

2002 No.

FINANCIAL SERVICES AND MARKETS

ELECTRONIC COMMUNICATIONS

**The Electronic Commerce Directive (Financial Services and
Markets) Regulations 2002**

<i>Made</i> - - - -	2002
<i>Laid before Parliament</i>	2002
<i>Coming into force</i> - -	2002

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The Treasury, being a government department designated(a) for the purposes of section 2(2) of the European Communities Act 1972(b) in relation to information society services, in exercise of the powers conferred by that section, and the powers conferred by sections 349(1)(b) and 414 of the Financial Services and Markets Act 2000(c), hereby make the following Regulations:

PART 1 GENERAL

Citation and commencement

1. These Regulations may be cited as the Electronic Commerce Directive (Financial Services and Markets) Regulations 2002, and come into force on 2002.

Interpretation

2. —(1) In these Regulations-

“the 2000 Act” means the Financial Services and Markets Act 2000;

“authorised incoming provider” means an incoming provider who is an authorised person within the meaning of the 2000 Act;

“the Authority” means the Financial Services Authority;

“commercial communication” means a communication, in any form, designed to promote, directly or indirectly, the goods, services or image of any person pursuing a commercial activity or exercising a regulated profession, other than a communication-

(a) referring only to any one or more of the following-

(i) a geographic address at which the activity or regulated profession is exercised or pursued, or

(ii) a name, address or other information which enables electronic communications to be sent to that person, or

(b) relating to the goods, services or image of that person provided that the communication has been prepared independently of the person making it, (and for this purpose, a communication prepared without financial consideration is to be taken to have been prepared independently unless the contrary is shown);

“the Commission” means the European Commission;

“consumer” means any individual who is acting for purposes other than those of his trade, business or profession;

“country of origin” in relation to an incoming electronic commerce activity means the EEA State in which the establishment from which the information society service in question is provided is situated;

“criminal conduct” means conduct which constitutes an offence in any part of the United Kingdom, or would constitute an offence in any part of the United Kingdom if it occurred there;

“direction” means a direction made, or proposed to be made, by the Authority under regulation 3;

“EEA regulator” means an authority in an EEA State other than the United Kingdom which exercises any function of a kind mentioned in section 195(4) of the 2000 Act;

(a) S.I. 2001/3495.

(b) 1972 c. 68.

(c) 2000 c. 8.

“EEA State” means a State which is a contracting party to the agreement on the European Economic Area signed at Oporto on 2 May 1992, as it has effect for the time being;

“Electronic Commerce Directive” means Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services(a);

“incoming electronic commerce activity” means an activity which-

- (a) consists of the provision of an information society service from an establishment in an EEA State other than the United Kingdom to a person or persons in the United Kingdom, and
- (b) which would, but for article 72A(b) of the Regulated Activities Order (and irrespective of the effect of article 72 of that Order), be a regulated activity within the meaning of the 2000 Act;

“incoming provider” means a person carrying on an incoming electronic commerce activity;

“information society service” means an information society service within the meaning of Article 2(a) of the Electronic Commerce Directive;

“investment” means an investment of a kind specified in an order made under section 22 of the 2000 Act;

“Regulated Activities Order” means the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001(c);

“regulated profession” has the same meaning as in the Electronic Commerce (EC Directive) Regulations 2002(d);

“relevant EEA regulator”, in relation to a direction, means the EEA regulator in the country of origin of the incoming electronic commerce activity to which the direction does, or would if made, relate, and which is responsible in that country for the regulation of that activity;

“rule” means a rule made by the Authority under the 2000 Act;

“specified” (except in the definition of “investment”) means specified in a direction;

“Tribunal” means the Financial Services and Markets Tribunal referred to in section 132 of the 2000 Act;

“UCITS Directive” means Directive 85/611/EEC of the Council of the European Communities of 20 December 1985 on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities(e);

“UCITS Directive scheme” means an undertaking for collective investment in transferable securities within the meaning of Article 2 of the UCITS Directive;

“unauthorised incoming provider” means an incoming provider who is not an authorised person within the meaning of the 2000 Act.

