

Travel Businesses and EU Unfair Trading Rules

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Aug 2008

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Summary

This article introduces the new

Consumer Protection from Unfair Trading Regulations

2008 [[1](#)] and outlines their requirements. It:

- sets out the basics of the new EU rules on unfair trading
- runs through the guidance relevant to those in the travel and tourism sectors
- analyses common tourism and travel queries under the new rules
- highlights the hot topics that concern regulators in the field.

Introduction

The **Consumer Protection from Unfair Trading Regulations 2008** (CPUT) implement the EU's Unfair Commercial Practices Directive (UCPD). The UCPD aims to harmonise European legislation preventing business practices that are unfair to consumers. The Directive is a maximum, or total, harmonisation measure. This means that the governments of all the EU Member States have agreed in their Council of Ministers that they will do exactly what the Directive says, ie they will do everything it requires but will not go beyond it.

The EU hopes that introducing uniform law about unfair commercial practices will make it easier for traders in one Member State to market and sell their products to consumers in other Member States. This is particularly relevant to the tourism sector.

The new Regulations will partially or wholly repeal provisions in 23 existing statutes:

- twelve of these laws will be repealed outright, including Part III of the **Consumer Protection Act 1987**
- another eleven will be repealed in part, including most of the **Trade Descriptions Act 1968**
- also repealed outright are the **Tourism (Sleeping Accommodation Price Display) Order 1977** [[2](#)] and the **Price Marking (Food and Drink Services) Order 2003** — note however, that even though the 1977 Order has been repealed, accommodation businesses still need to display room rates to comply with the CPUT.

The **Business Protection from Misleading Marketing Regulations 2008** (BPMMR) also

implement the EU's Unfair Commercial Practices Directive. These regulations tighten restrictions relating to how companies compare their products to rival products from other companies.

The same rules now apply across all 27 EU Member States.

This article focuses specifically on the

Consumer Protection from Unfair Trading Regulations

(CPUT).

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Importance of new Regulations

These two new Regulations provide a new and complete code for UK consumer laws and Trading Standards have the responsibility to enforce them. CPUT enforcement is through the criminal court so the standard of proof required is for the court to be satisfied that an offence has been committed.

If a travel business is found to have been engaged in an unfair commercial practice, Regulation 13 provides that the maximum penalty is a fine of £5000 in the Magistrates Court or an unlimited fine and/or a prison sentence of up to 2 years (or both). Regulation 15 (1) provides that if it is proved that a business commits a breach of the regulations with the "consent or connivance of an officer of that body", then that Director or officer will be liable as well as the business itself.

Unfair Trading Regulations overview

The aim of the CPUT is to prohibit "unfair commercial practices" (Regulation 3). A decision tree flowchart in the recently published Office of Fair Trading (OFT)/Department for Business, Enterprise and Regulatory Reform (BERR) joint guidance on the CPUT [3] provides a quick way to see if the Regulations apply to you.

Unfair commercial practices

The Regulations set out general rules to define what constitutes unfair practices. These can be grouped into four categories, which are outlined below.

In addition, 31 activities have been included on a blacklist that bans them outright. These include:

- falsely stating a product is only available for a very limited time
- describing a product as 'gratis', 'free' 'without charge' or similar if the customer has to pay anything other than the 'unavoidable costs of responding to the commercial practice'
- making persistent and unwanted solicitations by telephone, fax, email or other remote media 'except in circumstances and to the extent justified to enforce a contractual obligation'.

The full list can be found on the [OFT website](#).

Misleading action

A commercial practice is unfair if it is a "misleading action", which Regulation 5 defines as "containing false information" or "its overall presentation in any way deceives, or is likely to deceive, the average consumer" AND "it causes, or is likely to cause, the average consumer to take a transactional decision he/she would not have taken otherwise".

Misleading omission

A commercial practice is unfair if it is a "misleading omission", which Regulation 6 defines as omitting or hiding material information or "provid[ing] material information in a manner which is unclear, unintelligible, ambiguous or untimely" AND as a result "causes the average consumer to take a transactional decision he/she would not have taken otherwise".

