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Two key pieces of legislation recently entered into force

Unfair commercial practices: New rules regulating how you market your products and services enter into force

Victoria Hill and Claire Lowry

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Unacceptable conduct towards consumers and businesses is set to become a thing of the past, as any practice that misleads is now outlawed. Marketers will no longer be able to run spurious ‘closing-down sales’, hide promotional material within editorial content, or give the false impression that a consumer has already won a particular prize when in reality he or she has to pay out some money first.

Two key pieces of legislation recently entered into force, which will affect the way in which we all conduct business. Those who deal with the public should take note of the ‘Consumer Protection from Unfair Trading Regulations 2008’ (CPRs), which aims to ensure that we do not treat our customers unfairly, and the rest of us should take note of the ‘Business Protection from Misleading Marketing Regulations 2008’ (BPRs), which protect businesses from unfair commercial practices.

Background

These regulations implement the EU Unfair Commercial Practices Directive and aim to consolidate existing provisions while establishing consistent consumer protection laws throughout the European Union. They are important as they introduce into UK law a duty not to trade unfairly. Unfair commercial practices are now prohibited, and a list of those practices that will be considered unfair in all circumstances is provided under the new regime. In light of this, businesses must be careful to review their practices in order to market in line with these new regulations.

The CPRs incorporate European consumer protection requirements into domestic UK law. These new and more extensive regulations are designed to give enhanced protection to consumers and to ‘honest businesses’. The regulations aim to tackle ‘rogue traders’ and the unfair practices that some companies use when selling to consumers.

The BPRs have recently replaced the Trade Descriptions Act 1968, to the extent that it protected businesses. They make it an offence to mislead other businesses about goods and services, including immovable property, rights and obligations. Marketers should take note: the BPRs set out the conditions under which comparative advertisements are permitted.

All businesses that promote and do business with consumers will be affected

Who will be affected by the regulations?

All businesses that promote and do business with consumers will have to comply with the CPRs. In addition, those who act in the name of or on behalf of a business will also be affected. The regulations apply to online retailers, high street retailers and retailers that sell products through television ads or on the phone.

The BPRs are only applicable to business-to-business sales that have no potential to affect consumers.

What do the regulations actually prohibit?

Both sets of regulations place a general ban on conduct that is unacceptable towards consumers and businesses, respectively.

The CPRs

The CPRs

Section 2 of the CPRs introduces a general prohibition on businesses treating consumers unfairly. The wide scope of this duty is designed to avoid the need for new laws to cover every future scam.

What do they prohibit?

Section 3 of the CPRs contains the general prohibition on practices that are commercially unfair, in particular those that contravene the requirements of professional diligence or that are misleading. This general prohibition applies even if the information used to deceive the consumer is factually correct. This is because such commercial practices have the effect of misleading the average consumer into a transaction that they would not have otherwise pursued.

This is an 'honest practice' or 'good faith' provision designed to provide a safety-net level of protection for all consumers.

Who is the 'average consumer'?

The average consumer is identified as being reasonably well informed and reasonably observant, although exceptions are made for more vulnerable groups such as children.

What practices are considered to be misleading?

A practice can be misleading through its actions or omissions.

The definition of a misleading action is relatively wide and includes obvious practices such as businesses providing false information about a product or a service. A practice is also considered to be deceitful if the marketing of a product operates in such a way as to deceive or confuse the average consumer.

A misleading omission is a commercial practice that omits material information or provides information in a manner that is confusing to the consumer. The effect of the misleading omission is that it causes the average consumer to take a decision that they might not otherwise have taken.

What else is prohibited by the CPRs?

Aggressive commercial practices are also prohibited. These can include use of harassment, intimidation and coercion, which lead to the restriction of

A practice can be misleading through its actions or omissions

The CPRs prescribe a list of 31 unfair practices that are prohibited in all circumstances

the consumer's ability to make free choices. These aggressive practices harm the economic interests of the consumer, who would not have made the decision in the absence of the coercion or intimidation.

Are specific commercial practices now banned?

The CPRs prescribe a list of 31 unfair practices that are prohibited in all circumstances. Examples include the following.

- Falsely stating that a product will only be available for a very limited time so as to badger customers into an immediate decision, depriving them of sufficient time to make an informed choice.
- Dressing up rights that consumers already have by law as a distinctive feature of the trader's offer.
- Claiming that the trader is about to cease trading or move premises when he is not.

What do you need to do in the online world to stay on the right side of the law?

First, businesses are no longer allowed to advertise special deals for products when they do not have the necessary product stock to meet the potential demand generated by the advertisement.

Another practice that has been prohibited is the use of false 'limited time only' offers that trap unwary consumers into buying products quickly, without having the time or opportunity to make an informed choice.

Finally, businesses must be honest about advertorials. This is particularly relevant to the online world, where misleading fake blogs, or 'flogs', are created as marketing tools to promote a product.

The BPRs

The BPRs

The BPRs are intended to protect UK businesses from unfair commercial practices. If the business practices have a potential to affect consumers, the CPRs — and not the BPRs — will apply.

