

Implementation of the Distance Marketing of Consumer Financial Services Directive

Consultation Document

July 2003



HM TREASURY



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Financial Services Directive**

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Preface

1. This document sets out how the Government is minded to implement Directive 2002/65/EC concerning the distance marketing of consumer financial services (the DMD)¹. Annex C to this document details the legislation that the Treasury proposes to make under the European Communities Act 1972 (EC Act) to implement the DMD.
2. The Treasury would welcome comments on this consultation document. Please send your response, no later than 17th October 2003 to:

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When commenting, respondents should give details of any organisation whose views they represent. It will be assumed, unless indicated to the contrary, that respondents have no objection to their response being made public.

3. The regulations implementing the Directive are expected to provide benefits for business, consumers and others. But some provisions may entail compliance costs. The Financial Services Authority's (FSA) discussion paper² provides their preliminary understanding of where the main cost and benefits might arise for firms authorised under the Financial Services and Markets Act 2000 (FSMA). A full cost benefit analysis will be published by the FSA as part of the process of formulating their rules to implement the DMD. The Government particularly invites further information that would assist in estimating accurately benefits and compliance costs for financial service businesses and their clients (and especially for small businesses). To

¹ Official Journal of the European Communities, L 271, 9.10.2002, p. 16.

² FSA Discussion Paper 21: *Implementation of the Distance Marketing Directive* – March 2003.

assist with this a draft initial Regulatory Impact Assessment is included at Annex B.

Purpose

4. The marketing of goods and services at a distance, for example over the internet, telephone and by fax, has certain advantages for firms and consumers alike. For firms, the advantages include harnessing modern technology to access customers without the attendant costs of having face to face dealings with the customer. For the consumer it means having access to a wider range of products and services, across national boundaries thus increasing the ability to “shop around”. But consumers also require protection to ensure that they are not misled into buying products on the basis of inadequate information.
5. Directive 97/7/EC on the protection of consumers in respect of distance contracts³ (the DSD), already lays down the main rules applicable to distance contracts for goods or services concluded between a supplier and a consumer.
6. However, that Directive did not cover financial services, and there was therefore no harmonised approach across the Community to the regulation of distance contracts in relation to financial services. Consequently the DMD seeks to set out the principles governing the distance marketing of financial services.
7. The guiding principle of the European Parliament and the Council was that it is important in the context of achieving the aims of the single market, to adopt measures designed to consolidate progressively this market and those measures must contribute to attaining a high level of consumer protection. Both for consumers and suppliers of financial services, the DMD will constitute one of the main tangible results of the completion of the internal market.
8. It is essential to the smooth operation of the internal market for consumers to be able to negotiate and conclude contracts with an European Economic Area (EEA) supplier who is not established in the Member State in which the consumer resides.
9. Because of their intangible nature, financial services are

³ Official Journal of the European Communities, L 144, 4.6.1997, p. 19.

particularly suited to distance selling and the establishment of a legal framework governing the distance marketing of financial services should increase consumer confidence in the use of new techniques for the distance marketing of financial services, such as electronic commerce.

Introduction

10. The DMD sets common standards for the 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 means of distance communication (e.g. telephone, internet, fax or mail). There are also provisions for rights of withdrawal (“cancellation rights”) in many circumstances. The aim is to enhance the working of a single market by giving consumers the confidence to buy products on a cross border basis, with providers being governed by a common set of core standards across the European Union.
11. The DMD builds on the existing Directive⁴ governing the distance marketing of non-financial goods and services (the DSD). It also complements the E-Commerce Directive⁵ (ECD) which was implemented in August 2002. The scope of the ECD however is in one respect wider, covering as it does a broad spectrum of commercial activity. The DMD is confined to financial services and it is only the DMD and the DSD together which apply to a similarly wide spectrum of commercial activity. In another respect, however, it is the DMD which is wider. The E-Commerce Directive applies to transactions entered into over the internet while the DMD (like the DSD) also applies to contracts concluded by a supplier who made exclusive use of other means of distance communication, such as the telephone, fax or mail.
12. The impact of the DMD in the area of financial services is potentially wide-ranging because it applies to "any service of a banking, credit, insurance, personal pension, investment or payment nature".
13. Many financial services transactions are (and will increasingly be) likely to be conducted by distance means within and across borders between Member States. The DMD will apply in respect of all such services. It will be noted that some of these activities are currently not regulated under FSMA. The

⁴Directive 97/7/EC on the protection of consumers in respect of distance contracts, Official Journal of the European Communities, *L 144*, 4.6.1997, p. 19.

⁵ Directive 2000/31/EC on electronic commerce, Official Journal of the European Communities, *L 178*, 17.7.2000, p. 1.

Government's approach to implementing the DMD in the areas which are not currently governed by FSMA are discussed in the section dealing with "Scope".

14. In terms of impact, it is worth noting that the Directive's main requirements focus on pre-contract disclosure. There are no authorisation, licencing, conduct of business, training and competence requirements associated with the proposed regulatory regime. Many firms will already be familiar with disclosure requirements under their existing regulatory arrangements.

The Scope and Main Requirements of the Directive

General

15. The DMD definition of financial services encompasses any “service of a banking, credit, insurance, personal pension, investment or payment nature” (Article 2(b)). This is broad and covers most financial products that the ordinary man or woman in the street is likely to buy.
16. Most significant financial services are regulated by the FSA (see Annex A) but some are regulated by bodies *other than* the FSA, e.g. Department of Trade and Industry (DTI) / Office of Fair Trading (OFT). Yet others are “regulated” only by means of Codes of Practice with little or no statutory bite. For these latter situations the Government needs to consider how best to give legal effect to the Directive’s requirements and which body would be the most appropriate enforcement authority. The DMD requires that there be at least one body which can take action to ensure that the national measures implementing the Directive are complied with (Article 13). It does not require, however, the full panoply of FSMA style regulation.

Distance Contracts

17. A face to face sale such as where a customer walks into a bank and opens an Individual Savings Account (ISA) would not be caught under the DMD as the sale would not be at a distance. Whereas if the same customer was offered the ISA via the telephone, it would fall under the DMD as the means of selling was a means of distance communication.⁶ Between these two opposites, it is possible to conceive of a third situation: the customer walks into a bank, picks up an ISA leaflet, completes an application form at home and comes back to the bank the next day. If the customer contacts a member of staff in person to discuss the application, then the supplier has not made exclusive use of distance communication prior to the conclusion of the contract, and so the contract is not a distance contract. The DMD would therefore not apply. If however the customer simply drops off his completed application and does not actually speak to any one, the transaction would be a

⁶ ‘Means of distance communication’ and ‘distance contract’ are defined in Article 2 of the DMD.

distance contract as the supplier and consumer would have made exclusive use of distance means of communication.⁷ The contract would therefore fall within the scope of the DMD. (Similarly, if a customer uses their mobile to ring a bank's call centre, that contact with the bank would be by a distance means of communication, even if the customer was standing in a branch of that bank at the time.)

Main Requirements

18. The DMD's main requirements focus on disclosure before a customer is contractually committed, and on rights of withdrawal ("cancellation rights" periods) after a contract is concluded.
19. The main **disclosure requirements** are set out in Article 3 of the DMD and fall under the following broad headings:
 - a) the supplier, including details of any professional the consumer deals with instead of the supplier;
 - b) the financial service, including a description of the main characteristics of the financial service and the total price to be paid by the consumer;
 - c) the distance contract, including information on the right of withdrawal (if applicable), any rights the parties have to terminate the contract early, any contractual clause relating to the law applicable to the contract; and
 - d) redress: any out-of-court complaints and redress arrangements and any compensation arrangements other than those covered by the Deposit Guarantee and Investor Compensation Directives⁸.
20. The main right of withdrawal requirements are set out in Article 6 of the Directive which requires consumers to be given the right to withdraw from certain distance contracts. This right

⁷ The DSD contains the same definition of means of distance communication as the DMD but also provides an indicative list of means of distance communication in Annex I. That list includes unaddressed printed matter e.g. leaflets.

⁸ Directive 94/19/EC on deposit guarantee schemes (Official Journal of the European Communities *L 135*, 31.5.1994, p. 5) and Directive 97/9/EC on investor compensation schemes (Official Journal of the European Communities *L 84*, 26.3.1997, p. 22) respectively.

must be given for 30 days for life insurance and personal pensions and for 14 days for other contracts. There are, however, some important exceptions to this and some options.

Country of Origin

21. Where a supplier sells insurance by phone from France to a consumer in the United Kingdom, which Member State is responsible for enforcing the provisions of the Directive? Nowhere in the DMD is there an explicit provision as to whether it is the competent authorities of the supplier's or the consumer's state that should be responsible for enforcing its provisions in respect of transactions across a border between Member States. *However*, the Directive does contain a transitional provision (Article 16) that permits Member States to impose the provisions in the Directive on a host state basis where the Member State of origin of the supplier has not yet transposed the DMD. Consequently it is implicit, if not explicit, that the DMD should (with the limited exception of Article 16) be implemented **on a country of origin basis**: it is for the home Member State of the supplier to implement, and to enforce, the provisions of the Directive. The Treasury therefore regards the DMD as a country of origin Directive; under a host state interpretation Article 16 would simply be redundant. In other words, Article 16 presumes that but for its own provisions, which are of a transitional nature, it would not be open to Member States to apply rules to suppliers providing services from other Member States.
22. The effect of "country of origin" implementation is that provisions made by the UK apply to an establishment of an EEA supplier in the UK; such provisions apply to marketing within the UK and, in the same way, to marketing from that establishment into other Member States' jurisdiction. However, the UK's provisions do not apply to marketing into the UK from an EEA supplier entering a distance contract for financial services from an establishment in *another* Member State – it is that State's rules that apply.
23. The DMD is a single market Directive, and so its requirements do not themselves apply to a non-EEA firm, even if it has a branch in the UK. Nor does the DMD apply to the provision at a distance of financial services to consumers in the UK by a non-

EEA firm who has an establishment in another Member State. For example, the DMD does not apply where a US firm which has a branch in Paris enters into a distance contract from that branch with a consumer in the UK. Non-EEA firms are not subject to the requirements of the DMD. Nonetheless, the Treasury propose to subject non-EEA firms who supply financial services at a distance to the requirements of the DMD. If non-EEA firms were not subject to DMD type requirements, that would lessen consumer protection within the UK and the rest of the Community, and give such firms an unfair competitive advantage over EEA firms. So the Country of Origin reading does not preclude the UK imposing its own requirements on such contracts, and the protection of our consumers requires that we do so. Similarly, a US firm providing financial services at a distance from the US to consumers in the UK is not within the scope of the DMD. Again, however, consumers in the UK should not be deprived of DMD type protections just because the supplier is not within the Community.