Aggressive commercial practice

A commercial practice is unfair if it is "aggressive" under Regulation 7, which talks about "harassment, coercion or undue influence".

General prohibition

A commercial practice is unfair (Regulation 3 (3)) if it "contravenes the requirements of professional diligence" AND "it materially distorts, or is likely to distort, the economic behaviour of the average consumer with regard to the product". This is in effect a general duty to trade fairly, which some deem to be superfluous because of the other provisions in the Regulations.

Exaggeration in advertising

Regulation 2 sets out the circumstances in which a reference to the average consumer or the average member of a particular group of consumers, is "without prejudice to the common and legitimate advertising practice of making exaggerated statements which are not meant to be taken literally".

This appears to allow businesses to make exaggerated advertising claims provided that it is obvious that the average person would not take the exaggerated claim literally. However, tourism businesses need to be aware of other pieces of legislation on misleading advertising that apply (these are beyond the scope of this article).

Products covered by the CPUT

Under the misleading actions category mentioned above, there are also provisions relating to the misrepresentations of the "main characteristics of the product". "Product" is defined in Regulation 2 (1) as "any goods or service and includes immovable property, rights or obligations". This wide definition means that nearly all offerings from tourist and travel businesses will be regarded as "products".

Regulation 5 (5) sets out an indicative (but not an exhaustive) list of 18 factors defining the characteristics of a product. These include:

- benefits of the product
- after-sale customer assistance concerning the product
- handling of complaints concerning the product
- usage of the product
- results to be expected from the product.

The term "average consumer"

One cause of difficulty is the interpretation of the term "average consumer" since there is a requirement to show that misleading omissions, misleading actions or aggressive practices have caused so-called average consumers to take transactional decision they would not have otherwise taken.

An "average consumer" is defined by his/her "material characteristics", "including being reasonably well informed, reasonably observant and circumspect." If dealing with a specific group of consumers, the "average consumer" becomes an average member of that group. This aspect of the Regulations will be clarified as and when judgements from the European Court of Justice are laid down.

What does this mean for travel and tourism businesses?

The table below illustrates various common tourism-related queries and complaints where the CPUT might be relevant. It shows the 20 most common issues, the relevant CPUT unlawful practice category that might apply, and the relevant regulation from the CPUT. The final column gives comments on the relevance of CPUT or the issues to consider for that particular example and are provided by trading standards experts Bruce Treloar (the lead Trading Standards Officer for the Trading Standards Institute) and Cheri Lloyd (the Fair Trading Policy Officer at LACORS – the Local Authorities Coordinators of Regulatory Services).

Obviously their views are subject to the usual caveat that only a court can give a definitive interpretation of the law. Nevertheless, the table does give a clear indication of the areas that travel and tourism businesses need to focus on.

Table 1: Common queries and complaints and the effect of CPUT

No.	Scenario	Example	CPUT Category*	Regulation to consider under CPUT	Trading Standards comments on relevance of CPUT / issues to consider
1	Buy one, get one free offers (BOGOFs)	Hotel offers three nights for the price of two at weekends	BL	Schedule 1 paragraph 20	Martin Fisher (Pricing Lead Officer at TSI) has produced opinion for LACORS – this is on its website [4]. CPUTs are not intended to stop BOGOF offers. House of Lords debate to approve the Regulations [5]. See also [6]
2	Time-limited offers	Airline advertises discounted sale of tickets available until a specified date	BL	Schedule 1 paragraph 7	Consider if it can be proved that the statement is untrue. If action needs to be taken limiting it, TSOs will look at it on a case-by-case basis. TSI investigation into misleading travel prices on the internet [7]
3	Bundling of product offering	Breakfast at a B&B is bundled into the price. No option to pay for bed only or money off for not eating breakfast	MA	Regulation 5 (2) (a)	Consider whether the advertising is ambiguous and whether the bundling is material.
4	Data protection opt-outs	Hotel takes guest details when reserving and/or at check-in. There is a notice about opting out of marketing in the back of a booklet about the hotel's services	MA	Regulation 5 (4) (d) and (e)	Consider: <ul style="list-style-type: none"> avoiding practices similar to those whereby customers have to tick to opt out of travel insurance when purchasing a flight online - trading Standards view this as presumptive selling and unfair that personal data should be fairly obtained.
5	Hotel mini-bars	Guest puts their own bottle in fridge to chill and gets automatically charged because the sensor detects movement. Price of items bears no resemblance to reality.	MA	Regulation 5 (5) (k)	This is presumptive selling. Consider: <ul style="list-style-type: none"> warning customers they will be charged for using the mini-bar where to display the prices. <p>Note that TSOs do not get</p>

