DMFSD – State of play of discussions at technical level with the European Parliament team and options to be considered

1. The withdrawal button/function

During the negotiations, it has been discussed where the button/function should be placed. The European Parliament (EP) thinks that it is not technically possible to place the button/function on the **same online interface.** The same point of view has been made from some Stakeholders. When extending the button/function to all kinds of products and services, the question occurs whether if it is reasonable to require the button to be provided on the same interface (landing page). Furthermore, the requirement of same online interface might be particularly demanding for SMEs.

The EP has chosen a more technology-neutral solution, which states that the button/function must be placed **in a prominent manner and be easily accessible to the consumer.** The Presidency is of the opinion that this goes in the same direction as what a number of delegations expressed in the past and could be ready to consider this as a concession to be made to the EP in view of an overall global balanced package.

a) Could a more technology neutral solution for the placement of the button/function be acceptable to you?

b) If not, what would you suggest to be considered "same online interface"?

c) The Presidency would also be willing to receive feedback from delegations on EP amendments on the withdrawal button/function in addition to the comments made at the last WP-meeting.

2. The right of withdrawal

a) In line 106 EP has deleted "crypto-assets". The EP and the Commission argue that it's not necessary to keep it in this non exhaustive list of financial services, since MiCA will be in force before DMFSD, and the deletion will bring a more consumer friendly outcome. Would it be acceptable to you to delete this line?

b) The Presidency would also be willing to receive feedback from delegations on EP amendments on the to the right of withdrawal in addition to the comments made made at the last WP-meeting.

3. Adequate explanations

a) In line 130 the EP argues that the Council addition "at every stage of the […] contractual relationship" goes beyond the scope of this Directive, since this Directive focuses on the pre-contractual stage and not the contractual relationship. Given this argument, would delegations be open to deleting this addition?

4. Art. 16 E

During the negotiations, EP has further explained article 16 E which they consider consisting of three elements: **dark patterns, influencer marketing** and **the obligatory risk warning.** EP has clarified that they intend the element on influencer marketing to be a minimum and it has become clear during the discussions that EP strongly will insist on all these elements.

In order to maintain important changes to the text in the Council general approach, such as minimum harmonisation for pre-contractual information, certain elements on the *Lex Specialis* and penalties, there may be a need to show openness to some of the elements that the Parliament proposes.

The Presidency thus wishes to check with delegations their level of flexibility. If the Council needs to compromise to keep certain important elements, we ask you to indicate if you would prefer to accept regulation on **dark patterns, influencer marketing** or **risk warning?**

a) Dark Patterns

During previous Working Party meetings, several Member states have expressed that the proposed text by the EP is not clear enough. We here list a few examples of dark patterns that could be introduced in the text or recital to clarify what practices would not be permitted. We ask Member States to indicate if these or other clarifications are considered to be needed to facilitate the transposition of the EP proposal.

- A clarification containing examples on what measures according to line 134 should be avoided, such as:
  - giving prominence to certain choices when asking the consumer for a decision,
  - repeatedly requesting that the consumer makes a choice where that choice has already been made, for example by presenting pop-ups that interfere with the used experience,
  - timed transactions in order to instil a sense of urgency in consumers to speed up the conclusion of a contract,

- o the use of discriminatory price optimization based on individual price sensitivity,
- o other suggestions?

b) Influencer marketing

The Parliament's proposal contains "measures to tackle the risk associated with marketing practices promoting financial services concluded at a distance". We list a few possible components below, together with other possible clarifications and additions, and ask delegations to indicate which components may be acceptable to you.

- possible obligation to ensure professional requirements (competence/knowledge) of the person/company who advertise/promote the financial service,
- restrictions on advertising of certain financial services products,
- obligations to mention whether the person/company promoting/advertising the financial service is renumerated or rewarded through non-monetary compensation,
- ensuring that the marketing communication includes and discloses, in a prominent and concise way, the essential characteristics of the financial service and, where necessary, the related ancillary service(s),
- other suggestions?

c) Risk Warning

EP suggests in lines 134b-c that a risk warning should be published in certain cases. Considering that consumers may have difficulty understanding financial products, could you be open to the concept that the consumer should receive an extra warning when such services are advertised?

- In that case, for which risks is there a need for a warning and when should it be given?

d) Possible further additions

The Presidency would be grateful if delegations could indicate if further elements, like the suggestions below, would make a difference in accepting the whole or parts of art. 16 E.

- A provision that explains that the dark patterns or the marketing provision shall not apply to practices covered by other legislations, such as Directive 2005/29/EC or Regulation (EU) 2016/679,

- A provision that explains that all elements of art. 16 E is minimum harmonisation,

- Any other suggestion?

5. Possible compromise – alignment with CCD

Several issues under discussion have recently also been dealt with during the negotiations around CCD2 and there may of course be reason to consider whether certain provisions in the DMFS should be in line with those in other regulations regarding similar products/services, such as CCD2, MCD etc. It is not inconceivable that these issues might be lumped together as a package and negotiated together. The Presidency foresees difficult negotiations if alignment cannot be done consistently.

Examples of issues are:

- the issue of penalties (line 47),

- the pre-contractual reminder (line 83),

- certain cases of pre-contractual information in lines 79, 81, 88a (telephone/voice communication),

- the possibility for Member states to specify the manner for adequate explanations (line 129 a),

Could delegations, as part of a global balanced compromise package, accept a general alignment to CCD2 in the matters above? If not, delegations are invited to provide reasoned arguments which the Presidency could present to the EP.

6. Recitals

- Line 33 – given that the principles added by the Council are reflected in the operative part in line 98, would it be acceptable for delegations, in the spirit of compromise, to delete the Council addition? If not, the Presidency would be grateful for reasoned arguments on what is the added value of keeping some or all of the additions.

- Line 33a – the first sentence in the Council mandate does not fully correspond to the operative part in line 93 - 96. Would it be acceptable for delegations to align the recital also to the 30 days for pension products and the fact that the period in certain cases starts at the conclusion of the contract? If not, the Presidency would be grateful for reasoned arguments.

The Presidency would also be grateful for delegations' indication of their red lines in view of a possible overall balanced global compromise package.

The Presidency is grateful for the engagement of delegation on this file and their willingness to work under time pressure as technical meetings are taking place at an intensive pace, and documents can not always be ready well in advance.

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NOTE

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