

*The Law provides adequate protection for online consumers. Discuss*

The Distance Selling Directive (Dir 97/7/EC) was implemented into UK law as The Consumer Protection (Distance Selling) Regulations 2000 and came into force on October 2001,<sup>1</sup> for the protection of consumers in respect of distance contracts and to enhance consumer confidence in distance sales. To establish the full extent of protection that the Regulations provide an array of UK legislation will first be examined prior to an assessment of the Regulations itself.

At common law the position is that once parties have entered into a contract, they are bound to complete their bargain on the terms stated, unless the contract has been entered into as a result of mistake<sup>2</sup>, Duress<sup>3</sup>, Illegality<sup>4</sup> or as a consequence of misrepresentation.<sup>5</sup>

S.13 of The Sale of Goods Act 1979 (SOGA) holds that in contract's for the sale of goods by description, there is an implied term that the goods will correspond with the description.<sup>6</sup> This provision is particularly important in relation to online transactions as words and images on sites constitute descriptions. Secondly, there is an implied term that goods supplied under the contract, during the course of business, are of satisfactory quality (s.14(2))<sup>7</sup> and that the goods are reasonably fit for any purpose which the buyer expressly or impliedly makes it known to the seller

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<sup>1</sup> Henceforth known as the Regulations

<sup>2</sup> *Falck v Williams* [1990] AC 176

<sup>3</sup> *Lloyds Bank v Bundy* [1975] QB 326

<sup>4</sup> *Levy v Yates* (1838); *M. Allan (Merchandising) Ltd. v Cloke* [1963] 2 QB 340

<sup>5</sup> A false statement of fact which induces the other party to enter the contract.

<sup>6</sup> Description identifies source and characteristics of the goods supplied ( *Ashington Piggeries v Christopher Hill* [1972] AC441)

<sup>7</sup> Satisfactory quality includes fitness for all purposes for which goods of the kind in question are commonly bought; appearance and finish; freedom from minor defects ; safety and durability.

(s.14(3)).<sup>8</sup> Similarly, under s.2(1) the Consumer Protection Act 1987 holds that the supplier will be liable for any damage caused by a defect in a product.

Furthermore the use of Exclusion Clause's in contract's is also restricted under The Unfair Contract Terms Act 1977. It restricts clauses that attempt to limit liability for negligence, and breach of contract (s.2).

The above examples of consumer protecting legislation, convey that there are inadequate provisions to cater for the needs of the electronic consumer. In particular the absence of a valid geographical address in e-transactions, means that the above provisions are of limited use as the identity of the supplier is not known. Moreover, conventional payment schemes have also given rise to various problems such as fraud or credit card detail interception and thus discourages e-shopping.<sup>9</sup>

The Regulations represent an attempt to reduce the flaws of the above provisions and cater for the needs of e-consumers. They apply to all 'distance selling contracts',<sup>10</sup> between a supplier and a consumer.<sup>11</sup> The means by which the contract may be concluded are contained within Schedule 1,<sup>12</sup> and though does not contain the Internet, its 'indicative' nature would suggest it would be within the ambit of the list. This also permits the Regulations to be flexible in extending the scope of its provisions to cater for new methods of communication that may arise in the future.

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<sup>8</sup> Supply of Goods and Services Act 1982 provides further protection where goods are not sold within the meaning of the Sale of Goods Act 1979 or where a service is provided SGSA provides similar rights for goods, for example under sections 3,4,13.

<sup>9</sup> The Consumer Credit Act 1974 compensates for this under s.83, with some liability under s.84 but has now been removed by Reg 21 of the Regulations, discussed below. In addition, S.75 further provides further indemnity for the consumer where the transaction involves a cash price of between £100 and £30,000

<sup>10</sup> Under Reg 3(1) 'distance contract' is defined as: 'any contract concerning goods or services concluded between a supplier and a consumer under an organised distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded'.

<sup>11</sup> A 'consumer' is defined as 'any natural person who, in contracts to which these Regulations apply, is acting for purposes outside his business'.

<sup>12</sup> Means include: Catalogue; Phone with and without human intervention; Videophone, Electronic Mail; Fax; Television (Tele-shopping).

