



EU REGULATION OF DISTANCE MARKETING OF FINANCIAL SERVICES

The Directive regarding the distance marketing of consumer financial services¹ is an essential part of the Commission's strategy to develop an internal market for retail financial services. The strategy, as set out in the Commission's Communication on E-Commerce and Financial Services², is part of the Financial Services Action Plan³. This sets out the Commission's wider goal of creating a fully integrated European market in financial services by 2005 to complement the introduction of the euro. The aim of the Directive is to harmonise Member States' rules on the distance marketing of consumer financial services, thereby raising the level of consumer protection whilst enabling service providers to market their services across the EU without unnecessary obstacles.

The Directive

The Directive was issued by the European Parliament on 23 September 2002 and is to be implemented into national law by Member States before 9 October 2004.

The Directive largely follows the Distance Selling Directive⁴, which regulates the distance selling of most goods and services with the exception of financial services. Financial services were singled out for special treatment as part of the Financial Services Action Plan.

What is the Scope of the Directive?

The Directive applies to most types of retail financial services liable to be provided at a distance, but only in so far as they are supplied to a consumer. A consumer for these purposes means a natural person who is acting for purposes which are outside his trade, business or profession. So, a business person who buys financial

services will be protected by the Directive if he is acting in his personal capacity.

Banking, credit, insurance, personal pension, investment and payment services all take the form of retail financial services. Such services are provided at a distance if the associated contract is concluded as part of an organised distance sales or service-provision scheme which does not involve the simultaneous presence of the supplier and the consumer at any time leading to the conclusion of the contract. In other words, a "distance contract" arises as part of a scheme established by a supplier which removes the need for the parties physically to meet one another at any point during the offer, negotiation or execution of the contract. Services provided on a strictly occasional basis and outside a commercial structure dedicated to the conclusion of distance contracts are outside the scope of the Directive. The supplier is deemed to include any intermediary involved in the formation of the distance contract. So, the activities of financial advisers, for example, will be regulated by the Directive.

Which EU Law Applies?

The Directive does not affect the application of the Brussels Regulation regarding the choice of jurisdiction of a contract⁵ nor the 1980 Rome Convention regarding the choice of law of a contract. The basic rule for consumer contracts under the Rome Convention is that, although the parties may choose the applicable law, this choice must not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of law in the consumer's country. The Directive enacts mandatory rules, consumers being unable to waive the rights conferred on them by the Directive. So, the national laws of the consumer's home Member State will apply in respect of the Directive, regardless of where the supplier is established in the EU. Even if a distance contract is not concluded, the information requirements will be subject to the same law which would have applied to the distance contract, had it been concluded.

Member States are also required to take appropriate measures to ensure that the consumer does not lose the protection granted by the Directive by virtue of the choice

¹ Directive 2002/65/EC

² Communication regarding E-Commerce and Financial Services IP /01/185 dated 7 February 2001

³ Communication regarding an action plan for implementing the framework for financial markets COM (1999) 232 dated 11 May 1999

⁴ Directive 97/7/EC on the protection of consumers in respect of distance contracts

⁵ Council Regulation (EC) No. 44/2001 dated 22 December 2000



of the law of a non-Member State as the law applicable to the distance contract, if the distance contract has a close link with the territory of one or more Member States.

Information Requirements

It is a stated objective of the Commission that the use of means of distance communications should not lead to an unwarranted restriction on the information provided to the consumer. In the interests of transparency the Directive lays down the requirements needed to ensure that an appropriate level of information is provided to the consumer both before and after conclusion of the distance contract.

The consumer should receive sufficient information for him to properly appraise the financial service offered and so make a well-informed choice. The information should relate to the supplier, the financial service, the distance contract and any means of redress available to the consumer, and at a minimum the information should include the following:

- a) the identity, address and main business of the supplier, including the trade register in which the supplier is entered and its registration number;
- b) the identity and address of any supplier's representative;
- c) the Member State(s) whose laws are taken by the supplier as governing its relations with the consumer prior to the conclusion of the distance contract and any contractual clause on law application to the distance contract and/or on competent court;
- d) the language to be used for the contractual terms and for any communications;
- e) a description of the main characteristics of the financial service;
- f) the total price for the financial service, including all related costs and taxes – where an exact price cannot be indicated, the basis for the calculation of the price should be provided;
- g) the existence or absence of a right to withdraw, and, where the right exists, the duration and conditions for its exercise (including any associated costs), practical

instructions for exercising the right and any consequences of non-exercise of that right;

- h) the minimum duration of the distance contract and information on any rights the parties may have to terminate the distance contract early or unilaterally by virtue of the terms of distance contract, including any penalties in such circumstances;
- i) any out-of-court complaint and redress mechanism for the consumer and methods for having access to it.

This information needs to be provided in a clear and comprehensive manner appropriate to the means of distance communication used, with regard to principles of good faith and taking into account those who are unable to give their consent, such as minors.

