ENSURE YOUR DISCOUNT COMMUNICATIONS ARE COMPLIANT BEFORE YOU HOP ON THE SALES SEASON OMNIBUS!

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Policy and Regulatory Alert

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As “Holiday Season” is increasingly synonymous with “Sales Season”, and with many sales already in full swing (Black Friday in particular), brands and traders should make sure that their discounting campaigns are compliant with the latest EU and UK law requirements on transparent pricing.

EU POSITION

The new requirements in the Enforcement and Modernisation Directive (also known as the Omnibus Directive) (the Directive) came into force on 28 May 2022. The objective of this legislation (among other consumer protection aims) is to avoid traders artificially inflating prices to make discounts look bigger.

General Rule

In summary, the Directive requires that:

- Businesses ensure that the price of an item is clear and unambiguous—in particular in relation to price reductions and sales/discounts.
- Any discount advertised in store or on a website should be calculated against the lowest price for the item in the 30 days immediately prior to the price reduction. And the lowest price includes any discounted price during that 30 day period.

For example:

- The “normal” price of the product is €100.
- Three weeks ago, the brand ran a short temporary weekend promotion for 20% off (with a sale price of €80). The price is back up to €100 now.
- For Black Friday, the brand wants to run a promotion at €70. However, the discount shown cannot be “30% off” or “€30 off”. Rather, it would need to be calculated against €80 (the lowest price in the last 30 days) showing a much smaller saving.

This means that the discount shown can seem “small” or less attractive because of the 30-day rule. As a result, we are seeing more limited discounting in the month before major sales events like Black Friday.

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Brands need to be careful on how they promote their discounts. If they want to show discounts against any other numbers that are not the lowest price in the last 30 days (for example, the “recommended retail price” or the “usual price”), then this has to be clearly explained to the consumer.

Exceptions and Special Situations

An important possible exception to the 30-day rule is that Member States have the ability to allow a derogation in the case of a series of uninterrupted, progressively increasing discounts applied to an item (e.g., “further discounts”). In these circumstances, the 'prior price' against which the latest reduction can be compared can be the original starting price to which the first discount was applied.

> For example, if the product started at €100, was discounted to €80, and then was further discounted to €70 (without the price jumping back up in the interim), then the “full” 30% discount can be advertised (rather than the extra €10 only) as it represents a further continuous discount.

There are also special rules in the cases of:

- Customer loyalty programmes using discount cards or vouchers; and
- Comparative marketing claims against competitors' prices – the “30-day rule” does not prevent brands from making such claims.

PENALTIES

Failure to comply with the Directive can potentially result in significant financial penalties, which will be set by the individual Member States. In practice, as this legislation is new, enforcement remains minimal and it remains to be seen whether it will be a priority for governments.

However, irrespective of the legal risk, brands should also be mindful of the potential public relations and commercial risk, with consumers increasingly unafraid to air their grievances about potentially misleading pricing claims on social media.

UK POSITION

While the above rules do not strictly apply in the United Kingdom, prices in the United Kingdom must be unambiguous, easily identifiable, and provided in a clearly legible manner. That being said, similar changes to the EU updates are being contemplated in the coming years (including in the United Kingdom's draft Digital Markets, Competition and Consumer Bill). Additionally, many traders selling across Europe might voluntarily choose to align their approach in all countries for simplicity, especially if their marketing functions are centralised.

TAKEAWAYS

With some of the year's biggest sales events occurring over the next few weeks, brands will be keen to show their pricing in the most attractive way possible, but they should be guided always by these principles, in particular ensuring their discounting is transparent, not misleading, and in compliance with the applicable laws.

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