

FACT SHEET

Consumer Protection from Unfair Trading Regulations

Background

This Fact Sheet is designed to assist service providers and others in understanding the key implications arising from the implementation on 26 May 2008 of the Consumer Protection from Unfair Trading Regulations (the “Regulations”). These are the means by which the UK Government adopts the Unfair Commercial Practices Directive into UK law. The implementation of this Directive represents the biggest change in UK consumer protection framework for many years. PhonepayPlus is the “Established Means” for the enforcement of the Regulations.

Service providers and others that do everything in their power to deal fairly and honestly with their customers may not need to change the way they work at all. But to make sure you’re treating your customers properly, you and your staff should familiarise yourselves with these new Regulations. This Fact Sheet is designed to identify the key issues to consider; it should not, however, be treated as legal advice about the new Regulations.

The Regulations – key changes

The Regulations create a modern simplified consumer framework.

The Regulations provide three tiers of protection for consumers by prohibiting:

1. practices which “are contrary to the requirements of professional diligence”
2. misleading practices (actions and omissions) and aggressive practices
3. 31 specific practices which are banned under all circumstances

This Fact Sheet provides further information about these tiers of protection and what they may mean for service providers and others providing phone-paid services.

1. Practices contrary to the requirements of professional diligence

“Professional diligence” means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either:

- honest market practice in the trader’s field of activity, or

- the general principle of good faith in the trader's field of activity.

A practice will not be unfair unless it has, or is likely to have, an adverse impact on the economic behaviour of the average consumer. This is explained through the transactional decision test – that it 'causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise'.

"Average consumer" means:

- an average member of a particular group of consumers to whom the commercial practice is directed; or
- average member of a clearly identifiable group of consumers whom the trader could reasonably be expected to foresee would be particularly vulnerable to the commercial practice or the underlying product because of their mental or physical infirmity, age or credulity

"Transactional decision" is a very wide concept that covers any decision before, during or after the purchase (in relation to the product), and includes the decision not to buy or act (e.g. to exercise a contractual right)

2. Misleading and aggressive practices

A "misleading commercial practice" is one that

- contains false information and is therefore untruthful in relation to any of the specified matters, or if it or its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of the specified matters, even if the information is factually correct; and
- causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

The definition of 'misleading actions' also covers confusion with trade names/trade marks, "passing off", and infringement of a commercial practice that a trader indicates he is bound by.

As well as creating some new concepts with statutory force in the definition of the word 'misleading', the Regulations outlaw 'misleading omissions'. These are practices that omit or hide material information, or provide material information in a manner which is unclear, unintelligible, ambiguous or untimely. A material omission also covers the situation where the practice fails to identify its commercial intent, unless this is already apparent from the context. As in all cases of unfair practice, this is explained through the *transactional decision test*.

Aggressive commercial practices, which are also outlawed by the Regulations, cover the concept of impairing the consumer's freedom of choice/conduct through the use of 'harassment, coercion or undue influence' – all of which are terms that are more fully defined in the Regulations.

3. Specific practices that are banned

There is a new range of practices that is now outlawed by Schedule 1 to the Regulations. We identify below a limited number which service providers and others ought to be specifically aware are:

- **Not being true to the terms of the endorsement:** Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body or making such a claim without complying with the terms of the approval, endorsement or authorisation.
- **Limited time only:** Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.
- **Forcing the deal:** Including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he/she has already ordered the marketed product.
- **Advertising to children:** 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.
- **You can't promise a win:** Claiming that products are able to facilitate winning in games of chance.
- **Winner takes nothing:** Claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent.
- **Use of the word "Free":** Describing a product as 'gratis', 'free', 'without charge' or similar if the consumer has to pay anything other than:
 - the unavoidable cost of responding to the commercial practice
 - collecting or paying for delivery of the item.
- **No win situations:** Creating the false impression that the consumer has already won or will win a prize or other equivalent benefit, when in fact either:
 - There is no prize or other equivalent benefit, or
 - Taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.
- **Pestering the consumer:** Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation.

Enforcement

As the Established Means for enforcing the PhonepayPlus Code of Practice, it will usually be the case, as now, that PhonepayPlus will take up and investigate complaints made which allege a breach of the PhonepayPlus Code and/or of the Regulations.

It should also be noted, however, that the Regulations introduce criminal offences for a breach of nearly all the prohibitions in the Regulations with enforcement powers for Trading Standards and OFT. These and other (sectoral) bodies can bring civil enforcement (injunctive) action using Part 8 of the Enterprise Act 2002.

Pre-empting, Preventing, Protecting

PhonepayPlus focuses on pre-empting and preventing problems - the key, it believes, to effective long-term consumer protection and a dynamic, growing industry. PhonepayPlus wants to have the right measures in place to engender an industry-wide culture of compliance where services are offered responsibly and consumers get a fair deal.

We hope this Fact Sheet will assist service providers and others to comply with the new Regulations.

How PhonepayPlus can help you

As well as checking promotional material, we can provide advice on the content and overall operation of your services. Obtaining our advice before operating your service could help to ensure that you don't become the subject of a PhonepayPlus investigation. It could also help you avoid having to make costly changes to promotional material or scripts.

We are bound by confidentiality and data protection laws, as set out in our Code of Practice, so any information supplied to us about your service will be kept in confidence.

Contacting us

For more detailed information about how the Compliance Team can help you, please feel free to contact the team either:

By email: compliance@phonepayplus.org.uk

By phone: 0845 026 1060*

By fax: 0845 026 1061*

(* Calls provided by BT will be charged at up to 4 pence per minute at all times. A set-up fee of up to 6 pence per call applies to calls from residential lines. Mobile and other providers' charges may vary.)

Further information about the work of the Compliance Team can also be found on our website at www.phonepayplus.org.uk/compliance