

A Practical Guide to E-commerce and Internet Law

A Practical Guide to E-commerce and Internet Law

2nd Edition

Osborne Clarke



ICSA Publishing

Published by ICSA Publishing Limited
16 Park Crescent
London W1B 1AH

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Typeset in Sabon and Franklin Gothic by
Hands Fotoset, Woodthorpe, Nottingham

Printed and bound in Great Britain by
TJ International Ltd, Padstow, Cornwall

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library.

ISBN: 1-86072-305-5

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The Contributors

Andrew Braithwaite – Partner *Date of qualification: 1985*

Andrew's experience covers a wide range of non-contentious IP and IT transactions and technology issues. For 20 years, he has given specialist advice to the high-tech sector and has been a leading advisor in the emergence of internet and e-commerce businesses in the South West. Andrew also handles a range of IP licensing transactions, including trade marks and merchandising, sponsorship and TV production and has acted as legal adviser to a number of sport businesses, including Ryder Cup and the PGA for the past ten years.

James Pond – Lawyer *Date of qualification: 2001*

James is a commercial lawyer who specialises in all aspects of intellectual property and commercial work relating to the advertising, interactive media and entertainment industries. He has extensive experience of providing copy clearance advice and drafting, negotiating and advising on all forms of commercial agreements for advertising agencies and brand owners. James originally qualified as a barrister in 1998 before joining Osborne Clarke's London office in 2000. He has also worked in-house at one of the world's leading internet companies.

Victoria Powell – Lawyer *Date of qualification: 2001*

Victoria specialises in non-contentious commercial, regulatory and intellectual property issues within the technology and e-commerce sectors. She has wide experience of drafting, negotiating and advising in relation to a variety of commercial contracts, for example, software licences and technology agreements, participation agreements and card processing agreements. Victoria also advises in relation to data protection issues including drafting data processor agreements, notifications and privacy policies and has conducted a number of Europe-wide data protection audits of large organisations in conjunction with more widely focused business operations audits.

Emily Utley – Associate *Date of qualification: 1999*

Emily deals with all aspects of transacting online, from setting up websites

with appropriate terms and conditions and privacy policies, to ensuring compliance with e-commerce and Distance Selling Regulations. Emily has advised on, and drafted agreements for, e- and m-commerce transactions including global software development and licensing agreements, supply and installation, support and maintenance; content agreements; and web-based frameworks. She also advises technology clients on appropriate sales channels taking into account competition law and the Commercial Agents Regulations 1993.

Clare Robinson – Partner *Date of qualification: 1987*

Clare specialises in IP disputes and has been a partner since 1992. Since qualification she has advised many companies both in the UK and overseas on a full range of contentious IP issues. She has dealt with significant IP disputes involving patents, copyright, design right, database rights, trade marks and passing off. She has also devised and managed strategies for the enforcement of IP rights in the UK and across Europe for several major companies.

Douglas Peden – Associate *Date of qualification: 1996*

Douglas is a senior associate in the litigation department and deals with IP and general commercial disputes. He acts for a wide range of clients in all types of intellectual property disputes, including patent infringement claims, trade mark and passing off claims, copyright infringement, domain name disputes, database right issues and misuse of confidential information. He has particular experience of working with clients to develop and pursue anti-counterfeiting campaigns. He is also experienced in handling a wide variety of general commercial and contractual disputes, including IT disputes, warranty claims and disputes relating to commercial agencies.

Mark Antingham – Associate *Date of qualification: 1991*

Mark is an associate solicitor based in our Thames Valley office. He has 13 years' experience of advising on all aspects of intellectual property. He has particular expertise in the creation, protection and exploitation of trade marks and brands, as well as merchandising, sponsorship, franchising and anti-counterfeiting. He frequently advises on IP strategy and portfolio management as well as the IP implications of mergers and acquisitions and other commercial transactions. His experience spans many international markets and both traditional and electronic media.

Anna Keeling – Associate *Date of qualification: 1998*

Working for the Commercial department in Bristol, Anna is an Associate solicitor with wide experience of non-contentious IT transactions and technology issues. She has advised on and drafted agreements relating to global software development, reseller and licensing; supply and installation;

support and maintenance; content and web-based frameworks. She has worked closely with a number of universities and technology companies in relation to the development of spin-out and innovative technologies advising on patent and know how licensing, funding and competition issues. Anna also specialises in: advertising and marketing services; data protection; intellectual property and publishing.

