



Consumer protection from unfair trading (but don't tell anybody)

You may be aware that the Consumer Protection from Unfair Trading Regulations (CPUTR) come into force on 26 May 2008. They have been described by the Department for Business Enterprise and Regulatory Reform (BERR) as being the biggest change in the consumer protection framework for 40 years.

If this is a revelation that has so far passed you by, don't be surprised; there are many businesses out there that are only just waking up to the potential effect of these new regulations.

This may be due to the general way in which the regulations apply. Over the past few years a number of EU directives have been implemented into British Law that deal with specific areas or ways of trading. The CPUTR incorporate the Unfair Commercial Practices Directive, which was deliberately designed to introduce a general prohibition on unfair commercial practices across all business sectors. In other words, this was designed as a catchall directive to fill in the gaps left by the earlier specific directives and to ensure a general standard of fair trading across the EU.

Consequently, large numbers of prescriptive rules dealing with specific areas of trading are being abolished or amended. Obscure legislation, such as the Fraudulent Mediums Act 1951, the Mock Auctions Act 1961 and the Tourism (Sleeping Accommodation Price Display) Order 1977 are being swept away. Perhaps more relevant on a daily basis are the changes to important trading controls such as the Trade Descriptions Act 1968, the Fair Trading Act 1973 and the Consumer Credit Act 1974. There is unlikely to be a business in the UK that is not directly or indirectly affected by these changes.

So, what is coming in place of all these old regulations? The new regulations are principles-based and set out a number of broad rules, which provide three tiers of protection for consumers as follows:

1. They prohibit practices that are contrary to "professional diligence" – that is, the standard of behaviour, which a trader needs to exercise in order to demonstrate either "honest market practice" or "good faith" in their chosen field of activity
2. Secondly, misleading practices (actions and omissions) and aggressive practices (defined as harassment, coercion or undue influence) are outlawed

For both of these tiers, an offence is only committed if the practice in question can be shown to have had a negative effect: such as by materially distorting the behaviour of an average consumer or by causing them to take a transactional decision they would not otherwise have done. However:

3. There are also a number of specific practices (31 in total) that are considered sufficiently serious to be prohibited in all circumstances, regardless of whether they have had any effect on consumer behaviour

As indicated, the rules are (deliberately) broad and many businesses will undoubtedly struggle to come to terms with how the concepts affect their own behaviour. The regulations do not just relate to a purchasing decision by a consumer; they are designed to have an impact before, during and after a purchase. Indeed, they are designed to have effect even if there never is a purchase at all. As an example of just how wide this can be, the OFT have stated that the regulations even extend to cover the way in which unpaid debts are collected from consumers.

One key negative impact is that the regulations are not only subject to civil sanctions (being enforceable by the OFT, Trading Standards and similar bodies under part 8 of the Enterprise Act 2002) but also carry substantial criminal penalties, amounting in the most serious cases to unlimited fines and/or two years in prison. There are "due diligence" defences available in most cases but a trader who fails to give proper consideration to the requirements of "professional diligence" risks being guilty of "reckless" engagement in a practice that contravenes the regulations.

BERR have stated that the majority of businesses that deal fairly and honestly with their customers will not have to change their existing behaviour but will benefit because they will no longer have to face unfair competition from those who use underhand tactics. The OFT is also on record saying that it is not going to be interested in technical breaches of the regulations that do not have an adverse effect on consumer behaviour (though don't forget those 31 specific practices).

Most importantly, the regulations themselves state that they are not intended to affect "the common and legitimate advertising practice of making exaggerated statements which are not meant to be taken literally". That will, no doubt, come as a relief to many traders.

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