



# B2B E-commerce

A HELP GUIDE FOR OWNERS & OPERATORS

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## What is B2B e-commerce?

E-commerce (electronic commerce) allows businesses to buy and sell goods and services over the Internet.

Business-to-Business e-commerce (B2B) is conducted in a similar way Business-to-Consumer e-commerce, with the key distinction being the legal and regulatory protections in place for the latter.

E-commerce can be conducted over computers, tablets, smartphones, and other smart devices. Nearly every imaginable product and service is now being made available through e-commerce transactions.

While there's no universally accepted definition of e-commerce, it is generally included within the term 'e-business', which describes the concept of applying computer technology, not only to the buying and selling of goods, content or services, but also to internal processes within a business such as knowledge management and human resources.

## Modes of website-based e-commerce

The B2B e-commerce website sector includes the following basic methods:

- **Direct sales/portals:** the supplier establishes its own branded website or portal and sells directly to its customers (who are only offered the supplier's own products); this model is often used by larger business;
- **Market places:** the supplier sells through a website or portal which offers the supplier's product along with products from other suppliers (allowing the customer to compare prices and other features and select the product they want); the market place may be operated by either buyers or sellers and this model generally offers suppliers the opportunity to place their products in front of a wide number of customers at low cost. Depending on the market place, the supplier may still be responsible for collecting payment and ensuring orders are fulfilled (e.g. the logistics of delivering goods from its warehouse to the customer) and may need to ensure its own systems (e.g. Enterprise Resource Planning (ERP) systems) integrate into the market place;
- **Online auctions:** online versions of traditional auctions where goods or services are sold to the highest bidder (or in a reverse auction, the lowest bidder). Like the marketplace model, this can offer both suppliers and customers comparatively easy access to a wide range of potential counter-parties and products

In B2B website e-commerce, it is usual for traders (e.g. buyers and sellers) to contract on the basis of standard terms set out on the site.

## What to include on an e-commerce website

It is usual for a website to include at least:

- Terms of Use for the website
- Acceptable Use Policy
- Terms of Sale or Terms of Supply
- Privacy Notice
- Cookie Notice

- Copyright Notice
- Information about the provider

Most online ordering processes use a 'click wrap' agreement in which the user has to click an 'I agree' or similar button (or tick a box) to actively signify their consent to a contract governing the supply of the relevant goods, services or content.

An alternative is to use the less legally safe 'browse wrap' (or 'click free') approach, which attempts to impose terms on the user by virtue of their activities on the site (e.g. that use of a site deems acceptance of certain terms available on the site).

Browse wrap terms are generally found behind 'terms of use' or similar links and therefore intrude far less on user experience.

However, it is generally doubtful whether such terms would meet the requirements for an enforceable contract under English law. Therefore, browse wrap terms should ideally only be used for notices (such as those commonly found on website terms of use. Use of browse wrap terms in connection with an ordering process is not recommended- see [e-commerce contract formation](#).

## Online Platforms

Online platforms are a major component of website e-commerce and e-commerce.

They provide a meeting place for two or more different groups of users over the internet.

Examples include search engines, online marketplaces and social networks.

In an e-commerce context, online platforms are intermediaries that facilitate trade between trading partners, normally buyers and sellers.

B2B examples include Amazon Business (Amazon's dedicated platform for business procurement). There is no agreed definition of 'online platform' and whether an organisation such as Netflix, for example, is an online platform (or simply a reseller of services/content) may be debated.

Some of the main legal issues traders to be considered for online platforms include:

- The capacity in which the platform acts, in particular whether the platform is acting as an agent or distributor; the distinction will have key legal and commercial implications.
- A platform is acting as an agent, so that once the end customer purchases via the platform the resulting contract for the services or products supplied by the trader is entered into between the trader and end customer (rather than between the platform and end customer), with the platform being remunerated via a commission.
- Consideration should be given to whether the platform is genuinely an agent as defined by law, and if so whether they are a commercial agent subject to the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053.
- A platform is acting as a distributors (or re-seller) where for example where the trader sells or licenses goods or digital content to the platform and then the platform sells or sub-licenses to the customer; this may be on 'sale or return' (also known as consignment) basis.

