



EU REGULATION OF DISTANCE SELLING

In order to encourage consumer confidence in buying goods and services over the Internet the EU has adopted Directive EC 97/7 on the protection of consumers in respect to distance contracts (the "Distance Selling Directive"). In the UK, the Distance Selling Directive has been implemented by The Consumer Protection (Distance Selling) Regulations 2000 ("the Regulations"). The Distance Selling Directive provides an agreed minimum level of consumer protection throughout the EU, requiring businesses to provide certain information to consumers before and after ordering goods and services at a distance such as over the Internet or by phone providing consumers with rights of withdrawal and regulating certain marketing methods.

There is evidence to suggest that many businesses still have a lot to do in order to comply with their obligations under the Distance Selling Directive. In the UK, the Office of Fair Trading conducted a random review of UK business websites and determined that 52% of those sites may well have been in breach of the UK's Distance Selling Regulations for failing to give consumers easily accessible information on refund or exchange policies. Those UK businesses that fail to comply with the regulations can if necessary be subject to court injunctions.

For more information about the regulation of conducting business via the Internet specifically please see Sidley Austin Brown & Wood London's Briefing Paper on the EU Regulation of E-commerce under the E-Commerce Directive.

What Types of Contracts does the Distance Selling Directive Apply to?

The Distance Selling Directive applies to contracts for the provision of goods and/or services between a supplier and a consumer. It does not affect business to business transactions. Moreover, the Distance Selling Directive only applies where the supplier is engaged in an organised scheme to sell in such a way that the contract is concluded without the supplier and the consumer physically being present in the same place (a "Distance Contract"). This means that one-off instances where a supplier sells in this way will not trigger the application of the provisions of the Distance Selling Directive.

The supply of financial services is to be governed by a separate Directive¹. The Distance Selling Directive also has limited application to contracts for the supply of everyday consumables delivered to the home or office and contracts for the provision of accommodation, transport, catering or leisure activities (the "Excepted Purposes").

Requirements when Entering into Distance Contracts

There are a number of requirements that suppliers must be mindful of before entering into Distance Contracts. These are as follows:

Marketing by Automated Calling Device, Fax or Other Distance Communication

Suppliers must obey certain rules when approaching consumers to market the products and services that they intend to sell by Distance Contract.

Where the supplier intends to contact a consumer for the purposes of marketing through the use of an automated calling device or by fax, the supplier must always have the prior consent of the consumer to do so. Where the marketing is conducted by some other form of distance communication such as mail, telephone or email then the supplier should always refrain from such communications where the consumer has clearly objected to such communications being made. In addition, where contact with the consumer is made by way of the telephone, the identity of the supplier and the commercial purpose of the call must be made explicitly clear at the commencement of the telephone call, unless contact has been made in the context of the Excepted Purposes.

Suppliers should be aware that under the proposed Electronic Communications Directive, consumers will need to have consented before they receive unsolicited marketing emails².

¹For details see Sidley Austin Brown & Wood London's briefing paper on EU Regulation of Distance Marketing of Financial Services.

²For more information about marketing and data protection generally please see Sidley Austin Brown & Wood London's EU Data Protection Directive briefing paper and EU Legal Requirements in Online Marketing briefing paper.



Provision of Information

Before the conclusion of any Distance Contract, the consumer must (except in the context of an Excepted Purpose) be provided with certain information including:

- the identity of the supplier and, where pre-payment is required, the supplier's address and the main characteristics of the goods and services;
- the price (including all taxes), any delivery costs and details of the method of payment, delivery and performance;
- any right of withdrawal (see "What rights do customers have?" below) and any period during which the offer or price remains valid, the supplier's address to which complaints may be sent and any after-sales services or guarantees;
- any premium costs incurred as a result of using communications to conclude the contract at a distance (e.g. if the contract is agreed over the telephone and the telephone charges are more than the basic rate normally charged by the telephone company);
- where the products or services are being provided on an ongoing basis, the minimum term of the contract.

The information must be provided clearly and in a comprehensible manner using such means as may be appropriate in the circumstances.

Confirmation of Contract

If the information referred to above has not been given to the consumer prior to the contract then after the contract has been entered into the supplier must confirm such information to the consumer. The pre-contract information or confirmation must be made in writing or other 'durable medium' accessible to the consumer and made promptly, no later than the delivery of the goods. In the UK, the Department of Trade and Industry have indicated that they regard email confirmation as sufficient for these purposes. These confirmation requirements do not apply to the Excepted Purposes as defined above.

What Rights do Consumers Have?

