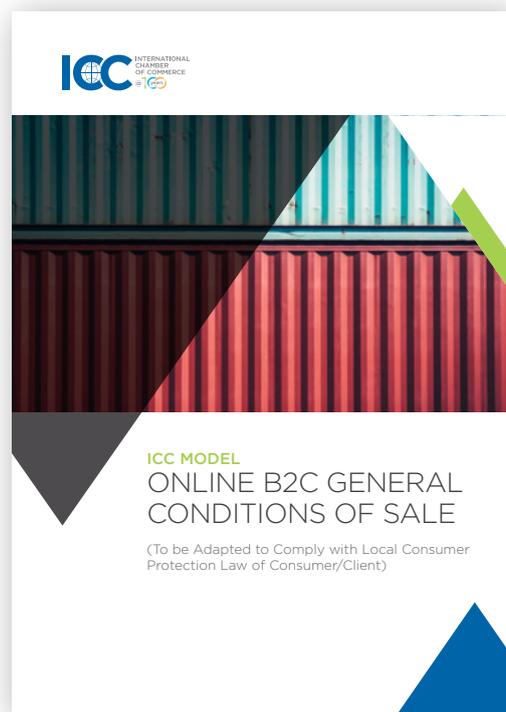


# EU REQUIREMENTS AND NON-EU COUNTRY ANNEXES

to accompany the  
ICC Model Online B2C General Conditions of Sale



# TABLE OF CONTENTS

<b>INTRODUCTORY NOTE AND DISCLAIMER</b> .....	<b>3</b>
<b>PART ONE: WEBSITE PRESENTATION REQUIREMENTS</b> .....	<b>4</b>
1. General information to be provided to the consumer.....	4
2. Information on the ordering process to be provided prior to the order being placed.....	4
3. Information on the sale contract to be provided before the consumer is bound by the contract.....	5
3.1 Requirements .....	5
3.2 Observations .....	6
3.3 Websites with limited space or time of display .....	7
4. Indication of price.....	7
5. Additional payments.....	8
6. Means of payment .....	9
7. Delivery restrictions.....	9
8. Geo-blocking and other discriminatory practices.....	9
9. Promotional offers and advertisement.....	10
10. Consumer reviews and endorsement.....	11
11. General conditions of online sale .....	11
12. Right of withdrawal.....	11
12.1 Withdrawal period.....	11
12.2 Exception to the right of withdrawal .....	12
12.3 Information on the right of withdrawal.....	12
12.4 Exercise of the right of withdrawal.....	14
12.5 Effects of withdrawal.....	14
12.6 Reimbursement of payment received by the consumer.....	14
12.7 Responsibility of the consumer for mishandling of goods during the withdrawal period.....	14
12.8 Obligation of the consumer in the event of withdrawal.....	15
13. Placing of the order.....	15
14. Language.....	15
15. Link to ODR platform and information on ADR entities .....	16
16. Confirmation of the contract concluded online.....	16
17. Privacy issues .....	17
17.1 Data protection ‘by design and by default’ .....	17
17.2 Cookies.....	17
17.3 Privacy information.....	18
17.4 Consent.....	19
17.5 Privacy policy.....	20
18. Terms of use.....	20
18.1 Disclaimer .....	20
18.2 Unauthorised use.....	20
18.3 Intellectual property and trademarks.....	21
<b>PART TWO: OTHER CONSUMER PROTECTION REQUIREMENTS</b> .....	<b>22</b>
19. Conclusion of the contract.....	22
20. Requirements upon receipt of the order .....	22
21. Delivery .....	23
22. Risk of accidental damage or loss.....	23
23. Conformity of goods.....	23
23.1 Time limits.....	25
23.2 Replaced goods.....	26
23.3 Reimbursement of the price of goods.....	26
24. Commercial guarantee.....	26
25. Unfair terms in consumer contract .....	26
26. Age requirements.....	28
27. Applicable law.....	28
28. Dispute resolution .....	29
29. Small claims procedure.....	29
<b>EU MEMBER STATE NOTES ON EU REQUIREMENTS</b> .....	<b>30</b>
<b>ANNEX 1 - BRAZILIAN LAW REQUIREMENTS</b> .....	<b>34</b>
PART ONE - WEBSITE PRESENTATION REQUIREMENTS.....	36
PART TWO - OTHER CONSUMER PROTECTION REQUIREMENTS .....	43

## INTRODUCTORY NOTE AND DISCLAIMER

This document is intended to accompany the ICC Model Online B2C General Conditions of Sale and provides supplementary information on requirements under the law of the EU and selected non-EU-countries regarding the establishment of a consumer-facing website for the sale of tangible goods online.

It may be supplemented from time to time on the ICC website by the addition of new Member State Notes or non-EU Country Annexes.

**Caution:** Users of this document and the ICC model are advised that:

- > Neither this document nor the ICC Model constitute legal advice.
- > Users should consider the content as guidance and should seek legal advice in order to adapt their own conditions of sale to the local consumer laws of any intended consumers/clients.
- > The guidance that follows should be checked for currency, as laws and regulations may change from time to time.

## PART ONE: WEBSITE PRESENTATION REQUIREMENTS

### 1. General information to be provided to the consumer

The seller must make easily accessible, in a direct and permanent manner, the following information:

- a. name of the seller;
- b. registered office (address);
- c. direct contact details (telephone or e-mail, availability time and applicable rate);
- d. trade register/public register and registration number of the seller's company to the trade or similar public register;
- e. VAT number;
- f. possible relevant supervisory authority, if the sale activity is subject to an authorisation scheme.

The above information must be kept updated.

To satisfy these Community law requirements, it is advisable to display such information so that it is directly and permanently accessible, i.e. at the bottom of the homepage of the website. This information is usually included in the website's terms of use. The identity and contact details of the seller should also be indicated in the General Conditions of Sale (indication of the trade register and VAT number in the General Conditions of Sale is not compulsory).

*[Legal source: Article 5 E-commerce Directive<sup>1</sup>; Article 7 § 5 UCDP<sup>2</sup>; Article 20 Services Directive<sup>3</sup>]*

Furthermore, sellers established in the EU shall provide on their websites an electronic link to the s.c. “**ODR platform**”, an interactive website on out-of-court dispute resolution for disputes arising from online sales transactions. Such link has to be easily accessible to the consumer, therefore it is advisable to include such link at the foot of the homepage (see **Section 15** for more details).

### 2. Information on the ordering process to be provided prior to the order being placed

Prior to an order being placed by a consumer the seller must provide to the consumer in a clear, comprehensible and unambiguous manner the following information:

- a. the different technical steps to follow to conclude the contract;
- b. whether or not the concluded contract will be filed by the seller in its management system and whether it is accessible to the consumer;
- c. the technical means for identifying and correcting input errors prior to the placing of an order;
- d. the languages offered for the conclusion of the contract; and
- e. the Seller's code of conduct, if any, and information on how the code can be consulted electronically (e.g. by a link to the relevant text).

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<sup>1</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). Available online at 1 May 2020: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32000L0031>

<sup>2</sup> Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (Text with EEA relevance). Available online at 1 May 2020: <https://eur-lex.europa.eu/eli/dir/2019/2161/oj>

<sup>3</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. Available online at 1 May 2020: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32006L0123>

[Legal source: Article 10 E-commerce Directive]

**e.g.:**

*“Customers may choose the articles by clicking on the respective image. They shall be included in the shopping cart and the order can be placed by filling out the order form and accepting the General Conditions of Sale. Prior to submitting the order Customers are required to verify the accuracy of the information provided and make the necessary corrections. The purchase order is submitted when the Customer selects the “Buy now” option. Following order submission, the order shall be sent directly to the Seller. The order shall be filed in the Seller’s order management system. Customers may access their order by clicking on their personal section in the Customer care area. The languages used for concluding sale contracts are: English, French and Italian”.*

The Seller should check whether individual countries to which it sells products require Seller to provide to the consumer any information in addition to that listed above.

Such information, to be provided before the consumer places the order (e.g. the instruction to click on the “Buy now” option), can be provided in a dedicated box appearing at the beginning of the sales process, or in the General Conditions of Sale, provided that the consumer has had the possibility to read such information before placing an order.

### 3. Information on the sale contract to be provided before the consumer is bound by the contract

#### 3.1 Requirements

Before the consumer is bound by the sale contract, the seller must provide the text of the General Conditions of Sale and, in a clear and comprehensible manner, the following information:

- a. the main characteristics of the goods, to the extent appropriate to the medium;
- b. the identity of the seller;
- c. the geographical address at which the seller is established, phone, fax number<sup>4</sup> and e-mail address where available and whether a seller is acting on behalf of a third party<sup>5</sup>;
- d. if different from the seller’s address indicated in point c), the geographical address of the place of business and, where applicable, that of the third-party seller on whose behalf seller is acting, where the consumer can send any complaints;
- e. the total price of the goods including taxes (please see **Section 4**, below);
- f. where applicable, that the price presented to the consumer has been personalised on the basis of automated decision-making<sup>6</sup>.
- g. the costs for using the means of distance communication for the conclusion of the contract where that cost is calculated other than at a basic rate;
- h. the arrangements for payment, delivery, the time by which the seller undertakes to deliver the goods or to perform the services and, where applicable, the seller’s complaint handling policy;

<sup>4</sup> According to Directive EU 2019/2161 dated 27 November 2019, which shall have to be adopted by Member States by November 28, 2021 and will be applicable from May 28, 2022, the indication of fax number will no longer be a necessary indication requirement. The new Directive also provides that where the seller provides for other means of online communication which guarantee that the consumer can keep any written correspondence, including date and time of such correspondence with the seller on a durable medium, the information shall also have to include details of those other means.

<sup>5</sup> From May 28, 2022 should the seller offer any other means of online communication which guarantee that the consumer can keep any written correspondence with the seller on a durable medium (e.g. an app such as Messenger) the seller also has to inform the consumer of the details of such means.

<sup>6</sup> From May 28, 2022, where applicable, consumers will have to be informed that the price was personalised on the basis of automated decision-making (profiling).

- i. the conditions, time limit and procedures for exercising the right of withdrawal as well as the model withdrawal form set out in Annex B of the Consumer Rights Directive<sup>7</sup> (please see **Section 12**, below);
- j. where applicable, that the consumer will have to bear the costs of returning the goods in case of withdrawal and, for distance contracts, if the goods, by their nature, cannot normally be returned by post, the costs of returning the goods;
- k. where the right of withdrawal is not provided for in accordance with the Consumer Rights Directive, the information that the consumer will not benefit from a right of withdrawal or, where applicable, the circumstances under which the consumer loses its right of withdrawal;
- l. a reminder of the existence of a legal guarantee of conformity of goods;
- m. where applicable, the functionality of the goods with digital elements, digital content;
- n. where applicable, any relevant compatibility and interoperability of goods with digital elements/digital content;
- o. where applicable, the existence and the conditions of after-sale customer assistance, after-sale services and commercial guarantees;
- p. where applicable, the existence of a relevant code of conduct;
- q. where applicable, the minimum duration of the consumer's obligations under the contract;
- r. where applicable, the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the seller;
- s. where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the seller is subject, and the methods for having access to it (please see **Section 15**, below); and
- t. the existence of possible contractual clauses on the law applicable to the contract and/or on jurisdiction<sup>8</sup>.

### 3.2 Observations

Information on the main characteristics of the goods is normally provided through a visual and/or verbal description of the goods and by reproducing the information contained in the package labelling. The need for inclusion of the characteristics of the goods may vary depending on the goods at issue. Please note that for certain goods there may be further legal requirements (e.g. the Toys Safety Directive (2009/48/EC) explicitly requires seller to specify the minimum/maximum age of use).

The presentation of the required information must not be misleading<sup>9</sup>. It therefore must not

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<sup>7</sup> Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (Text with EEA relevance). Available online at 1 May 2020: <https://eur-lex.europa.eu/eli/dir/2019/2161/oj>

<sup>8</sup> In non-EU countries law protecting consumers may also require an obligation to provide information to the consumer. For example in Brazil, Decree 7962/13 establishes that e-commerce transactions shall cover the following aspects: provision of clear information about the product, the service and the supplier, facilitated assistance to the consumer, and respect of the right of withdrawal. In Section 4, it requires that (i) a summary of the contract be made available in advance, containing all information necessary for the consumer to make its choice, and all restraining clauses; (ii) proper tools are ensured for identification and immediate correction of mistakes made prior to finalization of the purchase; (iii) the supplier immediately confirms receipt of the acceptance of the offering; and (iv) the supplier maintains adequate and efficient electronic service, which allows the consumer to request information, clarify doubts, make complaints, and demand suspension or termination of the contract.

In addition, the so-called Consumer Protection Code (Law 8078/90), in its article 31, regulates products offers, as well as items already mentioned above, and provides that consumers must be aware of composition of the goods, expiration date and health and safety risks, when applicable. Moreover, articles 39 to 41 of the Consumer Protection Code (Law 8078/90), forbid so-called abusive practices, under which, among others, sellers shall not condition the sale of a product or service on the sale of another product or service. Finally, the so-called Arbitration Law (Law 9307/96) provides that, in adhesion contracts, an arbitration clause will only be valid if the adhering party takes the initiative to file an arbitration proceeding or if it expressly agrees with its initiation, as long as it is in an attached written document or in boldface type, with a signature or special approval for that clause (Law 9307/96, article 4<sup>o</sup>, §2<sup>o</sup>).

