FI comments on the withdrawal button (16b, para 5):

For distance contracts concluded by the means of an online interface, the trader shall ensure that the consumer can withdraw from the contract on that same online interface by using a button.

The button shall be labelled in a legible manner and shall contain the words “withdraw from contract here” or a corresponding unambiguous formulation. The withdrawal button shall be placed on the online interface in a prominent manner.

Using the button shall allow the consumer to make the withdrawal statement by providing the following information:

(a) Name
(b) Identification of the contract
(c) Identification of the electronic mean by which the confirmation of the withdrawal shall be sent.

The withdrawal statement shall be submitted by using a confirmation button. The confirmation button shall be labelled in a legible manner with the words “withdraw now” or a corresponding unambiguous formulation

Once the consumer uses the confirmation button, the consumer shall then automatically receive a confirmation that the withdrawal statement has been submitted, including the date and time of the submission.

The trader shall confirm to the consumer without undue delay the content of the withdrawal statement, including the date and time of its receipt, on a durable medium.

Adequate explanations

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

a) ~~the required pre-contractual information;~~

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

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

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

2a. Member States may adapt the manner by which and the extent to which the explanations referred to in paragraph 1 is given, to the circumstances of the situation in which the financial service is offered, the person to whom it is offered and the nature of the financial service offered.

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

4. Where another Union act governing specific financial services contains rules on the ~~information~~ **adequate explanations** to be provided to the consumer ~~prior to the conclusion of the contract, paragraphs 1 to 3 of this Article shall not apply~~**, only the adequate explanations rules of that Union act shall apply to those specific financial services, unless provided otherwise in that act.**

2022 11 11 DMFSD – Italian Replies to Presidency notes wk15416.en22 and wk15416-ad01.en22

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)[1] – confirmation of the offer by the trader. Do you agree?

IT
We do not have any particular remark to make on this point.

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[2] – Inertia selling (reflected in the current DMFSD in Art. 9[3]). Do you agree?

IT
We agree with the extension proposed to the Art. 27 as a consequence of the repealing of Art. 9 DMFSD.

1.3 From the debate on the Working Party and the subsequent comments, it has also been suggested that Article 15[4] of the CRD, which deals with the effects of the right of withdrawal on ancillary contracts (Art. 6(7)[5] 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

[1] Art. 8(6) CRD, "Formal requirements for distance contracts": "Where a distance contract is to be concluded by telephone, Member States may provide that the trader has to confirm the offer to the consumer who is bound only once he has signed the offer or has sent his written consent. Member States may also provide that such confirmations have to be made on a durable medium."

[2] Art. 27 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."

[3] Art. 9 DMFSD 2002, "Unsolicited services": "Without prejudice to Member States provisions on the tacit renewal of distance contracts, when such rules permit tacit renewal, Member States shall take the necessary measures to:
- prohibit the supply of financial services to a consumer without a prior request on his part, when this supply includes a request for immediate or deferred payment,
- exempt the consumer from any obligation in the event of unsolicited supplies, the absence of a reply not constituting consent."

[4] Art. 15 CRD, "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."

[5] Art. 6(7) DMFSD 2002, "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(11)."

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?

IT
We do not oppose this change and we prefer Option 1.

1.4 Following the comments from Member States, the Presidency has improved the text in Article 3(1b), subpara 3[6], where, in alignment with the current DMFSD (Art. 1(2), subpara 2[7]), 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?

IT
We do not oppose this change, which seems to clarify the meaning of the provision.

2. Pre-contractual information

2.1 Article 16a(1), point (n)[8]
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;

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[6] Art. 3(1b), subpara 3 DMFSD proposal: "Where 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 16a and 16d ~~the provisions referred to in the first subparagraph~~ shall apply only to the first operation. 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 16a and 16d ~~the provisions referred to in the first subparagraph~~ shall apply."
Underlined parts are what have been added in the second proposal by the PCY.
[7] Art. 1(2), subpara 2 DMFSD 2002, "Object and scope": "In case there is no initial service agreement but the successive operations or the separate operations of the same nature performed over time are performed between the same contractual parties, Articles 3 and 4 apply only when the first operation is performed. Where, however, no operation of the same nature is performed for more than one year, the next operation will be deemed to be the first in a new series of operations and, accordingly, Articles 3 and 4 shall apply."
[8] Art. 16a(1), point (n) DMFSD proposal: "where applicable, a brief description of the risk-reward profile;".

C – change the point – please suggest concrete wording.

IT

We would prefer option B, keep the point as is. However, we reiterate that recital 19 of the current version does not appear exhaustive on this point; in particular, it seems to refer to a summary risk indicator, without further detailing it and without providing reference metrics to the professional obliged to do so. We reserve the right to propose changes to the recital in question when they will be placed under review in the context of the negotiations.

2.2 Article 16a(1), point (o)[9]

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

IT

We would prefer Option A – delete the point entirely.

2.3 Article 16a(3) – Timing[10]

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)[11] 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:

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[9] Art. 16a(1), point (o) DMFSD proposal: "where applicable, information on any environmental or social objectives targeted by the financial service;".

[10] Art. 16a(3)DMFSD proposal: "The trader shall provide the information referred to in paragraph 1 ~~at least one day~~ <u>in good time</u> before the consumer is bound by any distance contract ~~or any corresponding offer~~.

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

Underlined parts are what have been added in the second proposal by the PCY.

[11] Art. 5(2) DMFSD 2002, "Communication of the contractual terms and conditions and of the prior information": "2. The supplier shall fulfil his obligation under paragraph 1 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."

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?

IT
We have a preference for option A. The fact that contracts are concluded by telephone/voice communications does not by itself justify the necessity of an immediate conclusion of the contract that prevents consumers to be informed preliminarily and in a complete manner.
In some sectors, such as the insurance one, consumers prefers to stipulate the contract by telephone or other voice communications in order to avoid intermediary fees. Nevertheless, this is without prejudice to the benefit of consumers to receive a full pre-contractual information.

3. Article 16b(1) Right of Withdrawal
The change in subpara 3 of Article 16b(1)[12] is following the progress of the same provision in the CCD2 proposal. The text now better reflects Article 16b(1), subpara 2, point b)[13], 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

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[12] Art. 16b(1) subpara 3 DMFSD proposal: "~~Where the trader has not provided the consumer with the contractual terms and conditions and the information in accordance with Article 16a, the withdrawal period shall expire 12 months and 14 days after the conclusion of the contract.~~ <u>If the consumer has not received the contractual terms and conditions and the information referred to in Article 16a(1) and (5), the right of withdrawal shall expire one year and 14 calendar days after the conclusion of the contract.</u> This shall not apply if the consumer has not been informed about his right of withdrawal in accordance with ~~point (p)~~ of Article 16a(1), <u>point (p).</u>"
Underlined parts are what have been added in the second proposal by the PCY.
[13] Art. 16b(1) subpara 1 (b) DMFSD proposal: "the day on which the consumer receives the contractual terms and conditions and the information <u>referred to</u> in ~~accordance with~~ Article 16a<u>(1) and (5a)</u>, if that is later than the date in point (a) of this subparagraph."
Underlined parts are what have been added in the second proposal by the PCY.

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?

IT
We understand the reformulation in the sense that whether the relevant information are given in the contractual or pre-contractual phase is irrelevant. In particular, if it was given (in the pre-contractual documents or in the contract), the 14 days would start from the signing of the contract. If they were given after the stipulation, the 14 days would run from the time they are provided. If they have not been given, the term of 1 year and 14 days would apply from the stipulation, unless it concerns the info on the withdrawal, in which case the right never expires.
If our interpretation is correct, the PCY proposal effectively clarifies the point raised at the time[14]*, even if not completely: we had in fact also asked to clarify what happens if there is a discrepancy between the information provided in the pre-contractual phase and that given in the contract (e.g. only the first of the two is correct); in this case it is not clear what are the consequences of the expiration of the deadline for the withdrawal.*
As regards Article 16b(1), third subparagraph, we notice that the reference to Article 16a para. 5 should be amended, since the correct reference is to para. 5a, in accordance with the proposed amendments to Art. 16b(1), second subparagraph, point (b).