Withdrawal

Consumers are allowed a period of at least 7 days in which they can withdraw from the Distance Contract without penalty and for any reason. This includes the cancellation of and withdrawal from any credit which has been arranged by the supplier or a third party which has a commercial relationship with the supplier. If a consumer withdraws they need only pay for the direct costs involved in returning any goods provided (unless the goods were provided as equivalent substitutes for the ordered goods, in which case the supplier pays the costs of return). On withdrawal all other payments made by the consumer must be reimbursed promptly, but in any case no later than within 30 days.

If the confirmation information has not been provided to the consumer then the cooling off period is a 3 month period from the date of receipt of the goods by the consumer and for services from the date of conclusion of the contract. The consumer does not have these rights of withdrawal in the context of the Excepted Purposes and also in the following circumstances:

- where the consumer has agreed to the commencement of the service prior to the expiry of the cooling off period;
- where the contract price is dependent on fluctuations in the market that are beyond the control of the supplier;
- where goods are to be custom made, are liable to deteriorate rapidly, or their return would be otherwise inappropriate because of their nature;
- where audio or video recordings, or computer software have been supplied and unsealed by the consumer;
- where the contract relates to the supply of newspapers, periodicals, magazines, or gaming or lottery services.



Cancellation and Reimbursement for Fraudulent Use of Payment Card

If the consumer uses a credit card or some other form of payment card, they have the right to request cancellation of payment and reimbursement of amounts paid in the event of fraudulent use of their card.

Protection Against Inertia Selling

The Distance Selling Directive requires Member States to prohibit suppliers from sending unsolicited goods to consumers with a request for payment. Some suppliers have, in the past, sent products to households stating that the recipient may return the product if they do not want it, but if they do not return the product within a certain time period, they are supposed to pay for it. This kind of practice is known as inertia selling because it relies upon the consumer not doing anything in order to sell the product. It is also a practice that is viewed by the EU authorities as a means of manipulating consumers into buying products they would otherwise not buy. In such cases, the Distance Selling Directive exempts consumers from the need to respond or to pay for the product.

Performance Within 30 Days

Unless the consumer and the supplier expressly agree otherwise, there shall be an implied term in Distance Contracts that the supplier performs the contract within 30 days of the consumer making their order. If the goods or services are unavailable, the supplier must notify the consumer and provide a refund promptly, but in any event within 30 days. The Distance Selling Directive also gives Member States the option to allow suppliers and consumers to agree in the Distance Contract that if the goods or services ordered are not available, then the consumer will accept delivery of goods or services of equivalent quality and price. The implied obligation of the supplier to perform the contract within 30 days does not apply to the Excepted Purposes as defined above.

What Liability do Businesses Have for Non-Compliance?

All of the rights afforded to consumers are to be exercisable by the consumers themselves, but in an attempt to avoid suppliers taking advantage of consumers' lack of knowledge about their legal rights, the Distance Selling Directive requires Member States to ensure that either public bodies, consumer organisations, or professional organisations have the ability to take

suppliers to court for breach of the Distance Selling Directive as implemented in each Member State.

The UK Regulations

The Regulations implement the provisions of the Directive, applying to goods or services sold to consumers

- on the internet, or digital television;
- by mail order, including catalogue shopping;
- by phone;
- by fax; and
- by advertising on television or radio, in newspapers or magazines.

Schedule 1 of the Regulations contains an indicative list of means of distance communication.

The Regulations require the supplier to provide the consumer with prior information before the conclusion of the contract (see above).

The Regulations provide that where the consumer's payment card is used fraudulently to make a purchase under a distance contract the consumer has the right to cancel the payment, and to require reimbursement of amounts paid. The Regulations amend the Consumer Credit Act 1974 to remove the ability of the card issuer to charge the consumer for the first £50 of loss arising from fraudulent use in connection with a distance contract.

The Regulations prohibit the supply of unsolicited goods and services to consumers. This amends existing UK law.

The Director General of Fair Trading, Trading Standards Departments in Great Britain and the Department of Enterprise, Trade and Investment in Northern Ireland are enforcement authorities for the purposes of the Regulations. They would consider complaints about potential breaches, and can take action for injunctions to prevent further breaches.

The DTI has produced "A Guide for Business" relating to the Regulations and further useful information can be found on the DTI web site.³

³ <http://www.dti.gov.uk>



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Useful Steps

1. Review your terms and conditions to make sure they comply with the Distance Selling Directive and those Member State regulations where your business is based.
2. Never send unsolicited goods to a consumer and make sure that the way in which you contact customers complies with restrictions on marketing and that, where necessary, you have obtained the customer's prior consent.
3. Adjust your sales system so that it is compliant with the Distance Selling Directive and enables you to:
 - a) provide all of the necessary information that the customer has a right to know before they agree to buy from you such as on your website, in your literature and in your terms and conditions;
 - b) send the customer a confirmation of their order with the required information either by letter, email or fax;
 - c) cancel the contract in the event that the customer chooses to do so in the applicable cooling off period; and
 - d) perform the contract within 30 days.

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