

The changes to the Distance Selling Regulations – are they likely to rock the boat?

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Abstract

The Department of Trade and Industry (DTI) have announced minor changes to the Distance Selling Regulations. After a significant amount of consultation, the alterations are due to come into effect in April 2005. This article will provide an examination of the Regulations to date, highlight some of the criticisms, which led to the review, highlight the proposals and resultant changes, explaining the extent of the changes on distance consumers and businesses alike. The second part of the article will highlight the first decisions within the United Kingdom on the Regulations and evaluate the consequences of the decisions.

Background

The Distance Selling Directive (97/7/EC)¹ was implemented into the United Kingdom on 31st October 2000 as the Consumer Protection (Distance Selling) Regulations (SI 2000/2334).² It sought to harmonise distance selling rules on a European level³ and to increase consumer confidence in transacting online. On its implementation, Helen Liddell (the then Minister for Europe) stated:

These Regulations are good news for consumers buying goods and services from home. Millions of us now buy from catalogues and over the phone and, and with the popularity of buying products on the Internet increasing daily, it is important that all consumers are protected and made aware of their rights. The Distance Selling Regulations provide statutory backing for the good business practices many companies already observe, and will help ensure this best practice is followed by all.⁴

Before the final version of the Regulations were released, the DTI consulted very extensively to ensure the scope of the Regulations was correct. Accordingly, they only apply to business to consumer transactions for goods and services carried out exclusively by distance means in an organised distance sale. They do not apply to contracts

¹ Full text can be found at: http://www.europa.eu.int/comm/consumers/policy/developments/dist_sell/dist01_en.html [16th November 2004]

² The Regulations in full can be read at: <http://www.hmso.gov.uk/si/si2000/20002334.htm> [29th November 2004].

³ Article 1 of Directive.

⁴ DTI Press Release *New rights for home shopping consumers* P/2000/599 4th September 2000. Found at: <http://www.gmn.gov.uk/environment/detail.asp?ReleaseID=22477&NewsAreaID=2&NavigatedFromDepartment=False> [29th November 2004]

concerning land, financial or construction (amongst others⁵). The Regulations contain a number of provisions including the requirement for businesses to provide information about themselves and the good/service before the completion of the contract,⁶ that this must be written⁷ and the lynchpin of the Regulations, specifically the right to cancel the contract and withdraw to the extent that the position must be as if the contract was never entered into.⁸

Whilst the Regulations do provide a level of protection to consumers engaged in distance transacting, perhaps, not surprisingly they have been subject to a degree of criticism. It is suggested the greatest level of criticism that can be raised is that they provide a significantly greater level of protection to distance consumers than those who shop 'face-to-face'. It appears that consumers have a greater margin for fussiness and fickleness as they can return an item they do not want (for whatever reason) providing the last withdrawal date has not passed.⁹ The reasoning is clear as a person physically shopping can examine goods before purchasing them, whereas there is an element of a distance shopper taking a greater risk in the product they will eventually end up with. However, there seems to be a disproportionality between a distance consumer who can return a product because they do not like it and a face-to-face consumer who cannot return it as the business is under no obligation under the Sale of Goods Act to accept its return. This apparent imbalance can be enhanced when one examines the Regulation 8 requirement. It is arguable that this is a backwards step in contract law, as it requires terms, conditions, product and delivery details to be outlined in writing, even though the majority of daily business to consumer contracts involved limited, if any written material. Bill Thompson suggests:

The surprising thing to me is that so many online shops actually do go to the trouble of spelling out the many and various rights that people have when they enter into an agreement to buy something online. After all, my local Tesco supermarket does not make me read the Sale of Goods Act every time I pass through their checkout. It assumes that I will know the law. Yet when it comes to buying from a website we must all be told exactly what we can and cannot do every time we wield a credit card in anger, it seems.¹⁰

There is a clear unevenness between the duties owed to consumers placed on High Street stores and online businesses, and places many more onerous duties upon owners of online businesses. Potentially there is an argument for unfair competition between the two types of retailer, as the costs involved in supplying the information – as well any costs for cancellation - may be considerable.

⁵ See Regulations 4, 5 and 6.

⁶ Regulation 7.

⁷ Regulation 8.

⁸ Regulations 10-18.

⁹ Ibid.

