

Bristol Trading Standards Service

Neil Barnes
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Reply to: Steven Lings
Tel: 0117 352 5596
Email: steven.lings@bristol.gov.uk
Your Ref:
Our Ref: SJL
Date: 28th November 2008
steven.lings@bristol.gov.uk

CC. Robert Hammond, Consumer Focus.
The complainant, name and address withheld in accordance with the Data Protection Act 1998

Dear Mr Barnes,

Re: Energy Supply Probe – Consultation Response from Steven Lings, Bristol City Council Trading Standards

A Bristol resident recently complained to this department regarding his energy company informing him of price rises of 29.9% and 19.2% as of 25th August 2008 for his gas and electricity respectively by way of a letter in October. He wanted to know if this practice was legal.

Bristol Trading Standards have a statutory duty to enforce the Consumer Protection from Unfair Trading Regulations 2008 (Regulation 19(1) and 19(2)). The complaint in question was allocated to my caseload and I have been researching the legal position of the practice.

I believe this practice to be legally dubious in light of recent changes to European and UK consumer protection legislation and as a formal response to your consultation we would ask you to review General Condition 23 of the Standard Conditions of the Electricity and Gas Supply Licences.

Having researched the legal position of this commercial practice I would like to draw your attention to Regulation 10 of the Consumer Protection from Unfair Trading Regulations 2008. This makes it a criminal offence for a trader to breach Regulation 6, which deals with the concept of 'misleading omissions'.

I have concluded that it is possible to frame a Regulation 10 offence with regards to the complaint I received.

Regulation 6(1) reads as follows:

6.—(1) A commercial practice is a misleading omission if, in its factual context, taking account of the matters in paragraph (2)—

(a) the commercial practice omits material information,

(b) the commercial practice hides material information,

(c) the commercial practice provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, or

(d) the commercial practice fails to identify its commercial intent, unless this is already apparent from the context,

and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

Going through the key definitions I will explain why I believe it is possible to frame this offence below.

Commercial Practice

Regulation 2(1):

“commercial practice” means any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product;

Product

Regulation 2(1):

“product” means any goods or service and includes immovable property, rights and obligations

I fail to see that there can be any argument that gas and electricity suppliers are not engaged in a ‘commercial practice’ or that there is no ‘product’.

The Matters in Paragraph (2)

Regulation 6(2):

2) The matters referred to in paragraph (1) are—

(a) all the features and circumstances of the commercial practice;

(b) the limitations of the medium used to communicate the commercial practice (including limitations of space or time); and

(c) where the medium used to communicate the commercial practice imposes limitations of space or time, any measures taken by the trader to make the information available to consumers by other means.

We will come back to this in the discussion below.

Material Information

Regulation 6(3):

(3) In paragraph (1) “material information” means—

(a) the information which the average consumer needs, according to the context, to take an informed transactional decision; and

(b) any information requirement which applies in relation to a commercial communication as a result of a Community obligation.

Average Consumer

Regulation 2(2):

(2) In determining the effect of a commercial practice on the average consumer where the practice reaches or is addressed to a consumer or consumers account shall be taken of the material characteristics of such an average consumer including his being reasonably well informed, reasonably observant and circumspect.

Transactional Decision

Regulation 2(1):

“transactional decision” means any decision taken by a consumer, whether it is to act or to refrain from acting, concerning—

(a) whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product; or

(b) whether, how and on what terms to exercise a contractual right in relation to a product.

Discussion

In response to the consumer's complaint, the trader wrote back asserting that the decision to raise prices was made only a few days before the rises took effect, drawing attention to the practical issue of writing to several million customers and stating that they had announced their price rises in the media.

Firstly we have to ask whether the price of gas and electricity is 'material information', in other words, whether it is "information which the average consumer needs, according to the context, to take an informed transactional decision".

We have identified 4 transactional decisions that the consumer was unable to take with reference to the information that his prices had changed on 25th August.

- 1) The decision to research changing to a new supplier.
- 2) The decision to read the meter on the day that the price changes and inform the supplier in order that they are billed accurately.
- 3) The decision to change their consumption of gas and electricity.
- 4) The decision to modify their household budget in order to cope with the new price of gas and electricity.

We would argue that a "reasonably well informed, reasonably observant and circumspect" consumer might want to take one or more of these decisions should he know that his energy prices have risen substantially. Furthermore he would need to know what his new prices were in order to be able to take an informed decision.

We have to next ask ourselves whether this material information was 'hidden', or provided in a 'manner that is ... untimely'.

In terms of whether the information was 'hidden' it would be relevant to examine what steps the trader took to inform consumers. In this case they claim to have made media announcements. A court would need to know how they did this and what other steps were taken internally to bring customers up to speed. Were customer service call centre staff informed? Were they encouraged to proactively tell customers who called in with a query prior to

being informed? Why should a consumer be expected to read a particular newspaper?

