



Council of the European Union
General Secretariat

Brussels, 19 September 2022

Interinstitutional files:
2022/0147 (COD)

WK 12212/2022 INIT

LIMITE

CONSOM

MI

COMPET

EF

ECOFIN

DIGIT

CODEC

CYBER

This is a paper intended for a specific community of recipients. Handling and further distribution are under the sole responsibility of community members.

NOTE

From:	Presidency
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 - Presentation by the Presidency
----------	---

PUBLIC

DMFS

Member States' written comments

Working Party on Consumer Protection and Information

16th September 2022

CZ PRES



EU2022.CZ

Structure of the debate

- Following the structure of the CZ PRES questionnaire
- Also using the comments sent by Member States in 3-column table

Block A - Application of DMFS

Block B - DMFS rules in CRD

Block C - Additional rules (general CRD rules, „old DMFSD“ rules)





Block A

Application of DMFS



Safety net for unregulated products

Q1. 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?

examples from replies:

- some crowdfunding
- some deposit & saving products
- some pensions
- some insurances
- consumer credits < 200 eur, other products excluded form CCD
- crypto-assets (?)
- „still analysing“



Safety net for excluded products

Q2. 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?

possible approaches:

- DMFS should apply regardless of the current national solution (as the universal safety net)
- DMFS should apply only if there is no existing national solution (because we need some consumer protection)
- DMFS should not apply at all (because regulator stated no need to regulate those products/activities at all)



Proportionality

Q3. 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.)?

nearly unanimous view:

- proportionality should NOT be introduced into DMFS (due to its horizontal nature)



DMFS supplementing sectoral regulation

Q4. 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. 16c, 16e, sanctions)?

summary of replies:

- mostly „YES“ vs. 1 delegation „NO“ (as it would undermine the decisions of legislators in the sector)
- there could be some legal uncertainty



DMFS application scheme

Q5. 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?

summary of replies:

- not clear enough
- raised questions for several concrete examples
- still analysing



Full harmonization impact (1)

Q6. 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?

summary of replies:

- most still analysing
- examples from across many sectors (consumer credits outside the CCD limit, crowdfunding, pensions, insurance etc)



Full harmonization impact (2)

Q7. In which articles would you like for the MS to have a possibility of maintaining stricter rules in their national legal order?

summary of replies:

- Art. 16a (disclosure)
- Art. 16b (RoW)
- all articles



Definition of the financial service

Q8. 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?

summary of replies:

- necessary to clarify border/uncertain services (guaranties, investments in wine/whiskey/diamonds, credit management, loss adjustment, leasing/hiring)
- clarification in recitals preferred





Block B

DMFS rules in CRD



Disclosures (1) – scale and quality

Q9. 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?

summary of replies:

- mostly YES (both to scale and quality)
- some analysing what could be dropped
- many drafting suggestions
- questions on compatibility with other EU legislation



Disclosures (2) – clarification

Q10. 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)?

summary of replies:

- clarification required for a), f), g), h), j), n), o), s), v)
- „where applicable“ – some MS ask for clarification



Layering

Q11. 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?

summary of replies:

- mostly YES to layering BUT further development needed (in recitals, by modification of the legal text)
- need to discuss the 1st layer
- technical standards of layering



Withdrawal button

Q12. Are you opposed to the introduction of the “withdrawal button” as suggested in Art. 16b? If yes, why?

summary of replies:

- positive responses BUT need to modify the proposal so it is more functional
- non-paper by DE

for discussion

- What characteristics the WB must have to serve its purpose?
- WB on 1st layer?
- technical standards of WB?



Adequate explanations & Additional online protection

Q13. Do you see Art. 16d and Art. 16e as proportionate, beneficial for consumers and clearly defining obligations imposed on financial service providers?

summary of replies:

- several concerns, questions to COM
- more detail on „structure, design, function or manner of operation“
- more detail on „right to human intervention“
- interaction with other EU legislation



PUBLIC

Block C

Additional rules
(general CRD rules, „old DMFSD“ rules)



CRD articles

Q14. 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?

Replies:

- to be removed: Art. 22, 24, 25
- to explain possible overlap: Art. 19
- to be added: Art. 6(5), 6a, 8(6), 10, 15, 21, 27



CRD – Art. 22

to be removed

Article 22

Additional payments

Before the consumer is bound by the contract or offer, the trader shall seek the express consent of the consumer to any extra payment in addition to the remuneration agreed upon for the trader's main contractual obligation. If the trader has not obtained the consumer's express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment.



CRD – Art. 24

to be removed

Article 24

Penalties

1. Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.

