businesscompanion
trading standards law explained

Part 1. Specific prohibitions

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Misleading actions

The Digital Markets, Competition and Consumers Act 2024 (DMCCA) covers four types of misleading action if they are likely to affect the average consumer's transactional decision:

- giving false or misleading information. Even true information can give rise to a misleading action if it is presented in a misleading way
- an overall presentation that is likely to deceive the average consumer
- marketing of a product that causes or is likely to cause confusion with another trader, their product, or distinguishing mark
- failing to comply with a code of conduct that you claim to be complying with

Misleading omissions

Traders are required to give consumers all the information they need to make an informed transactional decision. If you do any of the following, and this would be likely to affect the average consumer's transactional decision, then you are likely to breach this provision:

- omit material information
- fail to give information that you are required to give under any other legislation (such as the requirement to give cancellation rights for distance and off-premises contracts)
- fail to identify the commercial intent, unless it is apparent from the context (for example, telling the consumer in a call that you are carrying out a survey, when it is actually a sales call)

Information is considered to be 'omitted' if it is provided in a way that is 'unclear' or 'untimely', or if the consumer is unlikely to see it. Examples of this would be if the information is in very small print, can only be seen by clicking through a website link or if it is insufficiently prominent.

Aggressive practices

If a trader is likely to affect the average consumer's transactional decision through the use of "harassment, coercion or undue influence", then it could be an aggressive practice; this would include physical or psychological pressure and taking advantage of a consumer's vulnerability. Effectively, you should not engage in techniques that intimidate, exploit or otherwise pressure consumers if this would affect a consumer's transactional decision.

When deciding whether a commercial practice could be aggressive, you must consider:

- the nature of the practice
- its timing and location
- whether any threatening language or behaviour is used
- whether a consumer's possible vulnerability is exploited
- whether threats to take action that cannot legally be taken are used
- whether the practice required the consumer to take unnecessary and disproportionate action in order to exercise their legal rights

'Harassment' is not specifically defined in the Act; 'coercion' includes the use of physical force; and 'undue influence' means exploiting a position of power in relation to a consumer so as to apply pressure in a way that significantly limits the consumer's ability to make an informed decision.

Examples of practices that could be considered to be aggressive:

- putting pressure on a consumer to have unnecessary work done on their property
- starting work on a consumer's property when the consumer has not agreed to having work done
- debt collectors threatening that bailiffs will call when a debt is not enforceable

Professional diligence

If you treat all customers fairly and honestly, then you are unlikely to be in breach of the requirements of professional diligence.

The term is defined as covering "the standard of skill and care which a trader may reasonably be expected to exercise towards consumers"; it looks at both of the following:

- honest market practice
- the general principle of good faith

If you carry out poor quality work, refuse to respond to consumers' complaints, or engage in other unfair or misleading practices, you could be breaching the requirements of professional diligence.

Invitation to purchase

This is defined in the Act as "a commercial practice involving the provision of information to a consumer:
(a) which indicates the characteristics of a product and its price, and
(b) which enables, or purports to enable, the consumer to decide whether to purchase the product or take another transactional decision in relation to the product."

What this means is that, if you are giving consumers a price and information on your product, you must give them all the key information they need to make an informed decision.

An invitation to purchase would include such things as:

- a price on an item in a shop
- a food item on a menu
- an item for sale on a website
- an advertisement on TV
- an advert in a newspaper

It is important to note that if there is no price, it is not an invitation to purchase. However, you will still have to make sure that you are not misleading consumers or omitting information that would affect the consumer's decision.

The Act lists information that, if omitted, or provided in an unclear or untimely way, would be considered to be material information that must not be omitted from an invitation to purchase.

This information is as follows:

- main characteristics of the product (in other words, what it is and what it does)
- the total price, including all mandatory fees, taxes, charges and other payments
- if the final price cannot be calculated in advance (for example, items purchased per metre or per kilogram), then information must be given to allow the consumer to understand how the price is calculated. All pricing information must be given with equal prominence
- any optional delivery charges not already included in the total price. If it is not possible for the charges to be calculated, then a statement that such charges are payable must be given
- the identity of the trader and the identity of any other person on whose behalf the trader is acting
- the trader's business address and, if different, the address where documents can be served, together with the trader's email address
- if the trader is acting on behalf of another person (for example, as an agent, subcontractor, etc), that person's contact information
- for products involving a right of withdrawal or cancellation (for example, distance or off-premises contracts), information about that right must be given. For more information on these types of contracts, please see 'Consumer contracts: distance sales' and 'Consumer contracts: off-premises sales'
- if the trader is acting in a way that is different from their published practice, then details about how it differs from this published practice
- any other information that is required to be given by a trader under any other legislation

All of this information must be provided clearly, in a timely way, and so that the consumer is likely to see it.

Drip pricing

Drip pricing is prohibited by the DMCCA as part of the concept of omitting 'material information' from an 'invitation to purchase'.

If a commercial practice is an invitation to purchase, then certain information is always considered to be material information, and a failure to include it could breach the Act, whether or not there is likely to be any effect on the average consumer's transactional decision.

Any information about price in an invitation to purchase must be the total price of the product, including all mandatory charges that the consumer will have to pay. Effectively, the price that is seen by the consumer on the item, menu, website, etc, must be the price that they pay. Traders should not give a 'headline price' and then add additional fees and charges throughout the transaction process.

Such charges may include:

- taxes
- service charges
- booking fees
- delivery charges
- administration fees
- joining fees

If it is not possible to calculate a charge in advance, then clear information about how to calculate it must appear alongside the price indicated in the invitation to purchase and be given equal prominence as that price.