					many complaints in this area.
6	Compulsory service charges	Restaurant adds on automatically a service charge of 15% to price of a meal	ACP	Regulation 7 (1)	Tell customers before they order (for example in the menu). Section 2.2.14 of the BERR Pricing Practices Guide 14 says "businesses should not include suggested optional sums, whether for service or any other item, in the bill presented to the customer."
7	Credit card handling fees	A fee of 3% is charged for paying by credit card. This only becomes apparent at the very end of an online purchasing process after inputting and saving a large amount of data.	MA	Regulations 5 (2) & 5 (4) (g)	Make this clear to customers early in the process.
8	Forfeiting reservation deposits	A holiday cottage owner always keeps the £200 deposit when the customer cancels, even where the cancellation is made for a valid reason (illness/death) and where the cottage is re-let.	MO ACP	Regulation 6 (1) (b) Regulation 7 (2)	Consider: <ul style="list-style-type: none"> • what is stated in the booking terms and conditions • has there been "exploitation" - distinguish between the situation where the cancellation is genuinely unavoidable and where a customer just changed their mind. <p>The proprietor would have to show that the charge taken was reasonable.</p>
9	Room locations	Customer books a hotel room. On arrival a room is automatically allocated. The room does not have a sea view or has a view of building works, etc	MO	Regulations 6 (a) and (b)	Consider: <ul style="list-style-type: none"> • how the room was advertised • Are customers told how rooms are allocated and that the one they get may not have a sea view? • are there different rates for a sea view room? • did the hotel explain that sea view rooms cost more? <p>Traders have to tell customers everything under CPUT. If part of a package holiday, the Package Travel Regulations may also apply.</p>

10	Failure to mention building works or out of action facilities, etc when booking.	The hotel website has photos of its luxurious spa, sauna, jacuzzi, Chinese hot rock aromatherapy room and swimming pool. On checking in, the customer is told these are not available owing to "routine maintenance"	MA MO	Regulation 5 (2) (b) Regulations 6 (a) and (b)	Consider: <ul style="list-style-type: none"> Customers should be told at the time of booking if scheduled maintenance is planned that materially affects the product offering Customers should be told as soon as possible of any unplanned maintenance that materially affects the product offering to provide them with an opportunity to reschedule or cancel Often acceptable alternative arrangements can be made such as the use of facilities at a neighboring property
11	Ban on food and drink purchased outside the hotel in rooms	A hotel notice forbids guest from bringing food/drink purchased off the premises into its rooms. Customer checks in late, the restaurant is closed, so he orders a take-away pizza. The hotel refuses to let the delivery boy in with it.	MA	Regulations 5 (2) and 5 (4) (g)	This is still being considered by the TSI and LACORS policy groups.
12	Sleeping accommodation price displays	A small hotel has heard that the Tourism (Sleeping Accommodation Price Display) Order 1977 has been revoked. It no longer displays room rates.	GP MO	Regulation 3(3) Regulation 6 (1) (a)	This is still being considered by the TSI and LACORS policy groups.
13	Disabled guests. Pricing of disabled facilities.	Hotel has a disabled room with special equipment for a disabled guest. It costs £50 more than a room of similar size.	MA	Regulations 5 (2) and (3)	This is still being considered by the TSI and LACORS policy groups.
14	Auto swipes of credit cards	A hotel automatically takes a swipe of a customer's credit card on checking in. A guest refuses because he has been the victim of identity theft in the past. The hotel refuses to let him stay.	MO	Regulation 6 (1) (d)	This is still being considered by the TSI and LACORS policy groups.
15	Exclusion of liability for thefts from rooms	A notice in a hotel excludes liability for thefts from rooms. A room safe costs £5 a night. A set of golf clubs	MA	Regulation 5 (2) (b)	This is still being considered by the TSI and LACORS policy groups.

