

Implementation of the Unfair Commercial Practices Directive

Draft Consumer Protection from Unfair Trading
Regulations 2007

A consultation response by the Office of Fair Trading

August 2007

OFT950

Introduction

- 1.1 We have divided our response into two, first commenting on the Draft Consumer Protection from Unfair Trading Regulations (CPRs) and secondly on the Draft Business Protection from Misleading Marketing Regulations (BPRs). Where our comments apply to both sets of Draft Regulations we refer to the relevant sections in both, and the substantive arguments can be found in the CPRs part of the response.

2. Draft Consumer Protection from Unfair Trading Regulations 2007

Question 1: Do both sets of Regulations meet the intentions set out in the Government Responses to the two previous consultations?

- 2.1 The OFT believes that the implementing legislation effectively transposes the Unfair Commercial Practices Directive (UCPD) so as to:
- provide a strong, uniform prohibition of unfair commercial conduct, ensuring that consumers are not subject to misleading or aggressive behaviour from traders or otherwise do not have their freedom of choice impaired
 - strengthen the internal market, ensuring that legitimate businesses are able to market cross-border within the EU without having to change their business strategies or incur undue costs due to differing consumer protection regimes.
- 2.2 The proposed legislation reflects the intentions previously expressed in the two Government Responses¹ and we also think it contains a

¹ www.berr.gov.uk/files/file39679.pdf
www.berr.gov.uk/files/file15311.pdf

number of helpful simplifications and clarifications of its concepts. We believe that the draft Regulations simplify the consumer protection regime.

- 2.3 We particularly welcome the Government's decision to make a range of tools, including criminal prosecutions and investigatory powers, available to the Department of Enterprise, Trading and Investment (Northern Ireland), Local Authority Trading Standards Services (TSS) and the OFT. This will greatly help to ensure that consumers are adequately protected from unfair practices.
- 2.4 The OFT welcomes the positive impact that the implementation of the UCPD is likely to have on the European internal market. Increasing consumer confidence and lowering cross-border regulatory barriers for business will bring real long-term benefits for UK consumers and traders, partly by improving competition for fair-dealing businesses. The OFT is supportive of the work BERR has done towards achieving the European Commission's aim of legislative harmonisation. The OFT will seek to build on this by working closely with enforcement colleagues in other Member States.

Established Means (Regulation 20 (4)) (and Regulation 14(4) in the BPRs)

- 2.5 The OFT welcomes the clarification that Regulation 20 (4) offers on the role of established means in promoting compliance with the Regulations. Formal enforcement is only one, albeit essential, element of achieving a high level of compliance and we actively encourage other effective initiatives to promote compliance. Therefore, as we have stated in previous consultation responses on the UCPD, we expect self-regulatory bodies to have an important role to play in achieving a high level of compliance with the CPRs.

Duty to Enforce (Regulation 20) (and Regulation 14 in the BPRs)

- 2.6 The OFT welcomes the helpful clarification of the duty to enforce by BERR (then DTI) in the Government Response of December 2006². It stated:
- 'This does not automatically mean that formal (civil or criminal) enforcement action will be taken in respect of each and every infringement. Instead, the duty will oblige enforcers to take steps to promote compliance by the most appropriate means, in line with their enforcement priorities and consistent with available resources'.**
- 2.7 The current consultation document³ repeats this text, helpfully confirming that BERR, like OFT, does not see a duty to enforce automatically requiring formal enforcement action to be taken in respect of each and every infringement. The document adds 'this [duty] could include advice and guidance'.
- 2.8 However, in our Response to the Criminal Sanctions consultation⁴ the OFT asked BERR to include an explicit statement in the CPRs and BPRs about the limitations and flexibility of the duty to enforce. While we note, and appreciate, the steps that BERR has already taken to clarify the duty to enforce (by adding the requirement to consider the use of established means) the above text is not included within the current draft of the legislation.
- 2.9 We remain of the view that making the nature of the duty overt on the face of the legislation would benefit all those affected. This is not a

² Government Response to the Consultation Paper on Implementing the Unfair Commercial Practices Directive, DTI, December 2006.

