

DMFSD2 - Fourth PCY redraft - comments IT

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Considering the state of the current negotiation, for the reasons you may find better explained below, IT does not support the inclusion of the DMFSD2 proposal on the 21th December Coreper Agenda.

1. Art. 1(1)(a)(1b)

Italy confirms its support for an approach of maximum harmonization in regulating financial services which do not fall under the scope of EU sectoral legislation and should come under the scope of the DMFSD2, performing its “safety net” function.

The problems for Italy arise only where the relationship between the DMFSD2 rules and the sectoral legislation is not regulated in an appropriate manner in the DMFSD2. In particular, it is necessary to clearly specify that, where EU sectoral legislation exists, the DMFSD2 does not apply. The European legislator, in fact, when issuing sectoral legislation, evaluates in detail how to regulate the matter depending on the specific characteristics of the sector and of the economic operators, as well as evaluating the rights of consumers.

In this regard, an exemplary case is represented by the Solvency II Directive (Directive 2009/138/EC), currently in the trialogue phase. Indeed, this Directive, despite primarily regulating the taking-up and pursuit of insurance and reinsurance business, provides the general normative framework for the sector, including specific rules on information for policy holders regarding both life and non-life insurance contracts, and, regarding the right of withdrawal, for life insurance contracts only (art. 186 “Cancellation period”). The choice not to provide the policy holder with a right of withdrawal for non-life insurance contracts, therefore, seems to be based on a precise assessment by the legislator.

Moreover, we see potential issues in a loose definition of “financial services”. In general, we would prefer “financial services” to be regulated in the DMFSD2 only to the extent that they are already qualified as such by a national or an EU piece of legislation and we therefore

suggest amending the definition of “financial services” accordingly. Otherwise, on the one hand, there would be a risk of undermining legal certainty. On the other hand, there would also be the risk of blurring the boundaries of the area of supervision and responsibility of the sectoral national authorities, which could be held accountable for the failure to supervise services whose nature is uncertain ex ante.

2. Recital 4

As confirmed by the Commission at the last WP meeting of December 12th 2022, even with the reference to art. 4 CRD, the current DMFSD proposal is without prejudice to the current national regulations on the pursuit of financial activities, including those on the prohibition of abusive pursuit of such activities. Consequently, we would like to modify recital 4 to include this clarification, adding in the last part: “Inter alia, this Directive shall be without prejudice to any rule of national law aimed at preventing the abusive provision of financial activities, subject to licensing, and the spread of scams, frauds or any other conducts carried out through the fraudulent or misleading use of distance electronics means.”

3. Recital 7

We welcome the clarification of the scope of the safety net feature (recital (7) for financial services which are not covered by Union sector specific legislation or excluded from the scope of Union acts governing specific financial services.

4. Recital 8

We appreciate the amendment to recital (8) which explicitly excludes, from the scope of DMFSD, precious metals, wine and diamonds. In any case, we would like to suggest an amendment as indicated in footnote¹ and in the “Proposed amendments” section, in order to avoid misunderstanding related to this commercial activities which are regulated by the unfair commercial practices framework and not subject in any way to the DMFSD2.

5. Recital 13a, 13b, 13c, 13d and 13e

With reference to the amendments to recital 13 and the introduction of recital 13a, 13b, 13c, 13d and 13e, aimed to clarify the principle of *lex specialis*, in our view DMFSD2 should not apply at all to products/services covered by sectoral legislation.

As we already pointed out in our previous comments, whenever an EU sectoral legal act regulates a specific financial service, this discipline shall in any case prevail on the one under the present proposal, regardless the existence of an actual “conflict” between the two or irrespective of the presence of rules in the specific matter (pre-contractual information, right of withdrawal and adequate explanation), for the sake of clarity and legal certainty, as well as the understanding of the scope of the vigilance duties of sector specific authorities.

¹ “Directive 2011/83/EU, similarly to Directive 2002/65/EC, provides for a right to pre-contractual information and a right of withdrawal for certain consumer contracts concluded at a distance. This complementarity is, however, limited since Directive 2011/83/EU does not cover financial services, **which are defined as services of a banking, credit, insurance, personal pension, investment or payment nature. Some services, such as the supplying of goods like precious metals, diamonds or wine, in view of their physical nature delivery, should not be deemed to be financial services**”.

Besides, if the DMFSD2 were to apply to products/services already regulated by sectoral legislation, such as in the case of right of withdrawal when the specific legislation does not provide it, it would undermine the choices already made by the legislator in each sector. As a matter of fact, this provision (i.e., the obligation to apply the right of withdrawal even where sectoral legislation exists but does not provide for it) could be complex or even incompatible with the nature of the service provided.

For example, the PSD2 does not provide for the right of withdrawal: on one hand, for framework contracts, introducing the right of withdrawal would be an unnecessary complication, given that Art. 55 PSD2 already allows for the termination of a framework contract "at any time", setting out its terms and conditions (so it is hard to see what the right of withdrawal would add). On the other hand, for single transactions, which would fall under DMFSD2 according to recital 15 as amended by the third draft of compromise, the right of withdrawal would be inconsistent with the provisions on the irrevocability of payment orders under Article 80 of PSD2.

It would therefore be necessary to clarify (in a recital or elsewhere) that the DMFSD2 right of withdrawal does not apply to services and transactions covered by PSD2 and, more generally, it does not apply not only when already regulated in sectoral legislation, but also when sectoral legislation contains provisions that are incompatible with it.

Regarding recital 13c, in order to clarify that whenever an EU directive governs something similar to the "adequate explanations" without calling them that, as is the case for example of the advice, sectoral rules apply and not the DMFSD2, we propose to rewrite recital 13c) using the same wording as in recital 13b. Therefore, recital 13c shall be modified as follows: "13c) With regard to rules on adequate explanations, certain Union acts governing specific financial services, such as Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property, already lay down rules on adequate explanations to be provided by the traders to the consumers with respect to the proposed contract. In order to ensure legal certainty, ~~the rules on adequate explanations set out in this Directive should not apply to financial services falling under Union acts governing specific financial services that contain rules on adequate explanation to be provided to the consumer prior to the conclusion of the contract~~ where the Union acts governing specific financial services lay down rules on adequate explanations to be provided by the traders to the consumers prior to the conclusion of the contract and irrespective of how it is called by that Union act, only the respective provisions of that Union act should apply to those specific consumer financial services unless otherwise provided in that act."

With specific reference to the amendments to recital 13d², aimed to clarify how the principle of *lex specialis* works in respect to the right of withdrawal, we think that the last amendment – relating to the use of pre contractual information provided in the DMFSD2 on the exercise of the right of withdrawal – can lead to a major confusion and lack of clarity. As already said

² Where Union acts governing specific financial services provide for rules on pre-contractual information but do not establish rules on the right of withdrawal, the right of withdrawal provisions of this Directive should apply. For instance, Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), sets out rules on pre-contractual information requirements, but, with respect to non-life insurance does not set out a right providing time to the consumer to consider the implications of the contract signed. In that case, rules on pre-contractual information laid down in the Union act governing specific financial services should apply and the rules on the right of withdrawal as laid down in this Directive should apply. Where a Union act governing specific financial services does not contain provisions on information on the right of withdrawal, the trader should provide this information according to this Directive in order to ensure proper information awareness of the consumer.

above, in our view DMFSD2 should not apply at all to products/services covered by sectoral legislation.

Recital 13e³ seems to be quite unclear and contradictory and the amendment introduced by the fourth draft did not improve it. First, for the reasons already explained above on the interpretation of the principle of *lex specialis*, the DMFSD2 right of withdrawal should not be applied to products for which the sectoral directives do not provide for it. Moreover, it seems that the recital aims at duplicate the mechanism for establishing the *dies a quo* of the withdrawal period used in the DMFSD2 to cases where specific Union acts exist. However, the alternative proposed is not clear, as we wonder how could a Union acts governing specific financial services providing for rules on precontractual information but not establishing rules on the right of withdrawal contain contains an information obligation on the right of withdrawal. Therefore, besides the fact that we do not agree in the first place with the content of this recital, the difference between the two alternative appears blurred.

6. Recital 15

The amendment introduced by the fourth draft “*Other Union acts governing specific financial services may provide for different rules for initial agreements and operations.*” is not clear. If there are other Union acts governing specific financial services, only those acts should be applied and therefore the rule would be redundant.

7. Recital 18a

We welcome the introduction of recital 18a, in order to clarify the principle of minimum harmonization to the precontractual information.

8. Art. 16a(4a)

Regarding the first sentence of art. 16a(4a), it should refer also to point (i). Especially in the pension funds sector, information relating to risks such as those in art. 16a(1)(i) are relevant for consumers. Consequently, we propose to include point (i) in the list of art. 16a(4a).

Besides, in order to further information awareness of the consumer, the consumer should effectively read all the pre-contractual information. Therefore, art. 16a(4a) shall be modified as follows (underlined parts are what has been added): “In case of layering of information, it shall be possible to view, save and print the information referred to in paragraph 1 as one single document. The trader shall ensure that the consumer views all the pre-contractual information referred to in paragraph 1 before the conclusion of the distance contract.”

³ (13e) Where Union acts governing specific financial services provide for rules on pre-contractual information but do not establish rules on the right of withdrawal, the period for withdrawal set out in this Directive should apply and begin from the provision of the contractual terms and conditions and pre-contractual information in accordance with the Union acts governing those specific financial services, or from the provision of the contractual terms and conditions and pre-contractual information in accordance with the Union acts governing those specific financial services in addition to the provision of the information on the right of withdrawal set out in this Directive in cases where specific Union acts do not contain such an information obligation on the right of withdrawal.

9. Art. 16a(4b), recital 20a, art. 16b(1)(3)

With regards to the art. 16a) it should be noted that paragraph 4b) has remained unchanged since the 3rd compromise text. We do not support this provision, believing that the conclusion of remote financial contracts should not be allowed before receiving the pre-contractual information, as, for instance, it has not been allowed in Regulation (EU) 2019/1238 on PEPPs.

Moreover, this kind of wording can make it questionable/unclear which communications/information can be provided even after the stipulation, giving rise to potential critical profiles not only with reference to the principle of certainty, but also with reference to the principle of alternatives between distribution channels (remote and traditional channels).

Should this provision be maintained, it would be better to modify the last part of recital 20a) and art. 16b(1) par. 3, limiting this possibility to the sole case that the service is provided at the request of the consumer. Accordingly, we would modify these provisions as follows (underlined parts are what has been added):

Recital (20a): If the contract has been concluded at the consumer's request and the consumer has not received the pre-contractual information ~~cannot be provided~~ on a durable medium before the conclusion of the contract due to the media chosen by the consumer, it should be provided as soon as possible after the conclusion.

Art. 16b(1)(3): "If the contract has been concluded at the consumer's request and the consumer has not received the contractual terms and conditions and the information referred to in accordance with Article 16a, withdrawal period shall expire 12 months and 14 calendar days after the conclusion of the contract. This shall not apply if the consumer has not been informed about his right of withdrawal in accordance with Article 16a(1), point (p)."

10. Art. 16a(6)

The amendment to Art. 16a (6)⁴, second par., implies the case where DMFSD2 right of withdrawal applies to financial products already regulated by union financial sectoral acts which do not provide for it. As already said above (see par. 4), we disagree with this solution. Moreover, we observe that if a sectoral act does not provide for the right of withdrawal, obviously it will not provide for pre-contractual information on the right of withdrawal.

11. Art. 16b(1)(3)

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.

⁴ "By way of derogation from the first subparagraph, where the consumer has the right of withdrawal in accordance with Article 16b, the trader shall inform the consumer about his right of withdrawal in accordance with Article 16a(1), point (p), when another Union act governing specific financial services does not contain rules on information about the right of withdrawal."

If our interpretation is correct, the PCY proposal effectively clarifies the point raised at the time⁵, 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).

12. Art. 16b(2)(b)

We ask for the deletion of the exclusion in absolute terms of the right of withdrawal with reference to the “travel and baggage insurance policies or similar short-term insurance policies of less than one month’s duration”. In fact, there is a significant growth of these products, both in terms of diffusion and relevance. In view of this trend, there is a need to adapt the consumer protection - especially concerning the right of withdrawal - so as to allow the applicability of the relevant safeguards to short-term policies. On the other hand, in order to take into consideration any proportionality issue, the period to exercise the right of withdrawal could be reduced to two days.

13. Art. 16b(2b)

Considering the changes made to recital 23, as well as the provisions of art. 16b(1) and (2), we deem it absolutely necessary that these provisions are modified in order to clarify that the right of withdrawal can also concern individual pension products linked to financial market instruments and that, in due to possible market fluctuations, the amount that is returned, following the withdrawal, is the amount resulting from market fluctuations both in terms of any losses or increases. We therefore propose to introduce a new paragraph 2a in art. 16b, of this tenure (underlined parts are what has been added): “The consumer has a right of withdrawal from personal pension products which are linked to financial market instruments. The amount to be returned to the consumer following the withdrawal shall be equal to the sum resulting from market fluctuations both in terms of any losses or increases.”

14. Art. 16b(6)

We would prefer a clear application of the principle of *lex specialis* (subsidiarity). As we have already said, in our view, if there is another Union act governing specific financial services,

⁵ 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?”

only that act should apply. In any case, as explained above (see par. 2), we'd rather clarify that the DMFSD2 right of withdrawal does not apply not only when already regulated in sectoral legislation, but also when sectoral legislation contains provisions that are incompatible with it.

15. Art. 16d

We welcome the reinserted art. 16d(1)(a), as well as the introduction of par. 3a that allows MS to maintain or adopt more stringent provisions on adequate explanations.

Currently, our 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. Thanks to the last amendment, those rules can be maintained in case of distance contracts, thus avoiding a step back in the protection of consumers.

As already observed, we do not support the deletion from para. 1 of the reference to "including the consequences of payment default or late payment by the consumer" (art. 16d(1)(c)). We believe that this aspect is very important for the consumer.

