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UCPD
AN ADVISERS' PERSPECTIVE

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Unfair Commercial Practices Directive
2005/29/EC

(Member states)...shall apply those
measures

by

12th December 2007...

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Change of outlook

- Based on principles
- Concept of unfairness
- Conduct and effect of that conduct
- Effect before during and after contracted
- Criminal and civil sanctions
- Maximum harmonisation – anything exceeding it must go !!!

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Replacement and harmonisation of existing UK law

So goodbye to:

- Control of Misleading Adverts (CMARS)
- Mock Auctions Act
- CPA Part III (misleading prices)
- Price Marking (Food & Drink) Services Order
- Most of Trade Descriptions Act (s1&14)
- Fraudulent Mediums Act...

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DRAFT "CPRs"

Consumer Protection from Unfair Trading Regulations 2007

Best to read it from back to front!!!

Schedule 1	Prohibited in all circumstances
Regulation 7	Aggressive Practices
Regulation 6	Misleading Omissions
Regulation 5	Misleading Actions
Regulation 3	General Prohibition

Schedule 1 – Prohibitions

31 SPECIFIC practices deemed likely to affect consumers decisions & therefore to always be unfair.

Includes:-

- Claiming approval, trust mark, code of conduct that trader does not have (TDA)
- Claim that is about to cease trading when is not (CPA III)
- Visiting consumer's home & refusing to leave (NEW)
- Trader claiming his job is in jeopardy if the consumer does not buy from him (NEW)
- Falsely stating that a product is only available for a limited time to elicit an immediate decision (NEW)

R7-Aggressive Commercial Practices

Significantly impairs (or likely to significantly impair) the *average* consumer's freedom of choice or conduct in relation to the product through the use of:-

- Harrassment
- Coercion
- Undue influence

AND

causes (or is likely to cause) the consumer to take a *transactional decision* he would not have taken otherwise

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R6-Misleading Omissions

Omits or hides material information
OR
provides it in a manner which is unclear,
unintelligible, ambiguous or untimely
OR
fails to identify its commercial intent
AND
causes or is likely to cause the **average consumer**
to take a **transactional decision** he would not have
taken otherwise

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R5-Misleading Actions

Contains false information in relation to any matter
listed in R 5 (4)
OR
it or its overall presentation deceives the **average
consumer** in relation to any of those matters, even
if the information is factually correct
AND
it causes or is likely to cause the **average
consumer** to take a **transactional decision** that he
would not have taken otherwise

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R5 (4)-info that must not be false or deceptive

INCLUDES:

- Existence or nature of product
- Main characteristic
- Statement/symbol relating to sponsorship/approval
- Price or manner in which price is calculated
- Need for service/repair/spare part
- Consumer's rights or the risks he might

Plus many others...

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R3-General prohibition

It contravenes the requirements of professional diligence

AND

It materially distorts or is likely to materially distort the economic behaviour of the consumer with regard to the product

(i.e. impairs the average consumer's ability to make an informed decision thereby causing him to take a transactional decision that he would not otherwise have taken)

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Practical Application

Mrs B, 87 yrs old, is posted a catalogue with a letter that tells her she has definitely won a cheque for £11,500. It implies that if she orders from the catalogue the processing of her cheque will be prioritised.

She orders from the catalogue & completes & returns the forms to confirm that she is the addressee and that she is happy to accept her £11,500 prize cheque.

For the next 3 months, every 3 days she receives another catalogue & letter, each time she orders further items and re-confirms her details.

As a result of this her house is rapidly filled with unwanted plastic trinkets, cosmetic products, health supplements & cheap jewellery (many of which her family will be disappointed to receive as Xmas presents...)

You receive several calls from the elderly regarding this promotion; you note that the terms & conditions (which are in grey print on a yellow background) state that this is simply a prize draw which will be drawn in 2009 and that each recipient is only going to win a '£1 voucher cheque' to put towards any orders from catalogue.....

Possible CPR breaches

Sch 1: Paragraph 31

...false impression that the consumer has already won...a prize...when in fact there is no prize or equivalent benefit/taking any action ...to claim the prize is subject to the consumer paying money or incurring a cost.

Reg 6: Misleading Omissions (if likely to affect transactional decision)

(1)(c) - providing material information in an unclear, ambiguous and unintelligible manner.

Reg 5: Misleading Actions (if likely to affect transactional decision)

False/deceptive statement:(4)(b)- characteristic of product
(5)(a)- availability of product

Reg 3: General prohibition (if ... impairment & transactional decision)

(3): contravenes professional diligence & distorts economic behaviour
(5)(a)(b)(c): breaches of Sch1, R6& R5

	CONDUCT	EFFECT		
Sch 1	One of 31 specified practices	“EFFECT” does not apply (ie no impairment or transactional decision tests) BUT Para 6 (intention) and Para 13 (deliberately) imply <i>mens rea</i>		
Reg 7	Aggressive practice – harassment, coercion or undue influence	AND likely to significantly impair the average consumer’s freedom of choice or conduct	A N D	likely to cause the average consumer to take a transactional decision which they otherwise would not have done
Reg 6	Omission of material information	→		
Reg 5	False or deceptive statement re specific list of factors (subsection (4))	→		
Reg 3	Contrary to the requirements of professional diligence	AND likely to significantly impair the average consumer’s freedom of choice or conduct		

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CRIMINAL OFFENCES

Can be prosecuted by OFT, TSS & DETINI

R3: *Contravention of general prohibition
R5: Misleading actions (*xopt 5(3)(b) code commitments)
R6: Misleading omissions
R7: Aggressive Practices
Sch 1: Banned practices (*except 11 & 28)

All are strict liability offences

*except R3 which require mens rea
R5(3)(b), Sch1 (11) & (28), and, R4 – CIVIL ROUTE ONLY

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EMPHASIS ON CIVIL ACTION

Enforcers must have regard to whether:-

- Action is necessary and proportionate
- Businesses are given an opportunity to make amends
- The most appropriate enforcer brings proceedings
- Action is co-ordinated

It is expected that 70% of action taken will be:

- Informal compliance mechanisms
- Established means (e.g. ASA, PhonePayPlus etc)
- Codes of conduct
- Civil enforcement (Part 8 Enterprise Act)

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How will it affect us?

Increased workload:

- advising changes to public & traders
- increased referrals
- increased witness statements for TSS advisers
- dealing with the inevitable 'misinformation'

Working with old & new legislation for up to 3 years

Need to consider appropriateness of referrals

Enforcement agencies' policies need updating

Advice agencies' referral policies need updating

Further Reading?

OFT Guidance

[The Office of Fair Trading: Consumer protection from Unfair Trading Regulations Guidance \(May 2007\)](#)

BERR – Consultation (inc draft CPR's & BPRs)

<http://www.berr.gov.uk/files/file39705.pdf>

CAB response to consultation

http://www.citizensadvice.org.uk/ucommercial_practices_consultation_on_draft_regs_final.pdf

OFT CPR queries

- Email cprqueries@oft.gsi.gov.uk

- Case support & training 020 7211 8198

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