

Checklist for traders

If you sell products or services to consumers through a website you must meet certain legal obligations. These rules apply whether you are a large established company or just starting out. It is important to know that some consumer rights are fully harmonised in the EU and therefore they are the same in all EU countries, irrespective of the transposition technique in each Member State. Other consumer rights may differ according to the country of residence of the consumer so you should be aware of any relevant national laws and the potential application of article 6(2) of Rome I regulation.¹

Additionally, it should be indicated how traders shall inform consumers about choice of law clauses and what the implications are (e.g. higher standards of protection could apply. In some areas such as legal guarantees).

These obligations include:²

General requirements under consumer law

- Products or services must comply with the given description and be of a satisfactory standard.
- Descriptions of and details about the item or service must be true and accurate.
- If a product is faulty, consumers can request a repair, replacement, or refund under certain conditions up to, at least, twenty-four months from the date of purchase. (more in some Member States).

The seller is liable to the consumer for any lack of conformity which exists when the goods are delivered to the consumer and which arises within a period of, at least, two years from delivery. However, a lack of conformity cannot be established if, at the moment of the conclusion of the contract of sale, the consumer knew or could not reasonably have been unaware of the lack of conformity.

Any lack of conformity becoming apparent within six months of delivery will be presumed to have existed at the time of delivery unless proof to the contrary is furnished or this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.³ During the first 6 months after purchase the burden of proof is on the trader to demonstrate that a product is not faulty; whereas after 6 months have elapsed, it is up to consumers to prove that the product is not in conformity.

- The concept of legal guarantee relates to the legal protection of the purchaser in respect of defects in the goods acquired discussed above. This legal protection is rendered compulsory by the law and is not dependent upon the contract.

¹ REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 June 2008 on the law applicable to contractual obligations (Rome I) http://www.cojef-project.eu/IMG/pdf/Rome_I_regulation.pdf

² Sources: The checklist is based on the checklist on p. 56 in “The European Online Marketplace – Consumer complaints 2010-2011, ”Consumer Rights: 10 ways the new EU Consumer Rights Directive will give people stronger rights when they shop online”, http://europa.eu/rapid/press-release_MEMO-11-450_en.htm?locale=en. Directive 2011/83/EU on Consumer Rights. “The European Online Marketplace – Consumer complaints 2010-2011”, http://ec.europa.eu/consumers/ecc/docs/e-commerce-report-2012_en.pdf “Too good to be true? It probably is! – Unfair Commercial Practices and Unsolicited Goods”. http://www.konsumenteuropa.se/globalassets/rappporter/too_good_to_be_true_it_probably_is_unfair_commercial_practices_and_unsolicited_goods.pdf Trading Standards http://dshub.tradingstandards.gov.uk/sites/default/files/DSchecklist_ECRs_PDF.pdf

³ DIRECTIVE 1999/44/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. All the Member States introduced this reversal of burden of proof in favour of the consumer in their national law. Three of them went further by extending the 6-months’ duration to a longer period of presumption. In Portugal, the reversal of burden of proof is applicable throughout the whole duration of the legal warranty of 2 years. This will also be the case in France starting from March 18th 2016, the period of presumption will be extended to 24 months from the delivery of the good. For second hand goods the reversal of burden of proof period will remain 6 months. In Slovakia, the Consumer Protection Act 250/2007 extends the reversal of burden of proof period to 12 months.

- The concept of commercial guarantee relates to the willingness of one party, the guarantor, to assume liability for certain defects. It is defined as follows: "any additional undertaking given by a seller or producer, over and above the legal rules governing the sale of consumer goods, to reimburse the price paid, to exchange, repair or handle product in any way, in the case of non-conformity of the product with the contract".⁴ Commercial guarantees are in addition to, and not in substitution for, consumers' statutory rights.

In addition to your obligations for faulty products under consumer law, specific rules apply to distance selling (where you take orders remotely from consumers, be it from your website, email, phone, or fax).

Distance selling in conformity with the EU Directive on Consumer Rights

EU Directive 2011/83/EU⁵ on consumer rights applies to distance contracts for goods and services when the trader is based in an EU country, Norway or Iceland.⁶ Compliance with the Directive is obligatory for all EU traders.

Information requirements

Prior to the contract being concluded, you must provide information about:

- Your business, including your business registration number, your full trading name and full contact details, such as the geographic address where your business is established and an e-mail.
- The main characteristics of the product or service.
- The order, e.g. the number of goods.
- The total price of the order, including taxes, fees, and delivery costs involved.
- The arrangements for payment, delivery, and performance.
- The time by which you undertake to deliver the goods or perform the service.
- The right of withdrawal and how the consumer exercises this right.
- The cost for the consumer for using the right of withdrawal, e.g. the cost for returning the goods if the goods, by their nature, cannot normally be returned by post.
- How to cancel the contract.
- When concluding a subscription, the minimum duration of the contract and information on how to terminate the contract.
- Details of any trade register (or similar organisation) in which you are registered, including the name of the register, your registration number or other reference.
- If your service is subject to an authorisation scheme, details of the relevant supervisory authority.
- If you are a member of a regulated profession, details of any professional body with which you are registered, any professional titles you hold within the EU-Member States in which the titles have been granted, how to access the professional rules and a short description of them.