<sup>9</sup> According to Directive EU 2019/2161 marketing goods across the Member States as being identical when, in reality, they have different composition or characteristics may be considered a misleading practice.

contain information which may be considered false, untruthful or in any way or capable of deceiving the average consumer or distorting the consumer's decision to buy the goods, particularly with reference to information listed under **Section 3.1**, above: a) characteristics of the goods, b) and c) contact details of the seller, e) price indication, g) payments and delivery conditions, h) right of withdrawal, and k) legal guarantee.

If goods at a certain price are available only for a limited period, this should be clearly and unambiguously indicated, for example by indicating that the price is valid until the goods are out of stock and that consumers should check the website for confirmation of the price.

Any information on the availability of the goods should be accurate and not misleading. For example, the practice of bait-and-switch advertising is considered a misleading act.

*[Legal source: Article 6 of the Consumer Rights Directive; Article 5, 6, 7§4 and Annex 1 of UCDP; Article 22 Services Directive]*

### 3.3 Websites with limited space or time of display

If the online sale contract is concluded through a means of distance communication which allows limited space or time to display the information (e.g. a trading website for mobile devices, apps), the seller can limit the information to be provided to the consumer prior to the conclusion of the sale contract, to the following (clause references at to the legal source, below):

- a. the main characteristics of the goods, to the extent appropriate to the medium;
- b. the identity of the seller;
- e. the total price of the goods including taxes;
- h. the conditions, time limit and procedures for exercising the right of withdrawal as well as the model withdrawal form<sup>10</sup> (please see **Section 12**, below); and
- i. the duration of the contract, where applicable, or if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract.

The other information referred to above (a-i) can be provided by referring to another source of information, for example by providing a hyperlink to a webpage of the seller where the relevant information is available.

*[Legal source: Article 8 § 4 and recital 36 of the Consumer Rights Directive]*

## 4. Indication of price<sup>11</sup>

Prices have to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

Where the nature of the goods is such that the price cannot reasonably be calculated in advance, the seller has to indicate the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges and any other costs or, where those charges cannot be reasonably calculated in advance, the fact that such additional charges may be payable (e.g. of products made to order, such as jewellery).

Where the seller is established in a country which is not a member of the European Union and

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<sup>10</sup> According to Directive EU 2019/2161, from May 28, 2022, in case of websites with limited space or time of display, the seller shall not be bound to provide the model withdrawal form immediately but the model withdrawal form may be provided by referring to another source of information e.g. hyperlink.

<sup>11</sup> The New Directive EU 2019/2161 dated 27 November 2019 has introduced new requirements as regards price indication. From May 28, 2022 "any announcement of a price reduction shall indicate the prior price applied by the trader for a determined period of time prior to the application of the price reduction." The prior price means the lowest price applied by the trader during a period of time not shorter than 30 days prior to the application of the price reduction. Furthermore Member States may provide for different rules for goods that deteriorate or expire rapidly, shorter periods for goods that have been on the market for less than 30 days or may increase the protection of consumers where a price reduction is progressively increased by indicating, as prior price, the price without the price reduction before the first application of price reduction.

sells to customers established in the European Union, information on customs duties and on the possible application of VAT shall also have to be provided.

Price information must always be up-to-date.

### **Drip pricing**

means showing the price exclusive of taxes, fees or charges or by adding unavoidable charges after having first presented them as optional. Such practice may be considered a misleading practice if it can lead consumers to make a transactional decision they would not have made had the full price been provided at first. This practice should therefore be avoided.

### **Dynamic pricing or real-time pricing**

means changing the price for goods in response to market demands. A seller should be free to determine at any time the price of its goods and to change the sale price indicated on its website provided that the consumer is informed about the total price and how it is calculated. However, if the seller raises the price of goods after a consumer has selected them in order to purchase them (e.g. put them in the shopping cart), this may be considered a misleading action, and is therefore not allowed.

### **Price discrimination**

based on nationality and place of residence is generally prohibited. Sellers may provide differences in the conditions of access only if those differences are directly justified by objective criteria.

As a general rule, sellers are required to indicate the selling price and the price of measurement (e.g. kilogram, litre) of all goods, save for goods sold in bulk. Member States can waive the obligation of indicating the unit prices of goods when such indication would not be useful or might create confusion. In general, in case of the sale of non-food goods sold in units, only the indication of the selling price is requested.

Sellers should check for which goods particular countries have waived the obligation to indicate the price of measurement.

### **Personalised price**

Automated decision-making and profiling of consumers allow traders to assess the consumers' purchasing power and to offer to personalise the price of their offers provided that the data protection rules are respected (the individual has the right not to be subject to automated individual decision-making including profiling). However, consumers have to be informed when the price presented to them has been personalised on the basis of automated decision-making.

### **Information on ranking criteria**

Sellers should inform consumers of the main parameters determining possible ranking of offers or sales if any<sup>12</sup>.

*[Legal source: Article 5 E-commerce Directive; Article 6 Consumer Rights Directive; Article 7 § 4 UCDP; Article 20 Services Directive; Article 3 and 5 Directive 98/6/CE; Directive 2019/2161]*

## **5. Additional payments**

The seller is not allowed to use pre-ticked boxes for charging additional payments to the consumer. Rather, the seller has to obtain the express consent of the consumer to any extra payment in addition to the remuneration agreed upon for the seller's main contractual obligation, before the consumer is bound by the contract or offer.

If the seller does not respect such requirement, the consumer shall be entitled to reimbursement of this payment.

*[Legal source: Article 22 of the Consumer Rights Directive]*

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<sup>12</sup> See Directive EU 2019/2161

## 6. Means of payment

The website has to indicate clearly and no later than at the beginning of the ordering process **which means of payment are accepted** (e.g. Visa, Mastercard, PayPal).

Moreover, consumers cannot be charged any costs in respect of the use of a given means of payment that exceed the costs borne by the seller for the use of such means.

*[Legal source: Articles 8, 19 of the Consumer Rights Directive]*

## 7. Delivery restrictions

The website has to indicate clearly and no later than at the beginning of the ordering process whether any delivery restrictions apply.

Such information can be displayed on the e-shopping webpage or once the consumer has added the selected item to the shopping bag and is beginning to complete the order.

With regard to dual use items which may be covered by country restrictions, the seller shall have to make sure it complies with the relevant legal requirements, particularly Regulation EU 428/2009 and subsequent modifications, and that by selling the goods to customers in a particular country it does not infringe and/or circumvent the prohibition to sell.

*[Legal source: Article 8 § 3 of the Consumer Rights Directive]*

## 8. Geo-blocking and other discriminatory practices

While the seller is free to decide in which countries it shall sell its products, it should avoid discriminatory practices among customers. In particular the following practices are considered unlawful under European Union law.

### Access to online interface

Sellers should not, through the use of technological measures or otherwise, block or limit a customer from having full and equal access to its website, for reasons related to the customer's nationality, place of residence, or place of establishment. Such practices, such as: the adoption of techniques of automatic geo-location tools, which identify the location of the computer of the consumer and prevent him or her from accessing the originally selected website; the use of techniques that automatically redirect the customer to the country-specific website of another country; or the imposition of payment methods that allow payment only from one country, are considered unlawful discrimination according to European Union law.

Consequently, sellers should not design their websites, or apply technological means or payment methods, in a way that would in practice not allow customers from other EU Member States to easily complete their orders.

The use of redirection techniques is admitted only with the customer's explicit consent. Sellers should not be obliged to require a customer's explicit consent each time that customer visits the same website—the consent given once should be deemed to be valid for all subsequent visits of the same customer to the same website. It should always be possible, however, for the customer to withdraw such consent at any time.

If the customer is redirected, the original version of the website to which the customer initially sought access must remain easily accessible to that customer.

Such prohibitions shall not apply where the blocking, limitation of access or redirection with respect to certain customers or to customers in certain territories is necessary in order to ensure compliance with a legal requirement in European Union law or in the laws of EU Member States in accordance with Union law.

The duty of non-discrimination also applies with regard to the payment conditions. The seller is free to decide which means of payment to accept. However, it should not apply different

conditions for a payment transaction for reasons related to a customer's nationality, place of residence, the location of the payment account, the place of establishment of the payment service provider, or the place of issue of the payment instrument within the Union where a) the payment transaction is made through an electronic transfer within the same payment brand or category; b) the authentications requirements are fulfilled; and c) the payment is in a currency accepted by the consumer.

Where justified by objective reasons, this prohibition shall not prevent the seller from withholding the delivery of the goods until the seller has received confirmation that the payment transaction has been properly initiated.

Furthermore, the seller must not apply different conditions of access (e.g. sales prices) for reasons related to the customer's nationality or place of residence<sup>13</sup>. Customers from different countries should be entitled to purchase goods under the same conditions as a local customer.

This rule applies in particular when the seller offers, in its general conditions of access, delivery to a location in a Member State and the consumer intends to take delivery in that location or when the goods are collected at a location agreed upon between the seller and the customer is in a Member State in which the seller offers such an option in the general conditions of access. In this situation the consumer should be able to purchase goods, under the same conditions, including price and conditions relating to the delivery of the goods, as similar customers who are residents of or are established in the Member State in which the goods are delivered or collected. In such cases, for example, a customer shall have to pick up the goods in the country where the seller delivers or arrange, with its own means, the cross-border delivery of the goods. The reasoning behind such provisions is that consumers should be treated in the same manner when they are in the same situation.

The above prohibition shall not prevent sellers from offering general conditions of access, including net sale prices, which differ among Member States or within a Member State and which are offered to customers in a specific territory or to specific groups of customers on a non-discriminatory basis.

Apart from the above specific situations, different conditions and/or different prices applied to the consumer depending on its nationality and/or place of residence are lawful only if justified by objective reasons that can vary from country to country (such as additional costs incurred because of the distance involved or the technical characteristics of the provision of the service, or different market conditions, such as higher or lower demand influenced by seasonality, different vacation periods in the Member States and pricing by different competitors, or extra risks linked to rules differing from those of the Member State of establishment)<sup>14</sup>.

*[Legal source: Article 3, 4 and 5 Regulation EU 2018/302; Article 20 of the Services Directive]*

## 9. Promotional offers and advertisement

Promotional offers such as discounts, premiums and gifts, where permitted, have to be clearly identifiable as such, and the conditions which are to be met to qualify for them have to be easily accessible and be presented clearly and unambiguously. Please note that the seller has to make sure that such promotional offers and in particular premiums are permitted in the country where the seller is established and that they comply with the consumer requirements of the country to

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<sup>13</sup> The prohibition shall not apply if the seller is prevented by law from selling the goods or providing the services to certain customers or to customers in certain territories. Furthermore, with respect to the sale of books, the prohibition shall not prevent sellers from applying different prices to customers in certain territories insofar as they are required to do so by law.

<sup>14</sup> Sellers should check on the application of possible rules (laws and/or case law) that require a website to provide access to disabled people equivalent to that provided to other consumers (e.g. in US see The Americans with Disabilities Act). Compliance with such rules is usually satisfied through technical means and standards such as those provided by the World Wide Web Consortium's -W3C- (see <https://www.w3.org/WAI/standards-guidelines/>) (e.g. mouse and keyboard should allow the same functions, or when a video is displayed, a description of what is in the video should run at the same time).

which its services are directed. In particular, if the offer concerns only a certain number of items available, such number shall have to be indicated.

*[Legal source: Article 6 of the E-Commerce Directive]*

Any advertisement on the website should comply with the existing rules on advertising, in particular, that web advertising must not be misleading and/or create confusion with any products, trademarks, trade names or other distinguishing marks of a competitor. Furthermore, comparative advertising is not permitted if it is misleading.

Be aware that in some countries there are strict regulations on misleading advertising and certain advertising methods may be regarded as misleading and/or unfair competition. The seller should check the conformity of its advertising methods (e.g. use of superlative terms in Germany<sup>15</sup>) with relevant local law.

## 10. Consumer reviews and endorsement

When traders present consumer reviews of products on their websites, they should inform consumers whether processes or procedures are in place to ensure that the published reviews originate from consumers who have actually used or purchased the products, how the checks are made, and how reviews are processed. For example, if all reviews, either positive or negative, are posted or whether the reviews have been sponsored or influenced by a contractual relationship with a trader<sup>16</sup>.

## 11. General conditions of online sale

General Conditions of Online Sale have to be approved by the consumer before the consumer completes an order. In case of non-acceptance by the consumer of the General Conditions of Online Sale, the consumer should be technically prevented from concluding the transaction.

Moreover, the General Conditions of Online Sale must be made available in a technical format that allows the customer to store and reproduce them without possibility of changing the text.

It is also advisable to have a permanent link to the General Conditions of Online Sale at the bottom of the homepage of the website.

## 12. Right of withdrawal

The consumer has a period of 14 (fourteen) days to withdraw from the online sale contract, without giving any reason, and without incurring any costs other than the direct costs of returning the goods, unless the seller has agreed to bear them or the seller failed to inform the consumer that the consumer has to bear them. Furthermore, should the consumer choose a type of delivery different than the least expensive type of standard delivery offered by the seller, the consumer shall have to bear such costs.

### 12.1 Withdrawal period

The withdrawal period expires after 14 (fourteen) calendar days from the day on which the consumer, or a third party other than the carrier and indicated by the consumer, acquires physical possession of the goods.

#### Multiple goods

In the case of multiple goods ordered by the consumer in one order and delivered separately, the 14 (fourteen) days shall be calculated from the day on which the consumer or such third party acquires physical possession of the last good.

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<sup>15</sup> Sellers should also check possible rules on misleading advertising and advertising methods when selling outside the EU. For example, in China the use of superlative terms would also be challenged.

<sup>16</sup> According to the new Directive EU 2019/2161 such obligation will be applicable from May 28, 2022 and incorrect information on the consumer reviews may also constitute an unfair commercial practice. It is therefore advisable to provide clear information on the consumer reviews even prior to such date.

