



If you have questions or would like additional information on the material covered in this Bulletin, please contact the Reed Smith attorney with whom you regularly work, or any of the following attorneys:

Katherine Holmes (London)
ddi: +44 (0)20 7772 5945
kholmes@reedsmith.com

Emma Lenthall (London)
ddi: +44 (0)20 7772 5870
elenthall@reedsmith.com

Sally Cook (London)
ddi: +44 (0)20 7816 3790
scook@reedsmith.com

June 2008

The information contained in this Alert is intended to be a general guide only and not to be comprehensive, nor to provide legal advice. You should not rely on the information contained in this Alert as if it were legal or other professional advice.

This Alert was compiled up to and including June 2008. All rights reserved.

Reed Smith is a trade name of Reed Smith Richards Butler LLP. Reed Smith Richards Butler LLP is a limited liability partnership registered in England and Wales with registered number OC303620 and its registered office at Beaufort House, Tenth Floor, 15 St Botolph Street, London EC3A 7EE. Reed Smith Richards Butler LLP is regulated by the Solicitors Regulation Authority. A list of the members of Reed Smith Richards Butler LLP, and their professional qualifications, is available at the registered office. The term partner is used to refer to a member of Reed Smith Richards Butler LLP or an employee of equivalent standing.

Reed Smith Richards Butler LLP is associated with Reed Smith LLP of Delaware, USA and the offices listed overleaf are offices of either Reed Smith Richards Butler LLP or Reed Smith LLP.

www.reedsmith.com

Consumer Protection from Unfair Trading Regulations 2008

A summary of the new regulations which came into force on 26 May 2008

The Consumer Protection from Unfair Trading Regulations 2008 (the Regulations) represent the biggest change to the UK consumer protection framework for almost 40 years and will put in place a more comprehensive framework for tackling traders who exploit loopholes in the existing consumer protection legislation.

Background

The Regulations implement the Unfair Commercial Practices Directive (2005/29/EC) (UCPD) which was adopted on 11 May 2005 and aims to harmonise unfair trading laws in EU member states in order to improve the functioning of the single market. The UCPD aims to establish a single regulatory framework with uniform rules to govern unfair commercial practices across the EU.

The Regulations introduce a general prohibition on traders treating consumers unfairly and make it a criminal offence to engage in unfair commercial practices.

The Regulations in detail

The Regulations cover the following areas:

General prohibition – regulation 3 – generally prohibits unfair commercial practices. This is intended to be a “catch all” provision covering unfair practices that do not fall within the more specific definitions below. The general prohibition is seen as an attempt to future-proof the legislation. Regulation 3 requires traders to meet an obligation of professional diligence which will be judged objectively by reference to honest market practice and good faith. Neither of these terms are defined in the regulations and the Office of Fair Trading (“OFT”), which is one of the enforcement bodies named in the Regulations, has not yet issued guidance as to how these terms will be applied, although it has suggested that it may do so in the future.

Misleading actions – regulation 5 – Commercial practices are misleading if they (a) give false information, or (b) present information in a way which deceives (or is likely to deceive) where in either case that causes (or is likely to cause) the average consumer to take a transactional decision that he/she would not otherwise have taken. False information may relate not only to the product or service itself, but also to the price or conditions of sale and the status of the trader.

Misleading omissions – regulation 6 – Commercial practices are misleading if, taking into account the circumstances of the commercial practice and the medium used to communicate it, they omit, hide, disguise or delay material information so as to cause the average consumer to take a transactional decision that he/she would not otherwise have made. Again, material information can relate to both the product or service and the wider information taken into account by the consumer in deciding to make the transaction.

One key area where this will apply is in internet trading where positive messages about a brand may be planted in blogs or forums or spread through viral advertising. If a brand owner engages in such activities without clearly identifying his interest in the goods about which he is commenting, this could be considered “falsely representing oneself as a consumer” which would amount to a criminal offence under the regulations. In practice, enforcement of the regulations in the field of internet trading is likely to be a challenge given the sheer scale and global nature of the internet.

Aggressive commercial practices – regulation 7 – An aggressive commercial practice is one which, by means of harassment, coercion or undue influence, significantly impairs (or is likely significantly to impair) the average consumer’s freedom of choice or conduct and so causes (or is likely to cause) the average consumer to take a transactional decision that he/she would not otherwise have made. Freedom of choice is not limited to decisions about whether

to buy, but will include other choices such as the terms on which the purchase is made and whether to exercise a contractual right in relation to that product.

