

# THE CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS: A COMMENTARY.

## PART SEVEN

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

The last article began a discussion of the offence of engaging in a commercial practice which is a misleading action – to be found in Regulation 9. That discussion is continued in this article.

Breaches of Reg. 5(4)(a) and 5(4)(b) – false or deceptive information about the 'existence or nature of the product' and 'the main characteristics of the product' have already been touched upon so we can now turn our attention to some of the other categories in Reg. 5(4). The first two of these refer to misleading prices.

These are probably the most important of the categories in Reg. 5(4) and now that the part of the Consumer Protection Act 1987 (CPA) dealing with misleading prices has been repealed it is the first line of defence against misleading prices. Interestingly the CPA took several full sections to control misleading prices whereas the CPR takes only two lines. It will be interesting to see whether this broad brush European approach is any more or less successful in curbing misleading price claims than the more detailed UK legislation.

One feature of the CPA was that it was accompanied by a statutory code of practice which set out what amounted to good practice in relation to pricing policies. With the advent of the CPR this code no longer has any legal effect but nevertheless BERR, the Department for Business, Enterprise and Regulatory Reform (now BIS, the

Department for Business Innovation and Skills) has published a non-statutory 'Pricing Practices Guide' (BERR/Pub 8727/15k/06/08/NP.URN 08/918; <http://www.bis.gov.uk/files/file46254.pdf>)

which contains much of the same information as the former statutory guidance. This guidance contains much good advice and is certainly a 'First Aid' guide as to what not to do to avoid prosecution under the CPR. Breach of the code does

not amount to the commission of an offence per se under the Regulations but it would be a foolish trader who ignored the advice.

The advice covers price comparisons, actual prices to the consumer and prices which become misleading after they have been published – much the same kind of advice as the previous guidance.

### *The price or the manner in which the price is calculated Reg. 5(4)(g)*

In the last article we looked at 'Flights for 50p – Stansted to Tralee' and argued that if no flights were available at that price at all then this would be false in relation to the *quantity* of the product. Would it also be false or deceptive in relation to the *price* of the product? Again, one could make out a prima facie case that it was indeed false or deceptive – but would it satisfy the condition that it would cause the average consumer to take a transactional decision he

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**The CPR are the first line  
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would not otherwise have taken? Don't we all know that these headline prices are not what they seem and we expect to pay far more in the way of 'optional extras'? The problem is that the airlines have 'educated' us into such a suspicion of these low headline prices that we don't believe them anyway!

If we look at some of the cases decided under the CPA this might provide some guidance as to the type of case that might arise. However, as indicated in previous articles, a successful prosecution under the CPA does not necessarily mean a similar result under the CPR, or vice versa.

One travel industry case involving misleading prices was *Berkshire CC v Olympic Holidays* (1993, Divisional Court, unreported) in which a confirmed booking was made between a client and a tour operator on the basis of a computer print out which displayed a price which was £182 lower than the actual price. In other words there had been an error on the screen so that a price was displayed which was £182 lower than the brochure price—which Olympic asserted was the actual price. Olympic were charged with a breach of section 20(1) of the CPA for advertising a price which was less than it fact it was. Ultimately they were found not guilty by the Divisional Court on the grounds that they had exercised all due diligence to prevent the offence occurring, however the Magistrates believed that a prima facie offence had occurred. If these facts were to re-occur today what might the outcome be under the CPR?

It is likely that there would be a similar outcome. It could be said that the information was false and/or likely to deceive the consumer under Reg. 5(2)(a). However if the defendant could make out a due diligence defence they would escape conviction.

The *Olympic* case is an example of a price simply being false but Reg. 5(4)(g) also covers the

manner in which a price is *calculated* – which leads us into the murky waters of airline, hotel and car hire pricing.