### **Good consisting of multiple lots or pieces**

In the case of delivery of a good consisting of multiple lots or pieces, the 14 (fourteen) days shall be calculated from the day on which the consumer or such third party acquires physical possession of the last lot or piece.

### **Regular delivery of goods**

In the case of contracts for regular delivery of goods during the defined period of time, the 14 (fourteen) days shall be calculated from the day on which the consumer or such third party acquires physical possession of the first good.

If the withdrawal period ends on a public holiday, Saturday or Sunday, the period shall end with the expiry of the last hour of the following working day.

*[Legal source: Article 9, 13, 14 Consumer Rights Directive; Regulation EC 1182/71 determining the rules applicable to periods, dates and the time limits]*

## **12.2 Exception to the right of withdrawal**

The right of withdrawal does not apply in the following circumstances:

- a.** goods made to the consumer's specifications or clearly personalised (e.g. tailor-made curtains or shoes, customised furniture);
- b.** goods which are liable to deteriorate or expire rapidly;
- c.** sealed goods which are not suitable for return due to health protection or hygiene reasons and were unsealed after delivery;
- d.** goods which are, after delivery, according to their nature, inseparably mixed with other items;
- e.** alcoholic beverages, the price of which has been agreed upon at the time of the conclusion of the sales contract, the delivery of which can only take place after 30 (thirty) days and the actual value of which is dependent on fluctuations in the market which cannot be controlled by the seller;
- f.** sealed audio or video recordings or computer software which were unsealed after delivery; and
- g.** newspapers, periodicals or magazines with the exception of subscription contracts for the supply of such publications.

The consumer must be informed where goods fall under one of these exceptions.

*[Legal source: Article 16 Consumer Rights Directive]*

## **12.3 Information on the right of withdrawal**

The seller has to inform the consumer of the right of withdrawal. In case of non-fulfilment of such obligation, the withdrawal period expires 12 (twelve) months from the end of the initial withdrawal period, and where the seller duly informs the consumer during these 12 (twelve) months, the withdrawal period shall expire 14 (fourteen) days after the day upon which the consumer receives such information.

The information has to be provided in a clear and comprehensible manner, before the consumer is bound by the sale contract.

The seller is considered to have met its obligation to inform the consumer of the right of withdrawal by using the model instruction on withdrawal set out in Annex I of the Consumer Rights Directive; a completed example of the model, relating to online goods, is below.

## Consumer Rights Directive

### INFORMATION CONCERNING THE EXERCISE OF THE RIGHT OF WITHDRAWAL

#### Right of withdrawal

You have the right to withdraw from this contract within 14 days without giving any reason.

The withdrawal period will expire after 14 days from the day on which you acquire, or a third party other than the carrier and indicated by you acquires, physical possession of the goods.

To exercise the right of withdrawal, you must inform us [*insert contact details*] of your decision to withdraw from this contract by an unequivocal statement (e.g. a letter sent by post, fax or e-mail). You may use the attached model withdrawal form, but it is not obligatory. You can also electronically fill in and submit the model withdrawal form or any other unequivocal statement on our website [*insert Internet address*]. If you use this option, we will communicate to you an acknowledgement of receipt of such a withdrawal on a durable medium (e.g. by e-mail) without delay.

To meet the withdrawal deadline, it is sufficient for you to send your communication concerning your exercise of the right of withdrawal before the withdrawal period has expired.

#### Effects of withdrawal

If you withdraw from this contract, we shall reimburse to you all payments received from you, including the costs of delivery (with the exception of the supplementary costs resulting from your choice of a type of delivery other than the least expensive type of standard delivery offered by us), without undue delay and in any event not later than 14 days from the day on which we are informed about your decision to withdraw from this contract. We will carry out such reimbursement using the same means of payment as you used for the initial transaction, unless you have expressly agreed otherwise; in any event, you will not incur any fees as a result of such reimbursement. We may withhold reimbursement until we have received the goods back or you have supplied evidence of having sent back the goods, whichever is the earliest.

You shall send back the goods or hand them over to us or ... [*insert the name and geographical address, where applicable, of the person authorised by you to receive the goods*], without undue delay and in any event not later than 14 days from the day on which you communicate your withdrawal from this contract to us. The deadline is met if you send back the goods before the period of 14 days has expired. You will have to bear the direct cost of returning the goods.

You are liable only for any diminished value of the goods resulting from the handling other than what is necessary to establish the nature, characteristics and functioning of the goods.

The model form annexed to the Consumer Rights Directive is not mandatory and the seller may adjust it to its needs, provided that the requested information is given to the consumer.

The direct cost of returning the goods is paid by the consumer, unless the seller has failed to inform the consumer of this requirement.

The seller may offer to collect the goods itself, in which case no costs of returning the goods will be borne by the consumer.

As mentioned above, it is important that the information on the right of withdrawal is given before the consumer is bound by the contract. It should be sufficient that such information is contained in the General Conditions of Online Sale to be approved by the consumer during the purchase procedure before the consumer forwards the order to the seller.

However, it is advisable to highlight the articles of the General Conditions of Online Sale related to the right of withdrawal, for example by a graphic representation in order to distinguish such

right from the other provisions and fulfil the requirement of clearness and comprehensibility, as requested by some national authorities.

A link to the information on the right of withdrawal at the bottom of the homepage is also strongly advised but not sufficient to fulfil the requirements of giving information to the consumer and would be simply an additional means of transmitting the information.

*[Legal source: Article 11 Consumer Rights Directive]*

#### **12.4 Exercise of the right of withdrawal**

As noted above in Section 12.3, it is advisable to make available on the webpage the model withdrawal form to be used by the consumer in order to exercise its right of withdrawal, which may follow the model recommended by the Consumer Rights Directive (see sample completed form above in Section 12.3) or any other unequivocal statement of intent to withdraw. The withdrawal form may be returned by the consumer by post, e-mail etc, or seller may provide the option to fill in the form electronically and submit it through its website. It is therefore advisable that the website of the seller is constructed accordingly.

In such a case the seller shall have to communicate to the consumer an acknowledgement of receipt of such withdrawal form, on a durable medium, without delay (e.g. e-mail).

#### **12.5 Effects of withdrawal**

The exercise of the right of withdrawal terminates the obligations of the parties who will no longer be bound to perform the contract.

*[Legal source: Article 12 Consumer Rights Directive]*

#### **12.6 Reimbursement of payment received by the consumer**

Within 14 (fourteen) days from the day on which the seller is informed of the consumer's decision to withdraw from the contract, the seller has to reimburse all payments received from the consumer, including, if applicable, the costs of delivery. However, the seller may withhold the reimbursement until it has received the goods back, or until the consumer has supplied evidence of having sent back the goods, whichever is earlier. This shall not apply where the seller has offered to collect the goods itself, in which case the seller has to reimburse all payments within 14 (fourteen) days from receipt of the notice of withdrawal.

The seller shall not be required to reimburse the supplementary costs, if the consumer has expressly opted for a type of delivery other than the least expensive type of standard delivery offered by the seller.

The seller has to use the same means of payment for the refund as the consumer used for the initial transaction. The seller and consumer can agree on a different method of refund, provided that the consumer does not incur any fees as a result of using a different method.

The seller should check whether particular countries provide for additional requirements dealing with the right of reimbursement.

*[Legal source: Article 13 Consumer Rights Directive]*

#### **12.7 Responsibility of the consumer for mishandling of goods during the withdrawal period**

The consumer is liable for any diminished value of the goods resulting from the handling of the goods other than in a manner necessary to establish the nature, characteristics and functioning of the goods. In order to establish the nature, characteristics and functioning of the goods, the consumer should only handle and inspect them in the same manner as he or she would be allowed to in a shop. For example, the consumer should only try on a garment and should not be allowed to wear it. Consequently, the consumer should handle and inspect the goods with due care during the withdrawal period.

In case of use of products by the consumer to an extent greater than that necessary to establish the nature, characteristics and functioning of the goods, the consumer should not lose the right to withdraw but should be liable for any diminished value of the goods.

European law does not regulate whether or not the seller is entitled to unilaterally charge the consumer or reduce the amount of any refund due to the consumer in order to compensate for the diminished value of the goods. These issues are therefore subject to the laws of Member States.

The seller should check whether particular countries provide for the right of the seller to reduce the amount of refund and compensate for the diminished value of goods.

The consumer shall in any event not be liable for diminished value of the goods where the seller has failed to provide notice of the right of withdrawal.

The seller could, in its General Conditions of Online Sale, state that the seller is allowed a right of set off, in which case seller has to specify the criteria for calculating the damage.

*[Legal source: Article 14 § 2 Consumer Rights Directive]*

### 12.8 Obligation of the consumer in the event of withdrawal<sup>17</sup>

Unless the seller has offered to collect the goods itself, the consumer has to send back the goods or hand them over to the seller or to a person authorised by the seller to receive the goods, without undue delay and in any event not later than 14 (fourteen) days from the day on which he or she has given notice of the withdrawal.

The consumer shall bear only the direct cost of returning the goods unless the seller has agreed to bear them or the seller has failed to inform the consumer that the consumer has to bear them.

*[Legal source: Article 14 § 2 Consumer Rights Directive]*

## 13. Placing of the order

The seller has to ensure that the consumer, when placing its order, explicitly acknowledges that the order implies an obligation to pay. Consequently the button, or a similar function, used to place the order has to be clearly labelled with the words “**order with obligation to pay**”, as expressly suggested by Community law, or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay the seller. (e.g. “**Buy now**”, “**Pay now**”)

If the seller has not complied with this obligation, the consumer shall not be bound by the contract order.

*[Legal source: Article 8 § 2 of the Consumer Rights Directive]*

## 14. Language

European law provides that Member States may maintain or introduce in their national law language requirements regarding information on the goods being sold and contractual information, in order to ensure that consumers can easily understand such information. The language of any country to which the online sale of goods is directed is therefore highly recommended.

Where a seller wants to structure its website using only seller’s local language, it should always

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<sup>17</sup> Directive EU 2019/2161 specifically deals with the case of withdrawal from the sale contract of goods with digital content, by providing that in the event of withdrawal from the contract, the consumer has to refrain from using the digital content and the seller may prevent any further use of the digital content, by making it inaccessible to the consumer or disabling the user account. Furthermore the trader shall have to refrain from using any content, other than personal data (for which the seller has to comply with the data protection rules), that was provided by the consumer when using the digital content, save in case such content has no utility outside the context of the digital content supplied by the seller, only relates to the consumer’s activity when using the digital content, has been aggregated with other data by the seller and cannot be disaggregated without disproportionate efforts, or has been generated jointly by the consumer and others, and other consumers are able to continue to make use of the content. The seller shall have to make available, at the request of consumer, the content other than the personal data, which was provided by the consumer when using the digital content.

check whether or not any Member State to which the website is directed has imposed any language requirements and, if so, make sure that the concerned information is provided in the required language.

*[Legal source: Article 8 on the General Safety of Products Directive (2001/95/EC); Recital 15, Article 6 of the Consumer Rights Directive]*

Furthermore, particular attention should be paid to the case where the website is directed to consumers of a country where a language is spoken that is different from language in which the General Conditions of Online Sale are made available; such practice could be considered as misleading or be prohibited (see EU Member State Notes, below). Where not prohibited, in such cases it is advisable to include on the website a box that the consumer can tick saying he or she understands the language in which the order is being processed.

## 15. Link to ODR platform and information on ADR entities<sup>18</sup>

The ODR platform is an interactive website on out-of-court dispute resolution for disputes arising from online transactions, which offers information and allows consumers and sellers to submit complaints, which are electronically transmitted to any competent alternative dispute resolution entities (ADR) linked to the platform.

Sellers established in the EU shall provide an electronic link to the ODR platform on their websites. Such link has to be easily accessible for the consumer, therefore it is advisable to indicate such link at the foot of the homepage.

Furthermore, if the seller has undertaken to use one or more ADR entities to resolve disputes with consumers, or is obliged to do so, seller must provide a link to the ODR platform and also information on the existence of the ODR platform, as well as information on the relevant ADR entity and on the possibility of using the ODR platform for resolving the disputes arising out of the sale contract. It is not clear whether there is an obligation also to provide such information in the General Conditions of Online Sale or whether the provision of this information is simply highly recommended.

Moreover, individual EU countries may provide for additional obligations, see EU Member State Notes, below.

*[Legal source: Article 14 Regulation on online dispute resolution for consumer disputes<sup>19</sup>; Article 13 Directive on alternative dispute resolution for consumers' disputes<sup>20</sup>]*

## 16. Confirmation of the contract concluded online

Once the online sale contract is concluded, the seller has to provide the consumer with the confirmation of the contract, in a durable medium within a reasonable time after contract conclusion, and in any case no later than the time of the delivery of the goods. The confirmation has to include all the pre-contractual information listed (as in Section 3, above) unless the seller has already provided that information to the consumer in a durable medium prior to the conclusion of the contract.

The requirement of a 'durable medium' is met if the consumer is able to store and print the information, so that the consumer may save it and reproduce it unchanged. General Conditions of Online Sale which are normally provided in pdf format meet these requirements. Consequently, the seller may provide the consumer with a confirmation mail containing only the pre-contractual

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<sup>18</sup> At May 1, 2020: <https://ec.europa.eu/consumers/odr/main/?event=main.trader.register>

<sup>19</sup> Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR). Available online at May 1, 2020: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0524>

<sup>20</sup> Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR). Available online at May 1, 2020: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0011>

information not present in the General Conditions of Online Sale.

