

한국법제연구원-은행법학회 공동학술대회

금융의 디지털화에 따른 규제와 이용자 보호

Digitalization of Finance : New Regulation and User Protection

2022.08.24.(수)



한국법제연구원
KOREA LEGISLATION RESEARCH INSTITUTE



사단법인 은행법학회
Korean Banking and Financial Law Association

한국법제연구원-은행법학회 공동학술대회

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PROGRAM

일시 : 2022.08.24.(수) 15:00-18:00

장소 : 한국법제연구원 중회의실1 (온·오프라인 하이브리드, 동시통역 제공)

14:30-15:00	등록
[사회] 한 정 미 (한국법제연구원 미래법제사업본부장)	
〈개회식〉	
15:00-15:10 (10)	개회사 - 김 계 홍 (한국법제연구원 원장) 축 사 - 정 대 (은행법학회 회장, 한국해양대학교 교수)
〈프로그램〉	
15:10-16:00 (50)	 제1주제 온라인 금융 서비스를 위한 새로운 EU 소비자 보호 규칙 <ul style="list-style-type: none">• 사회: 정 찬 모 (인하대학교 법학전문대학원 교수)• 발표: Christoph Busch (Osnabrück Universität 교수)• 토론: 최 현 정 (신한금융투자 변호사) 최 지 연 (한국법제연구원 연구위원)
16:00-16:50 (50)	 제2주제 디지털 금융의 규제에 대한 국제적 논의와 동향 - 금융의 디지털화와 빅테크와의 결합을 중심으로 - <ul style="list-style-type: none">• 사회: 안 수 현 (한국외국어대학교 법학전문대학원 교수)• 발표: 최 승 필 (한국외국어대학교 법학전문대학원 교수)• 토론: 배 승 욱 (벤처시장연구원 대표) 박 기 선 (한국법제연구원 부연구위원)
16:50-17:40 (50)	 제3주제 빅테크 금융규제의 필요성과 방향 <ul style="list-style-type: none">• 사회: 고 동 원 (성균관대학교 법학전문대학원 교수)• 발표: 김 자 봉 (한국금융연구원 선임연구위원)• 토론: 권 오 훈 (차앤권법률사무소 파트너변호사) 윤 희 상 (더시드파트너스 팀장)
17:40	폐회

※ 문의처 : 한국법제연구원 글로벌법제전략연구팀 (☎ 044-861-0414)

CONTENTS

개회사	4
축 사	6
[제1주제]	
▶ 온라인 금융 서비스를 위한 새로운 EU 소비자 보호 규칙	7
Towards New EU Consumer Protection Rules for Online Financial Services	
• Christoph Busch (Osnabrück Universität 교수)	
참고 자료	19
[토론문]	
Comments and Questions for Prof. Busch's Presentation	
• Jiyeon Choi (Senior Research Fellow, KLRI)	51
[제2주제]	
▶ 디지털 금융의 규제에 대한 국제적 논의와 동향 - 금융의 디지털화와 빅테크와의 결합을 중심으로 -	55
International Discussion and Trends on Regulation of Digital Finance	
- Focusing on the Digitalization of Finance and Combination with Big Tech -	
• 최 승 필 (한국외국어대학교 법학전문대학원 교수)	
[토론문]	
• 박 기 선 (한국법제연구원 부연구위원)	65
[제3주제]	
▶ 빅테크 금융규제의 필요성과 방향	69
Necessity and Direction of Big Tech Financial Regulation	
• 김 자 봉 (한국금융연구원 선임연구위원)	

Opening Remarks

개회사



안녕하십니까,
한국법제연구원 원장 김계홍입니다.

오늘 한국법제연구원과 은행법학회가 “금융의 디지털화에 따른 규제와 이용자 보호”를 주제로 각계의 여러 전문가를 모시고 공동학술대회를 개최하게 된 것을 매우 기쁘게 생각합니다.

먼저 오늘 학술행사를 준비하느라 애써주신 은행법학회의 정대 회장님, 은행법학회와 한국법제연구원 관계자 여러분께 감사드립니다. 아울러 바쁘신 와중에도 오늘 학술행사를 위해 흔쾌히 시간을 내어 발제를 맡아주신 한국금융연구원의 김자봉 박사님, 한국외국어대학교의 최승필 교수님과 토론을 준비해주시고 좌장을 맡아 주신 전문가분들께도 깊은 감사를 드립니다. 특히 이른 시간임에도 불구하고 독일 현지에서 온라인으로 참석하여 “온라인 금융 서비스를 위한 새로운 EU 소비자 보호 규칙”을 주제로 발제를 해주시는 오스나브뤼크 대학교(Osnabrück University)의 크리스토프 부쉬(Christoph Busch) 교수님께 다시 한 번 감사드립니다.

코로나19 팬데믹은 비대면의 일상화를 통해 우리 사회에 많은 영역에 디지털 전환이라는 큰 변화를 가져왔으며, 금융 분야의 디지털 전환도 더욱 가속화되고 있습니다. 금융의 디지털화는 금융회사의 업무적 효율성 향상과 금융소비자의 편리성 강화라는 긍정적인 측면도 있지만, 금융시장의 안정, 공정한 경쟁, 소비자 보호 등의 측면에서는 새로운 리스크에 대한 대응이라는 보완할 점도 상당 부분 존재하고 있습니다. 최근 개별 국가뿐만 아니라 국제기구를 중심으로 새로운 리스크에 대한 대응을 위한 노력을 기울이고 있으며, 이러한 국제사회의 논의는 국내 관련 입법 및 정책 구현에도 상당한 의미가 있을 것으로 예상됩니다.

한국법제연구원은 올해 글로벌법제전략연구사업의 사업목표를 ‘경계, 그 너머를 위한’ 전략적 법제 연구로 설정하여 종래 국가의 입법영역이라고 여겨졌던 경계를 뛰어 넘는 법적 이슈에 대한 연구를 수행하고 있으며, 국제금융을 주요 연구 분야의 하나로 다루고 있습니다. 오늘의 논의는 현재 연구 중인 “코로나19 이후 금융의 디지털화에 대한 글로벌 규범동향과 시사점 연구”에도 중요한 방향성을 제시할 것으로 기대됩니다. 특히, 오늘 이 자리는 금융 분야의 실무 전문가들이 토론에 참여해 주셔서 단순히 학문적 논의로 그치지 않고 향후 실효성 있는 법제도를 구축하기 위해 필요한 부분을 함께 고민할 수 있는 기회를 만들었다는 점에서 더욱 의미가 있습니다.

금융의 디지털화에 있어 핵심은 결국 사업자에 대한 규제와 소비자에 대한 보호를 어떻게 할 것인지에

있습니다. 오늘 한국법제연구원과 은행법학회의 공동 학술대회에서 이루어진 열띤 논의가 국내 디지털 금융 분야의 법제도화로 이어질 수 있기를 기대하며, 은행법학회와의 학문적 교류를 위한 초석이 되기를 역시 희망합니다.

마지막으로 이렇게 뜻깊은 자리를 마련하기 위해 애써주신 관계자 여러분과 발제, 토론, 좌장을 맡아 주신 참석자 모두에게 다시 한 번 깊이 감사드립니다.

2022. 8. 24.
한국법제연구원장 김 계 홍

Congratulatory Remarks

축사



안녕하십니까?
은행법학회 회장 정대 교수입니다.

한국법제연구원과 은행법학회가 공동으로 학술대회를 개최하게 됨을 기쁘게 생각합니다.

특히 “금융의 디지털화에 따른 규제와 이용자 보호”라는 학술대회의 주제는 최근 화두가 되고 있는 디지털경제시대에 매우 중요한 법적 이슈라고 생각합니다. 이미 금융의 디지털화 현상은 우리의 생활 속의 일부가 되고 있고, 나아가 핀테크산업이라는 새로운 산업의 분야를 창출하고 있습니다. 더욱이 새롭게 출발한 핀테크산업은 이제 전통적인 금융산업의 변화를 강하게 압박하며 금융시장에서 그 규모를 확대해 가고 있습니다.

또한, 블록체인기술에 기반한 암호화폐인 비트코인을 시작으로 다양한 종류의 암호화폐가 거래되고 있으며, 증권형토큰(security token; STO), 대체불가능토큰(Non-fungible token; NFT) 등과 같은 다양한 디지털자산(digital asset)이 거래되고 또한 실물경제에 영향을 주고 있습니다. 이러한 디지털자산시장은 디지털경제의 핵심 분야이면서도 자금세탁의 문제, 테러자금지원의 문제, 금융소비자보호의 문제 등과 같은 법적 이슈를 만들어 내고 있습니다.

신정부가 출범하면서 디지털자산에 관한 기본 입법을 추진하고 있는 현실 속에서 국내 최고의 법제연구기관인 한국법제연구원과 함께 “금융의 디지털화에 따른 규제와 이용자 보호”라는 학술대회를 개최하는 것은 매우 뜻깊은 일이라고 생각합니다. 특별히 Christoph Busch 교수님을 통해 EU법제에 관한 발표를 들을 수 있는 것은 영광이라고 생각합니다. 나아가 은행법 분야의 두 분의 훌륭한 학자의 발표도 매우 중요한 주제라고 하지 않을 수 없습니다. 최승필 교수님께서 디지털 금융 규제의 국제적 동향을 발제하시고, 김자봉 선임연구원님께서 빅테크 금융규제에 관한 발제를 해 주십니다. 그리고 디지털 금융 분야의 관련 전문가들이 토론을 통해 발표주제의 내용의 깊이를 더해 주실 것이라고 생각합니다.

모쪼록 이번 공동학술대회를 통해 은행법학회와 한국법제연구원이 금융법제 분야의 연구에 있어서 지속적으로 상호협력하는 좋은 모델을 구축하는 계기가 되었으면 합니다.

감사합니다.

