

# "All change please!" – Sweeping new legislation on unfair commercial practices comes into force on 26 May 2008

- Criminal liability for unfair business-to-consumer ('B2C') commercial practices and misleading business-to-business ('B2B') advertising
- Maximum penalty of two years' imprisonment and an unlimited fine

**The Consumer Protection from Unfair Trading Regulations 2008** (SI 2008/1277)

**The Business Protection from Misleading Marketing Regulations 2008** (SI 2008/1276)

After 26 May 2008, traders face criminal sanctions if they engage in unfair commercial practices towards consumers or misleading advertising towards other businesses. The maximum sentence is an unlimited fine and/or two years' imprisonment. Directors and others involved can be found guilty. Enforcement authorities also have the power to apply for civil injunctions.

Traders whose practices are already fair and not misleading, should have little to change. However, fairness in this context is a European concept focused on consumer protection. Given the new criminal sanctions, we recommend that companies and their staff familiarise themselves with the new Regulations.

This leaflet explains the basics of the new law and gives tips on minimising risks.

#### **Why is the new legislation important?**

In general, the new law covers all commercial practices in relation to the sale or promotion of goods and services to consumers and all B2B advertising.

There are two new laws:

- The Consumer Protection from Unfair Trading Regulations 2008 ('CPUT') – these cover all B2C practices (not just advertising), and
- The Business Protection from Misleading Marketing Regulations 2008 ('BPMM') – these deal with B2B advertising, including misleading and comparative advertising.

The legislation implements European Directives and is designed to harmonise EU trading practices for the benefit of consumers and traders. The CPUT Regulations are generally more wide-ranging than existing UK legislation, for example, by prohibiting aggressive practices.

#### **Does the new legislation affect my business?**

The new Regulations potentially affect all traders (including those online). Generally, if a trader's goods or services are ultimately for consumers, the trader will be bound by the CPUT Regulations. The test is whether the trader's act or omission is "directly connected with the promotion, sale or supply of a product to or from consumers". If the trader's goods or services are only supplied on a business to business basis, then the BPMM Regulations apply.

## Do the Regulations apply to non-UK businesses?

Yes. Where commercial practices relate to the promotion, sale or supply of goods or services to UK customers, the Regulations are likely to apply, even where a business has no UK presence "on the ground". Specific advice should be sought in relation to jurisdictional issues.

## Are any other laws affected?

Many laws have been amended or repealed. For example, the Control of Misleading Advertisements Regulations 1988, much of the Trade Descriptions Act 1968 and parts of the Consumer Protection Act 1987 (including section 20 on misleading price indications) have been repealed. Where other laws (e.g. on distance selling) are still in force, the new Regulations apply an additional layer of protection for consumers and businesses.

## What does the new law say as regards unfair B2C commercial practices?

There are five main prohibitions against unfair commercial practices to consumers:

1. The general prohibition;
2. Misleading actions;
3. Misleading omissions;
4. Aggressive practices;
5. The 31 blacklisted practices.

### The general prohibition

A commercial practice to consumers is unfair if:

- (a) it does not meet the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers and which is commensurate with honest market practice or the principle of good faith ('professional diligence'); and
- (b) it does, or is likely to, appreciably impair the average consumer's ability to make an informed decision, thereby causing him to take a transactional decision that he would not have taken otherwise.

### Misleading actions

An action is misleading if, for example, it contains false information about certain matters, is likely to deceive or creates confusion and it is likely to cause the average consumer to take a transactional decision he would not otherwise have taken.

#### False statements and deception:

A commercial practice is a misleading action if:

- (a) it contains false information in relation to certain matters or if it or its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of those matters, even if the information is factually correct; and

- (b) it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

The matters include the existence, nature or main characteristics of the product, any statement relating to direct or indirect sponsorship or approval, the price or manner in which the price is calculated, the existence of a specific price advantage or the consumer's rights or the risks he may face.

#### Confusion:

A commercial practice is a misleading action if:

- (a) it concerns any marketing of a product which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor; and
- (b) it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

It is interesting to note that this appears to overlap with passing off and yet a misleading action can be a criminal offence whereas passing off is not.