(2) A reference in these Regulations to a requirement imposed by the Authority under these Regulations is a reference to-

- (a) a requirement (including a requirement that a person no longer carry on an incoming electronic commerce activity) imposed by a direction; or
- (b) a requirement imposed by a rule applicable to incoming providers in accordance with regulation 3(4).

(a) OJL 178/1, 17 July 2000.

(b) Article 72A is inserted by the Financial Services and Markets Act 2000 (Regulated Activities)(Amendment)(Electronic Commerce Directive) Order 2002 (S.I. 2002/[]).

(c) S.I. 2001/544, amended by S.I. 2001/3544.

(d) S.I. 2002/[].

(e) OJL 375/3, 31 December 1985.

(3) For the purposes of these Regulations, a communication by electronic mail is to be regarded as unsolicited, unless it is made in response to an express request from the recipient of the communication.

PART 2

MODIFICATION OF FUNCTIONS OF THE FINANCIAL SERVICES AUTHORITY

Consumer contract requirements: modification of rule-making power

3.—(1) The power to make rules conferred by section 138 of the 2000 Act is to be taken to include a power to make rules applying to unauthorised incoming providers.

(2) In consequence of paragraph (1), references in sections 138 (4), (5) and (7) to (9), 148, 150 and 156 of the 2000 Act to-

- (a) an authorised person are to be taken to include a reference to an unauthorised incoming provider;
- (b) a regulated activity are to be taken to include a reference to an incoming electronic commerce activity.

(3) For the purpose of the exercise by the Authority of the power conferred by section 138 of the 2000 Act to make rules applying to incoming providers with respect to the carrying on by them of incoming electronic commerce activities, subsections (7) and (9) of that section have effect as if the reference to “person” where first occurring were a reference to an individual acting for purposes other than those of his trade, business or profession.

(4) Rules made by the Authority under section 138 of the 2000 Act do not apply to incoming providers with respect to the carrying on by them of incoming electronic commerce activities unless they-

- (a) impose consumer contract requirements;
- (b) apply with respect to communications that constitute an advertisement by a UCITS Directive scheme of units in that scheme; or
- (c) relate to the permissibility of unsolicited commercial communications by electronic mail.

(5) A consumer contract rule may provide that conduct engaged in by a person to whom the rule applies, and which is in conformity with a provision corresponding to the rule made by a body or authority in an EEA State other than the United Kingdom, is to be treated as conduct in conformity with the rule.

(6) “Consumer contract requirement” means a requirement-

- (a) that information of a kind referred to in regulation 4 be provided to a consumer before he enters into a contract for the provision of one or more information society services, or
- (b) as to the manner in which such information is to be provided.

(7) “Consumer contract rule” means a rule made by the Authority under section 138 of the 2000 Act which imposes a consumer contract requirement on incoming providers.

Consumer contract requirements: information

4. The information which may be the subject of a consumer contract requirement is-

- (a) the identity and the main business of the other party to the proposed contract (“the supplier”), the supplier’s address and any other address relevant to the consumer’s relations with the supplier;
- (b) if the supplier has a representative in the consumer’s country of residence, the identity and address of the representative, and any other address relevant to the consumer’s relations with the representative;