24. The Government is strongly committed to the “home state” or “country of origin” approach to achieving a single market in financial services⁹. The DMD will be implemented on a country of origin basis but to protect consumers in the UK, the transitional clause in Article 16 will be used and the FSA and other UK competent authorities will have powers to impose UK rules on incoming services if the Member State of origin is not regulating the outgoing service to the extent necessary to apply the rules required by the DMD.
25. In policy terms, this would be in keeping with the Chancellor's strategy for completing the single market by mutual recognition of home state rules supported by harmonised core standards.

Intermediaries

26. Many financial service providers in the UK engage their customers through intermediaries which include independent financial advisors, credit brokers, tied agents or simply

⁹ See *Completing a Dynamic Single European Financial Services Market: A Catalyst for Economic Prosperity for Citizens and Business Across the EU*, HM Treasury, July 2000

introducers. Similarly, intermediaries can also act for customers seeking to enter into a contract for the provision of a financial service. The DMD focuses on the relationship between “suppliers” and “consumers”, where there is no face to face contact – where, for the purposes of a contract for the provision of a financial service, the supplier only uses means of distance communication up to and including the time at which the contract is concluded.

27. The mere fact that an intermediary is involved and (therefore) that the supplier of a financial service does not have face to face contact with the consumer does not make the sale of a financial product or service a distance contract. However Recital 19 says that the DMD should apply when one of the marketing stages involves an intermediary “having regard to the nature and degree of that involvement”.
28. Suppose that a customer obtains an insurance policy, but only has contact with the insurer through an intermediary. If the intermediary and customer have face to face contact prior to the conclusion of a contract for the provision of a financial service, then the contract is not a distance contract and therefore the DMD does not apply.
29. If the contact between the intermediary and the customer is exclusively by means of distance communication up to and including the time at which the financial services contract is concluded, then the contract is a distance contract and so falls within the scope of the DMD. In practical terms this may not matter very much because by the effective date for the Directive (9 October 2004), or soon thereafter, most intermediaries would have to comply with FSA disclosure rules for most types of regulated activity.
30. Some of the services which some ‘intermediaries’ provide will themselves fall within the scope of the DMD, when provided under a distance contract. Just as buying or selling investments as principal is a service of an investment nature, so is buying or selling investments as an agent. Similarly, arranging deals in investments is a service of an investment nature within the scope of the DMD, when provided under a distance contract.
31. In contrast, advice, e.g. advice about investments or

mortgages is not within the scope of the definition of financial services in Article 2(b). Just as advice about marriage is not itself of a marriage nature, so advice about investments or mortgages is not itself advice of an investment nature or of a credit nature. It is, rather, just advice.

32. Clearly, if an intermediary provides advice as part of a package of services – including, say, buying or selling investments as principal – then the DMD will apply to a distance contract to provide that package of services. However if a customer only contracts for advice, then that contract will not fall within the scope of the DMD.
33. Accordingly the Treasury considers that the better view is that advice as an activity does not fall within the definition of financial services in Article 2(b). As such, it is within the scope of the Directive on Distance Selling¹⁰ (the DSD) covering non-financial services. The outcome for those being regulated would be similar whichever Directive applies, as the requirements of each are broadly comparable.¹¹

FSA Regulation

34. The FSA only regulates in respect of those activities which are specified in the Regulated Activities Order¹², and does not regulate the carrying on of regulated activities by *exempt* persons.¹³ Paragraphs 44 to 49 dealing with the “gap” addresses how the DMD will be implemented in respect of contracts for the provision of financial services which are not regulated by the FSA.
35. In the case of authorised persons, the example of deposit-taking may help to illustrate the flexibility there is in FSA rules for regulation. Deposit-taking is a regulated activity, so banks

¹⁰ Directive 97/7/EC on the protection of consumers in respect of distance contracts, Official Journal of the European Communities, L 144, 4.6.1997, p. 19.

¹¹ The Treasury propose that just as the FSA will implement the DMD in respect of the regulated activities of authorised persons via their rule-book, so they should implement the DSD in respect of the regulated activities of authorised persons via their rule-book. Regulated activities of authorised persons are carved out of the draft Distance Marketing Regulations at Annex C:9see draft regulation 4(3). Similarly, the Treasury propose that regulated activities or authorised persons, such as giving advice about investments or mortgages, which seem to fall within the scope of the DSD rather than the DMD, should be carved out of the Consumer Protection (Distance Selling) Regulations 2000:see draft regulation 24(4).

¹² Financial Services and Markets Act 2000 (Regulated Activities) Order 2001.

¹³ Section 19(1)(b) of the Financial Services and Markets Act 2000. Although the FSA do of course indirectly regulate appointed representatives through their principals: section 39 of that Act.

and credit unions are authorised by the FSA and the FSA has the power to write conduct of business rules in respect of deposit-taking. However, very few of FSA's conduct of business rules currently apply to deposit-taking (they primarily apply to other regulated activities of the deposit-taker, e.g. the selling of personal pensions, in the same way as for other authorised persons). Conduct of business standards for deposit-taking are established under the Banking Code (although not all banks and building societies are signatories to the voluntary Code). If the FSA is to be the vehicle for implementation of the DMD for regulated activities then that would entail some relatively detailed conduct of business rules being set directly by the FSA.

Consumer Credit

36. The Consumer Credit Act 1974 (CCA) protects consumers taking out regulated credit agreements with a value not exceeding £25,000. It requires that lenders must be licensed by the OFT and satisfy certain fitness criteria. The OFT and local Trading Standards Office monitor compliance with the Act and take enforcement action. Regulations under that Act control the form and content of credit advertisements¹⁴ and the content and form of credit agreements¹⁵. The Act lays down certain rights of withdrawal in respect of agreements where there have been antecedent negotiations and where agreements are not completed on trade premises.
37. At present most distance contracts that are governed by the Act relate to direct mail advertising or responses to other forms of advertising. The current Act does not permit the conclusion of consumer credit agreements electronically or in a paper-less environment. In a consultation paper¹⁶ issued in December 2002 the DTI announced its intention to facilitate the completion of credit and hire agreements electronically. That consultation made reference to some of the provisions of the DMD.

Consumer

38. The DMD applies only to contracts between a 'supplier' and a

¹⁴ The Consumer Credit (Advertisements) Regulations 1989 (*SI 1989/1125*)

¹⁵ The Consumer Credit (Agreements) Regulations 1983 (*SI 1983/1553*)

¹⁶ Review of The Consumer Credit Act 1974 Electronic Agreements CCP 015/02 – December 2002

'consumer'. 'Consumer' is defined as "any natural person who, in distance contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession" (Article 2(d)). This means that only private individuals are covered, and not individuals entering into contracts for business purposes as sole traders or members of a partnership. Thus borrowers for the purpose of a "buy to let" mortgage, would generally not be covered under the DMD. The FSA propose that those persons who are consumers within the meaning of the DMD but are not within the FSA's private customer category should be covered so that they receive the benefits of the DMD's requirements, and so that the Directive is properly implemented.

39. The CCA, which currently covers agreements up to a value of £25,000, applies a wider definition to the term "consumer" as it includes individuals, sole traders, partnerships and other unincorporated bodies. In November 2002 Melanie Johnson MP, Parliamentary Under Secretary of State for Competition, Consumers and Markets at the DTI announced that it is the Government's intention to remove the current limit of £25,000 in the CCA. She also stated it was her intention to narrow the scope of the CCA to sole traders, other unincorporated bodies and small partnerships of less than three partners.¹⁷ However, the DMD adopts the definition of consumer as "any natural person who is acting for purposes which are outside his trade, business or profession". In their review of the CCA, the DTI will be considering whether it is desirable to extend the implementation of the DMD in respect of CCA regulated agreements to include this wider definition of consumer.
40. Article 8 of the Directive requires Member States to ensure that in the event that a consumer's payment card is fraudulently used in connection with a distance contracts, the consumer can request cancellation of the payment and be re-credited. Section 84 of the CCA provides that the liability of a cardholder shall not exceed £50 if a credit card is misused during the period before loss or misuse of the card is reported. However section 84 does not apply to any use of a card in connection with a distance contract to which the Consumer Protection (Distance Selling) Regulations 2000 apply: section 84(3A) of

¹⁷ Consultation on Financial Limit and Exempt agreements of the Consumer Credit Act 1974 CA 005/002 – November 2002.

the CCA. Similarly, section 84 will not apply to any use of a card in connection with a distance contract to which the DMD applies.

The Government's Approach to Implementation

41. As stated earlier, the definition of financial services in the DMD is wider than that in FSMA and includes such services as consumer credit which the FSA does not regulate.
42. The table at Annex A shows the spread of financial services, distinguishing between those which are regulated by FSA under FSMA and by the DTI/OFT under the CCA. It also indicates services which are financial services for the purpose of the DMD but which are not regulated by either the FSA or DTI/OFT.
43. The Government needs to ensure that *all* the financial services within the scope of the Directive comply with the requirements of the DMD. And the mechanism it chooses to do this needs to work not just for the current range of financial services, but for future innovations in the sector too.

The Alternative Approaches

44. There are two possible approaches. The first is to use the powers of the EC Act and make regulations covering *all* distance contracts concerning financial services. There would thus be a set of overarching requirements giving effect in domestic law to the requirements of the Directive, adherence to which would be necessary for firms to comply with the DMD. Under this scenario there would be no specific regulator, like the FSA, as such. Firms not complying with the requirements would be in breach of those regulations, and one or more bodies or organisations would have to be empowered to take action to ensure that those regulations were complied with. Likely issues arising under this approach could include questions about the precise enforcement mechanism.
45. The alternative would be to incorporate the DMD requirements into the rules or other requirements of the competent authorities under the relevant existing legislation (mainly FSMA and the CCA) for the areas they cover. Under this scenario, the FSA would integrate the DMD requirements into the rules it sets for authorised firms, and DTI/OFT and Trading Standards Departments would similarly ensure that their consumer credit requirements were DMD compliant. The EC

Act regulations outlined in the preceding paragraph would only come into play in the event that a financial service falling within scope of the DMD was not covered by either FSMA or the CCA, i.e. to fill a “gap” between the two regimes. The table at Annex A shows that very few products or services fall into this category.