## E-commerce contract formation

General principles of contract law apply equally to contracts formed online and by email.

For an online contract to be binding there must be an offer, acceptance, an intention to create legal relations, and certainty of terms.

Under the law of England and Wales a simple contract (in the absence of any specific legal requirements regarding the form of the relevant arrangement) may be made:

- in writing (including via electronic documents);
- by word of mouth;
- by conduct;
- by a combination of writing, word of mouth and conduct.

A key issue in B2B e-commerce is the legal enforceability of the arrangements. Under the law of England and Wales a simple contract (whether made electronically or in any other manner) may be enforced if there is:

- offer and acceptance
- sufficient consideration
- intention to create legal relations
- sufficient certainty

A contract may also be found to be:

- unenforceable in whole or in part to the extent relevant terms are not incorporated;
- unenforceable or voidable where one of the parties is found either to lack the capacity or the authority to enter into the contract;
- unenforceable where the contract does not meet any required formalities (such as any requirement that the contract is in writing or executed).

The terms of the contract must be brought to the attention of the customer before the contract is completed.

## Click-Wrap and Browse-Wrap

One of the main questions for B2B e-commerce website is how to make sure the trader's terms and condition are binding on customers.

Contractual terms may be either express or implied. Express terms are those actually recorded in a written contract or openly expressed in an oral contract at the time the contract is made. Implied terms are not stated in the contract but arise 'by implication' to reflect the intention of the parties at the time the contract was made and may be implied by fact, law, custom or usage.

English courts are generally likely to be willing to find that terms have been incorporated where the counterparty has taken some positive action to indicate their agreement to those terms.

It is safer contractually for an e-commerce trader to make sure that its terms and conditions are express rather than implied.

But the English courts have not given definitive guidance as to how online express terms and conditions must be incorporated into an online contract.

It is generally thought that the most effective way is to design a B2B website so that customers are unable to complete an order until they have scrolled down the full terms and conditions on-screen and clicked an "I accept" button (or similar).

This is known as a click-wrap contract.