2022. 8. 24.
(사)은행법학회 회장 정 대

제1주제



온라인 금융 서비스를 위한 새로운 EU 소비자 보호 규칙

Towards New EU Consumer
Protection Rules for Online Financial Services

• **Christoph Busch** (Osnabrück Universität 교수)

Towards New EU Consumer Protection Rules for Online Financial Services

Prof. Dr. Christoph Busch, Maître en Droit

Director, European Legal Studies Institute, University of Osnabrück
Affiliated Fellow, Information Society Project, Yale Law School

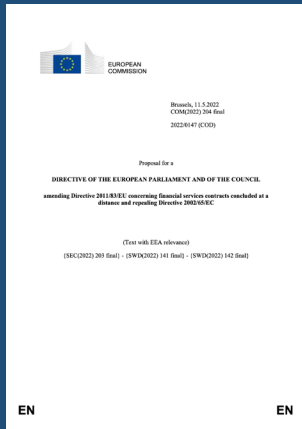
24 August 2022



**Proposal for a Directive
amending Directive
2011/83/EU concerning
financial services contracts
concluded at a distance and
repealing Directive 2002/65/EC**

11 May 2022

COM(2022) 204 final



COM(2022) 204 final



Context of the reform

Key provisions

Outlook

Context of the reform

- EU Directive 2002/65/EC on distance marketing of financial services is now 20 years old
- Changing business models in retail finance
- Changing regulatory landscape in Europe

Changing business models in retail finance

- Rapid digitalization of financial services
- New players: New non-bank players entering the market (e.g. fintech, digital platforms)
- New products: P2P lending, crowdfunding, buy-now-pay-later, robo advisors, crypto assets

Changing regulatory landscape in Europe

- Consumer Credit Directive (2008) Prevention of irresponsible lending and borrowing behavior by market participants
 - Mortgage Credit Directive (2014) Opening the market for fintechs
 - 2nd Payment Services Directive (2015) Lending / investment based crowdfunding
 - Crowdfunding Regulation (2020)
-
- Proposal for a Regulation on Markets in Crypto Assets (2020) Token Economy
 - Proposal for a new Consumer Credit Directive (2021) Buy-Now-Pay-Later, P2P Lending

Changing regulatory landscape in Europe



Policy options:

1. Repeal of Directive 2002/65/EC
2. Comprehensive revision
3. Integration of rules on distance selling of financial services into Consumer Rights Directive 2011/83/EU

Full legal harmonization

Context of the reform



Key provisions

Outlook

COM(2022) 204 final

Pre-contractual information duties

▪ Clearer rules on what, how and when information is to be provided to the consumer (Art. 16a)

- Identity of the trader and contact details
- Main characteristics of the financial service
- Price (including information on price personalization)
- Description of the risk-reward profile
- Existence of a right of withdrawal and practical instructions for exercising the right of withdrawal
- Contractual clauses on applicable law
- ...

Shorter list of information items for contracts concluded via telephone

Pre-contractual information duties

Directive 2002/65/EC: Information shall be provided „in good time“ before the conclusion of the contract.

▪ Information shall be provided at least **one day before** the consumer is bound by the distance contract (Art. 16a(3))

- “Where the information [...] is provided less than one day before the consumer is bound by the distance contracts, Member States shall require that trader sends a reminder, on a durable medium, to the consumer of the possibility to withdraw from the contract and of the procedure to follow for withdrawing [...].”
- “That reminder shall be provided, at the latest, one day after the conclusion of the distance contract.”

What happens when the trader violates Art. 16a(3)?

Pre-contractual information duties

- Information shall be made available on a "durable medium" (e.g. e-mail) "in a clear and comprehensible manner" and "easy to read"
- Key information (identity, main characteristics, price, right of withdrawal) must be provide upfront
- Other information can be provided in "layers" (e.g. pop-ups, layered links)
 - "In case the trader decides to layer the information it shall be possible to print the information [...] as one single document".

- Focus on **how** information is provided
- Trend towards "**design duties**" for websites & apps

Pre-contractual information duties

Klarna.

1683 Published on May 31, 2022 Download as PDF

Pay Later in 30 days Terms and Conditions

Thank you for choosing to shop with Klarna.

This is a credit agreement between you and us. When we use 'let', 'we' or 'our' in this document, we mean Klarna Bank AB UK Branch. When we use 'you' in this document, we mean anyone who has bought something using Pay Later in 30 days ("Pay Later") with Klarna.

1. Who can use Pay Later?

You must be a UK resident, over 18 years old and have a valid payment card to use Pay Later. When we say 'valid payment card', we mean the card must be in your name, and must not have expired. You should also make sure the card you use has enough money available to cover your payment.

Pay Later is a credit product. It's our decision whether or not we start a credit agreement with you.

2. How do I Pay Later?

With Pay Later, you can pay for something you buy up to 30 days from the order placement or shipment of your goods or when services you have purchased become available. We will send you a payment reminder with details on how to make payment to us directly. If you'd like to pay off your balance before the 30 days it is up to you to make a payment early through the Klarna App by paying by card immediately.

www.klarna.com

Table of contents with links

Clear and comprehensible language

Printable as a single document

Right of withdrawal

- Consumers have 14 calendar days to withdraw from the contract without any penalty and without giving any reason (Art. 16b)
- Withdrawal period starts not before:
 - 1) the conclusion of the contract
 - 2) the consumer receives terms & conditions and pre-contractual information

Does the violation of the information duties lead to an **"eternal right of withdrawal"**?

Possible solution: Right of withdrawal expires after **14 days + 12 months** (Art. 10 Consumer Rights Directive 2011/83/EU)

Right of withdrawal

- For contracts concluded by electronic means, traders must provide a withdrawal button on their electronic interface (Art. 16b(5))

Withdraw from Contract

Trend towards **"design duties"** for websites & apps

Order with obligation to pay

Order button (Art. 8(2) EU Consumer Rights Directive)

Cancel Subscription

Cancellation button (§ 312k German Civil Code)

Adequate explanations

- Traders must provide “adequate explanations” to consumers (Art. 16d)
- ...also when using “online tools such as live chats, bots, roboadvice, interactive tools or similar approaches”
- “Member States shall ensure that, in case the trader uses online tools, the consumer shall have a right to request and obtain human intervention”

Right to speak to a human being

Design of online interfaces

- Traders must “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” (Art. 16e)

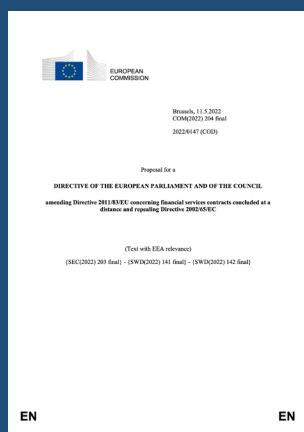
Regulation of “choice architectures”

How does this relate to the general rules on unfair commercial practices?

Ban on deceptive design patterns (“dark patterns”)

Enforcement

- Stronger penalties for widespread cross-border infringements
- Maximum penalty of at least 4% of annual turnover in the Member States concerned by the infringement



COM(2022) 204 final

Context of the reform

Key provisions



Outlook

Outlook

- Practical impact for existing business models will be limited
- Product specific rules will take precedence
- “Safety net” function
 - Financial products not covered by specific rules (e.g. personal pensions, crypto assets, P2P lending)
 - New financial products
 - Proposal for a Regulation on Markets in Crypto Assets
 - Proposal for a new Consumer Credit Directive

Outlook

The new rules for online financial services could be a source of inspiration and model for review of general consumer law

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CALL FOR EVIDENCE FOR AN EVALUATION / FITNESS CHECK	
This document aims to inform the public and stakeholders about the Commission's work, so they can provide feedback and participate effectively in consultation activities. We ask these groups to provide views on the Commission's understanding of the problem and possible solutions and to share any relevant information that they may have.	
TITLE OF THE EVALUATION	Fitness Check of EU consumer law on digital fairness
LEAD DG – RESPONSIBLE UNIT	DG JUST E2
INDICATIVE TIMETABLE	Q2 2024
ADDITIONAL INFORMATION	https://ec.europa.eu/info/law/law-topics/consumer-protection-law_en
<small>This document is for information purposes only. It does not prejudice the final decision of the Commission on whether this initiative will be pursued or on its final content. All elements of the initiative described by the document, including its timing, are subject to change.</small>	
A. Political context, purpose and scope of the evaluation	
Political context The Commission announced in the New Consumer Agenda of 13 November 2020 that by 2022, after updating its guidance documents on the Unfair Commercial Practices Directive and the Consumer Rights Directive, it will analyse whether additional legislation or other action is needed in the medium-term in order to ensure equal fairness online and offline. The new Commission Notice on the interpretation and application of the directives were published in the Official Journal on 29 December 2021. As a follow-up, the Commission is now launching a Fitness Check of EU consumer law on digital fairness in order to determine whether the existing key horizontal consumer law instruments remain adequate for ensuring a high level of consumer protection in the digital environment.	

Digital fairness – Fitness Check on EU Consumer Law

- Withdrawal button
- Layered information
- Algorithmic contracting (chatbots)
- Crypto assets

감사합니다

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참고 자료



EUROPEAN
COMMISSION

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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)

{SEC(2022) 203 final} - {SWD(2022) 141 final} - {SWD(2022) 142 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

Directive 2002/65/EC on Distance Marketing of Consumer Financial Services (the Directive or the DMFSD) aims to ensure the free movement of financial services in the single market by harmonising certain consumer protection rules in this area, and to ensure a high level of consumer protection. In so far as there is no EU product-specific legislation or no EU horizontal rules covering the particular consumer financial service, the Directive applies horizontally to any present or future service of a banking, credit, insurance, personal pension, investment or payment nature contracted by means of distance communication (i.e. without the simultaneous physical presence of the trader and the consumer). The Directive sets out information to be provided to the consumer prior to the conclusion of the distance contract (pre-contractual information), grants for certain financial services a right of withdrawal to the consumer and establishes rules on unsolicited services and unsolicited communication.

The Directive has been subject to a Regulatory Fitness (REFIT) Review **Evaluation** and the Commission has presented its results in a **Staff Working Document**¹. The main results of the evaluation can be distilled into two overarching conclusions. The first of these is that, following the entry into application of the Directive, a number of EU product-specific legislative acts (such as e.g. the Consumer Credit Directive² or the Mortgage Credit Directive³) and EU horizontal legislation (such as e.g. the General Data Protection Regulation⁴) have been enacted, which cover aspects of consumer's rights with regard to financial services that are also covered by the Directive. The impact of such recently enacted legislation is that the Directive's relevance and added value has subsequently decreased. The second conclusion is that nonetheless, the Evaluation highlighted that the Directive is still relevant in a number of areas (e.g. for certain expensive investments, such as diamonds, the provisions on the right to pre-contractual information continue to apply). The evaluation highlighted that the safety net feature ensured that consumers had a certain level of protection for contracts concluded at a distance even in the case of financial products that were not as yet subject to any EU legislation (e.g. in the absence of EU rules on crypto-assets, the Directive applies). The evaluation also pointed out that a number of developments such as the increasing digitalisation of services have affected the Directive's effectiveness in reaching its principal objectives of ensuring a high level of consumer protection and fostering the cross-border conclusion of financial services sold at a distance.

Alongside the Commission's various political and legislative actions, over the past 20 years the **distance marketing of consumer financial services has changed rapidly**. Financial services providers and consumers have abandoned the fax machine, mentioned in the Directive, and new players (such as fintech companies) with new business models and new

¹ European Commission, Commission Staff Working Document Evaluation of Directive 2002/65/EC concerning the distance marketing of consumer financial services, SWD (2020) 261 final.

² Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, 22.5.2008, p.66).

