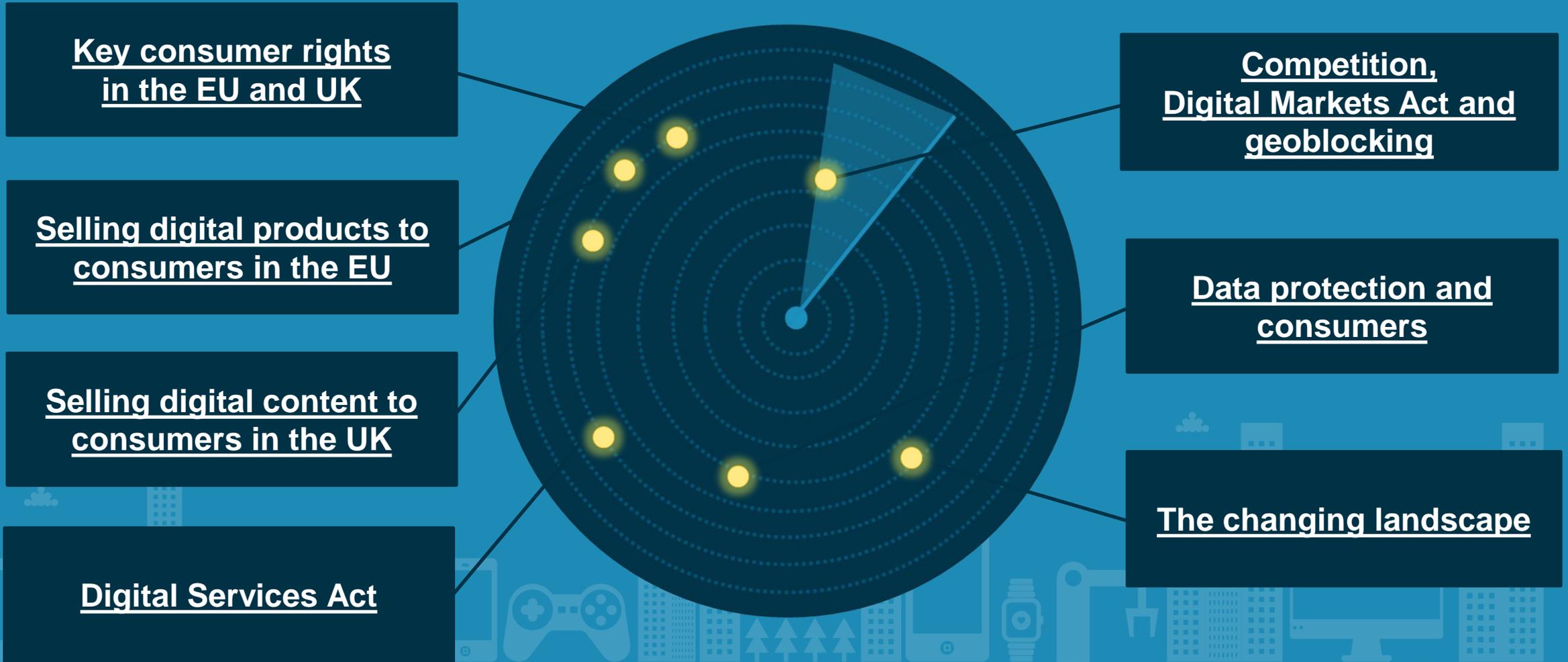


The Osborne Clarke Consumer and Digital Content Radar

A guide to key legislation to consider when selling digital content to EU and UK consumers



Key consumer rights (UK and EU)

