



Isle of Man Office of Fair Trading

CONSULTATION ON PROPOSED CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS 2019

SUMMARY OF RESPONSES



Isle of Man
Government

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Contents

1. Introduction

2. The Consultation Exercise

3. The Responses

4. Conclusions

Appendix 1: List of Respondents

Appendix 2: Summary of Responses

- i. Via the Consultation Hub**
- ii. By Email**

1. Introduction

BACKGROUND

The European Union's Unfair Commercial Practices Directive¹ ("UCPD") establishes a framework for consumer protection from unfair commercial practices within the EU. It is aimed at harmonising legislation covering business practices that are unfair to consumers with a view to making it easier for traders to sell to consumers across the territory. It is also intended to increase consumer confidence to shop by providing a high common standard for consumer protection.

The UCPD concerns business-to-consumer commercial practices and sets out the practices that are deemed unfair (due to misleading actions or omissions) or aggressive (involving harassment or coercion of the consumer). As such, it provides a framework for consumer protection from unfair trading and also indirectly protects legitimate businesses from competitors who do not play by the rules, ensuring fair competition.

In the UK the UCPD has been implemented by the Consumer Protection from Unfair Trading Regulations 2008. However, the UCPD has not previously applied to the Isle of Man so the Island's consumer protection legislation has been spread over several pieces of legislation, some of which have not been updated for a number of years.

In order to update and align Manx consumer protection legislation, Tynwald applied the UCPD to the Island in July 2019. This means that the Island is obliged to implement the UCPD. In order to do this the Consumer Protection from Unfair Trading Regulations 2019 (the CPRs) were drafted, largely based on the equivalent UK legislation.

The OFT decided to consult on a draft of the CPRs in order to ensure that they meet the requirements of consumers and businesses on the Island.

The CPRs will be enacted in regulations made under section 2B of the European Communities (Isle of Man) Act 1973. They will replace parts of several existing pieces of legislation in order to provide greater clarity on the law concerning consumer protection.

Our aim with the CPRs is to ensure that consumers are adequately protected from unfair trading practices whilst providing legislative alignment with the UK and EU in this area so that trade will not be impeded.

2. The Consultation Exercise

The consultation exercise ran from 16th August 2019 to 15th September 2019.

Whilst it was a public consultation, the consultation document was sent directly to:-

- Tynwald Members
- Attorney General's Chambers
- Local Authorities
- Chief Executives of Government Departments, Boards and Offices
- Isle of Man Chamber of Commerce
- Isle of Man Law Society
- Isle of Man Trades Union Council
- Victim Support Isle of Man
- Manx Citizens Advice Service

The consultation could be accessed online via the Consultation Hub (<https://consult.gov.im/>).

¹ Directive 2005/29/EC

3. The Responses

The OFT would like to thank each respondent for taking the time to assist it with this important work.

Five responses were received in total.

Two respondents wished to remain anonymous and one response was received late. The late response has not been included in this summary but will be answered in due course. None of the respondents answered each question.

Responses were received online via the Consultation Hub and by email.

A list of the respondents is included as **Appendix 1** and a summary of the responses as **Appendix 2**.

4. Conclusions

The introduction of the CPRs will signify the most significant change in the Island's consumer protection landscape in many years.

In the apparent absence of any insurmountable issues following the consultation exercise, the OFT is content that introducing the CPRs will ensure that consumers are adequately protected from unfair trading practices whilst providing legislative alignment with the UK and EU in this area so that trade will not be impeded.

The CPRs will put in place a modern, simplified and comprehensive consumer protection framework for dealing with sharp practices and rogue traders who deliberately set out to exploit weaknesses and loopholes in existing legislation.

Appendix 1 - List of Respondents

- Dr Alexander Allinson MHK
- Anonymous x 2
- The Hon Juan Watterson SHK ('Mr Speaker' from now on)

Dr Allinson MHK and anonymous x 2 responded via the Consultation Hub – See **Appendix 2i**

Mr Speaker responded by email – See **Appendix 2ii**

Appendix 2 - Summary of Responses

i. Via the Consultation Hub

Responses to questions 1 - 4 inclusive have not been included as they were merely for administrative purposes.