³ 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 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ L 60, 28.2.2014, p. 34)

⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L 119 4.5.2016, p. 1...).

distribution channels (e.g. financial services sold online) have emerged. Consumers are willing to use digital tools in this context and are purchasing financial products and services online, leading established players to adapt their marketing and business practices. The COVID-19 pandemic and the resulting lockdowns have also accelerated the use of online shopping in general. In this regard, the Directive has also played a role in ensuring the provision of financial services while at the same time ensuring a high level of consumer protection, for instance in the banking sector, in particular for digital on-boarding purposes⁵. Lockdowns during the pandemic meant that physical meetings in banks between consumers and providers were kept to a minimum. As a result, the digital on-boarding of potential clients took place on a more regular basis. In such cases, financial services providers, when seeking the views of the relevant competent authorities, applied the rules of the Directive since the contract was being concluded ‘at a distance’ (i.e without the simultaneous physical presence of the provider of the financial service and the consumer). Given the evaluation’s outcome, the Commission has listed the Directive for a REFIT Review in the 2020 Commission Work Programme⁶. To this end, the Commission carried out an Impact Assessment in 2021, building on the above-mentioned evaluation. The outcome of the Impact Assessment is the Legislative Proposal below.

The Proposal aims to simplify and modernise the legislative framework by repealing the existing DMFSD while including relevant aspects of consumer rights regarding financial services contracts concluded at a distance within the scope of the horizontally applicable Consumer Rights Directive.

The overall objective of the legislation remains unchanged: to promote the provision of financial services in the internal market while ensuring a high level of consumer protection. This objective is obtained in five distinct ways:

- **Full harmonisation:** The same high level of consumer protection across the single market is best ensured through full harmonisation. Harmonisation means the rules will be similar for all financial service providers and consumers will be guaranteed the same rights in all EU Member States.
- **Pre-contractual information:** Receiving key information in a timely manner and in a clear and comprehensible way, whether electronically or on paper, ensures the necessary transparency and empowers the consumer. In this regard, the proposal aims at regulating what, how and when pre-contractual information is to be provided. Concretely, the rules are modernised in that certain details not mentioned in Directive 2002/65/EC, such as the provision of the email address by the financial service provider, have been added. The proposal also regulates how the information is to be provided with regard to electronic communication. The proposal sets out rules when the information is to be provided so consumers are given sufficient time to understand the pre-contractual information received and be able to digest it before actually concluding the contract.

⁵ Digital on-boarding is the process by which a prospective consumer and a financial service provider, without physically meeting and in a totally digitalised manner, exchange views in real time with a view to the consumer’s becoming a client of the financial service provider.

⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Adjusted Commission Work Programme 2020, A Union that strives for more*, COM(2020) 440 final.

- **Right of withdrawal:** The right of withdrawal is a basic consumer right. It is particularly important in the area of financial services since certain products and services are complex and might be difficult to understand. This right has been strengthened in two specific ways: first, a withdrawal button is to be provided by the trader when the consumer concludes, by electronic means, a financial services contract at a distance. In this manner, it becomes easier for the consumer to exercise this right; second, and linked to when the pre-contractual information is to be provided, a notification of the right of withdrawal will be provided by the trader in case the pre-contractual information is received less than a day from the conclusion of the contract.
- **Online fairness:** financial service contracts are increasingly concluded by electronic means. This is why, to ensure a high level of consumer protection, the proposal sets out special rules to protect consumers when concluding contracts for financial services by electronic means. First, it establishes rules concerning adequate explanations that take place at a distance, including via online tools (e.g. roboadvice or chat boxes). The rules establish the information requirements that the trader is to provide the consumer with and the possibility for the consumer, if online tools are used, to request human intervention. Therefore, the consumer should always have the possibility to interact with a human being representing the trader. The proposal also aims to ensure that traders do not benefit from consumer biases. In this light, they are prohibited from setting up their online interfaces in a way which can distort or impair the consumers' ability to make a free, autonomous and informed decision or choice.
- **Enforcement:** The proposal also strengthens the rules on the enforcement with regard to the provision of financial services: it extends the rules on enforcement and penalties currently applicable in Directive 2011/83/EU on consumer rights ('the Consumer Rights Directive') to financial services contracts concluded at a distance, including the amendments introduced by the Better enforcement and modernisation Directive (EU) 2019/2161 concerning penalties in the case of cross-border widespread infringements.

- **Consistency with existing policy provisions in the policy area**

Directive 2002/65/EU and Directive 2011/83/EU share a number of similarities. They both provide consumers with basic consumer rights, such as the right of withdrawal and the right to obtain pre-contractual information. They both regulate contracts concluded at a distance and both apply horizontally, serving as general legislation. However, currently Directive 2011/83/EU excludes all financial services from its scope. The purpose of this proposal is to end the overall exclusion of financial services from Directive 2011/83/EU by broadening its scope to include financial services concluded at a distance. This means that a number of articles from the current Directive 2011/83/EU will be applied to financial services sold at a distance. A dedicated chapter on distance contracts for consumer financial services will be included in Directive 2011/83/EU. In this way, the Proposal ensures consistency with existing policy provisions both in the areas of consumer protection and financial services.

This proposal ensures consistency with current rules in the area of financial services. This is because the relationship between the two areas is regulated by the principle whereby, if any provision of this Directive conflicts with a provision of another Union act governing specific sectors, the provision of that other Union act shall prevail and shall apply to those specific sectors. Special attention has been dedicated to ensure that the overlaps between product-

specific legislation and this Proposal are clearly demarcated, in particular with regard to the right to pre-contractual information, the right of withdrawal and adequate explanations.

This proposal is consistent with the current horizontal rules concerning consumer rights beyond Directive 2011/83/EU, including Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and Directive 2006/114/EC concerning misleading and comparative advertising which already apply to financial services.

- **Consistency with other Union policies**

The objectives of the proposal are consistent with the EU's policies and objectives.

The proposal is consistent with and complementary to other EU legislation and policies, particularly in the areas of consumer protection and financial services.

The Commission recognises the significant impact of the digital transition on everyday life and has included the need for a Europe fit for the digital age among its headline ambitions. In September 2020, the Commission adopted the [Capital Markets Union \(CMU\) Action Plan](#) and a [Digital finance package](#), including a Digital finance strategy and legislative proposals on crypto-assets and digital resilience, for a competitive EU financial sector that gives consumers access to innovative financial products while ensuring consumer protection and financial stability. The CMU Action Plan consists of a number of actions, including a specific action on increasing trust in the capital markets. In this regard, the proposal takes into consideration these recent initiatives and aims to modernise the rules while also increasing consumer trust.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

Consumer protection falls within the joint remit (shared competence) of the EU and EU Member States. As Article 169 of the Treaty on the Functioning of the EU (TFEU) states, the EU must help protect the economic interests of consumers and promote their right to information and education, to safeguard their interests. This proposal is based on Article 114 TFEU. This is, in accordance with Article 169(2)(a) TFEU, the legal basis for adopting measures that contribute to the achievement of Article 169 TFEU objectives in the context of the completion of the single market.

- **Subsidiarity (for non-exclusive competence)**

The subsidiarity principle applies insofar as the proposal does not fall under the exclusive competence of the Union.

With digitalisation, and the potential entry into the financial market of new digital players, the cross-border provision of financial services is expected to increase. As a result, common EU rules fit for the digital age will be both more necessary and more effective in achieving EU policy objectives. This is why horizontal rules regulating current and future financial services can only be set by means of an EU act.

The objectives of the proposed action cannot be sufficiently achieved by Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Union. The Treaty provides for action to ensure the establishment and functioning of a single market with a high level of consumer protection and the free provision of services.

- **Proportionality**

In line with the proportionality principle, the proposal does not go beyond what is strictly necessary to achieve its objectives.

The proposed rules would entail some costs for suppliers but not going beyond what would be considered acceptable in the context of an ambitious and future-proof approach leading to higher benefits for consumers, suppliers and the broader society.

- **Choice of the instrument**

Directive 2002/65/EC will be repealed and a number of provisions concerning consumer financial services concluded at a distance will be introduced into Directive 2011/83/EU. This will enable Member States to amend the legislation in force to the extent that is needed to ensure compliance.

3. **RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS**

- **Ex-post evaluations/fitness checks of existing legislation**

In 2006 the Commission presented [a report](#) on the implementation of Directive 2002/65/EC. In that report the Commission concluded that it was not in a position to meet the requirements of Article 20 (1) of the Directive due to Member States being late in transposing the Directive and informed the co-legislators that another report would be presented at a later stage. In 2009, the Commission presented [a report](#) as laid down in Article 20(1) of the Directive.

In the [2017 EC Consumer Financial Services Action Plan](#), the Commission undertook to assess whether the distance selling market of retail financial services was still fit for purpose in order to identify the potential consumer risks and business opportunities in this market and, on that basis, decide on the need to amend distance-selling requirements. [A behavioural study published in 2019](#) looked how consumer behaviours were impacted by techniques used online by retail financial services providers at the advertising and pre-contractual stages. On the basis of the [2019 Work Programme](#), the Commission launched a [fully-fledged Evaluation](#) of the Directive. The evaluation was published in November 2020.

The [2020 Staff Working Document](#) revealed that Directive 2002/65/EC has been partially effective in increasing consumer protection and of limited effectiveness in contributing to consolidate the single market due to internal and external barriers. It concluded that the Directive still had an EU added value and that the objectives laid down in Article 1 of the Directive were still relevant. However, digitalisation exacerbated some aspects not fully addressed by the Directive, including how and when information should be provided. The 2020 Staff Working Document also concluded that the progressive introduction of EU product-specific legislation, such as Directive 2008/48/EU⁷, Directive 2014/17⁸, Directive 2014/92⁹, and EU horizontal legislation, such as Regulation 2016/679¹⁰, enacted after the

⁷ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 133, 22.5.2008, p. 66)

⁸ 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 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ L 60, 28.2.2014, p. 34)

⁹ Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features (OJ L 257, 28.8.2014, p. 214)

entry into force of the Directive has led to significant overlaps, thereby creating legal and practical difficulties.

The [Commission's 2020 Work Programme](#) lists this Directive under the REFIT initiatives as subject to a possible revision.

- **Stakeholder consultations**

In the last few years, the Commission has undertaken several consultation activities on rules applicable to consumer financial services concluded at a distance at EU level. Stakeholders were consulted for the REFIT Evaluation, whose results were published in 2020 and for the impact assessment conducted for the Directive's REFIT Review. As part of the REFIT Evaluation and REFIT Review, two public consultations have been carried out in addition to other consultation strands (consumer surveys, stakeholder interviews and surveys, targeted questionnaires aimed at national authorities, bilateral meetings, workshops, Member State dedicated expert group meetings).

The extensive consultation process made it possible to identify key issues. Stakeholders' feedback pointed to the digitalisation of the market and the increasing number of recent product-specific legislation as the main drivers to be considered in the review process.

Respondents across all stakeholder groups and EU Member States agree that there is a need to improve the rule regulating overlapping provisions between the Directive and the product-specific legislation. Consumer organisation favour an extensive revision of the Directive, for instance by increasing the scope to introduce rules on advertisement. Business representatives are in favour either of maintaining the status quo or repealing Directive 2002/65/EC, so long as the horizontal nature of the Directive remains. Member States generally support any type of legislative amendment so long as the horizontal nature of the Directive is kept. National authorities would support more robust provisions concerning enforcement while preserving the horizontal nature of the Directive.

