

Step-by-step guide to setting up an e-commerce site

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With the constantly growing popularity of online sales, clients are asking us about the legal compliance obligations associated with setting up an e-commerce website. There are a number of steps to consider and analyze to ensure your website complies with legal requirements. These include:

- price information must comply with European law, including on VAT and postage and packaging;
- a cookie policy that complies with European law;
- a privacy policy that complies with GDPR;
- an “About Us” page, where you state who you are and give certain important details;
- website terms of use that regulate how people may use your website (even where they do not make a purchase);
- terms of sale which deal with the sale of products, returns and complaints; and
- for companies trading in the UK, a “Modern Slavery” statement showing what steps you have taken to audit your supply chain.

Giving careful thought to the legal terms for online shops cannot be stressed enough. They represent the terms of the contract that retailers and their customers enter into. Thus, it is crucial for such terms and conditions to be compliant with the applicable European law, in order to protect traders from any unwanted consequences. Below we have composed an easy to follow step-by-step guide on what retailers should take into consideration when drafting the legal terms for their website. The relevant EU legislation includes the Consumer Rights Directive (CRD) and the E-Commerce Directive (ECD). Where you are targeting specific additional countries, you will also need to consider local laws in those countries.

1. Legal requirements for a website

Before making a sale to a consumer you will have to make available to the consumers the following information in plain and intelligible language:

1.1. Plain English

The terms of sale must be in plain English, easy to follow and not confusing. They should be made easily understandable by limiting use of purely legal language. It is best not to use technical legal expressions or abbreviations, which could be ambiguous. Many retailers now use “we” and “you” type of language.

1.2. Details of the seller

The consumer must know who they are dealing with. As such, the CRD requires a clear statement on each website about the owner of the website/seller to be displayed on a dedicated “About Us” page that is easily found (usually a link on the homepage).

Pursuant to Art. 6(1)(b) and 6(1)(c) CRD (as amended) the trader should clearly state in their terms of sale:

- the identity of the seller (i.e. the legal entity making the sale, if the trader is part of a bigger group), with registered number;
- VAT number;
- names of legal representatives (directors);
- address and telephone number;
- email address.

Please note that sometimes the brand name might differ from the actual registered name of the company. If that is the case, it is advisable for the trader to provide both the trading name and the legal name of their company. For example, ABC Limited trading as “Global Store”.

1.3. Acceptable means of payment

Pursuant to art. 8(3) CRD, traders have an obligation to provide consumers with details about the accepted means of payment. These could be simply listed, which would make it easy to understand for potential consumers.

1.4. Price transparency

Prices must be stated inclusive of VAT but exclusive of postage and packaging. The requirement is to expressly state that the price already includes VAT. This is best done every time the price is displayed as opposed to only on the check-out page. The charge for delivery needs to be given separately.

1.5. Countries to which goods are delivered

Under art. 8(3) CRD, traders need to inform the consumer about the countries to which they deliver products. It is recommended to regularly check and update the list of such countries in order to avoid displaying untrue information. Please note that shipping products to foreign countries can give rise to additional obligations under local laws such as a duty to pay local VAT or an obligation to offer a payment option in the local currency.

1.6. 14-day right of withdrawal

Under articles 6(1) and 9 CRD, consumers need to be informed about their right to withdraw from a purchase within 14 days. The right needs to be clearly stated using a very specific form of words.

Such information needs to cover:

- model wording;
- contact details of where the cancellation notice should be sent (typically an email address);
- timing (14-30 days depending on the country);

- details of who pays for postage and packaging.

The CRD recommends certain model wording should be used. Using the model wording is the safest option. Whilst it is legally permissible to use different wording, there are many risks associated with simplification of the model wording and we recommend to our retail clients to use the model wording. Article 10 of the CRD provides that if the wrong wording is used, the cooling off period is not valid and the customer has the right to return the product within 12 months.

The model wording explains to the customer how they can exercise their right to cancel the order, the time period and the requirements for sending back the goods. These steps must be clearly set out and none of these steps can be made more onerous for the customer by adding additional requirements. Traders should clearly inform the consumer how they should contact them about the withdrawal e.g. by e-mail to a certain address e.g. returns@traderscompany.com. Further, it must be clear how the right should be exercised. For this purpose the CRD provides a model withdrawal form. It must be made clear to the consumer (as part of the model wording) that the forms are suggestions and the consumer can use different words.

In terms of how the goods are to be returned, again the CRD requires clear wording, including as regards refund of postage previously paid and collection options. Again, this is a matter of using the exact statutory wording. Overall, whilst it may seem desirable to simplify, the safe approach is to use the model notice and repeat the exact statutory wording.

Under art. 14(1) of the CRD, the consumer is responsible for bearing the direct cost of returning the goods unless the trader has agreed to bear them or they have failed to inform the consumer that they need to bear such costs. The notion of direct cost should exclude any administrative, handling or restocking cost borne by the trader in connection with the return of the goods.

