

The Enterprise Act 2002: Your powers

Barrister Polly Dyer looks at how the latest legislation is shaping up and examines just what Part 8 of the legislation allows trading standards officers to do

The Enterprise Act 2002 (EA 2002) received Royal Assent in November 2002. The powers afforded to trading standards fall under Part 8 of the Act, entitled Enforcement of Certain Consumer Legislation, which came into force on 20 June 2003.

Part 8 does not provide any new substantive law for the protection of consumers, but it does provide a streamlined procedure that allows those with enforcement powers to seek injunctive relief, by way of an enforcement order, where there has been a domestic or community infringement of specified consumer protection legislation.

Historically, consumer protection in the UK was achieved through criminal prosecution, for example through the use of the Trade Descriptions Act 1968.¹

Legislation, such as Part III of the Fair Trading Act 1973, provided for injunctive type relief and, with the introduction of the Stop Now Orders (EC Directive) Regulations 1991, civil enforcement is now viewed as a clear alternative to criminal enforcement.

The enforcement procedure in Part 8 is based on the Stop Now Regulations, which it replaced along with Part III of the Fair Trading Act 1973, and aimed to strengthen and widen the scope of the powers provided. Part 8 has subsequently grown in importance, with the introduction of the Consumer Protection from Unfair Trading Regulations 2008 (CPUT), to the extent

that almost all CPUT infringements can now be dealt with under Part 8.²

Who can obtain an enforcement order?

Section 215 of the EA 2002 allows 'enforcers' (of which trading standards is one) to apply to the court – either the county court or high court if the person against whom the order is sought continues trading in England, Wales and Northern Ireland – for an enforcement order where there has been a domestic or community infringement.

An enforcement order is a form of injunctive relief and is a means of ordering the recipient(s) not to breach the consumer protection legislation to which Part 8 applies.³ Breach of an enforcement order is a contempt of court and a defendant is liable to imprisonment (not exceeding two years) and/or a fine.⁴

Enforcers

In brief summary, there are four categories of enforcers: general; designated; CPC; and community enforcers. Trading standards departments fall under 'general' and 'CPC enforcers'.⁵

As a general enforcer, an application may be made in respect of any infringement.⁶ This includes seeking injunctive relief in the courts of another member state, where the infringement originates in that member state but affects UK citizens.⁷

Under section 225, general enforcers (other than the Office of Fair Trading) are provided with information gathering powers. This allows the enforcer to demand information from any person who may have relevant information.⁸

CPC enforcers may make an application for an enforcement order in respect of





a community infringement.⁹ Section 213(5A), which designates certain bodies and individuals as CPC enforcers, was inserted by Part 8 of the Enterprise Act 2002 (Enterprise Act (Amendment) Regulations 2006 (SI 2006/3363).

The purpose of this regulation was to introduce into all member states a similar regime to facilitate cross-border cooperation and enforcement to address community infringements. CPC enforcers have additional powers in relation to search and seizure.¹⁰

Trading standards is a 'dual' enforcer. In these circumstances, it may act as the particular type of enforcer appropriate to the circumstances.¹¹ For example, if there was a trader infringing both domestic and community legislation, trading standards can act in its capacity as a general enforcer. If only community breaches were involved, trading standards may choose to act as a CPC enforcer given the powers available in relation to search and seizure.

Criteria for obtaining an enforcement order

To obtain an enforcement order, broadly three criteria need to be satisfied:

- The trader has engaged, or is engaging, in conduct that constitutes a domestic or a community infringement, or is likely to engage in conduct that constitutes a community infringement;
- There is, or has been, or is likely to be, harm to the collective interests of consumers in the UK;
- There has been appropriate consultation that has failed to bring about the cessation for the conduct about which complaint is made, or the need to consult has been waived.¹²

Infringements

The infringements that can be addressed by Part 8 are to be found in the following legislation:

A domestic infringement is defined in s.211 of the EA 2002. Schedule 1 to the Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2003 (SI 2003/1593) – as amended by the Consumer Protection From Unfair Trading

Regulations 2008 (SI 2008/1277) – lists a number of enactments, breach of which amounts to a domestic infringement.