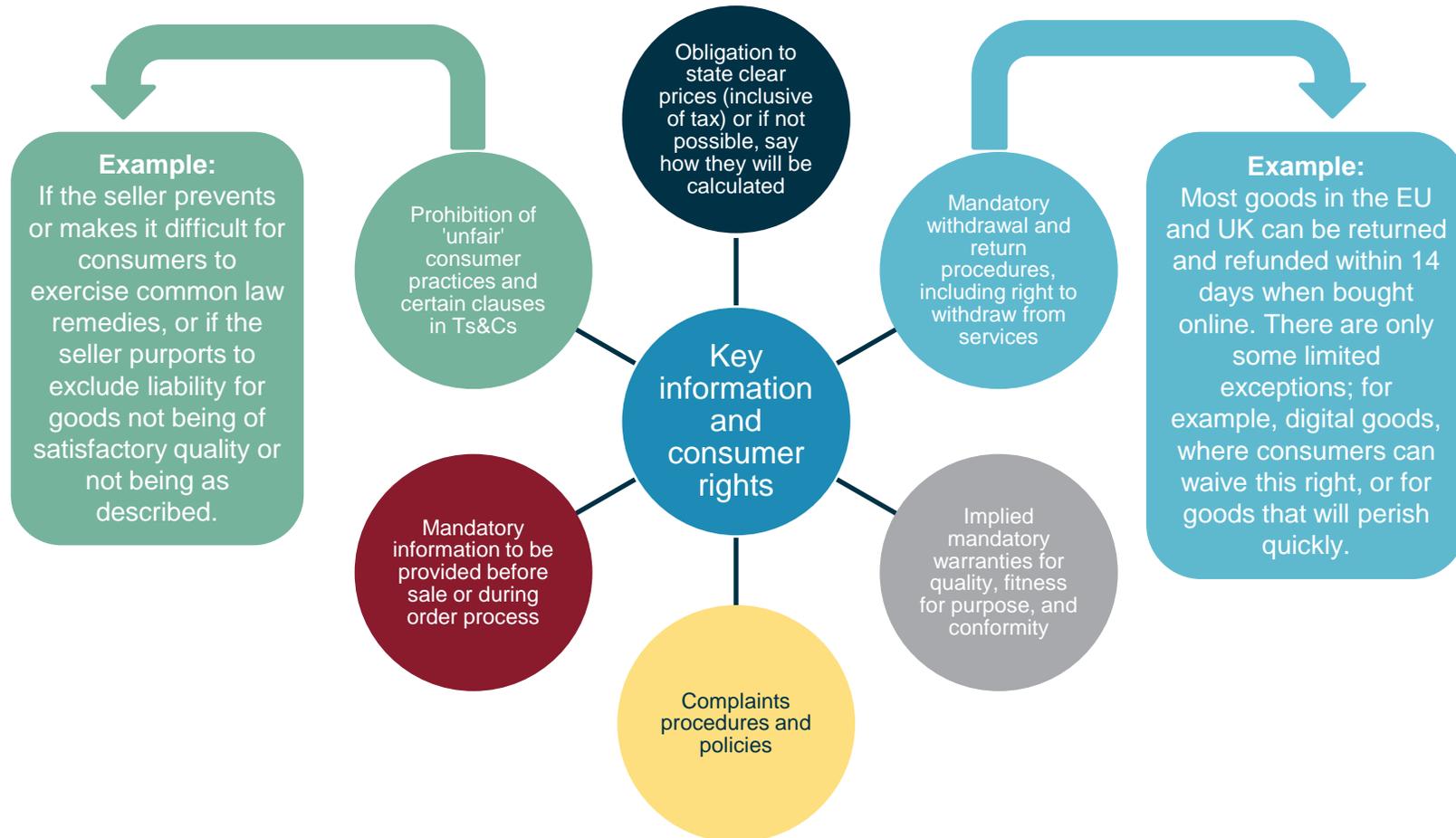


Who does it apply to?

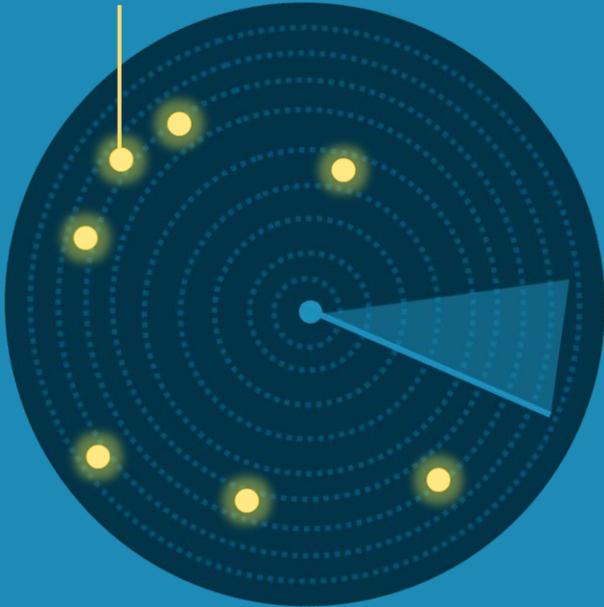
- Businesses selling goods or services to consumers in the UK and EU.
- Regardless of establishment or physical presence in the UK or EU.

What are companies required to do?

Businesses selling to consumers in the UK or the EU have to follow a variety of different rules – some are common across these jurisdictions, and many are different from rules in other parts of the world, like the US. This guide explains some key principles that businesses should be aware of when selling to UK and EU consumers.



