

qLegal

The small print for BIG IDEAS

Disclaimer: This online publication describes the law in general terms. It is not intended to provide legal advice on specific situations and should not be relied upon as a source of legal advice.

Date produced: 12 April 2021

qLegal Online Publication

What to consider when creating a website for your business

This online publication explains what things to consider before creating a website, for example for a small company wishing to sell its products online (B2C). Firstly, the question of acquiring ownership of a domain name will be dealt with. Secondly, the issue of cookies and privacy policies and their importance will be examined. Thirdly, the terms and conditions will be discussed. Finally, the document will explain what SEOs are and what they are used for.

1. Domain name

A domain name is an internet address used to find websites. It serves as an identification of a company on the internet. The type of company and the country in which it is domiciled needs to be taken into account for the sake of granting the top-level domain from an international organization, Internet Corporation for Assigned Names and Numbers (ICANN). Commonly, businesses will obtain domain names in regard to their domicile (i.e. .fr for a French business). The main principle of domain names is they are neither ownership rights nor intellectual property rights, but rights to use such names during the period for which the website is in use.

Domain names are registered under the first-come, first-served principle. Upon registration to a registrar, the relevant officer in the company searches through its database to see if the name is still available. If confirmed available, the name and rights to use it could be registered for a certain period of time. On the other hand, if your desired domain name is unavailable, it is possible to register any other type of new domains which are more flexible and 'cool' (e.g. ".voyage", ".app", ".ninja.") or pick another new name for the domain. In the event of domain name dispute, ICANN also provides a cheaper and easier dispute resolution body (UDRP).

qLegal

The small print for BIG IDEAS

2. Cookies and privacy policies

In order to understand the concept of cookies and privacy policies, it is important to recall what personal data is. “Personal data” means any information relating to an

identified or identifiable living individual who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual (Section 3 (2) and (3) of the Data Protection Act 2018 (“DPA 2018”). Concerning cookies, Recital 30 of the General Data Protection Regulation 2016/679 (“GDPR”) states that “natural persons may be associated with online identifiers provided by their devices, applications, tools and protocols, such as [...] cookie identifiers”. Therefore, cookies are web data and the Information Commissioner’s Office (hereinafter ICO) described them as “small pieces of information, normally consisting of just letters and numbers, which online services provide when users visit them”, and then the “software on the user’s device [...] can store cookies and send them back to the website next time they visit”. Cookies are considered personal data when the information contained may be linked to a name, a postal address or an email address, or when it collects a unique cookie ID and personal traits. Consumers are the weaker party in an online B2C contract and their data has to be protected, as cookies might “be used to collect information for online targeted advertising and marketing”. It should be added that if the website collects personal data, including through cookies, it should have a privacy policy. Indeed, it is through this privacy policy that the consumer is informed about how his or her data is collected and stored by the website.

The applicable laws relating to cookies and privacy policies are the Privacy and Electronic Communications Regulations 2003 (SI 2003/2426) (“PECR 2003”) as amended by the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011 (SI 2011/1208) (together “PECR”) and the DPA 2018. The latter Act supplements and tailors the GDPR and applies a broadly equivalent regime to certain types of processing to which the GDPR does not apply. The Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulation 2019, which merges the GDPR and the DPA 2018 into the “UK GDPR”, enabled the necessary changes to be made to ensure the correct application of the laws following the UK’s exit from the European Union.

In relation to cookies and privacy policies, the ICO, which is an independent body, plays a fundamental role in the UK. Indeed, its purpose is, among others, to ensure that companies and organisations process data in conformity with the law and regulations. The ICO also deals with data protection complaints and conducts related investigations. If necessary, the ICO prosecutes companies that do not comply with the law or regulations.

