed list of „CRD articles“ to be applied to financial services appropriate? Should any CRD articles be removed or added from/to the new Art.

3(1b)CRD?

In our opinion, the remission to Article 25 of the CRD raises concerns. More specifically, it should be noted that Article 12 of the current DMFSD ('Imperative Nature of the Directive') establishes that consumers may not waive the rights conferred by the Directive, irrespective of the law applicable to the agreement. On the other hand, Article 25 of the CRD foresees that the consumer may not waive the rights conferred by the Directive, if the law applicable to the agreement is the law of a Member State. The reference in paragraph 2 of article 25 of the CRD - "any contractual terms which directly or indirectly waive or restrict the rights resulting from this Directive shall not be binding on the consumer" – is only applicable to contracts regulated by the law of a Member State.

As such, the current drafting of the proposal will entail less consumer protection, in what regards distance marketing of consumer financial services.

To tackle this issue, new paragraphs could be added to Article 25 of the CRD, replicating

the current wording of article 12 of DMFSD, while limiting the scope of these new provisions to the financial services foreseen in article 16a et seq.

15. Are you missing any articles of the current DMFSD which you would like to add into the Proposal?

Although we understand the explanations provided by the Commission on the Staff Working Document Impact Assessment Report, according to which such provisions concerning the **ban on unsolicited services and communications** (Articles 9 and 10) are nowadays irrelevant, PT considers that these provisions should be maintained in the CRD review, since these rules ensure legal clarity and certainty. Similar provisions continue to be applicable in financial sectorial legislation, such as, for example, Article 70, (1), (b) of the PSD 2.

The ban on unsolicited services (currently established in Article 9 of the DMFSD) could be maintained through a remission to Article 27 of CRD in the list defined by Article 3(1b).

In relation to the ban of unsolicited communications (Article 10 of the DMFSD), the maintenance of, at least, the general principles foreseen in paragraph 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) should be considered.

Additionally, **PT considers important to consider introducing a provision establishing the possibility for consumers to oppose to the use by traders of certain communication channels, such as Short Message Services (SMSs) or push notifications.** This proposal is aligned with the *'EBA's Opinion on disclosure to consumers of banking services through digital means under Directive 2002/65/EC'*, according to which:

'Where appropriate, providers should be required to do so by using instant communication channels, such as emails, Short Message Service (SMS) or push

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

Regarding article 16b, the Proposal does not 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.

THE SLOVAK REPUBLIC

The Czech Presidency has prepared for the meeting which should take place on 16. September 2022 the questionnaire to facilitate Member States' discussion about the proposal of the new rules for financial services provided at a distance. We are pleased to send you below our answers to the questions asked.

Block A – Application of DMFS (scope, full harmonization, definitions)

Part I: The application and usefulness of the safety net

- 1. Does the DMFS cover well those financial products whose product type is not generally regulated at EU level (i.e. they have also not been specifically excluded)? What products do you see falling into that safety net?**

In connection with the safety net function of the DMFS directive, a correct setting of the definition of financial services is necessary. It is essential to be clear about what falls under term of financial service and what not. Directive 2011/83/EU currently contains in Art. 2 point 12 definition of financial services. The current definition covers several products, but may cause legal uncertainty as it is not entirely clear what exactly falls under this definition. More than 20 years have passed since the introduction of this definition, and in our opinion, it does not take into account last, nor future technological development in the financial market.

In our opinion, it may include, for example, cryptocurrencies, consumer credits up to €200 and over €75,000, P2P lending or various investment products. Moreover, we think that in the case of P2P, where it is a consumer-to-consumer loan relationship, where the platform itself is not a licensed entity, it is not entirely clear whether or not it should fall under the definition of financial services.

- 2. Should DMFS' safety net feature also cover those financial products, which are explicitly excluded from the scope of existing sectoral/product specific EU rules? Should the reason for the exclusion matter?**

We believe that these products fall under the safety net, but it is firstly important to set the definition of financial services in right order. Due to the interest of legal certainty and clarity, it should then be deduced from this definition whether the DMFS' safety net also includes financial products that are explicitly excluded from the scope of existing EU sectoral/product rules. In the interests of the greatest possible consumer protection, we prefer that these products also fall under the safety net of the directive.

- 3. Should the proportionality principle be more taken into account in DMFS despite it being a safety net? For example, should there be some kind of upper/lower limit for its application (value/price threshold, duration of contract etc.)?**

We are of the opinion that, within the framework of the principle of proportionality, it is particularly important to ensure that the objectives of the draft directive are achieved. Currently, we cannot properly evaluate whether there is a need to introduce any upper/lower limits for its application. However, it is questionable whether the same rules should apply, e.g. for credits up to €100 and at the same for credits over €100,000.