Selling digital products to EU consumers



Who does it apply to?

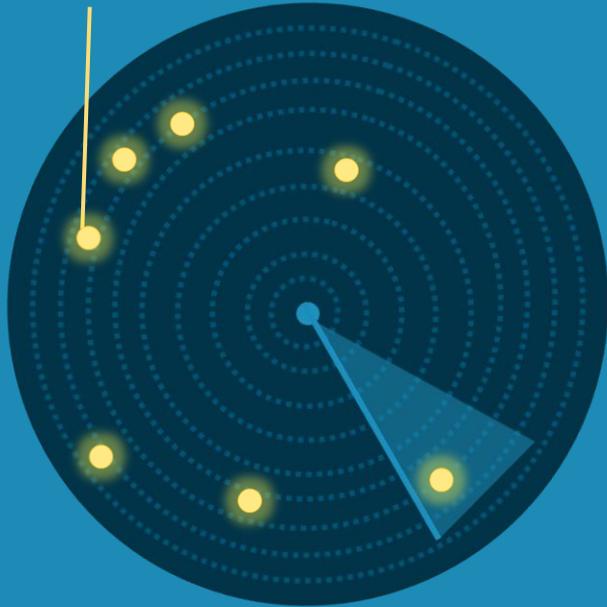
- Any company selling digital content to consumers in the EU.
- Whether or not the business is established or has a physical presence in the EU.

What are companies required to do?

The sale of digital content and services in the EU is primarily governed by the Digital Content Directive, as well as another directive updating various consumer laws, known as the 'Omnibus Directive'. These harmonise rules across the EU, introduce General Data Protection Regulation (GDPR) style fines for non-compliance, and set a minimum consumer protection standard. The Digital Content Directive contains obligations such as:

- A requirement for "functionality", "compatibility" and "interoperability" when assessing conformity of digital content or services
- New contractual mechanism for "payment with personal data".
- Obligation to supply consumers with updates (for example, security updates)
- Burden of proof for conformity is on the seller for one year after delivery.
- Obligation on traders to make available (at the customers request) any digital content provided or created by the consumer when using digital content or a digital service.
- New contractual regimes require updates to Ts&Cs, purchase flows and user interfaces
- Rules differ between "content" and "services", and between one-off contracts and on-going subscriptions. Sorting offerings in the correct bucket is key!

Selling digital content to UK consumers



Who does it apply to?

- Any company selling digital goods including, services, digital downloads and subscriptions to customers in the UK.
- Whether or not the business is established or has a physical presence in the UK.

What are companies required to do?

Whilst consumer law in the UK is somewhat driven from EU laws, the UK post Brexit has its own laws and separate regulatory bodies. The following are just some key impacts of the Consumer Rights Act 2015 (the main consumer protection law currently in place in the UK).

Important key terms under the CRA and an impact on digital content

Selling to a UK **consumer** will mean selling to an individual which is buying wholly or mainly outside that individual's trade, business craft or profession.

Consumers have common law and statutory rights that cannot be contracted out of. If a business argues that someone is not a consumer, it is on the business to prove.

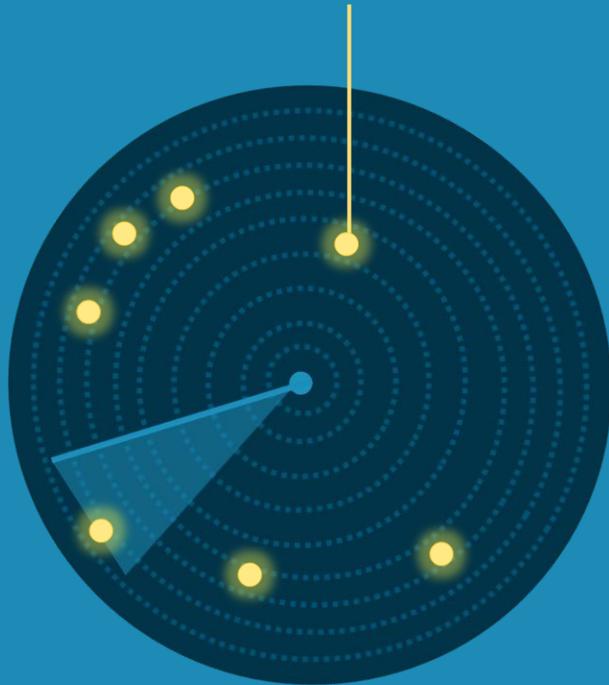
Digital content is data which is produced and supplied in digital form. Examples includes apps, games, software and music. It doesn't include digital content on tangible formats such as CDs/DVDs

Digital content still has to be satisfactory quality but the law recognises it cannot be returned. Instead there are rights for repair or replacement (or price reduction).