Under Reg 7 the Regulations attempt to balance the bargaining power of the consumer and the supplier by requiring the latter to provide the former with certain information in good time before the conclusion of the contract. These include the price of the product, delivery date and price, characteristics of the goods/services and the identity of the supplier, and these must be in a clear ‘comprehensible manner’.<sup>13</sup> This provides the consumer with the confidence that it is contracting with a legitimate party and allays any contrary fears. In addition, under Reg 8 prior to or in good time after conclusion of the contract the consumer must receive written confirmation of the information required under Reg 7 and further information such as rights of cancellation, under Reg 10 discussed below.<sup>14</sup> This must be in writing or in another ‘durable medium available and accessible to the consumer’<sup>15</sup> either prior to the conclusion of the contract or in good time thereafter and at the time of delivery at the latest.<sup>16</sup> Moreover, failure by the supplier to fulfil the contract within thirty days<sup>17</sup> will result in withdrawal and cancellation of any card payment (Reg 19).

To further achieve its aim and compensate for the e-consumer’s vulnerability owing to their inability ‘to see the product or ascertain the service’, Reg 10 provides for the right of withdrawal. This permits e-consumers to cancel contracts via a notice of cancellation, indicating their intention to do so, in writing or other ‘durable’

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<sup>13</sup> Reg 7(1) and (2) Other requirements includes payment, delivery or performance arrangements, existence of a right of cancellation (subject to regulation 13), cost of using the distance communication, period that the offer/price remains valid, and minimum duration of the contract (in the case of contracts for goods or services which are to be performed permanently or recurrently).

<sup>14</sup> Other information required includes the geographical address of the supplier for any complaints, information about any after-sales service and guarantees; conditions for exercising contractual right to cancel the contract where the contract is of an unspecified duration or of a duration exceeding one year.

<sup>15</sup> Durable medium has not been specified in the Regulations, but can include electronic mail but not a website or verbal communication, (Department of Trade and Industry Publication, *Distance Selling Directive- Implementation in the UK*, November 1999, para 3.9).

<sup>16</sup> The consequences of failing to do so is discussed in below

<sup>17</sup> Initiating from the day after which the consumer sends his order to him or within such other period for performance as the parties agree (Reg 19 (1)).

medium accessible to the supplier<sup>18</sup> but notably, without explanation or penalty. The time-scale within which the consumer must give notice of its intention to cancel begins on the day in which the contract is concluded and expires seven working days from the day after the consumer receives the goods (Reg 11), but significantly if the supplier fails to conform with the requirements under Reg 8, Reg 11 penalises it by increasing the period within which the consumer can cancel to three months. Thus, by encouraging the supplier to comply with Reg 8 through use of such mechanisms, the Regulations balance the burden of risk carried by the consumer and supplier in e-transactions. In the event of any cancellation, paid sums must be reimbursed within thirty days and without penalty other than any permitted charge for the costs of recovering the goods (Reg 14).

As mentioned above, conventional payment schemes discourage e-shopping. Consequently, Reg 21 holds that the consumer can cancel a payment if their card has been used fraudulently, and in such a case the consumer can retain the sums paid from the card issuers.<sup>19</sup>

However, the Regulations do entail certain faults. First, the lack of clarity is initially apparent where the Regulations require that the distance contract involve goods or services<sup>20</sup>, and yet fails to define neither goods nor services. Similarly, the right to receive information under Reg 8 and the right of withdrawal under Reg 10, does not define the exact moment a contract is formed. Furthermore, Reg 6(2) excludes from Regs 7-19 and 7(1) 'contracts for the supply of food, beverages or other

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<sup>18</sup> However, the right of withdrawal in certain circumstances may be unfair and is thus not permitted. Some examples under Reg 13 are the supply of books, lottery or betting services, computer software, goods made to the consumer's specifications etc.

<sup>19</sup> Importantly, the burden of proof is on the card issuer to prove that use was authorised in the situation where proceedings arise.

<sup>20</sup> Ibid.

goods intended for everyday consumption...’ again an unclear and ambiguous area.<sup>21</sup>

Second, the requirement under Reg 8<sup>22</sup> creates confusion as to how the information should reach the consumer. For example, if the supplier sends the information by ‘another durable medium’ and is not received by the consumer, the Regulations do not stipulate who would be at fault. Third, problems of purchasing products such as cars online and then trying to return them with the seven day period (Reg 10),<sup>23</sup> has not been addressed and conveys an area in need of attention.

