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**THE BUSINESS PROTECTION FROM MISLEADING MARKETING REGULATIONS 2008 AND
THE CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS 2008:
CRIMINAL PENALTIES**

For: In-house lawyers, senior marketing personnel and directors advising on marketing, advertising or special promotions.

During 2008 two regulations came into force implementing a European Union directive - The Business Protection from Misleading Marketing Regulations ('Business Regulations') and the Consumer Protection from Unfair Trading Regulations ('Consumer Regulations') (together the 'Regulations').

The Regulations represent the biggest change to the regulation of business practices and advertising in over 40 years. Their aim is to harmonise the laws regulating unfair trading throughout the European Union by protecting consumers and traders from unfair trading and improved enforcement. Both deal with misleading and immoral advertising and marketing practices and introduce criminal penalties for such.

It is still early days but they could potentially impact on many business practices so it is important that they are fully understood and the necessary changes to current practices are made.

Business Regulations

These only apply to business-to-business relationships and impose a prohibition on advertising which misleads traders.

There are two limbs to the Business Regulations:

1. Misleading Advertising

The concept of what constitutes an 'advertisement' is very broad and wide enough to cover visual and non-visual forms of advertising presented both offline and online, as well as spoken statements. This means the term will cover practically anything done to market or promote a product in a commercial context.

Key factors taken into account when determining whether an advert is misleading include information in the advertisement concerning:

~ the characteristics of the product (including its availability, nature, composition, method and date of manufacture, fitness for purpose and results to be expected from use);

~ price;

~ conditions of supply; and

~ the nature or rights of the advertiser (including the advertiser's identity, assets, qualifications and ownership of intellectual property rights).

2. Comparative Advertising

The second area prohibited by the Business Regulations is comparative advertising, which is defined widely enough to catch advertisements that not only compare the products of the advertiser with the products of a competitor, but also those which merely refer to a competitor or the products of the competitor.

Any comparative advertising must:

- ~ provide objective comparisons of products on a like-for-like basis;
- ~ not discredit or denigrate a competitor or its brand;
- ~ not take unfair advantage of the reputation of a competitor's brand; and
- ~ not create confusion between the advertiser and competitor, or their brands.

Trade Marks

Care must be taken in advertising if mention is made of the Trade Mark of another business as this could constitute Trade Mark infringement. If the rules on comparative advertising are not complied with and there is a likelihood of confusion between the products and services of the advertiser and the Trade Mark owner, then the possibility of an action for Trade Mark infringement will exist.

This is a complex area, which is likely to evolve the longer the Regulations are in force. If in any doubt legal advice should be sought.

Consumer Regulations

These apply where a business has a direct, or a sufficiently close, relationship with consumers or where a business purchases products from consumers. In essence, the Consumer Regulations mean traders have to act in a manner consistent with the reasonable expectations of the average consumer, thereby enabling consumers to make free and informed purchasing decisions.

The Consumer Regulations contain a 'General Prohibition' on unfair commercial practices of which there are five categories – misleading actions; misleading omissions; aggressive practices; and breaches of professional diligence.

To be unfair these practices must:

- ~ fail to meet the standard of professional diligence (i.e. the standard of skill and care that a trader in the relevant field of activity could reasonably be expected to exercise); and
- ~ materially distort the economic behaviour of the 'average consumer' (i.e. cause the consumer to make a different transactional decision from that which they may otherwise have made).

The Consumer Regulations also include a 'blacklist' of 31 commercial activities which are always considered unfair and are, therefore, banned. These include:

- ~ falsely stating that a product is available for a limited time (or on particular terms for a limited time);
- ~ using advertorials which fail to make it clear that a trader had paid for the promotion;
- ~ falsely claiming to be signatory to a code of conduct;
- ~ describing a product as free when it is tied to another purchase;
- ~ displaying a trust or quality mark without authorisation; and
- ~ including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents, or other adults, to buy advertised products for them.

Enforcement

Enforcement is carried out by an 'enforcement agency', which includes the Office of Fair Trading and Local Trading Standards Services. There is no private right of action against traders by businesses or consumers.

The relevant enforcement agency has three years from the date the offence occurred or one year from the date of discovery of the offence by the prosecutor (whichever is earlier) in which to commence proceedings.

Consequences of a breach – Criminal Offence

A breach of the Business Regulations will constitute a strict liability criminal offence but note that this relates solely to misleading advertising – offending comparative adverts can only be dealt with by way of an injunction.

In the case of the Consumer Regulations, a breach is generally a criminal offence as stated above except that, in relation to a breach of a 'General Prohibition', the prosecution will have to prove that the trader has knowingly, or recklessly, breached the requirements of professional diligence (as mentioned above).

The penalties which apply to the Regulations are:

~ for an offence on summary conviction, a fine of up to £5,000: or

~ for an offence on conviction on indictment, an unlimited fine.

Defence

1. Due Diligence Defence

This is available to any person if it can be proved that the offence was due to mistake, accident, reliance on information provided by another person(s), the act or default of another person or other causes beyond the trader's control but the trader must be able to show that they took all 'reasonable precautions and exercised all due diligence'.

2. Innocent Publication Defence

Available where the "publisher" of the advertisement can prove that:

~ they are in the business of publishing or arranging for the publication of advertising;

~ they received the offending advertisement in the ordinary course of that business; and

~ they did not know and had no reason to suspect that the publication of the advert would amount to an offence.

Action Points

- review business practices and guidelines to ensure they do not fall within any of the prohibitions set out in the Regulations and ensure marketing staff are sufficiently well trained in this area;
- consider risk allocation for new promotional initiatives;
- ensure arrangements with advertising, publishing or hosting services are reviewed and the risks appropriately allocated;
- ensure a member of your compliance team reviews any advertising which may be misleading or where there is a comparative element and if necessary take advice; and

- ensure that none of your company's normal practices are on the 'blacklist' found in the Consumer Regulations.

If you have any queries or require advice in relation to any of the issues discussed in this briefing note please contact either John North on 020 7842 1490 or at jd@royds.com or Louise Engel on 020 7842 1493 or at lx@royds.com.

The information contained in this note is intended as a general review of the Regulations and does not constitute legal advice. Detailed specialist advice should always be taken before taking or refraining from taking any action.

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