

Contracting with ecommerce platforms

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Commercial analysis: How is ecommerce changing the ways in which traders make contractual arrangements? Nick Phillips, a partner at Edwin Coe LLP, looks at the different types of ecommerce platform solutions and explains the issues surrounding contractual arrangements, including key legal considerations for the trader.

What contractual arrangements exist where a trader contracts with a provider of a cloud ecommerce platform (eg Shopify, BigCommerce or EKM)—both with that platform and any third parties?

There are basically two types of ecommerce platform solutions. The first type typically uses an open source platform (such as Magento Open Source or osCommerce), the code to which is available on an open source licence basis, and the second type is provided on a software as a service (SaaS) basis. The precise contractual arrangements in place will therefore vary according to the type of solution chosen.

A SaaS solution will tend to be a more all-in-one solution, with the SaaS provider taking on the technical side of managing the ecommerce solution. These contracts will include hosting, support and maintenance and the provision of technical updates in return for a monthly subscription fee. In addition it will be necessary to sign up to a payment gateway such as SagePay, PayPal or WorldPay in order to take payments online—although some, for example Shopify, also offer their own payment gateway (ShopifyPay).

With an open source solution, the contract is likely to be more straightforward as services such as hosting, and maintenance and support, will need to be supplied either in-house or by a third party. It is often also necessary to use a website developer to develop and design a site that is to use an open source platform solution, whereas with the SaaS solution this is likely to come as part of the solution.

In short therefore, while many of the same issues will exist when signing up to a SaaS-based solution and an open source-based cloud ecommerce platform with an open source-based solution, it is likely that a number of these contracts will be with different third parties, whereas with the SaaS-based solution they will all be included within the SaaS solution, with only the relationship with the payment gateway.

Another layer of complication with the SaaS solution is that the provider of the SaaS cloud ecommerce platform will usually be outsourcing the hosting of the solution to another cloud-computing vendor. For example, many SaaS providers will be using Amazon Web Services to host the solution. This can increase the complexity of the contract as issues will arise in relation to liability and the flow of data where an outsourced solution is being used.

To what extent can traders generally negotiate the relevant terms? Are there any notable exceptions?

The size of the trader compared to the cloud provider is representative of the bargaining powers of each. For smaller traders many SaaS contracts are non-negotiable, containing disclaimers on liability for data integrity, confidentiality and service continuity. Each cloud service provider develops its own standard terms and service levels to match its service and attitude to risk. There will be some flexibility for much larger traders who will want to negotiate on issues such as service levels, service credits and exit provisions.

More bespoke solutions can usually be obtained by choosing an open source solution, although these rely on the trader being sufficiently technically savvy and having the resources to create, support and operate an ecommerce solution based on an open source solution.

What are the key legal issues for the trader's legal advisors to consider when advising the trader?

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Data

In the new post-General Data Protection Regulation, [Regulation \(EU\) 2016/679](#) (GDPR) world of data protection, issues around data will be very much centre stage. These will include:

- security—ensuring that the supplier has appropriate security measures in place and offers sufficient guarantees to implement technical and organisational measures as required by the GDPR. Accreditations are likely to be important here, as is the right to audit
- data needs to be promptly returned on demand in a useable format, and while a fee for doing so is reasonable, it should not be extortionate
- no deletion of dormant accounts without sufficient notice to customer
- supplier accepts responsibility for data losses caused by supplier or ‘subcontractors’ and obligation to provide disaster recovery plan (beforehand) and assistance (afterward) at no additional cost
- reasonable risk allocation and liability limitation provisions
- no secondary commercial use or disclosure of customer data (or the customer’s/customers’ data) by cloud provider or its subcontractors

Price/renewal terms

- caps on fee increases year over year, if multiple year contract
- think ahead and ensure price increases are reasonable as demand for the trader’s service increases (don’t be sucked in by cheap introductory offers)
- litigation or regulatory change co-operation assistance (such as changes to privacy laws, breach reporting requirements and so on) usually at the customer’s cost, but at the vendor’s normal rates

Breaches

- duty of supplier to promptly report material breach of non-compliance with contractual obligations, including remedial efforts and known implications

Service levels and service credits

- these are key to the contract
- service levels should be clear and provide a ready method of measuring the supplier’s performance as well as being high enough to keep the trader’s business running
- service credits need to be meaningful for the supplier—often they are not and ideally should not preclude other remedies in the case of serious breaches

Termination

- supplier to be required to provide transition and conversion assistance so that data and functionality can be moved to another system after termination (usually at the trader’s cost, but at the supplier’s normal rates)
- prohibition against suspension of service without sufficient notice from supplier—bona fide fee disputes should not be a sufficient reason to suspend the service
- a cloud agreement should provide the trader with the ability to terminate for convenience with no (or realistically a reasonable) associated penalty or ‘termination fee’
- include ability to terminate for serious or continuous failure to meet committed service levels (eg uptime, response time, resolution etc)—having the ability to terminate should there be a serious service-level non-conformance is one way to ensure your supplier is standing behind their service levels rather than simply providing you with ‘objectives’ and/or ‘targets’

- care if allowing supplier to have the contractual right to terminate or suspend services other than for cause—if it is a business- or enterprise-critical application or service, trader is unlikely to want supplier to be able to choose when it wants to walk away from the relationship

What issues often arise from the terms put forward by platform providers and related third parties?

Suppliers will classically look to contract on standard terms that are strongly supplier-centric and largely provide the opposite of many of the points above. These will exclude all but the most limited of warranties and any liability for data loss or corruption or service failure.

In particular, several organisations reserve the right to delete customer data for breach of contract, such as non-payment, and will contain high exit charges with little or no post-termination support. Many suppliers will also seek a full indemnity for any use of the services in breach of the data protection legislation given the obligations which the GDPR places on processors.

Nick Phillips specialises in intellectual property (IP) and IT. He has considerable experience in advising clients on the implementation of the GDPR and on other data protection issues. He also regularly advises on a range of ecommerce, domain name, IP and internet related issues, as well as on a wide variety of IT contracts.

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