

# FSC Newsletter

Number 3 Year 2007



**Financial Services  
Commission**

## Distance Marketing

### Introduction

The Financial Services (Distance Marketing) Act 2006 (the Act) implements the Distance Marketing of Financial Services Directive (2002/65/EC). The Financial Services Commission (FSC) was appointed the Competent Authority under the Act on 12<sup>th</sup> July 2007.

The Act is available on the FSC website ([www.fsc.gi](http://www.fsc.gi)).

The Directive establishes a set of EU-wide rules on the information that must be supplied to consumers when financial services are sold at a distance and sets minimum periods of withdrawal from distance contracts.

This Newsletter is intended to provide guidance to firms covered by the Act.

### From when did the requirements take effect?

The Act commenced on the 15<sup>th</sup> February 2007 and applies to all distance marketing from that date.

### The aims of the Act

The basic provisions of the Distance Marketing Act are straightforward. It aims to protect consumers who deal with financial services firms and buy a product through distance means such as post, fax, internet and telephone.

Where a supplier agrees in writing, by telephone or electronically to provide financial services to a consumer, he must do two things:

- Provide the consumer with some specified information about the supplier and the service or product and,
- In some cases, allow the consumer to cancel the contract within a prescribed period.

Within the Act there are two Schedules: Schedule 1 stipulates the information to be provided to the consumer and Schedule 2 covers the information to be provided by telephone.

### What are Distance contracts?

The Act defines a distance contract as one that 'makes exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded'.

Distance communication is defined as 'any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the [distance] marketing of a service between those parties.'



Certain contracts are clearly distance contracts, for example where the consumer receives information through the post, through the press or through internet advertising and then deals with the firm solely by post, internet or telephone.

Other contracts are not distance contracts, for example where a consumer enters into the contract after face-to-face advice.

Some distance contracts are less obvious, such as when marketing literature regarding a product or service is available at a branch of the supplier, but the literature directs the consumer to call centres or to off-site processing offices.

In the case of, for example, a branch, the FSC considers a contract is not a distance contract if there is meaningful 'simultaneous physical presence' between the supplier and the consumer. The 'simultaneous physical presence of supplier and consumer' is only "meaningful", if at the time marketing literature is picked up from a branch, the product or service in question is one on which the branch is able to advise and deal with the consumer. If it is able to advise and deal, the contract will not be a distance contract even if the consumer decides not to take advantage of the facilities offered and simply fills in a form.

The same principles will apply if the contract is entered into through an intermediary.

#### **What products are covered?**

All "financial services" are covered. Under the Act, financial services means 'any service of a banking, credit, insurance, personal pension, investment or payment nature'.

#### **What firms are covered?**

All firms undertaking the distance marketing of financial services are caught by the Act. This includes intermediaries as well as suppliers.

#### **Which consumers are covered?**

Firms need only to apply the requirement of the Act to "consumers", as the protections of the Act are applicable to contracts with a 'consumer'.

Consumer is defined in the Directive as any natural person 'who, in distance contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession'.

#### **What are the requirements?**

When a distance contract is entered into with a consumer, the Act requires a firm to provide the consumer with information on a number of matters. This includes information about the firm; the service being provided (including notice of any special risks involved with the investments in question); the contract with the firm (for example, when and how any contract will come into existence and its governing law); the price payable; any right to cancel the contract; and the redress mechanisms available to the consumer.

These are detailed in the Schedules to the Act, which are reproduced for convenience at the end of this Newsletter.



### **What must firms do?**

Firms should review their terms of business to ensure they comply with the requirements of the Act. However, it should be remembered, that the Act imposes the additional information requirement only in respect of distance contracts, and only in respect of new consumers or existing consumers when new services are being provided.

Where additional information is required, firms may wish to create new integrated terms of business for both distance contracts and other business. Alternatively, the additional information could be included as a separate supplement. Terms of business may consist of more than one document, provided that it is clear that the documents collectively constitute the firm's terms of business, and that the significance of information and ease of use is not materially diminished.

Firms providing services through the internet should also bear in mind that, merely posting information on a website will not satisfy the requirement of the Act to make certain information available 'on a durable medium'.

As well as reviewing their terms of business and marketing materials, firms will also need to look again at telephone sales procedures. The Act does not preclude a contract being entered into over the telephone, provided that a more limited range of information is first provided to the consumer. Full terms of business must then be sent immediately after the contract is concluded.

Under the Act, a supplier or intermediary is not permitted to make any unsolicited distance communication (usually referred to as unsolicited calls) using any voice telephony system, an automatic calling machine or a facsimile machine, without the consumer's prior consent.

### **What are the cancellation rights?**

The Act provides a general right for a consumer to withdraw from a distance contract within a specified period after it has been concluded. The effect of cancellation is that the contract is terminated: the firm must pay back any sums that the consumer has paid to or for the firm (less payment for any service actually provided) within 30 days of receiving the notice of cancellation; and the consumer must return to the firm any property received under the contract within 30 days of sending the cancellation notice to the firm.

There are different periods within which contracts may be cancelled. The period for life policies is 30 days. A 30-day period also exists for personal pensions, but a 14-day cancellation period is specified for all other distance contracts.

Cancellation rights do not apply to a contract whose 'price depends on fluctuations in the financial market outside the supplier's control which may occur during the withdrawal period'. Nor do they apply to contracts which cover travel and baggage or similar short term insurance policies, and which have a total duration of less than one month. Other exceptions to the cancellation rights are contained in Section 11 of the Act.

