

Chapter 5

Distance communications

5.1 The distance marketing disclosure rules

Application

- 5.1.-1 **R** (1) This section applies to a *firm* that carries on any distance marketing activity from an establishment in the *United Kingdom*, with or for a *consumer* in the *United Kingdom*.
- (2) If a *firm* is an intermediary rather than the supplier under the *distance contract*, references to '*firm*' in ■ COBS 5 Annex 1 R and ■ COBS 5 Annex 2 R are to be interpreted as referring to the supplier except for references to '*firm*' in ■ COBS 5 Annex 1 R (2), (4) and (18).

The distance marketing disclosure rules

- 5.1.1 **R** A *firm* must provide a *consumer* with the distance marketing information (■ COBS 5 Annex 1 R) in good time before the *consumer* is bound by a *distance contract* or offer.

[Note: article 3(1) of the *Distance Marketing Directive*]

- 5.1.2 **R** A *firm* must ensure that the distance marketing information, the commercial purpose of which must be made clear, is provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, with due regard, in particular, to the principles of good faith in commercial transactions, and the legal principles governing the protection of those who are unable to give their consent, such as minors.

[Note: article 3(2) of the *Distance Marketing Directive*]

- 5.1.3 **R** When a *firm* makes a voice telephony communication to a *consumer*, it must make its identity and the purpose of its call explicitly clear at the beginning of the conversation.

[Note: article 3(3)(a) of the *Distance Marketing Directive*]

Exception: contracts for payment services

- 5.1.4 **R** A *firm* must ensure that information on contractual obligations to be communicated to a *consumer* during the pre-contractual phase is in conformity with the contractual obligations which would result from the law presumed to be applicable to the *distance contract* if that contract is concluded.

[Note: article 3(4) of the *Distance Marketing Directive*]

Terms and conditions, and form

5.1.5 **R** A firm must communicate to the consumer all the contractual terms and conditions and the information referred to in the distance marketing disclosure rules (■ COBS 5.1.1 R to ■ COBS 5.1.4 R) on a durable medium available and accessible to the consumer in good time before the consumer is bound by any distance contract or offer.

[Note: article 5(1) of the Distance Marketing Directive]

5.1.6 **G** A firm will provide information, or communicate contractual terms and conditions, to a consumer if another person provides the information, or communicates the terms and conditions, to the consumer on its behalf.

Exception: distance contract as a stage in the provision of another service

5.1.7 **R** This section does not apply to a distance contract to deal as agent, advise or arrange, if the distance contract is concluded merely as a stage in the provision of another service by the firm or another person.

[Note: recital 19 to the Distance Marketing Directive]

Exception: successive operations

5.1.8 **R** In the case of a distance contract comprising an initial service agreement, followed by successive operations or a series of separate operations of the same nature performed over time, the rules in this section only apply to the initial agreement.

[Note: article 1(2) of the Distance Marketing Directive]

5.1.9 **R** If there is no initial service agreement but the successive operations or separate operations of the same nature performed over time are performed between the same contractual parties, the distance marketing disclosure rules (■ COBS 5.1.1 R to ■ COBS 5.1.4 R) will only apply:

- (1) when the first operation is performed; and
- (2) if no operation of the same nature is performed for more than a year, when the next operation is performed (the next operation being deemed the first in a new series of operations).

[Note: recital 16 and article 1(2) of the Distance Marketing Directive]

5.1.10 **G** In this section:

- (1) 'initial service agreement' includes the opening of a bank account and the concluding of a portfolio management contract;
- (2) 'operations' includes transactions made within the framework of a portfolio management contract; and
- (3) adding new elements to an initial service agreement, such as the ability to use an electronic payment instrument together with one's existing bank account, does not constitute an 'operation' but an

additional contract to which the *rules* in this section apply. The subscription to new *units* of the same *fund* is considered to be one of 'successive operations of the same nature'.

