

E-Commerce & Consumer Protection



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The ever increasing use of the internet has led to rapid growth in the number of consumers shopping online and most retailers can no longer afford to ignore this lucrative market. A key factor in this growth is the heightened trust which consumers are placing in online sellers as a result of improved transparency and a greater understanding of their statutory rights before, during and after an online transaction.

These rights were harmonised throughout the European Union (“EU”) by a number of directives which were then implemented by member states into their own national legislation. These EU directives introduced a wide spectrum of e-commerce requirements which govern how online sellers must interact with consumers.

This guidance note firstly summarises the statutory information which any online retailer must provide when selling to consumers in the UK and secondly outlines some of the legal requirements which any online retailer should be aware of when assessing whether its website is compliant with UK legislation.



Background

As a result of the constantly expanding nature of e-commerce, there is a plethora of existing EU and UK consumer law which is often unclear, overlapping or unnecessarily complex.

The first stage in the harmonisation of online consumer law was the establishment of the internal market framework through the EU Electronic Commerce Directive in 2000. This was later supplemented by various EU directives relating to distance selling, consumer rights and consumer relationships which have been largely consolidated or superseded by the introduction of the EU Consumer Rights Directive in 2014.

These EU directives do not have a direct effect on consumers; rather EU member states are required to implement the provisions of these directives into their respective national legislation. Due to limitless national intricacies and variances, it is neither possible nor practical for an all-encompassing EU law to be introduced which would directly affect consumers in member states.

As such, while there is a general harmonisation of consumer law across the EU, every member state has interpreted and implemented the directives as appropriate for their respective legislative requirements. Accordingly, when dealing with different member states it is crucial to establish their precise consumer law requirements since these are likely to differ from other EU jurisdictions.

The Electronic Commerce Directive

The Electronic Commerce (EC Directive) Regulations 2002 (the “E-commerce Regulations”) which implement the EU Electronic Commerce Directive affect all companies that provide “information society services”, which is defined as:

“...any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, at the individual request of the recipient of the service...”

Removing the legalese from this definition, essentially these regulations may apply to any company which, for a charge, either (1) offers consumers information or other content online or (2) sells or supplies goods and/or certain services online.

Due to the slightly confusing terminology of the E-Commerce Regulations, the Department of Trade and Industry (now incorporated into the Department for Business, Innovation and Skills) published guidance to assist companies in determining whether they provided “information society services” and whether any exclusions may apply. [This guidance is available on the Department of Trade and Industry's archived website or accessible by clicking here.](#)

- Company registration number or other relevant trade register;
- Email address which consumers can use to contact the retailer;
- Confirmation as to whether the provision of the service is subject to any regulated profession and, if so, the details of the supervisory authority;
- Confirmation as to whether the business belongs to any regulated profession and, if so, (1) the detail of the professional body, (2) the professional title and (3) a reference to the relevant professional rules;
- Details as to any codes of conduct that may be applicable; and
- VAT number.

Company Information

The E-Commerce Regulations require affected companies to publish on their website the following general information:

- Company name of the retailer;
- Geographical address at which the retailer is established and, if different, the company's registered address. Please note it is not sufficient to only include a PO box number;

Transactional Information

There is also further information which must be provided where the website allows contracts to be concluded by electronic means, e.g. when selling goods or services.

The following information must be provided in a clear, comprehensible and unambiguous manner on the website:

- Whether a copy of the contract will be stored by the company and, if so, whether it will be made available to the consumer. Practically speaking, usually the contract will comprise the consumer's order (their offer to purchase products) and the retailer's confirmation of dispatch (their acceptance) which will be governed by the published terms and conditions. These terms and conditions should be identified to the consumer before purchase and the consumer should be able to store them in a durable form, i.e. paper or email;
- The different technical steps the consumer must follow to conclude the contract;
- The technical means by which the consumer can identify and correct input errors before placing an order. If the consumer is not able to correct any such errors then the consumer may be entitled to rescind the contract; and
- The languages offered for the conclusion of the online contract.

Where an e-commerce retailer refers to prices, the regulations require the prices to be indicated clearly and unambiguously and, in particular, the prices should indicate whether or not they are inclusive of tax and delivery costs.

Additionally, when selling goods or services the retailer must ensure that receipt of a customer's order is acknowledged without undue delay. Generally, most websites arrange for an automatic acknowledgment email to be sent to the consumer upon the submission of their order and then a later email to confirm whether their order has been accepted and provide details as to delivery etc.

The Consumer Rights Directive

UK Implementation

Following the introduction of the EU Consumer Rights Directive in 2014, the UK was required to implement national laws to incorporate this directive by July 2014. A draft Consumer Rights Bill was prepared to achieve this but, given the scale of reforms and its repercussions on existing consumer rights law, it was apparent that it would not be possible to finalise the Act by this deadline.