The supplier should communicate this information, together with the contractual terms and conditions, on paper or on another durable medium available and accessible to the consumer in good time before he is bound by any distance contract or offer. A durable medium could take the form of a floppy disk, CD ROM or even an e-mail stored on a computer's hard drive, but information which is merely available on a website would not necessarily satisfy this requirement. If the means of distance communication requested by the consumer does not permit such information to be notified before the distance contract is executed, the information should be provided by the supplier immediately after the execution of the distance contract. In addition, the consumer is entitled to request a copy of the contractual terms and conditions on paper at any time.

What Rights do Consumers Have?

Rights of Withdrawal

The consumer has 14 calendar days to withdraw from the distance contract without penalty and without giving a reason. This "cooling-off" period is extended to 30 calendar days for life insurance policies and personal pension policies. The time frame commences from the later in time of either the date on which the consumer executes the distance contract⁶ or the date on which the

⁶ In respect of insurance contracts, the date is taken from when the consumer is informed that the contract has been executed



consumer receives the contractual terms and conditions and the information in the appropriate manner.

Notably, the right to withdraw from the distance contract does not apply to financial services which may be subject to fluctuations in the financial market outside the supplier's control during the withdrawal period, such as sales of foreign currency and securities or interest-rate swaps. Nor does the right of withdrawal apply to insurance policies of less than one month's duration or to distance contracts whose performance has been fully completed by both parties at the consumer's express request before the consumer exercises his right of withdrawal. In addition, Member States may exclude mortgages and secured loans from this right of withdrawal.

When the consumer exercises his right of withdrawal, the supplier may charge the consumer for services already received. However, the consumer may only be required to pay for services provided by the supplier in accordance with the distance contract upon the consumer's approval and provided the consumer was informed about the amount payable. The supplier should not in any event require payment for services performed during the withdrawal period without the prior request of the consumer. The payment must not exceed an amount which is in proportion to the extent of the service already received, nor may it constitute a penalty.

The supplier should return any sums received from the consumer within 30 calendar days from the day on which the supplier receives the notice of withdrawal. Similarly, the consumer should return any sums received from the supplier within 30 calendar days from the day on which the consumer dispatches the notice of withdrawal.

Protection Against Fraudulent Use of Payment Cards

Member States should ensure that in the event of fraudulent use of payment cards in connection with distance contracts, consumers will be able to cancel transactions and will be entitled to reimbursement of any sums charged.

Protection Against Inertia Selling

In the past, some suppliers have sent products to households stating the recipient may return the product if he does not want it, but that failure to return the product

within a specified timeframe would result in the recipient being deemed to have accepted the product. This kind of practice has become known as "inertia selling" because the sale is dependent upon the recipient not doing anything. The Directive requires Member States to take the necessary measures to prohibit suppliers from sending unsolicited financial services to consumers with a request for payment, and to protect consumers from the imposition of any obligations in respect of unsolicited supplies. Consent should not be deemed to have been given in the absence of a reply. Provisions for the tacit renewal of distance contracts remain unaffected.

Unsolicited Commercial Communications

Automated calling machines and fax machines may only be used for unsolicited commercial communications with the consumer's prior consent ("opt-in"). Member States may choose whether to regulate all other forms of unsolicited communication (such as telephone calls, letters, e-mails and SMS) on an opt-in basis or whether to prohibit such communications only where the consumer has expressed his manifest objection ("opt-out"). However, to the extent that the unsolicited communications are made electronically, this choice has been rendered meaningless by the Directive on Privacy and Electronic Communications⁷. This Directive provides that all marketing by means of electronic communications will be subject to an opt-in requirement on an EU-wide basis by the end of October 2003.

Sanctions and Redress

Member States may impose "effective, proportional and dissuasive" sanctions on any supplier in breach of these rules. These sanctions include the right for the consumer to cancel the contract at any time without charge. Member States shall ensure that adequate and effective means exist to ensure compliance with the Directive in the interests of consumers. This means that public bodies, consumer organisations or professional organisations must be set up to protect consumers in this regard. Member States should also promote the setting up or development of adequate and effective out-of-court complaints and redress procedures for the settlement of consumer disputes concerning financial services provided at a distance.

⁷ Directive 2002/58/EC on the processing of personal data and the protection of privacy in the electronic communications sector dated 12 July 2002



SIDLEY AUSTIN BROWN & WOOD

London

What Steps Should Suppliers Take?

Suppliers should:

1. determine which Member State's law regulates the distance marketing of financial services;
2. assess whether their activities fall within the scope of the relevant Member State's law, and assuming that is the case;
3. ensure that, before sending unsolicited commercial communications to a consumer, they have either obtained the consumer's prior consent or ascertained that the consumer has not objected (as appropriate) to such form of communication;
4. ensure that they provide all the requisite information in the appropriate form in good time before the execution of a distance contract with the consumer;
5. review their terms and conditions to ensure that they comply with the relevant Member State law governing the distance marketing of financial services.

If you would like to discuss any aspects of business or financial services regulation please contact:

- John Casanova, Partner, Tel +44 (0) 20 7360 3739
- William Long, Associate, Tel +44 (0) 20 7778 1865
- Susan Atkinson, Associate, Tel +44 (0) 20 7778 1869

Sidley Austin Brown & Wood
1 Threadneedle Street
London EC2R 8AW
Tel: +44 (0) 20 7360 3600
Fax: +44 (0) 20 7626 7937
www.sidley.com

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