Whilst supplied digitally, some digital content will be considered "good" or "service" under UK consumer law which carries different rights.

Certain rights and remedies must be offered when selling goods or services. This includes that they must be satisfactory quality, and there are rights for consumers to be able to return goods.

Digital Services Act



Who will it apply to?

- The DSA applies to providers of online intermediary services to business and consumers in the EU.
- It also applies to online platforms and online search engines.

What will it require companies to do?

The Digital Services Act (DSA) applies to providers of online intermediary services and obligations vary depending on the size of the service provider and services offered. It came into force on 16 November 2022 and most of its provisions apply to service providers from February 2024 (but very large online platforms (VLOPs) or search engines (VLOSE) need to comply faster).

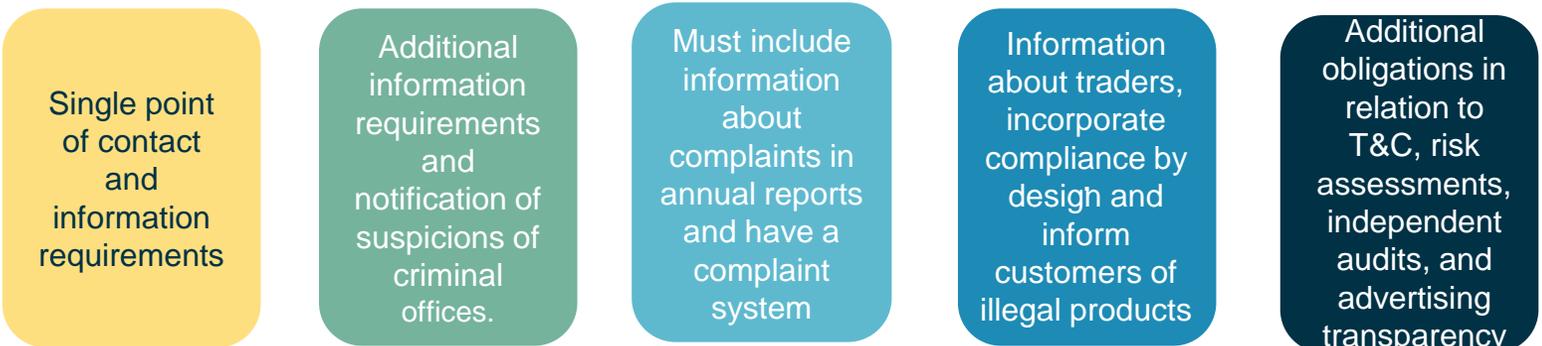
Companies will first need to determine whether they are:



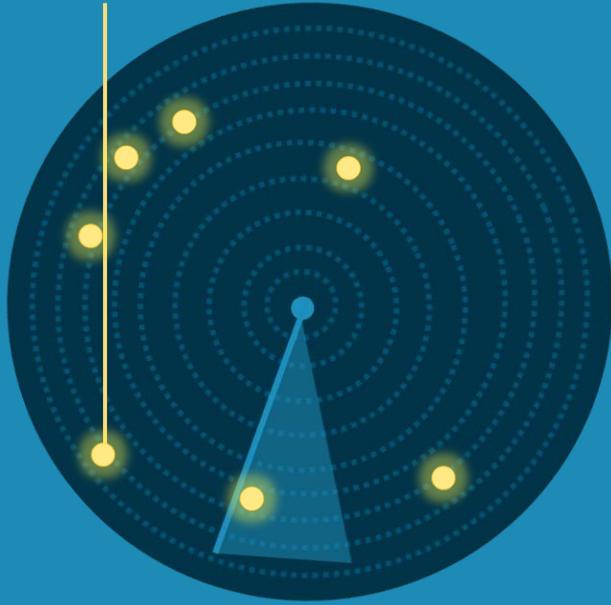
Increasing number of obligations



Examples of obligations



Competition, DMA and geoblocking



Who does it apply to?

- Both EU and UK have competition laws for companies dealing with consumers, which apply whether or not the trader is based there.
- The DMA and geo-blocking laws apply to traders offering goods to EU consumers

What are companies required to do?

Competition law (known as antitrust law in the US) imposes a host of obligations on traders to prevent abuse of a dominant position in the market, or collusion with other traders. EU traders must not discriminate against customers based elsewhere within the EU. Within the EU, there are rules against geoblocking users from other member states (such as preventing customers from member state A from using a website targeted at member state B).

