



THE UNFAIR TRADING REGULATIONS - CLAMPING DOWN ON SHARP PRACTICES - AND MORE!

Urgent! The most dramatic changes to consumer protection law for a generation are almost upon us. All businesses dealing with consumers need to take note and review their practices.

The draft Consumer Protection From Unfair Trading Regulations 2007 implement the Unfair Commercial Practices Directive and are expected to be in force on 6 April 2008. They will entirely re-write UK consumer protection law.

Some law to explain - skip this paragraph if you are in a hurry. European Directives tell governments of Member States how to legislate. In this area, the idea is to create a single European market for "business without frontiers", so that consumers have the same protection whether they buy from the shop down the road or via the internet in another Member State. "Maximum harmonisation" means the Governments of the Member States must legislate up to the standard, and must not create or maintain law which goes further than the (maximum) standard set by the Directive. In some respects, UK law went further than the Directive allows. Therefore, large swathes of old law are being repealed. It really is a case of "out with the old, and in with the new".

The Regulations will prohibit businesses from misleading consumers or subjecting them to aggressive selling techniques, and will ensure that. To avoid liability, businesses supplying or marketing to consumers should review their business practices urgently to ensure that they comply.

The new legislation identifies and prohibits unfair commercial practices, and "misleading and aggressive commercial practices", but those terms do not have their normal meanings.

The General Prohibition

There is a general prohibition on unfair commercial practices. These are practices of an unacceptable standard. Examples are where the trader's conduct is "unprofessional" or "unfair", and which affect (or are likely to affect) the economic behaviour of a typical consumer. Such practices may take place before, during or after a transaction. It is of some help to traders that practices will be judged by their impact on "the typical consumer". That may include consumers who are particularly vulnerable to the practice or product in question – perhaps elderly, infirm or very young customers. Difficulty remains,

however, as the definition is vague.

Practices caught by the general prohibition may also constitute misleading and/or aggressive commercial practices.

Misleading and Aggressive Commercial Practices

A *Misleading Commercial Practice* is either false information or something which deceives, or is likely to deceive a typical consumer so he decides differently than he would otherwise have done.

Examples of misleading commercial practices include:

- Causing a typical consumer to confuse a trader's product, trade marks, trade names or other distinguishing marks with those of a competitor;
- Failing to comply with a commitment in a code of conduct;
- Hiding material information (for example relating to the main characteristics or features of the product); or
- Providing information in an unclear, unintelligible, ambiguous or untimely manner.

An *Aggressive Commercial Practices* significantly impair the consumer's freedom of choice or conduct or are likely to do so. They include



COMMERCE BULLETIN

harassment, coercion or undue influence.

To decide whether they are aggressive, commercial practices must be judged in context. The draft Regulations contain a list of factors to consider. These include:

- timing;
- location;
- nature or persistence of the practice;
- the use of threatening or abusive language or behaviour; or
- the exploitation by the trader of any specific misfortune or circumstance that is of sufficient magnitude to impair the consumer's judgment.

But that list is non-exhaustive. Particular care must, therefore, be taken as regards typical consumers who are in any way disadvantaged.

Practices that are always unfair

The Regulations also specify 31 practices that will always be considered unfair, regardless of the surrounding factors.

Examples of commercial practices that will always be unfair include:

- Falsely claiming to be a signatory of a code of conduct or to be approved by a recognised body;
- "Bait advertising" scams (advertising a product as a special offer without actually having it in stock, or having only a token stock);
- Displaying a quality mark without authorisation;

- Falsely stating that a product is available for a very limited time to get an immediate decision;
- Making personal visits to the consumer's home and ignoring the consumer's request to leave and/or stay away;
- Demanding payment for products supplied even though they were not ordered by the consumer in the first place (inertia selling);
- Establishing, operating or promoting a pyramid promotional scheme.

Trading Standards, the Department of Enterprise, Trade and Investment in Northern Ireland and the Office of Fair Trading will have a range of tools to ensure traders' compliance with the new Regulations. As part of their civil enforcement powers against traders, the enforcement authorities may bring actions under the Enterprise Act 2002.

Failure to comply is also a criminal offence for which the maximum penalties are a fine of £5,000 or two years' imprisonment. Individual managers may also be personally liable for the offence where they have colluded in or consented to their company's offence, or where the offence has occurred as a result of their neglect. The enforcement authorities have extensive investigative powers, including the power to make test purchases and to enter premises with or without a warrant.

We cannot overstate the importance of these new Regulations and the

need to plan for their inception. Whilst the guidance notes published by the Office of Fair Trading, the Department for Business, Enterprise and Regulatory Reform are some help, the new Regulations are complex and their implications for each business are very specific to the practices of that business.

All businesses should have their trading practices reviewed by a lawyer to ensure that existing business practices and new selling techniques being considered do not fall foul of the new prohibitions.

If you are concerned about these issues, please contact Martineau Johnson's Commerce Team. We will be happy to help and can advise you on how such practices and techniques can be modified to ensure compliance with the new Regulations.

We are also planning to hold seminars/training sessions on the Regulations shortly, and will let you have details of these.

Contact Details:

Nick Mallett - Partner

T: 44(0)870 763 1234

E: nick.mallett@martjohn.com; or

Peter Manford - Partner

T: 44(0)870 763 1390

E: peter.manford@martjohn.com.

Commerce Bulletin aims to introduce you to legal issues. It is not a substitute for taking appropriate specialist advice in individual cases. This may be photocopied for the use of colleagues within your company.