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
As regards Article 16e (Additional protection regarding online interfaces), we appreciate the aim of mitigating the risk of cognitive or behavioral biases. Nonetheless, it could be appropriate to maintain the deletion of the Article having regards to the negotiations on Artificial Intelligence Regulation, currently ongoing, which could lead to a better regulation of the risk arising from the use of Artificial Intelligence systems[15]*.*

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[14] In particular, during the WP meeting of 13/10/2022, we stated: "With reference to the new paragraph introduced in Article 16b (1), concerning the duration of the withdrawal period, even though the expression is in line with the GA of CCD2, there is a substantial difference of meaning between the two rules. Actually, in the CCD2 the content of the agreement is harmonized in Article 20 and 21. Hence, the withdrawal period is made dependent on whether the creditor provided (or failed to provide) the information due in the contract. The new provision of DMFSD2 is different, because here the withdrawal period is made dependent on the information to be provided before the conclusion of the contract, while no provision is in place to harmonize the information to be included in the agreement. We believe that the implications of such difference would deserve specific consideration and further clarification. We wonder, for instance, if the extension of the withdrawal period would apply anyway in case the pre-contractual information was not provided in accordance with Article 16a but all the information was given in the agreement concluded at distance. Vice versa, what happens if the pre-contractual information is accurate but the contract is missing or it contains information diverging from that given in accordance with Article 16a? Would the withdrawal period be extended or not in this case?"
[15] 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

The withdrawal button (16b, para 5)[16]

IT

We praise the efforts of the Presidency to clarify the meaning of art. 16b(5) on the withdrawal button (WB). However, as already signaled in previous written comments, we have a scrutiny reserve on the point, as we have started a round of consultations with national suppliers of financial services and consumer association and we are waiting for their feedbacks.

Finally, we would like to know if other member States have had or intend to have consultations on this matter with their national stakeholders.

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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."]

[16] Presidency note wk15416-ad01.en22: "For distance contracts concluded by the means of an online interface, the trader shall ensure that the consumer can withdraw from the contract on that same online interface by using a button. The button shall be labelled in a legible manner and shall contain the words "withdraw from contract here" or a corresponding unambiguous formulation. The withdrawal button shall be placed on the online interface in a prominent manner.

Using the button shall allow the consumer to make the withdrawal statement by providing the following information:

1. (a) Name
2. (b) Identification of the contract
3. (c) Identification of the electronic mean by which

the confirmation of the withdrawal shall be sent.

The withdrawal statement shall be submitted by using a confirmation button. The confirmation button shall be labelled in a legible manner with the words "withdraw now" or a corresponding unambiguous formulation

Once the consumer uses the confirmation button, the consumer shall then automatically receive a confirmation that the withdrawal statement has been submitted, including the date and time of the submission.

The trader shall confirm to the consumer without undue delay the content of the withdrawal statement, including the date and time of its receipt, on a durable medium."

Adequate explanations[17]

IT

We welcome the introduction of the new art. 16d(2a), which answer our request to coordinate art. 16d with art. 12(2) CCD[18]*, allowing Member States to adapt the requirements to the specific circumstances, target audience and nature of the product offered. We believe that there was no reason for previous difference between the two texts and that the new provision ensures the needed flexibility.*

However, we do not support the deletion from para. 1 of the references to "the required pre-contractual information" (point a) and to "the consequences of payment default or late payment by the consumer" (point c). We believe that such aspects are very important for the consumer in order to assess whether the proposed contract and ancillary services are adapted to his or her needs and financial situation. Thus, we do not understand why the adequate explanations should not cover those items.

Currently, the national framework for banking products requires institutions to have in place procedures allowing them to provide explanations to the customer regarding, inter alia, their rights as described in the information documents. Given the principle of maximum harmonization in the revised DMFSD, those rules could not be applied any more in case of distance contracts. Therefore, we reiterate the request to eliminate the reference to art. 4 CRD and adopt a minimum harmonization approach in the proposal or, at least, to introduce a minimum harmonization rule for this art. 16d, like art. 16a(5a).

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[17] Presidency note wk15416-ad01.en22: "1. Member States shall ensure that traders are required to provide adequate explanations to the consumer on the proposed financial services contracts that make it possible for the consumer to assess whether the proposed contract and ancillary services are adapted to his or her needs and financial situation. The explanations shall ~~include~~ **be given on** the following elements:

a) ~~the required pre-contractual information~~;

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

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

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

2a. Member States may adapt the manner by which and the extent to which the explanations referred to in paragraph 1 is given, to the circumstances of the situation in which the financial service is offered, the person to whom it is offered and the nature of the financial service offered.

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

4. Where another Union act governing specific financial services contains rules on the ~~information~~ **adequate explanations** to be provided to the consumer ~~prior to the conclusion of the contract, paragraphs 1 to 3 of this Article shall not apply~~**, only the adequate explanations rules of that Union act shall apply to those specific financial services, unless provided otherwise in that act.**"

[18] Art. 12(2) CCD in the version of the Commission Proposal: 2. Member States may adapt the requirement referred to in paragraph 1 with regard to the manner in which the explanations shall be given and the extent to which they shall be given to the following: a) the circumstances of the situation in which the credit is offered; b) the person to whom the credit is offered; c) the nature of the credit offered.

PL comments

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?

PL comment: We accept the proposed expansion.

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?

PL comment: We accept the proposed expansion.

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?

PL comment: We agree with regulating this matter. Our preference is for option 1, as the ancillary contract is already defined in CRD. However we would like to point that the same goal could be achieved by placing reference to article 16b in article 15.

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?

PL comment: We agree with the proposed changes.

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.

PL comment: We believe that the point should be kept as it is.

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

PL comment: We are flexible in that matter

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 t**he 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?

PL comment: We prefer option A.

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?

PL comment: We do not agree to narrow the reference in article 16b (1) (b) to article 16a (1) and (5a). In our view article 16a (4) regarding durable medium, 16a (4a) regarding layering should also be mentioned. Otherwise failing to provide pre-contractual information on durable medium or not respecting the rules on layering would still result in beginning of the withdrawal period on the day of conclusion of the contract instead of the day of providing pre-contractual information in a correct manner.

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.

PL comment: We can be flexible in that regard – on one hand rules mentioned in article 16e are covered by UCPD, on the other hand – repeating them in DMFSD will not be harmful for consumers'' interest.

Withdrawal Button (Art. 16b, para 5) and **Adequate Explanations** (Art. 16d) – Commission proposal (WK15416-ad01)

The withdrawal button (16b, para 5)

PL comment: We believe that the new Commission proposal goes in the right direction, as it provides for two phases – activating withdrawal button and activating confirmation button. Nevertheless the following text:

"Using the button shall allow the consumer to make the withdrawal statement by providing the following information:
(a) Name
(b) Identification of the contract

(c) Identification of the electronic mean by which the confirmation of the withdrawal shall be sent. "

seems vague, as regards who should provide the information mentioned in points (a), (b) and (c). In our view, activating the withdrawal button should result in displaying a summary that contains these information and the confirmation button. Consumer should not be required to provide that information, as it would create unnecessary obstacles.

Having that in mind we would like to suggest the following text:

Using the button shall result in displaying the following information:
(a) Name
(b) Identification of the contract
(c) Identification of the electronic mean by which the confirmation of the withdrawal shall be sent.

Adequate explanations

PL comment: We can agree on the text proposed by the Commission.

JUSTITSMINISTERIET
Ministry of Justice

Date: November 16, 2022
Office: Formueretskontoret
Contact: Benjamin Vynne Muschinsky
Our ref.: 2018-0091-0183
Doc.: 2639032

To the Presidency,

First of all, since no new government has been elected after the parliamentary election on November 1, we are currently operating under a transitional government.

