HOUSE OF COMMONS LIBRARY

BRIEFING PAPER
Number 4678, 3 March 2020

Consumer protection: Unfair Trading Regulations 2008

By Lorraine Conway

Contents:

Contents

Summary

The Consumer Protection from Unfair Trading regulations 2008, known as the 'Unfair Trading Regulations', came into force on **26 May 2008**, and implement in the UK the *Unfair Commercial Practices Directive* (2005/29/EC). The Regulations have significant importance in the marketing and selling of goods and services.

The Unfair Trading Regulations impose a general prohibition on traders in all sectors from engaging in unfair commercial practices with consumers. Specifically, the Regulations protect consumers from unfair or misleading trading practices and ban misleading omissions and aggressive sales tactics. It follows from this that there is a duty to trade fairly and honestly with consumers. In the main, the Regulations apply to "business to consumer" practices. Amendments to the Unfair Trading Regulations came into force on 1 October 2014, giving consumers new rights of redress if they have been the victim of misleading actions or aggressive selling.

The purpose of this Commons briefing paper is to provide a brief overview of the Regulations and their usefulness to consumers.

1. Background

The Unfair Trading Regulations implement in the UK the Unfair Commercial Practices Directive 2005/29/EC (UCPD), which was adopted on 11 May 2005. The Directive is concerned with unfair business-to-consumer commercial practices.[1] Prior to the adoption of this Directive, each Member State had its own laws on unfair commercial practices. The Directive imposes common rules, to give consumers the same protection against unfair practices and rogue traders wherever they are buying.

For the purposes of the Directive, a "commercial practice" refers to activities linked to the promotion, sale or supply of a product to consumers. It covers any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) which is carried out by a trader. A commercial practice may be deemed "unfair" according to specified criteria. The four key elements to the Directive are summarised in **Box 1** below.

Box 1: The Unfair Commercial Practices Directive

There are four key elements to the Directive:

1. The Directive contains a general clause defining practices which are **unfair** and therefore **prohibited**.

2. The Directive sets out two main categories of unfair commercial practices: "misleading practices" and "aggressive practices".

   A commercial practice is misleading if it either;

   - contains false information and is therefore untruthful, or
   - in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is correct, and
   - causes or is likely to cause the consumer to take a transactional decision that he would have otherwise not taken

   A commercial practice is aggressive if "the average consumer's freedom of choice or conduct is significantly impaired." For example, a commercial practice that uses harassment or coercion (including physical force or undue influence). It is envisaged that most unfair commercial practices would be categorised as either misleading or aggressive practices.

3. If a commercial practice is neither misleading nor aggressive, it may still be regarded as unfair and prohibited if:

   - the practice is contrary to the requirement of professional diligence;
   - the practice materially distorts or is likely to distort the average consumer's economic behaviour

[1] OJ No L149, 11.6.2005, p.22

For the purposes of the Directive, "professional diligence" is taken to mean: "*the special skill and care which a trader may reasonably be expected to exercise, commensurate with honest market practices and/or general principle of good faith in the trader's field of activity.*"

To "materially distort the economic behaviour of consumers" is taken to mean using a commercial practice to impair the consumer's ability to make an informed decision.

4. Finally, certain commercial practices are simply banned outright under the Directive. A **blacklist** sets out various schemes that are in all circumstances considered unfair. It includes:

- Trust marks and codes – claiming to be a signatory to a code of conduct when the trader is not.
- Bait advertising – for example, a trader falsely stating that a product will only be available for a limited time).
- Promoting fake "free offers "that simply do not exist.
- Advertising products which cannot be sold legally
- Giving a misleading impression of consumers' rights
- Direct exhortations to children to buy advertised products.
- Pyramid schemes, where compensation is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of products.
- The use of emotional pressure by a trader to secure a sale.
- Creating the false impression that the consumer has already won or will win a prize, when in fact there is no prize
- Inertial selling (i.e. demanding immediate or deferred payment for products supplied by the trader but not ordered by the consumer).

It should be clear from **Box 1** that the Directive is wide in scope, it applies to all business sectors. However, it only seeks to protect the "economic interest" of the consumer; it does not protect other interests such as health or safety or issues of taste and decency. Importantly, competition law is beyond the scope of the Directive.