The input received was summarised and used to prepare the impact assessment accompanying the proposal, as well as to assess the impact of new rules on stakeholders.

- **Collection and use of expertise**

The Commission also drew on a series of studies and reports undertaken on issues relating to consumer financial services, including: the study by Tetra Report supporting the Directive's Impact Assessment (2021);¹¹ the ICF study supporting the Evaluation of the DMFSD (2020);¹² the behavioural study by LE Europe et al. on the digitalisation of the marketing and distance selling of retail financial services (2019)¹³. Other studies and reports concerning the DMFSD were also taken into consideration, including the [Joint Supervisory Authority response](#) to the European Commission's February 2021 Call for Advice on digital finance and related issues.

¹⁰ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1)

¹¹ VVA, Study on possible impacts of a revision of the DMFSD, 2022 (to be published together with the proposal).

¹² ICF, [Evaluation of Directive 2002/65/EC on Distance Marketing of Consumer Financial Services](#), 2020.

¹³ LE Europe, VVA Europe, Ipsos NV, ConPolicy and Time.lex, [Behavioural study on the digitalisation of the marketing and distance selling of retail financial services](#), 2019.

- **Impact assessment**

The Commission carried out an impact assessment.

The impact assessment gathered information about and analysed the Directive's coherence with other overlapping EU legislation. To do so, a mapping exercise of the relevant EU product and EU specific legislation was conducted to see whether all the relevant parts of the Directive have been taken over by the more recent EU legislation. The initiative looked into whether the Directive could be safely repealed without creating any legal lacunae and without lowering the level of consumer protection, whilst ensuring the fostering of the single market for cross-border sale of financial products and services sold at a distance. The conclusion arrived at was that the simple repeal of the Directive would lead to the lowering of consumer protection. This is because for certain financial services for which EU legislation is already in force, a number of provisions of the Directive apply (for instance, the right of withdrawal for certain insurances or the right to pre-contractual information for gift cards in the area of payment services).

As a second step, after analysing the coherence of the Directive, the aim was to consider whether the residual 'legally relevant' parts of the Directive are still practically relevant (effective) for the stakeholders. In other words, the aim of this second step was to see whether the still relevant elements of the Directive (for instance, the right of withdrawal in the area of insurances) played a significant role protecting consumers and consolidating the single market, especially in the context of digitalisation.

As part of this second step, the Directive's safety net feature was also analysed. The safety net means that the Directive's rules apply whenever (i) a new product appears on the market for which there is no EU legislation yet (e.g. virtual currencies are a financial service product not yet subject to legislation at EU level), (ii) the product-specific legislation does not provide the right(s) established by the Directive (e.g. the right for the consumer to withdraw from the contract within an established time-period is not laid down in the relevant insurance legislations), (iii) the product-specific legislation creates exemptions and the product falls outside the scope of application (e.g. consumer credit loans below EUR 200 are not covered by Directive 2008/48/EC - Consumer Credit Directive).

The conclusion reached was that the Member States have applied the safety net in various circumstances and financial services areas, such as the area of investment in expensive wines and diamonds; in this instance, the Directive's provisions on pre-contractual information were signalled as the applicable law. Other instances concern certain gift cards outside the scope of the Payment Services Directive II or the instance cited above of digital on-boarding during the COVID-19 pandemic. Instances of the importance of the safety net have also been recorded in judicial matters, with a national court applying certain provisions of the Directive (the rules on pre-contractual information) to cryptocurrencies.

The options assessed to achieve the objectives identified for the Initiative were: a no policy change scenario (Option 0 - baseline), Repeal of the Directive and non-regulatory measures (Option 1); Comprehensive revision (Option 2); Repeal, modernisation of relevant provisions introduced in a horizontal legislation (Option 3a); or Repeal, modernisation of relevant provisions introduced in the product specific legislation (Option 3b).

The preferred option, based on the data obtained and outcome of the respective scoring system, is Option 3a, namely to repeal Directive 2002/65/EC, modernise and then inject the still relevant articles (right to pre-contractual information and right of withdrawal) into Directive 2011/83/EU, extend the application of certain rules of Directive 2011/83/EU to consumer financial services concluded at a distance (e.g. rules on additional payments and

rules on enforcement and penalties) and introduce targeted new provisions to ensure online fairness when consumers conclude financial services. This option tackles the identified problems and addresses the objectives in the most effective, efficient and proportionate way. Moreover, it ensures a high level of coherence.

The proposed legal intervention makes the current DMFSD framework fit for purpose by repealing the provisions that are no longer relevant. All this is achieved through five distinct actions:

- (i) ensuring full harmonisation for the rules covering consumer financial services concluded at a distance;
- (ii) laying down rules on what, when and how pre-contractual information is to be provided, thereby rendering these rules fit for the digital age;
- (iii) making it easier, when financial services contracts are concluded by electronic means, to exercise the right of withdrawal through a withdrawal button, and ensuring that consumers who have had less than 1 day to digest the pre-contractual information are reminded about the right of withdrawal after the conclusion of the contract;
- (iv) introducing two articles to ensure online fairness;
- (v) strengthening the rules on enforcing the provisions on consumer financial services concluded at a distance.

This way, this legal revision ensures a high level of consumer protection, makes the relevant rights fit for the digital age, and safeguards, as requested by all stakeholders, the safety net feature for possible future emerging products.

This preferred option will lead to the repeal of the current legislation without the creation of a new legal instrument. Directive 2011/83/EU was chosen as the appropriate instrument since, similar to the DMFSD, it provides horizontal consumer rights and rules. Thus, introducing the DMFSD relevant rights into Directive 2011/83/EU ensures that the safety net feature is safeguarded. As of today, Directive 2011/83/EU, excludes from its scope ‘financial services’ altogether. However, it already provides for the right to pre-contractual information and the right of withdrawal for other contracts concluded at a distance.

Special care has been taken, on the one hand, to ensure the required specificity of financial services, and on the other hand, to ensure that Directive 2011/83/EU is not made too complex. The best identified way to proceed is to apply, as far as possible, rules already laid down in Directive 2011/83/EU to financial services (e.g. the provisions on enforcement and penalties) or to build on such rules, thereby creating more specific rules, and place them in the dedicated chapter on financial services contracts concluded at a distance (e.g. the withdrawal button concerning the exercise of the right of withdrawal). This added chapter contains certain new rules (e.g. provisions on online fairness) and builds on existing rules found either in Directive 2002/65/EC or in Directive 2011/83/EU. This added chapter will concern only consumer financial services concluded at a distance and will not apply to other contracts regulated by the Consumer Rights Directive.

The preferred option would also have a positive effect on the reduction of consumer detriment (at least EUR 170-210 million) and on consumer trust. It would entail some costs for financial service providers (at least around EUR 19 million) and public authorities (at least around EUR 6 million).

- **Regulatory fitness and simplification**

The review of the Directive is included in the Commission Work Programme's REFIT section. The proposal would entail costs for businesses, but its resulting legal certainty is also expected to reduce the burden on them.

The potential for simplification of the proposed initiative stems mainly from the regulatory approach chosen, namely repealing Directive 2002/65/EC and including a small number of articles in Directive 2011/83/EU. In addition, measures simplifying information requirements and adapting them to digital use and a provision clearly laying down the principle whereby, if two laws govern the same factual situation, a law governing a specific subject matter overrides a law governing only general matters, will also help simplify matters for businesses when concluding financial services at a distance.

As regards reduced burden for public administrations, the higher degree of legal clarity and the simplified regulatory framework is expected to reduce the number of complaints and increasing the level of certainty and compliance, which would render enforcement procedures more efficient. Specific measures to reinforce coordination and improve conditions for enforcement are also expected to result in efficiency gains in relation to the enforcement of the Directive's obligations.

Specific impacts on SMEs have not been identified to be significant.

- **Fundamental rights**

This proposal respects fundamental rights and observes the principles recognised in particular in the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure full respect for the rules on the protection of personal data, the right to property, non-discrimination, the protection of family and professional life, and consumer protection.

4. BUDGETARY IMPLICATIONS

This proposal has no implications for the EU's or agencies' budget, leaving aside the normal administrative costs of ensuring compliance with EU legislation, since no new committees are being created and no financial commitments being made.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The Commission will monitor the implementation of the revised Directive, if adopted, after its entry into force. The Commission will mainly be in charge of monitoring the Directive's impact, based on the data Member State authorities and financial service providers provide, which will be based on existing data sources where possible, to avoid imposing additional burdens on the various stakeholders.

- **Explanatory documents (for directives)**

As the proposal introduces specific amendments to an existing directive, Member States should either provide the Commission with the text of the specific amendments to national rules or, in the absence of such amendments, explain which specific national law provision already implements the amendments provided in the proposal.

- **Detailed explanation of the specific provisions of the proposal**

Article 1 – Amendments to Directive 2011/83/EU

Article 1 of the proposal amends Directive 2011/83/EC in different ways:

- (1) Article 1 paragraphs (1)(a) & (b) of the proposal amends Article 3 of Directive 2011/83/EU in three instances: first, it introduces a new paragraph in Directive 2011/83/EC ('Article 3(1b)'). The proposed new Article 3(1b) contains references to articles of the current Directive 2011/83/EU which shall apply directly to financial services contracts concluded at a distance and also lists the articles which will constitute the chapter on financial services concluded at a distances. In this regard, the rules of Directive 2011/83/EU concerning (i) Subject Matter – Article 1; (ii) Definitions – Article 2; (iii) Level of harmonisation; (iv) fees for the use of means of payment – Article 19, (ii) additional payment –Article 22; (iv) enforcement and penalties – Article 23 & 24; (v) Imperative Nature of the Directive – Article 25; (vi) Information – Article 26 – are extended to consumer financial services contracts concluded at a distance. Therefore, in this manner, the current rules of Directive 2011/83/EU in these areas are extended to financial services contracts concluded between a trader and a consumer at a distance. This will ensure that those financial services contracts will be subject to similar rules as other sales and services contracts and thereby ensuring a high level of consumer protection while at the same time fostering the provision of such services within the internal market. The extension of the rules on enforcement and penalties will ensure that national supervisory authorities shall be equipped with new rules to ensure effective, proportionate and dissuasive penalties. Second, current paragraphs of Directive 2002/65/EC concerning the 'objective and scope' (Article 1 of Directive 2002/65/EC) shall be included in proposed Article 3(1b) of Directive 2011/83/EC. Third, to ensure legal certainty, the proposal suggests to amend Article 3(3)(d) of Directive 2011/83/EC.
- (2) Article 1(2) of the proposal introduces in Directive 2011/83/EU a Chapter concerning consumer financial services contracts concluded at a distance. This Chapter applies only to financial services contracts concluded at a distance. It combines the relevant articles of Directive 2002/65/EC, namely the right to pre-contractual information and the right to withdrawal and introduces two new articles ('Adequate Explanations', 'Additional protection regarding online interfaces').
 - (a) The provision on the **right to pre-contractual information** follows the same structure as laid down in Directive 2002/65/EC. However, Article 1 of the proposal modernises the provision on the right to pre-contractual and renders it fit for the digital age by addressing which information needs to reach the consumer (for instance, the inclusion of the need for the trader to provide an email address); how the information needs to reach the consumer (for instance, when layering of information can be used and which information requirements need to be specified); and when the information should reach the consumer, namely, setting the norm that the information should reach the consumer at least a day before the actual signature.
 - (b) The rules concerning the **right of withdrawal** for financial services contracts concluded at a distance are largely the ones laid down in Directive 2002/65/EC. However, in line with the Proposal for a Directive on consumer credit¹⁴, rules on when the information should reach the consumer have been added. Thus, in case the time period between the provision of the pre-contractual information and the actual conclusion of the contract is less than

¹⁴ Proposal for a Directive of the European Parliament and of the Council on consumer credit, 30.6.2021, COM(2021) 347 final

one day, the trader providing the financial service at a distance is obliged to provide a notification after the conclusion of the contract to remind the consumer of the possibility to exercise his right of withdrawal. Another instance of how this right is being enhanced in the digital sphere is by including an obligation on the financial service trader to provide for a withdrawal button. This should facilitate the exercise of the right of withdrawal, in case the consumer concludes the financial services contract through electronic means and would like to withdraw within the necessary time-frame.