However, with charges such as postage, consideration should be given to giving a fixed price for postage and including it in the indicated price. See 'Delivery charges' for more information on this subject.

In addition, if the advert is for a fixed period (for example, a 12-month contract), then the headline price should be the total amount payable over the contract, including any setting up or joining fees, although the monthly price may also be indicated.

If the advert is for a product such as a holiday, where the price may depend on a number of variables, then a 'from' price may be used, but this price must be representative of the prices of the products available. Any compulsory charges, such as charges for visas on arrival or local fees that may need to be paid in cash at a hotel, should be included in this headline price wherever possible.

Traders should consider whether any price indication is a misleading action or a misleading omission under the DMCCA, and also whether it complies with other legislation such as the Price Marking Order 2004 (see 'Providing price information').

Fake reviews

Schedule 20 to the DMCCA includes 32 banned practices that are prohibited in all circumstances. This means that they are banned regardless of whether they are likely to affect the transactional decision of the average consumer. Information on the banned practices can be found in 'Protection from unfair trading (criminal law)'.

Fake reviews are a DMCCA addition to the list of banned practices (there were 31 in the Consumer Protection from Unfair Trading Regulations 2008). The banned practice relates to:

"13(1) Submitting, or commissioning another person to submit or write:
(a) a fake consumer review, or
(b) a consumer review that conceals the fact it has been incentivised.

"(2) Publishing consumer reviews, or consumer review information, in a misleading way.

"(3) Publishing consumer reviews, or consumer review information, without taking such reasonable and proportionate steps as are necessary for the purposes of:
(a) preventing the publication of:
(i) fake consumer reviews,
(ii) consumer reviews that conceal the fact they have been incentivised, or
(iii) consumer review information that is false or misleading, and
(b) removing any such reviews or information from publication.

"(4) Offering services to traders …", to do any of the above acts or facilitating them.

In order to understand what is prohibited, it is helpful to provide some definitions:

- **consumer review** is a review of a product, a trader or any other matter relating to a transactional decision
- **consumer review information** means information that is derived from, or is influenced by, consumer reviews
- a review is a **fake consumer review** if it purports to be, but is not, based on a person's genuine experience
- a review **conceals the fact it has been incentivised** if a person has been commissioned to submit or write the review and that fact is not made apparent
- a person **submits a review** if they supply it with a view to publication
- **commissioning** means **incentivising** by any means
- **publishing in a misleading way** includes:
    - failing to publish, or removing from publication, negative consumer reviews, whilst publishing positive ones (or vice versa)
    - giving greater prominence to positive consumer reviews than negative ones (or vice versa)
    - omitting information that is relevant to the circumstances in which a consumer review has been written (including that the person has been commissioned to write the review)

Reviews can be given in various ways, including:

- in writing
- verbally
- by use of a star rating or thumbs-up emoji

They can appear in any form, such as online or in publications.

Fake reviews may be in the form of a consumer expressing satisfaction with a trader or their product (when the consumer has not purchased or used the product), in order to boost the trader's rating or increase sales; or they could be negative, with the aim of adversely affect the ratings or business of a competitor.

It is not a banned practice to incentivise a review, providing that any review is based on the reviewer's actual experience; the prohibition relates to concealing or hiding the fact that the review has been incentivised. This means that it must be immediately obvious to consumers that the review is incentivised.

Incentivisation includes monetary payments, but it is not restricted to them. Examples of incentivisation include:

- money
- commissions
- discounts on purchases (whether for goods, services or digital content)
- free items
- free (or heavily discounted) stays in hotels
- tickets or invitations to events
- if the reviewer is linked to the trader or product in some way (such as being a shareholder in the company)

Care should be taken to ensure that the use of incentivised reviews is not misleading to consumers by increasing the overall review score (star rating).

The prohibition not only covers fake reviews, and hiding the fact that reviews are incentivised, but also publishing consumer reviews, or consumer review information, in a misleading way. This could, for example, include selectively quoting from a review, or basing the overall rating on fake consumer reviews.

Examples are:

- giving a star rating for a product that actually relates to a different product
- hiding or removing adverse reviews
- only publishing positive reviews
- hiding the fact that reviews have been incentivised
- giving an overall rating that includes information from incentivised reviews in order to increase the rating

The 'publisher' could be:

- the trader
- an online platform
- a specialist review site
- retailers
- booking agents
- a magazine or newspaper

It is not just prohibited to publish a fake review, but also to commission or submit a fake review. This covers the trader themselves, who might be giving incentives to someone to give a fake review, but also covers anyone else who might give a fake review, such as:

- individuals acting on behalf of the trader
- professional reviewers
- influencers
- celebrities
- marketing companies
- other traders

A trader is required to take such 'reasonable and proportionate steps' as are necessary to prevent or remove any review that is prohibited under the banned practice. This includes anyone who is considered to be a 'publisher'. This means that the trader must have a clear policy and process to ensure that prohibited reviews do not appear.

The Competition and Markets Authority's fake reviews guidance (see link below) goes through the types of steps that would be considered to be reasonable and proportionate, but this depends on the individual circumstances.

CMA guidance

The Competition and Markets Authority (CMA) has published various pieces of guidance on the unfair commercial practice elements of the DMCCA:

- *Unfair Commercial Practices: Guidance on the Protection from Unfair Trading Provisions in the Digital Markets, Competition and Consumers Act 2024*.
- *Fake Reviews: Guidance on the Prohibition Under Paragraph 13 of Schedule 20 to the Digital Markets, Competition and Consumers Act 2024*
- short guide on unfair commercial practices

< Introduction

> Part 2. Bite-size videos

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