

LEGAL REQUIREMENTS FOR ONLINE SALE IRELAND

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THE PURPOSE OF THIS NOTE IS TO EXPLAIN THE MAIN LEGAL REQUIREMENTS FOR A TRADER WHO WISHES TO CONDUCT ONLINE BUSINESS IN IRELAND

THE EUROPEAN COMMUNITIES (UNFAIR TERMS IN CONSUMER CONTRACTS) REGULATIONS 1995 (THE 1995 REGULATIONS)

The 1995 Regulations apply to any term in a contract between a consumer and a seller of goods or supplier of services, which has not been individually negotiated.

Under section 3(2) of the 1995 Regulations, a contractual term shall be regarded as unfair (and accordingly void) if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer, taking into account the nature of the goods or services for which the contract was concluded and all circumstances attending the conclusion of the contract and all other terms of the contract or of another contract on which it is dependent.

An online trader should therefore take care to ensure all contracted terms are fair and reasonable to potential consumers.

THE CONSUMER PROTECTION ACT 2007 (THE CPA)

The CPA classifies a broad range of business activities as unfair, and provides a system of enforcement mechanisms designed to encourage compliance by traders with the legislative provisions.

The following commercial practices are deemed to be unfair (and therefore void) in context of consumer contracts:-

- those which are contrary to the requirements of professional diligence;
- those which are likely to impair consumer choice; and
- those which cause the consumer to make a decision which he or she would otherwise not have made.

The CPA also prescribes a variety of activities including price controls, pyramid selling, price display regulations and codes of practice. Companies should avoid engaging in such practices.

THE EUROPEAN COMMUNITIES (COMPANIES) (AMENDMENT) REGULATIONS 2007 (THE 2007 COMPANIES REGULATIONS)

The 2007 Companies Regulations extended certain disclosure rules relating to company particulars which already applied on certain hard copy documentation to company websites. Under Regulation 9(2), the website of a company registered in Ireland must provide the following:-

- the name and legal form of the company;
- the place of registration of the company and the number with which it is registered;
- the address of the registered office of the company;
- in the case of a company exempt from the obligation to use the word 'limited' or 'teoranta' as part of its name, the fact that it is a limited company;
- in the case of a company that is being wound up, the fact that it is being wound up; and
- if reference is made on the website to the share capital of the company, the reference shall be to the capital that is subscribed and paid up.

In addition, all electronic communications by an Irish limited liability company must also contain the above information.

THE EUROPEAN COMMUNITIES (ELECTRONIC COMMUNICATION, NETWORKS AND SERVICES) (PRIVACY AND ELECTRONIC COMMUNICATIONS) REGULATIONS 2011 (THE 2011 REGULATIONS)

Under the 2011 Regulations, Regulation 5(3) a person is forbidden to use an electronic communications network to store information, or to gain access to information already stored in the terminal equipment of a subscriber or user, unless the user has given consent to that use.

The 2011 Regulations require that a website should offer "clear and comprehensive information" in connection with the information being collected.

The most common way in which a business compiles online information about a consumer is through the use of "cookies." If a website uses cookies, it should, at a minimum:-

- include a link to a suitable privacy policy on all pages;

- explain in that privacy policy how and why cookies are used; and
- notify how, if a visitor chooses to accept cookies, they also have the ability to later delete cookies that they have accepted.

EUROPEAN COMMUNITIES (UNFAIR TERMS IN CONSUMER CONTRACTS) AMENDMENT REGULATIONS 2013

The Consumer Rights Directive (2011/83/EC) (the 2011 Consumer Rights Directive) updated and extended the rights and remedies of consumers, in particular, the rights and remedies of consumers in respect of online contracts. The 2011 Consumer Rights Directive has been transposed into Irish Law by the European Communities (Unfair Terms in Consumer Contracts) Amendment Regulations 2013 (The 2013 Regulations) effective from 13th June 2014.