		that won't fit in the safe is stolen from the room, despite the room being locked by the guest.			
16	Bumping guests.	A guest arrives to check in but is told there has been a mix-up with the new computer system. There is no record of the booking and the hotel is now full due to a conference being held there.	ACP BL	Regulation 7 (2) Schedule 1 paragraph 5	This is still being considered by the TSI and LACORS policy groups.
17	Flattering web-site photos.	The hotel is photographed using a wide-angled lens. The sewage farm next door is airbrushed out.	MA	Regulation 5 (2) (a)	Joint OFT/BERR August 2008 Guidance on CPUT – Annex A Part 5 Example 5 states that it is a misleading omission not to tell customers about restricted view at time of booking. Airbrushing photos would be viewed in a similar manner.
18	Incentives, sales promotions and prize draws	A mailout for a package holiday company incentivises the promotion by offering a free prize draw for a car. There is a disappointing response. The company wants to withdraw the promotion.	BL	Schedule 1 paragraphs 31	Joint OFT/BERR August 2008 Guidance on CPUT – Annex A Part 4 Example 4 deals with prize draw promotions with impression that recipient has won major prize when in fact it is of low value. OFT say this is a misleading action and infringes 2 blacklist items
19	Incorrect signage or any use of inaccurate or unauthorised ratings	A guesthouse displays a 4 star rating. Following re-assessment they have gone down to 3 stars)	MA MO		If the rating has gone, the sign has to go too.
20	Pets	A £20 cleaning charge is made for taking a dog to a holiday cottage. A customer takes their small dog who has been thoroughly cleaned the day before going on holiday and is housetrained. No additional cleaning is needed on changeover day.	GP	Regulation 3(3)	This is still being considered by the TSI and LACORS policy groups.

*Key to CPUT categories: BL = Blacklist; MA = Misleading Action; MO = Misleading Omission; ACP = Aggressive Commercial Practice; GP = General Prohibition

Effect of the new Regulations

Public sector

Anna Adrien is the Industry Liaison Executive at VisitBritain (VB). She heads a team of three people and her role includes dealing with the complaints and queries that come to VisitBritain. In 2007, VisitBritain received about 1000 complaints from the general public about facets of their experience as holidaymakers.

The trend is for an increase in complaints. Two complaints to VB have already referred to CPUT. For example, a letter from a Hotel Association in Blackpool claimed that nine properties were displaying 'EnjoyEngland' logos that they were not entitled to display.

Hospitality sector

David Curtis-Brignell is the Director of Franchising, Branding and Regional Marketing – Europe at Millennium and Copthorne Hotels. Following their implementation and after consideration of the CPUT, Millennium and Copthorne Hotels feels that there is little in the Regulations that would warrant changes in its operations.

In terms of the effect on the number of complaints, a six-month study of complaints (of which they were only 23) revealed most to be about staff attitudes (brusque manner, etc), service and standards and cleanliness. This indicated that the CPUT had not caused a rise in complaints related to areas covered by the Regulations.

Trading Standards

In the case of complaints made to Trading Standards departments, these go to Consumer Direct. Bruce Treloar of Trading Standards explains that there is also a requirement for all Trading Standards officers to notify the Office of Fair Trading (OFT) of a CPUT action. The OFT maintains a database on this and the OFT Annual Report identifies trends.

For travel and tourism businesses that have a home authority, the final decision on enforcement action will rest with that authority and not with the authority which received the complaint. Where businesses have let the home authority relationship go stale, now is a very good time to re-kindle that relationship.