Fourth, there are significant exemptions under the Regulations. The most notable one under Reg 5(1) is auctions, and this may have adverse implications, as a consequence of ebay’s large consumer base in the e-commerce market. Moreover, as a result of the *EasyCar* case<sup>24</sup> contracts for the provision of car hire services comes within the ambit of Reg 6(2)<sup>25</sup> and thus cannot be cancelled by consumers without penalty. The consequence is that the scope of protection the Regulations afford are reduced. Final, with regard to enforcement procedures under Reg’s 26 and 27, the absence of a criminal offence is another flaw which may result in suppliers contravening it, even though there is a three-month return period as a sanction.<sup>26</sup> In addition, the Regulations also fail to resolve the practicability of enforce remedies against suppliers in different Member States. The fairly low value of contracts associated generally with e-transactions, does not make the pursuance of such remedies worthwhile.

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<sup>21</sup> Reg 6(2) could be read as either ‘supplied to the consumer’s residence or to this workplace by regular roundsmen’, or ‘supplied to the consumer’s residence (or to his workplace by regular roundsmen)’. The former interpretation would not exclude Tesco Direct since the supply to the residence would not be by regular roundsmen, whereas the latter definitely would.

<sup>22</sup> That the confirmation be sent in writing or via another ‘accessible’ ‘durable medium’ creates confusion as to how the information should reach the consumer.

<sup>23</sup> After which its value would have dropped,

<sup>24</sup> *EasyCar (UK) Ltd v Office of Fair Trading*. (C336/03) [2005]

<sup>25</sup> Contracts to which Regulations 7 to 19 do not apply to.

<sup>26</sup> However the Department of Trade and Industry does believe that the possibility of a three-month return period, mentioned above, is a sufficient deterrent.

The Regulations were amended in 2005 due to their outdated nature and need of modification as they were ‘...unclear, impracticable...[and] costly for suppliers’.<sup>27</sup> Further it was felt that as consumers could return an item for any reason<sup>28</sup> they have ‘...a greater margin for fussiness and fickleness...’.<sup>29</sup> Such concerns are addressed in the amendments, which also attempt to reduce the disproportionality between a distance consumer who can return a product for any reason and a face-to-face consumer who cannot do so as a result of the SOGA 1974.

Reg 8(3)<sup>30</sup> now holds that prior to the conclusion of the contract the consumer must be provided with information<sup>31</sup> as to how the right to cancel may be affected if the consumer agrees to performance starting less than seven working days after the contract was concluded.<sup>32</sup> Thus consumers can still cancel even after performance has begun where they did not receive notice of their right to cancel beforehand. Besides acting against ‘cold-callers’<sup>33</sup>, such a change was also held to be more ‘...workable for suppliers and consumers...’<sup>34</sup>, and particularly suppliers that offer services instantly after receiving orders.

Reg 12 now states that the consumer loses its right to cancel on commencement of the services if it agrees to performance beginning before the cooling-off period, and the supplier provides the required information before

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<sup>27</sup> Saxby, S Distance Selling comes of age (2004) Computer Law and Security Report Volume 20, Number 2, page 83.

<sup>28</sup> Provided the withdrawal date has not passed (Reg 10)

<sup>29</sup> Rogers, Kevin ‘The Changes to the Distance Selling Regulations- are they likely to rock the boat?’ Herts Law Journal 3(2), 45-54

<sup>30</sup> Relating to contracts for the supply of services

<sup>31</sup> This information must be provided prior to or in good time during the performance of the contract.

<sup>32</sup> The previous position was that the supplier was required to inform the consumer, prior to the conclusion of a contract for services, that he will not be able to cancel once performance of the services has begun with his agreement.

<sup>33</sup> Who are less concerned about informing the consumer of their rights

<sup>34</sup> DTI Consultation on proposed changes to the Consumer Protection (Distance Selling) Regulations 2000, January 2004 p.26.

performance of the contract. Reg 13 provides a further right to cancel in the situation where performance of the service has already commenced.<sup>35</sup>

Hence, although the Regulations provide a broad scope of protection for the e-consumer and promotes sound business practices, if it is to amply do so, the flaws indicated must be addressed. In addition it is vital that consumers are aware of their rights within the Regulations. Finally, the Regulations must be ready to adapt to the dynamic nature of mediums such as the Internet if it is to serve its purpose.

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<sup>35</sup> It holds that when information is provided in good time during the performance of the services, a right to cancel exists even if the consumer agrees to performance beginning within seven working days of the contract being concluded, but the cooling off period begins when the consumer receives the information and ends seven working days later or when performance is completed (whichever is