[**Note:** recital 17 of the *Distance Marketing Directive*]

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In the *FCA's* view, other examples of:

- (1) 'initial service agreement' include:
 - (a) subscribing to an *investment trust savings scheme*; or
 - (b) concluding a *life policy, personal pension scheme or stakeholder pension scheme* that includes a pre-selected option providing for future increases or decreases in regular *premiums* or payments; and
- (2) 'operations' include:
 - (a) successive purchases or sales of *shares* under an *investment trust savings scheme*; and
 - (b) subsequent index-linked changes to premiums or increases or decreases to pension contributions following fluctuations in salary.

Exception: voice telephony communications.....

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In the case of a voice telephony communication, and subject to the explicit consent of the *consumer*, only the abbreviated distance marketing information (■ COBS 5 Annex 2R) needs to be provided during that communication. However, a *firm* must still provide the distance marketing information (■ COBS 5 Annex 1R) on a *durable medium* available and accessible to the *consumer* in good time before the *consumer* is bound by any *distance contract* or offer, unless another exception applies.

[**Note:** articles 3(3)(b) and 5(1) of the *Distance Marketing Directive*]

Exception: means of distance communication not enabling disclosure

5.1.13 **R** A *firm* may provide the distance marketing information (■ COBS 5 Annex 1R) and the contractual terms and conditions in a *durable medium* immediately after the conclusion of a *distance contract*, if the contract has been concluded at a *consumer's* request using a means of distance communication that does not enable the provision of that information in that form in good time before the *consumer* is bound by any *distance contract* or offer.

[Note: article 5(2) of the *Distance Marketing Directive*]

Exception: contracts for payment services

5.1.13A **R** Where a *distance contract* is also a contract for *payment services* to which the *Payment Services Regulations* apply, a *firm* is required to provide to the *consumer* only the information specified in rows 7 to 12, 15, 16 and 20 of ■ COBS 5 Annex 1 R.

[Note: article 4(5) of the *Distance Marketing Directive*]

5.1.13B **G** Where a *distance contract* covers both *payment services* and *non-payment services*, this exception applies only to the *payment services* aspects of the contract. A *firm* taking advantage of this exception will need to comply with the information requirements in Part 6 of the *Payment Services Regulations*.

Distance marketing: other provisions

5.1.14 **R** If, at any time during the contractual relationship, a *consumer* that is a party to a *distance contract* asks a *firm*:

- (1) for a paper copy of the terms and conditions of that contract; or
- (2) to change the means of distance communication used;

the *firm* must provide that paper copy or change the means of distance communication used, unless (in the latter case) that would be incompatible with the contract or the nature of the service provided.

[Note: article 5(3) of the *Distance Marketing Directive*]

Unsolicited services

5.1.15 **R** (1) A *firm* must not enforce, or seek to enforce, any obligations under a *distance contract* against a *consumer*, in the event of an unsolicited supply of services, the absence of reply not constituting consent.

(2) This *rule* does not apply to the tacit renewal of a *distance contract*.

[Note: article 9 of the *Distance Marketing Directive*]

Mandatory nature of consumer's rights

5.1.16 **R** If a *consumer* purports to waive any of the *consumer's* rights created or implied by the *rules* in this section, a *firm* must not accept that waiver, nor seek to rely on or enforce it against the *consumer*.

[**Note:** article 12 of the *Distance Marketing Directive*]

5.1.17 **R** If a *firm* proposes to enter into a *distance contract* with a *consumer* that will be governed by the law of a country outside the *United Kingdom*, the *firm* must ensure that the *consumer* will not lose the protection created by the *rules* in this section if the *distance contract* has a close link with the territory of the *United Kingdom*.

[**Note:** articles 12 and 16 of the *Distance Marketing Directive*]

 5.2 E-Commerce**Application**

- 5.2.1 **R** This section applies to a *firm* carrying on an *electronic commerce activity* from an *establishment* in the *United Kingdom*, with or for a *person* in the *United Kingdom*.

