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Unfair Commercial Practices Directive: Implementation in the UK

The EU Unfair Commercial Practices Directive (the "Directive") prohibiting pressure selling and misleading marketing came into force on 11 June 2005 and were implemented in the UK on 26 May 2008 as the Consumer Protection from Unfair Trading Regulations (CPR).

Objectives

The purpose of this Directive is to harmonise the regime for the regulation of unfair commercial practices in EU Member States. It is aimed at clarifying consumers' rights and facilitating cross-border trade by establishing common EU-wide rules against aggressive or misleading business-to-consumer marketing. This will give consumers in all EU Member States the same protection against sharp business practices and 'rogue traders', whether they buy goods from their local shop or from a website registered in another Member State.

In order to harmonise provisions, the Directive will not allow stricter provisions in one Member States than the other, subject to a six year grace period for existing national provisions.

Scope

The CPR will only apply to business-to-consumer commercial practices. However the view of the Department for Business, Enterprise & Regulatory Reform (BERR) is that it will also apply to practices further up the supply chain, e.g. from a manufacturer who misleadingly labels their products, even though direct contact with the consumer is through the retailer.

The CPR applies to any goods or services, including not just simple items such as clothing but also including real estate and financial services, although these are not subject to the maximum harmonisation rule, i.e. they are allowed to be more tightly controlled at national level. BERR anticipate that only minimal changes will be needed to ensure current Financial Service Authority Guidance and the Banking Code achieve compliance.

Broadly speaking, if consumers are treated fairly, then traders are likely to be complying with the CPRs. This means that fair-dealing businesses should not have to make major changes to their practices.

Overview

In simple terms there are three layers of protection within the CPR:

- a general prohibition against unfair trading;
- a specific prohibition against misleading actions/omissions and aggressive practices; and
- a list of 31 behaviours which are banned outright.

The general prohibition

There is a general prohibition under Regulation 3 against treating consumers unfairly, which is intended to plug gaps in consumer protection legislation. In order to show that a commercial practice is unfair under the general prohibition the practice must:

- be contrary to the requirements of professional diligence (which is defined as the standard of skill and care which a trader may reasonably be expected to exercise towards consumers, given honest market practice and good faith in the trader's field of activity – an objective standard); and
- materially distort or be likely to materially distort the average consumer's economic behaviour. The question is whether the practice caused the consumer to take a decision he would not otherwise have taken.

The CPR refers to three types of consumer – "average", "average targeted" and "average vulnerable":

- "average consumer" - has been developed by EU case law, and the concept is enshrined in the Directive (and the CPR) as being a person who is reasonably well informed and reasonably observant, taking into account social, cultural and linguistic factors.

- "average targeted" consumer - will be relevant where a commercial practice is directed to a particular group of consumers. If a practice is targeted like this, then it is the average member of that group and that member's characteristics which are relevant.

Example 1 – Television advertisements during children's programmes may be directed at children and/or their parents.

Example 2 – Advertisements for a particular type of credit product may be directed at "sub-prime" borrowers.

- "average member of a vulnerable group of consumers" - includes people who are vulnerable to the commercial practice or to the underlying product because of their mental or physical infirmity, age or credulity.

Example – People using wheelchairs may be a vulnerable group in relation to advertising claims about cases of access.

A practice which is either misleading or aggressive is automatically unfair. If a practice does not fall within one of these two categories, the general prohibition will determine if it is unfair.

Misleading Actions

The CPR specify three types of misleading actions which may lead to false information or may deceive (or may be likely to deceive) the average consumer:

- misleading information generally;
- creating confusion with competitors' products; and
- failing to honour firm and verifiable commitments made in a code of conduct.

These prohibitions aim to ensure that consumers get from traders, in a clear and timely fashion, the information they need to make informed decisions relating to products.

Example 1 - A trader tries to sell a television package. The consumer is falsely told that the package includes sports channels, which are in fact only available at an additional subscription cost. The trader has provided false information about the main characteristics of the product.

