

Protecting Businesses from Misleading Advertising

The Business Protection from Misleading Marketing Regulations 2008; and The Consumer Protection from Unfair Trading Regulations 2008

The Consumer Protection from Unfair Trading Regulations 2008 (“Consumer Regulations”)

Since 26 May 2008, a number of existing laws (including most of the Trade Descriptions Act) have been replaced by the Consumer Regulations. The new Consumer Regulations ban traders in all sectors engaging in unfair commercial practices against consumers (mainly marketing and selling). The Consumer Regulations define unfair commercial practices mainly practices that are misleading (by action or omission) or aggressive.

The Consumer Regulations for the first time establish a general principle of not trading unfairly, using aggressive selling techniques or misleading consumers by helping to close loopholes previously exploited by ‘rogue traders’.

The Consumer Regulations aim to simplify consumer protection by streamlining existing UK regulations. They are intended to make life a lot tougher for those who do not comply, with the introduction of severe penalties and possible prosecution.

There is a list of 31 specific practices which are prohibited, as follows:-

- i. **Faking credentials** – If you are a trader, you cannot claim to be a signatory to a code of conduct when the trader is not.
- ii. **You are not who you say you are** – If you display a trust mark, quality mark or equivalent without having obtained the necessary authorisation.
- iii. **Your endorsement is not real** – If you claim that a code of conduct has an endorsement from a public or other body when it does not have.
- iv. **Not being true to the terms of an endorsement** - If you claim that a trader (including its commercial practices) or a product has been approved, endorsed or authorised by a public or private body when that is not the case, or making such a claim without complying with the terms of the approval, endorsement or authorisation.
- v. **Special offer – not in stock** – If you invite consumers to purchase products at a specified price, without disclosing the existence of any reasonable grounds you may have for believing that you will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a specific period, and in quantities that are, reasonable having regards to the product, the scale of advertising of the product and the price offered. This is known as bait advertising.
- vi. **Limited time only** – If you falsely state that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.
- vii. **Illegally selling goods** – If you state or otherwise create the impression that a product can legally be sold when it cannot.
- viii. **It’s not right** – If you present rights given to consumers in law as a distinctive feature of your offer.
- ix. **Over promise, under deliver** – If you falsely claim that a product is able to cure illnesses, dysfunction or malformations.
- x. **Promoting a product you don’t want to sell** – If you invite consumers to purchase products at a specified price and then:
 - (a) Refuse to show the advertised item to consumers; or
 - (b) Refuse to take orders for it or deliver it within a reasonable time; or
 - (c) Demonstrate a defective sample of it, with the intention of promoting a different product (known as bait and switch).

- xi. **Scare tactics** - If you make a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his or her family if the consumer does not purchase the product.
- xii. **Creating extra paperwork** – If you require a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his/her contractual rights.
- xiii. **Being honest about advertorials** – If you use editorial content in the media to promote a product where you have paid for the promotion (advertorial) without making that clear in the content or by images or sounds clearly identifiable by the consumer.
- xiv. **Faking goods** – If you promote a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not.
- xv. **Closing down sale** – If you claim that the trader is about to cease trading or move premises when you are not.
- xvi. **Pulling the wool over their eyes** – If you pass on materially inaccurate information on market conditions or on the possibility of finding a product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions.
- xvii. **Forcing the deal** – If you include in marketing material an invoice or similar document seeking payment which gives the consumer the impression that the consumer has already ordered the marketed product when the consumer has not.
- xviii. **A wolf in sheep's clothing** – If you falsely claim or create the impression that you are not acting for purposes relating to your trade, business, craft or profession, or falsely representing yourself as a consumer.
- xix. **Advertising to children** - If you include in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.
- xx. **Pyramid schemes** – If you establish, operate or promote a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme, rather than from the sale or consumption of products.
- xxi. **You can't promise a win** – If you claim that products are able to facilitate winning in games of chance.
- xxii. **Winner takes nothing** – If you claim in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent.
- xxiii. **Is it truly free?** – If you describe 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.
- xxiv. **No win situations** – If you create the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either: – There is no prize or other equivalent benefit; or take any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.
- xxv. **Forcing the sale** – If you create the impression that the consumer cannot leave the premises until a contract is formed.
- xxvi. **Overstaying your welcome** – If you conduct personal visits to a consumer's home and ignore the consumer's request to leave or not to return, except in circumstances and to the extent justified, under national law, to enforce a contractual obligation.
- xxvii. **Pestering the consumer** - If you make persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation.
- xxviii. **Using guilt to make sales** – If you explicitly inform a consumer that if the consumer does not buy the product or service, your job or livelihood will be in jeopardy.
- xxix. **Asking for payment when they didn't ask for the product** – If you demand immediate or deferred payment for, or the return or safekeeping of products supplied by you, but not solicited by the consumer except where the product is a substitute supplied in accordance with regulation 19(7) of the Consumer Protection (distance selling) Regulations 2000 (this is known as inertia selling).

