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Legal and Regulatory Update

This section of the journal looks at marketing, data protection, technology and e-commerce issues, providing an overview of recent key legal developments in these areas.

Consumer protection: The importance of fair and reasonable consumer contracts

Paul Langford

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Those of you who sell goods over the internet take note: customers who have a bad experience when returning an item are unlikely to buy from you ever again. Most online retailers know that they must provide a refund or replacement for goods that are faulty; but many website vendors fall short in dealing with other aspects of the process, such as who pays the cost of delivery, and the fact that customers have certain rights to a refund even where there is no fault.

The impact of getting your online terms and conditions wrong is threefold. First, staff will inevitably use such terms as their bible for dealing with customer queries and complaints, which may serve to exacerbate the level of rage among your legally adept customers. Secondly, customer relations will inevitably suffer: a disgruntled on-line shopper is not only unlikely to return to your site, but will encourage others to avoid it. To top this off, you may also find yourself subject to investigation by the Office of Fair Trading, who can require you to change your terms and conditions. This is exactly what happened to dabs.com plc (Dabs), which, following action by the OFT, recently agreed to amend numerous unfair terms and conditions in its consumer contracts.

Dabs' terms and conditions

Dabs is one of the UK's largest online retailers, supplying computers, software and electronic goods directly to customers in the UK. Its website contained more than 20 provisions and statements that caused concern to the OFT, and that Dabs has subsequently amended or deleted. These included the following:

— *An exclusion of the company's liability for errors in the descriptions of goods*

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UTCCRs

The original term in Dabs' conditions provided as follows:

'We accept no responsibility for keeping the information in these pages up to date or liability for any failure to do so.'

As this term excluded liability for errors, it fell foul of the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs). The OFT required this to be deleted.

— *A requirement on the consumer to pay cost of carriage to return faulty goods*

The original term provided in respect of the return of faulty goods:

'Please note that no courier collection charges will be refunded.'

This clause had the effect of limiting liability for defective goods by requiring the consumer to meet the cost of carriage for returning faulty goods, and therefore was required to be deleted.

— *Requirement on consumers to be bound by all terms*

Dabs was also required to amend a term that is contained in many websites' terms and conditions, which provided as follows:

'You agree to be bound by all terms and conditions for the use of this Service.'

This was replaced with wording *advising* consumers to read the terms, rather than *dictating* their acceptance of them.

— *Procedure for returning goods*

The procedure for returning goods was also deemed unfairly rigid, and the relevant provisions, including the following, were required to be replaced:

'If you only actually sent it back to us on day fifteen however, we would reject it because it wasn't sent within the fourteen days.'

This revised wording now *encourages* consumers to follow the supplier's returns procedure, but failure to do so no longer means that a consumer will lose his or her rights.

What powers does the OFT have?

OFTs powers

The OFT has extensive powers in respect of sellers that breach consumer legislation, including obtaining court orders against such traders. Online retailers therefore need to take particular care that their terms and conditions comply fully and accurately with a range of consumer legislation and, in particular (as was demonstrated by the Dabs action), the following:

— *Unfair Terms in Consumer Contracts Regulations 1999: The UTCCRs are designed to protect consumers against unfair standard*

terms in contracts they make with traders, and apply to any standard contract terms with consumers. At the heart of the UTTCRs is the requirement that any such standard terms are fair and reasonable. The legislation provides that a term is likely to be considered unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of consumers.

A consumer is not bound by a standard term in a contract with a trader if that term is unfair. Furthermore, as the Dabs action shows, the OFT — and certain other bodies — can take legal action to prevent the use of potentially unfair terms, with the courts ultimately deciding whether a term is unfair. Therefore, it is of paramount importance to any business to have standard terms that are fair and reasonable.

