

Harmonisation of EU consumer protection law

Background information

The Consumer Protection from Unfair Trading Regulations (CPRs) came into force on 26 May 2008.

The Explanatory Memorandum accompanying the CPRs emphasises the importance of addressing unfair marketing and selling techniques affecting consumers and it is clear that the principal purpose of the CPRs is to curtail "sharp practices and rogue traders". In reality, though, the effect of the CPRs is more wide-reaching.

The CPRs are intended to:

- 1 strengthen consumer protection by introducing measures prohibiting traders from treating consumers unfairly; and
- 2 increase confidence in cross-border trade throughout the EU states by creating a more level playing field in terms of the regulation of unfair business practices affecting consumers.

Structure of the CPRs

The CPRs apply across all business sectors involved in consumer trading and:

- 1 impose a general prohibition on traders from engaging in unfair commercial practices with consumers;
- 2 prohibit misleading actions or omissions and aggressive practices; and
- 3 outlaw certain specific practices which are listed in the CPRs.

There is also a prohibition on the promotion of any unfair commercial practices in any code of conduct to which a trader may adhere.

In order to avoid any overlap with existing law, the CPRs repeal 23 consumer protection laws entirely or in part. Most notably, most of the Trade Descriptions Act 1968 has been repealed.

Definitions

The CPRs prohibit unfair **commercial practices** which is defined very widely. It can mean any act, omission, course of conduct, representation, advertisement or marketing statement which is directly connected with the promotion, sale or supply of a product to or from a consumer.

A **consumer** means anyone acting for purposes wholly or mainly outside their business when dealing with the trader.

A **product** means, for the purposes of the CPRs, goods, services, rights and obligations.

The **average consumer** is defined as someone who is reasonably well informed and reasonably observant and circumspect. Where a group of consumers is affected, the average consumer will be the average member of the group.

The general prohibition

This prohibits any unfair commercial practice. A commercial practice will only be unfair if:

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- 1 it falls below the standard of skill and care which could reasonably be expected of the trader based on honest market practice or general principles of good faith; and
- 2 it causes the consumer to make a decision in relation to the product which he would not otherwise have made.

Whether a trader falls below the required standard is an objective test which will depend on the specific circumstances.

Misleading actions

Misleading actions are also an unfair commercial practice and can arise in three ways:

- 1 providing false or deceptive information relating to such things as the characteristics and price of a product, but only where the information causes the consumer to make a decision in relation to the product which he would not otherwise have made;
- 2 the marketing of a product which creates confusion between products, trade marks, trade names and brands. This can apply in cases of comparative advertising;
- 3 the failure by a trader to comply with a code of conduct which the trader claims to be compliant with.

Misleading omissions

Misleading omissions can amount to unfair commercial practices if material information is omitted, hidden, or presented in an

unclear or ambiguous way. If the omission causes the average consumer to make a decision he would not otherwise have taken, the omission will amount to an unfair commercial practice.

Material information is information which the consumer would need in order to reach a decision and includes details of the main characteristics of the product, the price, payment terms and any cancellation rights.

Aggressive commercial practices

A commercial practice is considered aggressive if the consumer is harassed or pressurised into making a decision in relation to a product which he would not otherwise have made. This behaviour can affect any aspect of the consumer's decision, such as the decision to buy or buy at a particular price or from that trader.

Again, the specific circumstances of the case will be relevant. The CPRs refer to such factors as the persistence of the trader, the use of threatening language and the exploitation by the trader of any specific misfortune affecting the consumer.

Specific prohibitions

31 commercial practices are listed in the CPRs and are stated to be unfair in any circumstances, whatever effect they may or may not have on the consumer's decision. These practices are wide ranging and include:

- 1 making personal visits to a consumer's home and ignoring the consumer's request to leave;
- 2 pyramid trading schemes;

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- 3 falsely claiming to be compliant with a code of conduct;
- 4 "closing down" sales;
- 5 describing products as free if the consumer has to pay anything;
- 6 a trader pretending to be acting as a consumer;
- 7 encouraging children in advertising to buy products or persuade others to buy products for them.