1.7. Product warranties

Pursuant to the European Commission's recommendations for a better presentation of information to consumers, traders should be transparent to consumers about the right to return faulty goods for two years. Many traders only offer a one-year warranty in their legal terms. This can be misleading. Furthermore, pursuant to art. 6(1)(m) CRD, the trader should inform the consumer about any after-sales services and commercial guarantees if provided.

1.8. Language requirements

Pursuant to art. 6(7) CRD, EU member states are free to introduce their national law language requirements regarding the language of the contractual information, meaning that when traders target consumers in other EU states, they should provide the terms and conditions in the official languages of the member states, if required. This is also a matter of transparency. This only applies if you are "targeting" other EU countries. This requires some form of active promotion of your offering to people abroad, although exact details are far from clear and guidance remains incomplete.

1.9. Applicable law and legal proceedings

Generally, if the seller offers products in other EU member states, they can choose the law governing the sale. However, they must, in a transparent way, inform the consumer that they will not lose the protection offered by their national consumer laws. Hence, if the seller chooses to sell goods to a consumer in Spain under German law, this would not deprive the consumer of additional Spanish law protections and they should be informed of this fact.

Additionally, consumers may bring proceedings against the seller in the courts of their home country regardless of the

domicile of the seller. We often see online terms that state that consumers must bring legal proceedings abroad. This is not permitted. The same applies when you wish to bring proceedings against a customer.

1.10. Click-wrap

Pursuant to European law, any communication by electronic means that records a legal agreement must be equivalent to writing. The European Court of Justice has confirmed that “click-wrapping” meets this requirement as long as it is possible for the party to save and print the terms and conditions before concluding the contract. In order for a click-wrap mechanism to be valid, you need to make sure that a number of steps are followed each time a customer makes a purchase. This includes taking them to an order page where they fill in their details, accept the terms of sale (via a tick box) and click on a button confirming that they wish to make a binding order. This process can be simplified for repeat customers by allowing them to set up an account.

1.11. Printing and saving the terms and conditions

Pursuant to art. 10(3) of the E-Commerce Directive, the contract terms and conditions should be provided to the recipient in a way that allows them to store and reproduce them. In order to do so, the trader could provide a pdf version that can be printed or saved. This should be easy to locate.

2. Privacy and cookies

As most websites use and process user data, it is crucial for online shops to ensure that they take sufficient steps in protecting personal information of their customers. In order to do so, companies that trace in Europe (or serve EU customers) must follow the requirements set out in the General Data Protection Regulation (GDPR). This includes ensuring that the personal data is:

- processed lawfully, transparently, and fairly;
- collected for a legitimate purpose;
- data that is being collected must be limited and relevant to what is necessary;
- data must be accurate and kept up to date;
- data must be processed in a manner ensuring security of the data.

Additionally, it is important to ensure that the use of cookie files on the websites satisfies requirements provided in the ePrivacy Directive and the latest judgments of the Court of Justice of the European Union. Traders are obliged to obtain acquire consent from each person before they use any cookies files, and to inform their customers about the type of data they intend to collect, the purpose of such actions and how the consumer can manage the cookies. Extra attention should be paid to the cookie banners used on the websites and making sure that these are compliant with the relevant requirements and guidance provided by the courts. More information about the specifics of the GDPR and the requirements for cookie files can be found here.

3. Modern Slavery Statement

Under s. 54(1) of the Modern Slavery Act 2015, companies with a total (global) turnover exceeding currently £36 million per financial year and which supply goods or services in the UK, are under an obligation to prepare and publish (on their website) a slavery and human trafficking statement for each financial year. Many companies do not

realize that this obligation applies to all companies that trade in the UK. The jurisdiction under the Act is extraterritorial, meaning that the obligation applies to both the companies with an office in the UK and those which are headquartered outside the UK but carrying out business or part of the business in the UK. The statement should cover information about a broad range of matters including:

- your policies in relation to avoiding modern slavery and human trafficking;
- your due diligence processes in relation to the prevention of slavery and human trafficking in your business and supply chains;
- you also need to state if you have identified any parts of your business and supply chain where there is a risk of slavery and human trafficking taking place, and the steps you have taken to assess and manage that risk.

Once completed, the statement must be approved by the board of directors and signed by a director. The statement must be published on your website.

4. Conclusion

As showed above, drafting the terms of sale can feel like stepping into a minefield and therefore traders selling their goods within the EU should carefully consider multiple factors and thoroughly follow guidance provided by the EU legislators. The guidance above analyzes the most crucial factors that need to be taken into account when composing such terms.

For more information on the laws and regulations governing an e-commerce business, please contact: **Babette Märzheuser-Wood**, Partner, Retail Group

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