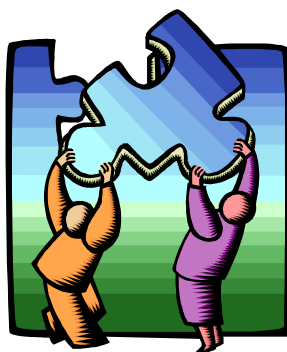


Due Diligence : Practical Guidance for Business

*A guide covering the requirements of Trading Standards law
and some suggestions on how to avoid prosecution*



This guide has been prepared to help local businesses meet the requirements of Consumer Protection law.

It is based on the best information currently available. Every effort has been made to ensure the accuracy of this guide, however in every instance it is the courts who decide if the law has been broken. It is recommended that you take advice on what is likely to constitute due diligence in any particular situation.

While not exhaustive in its coverage, this guide does seek to cover the concepts of

- Strict liability
- Reasonable precautions
- Due diligence



This is one of a series of leaflets prepared by the Wales Heads of Trading Standards Group. For details of other leaflets in the series, please contact your local Trading Standards Department - contact details are provided at the end of this leaflet.

Introduction

Trading Standards or Consumer Protection legislation aims to create equity; a balance that ensures adequate protection for consumers, while promoting and maintaining a fair trading environment for legitimate business. The way in which this balance is achieved and the structure of Consumer Protection legislation is discussed below.

In the vast majority of criminal cases, the prosecution has to prove that the person accused of any wrongdoing is guilty beyond reasonable doubt. i.e. 99% certainty.

How does Consumer Protection law work?

In many criminal cases, the prosecution also has to prove “mens rea” or guilty knowledge. They must show an intention to do something wrong.

HOWEVER some laws create offences that simply contain an absolute prohibition against doing something. In such cases it does not matter that you did not intend to do wrong OR were ignorant of requirements. The fact that you have contravened the law is sufficient to allow a court to convict.

This regime can, obviously cause injustice. A person might not have been responsible for the offence. It might have been due to an accident or somebody else. Add to this the complexity of today’s legislation and even the most diligent trader would break the law on a daily basis. Therefore to balance the scales of justice, Parliament has provided various defences and “let outs” and it is these provisions that this leaflet examines.

This means that the law is recognising the efforts made by reputable businesses to comply with its demands. The system of “let outs” includes the defence of reasonable precautions and due diligence.

To use these defences, a person must prove that he took all reasonable steps and exercised all due diligence to avoid committing the offence. If he can do so he is entitled to be acquitted. Whether or not a defence will be successful depends on the circumstances surrounding each case, what amounts to a successful due diligence defence has exercised the minds of many judges over many years and has resulted in a number of appeal cases which in themselves help us to understand more clearly what businesses have to do to avoid prosecution.

A prosecution benefits no one. A business may face fines, loss of product, loss of customers, adverse publicity and in extreme cases imprisonment is an option open to the courts. The Trading Standards service will only prosecute deliberate or persistent offenders. Advice and encouragement will always be offered first and when that advice is followed, the possibility of legal action is kept to a minimum.

The cost of prosecution

The form of wording for this type of defence is common to most Consumer Protection laws. It generally requires a business or person to;

Have taken all reasonable steps or precautions

AND

Have exercised all due diligence to avoid committing the offence.

At its simplest, it means that you have looked at the way in which your business operates and put in place a series of checks to prevent any problems occurring. Once you have done this you must ensure that the system of checks is being carried out. If you have a system that nobody knows about, or cares about, the system is useless and any defence plea will fail.

None of the laws that provide a “due diligence” defence describe in any detail what systems will satisfy the defence. To establish this point you need to examine the past decisions of the courts and draw upon that experience. But before you can set up any systems you need to know what you can and cannot do. Once you know what is prohibited you can build your defences.

To assist you in this task, some of the following themes have been extracted from past court decisions:

- ***Sitting back and doing nothing is unlikely to protect you***

The courts suggest that some form of positive action is necessary to satisfy the defence. In the past some businesses have tried to suggest that because past dealings in a particular area of commerce had raised no problems, or because they had no reason to suspect problems, that they could avoid prosecution. The Courts have been clear on this point; positive action is required, but the nature of that action will depend on the relevant circumstances. Business should check the terms and conditions of their contracts and the goods relating to those contracts whether they view them with suspicion or not.

