

The changing face of internet consumer protection

The regulation of consumer protection is set to undergo significant reform at a domestic and EU level that will require online businesses to revise their practices. Consumer rights are set to be strengthened by the changes introduced by the new Consumer Rights Directive. Kerry Gwyther, Partner and head of Corporate Defence at TLT Solicitors, discusses the main changes to consumer protection and the way in which such protection is enforced.

Consumer Rights Directive

Many changes are expected under the Consumer Rights Directive (CRD): the Government's proposals in respect of a Bill of Consumer Rights; restrictions on surcharges for certain payment methods (e.g. credit cards); and the introduction of an online dispute resolution mechanism for consumers to resolve cross border disputes with traders. There are also proposals for radical changes to the way in which consumer protection is enforced.

Until the CRD is implemented, consumer protection rights in EU Member States are governed by four different Directives: unfair contract terms; sales and guarantees; distance selling; and doorstep selling.

These Directives set a minimum level of consumer rights. Member States are free to maintain these standards or adopt stricter provisions, as long as the national legislation does not offer consumers a lower level of protection. This has led to a fragmented regulatory framework developing across the EU whereby consumer rights vary in each Member State. Online retailers wishing to trade across the EU are therefore often faced with significant costs in ensuring compliance with different national laws which, for the majority of traders, is an effective barrier to cross-border trade.

The CRD aims to remove this barrier and create an EU-wide level playing field of consumer rights. It merges the four Directives into a single set of rules which must be adopted by EU Member States.

Member States will no longer be able to adopt or maintain national legislation that goes beyond the provisions within the CRD. Businesses wishing to sell across the EU will need only comply with a common regulatory framework -

for example, by having only one standard set of terms and conditions. Member States have to adopt and publish the laws, regulations and administrative provisions necessary to comply with the CRD by 13 December 2013. They must apply those measures from 13 June 2014 to contracts concluded after that date.

Impact on online retailers

In addition to harmonising consumer rights across Member States, the CRD modernises the existing rules to take into account technological developments - such as e-commerce - and strengthens consumer rights. The most important changes for consumers affecting online retailers are likely to be as follows:

14 days cancellation period

The period under which consumers can cancel a sales contract (the 'cooling-off period') is extended from seven to 14 calendar days. During the cooling-off period, consumers can return the goods for whatever reason if they change their minds. The 14 day period will begin from the time the consumer receives physical possession of the goods and not at the conclusion of the contract, as is currently the case. As under current law, this cooling-off period will not apply to personalised or customer-specific goods. However, the right to cancel will apply to online auctions, such as eBay, in respect of goods purchased from professional sellers. For cancellations there will also be a model cancellation form which consumer may (but are not obliged to) use.

Refund rights

In general, retailers must refund consumers within 14 days of the notice of cancellation. With respect to sales contracts, retailers may

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withhold reimbursement until they have received the goods back or until the consumer has supplied evidence of having sent back the goods, whichever is the earliest. Any refund must include the costs of delivery to the consumer.

Retailers pay for returns

If retailers want the consumer to bear the cost of returning the goods, then consumers must be clearly informed in advance, otherwise retailers have to pay for the cost of returns themselves. For bulky goods bought over the internet or mail order, such as a sofa, retailers must give at least an estimate of the maximum costs in advance so that the consumer can make informed choice before purchasing the goods.

Cost transparency

Retailers have to disclose the total cost of the product or service, including taxes, as well as any extra fees (such as delivery charges). If shoppers are not informed in advance, they will not have to pay these fees.

Payment surcharges

Retailers must not charge more than the actual cost for the use of credit cards or any other method of payment.

Banning pre-ticked boxes

If retailers offer additional extras, such as car rental when purchasing a plane ticket, these cannot be pre-selected on the page so that consumers have to actively opt out. Consumers must positively opt in or tick the box in order to select the additional options.

Clearer information

Retailers selling digital content will have to provide clearer information regarding its compatibility with hardware and software, and the application of

any technical protection measures.

Risk during transit

The consumer is protected against the risk of loss or damage or transported goods until he or she actually receives them.

A uniform approach

Whilst the overarching approach of the CRD is full harmonisation across Member States, there are nonetheless a number of provisions where individual Member States may adopt specific national legislation.

The most significant of these is likely to be the ability of Member States to require additional pre-contractual information to be provided to the consumer for contracts other than distance or off-premises contracts.

Practically, this has the potential for significant disparities between Member States in the information that must be provided to the consumer either before or at the point of sale. Suddenly, businesses wishing to trade across the EU will need advice on 27 different laws. This may have a significant impact on the full harmonisation goal.

Other changes

In light of the changes made by the CRD, on 19 September 2011 the UK Government announced sweeping reforms to consumer protection laws in the UK.

