

This guidance is in the process of being reviewed by the Bar Council in light of recent case law on the enforceability of advance payments terms in public access cases where the case is adjourned. Anybody reading this guidance should do so alongside the judgment of the High Court in Glaser & Anor v Atay [2023] EWHC 2539 (KB).



The Bar Council

Consumer Contracts (Information etc.) Regulations 2013

Purpose:	To draw barristers' attention to obligations that may arise from these Regulations
Overview:	The 2013 Regulations – when the Regulations apply – who is a ‘consumer’ – ‘off-premises’, ‘distance’ and ‘on-premises’ contracts – required pre-contract information – cancellation rights – duties on cancellation – no work during cancellation period without express consent – consequences of non-compliance – client care letters – further guidance
Scope of Application:	Barristers who accept instructions directly from lay clients who are consumers
Issued by:	Legal Services and Ethics Committees
Issued:	May 2016
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Status and effect:	Please see the notice at end of this document. This is not ‘guidance’ for the purposes of the BSB Handbook I6.4.

Introduction

1. The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 came into force on 13 June 2014¹. The main effect of the Regulations

¹ SI 2013/3134. The original version of the Regulations can be found [here](#) but they have subsequently been amended, e.g. by reg. 9 of the Consumer Protection (Amendment) Regulations 2014 and the

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is to give consumers rights to cancel contracts for goods or services that are made remotely (for example by telephone, email or over the internet).

2. The Regulations are complex and this paper is intended as general guidance; it is not a substitute for reading them. The main issues of relevance to barristers are these:

2.1. The Regulations apply where services are provided to a consumer. Thus they are likely to be particularly relevant to barristers doing public access work (see paragraphs 3 to 9 below).

2.2. If they apply, the Regulations require you to notify your client of certain things; most particularly (where it exists) your client's right to cancel (see paragraphs 10 to 13 below).

2.3. The cancellation period is 14 days. You should not do any work during this period unless your client has expressly authorised you to do so (see paragraphs 14 to 17 below).

Application: who is a 'consumer'?

3. The Regulations apply to contracts between a 'trader' and a 'consumer' (reg. 4). Barristers acting in the course of their practice will qualify as traders under the Regulations. 'Consumers' are individuals acting for purposes which are wholly or mainly outside their trade, business, craft or profession.

4. It follows the Regulations will apply to public access work where you enter into a contract directly with a client who is a consumer. Examples of public access clients who will qualify as consumers include a husband or wife in a family case; immigration cases in which your client is an individual; employees in employment disputes; and housing cases in which your client is a tenant.

5. In the view of the Bar Council, the Regulations do not apply to contracts between barristers and the following types of client:

Consumer Contracts (Amendment) Regulations 2015. A 'Latest Available' version of the Regulations can be found on the 'legislation.gov.uk' website here: www.legislation.gov.uk/ukxi/2013/3134/contents.

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5.1. Solicitors who are acting for professional or business purposes (e.g. where instructions are received from an instructing solicitor on behalf of a lay client, even if the lay client would be a 'consumer').

5.2. Public access clients who (a) are acting for the purposes of their trade, business, craft or profession, or (b) are not individuals (such as clients who are corporate bodies).

5.3. Licensed access clients who (a) are not individuals, or (b) are acting for the purposes of their trade, business, craft or profession. In the latter category, the licensed access clients could be acting as intermediaries, or could be instructing you on their own behalf.

Application: location

6. The Regulations divide contracts between a trader and a consumer into three categories depending on where the contract was concluded: *on-premises*, *distance* and *off-premises*. The definitions of these types of contract are complex and there will undoubtedly be cases in which you will need to consult the Regulations to determine into which category the contract falls (reg.5). However, as a rough guide:

6.1. *Off-premises*. A contract concluded, or which follows discussions, in the simultaneous presence of the consumer and you (or your clerk) in a place other than chambers, qualifies as an *off-premises* contract. For you, this is likely to include contracts entered into, or following discussions, at your client's home or place of work or at court. *Off-premises* contracts are considered to present the greatest potential risk to the consumer – they would include, for example, doorstep sales – and the full range of protections apply.

6.2. *Distance*. A contract with a consumer entered into without any physical contact prior to its conclusion through the use of an organised *distance* sales or service-provision scheme is a *distance* contract. As explained in paragraphs 8 and 9 below, this probably includes a binding contract made by email or through a website, telephone, fax or postal system operated by you or your chambers.

6.3. *On-premises*. All other contracts with consumers qualify as *on-premises* contracts. These include situations in which a consumer has entered someone's business premises to engage their services. This category is likely to cover most contracts made between you and a consumer when they are in chambers. *On-*

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premises contracts are considered to present the lowest risk to the consumer and the right to cancel does not apply.