Prohibition of unfair commercial practices

Part 2 of the CPRs sets out the circumstances of when a commercial practice is unfair and prohibits such practices. These consist of misleading practices (either through an action or an omission) and aggressive practices.

Misleading practices involve the failure to provide information of the use of false information that may cause the average consumer to make a transactional decision that he or she would not otherwise make.

Aggressive commercial practices may involve the use of harassment, coercion or undue influence.

5. Part 2 adequately covers the circumstances when a commercial practice is considered unfair.

Agree = 1 (*Dr Allinson MHK*)

Disagree = 1*

Not answered = 1

*Reason given: *"Not being a legally qualified person with experience in the area I have no idea."*

6. Are there any other unfair business-to-consumer unfair commercial practices that you think should be included in the Regulations that are not already?

"The practice of getting people to sign up to long term contracts without clearly stating the break clauses available and a compulsory "cooling off period"." (*Dr Allinson MHK*)

7. What, if any, are your concerns that the Regulations will impact your ability to carry out your business?

No responses.

8. Further comments on Part 2 of the Regulations

No responses.

Offences

Part 3 of the CPRs makes engaging in unfair commercial practices an offence and sets out the penalties for such offences.

This part also outlines the circumstances under which a trader may not be guilty of unfair practices, such as if the offence was an accident or a mistake.

9. It is clear what constitutes an offence in Part 3 of the Regulations.

Agree = 1 (*Dr Allinson MHK*)

Disagree = 0

Not answered = 2

10. The penalties for offences under regulation 13 are:

About right = 1 (*Dr Allinson MHK*)
Too stringent = 0
Not answered = 2

11. The time limit for prosecutions under regulation 14 is:

About right = 1 (*Dr Allinson MHK*)
Too stringent = 0
Not answered = 2

12. Other than the defences against prosecution in regulations 17 and 18 are there any other circumstances that you believe would constitute a legal defence?

No responses.

Enforcement

It is intended that the OFT will enforce the CPRs. This enforcement may entail the OFT applying to the High Court to obtain an enforcement order or an interim enforcement order, but this can usually only be done after appropriate consultation with the person thought to have carried out the unfair practice. However, court proceedings can be avoided if the trader undertakes not to engage in unfair practices.

The OFT's powers to investigate any potential breach of the CPRs fall under sections 25 to 34 of the Consumer Protection Act 1991 and include making test purchases, being able to search premises and to seize goods.

13. The OFT is the right body to enforce the Regulations.

Agree = 1 (*Dr Allinson MHK*)
Disagree = 0
Not answered = 2

14. The OFT should usually consult with a person accused of an unfair trading infringement before obtaining an enforcement order to try to stop the infringement occurring or reoccurring.

Agree = 1 (*Dr Allinson MHK*)
Disagree = 0
Not answered = 2

15. The OFT can ask a person suspected of unfair business practices to undertake enhanced consumer measures such as offering compensation to consumers or to allowing the consumer to terminate the contract. Such measures are adequate to reduce the risk of repetition of the unfair conduct and to allow the consumer to choose a supplier of goods or services more effectively.

Agree = 1 (*Dr Allinson MHK*)
Disagree = 0
Not answered = 2

Consumers' rights to redress

Part 5 of the CPRs is intended to give consumers new private remedies where a trader lies or uses aggressive commercial practices. Whilst the rest of the CPRs will ensure that it is a criminal offence to use misleading or

aggressive commercial practices, this Part will extend to the consumer a private right to redress against a trader who has engaged in such practices.

Redress under the CPRs will consist of the right to unwind a contract and recover the consumer's money, to get a discount on the price paid or to claim damages.

These new rights do not generally apply to financial services as areas such as pensions, mortgages, insurance and banking are already regulated and applying new rights could lead to confusion and inconsistency.