- (c) if the consumer is to have dealings with any professional person in connection with the contract, the identity of that person, a statement of the capacity in which he is to act, and the address relevant to the consumer's relations with him;
- (d) if the supplier is registered on any public register in connection with the carrying on of his business (or such of his business as is relevant to the contract), the name of that register, and any registration number or other means of identifying the relevant entry on the register;
- (e) if the carrying on of the supplier's business (or such of it as is relevant to the contract) is subject to a requirement that he be authorised by a person or body in order to carry it on, the name and address of that person or body;
- (f) a description of the main features of the service or services to which the contract relates;
- (g) either-
 - (i) the total price to be paid by the consumer under the contract, including all related fees, charges and expenses, and all taxes paid by the supplier (in so far as these are reflected in the total price); or
 - (ii) if the price referred to in (i) cannot be given, the basis for the calculation of the price, in such a form as would enable the consumer to verify the price when calculated by the supplier;
- (h) the risks associated with the specific features of any investment or investments to which the contract relates (including the risk of fluctuation of the value of the investment or investments for reasons outside the control of the supplier);
- (i) if relevant to the contract, a statement to the effect that -
 - (aa) the history of the value of an investment may not be a reliable indicator of its future value;
 - (bb) taxes or other costs may exist which are not imposed or paid by the supplier;
- (j) the arrangements for payment under, and performance of, the contract;
- (k) any specific additional cost to the consumer due to the means adopted for the conclusion of the contract, if such cost forms, or will form, part of the total contract price;
- (l) the existence or absence of any legal right of the consumer to withdraw from the contract after it has been entered into, the conditions attached to the exercise of any such right, including the likely cost to the consumer of exercising it, and the consequences of not exercising the right;
- (m) where relevant, the minimum duration of the contract;
- (n) any rights the consumer or the provider may have to terminate the contract in accordance with an express term of the contract, any penalties which may apply in that event, and the procedure to be followed by the consumer in that event;
- (o) the State or States whose law governs the contract;
- (p) the language or languages in which the supplier undertakes (with the agreement of the consumer) to communicate with the consumer in relation to the contract;
- (q) whether any mechanism (other than redress through a court, and including guarantee funds and compensation schemes and arrangements) is available to the consumer in relation to matters arising in connection with the contract, and if so, the name and address of the person responsible for operating that mechanism, and the procedure to be followed by the consumer in order to gain access to it;
- (r) any limitations, of which the supplier should reasonably be aware, of the period for which the information provided will be valid.

Application of certain rules

5. Rules made by the Authority under section 140 or 141 of the 2000 Act do not apply to incoming providers to the extent that they specify an activity which is an incoming electronic commerce activity.

PART 3

ARTICLE 3.4 OF THE ELECTRONIC COMMERCE DIRECTIVE

Direction by Authority

6. —(1) If the policy conditions and the procedural conditions are met, the Authority may direct that an incoming provider may no longer carry on a specified incoming electronic commerce activity, or may only carry it on subject to specified requirements.

(2) A direction-

- (a) must be in writing;
- (b) has effect from-
 - (i) a specified date (which may be the date on which it is made); or
 - (ii) if no date is specified in the direction, the date on which the direction is no longer open to review within the meaning of section 391(8) of the 2000 Act;
- (c) must include a statement to the effect that the person to whom it applies may refer the matter to the Tribunal;
- (d) may have effect for a specified period, until the occurrence of a specified event, until specified conditions are met, or for an indefinite period.

(3) The requirements referred to in paragraph (1) may include the requirement that the person to whom the direction applies must comply with one or more rules (with such modifications (if any) as may be specified) with respect to the carrying on by him of an incoming electronic commerce activity.

Policy conditions

7. The policy conditions are that-

- (a) the Authority considers-
 - (i) the making of the direction to be necessary for -
 - (aa) the prevention, investigation, detection or prosecution of criminal conduct;
 - (bb) the protection of consumers; or
 - (cc) other reasons of public policy relevant to the regulatory objectives set out in Part I of the 2000 Act; and
 - (ii) that the carrying on of the incoming electronic commerce activity by the person to whom the direction is to apply prejudices, or presents a serious and grave risk of prejudice to, any of the objectives referred to in sub-paragraph (i); and
- (b) the direction appears to the Authority to be a proportionate means of achieving, or addressing the prejudice or risk of prejudice to, any of those objectives.

