

The unfair commercial practices directive law commercial essay

[Environment](#), [Air](#)



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Introduction

This essay seeks to critically evaluate the extent to which the Consumer Protection from Unfair Trading Regulations 2008 (" CPRs) meet the aim as set out in the Preamble to the Unfair Commercial Practices Directive[1]of providing a high level of consumer protection for misleading and aggressive commercial practices. It starts by a brief consideration of the main aims of the Unfair Commercial Practices Directive as set out in the Preamble. Then, it examines the relevant provision of the CRPs. Finally, it critically evaluates the extent to which the CRPs meet the aim of the Directive as set out in the Preamble. The essay argues that the maximum approximation of the Directive have enabled the CRPs to fully implemented it in the UK consumer protection law.

The Unfair Commercial Practices Directive

The aim of the Unfair Commercial Practices Directive 2005 is to approximate the laws of the EU Member States on unfair commercial practices, including

unfair advertising, which directly harm the economic interests of consumers and thereby indirectly harm the economic interests of legitimate competitors.[2]The provisions on unfair commercial practices should directly protect the economic interests of consumers from unfair business to consumer commercial practice,[3]cover aggressive commercial practices covering practices which impair the freedom of choice for consumers,[4]and identify commercial practices which are always unfair.[5]The Directive seeks to protect all consumers from unfair commercial practices in line with the principle of proportionality, a benchmark being the average consumer, who is well informed, reasonably observant and circumspect, taking into account social, cultural and linguistic factors[6]as well as such characteristics as age, physical or mental infirmity or credulity.[7]Unlike other Directives which provide minimum standards to be implemented by the Member States, Unfair Commercial Practices Directive, provide for maximum harmonisation. This means that Member State cannot provide more or less protection than specified by the Directive. Maximum harmonisation is controversial,[8]but it fits in the aim of the Unfair Commercial Practices Directive, which is to facilitate cross-border trading by creating a level playing field.

The CPRs

The CPRs implement the Unfair Commercial Practices Directive into the UK law. They entered into force on 26 May 2008. Regulation 3(3) of the CPRs contains a general prohibition of "unfair commercial practices" and Regulation 4 the promotion of such practice in relation to consumers. A "consumer" is defined as any individual acting outside the purposes of his/her

business.[9]A " commercial practice" is defined as a trader's act, omission, course of conduct, representation or commercial communication, which is directly connected with the promotion, sale or supply of a product to or from consumers.[10]Regulation 3(3) defines " unfair commercial practice" as the one that " contravenes the requirements of professional diligence, and materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product." [11]Further, Regulation 3(4) defines " unfair commercial practices" as a misleading action or omission, or is aggressive or is listed in Schedule 1 to the Regulations.

[12]Misleading action may involve providing false product information or deceptive presentation or non-compliance with any applicable code.

[13]Misleading omissions may include omitting or hiding material information or unclear or ambiguous use of such or failure to identify the commercial intent.[14]Aggressive commercial practice include those that impair, or likely to impair, the freedom of choice or conduct of the average consumer through the use of harassment, coercion or undue influence to cause him/her to enter into a transactional decision that s/he would not have done.

[15]Schedule 1 practices are deemed unfair. The Schedule contains a list of unfair or reprehensible practices as well as practices with parallels to passing off, such as promoting a product similar to one made by a certain manufacturer to deliberately mislead consumers into believing that the product is made by the same manufacturer.[16]The CRPs create new five criminal offences. One requires mens rea whilst the other four are strict liability offences. These are engagement into commercial practices contravening the requirement of professional diligence (mens rea in the form

of recklessness or knowledge is required),[17]misleading actions, [18]misleading omissions,[19]aggressive practices[20]and unfair practices specified in schedule 1 of the CRPs.[21]These offences can only be committed by a trader and does not give civil remedies to the consumer. Regulation 17 provide a defense of due diligence if the offence was committed due to a mistake, reliance on information supplied by another, an act of another, an accident or the cause was beyond the trader's control, and that all reasonable precautions were taken and all due diligence exercised to avoid the offence being committed. This is a question of fact and degree to be considered in the light of the particular circumstances of each case.[22]So far there has been one case relating to the CRPs. In *Purely Creative Ltd v Office of Fair Trading*,[23]the OFT brought an action for an order to restrain traders from continuing to distribute promotions to consumers that involved unfair commercial practices contrary to the CRPs. The traders had, by personal letters and by inserts in newspapers and magazines, invited consumers to claim prizes and rewards which were alleged to be misleading. The OFT argued that the promotions were " unfair commercial practices" and, thus, prohibited by Regulation 3 of CRPs, they included misleading actions and omissions contrary to Regulations 5 and 6 and were in breach of Paragraph 31(b) of Schedule 1 of the CRPs. This was because the promotion created, among other things a false impression that the consumer had won a prize without the consumer having to pay money or incur any other cost. The court was also required to consider for the first time important concepts in the CRPs, namely " average consumer", the meaning of " transactional decision" and " material information". Briggs J considered the traders'