7. The important point to note is if you are instructed directly by a client (a) who is a consumer and (b) where the contract falls into the category of *off-premises* or *distance*, then your client has a 14-day right to cancel the contract.

8. Barristers instructed on a public access basis frequently send client care letters out by post or email, inviting the client to read the letter and send back a signed copy. A contract made in this way will be a *distance* contract, and so the cancellation right will apply, if you offered your services through an ‘organised distance sales or service-provision scheme’.

9. Available guidance does not give a definitive answer to the question whether the offering of services by a barrister through chambers would amount to an ‘organised distance service-provision scheme’². The view of the former Office of Fair Trading was that sending a standard letter out to a potential client without a meeting taking place would be likely to fall within the definition³; and given that the purpose of the legislation is consumer protection, a court could accept this interpretation and apply it to barristers. Where you are engaged by a public access client who is a consumer, and the contract was not made at your chambers, you would be wise to proceed on the assumption that cancellation rights will exist under the Regulations, particularly in view of the consequences flowing from a failure to comply with the Regulations (see paragraph 18 below).

Information requirements

10. If the Regulations apply, then you must give a consumer client certain precontract information, in a clear and comprehensible manner, together with a

² The Commission guidance on the Directive (p.30) – the relevance of this guidance and the Directive are explained at paragraph 21 below – suggests the term ‘distance contract’ will not apply where a trader exceptionally concludes a contract by distance means after being contacted by the consumer. It also suggests (following recital 20 of the Directive) that the concept will not include reservations made by a consumer through a means of distance communication to request the provision of a service from a professional, citing the case of a consumer booking a hairdresser. However, it also states that although simply taking an appointment with a trader is not considered a *distance* contract, a binding reservation made by telephone for services to be received at a certain time is likely to be a *distance* contract (p.30).

³ <http://www.journalonline.co.uk/Magazine/47-3/1000073.aspx>

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cancellation form (if they have the right to cancel by virtue of it being a *distance* or *off-premises* contract), before the client is bound by the contract (regs.9, 10 and 13).

11. The information required differs between different types of contract, but includes matters such as contact details, cancellation rights (where applicable), the price of the services to be supplied and complaints procedures. Information required in relation to on-premises contracts appears in Sch.1 to the Regulations. That required in relation to *distance*⁴ and *off-premises* contracts appears in Sch.2 to the Regulations. The required cancellation form for *distance* and *off-premises* contracts appears in Sch.3 to the Regulations.

12. The required information is covered by the BSB public access model client care letter⁵, provided it is properly completed and supplied to the consumer (in person or by post, fax or email) before they are bound by the contract. It should be noted that the BSB model letters are drafted on the assumption that all public access clients are consumers and that they have rights of cancellation under the Regulations. When this is not the case, the client care letter should be amended accordingly. This subject is dealt with further in paragraph 20 below.

13. In the case of *off-premises* and *distance* contracts, written confirmation⁶ of the contract must also be given to the consumer within a reasonable time of the contract being entered into and before any service is provided under it (regs. 12 and 16).⁷ Again, this requirement can be met by an appropriate client care letter (though note that for *off-premises* contracts this must be provided on paper unless the client agrees to it being provided on another form of 'durable medium', such as email).

Cancellation rights

14. The Regulations provide a 14-day cancellation right for *distance* and *off-premises* contracts (regs.29 and 30). In effect, the consumer client has a 14-day cooling off period

⁴ See regs.13(4), 14 and 15 for relaxations and additional requirements in relation to means of distance communication with limited time or space to display information, distance contracts concluded by electronic means and telephone calls to conclude a distance contract.

⁵ <https://www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/code-guidance/>

⁶ For *off-premises* contracts, a copy of the signed contract may be given instead.

⁷ Note: in disputes regarding compliance with the information requirements regarding *off-premises* and *distance* contracts, the burden is on the barrister to prove he or she complied (reg.17). This does not apply in relation to proceedings for an offence under reg.19 or relating to compliance with an injunction under reg.45.

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in which to change his or her mind. The Regulations do not confer a cancellation right in relation to *on-premises* contracts.

15. You must not begin to supply any service before any cancellation period under the Regulations has expired unless your consumer client has made an express request for you to do so. In the case of an *off-premises* contract, that request must be in writing⁸ (reg.36(1)). If you supply a service during the cancellation period at the express request of your consumer client, then:

15.1. If you provide all of the services covered by the contract (so that your contract is fully performed) before cancellation and your client acknowledged when making their express request that they would lose the right to cancel once the contract had been fully performed, then the right to cancel will be lost, and your client will be liable for the full contract price (reg. 36(2)); and

15.2. If you provide part of those services (so that your contract is partially performed) before cancellation, then your client will be liable to pay for the part of the service which you provided before you were informed of the cancellation (reg. 36(4)).⁹

16. Subject to paragraph 17 below, if your client has paid you any sums before cancellation, then you must reimburse the client without undue delay and in any event within 14 days of you being informed of your client's decision to cancel (reg.34).