³ Paragraphs 3.39 to 3.42, Consultation on the draft Consumer Protection from Unfair Trading Regulations 2007', DTI, May 2007.

⁴ OFT Response to Framing Criminal Sanctions in the Unfair Commercial Practices Directive, February 2007.

new concept. Section 73(1) of the Financial Services and Markets Act 2000 provides:⁵

General duty of the competent authority. **73.** - (1) In discharging its general functions the competent authority must have regard to-

(a) the need to use its resources in the most efficient and economic way;

(b) the principle that a burden or restriction which is imposed on a person should be proportionate to the benefits, considered in general terms, which are expected to arise from the imposition of that burden or restriction;

(c) the desirability of facilitating innovation in respect of listed securities;

(d) the international character of capital markets and the desirability of maintaining the competitive position of the United Kingdom;

(e) the need to minimise the adverse effects on competition of anything done in the discharge of those functions;

(f) the desirability of facilitating competition in relation to listed securities.

2.10 These words demonstrate that duties have been clarified in legislation. By analogy, the duty in the CPRs (and BPRs) could be clarified by reflecting the text in bold at paragraph 2.6 above in the text of the Regulations. The OFT believes that clarifying the duties would clearly signal that the CPRs (and BPRs) will play an important role in

⁵ www.opsi.gov.uk/Acts/acts2000/00008--g.htm#73.

delivering a more modern, flexible, proportionate and efficient regulatory regime. It would ensure alternatives to formal enforcement action are given an explicit role in the statutory definition of duties and powers.

- 2.11 It would also be a more transparent way of setting out the responsibilities of enforcement agencies. Legislative clarity will better enable enforcers to take effective and proportionate action, in line with their public priorities, (including formal enforcement where necessary) to deal with breaches of the law. It will help enforcers ensure that their interventions and actions can be targeted at high-impact projects and cases so as to address areas of serious market failure or widespread consumer detriment. Without such a clarification of the duty to enforce, enforcers may, in some situations, find that their freedom of action is restricted, causing detriment to consumers and competitive markets.

Consistency of CPRs and BPRs

- 2.12 We believe it is important to have greater consistency in the level of protection offered in the BPRs and CPRs. For details, see our comments on the drafting of Regulation 3 in the BPRs below.

Investigatory Powers – (Regulations 22 and 23) (and Regulations 23 and 24 in the BPRs)

- 2.13 One of our key concerns in responding to this consultation is to seek to ensure that the investigatory powers are effective. We thus suggest a change that we believe will provide additional clarity about the use of these powers. Many of these powers are based on those in the Trade Descriptions Act 1968 (TDA). Although we agree that seeking to reproduce the effect of these powers in the new Regulations is a sound approach, we believe that there is also a need for some updating, for the purpose of clarity, and to support consistency of judgment and outcome, especially in cases brought before the lower courts.

2.14 In the current draft, Regulation 23 does not detail the powers that may be used once the premises have been entered under warrant. This contrasts with Regulation 22 (Power to enter premises without a warrant) which specifically refers to **search and seizure powers**. We believe it would be helpful to specify the powers available within the text of Regulation 23 either by copying across the listed powers, or by adding a sub-section to Regulation 23 that explicitly gives the warrant-equipped investigator access to the powers listed in Regulation 22.

Question 2: Are there any particular additions or changes to the Regulation that you would like to see?

2.15 See the text above for more detail on our suggested changes.

Defences – (Regulation 19) (and Regulation 13 in the BPRs)

2.16 The purpose of the 'publication of commercial practices (or indications) which are not advertisements' defence (the editorial comment defence) appears to be to ensure that a person who produces genuine editorial content has a defence available, where, for example, that content contains false statements. We note that the defence reflects a similar provision in the Trade Descriptions Act 1968. In our view, the defence is unnecessary and creates uncertainty for the reasons set out below.

