

2002 No. 2157

FINANCIAL SERVICES AND MARKETS

ELECTRONIC COMMUNICATIONS

**The Financial Services and Markets Act 2000 (Financial
Promotion) (Amendment) (Electronic Commerce Directive)
Order 2002**

Approved by both Houses of Parliament

Made - - - - - 20th August 2002

Coming into force - - - - - 21st August 2002

Whereas this Order varies a previous Order() made under section 21(5) of the Financial Services and Markets Act 2000(), so as to make section 21(1) of that Act apply in circumstances in which it did not, as a result of that previous Order, apply;

Whereas a draft of this Order has been approved by resolution of both Houses of Parliament;

Now, therefore, the Treasury, in exercise of the powers conferred on them by sections 21(5) and (6), 238(6) and (7), and 428(3) of the Financial Services and Markets Act 2000, hereby make the following Order:

PART 1

GENERAL

Citation and commencement

1. This Order may be cited as the Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) (Electronic Commerce Directive) Order 2002, and comes into force on the day after the day on which it is made.

PART 2

**AMENDMENT OF THE FINANCIAL SERVICES AND MARKETS ACT
2000 (FINANCIAL PROMOTION) ORDER 2001**

2. The Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 is amended as set out in this Part.

(a) The Financial Services and Markets Act 2000 (Financial Promotion) Order 2001, No. 1335, amended by S.I. 2001/2633, S.I. 2001/3650, S.I. 2001/3800 and S.I. 2002/1310.
(b) 2000 c. 8.

Interpretation provisions

3.—(1) In article 6, at the end insert—

- “(f) “electronic commerce communication” means a communication, the making of which constitutes the provision of an information society service;
- (g) “incoming electronic commerce communication” means an electronic commerce communication made from an establishment in an EEA State other than the United Kingdom;
- (h) “outgoing electronic commerce communication” means an electronic commerce communication made from an establishment in the United Kingdom to a person in an EEA State other than the United Kingdom.”.

(2) After article 8, insert—

“Interpretation: outgoing electronic commerce communications

8A.—(1) For the purposes of the application of those articles to outgoing electronic commerce communications—

- (a) any reference in article 48(4)(e), 50(1)(a) or (3)(c) or 52(3)(c) to an authorised person includes a reference to a person who is entitled, under the law of an EEA State other than the United Kingdom, to carry on regulated activities in that State;
- (b) any reference in article 68, 72 or 73(2)(b) to Part II of the Public Offers of Securities Regulations 1995^(a) includes a reference to provisions corresponding to that Part in the law of an EEA State other than the United Kingdom;
- (c) any reference in article 48 or 49 to an amount in pounds sterling includes a reference to an equivalent amount in another currency.

(2) For the purposes of the application of article 49 to outgoing electronic commerce communications, any reference in section 737 or 264(2) of the 1985 Act (or the equivalent provision in the 1986 Order) to a body corporate or company includes a reference to a body corporate or company registered under the law of an EEA State other than the United Kingdom.

(3) For the purposes of the application of articles 63 to 66 to outgoing electronic commerce communications, any reference in article 3 to Part II of the Public Offers of Securities Regulations 1995 includes a reference to provisions corresponding to that Part in the law of an EEA State other than the United Kingdom.

(4) For the purposes of the application of article 3 in respect of outgoing electronic commerce communications—

- (a) any reference in section 163(2)(b) of the 1985 Act (or the equivalent provision in the 1986 Order) to a company includes a reference to a company registered under the law of an EEA State other than the United Kingdom;
- (b) any reference in that section to an investment exchange includes a reference to an investment exchange which is recognised as an investment exchange under the law of an EEA State other than the United Kingdom.”.

Outgoing electronic commerce communications

4. In article 12—

- (a) in paragraph (1), for “paragraph (2)” substitute “paragraphs (2) and (7)”;
- (b) after paragraph (6), insert—

“(7) Paragraph (1) does not apply to an outgoing electronic commerce communication.”.

Mere conduits, caching and hosting

5.—(1) In article 18—

- (a) in paragraph (1), at the beginning insert “Subject to paragraph (4),”;

(a) S.I. 1995/1537, amended by S.I. 1999/734, S.I. 1999/1146 and S.I. 2001/3649.

(b) at the end, insert—

“(4) This article does not apply to an electronic commerce communication.”.

(2) After article 18, insert—

“Electronic commerce communications: mere conduits, caching and hosting

18A. The financial promotion restriction does not apply to an electronic commerce communication in circumstances where—

- (a) the making of the communication constitutes the provision of an information society service of a kind falling within paragraph 1 of Article 12, 13 or 14 of the electronic commerce directive (“mere conduit”, “caching” and “hosting”); and
- (b) the conditions mentioned in the paragraph in question, to the extent that they are applicable at the time of, or prior to, the making of the communication, are or have been met at that time.”.

Incoming electronic commerce communications

6. After article 20A, insert—

“Incoming electronic commerce communications

20B.—(1) The financial promotion restriction does not apply to an incoming electronic commerce communication.

(2) Paragraph (1) does not apply to—

- (a) a communication which constitutes an advertisement by the operator of a UCITS Directive scheme of units in that scheme;
- (b) a communication consisting of an invitation or inducement to enter into a contract of insurance, where—
 - (i) the communication is made by an undertaking which has received official authorisation in accordance with Article 6 of the first life insurance directive or the first non-life insurance directive, and
 - (ii) the insurance falls within the scope of any of the insurance directives; or
- (c) an unsolicited communication made by electronic mail.