17. The Bar Council takes the view that your contract can make it clear that any reimbursement that you may be obliged to make will be subject to your right to set off any sums lawfully due to you under the contract (i.e. those sums referred to in subparagraph (a) or (b) in paragraph 15 above). If your client agrees to this, then you would be obliged only to reimburse the balance to your client. As yet, however, there is no case law which confirms that this view is correct.

⁸ The Regulations state that the request must be made on 'durable medium.' This precludes, for example, filling in a form on a website; the reason being that this could not be stored by the client for future reference. However, an email, fax or letter would all comply with this requirement. One potential method of compliance would be for the client to make an election on the client care letter which he returns to you.

⁹ The amount the consumer is liable for is to be calculated in proportion to what has been supplied on the basis of the total contract price or, if the total contract price is excessive, then the market value of the service supplied (reg.36(4) and (5)).

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Non-compliance

18. Failure to comply with the Regulations can:

18.1. in the case of a failure to give notice of cancellation rights in respect of an *off-premises* contract, involve a criminal offence (reg. 19)¹⁰;

18.2. in the case of a failure to give notice of cancellation rights in respect of an *off-premises* contract or a *distance* contract, extend the cancellation period by up to 12 months (reg. 31) and result in your client not being liable to pay for services provided prior to cancellation (reg. 36(6));

18.3. in the case of a failure to provide the required information, place you in breach of contract (reg. 18); and

18.4. expose you to enforcement action for breach of the Regulations (regs. 44 and 45).

19. The BSB might also look carefully at whether a serious or persistent breach of consumer protection legislation may have involved or given rise to professional misconduct, even if it does not involve a criminal offence.

Client care letter

20. The BSB publishes on its website model client care letters for barristers instructed on a public access basis either directly by a lay client ('no intermediary cases') or on behalf of a lay client ('intermediary cases'). The following points should be noted about these model letters:

20.1. They have all been drafted on the assumption that the client (and, where relevant, intermediary) have cancellation rights under the Regulations. This means that they assume that every client or intermediary is a consumer, and that all contracts are *distance* or *off-premises*.

20.2. If that is not the case (for example if you are instructed by a business or professional client), then you would be wise to amend the client care letter to exclude references to rights of cancellation.

¹⁰ The offence is subject to a due diligence defence in the cases where the offence was due to the act or default, or information supplied by, another (reg.20).

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20.3. Under the heading 'Effects of cancellation', the model letters state that if the client cancels the contract in accordance with the right to do so under the Regulations, you will reimburse all payments received from the client. However, this takes no account of the possibility that your client has asked you to start work during the cancellation period, giving you the right to be paid such proportion of your fee as reflects any work done before cancellation. If you wish to have a right to set off any sums lawfully due to you under the contract (see paragraph 17 above), then you would be wise to make appropriate revisions to the client care letter to provide for this expressly.

Further guidance

21. The Regulations implement Directive 2011/83/EU on consumer rights. *European Commission Guidance* on the Directive can be viewed [here](#) (cached). For the relevance of the Directive to interpretation of the Regulations, see *Robertson v Swift* [2014] UKSC 50. EU-derived domestic legislation continues to have effect after Brexit (section 2, European Union (Withdrawal Agreement) Act 2020).

22. The *Department for Business Innovation and Skills* has issued general guidance on the Regulations, which can be viewed [here](#). Note however that this Guidance was issued in December 2013, prior to the Regulations coming into force, and has not been updated since. The department is now known as the *Department for Business, Energy & Industrial Strategy*.

23. The Law Society has issued guidance to solicitors which can be found [here](#).

24. A detailed legal consideration of the Regulations is to be found in Chapter 40 of *Chitty on Contracts* (34th Edition).

Important Notice

This document has been prepared by the Bar Council to assist barristers on matters of professional conduct and ethics. **It is not "guidance" for the purposes of the BSB Handbook I6.4, and neither the BSB nor a disciplinary tribunal nor the Legal Ombudsman is bound by any views or advice expressed in it.** It does not comprise - and cannot be relied on as giving - legal advice. It has been prepared in good faith, but neither the Bar Council nor any of the individuals responsible for or involved in its preparation accept any responsibility or liability for anything done in reliance on it. For fuller information as to the status and effect of this document, please see [here](#).