

Internet Delivery Charges to the Highlands of Scotland



Law & Guidance

Highland Council
Trading Standards
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◆ The Highland Council Area

The Highland Council is the largest local authority area in the UK and is approximately 25% larger than Wales. It has a population of over 220,000 (0.3% of UK population) with around one third of its residents living in Inverness – one of the fastest growing cities in Europe. It is an area of extremes with a vast rural hinterland sitting alongside the rapidly expanding urban centres surrounding Inverness. See Annex 2 for a list of relevant postcodes and a postcode district map. Whilst Highland has a well-established retail sector its residents have always looked outside the area to source more specialised products and consequently online shopping has likely proved to be more popular in the Highland area compared with other areas of the UK. A Highland consumer now enjoys access to a range of products like never before but along with that comes one of the most contentious aspects of online retailing – **delivery charges**.

◆ Delivery Charges Project

In 2011 Highland Council's Trading Standards service began an enforcement project to take a systematic look at the issue of delivery charges by online retailers. The project was prompted by a growing awareness that buyers in the Highlands believed they were getting a raw deal on delivery charges. Increasing numbers of complaints were being received from consumers and business buyers. Furthermore local and national politicians were taking a keen interest in the topic. An online survey generated a large response and several hundred online retailers were accused of treating Highland consumers unfairly on delivery charges. The project has succeeded in raising awareness of delivery charge issues and after being contacted by Highland Trading Standards, many retailers have adopted new delivery charges processes to ensure compliance and more transparent delivery charge pricing. Several have done this by reducing or eliminating surcharges to the Highlands. Highland consumers can continue to report issues at www.highland.gov.uk/deliverycharges.

◆ Delivery Charges issues

One of the main concerns highlighted by consumers is when retailers offer 'FREE MAINLAND UK DELIVERY' when in fact this is not available for all UK mainland areas; including in particular areas in the Highlands of Scotland. The Highland Council area is largely land based with only a relatively small area (7.5%) offshore. The largest 'Island' in the Highland Council area is the *Isle of Skye* but even it is linked to the mainland by a modern road bridge and is easily accessible. Therefore over 90% of the Highland Council area is part of the mainland area of the United Kingdom. Consequently when the average Highland Council resident reads '**Mainland UK**', they naturally and instinctively believe they will be included.

The second major issue is the failure to disclose delivery charges at an early stage in the transaction process. Disclosure has been observed at the very end of the buying process after registration and payment details have been entered. Worse still, there are also examples of post-contract charging where surcharges are demanded after contracts have been concluded. These guidance notes are intended to clarify the legal position surrounding delivery charge disclosure and hopefully improve the delivery charges landscape for both consumers and retailers.

◆ **Legislation impacting on delivery charges**

Delivery charges are regulated by the following UK laws - see Annex 1 for details.

- **Consumer Contracts (Information, Cancellation & Additional Charges) Regulations 2013**

The distance selling provisions state delivery charges must be made available to a consumer before the buyer is bound by a distance contract and an online seller must indicate clearly and legibly, at the latest at the beginning of the ordering process, whether any delivery restrictions apply.

- **Electronic Commerce (EC Directive) Regulations 2002**

The electronic commerce rules make it clear that any price for goods mentioned on a seller's website must indicate whether that price is inclusive of tax and delivery costs.

- **Price Marking Order 2004**

The price marking regime states that where a trader indicates that any product is or may be for sale to a consumer, he shall clearly indicate the selling price. Importantly the indication of any charges for postage, package or delivery of a product shall also be unambiguous, easily identifiable and clearly legible.

- **Consumer Protection from Unfair Trading Regulations 2008 (the "CPRs")**

The CPRs prohibit "misleading actions" and "misleading omissions". An example of a misleading action would be unqualified claims of "free mainland delivery" when in fact some mainland consumers are charged for delivery. An example of a misleading omission is failing to disclose the full delivery charge early in the buying process.

There are complications with the CPRs. To breach the Regulations a misleading action or omission must cause the "average consumer" to take a "transactional decision". An "invitation to purchase" triggers a requirement to declare all "material information", including delivery charges. These concepts are complex and are discussed in more detail below. However, the standard interpretations of "transactional decision" and "invitation to purchase" are wide and the effect is that:

- all claims relating to delivery must be accurate & be clearly qualified where necessary
- delivery charges must be indicated to any buyer at the start of the buying process.

- **Provision of Services Regulations 2009**

Unless delivery restrictions or a higher price can be duly justified by objective reasons, customers should not be discriminated against in this way due to their place of residence.