46. **The Treasury’s preference is for the second option.** It would be a more effective approach in terms of enforcement. The FSA in particular would be able to deploy its full range of remedies if needed, and it would simply extend rather than change the current regulatory architecture, so that firms currently regulated by the FSA would be regulated by the FSA for the purposes of the DMD, and those currently regulated by OFT would be regulated by that body for the purposes of the DMD. By contrast, the first option could give rise to uncertainty for financial institutions as to whether or not they should be complying with the FSA rule-book, if it appeared inconsistent with the regulations.
47. Where these regulations do come into play, an important question would be who would be the enforcement authority for financial service contracts which were covered by the EC Act Regulations. Such an enforcement authority would not have to act as a pro-active regulator. Following the model of the enforcement authority provided for for the DSD in the Consumer Protection (Distance Selling) Regulations 2000, its role could simply be to consider complaints that the regulations have been breached and to take proceedings for an injunction against a business to prevent further breaches.
48. Because of the diverse range of financial services, the Treasury’s view is that it would make sense for there to be a number of such enforcement authorities empowered to take the appropriate actions. The suggested bodies are the FSA, the DTI/OFT and Trading Standards Departments across Great Britain. The role of these bodies would only come into play when there is non-compliance involving a “gap” service. The working principle would be that whichever body was most closely associated with regulating a product similar to the “gap” product at issue, would be responsible for taking any necessary enforcement action. For example, if the product at issue relates to the business of debt management, the OFT

would be the obvious choice, given its role in regulating consumer credit.

49. Annex A is a table of retail financial services, setting out a grid of where current regulatory responsibility lies for various products. Those not regulated under FSMA or CCA have been labelled as “gap” candidates, where the gap filling arrangements outlined above are proposed to apply.

Do you agree with the Treasury’s approach as set out in the above paragraphs? If not, please indicate why an alternative approach may be preferable.

50. The preceding paragraphs discuss gap financial services i.e. services which are financial services within the meaning of the DMD but which are not regulated by either the FSA or DTI/OFT. There are in addition gap financial service providers. Most notably, the FSA does not regulate the provision of financial services by *exempt persons*¹⁸.
51. The FSA indirectly regulate appointed representatives through their principals (see footnote 13). However the FSA does not have the *vires* to implement all of the requirements of the DMD in respect of appointed representatives via its rule-book. While the FSA can use its rule-book to require appointed representatives to comply with the DMD’s prior information requirements, section 39 of the Financial Services and Markets Act 2000 only enables the FSA to make rules which confer rights on persons to rescind agreements with *authorised* persons. The FSA do not have the *vires* to write rules conferring on consumers the right to cancel distance contracts which they have entered with persons who are *not* authorised, including appointed representatives. The Treasury therefore propose that while the FSA will implement the DMD’s prior information requirements in respect of appointed representatives via its rule-book, rights of withdrawal will be conferred on consumers who contract at a distance with appointed representatives by the Distance Marketing Regulations. Appointed representatives will therefore be subject to the FSA’s rule book in respect of the DMD prior information requirements, but the Distance Marketing Regulations in respect of rights of withdrawal.

¹⁸ Section 19 of the Financial Services and Markets Act 2000.

52. The FSA do not regulate financial services activities falling within the scope of the DMD that are carried on by members of Designated Professional Bodies¹⁹ (DPBs), provided these are incidental to their main profession and that they comply with the rules of their DPB. It is proposed that if the DPB in question incorporates the DMD's prior information requirements into its rules (e.g. by following the FSA's DMD rules), its members will not be subject to the prior information provisions in the Distance Marketing Regulations. However, where the DPB has not adopted the necessary rules to implement the DMD's prior information requirements, then the relevant parts of the "gap" regulations would apply. In respect of cancellation rights, there is again the problem of whether DPBs can confer cancellation rights on third parties contracting with their members. The Treasury therefore propose that members of DPBs will be subject to those of the provisions of Distance Marketing Regulations which confer cancellation rights. So while members of DPBs which make rules implementing the DMD's prior information requirements will not be subject to the regulations which concern prior information, all members of DPBs *will* be subject to those regulations which confer cancellation rights on consumers.

Views are invited on this approach, especially from appointed representatives and their principals, and professional firms and bodies.

¹⁹ Part XX of the Financial Services and Markets Act 2000.

Disclosure of Prior Information (Article 3)

53. The FSA's rules in respect of regulated activities already require information disclosure for many face to face sales. For example the selling of most types of investment business require "Key Features Documents" which are regulated both as to form and content.
54. In its discussion paper on the subject²⁰, the FSA indicated that for DMD purposes it intended to work within the existing framework for information disclosure. So, for activities for which there are detailed existing requirements there would be changes to the detail but not the structure of the requirements. For some activities, notably deposit-taking, the FSA would have to introduce new rules.
55. The disclosure of pre-contract information and contractual terms under the CCA are primarily contained in the Consumer Credit (Advertisements) Regulations 1989 and in the Consumer Credit (Agreements) Regulations 1983.
56. These contain detailed rules for advertising credit products to consumers and lay down a strict format for the form and content of agreements which consumers are required to conclude. However neither implements the DMD requirement that pre-contractual information should be provided to the consumer "in good time" before the contract is concluded.
57. Telephone communications are dealt with in Article 3(3) and it is made clear that 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 whether or not there is a right of withdrawal) must be given to the consumer before the consumer is bound by any distance contract or offer.
58. The requirements under the DMD will need to be incorporated into any amending Regulations dealing with advertising and agreements. The DTI is currently engaged in preparing consultations on Forms of Agreement and on Advertising Regulations. A number of focus group meetings have already been held and it is proposed to issue separate consultation

²⁰ FSA Discussion Paper 21: *Implementation of the Distance Marketing Directive* – March 2003

papers later in 2003.

59. As outlined above, while the FSA and OFT between them cover nearly all financial services affected by the DMD, there is a small residue of such financial services which potentially falls into neither. For ease of reference these are termed as “**gap services or products**”. There are also the “gap financial service providers” referred to in paragraph 50. For the distance contracts which fall in the gap, the Treasury’s proposed approach in paragraph 45 envisages that Distance Marketing Regulations made under the EC Act would apply. The Consumer Protection (Distance Selling) Regulations 2000 apply to the distance selling of non-financial goods and services: they implement Directive 97/7/EC on the protection of consumers in respect of distance contracts. The intention is for similar regulations to cover distance contracts for the provision of financial services where those contracts do not fall under FSMA or CCA.
60. These regulations would implement the prior information requirements of the DMD but would not specify the particular form the disclosure should take.

Additional Requirements (Article 4)

61. The core requirements of the Directive focus on disclosure of information prior to the conclusion of the distance contract (Article 3) and on rights of withdrawal (Article 6). Article 4(2) states that pending further harmonization, Member States may impose, or maintain, more stringent prior information requirements. Article 4(2) does not explicitly say on whom the more stringent prior information rules can be imposed, and it does not explicitly state that any “more stringent provisions” imposed by a Member State can only be imposed on suppliers based in that State. However for the reasons given in paragraphs 21 to 25 above, the Government interprets this as a country of origin Directive.

The question of incoming providers aside, respondents are invited to express views on the desirability of using the provisions of Article 4(2) to impose additional information requirements beyond the core requirements of Article 3 in respect of those financial services and financial service providers falling within the gap. It would be helpful also to have details of what these additional requirements should be and what the costs and benefits might be.

Rights of Withdrawal (Article 6)

62. Article 6.1 of the DMD requires consumers to be given rights to withdraw without penalty from certain types of contract, for a specified period. The “cancellation rights” period are 30 days for a life insurance and pensions contract (and provision will be made in respect of these in the FSA’s rulebook), and 14 days for most other financial products.
63. Significant exceptions to this requirement are set out in Article 6(2), the most important of which is the category of financial services whose price depends on fluctuations in the financial market, outside the supplier’s control. This would mean for example that a range of financial services that are linked to stock market prices – such as unit trusts and transferable securities – would be exempt from the right to withdraw.
64. Another important exception is that the right of cancellation shall not apply to travel and baggage insurance policies of less than one month’s duration.
65. Article 6(3) gives Member States discretion over whether to apply rights of withdrawal to mortgage contracts. In its original consultation paper²¹ on the proposed rules for the regulation of regulated mortgage contracts within the meaning of Article 61 of the Regulated Activities Order²², the FSA concluded that there was generally enough time between a potential borrower applying for a mortgage and the eventual release of funds, for the consumer to reflect on his or her decisions. Following consultation it does not propose²³ to have a cancellation rights period for mortgages, but lenders would be obliged to disclose certain other information to the customer such as fees which are non-refundable in the event of the customer not proceeding with the contract. The Government concurs with this approach and proposes that there should not be cancellation rights in respect of those mortgages which are not regulated by the FSA, such as first charge mortgages secured on land outside the United Kingdom. Second charge mortgages with a value not exceeding £25,000 are regulated under the CCA, and there are generally rights of withdrawal *prior* to the conclusion of a

²¹ FSA Consultation Paper 98: *The Draft Mortgage Source book, including Policy Statement on CP70* – June 2001.

²² Financial Services and Markets Act 2000 (Regulated Activities) Order 2001.

²³ FSA Consultation Paper 146: *The FSA’s approach to regulating mortgage sales* – August 2002.

prospective land mortgage.²⁴ However the Consumer Credit Act does *not* provide for rights of cancellation of a regulated agreement secured on land once the agreement has been concluded.²⁵ .

66. Article 6(1) allows Member States to introduce provisions that would have the effect of suspending the enforceability of contracts relating to investment services, during the “cancellations rights” period. While this may impose some burdens on firms, it is not clear what further benefits would arise for consumers additional to the benefits they would already have from the right of cancellation. The Treasury are therefore of the view that, with respect to gap services, additional requirements should not be introduced. DTI and the FSA will be consulting separately on their proposals in respect of the investment services they regulate.

Respondents’ views would be welcomed on whether these additional requirements should be introduced, and respondents are invited to give their reasons.

67. Article 7(2) allows Member States to introduce provisions that would require firms to repay the consumer in full, when an insurance contract is cancelled. The regulation of insurance is largely a matter for the FSA. However they do not regulate breakdown insurance²⁶, or insurance in respect of non-motor goods supplied by the provider, or in respect of risks linked to travel booked with the provider²⁷, which are gap financial services. The Treasury’s initial view is that for general insurance it would be reasonable to allow insurers to charge for the services (including cover) already provided. For example it would be reasonable to allow an insurer to charge a driver who contracts for breakdown insurance for one year and cancels after two weeks for the services already provided i.e. for initially arranging the policy and for the two weeks of cover already provided. The FSA will be consulting separately on their proposals in respect of insurance regulated under FSMA.

²⁴ Section 58 of the Consumer Credit Act 1974 (‘Opportunity for withdrawal from prospective land mortgage’).

²⁵ Section 67(a) of the Consumer Credit Act 1974 (‘Cancellable agreements’).

²⁶ See Article 12 of the Regulated Activities Order.

²⁷ See Article 72B of the Regulated Activities Order.

Views are invited as to whether respondents concur with this approach.