The users of an online service need to be “provided with clear and comprehensive information about the purpose of the storage of, or access to, [their] information” stored and

qLegal

The small print for BIG IDEAS

have to give consent to any storage or access to their information (Regulation 6 (2) of the PECR 2003). There are three basic rules: the website provider has to (i) tell the users the cookies are there; (ii) explain what the cookies are doing and why; and (iii) get the

user's consent to store a cookie on their device. To be valid, consent must be given in a free and informed manner. It should be noted that the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulation 2019 amended PECR so that the GDPR definition of consent applies for the purpose of PECR. This digital consent can be found on the online page and users only need to click on a "privacy policy" link that is usually at the bottom of each page and in the terms and conditions. Also, users can consent by clicking "OK" in the cookie banner, by changing the settings or by just staying on the website without modifying the settings. Indeed, consent does not have to be given explicitly, but it must be given by clear positive action. The consent to the placement of cookies is to be received before the cookie is placed or before any information is collected. There are, however, some exceptions to this consent requirement. Consent is not needed when the cookie is only there to carry out the transmission of a communication, or when the cookie is only used to provide an information society service asked by the user.

A company that does not comply with its obligations relating to cookies exposes itself to the risk of being fined by the ICO. The latter can impose significant fines on organisations, namely a maximum of 20 million Euros or 4% of the undertaking's total annual worldwide turnover in the preceding financial year for breach of the DPA 2018, and a maximum of £500,000 for breach of PECR 2003. It is not only important to provide cookies for the protection of the privacy of website users, but it is also important to comply with the laws that relate to cookies "from a reputational point of view, [and] also from a financial perspective" for the company running the business. Recently, in December 2020, for example, the *Commission Nationale de l'Informatique et des Libertés* (CNIL) fined AMAZON EUROPE CORE 35 million euros and GOOGLE LLC and GOOGLE IRELAND LIMITED a total of 100 million euros for placing advertising cookies on users' computers without their prior consent.

3. Terms and conditions (Cf. ANNEX 1 WHAT SHOULD BE STATED IN THE TERMS AND CONDITIONS)

When a trader sells goods online, parties are dealing with a distance contract, and the consumer must have information about the contract before it is concluded. Indeed, before the client makes the purchase, pre-contract information must be given or made available to the consumer in a clear and comprehensible manner (Regulations 13 and 14 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013/3134 ("CCRs")) and, where the contract places the consumer under an obligation to pay, the consumer must be made aware of certain information (Regulation 14(s) CCR). When terms and conditions with the mandatory information are made available to the consumer before he orders, the seller fulfils the obligation to provide pre-contractual information. The

qLegal

The small print for BIG IDEAS

information that has to be given can be divided into two categories: (i) mandatory information, as mentioned in section 2 of the CCRs, and (ii) optional information, which results from commercial practices (cf. ANNEX 1).

It is important to give as much information as possible to the consumer, who will then have more confidence in the trader. The consumer must know about his rights. However, it should be noted that there is no legal obligation to provide for terms and conditions, in addition to the mandatory information already given. But when general terms and conditions are established, those terms and conditions must imperatively respect consumer rights and be fair, meaning that they balance the rights and obligations of each party in the contract. They inform the customer about who the seller is, how the seller provides his products, how parties can end the contract, what are the measures to take if a problem arises, and contains relevant information. These terms and conditions have to be drafted in plain and intelligible language so that the consumer is aware of all the contractual terms.

4. Search Engine Optimization (SEO)

SEO is a method to make a website more visible on search engines. It often directs users to high traffic websites by matching users' search patterns. For B2C businesses, SEO is vital to increase the amount of website traffic and transactions, so the website could be considered reliable by potential consumers. While deciding on what will be sold on the website, webmasters will also first analyse keywords that they will type.

Tips to avoid when using SEO:

- Heavily relying on paid SEO options instead of free ones to achieve natural results;
- Arranging for links supplied by link farms (outbound links posted for the purpose of making links seem popular);
- Using irrelevant mutual links (link exchange between two websites to boost both websites SEO);
- Using long and excessive keywords.

