



Protecting the consumer from unfair trading

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The Regulations

The UK was late implementing the EU's Commercial Practices Directive (2005/29/EC), but when the Regulations did finally come into force on 26 May 2008 they significantly altered UK law on consumer protection. They repealed or amended 23 existing consumer protection laws, including most of the Trade Descriptions Act, Part III of the Consumer Protection Act and certain provisions of the Consumer Credit Act. They replaced these rules with more general, overarching requirements in relation to commercial practices towards or involving consumers.

In essence, the Regulations:

- create a general prohibition on 'unfair commercial practices'. A commercial practice is unfair if it is 'contrary to the requirement of professional diligence' and if it materially distorts, or is likely materially to distort, the economic behaviour of the average consumer with regards to a product or service. The Office of Fair Trading (OFT) has suggested that this latter condition will be met in circumstances where the notional average consumer¹ would have bought a

- product or consumed a service that he or she would not otherwise have bought or consumed;
- prohibit 'misleading practices' that offer false information in relation to certain key features of the product or service (including its existence, its main characteristics, its price and the risks faced by the consumer) or the overall presentation of which would be likely to deceive consumers in relation to those key features. The OFT gives the example of a trader using hardwood from unsustainable sources, when it advertises itself as being a signatory to a code of practice that promotes the sustainable use of wood. Again, for the practice to be unlawful, it must in addition cause or be likely to cause the average consumer to take a different decision;
- prohibit 'misleading omissions', ie commercial practices that fail to disclose material information or that 'provide material information in a manner which is unclear, unintelligible, ambiguous or timely', and which cause or would be likely to cause the average consumer to take a different decision. In the context of an offer to a consumer to purchase a product or service, material information will include information on the main characteristics of the product, the trader's name and address, the price (inclusive of tax) and any postage or delivery charges;
- prohibit 'aggressive commercial practices' towards consumers. Practices will be aggressive if they involve the use of harassment, coercion or undue influence and, as before, would influence consumer transactional behaviour. The Regulations include a list of factors that should be considered in

¹ The 'average consumer' refers to consumers in general if the practice is aimed at all consumers. If the practice is aimed at a particular group, the 'average consumer' refers to the average member of that group. This may give vulnerable consumers, such as the elderly or children, special protection where a practice is aimed directly at them.

determining if a practice is aggressive, including the use of threatening or abusive language or threatening legal action where such action would not be possible; and

- list 31 specific commercial practices that will, in all circumstances, be considered unfair (see inset box). Whether these practices would impair or influence consumers' behaviour is irrelevant – they are a true blacklist.

Examples of blacklisted commercial practices towards consumers

- Stating that a product or service will be available for a limited time when it is not, in order to obtain an immediate decision.
- Claiming to be a signatory to a code of conduct when you are not or to have a professional accreditation that you do not have.
- Displaying a trust mark or quality mark (such as a CE-mark) without having obtained the necessary authorisation.
- Presenting consumers' existing statutory rights as a distinctive feature of any offer.
- Paying for editorial content in the media (advertorials) without making this clear to the consumer.
- Making false health claims about a product or service.
- Describing a product or service as 'gratis', 'free', 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.
- Falsely representing oneself as a consumer (eg to post favourable reviews of your product or service online).
- Advertising products or services directly to children or in an attempt to encourage 'pester power'.

In some cases, it will be easy to identify conduct that is now prohibited by the Regulations. In other cases, less so (eg the role of public relations agencies in placing stories in the media about their clients' products is something of a grey area). In addition, the Regulations arguably introduce mandatory requirements in terms of conduct towards consumers – eg compliance with voluntary code of practices to which a company has subscribed; the display of name and address details on packaging – that were not always spelled out in legislation before. The overlap between the Regulations and other consumer protection legislation also remains to be clarified (for example, would the sale or supply of a consumer product that was 'unsafe' within the meaning of the General Product Safety Regulations 2005 or the General Food Regulations 2004 itself trigger a breach of these Regulations, on the basis that the retailer had failed to provide material information concerning the characteristics of the product?).

Breaching most (but not all) of the requirements imposed by the Regulations is a criminal offence. Most breaches will be tried in the magistrates' court, with a maximum penalty of £5,000 per count, but more serious offences may be tried in the Crown Court and sanctioned with a potentially unlimited fine and/or a term of imprisonment of up to two years. There are the usual provisions governing the potential liability of directors, managers, company secretaries and other company officers, and the type of 'due diligence' defence that is commonly available to defendants under UK consumer protection laws is also available here.

Slow take up of enforcement to date

Responsibility for enforcement of the Regulations rests on a national level with the OFT and on a local level with over 200 local authority Trading Standards Services (TSS). Information obtained from the Department for Business Enterprise and Regulatory Reform (BERR) indicates only a low level of enforcement over the last year, targeted primarily at small- and medium-sized businesses. Thus, for example, as at January 2009 TSS have:

- obtained two successful criminal prosecutions against traders in the home repairs/maintenance sector and one guilty plea under the Regulations for falsely claiming to be a member of a trade association;
- obtained seven undertakings from local businesses in various sectors including home repairs, second hand motor vehicles, a caravan and camping park and a nursery goods and services business; and
- issued three warning letters, including one relating to a misleading 'free gift' offer from a local gym.

The outlook for business

The level of enforcement action is likely to increase over the next year. There are a number of reasons for this.

First, a number of investigations are reported to be underway, which may in due course lead to action. Many may involve higher profile targets than those against which enforcement action has been taken to date. The OFT has, for example, indicated that an investigation is active in relation to pricing in the aviation industry.

Second, consumer protection groups are themselves examining industry conduct for compliance with the

Regulations, which is in turn prompting regulatory involvement. For example, a review of insurance price comparison sites by Which? accused some of misleading consumers by claiming they could identify the cheapest policies on the web (when this was not the case). Both the OFT and the Financial Services Authority have launched investigations. Which? has also targeted supermarket special offers (claiming that these may be misleading within the meaning of the Regulations if goods are sold at a discount for a longer period than at the higher price) and the sale of extended warranties (to the extent that these duplicate consumers' existing statutory rights).

Third, it inevitably takes time for enforcement agencies to familiarise themselves with, and to make full use of, new statutory powers, particularly as many of the terms and concepts used in the CPRs are novel to UK law.

It is still unclear what effects the Regulations, and in particular their blacklist of prohibited commercial practices, will have on businesses' wider litigation risk. As well as complaining to regulators, consumers and consumer associations may be inclined to seek damages in the courts (for example, by means of a claim for breach of statutory duty or in negligence) where they believe that regulatory prohibitions have been infringed. Such action may, in particular, 'piggy-back' on successful enforcement action by a regulator. Given the EU-wide application of the Unfair Consumer Practices Directive, which the Regulations implemented in the UK, large scale claims of this nature may be a particular risk if the EU's current proposals to create similarly EU-wide 'class action' mechanisms bear fruit.

Our separate guide to 'Consumer class actions in the EU: How the current debate may affect the consumer products and retail sector' and other materials relevant to this sector may be found at: www.freshfields.com/industries/consumerproducts

The following links may also be of interest:

- The Regulations: www.opsi.gov.uk/si/si2008/draft/ukdsi_9780110811574_en_2
- BERR Guidance on the Regulations: www.berr.gov.uk/files/file46035.pdf
- European Commission website on the Unfair Commercial Practices Directive: <http://ec.europa.eu/consumers/rights/>.

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