With this in mind, we have the following remarks:

Regarding the compromise proposal:
As regards the last subparagraph of Article 3(1)(b) ("Where no initial service agreement…"), we would welcome a few examples of the situations that the provision could apply to.

As regards Article 16b(1), subparagraph 1, it seems unclear whether the withdrawal period may begin from the day of point (b), if that is earlier than the date in point (a).

For instance, if the consumer receives the information referred to in Art. 16a earlier than the day of the conclusion of the distance contract, does the withdrawal then begin before the conclusion of the distance contract?

We therefore suggest to clarify that the withdrawal period shall begin from the day of the conclusion of the distance contract, unless the information referred to in Article 16a(1) and (5a) is not received by the consumer on that date, in which case the withdrawal period shall begin on the day on which the consumer recives the referred information.

Regarding the questions and proposals in the Presidency note:

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As regards the proposed options in question 1.3, from a technical perspective, option 1 seems to be the more clear and unambigious wording.

Positions of the French delegation on the second compromise

A. General comments

We would like to thank the Czech Presidency for its work on the revision of the Directive on distance marketing of financial services, which is going in the right direction.

However, we wish to reiterate 2 points concerning the scope of the Directive and its articulation with existing sectoral regulations:

- It is essential to specify in the Directive that the text does not apply when certain financial services are already covered by sectoral provisions, **even in the silence of the said sectoral texts**, for the sake of good readability of the different texts.

- A definition of financial services is essential in order to establish the scope of application of the directive.

B. Article 1 and the articles of Directive 2011/83/EU applicable to financial services contracts concluded at a distance

a. *Addition of Article 8(6) of Directive 2011/83/EU to the list of articles applicable to financial services sold at a distance*

The French delegation is not opposed to this addition, as long as it gives Member States the possibility of providing a more detailed framework regarding the conclusion of the contract.

b. *Addition of Article 27 of Directive 2011/83/EU*

According to article 27 of the Directive: "Forced sale".

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

The French delegation can agree with this addition.

c. *Addition of a provision on ancillary contracts*

The Czech Presidency asks the delegations to decide on the addition of a provision that if the consumer exercises his right of withdrawal, contracts ancillary to the main contract are automatically terminated, without penalty for the consumer.

We can agree with such addition, which could be made in Article 16b. We suggest, however, that it is specified that the main contract is a financial service contract concluded at distance.

d. Contracts with successive operations

The Czech Presidency proposes adding the following provisions: "Where no initial service agreement but the successive operations or the separate operation of the same nature performed over time are performed between the same contractual party, Article 16a and article 16d shall apply only to the first operation. 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, Article 16a and Article 16d shall apply.

The result of this addition would be the absence of pre-contractual information and adequate information in the case of a contract with successive maturities, at the maturities following the first.

The French delegation would like that the Commission gives concrete examples of the application of this provision in the case of financial services sold at a distance during the next working group, as it seems complex at this stage to determine the real scope of this addition to the directive. These concrete examples could then be added to the recitals, for greater readability of the text and legal certainty. Furthermore, we wonder whether it would not be appropriate to add article 16b (right of withdrawal) to the list of articles that apply only at the time of the first expiry of the contract.

C. On pre-contractual information (Article 16(a))

a. On the deletion of Article 16a(1) point (n) and point (o)

The Presidency asks the Member States about the possible deletion of the mention of the "risk profile" in the pre-contractual information.

The French delegation can agree to maintain the provisions as they stand, but can also support the deletion of this point, so as not to make the pre-contractual information more cumbersome.

However, the French delegation is in favor of keeping point (o) concerning the social and environmental objectives of the financial service. We also propose that point (o) be completed as follows: "*where applicable, information on any environmental, social* ***or governance objectives*** *targeted by the financial service*".

b. *Timing of pre-contractual information*

The Presidency asks the Member States whether it should be possible for sellers of distance financial services to provide pre-contractual information immediately after the contract has been signed, when it is not possible to provide pre-contractual information before the contract is signed, as provided for in the current 2002 Distance Selling Directive.

France is in favor of maintaining this possibility in the new directive, and supports the wording proposed by the Czech Presidency in point B.

c. Other

A reference to the obligation to provide pre-contractual information in a language understood by the consumer seems essential to us.

Article 16a.2: disappearance of the consumer's explicit agreement to continue a telephone conversation - Two explicit agreements should be required from the consumer: (i) one to continue the telephone communication for commercial purposes, (ii) the other to agree to receive oral information restricted to points a), f), g) and p) of paragraph (1)

D. Right of withdrawal

The French delegation is generally in favor of the changes made by the Czech Presidency. However, we consider that the new provision on the expiry of the right of withdrawal can still be clarified.

- We are not sure about the clarity of the reference to Articles 16a (5a) and 16b 1a.

- In order to be in line with the consumer credit directive currently being negotiated, it seems necessary to amend paragraph 1 sentence as follows: *"If the consumer has not received the contractual terms and conditions and the information referred to in Article 16a(1) and (5), the withdrawal period shall expire one year and 14 calendar days after the conclusion of the contract.* ***<u>This shall not apply if the consumer has not been informed about his right of withdrawal in the contractual terms and conditions</u>****."*

Furthermore, on the disappearance of the possibility for MS to provide that no amount is due by the consumer for the cancellation of an insurance contract (art. 7(2) of the current directive): in contradiction with what currently exists in French law, this disappearance also raises questions of implementation (pro rata reimbursement of premiums paid? management fees? file fees?). We would like to keep this provision.

E. On Article 16e

We do not understand why this section was deleted. Finally, we regret the absence of provisions for unsolicited communications.

Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/83/EU concerning financial services contracts concluded at a distance and repealing Directive 2002/65/EC – SI COMMENTS

Slovenia would like to thank the Czech Presidency for the preparation of the second compromise text of the Proposal for a Directive concerning distance financial services contracts. We believe that the second compromise text is a step into the right direction. It involves good technical improvements that we can support, however further improvements upon deeper discussion are still needed.

Please find SI comments to the questions bellow:

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?

SI can support the Art. 8 (6) of CRD to be applied also to financial services.

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?

SI can support the Art. 27 of CRD to be applied also to financial services SI already suggested it in her previous comments.

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?

SI strongly supports the application of the Art. 15 of CRD since SI already suggested it in previous comments. Our preferred option is option 2 since it is more precise and therefore better for consumer.

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?

SI can support the change in the text regarding the adequate information.

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.

SI would like to keep the point as it is (B), since it is also already further explained in the recital 19.

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

SI can be flexible on this point.

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?

SI prefers option B adapting Article 5(2) of the current DMFSD with the option 4b. This option is also in line with the GA text of CCD proposal and SI believes that DMFS should be aligned with it.

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?

We would like to point out, that currently three different arrangements for the expiry of the deadline of the right of withdrawal in case of not providing particular information exist (, CRD provisions, CCD proposal and second draft on DMFS proposal).
CRD (Art 10 and Art 6(1h)):
The prolonged expiry deadline of the right of withdrawal refers only to the omission of particular pre-contractual information relating to the right of withdrawal.

The GA text of CCD
The prolonged expiry deadline of the right of withdrawal refers to all information that has to be included in the credit agreement. In contrary to CRD and second draft of DMFS, CCD doesn't refer to the pre-contractual information but rather to the information to be included in the credit agreement.

The second redraft of DMFS proposal
The prolonged expiry deadline of the right of withdrawal refers to the omission of the particular pre-contractual information (16a1 and 5 (a?), not relating to the right of withdrawal. If the pre-contractual information relating to the right of withdrawal are not provided to the consumer at all consumer can still exercise his right of withdrawal, because the right of withdrawal doesn't expire in this case due to improper provision of the information.

SI questions what is the rationale behind these 3 different arrangements and would appreciate more detailed explanation on the proposed compromise.