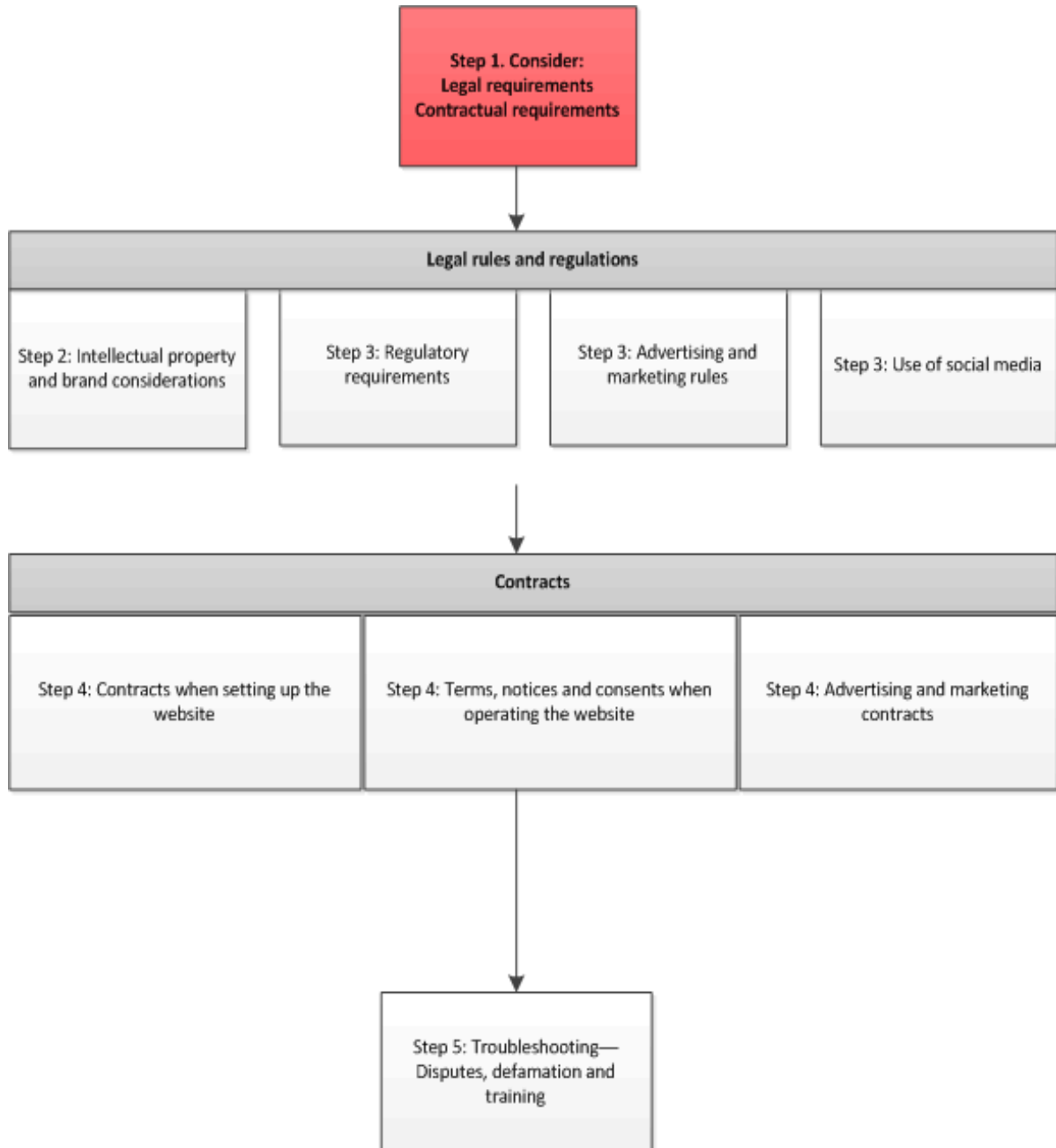
Browse-wrap contracts, are usually to be found behind 'terms of use' i.e. where a website user is notified that by continuing to use the website they are bound by certain terms and conditions, but without the user having to take a positive action to accept them.

In a B2B context, it is unlikely that a browse-wrap contract would be legally binding on a customer, as there is no opportunity to click to accept the trader's terms.

Browse-wrap terms are therefore more preferable for notices (such as statements regarding ownership of the copyright in a website and certain other terms commonly found on website terms of use) that are unlikely to be contentious, rather than contractual terms, and should not be used in connection with any ordering process from the website.

## Website set up flowchart

The flowchart below highlights regulatory and contractual issues to be considered when building or operating a website.



Flowchart by LexisNexis

## Data Protection

The parties to a B2B e-commerce transaction must comply with data protection laws in respect of any personal data processed in connection with an e-commerce transaction.

The United Kingdom General Data Protection Regulation, Retained Regulation (EU) 2016/679 (the UK GDPR) regime (applicable under UK law from the end of the Brexit implementation period) and the Data Protection Act 2018, govern the processing of personal data within the UK.

The UK GDPR regime applies to data processing '*wholly or partly by automated means*' and '*processing other than by automated means*' of personal data which form, or are intended to form part of a filing system.

Various sanction and enforcement mechanisms are available under the UK GDPR. These include:

- fines for non-compliance with the UK GDPR regime up to the greater of 4% of total global annual turnover or £17.5m;
- compensation to data subjects for infringement of the UK GDPR; and
- potential liabilities for breach of the contracts the UK GDPR often requires are put in place.

Businesses can also suffer potential reputational impact if they fail to comply with data protection laws, and may also be subject to other costs and losses arising from a breach or alleged breach of the UK GDPR regime (e.g. ex gratia payments to impacted data subjects, remediation costs, wasted staff time, loss of goodwill and/or loss of business).

