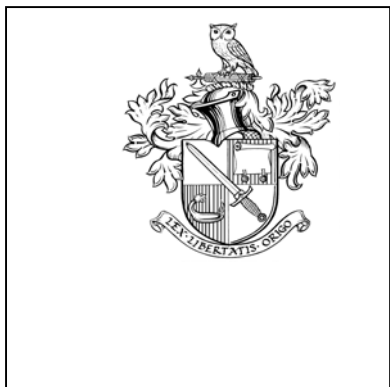


The City of London Law Society



4 College Hill
London EC4R 2RB
Tel: 020 7329 2173
Fax: 020 7329 2190
www.citysolicitors.org.uk

OFT Advertising of Prices – CLLS Commercial Law Committee: Response to draft proposals

1. CLLS: Background

The City of London Law Society (“CLLS”) represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees.

In this case the response has been prepared by the CLLS Commercial Law Committee. It reflects both the views of Committee members and some of their clients on the draft proposals put forward by the OFT as part of its Study into Advertising of Prices (the "Proposals"), dated September 2010.

2. Existing market practice and rules/guidance

Naturally we welcome clarification of the law and trading practices generally to avoid consumers being misled and there are many aspects of the Proposals which are to be welcomed and, in our view, should not be contentious.

That said, we have the following general concerns around the Proposals:

- The draft proposals envisage traders providing more detailed sales information to consumers with the aim that consumers are not misled over sales prices. While a laudable goal, in practice we see increased administrative burdens on traders, with significant time and cost consequences. Inevitably some of these additional costs may be passed on to consumers. With the increased levels of administration, we also see a likelihood of more pricing errors being made, and thereby consumers being more (not less) confused.
- The existing guidance (including the CAP Code (recently revised on 1 September 2010)) and the BERR Guidance for Traders on Good Practice (updated in May

2008 to take into account the Consumer Protection from Unfair Trading Regulations 2008 (CPRs)) already provide clear and easily understandable guidance to traders in making price indications. This allows them to run simple, yet effective, price campaigns. Our concern is that the Proposals are, in many cases, unnecessary to the extent that they change/conflict with existing settled areas of regulation/guidance which already provide effective compliance solutions (at least with larger organisations).

- The average UK consumer is generally endowed with qualities of being "*reasonably well informed, reasonably observant and circumspect*". The Proposals should not disregard the consumer's ability to assess products and prices independently. This may be particularly so for common every day products or where customers have a familiarity with brands.

3. **Comments on specific proposals**

We set out below comments on specific proposals and have followed the headings given in the draft Proposals. Note we do not comment on each and every Proposal.

3.1 **Drip Pricing**

Proposal 1: All compulsory charges (including taxes) must be in the headline offer price

Proposal 2: Where there are a range of alternatives for a compulsory element of the product or service (e.g the delivery method) the cheapest option available to at least 50% of the customers should be included in the headline price - with alternatives clearly listed and costed

We agree that consumers should be informed of the total price before payment is processed (see Proposal 3), but do not agree that upfront information on prices should necessarily lead to the headline price including delivery charges (even if compulsory).

We feel a distinction should be drawn between drip pricing of package additions (ie insurance, upgrading, additional luggage) and a delivery charge for products (where consumers may have a choice as to the cost/speed of delivery).

Customers are generally aware when purchasing online that they will need to take delivery of the product and pay for this. To include a delivery charge in the headline price (where a customer ultimately may not end up paying that price and could pay either a higher or lower price as options are available for faster/slower delivery) can be misleading and can result in increased difficulties for consumers in comparing prices. If there is a clear, short order process and a customer sees the total cost they have to pay (including delivery) before confirming an order we believe they are not disadvantaged.

If delivery charges are required to be included in the headline offer price, then we believe that it should be the cheapest option widely available to most customers that should be referenced rather than the option that 50% or more of customers actually take advantage of (as suggested by the comments to the Proposal). The latter requires the retailer to monitor percentages of customers who actually take up delivery options on an ongoing basis (which can be costly and time consuming) and leads to fluctuating prices (again likely to be confusing for customers). Further issues

arise over what period of time the monitoring is to take place over, the costs of amending prices etc.

Proposal 4: Consumers must not be automatically opted-in or opted-out rather presented with neutral boxes to ensure they actively make a choice

It is not always the case that neutral boxes are the only way of ensuring consumer choice - eg if a consumer is opted out from optional extras the need to opt in is surely a positive and clear choice. Online retailers often find that consumers may make no election (ie overlooking the choice) and if an election one way or another is required this can delay and frustrate consumers if they are presented with repeated holding pages during the order process.

3.2 Reference Pricing

Proposal 1: Traders should always use the most valid reference. RRP only likely to be most valid where a 'was' or External Reference Price (ERP) is not available.

The use of RRP is an efficient way of showing savings claims and providing a constant and clear reference point to consumers.