### **What happens in respect of repeated business with the same Consumer?**

The requirements only apply to what is referred to as the "initial service agreement" (ISA). ISA's include, for example, an agreement for the provision of–

- (a) A bank account;
- (b) A credit card; or
- (c) Portfolio management services.



Where an ISA exists, there is no need to supply the same information to either successive operations of the same nature, or a series of separate operations of the same nature that are subsequently performed between them over time and within the framework of that agreement.

“Operations” includes, for example, deposits to or withdrawals from a bank account; payments by a credit card; transactions carried out within the framework of an initial service agreement for portfolio management services and subscriptions to new units or shares of the same collective investment scheme.

Operations, however, do not include adding new elements to an existing initial service agreement, for example, adding the possibility of using an electronic payment instrument together with an existing bank account.

Even where there is no ISA, the requirements only apply when the first operation is performed and any operation which is performed more than one year after the previous operation.

### **What are the Passporting implications?**

The Act operates on a ‘country of origin’ basis. This means that Gibraltar’s implementing measures will apply to a firm operating from an establishment in Gibraltar, and marketing to or dealing with retail customers outside Gibraltar. The regulations will not, however, apply to marketing into Gibraltar from an EEA establishment outside Gibraltar as it is the rules of that state (the country of origin) that will apply.

### **Other provisions of the Act**

#### *Payment cards*

The Act also sets out certain provisions in relation to payment cards. In general, where a payment card has been issued to an individual and fraudulent use is made of that card, to make a payment under or in connection with a distance contract to which the Act applies, by another person, the card-holder may request cancellation of that payment and return of any monies paid.

#### *Complaints*

The Act requires the FSC to consider any complaint made to it about a breach of the requirements, unless the complaint appears to the FSC to be frivolous or vexatious.



## **SCHEDULE 1 INFORMATION REQUIRED PRIOR TO THE CONCLUSION OF THE CONTRACT**

### **1. About the Supplier.**

(a) The identity and the main business of the supplier, the geographical address at which the supplier is established and any other geographical address relevant to the consumer's relations with the supplier.

(b) Where the supplier and the intermediary has a representative established in the consumer's country or territory of residence, the identity of that representative and the geographical address relevant to the consumer's relations with him.

(c) Where the consumer's dealings are with any professional other than the supplier, the identity of that professional, the capacity in which he is acting with respect to the consumer, and the geographical address relevant to the consumer's relations with that professional.

(d) Where the supplier and the intermediary are registered in a trade or similar public register, the particulars of the register in which they are entered and their registration number or an equivalent means of identification in that register.

(e) Where the supplier's and the intermediary's activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority.

### **2. About the Financial Service.**

(a) A description of the main characteristics of the financial service.

(b) The total price to be paid by the consumer to the supplier for the financial service, including all related fees, charges and expenses, and all taxes paid via the supplier or, where an exact price cannot be indicated, the basis for the calculation of the price enabling the consumer to verify it.

(c) Where relevant, notice indicating that: (i) 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 supplier's control; and (ii) historical performances are no indicators for future performances.

(d) Notice of the possibility that other taxes or costs may exist that are not paid via the supplier or imposed by him.

(e) Any limitations of the period for which the information provided is valid.

(f) The arrangements for payment and for performance.

(g) Any specific additional cost for the consumer of using the means of distance communication, if such additional cost is charged.

### **3. About the Distance Contract.**

(a) Whether or not there is a right of cancellation and, where there is a right of cancellation, its duration and the conditions for exercising it, including information on the amount which the consumer may be required to pay in accordance with section 13, as well as the consequences of not exercising that right.



(b) The minimum duration of the distance contract in the case of financial services to be performed indefinitely or recurrently.

(c) Information on any rights the parties may have to terminate the distance contract early or unilaterally by virtue of the terms of the contract, including any penalties imposed by the contract in such cases.

(d) Practical instructions for exercising the right to cancel in accordance with section 9 indicating, among other things, the address at which the notice of cancellation should be left or to which it should be sent by post, and any facsimile number or electronic mail address to which it should be sent.

(e) The EEA State or States whose laws are taken by the supplier as a basis for the establishment of relations with the consumer prior to the conclusion of the distance contract.

(f) Any contractual clause on the law applicable to the distance contract or on the competent court.

(g) In which language, or languages: (i) the contractual terms and conditions, and the prior information specified in this Schedule, are supplied; and (ii) the supplier and the intermediary, with the agreement of the consumer, undertakes to communicate during the duration of the distance contract.

#### **4 About Redress.**

(a) Whether or not there is an out-of-court complaint and redress mechanism for the consumer and, if so, the methods for having access to it.

(b) The existence of guarantee funds or other compensation arrangements, except to the extent that they are required by Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit guarantee schemes or Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor compensation schemes.



## **SCHEDULE 2 INFORMATION REQUIRED IN THE CASE OF VOICE TELEPHONE COMMUNICATIONS**

1. The identity of the person in contact with the consumer and his link with the supplier.
2. A description of the main characteristics of the financial service.
3. The total price to be paid by the consumer to the supplier for the financial service including all taxes paid via the supplier or, if an exact price cannot be indicated, the basis for the calculation of the price enabling the consumer to verify it.
4. Notice of the possibility that other taxes or costs may exist that are not paid via the supplier or imposed by him.
5. Whether or not there is a right to cancel and, where there is such a right, its duration and the conditions for exercising it, including information on the amount which the consumer may be required to pay in accordance with section 13, as well as the consequences of not exercising that right.
6. That other information is available on request and the nature of that information.

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