The following articles were contributed by members of Osborne Clarke's Marketing Law team. The team is recognised as one of the UK's leading practices in this area of law and advises a wide range of marketing agencies and brand owners. Any queries arising from this article should be directed by email to Stephen Groom (stephen.groom@osborneclarke.com)

Who should regulate consumer credit advertising and sales?

Zoe Hare

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The Financial Services Consumer Panel (*FSCP*) has urged the Financial Services Authority (*FSA*) and Government to change the rules in relation to consumer credit regulation.

The FSCP has issued a paper in response to the Turner Review stating that the regulation of consumer credit should be passed from the Office of Fair Trading (*OFT*) to the FSA.

Consumer regulation responsibility split between OFT and FSA

At present, there is a split in consumer regulation between the OFT and the FSA, although they do work together to ensure a consistent approach. In a joint statement published in May 2008, the FSA and OFT set out the division of responsibilities in relation to the Consumer Protection from Unfair Trading Regulations 2008.

The FSA's responsibilities were to consider the fairness of commercial practices with regard to financial services of FSA-authorised firms and appointed representatives undertaking regulated activities (under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001). The OFT stated that it was responsible for unfair commercial practices in financial services where the activities were governed by the Consumer Credit Act 1974 or where the issue did not relate to an FSA-authorised firm or appointed representative.

Possible extension of FSA's role

The FSCP's view is that since the majority of regulation in the financial services sector is carried out by the FSA, this role should be extended to encompass the regulation of consumer credit. Adam Philips, Acting Chairman of the FSCP, has said that the FSA 'should regulate all aspects of business of the firms it authorises, including provision of consumer credit, which is presently regulated by the OFT'.

The present split could cause confusion, the FSCP says, as it may be unclear to some which body regulates which areas. The key issues raised by the FSCP in its paper are:

1. the FSA must deliver on its promise to increase its supervision of how firms conduct their business;
2. the FSA must increase its scrutiny of firms' business models;
3. the FSA should become a more transparent regulator;
4. the FSA should regulate all aspects of business of the firms it authorises, including provision of consumer credit, at present regulated by the OFT; and
5. the FSA should take a tougher stance on enforcement.

Why this matters

The consolidation of all financial services regulation will certainly create a smoother approach that would be more understandable to financial services institutions and consumers.

Changes intended to drive responsible lending

The FSCP is also hoping that this will result in financial services institutions lending more responsibly, and that it would help to reduce excessive debt caused by such lending. The FSCP believes that a dramatic change of the kind suggested would be beneficial to consumers.

However, there are obvious flaws with this approach. Consumer credit activities are not only carried on by FSA authorised firms. The FSCP proposals only seem to relate to FSA-authorised firms. Therefore, it appears that non-FSA-authorised firms will remain under the present regime with the OFT. This may lead to inconsistent approaches between the OFT and the FSA. In particular, the FSA has notoriously stringent rules by which its authorised firms must abide.

It remains to be seen whether the views of the FSCP are taken into account and whether this area of regulation is radically changed.

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Data protection

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Law stated as at: 27 July 2009

What happened

The Information Commissioner's Office (ICO) published its Annual Report for 2008/09 on 6 July 2009. The report summarises the ICO's activities over the past year and the way it has informed and ignited debate on privacy issues, as well as providing detailed information on the cases and complaints that it has handled. Of particular interest is the focus on marketing activities as a source of complaints to the ICO.

Complaints about marketing communications

Top reasons for complaints identified

As part of the Annual Report, the ICO has published statistics on the top-10 reasons for complaining. According to the report, complaints about email, automated calls, live phone calls and SMS account for 27 per cent of the complaints it receives.

Direct marketing businesses still have some work to do

Direct marketing responsible for high level of complaints

The ICO has also published a top-10 list of the business areas that are generating the most complaints, with direct marketing businesses being

the second largest cause for complaints, accounting for 14 per cent. This indicates that the marketing industry still has some work to do in terms of complying with the Data Protection Act and Privacy and Electronic Communications Regulations (the 'PEC Regs').

So what are organisations getting wrong?

There are no more details in the report on the exact nature of the complaints, but enforcement action by the ICO to date gives a flavour of the specific reasons why some organisations get into hot water about their marketing methods. For example, the Liberal Democrats were issued with an Enforcement Notice in September 2008 for making automated calls, which constituted direct marketing, to individuals who had previously not given their consent to receive calls. Weatherseal Holdings was also served with an Enforcement Notice after it failed to comply with undertakings it has given to comply with the PEC Regs. These related to unsolicited telephone calls made on behalf of the company to individuals who were registered with the Telephone Preference Service and had also made complaints to Weatherseal directly about continuing to receive such calls.

