

Chapter 5

Distance communications

5.1 Distance marketing

Application

- 5.1.1 **R** This chapter applies to a *firm*:
- (1) in relation to its *regulated funeral plan activity*; and
 - (2) that carries on any distance marketing activity from an establishment in the *United Kingdom*, with or for a *consumer* in the *United Kingdom*.

Guidance on the distance marketing rules

- 5.1.2 **G** *Guidance* on the application of the provisions in this section can be found in ■ FPCOB 5 Annex 1G.

The distance marketing disclosure rules

- 5.1.3 **R** A *firm* must provide a *consumer* with the distance marketing information (■ FPCOB 5 Annex 2R) in good time before the *consumer* is bound by a *distance contract* or offer.
- 5.1.4 **G** The *rules* setting out the responsibilities of *funeral plan providers* and *funeral plan intermediaries* for producing and providing information apply to requirements in this section to provide information (see ■ FPCOB 9.1.3R).
- 5.1.5 **R** A *firm* must ensure that the distance marketing information, the commercial purpose of which must be made clear, is provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, with due regard, in particular, to the principles of good faith in commercial transactions, and the legal principles governing the protection of those who are unable to give their consent.
- 5.1.6 **R** When a *firm* makes a telephone call to a *consumer*, it must make its identity and the purpose of its call explicitly clear at the beginning of the conversation.
- 5.1.7 **R** A *firm* must ensure that the information on contractual obligations to be communicated to a *consumer* during the pre-contractual phase conforms with the contractual obligations which would result from the law presumed to be applicable to the *distance contract* if that contract is concluded.

Terms and conditions, and form

5.1.8 **R** A *firm* must communicate to the *consumer* all the contractual terms and conditions and the information referred to in the distance marketing disclosure *rules* in writing or another *durable medium* available and accessible to the *consumer* in good time before conclusion of any *distance contract*.

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

Commencing performance of the distance contract

5.1.10 **R** The performance of the *distance contract* may only begin after the *consumer* has given their approval.

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

5.1.11 **R** This section does not apply to a *distance contract* to act as a *funeral plan intermediary*, if the *distance contract* is concluded merely as a stage in the provision of another service by the *firm* or another *person*.

Exception: successive operations

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

5.1.13 **R** If there is no initial service agreement but the successive operations or separate operations of the same nature performed over time are performed between the same contractual parties, the distance marketing disclosure *rules* will only apply:

when the first operation is performed; and

if no operation of the same nature is performed for more than a year, when the next operation is performed (the next operation being deemed to be the first in a new series of operations).

Exception: telephone calls

5.1.14 **R**

- (1) In the case of a telephone call, and subject to the explicit consent of the *consumer*, only the abbreviated distance marketing information (■ FPCOB 5 Annex 3R) needs to be provided during that communication.
- (2) However, unless another exemption applies (such as the exemption for means of distance communication not enabling disclosure), a *firm* must still provide the distance marketing information (■ FPCOB 5 Annex 2R) in writing or another *durable medium* available and accessible to the *consumer* in good time before conclusion of any *distance contract*.

Exception: means of distance communication not enabling disclosure

5.1.15 **R** A *firm* may provide the distance marketing information (■ FPCOB 5 Annex 2R) and the contractual terms and conditions in writing or another *durable medium* immediately after the conclusion of a *distance contract* if the contract has been concluded at a *consumer's* request using a means of distance communication that does not enable the provision of that information in that form in good time before conclusion of any *distance contract*.

Consumer's right to request paper copies and change

5.1.16 **R** At any time during the contractual relationship the *consumer* is entitled, at their request, to receive the contractual terms and conditions on paper. The *consumer* is also entitled to change the means of distance communication used unless this is incompatible with the contract concluded or the nature of the service provided.

Unsolicited services

5.1.17 **R**

- (1) A *firm* must not enforce, or seek to enforce, any obligations under a *distance contract* against a *consumer*, in the event of an unsolicited supply of services. The absence of a reply does not constitute consent.
- (2) This *rule* does not apply to the tacit *renewal* of a *distance contract*.

Mandatory nature of consumer's rights

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

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



5.2 E-Commerce

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

Information about the firm and its products or services

5.2.2 **R** A *firm* must make at least the following information easily, directly and permanently accessible to the recipients of the *information society services* it provides:

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

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

5.2.4 **R** A *firm* must ensure that commercial communications which are part of, or constitute, an *information society service*, comply with the following conditions:

- (1) the commercial communication must be clearly identifiable as such;
- (2) the *person* on whose behalf the commercial communication is made must be clearly identifiable;
- (3) promotional offers must be clearly identifiable as such, and the conditions that must be met to qualify for them must be easily accessible and presented clearly and unambiguously; and
- (4) promotional competitions or games must be clearly identifiable as such, and the conditions for participation must be easily accessible and presented clearly and unambiguously.

5.2.5

R

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

Requirements relating to the placing and receipt of orders

5.2.6

R

A *firm* must (except when otherwise agreed by parties who are not *consumers*):

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

5.2.7

R

For the purposes of ■ FPCOB 5.2.6R(3), an order and an acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.

5.2.8 **R** Contractual terms and conditions provided by a *firm* to an *ECA recipient* must be made available in a way that allows the recipient to store and reproduce them.

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

5.2.9 **R** The requirements relating to the placing and receipt of orders do not apply to contracts concluded exclusively by exchange of e-mail or by equivalent individual communications.

Guidance on the Distance Marketing Provisions

This Annex belongs to ■ FPCOB 5.1.2G.

Q1.What is a distance contract?