Russell Bowyer – Partner *Date of qualification: 1986*

Russell joined our Thames Valley office in August 1998 to head up its IT and Telecommunications group, which the independent legal directories have described as ‘first rate’ and ‘highly talented’. His expertise spans three interconnected areas of law: information technology, intellectual property and competition law – vital subjects for the region’s thriving technology sector. He acts for both technology suppliers and major users and has 18 years’ experience in advising on the commercial and legal issues relating to software development and licensing, facilities management and outsourcing, telecommunications, e-commerce, channel and partner relations and the development and commercial exploitation of intellectual property.

Eva Krogh – Lawyer *Date of qualification: 2003*

Eva joined Osborne Clarke having spent ten years in commerce. She specialises in commercial law, with emphasis on contracts within the regulatory framework of the technology and telecommunications sectors. She has experience of a broad range of commercial matters, including outsourcing, software licensing, IT and e-commerce matters. Eva also advises on distribution and agency arrangements involving cross border issues. Her work includes outsourcing deals for major UK telecommunications operators and advising a global provider of information and support in relation to services provided to OEM resellers. Eva has also advised a US internet security provider in relation to its localisation of an on-line subscriber and certification arrangement within the UK and project managing same within the EU. Eva also writes numerous articles for legal publications which have dealt with a variety of topics including data protection.

James Mullock – Partner *Date of qualification: 1996*

James specialises in technology and telecoms issues such as e-commerce business contracts, encryption and data protection and Freedom of Information issues (in particular compliance audits), technology and telecoms supply, procurement and outsourcing arrangements, IP licensing, establishing MVNOs and telecoms regulatory issues. He is the co-author of *The Data Protection Act 1998 Explained* (published by the Stationery Office), is an editor of the publication *Data Protection Law and Policy* and is regularly asked to comment on technology issues by trade and national press. James became a partner in 2001, and is based in our Bristol office.

Piers Leigh-Pollitt – Associate *Date of qualification: 1997*

Piers specialises in Data Protection and employment issues. He has advised on the human resources aspects of a European-wide data protection audit and has also co-ordinated the introduction of IT security and related policies on a pan-European basis. With James Mullock, he co-authored the book ‘The Data Protection Act 1998 Explained’. On the employment side, he regularly advises on a wide range of employment law issues, assisting clients in HR teams with disciplinaries and grievance hearings, equal opportunities and advising on redundancies and TUPE issues.

Rachael Wright – Associate *Date of qualification: 1994*

Rachael is the Training and Know-how Lawyer for Osborne Clarke’s employment, pensions and incentives department and Head of Knowledge Management at Osborne Clarke. A qualified solicitor specialising in employment law, Rachael worked for seven years as a fee-earner with a City firm where she gained particular experience in High Court and Employment Tribunal litigation, including industrial disputes, sexual harassment cases, and restraint of trade injunctions.

Emma Wills – Lawyer *Date of qualification: 2004*

Emma regularly deals with a broad range of employment issues, from drafting contracts, service agreements and policies to dealing with employment tribunal claims and handling dismissals. She also has experience of drafting various employee incentive schemes and reviewing schemes as part of corporate transactions. She has worked with and advised several plcs and large multinational companies as well as US companies looking to start up in the UK.

Catherine Shepherd – Associate *Date of qualification: 1999*

Catherine advises public and private companies on a full range of employment and work-related issues, including day-to-day workplace problems, wrongful and unfair dismissal claims and discrimination issues. She has also advised on the employment aspects of business transfers, share acquisitions, large-scale relocations and collective redundancies. Catherine is currently a visiting lecturer in employment law at the University of the West of England (Bristol Business School) teaching on the Masters in Human Resources Management.

Philip Moss – Partner *Date of qualification: 1983*

Philip is head of Tax at Osborne Clarke and a partner in the Corporate Tax unit. He deals with all areas of direct tax, stamp duty and VAT for business clients. Philip also leads the Property Tax function at Osborne Clarke. He advises UK and overseas companies and institutions on all taxation aspects (including VAT and stamp duty) of corporate and property matters and transactions. In addition to general day-to-day tax issues arising on the four

management, acquisition and sale of property portfolios, he has advised on many other matters, including property finance and finance leasing transactions, joint ventures and developments.