### Misleading omissions

A misleading omission is where, taking account of all the circumstances:

- (a) a commercial practice omits or hides material information, provides material information in a way which is unclear, unintelligible, ambiguous or untimely or fails to identify its commercial intent; and
- (b) this causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

'Material information' is information which the average consumer needs, according to the context, to take an informed transactional decision and information which is required to be communicated by EU law (e.g. under the distance selling regulations). Where the communication enables the consumer to purchase (an 'invitation to purchase'), particular information will be material, such as the main characteristics of the product, the identity and address of the trader, the price or manner in which the price can be calculated, and, where applicable, additional delivery charges and the right of cancellation.

### Aggressive practices

A commercial practice is aggressive if:

- (a) it significantly impairs, or is likely to significantly impair, the average consumer's freedom of choice or conduct through the use of harassment, coercion or undue influence; and

- (b) this causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

## The 31 blacklisted practices

The CPUR Regulations contain a list of 31 practices which are in all circumstances prohibited. Examples are:

- Making an invitation to purchase at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer those products or equivalent products at that price for a period that is, and in quantities that are, reasonable (bait advertising);
- Falsely stating that a product will only be available for a very limited time in order to elicit an immediate decision and deprive consumers of sufficient opportunity to make an informed choice;
- Presenting rights given to consumers in law as a distinctive feature of the trader's offer;
- Promoting a product similar to a product made by a particular manufacturer in such a way as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not (this could catch certain look-alike products);
- Claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent;
- Describing a product 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;
- Creating the false impression that after-sales service is available in an EEA State other than the one in which the product is sold;
- Making persistent and unwanted solicitations by telephone, fax, email or other remote media except in circumstances and to the extent justified to enforce a contractual obligation.

## Who is the average consumer?

The CPUR Regulations apply to three types of average consumer:

- (a) one who is reasonably well informed, reasonably observant and circumspect;
- (b) an average member of a particular group to which a consumer practice is directed; and
- (c) an average member of a clearly identifiable group of consumers who are particularly vulnerable because of their mental or physical infirmity, age or credulity.

An example of the second type could be sub-prime borrowers and the third type could be blind people. Children could fall into both types.

### What are the sanctions against unfair commercial practices?

The enforcement authorities have a duty to enforce the Regulations. The authorities include the Office of Fair Trading and Trading Standards. Enforcers can take various measures, including:

- Education, advice and guidance;
- Referring the matter to another body, such as the Advertising Standards Authority;
- Requiring undertakings;
- Applying to court for a civil injunction and an order for publication of a corrective statement. The court may require the provision of evidence as to the accuracy of any factual claim;
- Prosecuting criminal offences.

### What are the criminal offences for unfair commercial practices?

An offence for breaching the general prohibition requires that the trader knowingly or recklessly engages in a commercial practice which contravenes professional diligence. A trader shall be deemed to be reckless if he engages in a commercial practice without regard to whether the practice contravenes professional diligence.

Breach of the other prohibitions (misleading actions and omissions and aggressive and blacklisted practices) are strict liability offences. However, there are two defences to these offences: due diligence and innocent publication of advertising.

#### *The due diligence defence:*

It is a defence for the trader to prove that:

- (a) the commission of the offence was due to a mistake, reliance on information supplied by another, the act or default of another, an accident or another cause beyond his control; and
- (b) he took all reasonable precautions and exercised all due diligence to avoid commission of such an offence.

#### *The innocent publication defence:*

It is a defence for a publisher of an advertisement (including a catalogue, circular and price list) to prove that:

- (a) he is a person whose business it is to publish or to arrange the publication of advertisements;
- (b) he received the advertisement for publication in the ordinary course of business; and

- (c) he did not know and had no reason to believe that its publication would amount to an offence.

### Defendants for offences under the CPUT Regulations

If a company commits an offence, the officers of the company e.g. the directors, managers and the secretary (whether formally appointed or acting as such) can also be prosecuted in certain circumstances. If another person is found to be at fault for the offence, he could also be prosecuted.

### What are the investigation powers of the enforcement authorities?

Enforcers have strong powers under the Regulations, including the power to:

- seize, detain and test any goods;
- enter premises without a warrant and, with a warrant, to enter premises (including dwellings) by force;
- require traders to produce documents;
- seize and detain documents;
- break open containers and vending machines.