What do they prohibit?

The BPRs prohibit misleading business-to-business advertising and set out the conditions under which comparative advertising can take place. Advertising is widely defined in the BPRs, and adverts for all products, including financial services, are caught by the definition.

What practices are considered to be misleading?

Misleading advertisements that would harm a competitor or affect a trader's economic behaviour are prohibited.

The BPRs prescribe the conditions that advertisers must follow if they wish to comparatively advertise. Comparative advertising occurs when a business identifies a competitor or a product of a competitor within an advert. These conditions relate mostly to the fairness of the comparison between the products or competitors, but, in addition, the advertisement must not be misleading.

Misleading advertisements that would harm a competitor or affect a trader's economic behaviour are prohibited

If the comparative advertising does not meet these conditions, then the advertising is not permitted — regardless of whether customers or traders were not in fact misled and their consumer behaviour was not affected.

What will happen to businesses that don't comply?

A company that breaches these regulations commits a criminal offence. The penalties include fines of up to £5,000 and prison terms for directors and managers.

Who will enforce the regulations?

The regulations provide trading standards officers with a wide range of enforcement tools, including both criminal and civil sanctions. These include prosecution and obtaining undertakings and injunctions. Officers' powers of inspection and seizure of evidence will remain the same as under the old law, but it is worth noting that the Office of Fair Trading can also take direct enforcement action under the regulations.

When do the regulations come into force?

Both sets of regulations came into force on 26 May 2008.

What do you need to do?

The CPRs and BPRs introduce a broad duty to trade fairly and in a manner consistent with professional diligence. Now is the time to consider your advertising procedures and commercial contracts with customers, so that you can be confident that your professional practice complies with the new regulations.

Should you be in doubt or require any further information, the business and technology department at Berwin Leighton Paisner is well placed to help you formulate consumer and business-to-business policies that comply with the new regulations.

Victoria Hill, trainee, Business & Technology Services
victoria.hill@blplaw.com

Retail: French courts rule that eBay is responsible for policing brands

Ian De Freitas

eBay fined

eBay has been fined euro 35.68m by a French court for not doing enough to stop the sale of counterfeit goods through its auction site. The ruling is a surprise because it had always been thought that internet auction sites were immune from such claims, provided that they acted quickly to remove fake goods from sale once notified by brand owners.

Who is responsible for policing brand protection online?

In addition, the French court fined eBay a further euro 3.19m for breaching selective distribution agreements when facilitating the sale of genuine branded goods.

The claims were brought by six brands within the LVMH group. eBay has said that it will appeal the ruling.

France has always been a tricky jurisdiction for those trading over the internet. In 2000, a French court banned the sale of Nazi memorabilia through Yahoo's website. More recently, a French court ordered eBay to pay Hermes euro 20,000 for its role in the sale of three counterfeit handbags. In addition, a similar case is before the New York court, this time brought by Tiffany against eBay.

What is at issue here is the fundamental question of who is responsible for policing brand protection online. Is it the brand owners or is it the online auction sites? Expect this case to run all the way up to the European Court of Justice.

Ian De Freitas, partner, Intellectual Property
ian.defreitas@blplaw.com.

Court rejects freedom of expression arguments in domain name case

Ian De Freitas

It is a common problem to find a protest website set up using the target company's name as part of its domain name. A new ruling from the English High Court has strengthened the hand of companies trying to retrieve domain names from such cybersquatters.

Patel v Allos Therapeutics Inc.

Patel v Allos Therapeutics Inc. involved a Mr Patel who had registered the domain allostherapeutics.com. Allos Therapeutics Inc. is a global biopharmaceutical company. Mr Patel's intention was to set up a protest website critical of Allos.

Using the domain name dispute resolution process set up by the World Intellectual Property Organisation, Allos successfully applied to have the domain name transferred to them. Before the transfer took place, Mr Patel, however, applied to the court to overturn this decision. The court decided that Mr Patel had to show that he had some right to retain the domain name in order to succeed (the court being unable to act as an appellate body or to judicially review the decision to transfer the domain name).

The court dismissed Mr Patel's claim that the domain name transfer interfered with his right to freedom of expression set out in Article 10 of the European Convention on Human Rights. While recognising that it is generally considered to be in the public interest to promote free speech on the internet, that right has to be balanced with a trademark owner's right to freely use its own name. In registering a domain name

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without any indication that it would point to a protest website, and in using Allos' trade mark on the website, Mr Patel was posing as Allos in order to attract people to his website and intended thereby to confuse the public. Seeking to trick people in this way could not be a legitimate exercise of free speech.

This case further strengthens the hand of trademark owners in domain name disputes by confirming that the English court will not act as an appellate body from the WIPO dispute resolution process and by curtailing how protest websites can use domain names. The door is still open, however, to an argument that a domain name that incorporates a company name but also makes it clear that it is pointing to a protest website could be protected by free speech principles.

Ian De Freitas, partner, Intellectual Property
ian.defreitas@blplaw.com