Cancellation of Consumer Credit Contracts

68. In the area of consumer credit the CCA provides consumers with rights of cancellation in certain circumstances. These circumstances include those where the pre-contractual negotiations included oral representations made in the presence of the consumer and the consumer does not sign the agreement at the creditor's premises. These rights act as a protection for consumers who may have been pressurised into concluding an agreement. The lender is required to notify the consumer where the cancellation rights apply.
69. The CCA generally provides for a five day period of cancellation for agreements concluded away from trade premises, from the conclusion of the agreement or from when the consumer is notified that the agreement is concluded. For agreements secured on land there is a period of between 7 and 14 days for cooling-off *before* the agreement can be concluded. The CCA requires that a notice of cancellation rights be included in a copy of an unexecuted or executed cancellable agreement, and also to be sent separately in some circumstances.
70. The impact of the DMD will mean these requirements will need to be amended so that for distance contracts, the consumer has a right to withdraw from a contract for a period of 14 days from the day after the day on which the contract was concluded, or from the day after the day on which the consumer received the contractual terms and conditions and the prior information required by Article 5 (if later).
71. In the Consultation issued by the DTI on enabling and facilitating the conclusion of credit and hire agreement electronically²⁸ it was proposed that the rules on the cancellation of credit agreements could be simplified. In view of the DMD and the current proposals contained in the Consumer Credit Directive for a universal 14 day right of withdrawal, it was suggested that all credit agreements should be subject to a cancellation period of 14 days.

²⁸ Review of The Consumer Credit Act 1974 Electronic Agreements CCP 015/02.

72. Comments on these proposals have been received and a summary of responses will be issued later in the year by the DTI.
73. For the few residual “gap” products, and for distance contracts for the provision of financial services by a gap person, the Distance Marketing Regulations made under the EC Act would include appropriate provisions. These would apply where the distance contracts do not fall under FSMA or CCA, but are required by the DMD to have rights of withdrawal.

Unsolicited Communications (Article 10)

74. Article 10 of the Directive states that the use by a supplier of automatic calling machines and fax machines shall require the consumer's consent. The corresponding Article of the DSD was implemented in the UK not by Consumer Protection (Distance Selling) Regulations 2000, but by Part V of the Telecommunications (Data Protection and Privacy) Regulations 1999²⁹ (use of telecommunications services for direct marketing purposes). These will be revoked and replaced by DTI's draft Privacy and Electronic Communications (EC Directive) Regulations 2003. Consultation on the latter only ended on 19 June 2003 and it would therefore be premature to propose amendments to Regulations which are still being finalised³⁰.

²⁹ S.I. 1999/2093.

³⁰ DTI's consultation document *Implementation of the Directive on Privacy and Electronic Communications* is currently accessible at:
http://www.dti.gov.uk/industry_files/pdf/complete%20document.pdf.

Burden of Proof (Article 15)

75. Article 15 of the Directive states that any contractual term or condition which provides that the burden of proving that the supplier has complied with all or part of his obligations pursuant to the DMD shall be an unfair term within the meaning of Council Directive 93/13/EEC on unfair terms in consumer contracts.³¹ The latter Directive is implemented in the UK by the Unfair Terms in Consumer Contracts Regulations 1999³², and the draft Distance Marketing Regulations make the necessary amendments to those Regulations.
76. Article 15 of the DMD also states that the burden of proving that the core requirements of the Directive have been complied with *may* be placed by Member States on the supplier.
77. The Government does not in general propose to exercise the option provided for in Article 15 of placing the burden of proving compliance with the DMD upon the supplier. The implementation of the core requirements of the Directive will itself significantly increase consumer protection in respect of distance contracts for the provision of financial services. There is no evidence that the interests of consumers in this area are being harmed to such an extent that consumers should, in addition, benefit from a general reversal of the usual burden of proof in the event that they allege that a supplier has not complied with the requirements of the Directive. In implementing the DMD, there is in general therefore no clear need to go beyond its core requirements.
78. However it is important that firms are encouraged to have systems in place enabling them to identify unauthorised payments made using payment cards. Regulation 21(3) of the Consumer Protection (Distance Selling) Regulations 2000, which implement the DSD, provides that in certain circumstances, in proceedings in which a consumer alleges that use was made of a payment card issued to him which was not authorised by him, it is for the card issuer to prove that the

³¹ Official Journal of the European Communities, L 95, 21.4.1993, p 29.

³² S.I. 1999/2083.

use was authorised by him. The draft Distance Marketing Regulations make analogous provision: see draft regulation 13(3).

Views are invited from respondents on this approach.

The Directive on the Protection of Consumers' Interests (Article 19)

79. Article 19 of the DMD adds the DMD to the list of Directives to which the Directive on Injunctions for the Protection of Consumers' Interests³³ applies. The latter Directive is implemented in the UK by Part 8 of the Enterprise Act 2002 ('Enforcement of Certain Consumer Legislation') and the draft Distance Marketing Regulations would make the necessary amendments to Schedule 13 of that Act and to the Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2003³⁴: see draft regulations 25 and 26.
80. This raises the further question of whether the FSA should be designated by the Secretary of State as an enforcer for the purposes of Part 8 of that Act, on the basis that it has as one of its purposes the protection of the collective interests of consumers. (DTI have responsibility for making such designation orders.) Such an order may designate an enforcer in respect of all infringements, or in respect of infringements of such description as are specified in the order.³⁵ The Treasury are of the view that the FSA should be an enforcement authority under the Distance Marketing Regulations, *and* that they should be designated in respect of infringements of the DMD which harm the collective interests of consumers. Accordingly the Treasury are of the view that the FSA should be given a limited designation under Part 8 of the Enterprise Act. This would be analogous to the position of the OFT which is an enforcement authority under the Consumer Protection (Distance Selling) Regulations 2000³⁶, and a general enforcer under the Enterprise Act with (inter alia) a role taking enforcement action in respect of infringements of the DSD which harm the collective interests of consumers.³⁷

³³ Official Journal of the European Communities, L 166, 11.6.1998, p.51.

³⁴ S.I. 2003/1374.

³⁵ Section 213(6) of the *Enterprise Act 2002*.

³⁶ All references to the Director General of Fair Trading in the Consumer Protection (Distance Selling) Regulations 2000 have effect as if those references were to the OFT: section 2(3) of the *Enterprise Act 2002*.

³⁷ The DSD is a listed Directive within the meaning of section 212 of the *Enterprise Act*.

Timing of the DMD, IMD and Mortgage Regulation (Article 21)

81. Different implementation dates are likely to apply for the DMD, Directive 2002/92/EC on Insurance Mediation Directive³⁸ (IMD) and FSA regulation of mortgages.
82. The DMD has to be implemented no later than 9 October 2004: Article 21 of the DMD. The regulation of mortgages by the FSA will not come into effect until 31 October 2004 while implementation of the IMD is planned for 14 January 2005.
83. The latter two interact with the DMD in that it is the intermediary who often has the customer interface in the selling/buying of insurance or mortgage products, and if there is no face to face contact between the consumer and the intermediary then the DMD does apply. The FSA intend that the requirements of the DMD will be incorporated into their rules for mortgages and insurance intermediaries. However these rules can only be effective from the implementation dates of those regimes, 31 October 2004 and 14 January 2005 respectively.
84. Due to the impact the DMD will have on insurance intermediaries and mortgage intermediaries and providers there is a need to cater for the mismatch of the implementation dates for IMD and mortgage regulation. The Regulations to implement the DMD would come into effect on 9 October 2004. There would be a period of 21 days for mortgage regulation and 96 days for IMD before their relevant regulatory regimes comes into effect, during which an enforcement authority of the type mentioned above would be given interim enforcement powers using the powers to make regulations under the EC Act. There are three main options for the enforcement authority.
 - a) One option would be to give the interim enforcement powers to the OFT until such time as the FSA assumed its full powers for implementing the regulation of mortgages and the IMD (on 31 October 2004 and 14 January 2005 respectively).

³⁸ Official Journal of the European Communities, L 9, 15.01.2003, p. 3.

- b) Alternately, the interim enforcement powers to fill the gap period could be given to a consumer organisation having a legitimate interest in protecting consumers under Article 13 of the DMD. This could for example be the Consumers' Association for the interim period.

- c) The **Treasury's preferred option** would be to make **the FSA** itself the competent authority responsible for enforcing the DMD in the interim period between 9 October 2004 (when the DMD first comes into effect) until the respective implementation dates for the regulation of mortgages and IMD (31 October 2004 and 14 January 2005 respectively). On these dates, the FSA would assume its full regulatory powers to implement the DMD in these areas via its rule- book. (This is the policy reflected in the draft Distance Marketing Regulations: see draft regulation 16(2) (c) to (e)). The advantage of this option against the others is that the FSA would have the continuity of dealing with DMD issues throughout the interim period and beyond, commencing from the start date of the DMD. By contrast, the drawback of the other two options is that the relevant bodies would have to set in place arrangements for a limited period of time, (literally weeks in the case of mortgages) after which the responsibility would pass to the FSA.

**Do you agree that the third option is the most preferable?
Alternatively, is there another option not set out above?**

Summary of Questions

1. **The Government's Approach to Implementation** - Do you agree with the Treasury's approach as set out in the above paragraphs? If not, please indicate why an alternative approach may be preferable. (Page 19).
2. **The Government's Approach to Implementation** - Views are invited on this approach, especially from professional firms and bodies. (Page 20).
3. **Additional Requirements (Article 4)** - Respondents are invited to express views on the desirability of using the provisions of Article 4(2) to impose additional information requirements beyond core requirements of Article 3. It would be helpful also to have details of what these additional requirements should be and what the costs and benefits might be. (Page 23).
4. **Rights of Withdrawal (Article 6)** – Respondents' views would be welcomed on whether these additional requirements should be introduced, and other reasons why. (Page 25).
5. **Rights of Withdrawal (Article 6)** - Views are invited as to whether respondents concur with this approach. (Page 26).
6. **Burden of proof** - Views are invited from respondents on this approach. (Page 31).
7. **Timing of DMD, IMD and Mortgage Regulation (Article 21)** - Do you agree that the third option is the most preferable? Alternatively, is there another option not set out above? (Page 34).
8. **Initial Regulatory Impact Assessment (Annex B)** - The Government would welcome evidence from respondents as to the extent of the burden that will be imposed on firms by the implementation of the DMD. (Page 49).

9. **Initial Regulatory Impact Assessment** (Annex B) - The Government would welcome evidence of whether implementation of the DMD will impose significant additional costs on small or medium sized businesses. (Page 50).