The remaining sections in these guidance notes will focus on the important changes brought about by the Consumer Protection from Unfair Trading Regulations 2008 and the Provision of Services Regulations 2009.

◆ CPRs - Invitation to Purchase & Material Information

“Invitation to purchase” is a key concept within the CPRs. It is defined as any commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of that commercial communication and thereby enables the consumer to make a purchase. Obviously that is a relatively complex legal definition and how that relates to website sales needs further explanation. First of all a retailer’s website is by its very nature a commercial communication. Secondly when a retailer displays an image and/or a descriptor of a product then he is by definition indicating ‘characteristics of the product’. The third aspect of the invitation to purchase is indicating the price of the item. Therefore in a situation where an online retailer displays a product alongside a price for the item there is an “invitation to purchase”.



The final key feature of an invitation to purchase and the link by which all the three other aspects properly comes together, is the notion of ‘and thereby enables the consumer to make a purchase’. This does not necessarily mean the checkout/purchase stage – it primarily refers to the enabling of a purchase through the provision of information. Note, the amount of information that enables the consumer to make a purchase varies depending on the circumstances and complex products may require the provision of more information than simple ones. The former Office of Fair Trading (OFT) issued detailed guidance on these matters in 2008. The still relevant guidance includes information on the key concept of an ‘invitation to purchase’ and in addition how these rules apply to for example the sale of a computer online. The following boxed extracts are from pages 35-39 of the guidance [Ref: **OFT1008** see www.tinyurl.com/unfairguideuk]

An **invitation to purchase** has the following elements:

- it is a commercial communication, and
- it indicates characteristics of the **product** concerned and the price, in a way appropriate to the communication medium used, and
- it thereby enables the consumer to make a purchase.

The idea behind this concept is that the consumer is given the key information he needs to make an informed purchasing decision.

‘Thereby enables’ primarily refers to enabling of a purchase through the provision of information. The amount of information that enables the consumer to make a purchase will vary depending on the circumstances. Complex products may require the provision of more information than simple ones before a purchase is enabled.

Computer (a complex product)

A trader sells computers from his website. The site's homepage pictures the range of computers sold by the trader. Each picture provides a link to a detailed page which gives the specifications (characteristics) of the relevant computer and that page also gives its full price and has a 'buy now' button (by clicking on which the computer may be purchased). This detailed page is an invitation to purchase. On separate pages on the website that can be reached via a clearly-indicated link on the detailed page, are:

- the main characteristics of the computer (for example the processor, memory, graphics, software and accessories) including its function (for example 'home multimedia' or 'games package')
- the full price (inclusive of taxes and any freight or delivery charge) if this was not given on the previous page
- the trader's name and geographic address
- the delivery and payment arrangements as well as the complaints/after-sales procedures, and
- since the computer is being sold over the internet, information required by the Electronic Commerce (EC Directive) Regulations 2002 and The Consumer Protection (Distance Selling) Regulations 2000, including cancellation rights

◆ Invitation to Purchase and Transactional decision

If a product is displayed with a price beside it and an 'Add to basket' or 'Buy Now' button is displayed inviting consumers to take the first step to buy the product, then it is at that point crucially that a 'transactional decision' is FIRST made. In terms of the CPRs a 'transactional decision' means "*any decision taken by a consumer, whether it is to act or to refrain from acting, concerning ... whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product*". The European Court of Justice (ECJ) in a recent decision ruled that; "an invitation to purchase exists as soon as the information on the product advertised and its price is sufficient for the consumer to be able to make a transactional decision, without it being necessary for the commercial communication also to offer an actual opportunity to purchase the product or for it to appear in proximity to and at the same time as such an opportunity".