Furthermore, it is not clear if the PEPP regulation (Reg. Eu 2019/1238), that covers "advice", could be considered "lex specialis" in the sense of art. 16d(4) DMFSD2. We retain it should and that the point shall be clarified unequivocally. Otherwise, we propose to restore the first part of recital 13c, which, in fact, already provided for the exclusion of PEPPs from the application of the adequate explanations, thus giving a positive answer to the above question. Moreover, for the sake of clarity, the provision in the first part of recital 13c should be transfused into the text of art. 16d.

Finally, we note that art. 16d(2a) is not aligned with recital (26a), with the former stating that "Member States could adapt..." and the latter "Member States shall specify...". Therefore, we propose to use "may" in art. 16d(2a).

16. Art. 16e

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 systems⁶.

⁶ In particular, see, in the version of the second compromise, recital 8 ["Without prejudice to powers provided under Regulation (EU) 2019/1020, and where relevant and limited to what is necessary to fulfil their tasks, the market surveillance authorities shall be granted full access by the provider to the documentation as well as the training, validation and testing datasets used for the development of the high-risk AI system, including, where appropriate and subject to security safeguards, through application programming interfaces ('API') or other relevant technical means and tools enabling remote access"] and art. 52(3) ["3. Users of an AI system that generates or manipulates image, audio or video content that appreciably resembles existing persons, objects, places or other entities or events and would falsely appear to a person to be authentic or truthful ('deep fake'), shall disclose that the content has been artificially generated or manipulated."]

17. Proposed Amendments

It follows the proposed amendments to the text. The underlined parts are what has been added.

Recital (4): to be modified as it follows: “(4) Ensuring the same high level of consumer protection across the internal market is best achieved through full harmonisation. Full harmonisation is necessary in order to ensure that all consumers in the Union enjoy a high and equivalent level of protection of their interests and to create a well-functioning internal market. Member States should therefore not be allowed to maintain or introduce national provisions other than those laid down in this Directive, with respect to aspects covered by the Directive, unless otherwise provided in this Directive. Where no such harmonised provisions exist, Member States should remain free to maintain or introduce national legislation. Inter alia, this Directive shall be without prejudice to any rule of national law aimed at preventing the abusive provision of financial activities, subject to licensing, and the spread of scams, frauds or any other conducts carried out through the fraudulent or misleading use of distance electronics means.”

Recital (8): to be modified as it follows: “(8) Directive 2011/83/EU, similarly to Directive 2002/65/EC, provides for a right to pre-contractual information and a right of withdrawal for certain consumer contracts concluded at a distance. This complementarity is, however, limited since Directive 2011/83/EU does not cover financial services, which are defined as services of a banking, credit, insurance, personal pension, investment or payment nature. Some services, such as the supplying of goods like precious metals, diamonds or wine, in view of their physical delivery nature, should not be deemed to be financial services”.

Recital (13): to be modified as it follows: “(13) Certain consumer financial services are governed by specific Union acts, which continue to apply to those financial services. In order to ensure legal certainty, it should be clarified that where financial services fall under the scope of another Union act governing specific financial services, irrespective of the level of detail of that Union act, this Directive shall not apply, unless provided otherwise in that act. ~~another Union act governing specific financial services contains rules on pre-contractual information, on the right of withdrawal or on adequate explanations, and irrespective of detail of these rules, only the respective provisions of those other Union acts should apply to those specific consumer financial services unless provided otherwise in those acts.~~”

Recital (13c): to be modified as follows: “13c) With regard to rules on adequate explanations, certain Union acts governing specific financial services, such as Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property, already lay down rules on adequate explanations to be provided by the traders to the consumers with respect to the proposed contract. In order to ensure legal certainty, ~~the rules on adequate explanations set out in this Directive should not apply to financial services falling under Union acts governing specific financial services that contain rules on adequate explanation to be provided to the consumer prior to the conclusion of the contract~~ where the Union acts governing specific financial services lay down rules on adequate explanations to be provided by the traders to the consumers prior to the conclusion of the contract and irrespective of how it is called by that Union act, only the respective provisions of that Union act should apply to those specific consumer financial services unless otherwise provided in that act.”

Recital (13d): to be deleted entirely.

Recital (13e): to be deleted entirely.

Recital (20a): to be modified as follows: "If the contract has been concluded at the consumer's request and the consumer has not received the pre-contractual information cannot be provided on a durable medium before the conclusion of the contract due to the media chosen by the consumer, it should be provided as soon as possible after the conclusion."

Art. 16a(4a): to be modified as follows:

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

"In case of layering of information, it shall be possible to view, save and print the information referred to in paragraph 1 as one single document. The trader shall ensure that the consumer views all the pre-contractual information referred to in paragraph 1 before the conclusion of the distance contract."

Art. 16b(1)(3): to be modified as follows: "If the contract has been concluded at the consumer's request and the consumer has not received the contractual terms and conditions and the information referred to in accordance with Article 16a, withdrawal period shall expire 12 months and 14 calendar days after the conclusion of the contract. This shall not apply if the consumer has not been informed about his right of withdrawal in accordance with Article 16a(1), point (p)."

Art. 16b(2)(b): to be deleted entirely.

Art. 16b(2a): to be added as follows: "For travel and baggage insurance policies - or similar short term insurance policies - of less than one month's duration, the consumer shall have a period of 2 calendar days to withdraw from a contract, without penalty and without giving any reason."

Art. 16b(2b): "to be added as follows: "The consumer has a right of withdrawal from personal pension products which are linked to financial market instruments. The amount to be returned to the consumer following the withdrawal shall be equal to the sum resulting from market fluctuations both in terms of any losses or increases."

Art. 16b(6): to be modified as follows: "Where another Union act governing specific financial services contains rules on the right of withdrawal or provisions incompatible with it, only the rules of that Union act shall apply to those specific financial services, unless provided otherwise in that act. Where there exists an option for Member States to choose between right of withdrawal and an alternative, such as reflection period, only the corresponding rules of that Union act shall apply to those specific financial services, unless provided otherwise in that act."

Art. 16d(2a): to be modified as follows: "Member States may ~~shall~~ specify the manner..."

Art. 16d(3): to be modified as follows: "Member States shall ensure that, in case the trader uses online tools, the consumer shall have a right to request and obtain human intervention at every stage of the negotiation process and/or contractual relationship."

SI Comments

SI would like to thank the Presidency for a very hard work on this file and for the new compromise proposal. SI believes that the text goes in the right direction, although due to time constraints our experts haven't had the opportunity to examine all the details and to assess possible consequences of changes made in the text.

Nevertheless, we believe that there are still some open technical issues that should be resolved before the possible confirmation of the general approach. Since we are discussing a safety net directive, SI would like to avoid unwanted consequences during the transposition and enforcement phase and would therefore like to ensure legal certainty for consumers and for the industry, as well as the high consumer protection. The goal to adopt a legislation that will be effective in practice must be more important than the speed of its adoption.

Furthermore, the EP doesn't have a position yet and therefore the Council has enough time to prepare further improvements of the text during SE PRE.

SI would also like to clarify our understanding of changes made in Art. 16d mentioned also at the WP yesterday.

In the comments on the third compromise text regarding the provision of adequate explanations SI did not support the deletion of point »(a) the required pre-contractual information« and part of point »(c) including the consequences of payment default or late payment by the consumer«.

We have noted that the point (a) has been returned to the text, which we support.

Referring to the point (c) we understand that SI can still adopt this provision by using point 3a of this Article, which enables MS to maintain or adopt more stringent provisions on adequate explanations than those referred to in this Article. Is our understanding correct? Unfortunately, there was no confirmation of such understanding at the WP.

Namely, SI is of the opinion that specifically the information regarding consequences of payment default or late payment by the consumer should be explained in an appropriate manner to the consumer. The consumer should be aware of such consequences.

Although SI much appreciates the huge progress made during CZ PCY and understands the ambitions of the PCY, we would prefer having an opportunity for more technical work before

closing the file and we hope that the Presidency is in a position to take our request into account when deciding on further steps.



WK 17270/2022 INIT - Presidency note (4th re-draft of the Proposal (document 14631/22 REV2) _Comments from Greece

1. A possible addition in Article 16a (4a):

*“In case of layering of information, it shall be possible to view, save and print the information referred to in paragraph 1 as one single document. **The trader shall ensure that the consumer views all the pre-contractual information referred to in paragraph 1 before the conclusion of the distance contract.**”*

We agree with this additional provision because it strengthens consumer protection at a pre-contractual stage.

2. A possible addition in Article 16b (6a):

*“(6a) **Member States may decide not to apply this Article provided that the Member States apply rules on the right of withdrawal of another Union act governing specific financial services.**”*

We agree with this additional provision, allowing more flexibility for Member States through the possibility to apply the right of withdrawal rules of another sectoral Union act regarding financial services also to financial services excluded from its scope.

PT Comments

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

December 8th 2022 – WK 14631/2/22 REV 2

PT comments were inserted in blue boxes.

Preliminary remark

Regarding the Presidency's intention to submit this proposal to COREPER approval during the current month of December, we believe that such approach is not appropriate. More specifically, we consider that there are several elements of the recently changed proposal in relation to which Member States have not yet expressed a broad agreement nor have had the opportunity to thoroughly assess the consequences of such amendments.



Council of the
European Union

Brussels, 8 December 2022
(OR. en)

Interinstitutional File:
2022/0147(COD)

14631/2/22
REV 2

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NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	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 fourth redraft

In view of the Working Party on Consumer Protection and Information meeting on 12 December 2022, delegations will find in Annex to this note the fourth Presidency compromise proposal.

Changes compared to the Commission proposal are marked in **bold, underlined** for the new text and in ~~striketrough~~ for the deletions. In addition, changes compared to the third Presidency compromise proposal (doc. 14631/1/22 REV1) are highlighted in grey.

2022/0147 (COD)

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

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank¹,Having regard to the opinion of the European Economic and Social Committee²,

Acting in accordance with the ordinary legislative procedure,

Whereas:

¹ ...
² ...

- (1) Directive 2002/65/EC of the European Parliament and of the Council³ lays down rules at Union level concerning the distance marketing of consumer financial services. At the same time Directive 2011/83/EU of the European Parliament and of the Council⁴ lays down, amongst other, rules applicable to distance contracts for the sale of goods and provision of services concluded between a trader and a consumer.
- (2) Article 169(1) and Article 169(2), point (a), of the Treaty on the Functioning of the European Union (TFEU) provide that the Union is to contribute to the attainment of a high level of consumer protection through the measures adopted pursuant to Article 114 thereof. Article 38 of the Charter of Fundamental Rights of the European Union (the ‘Charter’) provides that Union policies are to ensure a high level of consumer protection.
- (3) Within the framework of the internal market, in order to safeguard freedom of choice, a high degree of consumer protection in the area of financial services contracts concluded at a distance is required in order to enhance consumer confidence in distance selling.
- (4) Ensuring the same high level of consumer protection across the internal market is best achieved through full harmonisation. Full harmonisation is necessary in order to ensure that all consumers in the Union enjoy a high and equivalent level of protection of their interests and to create a well-functioning internal market. Member States should therefore not be allowed to maintain or introduce national provisions other than those laid down in this Directive, with respect to aspects covered by the Directive, unless otherwise provided in this Directive. Where no such harmonised provisions exist, Member States should remain free to maintain or introduce national legislation.

³ Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ L 271, 9.10.2002, p. 16).

⁴ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC (OJ L 304, 22.11.2011, p. 64).

- (5) Directive 2002/65/EC has been the subject of different reviews. Those reviews revealed that the progressive introduction of Union product-specific legislation has led to significant overlaps with Directive 2002/65/EC and that digitalisation exacerbated some aspects that are not fully addressed by that Directive.
- (6) Digitalisation has contributed to market developments that were not foreseen at the time of the adoption of Directive 2002/65/EC. In fact, the rapid technological developments since then have brought significant changes to the financial services market. Although many sector specific acts have been adopted on the Union level, financial services offered to consumers have evolved and diversified considerably. New products have appeared, in particular in the online environment, and their use continues to develop, often in a fast and unpredicted manner. In this regard, the horizontal application of Directive 2002/65/EC remains relevant. The application of Directive 2002/65/EC to consumer financial services not regulated by sector specific Union legislation has meant that, a set of harmonised rules apply to the benefit of consumers and traders. This ‘safety net’ feature, contributes to ensuring a high level of consumer protection while ensuring a level playing field among traders.
- (7) In order to address the fact that the progressive introduction of Union sector specific legislation has led to significant overlaps of that legislation with Directive 2002/65/EC and that digitalisation exacerbated some aspects that are not fully addressed by the Directive, including how and when information should be provided to the consumer, it is necessary to revise the rules applicable to financial services contracts concluded between a consumer and a trader at a distance, while at the same time ensuring the application of the ‘safety net’ feature **for financial services which are not covered by Union sector specific legislation including financial services excluded from the scope of Union acts governing specific financial services.**

- (8) Directive 2011/83/EU, similarly to Directive 2002/65/EC, provides for a right to pre-contractual information and a right of withdrawal for certain consumer contracts concluded at a distance. This complementarity is, however, limited since Directive 2011/83/EU does not cover financial services contracts, which are defined as services of a banking, credit, insurance, personal pension, investment or payment nature. Some services, such as the supplying of goods like precious metals, diamonds or wine, in view of their physical delivery, should not be deemed to be financial services.
- (9) Extending the scope of Directive 2011/83/EU to cover financial services concluded at a distance should ensure the necessary complementarity. However, due to the particular nature of consumer financial services, in particular by reason of their complexity, not all the provisions of Directive 2011/83/EU should apply to consumer financial services contracts concluded at a distance. A dedicated chapter with rules applicable only to consumer financial services contracts concluded at a distance should ensure the necessary clarity and legal certainty.
- (9a) Financial service contracts concluded in some other manner than at a distance are not covered by this Directive. Member States can therefore determine, in accordance with Union law, which rules apply to such contracts, including by applying the requirements set out in this Directive to contracts not included in its scope.**
- (10) While not all the provisions of Directive 2011/83/EU should apply to financial services contracts concluded at a distance due to the specific nature of those services, a number of provisions of Directive 2011/83/EU, such as relevant definitions, rules on additional payments, on enforcement, ~~and penalties,~~ **inertia selling and reporting**, should also apply to financial services contracts concluded at a distance. The application of those provisions ensures complementarity between the different types of contracts concluded at a distance. The extension of the application of the rules on penalties of Directive 2011/83/EU will ensure that effective, proportionate and dissuasive fines are imposed on traders ~~responsible for widespread infringements or widespread infringements with a Union dimension.~~

- (11) A dedicated chapter in Directive 2011/83/EU should contain the still relevant and necessary rules of Directive 2002/65/EC, in particular concerning the right to pre-contractual information and the right to withdrawal, and rules ensuring online fairness when financial service contracts are concluded at a distance.
- (12) Since distance financial services contracts are most commonly concluded by electronic means, rules on ensuring online fairness when financial services are contracted at a distance should contribute to the achievement of the goals laid down in Article 114 TFEU and Article 38 of the Charter of the Fundamental Rights of the EU. The rule on adequate explanations should ensure added transparency and provide the consumer with the possibility to request human intervention when he or she interacts with the trader through online interfaces, such as a chatbots, roboadvice, interactive tools or similar ~~tools~~ **means**. ~~The trader should be prohibited to deploy measures in his or her online interface that could distort or impair the consumers' ability to make a free, autonomous and informed decision or choice.~~ **Other rules on ensuring online fairness as set in other Union acts, such as Digital Services Act⁵, apply when financial services are contracted at a distance by electronic means. In the interest of ensuring a high level of consumer protection, the Commission should assess how the structure, design, function or manner of operation of online interfaces used by the traders affects the consumers' ability to make a free, autonomous and informed decision or choice.**

We believe “online tools” would be more suitable than “online interfaces”. Additionally, we suggest substituting the examples (chatbots, roboadvice, interactive tools, etc) for a more encompassing term, such as “based solely on automated means or systems”.

