

A guide to the Business Protection Misleading Marketing Regulations 2008

The Business Protection from Misleading Marketing Regulations 2008 (BPRs) (<http://www.legislation.gov.uk/ukxi/2008/1276/contents/made>) came into force on 26 May 2008 and implement the Misleading and Comparative Advertising Directive. The Control of Misleading Advertisements Regulations 1988 were repealed by the 'consumer' version of the legislation - the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) (<http://www.legislation.gov.uk/ukxi/2008/1277/contents/made>).

It is useful to look at both sets of regulations as they are similar and there are elements in each which overlap.

What do the regulations cover?

It is important to remember these regulations deal mainly with the potential misleading of traders, although there are rules on comparative advertising which can be targeted both at traders and consumers. Part 1 of the regulations prohibits misleading advertising and also lays down strict guidelines for comparative advertising. It also ensures misleading advertising is not promoted by any code owner (namely a body responsible for a code of conduct).

Parts 2, 3 and 4 deal with the criminal offences and defences, the enforcement duty, and powers respectively.

What is prohibited?

Effectively, the BPRs prohibit advertising which is misleading to traders. There are four main issues to take into account when deciding if the advertising is misleading:

- the product characteristics (13 in total including availability, composition and specification)
- the price or manner in which the price is calculated
- the conditions on which the product is supplied or provided
- the nature, attributes and rights of the advertiser (five in total including identity and assets)

Comparative advertising:

Comparative advertising is permitted but only when all of the following conditions of the advertisement are met:

- it is not misleading under the BPRs or the CPRs
- it compares products meeting the same needs or intended for the same purpose
- it objectively compares one or more material, relevant, verifiable and representative features of those products (may include price)
- it does not create confusion among traders, either between the advertiser and competitor or between trade marks (or similar) of products of the advertiser and those of a competitor
- it does not discredit, denigrate or take unfair advantage of a competitor's trade mark (or similar)
- 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 (or similar) of a competitor or of the designation of origin of competing products
- it does not present products as imitations or replicas of products bearing a protected trade mark or trade name

A code owner is not permitted to promote (in a code of conduct) advertising which is misleading under the BPRs or comparative advertising that does not meet the listed conditions.

Comparative advertising would be considered a misleading action (regulation 5 of the CPRs) if:

- it contains false information or is likely to deceive the average consumer
- the marketing of the product creates confusion, or the trader fails to comply with a commitment in a relevant code of conduct

And if in both cases the consumer makes a transactional decision he would not have normally made.

Comparative advertising would be considered be a misleading omission (regulation 6 of the CPRs) if:

- material information is omitted, hidden or unclear, and as such the consumer makes a transactional decision he would not have normally made

What are the consequences of non-compliance?

The BPRs contain criminal offences for a breach of regulation 3 (general misleading advertising). Prosecution can be taken by the Office of Fair Trading (OFT), trading standards services (TSS), or the Department of Enterprise Trade and Investment in Northern Ireland (and by the Lord Advocate in Scotland). The penalties are:

- on summary conviction, a fine not exceeding the statutory maximum (currently £5,000)
- on conviction on indictment, an unlimited fine or imprisonment for up to two years, or both

Enforcers may also take civil enforcement action (an injunction) for this offence. This is also the only enforcement action that can be taken in respect of breaches of regulation 4 (comparative advertising not meeting the relevant requirements) and regulation 5 (promotion of misleading advertising by code owner).

Where can I get further help?

This leaflet is not an authoritative document on the law and is only intended for guidance. For further details or clarification contact Derbyshire Trading Standards at:

Chatsworth Hall
Chesterfield Road
Matlock
Derbyshire
DE4 3FW

(continued overleaf)

Telephone:

Businesses: Call Derbyshire 08 456 058 058
Consumers: Citizens Advice consumer helpline 08454 040506

Fax: 01629 536197

Website: www.derbyshire.gov.uk/tradingstandards

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