The Advertising Standards Authority has also been, and continues to be, active in this area via the obligations in the Committee of Advertising Practice Code (the CAP Code) relating to data protection compliance. Earlier this year, adverts run in the national press by Direct Home Shopping Brands Limited, trading as Kaleidoscope Limited, were held to have breached the CAP Code because they could not get opt-in consent using the wording in their advert.

An overview of electronic marketing rules

The rules for marketing by email, phone or SMS, and by fax are set out in the PEC Regs, and essentially (and very briefly) require the following:

Rules for communications to individuals

- For unsolicited marketing sent to individuals:
  - by fax, email or SMS: organisations must get opt-in consent unless it is marketing by email or SMS where what's known as 'soft opt-in' consent will be sufficient. This can be used where the email address or mobile number has been fairly and lawfully obtained in the context of a sale or negotiation for similar goods or services to those that are being marketed and the recipient is given the opportunity to opt-out free of charge each time they receive a communication.
  - by post and phone: permitted unless the individual opts-out

Rules for communications to corporate recipients

- For marketing sent to corporate recipients:
  - by all digital and non-digital methods: permitted unless the recipient has opted-out having been pre-notified about the possibility of receiving marketing materials from the organisation which sends them.

Rules for automated call systems

- For marketing using automated call systems prior consent must be obtained whether the calls are directed at individuals or corporate subscribers.

Before marketing to individuals or corporate recipients by fax or telephone, the Telephone Preference Service and Fax Preference Service should be screened to ensure that people on those lists do not receive marketing communications by these means. More detailed guidance for marketers is available on the ICO's website.

The new information commissioner and increased enforcement action?

The report is especially significant because it is the last report issued by Richard Thomas as Information Commissioner.

Christopher Graham has now taken, over having previously been the Director General of the Advertising Standards Agency (ASA). If the ASA's past activity levels in bringing enforcement actions for failure to obtain correct of marketing consents are anything to go by, we can expect Mr Graham to encourage his colleagues at the ICO to actively enforce against non-compliance with the PEC Regs. A new fee structure for data protection notification also comes into force on 1 October 2009, allowing the ICO to increase the fees payable by large organisations to £500. This is likely to boost the ICO's budget and fund additional enforcement action.

Why this matters

ICO likely to focus on marketing in coming year

The Annual Report shows that marketing is a significant problem that is likely to lead to a special focus on this area in 2009/10. With the ICO's increased income plus a new commissioner at the helm, together with the public's higher awareness of their rights, it is more important than ever to make sure that your organisation complies with its privacy obligations.

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Further changes proposed to UK consumer law

Nick Johnson

Law stated as at: 3 August 2009

What happened

White paper on reshaping consumer protection legislation

The Department for Business, Innovation and Skills (BIS — formerly 'BERR') has issued a 102 page White Paper outlining its proposals for reshaping consumer protection legislation.

The document ('A Better Deal for Consumers — Delivering Real Help Now and Change for the Future') focuses on four main themes:

- help for vulnerable consumers;
- consumer credit;
- better enforcement and information for consumers; and
- modernising consumer law.

Highlights

Key highlights for advertisers include the following proposals:

- a new approach to enforcement that encourages businesses to compensate consumers appropriately for consumer protection law breaches;
- the appointment in 2010 of a new 'Consumer Advocate' to champion the cause of groups of consumers who have suffered a loss at the hands of a business, and who would have rights to bring collective action on behalf of consumers — a form of 'class action';
- a new strategy and a new specialist team for internet enforcement on consumer issues;
- implementation of the Consumer Credit Directive, including new disclosure requirements;
- greater clarity as to how consumer laws apply to digital products;
- a review of the law on misrepresentation and duress; and
- implementation of the proposed EU Consumer Rights Directive.

Why this matters

Proposed legislation raises prospect of class actions

While the changes set out in the document are still only at proposal stage, they may be a good indication of which way the wind is blowing.

In particular, the proposal for a Consumer Advocate is one to keep tabs on. This development could significantly increase the risk associated with advertising claims that are not fully substantiated. Under the current regime, the prospect of individual consumers seeking to sue on an individual basis for misrepresentation can often be regarded as a low or even negligible risk; the new proposals raise the prospect of a potential form of class action litigation. Accordingly in scenarios where to date the key risk may have been an upheld ASA adjudication, all of a sudden there could be a major financial risk too. This will make the need for proper legal clearance of advertising claims more acute than ever before.

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