To be a *distance contract*, a contract must be concluded under an ‘organised distance sales or service-provision scheme’ run by the contractual provider of the service who, for the purpose of the contract, makes exclusive use (directly or otherwise) of one or more means of distance communication up to and including the time at which the contract is concluded.

So:

- the *firm* must have put in place facilities designed to enable a *consumer* to deal with it exclusively at a distance; and
- there must have been no simultaneous physical presence of the *firm* and the *consumer* throughout the offer, negotiation and conclusion of the contract. So, for example, contracts offered, negotiated and concluded over the internet, through a telemarketing operation or by *post*, will normally be *distance contracts*.

Q2.What about a firm that normally operates face-to-face but occasionally uses distance means?

If a *firm* normally operates face-to-face and has no facilities in place enabling a *consumer* to deal with it customarily by distance means, there will be no *distance contract*. A one-off transaction effected exclusively by distance means to meet a particular contingency or emergency will not be a *distance contract*.

Q3.What is meant by ‘simultaneous physical presence’?

A *consumer* may visit the *firm’s* local office in the course of the offer, negotiation or conclusion of a contract. Wherever, in the literal sense, there has been ‘simultaneous physical presence’ of the *firm* and the *consumer* at the time of such a visit, any ensuing contract will not be a *distance contract*.

Q4.Does the mere fact that an intermediary is involved make the sale of a product or service a distance contract?

No.

Q5.When is a contract concluded?

A contract is concluded when an offer to be bound by it has been accepted. An offer in the course of negotiations (for example, an offer by a *funeral plan provider* to consider an application) is not an offer to be bound, but is part of a pre-contractual negotiation.

A *consumer* will provide all the information a *funeral plan provider* needs to decide whether to offer a plan and to calculate the price of the plan. The *consumer* may do this orally or in writing. The response by a *funeral plan provider*, giving a quotation to the consumer specifying the price of the plan and the terms, is likely to amount to an offer of the terms on which the *funeral plan provider* will provide the plan. Agreement by the consumer to those terms is likely to be an acceptance which concludes the contract.

Q6.How do these provisions apply to funeral plan intermediaries’ services?

The *FCA* anticipates that the provisions relating to distance marketing are likely to apply to *funeral plan intermediaries’* services only in those cases where:

- (a) the *firm* concludes a *distance contract* with a *consumer* covering its *funeral plan distribution* which is additional to any *funeral plan contract* which it is marketing; and
- (b) that *distance contract* is concluded other than merely as a stage in the entering into of a *funeral plan contract* by the *firm* or another *person*: in other words, it has some continuity independent of a *funeral plan contract*, as opposed, for example, to being concluded as part of marketing a *funeral plan contract*.

Q7. Can you give examples of when the distance marketing provisions would and would not apply to funeral plan intermediaries' services?

The *rules* in this section are unlikely to apply in the typical case where a *funeral plan intermediary* sells a *funeral plan contract* to a *consumer* on a one-off basis.

Nor will the *rules* apply if a *funeral plan intermediary*, in its terms of business, makes clear that it does not, in conducting *funeral plan distribution*, act contractually on behalf of, or for, the *consumer*.

An example of when the provisions in this section would apply would be a *distance contract* under which a *funeral plan intermediary* agrees to provide advice to a *consumer* on *funeral plan contracts*.

Distance marketing information

This Annex belongs to ■ FPCOB 5.1.3R.

Distance marketing information

The firm

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

The financial service

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

The distance contract

- (12) The existence or absence of a right to cancel under the cancellation *rules* (FPCOB 13) and, where there is such a right, its duration and the conditions for exercising it, including information on the amount which the *consumer* may be required to pay (or which may not be returned to the *consumer*) in accordance with those *rules*, as well as the consequences of not exercising the right to cancel.
- (13) The minimum duration of the contract, in the case of services to be performed permanently or recurrently.
- (14) Information on any rights the parties may have to terminate the contract early or unilaterally under its terms, including any penalties imposed by the contract in such cases.
- (15) Practical instructions for exercising any right to cancel, including the address to which any cancellation notice should be sent.
- (16) Any contractual clause on law applicable to the contract or on the competent court, or both.
- (17) In which language, or languages, the contractual terms and conditions and the other information

Distance marketing information

in this Annex will be supplied, and in which language, or languages, the *firm*, with the agreement of the *consumer*, undertakes to communicate during the duration of the contract.

Redress

(18)How to complain to the *firm*, whether complaints may subsequently be referred to the *Financial Ombudsman Service* and, if so, the methods for having access to it, together with equivalent information about any other applicable named complaints scheme.

(19)Whether compensation may be available from the *compensation scheme*, or any other named compensation scheme, if the *firm* is unable to meet its liabilities, and information about any other applicable named compensation scheme.

Abbreviated distance marketing information

This Annex belongs to ■ FPCOB 5.1.14R.

Abbreviated distance marketing information	
(1)	The identity of the <i>person</i> in contact with the <i>consumer</i> and their link with the <i>firm</i> .
(2)	A description of the main characteristics of the financial service.
(3)	The total price to be paid by the <i>consumer</i> to the <i>firm</i> for the financial service, including all taxes paid through the <i>firm</i> or, when an exact price cannot be indicated, the basis for the calculation of the price enabling the <i>consumer</i> to verify it.
(4)	Notice of the possibility that other taxes or costs may exist that are not paid through the <i>firm</i> or imposed by it.
(5)	The existence or absence of a right to cancel in accordance with the cancellation <i>rules</i> (FPCOB 13) and, where the right to cancel exists, its duration and the conditions for exercising it, including information on the amount the <i>consumer</i> may be required to pay (or which may not be returned to the <i>consumer</i>) on the basis of those <i>rules</i> .
(6)	That other information is available on request and what the nature of that information is.