- ***If a reasonable step or precaution is not taken any defence is likely to fail***

What is a reasonable step? A classic case involved the sale of a watch described as “waterproof” and a “diver’s watch”. In court the judge asked why no checks had been carried out by the retailer, such as placing the watch in a bowl of water. This simple test would have revealed that the watch was not waterproof and could have avoided expensive litigation.

- ***Taking reasonable steps is likely to involve setting up a system of control that has due regard to the risks and the law involved***

One of the clearest messages from the courts about reasonable precautions and due diligence is that size does matter. The size of the business and the amount of risk associated with the product are some of the factors that help to determine what are “reasonable steps”. For example, the absence of any documented systems in

larger companies might be fatal. What will not be taken into account are factors like ignorance of the law, poor command of a language or a lack of common sense.

- ***Due Diligence means ensuring your system of checks works and that you can prove it***

If you have developed a programme of checks, it must work. Having a system in place that nobody follows is as bad as having no system at all. This is something that demands periodic or even constant monitoring. In creating a system you must consider all aspects of your business, from the design stage through to after sales. You should identify the risks, adopt appropriate controls and safeguards, record your actions and keep it under review.

- ***What is reasonable will depend upon particular circumstances***

This sounds like a cop out, but after 30 years of deliberation, the courts have yet to come up with a simple scheme to answer the often asked question of what is reasonable? This is not surprising when you consider the diversity of consumer products and services in modern society. You may find some help on this subject area by reading publications on risk assessment, hazard analysis and quality assurance. There is also a vast body of case law (decided court cases) relating to the due diligence concept available, although it is not often user friendly.

Without doubt, the best source of information available lies within the council itself. Trading Standards Officers are employed to assist local businesses as well as consumers and you are urged to seek their advice.

What follows are some pointers and examples of control techniques. They are not prescriptive and are intended to make you think about protecting yourself against legal action.

A Good Practice Guide:

Assess the Risk

What could go wrong in your business that might mean a Court appearance? An unsafe product, a false claim, a misleading advert, unsafe working practices, the list is endless. To assess the risk of such an incident, you should identify any weak links in the process chain. This requires you to analyse each stage of your operation and identify precautions. You should also know what is happening in your particular section of industry and be aware of how and where your products are being used or marketed.

Establish what you're going to do about it

Having analysed what could go wrong, you should put in place reasonable safeguards. Have you done all that the law requires? Are you meeting accepted industry standards? You should aim to control all risks by putting in place as many precautions as you think necessary. Your aim should be to either eliminate any chance of anything going wrong (this is unlikely) OR to control the risks so that errors will be detected and put right before

too much damage is done. There is no general formula for creating a due diligence system, because each business is different. You will need to use your judgement in deciding what is necessary and feasible. You should consider the following;

Reliance on certificates or warranties is unlikely to be considered as adequate if a business has rejected or failed to take a reasonable precaution. What constitutes reasonable action depends on your business. It is recommended that all the activities of the business which may cause a breach of the law should be identified, controlled and checked by a system of working, for example;

- Selection of raw materials and components
- Specifications and appropriate legal requirements
- Production processes
- Service delivery points
- Labelling, advertising and instructions for use
- Staff training and experience

Any system that you devise must be appropriate to the size of your business. The bigger you are, the more the law will expect you to do.

The systems you create must be appropriate to the consequences of a failure e.g. if a serious outbreak of food poisoning was a possibility, a thorough system of checks would be expected to be in place.

If sampling or testing is involved OR appropriate, the number of tests you do should reflect;

- The cost of getting it wrong
- The amount of product involved
- The complexity of the product
- The cost involved
- The degree of confidence you have
- The size of your business

Write down your solution

Write down your control system so that it can be followed. Unless you do so it will be difficult to claim any defence. Inform your employees of your actions and give training to those responsible for operating the system of checks.

Documented records should be kept outlining procedures followed and the checks operated to validate these processes. These records should be kept safe for future reference.

Operate your system

In order to satisfy the defence you have to show that you created a control system, that it worked and that you operated that system. This may require you to audit your system of checks and keep records of that audit. You should put in place a system of corrective action if things are found wrong. The system should be amended if necessary.

Review your system

Your system should be regularly reviewed to ensure that it remains effective. No system is 100% foolproof and over time problems will occur that the system does not address. The important thing to show is that the system is monitored and that failures are put right as soon as possible.

Where can I get more information?

Creating a system of checks is not easy. The policy of the Trading Standards service is to help local businesses wherever possible. This leaflet cannot answer every query you may have on this issue but it does offer a starting point. Further advice can be obtained by contacting your local Trading Standards Service at the address given below.



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