The main provisions of the 2013 Regulations are set out at (a) to (h):-

(a) Information requirements under the 2013 Regulations

The 2013 Regulations specify no less than 24 items of information that a trader will or may be obliged to provide to a consumer before that consumer can be bound by an online contract as follows:-

- the main characteristics of the goods or services;
- the identity of the trader, including the trader's trading name;
- if the trader is acting on behalf of another trader, the geographical address and identity of that trader;
- the trader's contact details, including the trader's address, telephone number, fax number and email address;
- the geographical address of the place of business of the trader where that address is different from the address given with the trader's contract details; and
- where the trader acts on behalf of another trader, the geographical address of that trader's place of business where it is different from the address given with the trader's contact details to which the consumer can address complaints;
- the total price of the goods or services, including taxes; or
- where the price of the goods or services is not readily ascertainable, the trader must provide the consumer with the method of calculation;
- all applicable freight, delivery or postal charges and other costs; or
- where this is not readily ascertainable, the trader must provide the retailer with the method of calculation;
- in the case of a contract of indeterminate duration or a contract containing a subscription:-
 - the total costs per billing period; or

- where the contract is charged at a fixed rate the total monthly cost ; or
- where these costs are not readily ascertainable, the method of calculation.
- the cost of using the means of distance communication used for the conclusion of the contract where the cost is calculated other than at the basic rate;
- the arrangements for payment, delivery, performance, and the time by which the trader undertakes to deliver the goods or perform the service;
- the trader's complaint handling policy, where applicable;
- where applicable, that the consumer will have to bear the costs associated with returning goods in case of cancellation of the contract;
- where the consumer exercises the right to cancel the contract contained in Part 5 of the Regulations, that the consumer is liable to pay the trader reasonable costs in accordance with that Regulation;
- where a right to cancel the contract does not apply under Regulation 13, the information that the consumer will not benefit from that right, or, where applicable, the circumstances in which the consumer loses that right;
- in the case of a sales contract, the existence of a legal obligation on the trader to supply goods that are in conformity with the contract;
- where applicable, the existence of after sales service, customer assistance and guarantees;
- the existence of relevant codes of practice as defined in section 2 of the CPA and where applicable, how copies of such codes can be obtained;
- the duration of the contract where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating it;
- where applicable, the minimum duration of the consumer's obligations under the contract;
- where applicable, the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader;
- where applicable, the functionality, including applicable technical protection measures of digital content;
- where applicable, any relevant interoperability of digital content with hardware and software of which the trader is, or can reasonably be expected to have been, aware; and
- where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism to which the trader is subject, and the methods for having access to it.

(b) Highlighting of creation of a payment obligations

If an obligation to pay is triggered by activating a button this must be clearly identified by the words “order with obligation to pay” or similar wording.

(c) Confirmation requirement

A trader who concludes an online sale must provide the consumer with a copy of the signed contract or confirmation of it on paper or if the consumer agrees, in another durable medium.

(d) Right to cancel and be repaid

The consumer has the right to cancel the sale (subject to limited exception) within 14 days from the day on which the contract is concluded either by sending a standard form cancellation notice or any other unequivocal message to the trader.

Where the trader fails to inform the consumer of this right of cancellation, the fourteen day period is extended to twelve months.

The trader must refund all payments including any delivery charges within 14 days of receipt of the cancellation notice. There is no linkage between the obligation to make the refund and the return of the goods. The consumer is however obligated to return goods within 14 days of cancellation.

(e) Fees for use of means of payment

A trader cannot charge a consumer more for a means of payment than the trader himself is charged for that service and must obtain the consumer’s express consent if an additional charge is to be applied.

(f) Passing of risk

Unless otherwise agreed, the goods remain at the trader’s risk until delivery to the consumer. Delivery must generally take place within 30 days.

(g) Cost of Communication

The 2013 Regulations contain provisions regulating the fees charged by traders in respect of the use of a given means of payment and the cost of calls by consumers to customer helplines, as well as provisions governing payments by consumers additional to the remuneration agreed for the trader’s main obligation under the contract.

(h) Enforcement

The various consumer protection mechanisms for Ireland are controlled and enforced by the National Consumer Agency (NCA).

In certain circumstances the 2013 Regulations can be enforced by criminal proceedings with a breach of the 2013 Regulations attracting a sentence of imprisonment of up to 12 months or a fine of up to € 60.000 or both.

Where a consumer wishes to make a complaint, he or she should try to complain to the seller first. If the seller refuses to act appropriately, the consumer should contact the NCA. If the trader is based in Ireland, the case can be brought to the Small Claims Court for claims not exceeding € 2000. If the trader is located outside the EU, the consumer should contact the European Consumer Centre.

