

THE CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS: A COMMENTARY.

PART EIGHT

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This is the eighth in a series of articles in which the Consumer Protection from Unfair Trading Regulations 2008 and their impact on the travel industry in the UK are examined.

Introduction

In the last article ([2013] TLQ 23) we concluded the discussion on Reg. 9 which dealt with misleading commercial *actions*. In this article we will be examining Reg. 10 which makes it an offence to engage in commercial actions which are misleading *omissions*.

Reg. 10 provides:

A trader is guilty of an offence if he engages in a commercial practice which is a misleading omission under regulation 6.

Reg. 6 provides:

6.—(1) A commercial practice is a misleading omission if, in its factual context, taking account of the matters in paragraph (2)—

- (a) the commercial practice omits material information,*
- (b) the commercial practice hides material information,*
- (c) the commercial practice provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, or*
- (d) the commercial practice fails to identify its commercial intent, unless this is already apparent from the context,*

and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

(2) The matters referred to in paragraph (1) are—

- (a) all the features and circumstances of the commercial practice; and*
- (c) where the medium used to communicate the commercial practice imposes limitations of space or time, any measures taken by the trader to make the information available to consumers by other means.*

(3) In paragraph (1) “material information” means—

- (a) the information which the average consumer needs, according to the context, to take an informed transactional decision; and*
- (b) any information requirement which applies in relation to a commercial communication as a result of a Community obligation.*

There are also special rules in Reg. 6 relating to invitations to treat:

- (4) Where a commercial practice is an invitation to purchase, the following information will be material if not already apparent from the context in addition to any other information which is material information under paragraph (3)–*
- (a) the main characteristics of the product, to the extent appropriate to the medium by which the invitation to purchase is communicated and the product;*
 - (b) the identity of the trader, such as his trading name, and the identity of any other trader on whose behalf the trader is acting;*
 - (c) the geographical address of the trader and the geographical address of any other trader on whose behalf the trader is acting;*
 - (d) either–*
 - (i) the price, including any taxes; or*
 - (ii) where the nature of the product is such that the price cannot reasonably be calculated in advance, the manner in which the price is calculated;*
 - (e) where appropriate, either–*
 - (i) all additional freight, delivery or postal charges; or*
 - (ii) where such charges cannot reasonably be calculated in advance, the fact that such charges may be payable;*
 - (f) the following matters where they depart from the requirements of professional diligence–*
 - (i) arrangements for payment,*
 - (ii) arrangements for delivery,*
 - (iii) arrangements for performance,*
 - (iv) complaint handling policy;*
 - (g) for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.*

Misleading omissions

If we break the offence down into its component parts we can see that a trader is guilty of an offence if -

- He engages in a commercial practice,
- Which, in context,
 - Omits or hides material information, or
 - Provides material information in an unclear, unintelligible, ambiguous or untimely manner, or
 - Fails to identify its commercial intent
- And as a consequence causes the average consumer to take a transactional decision he would not otherwise have taken

As with previous articles we will not dwell on the first and third components of the offence, having discussed them earlier.

The key principle in Reg. 6 is that the omission must be 'material' which, broadly speaking, means the information which a consumer needs to take an 'informed' transactional decision.

This was an issue discussed in the case of *Office of Fair Trading v Purely Creative Ltd & Ors* [2011] EWHC 106 (Ch). (Note that the case was appealed to the Court of Appeal ([2011] EWCA Civ 920) and from thence referred to the CJEU (Case C-428/11) on another point.) The case involved a number of defendants who distributed promotions informing consumers that they had won prizes which they could claim by phoning a premium rate number, or texting a response, or responding by post. Apart from the postal option the defendants made more money from the premium rate calls and texts than it cost to acquire and distribute the prizes. Five different promotions were considered by the court and the OFT identified numerous acts and omissions which they alleged were misleading. In a judgment running to 200 paragraphs Briggs J sustained some of the allegations and rejected others. In addressing specifically the meaning of what information is 'material' he said at para. 74:

"A literal reading of Regulation 6(3)(a) and its equivalent in Article 7.1 of the UCPD might suggest that something approaching an utmost good faith obligation is imposed in relation not merely to the consumer's decision whether to contract, but also to every transactional decision, such as, in the present case, a decision whether to respond to a promotion by post, text message or premium rate telephone call I regard that analysis as imposing an excessively high hurdle, and counsel did not suggest otherwise. It cannot have been the intention of the framers of the UCPD to require that level of disclosure, and to do so would indeed cause barriers to the free movement of goods and services beyond that necessary to achieve a high degree of consumer protection. In my judgment the key to understanding this paragraph is the concept of "need". The question is not whether the omitted information would assist, or be relevant, but whether its provision is necessary to enable the average consumer to take an informed transactional decision."

One of the promotions for instance involved the distribution of scratch cards which offered a Greek cruise as a prize. It was held that the failure to specify the minimum cost of a successful telephone call was misleading and this led to the consumer making a different transactional decision than they would have made otherwise.

If we go back to some of the previous case law, remembering that these were not decided under the CPR, and look for instance at *Mawdsley v Cosmosair* [2002] EWCA 587 it could be said that in that case there was an omission to inform consumers that the lift did not stop at the mezzanine floor where the restaurant was located. Was this omission material? Did the Mawdsley family need this information to make an informed decision? Almost certainly. Without this information the Mawdsleys made a transactional decision which they probably would not have taken if they had known that they could not take the lift to the restaurant floor.

When it comes to selling hotel rooms, particularly in a holiday context, is it an omission of 'material information' not to reveal that the hotel lies under an airport flight path or next to a noisy road or in the centre of a 'party' resort? We would venture to say yes, although it would be wise to bear in mind the words of Briggs J quoted above to the effect that the legislation does not impose a duty of utmost good faith upon a business. By the same token however he

counsels in the preceding paragraph that English concepts of *caveat emptor* that are applied to pre-contractual negotiations must be put to one side.

While some consumers might positively want to book such an hotel for reasons of convenience there would be many others who would want to know such information because what they are looking for on holiday is rest and relaxation away from the noise and bustle of everyday life. More difficult to decide would be an omission of any statement about the fire safety precautions at the hotel – particularly if they did not attain the kind of standard applicable in western Europe or the US. Are hoteliers and tour operators supposed to declare that hotels are firetraps? Or what about the tour operator who declares that an hotel ‘complies fully with all local fire safety standards’ but fails to explain that there are no local standards? This information would probably be regarded as unclear or ambiguous and therefore in breach of Reg. 6(1)(c).

Now that many consumers make decisions about hotels based on reviews on such sites as Tripadvisor is it an omission of material information not to reveal the reviews posted on Tripadvisor – including the bad ones? Given the popularity of such sites it would be hard to deny that this information was ‘material’ but Reg. 6(2)(a) requires ‘all the features and circumstances of the commercial practice’ to be taken into account. It might be argued that if such review sites are so well known there is no need for the hotel to re-publish the reviews. Consumers can find this information for themselves quite easily. It would be different if the hotel published the reviews it had received, but only those which were favourable. This would be the omission or hiding of material information or providing the information in an ‘ambiguous’ or ‘unclear’ manner.

Reg. 6(3)(b) refers to information requirements which apply in relation to a ‘Community obligation’. Of particular relevance in this respect are the Package Travel Regulations 1992 (PTR) which are part of UK law by virtue of the Package Travel Directive 1990. The PTR set out stringent information requirements as to information to be provided in advance and also in the contract (see Schedules 1 and 2 to the Regulations). The information covers such things as the type of transport; details about the accommodation including classification, degree of comfort and location; the itinerary; the meal plan, the price; name and address of the organiser and retailer; and the financial security arrangements for the package.

Thus if a tour operator omitted to disclose the hotel rating or that not all meals were part of the package this would infringe not only the PTR but also the CPR because this would be material information which the consumer would need to make an informed decision and failure to provide it might cause the consumer to take a different transactional decision.

