

The Omnibus Directive is almost here

26 May 2022

With the 28 May 2022 deadline for EU member states to implement the Enforcement and Modernisation Directive ((EU) 2019/2161) or “Omnibus Directive” just days away, what does this modernisation of consumer law mean for businesses and consumers?

Aimed at giving consumers more rights and greater protections, the “Omnibus Directive” amends rules contained in the: (a) Unfair Contract Terms Directive (93/13/EEC); (b) Price Indication Directive (98/6/EU); (c) Unfair Commercial Practices Directive (2005/29/EC); and (d) Consumer Rights Directive (2011/83/EU).

Amongst the measures being introduced are new rules on online reviews, price reduction promotions, enhanced rights for free digital consumers, GDPR-style fines and information requirements on online markets.

Greater penalties for non-compliance

The Omnibus Directive has given consumer law sharper teeth. Any company doing business in Europe will need to make sure that it complies with the requirements of the implementing legislation of the member state it operates in or risk substantive penalties.

The Directive requires member states to introduce fines for certain infringements of a minimum of 4% of a seller’s annual turnover in that member state. If the necessary financial information is not available to make this calculation, then the fine available to national regulators is up to at least €2m.

These turnover-based penalties bear similarities with GDPR fines, which are based on a proportion of a company’s global turnover. It will be interesting to see if lessons have been learnt from the implementation of the GDPR regime. Over 900 companies across the European Economic Area and the UK have received fines since its inception, and the five largest fines have been issued to household names (such as Amazon, WhatsApp and Google) which one would have thought had robust practices in place to avoid GDPR infringement.

It remains to be seen if the spectre of a 4% fine of annual turnover of the member state they’re operating in (as opposed to global turnover on which GDPR fines are based) help to get consumer law compliance towards the top of board agendas? Either way the potential for such fines should help to underline the importance of companies considering if they have the mechanisms in place to meet the new requirements.

Reform of consumer reviews

Several measures are being introduced to give consumers enough information to make faster and better informed buying decisions, based on genuine product reviews that reflect the experience of real consumers.

For example, the Omnibus Directive prohibits traders from:

- stating that reviews are from consumers who have purchased a product unless “reasonable and proportionate” steps have been taken to verify this is true;
- submitting or commissioning another person to submit fake reviews; and
- misrepresenting consumer reviews - for example by deleting unfavourable reviews.

Traders who display customer reviews will need to review their policies and procedures to ensure they have adequate measures in place to protect against fake reviews being posted. This might require a reviewer to verify they have used or purchased the product, or to

register on a specific platform to post reviews. But the trader will need to walk the tightrope between making the process so onerous that it puts real people off from submitting genuine reviews or accepting evidence so readily that it can't show it's taken adequate steps to protect against fake reviews.

The business model of the platform, the scale of the activity and the level of risk will determine whether a business has gone far enough to counter this risk. In other words, the steps that Amazon may be expected to take will be more onerous than a small independent trader.

New rules on price reductions

To tackle artificial pricing practices designed to hoodwink consumers into believing they've got a great deal, the Omnibus Directive introduces stricter requirements for traders who announce a price reduction on goods. When a price reduction is announced, a trader will now have to identify the prior price which applied before the reduction. This reference price must have applied for at least 30 days prior to the reduction, subject to limited exemptions.

Traders should ensure that their sales and marketing teams are fully up to speed with these new rules and that they have mechanisms in place to verify that any price change is genuine and not designed to artificially inflate prices prior to a sale.

Greater transparency obligations for online marketplaces

In recent years, online marketplaces have become an increasingly popular tool for consumers when deciding between various offers - such as travel and accommodation providers. These comparison sites will be subject to much greater transparency requirements under the Omnibus Directive. Marketplace operators must now publish the following information:

Ranking: information on how search results are ranked and the criteria used to do this must be easily accessible to the consumer (even if this is through a link to a separate page of the website).

Paid results: search providers must clearly identify where a higher placed search result has been influenced by payments made by the seller.

Status of the trader: The marketplace must state whether each seller listed is a private individual or a trader (this can be based on a self-declaration from the seller). This distinction is important because customers will only benefit from EU consumer law where they have purchased from a trader.

Consumer rights for “free” digital services and content

The Omnibus Directive expands consumer rights to users of free digital services and content such as online games or social media apps. Traditionally only paid digital services and content attracted EU consumer protections. Now if consumers provide personal data, such as their email address, in return for these free services, this will be treated as consideration in the same way that money is. Traders should ensure that where they offer free digital services and content, they've complied with the applicable consumer law obligations. These obligations include providing certain pre-contract information to the consumer and allowing them a right to cancel a contract for digital services up to 14 days after purchase.

The position for UK companies

As the United Kingdom has left the European Union, the Omnibus Directive will not be transposed into UK law. Consequently, UK-based companies who trade entirely within the UK will be unaffected by the Omnibus Directive. However, UK traders who offer their goods or services to EU resident consumers will have to comply or risk facing actions taken against them in member states.

However, for those traders operating only in the UK, the announcement of upcoming legislation, The Draft Digital Markets, Competition and Consumer Bill, in the Queen's Speech this month indicates that it will not be long before they also need to review their policies and procedures to address many of these issues or risk substantial fines. In particular, the Bill will look to tackle fake reviews and the 'subscription trap', as well as granting the Competition and Markets Authority an ability to enforce consumer law directly by imposing penalties of up to 10% of annual turnover for certain infringements.

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