The Digital Markets Act was introduced to “ensure a competitive and fair digital sector with a view to promoting innovation, high quality digital products and services, fair prices and high quality and choice in the digital sector”. The DMA introduces a set of obligations targeted at “gatekeeper” digital players with significant scale and reach in the EU generally speaking the measure is targeted at “Big Tech” operators.

Prohibited behaviour

- Self-preferencing own services
- Preventing links to third party services
- Combination of personal data obtained from core platform services with any other service

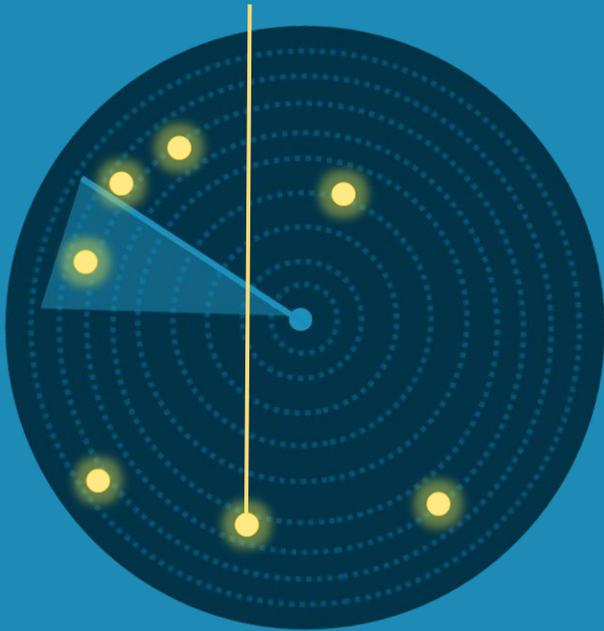
Gatekeeper obligations

- Permitting third parties to interoperate with gatekeeper provided services
- Permitting business users to access data they generate in their use of gatekeeper services

Merger notifications

- Gatekeepers must notify the EU Commission of any mergers involving other core platform or digital providers – even if not generally notifiable under EU rules

Data protection and consumers



Who does it apply to?

- The GDPR applies to companies processing EU personal data and the UK GDPR applies to companies processing UK personal data.
- They apply whether or not the company is incorporated in those locations.

What are companies required to do?

Dealing with consumers will mean dealing with personal data, whether that's in the context of processing online sales, advertising, or fulfilling orders. Data protection is a large area of law in itself, with large fines for non-compliance, so companies should contact a specialist to manage data protection risks.

Here are some legal obligations when dealing with consumers:

Data protection impact assessments

Obtaining consent for marketing

Contract terms with suppliers

Data subject rights e.g. to right of access



Privacy notices

The changing landscape (EU and UK)



Who will it apply to?

- Companies looking to sell to consumers either in the EU or UK.
- Whether or not the companies are incorporated or established there.

What will it require companies to do?

The effects of the Consumer Omnibus Directive in the EU are still being felt, with new national implementing law introducing variations, new wave of digital and artificial intelligence (AI) legislation being introduced, and enforcement ramping up. Post Brexit, the UK has proposed its own update with the Digital Markets, Competition and Consumer Bill.



- The Consumer Omnibus set of directives are subject to national implementation, giving Member States flexibility to be even more strict. Some Member States have additional rules, and further enhancements of EU consumer law are already being debated.
- Digital products that include AI aspects will soon be regulated in the EU under the EU AI Act (expected to come into force early 2024 on the current legislative trajectory).



- New powers for regulators – more powers for the Digital Markets Unit (DMU) and giving the Competition and Markets Authority (CMA). DMU will have flexibility to impose conduct requirements on designated firms.
- 14 day cool off period for subscriptions and easy cancellation.
- Higher fines for breach of consumer law (up to £300,000 GBP or 10% of worldwide turnover and the power for the CMA to enforce this directly).

Contact one of our international experts



Felix Hilgert

Partner
United States (German qualified)

+1 650 462 4034
felix.hilgert@osborneclarke.com



Emily Barwell

Associate
United States (English qualified)

+1 332 245 4103
emily.barwell@osborneclarke.com



Konstantin Ewald

Partner
Germany

+49 221 5108 4106
konstantin.ewald@osborneclarke.com



Claire Bouchenard

Partner
France

+33 1 84 8 24530
claire.bouchenard@osborneclarke.com



Katrina Anderson

Associate Director
United Kingdom

+44 207 105 7661
katrina.anderson@osborneclarke.com



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