If any personal data is processed as part of an e-commerce transaction, the appropriate data protection provisions should be included in the terms and conditions governing the arrangement and the use and operation of the website and in any notices or policies as appropriate and each controller and processor must ensure it complies with its obligations under the UK GDPR regime.

## General background information to be disclosed on e-commerce websites

Nature of general background information	Regulation
Name and identification details	
Name of the trader (and if the trader is a company or LLP, its registered name), its legal status and form	Names and Trading Disclosures Regulations 2015, SI 2015/17, reg 24(2) E-Commerce Regulations 2002, SI 2002/2013, reg 6(1)(a) Provision of Services Regulations 2009, SI 2009/2999, reg 8(1)(a)-(b)
If the trader is a company or LLP, the part of the United Kingdom in which it is registered and its registration number	Names and Trading Disclosures Regulations 2015, SI 2015/17, reg 25(2)(a)-(b)



Nature of general background information	Regulation
Name and identification details	
If the company is exempt from using the word 'limited' as part of its registered name, the fact that it is a limited company	Names and Trading Disclosures Regulations 2015, SI 2015/17, reg 25(2)(d)  Companies Act 2006, s 60
If the company is a community interest company which is not a public company, the fact that it is a limited company	Names and Trading Disclosures Regulations 2015, SI 2015/17, reg 25(2)(e)
If the company is an investment company, the fact that it is such a company	Names and Trading Disclosures Regulations 2015, SI 2015/17, reg 25(2)(f)  Companies Act 2006, s 833
If the company has a share capital and discloses the amount of share capital on its website, it must disclose the paid-up share capital	Names and Trading Disclosures Regulations 2015, SI 2015/17, reg 25(3)
Physical Address	
The geographic address at which the trader is established (a PO Box number is not sufficient)	E-Commerce Regulations 2002, SI 2002/2013, reg 6(1)(b)  Provision of Services Regulations 2009, SI 2009/2999, reg 8(1)(c)
If the trader is a company or LLP, the geographic address of its registered office (if different from the above)	Names and Trading Disclosures Regulations 2015, SI 2015/17, reg 25(2)(c)
To the extent additional to the above, any address which the trader is required by law to register, notify or maintain for the purpose of receiving notices or other communications	Provision of Services Regulations 2009, SI 2009/2999, reg 7(2)(c) and 7(3)
Contact Details	
Postal address for communications (e.g. complaints or requests for information about the service)	Provision of Services Regulations 2009, SI 2009/2999, reg 7(2)(a)

Nature of general background information	Regulation
Name and identification details	
Email address for communications (e.g. complaints or requests for information about the service)	<p>E-Commerce Regulations 2002, SI 2002/2013, reg 6(1)(c)</p> <p>Provision of Services Regulations 2009, SI 2009/2999, reg 7(2)(a)</p>
Telephone number for communications (e.g. complaints or requests for information about the service)	<p>Provision of Services Regulations 2009, SI 2009/2999, reg 7(2)(b)</p> <p>E-Commerce Regulations 2002, SI 2002/2013, reg 6(1)(c)</p> <p>C-298/07, that a phone number is required as a back-up. In any event, a phone number must always be provided under the Provision of Services Regulations 2009 (where that law applies).</p>
VAT	
Where the trader undertakes an activity subject to VAT, its VAT number	<p>E-Commerce Regulations 2002, SI 2002/2013, reg 6(1)(g)</p> <p>Provision of Services Regulations 2009, SI 2009/2999, reg 8(1)(g)</p>
Details of the public trade/similar register in which the trader is entered and its registration number, or equivalent means of identification in that register	<p>E-Commerce Regulations 2002, SI 2002/2013, reg 6(1)(d)</p> <p>Provision of Services Regulations 2009, SI 2009/2999, reg 8(1)(d)</p>
Service subject to an authorisation scheme or similar	
The particulars of the relevant supervisory authority/competent authority, or the electronic assistance facility	<p>E-Commerce Regulations 2002, SI 2002/2013, reg 6(1)(e)</p> <p>Provision of Services Regulations 2009, SI 2009/2999, reg 8(1)(e)</p> <p>Provision of Services Regulations 2009, SI 2009/2999, reg 38</p>