In terms of the information being 'untimely' it seems perfectly reasonable to argue that up to 65 working days after the event (about seven or eight weeks after in terms of this complainant) is untimely. There is of course the argument that it is not 'untimely' because it was provided in accordance with the licence conditions. However complying with the licence conditions does not exempt a trader from complying with consumer protection legislation in general.

The most problematic part of the offence is the 'ALL features and circumstances' argument. This makes it possible for the trader to complicate matters considerably. However, having said this, not complying with the law because it will cost you money to do so cannot be an excuse, otherwise no trader would have to comply with the jungle of consumer protection legislation the EU churn out. The EU do this with the expectation that it will be enforced by the relevant national authorities.

As you can see, it is very easy to word an offence under Regulation 10. I am of the opinion that, discounting for now the effect of Directive 2003/54/EC and the fact that the energy companies are complying with the current advice given by their industry regulator, that a court would have to decide on the three following points of law:

a) Bearing in mind a consumer pays in arrears for their gas and electricity, is it acceptable in terms of the Consumer Protection from Unfair Trading Regulations 2008, especially regulation 6, that an energy supplier makes the decision to raise domestic energy prices so soon to the event that they are unable to inform each individual consumer that the rise will take effect?

b) In terms of regulation 6(2) is an announcement in the national media good enough in terms of informing consumers of price increases? If so what form should this announcement take? What other steps should a supplier take to inform its' customers?

c) If, in terms of the above two questions, it is not acceptable in terms of the Consumer Protection from Unfair Trading Regulations 2008 that an company decides to raise prices with effect sooner than they can possibly announce it to consumers individually in writing, and announcements in the national media are not an acceptable way of informing consumers of price increases, can any reasoning related to the business operations of energy companies or the

structure of the market be reasonably considered a 'feature or circumstance' that would excuse energy companies from informing consumers in writing that their prices have increased? Would any such reasoning be tantamount to saying 'I can't comply with consumer protection legislation because it will cost me money to do so'?

Directive 2003/54/EC

I am aware that OFGEM have previously acted on the advice of BERR that this directive makes the 65 day rule imperative.

In light of Directive 2005/29/EC (the Unfair Commercial Practice Directive, which created maximum harmonisation of fair trading legislation in the EU) and the Consumer Protection from Unfair Trading Regulations 2008 I would venture that this is not necessarily any longer the case.

Admittedly, Directive 2005/29/EC states in Article 3(4):

“In the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.”

However Annex 1 of Directive 2003/54/EC also states:

“Without prejudice to Community rules on consumer protection ... Service providers shall notify their subscribers directly of any increase in charges, at an appropriate time no later than one normal billing period after the increase comes into effect.”

I am sure that you can see that these Directives seem to contradict each other. I believe we have to look at the intentions of both the EU and UK Parliament if we are to get to the bottom of this conundrum.

The Consumer Protection from Unfair Trading Regulations 2008 implement 'community rules' on how traders are expected to provide pricing information to consumers.

Directive 2005/29/EC is clear in both its preamble that it does not provide for maximum harmonization of contract law, intellectual property law, the law regarding the health and safety of products, financial services law, immovable property law or hallmarking law. If the European Parliament had wanted to exempt suppliers of domestic energy from the maximum harmonization provisions of the Directive then they would have done so.

If the UK Parliament had felt it necessary to transpose Article 4(3) of Directive 2005/29/EC into the Consumer Protection from Unfair Trading Regulations 2008, or exempt domestic energy suppliers from the provisions of Regulation 6 then they would have done so.

Furthermore, if the European Parliament had intended Annex 1 of Directive 2003/54/2008 to provide an exhaustive list of consumer protection measures for domestic energy suppliers they would have done so, instead of doing the opposite.

The intention of the EU Parliament with regards to Article 4(3) of Directive 2005/29/EC could be argued to be in order to allow industry specific regulation on unfair commercial practices. However, the EU have made prescriptive consumer protection regulation (as opposed to principles based regulation such as Directive 2005/29/EC) in a number of areas such as sales of goods, doorstep sales and distance selling.

These Directives cover 'specific unfair commercial practices' and all are fully transposed into UK law. Directive 2003/54/EC covers a specific industry, not a specific unfair commercial practice. I put it to OFGEM that the industry in question was never intended to be exempted from the maximum harmonization and increased consumer protection provisions of Directive 2005/54/EC.

In light of the above I would request that OFGEM reconsider General Condition 23 of the Standard Conditions of the Electricity and Gas Supply Licences.

I believe that in order to bring the General Licensing Requirements in line with the Consumer Protection from Unfair Trading Regulations 2008 domestic energy suppliers must be instructed to inform consumer of price rises, individually, in writing, prior to the event.

Yours Sincerely,

Steven Lings,
Trainee Trading Standards Officer.

