EXPANDING ONLINE SALES INTO THE UNITED KINGDOM AND ELSEWHERE IN THE EUROPEAN UNION: PRACTICAL ISSUES FOR US RETAILERS TAKING THE FIRST STEP

United States (US) retailers selling goods and services via the internet may well be looking for expansion opportunities overseas. Those looking to expand or start trading into the United Kingdom (UK) and elsewhere in the European Union (EU) need to be aware of some of the regulatory and legal issues involved in distance selling (i.e., online sales). While some larger retailers may be in a position to set up overseas trading subsidiaries and local websites from the start, other companies elect to test the marketplace and the international appetite for their brand first by launching online sales only.

Whichever route is chosen, retailers should be aware that there are significant differences in the regulatory approach between the US and the UK/EU that may impact their existing websites and terms and conditions of sale. To help make the most of your expansion plans, we set out below some key issues to consider at an early stage.

WHAT TO BE AWARE OF

The key point to note is that consumers buying goods online generally have greater rights in the UK and elsewhere in the EU than US retailers may be used to. Retailers looking to build goodwill among new customers should consider these rights when planning expansion - they will influence website design and the terms and conditions of sale to be used.

The main distance selling rules stem from EU Directive 97/7/EC, which has been implemented into national law in each EU Member State (see, for example, the Consumer Protection (Distance Selling) Regulations 2000 in the UK). These require businesses selling goods or services online to provide certain information before a contract is concluded (i.e., before a consumer clicks the “buy now” button). This includes, for example, the seller’s full name and address, the price of goods including all delivery charges and, in respect of most types of goods, the right for the consumer to cancel the contract. The same information must generally be provided again, this time in writing or another “durable medium” (e.g., via a confirmatory email), at the time of delivery of the goods, at the latest.

The distance selling rules also specify, for example, when goods must be delivered (generally within 30 days unless otherwise agreed), when the cost of returns can be passed on to the consumer (only where specified prior to the conclusion of the contract), when...
goods of equivalent quality and price may be substituted (again, only where specified prior to the conclusion of the contract), and when refunds must be paid if a contract is cancelled (see below for more on this) - these are issues that standard US website processes and returns policies may not cover.

**CANCELLATION/CoolING OFF PERIOD**

Under EU distance selling rules, other than in respect of certain excluded goods, consumers have a “cooling off period” following delivery of the goods during which they can cancel the order for no reason and at no cost (i.e., retailers must refund the price paid, including the initial delivery costs\(^1\)). The length of the cooling off period differs between EU Member States. Some countries, such as the UK, have implemented the minimum seven working day period post delivery, while in some other EU Member States the period lasts up to 14 days. Unless you are planning to target only one or two EU Member States, it may be simplest to offer 14 days from the date the goods are received across the board.

**REFUND/RETURN OBLIGATIONS**

Having cancelled their order, the consumer has a right to receive a refund within 30 days from the date of cancellation. This refund obligation technically applies even where the consumer has failed to return the goods at all. Common terms in the US restricting the return of goods and payment of refunds may also be unenforceable. For instance, retailers will not be able to rely on a restriction that goods must be returned in the packaging unopened or that goods cannot be worn (the only obligation on consumers is that they must take “reasonable care” of the goods). Retailers of expensive clothes and accessories may be particularly affected, as damage or marks to products during a trial by the consumer may devalue or make it difficult to resell a product.

Note: These rights do not apply to all goods. For example, custom-made goods, software that has been unsealed by the consumer, or goods which are liable to expire rapidly (e.g., fresh flowers) are all excluded.

**OTHER LEGAL ISSUES FOR US RETAILERS**

The European position is somewhat harmonised, although EU laws often only set out certain minimum standards. Often these are supplemented by other national laws in each EU Member State, making a “one stop shop” approach challenging.

Certain EU Member States treat contracts as having been formed at different times during the purchasing process than do other EU Member States. Under English law, a website constitutes a pre-contract advertisement (an invitation to treat), therefore any clear errors in pricing or availability of merchandise can be corrected and are not binding on the retailer. This is not necessarily the case in France or Belgium, where contracts can be formed as soon as a consumer places goods into his/her online shopping basket. In addition, French law mandates the use of French for goods offered online to French consumers (i.e., websites targeting French consumers should be translated into French).

Retailers should also be aware that even if the practical risk of legal action being brought by consumers for any breach of these obligations is low, official consumer rights organisations in the EU also have the right to take legal action. For example, an Austrian consumer rights group recently brought a case against an English online retailer who had failed to correctly provide the required pre-contractual information.\(^2\)

**NEW LAWS COMING SOON**

Retailers should note that new EU-wide laws in this area are due to be implemented into the national laws of EU Member States by mid-June 2014.\(^3\) The new requirements are likely to include the following:

- cancellation period extended to at least 14 days post-delivery (extended to a year where a seller has not clearly informed the consumer about this right);
- consumers to return goods within 14 days of cancellation; and
- refunds to be paid within 14 days of cancellation (including the initial delivery costs) - although this will be subject to the seller having received the goods back or being provided with proof that they were sent back.

Note that, as is the case with current EU distance selling laws, national implementing laws may differ. We will be monitoring these developments.

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1. Handelsgesellschaft Heinrich Heine GmbH v. Verbraucherzentrale Nordrhein-Westfalen eV, Case C-511/08
2. Content Services Ltd v. Bundesarbeitskammer (C-49/11)
3. Handelsgesellschaft Heinrich Heine GmbH v. Verbraucherzentrale Nordrhein-Westfalen eV, Case C-511/08
CONCLUSIONS
Given the complexities of EU legislation in this area, it is worth planning ahead for any online expansion of sales to the UK and elsewhere in the EU. Retailers looking to grow into these markets may want to consider the significant differences in distance selling regulation between the US and the EU that may entail changes to existing websites and terms and conditions of sale. Arnold & Porter is able to help retailers navigate the legal complexities involved and devise practical strategies to deal with any applicable regulations.

Arnold & Porter’s Retail Group comprises a senior team of lawyers with in-depth commercial experience of the retail and leisure sectors combined with a practical and technical understanding of the operational and strategic management of these consumer led businesses. International breadth means we can cross borders for our clients from our offices in London, Brussels, and across the United States.

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i These new laws come from the new Consumer Rights Directive (see http://ec.europa.eu/justice/consumer-marketing/rights-contracts/directive/index_en.htm)