¹⁰ Thompson, B *Right, Time to Shop* BBC News Website 14th March 2001. Found at: <http://www.bbc.co.uk/webwise/column/print85.shtml>

Furthermore, there is some uncertainty in some of the wording of the Regulations, which although to date has not caused any problems, there is the potential for difficulty. A good example would be the wording in Regulation 7(2), which reads:

The supplier shall ensure that the information required by paragraph (1) is provided in a clear and comprehensible manner appropriate to the means of distance communication used, with due regard in particular to the principles of *good faith in commercial transactions* and the principles governing the protection of those who are unable to give their consent such as minors.¹¹

As the law in the United Kingdom stands there is no general requirement for commercial transactions to be carried out following the principles of good faith. In *Walford v Miles*, Lord Ackner stated:

...the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations...A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party [and accordingly] has no legal content.¹²

Although, currently good faith is not a part of UK law, it is receiving some incremental acceptance, notably in Australia,¹³ however there is a degree of uncertainty about its definition.¹⁴ As Bradgate¹⁵ highlights, whilst at first glance good faith may mean dealing openly and transparently, it is surmised that how this is to be reached and how this is understood would vary between the business and the consumer.

The Consultation Areas

It was felt that the Regulations had already dated and were in need of alteration as they were “...unclear, impracticable [and] unduly costly for suppliers”.¹⁶ It was due to these representations – predominantly made by those in the vehicle rental and leasing sector - that on 22nd January 2004 the DTI launched a consultation on altering the Regulations.¹⁷ The consultation was entitled “Consumer and Competition Policy – Consultation on proposed changes to the Consumer Protection (Distance Selling) Regulations 2000”¹⁸ and required comments to be returned by 23rd April 2004. Under the objective of “*prosperity*

¹¹ Regulation 7(2) [Emphasis mine].

¹² [1992] 2 AC 128, 138.

¹³ See *Coal Cliff Collieries Pty v Sijehama Pty Ltd* (1991) 24 NSWLR 1.

¹⁴ See, for instance, *CTN Cash and Carry Ltd v Gallagher Ltd* [1994] 4 ALL ER 714.

¹⁵ Bradgate, R [1997] Web Journal of Current Legal Issues, Issue 4. Found at: <http://webjcli.ncl.ac.uk/1997/contents4.html> [29th November 2004].

¹⁶ Saxby, S *Distance Selling comes of age* (2004) Computer Law and Security Report Volume 20, Number 2, Page 83.

¹⁷ DTI Press Release *DTI consults on changes to Distance Selling Regulations* 22nd January 2004 P/2004/034. Found at: <http://www.gnn.gov.uk/environment/detail.asp?ReleaseID=106114&NewsAreaID=2&NavigatedFromDepartment=False> [29th November 2004].

¹⁸ Available at: <http://www.dti.gov.uk/ccp/consultations.htm> [29th November 2004]

for all” the DTI seeks to “...place empowered and protected consumers at the heart of an effective competition regime”.¹⁹ The changes were announced by the DTI on 22nd October 2004 after consideration of 43 different written responses received from businesses, trade associations, consumer organisations, regulatory and enforcement agencies, law firms and professional bodies.²⁰

The DTI consulted on three distinct areas of the Regulations. Firstly, to explicitly require the information provided to the consumer prior to the contract covers either the existence or absence of a right to cancel, and in the case of services whose performance is to start within seven days, information that the right to cancel will expire once performance begins (Regulation 7). Secondly, to require consumers to be given, during the performance of a service, information (in writing or another durable form) about the loss of cancellation rights once performance begins. At present this information must be provided prior to contract (Regulations 8 and 12). Finally, to allow consumers to cancel contracts by use of telephone (Regulation 10).²¹

Responses and Recommendations

i. Regulation 7

Regulation 7 details the information that must be provided by the supplier to the consumer prior to the conclusion of the contract. The DTI examined specifically Regulation 7(1)(a)(vi), which requires “...the existence of a right of cancellation except in the cases referred to in regulation 13.”²² The issue with this particular section is that if a consumer had no right to cancel, then the regulation could be interpreted as requiring the supplier not to mention the absence of a cancellation right, which could lead to a degree of confusion on the part of the consumer. Two options were presented to tighten this regulation up. Firstly, to leave it as written, or secondly to alter it so that it states more clearly whether or not a consumer has a right to cancel, and if positive the length of time it will remain valid in relation to services. The DTI were of the view that it would be appropriate that consumers were told about the lack of a cancellation right and recommended the alteration. According to the Consultation Report, reaction to this proposal received only a lukewarm welcome. It states:

A number of business organisations said a change to Regulation 7 would result in additional costs, associated with updating printed and electronic information, training staff, re-printing cancellation forms and allocating more website or screen space for the additional information.²³

¹⁹ Ibid. Page 3.

²⁰ The Consultation Report – *Changes to the Distance Selling Regulations* is available at <http://www.dti.gov.uk/ccp/consultpdf/distsselcon04.pdf> [29th November 2004].