(3) In this article, “UCITS Directive scheme” means an undertaking for collective investment in transferable securities which is subject to Directive 85/611/EEC of the Council of the European Communities of 20 December 1985 on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities(), and has been authorised in accordance with Article 4 of that Directive.

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

PART 3

**AMENDMENT OF THE FINANCIAL SERVICES AND MARKETS ACT 2000
(PROMOTION OF COLLECTIVE INVESTMENT SCHEMES) (EXEMPTIONS)
ORDER 2001**

7. The Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001() is amended as set out in this Part.

Interpretation provisions

8.—(1) In article 3, at the end insert—

“(f) “electronic commerce communication” means a communication, the making of which constitutes the provision of an information society service;

(a) OJ L375/3, 31 December 1985.

(b) S.I. 2001/1060, amended by S.I. 2001/2633 and S.I. 2002/1310.

- (g) “incoming electronic commerce communication” means an electronic commerce communication made from an establishment in an EEA State other than the United Kingdom;
- (h) “outgoing electronic commerce communication” means an electronic commerce communication made from an establishment in the United Kingdom to a person in an EEA State other than the United Kingdom.”.

(2) After article 5, insert—

“Interpretation: outgoing electronic commerce communications

5A.—(1) For the purposes of the application of those articles to outgoing electronic commerce communications—

- (a) any reference in article 21(4)(d) or 23(1)(a) or (3)(d) to an authorised person includes a reference to a person who is entitled, under the law of an EEA State other than the United Kingdom, to carry on regulated activities in that State;
- (b) any reference in article 21 or 22 to an amount in pounds sterling includes a reference to an equivalent amount in another currency.

(2) For the purposes of the application of article 22 to outgoing electronic commerce communications, any reference in section 737 or 264(2) of the Companies Act 1985() (or the equivalent provision in the Companies (Northern Ireland) Order 1986()) to a company includes a reference to a company registered under the law of an EEA State other than the United Kingdom.”.

Outgoing electronic commerce communications

9. In article 8—

- (a) in paragraph (1), for “paragraph (2)” substitute “paragraphs (2) and (7)”;
- (b) after paragraph (6), insert—

“(7) Paragraph (1) does not apply to an outgoing electronic commerce communication.”.

Incoming electronic commerce communications

10. After article 10, insert—

“Incoming electronic commerce communications

10A.—(1) The scheme promotion restriction does not apply to an incoming electronic commerce communication.

(2) Paragraph (1) does not apply to—

- (a) a communication which constitutes an advertisement by the operator of a UCITS Directive scheme of units in that scheme; or
- (b) an unsolicited communication made by electronic mail.

(3) In this article, “UCITS Directive scheme” means an undertaking for collective investment in transferable securities which is subject to Directive 85/611/EEC of the Council of the European Communities of 20 December 1985 on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities(), and has been authorised in accordance with Article 4 of that Directive.

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

*Ian Pearson
Jim Fitzpatrick*

20th August 2002

Two of the Lords Commissioners of Her Majesty’s Treasury

(a) 1985 c. 6.
(b) S.I. 1986/1032 (N.I. 6).
(c) OJ L375/3, 31 December 1985.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 (S.I. 2001/1335) (“the Financial Promotion Order”), and the Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001 (S.I. 2001/1060) (“the Scheme Promotion Order”) to take account of the European Parliament and Council Directive of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal market (No. 2000/31/EC) (“the Directive”).

This Order should be read with the Financial Services and Markets Act 2000 (Electronic Commerce Directive) Regulations 2002 (S.I. 2002/1775) and the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order 2002 (S.I. 2002/1776), which make additional provisions in connection with the Directive. The Order should also be read with forthcoming regulations to be made by the Secretary of State for Trade and Industry, which make general provision giving effect to the Directive.

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

Part 2 of this Order amends the Financial Promotion Order so that the general exemption from the financial promotion restriction in section 21(1) of the Financial Services and Markets Act 2000 (c. 8) contained in article 12 does not apply in respect of communications made from a place of establishment in the United Kingdom to persons in other States in the European Economic Area, and which constitute the provision of an information society service (“outgoing electronic commerce communications”). A new article 8A makes consequential provisions for the application of other exemptions in the Financial Promotion Order to such communications. Article 6 inserts a new article (20B) into the Financial Promotion Order, which creates a new general exemption in respect of communications made from places of establishment in States in the European Economic Area other than the United Kingdom, and which constitute the provision of ISS. Consistently with Article 3.3 of the Directive, this exemption does not apply in respect of communications which constitute an advertisement by the operator of a collective investment undertaking falling within Council Directive 85/611/EEC (a “UCITS Directive scheme”) of units in that scheme, communications concerning insurance, or an unsolicited commercial communication made by electronic mail.

Article 5 of this Order modifies the application of the “mere conduit” exemption in article 18 of the Financial Promotion Order. The effect of the amendment is that the financial promotion restriction will not apply in circumstances falling within the relevant provisions of the Directive.

Part 3 of this Order makes parallel amendments to the Scheme Promotion Order.

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