**For example:**

*Dear client,*

*We confirm your order number ... of the following product "...", [insert image];*

*Delivery address ...*

*Payment: credit card ....*

*Price of product .... + TVA ... + Total price*

A customer's personal account on the seller's website where the seller uploads the information related to the sale purchase may also be considered a durable medium, provided that the consumer is able to store and reproduce it unchanged.

*[Legal source: Article 8§7 Consumer Rights Directive; Court of Justice July 5, 2012, C-49/11, Content Services vs. Bundesarbeitskammer; Court of Justice May 21, 2015 C-322/14, El Majdoub vs Carsontheweb]*

## 17. Privacy issues

### 17.1 Data protection 'by design and by default'

The website has to be designed and managed taking into account all available state-of-the-art measures, the cost of implementation, and the nature, scope, context and purposes of processing client data as well as the risks related to client data (principle of data protection 'by design and by default'). In particular, the processor should implement all appropriate technical and organisational measures, such as pseudonymisation and data minimisation, in an effective manner and to integrate the necessary safeguards into the order processing to comply with data protection laws.

*[Legal source: Article 25 GDPR<sup>21</sup>]*

### 17.2 Cookies

Cookies can be of various types, in particular, it is important to distinguish the following three different types:

#### **"technical cookies"**

Used for the sole purpose of carrying out or facilitating the navigation of the website or strictly necessary in order to provide a service explicitly requested by the user;

#### **"analytical cookies"**

Statistical audience-measuring cookies not strictly necessary to provide a service requested by the user; and

#### **"tracking cookies"**

Used to track individuals, for additional purposes such as behavioural advertising and analytic or market research, etc.

If the website uses technical cookies, seller has to inform the user of the use of such cookies but is exempted from requiring consent.

If the website uses "analytical", "tracking" or cookies other than technical cookies, seller has

<sup>21</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance). Available online at May 1, 2020: <https://eur-lex.europa.eu/eli/reg/2016/679/oj>

to inform the user by identifying the type of cookies used and whether or not they are third parties' cookies and has to require user's specific consent. Should the user not provide consent, navigation on the website should still be allowed and the cookies for which no consent has been provided should be disabled<sup>22</sup>.

The seller must make immediately visible to users accessing the website a banner which must briefly include the following information:

- a. that the website uses cookies;
- b. a clickable link to the extended information notice, including information on the various types of cookies (technical and analytics and possible profiling cookies) along with tools to select the cookies to be enabled; and
- c. the possibility to consent to or deny the use of cookies or the warning that if the user continues browsing by accessing any other section or selecting any item on the website (e.g. by clicking a picture or a link), he or she signifies his or her consent to the use of cookies.

An extended information notice on the use of cookies can be then provided at the foot of the homepage together with the privacy policy. In such extended information, the seller shall have to specify the nature of the cookies used. In case of "profiling cookies", which are aimed at creating personally identifiable user profiles by analysing consumer choices or monitoring the use of electronic communication (e.g. used to send ads messages in line with the preferences shown by the user during navigation), such use shall have to be specified in the privacy policy and the user has to specifically consent to the use of such cookies.

[Legal source: Article 5.3 E-Privacy Directive<sup>23</sup>]

### 17.3 Privacy information

The seller has to provide the consumer information on the processing of its data. The relevant information to be provided under EU law is the following:

- a. identity of the data controller and its representative, if any;
- b. identity of the data protection officer, if any;
- c. purposes of that processing and the legal bases of the processing;
- d. the categories of personal data being processed;
- e. the recipients or categories of recipients, if any;
- f. the possible transfer of the data to a non-EU-country and the existence or absence of an adequacy decision by the Commission, or reference to the appropriate or suitable safeguards for the protection of data and the means to obtain a copy of them or where they have been made available;
- g. the period for which the personal data will be stored, or if that is not possible, the criteria used to determine that period;
- h. the existence of the right to request from the controller access to and rectification or erasure of personal data or restriction of processing concerning the data subject, and to object to processing, as well as the right to data portability;

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**22** Please note that according to the Proposal for an EU Regulation on Privacy and Electronic Communications dated 10.1.2017 COM(2017) 10 final, no consent should be needed for technical cookies as well as cookies necessary for web audience measuring, save when made by a third party. A specific informed consent shall be needed for any other type of cookies although the Proposal intends to simplify the means for obtaining consent which may be expressed by using the appropriate technical settings of a software application enabling access to the Internet (e.g. browsers such as Safari). For such purposes, in application of the principle of privacy 'by design and by default', software permitting electronic communications shall offer the option to prevent third parties from storing information on the terminal equipment of an end user or processing information already stored on that equipment.

**23** Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

Available online at May 1, 2020: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32006L0024>

- i. the right to lodge a complaint with a supervisory authority;
- j. that the provision of personal data is a requirement necessary to enter into the sale contract, that the data subject is obliged to provide the personal data in order to conclude and fulfil the online sale, and the possible consequences of failure to provide such data;
- k. the existence of automated decision-making, including profiling; and
- l. where the controller intends to further process the personal data for a purpose other than that of the online sale for which the personal data were collected (for example, processing the subject's IP address for geo-location), information, provided prior to that further processing, on that other purpose and any relevant further information.

If the seller intends to use the data collected for purposes that are different from the performance of the sale agreement (e.g. marketing / profiling purposes), it shall have to specifically inform the data subject and request his or her consent.

The privacy information should be provided during the purchase procedure where personal data are collected online, as well as being directly accessible on the homepage of the website, generally through a link at the foot of the homepage.

If the privacy information has been already provided to the data subject (e.g. during a previous online sale), it is not necessary to provide the same privacy information for future online sales to the same data subject.

Where the website offers customer service the seller should check to ensure compliance with relevant privacy rules. For example, where customer service is provided through a call centre a link to the privacy policy of the provider of such service should be present on the website and particular conditions may apply (e.g. the customer should be informed in advance as to where the call centre is physically located and if such location is in a non-EU country, be guaranteed a level of protection of personal data equivalent to that granted under EU regulation<sup>24</sup>).

*[Legal source: Article 13 GDPR]*

## 17.4 Consent

The simple processing of personal consumer data in order to manage the online sale of goods is not subject to specific consent.

However, should the controller intend to process the personal data for a purpose other than that of the online sale for which the personal data were collected, (e.g. for marketing or profiling purposes), a specific consent for such further use shall have to be obtained by the data subject. In such case, the request for consent has to be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language. In application of the principles of privacy 'by design and by default', the website has to be designed in such a way as to allow the user to expressly consent to such specific use.

Furthermore, the performance of the sale contract should not be conditional on consent to the processing of personal data for such different purposes that are not necessary for the performance of the sale contract.

The use of pre-ticked opt-in boxes in order to acquire consent is not permitted. The user has to perform a clear and affirmative act to consent to the processing; e.g. by actively ticking an optional box stating, "*I consent*".

*[Legal source: Article 6, 7 GDPR]*

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<sup>24</sup> In Italy, where a call centre is located outside the EU, notice has to be given to the Ministry of Labour, the Ministry of Economic Development and the Data Protection Authority. The sanction for the non-compliance with such obligation may be up to € 150.000,00 (see Legal Decree n.83 dated 22.06.2012).

## 17.5 Privacy policy

Any collection of personal data from an individual via website implies prior supply of information on the processing of data listing the minimum set of concrete measures to be put in place to process the data.

An extended text including privacy information regarding all data processed through the website, as well as the cookie information, has to be easily accessible to all Internet users not only when they start the ordering process but at an earlier stage, when they access the homepage of the website.

The Article 29 Working Party, a European advisory body charged with protection of privacy and personal data, recommends that the title of the heading Internet users will click in order to access the privacy policy document should be sufficiently highlighted (e.g. “*personal data/privacy protection*”) to give the users a clear idea of the content to which he or she is being directed. The content of the information to which the Internet user is directed should also be sufficiently specific.

The information contained in the privacy policy may be provided in combination with standardised icons, in order to give in an easily visible, intelligible and clearly legible manner, a meaningful overview of the intended processing. In such case, the icons shall have to be machine-readable. The Article 29 Working Party is drafting a set of standardised icons which can be used for such purpose.

*[Legal source: Article 12 GDPR]*

## 18. Terms of use

The website should also include a shortcut to “Website terms of use” to inform all potential users (whether customers/clients or not) of the functioning and rules of the website. These terms of use should be in a document separate from the General Conditions of Online Sale.

The terms of use should include the contact details of the entity in the name of which the website has been registered as well as the details of the entity that is operating the website, if different.

### 18.1 Disclaimer

It is advisable to show a disclaimer on possible links to third parties’ websites not controlled by the seller. Any other disclaimer or limitation of liability regarding the content, materials and functioning of the website has to be carefully evaluated to comply with applicable consumer protection law. In any case, the seller may declare that it shall do its best to verify the correctness of the content and materials uploaded on the website and keep it updated, but cannot exclude possible errors and/or possible interruption of the functioning of the website due to third-party events not under the control of the website holder or while updating and/or changing the content and information displayed on the website.

If the website allows hosting of information that may be provided by third parties (e.g. a blog) the seller should check whether or not the applicable law provides for information requirements or specific duties of care regarding such information. It is advisable in such a case to publish a code of conduct for the information provided by third parties as well as a disclaimer on the website regarding the content of such information.

*[Legal source: Article 14 and 15 E-Commerce Directive]*

### 18.2 Unauthorised use

The terms of use should list unauthorised uses of the website by the user. In particular the following uses should be indicated as prohibited:

- a. engaging in spidering, “screen scraping,” “database scraping,” harvesting of e-mail addresses, wireless addresses or other contact or personal information, or any other automatic means of accessing, logging-in or registering on the website or for any services or features offered on or through the website, or obtaining lists of users or obtaining or accessing other information or features on, from or through the website or the services offered on or through the website,

including, without limitation, any information residing on any server or database connected to the website or any services offered on or through the website;

- b. obtaining or attempting to obtain unauthorized access to computer systems, materials, information or any services made available on or through the website through any means;
- c. using the website or the services made available on or through the website in any manner with the intent to interrupt, damage, disable, overburden, impair the website or such services, or interfere with any other party's use and enjoyment of the website including, without limitation, sending mass unsolicited messages or "flooding" servers with requests;
- d. using the website or the website's services or features in violation of any intellectual property or other proprietary or legal rights;
- e. using the website or the website's services in violation of any applicable law;
- f. attempting (or encouraging or supporting anyone else's attempt) to circumvent, reverse engineer, decrypt, or otherwise alter or interfere with the website and the content, or make unauthorized use thereof as well as obtaining or attempting to obtain any materials or information through any means not intentionally made publicly available or provided for through the website;
- g. misusing the website by knowingly introducing viruses, trojans, worms, logic bombs or other content which is malicious or technologically harmful;
- h. attempting to gain unauthorized access to the website, the server on which the website is stored or any server, computer or database connected to the website;
- i. attacking the website via a denial-of-service attack or a distributed denial-of-service attack; and
- j. posting illegal, inappropriate and/or offensive content.

While the above-mentioned uses would likely be considered unlawful under many applicable laws, it is nevertheless recommended to point out any possible unauthorized use and to consequently provide that, in case of infringement of such provisions, the user's access to the website may be restricted, suspended and/or terminated.

### 18.3 Intellectual property and trademarks

A notice identifying the trademarks of the seller which appear on the website and regulating their use is also recommended.

#### **For Example**

*The website, and all material, elements and content included on the website (including drawings, designs, illustrations, photographs, text, computer code, sound tracks, and graphics) which appear on this website as well as the look and feel of and know-how related to the website, are the exclusive property of ..... and/or any of its subsidiaries or affiliates and the use by you of the Trademarks or any such material, look and feel and know how, in any manner, is strictly prohibited. Nothing contained in the website should be construed as granting by implication or otherwise, any license or right to use any Trademarks or other material displayed on this website without our written permission. You have permission to electronically copy and print hard copies of pages from this website solely in connection with non-commercial purposes related to placing an order or shopping with the website. Unless we give you specific permission in advance, any other use of this website, its content and its information, is strictly prohibited.*

It is important to make sure with the website designer that all intellectual property rights related to the website are owned and legitimately exercised by the seller.

Finally, it is strongly recommended that at the foot of the homepage the following three links are always present: privacy policy, terms of use, and General Conditions of Online Sale.

## PART TWO: OTHER CONSUMER PROTECTION REQUIREMENTS

### 19. Conclusion of the contract

The rules governing the conclusion of the online contract are dictated by the national laws applicable to the sale contract (see **Section 27**, below). The seller should always check the applicable rules on the formation of the contract.

It is a general principle, recognised in a majority of jurisdictions, that a contract is concluded at the moment when an offer made by one party to the contract is accepted by the other party.

Since the exact moment at which the acceptance becomes effective may vary among jurisdictions (e.g. in some jurisdictions, when acceptance is sent, in others, when acceptance is received) it is strongly recommended to specify such moment expressly in the General Conditions of Online Sale.

Generally, sellers tend to apply one of two methods to conclude the online sale contract:

#### **Order of the consumer considered as acceptance**

The display of all products and conditions of sale on the website is considered an offer which the consumer accepts by forwarding the order (e.g. by clicking the “Buy now” button and/or acceptance button).

#### **Order of the consumer considered as an offer<sup>25</sup>**

The display of all products and conditions of sale on the website is considered an “invitation to offer”; the consumer, by submitting the order, makes an offer which shall be subject to the seller’s acceptance. The seller shall accept the order in a second step, by sending an e-mail of the order’s acceptance.

This second method is sometimes used when the seller doesn’t want to immediately bind itself, but wants to reserve acceptance until, e.g., having had the chance to check that the goods are available.

In order to avoid such provision being considered an unfair term in a consumer contract or a misleading practice, the consumer should always be able to revoke its order until the time the seller has given its acceptance.