It remains to be seen whether there is going to be more enforcement actions under the CPUT. Bruce Treloar thinks there will be more actions under the CPUT because there is no requirement for *mens rea* [guilty mind, ie the crime has been committed willingly and knowingly]. He says:

'For misleading actions, Trading Standards officers still have to prove the action was misleading. For aggressive practices, this will be an issue for holiday clubs and timeshares that operate a hard-sell. For the general duty to trade fairly, I can't necessarily see Trading Standards officers using this. We have been given no additional resource and no specific funding for our work under the CPUT. We are duty bound to notify the OFT, so the OFT always has the details of any intended prosecutions or actions.'

The future

Article 18 of the Unfair Commercial Practices Directive 2005/29/EC commits the European Commission to submitting a report by 12 June 2011 on its operation to both the European Parliament and the Council of Ministers. This report may include recommendations for further measures and a further tightening up of the rules.

At the moment the Health and Consumer Protection Directorate (DG Sanco) of the European Commission is running a Europe-wide public consultation [\[8\]](#) on the development of a common method for reporting consumer complaints. This closes on 3 October 2008.

Those in the travel and tourism business, especially those operating in countries beyond the UK, should contribute to this consultation so that they stay close to what will happen.

Conclusion

The CPUT has the following implications for tourism businesses.

- Those who deal with feedback or complaints should familiarise themselves with the Regulations and OFT Guidance
- If links with the home authority have become rusty, now is the time to revive them
- Standard terms of trading should be looked at again to see how they pass muster under the new rules. Table 1 earlier gives an idea of how things have moved on

- Those involved in pricing should also familiarise themselves with the BERR Pricing Practices guide [9]
- Standard template letters or call centre scripts should also be reviewed to ensure they are up to date and refer to the CPUT and not to repealed laws like the **Trade Descriptions Act 1968** or the 1977 Order. Standard documented procedures in office manuals should also be reviewed.

These will be important in helping to prove a due diligence defence under Regulation 17 of the CPUT.

Some further guidance is expected from both the TSI and LACORs but ultimately it will be for the Courts to colour in the grey areas.

References

1. The Tourism (Sleeping Accommodation Price Display) Order 1977 (1977 SI No: 1877) made under section 18 of the Development of Tourism Act 1969 (1969 Chapter 51)
2. Misleading and Comparative Advertising Directive 2006/114/EC. Official Journal of the European Union dated 27th December 2006 L 376/21
eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0021:0027:EN:PDF (pdf file)
3. Unfair Commercial Practices Directive 2005/29/EC. Official Journal of the European Union dated 11th June 2005 L 149/22 eurlex.europa.eu/LexUriServ/site/en/oj/2005/l_149/l_14920050611en00220039.pdf (pdf file)
4. DTI Consultation on a draft Directive., July 2003 www.berr.gov.uk/files/file32081.pdf (pdf file).
5. DTI Consultation on Implementing the EU Directive on Unfair Commercial Practices and amending existing consumer legislation. December 2005. URN 05/1815
www.berr.gov.uk/files/file15311.pdf (pdf file).
6. Local Authorities Co-ordinating body on Regulatory Services ("LACORS") opinion from Donna Sidwell on "Buy one, Get one free" dated May 2008
www.lacors.gov.uk/lacors/upload/18188.doc (Word document).
7. Bruce Treloar, Trading Standards Institute – 'Hiding extra charges in the baggage'... *A Trading Standards Investigation into misleading travel prices on the internet*
www.tsi.org.uk/policy/btrreport260308.pdf (pdf file).
8. Joint Guidance from the Office of Fair Trading ("OFT") and BERR: "Consumer Protection from Unfair Trading" OFT 1008 August 2008
www.oft.gov.uk/shared_of/business_leaflets/530162/oft1008.pdf (pdf file).
9. House of Lords debate to approve the Consumer Protection from Unfair Trading Regulations 2008. Hansard: 23rd April 2008 – Columns 1565 to 1577
www.parliament.the-stationery-office.co.uk/pa/ld200708/ldhansrd/text/80423-0010.htm

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