16. Consumers should have a private right to redress from a business that has used unfair commercial practices.

Agree = 1 (*Dr Allinson MHK*)

Disagree = 0

Not answered = 2

17. The conditions for a right to redress under Part 5 of the Regulations are appropriate.

Agree = 1 (*Dr Allinson MHK*)

Disagree = 0

Not answered = 2

18. Regulation 39 adequately covers all the property that is relevant to unfair commercial practices.

Agree = 1 (*Dr Allinson MHK*)

Disagree = 0

Not answered = 2

19. Part 5 of the Regulations does not overlap with existing legislation governing financial services.

Agree = 1 (*Dr Allinson MHK*)

Disagree = 0

Not answered = 2

20. The rights under Part 5 are clear.

Agree = 1 (*Dr Allinson MHK*)

Disagree = 1

Not answered = 1

21. The rights under Part 5 are appropriate.

Agree = 1 (*Dr Allinson MHK*)

Disagree = 0

Not answered = 2

Effect on other legislation

In order to provide greater clarity on the law concerning consumer protection from unfair trading Schedule 2 to the CPRs repeals and revokes parts of other Manx legislation.

22. Do you have any concerns regarding the repeal or revocation of other legislation as a result of the commencement of the CPRs?

No responses.

Other suggestions

We have covered all the proposals contained in the CPRs. If there's anything that you think we have missed, please tell us about it here.

23. Do you have any other suggestions that were not covered in the consultation material?

No responses.

ii. By Email

Mr Speaker posed twenty questions. The questions are laid out below in **bold**. They are not the same as the questions appearing on the Consultation Hub.

Any supplementary questions posed, or statements made, by Mr Speaker are also in **bold**.

The OFT's answers to Mr Speaker's initial and supplementary questions are in plain text.

- **Question 1**

I am curious as to the reasons why the "Isle of Man Government" has been included in the definition of 'business'. First of all, "Isle of Man Government" is not a legal entity, so it is unclear whether this includes all Departments, Boards, Offices, wholly owned subsidiaries (Steam Packet, Manx Radio) etc. Are we referring only to the trading activities of IOMG?

The intention was to cover all trading activities of all aspects of Isle of Man Government, including those you list. Noting your comments we are seeking the views of Chambers on whether or not the term "Isle of Man Government" should substituted with the term: "the activities of any government department, local authority, statutory board, or wholly owned government subsidiary;".

- **Question 2**

How are we able to import this under EU legislation when we are including services, which are not covered by Protocol 3?

The European Communities (Consumer Protection) (Application) Order 2019 [SD 2019/0277] applied *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market* to the Island with modifications. Once this was approved at the July sitting of Tynwald it provided the vires to make the 2019 Regulations under s. 2B of the European Communities (Isle of Man) Act 1973.

2B only deals with things where we have an "EU obligation", which we do not have when it comes to services. I will pick this up with XXXX.

Section 2B(1)(c) provides the vires necessary for the purpose of implementing any instrument (such as the Order above) applied to the Island under section 2A of the European Communities (Isle of Man) Act 1973. Such Orders, as per section 2A(1) of that Act, can apply any EU instrument to the Island to the extent that EU instrument *does not* already apply to the Island under section 2(1) of the Act [i.e. Protocol 3].

Careful consideration was given, by the OFT and Chambers, to using the vires provided by the European Communities (Isle of Man) Act 1973, or the alternative vires provided by section 62A of the Consumer Protection Act 1991. Noting that the UK legislation was made to implement an EU Directive, and the vires under the former Act for making these Regulations were considered to be stronger than those provided by the latter Act, this drafting approach was chosen.

- **Question 3**

Regulation 6(3) – can you advise how people will know where to look for these?

“Material information” is information that the average consumer needs to have, in the context, in order to make informed decisions. What information is required will depend on the circumstances, e.g. what the product concerned is, where it is offered for sale and how it is offered for sale. By way of an example, a trader failing to mention that a contract has to run for a minimum period would almost certainly be a material omission.

Please note that the OFT will be publishing guidance on the 2019 Regulations in the near future.

- **Question 4**
Regulation 7(1)(a) – a simpler construction would be “likely to significantly impair”, but the real point is whether we are talking about ‘perceived freedom of choice’ rather than an actual imposed restriction on the freedom of choice?

If the trader has not behaved “aggressively” (i.e. the use of harassment, coercion or undue influence, as defined in regulation 7) then there is no aggressive commercial practice and any *perception* of a reduced freedom of choice on the consumer’s part would not constitute an aggressive commercial practice. Regulation 7 is thus concerned with *actual* restrictions on the freedom of choice.