- (c) Two articles intended to improve **online fairness** when consumer financial services are bought have been introduced in the Chapter of this Proposal: (i) when a trader provides adequate explanations, inter alia, by using online tools, such as roboadvice or chat boxes, the trader has to provide and explain to the consumer the key information, including information on the main characteristics of the proposed financial service contract. In addition, if the consumer so requests, he may ask for human intervention, thus ensuring the possibility for the consumer to interact with a human being representing the trader; (ii) the rule on additional protection regarding online interfaces prohibit the trader from deploying 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. The aim of this provision is to avoid as far as possible consumer biases and increase transparency.

The rest of the articles in this proposal are standard provisions concerning, respectively, the transposition, entry into force and addressees of this proposal.

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 Bank¹⁵,

Having regard to the opinion of the European Economic and Social Committee¹⁶,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Directive 2002/65/EC of the European Parliament and of the Council¹⁷ 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 Council¹⁸ 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

¹⁵ ...

¹⁶ ...

¹⁷ 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).

¹⁸ 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).

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.
- (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.
- (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.
- (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.
- (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, 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 chatbox or similar tools. 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.
- (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, only the respective provisions of those other Union acts should apply to those specific consumer financial services unless provided otherwise in those acts. For instance, when Article 186 of Directive 2009/138/EC of the European Parliament and of the Council¹⁹ 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 Council²⁰ applies, the rules on the right of withdrawal under this Directive should not apply. Likewise, certain Union acts governing specific financial services²¹ 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

¹⁹ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

²⁰ 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 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ L 60, 28.2.2014, p. 34).

²¹ Such as, Regulation (EU) 2019/1238 of the European Parliament and of the Council of 20 June 2019 on a pan-European Personal Pension Product (PEPP) (OJ L 198, 25.7.2019, p. 1), 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), 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), Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features (OJ L 257, 28.8.2014, p. 214)

on credit agreements for consumers relating to residential immovable property²², 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 to be provided to the consumer prior to the conclusion of the contract.

- (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. 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.
- (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 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. Consumers should also be clearly

²² 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 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ L 60, 28.2.2014, p. 34)

informed when the price presented to them is personalised on the basis of automated processing.

- (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.
- (21) 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 provided via additional pages. However, all the information should be provided on a durable medium before the conclusion of the distance contract.
- (22) 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 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. A possible manner of providing pre-contractual information is through 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.
- (23) Consumers should have a right of withdrawal without penalty and with no obligation to provide justification. 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.

- (24) 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.
- (25) For distance contracts concluded by electronic means, the trader should provide the consumer with the possibility to use a withdrawal button. In order for ensure the effective use of the withdrawal button, the trader should ensure that it is visible and, when the consumer uses the button, the trader should adequately document its use.
- (26) Consumers may need assistance in order to decide which financial service is the most appropriate for his or her needs and financial situation. 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 the essential characteristics of the products proposed. 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. 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.
- (27) 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.
- (28) Directive 2011/83/EU should therefore be amended accordingly.
- (29) Directive 2002/65/EC should therefore be repealed.
- (30) 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.
- (31) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents²³, 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,

²³ OJ C 369, 17.12.2011, p. 14.

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) ‘Articles 1 and 2, Article 3(2), (5) and (6), Article 4, Articles 16a to 16e, Article 19, Articles 21 to 23, Article 24(1), (2), (3) and (4) and Articles 25 and 26 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.

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

‘(d) for financial services, not covered by Article 3(1b).’

(2) The following Chapter is inserted:

‘CHAPTER IIIa

RULES CONCERNING FINANCIAL SERVICES CONTRACTS CONCLUDED AT A DISTANCE

Article 16a

Information requirements for distance contracts for consumer financial services

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:
 - (a) the identity and the main business of the trader;
 - (b) the geographical address at which the trader is established as well as 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; 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;
 - (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, where the consumer can address any complaints;

- (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 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 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 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 is valid;
- (l) the arrangements for payment and for performance;
- (m) any specific additional cost for the consumer of using the means of distance communication, if such additional cost is charged;
- (n) where applicable, a brief description of the risk-reward profile;
- (o) 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, as well as the consequences of non-exercise of that right;
- (q) 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;
 - (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 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.
- 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.
- 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.
3. The trader shall provide the information referred to in paragraph 1 at least one day before the consumer is bound by any distance contract.
- 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 to the consumer on a durable medium and laid out in a way that is easy to read, using characters of readable size.
- Except for the information referred to in paragraph 1, points (a), (f), (g), 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 information, it shall be possible to print the information referred to in paragraph 1 as one single document.
- 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.
5. As regards compliance with the information requirements laid down in this Article, the burden of proof shall be on the trader.
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 of that Union act shall apply to those specific financial services, unless provided otherwise in that act.

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.
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 in accordance with Article 16a, if that is later than the date in point (a) of this subparagraph.
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; 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 referred to in paragraph 5 is activated by the consumer before that period has expired.
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.

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.

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.
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 include the following elements:
 - (a) the required pre-contractual information;
 - (b) the essential characteristics of the proposed contract, including the possible ancillary services;
 - (c) the specific effects that the proposed contract may have on the consumer, including the consequences of payment default or late payment by the consumer.
2. Paragraph 1 shall also apply to explanations provided to the consumer, when using online tools such as live chats, chat bots, roboadvice, interactive tools or similar approaches.
3. Member States shall ensure that, in case the trader uses online tools, the consumer shall have a right to request and obtain human intervention.
4. Where another Union act governing specific financial services contains rules on the information to be provided to the consumer prior to the conclusion of the contract, paragraphs 1 to 3 of this Article shall not apply.

Article 16e

Additional protection regarding online interfaces

Without prejudice to Directive 2005/29/EC of the European Parliament and of the Council²⁴ and Council Directive 93/13/EEC²⁵, 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.

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 months from adoption*].

²⁴ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ L 149, 11.6.2005, p. 22).

²⁵ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29).

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 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



EUROPEAN
COMMISSION

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COM(2022) 204 final

ANNEX

ANNEX

to the

**Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL**

**amending Directive 2011/83/EU concerning financial services contracts concluded at a
distance and repealing Directive 2002/65/EC**

{SEC(2022) 203 final} - {SWD(2022) 141 final} - {SWD(2022) 142 final}

ANNEX

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	-

토론문



Comments and Questions for Prof. Busch's Presentation

• Jiyeon Choi (Senior Research Fellow, KLRI)

Comments and Questions for Prof. Busch's Presentation

Jiyeon Choi

Senior Research Fellow, KLRI

From the Treaty on the Functioning of the European Union Title XV, Consumer Protection has been laid out as one of the utmost important value of the Union. From the Treaty of Rome to the Distance Selling Directive (Directive 97/7/EC), Directive 1999/44/EC regarding classification/packaging/labelling of dangerous preparations, Directive 2002/65/EC on Distance Marketing of Consumer Financial Services, and Consumer Rights Directive 2011/83/EU, different aspects of distant contract and consumer protection rules are scattered around in different Directives, repealing and amending themselves.

Changed circumstances powered by technological developments and also pushed by societal situations surrounding pandemic boosted the virtual market. The sheer volume of online sales, including sales of financial services, has skyrocketed, thus the need for ensuring efficacy in consumer protection soared as well.

In this context, it makes perfect sense for the European Union to come up with a harmonized legislative action that gathers pieces of consumer protection schemes all over into a single Directive and brush them up to keep the provisions tech-savvy.

Korea is no exception in having its online market exploded. While reviewing to your presentation and thinking about the changed shape of contracts and commerce changing its venue to the cyber space, I could not help but thinking about the adver-

tisements that I hear on radio everyday on my way home in the evening. Stock brokerage apps boast that they provide real-time service with New York stock exchange, and when I log into my phone I could easily purchase stocks from overseas. Using apps, I manage my bank accounts in the United States. I am sure that more Europeans would have those over-the-continent financial services transaction experience than I.

Those financial services span out not only to other Member States in European Union but also to other continents. A French national may open a bank account in Switzerland and buys an insurance program from a British company, and that French national may take pension funds from the United States. There are so many countries that issue remote-worker visas for people working out of their home to come and stay in their countries. They are now called “digital-nomads.” Borders and nationalities are fading, and so do other types of sales, including financial services contracts.

The proposal would, if it passes, apply to consumers and sellers in the European Union, then what would happen to trans-continental transactions where the seller is located out of Europe with no physical presence in Europe but selling their financial service to European consumers? P. 4 of the Proposal published by the European Commission speaks of the issues of the subsidiary rules; however, it only validates Union level legislation over Member State actions.

There my question sprouts about geographical limit on applicability. Would the proposal, if passed, be still a protective scheme for consumers making contracts with out-of-Europe counterparty, and how?

Also another strand of question arose in terms of the form of legislation: – why go with ‘Directive’, which allow individual member states to transpose the Directive, but may choose their own method of doing so?

When compared to 'Regulation', 'Directive' seemed to be a format that could give more leeway for Member States. Financial service contracts concluded at a distance inherently implies that such contracts cross borders around the globe. If not a universal form of legislation all around, which is impossible at this stage, why not go with a more uniformly enforcing format such as 'Regulation'?

