



WORKING PARTY PAPERS

The Distance Selling Regulations

'Commercial Friend or Foe'

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A substantial number of periodicals, papers and articles are readily available to inform the consumer of their newly enhanced rights and protection under the **Consumer Protection (Distance Selling) Regulations 2000**¹ (the Regulations). This article however, is written to offer retailers generic advice² when considering the Regulations. Its target audience includes all forms of business whether they currently operate by means of distance communications, those who plan to in the future or simply those who are curious and want to understand what all the fuss is about. Throughout, the reader is prompted to consider the possible legal and/or fiscal consequences of using the Internet or other forms of remote media, to conduct business with Consumers. The article concludes ends with a reasoned submission as to why the objective of the Regulations will merely exasperate the 'catch 22' situation which the legislators set-out to break.

The article assumes that the reader has some prior knowledge of the Regulations. If not, copies are freely available from Her Majesty Stationery Office web site³.

THE RAISON D'ÊTRE FOR THE REGULATIONS

The Regulations which became law on the 31st October 2000, and will affect any business⁴ which utilises the Internet⁵ and other remote media to conducted with Consumers. The Regulations were drafted

“to give Consumers **greater confidence**, when effecting transactions at a **distance** i.e. a **non face-to-face** transactions...by ensuring that they have the same **legal protection** as a Consumer who conducts a traditional face-to-face transaction ...should a dispute arise”.

The Regulations having been widely promoted, not simply as the UK blindly complying with its European [implementation] obligations, but as a positive step towards increasing business, particular 'e-business'. The legislators believe it self-evident that as more businesses offer products and services by distance means then more Consumers would use this media as a preferred choice⁶. Therefore, it could be argued that the Regulations have a dual purpose:

- (i) to invoke confidence; and
- (ii) increase transactions.

¹ http://europa.eu.int/eur-lex/en/lif/dat/1997/en_397L0007.html. The author herein refers to the actual regulations heading numbers as “section numbers” to avoid confusion.

² Any advice or opinion given in this article is generic and the reader should take specific legal advice.

³ A copy of the Regulations, general information, guidance notes and the Directive can be obtained from <http://www.hmso.gov.uk/si/2000/20002334.htm>, <http://www.dti.gov.uk>, <http://www.ofi.gov.uk> respectively.

⁴ Throughout the article the authors uses the words 'supplier, merchant, retailer and business' interchangeably.

⁵ The “Internet” is used in general terms but includes all forms of TCP/IP transfer protocols.

⁶ A recent survey shows that a large percentage of internet transactions are ultimately concluded by the telephone <http://www.thetimes.co.uk> (Monday 15th January 2001).

THE OPERATIVE CLAUSES Part I

In brief the Regulations require that:

- the Consumer is provided with clear information about the goods or service offered;
- the Consumer must be sent confirmation of the order and notified of the “cooling-off period”;
- at or before the contract is concluded, the merchant must provide the Consumer with certain details e.g. the company details, the right to cancel or any additional transaction costs;
- the contract is to be performed and/or a refund given within 30 days.

Together, Section 3 and Schedule 1 provides definitions and a non-exhaustive list of what constitutes a “distance communication” and who the Regulations aims to be protected. A non face-to-face transaction involves several factors, where the main elements are

“a consumer who purchases goods or services from a merchant without having an opportunity to inspect the goods”.

Although this is a rather simplistic definition the critical elements require a merchant to deal with a consumer. A “consumer” is defined in words almost identical to existing statutes and regulations⁷ i.e. a natural legal person. Therefore consumers:

- ❖ who purchase via an auction⁸;
- ❖ who purchase as a members of club;
- ❖ who purchase by competitive tender;
- ❖ who purchase for or on behalf of a Business; and

Business-to-Business transactions are excluded from the scope of the Regulations. Merchants should bear in mind that a series of separate but related events will fall within the Regulations. Nevertheless, as the transaction **must be concluded** by means of distance communication(s) this appears to exclude circumstances where the consumer is required to collect and/or pay for goods or services at the Merchants’ or his agents’ locality. It is still to be tested, but submitted that where the Consumer’s operative obligations are not fulfilled at a distance the Regulations will not apply.