Nature of general background information	Regulation
Name and identification details	
Trader exercising a regulated profession	
<ul style="list-style-type: none"> <li>• The details of any professional body or similar institution with which the trader is registered</li> <li>• The trader's professional title and whether that title has been granted in the UK, or if not, the EU Member State where that title has been granted</li> <li>• A reference to the professional rules applicable to the trader in the UK or the EU Member State of establishment and the means to access them</li> </ul>	<p>E-Commerce Regulations 2002, SI 2002/2013, reg 6(1)(f)</p> <p>Provision of Services Regulations 2009, SI 2009/2999, reg 8(1)(h)</p>
Redress Systems	
<p>A trader subject to a code of conduct, or that is a member of a trade association or professional body, which provides for recourse to a non-judicial dispute resolution procedure, must:</p> <ul style="list-style-type: none"> <li>• Inform a recipient of the service of that fact</li> <li>• Mention it in any information document in which the trader gives a detailed description of the service, and</li> <li>• Specify how to access detailed information about that procedure</li> </ul>	<p>Provision of Services Regulations 2009, SI 2009/2999, reg 10</p>

### Transaction information to be disclosed on e-commerce websites

The following information must be clearly available on e-commerce websites (unless it is subject to an exception or has found another way of complying with the relevant obligations).

Information to be provided	Regulation
Prices	
<p>Where the trader refers to prices, these must be indicated clearly and unambiguously and indicate if they are inclusive of tax and delivery costs</p>	<p>E-Commerce Regulations 2002, SI 2002/2013, reg 6(2)</p>

Information to be provided	Regulation
Prices	
The price of the service, where a price is pre-determined by the trader for a given type of service	Provision of Services Regulations 2009, SI 2009/2999, reg 8(1)(l)
Services	
The main features of the service, if not already apparent from the context	Provision of Services Regulations 2009, SI 2009/2999, reg 8(1)(m)
Terms and Conditions	
Any general terms and conditions used	Provision of Services Regulations 2009, SI 2009/2999, reg 8(1)(i)
The existence of contractual terms, if any, used by the trader concerning the competent courts or the law applicable to the contract	Provision of Services Regulations 2009, SI 2009/2999, reg 8(1)(j)
Insurance and Guarantees	
The existence of any after-sales guarantee not imposed by law	Provision of Services Regulations 2009, SI 2009/2999, reg 8(1)(k)
Where the trader is required to hold professional liability insurance or guarantee, information about the insurance or guarantee and in particular: <ul style="list-style-type: none"> <li>the contact details of the insurer or guarantor, and</li> <li>the territorial coverage of the insurance or guarantee</li> </ul>	Provision of Services Regulations 2009, SI 2009/2999, reg 8(1)(n)
Redress Systems	
A trader subject to a code of conduct, or that is a member of a trade association or professional body, which provides for recourse to a non-judicial dispute resolution procedure, must:	Provision of Services Regulations 2009, SI 2009/2999, reg 10

Information to be provided	Regulation
Prices	
<ul style="list-style-type: none"> <li>• inform a recipient of the service of that fact</li> <li>• mention it in any information document in which the trader gives a detailed description of the service, and</li> <li>• specify how to access detailed information about that procedure</li> </ul>	

## Brand Protection

The growth of online platforms has especially assisted counterfeiters and infringers.