Annex A

Distance Marketing of Consumer Financial Services Directive – Mapping of Financial Services

Product/Service	Regulator, or “GAP” identified where no Regulator is responsible	Falls within DMD definition of “Financial Services”	HIM Treasury view on the Enforcement Authority responsible, for “GAP” services, for the purposes of DMD	Comments
Deposit taking and Savings Accounts	FSA	Banking nature		Follows the voluntary Banking Code operated by BBA.
Bank (current) accounts – Deposit taking	FSA	Banking nature		Follows the voluntary Banking Code operated by BBA.
Bank (current accounts – Overdrafts	DTI/OFT	Credit nature		Consumer Credit.
Debit Cards	FSA, given the provision of a debit card is always ancillary to deposit taking.	Payment nature		Payment nature linked to banking services.
E-money services	FSA	Payment nature		

Product/Service	Regulator, or “GAP” identified where no Regulator is responsible	Falls within DMD definition of “Financial Services”	HM Treasury view on the Enforcement Authority responsible, for “GAP” services, for the purposes of DMD	Comments
Small E-money ³⁹	“GAP”	Payment nature	FSA	Maximum storage amount of 150 euros.
Annuities	FSA	Investment nature		
Life assurance including with profits, endowments, pension policies, annuities, life AVCs	FSA	Insurance nature		
Personal pensions, stakeholder pensions and pension contacts	FSA	Personal pension nature		
General insurance including car, household, travel, credit protection, pure protection, reinsurance, medical insurance	FSA	Insurance nature		
Breakdown insurance ⁴⁰	“GAP”	Insurance nature	DTI/OFT	
Insurance in respect of non-	“GAP”	Insurance nature	DTI/OFT	

³⁹ See Article 9C of the Regulated Activities Order.

⁴⁰ See Article 12 of the Regulated Activities Order.

Product/Service	Regulator, or “GAP” identified where no Regulator is responsible	Falls within DMD definition of “Financial Services”	HM Treasury view on the Enforcement Authority responsible, for “GAP” services, for the purposes of DMD	Comments
motor goods supplied by the provider, or in respect of risks linked to travel booked with the provider ⁴¹				
Extended warranties on motor cars and other items	FSA	Some are of an insurance nature		Some extended warranties are of an insurance nature. Some are of service nature and so do not fall within the DMD. FSA will have to decide whether particular warranties are within the perimeter.
First charge mortgages on land (other than timeshare accommodation) in the UK, at least 40% of which is used as a dwelling by the borrower and their immediate family ⁴²	FSA from 31 October 2004	Credit nature	FSA before 31 October 2004	“Buy to let mortgages” will ordinarily fall outside the scope of the DMD. Since the borrower will ordinarily be acting for purposes within their business of being a landlord, they will not be a ‘consumer’ within the meaning of Article 2(d). Equity release products involve mortgages and a mortgage is a financial service within the meaning

⁴¹ See Article 72B of the Regulated Activities Order.

⁴² See Article 61 of the Regulated Activities Order.

Product/Service	Regulator, or “GAP” identified where no Regulator is responsible	Falls within DMD definition of “Financial Services”	HM Treasury view on the Enforcement Authority responsible, for “GAP” services, for the purposes of DMD	Comments
Mortgages which fall within the CCA (e.g. do not exceed £25,000) and are not regulated by the FSA (e.g. second charge mortgages)	DTI/OFT	Credit nature		of the DMD.
Mortgages which do not fall within the CCA (e.g. because they exceed £25,000) and are not regulated by the FSA (e.g. first charge mortgages on timeshare accommodation or on land overseas)	“GAP”	Credit nature	FSA in respect of first charge mortgages within the gap. DTI/OFT in respect of second charge mortgages within the gap.	
Consumer loans and credit	DTI/OFT	Credit nature		Credit agreements not exceeding £25k are regulated. Those over £25k are presently unregulated. Proposals are underway to remove

Product/Service	Regulator, or "GAP" identified where no Regulator is responsible	Falls within DMD definition of "Financial Services"	HM Treasury view on the Enforcement Authority responsible, for "GAP" services, for the purposes of DMD	Comments
				limit for consumer and small business credit agreements.
Credit cards (including store cards akin to credit cards)	DTI/OFT	Credit nature		
Other payment cards e.g. American Express – charge cards	"GAP"	Credit and Payment nature	DTI/OFT	
Debt management services	DTI/OFT	Payment nature		Appears to be within DMD where provider e.g. receives one payment a month and allocates a certain proportion of it to various creditors.
Money transmission linked to bank accounts and done remotely	FSA	Payment nature		
Payment systems not linked to bank accounts	"GAP"	Payment nature	DTI/OFT	
Spread betting services	FSA	Investment nature		

Product/Service	Regulator, or “GAP” identified where no Regulator is responsible	Falls within DMD definition of “Financial Services”	HM Treasury view on the Enforcement Authority responsible, for “GAP” services, for the purposes of DMD	Comments
Operating regulated collective investment schemes	FSA	Investment nature		
Individual Saving Accounts (ISAs)	FSA	Investment nature		
Dealing in investment as principal or agent	FSA	Investment nature		
Managing designated investments	FSA	Investment nature		
Buying and selling of units in collective investment scheme.	FSA	Investment nature		
Custody services	FSA	Banking nature		
Cheque cashing services	DTI/OFT	Credit nature		

We have also considered the following and reached a view that these are examples of financial services and products which fall outside the scope of the DMD.

Product/Service	Regulated Authority	Comments
Managing the underwriting capacity of a Lloyd's syndicate	FSA	This appears not to involve a contract between a consumer and supplier.
Advising on participation in a Lloyd's syndicate	FSA	Advising is not of a banking, credit, insurance, personal pension, investment or payment nature. See paragraphs 26 to 33.
Assisting in the administration and performance of insurance contracts	FSA	Not of a banking, credit, insurance, personal pension, investment or payment nature.
Advising on a regulated mortgage	FSA from 2004	Advising is not of a banking, credit, insurance, personal pension, investment or payment nature. See paragraphs 26 to 33.
Investment Advice	FSA	See paragraphs 26 to 33.
Advising on general insurance contracts	FSA	See paragraphs 26 to 33.
Home Reversion Plans		The sale of all or part of an interest in land for a lump sum is not of a banking, credit, insurance, personal pension, investment or payment nature. However some home reversion plans involve the sale of an interest in land for an annuity, and an annuity is a financial service within the meaning of the DMD, dealt with above.

Product/Service	Regulated Authority	Comments
Debt Advice	DTI/OFT	Not within the definition of financial services and falls outside the scope of the DMD. See paragraphs 26 to 33.
Occupational pensions	OPRA	Not of a banking, credit, insurance, personal pension, investment or payment nature.

Initial Regulatory Impact Assessment

1. This initial regulatory impact assessment deals specifically with the Government's plans for implementing the DMD, which covers financial services. The initial regulatory impact assessment accompanies a consultation document that explains the proposed policies in more depth.

Purpose and Intended Effect

2. The purpose is to implement the DMD that was adopted by the European Parliament and Council on 23 September 2002 and must be implemented by 9 October 2004 in the most cost effective and proportionate way.
3. The DMD sets common standards for the information that must be supplied to consumers of financial services purchased at a distance (e.g. over the telephone, internet, fax or by mail).
4. The DMD builds on existing Directives governing the distance marketing of non-financial services products. It complements the ECD, which was implemented in August 2002.
5. Many financial services transactions are likely to be conducted by electronic or other distance means across borders between member states. The main requirement of the Directive focuses primarily on pre-contractual disclosure. Many firms will already be familiar with disclosure requirements under their existing regulatory arrangements.
6. The Government supports the objectives of the Directive and believes that the information requirements that it sets out would help consumers to make sound judgments.

The Scope of the Directive

7. The DMD definition of financial services encompasses any service of a banking, credit, insurance, personal pension investment or payment nature. This definition is broad and covers most financial products.
8. The definition of financial services in the DMD is wider than that in FSMA. If the FSA regulated the selling and marketing of all financial services within the meaning of DMD, the task of implementing the Directive would be relatively straightforward; in effect the FSA's rule-book could be used to impose the Directive's requirements on those they regulate. However, the selling and marketing of some significant financial services are regulated by bodies other than the FSA e.g. DTI/OFT. And some other financial services are regulated by means of voluntary Codes of Practice with little or no statutory bite. The proposed approach in paragraph 11 seeks to accommodate the various channels through which regulation of financial services in the UK currently operates.
9. The Directive's main requirements focus on disclosure before a customer is contractually committed, and on rights of withdrawal (cancellation rights) after a contact is concluded. The disclosure and withdrawal requirements of the Directive are set out in the main consultation document.

Overall Approach

10. The Government is strongly committed to the "home state" or "country of origin" approach to achieving a single market in financial services. This would be in keeping with the Chancellor's strategy for completing the single market by mutual recognition of home rules supported by harmonised core standards.
11. The Treasury's preferred approach would be to incorporate the DMD requirements into the rules and other requirements of the competent authorities under the relevant existing legislation, FSMA and the CCA for the areas they cover. The FSA would integrate the DMD requirements into the rules it sets for authorised firms and DTI/OFT would ensure

their consumer credit requirements were DMD compliant. The EC Act Regulations would only come into effect in the event that a financial service falling within the scope of the DMD was not covered by either FSMA or the CCA to fill a “gap” which is not covered by the two regimes (see paras 44 and 45 of the consultation document).

12. Due to the impact the DMD will have on insurance intermediaries and providers there is a need to cater for the mismatch of the implementation dates for IMD and Mortgage regulation. The DMD would come into effect on 9 October 2004 while FSA regulation of mortgages and the IMD would come into effect on 31 October 2004 and 14 January 2005 respectively. The consultation document explains the issues and the Treasury’s preferred option which is to make the FSA the competent authority responsible for enforcing the DMD in the interim period between 9 October 2004 until the respective implementation dates for Mortgage regulations and IMD.

Benefits

13. The Government believes that the DMD could bring substantial benefits to both consumers and business. Many financial services transactions of a banking, credit, insurance, personal pension, investment or payment nature are likely to be conducted by electronic and other distance means across borders between Member States. The Directive will apply in respect of all such services.
14. The implementation of the Directive would mean businesses would be able to offer consumers a wider choice of the methods by which contracts can be concluded. It would mean that businesses would be able to operate on a level playing field and be more proactive in conducting business across borders and cross-border entry costs could decrease. In the longer-term, for business the common minimum standards introduced through the implementation of the Directive could increase consumer confidence in distance sales and make it more likely for consumers to use distance channels.
15. The Directive contains increased cancellation rights, which

are potentially a significant benefit to consumers. The Directive will offer consumers even more flexibility of choice and improved benefits in respect of the additional information that will be available to them. The Directive provides clear guidance in respect of information that has to be given to consumers prior to a contract being concluded. This will provide consumers with greater protection before entering into a contract at a distance. There will be the potential for access to a wider range of suppliers and services than before and could mean greater competition among suppliers, with potentially beneficial effects on prices for the consumer. There would be common standards across a range of products and services supplied at a distance, which would help to increase consumer understanding and confidence.

