

Misleading advertisements

This factsheet explains when and how the Office of Fair Trading (the OFT) can act under the Control of Misleading Advertisements Regulations 1988 (the Regulations)¹. It should not be taken as a full interpretation of the law or regarded as a substitute for the Regulations themselves.

There are also details of new powers given to the OFT by the Enterprise Act 2002. Part 8 of the Enterprise Act enables action to be taken against contraventions of a range of legal requirements that protect the consumer, including the Regulations. The Act leaves the OFT's role in relation to misleading and comparative advertising fundamentally unchanged, but its enforcement provisions differ in certain respects from those of the Regulations. More importantly, these are shared with certain other enforcement agencies. Other bodies can now, provided they consult with the OFT, also take action against advertisements which fall foul of the Regulations and harm the collective interests of consumers. Part 8 of the Enterprise Act is the subject of other guidance material published by the OFT.

¹ The reference is to the regulations as amended. The Regulations implement EC Directives 84/450 and 97/55 on misleading and comparative advertising.

THE OFT AND THE REGULATIONS

The Regulations are designed to protect consumers and traders from the effects of advertisements that mislead or make unacceptable comparisons. The OFT's main role is to support and reinforce existing advertising controls, not replace them. Where there is a complaint, the Regulations give the OFT power to step in if it thinks it appropriate that the continued publication of advertisements should be stopped by means of a court order. However, the OFT cannot seek compensation or other redress for any complainant.

Even where the OFT has the power to intervene, the bulk of complaints will continue to be handled through existing channels established prior to the Regulations. The main channels are:

- **Local trading standards (or consumer protection) services (TSSs):** TSSs have long had powers to act against false trade descriptions and misleading price indications. By virtue of Part 8 of the Enterprise Act 2002, they now share the OFT's powers to tackle advertising which is harmful to consumers generally. London boroughs, metropolitan boroughs, unitary authorities,

county councils and Scottish regional and island councils all have TSSs. In Northern Ireland the trading standards service is part of the Department of Enterprise, Trade and Investment, a department of the Northern Ireland Executive.

- **The Advertising Standards Authority (the ASA).** The ASA is the UK self-regulatory body for non-broadcast advertising. It administers the British Code of Advertising, Sales Promotion and Direct Marketing.

There are also other organisations which operate in specialised fields. For example:

- **The Financial Services Authority (the FSA)** operates in relation to investment advertisements issued by persons authorised under the Financial Services and Markets Act 2000 to carry on the business in respect of which they are advertising
- **The Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS)** operates in relation to the content and promotion of premium rate charged telecommunications services, and
- **The Medicines and Healthcare Products Regulatory Agency of the Department of Health** operates in relation to the advertising of medicines.

THE SCOPE OF THE OFT'S POWERS

The OFT's powers cover non-broadcast advertising, including:

- newspaper and magazine advertisements
- outdoor advertising including bus, taxi and aerial advertisements, as well as posters
- cinema commercials
- brochures, leaflets, inserts, point of sale advertising, display material, circulars and direct mail
- internet advertising
- oral statements, whether made in person or over the telephone
- promotional SMS text messages.

The OFT's powers in relation to the Regulations do not cover broadcast advertisements - carried on commercial TV, cable and satellite services or on commercial radio. The **Office of Communications (Ofcom)** operates in relation to these areas (its contact details can be found at the back of this leaflet).

PROCEDURES UNDER THE REGULATIONS

These require the OFT to consider any legitimate complaint made to it that an advertisement is misleading. But before investigating a complaint it can ask the complainant to show that the existing channels have been given

a reasonable opportunity to deal with the problem. If this has not been done, the complaint will normally be passed to the most suitable existing channel.

Complaints likely to be considered by the OFT will be those where:

- an existing channel has not been used but the complaint appears to raise such a serious risk of harm to consumers or competitors, that it justifies seeking an immediate court order
- there is no existing channel able to deal with the complaint
- there is an existing channel, but, although it has been approached and has had a reasonable opportunity to deal with the complaint, it has not done so adequately. If the OFT considers that an existing channel has adequately dealt with a complaint it may decline to use its powers, even if a complainant is not satisfied with either the outcome or the way the case has been handled.