Brand owners may have to tackle multiple types of infringement:

- trade-mark infringement, for example sale of counterfeit goods bearing the brand owner's logo or brand name.
- parallel imports or grey market goods;
- sale of generic goods via a website or other outlet falsely bearing the brand owner's name;
- copyright infringement, for example using proprietary product photographs to sell counterfeit or legitimate goods products that infringe copyright;
- design or patent infringement products sold that incorporate a proprietary design or patent without the permission of the right owner;
- infringements relating to their websites.

There are a number of practical steps that brand owners can take to address these issues and they tend to fall into one of two categories:

1. preventative steps to make a particular brand a less attractive target for infringers and counterfeiters; and
2. active enforcement in response to actual infringements.

## Online Brand Protection Checklist

An e-commerce offering is often essential for brands.

It is therefore important for e-commerce brands to ensure that their IP rights are properly protected and enforced so that they can be used effectively online while maintaining the brand's reputation. A brand protection strategy can prove essential.

The following checklist gives asks some initial questions about what to consider for online brand protection:

- |  |
|--|
| <ul style="list-style-type: none"> <li>• Do you have a website IP notice which puts third parties on notice of your rights?</li> </ul> |
|--|

- Do you have guidance for employees and partners on how to use your branding online?
- Do you have a dedicated and trained team or individual responsible for your social media accounts?
- Do you have terms of use which cover the brand's policy on acceptable use of its own and third parties' trade-marks and logos?
- Do your trade-mark licences include quality control provisions and a requirement to comply with brand guidelines?
- Have you put in place appropriate influencer agreements?

- Are appropriate trade-mark and other relevant registrations in place?
- Are you monitoring unauthorised activity on your website?
- Have you devised an enforcement strategy with criteria to prioritise certain infringements?
- Are you prepared to take swift action by using take-down procedures?
- Are you taking advantage of technological developments to make genuine items harder to copy?
- Do you have good working relations with customs and law enforcement agencies?
- Are third parties aware that the business will vigorously protect its brands?

- Have you gathered evidence of infringement (e.g. screenshots, test purchases)?
- Are you sure exactly what is being sold, i.e. whether it is a copy, a grey import or simply resale of genuine items?
- Have you gathered evidence of consumer confusion/complaints, effect on sales of genuine products and effect on traffic to genuine sites?
- Have you considered the wider context and checked for additional activities such as cybersquatting, spamming, content of advertisements, keyword use etc?
- Is the IP infringement part of a larger pattern of illegal activity and would it be worth involving law enforcement agencies?
- Have you noted any activity undertaken by the online marketplace to optimise the presentation or promote the sale of infringing goods?
- Have you put the online marketplace on notice of the infringing activity (e.g. by using a take-down notice or complaints procedure) and have they acted expeditiously to remove the material?
- Are you prepared to send a notice and take-down letter to an ISP and seek a website blocking order?

## B2B e-commerce law and regulation

The following laws and regulations are of particular significance for e-commerce operators:

- [The E-Commerce Regulations 2002 \(E-Commerce Regulations\)](#) impose a range of obligations on the operators of commercial websites, in particular obligations to provide users with certain information about the operator and its services.

- [The Provision of Services Regulations 2009 \(POS Regulations\)](#) provide that in the provision of services, traders must make specified information available to customers and meet certain standards when handling complaints.
- The UK GDPR (that is, the General Data Protection Regulation GDPR ((EU) 2016/679) provisions as implemented into UK law by [the Data Protection, Privacy and Electronic Communications \(Amendments etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/419\)](#)) and [Data Protection Act 2018](#) (DPA) contain provisions around the use of personal data, including concerning website users.
- [The Privacy and Electronic Communications \(EC Directive\) Regulations 2003](#) (PECR) govern direct marketing (both solicited and unsolicited) by means of electronic communication.
- [The Online Intermediation Services for Business Users \(Enforcement\) Regulations 2020 \(P2B Regulations\)](#) impose obligations on providers of online platforms or search engines that are used by businesses to reach consumers.

Other regulations to be aware of include the Equality Act 2010, Employment Relations Act 1996, Consumer Contracts Regulations 2013 and the Health and Safety at Work Regulations 2002.

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