Graham Roe – Lawyer *Date of qualification: 2002*

Graham specialises in corporate taxes, including the sale and purchase of companies and businesses. He advises selling shareholders and purchasers on relevant tax issues such as capital gains tax, VAT and stamp duty and how to structure and implement transactions in a tax efficient manner. Clients range from smaller owner managed companies to listed Plcs in a variety of industry sectors such as media and entertainment, support services and finance. Graham is also member of the Chartered Institute of Taxation having qualified as a Chartered Tax Adviser in 2001.

Miles Trower – Lawyer *Date of qualification: 2001*

Miles advises on all aspects of both UK and EU competition law. This includes advising on and making UK and EU merger filings as well as co-ordinating notifications on a wider international basis and seeking confidential guidance and informal advice from the OFT. He has also advised a leading distributor in relation to the Competition Commission's recent inquiry into the supply of prescription-only veterinary medicines. Miles has extensive experience of reviewing commercial agreements from a competition perspective, as well as drafting and negotiating a wide range of agreements, including distribution, outsourcing, franchise/master licences and dealer agreements. He also specialises in the area of motor vehicle distribution and after-sales operations.

Mark Webber – Associate *Date of qualification: 1999*

Mark advises on commercial matters in the technology, licensing and privacy fields. His areas of expertise include: transactional technology deals including outsourcing; IP and software licensing, and development deals, procurement, channel and partner relationships and wireless ventures. He gained a valuable insight into the US technology industry as head of Osborne Clarke's Silicon Valley office, and has substantial experience of organising and managing pan-European projects in multiple jurisdictions for both European and US clients. He is currently based in our Thames Valley office where his work includes: advising on European expansion for US technology businesses (including Vonage, Good Technology, JamdatMobile and Melodeo), negotiating deals in the wireless space and acting for technology outsourcing providers.

Simon Rendell – Partner and Commercial Practice Group Head

Date of qualification: 1991

Simon has worked within the technology sector for over 17 years, advising

on legal strategy for business growth through the exploitation of intellectual property. He is a non-executive director of three technology companies and a director of Technology Venture Consulting Ltd, an advisory company to technology SMEs. Simon is recognised in The Chambers Directory and The Legal 500 as one of the UK's leading practitioners of IT & telecommunications law. He has practised in this field since 1986, as well as advising on EC regulatory and competition law, intellectual property and all aspects of commercial law. Simon is responsible for the co-ordination of Osborne Clarke's North American business alliances and assists in the development of the firm's European Alliance. He has assisted in the legal development of global businesses such as Yahoo!, VeriSign, Apple and Electronic Arts.

Paula Staunton – Partner *Date of qualification: 1991*

Paula specialises in technology and commercial law. Based in London, she heads the Commercial department's sales channels team and advises clients on their distribution/reseller and agency agreements. Paula regularly advises both suppliers and users on the legal issues associated with intellectual property, outsourcing, ownership/licensing, IT procurement, software development, service level agreements and e-commerce. Other work has included advising on: outsourcing contracts in respect of a €400m securitisation of a hardware provider's leasing contracts; and, the anglicisation of an American IT company's reseller/distribution agreements, including an analysis of the impact of the European block exemption.

Truda Borthwick-Stevens *Date of qualification: 1995*

Truda Borthwick-Stevens edited both this edition of the book and the original version which appeared in 2002. She is also responsible for researching and re-writing the section on Criminal Liability in Chapter 4. Before entering the law, Truda worked as a commercial journalist. She qualified as a solicitor in 1995 and gained a broad range of experience in both commercial and IT law, working both in-house for Sun Life and NPI and for private practice. She also worked as a professional support lawyer for Osborne Clarke for four years where she developed and wrote a number of on-line legal updates for fee-earners and clients.

Foreword

There has been a tremendous upsurge in e-commerce activity since the last edition of this Guide. This has been facilitated by faster internet connections and more people having access to the internet. These days many people prefer to shop from the comfort of their own home or office rather than venture out to crowded stores. Besides, internet shopping can offer better value. And it hasn't just been the consumer that has benefited, business to business e-commerce trade has transformed all areas of procurement supply.