- *Distance Selling Regulations*: The Consumer Protection (Distance Selling) Regulations 2000 — or the Distance Selling Reg's as they are more commonly known (DSRs) — give additional rights to consumers where the contract is made 'at a distance'. This covers not only online sales but also mail order and telesales. The DSRs provide consumers with a number of benefits including rights to clear information, a cancellation period and further protection against fraudulent use of payment cards.

Particular care needs to be taken when drafting refund and return policies, as it is in this area that businesses often fail to reflect the legal requirements prescribed by the DSRs.

Ensure terms are consumer-friendly

Commentary

The action against Dabs provides an excellent example of why businesses that trade with consumers over the internet should ensure that their terms are consumer-friendly. Obviously, every trader will want to avoid the sort of action by the OFT that Dabs encountered. Beyond the strict legal requirements, however, it is also important to bear in mind the impact upon goodwill and repeat business that a sensible returns and refunds policy will have. In most cases, this should far outweigh any cost savings that an onerous set of terms and conditions are intended to achieve.

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Consumer protection: Government crack-down on aggressive and unfair trading

Gillian Gall

The Department of Trade and Industry (DTI) has published draft regulations that aim to implement the EC Unfair Commercial Practices Directive by cracking down on aggressive and unfair trading and selling practices.

What do the regulations do?

CPRs

The Consumer Protection from Unfair Trading Regulations (CPRs) aim to significantly improve consumer protection by prohibiting 31 sales practices that are currently unfair but not illegal. The government also hopes to reward honest businesses by simplifying consumer protection legislation and targeting illegal traders.

What practices are to be outlawed?

Outlawed practices

Practices set to become illegal include prize draw scams, misleading 'closing down' sales, refusing to leave a customer's home when asked to do so, making persistent and unwanted sales telephone calls to customers and exploiting people's fears about personal security to sell them burglar alarms.

Consumer Minister Ian McCartney, who heads up the consultation on the CPRs, commented that the proposed new law 'will give the cowboys nowhere to hide. It will crack down on underhand sales practices that are all too often used to back consumers into a corner. Traders who use bully-boy tactics have no right to pressure people into buying goods, often at rip-off prices. Elderly and vulnerable consumers will be given greater protection against rogue traders who use the hard sell to get what they want or prey on their fears and worries about living alone. Whether shopping on the high street or online, consumers have a right to be sold to honestly and fairly. This new protection will make life a lot tougher for the rogues and easier for legitimate businesses to operate.'

Effect of the CPRs

In addition to the draft regulations, the Office of Fair Trading (OFT) has published draft guidance on the law that sets out the views of the OFT and DTI on the likely effect of the new regulations.

Time frame

Consultations on both the draft regulations and guidance will be open to the public until 21 August 2007. It is anticipated that the regulations will become UK law in April 2008.

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Direct marketing: OFT finds no weight in miracle slimming claims

Paul Langford

A miracle cure?

Many of us dream of a miracle pill that would allow us to lose loads of weight without the need for boring diets and having to steer clear of chocolate and cakes. Therefore, when US company Long Life Consumer SA LLC (Long Life) sent mailings claiming that its slimming product was the ‘ultimate weapon against unwanted pounds’, nearly 4,000 recipients’ hopes were raised: each one was prepared to fork out a minimum of £26.50 for a course of ‘Linea 7’ capsules.

The miracle cure

Over 187,000 mailings were circulated, claiming that the capsules ‘dislodged and expelled excess fat’. The marketing even cited one woman who claimed to be 49 pounds lighter after taking only 14 capsules over two seven-day courses — quite some achievement! The literature went on to indicate that ‘Linea 7’ “forced” the body to lose up to 24 pounds of fat with only seven capsules effort, no dieting and no side effects and without ever gaining weight again’.

OFT action

Misleading claims

It all seemed too good to be true, which, of course, it was. After being made aware of the mailings, the OFT contacted Long Life to express concerns over the potentially misleading claims being made, and to ask it for some evidence.