2.17 The consultation document states⁶ that it is arguable whether the publication of editorial material is capable of being a commercial practice. In our view genuine editorial matter will not constitute a commercial practice (or indication). We believe that genuine editorial matter is not, by definition, directly connected to the promotion, sale or supply of a product. If editorial matter is connected thus, this should not, in our view, be regarded as genuine and should be treated

⁶ Paragraph 3.37. 'Consultation on the draft Consumer Protection from Unfair Trading Regulations 2007', DTI, May 2007.

under the CPRs or BPRs (as the case may be) in the same way as any other commercial practice (or indication). If, for example, a statement claiming to be editorial matter (but which is, in fact, directly connected to the sale, supply or promotion of a product) misleads (and meets the other requirements of breach, including, in the case of the CPRs, the transactional decision 'test') this would be considered to be an offence under the CPRs (or BPRs) unless the person who produced this matter is able to rely on the due diligence defence.

- 2.18 The editorial content defence is only available if criminal proceedings are brought against a person who produces such matter; the defence would not be available where an enforcer seeks an enforcement order (or BPRs injunction). If the editorial content defence is retained we believe that there is a real risk that the UK courts will construe the definition of 'commercial practice' (or 'indication') widely to include genuine editorial matter. This would be because the defence would not be needed if genuine editorial matter were outside the scope of the relevant definition. If the courts take this view then it would follow that an enforcer would be able successfully to obtain an enforcement order (or injunction) in relation to genuine editorial matter, if, for instance, (amongst other things) it were misleading. This outcome cannot be desirable from the point of view of editors.
- 2.19 We also believe that the way in which the defence is constructed may make it available to persons in circumstances where it was not intended that the defence should apply. The defence assumes that any matter which is not an advertisement is genuine editorial matter. There is of course a grey area between the two which includes, for example, 'advertorials'. Persons who produce 'advertorials' may successfully argue that the advertorials are not advertisements, particularly as neither the CPRs nor the BPRs contain a comprehensive definition of 'advertisement', and that they should accordingly have the benefit of the editorial content defence. In our view, such persons should not be able to claim the benefit of the defence. However, given the current structure of the defence it is open to such persons to argue that it applies to them. Given the uncertainties inherent in the defence we

believe that these will lead to costly and time-consuming legal arguments with no perceptible benefits to consumers.

2.20 In summary, we believe that the editorial comment defence is unnecessary and creates much uncertainty.

Obstruction – (Regulation 24) (and Regulation 25 in the BPRs)

2.21 We agree with suggestions made by our colleagues in Trading Standards that the level of fines available for penalising those who obstruct officers should be aligned with the penalties applicable for breach of the Regulations. Otherwise this might encourage guilty parties to obstruct rather than risk the greater penalties available under the prohibitions. We note that under the Statutory Instrument amending Part 8 of the Enterprise Act⁷ (which implemented the Consumer Protection Co-operation Regulation), the penalties for obstruction were set at the same level as for breaches.

Compensation – (Regulation 26) (and Regulation 27 in the BPRs)

2.22 We suggest that some further thinking is done on the construction of these compensation provisions. For example, it does not appear that they cover situations where the trader accepts a caution, or where an Enforcement Order has already been made or an undertaking given to the court. Other parallel action may also need to be included, such as conviction based on the same facts, or in relation to the same actions, under other legislation such as the Fraud Act.

2.23 We suggest that the text of Regulation 26 (1) (b) be amended. As drafted, it might be interpreted so as to mean that enforcers have to obtain an order, prosecute **and** receive an undertaking to avoid liability for compensation.

⁷ SI 3363, the Enterprise Act 2002 (Amendment) Regulations 2006.

Question 3: Do you agree that the powers to enter premises with or without warrant should be exercisable to investigate breaches of these Regulations and not only in relation to determining whether an offence has been committed?

2.24 Yes. We think this flexibility is important to enable the proportionate and effective use of the different enforcement tools available. This should allow enforcers to make correct decisions about the enforcement route available based on what the right outcome would be depending on the breach, not based on which powers are needed to investigate.

Question 4: Are there any impacts or unforeseen consequences of these proposed Regulations that you can identify?

2.25 See above for our comments on the Defences and other areas of concern.

Question 5: If you are a small or medium enterprise, what (if any) costs or other burdens could be associated with the introduction of the Regulations?

