



Staff Opinion on Advertising Free Delivery Service

Case Number: 8150-20

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FAIR TRADING COMMISSION

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This opinion is based solely on the information received from Celebration Brands Limited in their email dated September 28, 2020. No additional information, documentation or material concerning the proposed advertisement was used.

Synopsis

By way of email dated September 28, 2020, Celebration Brands Limited (“Celebration”), a joint venture company, which is owned by Pepsi Jamaica and Red Stripe wrote to the Fair Trading Commission (“FTC”) in relation to advertising its delivery service. The Staff of the FTC was advised that Celebration sells and distributes the beverages and beers of its owners to other businesses, such as restaurants, supermarkets, and bars. With the onset of the Covid-19 pandemic, Celebration has introduced a new business model where the company sells directly to final consumers.

Consequently, Celebration now sells the products in small quantities and it is delivered directly to the consumer by a third party engaged by Celebration. Celebration indicates that the pricing of the product considers all the associated costs of production, including but not limited to labour and delivery. Upon making a purchase, consumers are told the final price. Celebration seeks to advertise that delivery is free and requests the FTC’s opinion on whether such an advertisement would be in breach of the Fair Competition Act (“FCA”).

The Issue

Based on the foregoing the following issue arises for determination:

Whether Celebration proposed use of “free delivery” in advertisements would be a contravention of the FCA?

The Opinion

The offer of “free” goods or service is a promotional device frequently used to attract consumers. Arguably, most consumers will understand that advertisers are unlikely to give away products or services without any conditions, obligations or other strings attached on the part of the consumer. However, “free” in the truest sense signifies instances where consumers will receive something without parting with any money or other form of consideration for the product or service, except for the unavoidable and true cost of responding, collecting or delivering the item.

Additionally, there is also the further consideration that “free” should signify that there are no unstated terms or conditions that qualify the offer. The average consumer is likely to understand from “free delivery” that there would be no monetary commitment besides the purchase of the goods to qualify for free delivery.

Thus, the word “free” should be used in advertisements when the service is indeed free. A business should not make a free offer yet finance the offer from the pocket of consumers. Such an occurrence may constitute a misleading representation as the consumer may not have expected to pay any

additional cost. Essentially, an advertisement should clearly and conspicuously disclose the terms, conditions, limitations that the consumer must comply with from the onset of the offer.

These considerations are crucial as the FCA prohibits representations that are materially false, misleading, or likely to mislead. This prohibition is found in section 37(1) (a) of the FCA which addresses misleading advertising and applies to anyone promoting, directly or indirectly, the supply or use of a product or service or any business interest by any means.

For a representation to be false or misleading, or likely to be misleading under section 37(1) (a), there are specific elements that must be established. These are as follows:

- (i) there has to be a person acting in pursuance of a trade,
- (ii) that person must be acting for the purpose of promoting, directly or indirectly the supply or use of goods and services,
- (iii) the person must make a representation to the public, and
- (iv) the representation is false or misleading or is likely to be misleading in a material respect.

For this opinion, we will be focusing on the latter two elements which have been given some attention by the Courts. In this regard, it must be established that there has been a representation to prove that misleading advertising has occurred. A representation may encompass printed or broadcast advertisements, written or oral representation, audio-visual promotions, and illustrations. This is so as advertisements defined by section 2 of the FCA refers to “any form of communication made to the public or a section of the public for the purpose of promoting the supply of goods or services”. There is also the requirement that the representation is made to the public. It has been held that one person constitutes a representation to the public.

The Court has found “false” to mean any representation that is inconsistent with the facts, while “misleading” means a representation that would cause the general public to misunderstand or make incorrect decisions, regardless of whether such representation is consistent with facts.” Accordingly, a false representation is one that is contrary to the facts or incorrect and a misleading representation is one that led consumers into error.

It is of importance to establish that the representation was false or misleading “in a material respect”. This phrase has been interpreted to mean that the representation leads the person to a course of conduct that is based on the representation, he or she believes to be advantageous. Material is therefore a question of whether an average consumer interested in using the relevant product would be influenced in deciding to purchase the product being offered. Consequently, a representation is considered material where it is likely that the representation affects the consumer’s purchasing decision.

Notably, the contravention of section 37(1) (a) of the FCA may occur despite there being an absence of intention to mislead -but it is misleading if the information provided is -false or it contains an error. The section is one of absolute liability.

Conclusion

The likely effect that advertisements may have on the transactional decisions of consumers is a significant consideration. The average consumer may understand free as being without charge and with an absence of conditionalities and limitations. Arguably, it is a reasonable inference that free delivery signifies no additional charge beyond the stated price. Accordingly, where it is advertised that delivery is free, there ought to be no additional delivery fees attached at the end of the transaction, otherwise the advertisement may contravene section 37(1)(a) of the FCA.

Celebration Brands Limited must therefore assess its advertisement to determine whether there is or likely to be a breach of section 37 of the FCA.