Among the enactments listed are the Trade Descriptions Act 1968, the Consumer Credit Act 1974, the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982. Furthermore, an act done or omission made in breach of contract for the supply of goods or services to a consumer will also constitute a domestic infringement,¹³

A community infringement is defined in s.212 of the EA 2002. Under the Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2003 (SI 2003/1374), as amended, and the Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2006 (SI 2006/3372) certain UK enactments are specified that implement particular EU legislation.¹⁴

Infringements can range from breaching the regulations on misleading advertising to breaching the regulation of the internet in the ecommerce regulations.¹⁵

One of the key differences between domestic and community infringements is that an application to a court can be made in the case of a community infringement where the enforcer believes a breach is likely to occur in the future.¹⁶

Meaning of 'harms the collective interest of consumers'

'Consumer' is defined in s.210 of the EA 2002. The meaning of 'harms the collective interest of consumers' was considered in the Office of Fair Trading v MB Designs (Scotland) LTD [2005] SLT 691. The suggestion that the concept was based

services. The notion of collective interests of consumers indicates that there must be some harm or risk of harm to the public generally, specifically the members of the public who may buy the particular goods or service in question.¹⁸

Whether a single infringement or breach is enough to warrant seeking an enforcement order was addressed, in conjunction with the concept of harm to the collective interests of consumers, in Office of Fair Trading v Vance Miller [2009] EWCA Civ 34. It was held that it might be possible for collective harm to be established by a single breach.

Consultation and undertakings

Section 214(1) of the EA 2002 states that an application for an enforcement order must not be made unless the enforcer has engaged in appropriate consultation with the person against whom the order would be made, and the enforcer has given the OFT notice of their intention to apply for the order.¹⁹

There is an option for the enforcer to seek a waiver of consultation from the OFT under s.214(3) but this is reserved for urgent cases – that is, there is clear and immediate danger of serious consumer harm, where there is no time to engage with the trader or engagement is seen as pointless.

Section 214(2) specifies what will be considered as appropriate consultation for this purpose, namely consultation intended to stop a violation occurring, preventing repetition of a breach that either has occurred or is occurring, or preventing a future community infringement.

“ The difficulties which have arisen (have been) largely due to inappropriate cases being chosen or there being undue delay

upon percentages of the population, geography, or any statistical concept was rejected.¹⁷ It was held that there was collective harm when there was an infringement and there was potential risk to purchasers of the defective goods or

Consultation should be embarked upon when the enforcer is satisfied that the trader has engaged, or is engaging, in conduct that constitutes a domestic or a community infringement, or is likely to engage in conduct that

constitutes a community infringement.

The trader should be contacted and, in such communications, it would be advisable to specify that the enforcer is instituting consultation, detailing the infringements/breaches found, specifying the changes that the enforcer requires to be made and explaining when the duty to consult will end and the enforcer's powers that can subsequently be utilised.

The Enterprise Act 2002 (Part 8 Request for Consultation) Order 2003 (SI 2003/1375) addresses how the initial request for consultation should be made, stipulating the procedure for instituting communication.

There is no obligation to continue consultation for more than 14 days from the day after receipt of the request for consultation or, in the case of an application for an interim enforcement order, for more than seven days from the day after its receipt.²⁰

It may be appropriate in some cases to have a longer period of consultation, for example if the trader is cooperating and trying to address the infringing behaviour.

However, as is implied by the time limits, the consultation process is not intended to be drawn out and these occasions should be the exception as opposed to the rule.

Section 219 of the EA 2002 allows an enforcer to accept an undertaking where they have the power to make an application for an enforcement order – that is, the enforcer believes the trader has engaged, or is engaging, in conduct that constitutes an infringement or is likely to engage in conduct that constitutes a community infringement. Thus, like the duty to consult, the power to accept an undertaking should be exercised at the end of the investigative process.

When at this stage, it is advisable for the enforcer to offer the trader the opportunity to give undertakings before pursuing an enforcement order.

