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NOTE

From:	Presidency
To:	Working Party on Consumer Protection and Information (Consumer Credits) Working Party on Consumer Protection and Information (Attachés) Working Party on Consumer Protection and Information
Subject:	Presidency note



Presidency note

10 November 2022

Dear colleagues,

In the interest of moving the file forward the Presidency has decided to launch a written procedure for Member States to the **second redraft of DMFS** (ST 14631/22). This Note also contains several **proposals and questions** for which the Presidency would appreciate your comments.

The second redraft seeks to improve the text by reflecting comments and remarks received from Member States so far. This redraft has among other changes added two more Articles from the CRD to be applied to financial services, extended the list of non-layerable information, as well fixed the issue of the expiry of the right of withdrawal (after one year and 14 days).

The **recitals** are left unrevised as we are still waiting for the legislative text to be more stable. We expect to cover them in the next Presidency redraft.

As concerns the **Withdrawal Button** (Art. 16b, para 5) and **Adequate Explanations** (Art. 16d) we asked the Commission to rethink and explore these issues further, taking into consideration Member States' position. These two proposals are also attached to this Note – see addendum 1 to this note.

With the aim to present a comprehensive third redraft as soon as possible, the presidency would like to ask you to comment on the following questions and proposals.

1. CRD Articles

1.1 Following the debate on the Working Party and the subsequent comments, the list of CRD articles to be applied to financial services has been expanded by Art. 8(6) – confirmation of the offer by the trader. Do you agree?

1.2 Following the debate on the Working Party and the subsequent comments, the list of CRD articles to be applied to financial services has been expanded by Art. 27 – Inertia selling (reflected in the current DMFSD in Art. 9). Do you agree?



1.3 From the debate on the Working Party and the subsequent comments, it has also been suggested that Article 15 of the CRD, which deals with the effects of the right of withdrawal on ancillary contracts (Art. 6(7) of the current DMFSD), be included in the list of Articles to be applied to financial services. As the text of Article 15 of the CRD contains references to the RoW within the CRD, the Presidency does not consider appropriate to simply enter this Article into the list. As such, should the Article 15 be applicable on the financial services contracts sold at the distance, it would need to be reflected in the text itself (e.g. placing it in 16b). The following wording is being considered:

Option 1: *"x. If the consumer exercises his right of withdrawal from a distance contract in accordance with this Article, any ancillary contracts shall be automatically terminated, without any penalty for the consumer."*

OR

Option 2: *"x. Where an ancillary service relating to the distance contract is provided by the trader or by the third party on the basis of an agreement between that third party and the trader, this ancillary contract shall be automatically terminated, without any penalty for the consumer, if the consumer exercises his right of withdrawal in accordance with this Article."*

Do you agree with regulating this matter? If yes, which option would you prefer?

1.4 Following the comments from Member States, the Presidency has improved the text in Article 3(1b), subpara 3, where, in alignment with the current DMFSD (Art. 1(2), subpara 2), the list of provisions to be applied only to the first operation is limited to pre-contractual information (contained in 16a) and adequate explanations (contained in 16d). Considering that adequate explanations are related to pre-contractual information, it is logical for them to be applied to only the first operation as well. Do you agree with the change in text?

2. Pre-contractual information

2.1 Article 16a(1), point (n)

Some Member States have proposed to either cross out the point entirely or to modify it. In search of a good compromise, we would like you to comment on the following options:



- A – delete the point entirely;
- B – keep the point as is;
- C – change the point – please suggest concrete wording.

2.2 Article 16a(1), point (o)

Some Member States have proposed to either cross out the point entirely or to modify it. In search of reaching a good compromise, we would like you to comment on the following options.

- A – delete the point entirely
- B – keep the point as is
- C – change the point – please suggest how/suggest wording

2.3 Article 16a(3) – Timing

The COM proposal states that pre-contractual information need to be provided always before the conclusion of the contract, regardless of which means of distance communication is used. The current DMFSD contains an exclusion from this rule in Art. 5(2) for cases where the contract has been concluded by using a means of distance communication which does not enable providing all the information before the conclusion of the contract. In this case, the information is provided immediately after the conclusion of the contract, the condition being that the use of the means of distance communication has been at the consumer's request.

In relation to the COM proposal relating to telephone communication in Article 16a(2), in particular "...shall provide that information when fulfilling obligations under paragraph 3.", a question has arisen how would providing pre-contractual information work in practice, and if it even would be possible when concluding by telephone.

The following options are being considered:



- A. Keeping the current text – all information must be provided before concluding the contract, which also means in cases of telephone/voice communications.
- B. Adapting Article 5(2) of the current DMFSD – all information must be provided before the conclusion of the contract, with the exception for when a means of distance communication does not enable it (and when used at the consumer's request). Information is then provided immediately after the conclusion of the contract. A possible wording suggestion for this option:

"4b. If the contract has been concluded at the consumer's request using a means of distance communication which does not enable providing the information referred to in paragraph 1 in accordance with paragraph 3 and 4, the trader shall provide that information [on a durable medium] immediately after the conclusion of the contract."

- C. Including a special provision for telephone/ voice communications where only the "other" information (not provided by telephone, beyond what is provided in para 2) would be provided immediately after the conclusion of the contract. A possible wording suggestion of Article 16a(2) subpara 2 for this option:

"By way of derogation from paragraph 1, if the consumer explicitly agrees, the trader may provide only the information referred to in points (a), (f), (g), (j) and (p) of that paragraph. In that case the trader shall inform the consumer of the nature and the availability of the other information referred to in paragraph 1 and shall provide that information ~~when fulfilling obligations under paragraph 3~~ immediately after the conclusion of the contract."

Which option would you prefer?

3. Article 16b(1) Right of Withdrawal

The change in subpara 3 of Article 16b(1) is following the progress of the same provision in the CCD2 proposal. The text now better reflects Article 16b(1), subpara 2, point b), while at the same time clearly states when the right of withdrawal expires.



Considering that Article 16a does not regulate the content of the contract, the Presidency suggests to modify the reference in point b), subpara 3 to only the information to be provided. Referencing the whole Article 16a would widen the provision and include obligations which should not be connected with the right of withdrawal.

Do you agree to what is proposed in the redraft?

4. Article 16e Additional protection regarding online interfaces

Following the debate on the Working Party, the Presidency has considered the Article further. Nonetheless, the deletion of the Article has been maintained as the meaning of the obligations prescribed within is not clear.

It is the Presidency's hope to use Member States' comments on all these documents as a basis for a **third redraft** which would be then presented on the Working Party on November 29th. **Therefore, delegations are invited to send their comments to the questions above by 16 November.**

The Presidency would like to thank delegations for their valuable comments and insights that have been sent so far.

Best regards,

Czech Presidency team