The company responded by stating that the ingredients in the ‘Linea 7’ capsules had been tested a number of times in worldwide laboratories and that there existed clinical reports on the beneficial effects of the ingredients in the fight against excess weight and the

elimination of fat. But it was unable to provide proper evidence to back up its claims.

Long Life confirmed that it would never again distribute the mailing in the UK. In fact, it subsequently decided to withdraw its mail order business from the UK market altogether.

What can consumers do if they feel they are being misled?

Consumer Direct

Consumers no longer need to take such matters to their local Trading Standards office. Instead, they can simply contact Consumer Direct, the government-funded telephone and online service offering information and advice on consumer issues. Where appropriate, Consumer Direct will forward the details of a complaint to an agency that is authorised to take direct action, such as Trading Standards Services. This, in turn, may lead to an investigation by the OFT.

Commentary

The OFT estimates that 200,000 UK consumers fall victim to misleading miracle health and slimming cure claims every year, costing such individuals a combined total of around £20m.

While reputable traders avoid such tactics, all marketers should ensure that the claims they make in materials are accurate, and that they can be substantiated. The OFT is not the only body that will investigate complaints; the Advertising Standards Authority investigates all complaints it receives, and will require removal of any misleading adverts.

Therefore, a failure to ensure that your statements are accurate and truthful may simply lead to the wasted cost of removing relevant media. In more extreme cases — as Long Life discovered to its detriment — where the OFT gets involved, it may prove to be much more costly.

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Communications: OFT studies internet shopping

Kieran Healy

The OFT has released a report into internet shopping that concludes that the rapid growth of internet shopping is a success story, benefiting both consumers and businesses across a broad range of markets.

Internet shopping market

Value of the market

According to the Office for National Statistics, the UK internet shopping market is estimated to be worth in excess of £21.4bn with over 20 million people shopping online in 2006. The OFT believes, however, that both shoppers and businesses should be doing more to make the most of the opportunities provided by the Internet.

Key findings of the report

The report warns that, by failing to search effectively, shoppers are missing out on the best deals and a significant number are still not doing enough to protect themselves online. A lack of awareness concerning cancellation rights when shopping on the internet is also highlighted. This lack of awareness extends to businesses. The OFT's findings show that many are unaware of their obligations under the Distance Selling Regulations, which give extra protection to consumers who purchase goods and services without face-to-face contact with the seller. Some businesses could also do more to address consumers' concerns about privacy and security.

Action as a result of the report

As a result of these findings, the OFT has stated its commitment to working with businesses, consumer organisations and other public bodies to:

- ensure that businesses have easy access to clear information and advice about online selling
- advise shoppers how to protect themselves from threats to security and privacy
- address shoppers' concerns in terms of avoiding the most frequent problems by providing contact details and a secure environment and
- make the internet a safer environment for buying and selling, and build consumer confidence in internet shopping.

What next?

The OFT intends to produce more details by the end of 2007. In the meantime, such attempts to make shoppers feel confident and protected when buying online are a welcome step in the right direction if online shopping is to continue to flourish, and for businesses in the internet shopping and search sectors, the messages are clear: there is much opportunity, provided you stay on the right side of the law!

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OFT committed to working with businesses, consumer organisations and other public bodies

Communications: OFCOM takes a close look at the UK communications market

Kieran Healy

Ofcom has released its second annual review of telecoms, television and radio markets across the nations and regions of the UK. It aims to present the most comprehensive picture possible of trends in these markets, in an attempt to establish the context for policy decisions by Ofcom and other public and private sector organisations.

Leaders and laggards

Insight

This year's report offers a valuable insight into the challenges faced by people living in rural parts of the UK and shows that the gap between 'leaders' and 'laggards' on key indicators has shrunk over the period, with availability and take-up in rural areas closing on urban regions.

Availability of communications services

Rural areas lag behind

With regard to communications services availability, the report found that:

- People in Scotland, Wales and Northern Ireland's rural areas lag behind those in urban areas in take-up of many communications services.
- With the exception of England, perceived availability of communications services is lower in rural than in urban areas.
- Demand for services to be made available is the highest in Wales and Northern Ireland.