Furthermore, SI would like to express the support to the proposal of DEU that advocates a withdrawal button to all sectors and to all types of distance contracts covered by the CRD. If this proposal doesn't have enough support, SI could also agree to the inclusion of the electronic withdrawal button only within DMFS at this stage. From technical point of view SI welcomes the proposed 2-stage approach to withdrawal with the use of electronic button.

4. Article 16e Additional protection regarding online interfaces
SI has already explained at the meeting and in comments of the first redraft of DMFS that we had problems deciding to support PRE's proposal to delete this provision, as we believe that there was actually not enough discussion about this provision. So far SI has not received a comprehensive explanation regarding this provision and whether the provision could be adequately upgraded to make it clearer and thus useful in practice.

If the EC intends to regulate this issue comprehensively in the UCPD in the future, in our understanding this would not apply to financial services, therefore SI can support maintaining this provision in DMFS, but the wording of the Article has to be upgraded. SI does not have a concrete proposal for the text, but would be interested in whether the EC might have prepared some proposal based on an internal consultation among the various directorates and services of the EC.

Comments from Ireland

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?*

Answer: Ireland is supportive of applying Article 8(6) of the CRD to the Distance Marketing Directive.

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?*

Answer: Ireland is supportive of applying Article 27 of the CRD to the Distance Marketing Directive.

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?

Answer: Ireland is supportive of regulating ancillary services related to the distance contract.
In both proposed wordings above, we would suggest the addition of specifying who is responsible for terminating the contract i.e. *"If the consumer exercises their right of withdrawal from a distance contract in accordance with this Article, any ancillary contracts shall be automatically terminated* ***by the trader****, without any penalty for the consumer."*
Consideration should be given to include a point on informing the consumer that any ancillary contract will be automatically terminated.
Option 1 is preferred on the basis that it is better constructed.

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?*

Answer: Ireland is agreeable to this 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.

Answer:

We do not have a strong view on this new requirement, but can see the argument for (A) deletion, focusing in this directive on protecting against the distance element of the contract and leaving this requirement to product specific legislation.

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

Answer:

We can see the argument for (A) deletion here also. This is on the basis that the information requirements should be kept as concise as possible and focused on the distance element of the contract. The SFDR and the Taxonomy Regulation contain requirements in this area already and we want to avoid duplication.

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 t**he 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?

Answer: Ireland would prefer to use Option B as this wording is in line with current practice. We note that the contract is concluded at the consumer's request in this case and in line with the proposed application of Article 8(6) this would mean *"once he has signed the offer or has sent his written consent."*

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?

Answer:

In general, Ireland is supportive of the consumer being able to withdraw from a distance contract via an online interface and the updated text is generally agreeable although we have a number of queries we would like to clarify.

A withdrawal period of 1 year and 14 days after the conclusion of the contract applies where the relevant information has not been provided, but this shall not apply if the consumer has not been informed about the right of withdrawal in accordance with point (p) of Article 16a(1). Does this mean that there is no time limit to the withdrawal period where the consumer has not been informed of the right of withdrawal?

The text of Article 16b, para 5 provided in a separate document refers to distance contracts concluded by the means of an online interface providing that a consumer can also withdraw online. Does this preclude other forms of distance contract (e.g. those concluded by telephone) from having the right of withdrawal via an online interface? Should it be required simply where it is possible to enter such a contract with the provider by electronic means?

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.*

Written comments from Estonian delegation

We thank the Presidency for providing the opportunity to present written comments on the proposal concerning distance marketing of financial contracts.

Considering the tight time-frame, Estonia is currently submitting answers to the questions presented in PRES document no. WK 15416/2022 INIT and reserves the right to comment on other documents/made changes in the further proceedings.

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?

Art. 8(6) of CRD gives Member States an opportunity to provide that the trader has to confirm the offer to the consumer who is bound only once he has signed the offer or has sent his written consent. Also, that Member States may provide that such confirmations has to be made on a durable medium. Estonia used this opportunity when adopting CRD. Since financial services can be rather complicated for consumers and ill-considered and hasty decisions might be harmful for the consumer, we agree with extending Art. 8(6) to financial services concluded at distance.

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?

As we have noted in our previous written comments, the prohibition of inertia sales affects greatly the level of consumer protection, and although the prohibition of inertia selling is established in the Unfair Commercial Practices Directive, the latter regulates public law aspects, not contract law aspects. Therefore, we support extending Art. 27 of CRD to financial services concluded at distance.

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 working 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?

As we noted in our previous written comments, it seems like there are some differences between DMFSD Art. 6(7) and CRD Art. 15 regarding the bearing of costs. In addition, Art. 15 refers to other provisions of the CRD which do not apply to financial services concluded at distance. Therefore, we agree with regulating this matter in the chapter on distance contracts for financial services.

We think both options can be considered. At the same time, we wonder that if it is decided in favour of option 2, could there be a duplication since the concept of ancillary contracts is defined in Art. 2 point 15 of CRD.

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?

We are still analysing this matter, including what the situation would be, but initially this approach concerning adequate explanations seems reasonable.

We do not yet have an official position on this matter, but at first glance we are inclined to think that providing adequate explanations should also apply to all operations in order to ensure an adequate level of consumer protection. It would help us to assess this question if the definition of financial services was clearer.

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

We support option A – delete the point entirely. Point (n) isn't clear enough for the traders to define what information is necessary to provide to the consumer. Also, the information requirements should be limited to the essentials. Information overload might result in consumer being discouraged from reading precontractual information or miss some of the important information.

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

We support option A – delete the point entirely. We are not convinced that this information obligation is suitable and needed in the precontractual phase. The point isn't reasonably definable for traders. Also, the information requirements should be limited to the essentials. Information overload might result in consumer being discouraged from reading precontractual information or miss some of the important information. Also, as discussed in the last Working Party meeting, the substance of this obligation is not entirely clear.

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 immediately after the conclusion of the contract."

Which option would you prefer?

We are still analysing this matter. We worry that option A would not be as flexible as option B, because then consumers can't conclude a contract as quickly as he/she wants. However, if we now understand correctly, then option C will only regulate telephone/voice communications and option B will regulate the means of distance communication, including telephone/voice communications.

We are not entirely sure how option B will relate to the regulation of telephone communications. In case of option C, if we understand correctly, the consumer may not receive all of the information at once, but, upon consent, will first receive the information that comes from points (a), (f), (g), (j) and (p) of Art. 16a(1), and then separately the rest of the information referred to in Art. 16a(1). We believe consumers should get the information as a whole to have a better overview of the information.

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 samet ime 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?

We can agree with the need to align this provision to some extent with the general approach of CCD. In CCD this provision concerns the contractual terms and conditions and information in accordance with Articles 20 and 21, which regulate only the form and information requirements of the credit agreement. We wonder if such a general reference to "contractual terms and conditions" in the proposal, is sufficiently precise if the aim of the amendment is to tackle the problem of eternal right of withdrawal.

We also agree that referencing the whole Art. 16a would widen the provision and include obligations which should not be connected with the right of withdrawal. As we noted in our previous written comments, Art. 16a regulates also questions concerning, for example, layering, notifying the consumer about the recording of the call etc. Therefore, we find the redraft more suitable.

As a remark – it seems like there's a mistake in the second draft of Art. 16b(1) subpara 3. It's referencing to Art. 16a(5) not Art. 16a(5a).

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.

We agree with deleting Art. 16e, since it was 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. We think that provisions imposing obligations on Member States should be very clear in case of a fully harmonised directive.

Council of the European Union
General Secretariat

Interinstitutional files:
2022/0147 (COD)

Brussels, 29 November 2022

WK 16402/2022 INIT

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NOTE

From:	Delegations
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:	Directive on financial services contracts concluded at a distance - Member States' comments to WK 15416/22

Delegations will find attached comments from AT, BE, DE, DK, ES, ET, FI, FR, GR, HR, IE, IT, LT, LU, NL, PL, SI and SK.

BE Delegation

Questions DMFSD – Presidency note 10 November

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?

BE does 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?

BE does 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?

BE does agree and prefers option 2.

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?

BE does 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.

