

## Distance Selling

### Is your business affected?

#### What is distance selling?

This is a term describing the sale of goods or services to consumers in a situation where the consumer and seller do not deal face to face. This means selling:

- over the internet
- through digital television
- by phone, fax or mail order

It even extends to sales that result from advertising on television or radio or in newspapers or magazines.

"Consumer" is defined as any natural person who, in distance-selling contracts, is acting for purposes which are outside his business.

#### Why is this relevant?

The implications of distance selling must be thought through by any business habitually dealing in these ways because of the Consumer Protection (Distance Selling) Regulations 2000 or "the Regulations".

#### What are the Regulations?

They are another example of legislation intended to protect the consumer except that this time the target is businesses who do not trade from premises visited by their customers. The rationale is that a customer would be more likely to make an impulse purchase online or when put under some gentle pressure from a telephone salesperson.

In those circumstances (and to try to increase consumer confidence in on-line trading) the Regulations seek to ensure that the consumer has an opportunity to examine the goods or services being offered, as they would have when buying in a shop.

Although the Regulations have an obvious impact for businesses set up to trade at a distance from their customers, it is clear and unfortunate at the same time that other businesses trading through more traditional methods fall within the Regulations by default.

#### What do the Regulations say?

Here is a brief summary:

- the consumer must be given certain information about the goods or services on offer before the sale is made
- the consumer must, following the sale, be given written confirmation of the details of the sale
- the consumer has a seven day cooling-off period

There are some further implications as the Regulations have made changes to some associated law in this area and have also given new powers to Trading Standards and the OFT.

#### Do the Regulations always apply?

Generally, where goods and services are sold without face to face contact between the supplier and customer under an "organised distance sales or service provision scheme", the Regulations will apply.

The Regulations will not apply to:

- business to business transactions
- sales where the business does not normally sell to consumers at a distance but agrees to do so in response to a one-off request
- contracts relating to financial services
- contracts for the sale of land
- purchases from vending machines or use of payphones
- auction sales

#### Partial Exemptions

There are also partial exemptions from the Regulations. The obligation to give certain information, written confirmation and to advise of the right to cancel do not apply to:

- contracts for the provision of accommodation, transport, catering or leisure services where the services are to be provided for a specific date or within a specific period
- package holidays and timeshares, which are already subject to regulation
- the regular supply of perishable goods or everyday consumables to the home or workplace (but this does not extend to groceries etc bought over the internet from supermarkets)
- premium rate telephone services for which special rules apply

The obligation to advise of the right to cancel does not apply:

- where the consumer has consented to services beginning before the end of the cooling off period (although written notification of the cancellation right and the option to give consent and of the loss of the right where consent is so given must be given before the consumer actually does so)
- where the price of the goods or services depends on market fluctuations
- to sales of bespoke goods

- goods that cannot be returned because they are perishable
- audio, video or software goods if unsealed by the customer
- newspapers, periodicals and magazines
- gaming and lotteries

It is possible to envisage a situation where services are required urgently but where matters must be delayed whilst written notification of the cancellation right and the consumer's right to waive this right is given.

### **What information must we give?**

You must give clear and comprehensible information to the customer to enable the customer to decide whether to buy the goods or to take the services including:

- your name and address
- a description of the goods or services
- the price and delivery costs
- payment systems
- delivery systems
- the right to cancel, or how the right to cancel may be affected if the consumer agrees to performance of the services beginning before the end of the cooling off period
- how long the offer or price remains valid

This information must be given, but in a manner appropriate to the means of the sale. For telephone sales, this could be quite awkward.

### **Is that it?**

Of course not. Once the contract is made, you must send your customer confirmation of the details described above. This time it must be in writing, which includes fax or e-mail. However, if the customer has seen these details in writing (for example, in the original advertisement) no confirmation is necessary.

The best advice must be to send confirmation in writing to be sure and also because further information must be given about:

- the right to cancel
- details of after-sales services
- return mechanisms

### **What about this cooling off period?**

The customer has an unconditional right to cancel any distance contract made (subject to the exceptions noted). This right cannot be contracted out of.

The seven days start when the order is made and ends, broadly, seven working days later. This period is extended by up to three months if the customer is not given written confirmation of the necessary details and the right to cancel.

In practice and in theory, this could mean having to accept the return of goods a considerable time after you thought a sale was concluded.

### **What if the customer does want to cancel?**

Then the customer will have to do so in writing, not by phone.

The business should specify that any goods must be returned. Further, it is for the business to decide whether to pay for the costs of recovery but you must remember to make clear in your terms and conditions what the position is. This means making sure that your terms and conditions are seen by the customer before the contract is made (see Info. Sheet Business on whose terms?)

The amount paid by the customer would also have to be credited within thirty days of the date of cancellation.

If goods are returned in poor condition so that they cannot be resold as new goods, in theory the business would not have to accept the goods or could look for compensation from the customer. In practice, the prevailing view is that unpacked goods should be accepted by the business as the customer would have to unpack them to decide whether or not to cancel the contract.

### **Consumer protection**

The Regulations are only part of a raft of law that protects the consumer, both where buying online and using more traditional methods. You may already be aware of some of the others such as the Consumer Credit Act 1974 (as recently amended), the Consumer Protection Act 1987 and the Unfair Terms in Consumer Contracts Act 1977, and the E-Commerce (EC Directive) Regulations 2002.

### **Conclusion**

A lot of businesses trading online fail to comply with the Regulations. This leaves them open not only to a customer cancelling a contract months after it was made but to an injunction forcing compliance with the Regulations or forcing a business to cease trading.

This information sheet has been prepared by the E-Commerce and IP Unit to highlight some key issues relating to the Distance Selling Regulations. It is intended to be for general guidance only and is not a substitute for specific advice. It is based upon our understanding of the legal position as at September 2005 and may be affected by subsequent changes in the law.

Should you require any specific legal advice on the issues covered, please e-mail Nicky Androsov at [nicky.androsov@ts-p.co.uk](mailto:nicky.androsov@ts-p.co.uk) or call on 01892 510000.

The E-Commerce and IP Unit at Thomson Snell & Passmore provides a full range of services in relation to e-commerce, computer and technology law and intellectual property issues.

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