Accordingly, the UK introduced the Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013 (the "Consumer Contracts Regulations") which enabled it to comply with its requirement to implement the EU directive by this date without rushing into the extensive overhaul envisaged (and now brought about) by the Consumer Rights Act.

These Consumer Contracts Regulations were only intended as an interim measure and have now been consolidated (together with the existing abundance of UK consumer rights law) by the commencement of the Consumer Rights Act 2015 on 1 October 2015.

Selling online to consumers

The aim of the Consumer Contracts Regulations was to ensure that consumers negotiating and concluding agreements online were in a similar position to those making purchases in person. The Consumer Contracts Regulations supplement the E-commerce Regulations but require far more substantive information about the transaction itself, including by way of example:

- The main characteristics of the goods, services or digital content;
- The total price of goods, services or digital content which is inclusive of applicable taxes and excludes any ancillary hidden costs unless the consumer has expressly consented to them (e.g. gift wrapping);
- The arrangements for payment, delivery, performance and the timescale for such delivery; and
- Details of the consumer's right to cancel together with the conditions, time limit and procedures for exercising their right (where applicable).

[The complete list of information which must be provided to all consumers and that additional information required when concluding contracts online can be found here.](#) It is strongly advised these requirements are reviewed in their entirety when assessing online compliance and, where businesses are unclear whether these requirements are addressed, legal advice should be sought. Again, this information must be provided in a clear and comprehensible way.

While in some cases these requirements overlap with those necessary under the E-Commerce Regulations (e.g. company details), retailers should be aware that the provision of this information is to be treated as a term of the contract. As such, failure to provide this information would amount to a contractual breach enabling consumers to seek damages and/or repudiate the contract thereby ending each party's obligations to perform their contractual obligations.

Retailers should also be aware that there is a heightened obligation on retailers to notify consumers of the exact point at which they are contractually bound to pay for goods or services. Essentially, when concluding a transaction on a website it is no longer sufficient for the final stage of the order process to be the consumer clicking a button labelled 'confirm' or 'order' (for example). It is necessary for this button to clearly indicate to consumers their obligation to immediately pay, for example by being labelled 'pay now'.

Cancellation Rights

The Consumer Contracts Regulations strengthen and clarify a consumer's statutory rights to cancel a contract which it has entered into online.

Consumers are granted a 14 day cooling off period after purchasing goods which starts from the date they physically receive the goods. Within this period, consumers can cancel the contract for whatever reason by giving notice to the retailer. The retailer will then be obliged to reimburse all payments made by the consumer including the cost of standard delivery. This reimbursement must be made using the same payment method as the initial transaction within 14 days of the earlier of either receiving the goods back or the day on which the consumer provides evidence that it has done so. Unless otherwise agreed, it is for the consumer to bear the cost of returning the products.

When returning products, consumers are essentially entitled to the same return rights they would have if they had purchased the products face to face in a shop, i.e. the consumer can only handle the goods to the extent that is reasonably necessary to establish their nature, characteristics and functionality. If the consumer causes damage to the goods by going beyond this entitlement then the retailer is able to recover that amount from the consumer up to the contract price.

The online retailer is required to provide the consumer information about these rights and the Consumer Contracts Regulations themselves include a template cancellation policy which can be adapted by online retailers. They also include a model cancellation form which could be offered to consumers, although its use is not obligatory.

Failure to provide this information is a breach of the Consumer Contracts Regulations and can result in:

- The cooling off period being extended to a year;
- The inability of the retailer to recover losses suffered by consumers causing damage to goods; and
- The retailer being liable for the cost of returning unwanted goods during a cooling off period.

While a consumer's rights to cancel a contract must be notified to all consumers, there are a number of exceptions to which these rights do not apply. [A full list of these exceptions can be found here.](#) These exceptions should be notified to consumers in a retailer's terms and conditions of sale.

Online retailers should particularly be aware of their obligations when providing services or digital content to consumers. Generally speaking, consumers purchasing digital content will expect to be in a position to instantly download the content after payment, e.g. buying a MP3

download. Similarly, when a consumer purchases services it may expect such services to commence instantly or otherwise within a short time. Clearly, this conflicts somewhat with the consumer's cancellation rights since it would be eminently unreasonable for a retailer to provide digital content or services instantly and then for the consumer to later 'cancel' these within the cooling off period and be entitled to a refund.

When selling digital content retailers should therefore ensure that, prior to an order being confirmed, the consumer expressly waives its right to cancel. This waiver could be indicated by a check box (not pre-ticked) which confirms that the consumer will not be entitled to cancel its purchase once it has been provided with a download link, for example:

"By clicking the button below to proceed, you agree that we will provide you with immediate access to your digital content as soon as you finish your purchase without waiting the 14 day cooling off period. Therefore, you expressly waive your rights to withdraw from the purchase."