The Regulations are widely drawn and would include a ‘one-off single transactions’ which is against the merchants normal *modus operandi*. The schedule also lists “letters and un-addressed printed matter” which thereby encapsulate many modern marketing techniques. Businesses who ‘make cold calls’, should operate a standard introduction policy. The explanatory notes⁹ drafted by the Department of Trade and Industry expect such businesses to identify themselves and the nature of the call at the first possible opportunity¹⁰.

⁷ Unfair Terms in Consumer Contracts Regulations 1994.

⁸ It is the authors opinion that the **omission of auctions** from the scope of the Regulations is a serious flaw.

⁹ See note 3.

¹⁰ The Regulations have repealed the Mail Order Transaction (Information) Order 1976 however, such businesses are still subject to a variety of Data Protection and Privacy Regulations.

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EXEMPTED TRANSACTIONS

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Section 5 (and Schedule 2 which relates to financial services) contains a list of exempted contracts. Although these transactions fall outside of this Regulation they would still be the subject of other legal or fiscal constraints. It is interesting that “auctions” are included within this category. The exclusion of auctions by the legislators represents a ‘blessing and a curse’. First the blessing. The Regulations were some three years in the drafting, which is several generations in the world of IT. Yet the past two years has seen an explosion in the number of businesses using auctions, competitive tendering and bulk purchasing syndicates/collectives¹¹. In addition recent case law, both at home¹² and abroad¹³, appears to suggest that use of these ‘vehicles’ have potential to flourish. It is submitted that a purchase from, membership of or a subscription to an extranet (or Virtual Private Network (VPN) being analogous to a membership scheme) will take its purchase outside the definition of a Consumer and therefore outside the scope of the Regulations. However, this extension of existing law remains at present to be tested. Now the curse. Any vehicle with a potential to attract a large number of purchases always presents opportunities for abuse, whether by fraudsters or those involved in money laundering.

Section 6 contains a list of contracts which are partially exempted. A business should seek legal advice before assuming that its distance activities are exempted. **Consider:** A merchant who delivers both exempted and listed products, would the entire transaction fall under the Regulations? Further, if the credit card payment, formed the basis of the complaint, it would appear highly inconsistent with the EC consumer protection ethos that that contract should fall outside of the Regulations.

THE OPERATIVE CLAUSES Part II

Section 7 provides a list of a merchant’s obligations. The requirements are not repeated here as they are relatively unambiguous, however merchants must contemplate the detrimental effects of failing to observe the requirements. Although a merchant can through his terms and conditions add ‘a contractual gloss’ thereby reducing his own obligations (vis-à-vis those owed to the Consumers which are) imposed by the Regulations. However, he must ensure that any reduction does not offend the Regulations or existing consumer protection legislation. Even if a merchant fully complies with his obligations he should still consider making appropriate accounting provisions given:

- The consumer’s right to cancel;
- The possibility of collection charges;
- The increase scope for ‘bad debts’ with consequential administrative costs.

Section 8 provides that the aforementioned section 7 data should be available in a “durable medium” which includes “facsimile and e-mail”. To avoid problems non-compliance merchants should be make the information available by an automated download or immediately posted¹⁴ to the Consumer as part of the confirmation process. Section 8 is drafted to clarify certain contractual obligations, upon cancellation. Any

¹¹ I.e. Non-linked natural individuals and/or businesses. <http://www.Audionbroker.com>, <http://www.bidfind.com> and <http://www.letsbuyit.com>.

¹² Barry -v- Heathcote Ball & Co (Commercial Auctions) Ltd 2000 1 WLR 1962, (Lawtel C8600791). This case is a re-statement of the use of a no reserve which confirms that the bidder had a right of action against the auctioneer who refuse the highest (lowest bidder).

¹³ “eBay was held to be not liable for selling fake sport memorabilia on its site”: The Sports Memorabilia Case. <http://www.auctionwatch.com/awdaily/dailynews/january01/1-012201.html>.

¹⁴ It is assumed that the ‘postal’ Adams -v- Linsell (1818) 1 B. & Ald. 681. and ‘receipt’ rules Entores Ltd -v- Miles Far East Corp. [1955] 2 Q.B. 327, c.f. Winfield (1939), 55 L.Q.R. 499 would apply.

contractual wording related section should be well highlighted or brought to the consumers' attention, and an astute merchant will word his terms and conditions accordingly.