²¹ Ibid. Page 5 (S.1.2).

²² Regulation 13 lists the exceptions to the right of cancellation.

²³ *Supra* n. 17, Annex A, Part 7.

Costs were estimated to be in the region of £50,000-£100,000 for implementing the proposed changes. Although responders were generally of the same view regarding the costs of these changes, there was a discrepancy between whether the DTI's recommended addition would make the rules clearer for consumers. Whilst some parties considered that greater clarity would "...benefit all parties... [and]...help protect consumers against high pressure sellers of services"²⁴ others were of the view that the current Regulation 7(1)(a)(vi) was not causing undue detriment to consumers and therefore should be left alone. Furthermore, it was felt in some quarters that advising consumers that they do not have a right to cancel had the potential for confusion.²⁵ After taking into account these arguments, the Government considered that:

Given the ambiguities in the Directive and the potential for confusing consumers, we do not think it would be beneficial to require suppliers to refer to cancellation rights when none exist.²⁶

Although the Government were of the view that the Regulation should not be altered, they stated that it was important that situations where the cancellation right is not the full seven days should be highlighted (for instance in the case of services, which begins immediately after the consumer's consent to the product) and they should also be told the length of time they have to cancel should they so wish. Requirements under other statutory legislation, such as the Sale of Goods Act, still needs to be followed.

ii. Regulations 8(3) and 12

The second area of consultation was Regulation 8(3), which reads:

Prior to the conclusion of a contract for the supply of services, the supplier shall inform the consumer in writing or in another durable medium which is available and accessible to the consumer that, unless the parties agree otherwise, he will not be able to cancel the contract under regulation 10 once the performance of the services has begun with his agreement.

The DTI sought to slightly alter this provision to require that consumers be told about the loss of cancellation rights, before the contract was made. Regulation 8(3) is significantly tighter, than the parallel provision in the Directive,²⁷ which states that the loss of a right to cancel must be notified in good time during the performance of the contract. Regulation 8(3) was strengthened to give consumers added protection against 'cold-callers', who may be less scrupulous about informing the consumer of their full range of rights. However, at the same time, this created problems for legitimate suppliers –

²⁴ *Ibid.* Annex A, Part 10.

²⁵ *Ibid.* Annex A, Parts 12-13.

²⁶ *Ibid.* Annex A, Part 14.

²⁷ Article 5(1).

particularly for services that need to begin immediately and it was not always possible for the suppliers to notify the consumer fully of their rights.

The DTI outlined five main options for reform. Firstly, to keep the status quo. Secondly, to only apply regulation 8(3) to certain services (for instance, cold calling). Although the DTI acknowledge the difficulty of enforcing this adequately. Thirdly, to amend it so that cancellation rights are provided prior to the performance of the contract and regulation 12 would be altered to end the right to cancel once performance had begun. Fourthly, that cancellation rights be provided in good time during the performance of the service, with the right to cancel beginning on the day the contract is made (unless cancellation rights were provided before the start of performance, in which case cancellation rights would end on the commencement of performance). Finally, that the approach of the Directive is followed and the loss of the right to cancel is provided in good time during the performance of the service and no right to cancel once the performance has begun.

The DTI recommended the fourth option. They argue it is “...likely to be more workable for suppliers and consumers [and] offers more protection than the Directive”²⁸ It would mean that cancellation would still be possible after performance had begun, if the consumer had not received notification of their cancellation rights beforehand. This view was broadly supported. It was felt that compliance would be made easier, while at the same time consumers would need to receive the complete notification before losing the right to cancel. Some problems were put forward, for example for services that began immediately (for instance personalised number plates) and some argued that it was unduly burdensome on businesses and potentially out-of-step with the European Directive.²⁹

The government accepted the DTI’s proposal, with the one amendment that all cancellation rights cease once performance has been completed. Suppliers are no longer required to provide cancellation information prior to the conclusion of the contract, but there is an incentive if they do. The consumer would be able to cancel the contract during – but not after - performance, however the supplier would not be liable for meeting the cost of the service cancelled mid-way through performance.

iii. Regulation 10

Regulation 10 outlines the methods by which a consumer may cancel a contract by notifying the supplier. Regulation 10(3) states:

For the purposes of these Regulations, a notice of cancellation is a notice in writing or in another durable medium available and accessible to the supplier (or to the other person to whom it is given) which, however expressed, indicates the intention of the consumer to cancel the contract.

²⁸ *Supra* n. 18, page 14.

²⁹ *Supra* n. 20, Annex A parts 17-31.