Retailers should also ensure that an express statement reiterating that the consumer waived its cancellation rights pre-purchase is included on the acknowledgment email or otherwise displayed with the download link.

Similarly, when providing services, retailers should request an express confirmation from the consumer that they waive their right to cancel once the retailer has started delivering the services.

"Clearly and Comprehensibly"

As referred to above, a key aim of the EU directives is to increase transparency and allow consumers to identify who they are dealing with and on what terms. As such, the

EU directives repeatedly provide that information must be provided clearly, comprehensibly and unambiguously. These phrases are often replicated verbatim when implemented into national legislation.

Unfortunately, the EU directives do not give guidance on what would constitute a clear and comprehensible communication of this information. Further and of particular relevance to global consumers, the directives do not specify what language the information should be portrayed in; rather they grant member states the ability to include a language requirement into their national legislation.

This lack of clarity leads to differing interpretations and concurrently different legal requirements across member states. Further to this inconsistency as to the language requirements themselves, each member state is likely to have its own consumer protection group which may again have its own interpretation of whether the necessary information is provided clearly.

As such, e-commerce retailers intending to direct their website towards EU member states should obtain local legal advice as to whether local language requirements may be applicable and whether their website provides the information clearly and comprehensibly.

Website Compliance

Generally speaking, the above information referred would be included in the terms and conditions of sale or contained within the content of the website itself. For example, it would be usual to include the main product characteristics and information about price and delivery on the immediate consumer facing shop page with the full details available via hyperlink to the terms and conditions.

A website operator should also consider its other legal obligations, which may be addressed in the following:

- Terms and Conditions of Use;
 - A Privacy Policy; and
 - A Cookies Policy
- Limitations and exclusions of the website operator's liability for user generated content and other losses which users may suffer through their use of the website (e.g. viruses);
 - A statement setting out the website owner's ownership or licence to use all copyright and other IP used on the website; and

Terms and Conditions of Use

Terms and Conditions of Use are used to inform consumers about the terms on which they actually access the website. These are particularly important when consumers are able to generate and post their own content on the website, for example where the website hosts forums or enables product reviews to be posted.

While these terms will be personal and tailored for each website's requirements, they will generally include:

- Rules on what is and what is not considered acceptable behaviour when using the website;
- A prohibition on certain types of user generated content, for example content which is offensive, defamatory or otherwise unlawful;
- Details on how to report any inappropriate content;

- Confirmation of the applicable law and jurisdiction. In a business-to-consumer relationship, the consumer must have the right to commence proceedings in its local court and generally the local law would prevail. Any term attempting to impose the retailer's jurisdiction (if different to the consumer) is likely to be struck out.

It is possible to amalgamate the terms and conditions of sale and use together but often this leads to overly complex and confusing terms which, given the overarching aim of transparency, should be avoided.

[One practical solution to overcome this may be to adopt the approach used by companies such as Amazon, which has a single link to Conditions of Use & Sale but very clearly differentiates between the two sets of terms and conditions.](#)

Privacy Policy

A privacy policy is a crucial component to increase website transparency and comply with a business' legal requirements.

Pursuant to the Data Protection Act 1998, anyone who processes personal data must provide specific information to the persons whose personal data is being processed. Naturally any online retailer will fall under this category since it requires such information in order to process orders and deliver goods. Similarly, any website which requires users to register to use the website will acquire personal data about that user.

To inform users about such data processing, websites should incorporate a privacy policy which:

- Confirms the identity of the data controller and provides relevant company details;
- Explains what kind of personal data will be used and how it will be used;
- Explains whether and to whom personal data will be disclosed, e.g. to group companies or third parties, and states that consent will be sought prior to such disclosure if necessary;
- Sets out the individual's rights to access his or her personal data and make rectifications if necessary or oppose the processing of its data entirely; and
- Clarifies whether personal data will be transferred outside the European Economic Area.

Website owners may also be required to notify the Information Commissioner's Office (the "ICO") that they are a data controller, i.e. the person who determined the purpose and manner that personal data is processed. The ICO maintains a public register which sets out all registered data controllers and gives a general description of the processing carried out by each data controller.

[To assist in determining whether a company needs to register, the ICO has prepared a self-assessment test available on the ICO's website or accessible by clicking here.](#) The test will ask a number of questions to determine if a company is exempt from registration.

The cost of registration is dependent on the size and turnover of the business. For most companies the fee is £35 a year, although this is increased to £500 a year for either: (1) companies which have a turnover of or greater than £25.9m and more than 249 members of staff; or (2) are a public authority with more than 249 members of staff.