THE JURISDICTION IN THE CASE OF A CLAIM

The application of the 2013 Regulations to contracts between consumers located in Ireland and traders located in other Member States is determined by the relevant provisions of the Rome I Regulation on the Law Applicable to Contractual Obligations. Article 6(1) of the Rome I Regulations provides that the law applicable to a consumer contract is the law of the country where the consumer has his habitual place of residence if the trader either –

- pursues his commercial or professional activities in the consumer's country of residence, or
- by any means, directs his commercial or professional activities to the consumer's country of residence.

If a consumer contract does not satisfy the conditions of article 6(1) of the Rome I Regulations, it will be governed by the law of the country chosen by the parties as the applicable law for the contract or, in the absence of such a choice, by the law of the country where the seller has his habitual residence. If the consumer and the trader choose the law of the trader's country of residence as the law of the contract, Article 6(2) of the Regulations provides that such a choice cannot have the effect of depriving the consumer of the protections of mandatory provisions of the law in his or her country of residence. Irish consumers who conclude distance contracts for goods or services with traders in other Member States will, in most cases, therefore enjoy the protections of the 2013 Regulations.

VALUE ADDED TAX (VAT)

Under the Value Added Tax Consolidation Act 2010, VAT is charged on the supply of taxable goods and services. Except for goods sold subject to the distance sales rules (see below), there is no de minimis threshold for supplies made in Ireland of goods or services by a trader established outside Ireland.

VAT ON THE SALE OF GOODS BY AN EU TRADER TO AN IRISH BUSINESS OR PRIVATE CONSUMER

(a) Business to Private Consumer (B2C)

Where the goods are dispatched and transported for or on behalf of a supplier in one EU Member State to a private person in another Member State, the distance selling rules apply. According to these rules, the supplier must register for VAT in Ireland and account for VAT at the appropriate Irish rates if the level of online sales to customers in Ireland exceeds €35,000 in a calendar year. In case the threshold is not exceeded, the trader based in another EU Member State has an option to register and account for Irish VAT regarding to his distance sales to Ireland. If the trader elects not to register in Ireland in such circumstances, the trader may be obliged to account for VAT in the EU Member State from which the supply is made.

There is no threshold for excisable goods such as, for example, cigarettes and alcohol. Those goods are always subject to VAT in the state of arrival. A trader who makes distance sales of excisable goods to Ireland must register and account for VAT in Ireland.

(b) Business to Business (B2B)

For B2B sales from an EU trader to an Irish trader, the normal intracommunity VAT rules for the supply of goods apply.

VAT ON SERVICES

a) B2C

Currently in a cross border B2C transaction for the supply of services in another Member State, the supplier charges VAT at the rate applicable in the Member State of the supplier.

(b) B2B

For the supply of services to business in Ireland, as a general rule, the reverse charge procedure applies.

(c) Forthcoming change in VAT on certain cross border services

From 1 January 2015, the place of supply in respect of all supplies for consideration of telecommunications, broadcasting and e-services to consumers will be the Member State where the consumer resides. This means that the VAT on such supplies will be chargeable at the rate applicable in the Member State where the consumer resides and the supplier will have to account for the VAT in that Member State. This is a major change for businesses supplying these B2C services because the VAT rate applicable will be the rate of the Member

State where the consumer resides and there will be additional record keeping requirements for the supplier.

To simplify obligations of suppliers of telecommunications, broadcasting and e-services, a new special scheme known as the Mini One Stop Shop (MOSS) will come into operation on 1st January 2015. Instead of registering for VAT in several Member States, businesses may opt to declare and pay the relevant VAT due to Member States through the MOSS in the Member State where the business has its place of establishment (known as the Member State of Identification or MSI). A business which is established outside the EU but which has a fixed establishment (or several fixed establishments) within the EU can choose to register for MOSS in any Member State where it has a fixed establishment.

Although MOSS will initially apply only to the supply of the B2C services specified above, the intention is that the same arrangements will ultimately be extended to the supply of B2C goods and services generally.

DISCLAIMER

The above is intended as a general guide to the law only. It is not intended as a full statement of the law on any point. Before taking action in relation to any matter, full professional advice should be obtained.



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