Costs

16. The FSA's discussion paper⁴³ has an explanation of their preliminary understanding of where the main costs and benefits might arise of their implementation of the DMD for firms authorised under FSMA.
17. It is difficult to be precise about the costs of regulation. But both FSA and DTI/OFT have indicated possible costs, both direct and indirect to achieve compliance. The DTI are currently carrying out considerable work on the Consumer Credit Directive. In view of this work, it is hoped that the implementation of the DMD will have minimal additional impact.
18. Direct costs that the FSA and DTI/OFT have indicated are necessary in preparing for the implementation of the Directive.
19. The implementation of the Directive will bring additional compliance costs initially in the form of one-off costs to achieve compliance and these include time, the costs of changing systems, retraining staff, printing costs etc. Firms will also have continuing compliance costs.

⁴³ FSA Discussion Paper 21: *Implementation of the Distance Marketing Directive* – March 2003

20. Most firms established in the UK engaging in financial transactions will already be authorised in some form by the FSA and DTI/OFT. The additional costs for them as a result of implementation of the Directive will be the extension of the FSA's rules and CCA, which previously did not apply. For those firms that subscribe to a voluntary code (such as the Banking Code), and for firms carrying on activities that for the new regulatory requirements are subject to neither statutory regulation nor to a voluntary code, the costs may be slightly higher.

Risk Assessment

21. The Government supports the single market in financial services and believes that UK firms should be able to take advantage of the DMD. Implementing the DMD enables UK firms to take advantages of opportunities available in the financial services areas across member states.
22. Failure to implement the DMD could potentially allow businesses to not provide the best customer service and charge more for their products. It could also restrict choice, by stifling innovation and hampering the selling of products across member states that consumers want and need.
23. An unregulated financial services process across Member States can give rise to lack of disclosure and cancellation rights information between the buyer and seller. It can lead to inconsistencies of information provided to consumers across member states which might lead to confusion, mis-selling and lack of consumer confidence.

The Government would welcome evidence from respondents as to the extent of the burden that will be imposed on firms by the implementation of the DMD.

The Government would welcome evidence of whether implementation of the DMD will impose significant additional costs on small or medium sized businesses.

STATUTORY INSTRUMENTS

2004 No.

FINANCIAL SERVICES AND MARKETS

The Financial Services (Distance Marketing) Regulations 2004

<i>Made</i> - - - -	2004
<i>Laid before Parliament</i>	2004
<i>Coming into force</i> - -	[9th October] 2004

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 matters concerning the distance marketing of consumer financial services, in the exercise of the powers conferred on them by that section, hereby make the following Regulations:

Citation, Commencement and Extent

1.—(1) These Regulations may be cited as the Financial Services (Distance Marketing) Regulations 2004 and shall come into force on [9th October 2004].

(2) These Regulations extend to Northern Ireland.

Interpretation

2. —(1) In these Regulations –

“the 1974 Act” means the Consumer Credit Act 1974(c);

“the 2000 Act” means the Financial Services and Markets Act 2000(d);

“the Authority” means the Financial Services Authority;

“appointed representative” has the same meaning as in section 39(2) of the 2000 Act;

“authorised person” has the same meaning as in section 31(2) of the 2000 Act;

“breach” means a contravention by a supplier of a prohibition in, or a failure by a supplier to comply with a requirement of, these Regulations;

“business” includes a trade or profession;

(a) S.I. 2004/
(b) 1972 c. 68.
(c) 1974 c. 39.
(d) 2000 c. 8.

“consumer” means any individual who, in contracts to which these Regulations apply, is acting for purposes which are outside any business he may carry on;

“court” in relation to England and Wales and Northern Ireland means a county court or the High Court, and in relation to Scotland means the Sheriff Court or the Court of Session;

“credit” includes a cash loan and any other form of financial accommodation, and for this purpose “cash” includes money in any form;

“designated professional body” has the same meaning as in section 326(2) of the 2000 Act;

“the Directive” means Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC(a);

“distance contract” means any contract concerning one or more financial services concluded between a supplier and a consumer under an organised distance sales or service-provision scheme run by the supplier 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 contract is concluded;

“durable medium” means any instrument which enables a consumer to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;

“EEA supplier” means a supplier who is a national of an EEA State or a company or firm as mentioned in Article 48 of the Treaty establishing the European Community;

“EEA State” means a State which is a contracting party to the Agreement on the European Economic Area signed at Oporto on 2nd May 1992, as adjusted by the Protocol signed at Brussels on 17th March 1993;

“exempt regulated activities” has the same meaning as in section 325(2) of the 2000 Act;

“financial service” means any service of a banking, credit, insurance, personal pension, investment or payment nature;

“means of distance communication” means any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the marketing of a service between those parties;

“the OFT” means the Office of Fair Trading;

“operator or supplier of a means of communication” means any person whose business involves making one or more means of distance communication available to suppliers;

“regulated activity” means an activity which is a regulated activity within the meaning of section 22 of the 2000 Act, read with any relevant order under that section and Schedule 2 to that Act;

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

“rule” means a rule made by the Authority under the 2000 Act or by a designated professional body;

“supplier” means any person who, acting in his commercial or professional capacity, is the contractual provider of services subject to distance contracts.

(a) O.J. L 271, 9.10.2002, p.16.

(b) S.I. 2001/544, as amended by S.I. 2001/3544, S.I. 2002/682, S.I. 2002/1310, S.I. 2002/1776, S.I. 2002/1777, S.I. 2003/1475 and S.I. 2003/1476.

(2) In these Regulations, subject to paragraph (1), words and expressions also used in the Directive have the same meaning as in the Directive.

(3) Where a financial service is marketed by an intermediary, every reference to the supplier shall be taken to be a reference to the intermediary.

Scope of these Regulations

3. These Regulations apply, subject to regulations 4 and 5, to distance contracts.

4.—(1) Regulations 6 to 21, 23 and 25 to 26 do not apply to any contract between a consumer in the United Kingdom and an EEA supplier contracting from an establishment in an EEA State other than the United Kingdom, where that State –

- (a) has transposed the Directive, or
- (b) has obligations in its domestic law corresponding to those provided for in the Directive.

(2) Regulations 6 to 10 and 14 to 20 do not apply to any contract which is a regulated agreement within the meaning of section 8(3) of the 1974 Act.

(3) Regulations 6 to 10, 14 to 15(2) and 16 to 20 do not apply to any contract which is made by an authorised person, the making or performance of which constitutes or is part of a regulated activity carried on by him.

(4) Regulations 6 to 7 and 14 to 15(2) do not apply to any contract which is made by a member of a designated professional body, the making or performance of which constitutes or is part of an exempt regulated activity carried on by him, provided that body has rules equivalent to those regulations.

(5) Regulations 6, 7 and 14 to 15(2) do not apply to any contract which is made by an appointed representative, the making or performance of which constitutes or is part of a regulated activity carried on by him.

5.—(1) Where a consumer and a supplier enter an initial service agreement and –

- (a) successive operations of the same nature, or
- (b) a series of separate operations of the same nature performed over time,

are subsequently performed between them and within the framework of that agreement, then if any of regulations 6 to 20 and 23 to 26 apply, they apply only to the initial service agreement.

(2) Where a consumer and a supplier do not enter an initial service agreement and –

- (a) successive operations of the same nature, or
- (b) a series of separate operations of the same nature performed over time,

are performed between them, then if regulations 6 and 7 do apply, they apply only –

- (i) when the first operation is performed, and
- (ii) to any operation which is performed more than one year after the previous operation.

(3) “Initial service agreement” includes, for example, an agreement for the provision of –

- (a) a bank account,
- (b) a credit card,
- (c) portfolio management services.

(4) “Operations” includes, for example –

- (a) deposits to or withdrawals from a bank account,
- (b) payments by a credit card,
- (c) transactions carried out within the framework of an initial service agreement for portfolio management services.

Information required prior to the conclusion of the contract

6.—(1) Subject to paragraph (4), in good time prior to the consumer being bound by any distance contract, the supplier shall provide to the consumer the information specified in Schedule 1.

(2) The supplier shall provide the information specified in Schedule 1 in a clear and comprehensible manner appropriate to the means of distance communication used, with due regard in particular to the principles of good faith in commercial transactions and the principles governing the protection of those who are unable to give their consent such as minors.

(3) Subject to paragraph (4), the supplier shall make clear his commercial purpose when providing the information specified in Schedule 1.

(4) In the case of a voice telephone communication –

- (a) the supplier shall make clear his identity and the commercial purpose of any call initiated by him at the beginning of any conversation with the consumer; and
- (b) if the consumer explicitly consents, only the information specified in Schedule 2 need be given.

(5) When the supplier provides information to the consumer pursuant to this regulation regarding the contractual obligations which would arise if the distance contract were concluded, he shall provide information which accurately reflects the contractual obligations which would arise under the law presumed to be applicable to that contract.

Written and additional information

7.—(1) The supplier under a distance contract shall provide to the consumer on paper, or in another durable medium which is available and accessible to the consumer, all the contractual terms and conditions and the information specified in Schedule 1, either –

- (a) in good time prior to the consumer being bound by that distance contract; or
- (b) immediately after the conclusion of the contract, where the contract has been concluded at the consumer's request using a means of distance communication which does not enable provision in accordance with sub-paragraph (a) of the contractual terms and conditions and the information specified in Schedule 1.

(2) The supplier shall provide to the consumer the contractual terms and conditions on paper, if the consumer so requests at any time during their contractual relationship.

(3) The supplier shall change the means of distance communication with a consumer, unless that is incompatible with the contract between them or the nature of the financial service provided to the consumer, if that consumer so requests at any time during their contractual relationship.

Right to cancel

8.—(1) Subject to regulation 10, if within the cancellation period set out in regulation 9, notice of cancellation is properly given by the consumer to the supplier, or to any other person previously notified by the supplier to the consumer as a person to whom notice of cancellation may be given, the notice of cancellation shall operate to cancel the distance contract.

(2) Cancelling the contract has the effect of terminating the contract at the time at which the notice of cancellation is given.

(3) For the purposes of these Regulations, a notice of cancellation is a notification given –

- (a) orally;
- (b) in writing; or
- (c) in another durable medium available and accessible to the supplier (or to the other person to whom it is given),

which, however expressed, indicates the intention of the consumer to cancel the contract.