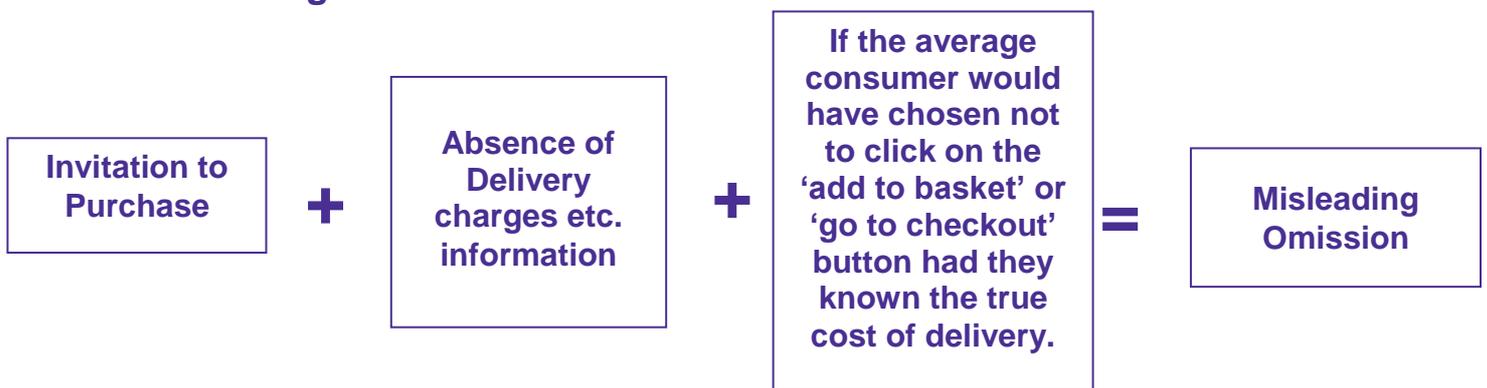
This legal judgement further clarifies the answer to the question 'at what point does an invitation to purchase first exist?' The Court decided it exists "as soon as the information on the product advertised and its price is sufficient for the consumer to be able to make a transactional decision", is presented.

*Judgment of the ECJ May 2011 Konsumentombudsmannen v Ving Sverige AB.
See full text at: www.tinyurl.com/invitationtopurchase*

◆ Avoiding Misleading Omissions & Actions

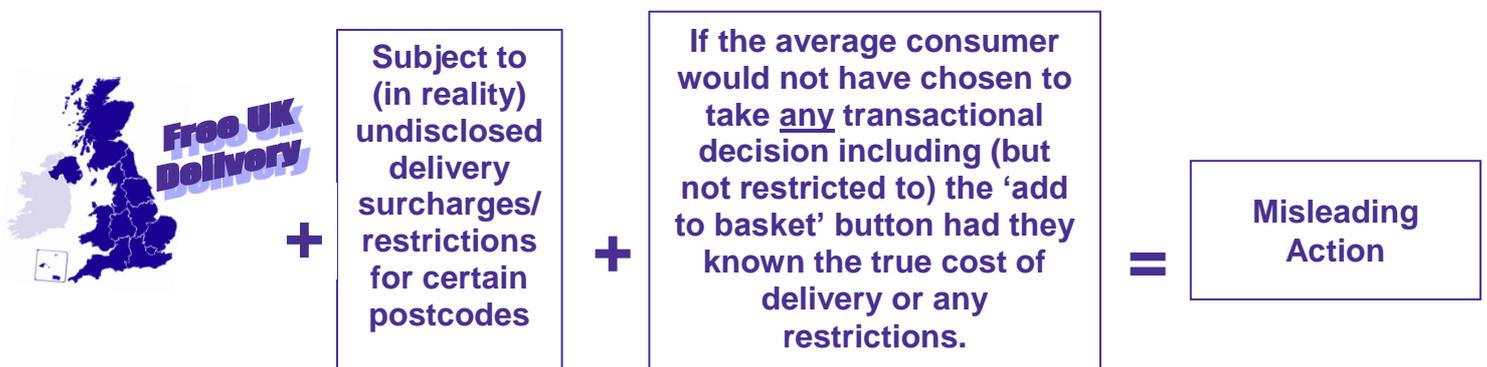
In terms of disclosure the law requires internet retailers to indicate any additional delivery charges that may apply to a transaction. Details of these charges should not be left out or hidden in small print or be in any way “unclear, unintelligible, ambiguous or untimely”. If the information is not disclosed properly and a consumer only finds out the true facts once they are further down the transactional process, then if it can be shown that the **average consumer** would have decided NOT to have made that original decision to add the item to the basket had they know the full cost of delivery, then the internet retailer is likely to be committing an offence of operating a commercial practice which amounts to a **misleading omission**.

- **Misleading omission**



- **Misleading action**

Offering free or fixed delivery costs across the UK is a common marketing strategy. However if a retailer wants to display 'free delivery' (or a fixed delivery cost) for a predetermined area such as the UK but in reality applies surcharges to outlying areas, then those surcharges have to be made absolutely clear in any **commercial communication**. Otherwise the retailer is likely to be guilty of the offence of engaging in a commercial practice which is a **misleading action**.