Offences

The offences are committed if a trader engages in a commercial practice which:

- 1 knowingly or recklessly breaches the general prohibition with the result that the consumer makes or is likely to make a decision which he would not otherwise have made; or
- 2 is a misleading action or a misleading omission; or
- 3 is an aggressive commercial practice; or
- 4 is one of the 31 listed unfair commercial practices.

The offences relating to misleading actions, misleading omissions, aggressive commercial practices and the 31 listed unfair commercial practices are all strict liability offences. This means that the intentions of the trader are irrelevant if the elements of the offence are committed.

Offences committed by corporate bodies

There is specific provision in the CPRs for situations where offences are committed by corporate bodies. In that case, it is possible for both the corporate body and its officers to be prosecuted.

An officer for this purpose includes directors, managers, the company secretary or similar officers. An officer would only be guilty if the offence is attributable to his neglect or if he consented to the commission of the offence.

Prosecutions

Proceedings can be brought by the Competition and Markets Authority (CMA) and the local weights and measures authorities. Any prosecution for breach of the CPRs must be brought within three years from the date of the offence or one year from the discovery of the offence by the prosecutor.

Prosecutors have power to investigate traders, before approaching them. This includes the power to make test purchases and to enter premises without a warrant.

It is also an offence to obstruct prosecutors in their investigations by making false statements or by physically obstructing them.

Defences

No defences are available in the CPRs for a breach of the general prohibition on unfair practices.

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In relation to the other offences, there are two possible defences:

1 the due diligence defence:

the trader will not be guilty if he can prove that he took all reasonable precautions and exercised all due diligence to avoid committing the offence and the offence resulted from a mistake, an accident, the act or default of another, reliance on information provided by another person or another cause beyond his control;

2 the innocent conduit defence:

the trader will not be guilty of an offence relating to the publication of an infringing advertisement if the trader is in the business of publishing adverts and did not know that the publication of the advert would amount to an offence.

It will be interesting to see how the Courts interpret the due diligence defence in view of the fact that it is drafted so broadly.

The second defence protects publishers of journals and websites which rely on adverts for revenue and which are not required to check the wording of each advert.

Penalties

The offences under the CPRs are criminal offences.

The penalties are:

- 1 on summary conviction, a fine up to £5000; and
- 2 on an indictment, a fine or up to two years' imprisonment or both.

Civil right of redress

The Consumer Protection from Unfair Trading Regulations 2014 brought in a direct civil right of redress for consumers against traders for misleading and aggressive practices.

The right arises where a misleading or aggressive practice is likely to cause the average consumer to enter into a contract they would not have entered into otherwise and where it is a significant factor in the consumer's own decision to enter the contract.

This right does not apply in relation to misleading omissions.

Comment

The OFT has issued detailed guidance on the CPRs providing practical examples of unfair commercial practices. For example, the guidance refers to the practice of pressurising bereaved families to buy expensive coffins or doorstep traders who insist on taking a consumer to the bank to collect money for immediate payment.

The practical implications of the CPRs for businesses are that they should review their procedures, terms and selling techniques to ensure that they comply with the law. Although the OFT stresses that any business that operates fairly is likely to be compliant with the law, businesses may not be fully aware of the all-encompassing scope of the CPRs. Training of staff to ensure compliance is essential.

The 2014 Regulations Code for Regulators stresses that all regulators, not just those charged with monitoring the CPRs, must

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take a measured approach to compliance.

Looking forward, we can anticipate further legislation in the area of consumer protection. The European Commission is currently undertaking a review into the main consumer-focused directives, including those regulating distance selling and unfair terms in consumer contracts.

This briefing paper is not intended to be comprehensive or to provide legal advice, which should be sought on particular matters.

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