Example 2 – A trader advertises televisions for sale saying the price has been substantially discounted. In fact they have only been on sale at the non-discounted price for a very short amount of time in one of the trader's numerous shops. Whilst the advertisement may be correct, it is nonetheless likely to be deceptive. The average consumer would have been deceived about the existence of a specific price advantage in a way that is likely to cause him to take a different decision about the television; in this case to buy it.

Example 3 – A trader brands new sunglasses to closely resemble a competitor brand so that it is likely that a consumer will be deceived.

Where there is an invitation to purchase (for example where there is a page on a website where consumers can place an order or there is a text message promotion to which consumers can directly respond in order to purchase the promoted product), the regulations specify the material information which must be included unless that information is apparent from the context. These include the main characteristics of the product, the existence of a specific price advantage or the nature, rights and attributes of the trader or his agent.

Misleading omission

A commercial practice may also mislead through an omission. A misleading omission will arise if material information a customer needs to know before making an informed choice in relation to a product is not provided, is not apparent from the context, or is unclear. Such material information will depend on the circumstances but is likely to again include the main characteristics of the product (e.g. availability, quantity, specification), the identity of the trader, the price inclusive of taxes the existence of any cancellation rights, the geographical address of the trader (which may be apparent from the context) and, where appropriate, additional delivery charges.

Aggressive practice

A commercial practice will be aggressive if it involves the use of harassment, coercion or undue influence. In determining whether a particular practice is aggressive, the practice must be considered in its factual context, taking into account all of its features and circumstances. A non-exhaustive list of factors is provided by the CPR and include, for example, the use of threatening or abusive language, a disproportionate non-contractual barrier to stop the consumer exercising a right (e.g. to switch providers) or threatening to take legal action where it would not be possible to do so.

Example 1 - Staff working in a funeral parlour put pressure on a recently bereaved relative, who is deciding on a coffin, to buy a more expensive coffin to avoid bringing shame on the family. This could amount to coercion or undue influence. (Here the exploitation of specific misfortune, and timing would be factors considered).

Example 2 - A doorstep trader pressures a consumer to pay in cash for home repairs immediately. He insists on giving the consumer a lift to the bank to withdraw the money. This could amount to coercion or undue influence. (Here the nature of the commercial practice, persistence and location would be considered).

Behaviours which are banned outright

In addition, schedule 1 to the CPR gives a blacklist of 31 commercial practices which are considered unfair in all circumstances and are prohibited. These include:

- falsely claiming to be a signatory to a code of conduct or to be approved by a recognised body;
- bait advertising scams (advertising a product as a special offer without actually having it in stock, or having only a token stock of the product);
- stating or creating the impression that a product can legally be sold when it cannot;
- making a materially inaccurate claim concerning a risk to a consumer or his family if he does not purchase the product;
- falsely stating that the product will be available for a very limited time to coerce an immediate purchasing decision;
- falsely claiming the trader is about to cease trading or move premises;
- creating the impression that the consumer cannot leave the premises until a contract is formed;
- conducting personal visits to the consumer's home, ignoring the consumer's request to leave or not return;
- making persistent and unwanted solicitations by telephone, fax or email or other remote media; and
- obstructing a consumer trying to make an insurance claim (e.g. by unreasonable requests for documents).

Offences and penalties

A breach of the CPR will generally constitute a criminal offence. Most of the offences follow the general regulatory approach of strict liability, however the offence for breach of the general prohibition requires proof of the 'guilty mind' of the trader.

The offences must be prosecuted within a year of discovery, with a three year back-stop from commission of the offence. If a person is found guilty of any offence under the CPR, the penalty will be:

- on summary conviction, a fine not exceeding the statutory maximum (currently £5,000); or
- on conviction on indictment, an unlimited fine and/or 2 years' imprisonment.

The CPR provides for the prosecution of senior management (e.g. directors, senior managers) of a corporate offender, where it is found that the offence was committed with their consent or connivance, or is attributable to any neglect on their part.