Apart from those considerations that have been mentioned, there are also a variety of considerations of the same importance that needed to be taken into account when creating a website. For instance, terms of website use that reduce the liability of a website and additional requirements and details. For further inquiries, please consider contacting qLegal to apply for bespoke advice from our legal advice clinic.

This online publication was drafted by students from the Centre for Commercial Law Studies, Queen Mary University of London: Muhammad IQBAL PRATAMA, Paloma CROSET SUAREZ



qLegal Online Publication

What to consider when creating a website for your business

ANNEX 1 WHAT SHOULD BE STATED IN THE TERMS AND CONDITIONS

The following is a non-exhaustive list of what must be included in the terms and conditions of the website (cf. Schedule 2 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134)).

Mandatory requirements (cf. Schedule 2 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134)):

- the main characteristics of the goods or services, to the extent appropriate to the medium of communication and to the goods or services;
- the identity of the trader (such as the trader's trading name);
- the geographical address at which the trader is established and, where available, the trader's telephone number, fax number and e-mail address, to enable the consumer to contact the trader quickly and communicate efficiently;
- where the trader is acting on behalf of another trader, the geographical address and identity of that other trader;
- if different from the address at which the trader is established, the geographical address of the place of business of the trader, and, where the trader acts on behalf of another trader, the geographical address of the place of business of that other trader, where the consumer can address any complaints;
- the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated;
- where applicable, all additional delivery charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;

qLegal

The small print for BIG IDEAS

- in the case of a contract of indeterminate duration or a contract containing a subscription, the total costs per billing period or (where such contracts are charged at a fixed rate) the total monthly costs;
- the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate;
- the arrangements for payment, delivery, performance, and the time by which the trader undertakes to deliver the goods or to perform the services;
- where applicable, the trader's complaint handling policy;
- where a right to cancel exists, the conditions, time limit and procedures for exercising that right in accordance with regulations 27 to 38;
- where applicable, that the consumer will have to bear the cost of returning the goods in case of cancellation and, for distance contracts, if the goods, by their nature, cannot normally be returned by post, the cost of returning the goods;
- that, if the consumer exercises the right to cancel after having made a request in accordance with regulation 36(1), the consumer is to be liable to pay the trader reasonable costs in accordance with regulation 36(4);
- where under regulation 28, 36 or 37 there is no right to cancel or the right to cancel may be lost, the information that the consumer will not benefit from a right to cancel, or the circumstances under which the consumer loses the right to cancel;
- in the case of a sales contract, a reminder that the trader is under a legal duty to supply goods that are in conformity with the contract;
- where applicable, the existence and the conditions of after-sale customer assistance, after-sales services and commercial guarantees;
- the existence of relevant codes of conduct, as defined in regulation 5(3)(b) of the Consumer Protection from Unfair Trading Regulations 2008, and how copies of them can be obtained, where applicable;
- 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;
- where applicable, the minimum duration of the consumer's obligations under the contract;
- 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 trader;
- where applicable, the functionality, including applicable technical protection measures, of digital content;
- where applicable, any relevant compatibility of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of;
- where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it.

qLegal

The small print for BIG IDEAS

Market standards (non-exhaustive):

- cooling-off period to the consumer (possibility to cancel the contract penalty-free);
- acceptance of the order, and therefore the formation of

the contract, when the seller sends a confirmation email (the consumer makes the offer: problems with the postal rule thus prevented);

- geographical restrictions (e.g. if the seller only wants to sell products in the UK);
- consumer's right to make changes;
- consumer's rights to terminate up to 14 days after delivery of goods (can be extended);
- transfer of risks and transfer of title (better for the seller to make an express provision ensuring that he maintains ownership of the goods until payment has been received);
- the seller may offer the consumer more guarantee than the law requires;
- trader's right to end the contract (common law right, but better to include it in the terms and conditions);
- interests on late payment (between 2% and 4%);
- name and information about the alternative dispute resolution entity;
- link to the privacy policy.