



# Complying with Consumer Legislation when Trading Online

As at December 2008, it was reported that 70.9% of the UK population has access to the internet either in the home or in the workplace. It is therefore of no surprise that the internet is fast becoming the most convenient and popular way for consumers to shop.

Legislation has been in place for a considerable period to ensure that consumers are not at a disadvantage when purchasing goods or services online as opposed to engaging in face to face transactions. Unfortunately not all online traders ("**Sellers**") are adhering to these mandatory provisions, and consumer confidence can be affected by this.

The main items of legislation enacted for the protection of consumers trading online are the Consumer Protection (Distance Selling) Regulations 2000 ("**the-Distance Selling Regs**") and the Electronic Commerce (EC Directive) Regulations 2002 (the "**E-commerce Regs**"). The Data Protection Act 1998 ("**the DPA**") also has a strong influence in the way online trading should operate.

## Burden or Benefit?

It is important for Sellers to have an understanding of the legal issues involved when selling goods and/or services to consumers. The legislation in place not only stipulates the information which should be provided to consumers before and during the conclusion of a contract, but it also sets out the legal rights and obligations of both parties. Compliance with these provisions will depend on the actions of the online trader in relation to selling goods and/or services online together with the information provided on its website, Terms and Conditions and Privacy Policy. For clarity, "Terms and Conditions" is a document containing the terms and conditions the seller wants to govern the contract with the consumer. Likewise, a Privacy Policy will contain information which a seller should provide to consumers in accordance with the DPA.

Rather than view these legislative provisions as a burden, Sellers should understand that having a well drafted set of Terms and Conditions and a Privacy Policy on their website would not only protect the consumer but would also serve to protect the trader as well.

To illustrate, in 2002 Kodak.com misstated the price of a Kodak DX 3700 digital camera on its website: although the retail price should have been £329, the camera was advertised for £100. An estimated 2000 cameras were ordered and each consumer received a confirmatory email confirming that a contract had been formed: this is where it all went wrong for Kodak.com. Kodak.com apologised to its customers but refused to fulfil the orders. After a court action was raised, Kodak.com relented and fulfilled the orders.

Although it is difficult to ensure that prices of goods are always correct, a good understanding of consumer legislation and well drafted Terms and Conditions could have avoided this situation. The Distance Selling Regs state that a confirmatory

email must be sent to acknowledge the order; however immediate conclusion of the contract (which Kodak.com's email confirmed) is not required. This could have been avoided had Kodak.com simply sent a confirmatory email stating that it had received the order and it was being processed. If the order was then accepted by Kodak.com, a contract would then have been formed. This would have given Kodak.com time to notice the error and it would have been able to politely refuse the orders.

Another example of where good Terms and Conditions could serve online sellers is in terms of cancellation and refunds. Under the Distance Selling Regs, a consumer has 7 days from receipt of the good to cancel a contract (known as the "cooling off period"). A similar cooling-off period is also provided in relation to contracts for services. However, this cooling-off period is based on the premise that the seller has complied with the Distance Selling Regs and provided the consumer with the required information before and during the ordering process. If the seller has not provided the consumer with the necessary information, the cancellation period can be extended for up to three months and seven days. In addition, by clearly stipulating that the consumer will be responsible for the cost in returning any goods, the seller can avoid having to meet this additional expense.

Lastly, due to the risk of fraud, consumers tend to be careful about which websites they use. Having Terms and Conditions and a Privacy Policy in place which are compliant with consumer legislation will give consumers confidence in a website, and will reassure them that it is safe to make a purchase.

#### Compliance during the Ordering Process

- To comply with the Distance Selling Regs, E-commerce Regs and the DPA, certain information must be provided to consumers before the order for goods and/or services is submitted and personal data collected. Information specific to a particular purchase (e.g. price and goods) should be brought to the attention of the consumer on the web pages advertising the goods and services, and should be reaffirmed during the purchasing process. More generic information applicable to all orders is better off provided within the Terms and Conditions and Privacy Policy.

