
Online Contracting Procedures Need to be Adjusted When Selling to EU Consumers

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In the European Union, the formation of online contracts and their enforceability remains an area of law where progress is being made more slowly than anticipated. By June 2000, EU Member States were required to implement EU's so-called "Distance Sales Directive," which relates to the protection of consumers in online transactions and other "distance contracts." The Distance Sales Directive involves a number of important e-commerce regulations, including a right of withdrawal in favor of consumers which cannot be waived by contract, and applies to most companies (including U.S. companies) engaging in online transactions with EU consumers. Although most EU Member States have yet to implement the Distance Sales Directive, it is already important to consider drafting agreements and adopting business practices that satisfy the requirements of the Distance Sales Directive. To view the text of the Directive, click [here](#).

In our [March 14, 2000 Internet Alert](#), we discussed the impact of the Distance Sales Directive and other EU Internet directives on e-commerce.

Companies that do not adjust their online contracting procedures in light of the Distance Sales Directives run the risk of; (1) extending the time periods within which EU consumers can withdraw from contracts; and (2) possibly

subjecting themselves to civil liability for violating national laws of the various EU Member States. The provisions of the EU Member States' laws implementing the Directive will apply even if a contract purports to be governed by the laws of one of the U.S. states or another non-EU jurisdiction.

Scope of Distance Sales Directive

The provisions of the Distance Sales Directive apply to contracts between a supplier and a consumer in which the supplier uses of one or more "means of distance communication," as part of an organized distance sales or service offering, including mail, press advertising with order form, catalog, telephone, radio, videotext, e-mail, fax, television and, of course, the Internet.

The Distance Sales Directive does not apply to certain categories of contracts, including contracts relating to financial services and construction. In addition, certain provisions of the Distance Sales Directive, such as the consumer's right of withdrawal, do not apply to specific categories of contracts, including those relating to the supply of food and beverages, accommodation, transport, catering or leisure services, newspapers, periodicals, magazines, gaming and lottery services.

Information Obligations

If the Distance Sales Directive applies, the supplier must provide the consumer with the following information in a timely manner, prior to forming any "distance contract:"

- information on the identity of the supplier and the geographical address of the supplier's place of business;
- the address to which the consumer may address any complaints;
- information on after-sales services and guaranties;
- the main characteristics of the goods or services;
- the price of the goods or services including all associated costs such as taxes and delivery costs;
- the arrangements for payment, delivery and performance;

- the existence of the consumer's right of withdrawal and the conditions and procedures for exercising such right;
- the cost of using the "means of distance communication," insofar as such costs exceed the normal base Internet access or telecommunication rates;
- the period for which the offer or the price remains valid;
- in the case of contracts for the supply of products or services to be performed repeatedly, the minimum duration of the contract; and
- in case of contracts of unspecified duration or a duration exceeding one year, the conditions for canceling the contract.

The supplier must provide the information described above either in writing or in another durable medium.

What constitutes a "durable medium?" A recent draft EU Directive proposes to define "durable medium" as "any instrument enabling the consumer to store information addressed personally and specifically to him and which is mainly contained on floppy drives, CD-ROMs and the hard drive of the consumer's computer on which electronic mail is stored." It seems clear that e-mail is within the definition. However, a link to a web site (which can be changed over time) would not qualify as a durable medium.

Two notes of caution. First, this is merely a proposed change to a proposed directive. Second, there is no equivalent language in the Distance Selling Directive. However, the German implementing legislation is consistent with the position that confirmation can be given via e-mail.

Insofar as the information is made available via the Internet, it is advisable to explicitly offer the consumer the ability to download or printout this information prior to forming the contract. Furthermore, after the consumer places his order, suppliers should send an email confirming the order and containing all the information described above.

Right of Withdrawal

For any contract subject to the Distance Sales Directive, the consumer has a period of at least seven working days in which to "withdraw from" the contract (in other words, cancel) without penalty and without giving any reason. This right cannot be waived by contract.

This seven-day period begins:

- in the case of goods, from the day the consumer received the confirmation in writing or in another durable medium;
- in the case of services, from the day of forming the contract or from the day the consumer received the confirmation in writing or in another durable medium, if it was provided to the consumer after forming the contract.

If the supplier fails to provide such confirmation to the consumer, this right of withdrawal can last as long as three months.

Where the right of withdrawal has been exercised by the consumer, the supplier is required to reimburse all amounts paid by the consumer, as soon as possible and in any case within 30 days. The only charge that may be made to the consumer because of the exercise of the right of withdrawal is the direct cost of returning the goods to the supplier.

Performance Obligations

Unless the parties have agreed otherwise, the supplier must fulfill any order under a contract subject to the Distance Sales Directive within 30 days. If the supplier fails to perform because the goods or services ordered are unavailable, the supplier must inform the consumer accordingly and must refund all amounts paid by the consumer as soon as possible, and in any case within 30 days.

If agreed between the parties, the supplier may provide the consumer with goods or services of equivalent quality and price. The supplier must inform the consumer of this possibility in a clear and comprehensible manner, once again through a written communication. The cost of returning the goods following exercise of the right of withdrawal must, in this case, be borne by the supplier, and the consumer must be informed of this fact.

Adoption by Member States

The Distance Sales Directive allows the individual EU Member States to introduce or maintain more stringent provisions, in order to provide an even higher level of consumer protection. Germany, for example, has extended the withdrawal period from seven working days to two weeks,

and, if the supplier fails to provide the required information, the withdrawal period is extended to four months rather than three months. The Directive has also been implemented through national legislation in Italy and Austria, with other EU Member States required to enact legislation in the near future.

Conclusion

U.S. companies selling goods and services online to consumers in the European Union must adjust their online contracting procedures in light of the Distance Sales Directive. Information will have to be provided, and the right of withdrawal must be described, as discussed above. More restrictive practices in specific EU Member States, such as Germany, will also need to be identified and incorporated into U.S. companies' online contracting procedures. Failure to do so will expose U.S. companies to obligations to accept returned goods or services well past the time periods required by the Distances Sales Directive and national legislation.