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THE DISTANCE SELLING REGULATIONS IN PRACTICE

Date: Wed 01 Oct 2008

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The European Directive on Distance Selling (Directive 97/7/EC) (the "Directive") was incorporated into Irish Law by the European Communities (Protection of Consumers in respect of contracts made by means of distance communication) Regulations 2001 (S.I. 207 of 2001). These regulations have been effective since 15 May 2001 and were amended by the European Communities (Protection of Consumers in respect of contracts made by means of distance communication)(Amendment) Regulations 2005 (S.I. 71 of 2005), the European Communities (Payment Services) Regulations, 2009 (S.I. 383 of 2009) and the European Communities (Protection of Consumers in Respect of Contracts made by Means of Distance Communication) (Amendment) Regulations, 2010 (S.I. 370 of 2010) (collectively the "Regulations").

The Regulations are designed to improve consumer protection and to promote consumer confidence in order to facilitate the free movement of goods and services.

The Regulations - What are they and when do they apply?

The Distance Selling Regulations apply to all contracts falling within the meaning of a "distance contract" as defined in regulation 3. Regulation 3 states that a distance contract means a contract between a supplier and a consumer which-

- relates to goods or services
- is made under an organised distance sales or service-provision scheme run by the supplier (e.g. an online shop), and,
- is made by the supplier making exclusive use of one more means of distance communication up to and including the moment at which the contract is made.

There are a number of issues worth noting from the above:

- the protection offered by the regulations only applies to consumers. The definition of consumer is given as "a natural person who, as regards a distance contract, is acting for purposes which are outside that person's trade, business or profession". A body corporate cannot be a consumer for the purposes of the regulations and to this extent business-to-business transactions will not be covered by the legislation.
- As it is a requirement that the distant contract be made under an organised scheme, it is probable that the regulations do not apply if a business does not usually sell to consumers in

response to letters, phone calls, faxes or e-mails. However, if the supplier has an organised means of responding to requests from consumers, this may fall within the Regulations.

- "Means of distance communication" is not confined to internet or e-sales. It includes any method which, without the simultaneous physical presence of the supplier and the consumer, may be used for making a contract between those parties. There is a non-exhaustive list of these "means of distance communication" set out in Schedule 1 of the Regulations, as follows:
 - Unaddressed printed matter
 - Addressed printed matter
 - Standard letter
 - Press advertising with order form
 - Catalogue
 - Telephone with human intervention
 - Telephone without human intervention (automatic calling machine, audiotext)
 - Radio
 - Videophone (telephone with screen)
 - Videotex (microcomputer and television screen) with keyboard or touch screen
 - Electronic Mail
 - Facsimile machine (fax)
 - Television (teleshopping)

The Regulations will therefore apply to all businesses that sell goods or services to consumers on the internet, on interactive digital television or radio, in newspapers or magazines.

When the Regulations do not apply: Absolute Exceptions

The Regulations do not apply to a contract which

- Relates to financial services, which includes but is not limited to
 - Investment Services,
 - Insurance and reinsurance operations,
 - Banking services
 - Operations relating to dealings in future options.

See EC (Distance Marketing of Consumer Financial Services) Regulations 2004 Legal Update

- Is made by means of automatic vending machines or automated commercial premises,

- Is made with telecommunication operators through use of public payphones
- Is made in respect of the construction and sale of immovable property or relating to other immovable property rights, other than the rental of such property or rights in such property.
- Is made at an auction.

How will the Regulations affect consumers?

Pre-contractual Information

Unlike offline businesses, where consumers can walk around shops, inspect goods and return them to the shop to complain, online businesses do not necessarily offer this facility to consumers. It can be difficult to ascertain the true identity of online suppliers, who frequently provide only a contact e-mail address for consumers with a problem. The regulations confer legal rights on consumers to return goods purchased online and to demand a refund. They also oblige online service providers to act more transparently.

Retailers are now required "in good time prior to making the contract" to provide the consumer with enough information to decide whether or not to proceed with the purchase.(Regulation 4).