In the absence of a trader's own "was" pricing (eg introductory offers), we do not believe that traders should be forced to look beyond the RRP as a point of reference, not least given the potential practical complications. For example:

- Being forced to compare with an ERP is likely to be a complex and cost-intensive process. How will traders select an appropriate ERP without confusing customers?
- Complications arise if the ERP changes or is unclear (eg national v regional prices, online v instore prices). Changes to ERPs will impact on print runs and media booking, and this in turn may lead to increased spoiling tactics by competitors (which may not be beneficial to consumers).
- The cost of research/constant competitor price monitoring is prohibitive and may expose traders to competitor action (eg comparative advertising claims/TM infringement claims).
- Given the increased administration costs of running promotions predicated on use of "was" or "ERP", it is likely that margins will be affected - clearly not beneficial in today's challenging economic climate. This proposal may also lead to increased print costs (in order to keep references current) just when the market (and consumers) need the opposite (ie generally lower prices). These issues may be particularly acute in certain industries, ie industries with very dynamic pricing policies (eg supermarkets) and clothing industries who are entering a period of rising manufacturing costs (eg cotton).
- A move away from RRP may also make the running of multiple price campaigns impractical (eg given turnover of sales tickets, impact on media buying etc).

The real and fundamental issue appears to us to be to ensure that RRPs are "genuine" in order to ensure that any price advantage claimed is real (ie generally used/available across the market as a whole and set by manufacturers). This is

already catered for in both the CAP Code and the BERR Guidance. In our view, therefore, it is not necessary to add to or change existing guidance on this issue.

Proposal 3: 'Was' prices should be established in at least 50% of outlets (by volume) that go on to use the offer price.

Our understanding from retail clients is that 50% is seen as an arbitrary reference point and raises practical monitoring difficulties.

Proposal 4: Traders using reference prices must state if they have sold the product at a lower price in the 3 months prior to the offer starting.

Monitoring multiple price points and matching these with ongoing sales promotions is an administrative headache for retailers and both time-consuming and costly. The proposed extension to a three month period adds an additional layer of complexity and will lead to increased monitoring for retailers, without any obvious benefit to consumers (who we do not believe expect or benefit from such a long reference period).

If the three month reference period is implemented there may be complications over national vs regional/high street vs online pricing strategies. This can result in increased label costs etc to address constantly changing prices.

The three month period also potentially jeopardises localised/dynamic/responsive pricing strategies. For example, retailers may be disinclined to run one-off one day sales if they know that they must reference that sale price in any subsequent promotion in the next three months. In practice, this Proposal would also prevent retailers from running any sale in the three months after Christmas without referencing the Christmas sale price points.

Proposal 5: ERPs must state the date of the comparison and be kept current as far as the medium allows.

This rule is already addressed in the existing CAP Code and BERR Guidance.

Proposal 7: RRP's should be set at a price at which viable levels of sales have been made.

Proposal 8: How far can retailers "police" the RRP's they are given? What reassurance/evidence do manufacturers typically give that their RRP's represent true selling prices?

It is currently unclear as to what will represent a "viable" level of sales.

Consideration should also be paid to how manufacturers are expected to set prices for new product launches (ie if no sales have already been made). How do you monitor instore vs online sales, or even national vs regional sales? These are difficult issues for manufacturers to handle (not least collation of data) and we feel they should be given (reasonable) flexibility to set RRP's based on their own previous selling history.

In addition, many retailers feel that it should not be their primary responsibility to police manufacturers. Comfort can be sought in manufacturer contracts as to true selling prices, but leaving the burden of enforcement on retailers is unrealistic.

Manufacturer relationships are difficult to maintain in any event (ie without the additional burden of the retailer threatening to police the RRP).

3.3 Time limited offers

Every offer is by its nature time limited. We believe it would be beneficial to clarify whether these provisions are aimed at traders who use time pressure tactics, as opposed to those who are genuinely bringing valuable offers to consumers (which may be on an ongoing, and extended, basis).

Proposal 1: Traders should clearly state the start and end dates of all price offers.

In our view, it is not necessary to include start dates on price offers that are available immediately the advertising/price indication can be seen by the general public. In contrast, if a sale is being advertised in advance of its start date, then it follows that publicising the start date makes sense to avoid disappointing consumers.

Proposal 2: The end date of the sale should not usually be extended unless for reasons beyond the traders control (such as extreme weather, industrial action, delays in supply chain).

Extending sales is often a very good thing for consumers.

It strikes us that the key issue is to ensure that extensions do not lead to "baiting" – ie using a (false) deadline to induce customers to enter a transaction more quickly than they would otherwise have done. This in practice leads to a need for flexibility and each individual situation to be judged on its own merits (for example, a distinction between short window sales and long window sales). For example, a 24 hour flight sale being extended by 2 weeks essentially fundamentally changes the nature of the offer, whereas extending a three week sale by two days (eg in order to sell existing final stock remnants) can only be beneficial to consumers.

3.4 Baiting Sales

Proposal 1: Volume limited offers must be clearly labelled as such – it may not be sufficient to simply state 'hurry while stocks last' – an indication of availability in units at the start of the offer may be required if availability is very restricted.

In our view, stock limited pricing is confusing. Customers are used to time limited offers (eg "hurry whilst stocks last"). If a trader has to state eg "15,000 items available" on promotional material, in real terms this may mean nothing to customers as they are no clearer on current stock levels on any particular day, nor how quickly this can be expected to be depleted.

How is "very restricted" availability judged? Across individual stores? Nationwide? By previous sales patterns? If the stock limited references are set out on some offers and not others, does that give the impression that the others are not limited, and thereby cause consumer confusion?

Proposal 3: As a rough rule of thumb if traders have less than 50% of stock or anticipated demand (whichever is larger) at the offer price then they should draw attention to the volume available in their adverts.

We believe that this situation is already catered for in the CAP Code/BERR Guidance, which requires a minimum of 10% of stock be available for a "save up to"/"From" type of claim. Again, we believe this works well in practice and allows traders to conduct attractive advertising campaigns without misleading consumers.

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