“ Civil enforcement is now viewed as a clear alternative to criminal enforcement ”

Acceptance of undertakings is at the enforcer's discretion. However, under section 217(4) the court must have regard to whether or not the person named in the application for an enforcement order has given undertakings, and whether or not they have complied with them. If the opportunity is not given, the trader could assert that they would have given them willingly if asked.

If undertakings are accepted, the OFT should be notified and provided with the details (s.219(6)).

Failure to comply with an undertaking given to an enforcer has no immediate sanction. However, if they are signed and then breached, or if undertakings are refused, the enforcer can simply proceed to court and the court will give this due regard (under s.217(4)).

Interim orders

An interim enforcement order can be granted any time before the grant of a final enforcement order.²¹ Section 218 of the EA 2002 addresses the content of such applications. An interim order is granted until a specific date, usually the full hearing date, or is made until a further court order.

Conclusion

Part 8 can provide an effective remedy for the enforcement of consumer legislation in the appropriate case, and it has been stated in *Consumer and Trading Standards: Law and Practice* that the response from the courts has been overwhelmingly positive, with the difficulties that have arisen largely due to inappropriate cases being chosen or there being undue delay.²²

However, Part 8 is potentially going to be subject to amendment. The recent Department of Business, Innovation and Skills consultation, which closed on 31 December 2012, is considering whether to amend Part 8 and extend its remit: instead of merely prohibiting a trader from behaving in a particular manner, consideration is being given to allow remedies to be attached to enforcement orders and undertakings.²³

The responses are currently the subject of consideration- we will have to await the outcome to see whether the enforcement powers provided to trading standards by Part 8 of the Enterprise Act 2002, as described above, are going to increase further.

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¹ Lewin, Bryan and Kirk QC, Jonathan, *Consumer and Trading Standards: Law and Practice*, Third Edition (Bristol, 2013), p. 90

² Ibid

³ s. 217(5) stipulates that an enforcement order must indicate the nature of the conduct which constitutes an infringement and direct the person to not continue or repeat the conduct, not engage in such conduct in the course of his business or another business and not to consent to or connive in the carrying out of such conduct by a body corporate with which he has a special relationship (within the meaning of s. 222(3)).

⁴ See s. 220 and paragraph 549 of the Explanatory Notes to the EA.

⁵ By s.213(1) of the EA 2002, every local weight and measures authority in Great Britain is a 'general enforcer' (see s.69 of the Weights and Measures Act 1985: meaning in effect any trading standards departments of local authorities); Section 213(5A) of the EA lists 'CPC enforcers'.

⁶ s. 215(2)

⁷ s. 221(2)

⁸ See s. 226 for further information regarding the procedure to be followed.

⁹ s. 215(4A)

¹⁰ See s. 227(A)-(C) for further information.

¹¹ s. 235B

¹² Lewin and Kirk QC, *Consumer and Trading Standards: Law and Practice*, p. 93

¹³ Lawson, Dr Richard, 'Using the Enterprise Act', *Justice of the Peace* (2005) 169 JPN 767

¹⁴ Ibid.

¹⁵ Barry, Dennis, 'Reigning in the rogue traders', *New Law Journal* (2004) 154 NLJ 1628

¹⁶ s. 217(2)

¹⁷ Lewin, Bryan and Kirk QC, Jonathan, *Trading Standards: Law and Practice*, Second Edition (Bristol, 2011), p. 48

¹⁸ Per Lord Dummond Young at para. 14

¹⁹ As a result of the Public Bodies (The Office of Fair Trading Transfer of Consumer Advice Scheme Function and Modification of Enforcement Functions) Order 2013, enforcers are no longer required to consult with the OFT before they make an application for an enforcement order.

²⁰ s. 214(4)

²¹ s. 218(5)

²² Lewin and Kirk QC, *Trading Standards: Law and Practice*, Second Edition, p. 45

²³ The BIS Consultation, 'Civil Enforcement remedies-consultation on extending the range of remedies available to public enforcers of consumer law'; <https://www.gov.uk/government/consultations/civil-enforcement-remedies-consultation-on-extending-the-range-of-remedies-available-to-public-enforcers-of-consumer-law>