A few years ago, it was mainly dotcom businesses that traded online. Now most stores have a website offering their goods for sale. Such websites often provide a greater variety of products than are available in-store, and provide a convenient way to search or sift through what's on offer. Companies are also increasingly diversifying the products which they offer on the internet, for example, Amazon.com, which is primarily known for specialising in selling books and CDs, now sells a vast range of products, from kitchen appliances and electronic goods to home and garden furniture. Amazon also encourages customers to sell their unwanted items through its website.

As e-commerce becomes ever more prevalent, so does the need for further legal regulation. Although initially many countries' governments and legislative bodies found ways to adapt existing laws in order to make them applicable to the internet, they are increasingly implementing new regulations to fill the grey areas. Unfortunately, as it has been hard to predict how internet activity and e-commerce would grow, these new regulations have often been introduced slowly, and in a fairly piecemeal fashion. This makes it extremely difficult to navigate your way through all the legislation with which one needs to be familiar before embarking on an internet business or expanding a business to trade online.

The authors of this Guide have attempted to collect the essential information and put it in one short, accessible text that is interesting and easy to understand. It will enable you to familiarise yourself with the 'legal' requirements so that you can make the right risk assessments before deciding

whether to offer your products and services on the internet. It will also help you ensure that you structure your legal relationship with the customer appropriately, which can sometimes be more demanding than the challenge of getting the right business plan and obtaining funding. You will find a lot of practical and useful information in this Guide.

Preface and Acknowledgements

The internet is one of the most powerful tools available to modern businesses. It allows traders to advertise and sell products online. It permits customers to browse virtual shop windows from their homes, select goods and place an order at the touch of a button. If used properly, it can significantly extend a business's reach and reduce costs and increase efficiency.

However, the internet is not a magic formula; it is a business medium. As such, it is necessary to understand both its benefits and pitfalls. For instance, the internet offers far greater scope to marketeers, permitting them to reach a much larger audience at a significantly lower cost than traditional methods of advertising. Unfortunately, there are also disadvantages which have to be considered. For example, as exposure to consumers is increased – often across international borders – so are the risks.

This book is aimed at company secretaries, finance directors, IT managers, in-house lawyers, students, and anyone in need of a broad-ranging introduction to the legislative and commercial issues related to doing business online. While the amount of legislation dealing specifically with e-commerce issues has increased in recent years, much of the relevant law affecting this area is still drawn from general commercial legislation and the common law. For this reason, the book offers a number of chapters dedicated to subjects such as tax, competition, media, employment, data protection and intellectual property, covering both general principles and specific, e-commerce applications.

Chapter 1 provides a general introduction to the key elements of contract law which are as relevant to contracts made online as to paper-based agreements. However, it also highlights areas of uncertainty regarding e-commerce (for instance the acceptance of offers by e-mail) to which online traders should pay particular attention.

Setting the context for the rest of the book, Chapter 2 uses the example of a fictitious company to enable readers to understand how and when various legislative elements affect different aspects of an online business. Chapters 3 to 10 then expand upon the subjects introduced in Chapter 2, setting out the basic principles of relevant legislation and then applying these to specific circumstances likely to be encountered by online businesses.

The book's no-nonsense approach aims to help readers get a better

understanding of the legal implications of doing business on-line. Apart from practical information, the book provides a number of checklists and summaries to facilitate the identification of some of the pitfalls commonly encountered by e-businesses. For instance – What are the key elements to be covered when drawing up an online privacy policy? What factors should be considered in an ISP agreement? What are the main issues to be addressed in an email/internet policy for employees?

Finally, the appendix provides useful sources of information, which should allow readers to perform further research of their own.

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We would like to thank all contributors to *A Practical Guide to E-commerce and Internet Law* for their hard work and patience. These include not only the contributors, whose biographies appear at pp. xv–xx, but also those responsible for advising, editing, researching, proof-reading, amending and collating the book. They are: Simon Rendell, Andrew Braithwaite, James Mullock, Nick Johnson, Mark Culbert, Truda Borthwick-Stevens, Anna Blackden, Joanne Lee, Jenny Withnall, Fiona Hunt and Chloe Swift.

Introduction: The Legal Context

Introduction

This chapter seeks to introduce the reader to some of the concepts and issues relating to e-commerce that will be covered in greater depth elsewhere in this book. It starts with a review of the basic principles of contract law. While these are still relevant to modern business, the formation of contracts online has presented some interesting problems.

