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Black Friday, Cyber Monday, Flash Sale…? Make Sure You Know the Rules

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With the ubiquitous "Black Friday"—and now "Black Week"—having taken hold in the European Union and the United Kingdom, consumers will currently be inundated with offers and shopping around for the best deal. Retailers should ensure they are ready to engage in transparent discounting that is compliant with the applicable EU and UK rules, or otherwise risk regulator action which is starting to bite more frequently.

EUROPEAN UNION—THE OMNIBUS DIRECTIVE

One of the key pieces of legislation on pricing and discounting in the European Union is the Omnibus Directive 2019/2161 (the Directive), which came into force on 28 May 2022.

We already discussed the Directive in our **article** last year, but to recap, the Directive aims to address the following issues of retail and e-commerce sales:

- Price reductions (they have to be more transparent);
- Seller information (must be clear so consumers know who they are buying from);
- Consumer reviews (have to be authentic); and
- Price optimisation algorithms (have to inform consumers that they are using them).

The Directive—What Does it Mean in Practice?

Both brick-and-mortar and online retailers must calculate and present any discount by reference to the lowest price of the product during the past 30 days in the relevant store or website (the 30 day rule).

This legislation aimed to put an end to the common practice of raising product prices before a sales season (e.g. Black Friday), only to then “discount” them for the sale so the savings looked bigger.

With the Directive now implemented across Europe, retailers should take care to carefully plan their promotional schedules in advance. One practical implication of the Directive that frustrates retailers is that it can make it very unattractive to run “teaser” promos in the weeks leading up to a big sales event such as Black Friday (to gain early market share or drive up demand and interest for the event). This is because it can lead to a retailer having to show very lukewarm savings to comply with the 30 day rule (i.e. a small saving only against the last discounted price, rather than against the full price), unless the retailer is prepared to keep the promo running until the big event.

To illustrate:

A retailer can usually run a promo (say 20% off full price/RRP, so €20 off €100); then if it carries on running the promo with no interruption it can advertise further discounts (e.g. further 10%/€10 off full price/RRP) for the big sale; and at the main sale event it can show the full discount off the starting full price (i.e. the full 30%/€30 off).

Whereas if it interrupts that earlier promo (in the prior 30 days), then whatever discount it applies for the main sale event must be calculated by reference to the most recent discounted price (€80) – in practice this means only showing

€10 off €80 (12.5%) which is normally an unappealing and unexciting proposition.

So prior planning with the marketing team has become ever more critical in Europe, to avoid running promotions too closely together or ensure they are part of a continuous uninterrupted series of promotions.

It is worth noting that the Directive potentially comes with hefty financial penalties–if found in breach, a company can in principle be fined a maximum of 4% of annual turnover of the business in the Member State in question or €2 million, if turnover cannot be determined. Although historically enforcement of price display rules has generally been weak, we are starting to see signs of national authorities becoming more interested in showing that these rules do not lack teeth. We therefore expect test cases on the horizon especially as sales seasons lengthen and intensify.

UNITED KINGDOM–REGULATORY ACTIVISM

The Directive is not directly applicable in the United Kingdom. Nevertheless, the relevant authorities such as the Competition & Markets Authority (CMA) and the Advertising Standards Authority (ASA) are active regulators and attempt to ensure pricing is fair and transparent across different sectors in the United Kingdom.

The CMA's Advice for Price Promotions

The CMA has released compliance advice for online businesses, which provides practical examples of misleading price advertising. Some important points include:

False sense of urgency

For example, if a 50% discount for a product is offered for a limited period of time, but then the product is offered again at the same discount soon afterwards.

Sellers also cannot falsely state that a discount will only be available for a limited time, but then continue selling the product with the discount, creating a false sense of urgency for consumers to make a purchase. One such technique is checkout timers with no actual end time/date, which we have discussed **here**.

Promotional prices

If a price is presented as promotional, then it should only apply for a much shorter period than the regular price. If the so-called 'promotional' price existed for a similar or longer period than the ‘full’ price, the promotional price should no longer be marketed this way and instead should be treated as the usual selling price.

ASA’S APPROACH TO TRANSPARENT PRICING

The ASA is the United Kingdom’s independent advertising regulator, which ensures that ads across the UK media comply with advertising rules. In addition to the CMA’s guidance, the ASA has provided some useful tips on the transparent pricing techniques:

Exaggeration of savings

When using “from” or “up to” wording to advertise a saving, advertisers must ensure that a significant proportion of sale items are discounted at the maximum savings. For example, if an advert includes products from a range of brands, then a significant amount of such items should be discounted at the maximum rate stated. What constitutes ‘significant’ would be assessed by the ASA on a case-by-case basis, but less than 10% is unlikely to satisfy this criterion.

Introductory offers

A sales period is a time when sellers should pay particularly close attention that introductory offers are clearly described as such. If a retailer has not sold a product before and wishes to offer it at an introductory price which is lower than the intended standard price, they should make it clear that the price is an introductory offer rather than a discount.

PRACTICAL TIPS FOR APPROACHING PRICE PROMOTIONS AHEAD OF SALES SEASON

Regulator focus on consumer law protection is on the rise. It can be difficult for sellers to navigate and apply the increasing regulation around pricing. This is particularly the case during popular sales periods when retailers are trying to make their promotions stand out from the crowd. As a first step, you may find the following practical tips useful:

- Conduct a review of current pricing mechanisms and tactics used both in store and online;
- Provide training to your marketing and sales teams about the 30 day rule in Europe (and check the local legislation at EU Member State level, at least for major markets for your business, as there may be some additional rules and requirements to comply with);
- Carefully assess whether any urgency techniques used (such as checkout timers), are genuine;
- Review the duration of product prices, and consider whether a product’s promotional price could be seen as

the new original price due to it applying longer than the non-promotional price;
- When advertising a promotion on a group or range of products, ensure that a significant proportion of that group is discounted; and
- Remember that introductory offers should be limited in time.

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