- **Question 5**
I would be interested in the views of the OFT as to whether organised religion might fall under the scope of Regulation 7(2)(c)?

The OFT’s view is that, whilst organised religion is not excluded *per se*, it would only fall under the scope of regulation 7(2)(c) if a commercial transaction was involved.

Do we know when that boundary is reached? I’m not aware of anyone selling indulgences these days, but you never know!

The OFT has conducted a search for case law on this matter but none has been identified at this stage. Complaints regarding unfair trading will accordingly be considered on the same basis regardless of whether or not the counterparty is a religious organisation.

- **Question 6**
Regulation 8(2) - this looks suspiciously like the definition of recklessly, so wonder what purpose this serves?

Regulation 8(2) provides greater clarity for the general reader of the Regulations on the meaning of “recklessly” in the context of an offence related to an unfair commercial practice.

- **Question 7**
Regulation 9 – I am not sure what the purpose of this is. Where is the offence of breaching Regulation 5(3)(b)?

Regulation 9 excludes regulation 5(3)(b) from being an offence of misleading action. In the UK Regulations enforcement of the prohibitions concerning codes of practice is dealt with through the civil route (as provided for in Part 8 of the UK Enterprise Act 2002). The majority of Part 8 of that Act has been transposed into the 2019 Regulations. Therefore, enforcement of the prohibition of regulation 5(3)(b) would be carried out by the OFT applying to the High Court for an enforcement notice. A subsequent breach of an enforcement order could constitute contempt of court. In addition, the consumer may also qualify for a right to redress (i.e. the right to unwind a contract, to a discount or to damages).

- **Question 8**
Regulation 14 – in instances where we are talking about a pattern of behaviour (e.g. coercive behaviour or harassment) how will the time be calculated in that instance?

In all instances the time will be calculated as the earlier of either the end of the period of 3 years

beginning with the date of the first aggressive behaviour or the end of the period of one year beginning with the date of discovery of the offence by the Attorney General. However, the clock will be reset for every separate transaction.

- **Question 9**

Regulation 15 – if Y is not a trader and does not appreciate the implications of his actions, how can he be liable for the original offence? Is it a defence for Y to be acting on the instruction of X?

Regulation 15 is intended to allow the OFT to prosecute people whose act or default has caused another to commit an unfair trading offence.

It would then be for the court to decide whether or not X and/or Y is guilty given the circumstances of the alleged offence.

The defences of due diligence (Regulation 16) and innocent publication of an advertisement (Regulation 17) are available to Y so, for example, Y could put forward the defence of "reliance on information supplied by another person" [ref. regulation 16(1)(a)(ii)].

- **Question 10**

Regulation 20(3) – on the basis that a case could often be made for enforcement without delay (why should a trader be allowed to continue to flout the law), then the consultation provisions seem somewhat pointless?

Regulation 20(3) allows the OFT some discretion in when to apply for an enforcement order but does not restrict the OFT from immediately applying for an enforcement order or from prosecuting a person who has carried out unfair trading.

I suppose I'm asking why all unfair trading isn't treated under the 'urgent' mechanism?

Unfair trading includes relatively minor matters that can be sorted out through consultation, e.g. unwitting use of a logo in an advertisement, to very serious matters, e.g. the elderly and vulnerable being targeted by unscrupulous traders, and the enforcement procedures reflect this.

- **Question 11**

Regulation 21 – if an application for an enforcement order required the name of the person involved, what powers do the OFT to get the person's name? I presume this could be a person or a company?

Regulation 31 provides for the investigatory powers contained in sections 25 to 34 of the Consumer Protection Act 1991 to be available to the OFT. These include the power of search, seizure of goods, copying records and the Treasury are permitted to disclose information to the OFT.

This could indeed be a person or a company.

Having looked at I'm still not sure if you have the power to compel someone to give their name, unlike s.27 of the Police Powers and Procedures Act 1988. You may argue a case under s.29 but it would be better to be clear that this power is needed.