2. The Unfair Trading Regulations

Following consultation in May 2007, and the publication of draft regulations in March 2008, the Consumer Protection from Unfair Trading regulations 2008, known as the "Unfair Trading Regulations", came into force on 26 May 2008. Commenting on the Regulations, Gareth Thomas, then Consumer Affairs Minister, said:

> "This law is good news for consumers, honest businesses and Trading Standards and the OFT, which will enforce it.
>
> It delivers better protections for consumers, cuts red tape and puts in place a simpler and clearer consumer law that will be easier to interpret and enforce."[2]

There are three main sections to the Unfair Trading Regulations, each with a separate objective. These are as follows:

- impose a general ban on unfair commercial practices;
- ban misleading and aggressive practices (commercial practices to be assessed in light of the effect they have, or are likely to have, on the average consumer); and
- impose a list of those practices which are unfair and thus banned in all circumstances (as set-out in Schedule 1).

Crucially, the Unfair Trading Regulations apply before, during and after a consumer contract is made. Detailed information on each objective is provided below.

2.1 General prohibition of unfair commercial practices

First and foremost, **regulation 3(1)** of the Unfair Trading Regulations prohibit all unfair commercial practices. Under paragraphs 3(3), a commercial practice is unfair if:

> 3(3)(a) it contravenes the requirements of professional diligence; and
>
> (b) it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product.

In addition, under paragraph 3(4), a commercial practice is unfair if:

> (a) it is a misleading action under the provisions of regulation 5;
>
> (b) it is a misleading omission under the provisions of regulation 6;
>
> (c) it is aggressive under the provisions of regulation 7; or
>
> (d) it is listed in Schedule 1.

In effect, the Unfair Trading Regulations impose on traders a general statutory duty to behave honestly and in good faith with consumers. To

---

2 Department for Business Enterprise and Regulatory Reform (now BEIS), "Unfair selling rules laid in Parliament," press notice 2008/048, 3 March 2008, [online] (accessed 3 March 2020)

this end, the Regulations prohibit traders from engaging in unfair commercial practices which harm consumers' economic interests.

For the general prohibition to apply, the trader's practice must be unacceptable when measured against an "objective standard" and must also have (or be likely to have) an effect on the economic behaviour of the "average consumer". The second condition is likely to be met if, for example, because of the practice, the average consumer buys a product they would not otherwise have bought, or do not exercise cancellation rights when otherwise they would have done so. In other words, a commercial practice may be "unfair" if it (or its presentation) is likely to deceive the average consumer, even if the information is factually correct.

2.2 Misleading and aggressive practices

The general prohibition on the use of unfair commercial practices is supplemented with more detailed rules (**regulations 5** to **7**) on **misleading actions** or **omissions**, and on **aggressive practices**, where any of these would cause or be likely to cause the "average" consumer to take a different transactional decision. For a commercial practice to be unfair it must harm, or be likely to harm, the economic interests of the average consumer.

Under the Regulations, traders are not allowed to use misleading tactics to entice consumers to buy their goods or services. An example of a **misleading action** might be a trader advertising goods at an attractive price to draw in customers, knowing full well that the goods are not in stock.

A **misleading omission** is where a trader deliberately misses out key information that the consumer might need to make an "informed" decision about the purchase of a good or service. All consumer information must be displayed clearly. For the purposes of the Regulations, it is considered misleading if a trader does any of the following:

- omits material information that the average consumer needs, according to the context, to make an informed transactional decision;
- hides or provide material information in an unclear, unintelligible, ambiguous or untimely manner; or
- fails to identify the commercial intent of the commercial practice if not already apparent from the context

In effect, the obscure presentation of consumer information will be treated as a misleading omission.

Finally, a commercial practice may be considered **aggressive** if the average consumer's freedom of choice or conduct is significantly impaired. Aggressive sales techniques might include the use of harassment, coercion or undue influence. "Undue influence" is generally taken to mean something that applies pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision.

To sum-up, if a trader is accused of misleading consumers or acting aggressively, it's not enough to simply demonstrate the activity. It must also be shown that the practice influenced the consumer's decision. This does not mean that the consumer must have entered into a contract, just that their actions were influenced in some way. For example, depending on the exact circumstances, it could be enough that the consumer contacted the trader or decided to visit the trader's shop.