2. Member States shall ensure that the following non-exhaustive and indicative criteria are taken into account for the imposition of penalties, where appropriate:

- (a) the nature, gravity, scale and duration of the infringement;
- (b) any action taken by the trader to mitigate or remedy the damage suffered by consumers;
- (c) any previous infringements by the trader;
- (d) the financial benefits gained or losses avoided by the trader due to the infringement, if the relevant data are available;
- (e) penalties imposed on the trader for the same infringement in other Member States in cross-border cases where information about such penalties is available through the mechanism established by Regulation (EU) 2017/2394 of the European Parliament and of the Council;
- (f) any other aggravating or mitigating factors applicable to the circumstances of the case.



CRD – Art. 24

to be removed

Article 24

Penalties

3. Member States shall ensure that when penalties are to be imposed in accordance with Article 21 of Regulation (EU) 2017/2394, they include the possibility either to impose fines through administrative procedures or to initiate legal proceedings for the imposition of fines, or both, the maximum amount of such fines being at least 4 % of the trader's annual turnover in the Member State or Member States concerned.

4. For cases where a fine is to be imposed in accordance with paragraph 3, but information on the trader's annual turnover is not available, Member States shall introduce the possibility to impose fines, the maximum amount of which shall be at least EUR 2 million.

5. Member States shall, by 28 November 2021, notify the Commission of the rules and measures referred to in paragraph 1 and shall notify it, without delay, of any subsequent amendment affecting them.



CRD – Art. 25

to be removed

Article 25

Imperative nature of the Directive

If the law applicable to the contract is the law of a Member State, consumers may not waive the rights conferred on them by the national measures transposing this Directive.

Any contractual terms which directly or indirectly waive or restrict the rights resulting from this Directive shall not be binding on the consumer.



CRD articles

Q14. 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?

examples of replies:

- to be removed: Art. 22, 24, 25
- to explain possible overlap: Art. 19
- to be added: Art. 6(5), 6a, 8(6), 10, 15, 21, 27



CRD – Art. 19

to explain possible overlap

Article 19

Fees for the use of means of payment

Member States shall prohibit traders from charging consumers, in respect of the use of a given means of payment, fees that exceed the cost borne by the trader for the use of such means.



CRD articles

Q14. 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?

examples of replies:

- to be removed: Art. 22, 24, 25
- to explain possible overlap: Art. 19
- to be added: Art. 6(5), 6a, 8(6), 10, 15, 21, 27



CRD – Art. 6a

to be added

Article 6a

Additional specific information requirements for contracts concluded on online marketplaces

1. Before a consumer is bound by a distance contract, or any corresponding offer, on an online marketplace, the provider of the online marketplace shall, without prejudice to Directive 2005/29/EC, provide the consumer with the following information in a clear and comprehensible manner and in a way appropriate to the means of distance communication:

- (a) general information, made available in a specific section of the online interface that is directly and easily accessible from the page where the offers are presented, on the main parameters determining ranking, as defined in point (m) of Article 2(1) of Directive 2005/29/EC, of offers presented to the consumer as a result of the search query and the relative importance of those parameters as opposed to other parameters;
- (b) whether the third party offering the goods, services or digital content is a trader or not, on the basis of the declaration of that third party to the provider of the online marketplace;
- (c) where the third party offering the goods, services or digital content is not a trader, that the consumer rights stemming from Union consumer protection law do not apply to the contract;
- (d) where applicable, how the obligations related to the contract are shared between the third party offering the goods, services or digital content and the provider of the online marketplace, such information being without prejudice to any responsibility that the provider of the online marketplace or the third-party trader has in relation to the contract under other Union or national law.



2. Without prejudice to Directive 2000/31/EC, this Article does not prevent Member States from imposing additional information requirements for providers of online marketplaces. Such provisions shall be proportionate, non-discriminatory and justified on grounds of consumer protection.

CRD – Art. 8(6)

to be added

Article 8

Formal requirements for distance contracts

8. Where a consumer wants the performance of services, or the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, or of district heating, to begin during the withdrawal period provided for in Article 9(2), and the contract places the consumer under an obligation to pay, the trader shall require that the consumer make an express request and request the consumer to acknowledge that, once the contract has been fully performed by the trader, the consumer will no longer have the right of withdrawal.



CRD – Art. 10

to be added

Article 10

Omission of information on the right of withdrawal

1. If the trader has not provided the consumer with the information on the right of withdrawal as required by point (h) of Article 6(1), the withdrawal period shall expire 12 months from the end of the initial withdrawal period, as determined in accordance with Article 9(2).
2. If the trader has provided the consumer with the information provided for in paragraph 1 of this Article within 12 months from the day referred to in Article 9(2), the withdrawal period shall expire 14 days or, in cases where Member States have adopted rules in accordance with Article 9(1a), 30 days after the day upon which the consumer receives that information.