E-mail and click-wrap contracts, the two main methods of contracting online, are discussed; and the question of how to incorporate terms and conditions into a website is considered.

In addition to a brief overview of some of the relevant statutory and case law, this chapter also highlights some items of specific interest to online traders. These include: warranties; dealing with returns and refunds; consumer protection; payment and security on the internet; and law and jurisdiction.

1. Basic principles of contract

Every day, we enter into contracts without realising that we are doing so. For example, successful deals made by the sales force may comprise the ‘contractual steps’ set out below.

Under English law the formation of a contract requires the following elements:

- an *offer*;
- unequivocal *acceptance* of the offer, which is communicated to the person making the offer;
- *consideration*;
- an *intention to create legal relations*; and
- *capacity* in each party to be legally bound.

A contract is formed when an offer has been accepted and, following

acceptance, the offer cannot be withdrawn. In general, contracts may be made verbally or in writing. However, there are some exceptions; these include formal contracts made by deed and other types of contract, such as contracts for the sale of an interest in land, which must be made in writing.

It is very important to be able to identify, and control, exactly when a contract has been formed. For instance, in the case of an international contract, this will decide which country's laws will be used when interpreting and enforcing the agreement. In the context of online trading, it is crucial to control when a contract is created, to minimise business risk.

1.1 Offer

English law distinguishes between an offer and an 'invitation to treat', such as an advertisement that promotes the sale of products but is not an offer. Under traditional contract law, the display of goods in a shop is not an offer but an invitation to treat (*Pharmaceutical Society of Britain v. Boots Cash Chemist Ltd.* [1952] 2 QB 795). Accordingly, when the purchaser asks the seller if he can buy a product, this constitutes the offer. At this point, the seller is free to accept or reject the purchaser's offer.

A business intending to trade online will be concerned to control the contract by ensuring its customers make offers, open for acceptance by the website owner. It should construct its website so that it is, in effect, a shop window. The site should carry a clear statement that the supplier will not be bound to a contract unless the supplier accepts the offer of the customer. (Statements to this effect are often seen on traditional terms and conditions and are regarded as an invitation to treat.)

The online business will also be keen to ensure it knows to whom it is making offers, and is in a position to target only those it wishes to accept. For instance, an online liquor store may target adults only; and a geographical limit on territories is often set on a retailer, who will only be able to target customers in its territory.

1.2 Unconditional acceptance

Under English law a contract is formed when the offer is unconditionally accepted. Acceptance may affect both the timing of the contract and the place it becomes effective. In the case of timing, it may be crucial for an online auctioneer to clarify which bid was accepted first; and in the case of location, this will affect the law that governs the contract and the tax treatment of the transaction. There are two rules of acceptance:

1. The *receipt rule*: this states that a contract is formed at the time and place

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when the acceptance is received by the offeror. This applies to instantaneous forms of communications such as telephone, fax and telex.

2. The *postal rule*: this applies to communications by post, according to which acceptance is effective at the time of posting of the communication. The postal rule does not apply to instantaneous communications.

Legal opinion continues to be divided on whether the postal rule applies to e-business, that is acceptance via a website or e-mail. Interestingly, provisions expressly dealing with contracts made over the internet were included in a proposal for an EU Directive but were subsequently dropped from the final Electronic Communications Act 2000 passed in the UK. The proposal suggested that e-mail was not an instantaneous form of communication. The reason given for this was that often, external e-mails are routed through a number of servers located in different jurisdictions before reaching their final destination and thus receipt can be delayed.

It has been suggested that out of office auto-replies may have an important role to play in this area. This is because an e-mail may be deemed to have been accepted when it reaches the intended recipient's machine, even if it is not read or acknowledged. This means that it is possible for a contract to exist even where one party is unaware of it, as long as the e-mail has reached their inbox. An out of office auto-reply would stop this situation arising as the sender would be made aware that the recipient had not accepted the contents of the e-mail. Given the current uncertainty, a supplier is advised to override the postal rule by using a clear statement in its website terms and conditions as to how acceptance can be made, and when it becomes effective. One suggestion has been to state that the offer is not accepted until payment has been taken from or charged to the customer.