- xxx. Talking the same language** – If you undertake to provide after-sales service to consumers with whom you have communicated prior to a transaction in a language which is not an official language of the European Member State where you are located, and then make such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction.
- xxxi. Misleading after-sales information** – If you create the false impression that after-sales service in relation to a product is available in a European Member State other than the one in which the product is sold.

The Business Protection from Misleading Marketing Regulations 2008 (“Misleading Regulations”)

The Misleading Regulations have replaced the Trade Descriptions Act insofar as that Act protects businesses and impact on all businesses in the UK, particularly those in retail, advertising and marketing. The Misleading Regulations came into effect on 26 May 2008.

Any advertising that misleads traders or comparative advertising which does not satisfy certain conditions are prohibited.

What is Advertising?

Advertising can be defined as any form of representation by a business to promote the supply or transfer of goods or services, including immovable property, rights and obligations. Advertising becomes misleading when it **deceives** or is likely to deceive businesses, and potentially affect their economic behaviour. Misleading advertising is banned under the Misleading Regulations. See sanctions below for breach of these Regulations.

Comparative Advertising

Comparative advertising has always been allowed under the law provided it was done as part of honest commercial practices. The Misleading Regulations contain certain conditions that now have to be met if you wanted to undertake comparative advertising. What you would be doing is directly or indirectly identifying a competitor or a competitor's product. Now if you engage in comparative advertising, your advertising will have to meet certain conditions. You cannot:-

- Compare products or materials not designed for the same purpose in your advertising
- Confuse traders about the origin of the advertiser and competitor
- Present imitations or replicas of products bearing a protected trade mark or trade name in your advertising
- Take unfair advantage of the reputation of competitors' trade marks, trade names, other distinguishing marks, or country of origin information; and
- Mislead traders or consumers

It is worth noting that if you are a body responsible for producing, monitoring or revising codes of practice, you will not be permitted to promote misleading advertising or comparative advertising that does not meet the prescribed conditions.

Protecting Consumers from Unfair Trading Practices

If you are a business in the UK that deal directly with, or sell goods to consumers, particularly if you are in retail, advertising or marketing you must ensure that you do not carry out unfair commercial practices as they are prohibited. Unfair commercial practices include:

- Activities that go against the requirements of professional diligence - honest marketing practices or good faith and is likely to alter the economic behaviour of the average consumer
- Misleading consumers - by providing false or deceptive information
- Misleading consumers by failing to give them important information or by giving information in an unclear way
- Using aggressive sales tactics that harass coerce or unduly influence a consumer to make a decision the consumer would not otherwise have made.

Sanctions

The Office of Fair Trading and Trading Standards may apply to the courts for injunctions to stop any breach of the Consumer or Misleading Regulations. It is a criminal offence if your advertising is misleading. It is recommended that you and your employees take all reasonable steps and carry out **due diligence** to ensure that your advertisements are not in any way misleading.

An offence will not be committed where you simply publish or arrange for the publication of advertising. This applies where you have no reason to suspect that the publication of a particular advertisement would amount to an offence. For instance, if you are the publisher of a magazine and you publish a prohibitive advertising.

© RT Coopers, 2008

Dr Rosanna Cooper is global head of RT Coopers. For more information contact tel: +44 (0) 207 488 2985; email: enquiries@rtcoopers.com ; website: www.rtcoopers.com