◆ Options available to comply

The most straightforward way of avoiding any potential offences is by charging all UK consumers the same delivery rates wherever they live and many internet retailers have adopted this approach. Some retailers have looked at the pros and cons of operating variable price delivery charge models and have concluded that it makes more commercial sense to offer a universal charging structure - absorbing any additional costs of delivering products to more remote and less populated areas into their overall business model.

On the other hand, if a business decides it cannot adopt a fixed delivery charge model, then that retailer will have to operate a suitable delivery charges disclosure system to avoid committing an offence. In our interpretation this will involve creating a website structure that clearly sets out all additional freight, delivery or postal charges that may apply to any consumer at all points during the buying process at which the consumer makes a transactional decision to consider buying an item (e.g. add to basket) and to avoid any misleading statements regarding their overall delivery charges policy.

For clarification Highland Council has produced the following example website layouts to demonstrate compliance using techniques such as pop-up information boxes or TAB table formats to allow easy access to delivery information.

| | | | | | |
|---|---|--------------|----|---|---------------------------|
|  | ACME Radio & dock M555 | | | | |
| | Features: <ul style="list-style-type: none"> • FM/DAB • Docking point with charger • Battery or 240V Product Code 267955 | | | | |
| | £59.99 inc. VAT | | | | |
| | Click on ▼ for more information | Quantity | - | 1 | + |
| |  ▼ | £5.95 | OR | | Collect in Store ▼ |

| | | | | |
|---|--|----------|---------|------|
|  | ACME Kettle T45 | | | |
| | Features | Delivery | Reviews | FAQs |
| | Features: <ul style="list-style-type: none"> • Fast boiling • Easy fill • Stainless steel | | | |
| | £29.99 | | | |
| | Quantity | - | 1 | + |

◆ **Provision of Services Regulations 2009**

The Provision of Services Regulations 2009 implemented the EU Services Directive 2006 into UK law. The wide-ranging rules contain a provision whereby businesses cannot discriminate on the grounds of nationality or place of residence in their general terms and conditions. General conditions can also be found in any non-contractual material such as an advertisement, in promotional literature, or on a website. Basically a business cannot offer different terms and conditions, provide a different standard of service, or refuse to offer a service, on the sole basis of place of residence, which can refer to a town, region, or country. However, businesses can retain different conditions where these are justified by 'objective criteria'.

The Directive is only beginning to impact the online retail sector however the European Commission has already stated:

“When trying to buy online, customers sometimes learn only at the end of the ordering process that the desired product or service cannot be delivered into their territory. Customers also sometimes note a sudden increase in the advertised price at the moment at which they indicate the country of residence or the place of delivery of the service. Unless delivery restrictions or the higher price can be duly justified by objective reasons, customers should not be discriminated against in this way due to their place of residence.”

Source: www.tinyurl.com/EU-objectivecriteria

◆ **OFT report on price and choice in remote communities**

See www.tinyurl.com/Remote-OFT and www.tinyurl.com/dshub-deliver

◆ **Statement of principles for parcel deliveries**

UK & Scottish Government supported statement of principles for parcel deliveries launched in 2014.

www.cas.org.uk/statement_of_principles_parcels

◆ **Further Information**

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This document is not an authoritative interpretation of the law and should be read in conjunction with the actual legislation. Ultimately only the courts can decide whether or not a commercial practice is unfair.

Annex 1

The following five European Directives have been implemented into UK law. Each contains measures impacting on online trading across the European Union:

| European Union Directives and implementing UK laws. [including details of specific measures concerning delivery charges] | | | |
|---|--|------------------|--|
|  | The Directive on Consumer Rights (2011) | | |
|  | Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 | | |
| <i>Before the consumer is bound by a distance contract, the trader must give or make available to the consumer (details of) ... 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. The trader must ensure that any trading website through which the contract is concluded indicates clearly and legibly, at the latest at the beginning of the ordering process, whether any delivery restrictions apply...</i> | | | |
| Law: | www.tinyurl.com/cicar2013 | Guidance: | www.tinyurl.com/distantuk |
|  | Electronic Commerce Directive (2000) | | |
|  | Electronic Commerce (EC Directive) Regulations 2002 | | |
| <i>Where a [seller] refers to prices, these shall be indicated clearly and unambiguously and, in particular, shall indicate whether they are inclusive of tax and delivery costs.</i> | | | |
| Law: | www.tinyurl.com/ecr2002 | Guidance: | www.tinyurl.com/ecommerceuk |
|  | Indication of Prices Directive (1998) | | |
|  | Price Marking Order 2004 | | |
| <i>An indication of selling price... shall be... unambiguous, easily identifiable and clearly legible ... given in proximity to... visual or written description of the product; and ... the indication of any charges for postage, package or delivery of a product shall be unambiguous, easily identifiable and clearly legible.</i> | | | |
| Law: | www.tinyurl.com/pmo2004 | Guidance: | www.tinyurl.com/priceuk |
|  | Unfair Commercial Practices Directive (2005) | | |
|  | Consumer Protection from Unfair Trading Regulations 2008 (CPRs) | | |
| <i>[Misleading Actions] Regulation 5(4)(g) of the CPRs prohibits traders from misleading consumers about the price of a product, or the manner in which the price is calculated and Regulation 5(4)(h) prohibits traders from misleading consumers as to the existence of a specific price advantage. [Misleading Omissions] Regulations 6(4)(d) and (e) prohibit the omission, in any case of an invitation to purchase, of information on the price or on any related charges including taxes, delivery and postal charges, unless these are already apparent from the context, where any such action or omission would cause, or be likely to cause, the consumer to take a different transactional decision. In many cases, a different transactional decision is likely to mean a decision whether or not to buy a product, but it could include other decisions taken about transactions.</i> | | | |
| Law: | www.tinyurl.com/cprs2008 | Guidance: | www.tinyurl.com/unfairuk |
|  | Services Directive (2006) | | |
|  | Provision of Services Regulations 2009 | | |
| <i>The provider of a service may not, in the general conditions of access to a service which the provider makes available to the public at large, include discriminatory provisions relating to the place of residence of recipients who are individuals... [this] does not apply to differences in conditions of access which are directly justified by objective criteria. Regulation 30</i> | | | |
| Law: | www.tinyurl.com/services2009 | Guidance: | www.tinyurl.com/servicesuk |

Annex 2

The Highland Council is divided into 87 Postcode Districts within the five Postcode Areas of IV, KW, PH, PA and AB. The vast majority (99.7%) of Highland residents live in IV, KW and PH combined, with the IV area itself accounting for about three quarters of the Highland population. Nearly a third resides in postcode districts IV1-3 (see map of actual districts). The Royal Mail Group has categorised the 'Highlands & Islands of Scotland' as Zone 2. It must be noted that this zone includes postcode districts outside the Highland Council area.

www.parcelforce.com/sites/default/files/list_of_postcodes_by_zone.pdf = www.tinyurl.com/zone2hc

| Zone 2 - Highlands & Islands of Scotland | | | | | | | | |
|--|------|------|------|------|------|------|------|------|
| HS1 | IV15 | IV36 | KA27 | KW17 | PA36 | PA63 | PH18 | PH38 |
| HS2 | IV16 | IV40 | KA28 | PA20 | PA37 | PA64 | PH19 | PH39 |
| HS3 | IV17 | IV41 | KW1 | PA21 | PA38 | PA65 | PH20 | PH40 |
| HS4 | IV18 | IV42 | KW2 | PA22 | PA39 | PA66 | PH21 | PH41 |
| HS5 | IV19 | IV43 | KW3 | PA23 | PA40 | PA67 | PH22 | PH42 |
| HS6 | IV20 | IV44 | KW5 | PA24 | PA41 | PA68 | PH23 | PH43 |
| HS7 | IV21 | IV45 | KW6 | PA25 | PA42 | PA69 | PH24 | PH44 |
| HS8 | IV22 | IV46 | KW7 | PA26 | PA43 | PA70 | PH25 | PH49 |
| HS9 | IV23 | IV47 | KW8 | PA27 | PA44 | PA71 | PH26 | PH50 |
| IV1 | IV24 | IV48 | KW9 | PA28 | PA45 | PA72 | PH30 | ZE1 |
| IV2 | IV25 | IV49 | KW10 | PA29 | PA46 | PA73 | PH31 | ZE2 |
| IV3 | IV26 | IV51 | KW11 | PA30 | PA47 | PA74 | PH32 | ZE3 |
| IV10 | IV27 | IV52 | KW12 | PA31 | PA48 | PA75 | PH33 | |
| IV11 | IV28 | IV53 | KW13 | PA32 | PA49 | PA76 | PH34 | |
| IV12 | IV30 | IV54 | KW14 | PA33 | PA60 | PA77 | PH35 | |
| IV13 | IV31 | IV55 | KW15 | PA34 | PA61 | PA78 | PH36 | |
| IV14 | IV32 | IV56 | KW16 | PA35 | PA62 | PH17 | PH37 | |

Zone 2 contains districts outside Highland Council boundaries.

Map of Highland Council postcode districts.