Acceptance of an offer is normally communicated, but can also be inferred by the conduct of the parties, which may amount to performance (for example, carrying out the service requested or paying the price for the relevant item). So it is also important that the seller makes it clear which acts (if any) will amount to acceptance.

1.3 Consideration

Consideration is essential to create a contract. In simple terms it is the exchange of promises, normally for the supplier to give up something of value, in exchange for the customer making payment. The requirements are the same in online business.

Consideration need not be money. For example, an online business may offer an information service that provides information to subscribers. In return, the person receiving the service agrees to supply the provider with his or

her profile and other relevant data. Such data may be valuable in itself and will therefore amount to consideration.

1.4 The intention to create legal relations

Although intention to create a binding contract is a requirement, it is generally not an issue in day-to-day business – if a party alleges a lack of intent on their part, they face a hefty burden of proof. Just consider what arguments Argos raised following a computer error, which resulted in the company advertising televisions for sale on its website for £2.99 instead of the correct price of £299.99. The intention of the parties to enter into a legally binding document can be inferred from surrounding circumstances – for example, the payment of money or compliance with certain obligations in return for goods or services.

Letters of intent (unless otherwise stated) do not create legal relations since they indicate only an intention to negotiate rather than establish contractual obligations. As we will see, the same principle applies to electronic commerce.

1.5 Capacity

A number of difficulties may arise for online suppliers over the identity of the other parties to a contract. Such difficulties generally fall into two categories: legal capacity and mistake.

1. *Legal capacity*: Under English law, contracts made with minors are generally voidable at the minor's option under the Minors' Contracts Act 1987. However, adults who do not seek to take unfair advantage of a minor with whom they have entered into a contract are entitled to uphold a contract for certain necessary items covering a variety of goods and services excluding luxuries. Generally speaking a contract with a mental patient is valid unless the other contracting party knew of the other's disability in which case the contract is voidable. Online suppliers therefore need to ensure they have certain basic information about the person with whom they are making a contract.
2. *Mistake*: Generally, a mistake does not invalidate a contract unless it is fundamental. A fundamental mistake is one which means that the intended offer and acceptance do not coincide and therefore there is no true consensus. There are three general circumstances where a mistake will be fundamental. These are:
 - a) where a reasonable person could not infer the intention of the parties from the circumstances surrounding the transaction; or
 - b) where one party knew of the other's mistake; or
 - c) where one party negligently induced the other's mistake.

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A fundamental mistake occurred in the old case of *Raffles v. Wichelhaus* in 1864 which involved a contract for cotton on board a ship called *Peerless* sailing from Bombay. In fact, there were two ships of that name sailing from Bombay, one in October and one in December and the parties had different ships in mind. The contract was void for mistake in this instance. However in a more recent case, *OT Africa Line Ltd v. Vickers Plc* in 1996, a typing error meant that \$155,000 actually appeared as £150,000 in the final contract. The judge in this case held that the contract was binding because the offer made sense in the circumstances in which it was made. He went on to say that there was nothing in the claimants' conduct making it inequitable for them to hold the defendants to the contract. The rules relating to mistake are clearly heavily influenced by the circumstances surrounding the contract and each case will have to be decided on its own particular facts. This area of law can affect online suppliers, for example where a person is seeking the goods of one company and mistakenly visits the website of another company with a confusingly similar domain name or, as in the case above, a typing error occurs.

2. The E-Commerce Regulations

The Electronic Commerce (EC) Regulations came into force on 21 August 2002. They are a brave first attempt at setting out the basic requirements of e-contracting. The purpose of the Regulations is to ensure that what are described as 'information society services', i.e. broadly e-commerce, benefit from the EU internal market principles of free movement of services and freedom of establishment. The Regulations cover online services such as trade and advertising but do not apply to non-commercial interactions or the offline elements of online transactions. They may apply to companies that sell or advertise goods or services both to businesses and to consumers through websites or via e-mail or to those who convey content using e-mail or provide access to a communications network. The Regulations define 'Information Society Services' as 'any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing and storage of data, and at the individual request of a recipient of a service'.

The basic position under the Regulations is that any person providing an information society service must make the following information available to the recipient:

- the name of the service provider;
- the service provider's geographic address;
- details of the service provider, including an e-mail address;
- details of the service provider's trade registrations, if any;
- particulars of any relevant supervisory authority.