Procedural conditions

8. The procedural conditions are that-

- (a) the Authority has requested the relevant EEA regulator to take measures to remedy the situation giving rise to the request;
- (b) the relevant EEA regulator-

- (i) has not, within what appears to the Authority to be a reasonable time, taken such measures; or
- (ii) has taken such measures, but the measures appear to the Authority to be inadequate in the circumstances;
- (c) the Authority has notified the Commission and the relevant EEA regulator of its intention to make the direction; and
- (d) the Authority has notified the person to whom the direction is to apply of its proposal to make the direction, and afforded that person the opportunity to make representations to the Authority in such manner, and within such period, as the Authority may determine.

Urgent cases

9.—(1) If the case appears to the Authority to be one of urgency, it may make a direction regardless of whether the procedural conditions are met.

(2) If the Authority makes a direction in reliance on paragraph (1), it must notify the Commission and the relevant EEA regulator as soon as possible that the direction has been made, and provide each of those bodies with a statement of its reasons for considering the case to be one of urgency.

Directions made under regulation 7

10.—(1) Subject to the following provisions of this regulation, the Authority may vary or revoke a direction by notice in writing to the person to whom the direction applies.

(2) The Authority may vary or revoke a direction under this regulation on its own initiative, or on the application of the person to whom the direction applies.

(3) If the Authority decides to refuse an application for the variation or revocation of a direction made under this regulation, it must notify the applicant in writing of its decision.

(4) The Authority must not vary a direction on its own initiative under this regulation unless it has afforded the person to whom the direction applies the opportunity to make representations to the Authority in such manner, and within such period, as the Authority may determine.

(5) Paragraph (3) does not apply if the case appears to the Authority to be one of urgency.

(6) A decision by the Authority to vary a direction has effect from-

- (a) a date referred to in the notice given under paragraph (1) (which must not be earlier than the date on which the decision was made); or
- (b) if no such date is referred to, the date on which the decision was made.

(7) If the case is one to which regulation 11(b) or (c) applies, a notice under paragraph (1) or (3) must include a statement to the effect that the person to whom the direction applies may refer the matter to the Tribunal.

(8) If the Authority makes a direction it may publish, in such manner as it considers appropriate, such information about the matter to which the direction relates as it considers appropriate in furtherance of any of the objectives referred to in regulation 7(a)(i).

Referral to the Tribunal

11. If the Authority-

- (a) makes a direction;
- (b) varies a direction on its own initiative; or
- (c) decides to refuse an application for the variation or revocation of a direction,

the person to whom the direction applies may refer the matter to the Tribunal.

PART 4 ENFORCEMENT

Application of certain provisions of the 2000 Act

12.—(1) For the purposes of sections 205 to 209 and 384 of the 2000 Act, a requirement imposed by the Authority under these Regulations upon an authorised incoming provider is to be treated as imposed on him by or under that Act.

(2) For the purposes of sections 380, 382 and 398 of, and paragraph 6 of Schedule 1 to, the 2000 Act, a requirement imposed by the Authority under these Regulations upon an incoming provider is to be treated as imposed on him by or under that Act.

(3) References in-

- (a) sections 165 to 168 and 176 of the 2000 Act to an authorised person are to be taken to include a reference to an unauthorised incoming provider;
- (b) sections 165 and 348 of, and Schedule 1 to, the 2000 Act, to functions conferred on the Authority by or under that Act (however expressed), are to be taken to include a reference to functions conferred on the Authority by these Regulations;
- (c) sections 132 and 133 of the 2000 Act to that Act are to be taken to include a reference to these Regulations.

(4) The reference in section 168(4)(c) of the 2000 Act to a rule made by the Authority is to be taken to include a reference to a requirement imposed by the Authority under these Regulations.

PART 5 AMENDMENT OF THE FINANCIAL SERVICES AND MARKETS ACT 2000

Amendment of sections 417 and 418 of the 2000 Act

13.—(1) The Financial Services and Markets Act 2000(a) is amended as follows.