*[Legal source: Article 10 of Regulation Rome I<sup>26</sup>; Article 9 of E-Commerce Directive; § (c) of the Annex to Unfair Terms Directive<sup>27</sup>]*

### 20. Requirements upon receipt of the order

The seller has to acknowledge the receipt of the order without undue delay and by electronic means. This obligation may be fulfilled e.g. by sending an e-mail which acknowledges the receipt of the order. The seller should check whether particular countries provide for additional information to be provided together with the order receipt acknowledgment.

*[Legal source: Article 11 of E-Commerce Directive]*

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<sup>25</sup> Sellers should check if such option is admitted under the applicable law also when selling outside the EU. For example, in Russia mandatory rules do not admit it.

<sup>26</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). Available online at May 1, 2020: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008R0593>

<sup>27</sup> Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (Text with EEA relevance). Available online at May 1, 2020: <https://eur-lex.europa.eu/eli/dir/2019/2161/oj>

## 21. Delivery

The parties may agree on the delivery time.

In the absence of an agreement on the time of delivery, delivery has to take place without delay and not more than 30 (thirty) days after the conclusion of the contract.

In case of non-fulfilment of such obligation the consumer can send a notice to the seller to deliver the goods within an additional period and if the seller fails to deliver the goods within that additional period of time the consumer is entitled to terminate the contract.

Where the seller has refused to deliver the goods or where delivery within the agreed delivery period is essential taking into account all the circumstances attending the conclusion of the contract, or where the consumer informs the seller, prior to the conclusion of the contract, that delivery by or on a specified date is essential and the seller fails to deliver the goods at the time agreed upon with the consumer or within 30 (thirty) days from the conclusion of the contract, the consumer shall be entitled to terminate the contract immediately. Upon termination of the contract, the seller shall, without undue delay, reimburse all sums paid under the contract.

In addition to the termination of the contract for non-delivery of the goods, the consumer may have recourse to other remedies provided for by national law of the EU Member States.

The seller should check whether particular countries provide for remedies other than the termination of the contract.

*[Legal source: Article 18 Consumer Rights Directive]*

## 22. Risk of accidental damage or loss

According to European Community law, the risk of loss of or damage to the goods passes to the consumer only when consumer or a third party indicated by the consumer—other than the carrier—has acquired physical possession of the goods.

However, if the carrier was commissioned by the consumer to carry the goods and that choice was not offered by the seller, the risk shall pass to the consumer upon delivery to the carrier, without prejudice to the rights of the consumer against the carrier.

Apart from such cases, it is not possible for the seller to agree on a different time for the passing of the risk.

European law does not regulate the case of accidental damage or loss during the return of goods when the consumer has withdrawn from the contract. In such case, it may be that the risk would be deemed to belong to the consumer since the risk will already have passed to the consumer once it acquired physical possession of the goods.

*[Legal source: Recital 55, Article 20 of the Consumer Rights Directive]*

## 23. Conformity of goods

The seller shall be liable for any lack of conformity which exists at the time the goods were delivered and which becomes apparent within 2 (two) years after delivery.

A reminder of the consumer legal guarantee has to be provided to the consumer before it is bound by the contract. Such reminder is normally contained in the General Conditions of Online Sale. The legal guarantee provided by the consumer under Community law consists of the following common provisions:

## CONFORMITY WITH THE CONTRACT

The seller must deliver goods to the consumer which are in conformity with the contract of sale. Consumer goods are presumed to be in conformity with the contract if they:

- a. comply with the description given by the seller and possess the quality of goods which the seller has held out to the consumer as a sample or model;
- b. are fit for any particular purpose for which the consumer requires them and which consumer made known to the seller at the time of conclusion of the contract and which the seller has accepted;
- c. are fit for the purposes for which goods of the same type are normally used;
- d. show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or its representative, particularly in advertising or labelling.

There shall be deemed not to be a lack of conformity if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware, of the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer.

The seller shall not be bound by public statement as referred in paragraph d), if seller shows that at the time of conclusion of the contract the statement had been correct.

### Rights of the consumer

1. The seller shall be liable to the consumer for any lack of conformity which exists at the time the goods were delivered.
2. In the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement, in accordance with paragraph 3, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods, in accordance with paragraphs 5 and 6.
3. In the first place, the consumer may require the seller to repair the goods or replace them, in either case free of charge, unless this is impossible or disproportionate. A remedy shall be deemed to be disproportionate if it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable, taking into account:
  - the value the goods would have if there were no lack of conformity,
  - the significance of the lack of conformity, and
  - whether the alternative remedy could be completed without significant inconvenience to the consumer.

Any repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods.

4. The terms «free of charge» in paragraphs 2 and 3 refer to the necessary costs incurred to bring the goods into conformity, particularly the cost of postage, labour and materials.
5. The consumer may require an appropriate reduction of the price or have the contract rescinded if:
  - the consumer is entitled to neither repair nor replacement, or
  - the seller has not completed the remedy within a reasonable time, or
  - the seller has not completed the remedy without significant inconvenience to the consumer.

The consumer is not entitled to have the contract rescinded if the lack of conformity is minor.

[Legal source: Articles 2, 3 and 6 Consumer Sales and Guarantee Directive (1999/44/EC)<sup>28</sup>]

Any contractual term which directly or indirectly waives or restricts the rights of the consumer to such legal guarantee shall not be binding on the consumer.

### 23.1 Time limits

The seller is held liable where the lack of conformity becomes apparent within 2 (two) years from delivery of the goods. Unless proved otherwise, any lack of conformity which becomes apparent within 6 (six) months<sup>29</sup> of delivery of the goods shall be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity<sup>30</sup>.

Member States may provide that, in order to benefit from this right, the consumer must inform the seller of the lack of conformity within a period of 2 (two) months from its discovery. Member States may furthermore adopt longer time limits to protect consumers. The seller should check whether particular countries provide for more stringent provisions<sup>31</sup>.

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28 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. Available online at May 1, 2020: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31999L0044>

Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (Text with EEA relevance.) Available online at May 1, 2020: [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:OJ.L\\_.2019.136.01.0028.01.ENG](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:OJ.L_.2019.136.01.0028.01.ENG)

From January 1, 2022, Directive 1999/44/EC shall be repealed and Directive UE 2019/771 dated May 20, 2019 shall become applicable. According to the new Directive the requirements for conformity of sales contract goods are distinguished in subjective and objective requirements and both of them have to be met.

**Subjective requirements:** the goods, where applicable, shall have to: (a) be of the description, type, quantity and quality, and possess the functionality, compatibility, interoperability and other features, as required by the sales contract; (b) be fit for any particular purpose for which the consumer requires them and which the consumer made known to the seller at the latest at the time of the conclusion of the sales contract, and in respect of which the seller has given acceptance; (c) be delivered with all accessories and instructions, including on installation, as stipulated by the sales contract; and (d) be supplied with updates as stipulated by the sales contract.

**Objective requirements:** the goods shall have to: (a) be fit for the purposes for which goods of the same type would normally be used, taking into account, where applicable, any existing Union and national law, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct; (b) where applicable, be of the quality and correspond to the description of a sample or model that the seller made available to the consumer before the conclusion of the contract; (c) where applicable, be delivered along with such accessories, including packaging, installation instructions or other instructions, as the consumer may reasonably expect to receive; and (d) be of the quantity and possess the qualities and other features, including in relation to durability, functionality, compatibility and security normal for goods of the same type and which the consumer may reasonably expect given the nature of the goods and taking into account any public statement made by or on behalf of the seller, or other persons in previous links of the chain of transactions, including the producer, particularly in advertising or on labelling.

Furthermore, in case of goods with digital elements, the seller shall ensure that the consumer is informed of and supplied with updates, including security updates, that are necessary to keep those goods in conformity, for the period of time: (a) that the consumer may reasonably expect given the type and purpose of the goods and the digital elements, and taking into account the circumstances and nature of the contract, where the sales contract provides for a single act of supply of the digital content or digital service; or (b) where the sales contract provides for a continuous supply of the digital content or digital service over a period of time, for the period of time of two years or in case of a supply for over two years, for the period of time during which the digital content or digital service is to be supplied.

**Rights of the consumer.** In case of lack of conformity the consumer shall be first of all entitled to repair or replacement. Provisions related to such remedies remain substantially unchanged from the respective provisions of Directive 1999/44. For price reduction and termination of the sale agreement the new Directive EU 2019/771 states that such remedies may apply in the following cases: a) the seller has not completed repair or replacement or, where applicable, has not completed repair or replacement within a reasonable period of time from the moment the seller has been informed by the consumer about the lack of conformity and without any significant inconvenience to the consumer, or the seller has refused to bring the goods into conformity, b) a lack of conformity appears despite the seller having attempted to bring the goods into conformity; c) the lack of conformity is of such a serious nature as to justify an immediate price reduction or termination of the sales contract; or d) the seller has declared, or it is clear from the circumstances, that the seller will not bring the goods into conformity within a reasonable time, or without significant inconvenience for the consumer. Furthermore the consumer shall not be entitled to terminate the contract if the lack of conformity is minor (the burden on the entirety of the lack of conformity being on the seller). A new provision of the Directive EU 2019/771 is related to sale contracts of multiple goods; in case the lack of conformity relates only to one or some of the goods delivered under the same sale contract and there is a ground for termination of the sale contract, only in relation to those goods, the consumer may also terminate the agreement with the other goods even if these are in conformity, if the consumer cannot reasonably be expected to accept to keep only the conforming goods.

29 According to Directive EU 2019/771, applicable from 1 January 2022, the presumption period shall be of **one year** from delivery. Member States may however maintain or introduce a presumption period of two years.

30 According to Directive EU 2019/771, where the contract provides for a continuous supply for more than two years, the seller shall be liable for any lack of conformity of the digital content or digital service that occurs or becomes apparent within the period of time during which the digital content or digital service is to be supplied under the sales contract.

31 Also according to Directive EU 2019/771, Member States may adopt more stringent provisions as to time limits to protect consumers,

## 23.2 Replaced goods

In case of replacement of goods Member States may provide for a suspension/interruption of the limitation period. In some countries once a replacement item is delivered to a consumer, a new legal guarantee period starts. Sellers should check the specific provisions of individual countries.

*[Legal source: Recital 18, Consumer's right Directive<sup>32</sup>]*

## 23.3 Reimbursement of the price of goods

Member States can also provide that any reimbursement to the consumer may be reduced to take account of the use the consumer has made of the goods since they were delivered. The seller should therefore check whether such possibility is provided for in the country in which it is selling its products.

## 24. Commercial guarantee

In addition to the legal guarantee, the seller may provide a conventional, or commercial, guarantee, which guarantees are fully legitimate. The commercial guarantee must provide for different, additional rights compared to those legally provided for by the seller. The commercial guarantee shall be legally binding on the seller under the conditions laid out in the guarantee statement and any associated promotional activities.

In order not to mislead the consumer, Community law requires that such conventional guarantees should: (i) state that the consumer has legal rights under applicable national legislation governing the sale of consumer goods and make clear that those rights are not affected by the guarantee; and (ii) set out in plain intelligible language the contents of the conventional guarantee and the essential particulars necessary for making claims under the guarantee, notably the duration and territorial scope of the guarantee as well as the name and address of the guarantor. It is important to provide to the consumer a clear explanation of the object of the commercial guarantee (e.g. whether it refers to the entire product or only to parts of the product) and its duration as well as whether it is valid only within a specific country or a group of countries. It is recommended to provide a direct explanation of the guarantee without referring to other sources of information and/or documents<sup>33</sup>.

*[Legal source: Article 6 Consumer Rights Directive]*

Member States may provide that the guarantee may be drafted in one or more languages. The seller should check the language requirements set forth by each Member State in which its products are sold.

## 25. Unfair terms in consumer contract

The seller should check that the terms set out in its General Conditions of Online Sale are not regarded as unfair under Community law. According to Community law, a term which has not been individually negotiated with the consumer, such as the terms drafted by the seller and set out in the General Conditions of Online Sale, is considered unfair if it causes a significant

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consequently seller should check whether particular countries provide for more stringent provisions. However, the Directive expressly provides that with regard to the sale of secondhand goods the parties may agree on a shorter liability or limitation period provided that such shorter periods shall not be less than one year.

**32** The same provision will apply also under Directive EU 2019/771.

**33** According to Directive EU 2019/771 the commercial guarantee statement shall be provided to the consumer on a durable medium at the latest at the time of delivery of the goods; it may therefore be included in the General Conditions of Sale or be sent with the goods. The commercial guarantee statement shall have to expressly include the following: "(a) a clear statement that the consumer is entitled by law to remedies from the seller free of charge in the event of a lack of conformity of the goods and that those remedies are not affected by the commercial guarantee; (b) the name and address of the guarantor; (c) the procedure to be followed by the consumer to obtain the implementation of the commercial guarantee; (d) the designation of the goods to which the commercial guarantee applies; and (e) the terms of the commercial guarantee". Since Member States may lay down rules on other aspects concerning commercial guarantees which are not regulated by the Directive EU 2019/771, Seller shall have to check whether further rules apply (e.g. language requirements) for each Member State.

imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

Unfair terms are not binding on the consumer.

