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The customer's always right – how new UK consumer regulations will affect online digital content providers

On 13 June 2014, the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (the Regulations) will come into force and affect any UK businesses selling to consumers.

The Regulations, which implement the EU Consumer Rights Directive (2011/83/EU), will apply to most consumer contracts in the UK, whether for the sale of goods or services and whether in-store or via the Internet. However, this update focuses on how the Regulations will affect digital content service providers who sell digital content on a non-tangible medium to consumers via the Internet, such as downloads and streams of audiovisual content, digital music, software, apps, games and ebooks (Digital Content).

Background

With 13 June 2014 fast approaching, Digital Content service providers (Providers) need to ensure that their service will be compliant with the Regulations.

Whilst Providers will be familiar with the nature of various requirements of the Regulations from the existing UK Consumer Protection (Distance Selling) Regulations 2000, the Regulations are broader in scope and now have specific application to contracts for the supply of Digital Content.

Under the current distance selling regime, most Providers have worked under the assumption that the supply of Digital Content will be treated as “services” for the purposes of regulatory compliance. However, the Regulations now treat the supply of Digital Content separately from sale contracts and service contracts and specify particular digital-content-related requirements for Providers.

What do the Regulations require?

Information requirements

Before the consumer is bound by the contract, particular information relating to the purchase must be provided or made available to them in a clear and comprehensible manner, appropriate to the means of distance communication usedⁱ and in a way in which the consumer can reasonably be expected to know how to access itⁱⁱ.

Schedule 2 of the Regulations contains a lengthy list of information which must be provided, covering 24 items in total (Required Information). Providers will no doubt already be familiar with a number of the items, but for Providers supplying Digital Content, the most noteworthy additions are:

- Information concerning the functionality of the Digital Content and any applicable technical protection measures attached to the content, such as digital rights management technology and region coding (e.g. this will include relevant usage rules imposed by the DRM such as restrictions on format-shifting and copying)

- Information concerning relevant compatibility requirements of the Digital Content with hardware and software (e.g. if the content is only compatible with the Provider's software and/or can only be played or used on a specific device or category of devices)

For mobile transactions where limited space or time is available (for instance, in-app purchases), the Regulations allow for a shorter list of information to be provided to consumers. The rest of the Required Information may be provided in another "appropriate way"ⁱⁱⁱ.

Providers must also "clearly and legibly" notify consumers at the beginning of the ordering process (at the very latest) of any delivery restrictions and acceptable means of payment (e.g. Visa, AMEX, PayPal etc.)^{iv}.

Depending on which information has not been provided to the consumer, failure to comply with these requirements can result in either: (a) the consumer not being obliged to pay for the content, and/or (b) the consumer having their right of cancellation extended by 12 months.

Confirmation of contracts

Once the contract has been entered into, Providers will need to provide consumers with confirmation of the contract in a "durable medium", so that the consumer has a record of what was agreed^v. Confirmation must include the Required Information unless the Provider has provided such information in a durable medium beforehand.

The Regulations define durable medium as paper or email (or any other medium) that: (a) allows for the information to be addressed personally to the consumer; and (b) enables the consumer to store and reproduce the information for future reference in an unchanged form. An email addressed to the consumer would therefore satisfy this requirement, provided it includes the Required Information.

The Implementing Guidance dated December 2013, issued by the Department for Business Innovation & Skills (BIS Guidance), advises that: "An email is a durable medium. However, information contained via a link to a website which may change, and which is embedded in an email is not." The effect of this is that Providers which wish to send confirmation in a durable medium by means of email, will have to include in the email all of the Required Information and will not be entitled to link to, for example, the most current version of its terms and conditions. No doubt this will cause headaches for Providers who, understandably, wish to keep emails to consumers as short and concise as possible.

Obligation to pay

Under the Regulations, before the consumer places an order, Providers must make it clear that the order implies an obligation to pay^{vi}.

The Regulations state that order buttons must be labelled with the phrase: "Order with obligation to pay", or other wording which unambiguously informs the consumer that placing the order entails an obligation to pay the Provider. The BIS Guidance proposes that "Pay Now" would be acceptable but notes that the requirement still exists where payment is to be deferred, which will mean that subscription services offering a 30-day free trial may also have to change their buy buttons (e.g. "Subscribe now and pay in 30 days").

Failure to comply with these requirements will mean that the consumer is not bound by the order.

Cancellation right

Extended cancellation period

One major development for consumers is that the Regulations will extend the statutory cancellation period from seven working days under the current framework to 14 calendar days. For Digital Content, consumers will have up to 14 calendar days from the day on which the contract is entered into to cancel the contract and receive a refund^{vii}. Refunds must be made by Providers within 14 days of receipt of the consumer's decision to cancel^{viii}.

Exercising the cancellation right

A consumer can exercise their cancellation right by informing the Provider of the decision to cancel within the cancellation period. The Regulations provide for a "model cancellation form" which consumers may, but are not obliged, to use to cancel the contract. Providers must make the model cancellation form (as set out at Schedule 3(B) of the Regulations) available to the consumers prior to entry into the contract, even if the Provider already has a simple cancellation procedure in place. If the consumer decides not to use the cancellation form, any clear statement setting out the decision to cancel the contract will be sufficient^{ix}.

Where the Provider decides to provide the consumer with the option to cancel the contract by means of filling out and submitting a cancellation form on the Provider's website, the Provider must acknowledge receipt of the cancellation on a durable medium, without delay (e.g. by means of an email confirming the consumer's decision to cancel the contract).