Information about the firm and its products or services

- 5.2.2 **R** A *firm* must make at least the following information easily, directly and permanently accessible to the recipients of the *information society services* it provides:
- (1) its name;
 - (2) the geographic address at which it is established;
 - (3) the details of the *firm*, including its e-mail address, which allow it to be contacted rapidly and communicated with in a direct and effective manner;
 - (4) an appropriate statutory status disclosure statement (■ GEN 4 Annex 1 R or ■ GEN 4 Annex 1A R as appropriate), together with a statement which explains that it is on the *Financial Services Register* and includes its Firm Reference Number;
 - (5) if it is a *professional firm*:
 - (a) the name of the professional body (including any *designated professional body*) or similar institution with which it is registered;
 - (b) the professional title;
 - (c) a reference to the applicable professional rules and the means to access them; and
 - (6) where the *firm* undertakes an activity that is subject to VAT, its VAT number.

[Note: article 5(1) of the *E-Commerce Directive*]

- 5.2.3 **R** If a *firm* refers to price, it must do so clearly and unambiguously, indicating whether the price is inclusive of tax and delivery costs.

[Note: article 5(2) of the *E-Commerce Directive*]

- 5.2.4** **R** A *firm* must ensure that commercial communications which are part of, or constitute, an *information society service*, comply with the following conditions:
- (1) the commercial communication must be clearly identifiable as such;
 - (2) the *person* on whose behalf the commercial communication is made must be clearly identifiable;
 - (3) promotional offers must be clearly identifiable as such, and the conditions that must be met to qualify for them must be easily accessible and presented clearly and unambiguously; and
 - (4) promotional competitions or games must be clearly identifiable as such, and the conditions for participation must be easily accessible and presented clearly and unambiguously.

[Note: article 6 of the *E-Commerce Directive*]

- 5.2.5** **R** An unsolicited commercial communication sent by e-mail by a *firm* must be identifiable clearly and unambiguously as an unsolicited commercial communication as soon as it is received by the recipient.

[Note: article 7(1) of the *E-Commerce Directive*]

Requirements relating to the placing and receipt of orders

- 5.2.6** **R** A *firm* must (except when otherwise agreed by parties who are not *consumers*):
- (1) give an *ECA recipient* at least the following information, clearly, comprehensibly and unambiguously, and prior to the order being placed by the recipient of the service:
 - (a) the different technical steps to follow to conclude the contract;
 - (b) whether or not the concluded contract will be filed by the *firm* and whether it will be accessible;
 - (c) the technical means for identifying and correcting input errors prior to the placing of the order; and
 - (d) the languages offered for the conclusion of the contract;
 - (2) indicate any relevant codes of conduct to which it subscribes and information on how those codes can be consulted electronically;
 - (3) (when an *ECA recipient* places an order through technological means), acknowledge the receipt of the recipient's order without undue delay and by electronic means; and
 - (4) make available to an *ECA recipient*, appropriate, effective and accessible technical means allowing the recipient to identify and correct input errors prior to the placing of an order.

[Note: articles 10(1) and (2) and 11(1) and (2) of the *E-Commerce Directive*]

5.2.7 **R** For the purposes of **■ COBS 5.2.6 R (3)**, an order and an acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.
[Note: article 11(1) of the *E-Commerce Directive*]

5.2.8 **R** Contractual terms and conditions provided by a *firm* to an *ECA recipient* must be made available in a way that allows the recipient to store and reproduce them.
[Note: article 10(3) of the *E-Commerce Directive*]

Exception: contract concluded by e-mail.....

