

## **Distance Marketing of Consumer Financial Services - UK Implementation**

The Distance Marketing of Consumer Financial Services Directive, Directive 2002/65 (“**DMCFS**”) amends Council Directive 90/619/EEC ( **the Life Assurance Directive, though repealed by Directive 2002/83**) and Directives 97/7 ( **the Distance Selling Directive** ) and 98 /27/EC ( **the Injunctions Directive** ) and is implemented in the UK by the Financial Services ( Distance Marketing ) Regulations 2004 ( no 2095 ) which have effect from 31<sup>st</sup> of October 2004 (“**the Regulations** “) .

**The Regulations and Consumer Credit.** The Regulations also cover distance contracts for Consumer Credit, however the prior information requirements set out in regulations 7 and 8 and Schedules 1 and 2 of the Regulations are in addition to the requirements set out in the **Consumer Credit ( Agreements ) (Amendment ) Regulations 2004** and the **Consumer Credit ( Disclosure of Information ) Regulations 2004**. These prior information requirements as regards Consumer Credit agreements which are distance contracts, will not have effect until the specified Consumer Credit Act amendment regulations have effect at the end of May 2005. However there is no transitional period for the withdrawal /cancellation rights ( detailed below ) in relation to Consumer Credit Act distance contracts.

**The Regulations and FSA regulated products.** For firms and products which are regulated under the Financial Services and Markets Act 2000, the Regulations need to be read in conjunction with PS 04/11 ( FSA Implementation of the DMCFS) which sets out the amendments to the FSA Handbook.

**Gap products and services.** The Government has stated that they will legislate under the 1972 European Communities Act in respect of any financial service falling within the scope of the DMCFS which is not covered by either the Financial Services and Markets Act 2002 or the Consumer Credit Act 1974.

**Background. The Distance Selling Directive**<sup>1</sup> already lays down the main rules applicable to distance contracts for goods or services concluded between a supplier and a consumer. **The Distance Selling Directive** did not cover financial services and so no harmonised approach across the EU to the regulation of distance contracts in relation to financial services existed. Hence the **DMCFS** was necessary. **The Injunctions Directive**<sup>2</sup> provides for a harmonised system for injunctions for the protection of consumers interests in the context of the **Distance Selling Directive**.

The **DMCFS** complements the **eCommerce Directive ( Directive 2000/31/EC)**<sup>3</sup> which was implemented in August 2002.

**What is a distance contract.** Regulation 2(1) defines a distance contract as “ any contract concerning financial services concluded between a supplier and a consumer under an organised distance sales or service provision scheme run by the supplier or an intermediary, who for the purpose of that contract, makes exclusive use of one or more means of distance communication up to and including the time at which the

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<sup>1</sup> Implemented by the Consumer Protection ( Distance Selling ) Regulations 2000

<sup>2</sup> Implemented by Part 8 of the Enterprise Act 2002 and by the Enterprise Act 2002 ( Part 8 Community Infringements Specified UK Laws ) Order 2003

<sup>3</sup> Implemented by the Electronic Commerce ( EC Directive ) Regulations 2002

contract is concluded” and “ **means of distance communication**” 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.** “

It is clear that if a consumer enters into a contract for a financial service and that transaction is conducted wholly at a distance eg. over the internet, by telephone, fax or mail from his home, there will be a distance contract. However it is not clear whether there is a distance contract where a consumer enters a bank, picks up a leaflet about financial services offered and ( without talking to anyone about the product ) takes it away to complete elsewhere and either posts it back or completes an application online. **The Government has decided to leave interpretation and guidance on these definitions to the enforcement authorities and the courts.**

### **The range of financial services product providers affected by the Regulations**

The product providers affected include, life assurance companies or friendly societies, ( when acting as provider of a life policy other than a pure protection policy ), the manager or operator of a collective investment scheme, promoters of an enterprise investment scheme, investment manager, stockbroker, corporate finance firm ( in certain circumstances ), deposit taking institutions, principals of appointed representatives (who will be responsible for ensuring they make the same changes as if the principal were carrying on the activities of the appointed representative – see section 19 of the Financial Services and Markets Act 2000 ) and firms that communicate or approve financial promotions.

The government has decided that “ **financial service** “ defined in regulation 2 (1), as “ any service of a banking, credit, insurance, personal pension, investment or payment nature” does include “**financial advice.** “

**What the DMCFS requires.** The DMCFS sets out common standards for information that must be supplied to consumers of financial services prior to a contract being concluded at a distance, where the supplier makes exclusive use of one or more services of distance communication (example – a telephone, internet, fax or mail). The DMCFS only applies to contracts made by persons acting for purposes which are outside any business they may carry on ( “**consumers**”).

**Supply of information** More particularly, under Schedule 1 to the regulations, the supplier in good time before the contract has been made, is required to provide information in a clear and comprehensible form concerning ( the following is not all inclusive ):

- the supplier itself, including identity, address, the public register on which he is registered and his registration number, his supervisory authority, the identity and address of any supplier’s representative the consumer deals with instead of the supplier;
- 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 of the consumer and the geographical address relevant to the consumer’s relations with that professional;

- the financial service, including a description of the service, total price to be paid, arrangements for payment and performance, notice of special risks and details of taxes;
- the contract itself, including duration, rights of withdrawal and any other early termination rights and penalties, applicable law and jurisdiction; and
- redress – any out of court complaints procedure and the existence of any guarantee fund or other compensation arrangements.