So I looked up the "Flexible Implementation and the Consumer Rights Directive ("CRD")" working paper published by the European University Institute this year.¹ Researchers for the report took samples of four European Countries (The Czech Republic, Germany, Ireland, and the Netherlands) and analyzed their laws to see how much of the CRD were implemented into their national laws. Unfortunately, the result showed that the four Member States tried to preserve their existing consumer protection regimes to the greatest possible extent. Integration differed especially in the enforcement sectors, such as the lists of remedies available, persons who can bring the complaints, bodies dealing with the complaints, or the range and severity of penalties.

Implementing Directive into the national laws leaves such a loophole and it could really prevent the cross-the-board application of the Directive in the European Union. I do not believe it would be particularly different for the financial services contracts. Then I wondered, given that Regulations would provide more horizontal and harmonized enforcement power than Directives, what was the reason for not pursuing to have this protective measure into Regulation than designing the legislation as Directive. Could it have been procedural reasons or even political one?

Thank you again for your presentation, and I yield my time.

1 Hubert Smekal, Alexander Hoppe, Michael Hübner, Pavla Hosnedlová, Anna Taimr, Elaine Mak, Flexible Implementation and the Consumer Rights Directive, Working Paper, Robert Schuman Centre for Advanced Studies Integrating Diversity in the European Union, RSC 2022/24, European University Institute (2022) https://cadmus.eui.eu/bitstream/handle/1814/74393/RSC_2022_24.pdf?sequence=1 (last visited August 18, 2022)

제2주제



디지털 금융의 규제에 대한 국제적 논의와 동향

- 금융의 디지털화와
빅테크와의 결합을 중심으로 -

International Discussion and Trends on Reg-
ulation of Digital Finance

- Focusing on the Digitalization of Finance and Combina-
tion with Big Tech -

• 최 승 필 (한국외국어대학교 법학전문대학원 교수)

International trends and implications of digital finance

- Focused on the discussion of International financial organization -



Hankuk University of Foreign Studies
Law School
Prof. Dr. iur. Choi, Seung Pil



Covid 19 이후 금융의 디지털화 가속

○ 금융부문에서 디지털 경제의 가속화

Internet Banking(Source : FSS)

시기(stock)	등록고객 (억명)	시기(flow)	일평균이용 실적(만건)	금액(조원)
2018년말	1.47	2018년	1,024	47.5
2019년말	1.64	2019년	1,272	48.8
Covid -19				
2020년말	1.74	2020년	1,468	58.9
2021년말	1.91	2021년	1,732	70.6

Internet Banking(Source : FSS)

시기(stock)	등록고객 (억명)	시기(flow)	일평균이용 실적(만건)	금액(조원)
2018년말	1.05	2018년	691	5.3
2019년말	1.22	2019년	951	6.4
Covid -19				
2020년말	1.35	2020년	1,168	9.4
2021년말	1.53	2021년	1,436	12.9



Characteristics of Digital Finance

o Characteristics of Digital Finance

- Extreme returns to Scale : 고객이 많아질 수록 생산단가는 더욱 낮아진다.
- Network Externalities : 질적 양적 인프라 확충을 위한 제3자 제휴와 빅테크의 진입
- Role of Data : 광범위한 데이터의 사용과 관리

o 빅테크의 진출유형

- 빅테크의 시장직접진출 및 incumbent FI와 직접 경쟁
- Incumbent FI와의 제휴
 - A. US Model : Payment & Cloud Service ex) Alphabet Amazone, Meta
 - B. Japan Model : Payment + Securities & Insurance
 - C. China Model : Payment + Banking, Insurance, Investment

* FSB, BigTech in finance, Market developments and potential financial stability implications, 2019 / IMF, BigTech in Financial Services: Regulatory Approaches and Architecture, 2022

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빅테크의 탄생과 성숙, 새로운 결합

o 빅테크의 탄생과 성숙

탄생(Birth)	성장(Growth)	성숙(Maturity)
<ul style="list-style-type: none"> · 온라인 다면플랫폼 형성 · 적절한 가격구조 설정 · 일정량의 유저 확보 	<ul style="list-style-type: none"> · 규모의 경제 (scale of economy) · 유저의 경험을 반영한 기능의 추가 · 네트워크의 외부성 	<ul style="list-style-type: none"> · 범위의 경제 (scope of economy) · 전환비용을 증가시키는 생태계의 형성* · 빅데이터의 분석 · 금융서비스로의 확장

* BIS, BigTech in Finance: Opportunity and Risks, BIS Annual Report, 2019

o 은행과 빅테크의 결합의 장점

- A. 신뢰성 : 사이즈, 브랜드 인지도, 고객충성도
- B. 레버리지 : 투자능력, 펀딩, 글로벌 소비자확보, 네트워크 효과
- C. 성과 : 첨단기술력, 상호보조, 제한된 규제부담, 지속적인 결합과 확대

*FSB, BigTech in finance, Market developments and potential financial stability implications, 2019

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빅테크와 금융의 결합상 쟁점

○ Level Playing Field

- 금융상품이 차별화되기 어려운 속성. 전략으로서 소비자에 대한 보다 많은 노출 필요. 빅테크의 교섭력 증가
- 공급시장을 빅테크가 주도
- 성숙단계에서 전환비용의 발생. 소비자의 고착화

• * EU Commission, Competition policy for the digital era, 2019

○ 정당한 경쟁에서 금융기관의 보호필요성과 건전성

- 빅테크와 금융기관 결합시 사업영역의 규제
- 일반경쟁당국과 금융감독당국간 협업체제 구축
- 활동중심의 규제 vs 형태중심의 규제

* FSB, BigTech in finance – Market developments and potential financial stability implication, 2019

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빅테크와 금융의 결합상 쟁점

○ 빅테크와 시스템 리스크의 증가

- 빅테크 리스크의 금융부문으로의 전이
- 빅테크를 통한 종합금융서비스의 제공 : 은행+증권+보험 등 결합영역을 통해 전금융영역으로 리스크 확장 가능성
- 사이버 리스크의 확대 ex) 클라우드 서비스

○ 빅테크가 야기하는 새로운 금융리스크에 대해 적합한 감독 및 규제 체제 미구성

: 리스크 발생시 시스템 리스크로 발전가능성

○ 국제적으로 합의된 규제기준의 설정상 어려움

- A. 빅테크와 금융의 발달 정도상의 차이
- B. 자국 빅테크 기업의 보유 여부에 따른 각기 다른 입장

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빅테크와 금융의 결합상 쟁점

○ 데이터 주도적 금융과 경기변화

- 빅테크 기업 주도적 데이터 활용과 양날의 검

: Social Credit을 쌓지 못한 청년층 등에 대한 금융서비스의 접근성 강화 / 관계중심에서 데이터 중심으로 전환하면서 경기침체시 대출 등에서 sharper contraction의 발생

○ 빅테크 기업의 리스크 관리상 한계

- 금융기관이 데이터 처리 및 클라우드 서비스를 빅테크에 의존하나 리스크 관리상 한계 가능성 - Problem of third party provider

- 빅테크를 통한 금융상품 판매시 소비자보호상 한계 가능성

* FSB, BigTech in finance – Market developments and potential financial stability implication, 2019

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리스크 대응과 감독정책적 접근

○ 리스크의 유형화와 특징

리스크 형태	빅테크의 영향
금융안정	<ul style="list-style-type: none"> · 업역을 관통하는 빅테크의 확장은 리스크 증가시킴 · 기존의 금융사업자간 연결 · 클라우드 또는 지급인프라와 같은 systemically important activity의 증가
소비자보호	<ul style="list-style-type: none"> · 서비스의 묶음 제공으로 인한 소비자 선택권의 감소 · 시장지배로 인해 혁신을 가격인상의 매개로 활용 · 활동, 파트너십, regulatory protection에 대한 정보공개의 미흡 · 소비자데이터의 확보를 조건으로 한 값싼 혹은 무료서비스의 제공
시장무결성	<ul style="list-style-type: none"> · 규제, 감독 그리고 집행상의 어려움 - BigTech in other jurisdictions - 비금융영역에서 핵심서비스를 영위하고 있는 빅테크(즉, 이커머스가 주된 빅테크의 영역인 경우, 금융주력 빅테크가 아닌 경우)
금융무결성 (Financial Integrity)	<ul style="list-style-type: none"> · 빅테크가 국경을 관통하는 사기, 절도, 돈세탁에 활용 · 블록체인에 기반한 빅테크 서비스의 경우 최종사용자(End-user)를 확인 불가

* IMF, BigTech in Financial Services: Regulatory Approaches and Architecture, 2022

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빅테크 규제의 접근방식과 특징

- o Entity-based approach
 - 최초 시장진입시 인허가에 따른 감독 / 전통적 감독방식
 - 행위규제, 건전성규제, 거버넌스규제
 - 모니터링 + 임점검사 - 감독당국과의 상호작용
 - rule-based supervision & principle-based supervision
- o Activity-based approach
 - 인허가를 통한 진입장벽 제거. 빅테크와의 결합 용이
 - 새로운 비금융사업자에 대한 규제와 규제차익 제거가 중요
 - 매번 활동형태를 확정하고 기존 규제체제에 적용하는 어려움. 조기대응 및 선제적 조치상 한계
 - Cross-border 활동에 대한 감독상 어려움 가중

* IMF, BigTech in Financial Services: Regulatory Approaches and Architecture, 2022

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빅테크 규제의 접근방식과 특징

- o Entity-based approach + Activity-based approach
 - Entity-based approach is a principle, Activity-based supervision is used as a compliment
 - 명확한 감독의 틀 미형성
 - 감독을 단기, 중기, 장기로 나누어 규제 틀을 형성

시기	규제형태
단기	·정보의 공개 사업활동(예를 들어 대출, 소비자리스크, 기업의 의무사항 등)의 정보 및 리스크를 포함한 빅테크 활동에 대한 정보를 공개
중기	·행위기준의 마련 기준의 설정은 빅테크의 규제되지 않은 활동으로부터 금융영역으로 야기되는 위협의 확산을 방지할 수 있고, 공적영역과 사적영역간의 규제협업을 형성
장기	·복합규제(Hybrid regulation) 적절한 실체규제와 함께 활동규제를 활용. 특히 활동중심 규제의 경우 국경간 서비스에 유용

* IMF, BigTech in Financial Services: Regulatory Approaches and Architecture, 2022

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CBDC

- o CBDC를 보는 몇가지 시각
 - Financial Inclusion / Access to Payments
 - Making Payment More Efficient
 - Ensuring Resilience of Payment
 - Reducing Illicit Use of Money
 - Monetary Sovereignty
 - Competition in International Payment Market
- o CBDC 도입상 몇가지 제한요소
 - Lack of Precedents
 - Unwillingness to adopt digital payment among the population
 - Unsolved legal issues ex) minus interest
 - Cyber security
 - Technology uncertainty ex) DLT Technology

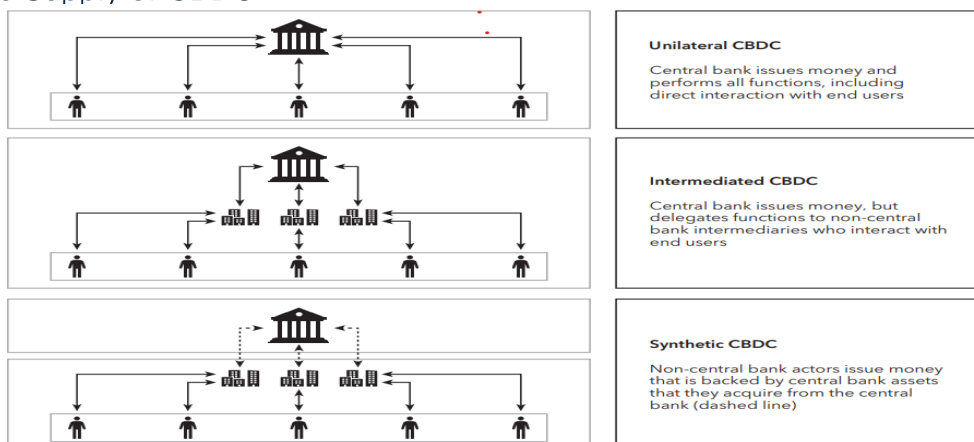
* IMF, Legal Aspects of Central Bank Digital Currency: Central Bank and Monetary Law Considerations, 2020

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CBDC

o Supply of CBDC



Source: IMF staff.
Note: CBDC = central bank digital currency.