The OFT must decide how to deal with a particular case having regard to all the interests involved and in particular what is in the public interest and the desirability of self-regulation.

WHEN THE OFT CAN ACT

- Before taking action, the OFT must be satisfied that there is an advertisement as defined in the Regulations:

'Advertisement' means any form of representation which is made in connection with a trade, business, craft or profession in order to promote the supply or transfer of goods or services, immovable property, rights or obligations.

This includes representations (i.e. statements) made orally or in printed material, websites, emails, SMS text messages or pictures, and covers advertising in connection with just about every type of commercial activity.

- The OFT has to consider any complaints it receives but does not necessarily have to wait until it has received a complaint before taking action. Under Part 8 of the Enterprise Act, it (or fellow enforcers) may intervene wherever advertising falls foul of the Regulations provided that it seems likely to harm the interests of consumers generally.
- Action can also be taken where advertising has not yet taken place, but it appears likely that it will be published and will be misleading. However, the OFT has no power to clear advertisements in advance of publication.
- The OFT's stated aim is to make markets work well for consumers. However, action may be taken under the Regulations where advertising is targeted at businesses, not only in cases where it is directed at consumers.

WHAT IS A MISLEADING ADVERTISEMENT?

An advertisement is misleading if it **deceives** or is likely to deceive those to whom it is addressed and as a result is likely to **affect their economic behaviour** or is likely to **injure a competitor** of the advertiser.

An advertisement can be deceptive in various ways including where it:

- contains a false statement of fact - this may be possible to prove or disprove by evidence
- conceals or leaves out important facts
- includes or implies a promise to do something but there is no intention of carrying it out
- creates a false impression, even if everything stated in it may be literally true.

An advertisement will affect economic behaviour (or injure a competitor) if, for example, it induces people to make purchases they would not otherwise have done. But economic behaviour can cover any activity that involves spending money.

WHAT IS AN UNACCEPTABLE COMPARATIVE ADVERTISEMENT?

An advertisement is comparative if, either explicitly or implicitly, it identifies a competitor or goods or services offered by a competitor.

Comparative advertising is allowed, but only if it is not misleading and meets a number of other conditions, which are that:

- it compares goods or services meeting the same needs or intended for the same purpose
- it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price
- it does not create confusion in the market place between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor
- for products with designation of origin, it relates in each case to products with the same designation
- it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products
- it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.

When a comparative advertisement refers to a special offer, in addition to satisfying the above conditions, it must also include further information in a clear and unequivocal way. It should include the date on which the offer ends or, where appropriate, that the special offer is subject to the availability of the goods and services, and, where

the special offer has not yet begun, the date of the start of the period during which the special offer applies.

WHEN THE OFT CANNOT ACT

The OFT cannot use its powers in relation to advertising

- on the basis of a complaint that is frivolous or vexatious
- against advertising that is distasteful or indecent rather than misleading
- where a complaint is about the products, services or activities which are being advertised rather than about the advertising claims themselves. For example, a complaint about the quality or wear of a jacket when the advertisement does not say anything about its quality or wear that is likely to deceive.
- against an advertisement published by a private individual not acting in a business capacity - for example someone selling personal possessions through the classified columns of a local newspaper.
- against other advertising not being published in the course of a trade or profession – for instance political material or advertising by charities aimed at soliciting donations.

These are the main situations but there may be others.