Sections 10, 11 and 12 are interrelated and comprise of the Consumers various "rights to cancel" the contract for goods (section 11) or services (section 12). A supplier should clearly state the 'return address' if this differs from details given under section 7. **Diagram 1** indicates the possible cancellation periods. It is clear to see the detrimental effects of Business not complying with section 7. **Consider:** Should a suitable contingencies be made in the company accounts?

Section 14 is a mixture of Consumer and Business based protection. First, it aims to ensure that a Consumer is reimbursed and within 30 days. Nevertheless, it permits the merchant to make a **deduction** of or **charge** certain costs, if stated in the contract. A review of paragraph 5, shows that the Supplier is permitted to charge the Consumer

"...the direct costs of recovering any goods supplied....where the terms of the contract provides that the consumer **must return any goods supplied** (emphasis added) if he cancels the contract....but...does not comply with the provisions or return the goods at the expense of the supplier".

Although this protection is subject to the exceptions¹⁵ contained in paragraphs 7 and 8 a prudent merchant should ensure that their contract reflects this clause. Nevertheless, merchants should check their 'on and/or off-line merchant contract' in respect to 'chargebacks and CNP'¹⁶, as a small increase in the number of refunds given may have an adverse effect on ones merchant status. **Consider:** Should a contingency be made in the accounts for return costs, re-stocking and administration? When should profit be calculated?

Section 15 refers to "related credit agreements" which are normally associated with 'large tickets items'. A merchant should be **extra vigilant** when/if using credit agreements at a distance. A possible solution could be to opt to complete such transactions and paperwork at merchant's brick and mortar site, where more familiar legislation¹⁷ will be operative. Although section 16 represents a gloss on section 15 and seeks to prevent a Consumer obtaining an advantage (pecuniary or otherwise) where an agreement is cancelled. However, it is of little assistance where, M sells the latest wide screen television to C, who retains it during the World Cup, then cancels the agreement. Even if C returns the goods, M is still left with expensive second-hand goods!

Section 17 is analogous to a 'retention of title clause'¹⁸ in its most basic form not by vesting legal title (ownership) with the merchant until the purchase price is fully paid but by imposing a post contractual duty, on the Consumer,

"to **retain possession**...and...**take reasonable** care" of the goods.

The comparison continues as, such clauses and this section suffer from similar practical and legal problems e.g. enforceability and locating the goods. How would a merchant

¹⁵ Also see note UCTA.

¹⁶ [The use of "Card holder not present", may be a breach of the merchants PDO contract if not authorised by the bank.](#)

¹⁷ Consumer Credit Act 1974 et al.

¹⁸ [Aluminium Industrie Vaasen B.V. -v- Romalpa Aluminium Ltd \[1976\] 1 W.L.R. 676. In its most basic form such a clause permits the Seller of goods to retain the legal title to those goods until the Buyer has paid the full contract price, notwithstanding that the goods are in the Buyers' possession.](#)

'force' a Consumer to take a day off work to **wait in** for goods to be collected? Further and more importantly section 17 is **not enforceable**, that is the Regulations **do not require** the Consumer to return the goods unless there is a contractual obligation, **and** the Consumer has **unreasonably** fails to fulfil that obligation, **only then** he must pay the merchant the cost of recovering the goods. Would it be unreasonable for the Consumer to refuse if the goods were the subject of a legal dispute or personal injury claim? In addition how can a Business enforce a duty

“to see that goods are received [returned to the merchant] and not damaged in transit”

on a Consumer who stated that the goods were not damaged when packed, particularly if the Consumer is aware that once they have transmitted the goods their duty ends!

Numerous surveys show¹⁹ that e-business credit card transactions count for less than 5% of all credit cards sells but represent over 50% of all credit cards complaints. The theory behind section 21, payment by credit cards, being core to the Regulations and consumer confidence, but clearly fail to consider who will bear the ultimate cost. Although the legislator drafted paragraph (3) so that

“...it is for the card issuer to prove that the use [of the card] was so authorised”

it is respectfully submitted that it will the merchant who will be left holding the proverbial baby. A simple solution would be to utilise the S.E.T. protocols²⁰. When the cards details are confirmed the card issuer could also furnish the merchant with the customer address. There would be no breach or conflict as the Consumer would have already supplied the Merchant with their address to facilitate delivery. It not suggested that this method is without fault but it give both Consumers and commerce confidence.