* IMF, Legal Aspects of Central Bank Digital Currency: Central Bank and Monetary Law Considerations, 2020

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CBDC

o Account or Token ?

설정방식	소유권 설정 논리
계좌기반	"I am therefore I own"
물리적 토큰 기반	"I possess therefore I own"
디지털 토큰 기반	"I know therefore I own"

o Resource of "Mandate"

– Constitutional Mandate?

: US Constitution, Australian Constitution, etc.

– Central Bank Act

– Monetary Act

– related Acts

* IMF, Legal Aspects of Central Bank Digital Currency: Central Bank and Monetary Law Considerations, 2020

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디지털 금융규제에 대한 주요국 동향 (EU)

o Digital Service Act & Digital Market Act 2022

– 공정한 경쟁의 헌법적 기초로서 유럽기능조약 제102조

o "Same Activities, Same Rule"

o Innovation Hub or Regulatory Sandbox

– Innovation Hub의 일반적 사용

– Regulatory Sandbox ex) 네덜란드, 덴마크, 폴란드, 리투아니아

o AI의 활용과 규제(EBA, Report on Big Data and Advanced Analytics, 2020)

– 윤리, 설명 및 해석가능성, 공정성 및 데이터 오류회피 입증, 데이터 보호, 양질의 데이터 축적, 보안, 금융소비자 보호

o 개인정보의 활용과 보호

o CBDC와 관련한 쟁점

– 네거티브 금리 vs. 유럽기본권 헌장 제17조 제1항

: 재산의 수용 또는 수용적 사용시 정당한 보상

CSP



디지털 금융규제에 대한 주요국 동향 (미국)

- 빅테크의 진출에 따라 third-party service provider에 대한 감독체계 도입
 - 법적 근거 : Bank Service Company Act
 - Federal Reserve, FDIC, OCC에 감독권을 부여
 - 감독대상은 연방예금보험공사의 부보기관 및 자회사
 - 규제대상 서비스 : 지급결제프로세스, 백오피스, 회계, 데이터처리서비스
 - 규제중점사항 : 기술관리, 데이터무결성, 정보의 기밀성, 서비스 이용성, 컴플라이언스
- 디지털화폐의 규제
 - 스테이블코인 : 준비자산 안전망 부족, 불분명한 상환조항, 사이버보안, 코인런의 가능성 / 감독체계의 정비
 - CBDC : 돈의 형태나 금융서비스의 보완적 수단, 프라이버시보호와 범죄행위로부터 대응 필요, 전체경제에 편익제공

CSP



디지털 금융규제에 대한 주요국 동향 (미국)

- CBDC에 대한 몇가지 질문
 - 금융포용에 미치는 영향
 - 금융안정에 미치는 영향
 - 일반대중의 접근성 유지
 - 국가간 디지털 결제의 양상 변화
 - 사이버복원력과 관계
 - 이자지급여부
 - 개인별 보유량의 제한여부
 - CBDC의 중개기관

* The U.S. Dollar in the Age of Digital Transformation January 2022
(<https://www.federalreserve.gov/publications/files/money-and-payments-20220120.pdf>)

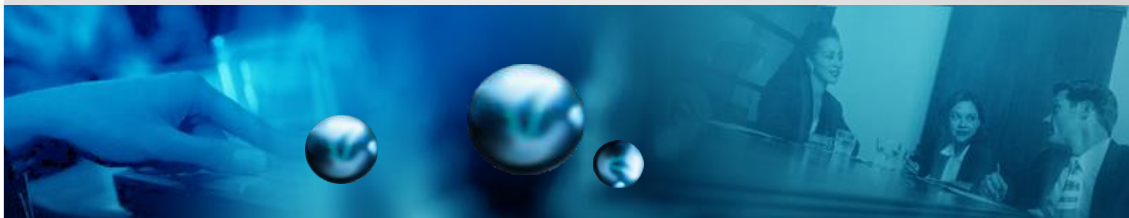
CSP



디지털 금융규제에 대한 주요국 동향 (일본)

- 빅테크의 진출에 따른 금융중개기능의 증가
 - 금융중개기능에 대한 규제근거 마련
 - : 금융상품판매 등에 관한 법률명을 개정하고 개정. 금융서비스제공에 관한 법률. 금융서비스 중개업을 신설. 빅테크를 매개로 한 은행, 증권, 보험의 결합화 대응
 - 금융서비스 중개업자에 대한 진입규제, 겸업규제, 행위규제
 - 행위규제 : 성실의무, 수수료 및 보수정보 제공, 설명의무 등
- 디지털화폐
 - 사회적으로 폭넓게 사용될 수 있는 디지털 통화에 대한 규제방향 마련(금융청, 디지털 분산형 금융에 대한 대응방향 연구회 중간보고서 2021)
 - : 송금결제이용자 보호, 자금세탁 및 테러자금 대책, 결제안정성
 - CBDC

CSP



Thank You !

토론문



- 박기선 (한국법제연구원 부연구위원)

토론문

박 기 선

한국법제연구원 부연구위원

안녕하십니까.

먼저 한국법제연구원과 은행법학회의 공동학술대회에 토론자로 참여하게 되어 영광으로 생각하고 있습니다. 오늘 공동학술대회의 주제인 “금융의 디지털화에 따른 규제와 이용자 보호”는 디지털 전환 시대에 있어 심도 있는 논의가 필요한 중요한 분야라는 점에서는 이견이 없을 것이라 생각합니다. 그럼에도 불구하고 개인적으로는 이 분야에 대한 전문성이 없는 제가 금융법 분야의 최고 권위자 중 한 분인 최승필 교수님 발제에 대하여 토론을 하는 것이 송구스럽지만, 향후 다양한 분야로 연구영역을 넓혀갈 수 있는 좋은 기회라 생각하고 토론에 임하고자 합니다.

최승필 교수님께서 발표해 주신 “디지털 금융의 국제적 동향 및 시사점”을 통해 코로나19 이후 금융부문에서 가속화되고 있는 디지털 금융의 특징, 빅테크와 금융의 결합상 쟁점, 디지털 금융 규제에 대한 주요국의 동향 등 디지털 금융 분야의 주요 논의를 한 번에 조망할 수 있었습니다. 특히, 일반적인 금융산업에 대한 규제와 달리 빅테크에 대한 규제는 명확한 감독의 틀이 형성되어 있지 않아 단기, 중기, 장기 단계별로 규제 틀을 형성해야 한다는 부분은 충분히 공감할 수 있는 내용이었습니다.

저는 최승필 교수님께서 발표해주신 내용을 바탕으로 궁금한 사항에 대해 두 가지 질문을 드리는 것으로 토론을 갈음하고자 합니다. 교수님께서 작성해 주신 발표자료의 제목에는 디지털 금융의 국제적 동향에 대한 소개와 더불어 국내법제에 참고할 수 있는 시사점이 포함된 것으로 보는데 지면의 제약으로 인해 해당 내용이 포함되어 있지 않은 것 같습니다. 결국 우리가 국제사회의 논의를 살펴보는 것은 이를 통한 시사점을 발굴하고 국내 여건에 적합한 방향성을 모색하기 위함이지 않을까 생각합니다. 그러한 관점에서 첫 번째 질문을 드리고자 합니다.

빅테크의 금융서비스 진출로 인해 소비자의 편리성이 향상된 것도 사실이지만 한편으로는 빅테크가 금융시장으로의 진입, 건전성, 영업행위 등 주요 규제 측면에서 일반 금융회사보다 낮은 규제를 받고 있어 이로 인한 각종 리스크가 더 크다는 점도 부인할 수 없을 것 같습니다. 최근 이슈가 되고 있는 무기명 형태의 카카오 간편 송금 제한에 관한 논란도 보이스피싱 등 범죄 악용을 막기 위한 목적으로 전자금융거래법 개정안이 발의가 된 데서 시작되었지만, 그 이면에는 카카오와 같이 금융업에 진출한 빅테크가 간편송금 사업을 위해 선불전자금융업으로 등록하여 이용자에게 양도·환급을 해줌으로써 규제를 피해 사실상 자금이체와 같은 영업을 하는 것에 대한 비판적 목소리가 반영된 것이 아닌가 합니다. 디지털 금융 규제에 있어 “동일 기능 동일 규제” 원칙의 관점에서 바라본다면, 일반 금융회사에 대한 규제와 금융서비스를 수행하는 빅테크에 대한 규제는 같은 서비스를 제공한다는 측면에서 어느 정도 동일한 수준을 유지해야 할 필요성이 있지 않을까 합니다. 그렇다면 현 상태에서 일반 금융회사와 금융업에 진출한 빅테크 간에 규제 격차를 해소하면서도 빅테크·핀테크 시장을 활성화 할 수 있는 방안으로 어떤 것이 있을지 혹은 국제사회에서 이러한 문제들에 대해 어떻게 접근하여 해결하고 있는지 궁금합니다.