Drafting suggestion:

“Since distance financial services contracts are most commonly concluded by electronic means, rules on ensuring online fairness when financial services are contracted at a distance should contribute to the achievement of the goals laid down in Article 114 TFEU and Article 38 of the Charter of the Fundamental Rights of the EU. The rule on adequate explanations should ensure added transparency and provide the consumer with the possibility to request human intervention when he or she interacts with the trader through online ~~interfaces~~ **tools**, such as a chatbots, roboadvice, interactive tools or similar ~~means~~ **based solely on automated means or systems**. ~~The trader should be prohibited to deploy measures in his or her online interface that could distort or impair the consumers' ability to make a free, autonomous and informed decision or choice.~~ Other rules on ensuring online fairness as set in other Union acts, such as Digital Services Act⁵, apply when financial services are contracted at

a distance by electronic means. In the interest of ensuring a high level of consumer protection, the Commission should assess how the structure, design, function or manner of operation of online interfaces used by the traders affects the consumers' ability to make a free, autonomous and informed decision or choice."

- (13) Certain consumer financial services are governed by specific Union acts, which continue to apply to those financial services. In order to ensure legal certainty, it should be clarified that where another Union act governing specific financial services contains rules on pre-contractual information, ~~or on the exercise of the right of withdrawal~~ **or on adequate explanations, and irrespective of the level of detail of these rules,** only the respective provisions of those other Union acts should apply to those specific consumer financial services unless provided otherwise in those acts, **including the explicit option for Member States to exclude the application of those specific rules.**

- (13a) With regard to pre-contractual information, certain Union acts governing specific financial services contain rules adapted for that specific financial services designed to ensure that consumers are able to understand the essential characteristics of the proposed contract. For instance, Regulation (EU) 2019/1238 on a pan-European Personal Pension Product (PEPP)⁶ or Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features⁷, provide for pre-contractual information both in the basic specific Union act and also empower the Commission to adopt delegated or implementing acts. Only the pre-contractual information requirements laid down in such Union acts should apply to those specific consumer financial services, unless provided otherwise in those acts. This should also be the case where the Union act governing specific financial services provides different or minimal rules on pre-contractual information in comparison with the rules laid down by this Directive.**

- (13b) With regard to the right of withdrawal, where the Union act governing specific financial services gives consumers time to consider the implications of the contract signed, and irrespective of how it is called by that Union act, only the respective provisions of that Union act should apply to those specific consumer financial services unless otherwise provided in that act.** For instance, when Article 186 of Directive 2009/138/EC of the European Parliament and of the Council⁸ applies, the rules concerning

the 'cancellation period' laid down in Directive 2009/138/EC apply and not the rules on the right of withdrawal laid down in this Directive and when Article 14(6) of Directive 2014/17/EU of the European Parliament and of the Council⁹ applies, **the rules concerning the possibility to choose between the right of withdrawal and the reflection period laid down in Directive 2014/17/EU apply, not** the rules on the right of withdrawal under this Directive ~~should not apply~~.

(13c) With regard to rules on adequate explanation. ~~Likewise, certain Union acts governing specific financial services¹⁰ contain extensive and developed rules designed to ensure that consumers are able to understand the essential characteristics of the proposed contract. Furthermore, certain Union acts governing specific financial services, such as Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property¹¹, already lay down rules on adequate explanations to be provided by the traders to the consumers with respect to the proposed contract. In order to ensure legal certainty, the rules on adequate explanations set out in this Directive should not apply to financial services falling under Union acts governing specific financial services that contain rules on the information~~ **adequate explanation** to be provided to the consumer prior to the conclusion of the contract.

(13d) Where Union acts governing specific financial services provide for rules on pre-contractual information but do not establish rules on the right of withdrawal, the right of withdrawal provisions of this Directive should apply. For instance, Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), sets out rules on pre-contractual information requirements, but, with respect to non-life insurance does not set out a right providing time to the consumer to consider the implications of the contract signed. In that case, rules on pre-contractual information laid down in the Union act governing specific financial services should apply and the rules on the right of withdrawal as laid down in this Directive should apply. Where a Union act governing specific financial services does not contain provisions on information on the right of withdrawal, the trader should provide this information according to this Directive in order to ensure proper information awareness of the consumer.

(13e) Where Union acts governing specific financial services provide for rules on pre-contractual information but do not establish rules on the right of withdrawal, the period for withdrawal set out in this Directive should apply and begin from the

provision of the contractual terms and conditions and pre-contractual information in accordance with the Union acts governing those specific financial services, or from the provision of the contractual terms and conditions and pre-contractual information in accordance with the Union acts governing those specific financial services in addition to the provision of the information on the right of withdrawal set out in this Directive in cases where specific Union acts do not contain such an information obligation on the right of withdrawal.

We support the general principle that the EU sectorial legislation should always prevail over the rules established under the DMFSD. This means that when there are specific rules related to pre-contractual information requirements, right of withdrawal and adequate explanations in the EU sectorial legislation, those rules should prevail. This Directive should apply when the sectorial legislation does not establish rules for the conclusion of contracts at a distance, ensuring that this complementarity approach is not incompatible with the sectorial legislation. For example, we find important to guarantee that the use of the withdrawal button would be a cross-sectorial practice adopted for all financial products and services marketed *via* electronic means.

- (14) Consumer financial services contracts negotiated at a distance involve the use of means of distance communication which are used as part of a distance sales or service-provision scheme not involving the simultaneous presence of the trader and the consumer. In order to tackle the constant development of those means of communication principles should be defined that are valid even for those means which are not yet in widespread use or which are not yet known.
- (15) A single financial service contract involving successive operations or separate operations of the same nature performed over time may be subject to different legal treatment in different Member States, but it is important that the rules are applied in the same way in all the Member States. To that end, it is appropriate to provide that the provisions governing the financial services contracts concluded at a distance should apply to the first of a series of successive operations or separate operations of the same nature performed over time which may be considered as forming a whole, irrespective of whether that operation or series of operations is the subject of a single contract or several successive contracts.
- Where there is no initial agreement, the provisions governing the financial services contracts concluded at a distance should apply to all successive or separate operations, except for the pre-contractual information, which should apply only to**

the first operation. For example, an "initial service agreement" may be considered to be the opening of a bank account, and "operations" may be considered to be the deposit or withdrawal of funds to or from the bank account. Adding new elements to an initial service agreement does not constitute an "operation" but an additional contract. **Other Union acts governing specific financial services may provide for different rules for initial agreements and operations.**

- (16) In order to delimit the scope of application of this Directive, the rules concerning consumer financial services concluded at a distance should not apply to services provided on a strictly occasional basis and outside a commercial structure dedicated to the conclusion of distance contracts.
- (17) The use of means of distance communications should not lead to an unwarranted restriction on the information provided to the consumer. In the interests of transparency, requirements should be laid down with regard to when the information should be provided to the consumer prior to the conclusion of the distance contract and how that information should reach the consumer. In order to be able to make their decisions in full knowledge of the facts, consumers should receive the information ~~at least one day~~ **in good time** prior to the conclusion of the distance contract. ~~Only in exceptional cases can the information be provided less than a day before the conclusion of the distance contract for financial service. In case the contract is concluded less than one day before, the trader, within the established timeframe, should be obliged to remind the consumer about the possibility to withdraw from the distance contract for financial service.~~
- (18) The information requirements should be modernised ~~and updated to include, for example, the email address of the trader and the information on the risk and reward related to certain consumer financial services~~ **and made future-proof. Therefore, the trader should communicate to the consumer its telephone number, but also its email address or other means of communication which can encompass various methods of communication, as well as the information on where to address complaints. The requirements on the complaint handling policy could be determined by Member States. Consumers should be informed about the specific additional costs of using the means of distance communication which in the case of telephone communication include costs calculated at a rate other than the basic rate.** Consumers should also be clearly informed when the price presented to them is personalised on the basis of automated processing.

(18a) Under Directive 2002/65/EC Member States could maintain or introduce more stringent provisions on prior information requirements when the provisions are in conformity with Union law. Several Member States have maintained or introduced additional information requirements in that context. This possibility to offer a higher level of consumer protection with respect to the rules on pre-contractual information should remain. This should apply both to the information catalogue and the ways of presenting information. The application of stricter rules may also include the application of requirements set out in Union acts concerning specific financial services to financial services not covered by these sectoral Union acts.

We believe that this proposal would amount to a circumvention of a Union law and that it creates legal uncertainty by extending a regime to services that are not covered by a certain Union act, either by omission or through the decision of the specific legislators in charge of such drafting. We also believe that this recital is inconsistent with the first subparagraph of Article 16a(6).

(19) ~~When the consumer financial service concluded at a distance includes a risk-reward profile, it should contain such elements as a summary risk indicator, supplemented by a narrative explanation of that indicator, its main limitations and a narrative explanation of the risks which are materially relevant to the financial service and the possible maximum loss of capital, including information on whether all capital can be lost.~~

(20) ~~Certain financial services might pursue an environmental or social objective such as contributing to the fight against climate change or contributing to the reduction of over-indebtedness. In order to be able to make an informed decision, the consumer should also be informed about the particular environmental or social objectives targeted by the financial service.~~

(20a) The trader should provide all pre-contractual information in good time before the consumer is bound by the distance contract, so that the consumer has enough time to make an informed decision. The information should be provided on a durable medium and in a way that the information is both easy for the consumer to comprehend and is in a readable format. Being in a readable format means written in legible fonts in a readable size and in colours that do not diminish the comprehensibility of the information, including when the document is presented.

printed or photocopied in black and white. If the information cannot be provided on a durable medium before the conclusion of the contract due to the media chosen by the consumer, it should be provided as soon as possible after the conclusion. The information requirements should be adapted to take into account the technical constraints of certain media, such as the restrictions on the number of characters on certain mobile telephone screens. In the case of mobile telephone screens, where the trader has customised the content and presentation of the online interface for such devices, the following information must be provided most prominently and in an upfront manner: information concerning the identity of the trader, the main characteristics of the consumer financial service, the total price to be paid by the consumer to the trader for the consumer financial service including all taxes paid via the trader or, when an exact price cannot be indicated, the basis for the calculation of the price enabling the consumer to verify it, and the existence or absence of the right of withdrawal, including the conditions, time limit and procedures for exercising that right. The rest of the information could be layered provided via additional pages. However, all the information should be provided on a durable medium before the conclusion of the distance contract.

- (21) When providing pre-contractual information through electronic means, such information should be presented in a clear and comprehensible manner. In this regard, the information could be highlighted, framed and contextualised effectively within the display screen. The technique of layering, whereby certain pre-contractual information requirements are deemed key elements and thus placed in a prominent way on the first layer and other detailed parts of the pre-contractual information are presented in accompanying layers, has been tested and proved to be useful for certain financial services; its uses, ~~namely the possibility to present detailed parts of the information through pop-ups or through links to accompanying layers, should be encouraged.~~ When making use of the technique of layering pursuant to this Directive, the trader should provide on the first layer of the electronic means at least, the identity and the main business of the trader, the main characteristics of the financial service, the total price to be paid by the consumer, notice of the possibility that other taxes or costs may exist and the existence or absence of a right of withdrawal. The other remaining pre-contractual information requirements could be displayed in other layers. When layering is used all the information should be easily accessible to the consumer and the use of

accompanying layers does not distract the customer's attention from the content of the document and should not obscure key information. It should be possible to print all the parts of the pre-contractual information in one single document.

- (22a) **Another** possible manner of providing pre-contractual information is through **electronic means is** the ‘tables of contents’ approach using expandable headings. At the top level, consumers could find the main topics, each of which can be expanded by clicking on it, so that the consumers are directed to a more detailed presentation of the relevant information. In this way, the consumer has all the required information in one place, while retaining control over what to review and when. Consumers should have the possibility to download all the pre-contractual information document and to save it as a stand-alone document.
- (22) Consumers should have a right of withdrawal without penalty and with no obligation to provide justification. **The right of withdrawal should not apply to financial services whose price depends on fluctuation in the financial market. Certain products, such as some pension products or insurance-based investment products, could be linked to financial market instruments and, as such, be dependent on fluctuations in the financial market. When the consumer has a right to withdraw from these contracts, the possible loss in value of the financial market instruments should be taken into account in the amount payable to the consumer.** When the right of withdrawal does not apply because the consumer has expressly requested the performance of a distance contract before the expiry of the withdrawal period, the trader should inform the consumer of this fact before the start of the performance of the contract.