(2) In section 417-

(a) after the definition of “documents”, insert-

““electronic commerce directive” means Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services;”;

(b) after the definition of “industrial and provident society”, insert-

““information society service” means an information society service within the meaning of Article 2(a) of the electronic commerce directive;”.

(c) After subsection (3), insert-

“(4) For the purposes of this Act-

(a) an information society service is provided from an EEA State if it is provided from an establishment in that State;

(b) an establishment, in connection with an information society service, is the place at which the provider of the service effectively pursues an economic activity for an indefinite period;

(c) the presence or use in a particular place of equipment or other technical means of providing an information society service does not, of itself, constitute that place as an establishment of the kind mentioned in paragraph (b);

(a) 2000 c. 8.

(d) where it is unclear from which of a number of establishments a particular information society service is provided, that service is to be regarded as provided from the establishment where the provider has the centre of his activities relating to the service.”.

(3) In section 418-

(a) in subsection (1), for “four” substitute “five”;

(b) after subsection (5), insert-

“(5A) The fifth case is where-

(a) the fourth case does not apply; and

(b) the activity-

(i) consists of the provision of an information society service to a person or persons in one or more EEA States; and

(ii) is carried on from an establishment in the United Kingdom.”;

(c) in subsection (6), for “(5)” substitute “(5A)”.

PART 6 INFORMATION AND NOTICES

Disclosure of information

14. In any enactment that requires or permits the disclosure of information to or by the Authority, a reference (however expressed) to powers or functions conferred on the Authority by or under the 2000 Act is, for the purposes of such disclosure, to be taken to include a reference to the Authority’s functions under these Regulations.

Notices

15. The Financial Services and Markets Act 2000 (Service of Notices) Regulations 2001(a) apply for the purposes of these Regulations as if references in those Regulations to “the Act” included a reference to these Regulations.

Amendment of the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001

16. The Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001(b) are amended by inserting, after regulation 12A-

“Electronic Commerce

12B. The Authority may disclose information to which this Part applies if it decides to publish that information in accordance with regulation 10(7) of the Electronic Commerce Directive (Financial Services and Markets) Regulations 2002(c).”.

(a) S.I. 2001/1420.

(b) S.I. 2001/2188, amended by S.I. 2001/3437 and S.I. 2001/3624.

(c) S.I. 2002/[].

PART 7
EXCLUSION OF GENERAL REGULATIONS

Exclusion of general regulations

17.—(1) Regulation 7(1) of the general regulations does not apply to an enforcement authority in respect of its responsibility in relation to-

- (a) the Financial Services and Markets Act 2000^(a); or
- (b) any legal requirement resulting from that Act.

(2) The application of the Financial Services and Markets Act 2000, or any legal requirement resulting from it, is not affected by regulation 7(2) of the general regulations.

(3) Information rules made by the Authority apply instead of regulations 8 to 10 of the general regulations.

(4) In this regulation-

“the general regulations” means the Electronic Commerce (EC Directive) Regulations 2002^(b);

“information rules” means rules made by the Authority which correspond to regulations 8 to 10 of the general regulations.

2002

Two of the Lords Commissioners of
Her Majesty’s Treasury

^(a) 2000 c. 8.
^(b) S.I. 2002[] .

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations give effect to the European Parliament and Council Directive of 8 June 2000 on certain legal aspects of information society services (No. 2000/31/EC; O.J. L178/1, 17 July 2000) (“the Directive”), in respect of matters within the scope of the Financial Services and Markets Act 2000 (c. 8) (“the 2000 Act”).

These Regulations should be read with the Financial Services and Markets Act (Regulated Activities) (Amendment) (Electronic Commerce Directive) Order 2002 (S.I. 2002/[]) (“the RAO Amendment Order”) and the Financial Services and Markets Act (Financial Promotion) (Amendment) (Electronic Commerce Directive) Order 2002 (S.I. 2002/[]), which make amendments to secondary legislation under the 2000 Act in consequence of the Directive. The Regulations should also be read with the Electronic Commerce (EC Directive) Regulations 2002 (S.I. 2002/[]), which make general provisions giving effect to the Directive.