다른 하나는 디지털 금융규제에 대한 주요국 동향 중 EU에 관한 부분입니다. EU는 플랫폼 사업자에 대한 규제 강화를 위해 2020년 12월부터 추진해 온 디지털 시장법(DMA)과 디지털 서비스법(DSA)을 최근 통과시킨 것으로 알고 있습니다. 디지털 시장법(DMA)은 EU 단일 시장의 디지털 부분에서 시장지배력을 보유하거나 시장지배력 보유가 예견되는 “게이트 키퍼” 역할을 하는 플랫폼 사업자가 법령을 위반하여 디지털 시장의 공정경쟁을 저해할 경우 규제할 수 있도록 하여 디지털 부분에서의 공정성과 경합성을 개선하는 것을 목적으로 하는 법률이라는 점에서 금융업에 진출한 빅테크 규제에 관한 논의와 관련성이 있다고 보여집니다. 반면, 디지털 서비스법(DSA)은 온라인상의 불법적·잠재적으로 유해한 콘텐츠 처리, 제3자 콘텐츠에 대한 온라인 공급자의 책임 등 빅테크 기업이 자사 플랫폼의 불법 콘텐츠를 더 적극적으로 감시하는데 주된 목적이 있는 것으로 보여집니다. 그렇다면 교수님께서서는 디지털 서비스법(DSA)의 어떤 부분이 디지털 금융규제와 관련되어 있다고 보는 것인지에 대해서도 궁금합니다.

시대의 흐름 보다 더 급속도로 변화하고 있는 금융의 디지털화와 관련하여 좋은 발표를 듣는 것만으로도 오늘 학술대회를 통해 배우는 바가 많은 것 같습니다. 저의 부족한 토론은 이 정도로 마칠까 합니다. 감사합니다.

제3주제



빅테크 금융규제의 필요성과 방향

Necessity and Direction of Big Tech Financial Regulation

• 김 자 봉 (한국금융연구원 선임연구위원)

Korea Banking Law Association-Korea Legislation
Research Institute Conference August 24, 2022.

Regulating Bigtech in Finance

Jabonn Kim
(Senior Fellow, Korea Institute of Finance)

Disclaimer

- This presentation is not an official view of KIF but of only the author.

Motivation

- Already strong presence of bigtech with market power in financial market
- Threat to market soundness and systemic resilience
 - Big tech in finance already as systemically important financial institution

3

Research Questions

- (1) What are reasonable regulatory principles for digital finance?
- (2) Why need to regulate fintech and bigtech in finance?
- (3) How to regulate fin, big techs in finance?

4

contents

1. Fundamental problem of financial market
2. Fundamental problem of financial policy: regulatory trilemma
3. Big techs: characteristics and risks
4. Regulatory principles and framework for big tech
5. Concluding remarks

5

Fundamental problem of financial market

- Information asymmetry
 - Seller v. buyer
 - Limits financial efficiency and financial inclusions
 - Solutions of infor. Asymmetry problem in financial history
 - Intermediaries as banks
 - Central counter party
 - Two different approaches of digital finance:
 - (1) big data: higher information concentration in platform
 - (2) blockchain: information dissemination
 - Which one is better?
 - Incentive v. disincentive to produce to produce more information
 - Information dissemination may fail to achieve informational efficiency
 - Can big data be better than bank's data? Depends on scope of big data.

6

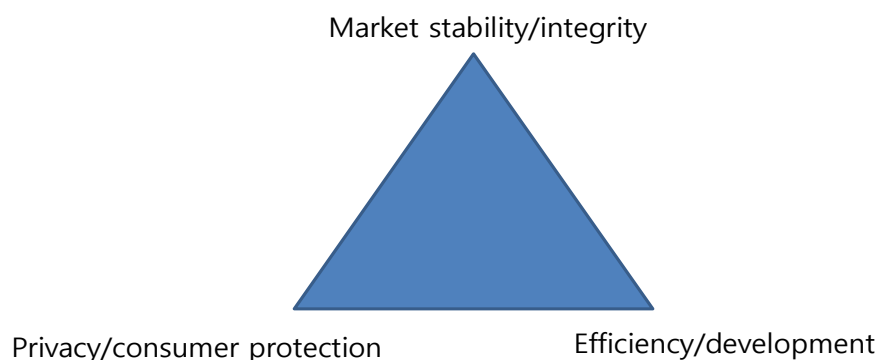
Fundamental problem of financial policy

➤ Regulatory trilemma

- Conflict between financial innovation and financial stability
- How to achieve balance between innovation and stability?
 - Stiglitz(2009, Regulation and Failure). Market is always full of moral hazard and market failure rather than innovative efforts → market integrity should be strengthened
 - Carletti et al(2020), Brummer and Yadav(2019), Kirakul et al(2021)
 - Croxson et al(2022), BIS(2019), Carriere-Swallow and Haksar(2019)
 - Feyen et al(2021)

7

Regulatory Trilemma



Source: Carletti et al(2020)

8

Characteristics of bigtech

- Rebundling of banking services centered around payment services
 - Young bigtech: unbundling payment services from banks
 - Old bigtech: rebundling banking services around payment services
- Partnership or shadow banking ways rather than bank license
 - Regulatory arbitrage

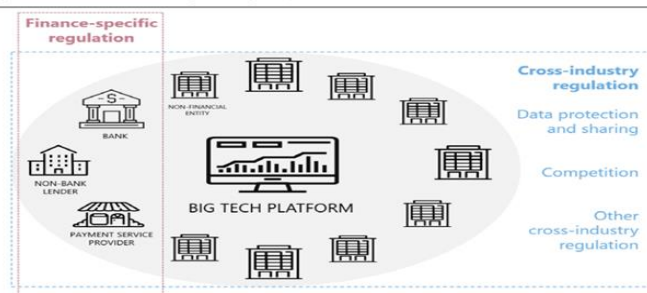
9

Characteristics of bigtech

- Consolidating financial and non-financial businesses
 - Can hurt soundness of banking
 - Crisanto et al(2021, BIS)

Regulatory environment for big tech groups

Graph 1



Source: FSL

10

Characteristics of bigtech

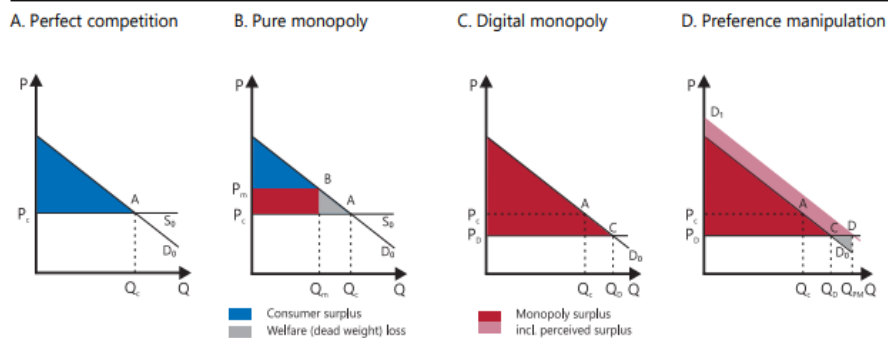
- Data asymmetry
 - Open banking
 - Leveling playing field problem between bigtech and banks
- Network effect
 - Data-network-activities
 - Market dominance
- Price discrimination using big data
 - First-degree price discrimination
 - Lower social welfare level
- Distrust on big tech's safeguarding consumer's data
 - Strict and systematic distrust overall countries

11

Characteristics of bigtech

Illustrative market structures: from competition to market manipulation

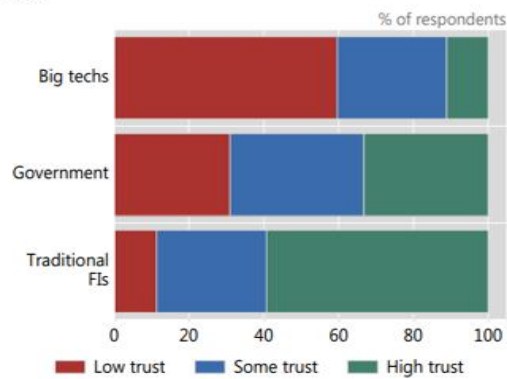
Graph 1



12

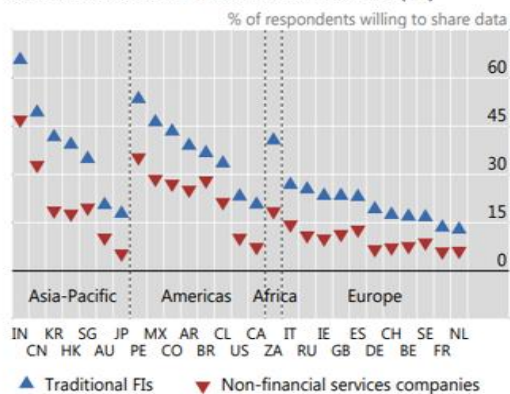
Characteristics of bigtech

US consumers' trust in counterparties to safeguard their data¹



13

Globally, consumers are generally more willing to share data with traditional financial intermediaries (FIs)²



Risks and benefits of bigtech

➤ FSB(2022)

➤ Benefits

- Digital technology → enhance financial efficiency
- Easier entry and exit in market → market contestability
- Financial inclusion

➤ Risks

- Innovation outside regulatory perimeter → hard to assess risks
- Disintermediating banks → threat to financial stability
- Vulnerable to cyber attack
- Regulatory arbitrage
- higher interconnectedness → systemic risks
- Unfair competition between bigtech and banks
- Threat to Consumer protection

14

Comparative Risks of small, medium, and bigtech

	Conflicts of interest	Concentration of power and anticompetitive behaviour	Contagion and systemic risk	Complex organisational structure impedes consolidated supervision	Ability of parent (or main shareholders) to support the bank
Standalone fintechs	Low risk	Low risk	Low risk	Low risk	High risk
Larger, diversified fintechs	Moderate risk	Low to moderate risk	Moderate risk	Moderate risk	Moderate to high risk
Big techs	High risk	High risk	High risk	High risk	Low risk
Commercial and industrial firms	High risk	High risk	High risk	High risk	

Source: Zamil and Lawson(2022)

15

Regulatory Principles for bigtech

Regulatory principles:

- Edward George Principle for regulatory coverage:
 - Thing that changes the flow of deposit is de facto a bank
- Evidence-based step-by-step approach principle for innovative business:
 - Given business model is untested and risk is unknown
- Same activity, same regulation principle for an unbundled service
 - Small and medium size fintech specializing a product or service
- Different risk, different regulation principle for bundled, rebundled products or services
 - Big tech serving multiple line of products
- Priority principle for regulatory trilemma
 - Stability and consumer protection have higher policy priority than innovation

Regulatory Impossibility Theorem:

- May not possible to get reach at social agreement on the list of priorities

16

Regulatory framework for bigtech

Comprehensive regulatory strategy:

- Micro prudential
 - Capital charge, ownership-governance structure regulation
- Macro prudential
 - Capital buffer, settlement system stability, consolidated regulation
- Fair competition
 - Between bigtech and banks
 - Within platform, between sellers
 - Between buyers: Prohibiting price discrimination
- Financial consumer protection
 - Strengthening information control rights of subjects
 - Privacy and pecuniary penalty

17

Concluding remarks

- Regulatory trilemma implies that keeping balance between innovation and stability may not be easy.
- We need to construct comprehensive regulatory strategy for micro prudential, macro prudential, fair competition, and financial consumer protections.

18

The End

19

한국법제연구원-은행법학회 공동학술대회

금융의 디지털화에 따른 규제와 이용자 보호

2022.08.24.(수)