Under Community law, the following terms may be considered unfair:

- a. excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
- b. inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him or her;
- c. making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on its own will alone;
- d. permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
- e. requiring any consumer who fails to fulfil its obligation to pay a disproportionately high sum in compensation;
- f. authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by it where it is the seller or supplier itself who dissolves the contract;
- g. enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
- h. automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early;
- i. irrevocably binding the consumer to terms with which he or she had no real opportunity of becoming acquainted before the conclusion of the contract;
- j. enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
- k. enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
- l. providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;
- m. giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving seller the exclusive right to interpret any term of the contract;
- n. limiting the seller's or supplier's obligation to respect commitments undertaken by its agents or making its commitments subject to compliance with a particular formality;
- o. obliging the consumer to fulfil all its obligations where the seller or supplier does not perform its own;

- p. giving the seller or supplier the possibility of transferring its rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;
- q. excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to consumer or imposing on consumer a burden of proof which, according to the applicable law, should lie with another party to the contract.

Such list is non-exhaustive.

Member States may adopt more stringent provisions to protect consumers. The seller should check whether individual countries provide for more stringent provisions.

[Legal source: Article 3, 6, 8 Unfair Terms Directive]

## 26. Age requirements

The validity of a sale contract concluded on the website by a person who has not reached the age of majority or has no legal capacity could be challenged. Legal age of majority may vary from country to country (generally a person acquires legal capacity at 18 years old, but in some countries it can be lower, e.g., 16 years old). It is generally the duty of a seller to check that it is selling to customers of legal age, especially in case of sale of goods of a particularly high value. This is, however, difficult when selling online. In some countries a sale concluded by a minor using its parents' details and credit card may be considered valid if the value of the goods is low. Some countries consider that if the minor has hidden his or her age the sale should be considered valid.

It is therefore advisable to be able to prove that the customer has been made aware that it must be of legal age to validly conclude a contract. As an alternative to the related provision of the ICC Model Online B2C General Conditions of Sale, the following provision may be used:

**“PURCHASER REPRESENTATIONS.** *By accepting these General Conditions of Online Sale, you represent that either you are of sufficient legal age to purchase from this website and to create binding legal obligations for any liability you may incur as a result of the purchase, or a parent or guardian has accepted these General Conditions of Online Sale on your behalf. In addition, you agree to abide by all applicable laws and regulations governing your use of the website”.*

## 27. Applicable law

The seller can choose in its General Conditions of Online Sale the law applicable to the sale contract (e.g. by indicating the law of the country in which seller is established). Such choice may not, that cannot be derogated by agreement by virtue of the law that would be applicable in the absence of a choice of applicable law (typically, the law where the consumer has its habitual residence, save for the case in which the seller does not pursue its online sales activity towards that country). Any contractual terms which directly or indirectly waive such right shall not be binding on the consumer.

Furthermore, the choice of law clause, in order not to be considered unfair, must expressly indicate that the consumer enjoys the protection of the mandatory provisions of the law that would be applicable in the absence of that clause.

Sellers should consider carefully any potential risk deriving from the mandatory provisions of the law of the country of the consumer. The infringement of such provisions may lead not only to contractual and damage claims, but also to high pecuniary sanctions and/or tort claims. An assessment of the legal risk is therefore the first step a seller should carry out when deciding in which country/ies to sell its products.

[Legal source: Article 6 Rome I Regulation; Court of Justice July 28, 2016 C-191/15, Verein für Konsumenteninformation v. Amazon Eu Sàrl]

## 28. Dispute resolution

A consumer may bring proceedings against the seller, at consumer's choice, either in the courts of the Member State in which the seller is domiciled or, regardless of the domicile of the seller, in the courts of the place where the consumer is domiciled.

The seller may bring a proceeding against the consumer only in the courts of the Member State in which the consumer is domiciled.

Such rule does not apply where the seller does not pursue its online sales activity towards that country (e.g. the case in which the website does not allow the sale towards a particular EU country). In such case, a possible clause providing the competence of the court of the country in which the seller is established would be considered valid. It may not always be easy to know when the online sale activity is directed towards a particular country. The European Court of Justice has held that possible evidence demonstrating that the seller was envisaging doing business with consumers domiciled in a Member State can be found in the following non-exhaustive list:

- a. the international nature of the activity;
- b. the use of a language or a currency other than the language or currency usually used in the Member State in which the seller is established with the possibility of ordering in the different language;
- c. the indication of telephone numbers together with an international prefix;
- d. the deployment of financial resources for an Internet-based positioning service in order to facilitate access to the seller's site for consumers domiciled in other Member States;
- e. the use of a first-level domain name other than that of the Member State in which the seller is established and the mention of an international clientele composed of domiciled customers in different Member States.

[EU Court of Justice, C-585/08 and C-144/09 dated 7 December 2010, P. Pammer v. Reederei Karl Schlüter GmbH & Co Kg; Hotel Alpenhof GesmbH v. Oliver Heller]

Disputes arising out of online transactions may be resolved also by recourse to out-of-court alternative dispute resolution and the seller is bound to inform the consumer of such possibility with a link to the ODR platform (see **Section 14**, above).

Furthermore, sellers should check whether there are mandatory rules providing for compulsory out-of-court dispute resolution procedures (e.g. mediation in France).

[Legal source: Articles 17 and 18 Recognition and Enforcement of Judgments Regulation<sup>34</sup>]

## 29. Small claims procedure

Please note that a European procedure for small claims where the credit does not exceed € 5000,00 has been established by Regulation EC 861/2007 dated 11.07.2007 as amended by Regulation EU 241/2015. The procedure is very quick, simple and does not require the assistance of a lawyer; it may be recommended in cases of online sales of goods when the value of the goods is limited instead of recourse to an ordinary proceeding. For more information please consult the following link: [https://e-justice.europa.eu/content\\_small\\_claims-42-en.do](https://e-justice.europa.eu/content_small_claims-42-en.do)

<sup>34</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Available online at May 1, 2020: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215a>

## EU MEMBER STATE NOTES ON EU REQUIREMENTS

**(Readers are encouraged to check for any relevant updates)**

To be read in conjunction with the general EU requirements document, above.

**Caution:** Users of this document and the *ICC Model Online B2C General Conditions of Sale* are advised that:

- > Neither this document nor the ICC Model constitute legal advice.
- > Users should consider the content as guidance and should seek legal advice in order to adapt their own conditions of sale to the local consumer laws of any intended consumers/clients.
- > The guidance that follows should be checked for currency, as laws and regulations may change from time to time.

12.6	Reimbursement of payment received by the consumer
<b>Germany</b>	This rule also applies in Germany. Even a clause trying to circumvent the ban of a limit to reimbursement is void.
<b>Italy</b>	Any contractual clauses that limit the reimbursement of the amount paid to the consumer are null and void.
12.7	Responsibility of the consumer for mishandling of goods during the withdrawal period
<b>Germany</b>	The seller is entitled to set off its claim for compensation against the diminished value of the returned good, provided that the diminished value results from mishandling of said good.
<b>Italy</b>	The Italian antitrust authority considered valid the right of a seller of vehicles, as set out in seller's General Conditions of Sale, to charge consumers 5 € for each km driven over and above 120 km during the withdrawal period on the basis that the amount requested was proportional to the type of good sold and that the provision was justified to avoid the mishandling of the good during the withdrawal period.
14	Language
<b>Germany</b>	There are no specific requirements regarding language. However, the General Conditions only become a part of the contract if the consumer had the possibility to take notice of their content in an acceptable manner.
<b>Italy</b>	The following information must be provided in Italian: Product name; indication of the producer or of the importer; country of origin of the product if different from EU; possible presence of material or substance which may be of damage to humans, things and/or the environment; materials used and method of production if these are relevant for the qualities or characteristics of the products; instructions, such as possible precautions and use of the product if relevant for the safety of the product; price information; and the conventional guarantee.
<b>Sweden</b>	A website and General Conditions must be in the same language

15	Link to ODR platform and information on ADR entities
Germany	There is no general obligation for the seller to participate in ADR or ODR. If it adheres to a specific ADR entity, the seller has to indicate it and provide the consumer with the ADR entity's contact details. This information also has to be given in the General Conditions of Online Sale.
Italy	If the seller has committed to have recourse to a specific ADR entity, this has to be indicated in the General Conditions of Online Sale.
20	Requirements upon receipt of the order
Germany	It is not necessary that the acknowledgment of receipt is the acceptance of the order. Therefore it is not yet necessary to restate the general and specific conditions of the sales contract.
Italy	Seller must provide a summary of the general and specific conditions of sale, essential features of the goods ordered, detailed indication of the price, means of payment, right of withdrawal, delivery cost, and applicable taxes.
21	Delivery
Germany	In Germany the consumer may demand damages if the seller delivers in default.
Italy	Damage compensation.
Spain	Any unjustified delay incurred by seller in reimbursing the sums paid by the consumer, entitles the consumer to claim for reimbursement in an amount double of any sums paid under the contract, in addition of any damages exceeding such sums.
23.1	Time limits
Denmark	The standard product warranty period for consumer goods is 2 (two) years from the date of delivery. Rights of the consumer are subject to a limitation period (prescription) of 3 (three) years from the date of delivery.
Germany	<p>For the right to demand cure/supplementary performance and for the right to demand damages (or the right to demand reimbursement of futile expenditure) the limitation period is 2 (two) years starting from the delivery of the good. For these rights the limitation period may be 3 (three) years, if the seller fraudulently concealed the defect.</p> <p>For the right deriving from a revocation of the contract and for the right based on a declaration to reduce the purchase price the limitation period is always 3 (three) years, but the revocation or the reduction must be declared within 2 (two) years.</p> <p>During 6 (six) months from delivery there is a presumption that the good was defective already at the time of delivery/passing of the risk (unless this presumption is incompatible with the nature of the good or of the defect). After this period of 6 (six) months is elapsed, the consumer is obliged to prove that the goods were defective at the time of delivery/passing of the risk.</p>

<b>Ireland and UK</b>	<p>The consumer must inform the seller of the lack of conformity within reasonable time from the date on which he or she detected such lack of conformity. Notice within 2 (two) months from detection of the lack of conformity is always considered reasonable.</p> <p>Rights of the consumer are subject to a limitation period (prescription) of 3 (three) years from the detection of lack of conformity of the goods provided that he or she has informed the seller of the lack of conformity within 2 (two) months from the discovery and within 2 (two) years from the time of delivery.</p>
<b>Italy</b>	<p>The consumer must inform the seller of the lack of conformity within a period of 2 (two) months from the date on which he or she detected such lack of conformity. The consumer must take legal action within 26 (twenty-six) months of delivery. (art. 132 D.lgs. 670972005 n. 206)</p>
<b>Spain</b>	<p>The standard product warranty period for consumer goods is two (2) years from the date of delivery. Rights of the consumer are subject to a limitation period (prescription) of three (3) years from the date of delivery (art.123 Spanish Consumers Act -RDL 1/2007 of 16th November-)</p>

<b>23.2</b>	<b>Replaced goods</b>
<b>Germany</b>	<p>If the seller replaces the good the limitation periods restarts. If seller and buyer negotiate on the rights of the seller, the limitation is suspended during the period of negotiation.</p>
<b>Italy</b>	<p>No specific provisions on the point. By applying the general principles of civil law, it has been held that the replacement of the goods does not give rise to a new guarantee on the replaced goods. The effect of the exercise of the guarantee is only the interruption of the limitation period which continues as soon as the good is replaced (art. 2944 c.c., Cass. Civ. Sezioni Unite, 21.06.2005 n. 13294).</p>

<b>23.3</b>	<b>Reimbursement of the price of goods</b>
<b>Germany</b>	<p>In case of withdrawal from the contract there is no reimbursement for the use of the goods. In case of consumer contracts there is also no reimbursement if the Seller supplies another good free of defects for the purpose of cure. However, in case of a revocation of the contract a reimbursement for the use is possible.</p>
<b>Italy</b>	<p>It is possible to reduce reimbursement taking account of the use the consumer has made of the goods since they were delivered. (art. 130 § 8 of D.lgs. 6/09/2005 n. 206)</p>

<b>24</b>	<b>Commercial guarantee</b>
<b>Germany</b>	<p>There are no specific requirements regarding the language of the guarantee. However General Conditions only become a part of the contract, if the consumer had the possibility to take notice of its content in an acceptable manner. Thus a German consumer might assert that he or she could not take notice of the General Conditions in an acceptable manner if they are presented in a language other than German.</p>
<b>Italy</b>	<p>The text of the conventional guarantee has to be drafted in Italian and the presentation used must not be less evident than that used for any other language.</p>

<b>Scandinavia</b>	Interpretation that the use of word 'guarantee' may imply a substantial benefit.
<b>Spain</b>	To be drafted and delivered in writing to the consumer, at least in Spanish (art. 125 Spanish Consumers Act).

<b>25</b>	<b>Unfair terms in consumer contract</b>
<b>Germany</b>	There is a provision in German law, which applies to any terms and conditions, providing that, contrary to the requirement of good faith, clauses that unreasonably disadvantage the other party are void. 'Unreasonably disadvantaging' is quite close to the term 'unfair'. Besides the aforementioned general clause, sections 308 and 309 of the German Civil Code (BGB) list clauses prohibited in consumer contracts.
<b>Italy</b>	<ol style="list-style-type: none"> <li>1. (a), (b) and (i) listed above are to be considered in any case abusive even when negotiated by the parties.</li> <li>2. All provisions (a) - (q) listed above are to be considered abusive unless proved to the contrary.</li> <li>3. In addition to the above-listed provisions, the following provisions are also considered abusive unless proved to the contrary: <ul style="list-style-type: none"> <li>— the choice of forum for disputes is in a different place than the one where the consumer has its residence or chosen domicile;</li> <li>— the transfer of a right or the undertaking of an obligation depends merely on the seller's will against an immediately effective obligation borne by the consumer.</li> </ul> </li> </ol>
<b>Spain</b>	<p>Articles 80-91 of the Spanish Consumers Act provide for a list of abusive terms in consumer contracts; for instance, the following terms concerning choice of law/choice of forum are considered abusive and, thus, null and void:</p> <ol style="list-style-type: none"> <li>1. Choice of arbitration courts other than consumer arbitration, except in case of institutional arbitration courts created by law for a specific business sector or situation;</li> <li>2. Choice of forum resulting in a court different than the one corresponding to the consumer's address;</li> </ol> <p>Choice of law resulting in foreign law different than the one corresponding to the consumer's domicile or that where the seller runs its business.</p>

## ANNEX 1 – BRAZILIAN LAW REQUIREMENTS

To be read in conjunction with the general EU requirements document, above.