CRD – Art. 15

to be added

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 (6), 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.

CRD – Art. 21

to be added

Article 21

Communication by telephone

Member States shall ensure that where the trader operates a telephone line for the purpose of contacting him by telephone in relation to the contract concluded, the consumer, when contacting the trader is not bound to pay more than the basic rate.

The first subparagraph shall be without prejudice to the right of telecommunication services providers to charge for such calls.



CRD – Art. 27

to be added

Article 27

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.



„Old DMFSD“ rules

Q15. Are you missing any articles of the current DMFSD which you would like to add into the Proposal?

examples of replies:

- to return: Art. 1(1), 3(2), 3(3), 5(3), 6(7), 7(2), 9, 10



„Old DMFSD“ – Art. 1(1)

to be returned

Article 1

Object and scope

1. The object of this Directive is to approximate the laws, regulations and administrative provisions of the Member States concerning the distance marketing of consumer financial services.



„Old DMFSD“ – Art. 3(2)

to be returned

Article 3

Information to the consumer prior to the conclusion of the distance contract

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

...

2. The information referred to in paragraph 1, the commercial purpose of which must be made clear, shall be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, with due regard, in particular, to the principles of good faith in commercial transactions, and the principles governing the protection of those who are unable, pursuant to the legislation of the Member States, to give their consent, such as minors.



„Old DMFSD“ – Art. 3(3)

to be returned

Article 3

Information to the consumer prior to the conclusion of the distance contract

3. In the case of voice telephony communications

(a) the identity of the supplier and the commercial purpose of the call initiated by the supplier shall be made explicitly clear at the beginning of any conversation with the consumer;

(b) 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,
- a description of the main characteristics of the financial service,
- the total price to be paid by the consumer to the supplier for the financial service including all taxes paid via the supplier or, when an exact price cannot be indicated, the basis for the calculation of the price enabling the consumer to verify it,
- notice of the possibility that other taxes and/or costs may exist that are not paid via the supplier or imposed by him,
- the existence or absence of a right of withdrawal in accordance with Article 6 and, where the right of withdrawal exists, its duration and the conditions for exercising it, including information on the amount which the consumer may be required to pay on the basis of Article 7(1).



The supplier shall inform the consumer that other information is available on request and of what nature this information is. In any case the supplier shall provide the full information when he fulfils his obligations under Article 5.

„Old DMFSD“ – Art. 5(3)

to be returned

Article 5

Communication of the contractual terms and conditions and of the prior information

...

3. At any time during the contractual relationship the consumer is entitled, at his request, to receive the contractual terms and conditions on paper. 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.



„Old DMFSD“ – Art. 6(7)

to be returned

Article 6

Right of withdrawal

...

7. This Article does not apply to credit agreements cancelled under the conditions of Article 6(4) of Directive 97/7/EC or Article 7 of Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (4).

If to a distance contract of a given financial service another distance contract has been attached concerning services provided by the supplier or by a third party on the basis of an agreement between the third party and the supplier, this additional distance contract shall be cancelled, without any penalty, if the consumer exercises his right of withdrawal as provided for in Article 6(1).



„Old DMFSD“ – Art. 7(2)

to be returned

Article 7

Payment of the service provided before withdrawal

...

2. Member States may provide that the consumer cannot be required to pay any amount when withdrawing from an insurance contract.



„Old DMFSD“ – Art. 9

to be returned

Article 9

Given the prohibition of inertia selling practices laid down in Directive 2005/29/EC of 11 May 2005 of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (5) and without prejudice to the provisions of Member States' legislation on the tacit renewal of distance contracts, when such rules permit tacit renewal, Member States shall take measures to exempt the consumer from any obligation in the event of unsolicited supplies, the absence of a reply not constituting consent.



„Old DMFSD“ – Art. 10

to be returned

Article 10

Unsolicited communications

1. The use by a supplier of the following distance communication techniques shall require the consumer's prior consent:

- (a) automated calling systems without human intervention (automatic calling machines);
- (b) fax machines.

2. Member States shall ensure that means of distance communication other than those referred to in paragraph 1, when they allow individual communications:

- (a) shall not be authorised unless the consent of the consumers concerned has been obtained, or
- (b) may only be used if the consumer has not expressed his manifest objection.

3. The measures referred to in paragraphs 1 and 2 shall not entail costs for consumers.



PUBLIC



EU2022.CZ