

New rules for e-commerce

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New EU rules on some types of contracts came into effect in England and Wales on 13 June 2014 under the “Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013” (the “Regulations”), which repeal earlier rules in this field.

These Regulations essentially enhance consumer rights, and, affect those doing business online, bringing significant changes in a number of key areas.

Pre-Contract Information Requirements

Before entering into either a “distance” or an “off-premises” contract (i.e a contract where a trader and consumer are not physically together), such as online sales, certain information has to be provided by the trader to a consumer. There are 24 areas of possible information that may need to be provided. Important new information requirements include:

- the total cost of the relevant product or service and any extra fees;
- the functionality of digital content (such as region coding, restrictions built in for the purposes of digital rights management etc), including applicable technical protection measures;
- any relevant compatibility of digital content with hardware and software;

In addition, for distance contracts an online business must also make it clear that where placing an order is done by clicking a button or something similar, the trader must ensure that the button is labelled in an easy to read manner only with the words “order with obligation to pay” or a “corresponding unambiguous formulation” indicating that placing the order brings with it an obligation to pay.

Where cancellation rights exist (see below), traders falling within the scope of the Regulations will also have to provide a consumer with a cancellation form.

Once a distance-selling contract is concluded, its confirmation must be provided on a “durable medium” which in effect means: a letter, a CD/DVD, an email, a text, or, placing the information in a customer’s personal online account. What is clear is that simply providing the information via a link to a website is not enough.

Cancellation Rights

After having entered into a distance or off-premises contract a consumer can cancel the contract at any time during a set cancellation period without giving any reason and without incurring any liability, except under certain circumstances (and certain contracts are also exempt from cancellation rights obligations). The cancellation period during which a consumer may withdraw from a distance or off-premises contract has been extended by twice the previous time to 14 calendar days. Failure by a trader to notify a consumer of their cancellation right will extend the right to 12 months. Consumers must return cancelled items within 14 days of their receipt.

Traders may not begin providing online services before the cooling-off period has ended unless the consumer has made an express request. In the case of an off-premise contract this request must be in a so-called “durable medium” (see above). A trader cannot therefore accept the use of a service as acceptance of the services starting. Where a consumer has decided to cancel within the cancellation period and has made an express request to start the service, a trader can receive payment for any services provided for the period ending when the trader has been informed of the consumer’s decision. This situation also applies to digital content. “Ancillary contracts” are also covered by the Regulations. These contracts must be for the purchase of goods or services related to the main contract and also be provided by a trader to the main contract or by a third party with whom a trader has an arrangement. Typically those contracts would be for items such as warranties, insurance, or a credit agreement. Where a consumer cancels the main contract the ancillary contract is automatically cancelled and the trader has to notify any relevant third-party.

Refunds

A trader must refund a consumer (including the costs of delivery) within 14 days of cancellation of a service contract or receipt of goods (or of evidence of the consumer returning them). A distance or off-premises trader, including those doing business online, may withhold refunds until goods are returned (or evidence of return is provided) and may reduce the amount of money refunded for goods returned if the handling of the goods is beyond what is necessary to establish the nature, characteristics and functioning of the goods. It is likely that removing the packaging from a product would meet this condition, but, some sort of wear and tear of the product probably would not.

Payment Consent Requirement & Costs

A trader must get a consumer's express prior consent before taking any additional or default payments. Pre-ticked boxes are therefore not permitted (consent can no longer be inferred because a consumer doesn't change a default option - the options can no longer exist). It is also worth stressing here that, as indicated in the section about pre-contract requirements, consumers will not be liable for costs that they have not been told about. Further, a trader may not charge a consumer more for paying by any particular means of payment, e.g a credit card, than the actual cost to the trader of offering the particular means of payment for that transaction. This is an area where some traders - including low-cost airlines - have been heavily criticised in the past.

Delivery

In contracts for the supply of goods, unless otherwise agreed between the parties, the goods should be delivered within 30 days. Risk for the goods will only pass to the consumer on delivery of the goods to the consumer. But, if the consumer commissions the carrier to deliver the goods and the carrier is not one that a trader has named as an option for the consumer, the goods are at the consumer's risk on and after delivery to the carrier.

Helpline Charges

Although it is not a requirement for a trader to provide consumers with a telephone helpline/hotline, where traders do provide this so that consumers can contact a trader about a purchase, the number that consumers can call must be charged at no more than the "basic rate". The Regulations do not define the "basic rate" but, it seems that mobile phones are regarded as "basic rate" numbers (despite being usually more expensive than landlines), and, it is understood that this essentially means not charging more than it would cost to call a friend or relative - premium rate numbers would not comply. Where a consumer is charged more than the "basic rate" then the consumer can claim the excess amount back from the trader as a contractual claim under the Regulations.

Sanctions & Non-Compliance

Failure to comply with the Regulations may result in contracts being deemed non-enforceable, and, potential criminal fines. The burden of proof of ensuring and proving compliance falls on traders, notably as regards demonstrating that the required information has been provided to consumers in connection with a contract, so under the Regulations traders are also obliged to keep records to meet their burden of proof.

It must be highlighted that these changes will apply to any contract concluded on or after 13 June 2014. Accordingly, businesses falling under its scope must adapt their practices accordingly - it should be noted that a number of types of contracts are also excluded from the Regulations.

What needs to be done?

In order to ensure compliance, by way of an initial check, traders should therefore re-examine and where appropriate revise:

- their terms and conditions, including in particular cancellation terms;
- their website payment pages; and,

- their hotline charges.

The Cordery team has extensive experience of reviewing distance selling arrangements and we're happy to help.

It should be pointed that where goods received are faulty or not fit for purpose or as described, consumers have different rights which are covered by separate legislation.

Finally, it must be emphasised that this note is just a summary of what are quite intricate and detailed rules (and these rules also deal with "on-premises" contracts) which should therefore be fully reviewed to ensure complete compliance.

[André Bywater](#) is a commercial lawyer with Cordery in London where he focuses on regulatory compliance, processes and investigations.

André Bywater, Cordery, Lexis House, 30 Farringdon Street, London, EC4A 4HH
Office: +44 (0)207 075 1785
andre.bywater@corderycompliance.com