Part II: The application of the principle *lex specialis derogat legi generali*

- 4. Do you find appropriate that the DMFS is to some extent applied also to products/services already covered by sectoral legislation (by adding new rules, e.g. 16d, 16e, sanctions)?**

We are of the opinion that it is essential to find the right measure of application and connection of sectoral legislation with the DMFS directive. We are in favour of the interconnection of several directives, such as CCD and CRD.

We are flexible in applying the draft directive to products that are already covered by other sectoral legislation, but it needs to be properly defined and set which legislation, not to cause any application problems or duplication of legislation.

5. Does Art. 3(2) of the CRD (together with recitals and rules contained in Art. 16a/16b/16d) provide a sufficiently clear view on what rules are to be used?

In our opinion, the provision is not clear enough. It is necessary to specify in Art. 3(2) CRD, which cases are concerned, with specific reference to the relevant provisions. There may be cases where the DMFS will only be applied to certain situations (in case of consumer credits, the withdrawal button will only apply to credits up to €200 and over €75,000 and it will not be necessary for consumer credits from €200-75,000), so it is questionable, whether such legislation is desirable and appropriate.

Part III: The impact of full harmonisation on the national legal order

6. Does your MS have its own national product regulation for a product or service that would fall into DMFS rules? Have you analysed the compatibility of these rules? What consequences on your national legal framework could the DMFS rules bring?

The Slovak Republic does not have its own national "pure" product regulation for a product or service that would fall into DMFS rules.

7. In which articles would you like for the MS to have a possibility of maintaining stricter rules in their national legal order?

N/A

Part IV: Definitions

8. Do you know of any particular product or service as being unclear as to whether or not it falls under the term financial service? If yes, which? Would it be welcome to provide clarification in the recitals?

As shown in our response to Q1, it is not clear to us whether cryptocurrencies fall under the definition in their part related to the investing through cryptocurrencies, since, in our opinion, the purchase and sale of cryptocurrencies can also be provided by entities without an investment company license. P2P is also questionable, where it is a consumer-consumer loan relationship, while the platform itself is not a licensed entity, as well. It is also questionable whether this includes operational leasing or not, etc.

Block B – (New) Chapter IIIa Rules concerning financial services contracts concluded at a distance (Art. 16a to 16e)

9. Are the scale and quality of information requirements set by Art. 16a appropriate and proportionate to the specific (residual) nature of financial services intended to be covered by DMFS?

In our opinion, the scope and quality of information requirements set by Art. 16a are appropriate and proportionate to the specific (residual) nature of financial services intended to be covered by DMFS.

10. Should any of the disclosures laid down in Art. 16a (1) be clarified? How do you understand the words „where applicable“ used in letters (h), (n), (o) and (v)?

For example, in letter (h) it is not clear to us how to proceed in the case of non-automated decision-making. In our opinion, in the provisions where it is explicitly stated that these are "where applicable" situations, it would be appropriate to give an explanation, at least in the recitals, which situations are involved. We are of the opinion, that

in case there is information according to letter (h), (n), (o) and (v) in the disposal of the entity, it should provide it, and in the absence of such information, there is no obligation to provide it.

11. Do you consider layering as suggested in Art. 16a an appropriate way to ensure consumer awareness when using digital communication? Should the rules on layering be further specified? Should there be any red-lines for using layering?

We have no specific reservations about layering, if the consumer is provided with all the information to be provided and the clarity of the text does not suffer.

12. Are you opposed to the introduction of the “withdrawal button” as suggested in Art. 16b? If yes, why?

We are not opposed the introduction of the “withdrawal button” as suggested in Art. 16b. However, it is questionable whether it is desirable for the withdrawal button to refer, e.g. in the case of consumer credits, only to credits up to €200 and over €75,000 and not to credits from €200 to €75,000.

13. Do you see Art. 16d and Art. 16e as proportionate, beneficial for consumers and clearly defining obligations imposed on financial service providers?

Currently, we do not see a problem in the provisions of Art. 16d and 16e.

Block C – Additional articles to be considered for financial services from CRD/DMFSD

14. Do you consider the proposed list of „CRD articles“ to be applied to financial services appropriate? Should any CRD articles be removed or added from/to the new Art. 3(1b) CRD?

Scrutiny reservation.

15. Are you missing any articles of the current DMFSD which you would like to add into the Proposal?

Scrutiny reservation.