You shall inform consumers about choice of law clauses and what the implications are (e.g. higher standards of protection could apply in some areas such as legal guarantees).

⁴ http://europa.eu/legislation_summaries/consumers/protection_of_consumers/l32022_en.htm

⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:0088:en:PDF>

⁶ Please note, that some type of contracts are excluded from the Directive's application, such as contracts for social services or gambling. Consult the extensive list in article 3.3 in Directive 2011/83/EU.

Requirements for the conclusion of distance contracts

- The information stated above has to be clearly visible and accessible for the consumer. It has to be written in a clear and comprehensible language.
- If the order places the consumer under an obligation to pay, you have to ensure that the consumer explicitly acknowledges that the order implies an obligation to pay e.g. by requiring the consumer to click a button labelled 'confirm purchase', 'pay now' etc. If the consumer's express consent is not obtained they shall not be bound by the contract.
- You have to provide the consumer with a confirmation of the contract concluded. Any terms and conditions applicable to the contract must be made available to your customer in a way that allows them to store and reproduce them. This confirmation has to be provided on a durable medium within a reasonable time after the conclusion of the contract and at the latest upon delivery of the goods or before the performance of the service begins. You can send an e-mail to the consumer with this information.

Cooling off

- The consumer has the right to withdraw from a distance contract (the so-called cooling-off period), within a period of 14 days counted from the date of the delivery of the goods or from the date of the conclusion of the contract, if it concerns services.⁷
- The trader must inform the consumer about the conditions, time limits and procedures for exercising their right to withdraw as well as providing the model withdrawal form set out in Annex I (B) of the Directive.
- If you have failed to inform the consumer about their right to withdrawal, the cooling off period shall expire 12 months from the end of the initial withdrawal period or 14 days from the moment the consumer receives the information if provided within those 12 months.
- This right can be exercised without any reason being given and you cannot charge the consumer any cost other than the cost for sending back the goods⁸, if you have not offered to collect the goods yourself.
- After the consumer has withdrawn from the contract, you must reimburse all payments from the consumer no later than 14 days from the date the consumer informed you of his decision to withdraw from the contract. If the contract concerns a purchase of goods, you have the right to postpone the repayment until you have received the goods back or until the consumer has supplied evidence of having sent back the goods.
- Unless you have offered to collect the goods, the consumer has 14 days to return the goods counted from the date he informed you about his decision to withdraw from the contract.
- The consumer is liable for any diminished value of the goods, if he or she has handled the goods in excess of what is necessary to establish the nature, characteristics and functioning of the goods. However, if you have failed to provide information about the right of withdrawal, the consumer is not liable for the diminished value of the goods.

There are exceptions to the right of withdrawal, e.g. plane tickets, package travels and car rental services etc.⁹

⁷ Please note, that in some situations the right of cooling off does not apply. However, this is only exceptions and concerns for instance when the consumer has expressly agreed not to have a period of cooling off or when it concerns contracts of goods which expire rapidly. Consult the extensive list in article 16 in Directive 2011/83/EU.

⁸ See ECC-Net report The European Online Marketplace Consumer complaints 2010-2011, page 25, Figure 4.1 Overview per country of cooling off period and the contractual party who covers the return costs.

⁹ Art. 16 DIRECTIVE 2011/83/EU, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0083&rid=1>

Delivery

- Unless you and the consumer have agreed otherwise, you have to deliver the goods to the consumer no later than 30 days from the date of conclusion of the contract.
- If you fail to deliver within the right time, the consumer can contact you and request delivery within an additional period of time unless the delivery of the product within the agreed timeframe was essential. In such a case the consumer should be entitled to terminate the contract immediately upon expiry of the initially agreed time limit.
- If you still have not delivered the goods, according to the consumer's request, the consumer is entitled to terminate the contract.
- If the contract is cancelled, you must reimburse all sums the consumer has paid during the contract, without undue delay.

Passing of risk (responsibility for the transit of goods)

- You are held responsible for lost or damaged goods until they are physically delivered to the consumer, if your contract includes delivery.
- If it has been agreed that the consumer will arrange the transportation, the consumer is responsible for the goods directly upon delivery to the carrier.

Premium rate customer services

If you operate a customer service helpline, you are not allowed to charge the consumer any more than the basic telephone rate. To comply with this provision you must use telephone numbers such as standard (geographic) numbers that are not subject to any special tariff regime.

Payment

- Traders should provide safe, secure and variable payment methods. Usually payment by credit/debit card is safer for consumers.
- If you offer payment through a payment transaction intermediary ensure it is reliable.