We believe this recital should be further clarified as it appears to be inconsistent with the provision in Article 16b(2). Indeed, the former seems to allow the exercise of the right of withdrawal in case of “financial services whose price depends on fluctuations in the financial market outside the traders control”, while the latter prohibited this possibility.

- (23a) **The withdrawal period should expire 14 calendar days after providing both pre-contractual information and contractual terms and conditions. In order to increase legal certainty, if the consumer has not received that pre-contractual information and contractual terms and conditions, the withdrawal period should expire at the latest 12 months and 14 calendar days after the conclusion of the distance contract. The withdrawal period should not expire if the consumer has not been informed about the**

right of withdrawal on a durable medium.

- (23) In order to ensure the effective exercise of the right of withdrawal, the procedure for the exercise of that right should not be more burdensome than the procedure for the conclusion of the distance contract.
- (24) ~~For distance contracts concluded by electronic means, the trader should provide the consumer with the possibility to use a withdrawal button.~~ **Where the trader offers the possibility of concluding distance contracts by means of an online interface (e.g. via web-site or application), he should additionally be obliged to enable the consumer to withdraw from such a contract via a button on that same interface. This should ensure that consumers can withdraw from a contract just as easily as they can conclude it. To achieve this, the trader is to provide a button on the online interface on which the contract is concluded that indicates the possibility of withdrawal. The consumer should be allowed to make the withdrawal statement and to provide certain information to identify the contract. The withdrawal statement should be submitted by using a confirmation button.** In order ~~for~~ **to** ensure the effective use of the withdrawal button, the trader should ensure that it is visible and **easily accessible and**, when the consumer uses the button, the trader should adequately document its use. **This obligation should be laid down not only to distance contracts for financial services, but also to distance contract for goods and services to enhance the possibilities for consumers to get out of contracts by means of withdrawal.**
- (25) Consumers, **in addition to the pre-contractual information provided to them by the trader,** may **still** need assistance in order to decide which financial service is the most appropriate for his or her needs and financial situation. **The objective of the provision of adequate explanation is to ensure that the consumer understands financial service offered by the trader before he or she signs the contract.** Therefore, Member States should ensure that before the conclusion of a financial service contract at a distance, traders provide such assistance in relation to the financial services which they offer to the consumer, by providing adequate explanations ~~about the relevant information, including~~ **concerning** the essential characteristics of the ~~products-proposed~~ **contract, including the possible ancillary services, and the specific effects that the proposed contract may have on the consumer.** **With regard to the essential characteristics of the proposed contract the trader should explain the main features of the offer, such as the total price to be paid by the consumer to the trader and the description of the main**

characteristics of the financial service, and its impact on the consumer, including, where applicable, whether the ancillary services can or cannot be terminated separately and the consequences of such termination. With regard to the specific effects of the proposed contract, the trader should also explain the main consequences of non-compliance with the contractual obligations.

(26a) The contracts under this Directive can be of different financial natures and thus can vary considerably. Therefore, Member States could adapt the way in which such explanations are given to the circumstances in which the financial service is offered and to the consumer's need for assistance, taking into account the consumer's knowledge and experience of financial service and its nature.

(26b) The obligation of providing adequate explanations is particularly important when consumers intend to conclude a financial service contract at a distance and the trader provides explanations through online tools such as chatbots, roboadvice, interactive tools or similar means. In order to ensure that the consumer understands the effects that the contract may have on his or her economic situation, the consumer should always be able to obtain human intervention on behalf of the trader, free of charge, during business hours of the trader.

~~(26) When concluding financial services contracts at a distance, traders should be prohibited to use the structure, design, function or manner of operation of their online interface in a way that could distort or impair consumers' ability to make a free, autonomous and informed decision or choice.~~

(27) Directive 2011/83/EU should therefore be amended accordingly.

(28) Directive 2002/65/EC should therefore be repealed.

(29) Since the objective of this Directive, namely, through the achievement of a high level of consumer protection, to contribute to the proper functioning of the internal market, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

- (30) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents¹², Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 2011/83/EU

Directive 2011/83/EU is amended as follows:

- (1) Article 3 is amended as follows:

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

‘(1b) **Only** Articles 1 and 2, Article 3(2), (5) and (6), Article 4, **Article 8(6), Article 11a**, Articles 16a to ~~16e~~**16d**, Article 19, Articles 21 to 23, Article 24(1), ~~(2), (3) and (4)~~, and Articles 25 ~~and to 26-27 and Article 29~~ shall apply to distance contracts concluded between a trader and a consumer for the supply of financial services.

DMFSD aims to provide a “safety net” to consumers of financial services across the EU, we consider that such role is better achieved by allowing Member States to establish in their national legal framework more protective regimes than the ones resulting from the DMFSD.

Therefore, we do not agree with the reference to **Article 4** of the Consumer Rights Directive, which establishes a level of maximum harmonisation.

Coherently, we support the current drafting of Article 16a(5a) of the proposal, which allows Member States to specify the information requirements that best ensure consumer protection.

More importantly, we consider that Member States should be able to maintain or introduce at a national level more protective conditions for the exercise of the **right of withdrawal**. We consider that this approach ensures the maintenance of the “safety net” aim of this proposal while allowing consumers to keep benefiting from more favourable withdrawal national regimes that do not stem from Union law. This is the case, for instance, of non-life insurance products, such as personal injuries and health insurance with a duration superior to six months or insurance-based investment products (in accordance with Article 118 (1) of the Decree-Law n°

72/2008, of 16 April), which benefit from a 30-day period for the exercise of the right of withdrawal.

It should also be noted that article 25 of the CRD, regarding the imperative nature of the Directive, does not seem to grant the same level of protection as article 12 of the DMFSD.

According to article 25 of the CRD, “if the law applicable to the contract is the law of a Member State, consumers may not waive the rights conferred on them by the national measures transposing this Directive”. And “any contractual terms which directly or indirectly waive or restrict the rights resulting from this Directive shall not be binding on the consumer”.

In result, the waiver of the rights conferred by the CRD is possible if the law applicable to the agreement is from a country outside the EU.

On other hand, article 12(1) of the DMFSD simply states that consumers may not waive the rights conferred on them by it (regardless of the law applicable to the contract). Furthermore, paragraph 2 of article 12 states that: “Member States shall take the measures needed to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-member country as the law applicable to the contract, if this contract has a close link with the territory of one or more Member States”.

It should be noted that this stricter provision, when compared with the one foreseen in article 25 of the CRD, stems from the fact that the financial services sector is highly regulated and only entities that are duly authorized by one of the Member States may provide financial services in the EU, therefore, the provisions regarding the DMFS would always be applicable.

For these reasons, a special provision should be included in article 25 of the CRD, clearly indicating that consumers may not waive the rights granted by the Directive in respect of distance marketing of financial services, even if the law applicable to the contract in question is from a country outside the EU.

Drafting suggestion:

“Only Articles 1 and 2, Article 3(2), (5) and (6), ~~Article 4~~, Article 8(6), Article 11a, Articles 16a to 16e and 16d, Article 19, Articles 21 to 23, Article 24(1), ~~(2), (3) and (4)~~, and Articles 25 and to 26-27 and Article 29 shall apply to distance contracts concluded between a trader and a consumer for the supply of financial services.”

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

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 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 shall apply.’

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

‘(d) for financial services, **other than distance contracts** not covered by Article 3(1b).’

(1a) In Article 6 paragraph 1, point (h) is replaced by the following:

‘(h) where a right of withdrawal exists, the conditions, time limit and procedures for exercising that right in accordance with Article 11(1), as well as the model withdrawal form set out in Annex I(B), and, where applicable, information about the existence and placement of the withdrawal button or a similar function referred to in Article 11a;’

(1b) The following Article 11a is inserted:

‘Article 11a

Exercise of the right of withdrawal from distance contracts concluded by the means of an online interface

1. 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 or a similar function.

(a) name of the consumer;

(b) identification of the contract;

(c) details of the electronic means by which the confirmation of the withdrawal shall be sent to the consumer.

2. The withdrawal statement shall be submitted by using a confirmation button or a similar function.

The confirmation button or a similar function shall be labelled in a legible manner with the words “withdraw now” or a corresponding unambiguous formulation.

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

4. 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.

PT supports the extension of the withdrawal button to all of the CRD, as we support the principle that exercising the right of withdrawal should not be more difficult or burdensome than contracting a service.

Without prejudice, and as preliminary comment, we believe that in order to ensure legal certainty, the definition of “online interface” should be added to the CRD, as suggested before, the definition of “online interface” from the Geo-blocking Regulation could be used as a base.

Additionally, we consider it is relevant to maintain the provision of the withdrawal button being “permanently available during the entire withdrawal period on the same electronic interface as the one used to conclude the distance contract” which is missing from the new proposal.

(2) The following Chapter is inserted:

‘CHAPTER IIIa

RULES CONCERNING DISTANCE CONTRACTS FOR FINANCIAL SERVICES ~~CONTRACTS CONCLUDED AT A DISTANCE~~

Article 16a

Information requirements for distance contracts for ~~consumer~~ financial services

In our view, it is important to include a provision equivalent to the one foreseen in article 3(4)(b) of the current DMFS, as the possibility of redress through guarantee funds or other compensation arrangements, not covered by Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit guarantee schemes and Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor compensation schemes, is a relevant factor for an investment decision.

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

We suggest maintaining the reference “in any way appropriate to the means of distance communication used” from the current DMFSD, as it ensures the adequacy of the way the information is provided, considering the means of communication used by the trader.

Drafting suggestion:

“Before the consumer is bound by a distance contract, or any corresponding offer the trader shall provide the consumer with the following information, in a clear and comprehensible manner in any way appropriate to the means of distance communication used:”

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

In our view, the means of communication provided by the trader should, also, be equivalent to those used for the presentation of the distance contract. As such, in contracts carried out through digital means, the trader should provide digital means of communication such as an email or specific address for communication (i.e., an online form). **In addition**, we would like to know the rationale for not including the provision currently foreseen in article 3(3)(e) of the current DMFSD.

Drafting suggestion:

“the geographical address at which the trader is established as well as the trader’s telephone

number, email address or details of other means of communication provided by the trader, and where applicable, that of the trader on whose behalf he is acting; all those means of communication provided by the trader shall **be equivalent to those used for the presentation of the distance contract**, enable the consumer to contact the trader quickly communicate with him efficiently **and guarantee that the consumer can keep any written correspondence with the trader on a durable medium.**”

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

We consider traders should be required to provide consumers with information on the possibility of submitting a complaint through digital channels when this possibility is available.

- (d) where the trader is registered in a trade or similar public register, the ~~trade~~ register in which the trader is entered and the registration number or an equivalent means of identification in that register;
- (e) where the trader's activity is subject to an authorisation scheme, the ~~particulars~~ **name and address** of the relevant supervisory authority;

We suggest the introduction of an information requirement regarding the supervisory authority's website, as well as any other relevant contact information imposed by said supervisory authority.

Drafting suggestion:

*“where the trader's activity is subject to an authorisation scheme, the name, address, **website as well as any other contact information** of the relevant supervisory authority.”*

- (f) a description of the main characteristics of the financial service;
- (g) the total price to be paid by the consumer to the trader for the financial service,

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

- (h) where applicable, that the price was personalised on the basis of automated decision-making;
- (i) where ~~relevant~~ **applicable**, notice indicating that the financial service is related to instruments involving special risks related to their specific features or the operations to be executed or whose price depends on fluctuations in the financial markets outside the trader's control and that historical performances are ~~no~~ **not** indicators for future performances;
- (j) notice of the possibility that other taxes ~~and/or~~ costs may exist that are not paid via the trader or imposed by him;
- (k) any limitations of the period for which the information provided **in accordance with this paragraph** is valid;

We question the rationale for restricting the scope to the information provided as imposed by Article 16a. The consumer should be informed about the limited validity of any information regarding the financial service, regardless of it being foreseen in this Article. Note that the drafting suggestion is aligned with the current wording of the corresponding provision of the DMFSD.

Drafting suggestion:

*“any limitations of the period for which the information provided **regarding the financial service** ~~in accordance with this paragraph~~ is valid;”*

- (l) the arrangements for payment and for performance;
- (m) any specific additional costs ~~s~~ for the consumer of using the means of distance communication, if such additional costs ~~s~~ **is are** charged;
- (n) ~~where applicable, a brief description of the risk-reward profile;~~

We believe the disclosure of information in Article 16a (1)(n) is essential for the consumer to assess the risk associated with the financial service, promoting awareness as to the decision-making process, thus we suggest reinstating this provision in the final text.

- (e) ~~where applicable, information on any environmental or social objectives targeted by the financial service;~~
- (p) the existence or absence of a right of withdrawal and, where the right of withdrawal exists, its duration and the conditions for exercising it including information on the amount which the consumer may be required to pay in accordance with Article 16c(1) and procedures for exercising the right of withdrawal, *inter alia*, the address or details of the means of communication relevant for sending the withdrawal statement and for financial contracts concluded by the means of an online interface, information about the existence and placement of the withdrawal button or a similar function, referred to in Article 11a, as well as the consequences of non-exercise of that right;
- (q) where applicable, the minimum duration of the distance contract in the case of financial services to be performed permanently or recurrently;
- (r) information on any rights the parties may have to terminate the contract early or unilaterally by virtue of the terms of the distance contract, including any penalties imposed by the contract in such cases;
- (s) ~~practical instructions for exercising the right of withdrawal indicating, *inter alia*, the address or email address to which the notification of a withdrawal should be sent and for financial contracts concluded by electronic means, information about the existence and placement of the withdrawal button, referred to in Article 16d;~~
- (t) any contractual clause on law applicable to the distance contract ~~and/or on competent court;~~

We consider the reference to the competent court is quite relevant for the average consumer. A consumer should be aware that, in case of litigation and in specific circumstances, he might have to discuss the matter in a court located, for instance, outside his member state of residence, which may entail unforeseeable costs.