Voice telephone communications are dealt with in Schedule 2 of the Regulations, which provides essentially that if a consumer explicitly consents, only certain key information ( such as the identity of the supplier, a description of the main characteristics of the financial service, the total price for the service and the rights of withdrawal ) need be given to the consumer before the consumer is bound by any distance contract or offer.

**The successive operations issue.** Regulation 5 gives effect to Article 1.2 of the **DMCFS** in the light of recital (17). Under this, the substantive provisions of the **DMCFS**, namely pre contract information requirements, rights of withdrawal/cancellation and other rights, apply only to an initial service agreement ( ie such as the opening of a bank account or acquiring a credit card or **subscriptions to new units of a collective investment scheme** ) where (a) successive operations of the same nature, or (b) a series of separate operations of the same nature within the framework of the initial services agreement are subsequently performed.

Where there is no initial service agreement and (a) successive operations of the same nature or (b) or a series of separate operations of the same nature are performed over time, then the pre contract information requirements ( including the supply of the ts and cs ) only apply (i) when the first operation is performed and (ii) to any operation which is performed more than one year after the previous operation.

The word **operations** does 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.

**Rights of cancellation.** Regulation 9 provides that the consumer has a period of 14 calendar days ( 30 calendar days in the case of contracts for a personal pension ) running generally from the time the consumer is bound by the contract or from his receipt of the contract terms whichever is later, during which time he is free to withdraw from the contract without penalty and without giving any reason. In the case of life assurance contracts, the time limit is 30 calendar days and this runs from the time when the consumer is informed that the distance contract has been concluded.

**Automatic cancellation.** Regulation 12 provides, that where a distance contract is cancelled, certain subsidiary contracts connected with that contract ( ie attached contracts ) are automatically cancelled too.

**Exceptions to the right to cancel.** Regulation 11 sets out the exceptions to the right to cancel. These include products whose price depends upon market fluctuations outside the supplier's control ( such as money market instruments, transferable securities, UCITS and others ), and in the context of insurance, the right to withdraw

does not extend to travel insurance and similar short term policies whose duration is less than one month. **Note the right to cancel does not extend to a contract whose performance has been fully completed by both parties at the consumer's express request before the consumer gives notice of cancellation.**

**Refund rights** under regulation 13, where cancellation is made under regulation 9, the supplier must refund any sums received from the consumer under the contract, less a proportionate charge for any services already supplied and must release and return to the consumer any security taken under the contract: the consumer must repay to the supplier any money paid to the consumer under the contract and return any property acquired by it.

**The DMCFS and Territoriality issue.** The Directive contains no explicit provision as to whether it is the competent enforcement authorities of the supplier's or consumer's state that should be responsible for enforcing its provisions in respect of transactions involving more than one Member State. However article 16 allows a Member State to implement the provisions on a host state basis where the Member State of origin of the supplier has not yet transposed the Directive. The Government has now implemented the Directive on a country of origin basis.

In general terms, this means that the implementing provisions in each country will apply to marketing from an establishment in the country within the country or into the rest of the EEA.

As regards the marketing into the UK from another EEA state, the other state's implementation of the DMCFS will apply, but UK pre contractual information requirements will apply on a transitional basis until the EEA state from which the distance marketing is conducted has implemented the DMCFS.

Because the DMCFS harmonisation is only within its stated scope, the FSA have stated that existing prohibitions on the marketing to UK retail consumers of broker funds, derivatives and warrants and unregulated collective investment schemes will be retained.

**The DMCFS and Intermediaries.** Recital 19 of the DMCFS recognises that an intermediary may have involvement in the conclusion of a contract with a consumer. Recital 19 further provides that having regard to the nature and degree of that involvement, the pertinent provisions of the DMCFS would apply to such an intermediary, irrespective of his or her legal status. In FSA CP 196, the FSA set out that where a firm intermediates between a consumer and the supplier of a product or service, then there is a distance contract between the supplier and the consumer only if, treating the intermediary as the supplier, there would be a distance contract. In other words, there is a distance contract only if the intermediary is acting at a distance from the retail consumer. What follows is (a) where an investment adviser or other intermediary meets face to face with a consumer, there is no distance contract between the supplier and the consumer; but (b) where an intermediary is acting at a distance from the consumer, there will be a distance contract between the supplier and the consumer and accordingly regulation 6 of the Regulations will apply. It is important to note that the DMCFS will apply to intermediation services such as advice and arranging deals. Also an intermediary acting at a distance from a consumer who

enters into a contract with the consumer will for his own services have to follow the DMCFS and additionally if he is authorised, the FSA rules in PS 04/11.

**The DMCFS and credit cards.** Regulation 14 provides that in the event that a consumers payment card is fraudulently used in connection with a distance contract, ( other than where the Consumer Credit Act 1974 ( s39) covers the matter), the consumer is entitled to demand cancellation of the payment and be recredited with the sum paid or have it returned by the card issuer.

**Unsolicited financial services.** Regulation 15 prevents consumers from being bound by any obligation in respect of financial services supplied to them, but for which they have not been asked; and makes it a criminal offence to demand or assert a right to payment with any such supply; or to make or threaten enforcement action with a view to obtaining payment for such a supply, without reasons to believe payment is legally due.

**Contracting out of the DMCFS.** Regulation 16 renders void any contractual term which is inconsistent with any provisions of the regulations or purports to impose on a consumer additional or greater duties or liabilities than those provided for in the regulations. It overrides any contractual term which aims to apply the law of a non EEA State, so as to prevent a contract or supply closely connected with an EEA State from being governed by the provisions of the DMCFS.

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