We prefer point B, under the condition that where another Union or national act governing specific financial services contains rules on this point, these rules are applicable.

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

BE can be flexible on this, but we question the added value of this point.

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 t****he 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?

BE prefers option A.

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?

BE does agree on what is proposed in the redraft. Additionally we want to remark that:
- In point 16.b.1 the reference should be made to article 16.A, 3) (in other words the hypothesis of the consumer receiving the additional information after the conclusion by phone of the contract (see in the same sense art. 6.1. directive 2002/65);
- In point 16.b.1, third subpar. there is made reference to *the information referred to in Article 16a(1) and (5)*; barring a mistake this should be **(5a)**.

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.

DELEGATION FROM AUSTRIA

Please find below the AT answers to the questions posed in presidency note 15416/22:

1.1. Yes, we agree.

1.2. Yes, we agree.

1.3. Art. 6(7) of the current Directive only refers to attached distance contracts, whereas the term "ancillary contract" (according to the definition in Art. 2 (15) CRD) is not restricted to distance contracts ("'ancillary contract' means a contract by which the consumer acquires goods or services related to a distance contract or an off- premises contract and where those goods are supplied or those services are provided by the trader or by a third party on the basis of an arrangement between that third party and the trader"). The scope of application would therefore be wider. A connection between the trader of the financial service and the supplier of the ancillary contract (as in option 2) would be necessary, but might already result from the definition of "ancillary contract". The consequence that the contract is "automatically terminated" is excessive, because the consumer should have the possibility to hold on to these contracts (e.g. "shall no longer be bound by"). Overall, however, the provision should be designed as a mere option for the member states. This could best be done by a clarification in the recitals following the example of the CCD (General Approach of the CCD, recital 13 "Member States should also have the possibility to maintain or introduce national provisions on the cancellation of a contract for the sale of goods or supply of services where the consumer exercises his right of withdrawal from the credit agreement.").

1.4. Yes.

2.1. Option B. Keep the point as it is.

2.2. Option A. Delete the point entirely.

2.3. Option B cannot be assessed conclusively because the last part of para. 2 would also have to be changed.

Option C could be sufficient, especially if Art. 8(6) should also apply to financial services (see question 1.1.). However, we do not think that Option C means that the trader has to provide only the "other" information on a durable medium after having provided the rest probably only orally during the telephone call. All information has to be (immediately after the conclusion of the contract) provided on a durable medium. Moreover we noticed that in the Presidency second compromise proposal 14631/22 the words "or any corresponding offer" were deleted in Art. 16a(1) and Art. 16a(3) ("before the consumer is bound by any distance contract or any corresponding offer"). We think that the words "or any corresponding offer" are relevant and should be kept in the text. They refer to cases where the consumer (not the trader) is the one who makes the formal offer (based on information given by the trader) and the offer is then accepted by the trader (Article 12(b) CRD refers to this). In these cases the consumer is bound (by his offer) earlier than at the time at which the contract is concluded.

2. Therefore an offer has to be addressed in Art. 16a(1) and Art. 16a(3) (see Article 5(1) CRD, Article 6(1) CRD, Article 6a (1) CRD, Article 22 CRD, where an offer is also mentioned).

Germany – Written Comments

We would like to thank the Presidency for the second DMFSD compromise draft and the list of proposals and questions on which we will be happy to comment. We would also like to take this opportunity to highlight some current issues that need to be further discussed in the following Working Groups, also under the chairmanship of the incoming Presidency:

I. Current issues

1. Withdrawal button

Germany strongly supports the idea of an electronic withdrawal button and this should be introduced in CRD as a horizontal clause for all distance contracts covered by the CRD. We also refer to our proposal to introduce an horizontal electronic withdrawal button in the CRD regarding the negotiations for the "Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information (*EmpCo*)."

Therefore, we would like to highlight that the electronic withdrawal button should apply **across all sectors and to all types of distance contracts** covered by the CRD. There is no conceivable reason why there should be only a withdrawal button for financial services and not for goods and other services. The article on the electronic withdrawal button should, therefore, be added as a **new Article 11a in the CRD**.

The idea of this button proposed during the *EmpCo* negotiations was welcomed by a large number of Member States. According to Commissioner Mr. Reynders the Commission has also endorsed the idea of a **horizontal application of the withdrawal button**. DE is open as to whether this button is integrated into the CRD via EmpCo or via DMFSD. It is our understanding that COM is favouring the integration via DMFSD.

DE welcomes that the amended proposal provides for a so-called two-stage solution allowing for clear identification of the contract. Our proposal also provides for this and this solution seems to be necessary in particular for reasons of legal certainty and data economy. A “Withdraw here”-button leads to a confirmation page where the consumer can enter contract details. On this confirmation page the consumer can finally confirm his or her will by clicking “withdraw now”-button.

However, the proposed withdrawal button still lacks a provision on sanctions. In order for the withdrawal button to be efficient and to enable consumers to easily withdraw from a contract, sanctions for non-compliant traders are essential.

2. Subsidiarity

The problem of subsidiarity still persists. There must be a clear distinction as to when the DMFSD applies and when other, product-specific regulations apply. A coexistence or overlapping of rules for respective products must be avoided. At present, it is still unclear when the DMFSD applies and when, for instance,

- the Consumer Credit Directive (ongoing negotiations),
- the Mortgage Credit Directive (2014/17/EU),
- the Payment Services Directive (2015/236/EU),
- the Solvency II Directive (2009/138/EC)
- the Insurance Distribution Directive (2016/97/EU)

have priority.

This applies with regard to the pre-contractual information requirements in Art. 16a as well as to the withdrawal right in Art. 16b.

As to Art. 16a DE has persistently asked for an – at least indicative – list of other EU-law provisions which fall under the exception provided for in Art. 16a (6). National law makers need absolute certainty about which legal act prevails. It must be also clear that para. 6 is not to be construed as an “as far as”- rule. As soon as the other EU-law instrument contains any pre-contractual information obligation, Art. 16a is – as a whole – not applicable. This should be reflected in the Article and also in an amending recital with examples. Therefore, we have proposed to add the following sentence:

“This also applies if the Union act specifies only a certain part of the information requirements for certain products or gives the member states a margin of implementation with regard to the information requirements to be applied.”

As to Art. 16b, DE has already drawn the attention to the fact that different situations provided for in other EU acts have to be regarded. For the national lawmakers it must be absolutely clear what the "trigger" of a right to withdrawal will be. This still seems to be unclear in the following cases:

a. Payment Services Directive 2 (PSD2)

There are special legal acts, like the PSD2, that only provide for information requirements, but not for a right of withdrawal. Should the beginning of the right of withdrawal under Article 16b then be linked to the information requirements foreseen by the DMFS or to the informational duties foreseen by the PSD2?

Germany advocates the latter solution (the right of withdrawal under Article 16b para. (6) only starts to run, when the informational duties under PSD2 are fulfilled). This solution is in line with the intended regulatory objective of Article 16a and Article 16b para.(2).

b. Mortgage Credit Directive (MCD)

Then there are legal acts that provide for both information requirements and a right of withdrawal, but exclude certain products from the right of withdrawal or apply only part of their information requirements to some products (such as Article 3 para. (5) MCD with regard to promotional loans). What should then apply?

More in-depth discussion is necessary on these points. The following solutions might be advisable on first sight:

aa. financial services excluded from the right of withdrawal of the specific legal act: the right of withdrawal under the DMFS should apply.

bb. the informational duties of the specific legal act apply only partially to some financial services: only the pre-contractual informational duties of the specific legal act should remain applicable.

c. Consumer Credit Directive (CCD)

The CCD provides for pre-contractual information, for contractual information and for a right of withdrawal. The beginning of the right of withdrawal is linked to the fulfilment of the contractual information, not of the pre-contractual information. Thus, in this case, the current proposal does not lead to a clear result (which is not surprising as the DMFS does not regulate contractual information). However, for reasons of legal certainty, a clarification is necessary.

