

Chapter 3

Distance communications

Guidance on the Distance Marketing Directive

This Annex belongs to ■ ICOBS 3.1.2 G

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 an *insurer* 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 an *insurer* needs to decide whether to accept a risk and to calculate the *premium*. The *consumer* may do this orally, in writing or by completing a proposal form. The response by an *insurer*, giving a quotation to the *consumer* specifying the *premium* and the terms, is likely to amount to an offer of the terms on which the *insurer* will insure the risk. Agreement by the *consumer* to those terms is likely to be an acceptance which concludes the contract.

In other cases where the *insurer* requires a signed proposal form (for example, some *pure protection contracts*), the proposal form may amount to an offer by the *consumer* on which the *insurer* decides whether to insure the risk and in such cases the *insurer's* response is likely to be the acceptance.

Q6. What if the contract has not been concluded but cover has commenced?

Where the parties to a contract agree that insurance cover should commence before all the terms and conditions have been agreed, the *consumer* should be provided with information required to be provided before conclusion of the contract to the extent that agreement has been reached.

Q7. How does the Directive apply to insurance intermediaries' services?

The FCA expects the *Distance Marketing Directive* to apply to *insurance intermediaries'* services only in the small minority of cases where:

- the *firm* concludes a *distance contract* with a *consumer* covering its *insurance distribution activities* which is additional to any insurance contract which it is marketing; and
- that *distance contract* is concluded other than merely as a stage in the *effecting or carrying out* of an insurance contract by the *firm* or another *person*: in other words it has some continuity independent of an insurance contract, as opposed, for example, to being concluded as part of marketing an insurance contract.

Q8. Can you give examples of when the Directive would and would not apply to insurance intermediaries' services?

The *rules* implementing the *Distance Marketing Directive* will not apply in the typical case where an *insurance intermediary* sells an insurance contract to a *consumer* on a one-off basis, even if the *insurance intermediary* is involved in the *renewal* of that contract and handling claims under it.

Nor will the Directive apply if an *insurance intermediary*, in its terms of business, makes clear that it does not, in conducting *insurance distribution activities*, act contractually on behalf of, or for, the *consumer*.

An example of when the *Distance Marketing Directive* would apply would be a *distance contract* under which an *insurance intermediary* agrees to provide advice on a *consumer's* insurance needs as and when they arise.

Q9. When would the exception for successive operations apply?

We consider that the *renewal* of a *policy* falls within the scope of this exception. So, the distance marketing disclosure *rules* would only apply in relation to the initial sale of a *policy*, and not to subsequent *renewals* provided that the new *policy* is of the same nature as the initial *policy*. However, unless there is an initial service agreement in place, the exclusion would only apply where the *renewal* takes place no later than one year after the initial *policy* was taken out or one year after its last *renewal*. If the *policy* terms have changed, *firms* will need to consider what information should be disclosed about those changes in accordance with the requirement to disclose appropriate information about a *policy* (see ICOBS 6.1.5 R), as well as ensuring their effectiveness under contract law.