5.2.9 **R** The requirements relating to the placing and receipt of orders (**■ COBS 5.2.6 R**) do not apply to contracts concluded exclusively by exchange of e-mail or by equivalent individual communications.
[Note: article 10(4) and 11(3) of the *E-Commerce Directive*]

Distance marketing information

This Annex belongs to ■ COBS 5.1.1 R (The distance marketing disclosure rules)

Information about the firm

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| (1) | The name and the main business of the <i>firm</i> , the geographical address at which it is established and any other geographical address relevant for the <i>consumer's</i> relations with the <i>firm</i> . |
| (2) | Where the <i>firm</i> has a representative established in the <i>United Kingdom</i> ; , the name of that representative and the geographical address relevant for the <i>consumer's</i> relations with that representative. |
| (3) | Where the <i>consumer's</i> dealings are with any professional other than the <i>firm</i> , the identity of that professional, the capacity in which he is acting with respect to the <i>consumer</i> , and the geographical address relevant to the <i>consumer's</i> relations with that professional. |
| (4) | An appropriate statutory status disclosure statement (GEN 4), a statement that the <i>firm</i> is on the <i>Financial Services Register</i> and its <i>FCA</i> registration number. |

Information about the financial service

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| (5) | A description of the main characteristics of the service the <i>firm</i> will provide. |
| (6) | The total price to be paid by the <i>consumer</i> to the <i>firm</i> for the financial service, including all related fees, charges and expenses, and all taxes paid through the <i>firm</i> or, where an exact price cannot be indicated, the basis for the calculation of the price enabling the <i>consumer</i> to verify it. |
| (7) | Where relevant, notice indicating that the 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 <i>firm's</i> control and that past performance is no indicator of future performance. |
| (8) | Notice of the possibility that other taxes or costs may exist that are not paid via the <i>firm</i> or imposed by it. |
| (9) | Any limitations on the period for which the information provided is valid, including a clear explanation as to how long a <i>firm's</i> offer applies as it stands. |
| (10) | The arrangements for payment and performance. |

(11)	Details of any specific additional cost to the <i>consumer</i> for using a means of distance communication.
Information about the contract	
(12)	The existence or absence of a right to cancel or withdraw under the cancellation rules (COBS 15) and, where there is such a right, its duration and the conditions for exercising it, including information on the amount which the <i>consumer</i> may be required to pay (or which may not be returned to the <i>consumer</i>) in accordance with those <i>rules</i> , as well as the consequences of not exercising the right to cancel or withdraw.
(13)	The minimum duration of the contract, in the case of services to be performed permanently or recurrently.
(14)	Information on any rights the parties may have to terminate the contract early or unilaterally under its terms, including any penalties imposed by the contract in such cases.
(15)	Practical instructions for exercising any right to cancel or withdraw, including the address to which any cancellation or withdrawal notice should be sent.
(16)	[deleted]
(17)	Any contractual clause on the law applicable to the contract or on the competent court, or both.
(18)	In which language, or languages, the contractual terms and conditions and the other information in this Annex will be supplied, and in which language, or languages, the <i>firm</i> , with the agreement of the <i>consumer</i> , undertakes to communicate during the duration of the contract.
Information about redress	
(19)	How to complain to the <i>firm</i> , whether complaints may subsequently be referred to the <i>Financial Ombudsman Service</i> and, if so, the methods for having access to it, together with equivalent information about any other applicable named complaints scheme.
(20)	Whether compensation may be available from the <i>compensation scheme</i> , or any other named compensation scheme, if the <i>firm</i> is unable to meet its liabilities.

[Note: Recitals 21 and 23 to, and article 3(1) of, the *Distance Marketing Directive*]

Abbreviated distance marketing disclosure

This Annex belongs to ■ COBS 5.1.12 R

- (1) The identity of the *person* in contact with the *consumer* and his link with the *firm*.
- (2) A description of the main characteristics of the financial service.
- (3) The total price to be paid by the *consumer* to the *firm* for the financial service including all taxes paid via the *firm* or, when 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 and/or costs may exist that are not paid via the *firm* or imposed by him.
- (5) The existence or absence of a right to cancel or withdraw in accordance with the cancellation rules (COBS 15) and, where the right to cancel or withdraw exists, its duration and the conditions for exercising it, including information on the amount the *consumer* may be required to pay on the basis of the cancellation rules.
- (6) That other information is available on request and what the nature of that information is.
[Note: article 3(3)(b) of the *Distance Marketing Directive*]