DE, therefore, reiterates its proposal to add the following paragraphs:

(x) Where, pursuant to the Union act referred to in paragraph (6), the beginning of the withdrawal period is subject to conditions other than pre-contractual information, only the provisions of the other Union act shall apply with regard to the beginning of the withdrawal period referred to in Article 16b para. (1).

(xx) Where the Union act referred to in paragraph (6) does not provide for a right of withdrawal at all or for certain financial services, but provides for pre-contractual information, only the information requirements of the other Union act shall apply with regard to the beginning of the withdrawal period referred to in Article 16b para. (1). This also applies if the other Union act only provides for a reduced set of pre-contractual information for certain financial services.

3. Eternal right of withdrawal

Germany expressly welcomes the proposal to provide for a maximum period for the right of withdrawal. However, DE still favours to add a provision whereby the trader can trigger the withdrawal by providing the information at a later stage:

"If the trader has provided the information referred to in Art. 16a (1) and (5a) within twelve months from the conclusion of the contract, the withdrawal period shall commence on the day upon which the consumer receives that information."

4. CCD

Conflicting or contradictory regulations with other EU law must be avoided. This applies in particular to similar subjects of regulation, such as the exercise of withdrawal or the timing of the duty to provide (pre-) contractual information. Therefore, the results of the negotiations on the CCD should be awaited. DE reiterates its point of view that products which – for good reasons – are excluded from instruments other EU acts like the CCD this should also be reflected in the DSFSD. If a specific product is explicitly excluded from the scope of sectoral/product specific EU rules because the legislator does not see a need for regulation from a consumer protection perspective, this assessment should be a decisive factor. This is e.g. true for **promotional loans** which are excluded from the CCD (Art. 2 para. (2) lit. (l) and from the MCD (Art. 3 para. (3) lit. c). When the legislator has considered a product to pose little risk under the specific legislation, consideration could be given to whether the application of DMFS is necessary.

5. Adequate explanations (Art. 16d)

DE generally welcomes the proposed clarifications.

However, the question arises as to why para (2) with the list of online tools as a regulation for adapting to digitization should be deleted. Regarding para (3) we want to point out that there might still be the need to clarify the term “online tools”.

Regarding para (4) DE recommends that the recitals as well as a footnote provide examples and references to legal acts (e.g. PSD2 and MiCA) to provide a better legal certainty.

6. Telephone communication (Article 16a (2))

Regarding the regulation that the trader shall notify the consumer when the call is or may be recorded it should be considered that the trader might already be obliged to inform the consumer and get his/her consent to the recording under data protection law. At least this should be additionally made clear in the provision. In this respect, it would be better to add that consent is always required. In all cases it should also be possible for the consumer to proceed with the call without being recorded.

7. Use of colours when providing information (Article 16a (4) and (4a))

With regard to Art. 16a (4) subparagraph 3, we would like to point out again that this paragraph should be deleted against the background of Directive 2019/882 in order to avoid contradictions.

The use of colours when presenting important information poses a great potential for misuse and manipulation of consumers, so we generally welcome a requirement that the use of colours must not impair the comprehensibility of the information. Therefore, if the PRES decides to maintain the deletion of Art. 16e, DE cannot agree to the deletion of the second subparagraph of Art. 16a (4).

8. Layering of information (Article 16a (4a))

DE generally supports rules for “layered information”. At least there should be given a clear definition for the method of layering in the definitions (not only in the recitals). But DE would like to point out that with the deletion of Art. 16e there is no safeguard that ensures that the option of layering the information is not used to manipulate or deceive consumers by making it harder to access certain information. If the PRES decides to maintain the deletion of Art. 16e we suggest to add a provision to Art. 16a (4a) that makes sure the option of layering is not misused.

II. Questions and Proposals

1. CRD Articles

Q: 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?

A: *Yes. We think the list of CRD articles to be applied to financial services should also be extended to Article 8 (6). DE reiterates its proposal to extend it also to Art. 8 (2). There is no obvious reason to provide for an electronic withdrawal button where there is no obligation to provide for an order button as in Art. 8(2).*

Q: 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?

A: *Yes*.

Q: 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?

A: *We agree with regulating this matter. We prefer "Option 2". "Option 2" corresponds to the wording of the current DMFSD. It is also explicitly stated that third-party contracts shall also be automatically terminated*.

Q: 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?

A: *Yes*. *Nevertheless, DE still favours a clarification that Member States can introduce or uphold equivalent rules for financial services being provided via doorstep selling*.

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

Q: 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.

A: *A. It is still unclear what kind of information needs to be provided in which cases. This can lead to legal uncertainties.*

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

Q: 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

A: *C. It should be changed so that there is legal certainty to what kind of information needs to be provided in which cases.*

2.3 Article 16a(3) – Timing

Q: 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?

A: *Option B is preferred*.

3. Article 16b(1) Right of Withdrawal

Q: 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?

A: *In principle, we support the changes. However, the wording should also be consistent with other directives. Hence, instead of "right of withdrawal shall expire", the wording "withdrawal period shall expire" should remain. This also refers to the draft "12 months" instead of "1 year". This wording also deviates from the General Approach of the CCD II.*

4. Article 16e Additional protection regarding online interfaces

Considering that deceptive and/or manipulating design practices can have major negative impacts on consumers, especially regarding financial distance-contracts, we are open to further specify Article 16e rather than deleting it completely. Hence, we are open to ideas or corresponding drafts on Art. 16e. However, a possible draft must ensure that the provisions of Art. 16e are legally unambiguous for national legislators when it comes to transposing the directive into national law. It should also be drawn into consideration whether Directive 2005/29/EC is more suitable for such a provision. DE will examine whether a further proposal can be submitted on this.

Further explanations regarding the scope of the regulation can then also be provided in the recitals. In this context and for further clarification we also suggest to add a list of examples for such dark patterns that will be covered by Art. 16e, i. e. examples that cover specific cases regarding the conclusion of distant financial services contracts.

THE SLOVAK REPUBLIC

The Czech Presidency has prepared in the interest of moving the file forward the Notes (WK 15416/2022 INIT, WK 15416/2022 ADD 1). We are pleased to send you below our answers to the questions asked. As concerns the Withdrawal Button (Art. 16b, para 5) and Adequate Explanations (Art. 16d) we will wait for the Commission to rethink and explore these issues as we already expressed our position through written comments as well as at the last meeting.

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?
Yes, we 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?
Yes, we agree.

1.3 Do you agree with regulating this matter? If yes, which option would you prefer?
Yes, we agree and we prefer option 2.

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?
Yes, we agree with the change in text.

2. ***Pre-contractual information***

2.1 Article 16a (1), point (n)
We prefer option B – keep the point as is.

2.2 Article 16a (1), point (o)
We prefer option A - delete the point entirely.

2.3 Article 16a (3) – Timing
We prefer option C, but it is important to state that it is in cases of telephone/voice communications.

3. ***Article 16b (1) Right of Withdrawal***
Yes, we agree to what is proposed in the redraft.

4. ***Article 16e Additional protection regarding online interfaces***
Yes, we agree with the deletion of this Article.

HR answers to questions from Presidency note in doc. WK 15416/2022 bellow in red.

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? Yes. Also, in line with our previous proposals, Article 6a of the CRD should be applied to financial services as well.

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?
Yes. Also, in line with our previous proposals, Article 6a of the CRD should be applied to financial services as well.

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?

HR agrees with the proposed option 1 that has wider application, given it covers all possible ancillary contracts.

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? HR agrees. However, as we suggested that Article 16e remains in the Proposal, the text should reflect our proposal.

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.

HR proposes change in wording (option C)).

The obligation in point n) should explicitly clarify that risk-reward profile includes information on possible maximum loss of capital and whether all capital can be lost:

"(n) where applicable, a brief description of the risk-reward profile, ***including information on possible maximum loss of capital and whether all capital can be lost****".*

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

HR proposes option A.