Supplying Digital Content during the cancellation period

The Regulations prohibit Providers from supplying consumers with the Digital Content they have purchased before the 14-day cancellation period expires, unless:

- The consumer has given their express consent
- The consumer has acknowledged that by receiving the content before the cancellation period expires, their right to cancel the contract will be lost

If the consumer has consented and acknowledged as above, and starts to download/stream the Digital Content before the expiry of the cancellation period, then the consumer will lose the right to cancel under the Regulations^x.

In light of the nature in which the majority of consumers consume Digital Content, it is likely in most cases that delivery of content will occur within the cancellation period. With that in mind, Providers must be careful to ensure strict compliance with the process for enabling consumers to waive their cancellation rights.

Nowadays consumers expect most content (particularly music and VOD content) to be available for consumption immediately after purchase and do not want to wait for various stages of confirmation before they can start downloading. Providers will therefore have to find ways in which they can quickly and effectively obtain the consumer's: (a) express consent for the commencement of delivery of Digital Content, and (b) acknowledgement that once delivery commences, the right to cancel will be lost.

Providers can consider using tick-boxes at the point of purchase, pop-up notices at the point at which the consumer clicks "download" or various other mechanisms which strike a balance between obtaining the required consent and acknowledgement prior to commencement of delivery and causing as little interruption to the consumer journey as possible. This is likely to be particularly challenging for services available via mobile and tablet platforms.

In addition, where Providers obtain such consent and acknowledgement from consumers at the point of purchase, the contract confirmation referred to above must include a confirmation that the consumer has provided such consent and acknowledgement^{xi}.

Helplines

Where Providers operate a phone line to enable consumers to call and enquire about their contracts, the Regulations require such helpline services to be operated and charged to consumers at no more than the basic rate^{xii}. This means that 0871/2/3 numbers and other premium rate numbers cannot be used for such consumer helplines, unless a basic rate alternative number is also provided and communicated with equal prominence.

Additional payments

Under the Regulations, Providers must obtain consumers' express consent for any additional payments and charges to be added to their orders^{xiii}. Consumers will not be bound to pay such additional payments unless they explicitly consented to do so. Pre-ticked tick boxes on a website will not amount to "express consent" for these purposes.

What will I need to change on my service?

In order to comply with the Regulations, Providers will need to make various changes to their services on each platform from which the service is available (e.g. mobile and tablet apps, websites etc.). By way of example, Providers will need to consider revising and updating the following:

- **The user journey** – consumers purchasing content via a Provider's website need to be made aware of delivery restrictions and acceptable payment methods at the beginning of the ordering process
- **Terms and conditions** – the t&cs will need to be updated to provide for the extended cancellation right and explain how users can cancel using either the model cancellation form (which Providers will also need to make available) or another means of cancellation (such as web-form or email). Unless easily accessible elsewhere, the t&cs will also need to include the Required Information, such as information concerning functionality, compatibility and technical protection measures
- **Purchase pages** –
 - o Purchase pages will need to provide sufficient detail concerning: (a) the main characteristics of Digital Content, (b) for one-off Digital Content purchases, the price of the content inclusive of VAT, and (c) for monthly subscription contracts, the monthly charges, duration of contract (or for rolling contracts, the conditions for termination) and, where applicable, the minimum duration of the consumer's obligations (e.g. where a consumer must subscribe for at least three months)
 - o Ambiguous order buttons such as "Place your order" or "Confirm purchase" will need to be replaced with "Pay Now" or "Subscribe now and pay in 30 days" or similar
 - o Providers may wish to consider including an unchecked tick-box or other method and notice through which it obtains: (a) the consumer's express consent for the commencement of delivery of content, and (b) an acknowledgement from the consumer that once delivery of content commences, the statutory right to cancel will be lost

- **Confirmation emails** – confirmation emails will need to repeat all of the Required Information and, where applicable, include confirmation that the consumer has consented to the delivery of content prior to the expiry of the 14-day cancellation period and has acknowledged that they lose their right to cancel once delivery commences
- **Help pages and FAQs** – these will need to reflect the updated cancellation rights of the consumer. Providers may also want to provide further detail concerning functionality, interoperability, compatibility and technical restrictions pertaining to content they sell
- **Cancellation emails** – where the consumer chooses to cancel their contract during the cancellation period by means of a web-based form provided by the Provider, the Provider will need to confirm receipt of such cancellation by email (or other durable medium)

Final thoughts

The European Commission is due to issue guidance on the application of the Consumer Rights Directive within the next month. The guidance should hopefully give more clarity as to, among other things, the level of detail Providers are expected to give consumers about the functionality, interoperability, compatibility and technical restrictions applicable to Digital Content.

The Regulations require significant consideration by Providers and may require substantial involvement from Providers' technical teams, particularly when dealing with multi-platform services. Providers should start implementing their transition plans as soon as possible to ensure compliance by 13 June 2014.

The information contained in this guidance note is intended to be a general guide only and not to be comprehensive, nor to provide legal advice. You should not rely on the information contained in this guidance note as if it were legal or other professional advice.

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ⁱ Regulation 13
ⁱⁱ Regulation 8
ⁱⁱⁱ Regulation 13(4)
^{iv} Regulation 14(6)
^v Regulation 16
^{vi} Regulation 14
^{vii} Regulation 29
^{viii} Regulation 34(6)
^{ix} Regulation 32
^x Regulation 37
^{xi} Regulation 16(3)
^{xii} Regulation 41
^{xiii} Regulation 40