Additional payment

You are not allowed to charge the consumer any extra fees in addition to the price agreed, without his or her express consent. In particular you are not allowed to use pre-ticked boxes to offer and charge for additional goods/services.

You are also not allowed to charge consumers more for paying by credit card (or other means of payment) than what it actually costs you to offer such means of payment.

Applicable law

It is important to be aware of any national rules in the consumer's jurisdiction which may be applicable to the contract. When it comes to cross border transactions, Regulation (EC) 593/2008 (Rome I)¹⁰ determines which country's law is applicable to contractual obligations in a given situation.¹¹

¹⁰ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R0593&from=EN>

¹¹ Rome I is not applicable in Denmark (it has not been implemented due to the Danish opt-out on judicial matters) and Denmark still use Regulation 80/934 to decide which law is applicable. Norway (the Norwegian Supreme Court has stated in several decisions that Norway should seek unity with EU law and therefore the same principle applies).

In consumer contracts, generally the law applicable is the law of the country where the consumer has his habitual residence provided you pursue your commercial activities in that country or direct your commercial activities to that country or to several countries including that country. You could be deemed to be directing your commercial activities to the consumer's country if, for instance your website provides information in the language of the consumer or allows the consumer to choose to pay in his own currency.

The following matters may constitute evidence that your commercial activities are directed to the consumer's country:¹²

- the international nature of the activity.
- mention of itineraries from other Member States for going to the place where the trader is established.
- use of a language or a currency other than the language or currency generally used in the Member State, in which the trader is established with the possibility of making and confirming the reservation in that other language.
- mention of telephone numbers with an international code.
- outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States.
- use of a top-level domain name other than that of the Member State in which the trader is established.
- mention of an international clientele composed of customers domiciled in various Member States.

Since the Regulation is based on the principle of freedom of choice, the law applicable to a contract can also be the law chosen by the parties. As the trader, you have the possibility to state in your terms and conditions, which law applies to the contract. Be aware that the law chosen by you only applies as long as it provides the same level of protection to the consumer as that of his country of habitual residence. In case of a complaint the consumer can refer to the law of the country of his residence, if it offers a higher level of protection.

If you direct your commercial activities to another country, it is therefore recommended that you have basic knowledge of that country's consumer legislation and consider how they affect you and your business.

Data protection

Traders are obliged to protect their consumers' data. You will need a privacy statement if you collect personal data such as order forms, feedback forms etc. by using cookies or other tracking devices, or via users' IP or email addresses. You may need to register with your local data protection commissioner as a data controller.

Marketing and unfair commercial practices

EU legislation provides for a black list of unfair practices which are banned in all circumstances while other commercial practices are subject to a case-by-case unfairness test.

- All information you provide to consumers must be true. You are not allowed to deceive or mislead consumers in any way either by means of express statement or by omission of material information.
- Marketing material and information which the consumer needs in order to make a transactional decision, must be clearly visible to him.
- You are not allowed to state that a product is available for a very limited time, if such limitation does not actually apply.
- Neither are you allowed to describe products as "free" or "without charge" if the consumer is required to pay something.

¹² Pammer v. Karl Schlütter GmbH & Co. KG C-585/08 and Hotel Alpenhof v. Mr. Heller C-144/09 are cases from Court of Justice European Union (CJEU) 2010, concerning consumer protection and the jurisdiction of transnational internet and consumer transactions.

- You cannot demand payment when a product is not solicited by the consumer.¹³ i.e the consumer has not purchased the product.
- You must display the total price of the product or service to consumers, including any unavoidable extra fees. Online shoppers do not have to pay any extra costs, if they were not properly informed before they placed the order.¹⁴

Unsolicited products

You are not allowed to deliver products the consumer has not ordered and the consumer cannot be obliged to pay for unsolicited products.¹⁵

The handling of complaints

Be aware that the regulations concerning faulty products differ according to the national law applicable, but in general the consumer has the right to repair, replacement or reimbursement within, at least, 24 months from the date of purchase.

It is advisable that the consumer should contact you in writing stating their complaint within a moderate time after he or she has detected the defect, if he or she received faulty goods or no goods at all. You should keep copies of all correspondence with the consumer regarding the dispute.

¹³ “Too good to be true? It probably is! – Unfair Commercial Practices and Unsolicited Goods”, p 26. http://www.konsumenteuropa.se/globalassets/rapporter/too_good_to_be_true_it_probably_is_unfair_commercial_practices_and_unsolicited_goods.pdf

¹⁴ ”Consumer Rights: 10 ways the new EU Consumer Rights Directive will give people stronger rights when they shop online”, http://europa.eu/rapid/press-release_MEMO-11-450_en.htm?locale=en, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0083&rid=1>

¹⁵ http://www.isitfair.eu/pdf/ucp_en.pdf



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