Specific prohibitions – Schedule 1 – contains a list of 31 commercial practices that will always be unfair. These include displaying a quality mark without authorisation, falsely claiming to be a signatory to a code of conduct and inaccurately describing a product as free. (For clarity, this does not cover ‘Buy One Get One Free Offers’ but would capture ‘bundling’ situations when part of the bundle is described as free if in practice there is an expense in acquiring the larger bundle.)

The OFT has issued useful guidance setting out examples of specific prohibited conduct that will fall foul of the Regulations (see http://www.offt.gov.uk/shared_offt/business_leaflets/530162/oft979.pdf). With the exception of the practices set out at paragraphs 11 and 28 (misleading advertorials and exhortations directed at children) all the activities set out in Schedule 1 constitute a criminal offence.

Changes to existing legislation

The new Regulations repeal provisions in a number of laws in force in the UK where they are not compatible with the directive, including most of the **Trade Descriptions Act 1968** and the provisions on misleading price indications in sections 20-26 of the **Consumer Protection Act 1987**.

Existing European-derived consumer protection legislation such as the E-Commerce Regulations and the Unfair Terms in Consumer Contracts Regulations remains in force and applies in parallel. If the requirements of other Community law directly contradict the Regulations, the former will apply.

Scope

The Regulations apply to transactions involving individual consumers acting for purposes outside their business. Business-to-business commercial practices will be regulated by the Business Protection from Misleading Marketing Regulations 2008.

In contrast to previous legislation, the new Regulations use the word “product” to refer to goods and services including immovable property, rights and obligations and they are extended to intangible rights such as cancellation rights. Unlike the Trade Descriptions Act, the Regulations apply the same rules for both goods and services.

“Commercial practices” are more widely defined in the Regulations than in the UCPD to include all transactions between consumers and traders so that not only sales by traders to consumers but also purchases by traders from consumers (e.g. where a consumer trades in a used car) are covered.

Enforcement

The criminal offences may be enforced by the UK Office of Fair Trading. In Northern Ireland they will be enforced by the Department of Enterprise, Trade and Investment and in Scotland by the Lord Advocate. The Regulations give these bodies wide powers including the power to make test purchases and the power to enter and search premises and seize property. It is notable that entry, search and seizure powers may be exercised without a warrant unless the premises in question are used as dwellings.

The OFT, and other designated enforcement bodies (including sectoral regulators) also have powers through the procedure for the enforcement of Community infringements under Part 8 of the Enterprise Act 2002 to take preventative measures against businesses that do not comply with their legal obligations to consumers. Under Part 8, the above-mentioned bodies may apply to the courts for enforcement orders to prevent or stop the use of unfair commercial practices that may harm the collective consumer interest. However, where there are already effective systems of self-regulation in place, such as those administered by the Advertising Standards Authority and PhonepayPlus, complaints should initially be referred to these bodies.



Controversially, the Regulations do not provide for consumers or competing traders to bring a stand alone damages action against a trader who has engaged in prohibited practices. However, the Government has asked the Law Commission to undertake a project to consider how far a private right of redress for unfair commercial practices would simplify and extend consumer law.

Burden of Proof

The offences follow the general approach of strict liability, which requires proof only that a trader has engaged in a prohibited commercial practice. However, there will be no criminal offence where a trader engages in practices falling below honest market practice or good faith (regulation 3), unless the trader knowingly or recklessly engages in this conduct.

Sanctions/Penalties

Sanctions for the criminal offences include fines of up to the statutory maximum (currently £5,000) and /or imprisonment for up to 2 years. Where criminal offences are committed by corporate bodies, the Regulations provide for the prosecution of an officer (i.e. a director, manager, secretary or similar officer and anyone purporting to act as such) as well as the corporate body, if the offence has been committed with the consent or connivance of the officer or is attributable to any neglect on his/her part.

Breach of an enforcement order issued pursuant to Part 8 of the Enterprise Act could lead to up to two years imprisonment and/or an unlimited fine.

Impact for retailers

In order to comply with the Regulations, traders (including those trading and marketing online) will be required to take extra care in relation to the activities surrounding their transactions with consumers especially in the areas of marketing and advertising (including prize draws, promotions and endorsements, online word of mouth and buzz marketing), credit financing, and debt collection. Particular care should be taken to make sure these activities do not breach any of the wide-ranging prohibitions, especially where they are carried out by or delegated to third parties.