Obligation to provide information on environmental or social objectives targeted by the financial service is already regulated by the SFDR Regulation and by the Taxonomy Regulation, so there is no need to duplicate information requirements.

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 t**he 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?

Option C.

Informing consumer during telephone conversation on all information specified in Article 16a could result with information overload and misunderstanding of the main consumer obligation and conditions of the financial service subject to the contract. During the conversation, consumer needs to get clear information on the main information referred to in points (a), (f), (g), **(i),** (j), **(n)** and (p), while the rest of the information should be provided immediately after the conclusion of the contract, preferably on paper or on another durable medium. In addition, information on any kind of financial costs and risks should be included as necessary information given to the consumer during telephone conversation thus points (i) and (n) need to be prescribed as main information in the context of the Article 16a (2).

In addition on the option B, although it seems that proposed amendment would ensure better consumer information, wording of the provision is vague and could be a matter of different interpretation and traders may justify omission of numerous information listed in Article 16a (1) by the limitations of the voice conversation.

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?

HR disagrees with proposed redraft. Information specified in Article 16a are main information on the contract and the parties. Omission to inform on some of these could affect consumer's decision on the contract. In such cases termination period needs to be longer. If the intention of the change of the provision is to limit right to terminate contract within a year and 14 days after the conclusion of the contract only when consumer isn't informed on the right to terminate the contract, such change limits consumer rights and can't be justified.

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.

We'd prefer this provision to remain in the Proposal. We can support LU proposal to extend this provision to any "means of distance communication".

16 November 2022
Strictly confidential

WRITTEN COMMENTS BY THE NETHERLANDS

on (i) the Presidency Note dated 10 November 2022, (ii) addendum 1 to the Presidency Note and (iii) the second redraft of the proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2011/83/EU concerning financial services contracts concluded at a distance and repealing Directive 2002/65/EC (the **Second Redraft of the Proposal**).

Please find below the written comments by the Netherlands on:

(A) The questions raised by the Presidency in the Presidency Note date 10 November 2022;
(B) The proposals for the Withdrawal Button (Art. 16b, para 5) and the Adequate Explanations (Art. 16d); and
(C) The Second Redraft of the Proposal.

A: Questions raised by the Presidency in the Presidency Note dated 10 November 2022 and written comments by the Netherlands

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?

Answer:

Yes.

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?

Answer:

Yes.

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?

Answer:

Yes. We prefer 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”.*

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?

Answer:

Yes.

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.

Answer:

We opt for option B. The words ''where applicable'' already narrows the scope down to financial services where it is possible to share such a profile. Therefore, consumers have the opportunity to estimate whether the financial service they might want to make use of, fits their risk profile and their expectations (i.e. the risk profile is provided before the consumer is bound). We therefore see no reason to alternate this article.

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

Answer:

We opt for option B. If a consumer enters into a contract for a financial service where certain environmental or social objectives are targeted by the financial service, the consumer must be able to know what the requirements are. We therefore see no reason to alternate this article.

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?

> Answer:
>
> *We prefer option A: "Keeping the current text – all information must be provided before concluding the contract, which also means in cases of telephone/voice communications."*
>
> *We are in favor of keeping the current text (option A). A consumer must receive all the precontractual information before being bound to a distance contract for financial services. Providing the necessary information after the conclusion of the contract would enable financial service providers to withhold information and provide it only after when the products have been sold and make use of probable barriers to the right of withdrawal. It has to be absolutely clear that a consumer receives the information required. An option of providing information would create a slippery slope of unwanted precedencies, which is not in the interest of consumers.*
>
> *No exceptions should be made for contracts that are concluded by phone or voice communications.*

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?

Answer:

The proposed changes have the support of the Netherlands.

As to the withdrawal button: it remains the question though, why the button will only regulate the distance contracts for financial services, and not also the other distance contracts. We believe it to be in the best interest of the Member States to broaden the scope as a part of the current proposal, otherwise this might not be (adequately) addressed before 2024.

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.

Answer:

In the last three-column table, dated 24 October 2022, we extensively shared our views on why Article 16e is an important article in consumer protection rules. We also made a text proposal, in which we met requests of other member states, by adding a slight redraft of a paragraph that is currently being used in Article 25 of the (final) text of the proposed amendment of the Digital Services Act (Regulation of the European Parliament and of the Council on a Single Market for Digital Services and amending Directive 2000/31/EC (DSA)) and by adding examples in recital (27) of the proposal. The recital could also be amended in a way similar to recital (67) of the (final) text of the DSA, that states:

"Dark patterns on online interfaces of online platforms are practices that materially distort or impair, either on purpose or in effect, the ability of recipients of the service to make autonomous and informed choices or decisions. Those practices can be used to persuade the recipients of the service to engage in unwanted behaviours or into undesired decisions which have negative consequences for them. Providers of online platforms should therefore be prohibited from deceiving or nudging recipients of the service and from distorting or impairing the autonomy, decision-making, or choice of the recipients of the service via the structure, design or functionalities of an online interface or a part thereof. This should include, but not be limited to, exploitative design choices to direct the recipient to actions that benefit the provider of online platforms, but which may not be in the recipients' interests, presenting choices in a non-neutral manner, such as giving more prominence to certain choices through visual, auditory, or other components, when asking the recipient of the service for a decision."

We therefore see no reason, why the deletion of Article 16 on Additional protection regarding online interfaces should be maintained. The obligations prescribed in the proposal – and more so in our drafting proposal and comments – are clear. We kindly request you to reconsider adding Article 16e. Please find our drafting suggestion on page 127 and 182 of the three-column table dated 24 October 2022.

If you are looking for more substance or wish to discuss, please do contact us.

16 November 2022
Strictly confidential

B: Written comments by the Netherlands on the proposals for the Withdrawal Button (Art. 16b, para 5) and the Adequate Explanations (Art. 16d)

Proposal for Article 16b, para 5 (Withdrawal Button):

Please find our drafting proposal in yellow below:

> *For distance contracts concluded by the means of an online interface, the trader shall ensure that the consumer can withdraw from the contract on that same online interface by using a button.*
>
> *The button shall be labelled in a legible manner and shall contain the words "withdraw from contract here" or a corresponding unambiguous formulation. The withdrawal button shall be placed on the online interface in a prominent manner.*
>
> *Using the button shall allow the consumer to make the withdrawal statement by providing the following information:*
>
> *(a) Name*
>
> *(b) Identification of the contract*
>
> *(c) Identification of the electronic mean by which the confirmation of the withdrawal shall be sent.*
>
> *The consumer should not have to provide more information than necessary to identify the contract from which he wishes to withdraw.*
>
> *The withdrawal statement shall be submitted by using a confirmation button. The confirmation button shall be labelled in a legible manner with the words "withdraw now" or a corresponding unambiguous formulation*
>
> *Once the consumer uses the confirmation button, the consumer shall then automatically receive a confirmation that the withdrawal statement has been submitted, including the date and time of the submission.*
>
> *The trader shall confirm to the consumer without undue delay the content of the withdrawal statement, including the date and time of its receipt, on a durable medium.*

Proposal for Article 16d (on Adequate Explanations)

> *At this stage the Netherlands has no comments. We look forward to hearing further explanations during the Working Party on November 29th.*

16 November 2022
Strictly confidential

C: Written comments by the Netherlands on the Second Redraft of the Proposal

We kindly request you to reconsider amending the Proposal in line with the comments and drafting proposals submitted by the Netherlands and the other Member States in earlier three-column tables and during the Working Party dated 13 November 2022. We hope you will pay a particular attention to the following topics that are not covered above:

(i) Analysis of differences (see p. 1 of the three-column table dated 24 October 2022):

Please consider providing the Member States with an analysis of the differences between the proposed provisions that will be solely applicable to distance contracts for financial services and the provisions that are already part of Directive 2011/83/EU (CRD) and are applicable to distance contracts, other than distance contracts for financial services. Please consider/elaborate on the possibility of adding the proposed provisions to the already existing articles. If certain obligations only apply to financial services, use could be made of constructions such as: 'if the contract is a distance contract for financial services, the following shall apply in addition to the above'.