Drafting suggestion:

“any contractual clause on law applicable to the distance contract and/or on competent court;”

- (u) in which language, or languages, the contractual terms and conditions, and the prior information referred to in this Article are supplied, and furthermore in which language, or languages, the trader, with the agreement of the consumer, undertakes to communicate during the duration of ~~this~~ **the** distance contract;
- (v) where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it.

2. In the case of telephone communications, the identity of the trader and the commercial purpose of the call initiated by the trader shall be made explicitly clear at the beginning of any conversation with the consumer. **The trader shall also notify the consumer when the call is or may be recorded.**

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

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), (i) and (p) of that paragraph. In that case t~~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.~~

We suggest adding the reference to paragraph (i) of Article 16a, 1 and amend the wording in accordance with the current corresponding provision in the DMFSD.

Drafting suggestion:

“By way of derogation from paragraph 1, if the consumer explicitly agrees, the trader needs only to provide the information referred to in points (a), (f), (g), **(i)**, (j) and (p) of that paragraph. In that case (...).”

3. The trader shall provide the information referred to in paragraph 1 ~~at least one day~~ **in good time** 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.~~

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

The information referred to in paragraph 1 shall be provided upon request in an appropriate format to consumers with disabilities, including those with a visual impairment.

- 4a.** Except for the information referred to in paragraph 1, points (a), (f), (g), ~~(j)~~ and (p), the trader shall be permitted to layer the information where it is provided by electronic means.

In case ~~the trader decides to layer the~~ **of layering of** information, it shall be possible to **view, save and** print the information referred to in paragraph 1 as one single document.

We believe the information provided in (i), (k), (m) and (n), (particularly (m) regarding the costs of the transaction), **should also be excluded from layering, due to their immediate relevance to the consumer.**

Drafting suggestion:

“Except for the information referred to in paragraph 1, points (a), (f), (g), **(i), (j), (k), (m), (n)** and (p), the trader shall be permitted to layer the information where it is provided by electronic means.”

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

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

- 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 4 in good time before the consumer is bound by the distance contract, the trader shall provide that information in**

accordance with paragraph 4 immediately after the conclusion of the contract.

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

We have noticed that the current proposal only refers to the burden of proof in relation to information requirements. While we agree with further harmonisation in this context, we consider that the burden of proof should have a broader scope, namely by stating that the burden of proof also includes aspects such as the consumer's consent to conclusion of the contract and, where appropriate, its performance, as established in Article 15 of the DMFSD.

Note that the proposal entails a duty for the consumer to prove a negative fact, i.e. that something has not occurred, or in this particular case, to prove that "he did not provide consent". Regardless of the particulars of the civil procedural system applicable in each Member State, it will always be easier for the trader to prove the "positive fact" i.e., that the consumer consented to enter into the agreement, than for the consumer to prove that he did not provide consent to enter into the agreement.

5a. Member States may maintain or adopt more stringent provisions on information requirements than those referred to in this Article. Member States shall communicate to the Commission those national provisions. The Commission shall ensure that information on those national provisions is made available to consumers and traders.

We support the introduction of this Article, since it allows Member States to maintain or introduce national provisions that enhance consumers' protection, namely by adding more stringent requirements on pre-contractual information that those established by the DMFSD safety net.

In Portugal, consumers benefit from a set of rights regarding the provision of pre-contractual information, when opening an account or setting up a deposit (e.g., this information includes the provision of a standardised information sheet). These rights derive from our national framework and not from a Union act.

More specifically, the Legal Framework of Credit Institutions and Financial Companies (available at (in English): <https://www.bportugal.pt/en/page/legal-framework-credit-institutions-and-financial-companies>) establishes that credit institutions shall inform their customers, among other aspects, of the characterising features of the products offered (Article 77, (1)). For this purpose, the referred Legal Framework attributes powers to Banco de Portugal, in order to regulate, in more detail, the pre-contractual information requirements that credit institutions must comply with regarding the services they provide to their customers (Articles 76, (1) and 77, (4) to (5)).

Therefore, for instance, before opening an account, credit institutions must provide consumers with information on the characteristics of such account, in accordance with a standardised information sheet.

This standardised information sheet has different templates, depending on if the account is a current account (template available at (only in Portuguese): <https://www.bportugal.pt/sites/default/files/anexos/cartas-circulares/4-2009a1.pdf>) or other type of account (template available at (only in Portuguese): <https://www.bportugal.pt/sites/default/files/anexos/cartas-circulares/4-2009a2.pdf>).

The obligation to provide a standardised information sheet, in the commercialisation of banking accounts, is established by Article 4 of Notice No. 4/2009, issued by Banco de Portugal (available at (only in Portuguese): <https://www.bportugal.pt/sites/default/files/anexos/cartas-circulares/4-2009a.pdf>).

In result of full harmonisation of the rules concerning financial services sold at a distance, this more protective framework would be replaced by the ‘minimum’ protection requirements established by CRD. Hence, if this approach is adopted, it will reduce the level of protection that consumers enjoy today, particularly when, taking into account the mean of commercialisation, such protection is particularly relevant to prevent consumers’ detriment.

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

By way of derogation from the first subparagraph, where the consumer has the right of withdrawal in accordance with Article 16b, the trader shall inform the consumer about his right of withdrawal in accordance with Article 16a(1), point (p), when another Union act governing specific financial services does not contain rules on information about the right of withdrawal.

Article 16b

Right of withdrawal from distance contracts for financial services

1. The Member States shall ensure that the consumer shall have a period of 14 calendar days to withdraw from a contract without penalty and without giving any reason. **This period shall be extended to 30 calendar days in distance contracts relating to personal pension operations.**

We are concerned with the possibility that this proposal will result in situations where consumers contracting financial services through distance communication means would benefit from a lower level of protection than if such contract was concluded in the presence of the trader. In our view, this possibility is not aligned with the objective of this proposal (i.e. to foster consumer protection) and could inclusively result in a decrease of consumers' rights, as currently granted.

Indeed, the current proposal is insufficient to protect consumers in our jurisdiction, as in accordance to national law more services besides "personal pension operations", not covered by EU sectorial legislation, benefit from the 30-day right of withdrawal period when contracted in the presence of the trader, such as (i) personal injuries and health insurance with a duration superior to six months or (ii) insurance-based investment products. Hence, in order to maximize the compatibility of this regime with national specificities, we consider that it is appropriate to allow Member States to determine which services not covered by EU sectorial legislation would benefit from a longer withdrawal period.

By implementing the proposal above, we could ensure that no consumer right's currently in place would be undermined in result of this proposal and that all consumers would benefit from the same protection, regardless of whether the contract was concluded at a distance or in the trader's presence.

Drafting suggestion:

"1. The Member States shall ensure that the consumer shall have a period of 14 calendar days to withdraw from a contract without penalty and without giving any reason. ~~This Member States may period shall be~~ extended this period to 30 calendar days in distance contracts relating to specific financial services not governed by another Union act personal pension operations."

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

- (a) the day of the conclusion of the distance contract,
- (b) the day on which the consumer receives the contractual terms and conditions and the information ~~referred to~~ in accordance with Article 16a(1) and (5a), if that is later than the date in point (a) of this subparagraph.

If the consumer has not received the contractual terms and conditions and the information referred to in accordance with Article 16a(1) and (5), the right of withdrawal period shall expire ~~one year~~ 12 months and 14 calendar days after the conclusion of the contract. This shall not apply if the consumer has not been informed about his right of withdrawal in accordance with Article 16a(1), point (p).

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

- (a) ~~consumer~~ financial services whose price depends on fluctuations in the financial market outside the traders control, which may occur during the withdrawal period, such as services related to:
- foreign exchange; ~~money market instruments~~;
 - **money market instruments**;
 - transferable securities;
 - units in collective investment undertakings;
 - financial-futures contracts, including equivalent cash-settled instruments;
 - forward interest-rate agreements (FRAs);
 - interest-rate, currency and equity swaps;
 - options to acquire or dispose of any instruments referred to in this point including equivalent cash-settled instruments. This category includes in particular options on currency and on interest rates;
- crypto-assets as defined in ~~[Article 3(1)(2) of Commission Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/193 24.9.2020 COM(2020)593 final]~~;
- (b) travel and baggage insurance policies or similar short-term insurance policies of less than one month's duration;
- (c) contracts whose performance has been fully completed by both parties at the consumer's express request before the consumer exercises his right of withdrawal.

3. The consumer shall have exercised his right of withdrawal within the withdrawal period referred to in paragraph 1 if the communication concerning the exercise of the right of withdrawal is sent or the withdrawal button **or a similar function** referred to in ~~paragraph~~

~~5- Article 11a~~ is ~~activated-used~~ by the consumer before that period has expired.

PT would like to question the reasoning for the exclusion of a similar provision to the one established in Article 6 (6) of DMSFD. Indeed, since this provision only covers situations where the right of withdrawal exercised through the respective button, we consider that more details on the procedure that the consumer must follow in order to exercise his right of withdrawal on those situations are warranted. The only reference to such exercise is in this paragraph (3) which appears insufficient and should be further densified, in order to ensure legal certainty regarding the procedure to be followed by the consumer.

4. This Article shall be without prejudice to any rule of national law establishing a period of time during which the performance of the contract may not begin.
5. ~~Member States shall ensure that, for distance contracts concluded by electronic means, the trader provides a possibility to use a withdrawal button in order to facilitate the consumer's exercise of the right of withdrawal. Such button shall be clearly labelled with the words 'Withdraw from Contract' or a corresponding unambiguous formulation.~~

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

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

- 5a. Where an ancillary service relating to the distance contract for financial service 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 terminated, without any penalty for the consumer, if the consumer exercises his right of withdrawal in accordance with this Article.**

In line with our comments to Article 16a (5a), we consider that this approach ensures the maintenance of the "safety net" aim of this proposal while allowing consumers to keep benefiting

from more favourable withdrawal national regimes. This is the case, for instance, of personal injuries and health insurance with a duration superior to six months or insurance-based investment products which, in accordance with Article 118 (1) of the Decree-Law n° 72/2008, of 16 April, benefit from a 30-day period for the exercise of the right of withdrawal.

Additionally, according to Portuguese legislation, insurance policies should be provided (i) after the conclusion of the contract, (ii) in fourteen days for mass risk insurance, unless there is a justifiable reason or (iii) in the deadline agreed by the parties for large risk insurance. If the referred deadlines have lapsed and while the insurance policy is not provided, the insurance policyholder can withdraw the contract with retroactive effect and is entitled to the reimbursement of the premium paid.

Drafting suggestion:

“5b. Member States may maintain or introduce at a national level more favourable conditions for the exercise of the right of withdrawal, when the provisions are in conformity with the Union law.”

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

Where there exists an option for Member States to choose between right of withdrawal and an alternative, such as reflection period, only the corresponding rules of that Union act shall apply to those specific financial services, unless provided otherwise in that act.

Article 16c

Payment of the service provided before withdrawal

1. Where the consumer exercises the right of withdrawal under Article 16b, the consumer may only be required to pay, without any undue delay, for the service actually provided by the trader in accordance with the distance contract. The amount payable shall not:
 - (a) exceed an amount which is in proportion to the extent of the service already provided in comparison with the full coverage of the distance contract;
 - (b) in any case be such that it could be construed as a penalty.

1a. Member States may provide that the consumer cannot be required to pay any

amount when withdrawing from an insurance contract

We support the addition of this provision, as we deem important to keep the option established in Article 7(2) of the current Directive, since we have adopted this possibility in our legal framework. If such option is not kept, the safeguards of our consumers will not be maintained.

2. The trader may not require the consumer to pay any amount on the basis of paragraph 1 of this Article unless the trader can prove that the consumer was duly informed about the amount payable, in conformity with Article 16a(1), point (p). However, in no case may the trader require such payment if the trader has commenced the performance of the contract before the expiry of the withdrawal period provided for in Article 16b(1) without the consumer's prior request.
3. The trader shall, without any undue delay and no later than ~~within~~ 30 calendar days, return to the consumer any sums the trader has received from him in accordance with the distance contract, except for the amount referred to in paragraph 1. This period shall begin from the day on which the trader receives the notification of withdrawal.
4. The consumer shall return to the trader any sums he or she has received from the trader without any undue delay and no later than ~~within~~ 30 calendar days. This period shall begin from the day on which the consumer withdraws from the contract.

Article 16d

Adequate explanations

1. Member States shall ensure that traders are required to provide adequate explanations to the consumer on the proposed financial services contracts that make it possible for the consumer to assess whether the proposed contract and ancillary services are adapted to his or her needs and financial situation. The explanations shall **be given on** ~~include~~ the following elements:
 - (a) **the required pre-contractual information;**
 - (b) the essential characteristics of the proposed contract, including the possible

ancillary services;

We deem important to introduce adjustments to Article 16d, (1).

A first adjustment intends to clarify that the list of elements included in this provision is illustrative, as the consumer may request explanations regarding other elements of the contract. Therefore, **the second sentence of the first paragraph should include a reference to “at least”.**

A second adjustment aims to ensure a reference to information regarding the process necessary to conclude the contract, that is, the various stages of the process necessary to conclude the contract, as well as the documents that must be made available by consumers to the trader for that purpose.

Drafting suggestion:

“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 **be given, at least, on** ~~include~~ the following elements:

[...]

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

- (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.~~

Why was the final part deleted? The subject of the consequences of payment default or late payment by the consumer clearly might demand adequate explanations.

We suggest also to establish that the tools used to provide explanations/assistance must be appropriate to the complexity of the product/service, the channel used the information being provided and the contracting process.

Drafting suggestion:

“1a. The traders shall also be required to use assistance tools appropriated to the complexity of the financial service, the information being provided, the distribution channel and the contracting process.”

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 shall specify the manner in which and the extent to which the explanations referred to in paragraph 1 are given, and may adapt it 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.

We see no need to add paragraph 2a. A provision such as this was never a necessity under the current DMFSD and establishing it will further dilute the minimum protection levels for consumers of financial services, as it will increase unnecessary variability across the different Member States.

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.

Another adjustment refers to a misuse of the reference to “online tools” that seems to imply that these tools do not encompass human intervention, which is not accurate. Therefore, we propose the use of the term “automated means or systems of communication”, which, in our view, is more adequate to the objectives pursued by this proposal.