The Regulations provide that all online businesses, or businesses which use any of the means of distance sales mentioned above, must at a minimum provide the following information before an enforceable online contract can take place.

- Name and address of the supplier
- Main characteristics of the goods or services
- Price of the goods or services including all taxes
- Delivery costs where appropriate

Arrangements for payment, delivery or performance

- Inform the consumer of their right of cancellation (unless the transaction is one of the limited type to which this right does not apply, see the section below on "cooling off periods")
- Telecoms cost if it is calculated other than at basic rate Period for which the offer or price remains valid
- For ongoing contracts, the minimum duration of the contract.

A contract will not be enforceable against the consumer unless the above, detailed information is given. The information must be set out in a clear fashion and in a manner "which is appropriate to the means of distance communication used".

The consumer must also be informed of the purpose of the information and of the contract in good time prior to the making of the contract. Consumers must be made aware that they are entering into a binding contract in the clearest possible terms. Suppliers are obliged to have due regard to the principles of good faith in commercial transactions, and to any principles governing the protection of those who are unable to give their consent, such as minors. This would include for example, adhering to the Advertising Standards Authority of Ireland's Codes of Practice. They have introduced new rules in light of the Regulations to make sure that their members conform with the legislation.

Confirmation Rights

In addition to the pre-contractual information, a distance contract will not be enforceable against a consumer unless the consumer has received confirmation of the prior information mentioned above. This confirmation must be in writing or in another durable form which is accessible to the consumer. Fax or e-mail would be sufficient to cover this requirement where such a medium is accessible to the relevant consumer.

Again, the confirmation must include information on the right of cancellation, the geographical address of the place of business of the supplier to which the consumer may address any complaints, existing after-sales services and guarantees and conditions for cancelling the contract if it is of unspecified duration or longer than one year. In practice this will require e-commerce operators to email details to consumers on receipt of the orders for goods or services. The written confirmation must be provided during the performance of the contract and at the latest at the time of delivery of goods where goods not for delivery to third parties are concerned.

Note: Once-off services that are invoiced by a distance communication are exempt from the requirement of written confirmation, unless the geographical address of the place of business of the supplier to which complaints may be addressed is not given.

Cooling off periods: the consumer's right to cancel the contract

Perhaps the most far-reaching implications for all retailers is the withdrawal right of the consumer. (Regulations 6,7 and 8). With certain exceptions (discussed below), the consumer has a period of 7 working days in which to cancel the distance contract without giving penalty and without any reason. This right exists irrespective of the fact that a legally binding agreement has been validly made in the eyes of the law. This right of withdrawal is described in Regulation 6 as an "implied condition". From the general rules of contract law, we know that the breach of this "condition" entitles the non-breaching party to repudiate the agreement and treat it as if it was discharged. The rationale for including this right of withdrawal, as is explained in a recital to the directive, is to protect the vulnerability of the consumer caused by the inability "to see the product or ascertain the service". The only penalty payable by the consumer is the direct cost of returning the goods. All sums paid by the consumer must be returned and any credit arrangements entered into by or on behalf of the consumer to finance the transaction must be cancelled without charge or penalty.

The 7 day "cooling off" period begins as soon as the goods have been received or, for services, from when the distance contract was formed; and in both cases the confirmation requirement must have been complied with before the cooling off period begins to run.

If the confirmation requirements have not been complied with, the cooling period is extended to 3 months. For example where the supplier fails to provide the necessary written confirmation the cooling off period will last for 3 months rather than just 7 days.

This cooling off right is not unique in Irish law. A similar right exists under section 50 of the Consumer Credit Act 1995 in respect of consumer credit agreements. Council Directive 85/577/EEC (to protect the consumer in respect of contracts negotiated away from business premises) also allowed for a period of cooling off.

These Regulations are quite far-reaching because the right of reimbursement for goods extends beyond circumstances of defective goods or services. The consumer has a right to demand their money back even where the goods are in perfectly good condition.

On-line businesses should be aware that the Regulations do not specify that the cancellation in distance contracts must be in writing. As they do not expressly specify that the consumer actually return the goods, businesses should include these matters in their contractual terms.

