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Intellectual Property & Information Technology

# E-Commerce Update

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## Important Clarification for Online Contracts

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In our e-commerce update we highlight some recent developments in the area of e-commerce, including developments in relation to on-line contracts and in the practice of the Data Protection Commissioner in relation to compliance with regulations relating to “cookies” and unsolicited direct marketing emails and texts.

The European Court of Justice has ruled in *Content Services v Budesarbeitskammer* Case C-49/11 that providing consumers with required information via a hyperlink to the business’s website does not meet the requirements of the Distance Selling Directive 97/7/EC.

The Distance Selling Directive requires that consumers “receive written confirmation or confirmation in another durable medium” of certain information relating to their contract. This includes information in relation to the right to cancel the contract during the cooling off period.

In the case before the Court, when the consumer placed an order, Content Services sent an email to the consumer containing a hyperlink to a website. The information required to be given to the consumer could only be obtained by clicking on the link. The Court clarified that this did not meet the requirements of the Directive. It found that the requirement that the consumer “receive” the information meant that the consumer should not have to take any action to get the information, such as clicking on a link.

It also found that the requirement that the information be given in a “durable medium” meant that the consumer, as is the case when it is provided in paper form, must be in possession of the information referred to in a form which is not alterable and is accessible for an adequate period so that consumers can reproduce it unchanged.

The required information must be given to the consumer at the latest at the time of delivery of the goods. If the business fails to give the information, the contract will be unenforceable against the consumer. Businesses selling on-line or using other methods of distance selling should ensure that the information is set out in an email to the consumer prior to delivery of the goods or in a delivery note included with the goods.

### Cookies Compliance

The Office of the Data Protection Commissioner has recently written to the operators of 80 websites, including many well known businesses and government bodies, seeking information in relation to their compliance with the requirements in relation to cookies under the European Communities (Electronic Communications Networks And Services) (Privacy And Electronic Communications) Regulations 2011. The websites were chosen at random and not based on their compliance with the legislation.

A cookie is a small text file placed on a website user's computer by a website provider. Cookies collect information about website users and can be used for a number of reasons, including for example, to recognise the user on his or her return to the website and to track the user's preferences so that services can be tailored to them.

The legislation, which was introduced in July 2011, requires that a website user is provided with clear and comprehensive information in relation to the cookies used on the website and that the user has given their consent to the use of the cookies. The legislation does not prevent the use of cookies which are strictly necessary in order to provide a service requested by the user.

The Office of the Data Protection Commissioner has stated that the level of compliance in Ireland is very low compared to the UK and that they cannot allow that situation to continue. They have stated that the websites targeted have 21 days to outline their approach and where they fail to engage with the Office and meet their legal requirements, the Office will be obliged to take enforcement action.

There are a number of different ways of providing the information and obtaining consent, these include the use of information banners, pop up screens and appropriate browser settings. As a first step to ensure compliance with the legislation, website owners should ascertain what cookies they use on their website and the purpose of those cookies. They can then determine what information they should give their users and how they should seek their consent.

### **Prosecutions for Electronic Direct Marketing**

Last month the Data Protection Commissioner again prosecuted a number of companies in relation to sending unsolicited direct marketing emails and texts. The prosecutions were brought as a result of complaints made by customers about receiving unsolicited marketing texts and emails and that they could not opt out of receiving the messages.

Under the Privacy and Electronic Communications Regulations, the fine for sending such emails and texts is up to €5,000 per email or text. In light of the serious consequences of breaching the legislation, it is important that businesses ensure that they have obtained from their customers the required consent to send direct marketing emails or texts and that they provide an unsubscribe facility with all such emails and texts.

*For further information on this topic or generally please contact Jane Farren, Associate, [jfarren@efc.ie](mailto:jfarren@efc.ie) or any member of the Intellectual Property and Information Technology Group.*

*This note is intended to provide a general overview and guidance. It is given wholly without any liability or responsibility on the part of Eugene F. Collins and does not replace the necessity to obtain legal advice.*