Drafting suggestion:

“3. Member States shall ensure that, in case the trader uses ~~online tools~~ **automated means or systems of communication**, the consumer shall have a right to request and obtain human intervention.”

3a. Member States may maintain or adopt more stringent provisions on adequate explanations than those referred to in this Article.

4. Where another Union act governing specific financial services contains rules on the **adequate explanations** information to be provided to the consumer, **only rules on the adequate explanations of that Union act shall apply to those specific financial services, unless provided otherwise in that act** prior to the conclusion of the contract, paragraphs 1 to 3 of this Article shall not apply. 2

Article 16e

Additional protection regarding online interfaces

~~Without prejudice to Directive 2005/29/EC of the European Parliament and of the Council¹³ and Council Directive 93/13/EEC¹⁴, Member States shall adopt measures requiring that traders, when concluding financial services contracts at a distance, do not use the structure, design, function or manner of operation of their online interface in a way that could distort or impair consumers' ability to make a free, autonomous and informed decision or choice.~~

Considering that the Digital Services Act is not applicable to financial services [Article 3, paragraph (a) of the said Act and Article 1, (4) of Directive (EU) 2015/1535] and that the UCPD focuses on unfair commercial practices, a legal concept that might not necessarily include issues related to structure, design, function or manner of operation of the trader's online interface. In particular, when used in a way that could distort or impair consumers' ability to make a free, autonomous and informed decision or choice, it would be preferable to maintain Article 16e, and further densify this provision. For instance, by using EBA's "Opinion on disclosure to consumers of banking services through digital means" ([link](#)).

(3) In Article 29, paragraph 1 is replaced by the following:

'1. Where a Member State makes use of any of the regulatory choices referred to in Article 3(4), Article 6(7), Article 6(8), Article 7(4), Article 8(6), Article 9(1a), Article 9(3), Article 16(2), Article 16(3), and Article 16a(5a) and Article 16d(3a), it shall inform the Commission thereof by [date of transposition], as well as of any subsequent changes.'

(4) In Article 30, the following subparagraph is inserted:

'By [5 years from entry into force], the Commission shall submit a report on the application of this Directive regarding the distance contracts for financial services to the European Parliament and the Council. That report shall include in particular an assessment of the provision of financial services by means of an online interfaces including effects of the structure, design, function or manner of operation of online interfaces on consumer's ability to make decisions. The report shall be accompanied, where necessary, by a legislative proposal to adapt this Directive to the development in the field of consumer rights.'

Article 2

Transposition

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

They shall apply those provisions from [*the date after 24+6 months from adoption*].

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

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

Article 3

Repeal

Directive 2002/65/EC is repealed with effect from [*24+6 months from adoption*].

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

Article 4

Entry into force

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

Article 5

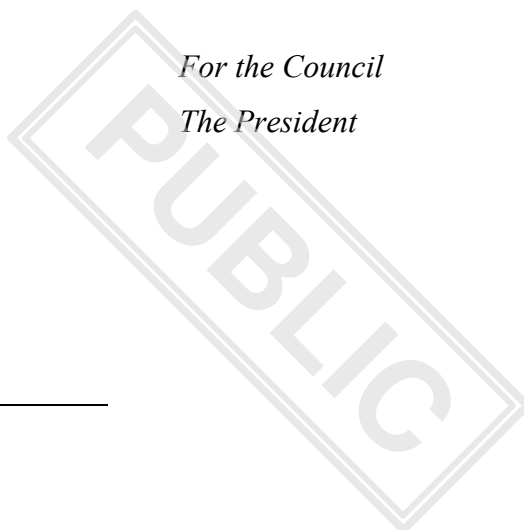
Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President



Correlation Table

Directive 2002/65/EC	Directive 2011/83/EU, as amended by this Directive
Article 1(1)	-
Article 1(2), first subparagraph	Article 3(1b), second subparagraph
Article 1(2), second subparagraph	-
Article 2, point (a)	Article 2, point (7)
Article 2, point (b)	Article 2, point (12)
Article 2, point (c)	Article 2, point (2)
Article 2, point (d)	Article 2, point (1)
Article 2, point (e)	Article 2, point (7)
Article 2, point (f)	Article 2, point (10)
Article 2, point (g)	-
Article 3(1)	Article 16a(1)
Article 3(1), point 1(a), (b) and (c)	Article 16a(1), point (a) and (b)
Article 3(1), point 1(d)	Article 16a(1), point (d)
Article 3(1), point 1(e)	Article 16a(1), point (e)
Article 3(1), point 2(a)	Article 16a(1), point (f)
Article 3(1), point 2(b)	Article 16a(1), point (g)
Article 3(1), point 2(c)	Article 16a(1), point (i)
Article 3(1), point 2(d)	Article 16a(1), point (j)
Article 3(1), point 2(e)	Article 16a(1), point (k)
Article 3(1), point 2 (f)	Article 16a(1), point (l)
Article 3(1), point 2 (g)	Article 16a(1), point (m)
Article 3(1), point 3(a)	Article 16a(1), point (p)

Article 3(1), point 3(b)	Article 16a(1), point (q)
Article 3(1), point 3(c)	Article 16a(1), point (r)
Article 3(1), point 3(d)	Article 16a(1), point (s)
Article 3(1), point 3(e)	-
Article 3(1), point 3(f)	Article 16a(1), point (t)
Article 3(1), point 3(g)	Article 16a(1), point (u)
Article 3(1), point 4(a)	Article 16a(1), point (v)
Article 3(1), point 4(b)	-
Article 3(2)	-
Article 3(3), point (a)	Article 16a(2), first subparagraph
Article 3(3), point (b) first, second, third and fifth indent	Article 16a(2), second subparagraph
Article 3(3), point (b), fourth indent	-
Article 3(3), second subparagraph	Article 16a(2), third subparagraph
Article 3(4)	-
Article 4(1) and (5)	Article 16a(6)
Article 4 (2), (3), (4)	-
Article 5(1)	Article 16a(3), first subparagraph and (4), first subparagraph
Article 5(2)	-
Article 5(3)	-
Article 6(1), first subparagraph, first sentence	Article 16b(1), first subparagraph
Article 6(1), first subparagraph, second sentence	-
Article 6(1), second subparagraph, first indent	Article 16b(1), second subparagraph, point (a)
Article 6(1), second subparagraph, second indent	Article 16b(1), second subparagraph, point (b)

Article 6(1), third subparagraph	-
Article 6(2), point (a)	Article 16b(2), point (a)
Article 6(2), point (b)	Article 16b(2), point (b)
Article 6(2), point (c)	Article 16b(2), point (c)
Article 6(3), (4), (5), (6), (7) and (8)	-
Article 7(1), introductory wording	Article 16c(1), introductory wording
Article 7(1), first indent	Article 16c(1), point (a)
Article 7(1), second indent	Article 16c(1), point (b)
Article 7(2)	-
Article 7(3)	Article 16c(2)
Article 7(4)	Article 16c(3)
Article 7(5)	Article 16c(4)
Article 9	-
Article 10	-
Article 11, first and third subparagraphs	Article 24(1)
Article 11, second subparagraph	-
Article 12 (1)	Article 25, first subparagraph
Article 12 (2)	-
Article 13(1)	Article 23(1)
Article 13(2)	Article 23(2)
Article 13(3)	-
Article 14	-
Article 15	-
Article 16	-
Article 17	-
Article 18	-

Article 19	-
Article 20	-
Article 21	-
Article 22	-
Article 23	-



JUSTITS MINISTERIET

Ministry of Justice

Date: December 13, 2022
Office: Formueretskontoret
Contact: Benjamin Vynne
Muschinsky
Our ref.: 2022-709-0399
Doc.: 2668762

General remark

Please note that the Danish government has stepped back following the general election in Denmark on 1 November, and that Denmark maintains a parliamentary reservation as well as a scrutiny reservation regarding the proposal. Denmark can therefore not declare a final position at present. With this in mind, we have the following technical remarks:

The general scope of the proposal

As previously stated, we find that the Directive should not apply to contracts and products covered by or explicitly excluded from the scope of other Union acts. It is our general position that such specific products should be regulated by product specific regulation, and that Member States should be allowed to extend product specific legislation in national law to also include exempted products, rather than applying a general directive which does not take into account the special characteristics of the specific products. Further, it would contribute to greater clarity and legal certainty if Member States were allowed to apply the same rules to the same financial products. With this in mind, we are not convinced that the added sentence in recital 7, provides the needed clarity as it states that the safety net feature also applies to “financial services excluded from the scope of Union acts governing specific financial services”. We therefore propose that the cited sentence is removed.

Article 11a

We support any measure that improves the consumer’s access to make use of the right to withdraw.

Therefore, we welcome that the withdrawal button should be easily accessible to the consumer and we therefore stress that the withdrawal button

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should be available for the consumer where the consumer seeks information regarding the contract in the period of the right to withdraw. This would typically be in the material sent to the consumer by e-mail.

However, as regards the scope of the application of the withdrawal button, we are hesitant towards such expansion, especially as there has not been conducted an impact assessment on the consequences (of expanding the scope of the provision to all distance contracts concluded by the means of an online interface).

Such a provision may entail administrative and economic consequences, which, as a general rule, should be assessed by relevant EU bodies and on national level, with the involvement of relevant stakeholders, before deciding on such an important issue.

We therefore propose, as a compromise, that the withdrawal button should apply in financial services contracts concluded at a distance, and that Member States should have the option to apply the withdrawal button in other distance contracts concluded by the means of an online interface. Thereby leaving it up to member states to decide if they wish to apply the withdrawal button to all contracts and services covered by the CRD.

Article 16b

As regards Article 16b, it is important that mortgage loans concluded at a distance are not covered by the Article. We therefore welcome and support the clarification in the second sentence of Article 16b, paragraph 6.



Council of the European Union
General Secretariat

**Interinstitutional files:
2022/0147 (COD)**

Brussels, 12 January 2023

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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 14631/22 REV2

Delegations will find attached comments from BE, DE, DK, FI, GR, HR, IT, LV, PL, PT, SI and SK

German Delegation

Proposal for a Directive concerning financial services contracts concluded at a distance and repealing Directive 2002/65/EC („DMFSD“)

Comments on Presidency Forth Redraft (14631/2/22 REV 2)

General

- We thank the CZE-Presidency for their endeavour in the last months. The draft directive has been improved in some important points.
- We especially thank the Presidency for their openness towards the German proposal for the introduction of a **horizontal withdrawal button into the CRD**. This is a considerable progress for consumer protection in the digital world. We are very happy that we found a solution in this dossier which seems to be acceptable for all Member States and for the Commission.
- However, due to the very tight time scheme and the political process which has to be gone through in Germany, we still have a positive scrutiny reservation.

Withdrawal Button

- We thank the Presidency for their openness towards the German proposal for the introduction of a **horizontal withdrawal button into the CRD**, for the good co-operation, and for the support.
- The horizontal withdrawal button is an additional solution that allows consumers to withdraw online from a distance contract as easily as to conclude it. We believe that this is the right instrument to enable consumers to exercise their rights more easily and for saving time and resources.
- Thanks also to the Commission for the support while drafting this new article and discussing the interactions with other parts of the CRD. Finally, we also would like to thank all the other delegations that have supported us in this regard.

Subsidiarity

- From our point of view, the rules and recitals on subsidiarity would still have been worth a deeper insight. National lawmakers must be sure which directive to submit individual financial services. Therefore, we have asked the Commission several

times to deliver a non-exhaustive list on all sectoral legislation for financial services that may prevail over the rules of the present directive.

- Significant legal uncertainty remains if consistency with other legal acts is only addressed in the recitals. Therefore, we would still prefer to reflect the ideas contained in recitals 13 to 13e in the text of the directive itself. We consider to come back to this point in the course of the trilogue.
- Furthermore, some legal provisions on specific financial services contained in other directives should still be adjusted to the DMFSD following the new rules on subsidiarity, e.g. *inter alia* Art. 14 para. 6, 7 and 10 of the Mortgage Credit Directive (MCD) and Art. 39 subpara. 2 of the Payment Services II-Directive. This especially applies to Art. 14 para. 7 of the MCD. Here, creditors and others upon the supply of the ESIS leaflet “*shall be deemed to have fulfilled the requirements*” of the old DMFSD. However, according to the explanations on subsidiarity contained in the present directive, the DMFSD would no longer be applicable. We, therefore, **strongly recommend to delete Art. 14 para. 7 of the MCD** to avoid any misunderstandings before the General Approach so that Germany can give up its scrutiny reservation.

Other Aspects

- We regret that due to the tight time frame it was not possible to further elaborate on Art. 16e. In this context we also regret that Art. 16a para. 4a subpara. 3 on colours used for providing pre-contractual information was deleted, too. Due to the great risk of misuse and manipulation of consumers through deceptive and/or manipulating design practices we see the need to ensure consumers are protected against those practices. The topic of dark patterns will most probably play an important role in the upcoming “Fitness Check of EU consumer law on digital fairness”. So this time frame seems to be a bit tighter than the proposed 5 years for the Commission report as foreseen in Article 30. This Fitness Check should also cover financial services.
- In Art. 16a para. 2 there is still a rule missing about what happens if the consumer does not give his consent that his telephone call is recorded. It should be made clear that it is possible for the consumer to proceed with the call without being recorded.