The British Government has proposed a Consumer Bill of Rights intended to bring together consumer rights currently found in twelve acts or regulations and the incoming provisions of the CRD. It will be in simple English, making it easier for consumers and businesses to understand what is a complex and inconsistent area of law. Consumer Minister Edward Davey explained that "the Consumer Bill of Rights will consolidate, clarify and strengthen

the consumer laws already in place, which will make it easier for everyone to understand and consumer rights in the UK will be stronger than ever. This bill will give everyone a single place to find all their consumer rights".

It is proposed that the bill will modernise the law for goods and services and for digital content, clarify the law on unfair contract terms, consolidate consumer powers for Trading Standards and provide much stronger protection for vulnerable customers targeted by misleading aggressive sales practices.

Specifically, the UK Government has targeted the following aggressive practices:

- implying a connection with social services or old age charities;
- preying on the elderly person's fear of losing their independence;
- writing out cheques or an order form for the victim; and
- salespersons refusing to leave until they have secured a sale.

Excessive credit card charges

Last month the UK Government announced further measures relating to credit card charges designed to protect consumers. It has committed itself to taking action to tackle excessive card surcharges that are misleading and prevent consumers from getting a good deal. This commitment follows recommendations from the Office of Fair Trading. A ban is proposed on excessive surcharges on all forms of payment, not just debit cards. It is proposed that this ban will be in place across most retail sectors. The government is expected to publish a consultation on this in 2012. The Consumer Minister, Edward Davey, explained that "we want to make sure that consumers paying by card do not have to pay the excessively high surcharges being imposed on them by some airlines and other

businesses. That is why we will consult on the early implementation of the Consumer Rights Directive provision to protect consumers from excessively high credit and debit card charges".

Enhanced consumer redress

At the end of November, the European Commission proposed the introduction of new laws on alternative dispute resolution for consumer disputes (for example, the resolution of complaints without the need for traditional intervention of the courts). This, together with the CRD, is a further strengthening of consumer rights particularly in the area of e-commerce.

Specific proposals have been put forward in respect of online dispute resolution with the proposed introduction of an 'ODR platform': an interactive website which offers a single point of entry to consumers and traders who seek to resolve out of court a dispute which has arisen from a cross border e-commerce transaction. In its proposal, the Commission states that: 'Action at EU level is necessary to establish an EU wide ODR platform which is an essential tool for promoting e-commerce. It is also imperative to provide European consumers with the same level of protection and promote competitive practices amongst businesses, thus increasing the exchange of products and services online and across borders'.

The Commission believes that the use of an online ADR process is likely to produce time savings and also ease communications between the parties. The positives for businesses are two-fold: not only can effective use of these procedures resolve matters efficiently but good use of an alternative dispute resolution procedure can also assist in

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avoiding, and handling, intervention from the regulators. Indeed, customers who would have been otherwise inclined to complain to the regulators may be less minded to do so, instead focusing on the ODR route.

Further, genuine efforts by businesses who engage with the process to resolve consumer issues ought to be viewed more positively by the regulators. Whether this translates into practice will have to be seen.

The Department for Business Innovation & Skills (BIS) is presently consulting on these EU proposals and the closing date for the consultation is 31 January 2012. BIS acknowledges that the proposals are likely to impact UK consumers, businesses and organisations and are seeking views, in particular, as to the likely scale of that impact.

Changes to enforcement

In June 2011, the Government launched a consultation on plans to radically reform the consumer protection regime. The plans outline proposals to transfer the OFT's consumer enforcement functions to a newly created Trading Standards Policy Board (TSPB) to take on 'large complex cases which may...raise novel legal issues across the UK', made up of regional Chief Trading Standards Officers acting together, with the competition functions of the OFT and Competition Commission merged to form the Competition and Markets Authority (CMA).

The intention is that the TSPB would have overarching policy-setting responsibility and significant funding to combat both regional and national threats, except those relating to structural market failings which would fall within the remit of the CMA. Local Area Trading Standards Services (LATSS) would retain their own

budget and responsibility for exclusively local threats.

The main function of the TSPB would be the 'prioritisation and coordination of national enforcement cases'. As the TSPB is made of regional chiefs, the intention is that it would be in a strong position to co-ordinate UK funding and efforts around a common agenda to enhance the collective capacity of LATSS to better pursue cross-boundary cases.

The UK Government is proposing to allocate additional central funding to resource such regional/national activity. In accordance with the Government's aim of strengthening consumer protection in the UK, these measures are likely to see stronger and greater enforcement of consumer protection laws. Businesses will need to be ready for these changes and ensure that they have robust due diligence systems in place to ensure that they stay on the right side of the consumer protection laws.

In addition to changes to the substantive laws, such as the onset of the CRD and the Consumer Bill of Rights, there are also likely to be changes to consumer dispute resolution and regulatory enforcement. These may bring benefits for online business and industry but are also likely to bring new challenges. To ensure the best outcome, businesses will need to engage with the changes, contribute to the consultations regarding the changes, revise procedures and processes in accordance with the changes and implement robust governance to ensure that the regulator stays away.

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