One case under the CPA which addressed this kind of issue in passing was *Association of British Travel Agents & Others v British Airways & Others* [2000] 1 Lloyd's Rep. 169; aff'd [2000] 2 Lloyd's Rep. 209. In January 1999, IATA airlines changed the basis on which their fares were calculated in such a way that travel agents received less commission. What they did was to ask travel agents to represent the Passenger Service Charge (PSC) on tickets as a tax. The PSC is a charge

levied on airlines by airports for the provision of certain airport services and is calculated according to the volume of passengers the airline puts through the airport. It is important to note that the PSC is *not* a tax and it is *not*

a charge on passengers, it is merely one of the overheads of airline operation. However, by calling it a tax the airlines would not then have to pay commission on that element of the fare!

One of the issues that arose out of the case was whether there was an implied term in the standard contract between IATA airlines and ABTA tour operators to the effect that the airlines would not require travel agents to commit an illegal act—i.e. give a misleading price indication as to the method of calculating the price of an airline ticket. On that point the judge in the High Court had this to say:

"Under s. 20(1) of the 1987 Act, it is an offence to give to 'any consumers an indication which is misleading as to the price at which any services are available'. Since the definition of 'misleading' in s.21(2) encompasses an indication which is misleading as to a 'method' of determining a price, it seems clear enough that a document which states that the total

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price includes an ingredient for tax when it does not, conveys an indication that the method of determining the price 'is not what in fact it is' within s. 21(2)(a)."

If these facts were to occur today and an airline advertised prices to consumers as being '£50 plus taxes of £25' would this contravene the CPR? The answer would almost certainly be yes if that charge of £25 for taxes included the PSC. The way many airlines get around this problem is to say that the £25 covers 'taxes, charges and fees' – a phrase calculated to be wide enough to encompass the PSC. But is it wide enough not to be deceptive? It gives the impression that these are mandatory sums which are imposed by others rather than being the normal overheads of the business – like wages and fuel costs.

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In 1997, controversy arose over the way in which Air Passenger Duty (APD) is shown in brochures. Following the Code of Practice, most tour operators correctly included it in the basic price. For some time at least one major operator refused to do so, arguing that airlines always showed taxes separately and thereby gained an apparent price advantage. However following a complaint to the Advertising Standards Authority by the Air Transport Users Council in 1997 the ASA required airlines to consolidate their prices and most airlines complied immediately. (See ASA Monthly Report for December 1997.) There has however been a running battle between the airlines and the Office of Fair Trading over the issue of 'drip pricing' on the internet and the cost of booking with a credit or debit card (see 2012 [TLQ] 210 for further details).

In the 2005 case of *Essex County Council v Ryanair* (Chelmsford Crown Court); the airline was convicted of offences where it made no mention, on its website front pages, of additional taxes, fees or other charges, which were then a nasty shock for consumers who came across

them later. However Ryanair were acquitted in those cases where they initially mentioned the existence of charges as being extra, even though the amounts were not specified (nor of course included in the basic price). This part of the decision has surprised many, but being a jury decision, it is not capable of further analytical penetration. Perhaps, as indicated previously, it is just that the average consumer is becoming more sophisticated or "savvy" in these matters.

A non-travel case involving misleading prices is *Toyota (GB) Ltd v North Yorkshire County Council* (Div. Ct., March 11, 1998; (1998) 162 J.P. 794. In that case, which was decided under the CPA, the defendants published an advertisement for a car which gave a headline price of £11,655 but included in very small print at the bottom of the advertisement further obligatory

charges of £445 for taxes and delivery charges, etc. It was confirmed on appeal that despite the qualifying words the advertisement amounted to a misleading price indication under s.20(1) because it conveyed that the car was available for £11,655 when it was not. The test would be different under the CPR – was it likely to deceive the average consumer (Reg. 5) and cause them to take a different transactional decision? Case law under the TDA, *London Borough of Southwark v Time Computer Systems Ltd* (Divisional Court, July 7, 1997) and *Lewin v Purity Soft Drinks* [2004] EWHC (Admin) 3119 suggest that the position is not clear cut. In the former case an advertisement for a computer was in a 20-page brochure contained in a specialist computer magazine. The computer was represented in a photograph surrounded by boxes of software. The prosecution contended that the advertisement constituted a false trade description on the basis that although the software had been pre-installed on the machine it was not supplied with either the software disks or manuals. Although on the page in the brochure where the photograph appeared there was no specific reference

to the fact that no disks or manuals were supplied there were a number of such references in other parts of the brochure. Both the Magistrates and the Divisional Court found that it was reasonable to expect the reasonable customer to consider the brochure as a whole and that taken as a whole the brochure did not contain a false trade description. In the latter case, on food labelling, it was held that the "statement" is the whole statement, not just a part removed from its context.

