

Covid-19 scams and how to tackle them

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Sadly, reports of the exploitation of the current health crisis, at a time when vulnerabilities are exacerbated, are rife. Such exploitation is directly relevant to the role of Trading Standards and is reported to include:

- a) Supplying counterfeit face masks, virus swabbing kits and hand sanitiser, including supplying sanitiser which contains banned substances.
- b) Offering for sale health supplements that claim to prevent infection.
- c) Failing to supply ordered and paid for Personal Protective Equipment (“PPE”).
- d) Selling PPE, hand sanitiser, toiletries and other staple goods at hugely inflated prices.
- e) Email scams purporting to provide COVID-19 related advice or tax rebates in order to support people through this challenging time.
- f) Door knocking and leafleting of elderly and vulnerable individuals requesting cash upfront for decontamination or shopping services which are not supplied. Further, claiming to offer home testing.

Such reports have led to CTSI already issuing COVID-19 related scams warnings on four occasions between 17 March 2020 and 24 March 2020. No doubt, more are to follow.

Accordingly, as offices close and Trading Standards Officers start working from home, the role that Trading Standards can and does play in tackling such scams becomes more and more important. So, what can be done?

Are any emergency powers available?

The Coronavirus Bill 2019 – 21, which finished its fast-tracked passage through Parliament and received Royal Assent on 25 March 2020, became the Coronavirus Act 2020 on the same date. Widely understood as the COVID-19 emergency package, it creates sweeping emergency powers ranging from inquests without juries to the emergency registration of health professionals and the postponement of elections. However, the Act provides Trading Standards Departments with

COVID-19 SCAMS AND HOW TO TACKLE THEM
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no new powers to tackle COVID-19 scams. Accordingly, use must be made of the tried and tested methods and powers for tackling scams and unfair practices.

As a side note and of interest to Departments who have upcoming criminal trials listed, are the amendments to the Criminal Justice Act 2003 and the Crime and Disorder Act 1998 to facilitate the temporary use of live audio links and live video links in the criminal courts. Subject to the Court being satisfied that it is in the interests of justice for the person concerned to take part through a live link, having considered all the circumstances of the case and given the parties an opportunity to make representations (through a live audio link or live video link if necessary), any person, except a member of the jury, but including the Judge, may be directed to participate in any part or all of a Magistrates' Court trial or a Crown Court trial through a live link.

Similar provisions are made for preliminary hearings, sentencing hearings and enforcement hearings, with a few exceptions, including that the Defendant may not take part through a live audio link in any disputed bail hearing, a hearing in which it is anticipated that the Defendant will enter a guilty plea and at a sentencing hearing.

Traditional responses

Investigators will need to be mindful of limited resources (as officers are forced to isolate and work remotely) and the current difficulties with both investigation and enforcement (e.g. difficulties in attending upon complainants self-isolating or in lock down) when considering how best to tackle potential offenders.

The starting point may well be to disrupt through test purchases and, where possible, seizure of goods, and there have been a few success stories that have followed this approach. Strongly worded written warnings, following disruptive actions, may be sufficient to satisfactorily end some unwanted practices. However, some Trading Standards Departments may find even disruptive action difficult currently and consideration should also be given, therefore, to writing to all identified suspected traders as a way of attempting to limit illicit activity. In effect, make clear that enforcers are aware of the unfair practices being adopted and will take action if they continue. Such a limited approach may be far from ideal, but it is readily achievable, in these difficult times, and may bring some success. It would certainly act as a good evidential foundation for future action if the trader were to persist.

Where traders persist, an investigation into the trader must still follow if there is to be effective curtailment of these illegal activities, which, no doubt, will be viewed extremely seriously by the courts due to the vulnerabilities associated with many of the consumers impacted. The Consumer Protection from Unfair Trading Regulations 2008 seem the obvious starting point.

Depending on the particular scam and related evidence, it may be of assistance to consider the following offences:

- a) Contravening professional diligence (Regulation 8).
 - Most of the scams identified to date seem to run contrary to honest market practices or the general principle of good faith, and it is hardly a stretch to conclude that traders either are aware of this or ought to be. Boris Johnson, the PM, has regularly highlighted his disgust with such practices and the Competition and Markets Authority has already issued a warning to traders to not take advantage of people's needs.¹
- b) Engaging in commercial practices which constitute a misleading action (Regulation 9) or a misleading omission (Regulation 10).
- c) Engaging in aggressive commercial practices (Regulation 11).
 - It's certainly arguable that some traders are exploiting a position of power in relation to consumers so as to apply pressure in a way that influences their decision making, i.e. applying undue influence.
- d) Engaging in the following banned practices (Regulation 12):
 - Stating, or otherwise creating the impression, that a product can legally be sold when it cannot (Schedule 1, paragraph 9).
 - Falsely claiming that a product is able to cure illnesses, dysfunction or malformations (Schedule 1, paragraph 17).
 - Passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions (Schedule 1, paragraph 18).

This article's purpose is not to provide a comprehensive analysis of the possible, trigger CPUT offences, but the above does, we hope, provide a framework of offences likely to be relevant, enforced by Trading Standards and accompanied by powers. It should be kept in mind, of course, that many COVID-19 scams may go as far as to stray into fraud, where there is clear evidence of dishonesty.

¹ <https://www.gov.uk/government/news/covid-19-sales-and-pricing-practices-during-coronavirus-outbreak>

COVID-19 SCAMS AND HOW TO TACKLE THEM
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Where traders cannot be identified and/or where there is concern over widespread scams in a particular locality, local Trading Standards Departments should nevertheless consider taking steps to increase awareness amongst the general public, particularly the vulnerable, as to the nature of the prevalent scams and direct them to legitimate help and assistance.

Potential problems

Trading Standards Departments may face some of the following difficulties in successfully disrupting, investigating and prosecuting some of the COVID-19 scams:

- a) Opportunistic individuals who have only very recently set up shop may argue that CPUT does not apply to them as they are not ‘traders’ as defined (i.e. they are not acting for purposes relating to their business). However, depending on the specific facts, it is likely that the wide definition of ‘business’ as including a trade, craft or profession, will mitigate this concern.
- b) Within the group of opportunistic individuals newly trading, there may be a difficulty in distinguishing between ill-informed well-meaning individuals and true scammers.
- c) Currently, there does not exist a specific offence relating to the inflation of prices and the same does not necessarily squarely fall into any of the current offences, and arguments around the principle of supply and demand are likely to be raised.
- d) In relation to the banned practice in Schedule 1, paragraph 18, evidence is required of actual market conditions in relation to the product, which may be difficult to acquire in the current circumstances.

What next?

With the rapid evolution of the Government’s response, whether future assistance may be provided to Trading Standards Departments to tackle COVID-19 related scams is hard to predict. However, at Prime Minister’s Questions on 25 March 2020, Boris Johnson suggested that legislating to outlaw profiteering during the COVID-19 outbreak was an option. Further, a CMA taskforce to investigate profiteering during the outbreak was established on 20 March 2020. One role of the taskforce is to equip the CMA to advise the Government on emergency legislation if the negative impacts of profiteering cannot be addressed through the existing available powers. As such, the Prime Minister’s suggestion is presumably being explored by the taskforce and a keen eye should be kept on any new developments to see if the Government

increase the options available to Trading Standards Departments to respond to COVID-19 scams.

The current legislative framework does still, however, provide a solid foundation for Trading Standards to take action, and difficult as it may be, there is a clear public interest and need for such actions to protect some of the most vulnerable.