(ii) Recital 13 of the Proposal (see p. 9 and p. 10 of the three-column table dated 24 October 2022):

As mentioned during the meeting on 13 October 2022, the text of the proposal should clarify the relationship between the proposed provisions and other specific Union acts governing certain consumer financial services. It should be made clear that the proposed provisions are only applicable if there is no product specific Union act governing aspects of the proposal (e.g. if a certain product specific Union act contains provisions on precontractual information, the proposed provisions do not apply. Even if the provisions in said Union act are less far-reaching than the proposed provisions). As such the proposed provisions are a safety net and will only apply if nothing is set out in other product specific Union acts and thus not be considered supplementary.

We propose to also consider amending Article 3(2) of Directive 2011/83/EU in line with (the new) recital (13).

In addition, we note that certain product specific Union acts have explicitly exempted certain financial services from its scope. At this moment, the DMFSD would apply to these financial services. In the past this has led to different regimes of regulation. Please consider clarifying this in the recitals to the proposal.

(iii) Definition of financial services (see p. 20 and 21 of the three-column table dated 24 October 2022)

Given the uncertainty of which financial services are currently being governed by the DMFSD and the Proposal, we kindly ask you to once again consider to amend Article 2 (12) of Directive 2011/83/EU or add a recital by which more substance is given to the definition of 'financial service'. By doing that certain ambiguities can be proactively taken away.

We note that during the Working Party on 13 October 2022, several of the Member States also expressed their concerns about the lack of certainty.

(iv) <u>Adoption of more stringent provisions</u> (see p. 97 of the three-column table dated 24 October 2022)

Please consider adding a provision similar to the proposed Article 16.a.5 to give the Member States the possibility to maintain or adopt more stringent and/or additional provisions than those referred to in article 16b (the right of withdrawal from distance contracts for financial services).

(v) <u>Scope of the withdrawal button</u> (see p. 1 and p. 106 of the three-column table dated 24 October 2022)

Please consider widening the scope of article 16.b.5 to <u>all</u> distance contracts instead of just the distance contracts for financial services.

DELEGATION FROM LITHUANIA

The delegacy of Lithuania sends the answers to the questions asked in the paper WK 15416/2022 INIT:

1.1. Agree;

1.2. Agree;

1.3. Agree with the option 2;

1.4. Agree;

2.1. Agree with the option B;

2.2. Agree with the option B;

2.3. Agree with the option B;

3. Agree with the proposals.

ES answers 2nd draft DMFSD – WK 15416/2022 INIT

1. <u>CRD articles</u>

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?

ES considers art 8(6) as unnecessary and redundant since it refers to "MS may provide that". Such inclusion is only acceptable if DMFSD2 clearly states that it does not apply when sectoral/product legislation explicitly excludes a certain product from scope, in line with our initial demands.

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?

ES considers art 27 as unnecessary. Such inclusion is only acceptable if DMFSD2 clearly states that it does not apply when sectoral/product legislation explicitly excludes a certain product from scope, in line with our initial demands.

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?

ES considers this unnecessary. Such inclusion is only acceptable if DMFSD2 clearly states that it does not apply when sectoral/product legislation explicitly excludes a certain product from scope, in line with our initial demands.

If included, which we oppose strongly, it could only be done if clarified that it is "without any penalty for the consumer that is not included in the contract".

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?

Yes.

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?

Option B.

3. <u>Article 16b(1) Right of Withdrawal</u>

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?

Yes.

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.

We agree with the latest text (deletion).

<u>Comments from GR delegation</u>

<u>WK 15416/2022 INIT - Presidency note</u>

Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2011/83/EU concerning financial services contracts concluded at a distance and repealing Directive 2002/65/EC - Presidency second compromise proposal (14631/22) – Comments from Greece

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?

Yes we agree with this extension. To our point of view this provision strengthens consumer protection.

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?

Yes we agree with this extension. To our point of view this provision strengthens consumer protection.

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?

We agree with regulating the matter and prefer the option 1.

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?

Yes we agree with this 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.

We would prefer option B. Any clarifications regarding the risk reward profile could be inserted in recitals.

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

We would prefer option A. We are not convinced that this information obligation is suitable and needed in the pre - contractual phase.

Furthermore to our opinion 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.

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?

We would prefer option A, provided that information on any kind of financial costs and risks should be included as necessary information given to the consumer before concluding the contract.

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?

We agree with the proposed wording in the redraft. We suggest that an explanatory recital should be added in order to clarify its meaning.

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.

We do not oppose the deletion of Art. 16e. First, the provision is not specific enough and second, the CRD is probably not the suitable legal act to introduce such a provision.

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FI comments
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?

We welcome this addition, which is in line with our earlier comments.

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?

This is, preliminarily, fine by us, even if these practices are typically restricted in the relevant product-specific legislation (such as CCD).

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?

We agree with the Presidency on the principle that the termination of ancillary contracts should be conditional upon the consumer exercising their right of withdrawal and prefer Option 2.

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?

We interpret Art 1(2) subparagraph 2 of the current DMFSD as meaning that the trader has to provide the consumer with the required information in connection with the first operation only and the information can be excluded from the following operations. However, all the other DMFSD provisions apply to these following operations.

Analogically, all the other CRD provisions mentioned in Article 3(1b) subparagraph 1 (apart from 16a and 16d) should also apply to the following operations meant in subparagraph 3. This may well have been the intention of the Presidency, but we find the wording of this note somewhat unclear and look forward to a clarification in the next compromise draft.

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; *(x) We are in favour of deleting this in its current form, as the wording is unclear.*

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.

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A – delete the point entirely *(x) We are in favour of deleting this in its current form, as the wording is unclear.*

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

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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 t****he 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?

We would like to emphasize that the current DMFSD requires the supplier (trader) to provide the consumer with the required information in good time before the consumer is bound by the contract. Article 5(2) does not make an exception from this rule, but provides the supplier (trader) with a possibility to give the required information ***on a durable medium*** *after the conclusion of the contract. These are separate points and we favor maintaining this approach. We thus call for a retooling of both options.*

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.

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Do you agree to what is proposed in the redraft?

We consider the stipulations of Article 16a(2)-(4a) important for consumer protection, and are preliminarily opposed to a modification of Art 16b in a way that would restrict the consumer's possibility to cite breaches of 16a(2)-(4a) as a reason for withdrawing from the contract after the regular fourteen-day period.

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.

We still think additional protection is necessary, while agreeing on the opaqueness of the current wording. This could be addressed in the recitals by seeking inspiration from the DSA or other relevant Union acts.

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

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LU comments
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.

LU: LU would like to recall that the interaction between the DFMSD and sectoral laws is not yet fully clarified. Moreover, the proposal regarding the withdrawal button in the addendum 1 seems more detailed than necessary. Finally, we maintain a reservation regarding the idea of the potential extension of the withdrawal button to the entire scope of the CRD.

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?

LU: yes, we agree in as much as this would be an alignment with existing rules for other contracts concluded at a distance.

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?

LU: yes, we 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?

LU: option 2 as it is more accurate.

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?

LU: yes, we agree with this logic. However, we would appreciate concrete examples of the type of contracts envisaged.

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.

LU: LU needs to further analyze this proposal.

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

LU: LU tends towards option B.

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 t****he 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?

LU : in principle, between option B or option C as they are more coherent and accurate. In both cases some questions remain: 1° On option B: what are "these means of communication"? If only telephone conversations are targeted, then option C seems more appropriate. 2° On options B and C: what does "immediately after" means? Is it 5 minutes after hanging up, the same day before the close of business, 24 hours or 3 days? This could be clarified in the recitals.

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.

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Do you agree to what is proposed in the redraft?

LU: yes, we agree.

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. **<u>Therefore, delegations are invited to send their comments to the questions above by 16 November.</u>**

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

Best regards,

Czech Presidency team