CASES WHERE THE OFT IS LIKELY TO ACT

If the OFT thinks the advertisement is misleading or makes an unacceptable comparison, then it has to decide whether to take court action. In making its decision, it must have regard to all the interests involved, particularly the public interest. This means that, among other things, it will assess the gravity of the complaint (e.g. the level of detriment caused or potentially caused to consumers). It is not possible to give a comprehensive list of factors which might be considered when assessing gravity but they are likely to include:

- health and safety
- the nature of goods or services advertised
- loss suffered by a complainant
- the nature of the target audience – e.g. whether it is vulnerable (particularly children or the elderly)
- the likely size of the target audience
- the cost of products or services advertised
- the likelihood of continued publication if court proceedings are not started.

ACTION IN THE COURTS

The OFT will take court action where it considers it is warranted by the gravity of the situation and no immediate undertaking is given to amend or discontinue it. It will seek a court order to stop the advertising. It may ask in the first instance for an interim (a temporary) order which will prevent publication of the offending advertisement until the case can be fully argued in court.

The OFT can bring an action against any person appearing to be concerned or likely to be concerned with the publication or dissemination of the advertisement. This could be, for example, the individual or company placing the advertisement or the individual or company publishing the magazine or newspaper in which the advertisement appears. If a company is involved, powers under the Enterprise Act can be used against other connected companies.

The Regulations provide that the court can order any person responsible for the publication of an advertisement to provide evidence to show that any factual claims it makes are accurate. If no adequate evidence to substantiate such claims is provided, the court may refuse to regard them as accurate.

If the court decides that an advertisement is misleading or makes an unacceptable comparison, it must also consider all the interests involved - in particular the public interest. It may then grant an order preventing further publication. This can cover other advertisements likely to convey a similar impression, and may also prohibit

the advertiser from making the same claims or comparisons about other products or services. The Regulations also provide that the injunction can be granted without proof of actual loss or damage or without proof of intention or negligence on the advertiser's part. Failure to obey an order could result in proceedings for contempt of court.

If powers conferred by the Enterprise Act are used, the court can order a business found to have contravened the Regulations to publish a corrective statement, and, if appropriate, also the terms of any order made against it, or of any undertaking it has given to the court.

Obtaining evidence

The OFT has powers to require any person to provide information and documents to help it or a fellow enforcer carry out their enforcement role. For example, it can ask a complainant to provide it with evidence to support the complaint, and it can ask any person concerned with the publication of an advertisement to justify a claim made in an advertisement, or to provide other relevant information or documents.

Duty to give reasons

The Regulations place a duty onto the OFT to give reasons for its decision to apply (or not to apply) for a court order.

Information and advice

The OFT can only disclose any complaint details or other information it receives to another

organisation where permitted by law, in particular the relevant provisions of the Enterprise Act.

The OFT will usually put information on completed cases (where an undertaking or court order was obtained) into the public domain. Publicity will be accurate, balanced and fair.

It can also publish information and advice concerning the operation of the Regulations to members of the public and anyone likely to be affected by the Regulations.

SOME USEFUL ADDRESSES

Advertising Standards Authority

Brook House
2 Torrington Place
London WC1E 7HW
Tel: 020 7580 5555
Web: www.asa.org.uk

Local trading standards services

(for addresses see your local phone book or www.tradingstandards.gov.uk)

Financial Services Authority

25 The North Colonnade
Canary Wharf
London E14 5HS
Tel: 020 7066 1000 (switchboard)
0845 606 1234 (consumer helpline)
Web: www.fsa.gov.uk

Office of Communications (Ofcom)

Ofcom Contact Centre
Riverside House
2a Southwark Bridge Road
London E1 9HA
Tel: 0845 456 3000
020 7981 3040
Web: www.ofcom.org.uk

Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS)

1st Floor
Clove Building
4 Maguire Street
London SE1 2NQ
Web: www.icstis.org.uk

Medicines and Healthcare Products Regulatory Agency

Information Centre
10-2, Market Towers
1 Nine Elms Lane
London SW8 5NQ
Tel: 020 7084 2000
Web: www.mhra.gov.uk

Office of Fair Trading

Fleetbank House
2-6 Salisbury Square
London EC4Y 8JX
Tel: 020 7211 8000 (switchboard)
0845 722 4499 (enquiries)
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