

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* or another *EEA State*.
- (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*]

5.1.11 **G** 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

5.1.12 **R** 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 *EEA*, 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 one or more *EEA States*.

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