promotions in detail and held that they involved unfair commercial practices. The CRPs the "average consumer" is one who is "reasonably well informed, observant and circumspect." [24] Briggs J said this means that it is only those "who take reasonable care of themselves, rather than the ignorant, the careless or the over-hasty consumer" who are protected. [25] On the meaning of "transactional decision", he found that any decision having an economic consequence was a transactional decision, even if it simply meant the difference between doing nothing or making a premium rate call, or posting a letter. [26] On the "material information", he said "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." [27] The defendants appealed to the Court of Appeal against the wording of undertakings that they had given in lieu of an enforcement order being made against them. The OFT cross-appealed against the wording of the undertakings and sought a reference to the ECJ as to the proper interpretation of the Directive. Appellant argued that the judge had misapplied Schedule 1, Paragraph 21 of the CRPs and the undertakings needed to be modified to reflect a narrower interpretation of the Directive. The Court of Appeal stayed appeal pending a referral to the Court of Justice on five questions under the CRPs. [28] One of the questions was whether a trader may impose a cost, even a minimal cost, on a consumer who has been informed that s/he has won a prize. In its judgment, [29] the Court of Justice held that the EU law prohibits aggressive practices which give the consumer the impression that s/he has already won a prize, whilst s/he is obliged to pay money or incur a certain cost in order to be informed of the nature of

that prize or to take certain action to acquire it.[30]The Court of Justice made it clear that such practices are prohibited even if the cost imposed on the consumer is minimal compared to the value of the price or where it does not procure the trader any benefit.[31]In addition, the Court of Justice held that those aggressive practices are prohibited even if the trader offers a number of methods to the consumer in order to obtain the prize even if one of the methods is free of charge.[32]This decision will prove very useful for traders, particularly scratch-card companies and others providing similar promotions because traders have had relatively little judicial authority to assist them in complying with the CPRs and have had to make do instead with commentary from the EU Commission and the UK Government.[33]

Critical evaluation

The CRPs have been described as " one of the most significant changes in consumer protection for generation." [34]They introduce the most important and far-reaching changes to UK consumer protection law for over 40 years. [35]They have modernise and simplify the UK's consumer protection framework by partially or wholly repealing provisions in 23 such laws. The CRPs defines the " average consumer" by including only the first half of the definition in Paragraph 18 of in the Preamble of the Directive.[36]However, the failure to include reference to social, cultural and linguistic factors suggests that, to a certain extent, the CRPs do not meet the aim as set out in the Preamble of the Directive. However, a court will still interpret the definition provided by the CRPs in so far as to comply with the intention of the Directive as evidenced by its Preamble.[37]The CRPs create offences

including knowingly or recklessly engaging in commercial practice which distort a consumer's economic behaviour. Therefore, traders have to consider whether their marketing practices contravene requirements in order to avoid being considered reckless in this regard.[38] However, there might be few prosecutions due to the requirement of mens rea for the offences relating to the engagement in a commercial practice contravening the requirement of professional diligence. This is because the enforcement authorities will potentially face the difficulty of identifying precisely what they are obliged to prove and how they can prove it.[39] As a result, there is a danger of under-enforcement of those offences that require proof of mens rea. Further, since the offences can be committed by corporate bodies, it might be difficult for the enforcement authority to prove mens rea, given the reluctance of the courts to depart from the narrow interpretation of the doctrine of identification as established in *Tesco Supermarkets v Natrass*. [40] Cartwright suggests that from the perspective of the enforcement authority, one solution to the danger that the courts adopt a narrow interpretation of identification along the lines of *Tesco v Natrass* will be to put the company on notice.[41] In 2010, the Law Commission published a consultation paper looking at how regulators use criminal sanctions to punish non-compliance with relevant legislation.[42] The Law Commission considered the increase of new criminal offences and the question whether criminal prosecutions should be reserved for the most serious cases of non-compliance with the relevant law. It suggested that in other cases, civil penalties, such as fines, warning, notices, search and seizure may be quicker and cheaper to administer and severe than criminal penalties. Penalties for

breach of the CRPs are very low at a maximum fine of £5, 000. Only enforcing authorities, such as the OFT and Trading Standards can enforce the CRPs. They have been given powers to seek injunctions to secure compliance with the CRPs and investigatory powers and powers to enter premises with or without warrant. However, consumers who are victims of unfair commercial practices cannot enforce the CRPs directly. They have to rely on private law rights, but a review by the Law Commission has found the current law on this area to be fragmented, complex and unclear.[43]The law should simple and clear to allow consumers to directly bring claims for compensation as a result misleading, aggressive and unfair commercial practices.[44]In November 2012, the Government published a consultation on civil enforcement remedies proposing new powers for enforcers so that consumers could obtain remedy redress fro breaches of certain consumer protection law.[45]

Conclusion

The CRPs implements the Unfair Commercial Practices Directive which harmonises unfair trading laws across the EU and prohibits unfair treatment of consumers by traders. The CRPs deal with unscrupulous advertising and marketing practices and introduce criminal penalties for such practices. To certain extent, the CRPs meet the aim of the Directive by prohibiting unfair commercial practices contravening the requirements of professional diligence, those which are misleading by their act or omission and those specifically identified and always considered to be unfair. They ensure that the aim of the Directive is achieved by repealing many provision may

consumer related laws which have existed for many years. It is still early to tell whether the aim will be met in practice, but the decisions in *Purely Creative Ltd v Office of Fair Trading* provides a useful judicial authority to assist in compliance with the CPRs.