Currently, a cancellation may be posted, faxed or emailed to the supplier.³⁰ A telephone conversation is not adequate for a cancellation, however desirable it may be for a product, which may require swift cancellation. The DTI proposed forward two options. Firstly, to leave the section as it is currently written or secondly, to amend Regulation 10(4) to allow for the methods of cancellation to be extended to include wider technological methods, including telephone, website and text messages. The DTI highlight various advantages for extending this provision. It would make cancellation quicker and easier (particularly for people with literacy problems) and would also make the time of cancellation easier to ascertain than by post. Furthermore, it would help to alleviate the problem of suppliers supplying services in between the time a consumer posts a cancellation and the moment it arrives. However, the DTI also mentioned the possibility of uncertainty with a telephone call and the difficulty of proving that a telephone call had been received; yet the DTI favoured the proposed alteration.

The responses received pointed to the increase in cost for accepting cancellation by telephone, while unsurprisingly consumer groups were in favour of such an alteration, as it would “*make it easier for consumers to exercise their rights*”.³¹ Others suggested that as many contracts (for example energy) are negotiated and concluded over the telephone it seems reasonable to allow cancellation to be effected in the same way. While others suggested that there is the potential for technical glitches.³²

It was with the in mind that the Government decided to maintain the status quo and not provide for cancellation by telephone, website or text message. They stated that:

...Were we to amend the Regulations to include these means of communication, suppliers equipped with them would be expected to accept cancellation by those means. This could impose unacceptable costs on smaller firms in particular; most, for example, are likely to have phones, but many would find it expensive to record and monitor cancellation calls.³³

The Government also suggested that the burden of proof to prove that cancellation had been made had the potential of being problematic.

Recent case law

The first decision which concerned the Regulations was that of *EasyCar (UK) Ltd v Office of Fair Trading*.³⁴ This case concerned the partial exception under Regulation 6(2)(b), which relates to contracts for the provision of transport services. The issue at hand was that EasyCar (part of the EasyJet group) operated an Internet-only car hire

³⁰ Regulation 10(4) (a-d).

³¹ *Supra* n. 20 Annex, Part 38.

³² *Ibid* Annex A, Parts 33-43.

³³ *Ibid* Annex A, Part 44.

³⁴ C-336/03. Judgement handed down on 10th March 2005 and is available on Westlaw EU Focus (2005), 163, pages 12-13.

service on a book-early pay-less model. In other words, the earlier a customer booked a hire care, the cheaper it was. The question arose, however, whether there was still a right to cancel. The Office of Fair Trading (OFT) were of the opinion that customers should still be able to cancel the contract and have a full refund under Regulation 10 as a hire car is a vehicle to travel in and not a transport service. EasyCar countered by arguing that a hire car was a transport service and thus they should be able to take advantage of the partial exception found in regulation 6(2)(b). On a reference to the European Court of Justice (ECJ) by the High Court, the ECJ found that:

...the term “transport services” represented, like each of the other categories of the services listed, a sectoral exemption, and it therefore related generally to services in the transport sector...the legislature intended to define the exemption laid down in the that provision, not according to the type of contract, but in such a way that all contracts for the provision of services in the transport sector came within the scope of that exemption.³⁵

This is an important decision, particularly when considering the cancellation right within the Regulations is arguable the most controversial section. From a consumer’s perspective this decision restricts the applicability of the Regulations as the definition of a ‘transport service’ is given a wide definition. However, on the flip side of the coin and making a broader analysis, commercially the decision is to be welcomed:

...the outcome of this case clearly makes good commercial sense: without the benefit of the exemption, supplier cannot afford to offer, and customers cannot expect to take advantage of, savings in return for early commitment.³⁶

However, it is contented that this is a restrictive and constraining provision. The Distance Selling Regulations is a piece of consumer protection legislation and this decision has undoubtedly narrowed the scope of protection already available to consumers. It is important to remember that this is one of several exemptions (partial or otherwise) in the Regulations and the question needs to be posed just exactly how much protection do the Regulations offer consumers.

The second case within the United Kingdom on the Regulations was passed down by the Second Division of the Inner House in the Court of Session, Scotland on 11th November 2005. The decision in *The Commissioners of Customs and Excise v Robertson’s Electrical Limited*³⁷ is a decision of particular relevance to businesses, as it held that VAT is payable on goods purchased online on the day they paid for and not at the end of the seven day cancellation period. This is relevant if the seven days cross over an accounting period.

³⁵ Ibid. Page 13.

³⁶ Walker, C *ECJ: Online car rental rights exempt from cancellation rights* (April 2005) E-Commerce Law and Policy, pages 3-4.