(4) Notice of cancellation given under this regulation by a consumer to a supplier or other person is to be treated as having been properly given if the consumer -

- (a) gives it orally to the supplier or other person;
- (b) leaves it at the address of the supplier or other person last known to the consumer and addressed to the supplier or other person by name (in which case it is to be taken to have been given on the day on which it was left);
- (c) sends it by post to the address of the supplier or other person last known to the consumer and addressed to the supplier or other person by name (in which case it is to be taken to have been given on the day on which it was posted);
- (d) sends it by facsimile to the business facsimile number of the supplier or other person last known to the consumer (in which case it is to be taken to have been given on the day on which it is sent); or
- (e) sends it by electronic mail to the business electronic mail address of the supplier or other person last known to the consumer (in which case it is to be taken to have been given on the day on which it is sent).

(5) The references in paragraph (4)(b) and (c) to the address of the supplier or other person shall, in the case of a supplier or other person which is a body corporate, be treated as including a reference to the address of the secretary or clerk of that body.

(6) The references in paragraph (4)(b) and (c) to the address of the supplier or other person shall, in the case of a supplier or other person which is a partnership, be treated as including a reference to the address of a partner or a person having control or management of the partnership business.

Cancellation period

9.—(1) For the purposes of regulation 8, the cancellation period begins on the day on which the distance contract is concluded (“conclusion day”) and ends as provided for in paragraphs (2) and (3).

(2) Where the supplier complies with regulation 7(1) on or before conclusion day, the cancellation period ends on the expiry of fourteen calendar days beginning with the day after conclusion day.

(3) Where the supplier does not comply with regulation 7(1) on or before conclusion day, but subsequently provides to the consumer on paper, or in another durable medium which is available and accessible to the consumer, all the contractual terms and conditions and the information required under regulation 7(1), the cancellation period ends on the expiry of fourteen calendar days beginning with the day after the day on which the consumer receives the last of those terms and conditions and of that information.

Exceptions to the right to cancel

10. A consumer does not have the right to cancel a distance contract by giving notice of cancellation pursuant to regulation 8 in respect of -

- (a) a contract for a financial service where the price of that service depends on fluctuations in the financial market outside the supplier’s control, which may occur during the cancellation period, such as services related to-
 - (i) foreign exchange,
 - (ii) money market instruments,
 - (iii) transferable securities,
 - (iv) units in collective investment undertakings,
 - (v) financial-futures contracts, including equivalent cash-settled instruments,
 - (vi) forward interest-rate agreements,
 - (vii) interest-rate, currency and equity swaps,

- (viii) options to acquire or dispose of any instruments referred to in sub-paragraphs (i) to (vii), including cash-settled instruments and options on currency and on interest rates;
- (b) a contract whose performance has been fully completed by both parties at the consumer's express request before the consumer gives notice of cancellation;
- (c) a contract which -
 - (i) is a connected contract of insurance within the meaning of article 72B(1) of the Regulated Activities Order,
 - (ii) covers travel risks within the meaning of article 72B(1)(d)(ii) of that Order, and
 - (iii) has a total duration of less than one month;
- (d) a contract under which a supplier provides credit to a consumer and the consumer's obligation to repay is secured by a legal mortgage on land;
- (e) a credit agreement cancelled under regulation 15(1) of the Consumer Protection (Distance Selling) Regulations 2000(a);
- (f) a credit agreement cancelled under section 6A of the Timeshare Act 1992(b).

Automatic cancellation of an attached distance contract

11.—(1) For the purposes of this regulation where there is a distance contract for the provision of a financial service by a supplier to a consumer (“the main contract”) and there is a further distance contract (“the secondary contract”) for the provision to that consumer of a further financial service by –

- (a) the same supplier, or
- (b) a third party, the further financial service being provided pursuant to an agreement between the third party and the supplier under the main contract,

then the secondary contract is attached to the main contract, if –

- (i) the secondary contract is entered into pursuant to a term of the main contract,
- (ii) the main contract is financed or is to be financed by the secondary contract,
- (iii) the consumer entered into the secondary contract for a purpose related to the main contract, or
- (iv) performance of the secondary contract requires performance of the main contract.

(2) Where notice of cancellation is given under regulation 8 which operates to cancel a main contract, the giving of the notice shall also operate to cancel any attached contract.

(3) Where a main contract which is a regulated agreement within the meaning of section 8(3) of the 1974 Act is cancelled under [consumer credit] enactments corresponding to regulation 8, the cancellation of the main contract shall also operate to cancel any attached contract.

(4) Where a main contract made by an authorised person, the making or performance of which constitutes or is part of a regulated activity carried on by him, is cancelled under rules made by the Authority corresponding to regulation 8, the cancellation of the main contract shall also operate to cancel any attached contract.

(5) Where an attached contract is cancelled by virtue of one of paragraphs (2) to (4) –

- (a) the supplier under the main contract shall, if he is not the same person as the supplier under the attached contract, forthwith on receipt of the notice of cancellation inform the supplier under the attached contract; and
- (b) the attached contract shall terminate at the time at which the notice of cancellation in respect of the main contract is given.

(a) S.I. 2000/2334.
 (b) 1992 c. 35.

Payment for services provided before cancellation

12.—(1) Where a distance contract is cancelled under regulation 8 or 11, the supplier under that contract shall refund any sum paid by or on behalf of the consumer under or in relation to that contract to the person by whom it was made, less any charge made in accordance with paragraph (5).

(2) The reference in paragraph (1) to any sum paid on behalf of the consumer includes any sum paid by a creditor, who is not the same person as the supplier, under a personal credit agreement with the consumer.

(3) The supplier shall make the refund referred to in paragraph (1) as soon as possible and in any event within a period not exceeding 30 days beginning with the day on which the notice of cancellation was given.

(4) Where any security has been provided in relation to the contract, the security (so far as it has been provided) shall, on cancellation under regulation 8, be treated as never having had effect; and any property lodged solely for the purposes of the security as so provided shall be returned by the person it is lodged with forthwith.

(5) Subject to paragraphs (6), (7) and (8), the supplier may make a charge for any service actually provided by the supplier in accordance with the contract.

(6) The charge shall not exceed an amount which is in proportion to the extent of the service provided to the consumer prior to the time at which the notice of cancellation is given (including the service of arranging to provide the financial service) in comparison with the full coverage of the contract, and in any event shall not be such that it could be construed as a penalty.

(7) The supplier may not make any charge unless he can prove on the balance of probabilities that the consumer was informed about the amount payable, pursuant to regulation 6(1) in accordance with paragraph (13) of Schedule 1, or pursuant to regulation 6(4) in accordance with paragraph (5) of Schedule 2, as the case may be.

(8) The supplier may not make any charge if he commenced performance of the contract prior to the expiry of the cancellation period set out in regulation 9 without the consumer's prior request.

(9) For the purposes of this regulation, a personal credit agreement is an agreement between the consumer and any other person ("the creditor") by which the creditor provides the consumer with credit of any amount.

(10) Where a distance contract is cancelled under regulation 8 or 11, the consumer shall –

- (a) refund any sum paid by or on behalf of the supplier under or in relation to that contract to the person by whom it was made; and
- (b) restore any property of which he has acquired possession under that contract.

(11) The consumer shall make the refund referred to in paragraph (10)(a) and the restoration referred to in paragraph (10)(b) as soon as possible and in any event within a period not exceeding 30 days beginning with the day on which the notice of cancellation was given.

Payment by card

13.—(1) Subject to paragraph (3), where –

- (a) a payment card has been issued to an individual who when entering the contract for the provision of that card was acting for purposes which were all outside any business he may carry on ("the card-holder"); and
- (b) fraudulent use is made of that card to make a payment under or in connection with a distance contract to which these Regulations apply, by another person who is neither acting, nor to be treated as acting, as the card-holder's agent,

the card-holder may cancel that payment.

(2) Subject to paragraph (3), where a card-holder cancels a payment pursuant to paragraph (1), the card-holder is entitled to be recredited, or to have all sums returned, by the card issuer.

(3) Where paragraphs (1) and (2) apply, if in any proceedings the consumer alleges that any use made of the payment card was not authorised by him it is for the card issuer to prove that the use was so authorised.

(4) Paragraphs (1) and (2) do not apply to an agreement to which section 83(1) of the 1974 Act applies.

(5) Section 84 of the 1974 Act (misuse of credit-tokens) is amended by the insertion after subsection (3B) of-

“(3C) Subsections (1) and (2) shall not apply to any use, in connection with a distance contract (other than an excepted contract), of a card which is a credit-token.

(3D) In subsection (3C), “distance contract” and “excepted contract” have the meanings given in the Financial Services (Distance Marketing) Regulations 2004.”.

(6) For the purposes of this regulation -

“card issuer” means the owner of the card; and

“payment card” includes a credit card, a charge card, a debit card and a store card.

Unsolicited services

14.—(1) A person (“the recipient”) who receives unsolicited financial services for purposes other than those of his business from another person who supplies those services in the course of his business, shall not thereby become subject to any obligation (to make payment, or otherwise).

(2) A person who in the course of any business –

(a) supplies unsolicited financial services for purposes other than those of the recipient’s business; and

(b) makes a demand for payment, or asserts a present or prospective right to payment in respect of those services,

is guilty of an offence and liable, on summary conviction, to a fine not exceeding level 5 on the standard scale.

(3) In this regulation “unsolicited” means, in relation to financial services supplied to any person, that they are supplied without any prior request made by or on behalf of that person.

(4) For the purposes of this regulation, a person who sends to a recipient an invoice or similar document which –

(a) states the amount of a payment; and

(b) fails to comply with the requirements applicable to that document of regulations made under section 3A of the Unsolicited Goods and Services Act 1971(a) or, as the case may be, article 6 of the Unsolicited Goods and Services (Northern Ireland) Order 1976(b),

is to be regarded as asserting a right to the payment.

(5) Section 3A of the Unsolicited Goods and Services Act 1971 applies for the purposes of this regulation in its application to England, Wales and Scotland as it applies for the purposes of that Act.

(6) Article 6 of the Unsolicited Goods and Services (Northern Ireland) Order 1976 applies for the purposes of this regulation in its application to Northern Ireland as it applies for the purposes of that Order.

(7) This regulation is without prejudice to any right a supplier may have, by contract or otherwise, to renew a distance contract with a consumer without any request made by or on behalf of that consumer prior to the renewal of that contract.

(8) This regulation applies only in relation to financial services supplied after the date on which it comes into force.

(a) 1971 c. 30.

(b) S.I. 1976/57 (N.I.1).

No contracting-out

15.—(1) A term contained in any contract to which these Regulations apply is void if, and to the extent that, it is inconsistent with a provision in these Regulations.

(2) Where a provision of these Regulations specifies a duty or liability of the consumer in certain circumstances, a term contained in a contract to which these Regulations apply is inconsistent with that provision if it purports to impose, directly or indirectly, an additional or greater duty or liability on him in those circumstances.