**(Readers are encouraged to check for any relevant updates)**

**Caution:** Users of this document and the *ICC Model Online B2C General Conditions of Sale* are advised that:

- > Neither this document nor the ICC Model constitute legal advice.
- > Users should consider the content as guidance and should seek legal advice in order to adapt their own conditions of sale to the local consumer laws of any intended consumers/clients.
- > The guidance that follows should be checked for currency, as laws and regulations may change from time to time.

### Background

ICC Brazil's task force on B2C Online General Conditions of Sale prepared this Annex to the ICC Online B2C EU Requirements document ('EU Requirements') to set out specific relevant requirements provided by Brazilian law. This Annex 1 follows the order and structure of the EU Requirements, above. The first 18 sections (Part I) address Website Presentation Requirements and the remaining sections (Part II) address Other Consumer Protection Requirements. This Annex 1 is a complement to the EU Requirements and should be read together with the EU Requirements to avoid any misinterpretation or inconsistency.

Various Brazilian laws and decrees may apply to any B2C relationship from time to time. This Annex 1 addresses the main legislation in force as of April 2020, and does not address temporary rules arising from, or issued in connection with, the COVID-19 pandemic.

### Introduction to Brazilian Laws on E-commerce

As mentioned above, various Brazilian laws, decrees and other regulations may apply to any B2C relationship from time to time.

The two most important are Law 8078/90, the so-called Consumer Protection Code, and Decree 7962/13, the so-called E-commerce Decree. While the Consumer Protection Code establishes the main rights of consumers, whether they are purchasing online or not, the E-commerce Decree applies to e-commerce relationships. The E-commerce Decree is complemented by Decree 10271/20, which reflects Mercosur's GMC Resolution 37/19 on e-commerce matters.

Given the scope of this Annex, it is important to address several procedural provisions contained in Law 13105/15 (Brazilian Code of Civil Procedure), Law 9307/96 (Arbitration Law), and Law 13140/15 (Brazilian Mediation Act), as well as conflicts of laws principles in Decree-Law 4657/42 (Brazilian Rules of Private International Law).

It is also worth mentioning Law 5768/71 (Brazilian Commercial Promotions Act) and Law 8069/90 (Brazilian Child and Teenager Statute (*Estatuto da Criança e do Adolescente*)).

Last but not least, as data protection is currently at the center of many discussions, this Annex addresses provisions of Law 13709/18 (Brazilian Data Protection Law), Law 12965/14 (Civil Framework for the Internet (*Marco Civil da Internet*)) and Decree 8771/16 (regulation of Civil Framework for the Internet).

Other laws and decrees may apply on a case-by-case basis.

## Legislation - Glossary

The following laws and decrees may be referred to herein interchangeably by their number or assigned name:

- > Law 8078/90: Consumer Protection Code
- > Decree 7962/13: E-commerce Decree
- > Decree 10271/20 reflects Mercosur's GMC Resolution 37/19 on e-commerce matters
- > Law 5768/71: Brazilian Commercial Promotions Act
- > Law 13105/15: Brazilian Code of Civil Procedure
- > Law 9307/96: Arbitration Law
- > Law 13140/15: Brazilian Mediation Act
- > Law 8069/90: Brazilian Child and Teenager Statute (*Estatuto da Criança e do Adolescente*)
- > Law 13709/18: Brazilian Data Protection Law (LGPD)
- > Law 12965/14: Civil Framework for the Internet (*Marco Civil da Internet*)
- > Decree 8771/16: The regulation of Civil Framework for the Internet
- > Decree-Law 4657/42: Brazilian Rules of Private International Law (LINDB)

## PART ONE – WEBSITE PRESENTATION REQUIREMENTS

Section	Brazil – Comments
<p><b>1. General information to be provided to the consumer</b></p>	<p>The Consumer Protection Code, the E-commerce Decree, and Decree 10271/20, all together, require the provision of the following information to consumers: characteristics, composition, quality, quantity, taxes, price (in local currency, also indicating interest and other legal accruals, installments, freight, insurance and other expenses), warranty, term of validity, origin, availability, risks, restrictions, name and taxpayer number of the supplier, its physical and electronic address, conditions for exercise of the right of withdrawal, electronic address of the customer assistance service, and identification of the manufacturer. This information shall be provided in local language and be made available to consumers on the supplier’s website and other electronic media, prior to completion of contracting, in a place easy to see.</p> <p>In the case of adhesion contracts, the body of information must be displayed with letters in minimum size 12-point font.</p>
<p><b>2. Information on the ordering process to be provided prior to the order being placed</b></p>	<p>Decree 10271/20 (Article 1) establishes that during the whole process of a transaction consumers shall be guaranteed the right to clear, sufficient, truthful and easy-access information on the supplier, the product and/or service and the transaction entered into.</p>
<p><b>3. Information on the sale contract to be provided before the consumer is bound by the contract</b></p>	<p>The E-Commerce Decree (Article 4) requires that (i) a summary of the contract be made available in advance, containing all information necessary for the consumer to make her choice, and all restraining clauses; (ii) proper tools shall be ensured for identification and immediate correction of mistakes made prior to finalization of the purchase; (iii) the supplier shall immediately confirm receipt of the acceptance of the offering; and (iv) the supplier shall maintain adequate and efficient electronic service, which allows the consumer to request information, clarify doubts, make complaints, and demand suspension or termination of the contract.</p>
<p><b>3.1. Requirements</b></p>	<p>Decree 10271/20 requires that the contract does not contain references to other documents which are not provided simultaneously with the contract.</p> <p>In addition, the Consumer Protection Code, in Article 31, regulating product offerings, as well as items already mentioned above, provides that consumers must be aware of composition of the goods, expiration date and health and safety risks, when applicable. Articles 39 to 41 of the Consumer Protection Code forbid abusive practices, which include, among others, that sellers shall not condition the sale of a product or service to the sale of another product or service. Finally, the Arbitration Law provides that, in adhesion contracts, an arbitration clause will only be valid if the adhering party takes the initiative to file an arbitration proceeding or if it expressly agrees with its initiation, as long as it is in an attached written document or in boldface type, with a signature or special approval for that clause (Article 4, §2).</p>
<p><b>4. Indication of price</b></p>	<p>The E-commerce Decree (Article 2) requires indication of any expenses which are integrated into the overall price, such as delivery or insurance charges, and full disclosure of the terms and conditions of the offering such as payment options, availability, form and term for performance of service or for delivery of product. As indicated in item 1 above, Decree 10271/20 requires indication of applicable tax and total cost of the transaction (with number and periodicity of installments, where applicable).</p>
<p><b>5. Additional payments</b></p>	<p></p>

Section	Brazil – Comments
<p><b>6. Means of payment</b></p>	<p>The E-Commerce Decree (Article 2, V) and Decree 10271/20 (Article 2, IX) require supplier to clearly indicate the alternative means of payment, detailing the number of installments, periodicity and total financial cost of the transaction, if the purchase is not performed in person.</p> <p>The E-commerce Decree (Article 4) requires that supplier ensure appropriate security means for payments (as well as for treatment of consumer data).</p>
<p><b>7. Delivery restrictions</b></p>	<p>The E-Commerce Decree (Article 2, IV and V) requires that electronic sites or other electronic means used (e.g., e-mails) disclose, in a prominent and easy-to-view location, all the information regarding additional charges related to delivery costs, as well as the complete conditions of the offer, including delivery time.</p> <p>In the event of cross-border transactions, customs clearance rules and restrictions may apply. Therefore, such rules shall be analyzed and discussed on a case-by-case basis. For example, all packages shipped from foreign countries to Brazil must include the recipient's Tax ID number. This rule is issued by the Brazilian Federal Revenue Office as a condition for performing customs clearance procedures. Packages that do not have the recipient's Tax ID information will be subject to return or destruction.</p>
<p><b>8. Geo-blocking and other discriminatory practices</b></p>	<p>Regulation on geo-blocking is not expressly provided for in Brazil. In terms of applicable general rules, the Consumer Protection Code establishes as consumers' basic rights: (i) equality in contracting; (ii) appropriate and clear information about different products and services; and (iii) correct specification as to the price, among other rights (Article 6, items II and III). In addition, the Consumer Protection Code classifies as abusive the practice of raising product or service prices without cause (Article 39, X). Based on such principles, an important local precedent was issued in June 2018 against discriminatory practices in a clearly unjustified situation. The Department of Consumer Protection, a body of the Brazilian Ministry of Justice and Public Security, applied a penalty to the online travel booking service Decolar.com in the amount of R\$ 7.5 Million for differentiation of accommodation prices and negative supply of vacancies, when available, according to the location of the consumer. As of early 2020, geo-blocking is a subject of relatively recent appreciation in Brazil and there are still no clear precedents for situations where discrimination can be considered reasonable.</p>

Section	Brazil – Comments
<p><b>9. Promotional offers and advertisement</b></p>	<p>Following the legal standards and practice in the EU, advertisements and promotional offers, where permitted, have to be clearly identifiable as such, and the conditions which are to be met to qualify for them have to be easily accessible and presented in a clear, unambiguous and thorough fashion. Decree 7962/13 (Article 2, §§3 and 7) establishes that websites and further electronic means used to make an offer or conclude a contract online shall provide, in addition to all information mentioned in item 1 above, “clear and extensive information” regarding any restrictions placed on the fruition of the offer.</p> <p>The Brazilian Consumer Protection Code (Article 6, § III) sets forth as a fundamental consumer right: “protection against misleading and abusive publicity, commercial methods based on coercion or in any other way unlawful, as well as against practices and causes that are abusive or imposed as part of the products and services being supplied”.</p> <p>Furthermore, there are some general limitations posed by statutory law to promotional offers. The first is related to existing rules on commercial practices, offers and advertisement (Articles 30 et seq, Consumer Protection Code), according to which any form of online advertising, including promotional offers, must not be misleading or abusive and/or susceptible to induce the consumer to confusion in relation to the “nature, characteristics, quality, quantity, properties, origin, price, and any other information about products and services”.</p> <p>Secondly, according to Brazilian laws, the enforcement of consumer rights within the framework of the National Policy for Consumer Relations is to be guided by the main goal of restraining and repressing “dishonest competition, inadequate use of industrial inventions, trademarks, trade names that might cause losses to consumer” (Article 4, § 6, Consumer Protection Code). Promotional offers will be also expressly prohibited – and would be considered abusive - in cases where the advertisement contains any discriminatory nature, incites violence, exploits fear or superstition, takes advantage of a child’s lack of judgment or experience, disrespects environmental values or may cause the consumer to behave so as to bring harm to his or her own health or safety. Also in line with Brazilian law, the advertiser or sponsor will bear the burden of proof regarding the veracity and the correctness of the information or the marketing campaign which has been made in an advertisement (Article 4, §6, Consumer Protection Code).</p> <p>As a rule, the Brazilian Commercial Promotions Act (Law 5768/71) establishes that all free distribution of prizes for marketing purposes which are carried out in Brazil by means of draws/sweepstakes, the offering of coupons exchangeable for products, contests, and similar initiatives require prior authorization to be implemented. The exceptions to this rule are free distributions of prizes that (a) are implemented by draws/sweepstakes carried out by a governmental entity for certain specific purposes, and (b) occur as the result of a contest that is of an exclusively cultural, artistic, sports or recreational nature, not subject to any luck factor or payment by the participants, nor any connection between the participants or awardees and the acquisition of any merchandise, right or service. Natural persons are not allowed to conduct any such promotional campaigns in Brazil. Currently, the Ministry of Economy is the authority with powers to grant such authorizations. The following items can be distributed in the context of a campaign: (i) goods manufactured in Brazil or regularly imported; (ii) residential units, located in an urban area of Brazil; (iii) tourism/travel vouchers (transportation, accommodation and at least one meal); and (iv) scholarships. The Act forbids the distribution and conversion of premium or gifts in cash. Recently the Brazilian Commercial Promotions Act was amended to include a provision extending the scope of application of the authorization requirement for commercial promotions to national television networks that provide entertainment services to the public through applications, digital platforms or similar means (Article 1, § 1-A, Law 5768/71).</p>