Availability of telecoms services

In relation to telecoms markets, the report made the following observations:

- Almost everyone in the UK lived in a postcode with 95 per cent or more 2G area coverage in Q1 2007, while 91 per cent lived in a postcode with 50 per cent 3G area coverage.
- Across the UK almost all premises were connected to a DSL-enabled local exchange, although a small proportion of these will not be able to receive broadband or may only be able to do so at limited download speeds and the proportion of households able to receive LLU broadband increased by around 25 per cent during the year.

- Internet and broadband penetration continue to grow with research, indicating that 50 per cent of UK households have a broadband connection.
- Average household mobile spend is greater than fixed-line and internet combined.
- Almost three out of ten households buy bundled telecoms services.
- Satisfaction levels among consumers are high, particularly among broadband users.

Great opportunity for service providers

What this shows is that there is still great opportunity for service providers in the market.

What next?

This report is the first of Ofcom's three 2007 publications examining different aspects of the UK's communications markets. The next report, the Communications Market 2007, considers the UK-wide market in depth, and The International Communications Market report, to be published around Christmas, will compare the UK and overseas markets.

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Media regulation: Big changes ahead for rules on audiovisual media

Gillian Gall

'AVMS Directive'

The European Parliament and Council has agreed on the content of the new Audiovisual Media Services Directive ('AVMS Directive'), which replaces the Television Without Frontiers Directive. It promises to offer a comprehensive legal framework covering all audiovisual media services and paves the way for more flexible financing of audiovisual content by way of television advertising.

Background

The AVMS Directive was initially proposed by the European Commission in December 2005 to keep up to speed with the rapid technological and market developments in the audiovisual industry,

such as the expansion of the internet, increase in pay-per-view television and the arrival of new services such as video on demand.

The 'country of origin' principle will feature in the new package, meaning that broadcasters will be governed by their national country rules even where their programmes are transmitted to other member states.

Main features

The main features of the AVMS Directive include:

- The reduction of the current regulatory burden, while extending rules to cover all audiovisual media services regardless of the transmission technology used. Rules will, however, be less stringent for audiovisual content supplied at the viewer's request (on demand) compared to traditional television broadcasting.
- The modernisation of television advertising rules to enable better financing of audiovisual content. While broadcasters will still be limited to 12 min of advertising per hour, the current limit of three hours per day of advertising is to be scrapped.
- The introduction of Europe-wide product placement rules so that viewers must be informed when this is taking place.
- New features, such as obliging media service providers, to improve access for people with visual or hearing impairments.

Commentary

Critics had feared that attempts to regulate the internet by the AVMS Directive would lead to overly complicated inflexible regulations. The European Commission has said, however, that the regulations will only cover television services and not all audiovisual content posted on the internet. The EU Media Commissioner Viviane Reding said the AVMS Directive 'brings Europe's audiovisual policies into the 21st century, providing a welcome shot in the arm to industry. It promises less regulation, better financing for European content and higher visibility to Europe's key values, cultural diversity and the protection of minors.'

Time frame

It is expected that the AVMS Directive will enter into force at the end of 2007 or early 2008. Member States will have two years to implement the new rules nationally, and so the regulations are likely to fully apply in 2010.

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Copyright: YouTube defends Premier League attack

Gillian Gall

Action against YouTube

The Football Association Premier League recently launched legal action in the United States against YouTube and its parent company, Google. The Premier League alleges that YouTube is 'pursuing a deliberate strategy of engaging in, permitting, encouraging and facilitating massive copyright infringement on the YouTube website.'

Request for an injunction

The claimed infringement

Independent music publisher Bourne has joined the Premier League in what the Premier League hopes will be a class action against YouTube, prosecuted on behalf of the two companies and any others whose copyrighted works have appeared on the website. The lawsuit requests an injunction to prevent YouTube from continuing to violate copyright laws and unspecified damages for its past copyright infringements.