Examples of the type of information which should be provided to the consumer before the order is submitted, whether via the web pages, Terms and Conditions or Privacy Policy includes:-

- the steps to follow to conclude the contract;
- the identity of the supplier, along with its address;
- a description of the goods or services;
- the price of the goods or services (inclusive of all taxes);
- delivery costs, where applicable;
- the arrangements for payment, delivery or performance;
- the customer's right to cancel the order;
- how long the offer or the price remains valid for;
- minimum duration of the contract, if applicable;
- cost of any premium rate telephone, fax or internet charges;
- where the goods are unavailable or out of stock, whether substitute goods of equivalent price and quality will be offered;
- whether the cost of returning any substitute goods will be met by the supplier where the customer cancels the substitute order;

- whether a copy of the concluded contract will be filed by the online trader and whether it will be accessible by the consumer;
- the ways in which the consumer can correct any errors in their order prior to submitting the order;
- the language of the concluding contract e.g. English;
- the personal data which is to be collected;
- whether a third party payment gateway will be used;
- what the personal data will be used for e.g. fulfilment of contract, marketing etc whether the personal data will be transferred to any third party (and, if so, whether it will be transferred outside the EEA);
- the security provisions in place to protect personal data; and
- the means by which the consumer can contact the seller to update their personal data or communicate any queries about their personal data.

➤ Given that the majority of the information will be included in the Terms and Conditions and Privacy Policy, steps should be taken to ensure the Terms and Conditions and Privacy Policy are appropriately incorporated into the contract. Simply providing a link to Terms and Conditions and Privacy Policy may not be deemed as sufficient to incorporate these terms into the contractual relationship, which could leave the seller unable to enforce or rely upon such terms.

Accordingly, it is recommended that a multi-faceted approach is adopted to ensure that the Terms and Conditions and Privacy Policy are sufficiently brought to the attention of the consumer and thereby form part of the contract.

One approach would be to have a link on each web page to the Terms and Conditions and Privacy Policy for easy access. When a consumer takes steps to place an order, best practice would be for the Terms and Conditions to be brought up on a separate page, which the consumer must then scroll down to the bottom and tick "I Accept" before proceeding. Once the order has been completed and the consumer clicks "Proceed", the Privacy Policy should then be brought up on a separate page, which the consumer must again scroll down to the bottom and click "I Accept" before being asked to enter their payment details.

The aforementioned method could be viewed as inconvenient for consumers, in which case Sellers may choose to go with a similar but slightly less onerous approach. This could be by incorporating the Terms and Conditions and Privacy Policy by placing a link to such documents on the order page and payment page as appropriate, together with a corresponding "I Accept" box confirming that the consumer has read, understood and agrees to be bound by the terms. For additional piece of mind, the most important terms could be highlighted on the order form or payment page again e.g. cancellation rights and the provisions which make provision as to when the contract will be deemed as concluded.

➤ Once a consumer has placed an order for goods/services and the payment details have been verified, the majority of the information above must again be confirmed in writing to the consumer, along with the following additional information:-

- when and how the consumer can cancel the order;

- details of the circumstances under which the customer can return the goods;
- whether it is the seller or the customer who will bear the costs of returning or recovering the goods;
- a geographical address where the seller can be contacted by the customer; and
- details of any after-sales services or guarantees.

For the reasons given in the Kodak example above, it is important this it is made clear that the contract is not formed at this point.

- Once the online trader is happy with the order and that it can fulfil the order, the online trader should dispatch the goods or provide the services. It is also recommended that a further email is sent to the consumer advising that their order has been accepted.

### Consequences of non-compliance

Sellers which do not conform to the Distance Selling Regs, E-commerce Regs and/or the DPA could find themselves falling foul of the Office of Fair Trading (“**OFT**”) or the Information Commissioner, which could result in enforcement action being taken. In serious cases of non-adherence, sellers could face court action. Sellers may think that, given the difficulty in policing such adherence, that they need not worry themselves about this. However in addition to relying on consumer complaints, the OFT takes positive action to seek out non-compliance. Indeed, in 2007 the OFT conducted a web sweep of 530 websites to assess whether sellers are complying with the key requirements of the Distance Selling Regs. It is therefore likely to be only a matter of time until sellers operating websites which fail to comply with consumer legislation are caught.

### Further information

For further advice on complying with consumer legislation in respect of online trading, please feel free to contact Lesley Larg ([llarg@thorntons-law.co.uk](mailto:llarg@thorntons-law.co.uk)) of the Intellectual Property Team at Thorntons Law LLP ([www.thorntons-law.co.uk](http://www.thorntons-law.co.uk)).

This article is intended to give general guidance on the law, and states the law as at 30<sup>th</sup> March 2009. You should take professional advice before acting on the material contained in this article as it may not be appropriate to your circumstances.  
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