Article 3 of the Directive provides for the regulation of information society services (defined in Article 2(a)) (“ISS”) on a “country of origin” basis. Member States are required to ensure that providers of ISS established on their territories comply with national legal requirements falling within the “coordinated field”, as defined in Article 2(h) of the Directive. They are also prohibited from restricting, for reasons falling within the co-ordinated field, the freedom to provide information society services from other Member States. Article 3.3 of the Directive excludes certain matters (listed in the Annex to the Directive) from the “country of origin” approach, including the advertising of their units by collective investment undertakings falling within Council Directive 85/611/EEC, contractual obligations concerning consumer contracts, and the permissibility of unsolicited commercial communications by electronic mail. Article 3.4 of the Directive creates a derogation from the country of origin approach in relation to individual information society services, to be exercised on a case-by-case basis on public policy grounds, and subject to certain procedures.

The RAO Amendment Order excludes from the scope of “regulated activities” under section 22 of the 2000 Act activities constituting the provision of an information society service from an establishment in a state in the European Economic Area other than the United Kingdom (termed “incoming electronic commerce activities” in these Regulations). Consequently, it is not necessary for persons to be “authorised persons” within the meaning of the 2000 Act before they can carry on such activities in the United Kingdom. Such persons will, however, need to be authorised in respect of regulated activities carried out in the United Kingdom that do not constitute the provision of an ISS.

Part 2 of these Regulations gives effect to certain of the exclusions in Article 3.3 of the Directive, by modifying the functions of the Financial Services Authority (“the Authority”) in relation to both authorised and unauthorised persons carrying on incoming electronic commerce activities (“incoming providers”). Regulation 3 modifies the Authority’s powers under sections 138 (rules for the purpose of protecting the interests of consumers) and 145 (rules about financial promotions) of the 2000 Act, so that rules made under them may apply to incoming providers who are not authorised under the Act (“unauthorised incoming providers”). The area of application of rules made under those sections (in respect of all incoming providers, whether authorised or not) is then restricted to certain matters listed in Annex to the Directive - the imposition of the information requirements specified in regulation 4 (consumer contract requirements), communications that constitute an advertisement of its units by a collective investment undertaking falling within Council Directive 85/611/EEC, and the permissibility of unsolicited commercial communications by electronic mail. Regulations 5 and 6 restrict the application of certain other provisions in connection with incoming providers.

Part 3 of the Regulations gives effect to the “case-by-case” derogation in Article 3.4 of the Directive. Regulation 7 allows the Authority, in cases where the policy and procedural conditions in Article 3.4 (set out in regulations 8 and 9) are met, to direct that particular incoming providers may no longer carry on a particular electronic commerce activity, or may only do so subject to

specified requirements. Regulation 10 provides that the Authority may dispense with the need to satisfy the conditions in regulations 8 and 9 in urgent cases, and regulations 11 and 12 make procedural provisions in connection with directions, including the rights of parties to whom they apply to refer the matter to the Financial Services and Markets Tribunal.

Part 4 of the Regulations applies, with modifications, certain enforcement powers in the 2000 Act in respect of requirements imposed by the Authority under these Regulations.

Part 5 of the Regulations gives effect to Article 3.1 of the Directive in relation to matters falling within the 2000 Act, by amending section 418 of that Act so that the activity of providing ISS within the European Economic Area from an establishment in the United Kingdom is to be regarded as carried on in the United Kingdom, in all cases where it would not otherwise be so regarded.

Part 6 of the Regulations makes provision with respect to the disclosure of information and service of notices.

Part 7 of the Regulations restricts the operation of certain provisions of the Electronic Commerce (EC Directive) Regulations 2002 (S.I. 2002/[]), in relation to the 2000 Act, and enforcement action taken under it.