## What does the new law say as regards B2B advertising?

The new B2B law is narrower in scope than the new B2C Regulations. Engaging in a misleading B2B advertisement amounts to a criminal offence. Comparative advertising generally has to meet the same criteria as under the old law. If it does not, there is no criminal offence but enforcement authorities can take other measures e.g. applying to court for an injunction.

### Misleading B2B advertising

Misleading advertising is advertising which deceives or is likely to deceive the traders to whom it is addressed and by reason of its deceptive nature is likely to affect their economic behaviour or injures or is likely to injure a competitor.

'Advertising' is widely defined as any form of representation which is made in connection with a trade, business, craft or profession in order to promote the supply or transfer of any goods or services.

### B2B comparative advertising

As far as the comparison is concerned, the advertisement must satisfy a number of conditions including:

- it is not misleading under the B2B Regulations or a misleading action or omission under the B2C Regulations;
- it compares products meeting the same needs or intended for the same purpose;
- it objectively compares one or more material, relevant, verifiable and representative features of those products;
- it does not create confusion;
- it does not discredit or denigrate; and
- it does not take unfair advantage.

### What are the penalties for misleading B2B advertising?

It is a criminal offence for a trader to engage in misleading B2B advertising. The maximum sentence (two years imprisonment and/or a fine), defences (due diligence and innocent publication) and potential defendants are the same as for the offences for unfair B2C commercial practices (see above).

### What other action can enforcement authorities take in relation to unlawful B2B advertising?

Enforcers have a duty to enforce the BPMM Regulations. Apart from prosecuting defendants for misleading B2B advertising (see above), they can apply to court for an injunction and may require the defendant to publish a corrective statement. Enforcers may instead accept undertakings from a defendant.

The powers of the enforcement authorities are similar to those under the CPUT Regulations (see above).

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## Practical tips

### How to reduce the risk of a breach?

The onerous criminal sanctions for breaching the Regulations mean that traders would be wise to assess their commercial practices as soon as possible. Risks can be minimised if traders have a procedure to ensure that commercial practices are created and reviewed with the Regulations in mind. This may be a two-step process: education and internal checking procedures.

### Education

The new Regulations may be a catalyst for not only training staff and managers on the new law, but also ensuring that directors are aware of their potential criminal liability. We can present or help you organise appropriate training sessions.

### Internal procedures and policies

An effective way to minimise risks is to have in place a formal checking procedure for commercial practices. We can help you establish this (if your company does not already have one). The procedure can include a form which must be completed before any commercial practice is implemented. For example, before advertising or marketing materials are released, a director and/or in-house lawyer should sign that he or she is satisfied that:

- All claims are fair, accurate and not misleading;
- The business possesses documents to substantiate the factual accuracy of all claims;
- All material information is being provided, as appropriate to the circumstances, to enable the average consumer to take an informed transactional decision;

- If there is an invitation to purchase, the advertisement includes the required material information;
- No content is unclear, unintelligible, ambiguous;
- The advertisement is not deceptive and does not create confusion;
- There are no blacklisted practices;
- All comparative claims comply with the specific comparative advertising criteria;
- The business has exercised all reasonable precautions and all due diligence to avoid the commission of an offence.

In the first instance, the person who is responsible for creating the advertisement should sign off that he or she is satisfied with the above points and be prepared to justify the position to the director/in-house lawyer. If this procedure is carried out properly, we consider that the risk of any criminal offence having been committed should be minimised. It will also help ensure that your commercial practices comply with the new law.

### What to do if you are being investigated or prosecuted?

Enforcement is likely to be by Trading Standards officers. We suggest that you ask the officer to produce evidence of his or her identity. If the enforcement officer makes certain requests e.g. to enter your premises, inspect and seize documents and/or goods, you should in general comply with their requests. However, this may need to be weighed against the risk of self-incrimination. Intentionally obstructing an officer carrying out enforcement activities or failing to comply with his or her requests can amount to a criminal offence. We recommend that you take legal advice when deciding how to react to a request from an enforcement officer.

### Contact us

If you would like further information, please get in touch with your usual Taylor Wessing contact, or,

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