(3) These Regulations shall apply notwithstanding any contract term which applies or purports to apply the law of a State which is not an EEA State if the contract has a close connection with the territory of an EEA State.

Enforcement authorities

16.—(1) In regulations 17 to 20 -

- (a) in relation to alleged breaches concerning specified contracts, the Authority is the enforcement authority;
- (b) in relation to all other alleged breaches, the OFT, every weights and measures authority in Great Britain, and the Department of Enterprise, Trade and Investment in Northern Ireland is an enforcement authority.

(2) Each of the following is a specified contract -

- (a) a contract which is made by a person who is not an authorised person or an appointed representative, the making or performance of which constitutes or is part of a regulated activity carried on by him;
- (b) a contract relating to the issuing of electronic money by a person to whom the Authority has given a certificate under article 9C of the Regulated Activities Order;
- (c) a contract under which a supplier provides credit to a consumer and the obligation of the consumer to repay is secured by a first legal mortgage on land;
- (d) a contract for insurance mediation activity in respect of long-term care insurance entered into after 8th October 2004 and before 31st October 2004;
- (e) a contract for insurance mediation activity other than in respect of long-term care insurance entered into after 8th October 2004 and before 14th January 2005.

(3) For the purposes of this regulation -

- (a) “insurance mediation activity” means any activity of the kind specified by article 21, 25(1) or (2), 39A or 53 of the Regulated Activities Order as amended by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order 2003(a) which is not a regulated activity prior to 14th January 2005; and
- (b) “long-term care insurance” has the same meaning as in that Order.

Consideration of complaints

17.—(1) An enforcement authority shall consider any complaint made to it about a breach unless -

- (a) the complaint appears to the authority to be frivolous or vexatious; or
- (b) it is aware that another enforcement authority has notified the OFT that it agrees to consider the complaint.

(2) If an enforcement authority notifies the OFT that it agrees to consider a complaint made to another enforcement authority, the first mentioned authority shall be under a duty to consider the complaint.

(a) S.I. 2003/

Injunctions to secure compliance with these Regulations

18.—(1) Subject to paragraph (2), an enforcement authority may apply for an injunction (including an interim injunction) against any person who appears to that authority to be responsible for a breach.

(2) An enforcement authority other than the OFT or the Authority may apply for an injunction only where -

- (a) it has notified the OFT of its intention to apply at least fourteen days before the date on which the application is to be made, beginning with the date on which the notification was given; or
- (b) the OFT consents to the application being made within a shorter period.

(3) The court on an application under this regulation may grant an injunction on such terms as it thinks fit to secure compliance with these Regulations.

(4) An enforcement authority which has a duty under regulation 17 to consider a complaint shall give reasons for its decision to apply or not to apply, as the case may be, for an injunction.

(5) In deciding whether or not to apply for an injunction in respect of a breach, an enforcement authority may, if it considers it appropriate to do so, have regard to any undertaking given to it or to another enforcement authority by or on behalf of any person as to compliance with these Regulations.

(6) In the application of this regulation to Scotland, for references to an “injunction” or an “interim injunction” there shall be substituted references to an “interdict” or an “interim interdict” respectively.

Notification of undertakings and orders to the OFT

19. An enforcement authority other than the OFT and the Authority shall notify the OFT -

- (a) of any undertaking given to it by or on behalf of any person who appears to it to be responsible for a breach;
- (b) of the outcome of any application made by it under regulation 18 and of the terms of any undertaking given to, or order made by, the court; and
- (c) of the outcome of any application made by it to enforce a previous order of the court.

Publication, information and advice

20.—(1) The OFT shall arrange for the publication in such form and manner as it considers appropriate of details of any undertaking or order notified to it under regulation 19.

(2) Each of the OFT and the Authority shall arrange for the publication in such form and manner as it considers appropriate of -

- (a) details of any undertaking given to it by or on behalf of any person as to compliance with these Regulations;
- (b) details of any application made by it under regulation 18, and of the terms of any undertaking given to, or order made by, the court;
- (c) details of any application made by it to enforce a previous order of the court.

(3) Each of the OFT and the Authority may arrange for the dissemination in such form and manner as it considers appropriate of such information and advice concerning the operation of these Regulations as may appear to it to be expedient to give to the public and to all persons likely to be affected by these Regulations.

Functions of the Authority

21. For the purposes of the 2000 Act, the functions conferred on the Authority by these Regulations shall be treated as conferred by that Act.

Modification of rule-making power of the Authority

22.—(1) Subject to paragraph (2), the Authority may not make rules under Part X of the 2000 Act which impose upon an EEA supplier contracting from an establishment in an EEA State other than the United Kingdom a requirement which applies if the supplier enters or is to enter a distance contract, but which does not apply if the supplier enters or is to enter a contract that is not a distance contract.

(2) Paragraph (1) does not apply to rules imposing requirements upon an EEA supplier contracting from an establishment in an EEA State if that State -

- (a) has not yet transposed the Directive; and
- (b) does not have obligations in its domestic law corresponding to those provided for in the Directive.

Amendment of the Unfair Terms in Consumer Contracts Regulations 1999

23. After regulation 5(5) of the Unfair Terms in Consumer Contracts Regulations 1999(a), insert -

“(6) Any contractual term providing that the consumer bears the burden of proof in respect of showing that the supplier complied with any or all of the obligations upon him resulting from the Directive and any rule or enactment implementing it shall always be regarded as unfair.

(7) In this regulation “the Directive” means Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directive 97/7EC and 98/27/EC.

(8) In this regulation “rule” means a rule made by the Financial Services Authority under the Financial Services and Markets Act 2000 or by a designated professional body within the meaning of section 326(2) of that Act.”.

Amendment of the Consumer Protection (Distance Selling) Regulations 2000

24.—(1) The Consumer Protection (Distance Selling) Regulations 2000 are amended as follows.

(2) In regulation 3(1)–

- (a) before the definition of “breach” insert–

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

“appointed representative” has the same meaning as in section 39(2) of the 2000 Act;

“authorised person” has the same meaning as in section 31(2) of the 2000 Act;”;

- (b) after the definition of “excepted contract” insert–

““financial service” means any service of a banking, credit, insurance, personal pension, investment or payment nature;”;

- (c) after the definition of “personal credit agreement” insert–

““regulated activity” means an activity which is a regulated activity within the meaning of section 22 of the 2000 Act, read with any relevant order under that section and Schedule 2 to that Act;”.

(3) In regulation 5(1)(c) omit “, a non-exhaustive list of which is contained in Schedule 2”.

(4) Insert after regulation 6(3) –

(a) S.I. 1999/2083.

“(4) Regulations 7 to 14, 17 to 20, and 22 to 29 shall not apply to any contract which is made by an authorised person, the making or performance of which constitutes or is part of a regulated activity carried on by him.

(5) Regulations 7 to 9, 17 to 20, and 22 to 29 shall not apply to any contract which is made by an appointed representative, the making or performance of which constitutes or is part of a regulated activity carried on by him.”.

(5) Omit Schedule 2.

Amendment of the Enterprise Act 2002

25. In Part 1 of Schedule 13 to the Enterprise Act 2002(a), after entry 9 add–

“9A

“Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC.”.

Amendment of the Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2003

26. In the table of Listed Directives in the Schedule to the Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2003(b), after the entry for Directive 2000/31/EC (“Directive on electronic commerce”) add–

“Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC.

Two of the Lord’s Commissioners of Her Majesty’s Treasury

SCHEDULE 1

Regulation 6(1)

Information required prior to the conclusion of the contract

1. The identity and the main business of the supplier, the geographical address at which the supplier is established and any other geographical address relevant to the consumer’s relations with the supplier.
2. Where the supplier has a representative established in the consumer’s State of residence, the identity of that representative and the geographical address relevant to the consumer’s relations with him.

(a) 2002 c. 40.
(b) S.I. 2003/1374.

3. 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 to the consumer, and the geographical address relevant to the consumer's relations with that professional.
4. Where the supplier is registered in a trade or similar public register, the particulars of the register in which the supplier is entered and his registration number or an equivalent means of identification in that register.
5. Where the supplier's activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority.
6. A description of the main characteristics of the financial service.
7. The total price to be paid by the consumer to the supplier for the financial service, including all related fees, charges and expenses, and all taxes paid via the supplier or, where an exact price cannot be indicated, the basis for the calculation of the price enabling the consumer to verify it.
8. Where relevant notice indicating that: (i) the financial 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 supplier's control; and (ii) historical performances are no indicators for future performances.
9. Notice of the possibility that other taxes or costs may exist that are not paid via the supplier or imposed by him.
10. Any limitations of the period for which the information provided is valid.
11. The arrangements for payment and for performance.
12. Any specific additional cost for the consumer of using the means of distance communication, if such additional cost is charged.
13. Whether or not there is a right of cancellation and, where there is a right of cancellation, its duration and the conditions for exercising it, including information on the amount which the consumer may be required to pay in accordance with regulation 11, as well as the consequences of not exercising that right.
14. The minimum duration of the distance contract in the case of financial services to be performed indefinitely or recurrently.
15. Information on any rights the parties may have to terminate the distance contract early or unilaterally by virtue of the terms of the contract, including any penalties imposed by the contract in such cases.
16. Practical instructions for exercising the right of withdrawal in accordance with regulation 8(4), (5) and (6) indicating, among other things, the address to which the notice of cancellation should be sent.
17. The EEA State or States whose laws are taken by the supplier as a basis for the establishment of relations with the consumer prior to the conclusion of the distance contract.
18. Any contractual clause on the law applicable to the distance contract or on the competent court.
19. In which language, or languages: (i) the contractual terms and conditions, and the prior information specified in this Schedule are supplied; and (ii) the supplier, with the agreement of the consumer, undertakes to communicate during the duration of the distance contract.
20. Whether or not there is an out-of-court complaint and redress mechanism for the consumer and, if so, the methods for having access to it.

21. The existence of guarantee funds or other compensation arrangements, except to the extent that they are required by Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit guarantee schemes^(a) or Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor compensation schemes^(b).

SCHEDULE 2

Regulation 6(4)

Information required in the case of voice telephone communications

1. The identity of the person in contact with the consumer and his link with the supplier.
2. A description of the main characteristics of the financial service.
3. The total price to be paid by the consumer to the supplier for the financial service including all taxes paid via the supplier or, if 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 or costs may exist that are not paid via the supplier or imposed by him.
5. Whether or not there is a right of cancellation and, where there is a right of cancellation, its duration and the conditions for exercising it, including information on the amount which the consumer may be required to pay in accordance with regulation 11, as well as the consequences of not exercising that right.
6. That other information is available on request and the nature of that information.

^(a) O.J. L 135, 31.5.1994, p.5.

^(b) O.J. L 84, 26.3.1997, p.22.