Exploitation of rights

Football clips of Premier League football games, which are largely put together by fans from official footage, have been uploaded and viewed by users of the YouTube website. The rights to show live Premier League games and highlights over the next three years are worth £2.7bn worldwide and the Premier League is therefore anxious to protect these.

YouTube is accused of consciously encouraging people to view the football clips in order to raise its profile and thereby knowingly misappropriating and exploiting the valuable intellectual property rights for their own gain without payment or licence to the owners.

Similar allegations — Viacom complaint

The complaint against YouTube follows similar allegations of copyright infringement made in March of this year by media giant Viacom. The \$1bn Viacom lawsuit, which has yet to be resolved, focuses on content posted by YouTube users that came from Viacom programmes such as *SpongeBob SquarePants*.

Google recently filed a response, asking for the lawsuit to be dismissed and arguing that it represents a threat to the internet.

Google's response

In response to the Premier League allegations, a Google spokesman said that there had been a misunderstanding of the Digital Millennium Copyright Act, which balances the rights of copyright holders against the need to protect internet communications and content. Google

warned that the proposed lawsuit endangers the legitimate exchange of information, news, entertainment and expression over the web.

Agreements with YouTube

Several media organisations have reached agreements with YouTube for the supply of clips and it has been suggested that the Viacom lawsuit may lead to a licensing deal between Viacom and YouTube. The Premier League and Bourne, however, have said that their plan is to prosecute on behalf of themselves and thousands of others, which makes a deal with YouTube look less likely.

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Data protection: Information Commissioner approves binding corporate rules

Gary Brooks

BCR

In a significant development, the Information Commissioner has approved electrical giant Philips's data protection Binding Corporate Rules (BCR). This approval enables Philips to export its employees' and customers' personal information lawfully from the UK to Philips companies all over the world. This is only the second time that the Commissioner has approved a company's BCR (the other being General Electric, as reported by e-brief in December 2005).

Transfer of personal data outside the EEA under the Data Protection Act

The Data Protection Act bans the transfer of personal data from the UK to a country outside of the European Economic Area unless that country ensures an adequate level of protection for individuals' personal data. The BCR allow the Information Commissioner to authorise a company's overseas data transfers, provided they are made in such a manner as to ensure 'adequate safeguards' for the data protection rights and freedoms of individuals.

What are BCR?

BCR consist of internal data protection codes of conduct that are drawn up by a multinational organisation for the purposes of enabling transfers of personal data outside Europe (but within the corporate group). From the regulator's point of view, a BCR system is about two

Internal data protection codes of conduct

things: adopting European data protection standards and demonstrating true enforceability across the group companies.

Flexibility

What are the advantages of BCR?

BCR offer the advantages of flexibility and a tailored solution to the difficult problem of legitimising overseas intra-company data transfers. For global companies, they may present a more attractive option than having a web of intra-group contracts based on the EU model clauses, which is inherently complex and often impractical.

What is the approvals process for BCR?

The regulatory approvals process for BCR is complex and involves a cooperation procedure whereby the exporting data controller (ie Philips) deals, in the first instance, with one national data protection authority (in this case the UK Information Commissioner), who then coordinates the authorisation process from the other national data protection authorities in all the other European jurisdictions in which that company operates.

Commentary

BCR are seen by some commentators as the ‘holy grail’ of data protection compliance — a note of caution though: while the rewards of obtaining BCR approval are great, the process of drafting and implementing them at present involves running a somewhat daunting regulatory marathon. It has taken Philips several years and a very considerable amount of effort and investment across its organisation to obtain regulatory approval for its BCR.

BCR expected to become a more attractive option

If, as expected, the EU-wide approvals process becomes more streamlined, we expect BCR to become a more attractive option, with more multinationals taking the plunge and enjoying the benefits of advertising themselves as a ‘privacy-friendly’ business through their adoption of BCR.

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