Sections 22-24 clarify (in essence outlaws) the rules relating to “unsolicited goods” and “inertia selling” i.e. the practice of sending un-requested goods to potential customers, then demanding payment. A recipient will be permitted to treat such goods as a gift and therefore retain the items.

Section 25 reflects most consumers bias legislation, and prevents both affected party's from “opting out” of the scope of the Regulations, but confirms that if any clause in the merchants' imposed terms and conditions are inconsistent with the Regulation, then that clause will be void i.e. unenforceable. Suppliers should therefore take extra care when drafting contracts especially if the clause imposes an onerous obligation or seeks a disproportionate recovery charge.

¹⁹ <http://www.zdnet.co.uk> as well as surveys by British Telecommunications and PricewaterhouseCoopers.

²⁰ Secure Electronic Transfer is a secure encrypted protocols developed by MasterCard, Visa, Amex, JCB and others, where the merchants does not see the actual, but receive confirmatory details.

Enforcement

The Office of Fair Trading (OFT) have been charged with the task of policing the Regulations. Compliance is achieved by use of "injunctions", either full or interim, requiring the offender to remove offending wording, stop the act complained of etc. The OFT will be assisted by the Trading Standards Departments²¹, however their powers will be restricted and they will act as a referral agent.

Conclusion

Do the Regulations achieve their goal? If the goal is to give Consumers enhance protection when dealing with non face-to-face with merchants, then clearly the legislator has fulfilled this aim. If however the goal is to give Consumers greater confidence to undertake such transactions time will tell. Yet what good is this enhanced 'state of utopia' if there is nowhere to shop when you arrive. The shops will all be closed because merchants may consider that the risk of trading at a distance far outweigh the benefits. Hence, herein lies the fabled 'catch 22'.

Merchants will not deal with Consumers at a distance unless they can protect themselves against fraudulent transactions; and Consumer do not want to be liable for goods they have not ordered.

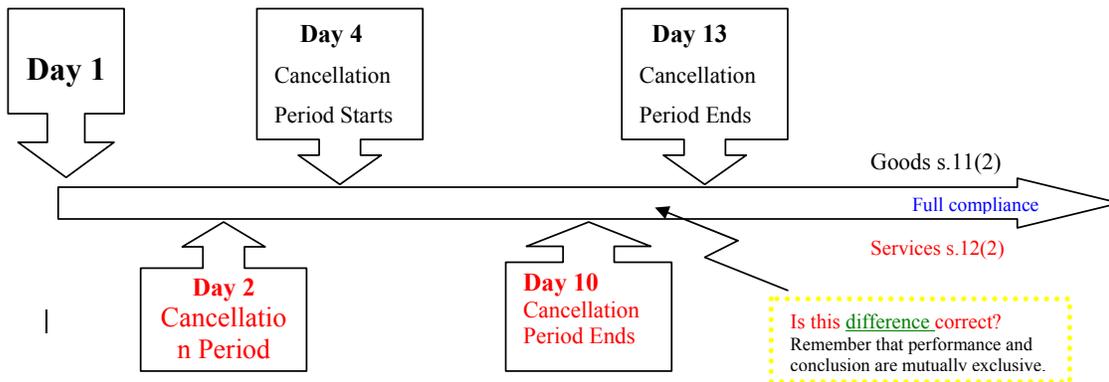
It is submitted that the Regulations do little to enhance the Merchant protection, albeit not all avenue of trades have been included. The legislator have forgotten one of the basis rules of retailing 'never throw good money after bad'. Yet, it is not too late to level out the playing field in a way which would still ensure that Consumers are protected but allowing the Merchant to tried to protect themselves i.e. by providing a secure method of verifying the consumer address against the card details. Sometimes the simplest solutions are the most effective.

²¹ It was mooted that the Consumer Association (Which) may also fall into the category, however, they would not be able to instigate an action only refer the same.

Diagram 1

The following assumptions are made:-

- All other legal obligations are completed;
- The order is confirmed on Day 1;
- Day 1 is the first working day; and
- Delivery of goods/service takes place on Day 3



Assume all the above and the confirmatory details are delivered and received on Day 9