2.3 Blacklist of banned commercial practices

In addition to tackling misleading and aggressive sales practices, **Schedule 1** to the Regulations lists various commercial practices which, because of their inherently unfair nature, are prohibited in all circumstances. The aim of this blacklist is for traders to be clear about what type of commercial behaviour is prohibited. Evidence of their effect, or likely effect, on the "average" consumer is not required in order to prove a breach of one of these outright banned practices. By way of example, the list of banned practices includes the following:

- false free offers - describing a product as "free", "without charge" or similar if the consumer must pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item;
- faking credentials – for instance, a trader claiming to be a signatory to a code of conduct when he is not;
- bait advertising – enticing the consumer with advertising around special prices when the trader knows that he cannot offer that product, or only has a few in stock at that price;
- bait and switch – luring the consumer with attractive advertising of one product at a special price, with the intention of selling the consumer something else;
- limited offers – falsely stating that a product will only be available for a limited time, or that it will only be available on certain terms for a very limited time, in order to force the consumer to enter into a contract;
- pressure selling – creating the impression that the consumer cannot leave the premises until a contract is formed; and
- aggressive doorstep selling – in particular, a salesman conducting personal visits to the consumer's home and ignoring the consumer's request to leave or nor to return.

2.4 Redress for consumers

In October 2014, amendments were made to the Unfair Trading Regulations to give consumers new rights of redress if subject to a misleading action or aggressive selling by a trader.[3]

---

[3] Consumer Protection (Amendment) Regulations 2014

For these new redress rights to apply, two conditions must be met:

- First, the consumer must have entered into a contract. This is different from the rest of the Regulations where it is enough to show that the consumer took some other kind of transactional decision. (For example, deciding to go into a particular shop because of a misleading advertisement in the window.)
- Second, the misleading action must be a significant factor. In effect, if the consumer entered into a contract as a result of a misleading action or aggressive selling, he/she will need to show that this was at least a significant factor in their decision to enter into the contract.[4]

If both conditions are satisfied, a consumer may have the benefit of one or more of three new redress rights (much would depend on the exact circumstances). They are as follows:

- A right to undo the contract - The consumer may be able to end the contract provided they haven't fully consumed goods or digital products or received a service in full. To receive a refund the consumer must have exercised their right to unwind the contract not more than 90 days from when they received the goods, or the service commenced. This is on the provision that any goods supplied to the consumer are made available for collection by the trader.[5]

- A right to a discount on the price paid – The consumer may be able to seek a discount in respect of past or future payments due under a contract. In practice, the "seriousness" of the trader's breach would depend on the nature of their behaviour; the impact this has had on the consumer; and how long it has been since the consumer signed the contract.

- An entitlement to seek damages – In certain circumstances, a consumer may be able to claim damages if they have incurred a financial loss as a result of the trader's actions. A claim might also be made if the consumer has suffered "alarm, distress or physical inconvenience or discomfort" as a result of the trader's actions (again, much would depend on the circumstances). However, a trader may have a defence to a claim for damages, for example, if they can demonstrate that their actions were accidental, due to a mistake or to factors outside their control.

2.5 Enforcement of the Unfair Trading Regulations

Local Authority Trading Standards Services (TSS) enforce the Regulations. A wide range of sanctions are available depending on the seriousness of the offence. However, this does not mean that civil or criminal enforcement action must be taken in respect of each and every

[4] Department for Business Innovation and Skills (now BEIS), "Guidance on the Consumer Protection (Amendment) Regulations 2014", August 2014, [online] (accessed 3 March 2020)

[5] Depending on the exact circumstances, any related finance agreement entered into by the consumer may be cancelled

infringement. It is important to note that the Unfair Trading Regulations sit alongside other protections for consumers

3. Help and information

An aggrieved consumer may need to seek proper legal advice on whether the Unfair Trading Regulations apply to the circumstances of their case. The Library's briefing paper, "Legal help: where to go and how to pay" (CBP 3207) may assist. In addition to a solicitor, legal advice might be sought free of charge from the consumer's local citizens Advice Bureau (CAB). The Citizens Advice website contains a useful search tool to help people find their nearest CAB.

BRIEFING PAPER
Number 4678
3 March 2020

About the Library

The House of Commons Library research service provides MPs and their staff with the impartial briefing and evidence base they need to do their work in scrutinising Government, proposing legislation, and supporting constituents.

As well as providing MPs with a confidential service we publish open briefing papers, which are available on the Parliament website.

Every effort is made to ensure that the information contained in these publicly available research briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

If you have any comments on our briefings please email papers@parliament.uk. Authors are available to discuss the content of this briefing only with Members and their staff.

If you have any general questions about the work of the House of Commons you can email hcenquiries@parliament.uk.