

New Consumer Compensation Rights: One for Now and One for the Future

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Introduction

Readers may have heard about the new rights of civil redress afforded to consumers who have been subject to aggressive or misleading practices by traders. Those rights, which are part of an amendment to the Consumer Protection from Unfair Trading Regulations 2008 (“CPUT”), came into force on 1 October. They are only part of the picture, however, as the Consumer Rights Bill (“CRB”) will give new powers to enforcers of consumer protection legislation to require traders to put into place “enhanced consumer measures”, which could include the provision of financial redress to affected consumers. These two changes may make a significant difference to the way enforcers and traders approach breaches of consumer protection law, in ways that are explored below.

Civil redress

A consumer is entitled to a remedy if the following three requirements are met:

- There is either a B2C or C2B contract in existence, or the consumer has made a non-contractual payment to the trader;
- The trader has engaged in a “prohibited practice”, i.e. conduct which would fall within the definition of a “misleading action” or an “aggressive commercial practice” within CPUT; or the *producer* of the goods or digital content concerned has engaged in a prohibited practice of which the trader is or could reasonably be expected to be aware;
- The prohibited practice is a significant factor in the consumer’s decision to buy the product or make the payment.

If these requirements are met, the consumer is entitled to the following forms of redress:

- The “right to unwind”, i.e. the right to get out of the contract or to get the payment returned, provided that the goods or services concerned have not been fully consumed or performed. This right persists for 90 days.

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- Alternatively, the consumer may claim a discount, on a sliding scale from 25% to 100% of the price, with the level of discount applicable depending on the seriousness of the prohibited practice. This is to be determined by reference to matters including the impact on the consumer, the behaviour of the trader and the passage of time.
- Finally, a consumer may also claim damages in respect of financial loss from the prohibited practice and/or alarm, distress, physical inconvenience or discomfort. Damages are limited to loss which was reasonably foreseeable and there is no right to damages if the trader has a due diligence defence

Businesses should therefore be alive to the possibility of potential claims from consumers if, for example, they are successfully prosecuted for a CPUT offence or are subject to proceedings under the Enterprise Act 2002 (“EA”) for contraventions of CPUT. In such circumstances it would be relatively simple for consumers to bring a claim parasitic on that enforcement action, and it is not beyond the bounds of imagination to think that there would be certain firms of claim handlers who would seek to benefit from such actions.

Enhanced consumer measures

The CRB is currently at Committee Stage in the House of Lords and is expected to come into force next year. Schedule 7 to the CRB contains provisions which will amend the EA to provide enforcers such as the CAA with an additional power when taking enforcement action (whether accepting undertakings or seeking an enforcement order) to require a trader to take “enhanced consumer measures”. These measures are divided into three categories: redress; compliance; and choice. In summary form, they permit enforcers to require traders to pay compensation, to improve their business practices (for example by appointing a compliance officer) or to publish information which will enable consumers to make a better choice.

In considering whether to require such measures to be taken, the enforcer may only include such measures as are just and reasonable, and in particular is required to consider whether the measure in question is proportionate, taking into account the likely benefit to consumers, the cost to the trader (including administrative costs) and the cost to consumers of obtaining the benefit of the measures.

Draft Guidance has recently been issued for consideration by key enforcers in relation to the use of these powers. The draft makes reference to a need to consider the Regulators Code and the public interest generally when considering whether to require such measures to be taken. However, there is always likely to be considerable room for divergence of opinion as to the circumstances in which it is proportionate to require a trader to provide financial compensation to all affected consumers.

Conclusion

These two changes are likely to increase the financial consequences of breaches of CPUT and, in the case of the EA changes, breaches of other consumer protection legislation. It will also be necessary for businesses to approach any potential regulatory action with greater caution, alive to the possibility that a resolution such as a plea of guilty or the giving of undertakings may open up substantial civil claims or the need to make compensation payments.