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**NOTE**

|          |                                                                                                                                                                                                    |
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| From:    | Delegation of Germany                                                                                                                                                                              |
| To:      | Working Party on Consumer Protection and Information (Consumer Credits)<br>Working Party on Consumer Protection and Information (Attachés)<br>Working Party on Consumer Protection and Information |
| Subject: | Directive on financial services contracts concluded at a distance<br>- DEU non-paper on subsidiarity                                                                                               |

**DEU Non-paper**  
**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**

We would like to thank the Presidency for its proposals and improvements concerning the **problem of subsidiarity**. We believe that those proposals are an important and correct step in the right direction. Nevertheless, we still see room for further adjustments.

We welcome the addition of the **new recitals 13 et seq.** These recitals provide a direction that we are happy to orient ourselves to. Nevertheless, there is **still some uncertainty** when it comes to the distinction as to when the DMFSD applies and when other, product-specific regulations apply. This **legal uncertainty poses a major threat to national legislators**, who must transpose the directive into their own law.

**Art. 16b** regulates the right of withdrawal and in particular the start and duration of the withdrawal period. According to Art. 16b(1)(b), the start of the withdrawal period requires, among other things, that the consumer has been provided the respective (pre-contractual) information referred to in Art. 16a. Against this background, the following constellations are conceivable:

1) Own information requirements and right of withdrawal

A **specific EU act** contains its **own information requirements** and its **own right of withdrawal** (so e.g. CCD):

- Here it must be clear that the regulations of the CCD apply exclusively. Thus, we are **fine with Art. 16b (6) and with the draft of rec. 13a**, especially with the clause: *“This should also be the case where the Union act governing specific financial services provides different or minimal rules on pre-contractual information in comparison with the rules laid down by this Directive.”*

2) No right of withdrawal and own rules on information

There may be cases where **the specific EU act**

a. does **not provide for a right of withdrawal**, but has its **own rules** on (pre-contractual) **information obligations** (e.g. PSD2), which

b. may also be **less extensive** than those of the DMFSD (e.g. MCD):

- Here it should be clarified in text itself that the right of withdrawal from the DMFSD applies, but is triggered when the information-obligations from the more specific directives (and only these) are fulfilled.
- Rec. 13d and 13e mirror these situations well, but are not covered by Art. 16b(6). We still believe that they should be contained in the regulatory text itself.

3) Services explicitly exempted from other directives

In addition, there are situations where products are subject to the sector-specific directives but have been explicitly exempted from their right of withdrawal (e.g. MCD - promotional loans).

- Here, we are still in favour of excluding these products from the scope of the DMFSD as well.
- This case is still not covered by the proposal. We, therefore, propose to add a carve-out for these cases, either in Art. 3(1b) or in Art. 16b.