

EXPLANATORY MEMORANDUM TO
THE ELECTRONIC COMMERCE DIRECTIVE (FINANCIAL SERVICES
AND MARKETS) (AMENDMENT) REGULATIONS 2004

2004 No. 3378

1. This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 The purpose of these Regulations is to ensure that rules made by the Financial Services Authority (FSA) under section 138 of the Financial Services and Markets Act 2000 (FSMA) imposing consumer contract requirements do not apply to an electronic commerce activity consisting of the provision of an information society service from another EEA State, where the law of that State regulates the activity in accordance with Directive 2002/65/EC concerning the distance marketing of consumer financial services (O.J. L271, 9.10.2002, p.16) (“the Distance Marketing Directive”).

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Background

4.1 These Regulations amend the Electronic Commerce Directive (Financial Services and Markets) Regulations 2002 (S.I.2002/1775) which transpose Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (O.J. No. L178, 17.7.2000, p.1) (“the Electronic Commerce Directive”). The Electronic Commerce Directive removed restrictions on the provision of information society services (“ISS”) by persons established within the EEA. This was achieved by creating a ‘country of origin’ framework for the regulation of ISS.

4.2 The 2002 Regulations excluded from the country of origin approach incoming electronic commerce activities comprising ISS where such activities imposed consumer contract requirements. It did this by providing for rules made by the FSA under section 138 of the FSMA to apply in such cases. The effect of the amendment made by these Regulations is to remove the exclusion in the 2002 Regulations in respect of ISS provided from an EEA State once that country has implemented the Distance Marketing Directive so as to cover such activities (or it has equivalent domestic provisions).

5. Extent

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

Not applicable.

7. Policy background

7.1 Article 3 of the Electronic Commerce Directive is designed to enhance the functioning of the internal market by removing restrictions on the provision of ISS by persons established within the EEA by creating a 'country of origin' framework for the regulation of ISS. Specific areas of law are excluded from the 'country of origin' framework by Article 3(3) of and the Annex to the Directive. These exclusions include contractual obligations concerning consumer contracts and accordingly the 2002 Regulations enabled the FSA to continue to impose pre-contractual information requirements on e-commerce providers established in other Member States in respect of services supplied in the UK.

7.2 The Distance Marketing Directive sets common minimum standards for the information that must be supplied to consumers of financial services prior to a distance contract for such services being concluded. A "distance contract" is one concluded between a supplier and a consumer under an organised distance sales or service-provision scheme run by the supplier or by an intermediary, who, for the purpose of that contract, makes exclusive use of one or more means of distance communication (e.g. telephone, internet, fax or mail) up to and including the time at which the contract is concluded. The Distance Marketing Directive applies to any service of a banking, credit, insurance, personal pension, and investment or payment nature. The UK has implemented the Distance Marketing Directive on a 'country of origin' basis, in keeping with the overall aim of completing the single market by mutual recognition of home State rules supported by harmonised core standards. The Financial Services (Distance Marketing) Regulations 2004 (S.I. 2004/2095) came into force on 31st October 2004. As a consequence of other EEA States taking similar action, there will no longer be a need for rules made by the FSA to be able to apply to incoming electronic commerce activities relating to ISS which impose consumer contract requirements. The FSA have already amended their Rules accordingly.

7.3 As part of the implementation of the Electronic Commerce Directive in relation to financial services, the Treasury consulted in December 2001 and published a further consultation in March 2002. Paragraphs 47 to 55 in the first paper set out the Government's intentions in respect of the application of FSA rules to incoming ISS providers in relation to consumer contracts. The approach to be taken was confirmed by paragraphs 1.3 to 1.6 in the Government's second consultation paper published in March 2002.

8. Impact

8.1 A Regulatory Impact Assessment (RIA) has not been prepared for this instrument as a full RIA was prepared by DTI when the Electronic Commerce

Directive was implemented by means of the Electronic Commerce Directive (Financial Services and Markets) Regulations 2002.

9. Contact

Anil Pillai at HM Treasury Tel: 020 7270 5272 or e-mail: anil.pillai@hm-treasury.x.gsi.gov.uk can answer any queries regarding the instrument.