Regulation 6(4): Contracts to which the Consumer's Right of Withdrawal do not apply:

This regulation mitigates somewhat the potential harshness of this new right of withdrawal from the point of view of the supplier in certain circumstances. It provides that the consumer's right of cancellation in distance contracts does not apply in the following situations:

- For services if performance has begun with the consumer's agreement before the cooling off period ends;
- For supply of goods and services the price of which is subject to fluctuations in the financial market;
- For customised or perishable goods;
- For supply of audio or video recordings or computer software which was unsealed by the consumer;
- For the supply of newspapers, periodicals and magazines (the exception does not extend to books) and
- For gaming and lottery services.

There is a category of agreements to which none of the provision of information, confirmation and the right to withdraw apply, the most important of which are as follows:

- agreements for the provision of "foodstuffs, beverages or other goods intended for everyday consumption supplied to the home, residence or workplace of the consumer by regular roundsmen" and
- agreements for the supply of "accommodation, transport, catering or leisure services where the supplier undertakes, when the contract is made, to provide those services on a specific date or within a specific period". This latter exception is quite unfortunate when you consider that online travel and accommodation bookings are perhaps one of the most popular uses of the internet in Ireland.

Prompt Performance - Time Limits

The Regulations provide for a maximum timescale in which the contract must be performed. Retailers are now obliged to perform contract obligations within 30 days from its formation.

If retailers cannot meet the 30 day deadline, they must notify the consumer of his right to a refund. This refund must take place no later than a further 30 days after the consumer has been notified of this right: that is, within 60 days of the original formation of the contract. Regulation 7 makes it clear that non-compliance with this reimbursement requirement within the specified 30 days is a criminal offence.

An additional option for a retailer who cannot perform the agreement due to the unavailability of goods is the delivery of "equivalent goods or services" to the consumer. The supplier must ensure that the consumer has been notified of the possibility of this eventuality in advance of creating the contract. If the consumer wishes to reject such goods within the cooling off period, it will be the retailer who is responsible for the cost of returning the goods. The Regulations also provide that the delivery of alternative goods should not be regarded as inertia selling.

Inertia Selling

Inertia selling, that is, delivery of unsolicited goods or services to a consumer coupled with a demand for payment, is prohibited.

Attempts to conclude a distance contract made by means of an automated calling system or unsolicited fax is not enforceable against a consumer unless the consumer's prior consent to such means being used has been obtained. Under normal contract law principles, such contracts are in any event unenforceable against the consumer. The Regulations introduce a criminal offence where a person acting in the course of trade demands payment, without reasonable cause, for what he knows to be unsolicited goods. It is also an offence for a retailer seeking payment for unsolicited goods or services to

- Threaten to bring legal proceedings against the consumer to recover payment
- To place or threaten to place the name of the consumer on a debtors list or the like, or
- Invoke, threaten or cause to be invoked a collection procedure.

Consequences of Non-Compliance: Penalty

Once an agreement falls within the terms of the Regulations, the obligations imposed on the retailer are quite onerous. Failure to comply with these obligations is a criminal offence which carries a penalty of up to €3,000. The National Consumer Agency ("NCA") is charged with enforcing the Regulations. Personal liability may attach to officers of a company if they have consented or contributed to a breach. The NCA or a consumer organisation may apply to the High Court for an order to effect compliance. Actual loss or damage or recklessness or negligence need not be proved. The Court will, in particular, take the public interest into account.

Due to the creation by these Regulations of a whole series of new criminal offences which businesses selling on-line can easily commit, solicitors will have to be very careful advising clients who propose to provide on-line services. Such criminal sanctions were not expressly provided for in the Directive. The Regulations' principal objective was the protection of consumers rather than the promotion of e-commerce.

Authorised officers of the NCA have powers of requiring information, inspection and retention of records and data and may apply to the District Court for further warrants.

A consumer may not waive the rights conferred on him/her under the Regulation 18 and any terms and conditions which attempt to over-ride the Regulations will be void.