2022 12 12 DMFSD - Red lines – IT

IT maintains that the text is not yet mature to be discussed in COREPER and that it needs further analysis, under the Swedish PCY. In particular, we have the following red lines:

1. In order to avoid legal uncertainties, the **definition of “financial services”** should be better drafted as it is very broad and subject to interpretation. It should be clarified that a service can only fall under the said definition when it has been identified as “financial” by an Union act or a national legislation. The current formulation (see art. 1(a)(1b)) DMFSD referring to art. 2 nr. 12 CRD) does not make it possible to clearly identify which financial services fall within the scope of the directive. Consequently, it makes it difficult for consumers to know their rights, for suppliers to know their obligations and for sector specific authorities to have a clear understanding of their supervisory duties.
2. The **principle of *lex specialis*** should receive proper application, meaning that, where EU sectoral legislation exists, the DMFSD2 does not apply. In other words, whenever an EU sectoral legal act regulates a specific financial service, this discipline shall in any case prevail on the one under the present proposal, regardless the existence of an actual “conflict” between the two or irrespective of the presence of rules in the specific matter (pre-contractual information, right of withdrawal and adequate explanation), for the sake of clarity and legal certainty, as well as the understanding of the scope of the supervisory duties of sector specific authorities (see art. 1(a)(1b), art. 16a(6), art. 16b(6), art. 16d(4) and recitals from 13 to 13e). In the same perspective, we believe that the right of withdrawal provided for by DMFSD2 should not apply to products/services already regulated by sectoral legislation as it would undermine the choices already made by the legislator in each sector. Otherwise, the obligation to apply the right of withdrawal where sectoral legislation exists but does not provide for it could be inconsistent with the nature of the service provided and lead to legal uncertainty (e.g. in the context of payment services under the PSD2).
3. The possibility for consumers to sign the contract without being preliminarily informed should be excluded (see **art. 16a(4b)**).
4. The extension of the **withdrawal period to 30 calendar days** in distance contracts relating to **personal pension operations** (art. 16b(1)) should be kept in the text.
5. Minimum harmonization clause in **art. 16a(5a)** and **art. 16d(3a)** should be kept in the text.

THE SLOVAK REPUBLIC
(13.12.2022)

The Czech Presidency has prepared for the attaché meeting which took place on 12. December 2022 the new proposal of the provision modifying the withdrawal button. We are pleased to send you below our position on that. In general, we are pleased that the text of proposal on financial services contracts concluded at a distance and repealing Directive 2002/65/EC is going on the right direction. However, we are of the opinion that there is still room for technical fine-tuning of the text.

We are not happy to apply withdrawal button for whole Directive 2011/83/EU ("CRD"). We consider it problematic to introduce a withdrawal button as an obligation for all traders who conclude contracts with consumers at a distance via an online interface. Directive 2011/83/EU already currently establishes the right of consumers to withdraw from the contract in a simple way - by making any unequivocal statement setting out the consumer's decision to withdraw from the contract, including the possibility to withdraw from the contract, use a model withdrawal form that the trader is obliged to provide to the consumer (Article 11, paragraph 1 of Directive 2011/83/EU), while the trader is also obliged to inform the consumer about the conditions, time limit and procedures for exercising the right to withdraw from the contract (Article 6(1)(h) of Directive 2011/83/EU).

The introduction of the aforementioned obligation for all traders concluding contracts with consumers at a distance via an online interface, i.e. for practically all online stores, in our opinion, it could represent an excessive burden for these business entities, especially when it comes to online stores falling into the category of SMEs.

In addition, in our opinion, the proposal is not sufficiently examined even from the point of view of its environmental aspects, i.e. j. whether the introduction of the button to withdraw from the contract would result in more frequent use of the right to withdraw from the contract and thus an increased volume of returned goods. We are of the opinion that the issue of the possible widespread introduction of the button to withdraw from the contract should be subjected to a detailed analysis and the European Commission should deal with it as part of the ongoing fitness check of EU consumer law (the so-called Fitness Check on Digital Fairness), which should be completed by the report of the European Commission in the spring of 2024. As part of this suitability check, Directive 2011/83/EU is also being reviewed in order to determine whether it ensures a high level of consumer protection in the digital environment.

**CROATIAN COMMENTS ON THE 4TH PRESIDENCY COMPROMISE PROPOSAL REGARDING
DISTANCE SELLING OF FINANCIAL SERVICES (ST 14631/2/22 REV2)**

Rec 8

RED LINE: We don't agree with the proposed explanations of the definition of financial services in the Rec 8. HR proposes amendments of Article 2, point 12 of CRD – i.e. the definition of financial service to include housing savings services and leasing.

EC said that we are to wait for EC's judgement on the matter of financial services, however that ruling won't address the nature of operative leasing. We should prescribe this services as financial by amendments of Art 2 pint 12 of CRD, alongside with all housing savings services (including ones provided by building societies).

Second - we would like clarification whether crowdfunding services as defined by Crowdfunding Regulation (2020/1503) are covered by this Proposal? If they are not, we propose that this exemption is explicitly prescribed in Article 16.b paragraph 2.

Art. 3(1b) CRD and Recital 15

We propose to include also Article 6a ~~and 16e~~. Also, we disagree with deleting reference to the Article 24 Paragraphs 2 to 4 of the CRD.

Regarding Recital 15, for the sake of clarity of the example, in the last sentence we propose adding the full last sentence from the Recital 17 of the current DMFSD to Recital 15 of this Proposal. So, the last sentence would read:

*Adding new elements to an initial service agreement, **such as a possibility to use an electronic payment instrument together with one's existing bank account**, does not constitute an "operation" but an additional contract.*

Regarding Article 6a of the CRD, although there are not many examples of financial services being offered on online marketplaces, in such cases consumer needs to be informed of the counterparty (whether the service provider is a trader or not) and whether the consumer rights stemming from Union consumer protection law apply to the contract.

Regarding Article 24 Paragraphs 2 to 4 of the CRD, we believe that those paragraphs should remain in the text. Namely, provision on the criteria for the application of penalties regulates only indicative and non-exhaustive criteria that are common in every MS, thus these provisions don't present any novelty in MS law on penalties. Also, this provision needs to be retained in the Proposal because the same criteria should be applied in deciding on penalties for all infringements of the consumer law. Regarding provisions prescribing the rate of penalties in case of widespread infringements and widespread infringements with a Union dimension, if there are such infringements in financial sector, penalties should be dissuasive and effective, especially given the damage consumer are experiencing in cases of these infringements. Therefore, fines need to be proportionate to the infringement and Member States should set in their national law the maximum fine for such infringements at a level that is at least 4 % of the trader's annual turnover.

*'(1b) **Only** Articles 1 and 2, Article 3(2), (5) and (6), Article 4, **Article 6a**, **Article 8(6)**, **11a**, Articles 16a to ~~16e~~ **16d**, Article 19, Articles 21 to 23, **Article 24(1), (2), (3) and (4)**, ~~and~~ Articles 25 ~~and to~~ **26***

27 and Article 29 shall apply to distance contracts concluded between a trader and a consumer for the supply of financial services.

Art 16a para 1 and 3

We remain on the request to delete words “or any corresponding offer” in paras 1 and 3 since this explicit reference does not change the traders’ obligation in any way **and is therefore redundant**. Announced changes of CRD should delete this wording in corresponding articles.

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

Art 16a(1)(b)

Although, Para 5a allows MS to prescribe stricken provisions on precontractual obligations, we still request that this provision explicitly regulates traders’ obligation to ensure e-communication through means **which guarantee that the consumer can keep correspondence, including the time of such correspondence, with the trader on a durable medium** and that such obligation needs to be guaranteed on Union level. This right is already guaranteed by Art 6 (1) c of the CRD and given the sensitivity of financial services and complexity of this type of services for the average consumer, same right needs to be guaranteed by this Proposal. Consumer needs to have all the correspondence between him and the trader to ensure certainty of what and when was disputed regarding his contract.

Additionally, we propose to amend this Proposal and insert a new definition of e-mail address in Article 2 of the CRD. The only available definition of the e-mail address we found in the Article 2 e-Privacy Directive (2002/58/EZ), stating that e-mail presumes any message sent over a public communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient. Traders are of the opinion that this includes contact forms. In order to ensure that contact forms and similar means of e-communication that don’t allow consumer to keep correspondence are excluded from the scope of this provision, we should prescribe that definition of e-mail that would only include messages (text, voice, sound image,...) sent from e-mail address and which is recorded on a server sending such messages.

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

Art 16a(1)(c)

We believe that changes of this provision could be misleading for the consumers when we read it in relation to the point (b) of this paragraph.

Namely, point (b) of this paragraph already regulates means of communication with the trader/trader on whose behalf he is acting and such communication necessarily includes the possibility for the consumer to lodge his complaint through that means of communication.

If provision regulated by point c) is limited on the information where consumer can file a complaint (in the sense which electronic means of communication can be used for that purpose) the provision could be misleading because there is a provision (namely the point b) regulating electronic means of communication that differs from means where consumer can file a complaint.

If this provision is limited on the question to whom consumer can file a complaint, either to the trader or to the trader on whose behalf he is acting, there is no justification for such limitation, given that they are jointly and severally responsible to handle consumer complaints.

Art 16a(1)(e)

We find that the previous text was better. It could be interpreted broadly and could include other relevant information such contact address, which, in our view, was more appropriate. Therefore we support to the previous text.

*“(e) where the trader's activity is subject to an authorisation scheme, the **particulars name and address** of the relevant supervisory authority;”*

Art 16a(1)(n) and Recital 19

RED LINE: We strongly disagree with deletion of point n. Although there are numerous MS comments on the scope of the trader's obligation relating information on risk-reward profile, such obligation undoubtedly needs to be regulated by this Proposal as one of decisive reason for the consumer to conclude the contract. In relation to the comments on the clarity of the provision, 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. And this obligation needs to be harmonized.

Thus, we propose to reintroduce point n) in the text and amend it slightly. Namely, we suggest to add the following text at the end of the point: *including 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;”

Art 16a(1)(t)

We believe that the wording of this provision should remain as it was originally proposed. Average consumer isn't informed of the regulations on the competence of the court and therefore this

information should be included in the pre-contractual information to facilitate consumer protection in cases of infringement of consumer rights.

Additionally, we propose to add the point z) on the guarantee funds from the current DMSFD.

Art 16a(4) and Recital 20a

In addition, we suggest keeping provision from Article 5 Paragraph 3 of the current DMFSD. Such provision is not only favourable for the consumer, but also ensures easy change of the means of distance communication used in age of fast technology growth. Given that this provision has been in force for quite some time, traders have already adjusted their business to this obligation and keeping this provision wouldn't be burdensome for them.

The consumer is entitled to change the means of distance communication used, unless this is incompatible with the contract concluded or the nature of the financial service provided."

Art 16a(6) and Recital 13b

Obligation to provide consumer with pre-contractual information in special Union laws includes a specific scope of information, e.g. information about the distributor's legal form, his cooperation with insurance companies, about the product itself, etc. This obligation regulated by special Union acts should not exclude obligation to provide pre-contractual information under this Proposal, but rather should complement them.

Therefore, we propose to delete **only** and add **also** after *shall*.

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

Art 16b(1)(b) third subparagraph

Consequences of omission to inform consumer of the right to withdraw are unclear, does it mean that in such case consumer has indefinite right to withdraw? There is no time limit for right to withdraw? Is that is the case the provision need to be explicit on that consequence.

Art 16b(2)(a)

If this reference to the definition of crypto assets in MiCA Regulation is deleted from the text, it is necessary to prescribe an appropriate and applicable definition in this Proposal in order to ensure legal certainty.

Art 16b(6)

As explained before, obligation to provide consumer with pre-contractual information in sectorial EU legislation includes a specific scope of information, e.g. information about the distributor's legal form, his cooperation with insurance companies, about the product itself, etc. This obligation regulated by specific Union acts should not exclude obligation to provide pre-contractual information under this Proposal, but rather should complement them.

Regarding the correlation between right to withdraw from the contract and reflection period, in order to ensure high level of consumer protection in financial sector, consumer's right to withdraw should never be affected by the right to reflection.

Therefore, as in Art16(6) we propose to delete **only** and add **also** after *shall* in the first sentence and to delete the second sentence.

*"Where another Union act governing specific financial services contains rules on the right of withdrawal, ~~only~~ the right of withdrawal rules of that Union act shall **also** apply to those specific financial services, unless provided otherwise in that act. ~~Where there exists an option for Member States to choose between right of withdrawal and an alternative, such as reflection period, only the corresponding rules of that Union act shall apply to those specific financial services, unless provided otherwise in that act..~~"*

Art 16c(1a) and Recital 23

We would like an explanation of necessity of this provision.

Art 16d(2a)

As it was explained by CZ PRES that this is merely an option for MS, text should reflect that, thus word "*shall*" needs to be replaced with "*may*".

Art 16e and Recital 12

In order to support deletion of the Art 16e and addition in Recital 12, Recital 12 needs to specify how the Commission will assess how the structure, design, function or manner of operation affects the consumers' ability to make a free, autonomous and informed decision. Shall this assessment result with soft law such as guidance or a delegated act that shall regulate this matter concretely?

Comments from Latvia :

1. The new 11a. Article that introduces the “withdrawal button” requirement for all services included in the scope of the Directive. Latvia has concerns regarding how urgently and without proper discussion this proposal was included in the text. We draw attention to the fact that such a proposal will have severe and far-reaching consequences and must be thoroughly analysed and discussed. First, this proposal, requires an impact assessment regarding other spheres/industries involved in its application. An impact assessment for such a proposal is imperative to understand the proportionality of such requirement – gain for consumers vs the cost for industry. Second, Member States should be allowed sufficient time to at least conduct internal discussions with the industry and other institutions on this issue in order to clarify the potential costs for service providers, the impact on consumers and other potential side effects. Without this additional discussion/evaluation, Latvia cannot give support to the new Art.11a.

2. Latvia expresses its regret that a number of its and other Member States' editorial proposals, which in our view are useful and would significantly improve the text, have not been taken into account.

a. In our view, 16a. the article still needs editorial improvement. 16a. in paragraph 2 of the article, the problems related to the GDPR are still not resolved. 16a. Article 4b. in the paragraph, it is still unclear whether it applied only to consumers with disabilities, and it is unclear what means of distance communication are meant in the 4b. paragraph.

b. In our view, 16e has not been discussed enough. justification of deletion of Article. We draw attention to the fact that in the discussions of the working group it was indicated that 16e. article may have significant added value, as it will cover those means of distance communication online that are not covered by the Digital Services Act.