2.26 Not applicable.

Question 6: Do you agree that authorized trading standards officers in England and Wales should have rights of audience and rights to conduct litigation in the county courts in England and Wales?

2.27 Yes. We support rights of audience for Trading Standards Officers across the UK. We previously commented: 'Without rights of audience in civil courts, TSOs are forced to employ lawyers to represent them in civil actions. In some cases, costs incurred may be disproportionate to the outcome and hence affect the decision to take civil action. We suggest that providing TSOs with a right of audience in civil courts would improve objectivity in choice of enforcement route'⁸. These

⁸ OFT Response Framing Criminal Sanctions s in the UCPD, February 2007.

rights of audience should also be made available for breaches of domestic infringements under Part 8 of the Enterprise Act, when legislative opportunity allows, given that a case Local Authority Trading Standards Services wish to bring may well relate to both domestic and Community infringements.

- 2.28 Additionally, we believe that BERR should also take action to seek to secure rights of audience in the sheriff courts in Scotland and county courts Northern Ireland as well as county courts in England and Wales, to ensure effective operation of the regime across the UK. We believe this should be followed up, and soon, if there is to be the desired level of consistency and to promote the use of civil enforcement where appropriate.

Question 7: Do you think that OFCOM should be given a duty to consider complaints about unfair commercial practices in the broadcast media to reflect their existing powers under the CMARs, and which are retained in the BPRs?

- 2.29 We believe it is important that we continue to work closely with OFCOM in our joint enforcement of these and other Regulations. Having spoken to OFCOM about this matter, we suggest that retaining the duty to consider complaints would be a helpful way of preserving this joint role.

3. Draft Business Protection from Misleading Marketing Regulations 2007

Question 1: Do both sets of Regulations meet the intentions set out in the Government Responses to the two previous consultations?

- 3.1 We believe the draft BPRs accurately implement the revised CMAD. See comments on the CPRs in our answers above. We make similar points about the corresponding duty, powers and defences in the BPRs.
- 3.2 Whilst the OFT believes that the effects of Regulation 5 in the CPRs and Regulation 3 in the BPRs are similar, we nonetheless think that the text should be amended so as to achieve greater similarity. See below for more details.

Question 2: Are there any particular additions or changes to the Regulations that you would like to see?

- 3.3 Our comments on changes to the CPRs (see above) all apply equally to the BPRs. See above for the details.
- 3.4 Importantly, we believe that BERR should add the clarifying text on the duty to enforce to the body of the BPRs. This is very important for our ability to exercise our priorities and protect consumers and markets.
- 3.5 Additionally, we believe that BERR should change the text in Regulation 3 (2) (a) of the BPRs to:
'if in any way, including its presentation, it deceives or is likely to deceive the traderss to whom it is addressed or whom it reaches...'
- 3.6 Section 6 of the Interpretation Act 1978 provides for the singular to include the plural, unless the contrary appears. However, in this instance we fear that such a contrary intention might be implied by the courts and suggest that an amendment be made to clarify that the

BPRs are not concerned with misleading indications given to a particular trader. We think that this would be a better implementation of the Misleading and Comparative Advertising Directive which uses the term 'persons'⁹.

Question 3: Do you agree that the powers to enter premises with or without warrant should be exercisable to investigate breaches of these Regulations and not only in relation to determining whether an offence has been committed?

3.7 Yes. See our comments above on the CPRs.

Question 4: Are there any impacts or unforeseen consequences of these proposed Regulations that you can identify?

3.8 See our comments above on the CPRs.

3.9 The co-ordination function for BPRs cases (Regulation 17) will be a new function for the OFT and this raises potential resourcing issues.

Question 5: If you are a small or medium enterprise, what (if any) costs or other burdens could be associated with the introduction of the Regulations?

3.14 Not applicable.

Question 8: Do you agree that the courts should have the power to order the publication of injunctions and/or corrective statements?

3.15 Yes.

⁹ Article 2 (b) of Directive 2006/114/EC concerning misleading and comparative advertising.

Question 9: Do you consider that trading standards officers should be given rights of audience and rights to conduct litigation in the county courts in relation to application for injunctions under the BPRs?

3.16 Yes. See the arguments in the CPRs text above.