Section	Brazil – Comments
<b>10. Consumer reviews and endorsement</b>	<p>There is no express obligation to inform consumers whether processes or procedures are in place to ensure that the published reviews originate from consumers who have actually used or purchased the product. Still, the review section of the website shall not be deceptive or misleading, in application of the general obligation of good faith and the prohibition of misleading information (s Consumer Protection Code, Article 37, §1).</p>
<b>11. General conditions of online sale</b>	<p>Besides the information requirements indicated in items 1 and 3 above, the E-Commerce Decree (Article 4) requires that a summary of the contract be made available prior to contracting, with information necessary for the full exercise of the right of choice by consumers, stressing the clauses which restrain rights, and that supplier provides consumers with efficient tools for identification and immediate correction of errors made at prior steps in the process of completion of the contract. In addition, the contract must be made available to the consumer immediately upon contracting, in a medium which allows its conservation and reproduction, and an appropriate electronic channel must be maintained for consumers to obtain assistance regarding information, doubts, complaints, and suspension or cancellation of the contract, and for supplier to immediately confirm receipt of such consumer request of assistance, and respond to such request within five days.</p> <p>Decree 10271/20 (Article 3) establishes that suppliers shall provide easy access, with clear visibility, to the terms of contracting, ensuring that they can be read, kept and/or stored by consumer in a fixed medium.</p>
<b>12. Right of withdrawal</b>	<p>The Consumer Protection Code (Article 49) establishes that the right of withdrawal is applicable to purchases outside the store (e.g., by phone or computers, or by delivery at domicile).</p> <p>The E-Commerce Decree (Article 5) establishes that supplier shall clearly and conspicuously inform the consumer of the applicable means for exercise of his or her right of withdrawal, including the option for consumer to use the same means available at the time of contracting. Any withdrawal implies termination of ancillary contracts, without burden to the consumer. Supplier is required to immediately communicate the withdrawal to the consumer’s financial institution or credit card company so that the transaction not be charged to the consumer, or that the debt is cancelled if already booked. Supplier shall send the consumer immediate confirmation of receipt of the request of withdrawal.</p>
<b>12.1. Withdrawal period</b>	<p>The Consumer Protection Code establishes (Article 49) that the term for exercising the right of withdrawal is 7 (seven) days, counted from contract execution or from receipt of the product or service.</p>
<b>13. Placing of the order</b>	<p>Pursuant to Decree 10271/20 (Article 5), the supplier should provide the consumer with the technical tools to correctly place the order, before entering into the transaction. In addition, the supplier should provide an express confirmation tool to acknowledge consumer’s intention to proceed with the transaction. Consumer’s silence will not be taken as her consent.</p>
<b>14. Language</b>	<p>The Consumer Protection Code (Article 31) establishes that the language of the offer shall be in Portuguese.</p>

Section	Brazil – Comments
<p><b>15. Link to ODR platform and information on ADR entities</b></p>	<p>Article 46 of the Brazilian Mediation Act (Law 13140/15) allows mediation through the internet or any other communication means that allows settlement of disputes online, as long as parties agree to it. Furthermore, any party domiciled abroad is allowed to enter into mediation according to the rules established in the Mediation Act. Following one of the principles underlying the “National Policy for Consumer Relations”, the Executive branch established the platform “consumidor.gov.br” in 2014 (Article 4, § V, of the Consumer Protection Code). Currently managed by the Ministry of Justice and Public Security, the platform operates as a free service aiming at approximating companies/suppliers and consumers, without any interference of a governmental body, as it was originally designed to stimulate alternative dispute resolution. In principle, the participation of companies is made on an optional basis and depends on an agreement entered into with the platform, by which companies undertake to receive, analyse and make all possible efforts to solve the complaint presented by the consumer through the platform. In March 2020, SENACON (National Secretariat of the Consumer, a body linked to the Ministry of Justice and Public Security) issued Portaria SENACON 15/20, ordering companies that meet certain criteria to mandatorily enrol with the consumidor.gov.br platform. There is no link to alternative dispute resolution entities (ADR), such as the one provided for in the EU model. Yet the innovative feature of the Brazilian consumidor.gov.br platform relies on an open database serving as a source of indicators on best practices about the expedited rates of solving complaints and time elapsed for a satisfactory/unsatisfactory response by the sellers. In addition, it does not prevent parties from seeking an alternative ADR entity and there is no general obligation for the seller to participate in ADR or ODR. Articles 21 to 23 of the Brazilian Mediation Act establish the legal framework for mediation. ODR platforms and the like are also adopted by companies rendering ADR services to suppliers and consumers and some of them offer an interactive channel for amicable solution based on contacts by suppliers, negotiation, and post-sales assessment by consumers online (e.g. ReclameAqui).</p> <p>According to Decree 10271/29, MERCOSUR Member States shall provide for the adoption of “agile, fair, transparent, accessible and low-cost online dispute resolution mechanisms, so that consumers can obtain satisfaction from their complaints”, with special consideration for the most vulnerable consumers (Article 8).</p>
<p><b>16. Confirmation of the contract concluded online</b></p>	<p>The Consumer Protection Code establishes that in order to ensure facilitated assistance to consumers, suppliers shall immediately confirm receipt of acceptance of the offer.</p> <p>Decree 10271/20 also addresses the matter, setting forth that suppliers shall make available a mechanism of express confirmation of the decision to enter into the transaction, so that consumer’s silence shall not be considered as consent.</p>
<p><b>17. Privacy Issues</b></p>	<p>The main duties and obligations related to privacy and data protection matters in Brazil are those set forth in Law 13709/18 (Brazilian Data Protection Law), which was enacted in 2018 and is expected to come into force in August 2020 (if such date is not postponed). There are also general principles and provisions on data protection and privacy in the Brazilian Federal Constitution, the Brazilian Civil Code and in other specific laws and regulations, including the Brazilian Consumer Protection Code, and, particularly, Law 12965/14 (Civil Framework for the Internet) and Decree 8771/16 (the regulation of Civil Framework for the Internet).</p>

Section	Brazil – Comments
<p><b>17.1. Data protection ‘by design and by default’</b></p>	<p>Law 13709/18 (Brazilian Data Protection Law) establishes (Article 46) that both controllers and processors must adopt security, technical and administrative measures to protect personal data (whose minimum standards may be established by the National Data Protection Authority) as from the design of the service or product up to its execution. Such Law does not expressly provide for a concept of data protection “by default”, as GDPR does for the European Union, but this concept might be adopted in the future by the National Data Protection Authority.</p>
<p><b>17.2. Cookies</b></p>	<p>Brazil does not have specific legal provisions expressly addressing cookies. However, Law 12965/14 (Civil Framework for the Internet) sets forth (Article 7, items VIII and IX) that Internet users have the right to clear and complete information on the collection, use, storage, processing and protection of their personal data (which could include information regarding cookies), and that Internet connection and application providers must obtain the express consent of Internet users to carry out such activities (which could be applicable to “profiling cookies”). In addition, Law 13709/18 (Brazilian Data Protection Law) has established specific requirements in connection with the processing of personal data (which includes information collected through cookies).</p>
<p><b>17.3. Privacy information</b></p>	<p>Law 12965/14 (Civil Framework for the Internet) sets forth (Article 7, item VIII) that Internet users have the right to clear and complete information on the collection, use, storage, processing and protection of their personal data. In addition, Law 13709/18 (Brazilian Data Protection Law) establishes that data subjects shall be clearly, properly and evidently informed of, among other information, (i) the specific purpose of the data processing; (ii) the form and duration of the data processing; (iii) the identification and contact information of the data controller; (iv) the persons or categories of persons to whom the information may be communicated and the scope of the communication; (v) the responsibilities of the agents who will carry out the data processing; (vi) that the processing of personal data is a condition for provision of a product or service or for exercising a right (if applicable); and (vii) data subject’s rights. According to Law 13709/18, whenever consent is required, it shall be deemed null and void if the above-mentioned information is misleading or is not presented in a clear, proper and evident manner.</p>
<p><b>17.4. Consent</b></p>	<p>Law 12965/14 (Civil Framework for the Internet), in Article 7, item IX, sets forth, without exception, that Internet connection and application providers must obtain the express consent of Internet users for the collection, use, storage and processing of their personal data. However, Law 13709/18 (Brazilian Data Protection Law) establishes that personal data may be processed without consent, among other cases, when necessary for the performance of an agreement or for preliminary procedures related to an agreement to which the data subject is a party, upon their request. In any case, whenever a data controller intends to process personal data for a purpose other than the one for which the data was collected, a specific consent shall be obtained from the data subject in case none of the other lawful bases for data processing applies.</p>
<p><b>17.5. Privacy policy</b></p>	<p>Law 12965/14 (Civil Framework for the Internet) sets forth (Article 7, item VIII) that Internet users have the right to clear and complete information on the collection, use, storage, processing and protection of their personal data (which could be provided by means of a Privacy Policy). In addition, Law 13709/18 (Brazilian Data Protection Law) establishes that data subjects shall receive clear, proper and comprehensive information about the processing activities affecting their personal data.</p>

Section	Brazil – Comments
<p><b>18. Terms of use</b></p>	<p>The Consumer Protection Code establishes that adhesion agreements shall be made available in clear terms and with conspicuous and legible characters, with a font no smaller than size twelve point, in order to facilitate its understanding by the consumer. Furthermore, Decree 10271/20 (by means of which Brazil adopted the MERCOSUR Regulation GCM 37/19) establishes that the terms of the agreement shall be provided in an easy-to-access and clearly visible manner, ensuring that they can be read, saved and/or stored by the consumer, in an unalterable way. Also, Decree 7962/13 requires that a summary of the contract be made available in advance, containing all information necessary for the consumer to make her choice, and all restraining clauses.</p>



Section	Brazil – Comments
<p><b>24. Commercial guarantee</b></p>	<p>The Consumer Protection Code establishes (Article 31) that all information regarding the offering, including information about guarantee/warranty, shall be displayed in Portuguese. The conventional guarantee/warranty shall be in addition to the statutory guarantee/warranty, unless otherwise expressly provided in the terms and conditions of sale (Article 50). The guarantee/warranty term or equivalent must be standardized and clarify, in an appropriate manner, what the guarantee consists of, as well as the form, term and place in which it can be exercised and the charges/burden to be borne by the consumer, and must be delivered to her, duly completed by the supplier, upon delivery, accompanied by an instruction manual on the installation and use of the product in didactic language, with illustrations.</p>
<p><b>25. Unfair terms in consumer contract</b></p>	<p>Article 51 of the Consumer Protection Code lists several clauses that are deemed abusive and, therefore null and void. For example, among others, clauses that: suppress or mitigate the supplier’s liability for defects of any nature in the products, or imply waiver of rights; remove consumer’s option of being refunded the amount already paid, in the cases provided for in the code; or transfer of responsibilities / liabilities to third parties.</p>
<p><b>26. Age requirements</b></p>	<p>First, it is important to highlight that the Brazilian Child and Teenager Statute (<i>Estatuto da Criança e do Adolescente</i>) defines ‘child’ as a person under twelve years old, and ‘teenager’ as a person between twelve and eighteen years old. The Brazilian Civil Code establishes that those under sixteen years old are absolutely incapable of exercising the activities of civil life, and that those between sixteen and eighteen years old are relatively incapable. The Consumer Protection Code establishes that any advertising that takes advantage of a child’s poor judgment and experience is abusive. Law 12965/14 (Civil Framework for the Internet) allows the user full discretion to choose any parental control software it deems appropriate. Law 13709/18 (Brazilian Data Protection Law), when it comes into force, will require that processing of personal data related to children and teenagers must be carried out in their best interests and, if related to children, shall only be based on the consent of one of the parents or guardians, save for specific exceptions set forth in the law.</p>
<p><b>27. Applicable law</b></p>	<p>Decree-Law 4657/42 (Brazilian Rules of Private International Law), in its Article 9, establishes that the law of the State where the obligations are constituted shall apply. §1 specifies that if an obligation that ought to be performed in Brazil has a prescribed form, this should be observed, including the peculiarities of a foreign law regarding the extrinsic requirements of the legal act; on the other hand, § 2 establishes that the contractual obligation is considered constituted in the place of residence of the proponent. Bills of Law 3514/15 and 6533/16 propose to change the Decree-Law 4657/42, particularly concerning its Article 9, by revoking its §§ 1 and 2 and requiring the application of the law that is more favourable to consumers’ interests in certain situations. Both bills were attached to other bills (bills of Law 4906/2001 and 3514/15, respectively), the processing of which is still pending in the Brazilian Congress, in the lower house. Regardless of the above, public order rules will prevail over the foregoing; for instance, the Consumer Protection Code shall apply to Brazilian consumers in any event and Brazilian data protection laws will apply to Brazilian residents.</p>

Section	Brazil – Comments
<p><b>28. Dispute resolution</b></p>	<p>The Brazilian Code of Civil Procedure states (Articles 21 to 23) that Brazilian courts should process and judge claims concerning certain themes, such as claims arising from consumer relations when the customer is domiciled or is resident in Brazil (Article 22, II). Article 101 of the Consumer Protection Code establishes that the consumer may file a claim in the place of her residence. As regards arbitration clauses, the Arbitration Law provides that, in adhesion contracts, an arbitration clause will only be valid if the adhering party takes the initiative to file an arbitration proceeding or if it expressly agrees with its initiation, provided that it is in an attached written document or in boldface type, with a signature or special approval for that clause (Article 4, §2).</p> <p>According to the Consumer Protection Code, several federal and state bodies and associations have standing to sue suppliers on behalf of consumers (Articles 81, 82 and 91, among others).</p>
<p><b>29. Small claims procedure</b></p>	<p>A Brazilian procedure for small claims where the credit does not exceed 40 (forty) times the minimum monthly salary provided by law has been established by Law 9099/95. The procedure is very quick, simple and does not require the assistance of a lawyer in cases where the credit does not exceed 20 (twenty) times the minimum monthly salary provided by law. Usually consumers resort to this procedure in cases of online sales of goods when the value of the goods is limited instead of resorting to an ordinary proceeding.</p>

#### ABOUT THE INTERNATIONAL CHAMBER OF COMMERCE (ICC)

The International Chamber of Commerce (ICC) is the institutional representative of more than 45 million companies in over 100 countries. ICC's core mission is to make business work for everyone, every day, everywhere. Through a unique mix of advocacy, solutions and standard setting, we promote international trade, responsible business conduct and a global approach to regulation, in addition to providing market-leading dispute resolution services. Our members include many of the world's leading companies, SMEs, business associations and local chambers of commerce.



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