Another, less well known piece of legislation, also of European origin are the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013). These require, amongst other things, that companies doing business over the internet must provide “ ... the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner;” (Reg. 6(1)(c)). Failure to do so would be both a breach of the E-Commerce Regulations and the CPR – for omitting information required by a ‘Community obligation’. But would the average consumer take a transactional decision that he would not otherwise have taken if for instance an airline did not provide an email address which would enable them to communicate directly and effectively with the airline? It would probably not deter the consumer from making the contract in

the first place but it is important to note that the transactional decision need not relate to the initial making of the contract, it can relate to deciding ‘whether, how and on what terms to exercise a contractual right in relation to a product’ (see the definitions in Reg. 2). So if a consumer wished to complain to the airline about a breach of contract but could only do so in writing, perhaps to a foreign jurisdiction, because no email address was provided, this might cause them to abandon their claim. This would be a transactional decision they would not otherwise have made because the omission of the address made it too inconvenient to pursue their claim.

Providing ‘material information in a manner which is unclear, unintelligible, ambiguous or untimely manner’ also amounts to an offence. This brings us back, yet again, to the no-frills airline pricing practices when booking over the internet where non-optional fees and charges are added to the price on a drip feed basis until the final price exceeds the initial headline price by significant amounts. To the uninitiated such a booking process could very well be ‘unclear’ and ‘unintelligible’ but would such a person be ‘an average consumer’? – a person who is ‘reasonably well informed, reasonably observant and circumspect’ (Reg. 2). Such is the proliferation of such sites and the number of bookings made over them so numerous that it could be argued that the average consumer could be expected to have a reasonable grasp of how to navigate such sites despite their complexity.

In relation to such sites however the key word may be ‘untimely’. If some of the pricing information is withheld until towards the end of the booking process, credit card charges for instance, by which time the consumer has expended so much emotional capital in getting to that page that they are unlikely to start again with another provider then it could be argued that the information has been provided in an untimely manner – causing the consumer to take a transactional decision they might not otherwise have taken.

Invitations to purchase

Invitations to purchase were discussed in the third article in this series ([2010] TLQ 118). There we saw that an invitation to purchase means:

‘... a 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.’

If the commercial communication satisfies these conditions then Reg. 6(4)(a)-(g) lists certain information which is regarded as material to the making of an informed decision which, if omitted, could amount to an offence – if it causes, or is likely to cause the consumer to take a different transactional decision. These categories are listed above.

One of the categories listed is ‘the main characteristics of the product’ (Reg. 6(4)(a)). If an airline website failed to mention that flights it was selling were on ageing propeller driven aeroplanes rather than modern jets this could very well be a failure to provide information about the main characteristics of the product. If a car hire firm omitted to say that their cars operated on LPG rather than petrol or diesel this too would be a failure to provide information about the main characteristics of the product.

Another of the categories is the 'geographical address of the trader' (Reg. 6(4)(c)). Despite attempts by the EU to create a single European market consumers are still more likely to purchase products within their own jurisdiction rather than from somewhere else in Europe. The language barrier (particularly for UK citizens) is one of the reasons contributing this but there is also the issue of dealing with a company within the consumer's own jurisdiction – a business which is easily accessible and which, in necessary can be sued within the consumer's jurisdiction. This is the rationale for defining such information as 'material' and it is a small step to say that a failure to reveal where the business is based, particularly if it is outside the consumer's domestic jurisdiction, could cause the consumer to take a transactional decision he might not otherwise have taken.

One final category to mention in passing is that found in Reg. (Reg. 6(4)(d)(i) and (ii)). This provision makes the price, including taxes, and the manner in which a price is calculated information which is material and which must be included in an invitation to purchase. Much of what needs to be said about this has already been discussed in relation to the offence in Reg. 9.

This completes the discussion of the offence under Reg. 10 of engaging in commercial practices which are misleading. The next article will examine Reg. 11 on aggressive commercial practices and Reg. 12 which sets out a series of commercial practices which are regarded as being unfair in all circumstances.

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