When it comes to hotel pricing one of the most pernicious charges is the 'resort fee' charged by hotels that offer the use of a swimming pool or beach access, attendants and towels. If a guest books an hotel online, at a 'fully inclusive price' and then finds on arrival that they have to pay an extra, mandatory, resort fee is this false or deceptive? If the pool is described as one of the features of the hotel and the resort fee is not mentioned during the booking process one is drawn to the conclusion that this would be a contravention of the Regulations as the 'overall presentation' is likely to deceive the guest that the pool facilities are available at no extra cost. As always however the devil is in the detail. Often the resort charge and other 'taxes collected locally' are mentioned on the website but buried in the detail of the booking and not included in the 'total price' that the guest pays. This permits the travel company to plead that the charges were not deceptive because they were expressly mentioned. Whether they would get away with this if the evidence was that consumers were regularly surprised by the resort fee is a moot point. By way of anecdotal evidence the author, to his great chagrin, believing himself to be a 'savvy traveller' and knowledgeable about internet travel sites, has been caught out by such practices on more than one occasion and had to argue the point on arrival at the hotel reception – with only limited success.

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**Car hire charges are at least as byzantine as airline and hotel charges**

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Car hire charges are at least as byzantine as airline and hotel charges, if not more so: a myriad of confusing insurance options; one-way drop off fees; extra driver charges; local taxes; airport concession recovery fees; energy surcharges; and various fuelling options. As with the 'resort charges' the car hire charges are likely to have been mentioned during the booking process but often in such a way as to confuse or obfuscate. One example the author has come across is a car hire company that charges an airport concession recovery fee – which is made clear in the initial booking. However the same company does not permit the hirer to pay for an extra driver when booking online, this must be done at the counter when collecting the car. No indication is given on the website of how much the extra driver will cost, nor that when this extra service is purchased the airport concession recovery fee is increased pro rata. Given that there is only one car involved and one airport and no indication that the fee varies according to the number of drivers this would give grounds for saying that the information is likely to deceive the average consumer as to how the price is calculated.

One problem that tour operators in particular are faced with is what to do if they have published a brochure with prices included, but then wish to raise those prices. Under the old legislation specific provision was made for prices which were accurate when published but subsequently became misleading. Essentially the tour operator would escape liability if it took all reasonable steps to prevent consumers relying upon the old price. However under the CPR there is no such provision, it simply provides that the commercial practice is a misleading action if the price is false. So if a consumer sees a holiday advertised in a brochure and then tries to book it at the brochure price only to be told that the price had been increased this would amount to a prima facie offence. The tour operator would have to turn to the due diligence defence if they wished to

escape conviction. In this respect the advice given in the 'Pricing Practices Guide' might be of assistance:

"3.3.1 The price indication should apply for a reasonable period: what is reasonable will depend on the circumstances. Should a price indication become misleading, you should make sure the correct price indication is given to anyone who orders the product to which it relates. You should do so before the consumer is committed to buying the product.

3.3.2 Should a price indication become misleading while your brochure is still current, you should make this clear to the travel agents to whom you distributed the brochure."

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**If you choose to make price comparisons, you should be able to justify them**

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### *The existence of a specific price*

#### *advantage Reg. 5(4)(h)*

The Pricing Practices Guide has this to say about price comparisons:

"1.1.1 The CPRs prohibit traders from giving false or misleading information, or omitting material information, about price or the manner of calculation of the price for a product, where this causes or is likely to cause the average consumer to take a transactional decision he would not otherwise have taken. If you choose to make price comparisons, you should therefore be able to justify them, and to show that any claims you make are accurate and valid – in particular, that any price advantage claimed is real.