BE comments and text suggestions

1. Recital (13a) – examples of Union acts governing specific financial services containing rules on pre-contractual information

We suggest to mention some additional examples in recital (13a) in order to further clarify the relationship between the pre-contractual information requirements in this Directive and the pre-contractual information requirements in the existing Union acts governing specific financial services (in particular with regard to investment services and insurances):

Text suggestion:

(13a) With regard to pre-contractual information, certain Union acts governing specific financial services contain rules adapted for that specific financial services designed to ensure that consumers are able to understand the essential characteristics of the proposed contract. For instance, Regulation (EU) 2019/1238 on a pan-European Personal Pension Product (PEPP)¹, Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basis features², Directive 2014/65/EU on markets in financial instruments³ and Directive (EU) 2016/97 on insurance distribution⁴, provide for pre-contractual information both in the basic specific Union act and also empower the Commission to adopt delegated or implementing acts. Only the pre-contractual information requirements laid down in such Union acts should apply to those specific consumer financial services, unless provided otherwise in those acts. This should also be the case where the Union act governing specific financial services provides different or minimal rules on pre-contractual information in comparison with the rules laid down by this Directive.

2. Recital (13c) – Article 16d(4) adequate explanations in Union acts governing specific financial services

Recital (13c) provides that certain Union acts governing specific financial services already lay down rules on adequate explanations to be provided by the traders to the consumers with respect to the proposed contract.

We understand from recital (26) that the purpose of these rules is to provide assistance to the consumer in order to decide which financial service is the most appropriate for his or her needs and financial situation.

Consequently, we would like to know whether the rules of conduct in Directive 2014/65/EU on investment services (MiFID II), for instance on the assessment of the suitability/appropriateness of the product or service are also to be considered as rules on adequate explanations laid down in another Union act within the meaning of Recital (13c). The same goes for the rules on the demands and needs test laid down in Directive 2016/97/EU on insurance distribution (IDD).

If this is the case, we propose to add these directives as examples in recital (13c) in order to ensure legal certainty on which rules are applicable to these specific financial services.

¹ OJ L 198, 25.7.2019, p. 1

² OJ L 257, 28.8.2014, p. 214.

³ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349–496).

⁴ Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (OJ L 26, 2.2.2016, p. 19–59).

Text suggestion:

(13c) With regard to rules on adequate explanation, certain Union acts governing specific financial services, such as Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property⁵, Directive 2014/65/EU on markets in financial instruments⁶ and Directive (EU) 2016/97 on insurance distribution⁷, already lay down rules on adequate explanations to be provided by the traders to the consumers with respect to the proposed contract. In order to ensure legal certainty, the rules on adequate explanations set out in this Directive should not apply to financial services falling under Union acts governing specific financial services that contain rules on adequate explanation to be provided to the consumer prior to the conclusion of the contract.

⁵ Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/45/EC and 2013/36/EU and Regulation No 1093/2010 (OJ L 60, 28.2.2014, p. 34)

⁶ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349–496).

⁷ Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (OJ L 26, 2.2.2016, p. 19–59).

Comments by FI on the fourth Presidency compromise proposal regarding distance selling of financial services

The latest compromise proposal is, again, a step in the right direction. We thank the Presidency for all the good work done in the context of this proposal. However, it is clear that there are still a number of issues which need to be discussed at the expert level in order to ensure sufficient level of legal certainty, in particular as regards the interplay of the proposal with the product-specific legislation.

We welcome the amendments made by the Presidency in the recitals to clarify the interplay between the product-specific legislation and the proposal. In order to reflect the amendments also in the legislative text, we suggest certain amendments into the proposal. You'll find our comments and suggestions with explanations below.

Please note that we have tried to improve the wording of our suggestion for Article 16b(6a) based on the comments and questions we have received.

1) Art. 16b (Right of withdrawal from distance contracts for financial services)

We note that the proposed paragraph 6 in the fourth redraft causes an illogical diversity of rules among products of the same nature.

For example, under [the current CCD](#), consumer credit agreements involving a total amount of credit less than EUR 200 or more than EUR 75 000 are excluded from the scope of application of that directive. In accordance with the current wording of the proposal for DMFSD, credit agreements involving a total amount of credit less than EUR 200 and more than EUR 75 000 would, consequently, be subject to provisions under the proposal for DMFSD whereas the provisions of the CCD would apply to credit agreements involving a total amount of credit between EUR 200 and EUR 75 000.

This outcome is undesirable as it leads to application of different set of rules to products of the same nature, i.e. consumer credit agreements, depending on the amount of credit involved. As a result, the provisions on right of withdrawal under Articles 14 and 15 of the CCD would apply to consumer credits involving a total amount of credit between EUR 200 and EUR 75 000 whereas the provisions of Articles 16b and 16c of the proposal for DMFSD would apply to consumer credits involving a total amount of credit less than EUR 200 or more than EUR 75 000. The said provisions differ from each other e.g. as regards to the amount payable by the consumer in case he/she exercises the right of withdrawal.

Similar diversity would concern also credit agreements for consumers secured by a mortgage falling outside the scope of the MCD and certain pension products outside Solvency II.

It would be more suitable that a MS could apply product-specific rules on right of withdrawal on all those products which are at the national level within the scope of the product-specific legislation, because sector-specific legislation takes better into account the specific characteristics of those specific products.

Furthermore, certain Union acts provide consumers with different rights similar to the right of withdrawal, such as a reflection period or a right to cancel. These rights are not necessarily alternative to the right of withdrawal and may even be provided as an exclusive option (e.g. reflection period under the Crowdfunding regulation (EU 2020/1503)).

In order to avoid this fragmentation in the applicable rules on right of withdrawal and to take into account the different forms of right to terminate the contract and the reflection period (as already mentioned in recital 13b), we propose amendments to Article 16b as follows (the amendments in yellow):

“6. Where another Union act governing specific financial services contains rules on the exercise of the right of withdrawal **or a corresponding right to terminate the contract or a reflection period**, only rules of that Union act shall apply to those specific financial services, unless provided otherwise in that act. Where there exists an option for Member States to choose between right of withdrawal and an alternative, such as reflection period, only the corresponding rules of that Union act shall apply to those specific financial services, unless provided otherwise in that act.”

“6a. By way of derogation from this Article, Member States may apply the rules of another Union act on the right of withdrawal or on a corresponding right to terminate the contract or on a reflection period also to financial services that are excluded from the scope of that Union act.”

2) Art. 16a (Information requirements for distance contracts for financial services)

We thank the Presidency for adding new second subparagraph into Article 16a(6). It is a major step in the right direction in regulating the interplay between the sector specific legislation and the proposal. However, we point out that this provision should cover also those cases where the consumer does not have a right of withdrawal. We refer to point (p) of paragraph 1 according to which the consumer must be informed also about the absence of the right of withdrawal.

Hence, we propose a following amendment into the wording (the amendment in yellow):

“By way of derogation from the first subparagraph, **where another Union act governing specific financial services does not contain rules on information about the right of withdrawal**, the trader shall inform the consumer about the existence or absence of such a right in accordance with Article 16a(1), point (p) **[deleted]**.”

In order to strengthen the information awareness of the consumer, we further suggest adding the following sentence to Article 16a(4a) (the amendment in yellow):

“In case of layering of information, it shall be possible to view, save and print the information referred to in paragraph 1 as one single document. **The trader shall ensure that the consumer views all the pre-contractual information referred to in paragraph 1 before the conclusion of the distance contract.**”

The idea behind our suggestion is to ensure that a consumer could not enter an agreement before viewing all the information. From a practical point of view, it should be sufficient for the trader to use a box to be ticked or to make sure that layered information have been opened or scrolled through etc. Regarding the use of email or post for the provision of pre-contractual information, we are under the impression that layering technique could not be used for such methods of delivery. As the burden of proof is laid down under Article 16a(5) on the trader, the information on ensuring that the consumer has viewed the information in case of layering could be saved in a similar manner as the information on the provision of pre-contractual information itself is to be saved.

3) Art. 3(1b) (Scope)

We still need to come back to subparagraph 2 of Article 3(1b) of the proposal. We thank the Presidency for adding new recital (9a). It clarifies that we can apply Article 21 when a contract on financial services is concluded in other manner than in distance selling. However, our understanding is that subparagraph 2 of Article 3(1b) together with full harmonization principle would prevent us from applying Article 21 in distance selling to successive operations or to a series of separate operations, i.e. we could only apply Article 21 to the initial agreement in the distance selling of financial services.

For instance, acquiring a credit card constitutes an 'initial service agreement' whereas payment by credit card constitutes an 'operation' referred to in subparagraph 2. It is important for us (and to our national parliament) that we do not have to lower our level of consumer protection in this regard. As we understand it might be difficult to make this provision obligatory for all the MSs at this stage of the negotiations, we suggest an option for MSs which could be formulated in the following manner (the amendment in yellow):

"Where contracts referred to in the first subparagraph comprise an initial service agreement followed by successive operations or a series of separate operations of the same nature performed over time, the provisions referred to in the first subparagraph shall apply only to the initial agreement. **Member States may decide to apply Article 21 also to successive operations and separate operations of the same nature performed over time.**"

4) Art. 11a (Withdrawal button)

Furthermore, we would like to note that Article 11a should only concern cases where the consumer has a right of withdrawal and that this should be clear based on the article text itself. We believe it is of course the intention that withdrawal button shall be placed on the online interface only in such cases where the consumer has the right of withdrawal. Otherwise we could end up in a situation which is highly misleading for the consumer, i.e. to have a withdrawal button available even though according to the law the consumer does not have any right of withdrawal.

Thus, we suggest that a slight addition is made to subparagraph 1 of paragraph 1 of Article 11a as follows (the amendment in yellow):

"Where the consumer has a right of withdrawal in accordance with Union legislation, the trader shall, for distance contracts concluded by the means of an online

interface, ensure that the consumer can withdraw from the contract on that same online interface by using a button or a similar function.”

5) Other remarks

Recitals 13 and 13a

The text of recital 13 should be modified taking into account e.g. the new second subparagraph of Article 16a(6) and Article 11a. For instance, those provisions of the proposal are applied also in such cases where sector-specific legislation includes rules on information obligations and right of withdrawal. Hence, it is not true, as mentioned in the last sentence of recital 13, that only provisions of other Union acts are applicable.

Likewise, recital 13a requires updating due to new second subparagraph of Article 16a(6).

Recital 20a

In our view, the last sentence of the recital 20a should read as follows: “it should be provided **in such a manner** as soon as possible after the conclusion”.

This slight change is important in order to be clear that there is always an obligation to give pre-contractual information in some manner before the conclusion of the contract.

PSD2 and MCD

Furthermore, we would like point out that the interplay of the proposal with certain provisions of PSD2 and MCD needs to be examined and, accordingly, amendments be made.

In particular, Article 39(2) of [the PSD2](#) refers to, in addition to Articles 44, 45, 51 and 52 of that directive, points (2)(c) to (g), (3)(a), (d) and (e), and (4)(b) of Article 3(1) of the current DMFSD which entails that the information requirements are based on both the DMFSD and the PSD2. We would like to have it clarified, do these requirements fall within the scope of the first subparagraph of Article 16a(6) also when a reference is made back to the DMFSD as in this case?

In any case, the references in Article 14 of the MCD and Article 39 of the PSD2 should be updated to refer to the CRD and its respective new provisions.

DMFSD - PL comments to 4th compromise proposal

1) Withdrawal button (proposed article 11a paragraph 2) (red line)

In our view, imposing an obligation for the consumer to provide name of the consumer and identification of the contract as a condition to withdraw from the contract using a withdrawal button, regardless of whether consumer is already signed in to an online platform will decrease effectiveness of that tool. The text of article 11a paragraph is not in line with the intentions expressed in recital 25, which clearly states that **consumers can withdraw from a contract just as easily as they can conclude it**. This can be illustrated with the following example:

Purchase phase:

Consumer has had an online shopping platform account for several months and while signing up he submitted all relevant personal and contact data as well as shipping address. Consumer logged in to the online platform, on the main page noticed an interesting offer of a product. He viewed the product page, clicked “click and pay” button, chose the payment method, confirmed purchase and then confirmed payment.

Withdrawal phase:

Having changed his mind, consumer logged in to the online platform once again. He opened “my purchases” section and viewed the list of purchased products. He clicked on the withdrawal button placed next to the purchase he intended to withdraw from. A dialogue window opened with empty fields labelled “name and surname of the buyer”, “identification of the contract” and “means by which the confirmation will be sent”. He typed his name and surname, name of the product and “email” and clicked “confirm”. Then another dialogue window appeared – “no results found”. He tried again, this time before typing the name of product, he typed: “contract of “sales agreement” with the same results. After contacting the platform employees it turned out that the search engine could not identify his purchase because he did not paste the exact wording of the name of the product as it was used by the online platform.

In our view, that example shows that the proposed wording of article 11a does not ensure that withdrawal from the contract is as easy as the conclusion of the contract as it requires additional steps that were not required when concluding the contract.

In our view, the article on withdrawal button should be technologically neutral and concentrate on the function, not the technicalities. We would like to point that neither DMFSD nor CRD regulate authentication methods applied in online platforms. We believe that any authentication method that was considered sufficient for conclusion of the contract should also be considered sufficient for the withdrawal from the contract. At the same time user interface of the online platform should be clear and allow consumer to easily view and withdraw from any contract he has concluded without creating obstacles that did not exist at the conclusion phase.

Having that in mind we propose the following wording of paragraph 2:

*Using the button or a similar function shall allow the consumer to **select the electronic means by which the confirmation of the withdrawal shall be sent to the consumer and to confirm** ~~make the withdrawal statement by providing~~ the following information:*

(a) name of the consumer;

(b) identification of the contract;

~~(c) details of the electronic means by which the confirmation of the withdrawal shall be sent to the consumer.~~

Having that in mind we would like to stress that ensuring effectiveness of the withdrawal button mechanism is our priority.

2) Presidency proposal regarding a possible addition in Article 16b (6a).

We would like to point that whether a Member State applies rules on the right of withdrawal of another Union act governing specific financial services is not a choice of a Member State but results from the provisions of EU law. It is our understanding that this issue has been thoroughly explained and article 16b should be applied if the right of withdrawal is not regulated by another Union act governing specific financial services. Having that in mind, we are open-minded as regards the possibility to apply article 16b even if certain specific Union acts already regulate the right of withdrawal regarding certain product. It could be justified by the fact that art. 16b introduces “withdrawal button” that is designed with online interfaces in mind.