

# COMMENTARY ON THE RECENT HOUSE OF FRASER CASE

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## Context

On the 29 November 2016, House of Fraser was fined £40,000 for misleading customers over 2015 Christmas sale deals following an investigation led by Torfaen County Borough Council. Newport Magistrates Court heard that "numerous" items were labelled with "was/now" prices. The pricing failed to reflect lower ("was") pricing in the intervening period, artificially inflating the difference between the two price points and therefore the 'sale reduction', contrary to the Consumer Protection from Unfair Trading Regulations 2008 (the **CPRs**).

## The law

The CPRs prohibit retailers from engaging in unfair commercial practices which by definition harm consumers' economic interests. In particular, it is illegal for a retailer to indulge in misleading or aggressive commercial practices. The CPRs are deliberately based on broad principles, intended to operate flexibly to capture various unfair practices.

In November 2010, recognising the need to assist retailers interpret the CPRs with respect to pricing information, the Department for Business, Innovation & Skills (the **BIS**), created the Pricing Practices Guide (the **PPG**). The PPG states that a comparison with a retailer's own previous price should in general be with its immediately previous price for the product. It goes on to say that if the retailer has offered the product at a lower price for any significant period in the interval then this should be stated. Clearly, House of Fraser's actions breached this requirement.

## Analysis

The PPG is guidance and as such has no mandatory force. However, this case reinforces the fact that retailers should pay heed to Government guidance on consumer legislation generally, and take particular note where that guidance is specific and/or uses prescriptive language. This case is the latest in a number of a line of cases where retailers have been taken to task for misleading and/or inflated price referencing. Tesco, for example, was fined £300,000 for misleading customers over "half price" strawberries in August 2013 – a case also initiated by the relevant local council (Birmingham in that instance).

Given that local councils have individual enforcement responsibilities, it is possible that certain councils may be more judicious than others. One Torfaen councillor stated (about the House of Fraser case), *"This case sends a clear warning to them (retailers) that our trading standards officers will act in the interests of our residents to crackdown on those who fail to adhere to Government guidelines and consumer protection legislation."* It should, however, be noted that the CMA (as successor to the OFT) also has enforcement powers and that these are likely to be exercised more uniformly.

## A change in approach?

While retailers should continue to follow the PPG while it is in force, some revised guidance created by the Chartered Trading Standard Institute (the **CTSI**) is anticipated in the next few weeks. This is the result of extensive consultation and represents an attempt to revert to a more principled regime. It was felt that hard and fast rules – retailers had come to rely on the letter of the PPG rather than the spirit of the CPRs - do not reflect the ever changing nature of price and promotion in a dynamic sector.

The new guidance will be less prescriptive and give retailers more freedom to interpret the CPRs in practice – this is likely to make it harder to interpret the law in this area. The trade off with the new guidance seems to be the loss of certainty for the benefit of greater flexibility.



**DOMINIC MCLEAN**

Associate

0161 934 6520

[dominic.mclean@addleshawgoddard.com](mailto:dominic.mclean@addleshawgoddard.com)