Enforcement powers

Enforcement powers have been given to the OFT, Local Authority Trading Standards Services in Great Britain and the Department of Enterprise, Trade and Investment in Northern Ireland ("DETINI"), and include powers of entry

and seizure. Their powers range from informal regulatory (or self-regulatory) procedures to a civil action for an enforcement order, and, in worst cases, criminal proceedings.

Enforcement officers will have the power to test compliance by purchasing products and can enter premises in certain circumstances.

At the lower end of the scale, enforcers can refer complaints to existing regulatory bodies to be dealt with under their own codes of practice. An obvious example would be the Advertising Standards Authority, which regulates the content of advertisements, sales promotions and direct marketing in the UK.

Consumers affected by a breach of the CPR do not have the right to bring a claim for compensation; this however is under review.

Defence

The main defence available is the due diligence defence. To rely on this defence the person accused must prove that the commission of the offence was due to a mistake, reliance on information given by another person, the act or default of another, an accident or another cause beyond his control, and in addition that he took all reasonable precautions to avoid committing the offence.

Additionally, advertising businesses have the defence of the innocent publication of an advertisement.

Impact on existing legislation

BERR has tried to simplify the statutory regime for consumer protection; as a consequence of the CPR there are significant proposed changes to existing UK statutory provisions. These are set out in schedule 2 to the CPR. The most significant changes are:

- **Trade Descriptions Act 1968** - Repeal of:
 - Section 1(1) on prohibition of false trade descriptions.
 - Section 5 on trade descriptions used in advertisements.
 - Sections 13 to 15 on false representations concerning services.
 - Section 32 on the power to exempt goods sold for export.
- Repeal of the **Control of Misleading Advertisements Regulations 1988** (as amended in 2000 and 2003). This will be replaced by the Business Protection from Misleading Marketing Regulations 2008, to ensure that there is no reduction in business protections following the repeal of certain legislation.
- **Consumer Credit Act 1974** – Repeal of section 46 on false or misleading advertisements.
- **Consumer Protection Act 1987** – Repeal of sections 20 to 26 on misleading price indications.

- **Enterprise Act 2002**
 - A new section 218A proposes that an applicant may have to provide evidence to substantiate his claim that a practice is unfair when applying for an enforcement notice for a Community infringement.
 - A new section 228A will give officers of enforcement authorities rights of audience to conduct litigation in County Courts in relation to applications for enforcement notices for a Community infringement.
 - Repeal of s.10(2), which will have the effect of repealing the Fair Trading Act 1973.
- Amendments to the **Consumer Protection (Distance Selling) Regulations 2000** to remove the offences for demanding payment for unsolicited goods, or threatening legal action in respect of non-payment of unsolicited goods. Such conduct will be an offence under CPR.
- The **Price Marking (Food and Drink) Services Order 2003** is revoked.

What should you do?

The CPR will impact on many businesses from retailers to estate agents, financial advisers and insurers. These businesses must keep up-to-date with and prepare for the changes which will be introduced by the CPR. Sensible steps would include reviewing:

- the guidance issued by BERR;
- any Codes of Practice you may be signed up to directly and via memberships;
- your methods of payment for products;
- your use of incentives which may encourage unfair practices;
- drafting of sales literature whether written or electronic;
- drafting of standard terms and conditions;
- your websites, interactive game sites and other media used by you to communicate sales information
- your price comparison strategy;
- any comparative advertising;
- any look-alike products;
- your use of sales promotions and sale offer prices;
- ensuring that you are not engaged in any practice under the list of 31 banned practices which creates strict liability.

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Contact:

Pauline Munro

T: 0113 294 5196, E: pauline.munro@pinsentmasons.com;

Peter Atkinson

T: 0113 294 5152, E: peter.atkinson@pinsentmasons.com

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LONDON DUBAI BEIJING SHANGHAI HONG KONG SINGAPORE

OTHER UK LOCATIONS: BIRMINGHAM EDINBURGH GLASGOW LEEDS MANCHESTER

International: T +44 (0)20 7418 7000 UK: T 0845 300 32 32

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