Jurisdictional Issues

The Regulations have been drafted so as to prevent parties from circumventing them by locating outside of the Member States. In this regard, Regulation 19(1) provides that a condition in a distance selling contract which applies or purports to apply the law of a State other than a Member State shall be void if the contract has a "close connection" with the territory of a Member State.

The Directive is a piece of harmonising legislation, so theoretically the laws of all EU Member States on distance contracts are now harmonised. In practice therefore, a consumer in Ireland should not be unfairly prejudiced by a choice of law clause that seeks to apply Spanish law to a contract which might have been concluded here and then performed in Germany.

The Brussels Regulations

Another development which impacts on the Distance Selling Regulations is the implementation of the Brussels Regulation. It is better known as Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. It is directly applicable in all EU Member States, apart from Denmark and is also applicable in Iceland, Liechtenstein, Norway, and Switzerland.

The Brussels Regulation has important implications for online retailers and consumers. It increases protection for consumers purchasing goods or services from internet retailers with a branch, agency or other establishment in any of the Member States.

In the event of a contractually-based dispute, a consumer in an EU Member State will in most cases have the right to sue the EU business in his/her home Court. Any judgment given would be enforceable in the defendant's home State.

The Brussels Regulation essentially provides that a business wanting to sue a consumer will have to do so in the consumer's home State. If a website "directs" its activities at the consumer's home State, it will be caught by the Brussels Regulation. The meaning of "directs" has not been defined. However, a site is likely to be covered if:

- It fulfils orders to consumers in that State;
- Its website is in the language of the State; or
- It provides prices for its products or services in the currency of that State.

If a business intends only to sell within one Member State,(e.g. its home State) and its site reflects this, it is less likely to be sued abroad. Any clients who have web-sites, should therefore be advised that their websites should display notices about target markets and should also use technical means to catch those who ignore the notice (e.g. Invite the user to select his/her country replica watches from a list and block orders from non- targeted countries). The Regulations do not apply to certain types of civil cases, including insolvency.

VAT

In light of the Regulations, the Revenue has issued an information leaflet published in October, 2008. The main consequences of the Regulations from a VAT perspective are as follows:

Under the distance selling arrangements, sales to customers in other Member States who are not registered for VAT are liable to VAT at the rate set in the Member State of the supplier, provided that the VAT threshold appropriate to the Member State of the customer is not breached. Under the EU VAT arrangements, Member States were required to adopt a distance sales threshold of either €35,000 or €100,000. Ireland has adopted the €35,000 threshold. This means that where the total value of distance sales to persons within Ireland by a supplier in another Member State exceeds €35,000, that threshold in a given calendar year, that supplier must register for VAT in the State and must account for VAT at the appropriate Irish VAT rates. Similarly, any Irish suppliers who make distance sales abroad should be aware that they need to register for VAT in each Member State in which the value of his distance sales exceeds the appropriate threshold. If the value of the distance sales to other Member States is less than the threshold amount, and the Supplier is not registered for VAT in a particular Member State, Irish suppliers will then be liable to account for VAT in Ireland at the Irish VAT rates.

The rules in relation to excisable goods, such as alcohol and tobacco remain unchanged. The VAT on these, along with on new cars, must be paid in the Member State of Destination. It should also be noted that while goods ordered on the internet and then physically delivered are considered to be distance sales for these VAT rules, digitised goods, downloaded directly from the internet are considered to be services and are taxed accordingly.

Conclusion

The Regulations arguably comprise the most important consumer protection legislation for e-commerce operators in Ireland. It is important that the Regulations be considered in light of other consumer protection legislation in place in Ireland such as the Sales of Goods, Unfair Contracts, misleading advertising and product liability legislation.

These Regulations are quite onerous for distance retailers, especially for e-businesses. While the pace of these business transactions may have been hampered and to some extent the costs of running an e-business increased, the overall protection to consumers offered by these Regulations is to be commended. The increased level of replica rolex watches protection will encourage consumers to use electronic means of contracting and will, hopefully, have the ultimate effect of increasing distance sales.

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.

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