1.1.2 In general you should compare like with like. This implies that the products compared should be the same, or very similar; and should have been on offer in

the same outlet. Also, the basis of the price comparison should be reasonable in terms of time. What is reasonable will depend on the circumstances.

1.1.3 If your comparison is made on a basis which differs on any point from the practice recommended in this Part of the Guide, you should make the basis of the comparison explicit, so far as it differs. Any such explanation should be clear, and easily accessible to the consumer: it should be unambiguous, easily identifiable and (except where this is impractical, for instance, in distance contracts that are concluded orally), easily legible by the consumer. It should set out positively what comparison is being made, rather than vague

negative disclaimers (e.g., 'price compared may not have been on offer for 28 consecutive days')."

So if a travel company advertises that certain of its products are 'on sale' or 'discounted' or 'cheaper than our competitors' and this turns out not to be true then this would be a breach of Reg. 5(4)(h) – the advertisement contained false information which was likely to cause the consumer to take a different decision i.e. to buy the product. More difficult would be the case where say an airline advertises flights from Gatwick to Malaga for 'Only £50!' – which in fact represents a £10 increase in price over the normal price. Does the use of the word 'only' coupled with the exclamation mark signify a 'specific price advantage'? Is the average consumer deceived into believing that they are getting a price advantage? To put it another way: do they think they are getting a bargain? The advertisement is factually true, the flights only cost £50, but is its presentation likely to deceive?

If the wording was 'Special Offer. Flights to Malaga £50' this would tend toward a finding

that the advertisement was deceptive. It suggests much more strongly that this is a bargain, cheaper than the regular price. The Pricing Practices Guide suggests that such an approach might be an infringement:

"1.1.4 You should make the meaning of any price comparison clear to the consumer. You should not leave consumers to guess whether or not a price comparison is being made. If no price comparison is intended, you should avoid words or phrases which, in their normal everyday use and in the context in which they are used, are likely to give consumers the impression that a price comparison is being made."

Despite being passed in 2008 very few cases have been brought under the CPR and to my knowledge none against travel industry companies for infringing the pricing provisions so it may yet be some time before we have authoritative decisions on what amounts to an offence.

### *The nature, attributes and rights of the trader Reg. 5(4)(j)*

This is further defined in Reg. 5(6) to include the trader's:

- (a) identity
- (b) assets
- (c) qualifications
- (d) status
- (e) approval
- (f) affiliations or connections
- (g) ownership of industrial, commercial or intellectual property rights; and
- (h) awards and distinctions

Thus if an hotel indicated that it had the approval of the AA or the RAC and this was not the case an offence would be committed. It would be the

same if an airline suggested it was a member or IATA or a tour operator that it was a member of ABTA or AITO as this would relate to its *status* or *affiliations*. If a tour operator were to say that its holidays were protected by the ATOL scheme when they were not would be false as to its *status* as an ATOL licensed operator. If a cruiseline were to say that it was 'Cruiseline of the year 2011' and this was not so this would be false as to its *awards* or *distinctions*.

### *The consumer's rights or the risks he may face Reg. 5(4)(k)*

If a tour operator stated in its terms and conditions that if a *force majeure* event occurred while the consumer was on a package holiday the operator would have no further responsibility for the consumer this would be a misleading action as to the consumer's rights under Reg. 14 of the Package Travel Regulations which require the operator to make suitable alternative arrangements under such circumstances.

If an EU registered airline stated that it was under no obligation to provide assistance to passengers who were subject to a long delay this would be a contravention of EU Regulation 261/2004 which requires airlines to provide assistance in those circumstances – and therefore a breach of Reg. 9.

If an adventure tour operator included a clause in its terms and conditions that it would not be liable for any injuries sustained by consumers arising out of the activities they undertook on the tour 'under any circumstances' this would be a breach of the Unfair Contract Terms Act 1977, the Package Travel Regulations 1992 and the Unfair Terms in Consumer Contracts 1999 which all outlaw the exclusion of liability for negligence. Inevitably therefore it would be a breach of Reg. 9 because it misled consumers about their rights.

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The next article in this series will move on to discuss Reg. 10 on misleading omissions