Given that failure to register is a criminal offence and punishable by a fine of up to £500,000 (currently expected to increase to the greater of £1 million or 2% of a company's annual worldwide turnover under proposed data protection reforms), in the event of any ambiguity it may be sensible to register with the ICO to limit risks of non-compliance, particularly as registration is a simple administrative process.

A company's requirements under data protection law are clearly defined and communicated to consumers. While this review does not go into the details of data protection in general, all data controllers and data processors must be aware of their legal requirements and, in the event of any uncertainty, should seek legal advice.

Cookies Policy

Often websites will use cookies to allow the website to function correctly and enhance the user's experience. The existence of cookies should be notified to the user, either by reference in the privacy policy or ideally by the publication of a distinct cookies policy.

Cookies are small text files made up of letters and numbers which are downloaded onto a device when the user accesses certain websites. The ICO has published guidance on different types of cookies which primarily fall into the following categories:

- Session cookies, which are used to remember what a user has put in an internet shopping basket and for security when a user is accessing internet banking. These are the least intrusive since they expire when the user has finished browsing the website;
- Persistent cookies, which allow the preferences or actions of users to be remembered, for example for the next time they browse the website or to target advertising;
- First and third party cookies, which track usage of the website. First party cookies are set by the website owner whereas third party cookies are those set by third parties who may post content on the website users are visiting. The ICO advises in particular that third party cookies are clearly identified to users.

Website operators cannot use cookies unless they:

- Tell people the cookies are there;
- Explain what the cookies are doing; and
- Obtain their consent to store a cookie on their device.

The regulations relating to cookies were changed in May 2011 to include the requirement for users to expressly opt in to a website's use of cookies. This position differs from the previous regulations whereby any website operator could store cookies on a user's computer provided that the user was given the opportunity to refuse such storage, i.e. the right to opt out.

There are several exceptions to the opt in requirement, for example those cookies which are "strictly necessary for the provision of a service" requested by a user or where consent is indicated by a user's internet browsers. Regulatory guidance emphasises that these exemptions are narrowly construed and, given the various changes to cookie requirements over the last few years, website operators would be sensible to adopt a more encompassing approach rather than rely on uncertain exemptions.

ICO guidance recommends that companies which use cookies take the following steps:

- Check usage of cookies to ensure that such use is strictly necessary and confirm whether or not there is the need for individual user consent;
- Consider how intrusive the use of cookies is, with the general rule that the more intrusive the use of cookies the more prominence and priority any notice and consent should have;
- Consider how best to obtain consent; and
- Apply exemptions as appropriate

[The full ICO guidance is available on their website or by clicking here.](#)

The ideal approach, which has been adopted by an ever increasing number of companies, is to include a banner which appears on the website whenever a user visits the website. This banner will notify users that the website uses cookies, provide a link to the cookie policy and explain how they can be deactivated if consent is not granted. It is sufficient to either give the user the option to expressly consent to the use of cookies by clicking a button on the banner (whereby the banner disappears) or state that the continual usage of the website signifies their consent to the website's use of cookies.

If this strategy is not taken and a more minimal approach is used, it would be sensible to carefully monitor developments in cookie regulations since they are in a state of clarification and change.

As is apparent from the above that e-commerce and consumer regulations are rapidly changing and retailers must be aware of their current legal requirements. Notably, the Consumer Rights Act 2015 has brought about significant changes to much of the existing consumer rights protection in the UK and the envisaged reforms to data protection (the EU Draft General Data Protection Regulations due to be finalised before the end of 2015) will drastically strengthen online privacy rights.

Accordingly, online retailers should undertake systematic website reviews to avoid falling short of their compliance obligations.

Online retailers should be aware that in the event of ambiguity or uncertainty, courts tend to favour the consumer. Given the effect on reputation and goodwill such rulings could cause, it is suggested that appropriate advice is sought where businesses have any queries or concerns about website compliance.

About the Authors



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Luke read Law at the University of Exeter and took the LPC at the College of Law, Guildford in 2012. Prior to working at Laytons, Luke worked in-house at Porsche Cars Great Britain Limited.

Luke joined Laytons' Guildford office as a Trainee Solicitor in September 2013 and has undertaken seats in:

- Residential Property;
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Luke is now a Solicitor in the Dispute Resolution team in Laytons' Guildford office.



David Garvey

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Post qualification in Autumn 2013, David joined our Commercial team following a two-year training contract.

In addition to a part-time secondment to one of our clients, David works with a broad range of clients within the medical technology & healthcare, IT, manufacturing, creative industries and supply-chain sectors.

Prior to his time at Laytons, he spent time as an Associate Lecturer and Head of European Law at the University of Winchester, a visiting lecturer at Westminster Business School, University of Westminster and working for the Office of the Public Guardian and within the Court of Protection.



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