Presidency Working Paper

Information about the negotiations

The Presidency has preliminary agreed with the EP on several points in the proposal, including regarding the important issue of *lex specialis* where the EP has accepted the Council texts. An updated 4-column document will be distributed at the beginning of next week. Based on the outcome of the negotiations so far, it is likely that the minimum harmonisation of pre-contractual information, transposition date and repeal and article 16 E will not be solved at technical level and instead be put on the agenda of the second political trilogue on 6 June.

Potential compromise regarding article 16 E

During the negotiations it has become clear that the EP will insist on the elements in the proposed article 16 E, i.e. dark patterns, marketing on social media and the obligatory risk warning. As mentioned at the last Working Party meeting, we are of the view that it will be necessary to show openness and include at least some of these elements in the text, in order to maintain, in exchange, other important parts of the Council general approach.

On the basis of the Member States' comments during and following our last Working Party meeting on 5 May, we have drafted possible compromise texts on the elements in article 16 E which seem to be most important for the EP: dark patterns and marketing on social media, for your comments. The aim is clarify what we can put forward in the discussions with the EP.

When it comes to dark patterns the text is very close to the wording of the Digital Services Act. In the marketing provision, the scope has been limited to marketing practices *on social media*, and the word "influencer" is not included in the operative part of the directive. Both for dark patterns and marketing on social media we have drafted two different options. The first option is for both issues a more general provision, which is to be supplemented with clarifying recitals that contain examples of possible measures to adopt. The second option for both issues is a more detailed provision, which clearly states certain measures that the Member States shall adopt, while at the same time clearly limiting their obligations.

In all options, there is a rule on minimum harmonisation from which it follows that Member States are free to maintain or introduce more stringent provisions. Also, all options include a clarification of the relationship to other legal acts.

The Presidency would be most grateful for your comments on the suggested compromises below, including an indication on which option you prefer and possible remarks on each option, no later than on Monday 22 May COB.

We do apologize for the short period of time to submit your comments, unfortunately we work under time pressure, and we are grateful for your understanding.

In the beginning of next week, we will send out more information in preparation of the upcoming Working Party meeting on 24 May and, as mentioned above, an updated 4-column document.

In the meanwhile, we wish you all a very nice weekend!

/The Swedish Presidency Team

Please find below the suggested compromises on dark patterns and marketing on social media.

Dark patterns

Regarding dark patterns the two options of a suggested compromise are the following:

Article 16 E "dark patterns"

Option 1

1. Member States shall adopt measures requiring that traders, when concluding financial services contracts at a distance, shall not design, organise or operate their online interfaces, as defined in Article 3(m) of Regulation 2022/2065, in a way that deceives or manipulates the consumers who are recipients of their service or in a way that otherwise materially distorts or impairs their ability to make free and informed decisions.

2. The prohibition in paragraph 1 shall not apply to practices covered by Directive 2005/29/EC, Regulation (EU) 2016/679 or Regulation (EU) 2022/2065.

3. Member States may maintain or introduce more stringent provisions on the requirements for traders, when concluding financial services contracts at a distance, not to design, organise or operate their online interfaces, in a way that deceives or manipulates consumers who are recipients of their service or in a way that otherwise

materially distorts or impairs their ability to make free and informed decisions, when the provisions are in conformity with Union law.

+ Recital: Those measures could include, for example, giving inappropriate 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, especially by presenting pop-ups that interfere with the user experience; unjustified timed transactions placed in order to instil a sense of urgency in consumers to speed up the conclusion of a contract; the use of discriminatory price optimization based on individual price sensitivity; or making the procedure for terminating a service unnecessarily difficult.

Option 2

1. Member States shall adopt measures requiring that traders, when concluding financial services contracts at a distance, shall not design, organise or operate their online interfaces, as defined in Article 3(m) of Regulation 2022/2065, in a way that deceives or manipulates the consumers who are recipients of their service or in a way that otherwise materially distorts or impairs their ability to make free and informed decisions.
   Member States shall adopt measures on at least the following practices:
   a) giving inappropriate prominence to certain choices when asking the consumer for a decision; and
   b) making the procedure for terminating a service unnecessarily difficult.

2. The prohibition shall not apply to practices covered by Directive 2005/29/EC, Regulation (EU) 2016/679 or Regulation (EU) 2022/2065.

3. Member States may maintain or introduce more stringent provisions on the requirements for traders, when concluding financial services contracts at a distance, not to design, organise or operate their online interfaces, in a way that deceives or manipulates consumers who are recipients of their service or in a way that otherwise materially distorts or impairs their ability to make free and informed decisions, when the provisions are in conformity with Union law.

Marketing on social media

Regarding marketing the two options of a suggested compromise are the following:

Article 16 E Marketing practices on social media

Option 1

1. Without prejudice to Directive 2010/13/EU, Member States shall adopt measures to address the risks associated with traders' marketing practices on social media

promoting financial services concluded at a distance, to ensure fair and clear advertising.

2. When another Union act governing specific financial services contains rules on advertising of financial services contracts concluded at a distance on social media, only the rules of that Union act shall apply to those specific financial services, irrespective of the level of detail of these rules, unless provided otherwise in that act.

3. Member States may maintain or introduce more stringent provisions on advertising of financial services contracts concluded at a distance on social media than those referred to in this Article, when the provisions are in conformity with Union law.

<u>+ Recital</u>: Those measures could include, for example, 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); or disclosing whether the person promoting the financial service is remunerated or rewarded through non-monetary compensation; or certain restrictions on advertising of certain financial services products.

<u>Option 2</u>

1. Without prejudice to Directive 2010/13/EU, Member States shall adopt measures to address the risks associated with traders' marketing practices on social media promoting financial services concluded at a distance, to ensure fair and clear advertising.

   Member States shall maintain or introduce measures that ensure at least the following:

   a) The marketing communication shall include and disclose, in a prominent and concise way, the essential characteristics of the financial service and, where necessary, the related ancillary service(s), and

   b) Disclosure of whether the person promoting the financial service is remunerated or rewarded through non-monetary compensation.

2. When another Union act governing specific financial services contains rules on advertising of financial services contracts concluded at a distance on social media, only the rules of that Union act shall apply to those specific financial services, irrespective of the level of detail of these rules, unless provided otherwise in that act.

3. Member States may maintain or introduce more stringent provisions on advertising of financial services contracts concluded at a distance on social media than those referred to in this Article, when the provisions are in conformity with Union law.

Council of the European Union
General Secretariat

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NOTE

From:	General Secretariat of the Council
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
N° Cion doc.:	ST 9053 2022 INIT + ST 9053 2022 ADD 1 + ST 9053 2022 ADD 2 + ST 9053 2022 ADD 3 + ST 9053 2022 ADD 4
Subject:	Presidency Working Paper

Delegations will find in the annex a Presidency Working Paper for the preparation of the negotiations with the European Parliament.