³⁷ [2005] CSIH75. The decision is available at: <http://www.scotscourts.gov.uk/opinions/2005CSIN75.html> [17th November 2005].

This case was effectively on of cash-flow, and businesses being able to retain the VAT from a handful of products until the next financial quarter. However, more concerning for businesses is the possibility that a customer will order and pay for a good at the end of one financial quarter, then at the beginning of the next financial quarter (and within the seven day cancellation period) could cancel the good under Regulation 10. This decision means that the business will be liable for not only refunding the customer, but paying the VAT on the good paid for, and then having to claim it back, which leads to increased administration for the business.

Conclusions

The Internet is arguably rapidly becoming the key method for commerce in a global market. According to National Statistics, in 2003 alone the value of businesses' Internet sales was put at £39.5bn and of these sales £11.4bn went to households. This is a rise from £19bn and £6.4bn in 2002 respectively.³⁸ Therefore, with such a vast amount of money being spent it is vital that the regulation around the e-commerce machine is sufficiently robust enough to protect consumers and allow commercial entities the freedom to conduct business.

The only actual change to the Regulations will be under Regulation 8(3) and the cancellation rights in relation to services. In the grander scale this is unlikely to make a large difference to the working of the Regulations; however reaction has been fairly positive to the changes. On announcing the changes, Gerry Sutcliffe (the Consumer Minister) stated:

There is a clear case for updating the rules governing distance selling to help businesses keep pace with a rapidly evolving market place. These changes strike a fair and workable balance for both business and customers.³⁹

Furthermore, John Lewis, the Director General of the British Vehicle Rental and Leasing Association (BVRLA) also added his support and announced:

The BVLRA is very pleased that the government has been willing to engage with our industry and recognise the burden and cost that delivering hard copy notification prior to a car rental imposes. With notification now to be delivered before, or during the rental, costs will be contained with no detriment to consumer protection.⁴⁰

³⁸ See *Value of UK E-Commerce sales doubled in 2003 says National Statistics* 23rd November 2004. Available at <http://www.publictechnology.net/print.php?sid=2114> [23rd November 2004].

³⁹ DTI Press Release *Rule changes make it easier for business to go the distance* 22nd October 2004. Available at: <http://www.gmn.gov.uk/environment/detail.asp?ReleaseID=133138> [28th October 2004].

⁴⁰ Ibid.

This changes came into effect in April 2005 as *The Consumer Protection (Distance Selling) (Amendment) Regulations 2005*⁴¹ and in practice will mean that businesses will be able to provide the necessary information at any point from the moment the order is made to the completion of the service. It is suggested that this will provide businesses with a greater flexibility, while at the same time encouraging them to provide the consumer with the information at the earliest possible time so that consumers will have less time to cancel the service. The longer the company takes to provide the information, the longer the consumer will have to cancel. In practice therefore, the clever company will provide the information as soon as possible, which is not only positive for consumer protection, but also protects their position. However, with the changes, it is telling that research carried out in July 2005 by *SaferShopping.org* (a consumer organisation), showed that 93% of online shoppers in the United Kingdom do not know their rights when it comes to shopping online.⁴²

It appears this consultation has not rocked the boat to too great an extent and to a large degree the changes have gone though unnoticed; perhaps the cynic would argue unnoticed because very few consumers know about them. In the responses, various other issues and concerns about the Regulations were highlighted and to answer these, the DTI and the Office of Fair Trading produced a consultation paper entitled: *A guide for business on home shopping*.⁴³ The aim of the Consultation is to produce guidance to:

...provide a convenient source of reference for businesses and their advisors about their responsibilities and consumers' rights under the law and to ensure compliance.⁴⁴

The consultation closed on 11th November 2005 and the results are still awaited. Hopefully, this document, when completed, will assist raising the profile of the Distance Selling Regulations.

⁴¹ Statutory Instrument 2005 No. 689. Available at: <http://www.opsi.gov.uk/si/si2005/20050689.htm> [4th November 2005]. See also Stone, K *Distance Selling changes aim to clarify cancellation right* (August 2005) E-commerce Law and Policy, pages 3-5.

⁴² ClickPress Press Release *93% of online shoppers in the UK don't know their rights* 8th July 2005. Available at: <http://www.clickpress.com/releases/DEtailed/2504005cp.shtml> [9th July 2005].

⁴³ Available at: <http://www.offt.gov.uk/NR/rdonlyres/4B6E1E17-FFF0-4262-9021-03D2DC49F314/0/oft698cons.pdf> [6th September 2005].

⁴⁴ *Ibid.* Page 1.