I note section 27 of the PPPA 1998 allows the Police to *compel* someone to give their name as part of the arrest process. In contrast, section 29 of the CPA 1991 only allows officers of the OFT to require information to be provided (such as a person's name) if the request is *reasonably required for the exercise of the OFT officers functions*. As the role and duties of officers of the OFT are more limited than those of police officers, the differences between these enforcement powers seems reasonable.

- **Question 12**

I'm curious as to an example of a consumer to business contract. Can you give an example?

A trader offers money for gold. The trader tells the consumer the gold is low quality when in fact it is not. The consumer sells their gold to the trader for a much below market price.

- **Question 13**
Regulation 39(3)(c) - surely if someone has a lease they are not homeless? Surely without a property or lease anyone is homeless?

When drafting the 2019 Regulations the OFT sought the view of the Department of Infrastructure with regard to this Regulation. The DOI views were that this provision may not be required but that it might be useful to retain in the event such a circumstance arose. In light of your concerns we are seeking confirmation from the DOI as to whether or not this regulation is required, noting that charities may fall within the definition of housing associations.

Happy to leave this ecumenical matter to you and the DOI. However, I don't think it currently does what you hope it will!

- **Question 14**
Regulation 40(1) – if businesses are exempt from the Financial Services Act, Insurance Act etc., then they are not regulated by them. Why then should businesses exempt from financial services regulation also be carved out of these provisions?

Regulation 40(1) exempts most financial services from the 2019 Regulations that are carrying out a "regulated activity" (within the meaning of section 3 of the Financial Services Act 2008) and where the person is licensed under that Act to carry on that class of regulated activity. It therefore only exempts financial services that are already regulated under other legislation, the intention being to avoid extending new rights to these areas that could lead to confusion and inconsistency as to what rights apply.

That's not my reading of it. What legislation is regulating the businesses under 40(b)(iii) and (v) – they are exempt from the FSA, so should surely come under your legislation?

The OFT is in correspondence with the FSA concerning the issue you have raised.

- **Question 15**
Regulation 41 introduces the concept of a "right to unwind", whilst I appreciate the relaxing undertones of the title, I believe it would bear definition so that a lay reader could understand what it was. Looks rather like restitution.

In defining the "right to unwind" in the 2019 Regulations we may inadvertently diverge from the UK Regulations in such a way as to weaken the application of existing case law. Instead, we will include information on the meaning of the "right to unwind" in the guidance that will be published to accompany the 2019 Regulations.

Surely it is your right to get out of a contract? I don't think it's reasonable to provide a definition which someone will need to rely on in court in non-binding guidance.

The OFT will ensure that clarity on this point is provided in the guidance relating to these Regulations.

- **Question 16**
In regulation 45(5) – has the OFT considered whether the actions or behaviour of the customer should also be taken into account when considering the entitlement to a discount. Wouldn't customer conduct be considered by a court in assessing damages?

For the right to a discount to apply, regulation 37 states that the trader must have engaged in a prohibited practice (one that is misleading or aggressive). If such a practice has occurred then the right to a discount should be available. However, in assessing the seriousness of the prohibited practice under regulation 45(5), the OFT can take into account the behaviour of the person who engaged in the practice. If it was decided that this behaviour was in some way exacerbated by the

behaviour of the consumer then this could be taken into account.

Where is the vires for this exercise of judgment by the OFT?

There is no vires, I should have said "the court". Apologies.

- **Question 17**
Regulation 45(6)(a), I would be interested in the thinking behind the £5,000 threshold and whether consideration was given to pegging it to the maximum recoverable in small claims court?

The £5000 threshold is based on the threshold applied in the UK following extensive research into consumers' experience of unfair commercial practices generally and any losses they suffered.

- **Question 18**
Regulation 51 - Schedule 2 – can you clarify what the vires are for the repeal of statutes in this Schedule please?

The 2019 Regulations are made under section 2B of the European Communities (Isle of Man) Act 1973. The vires in this section allow for these Regulations to apply provisions that might be made by an Act of Tynwald, which may include the repeal of statutes.

- **Question 19**
Schedule 1(3) – would this include use of terms such as 'Government Registered'?

The use of such terms would be included, particularly under Schedule 1(4).

- **Question 20:**
Schedule 2(8)(6) – the deliberate error is the missing " after "supply".

Thank you for spotting that. The draft has now been corrected.