

# **Consultation on Section 43 (6) (a) of the Consumer Protection Act 2007 (CPA)**

## **Elaboration on a commercial practice relating to representations that a product was on sale at a previous price'**

### **Introduction**

At the seminar for the Retail Sector held on 7 September 2007 by the National Consumer Agency (NCA), concerns were expressed about the 'reasonable period' reference in the Consumer Protection Act, in the context of price reductions (i.e. retailer claims that products were on sale at a previous price). Various representatives were concerned that different traders would interpret the 'reasonable period' reference to suit their own needs. This would have the effect of creating an uneven playing field.

### **Comparison between provisions of Consumer Information Act 1978 and Consumer Protection Act 2007**

Section 7 (2) (a) of the Consumer Information Act relating to sales promotions (popularly known as the '28 day rule') stated

*'(2) For the purposes of this section—  
an indication that goods, services or accommodation were or was previously offered at a different price or charge or at a particular price or charge shall be treated, unless the contrary is expressed, as an indication that they were so offered openly at the same place within the preceding 3 months for not less than 28 successive days',*

Section 43 (6) (a) of the Consumer Protection Act, includes the following provision

*'Without limiting subsection 5-  
if the commercial practice involves a representation or creates an impression (whether in advertising, marketing or otherwise) that a product was previously offered at a different price or at a particular price, consideration shall be given to whether the product was previously offered openly and in good faith at that price and at the same place for a reasonable period of time before the representation was made, and.....'*

### **Comments on 'a reasonable period'**

Under the Consumer Protection Act, the trader is required to meet the following requirements:

- (i) the general principle of good faith in the trader's field of activity, and
- (ii) the standard of skill and care that the trader may reasonably be expected to exercise in respect of his/her dealings with consumers.

While accepting that there is an onus on traders to act in good faith, it is recognized that the reference to a 'reasonable period' is open to interpretation and that traders may regard a very short period as reasonable, and still claim that they are meeting the good faith and due diligence requirements.

There is also the need to take into account the fact that some products such as food and other perishables would have a shorter shelf life than other products. In these cases it could be argued that the ‘reasonable period’ should be shorter in the context of offering these items at a discount.

Given the extent and nature of the concerns raised at the retail seminar, it is clear that there is a need for a standard approach towards interpreting what should be regarded as ‘a reasonable period’. The best way of achieving this would be to obtain sectoral consensus. With this objective in mind, NCA has decided that it would seek the sector’s views on the issue. It proposes, following consultation with the sector, to avail of the provisions of Section 90 of the Consumer Protection Act and issue guidelines on what could be regarded as ‘a reasonable period’.

### **Status of NCA Guidelines**

Section 90 provides for the National Consumer Agency to issue and publish guidelines on a range of matters including

‘practical guidance to traders in relation to commercial practices whether generally or in a particular trade, business or professional sector’

Guidelines drawn up by the NCA under this section are not binding. A trader who fails to comply with them would not be liable to any proceedings. Notwithstanding this, the Act does make provision for due regard to be given to the guidelines in any Court action.

*Section 90(5) states:*

‘In any proceedings before a court, guidelines issued and published under this section are admissible in evidence and if any provision of the guidelines is relevant to a question arising in those proceedings, the provision may be taken into account in determining that question.’

### **Proposed definition of ‘a reasonable period’**

Notwithstanding that NCA intends seeking the views of the sector on what could be interpreted as ‘a reasonable period’ in the context of price reductions, it is of the view that the requirement of 28 successive days in the previous 3 month period could continue to be regarded as reasonable.

The 28 day rule had been in place for almost 30 years and the requirement that an indication that products were ‘offered openly at the same place within the preceding 3 months for not less than 28 successive days’ has been accepted throughout the sector. Given the general acceptance of this it is felt that this requirement should be accepted as the norm for the sector. A shorter period could be considered in respect of perishables.

## **Invitation for views**

The National Consumer Agency is formally requesting the Retail Sector to provide comments/observations on the above proposal. All views should be submitted within one month of the issue of this consultation document. Based on the views received, NCA will draw up Guidelines as provided under section 90 of the Consumer Protection Act, on what may be regarded as a 'reasonable period'. This document may be accessed at [www.nca.ie](http://www.nca.ie)

All views should be sent electronically to [pricereduction@nca.ie](mailto:pricereduction@nca.ie)

**National Consumer Agency**

**November 2007**