

## D: Consumer Protection from Unfair Trading Regulations 2008

### D.1 Introduction

From the 26<sup>th</sup> May 2008, the Consumer Protection from Unfair Trading Regulations (the Regulations) 2008 came into force. These Regulations replace some previous legislative provisions and aim to protect consumers from unfair, misleading or aggressive selling practices (e.g. Part III of the Consumer Protection Act 1987, most of the Trade Descriptions Act 1968). Further, the Regulations ban 31 practices which are deemed to be unfair in all circumstances. The Regulations aims are to ensure fair dealing and honesty between businesses and consumers.<sup>1</sup>

Two important points need to be understood from the outset. First, the Regulations establish criminal offences that will be applied against recalcitrant traders. However, they do not give consumers any right of personal enforcement. Secondly, neither do the Regulations invalidate a contract established by a consumer.

### D.2 Who is Protected

Contracts / transactions between consumers and businesses will be covered by the Regulations. They apply to conduct before, during and after the contract.

Contracts / transactions between businesses may also be affected by the Regulations where they involve the Misleading Marketing Regulations 2008.

The definitions applicable to the Regulations, and hence who is protected, are provided in s.2. The most relevant definitions are as follows:

- “average consumer” shall be construed in accordance with paragraphs (2) to (6) (*The average consumer is a very important concept and must be interpreted in context. In its widest sense, it refers to consumers – most of whom are reasonably well informed and reasonably cautious of claims and advertising. However, where a commercial practice is targeted specifically at a section of consumers – e.g. the elderly, persons with a disability and so on, this is the average consumer to whom the test is now applied – see below*);
- “business” includes a trade, craft or profession;
- “commercial practice” means any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product;
- “consumer” means any individual who in relation to a commercial practice is acting for purposes which are outside his business;
- “trader” means any person who in relation to a commercial practice is acting for purposes relating to his business, and anyone acting in the name of or on behalf of a trader (*As such, agents of the shop owner – shop assistants, employees and so on are included*).<sup>2</sup>

and

- In determining the effect of a commercial practice on the average consumer—
- (a) where a clearly identifiable group of consumers is particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and
- (b) where the practice is likely to materially distort the economic behaviour only of that group,

<sup>1</sup> See <http://www.businesslink.gov.uk/unfairtrading> for further information and practical guidance – particularly for businesses.

<sup>2</sup> Regulation 2(1).

- a reference to the average consumer shall be read as referring to the average member of that group.<sup>3</sup>
- (6) Paragraph (5) is without prejudice to the common and legitimate advertising practice of making exaggerated statements which are not meant to be taken literally.

## D.2 Unfair Commercial Practices

A commercial practice is unfair if it is not professionally diligent<sup>4</sup> and it materially distorts, or is likely to materially distort, the economic behaviour of the average consumer.<sup>5</sup> Hence there exists a level of objectivity in the standards. Also, the 'likely to materially distort' element of the definition ensures that the law applies even in the absence of a commercial transaction. It is the trader, not a consumer, who engages in a commercial practice, and the Regulations also apply to traders who buy from consumers.

Regulation 4 identifies that a commercial practices is unfair if:

- (a) it is a misleading action under the provisions of regulation 5;
- (b) it is a misleading omission under the provisions of regulation 6;
- (c) it is aggressive under the provisions of regulation 7; or
- (d) it is listed in Schedule 1.

Offences relating to unfair commercial practices

Regulation 8(1) A trader is guilty of an offence if —

- (a) he knowingly or recklessly engages in a commercial practice which contravenes the requirements of professional diligence under regulation 3(3)(a); and
- (b) the practice materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product under regulation 3(3)(b).

(2) For the purposes of paragraph (1)(a) a trader who engages in a commercial practice without regard to whether the practice contravenes the requirements of professional diligence shall be deemed recklessly to engage in the practice, whether or not the trader has reason for believing that the practice might contravene those requirements.

## D.3 Misleading Acts and Omissions

### D.3.1 Misleading Actions:

Misleading actions are identified in Regulation 5 (this is a strict liability offence).

5(1) A commercial practice is a misleading action if it satisfies the conditions in either paragraph (2) or paragraph (3).

(2) A commercial practice satisfies the conditions of this paragraph—

- (a) if it contains false information and is therefore untruthful in relation to any of the matters in paragraph (4) 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 matters in that paragraph, even if the information is factually correct; and
- (b) it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

(3) A commercial practice satisfies the conditions of this paragraph if—

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<sup>3</sup> Regulation 2(5).

<sup>4</sup> Regulation 3(3)(a).

<sup>5</sup> Regulation 3(3)(b).

(a) it concerns any marketing of a product (including comparative advertising) which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor; or  
(b) it concerns any failure by a trader to comply with a commitment contained in a code of conduct which the trader has undertaken to comply with, if—

(i) the trader indicates in a commercial practice that he is bound by that code of conduct, and  
(ii) the commitment is firm and capable of being verified and is not aspirational,

and it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise, taking account of its factual context and of all its features and circumstances.

(4) The matters referred to in paragraph (2)(a) are—

(a) the existence or nature of the product;  
(b) the main characteristics of the product (as defined in paragraph 5);  
(c) the extent of the trader's commitments;  
(d) the motives for the commercial practice;  
(e) the nature of the sales process;  
(f) any statement or symbol relating to direct or indirect sponsorship or approval of the trader or the product;  
(g) the price or the manner in which the price is calculated;  
(h) the existence of a specific price advantage;  
(i) the need for a service, part, replacement or repair;  
(j) the nature, attributes and rights of the trader (as defined in paragraph 6);  
(k) the consumer's rights or the risks he may face.

(5) In paragraph (4)(b), the "main characteristics of the product" include —

(a) availability of the product;  
(b) benefits of the product;  
(c) risks of the product;  
(d) execution of the product;  
(e) composition of the product;  
(f) accessories of the product;  
(g) after-sale customer assistance concerning the product;  
(h) the handling of complaints about the product;  
(i) the method and date of manufacture of the product;  
(j) the method and date of provision of the product;  
(k) delivery of the product;  
(l) fitness for purpose of the product;  
(m) usage of the product;  
(n) quantity of the product;  
(o) specification of the product;  
(p) geographical or commercial origin of the product;  
(q) results to be expected from use of the product; and  
(r) results and material features of tests or checks carried out on the product.

(6) In paragraph (4)(j), the "nature, attributes and rights" as far as concern the trader include the trader's —

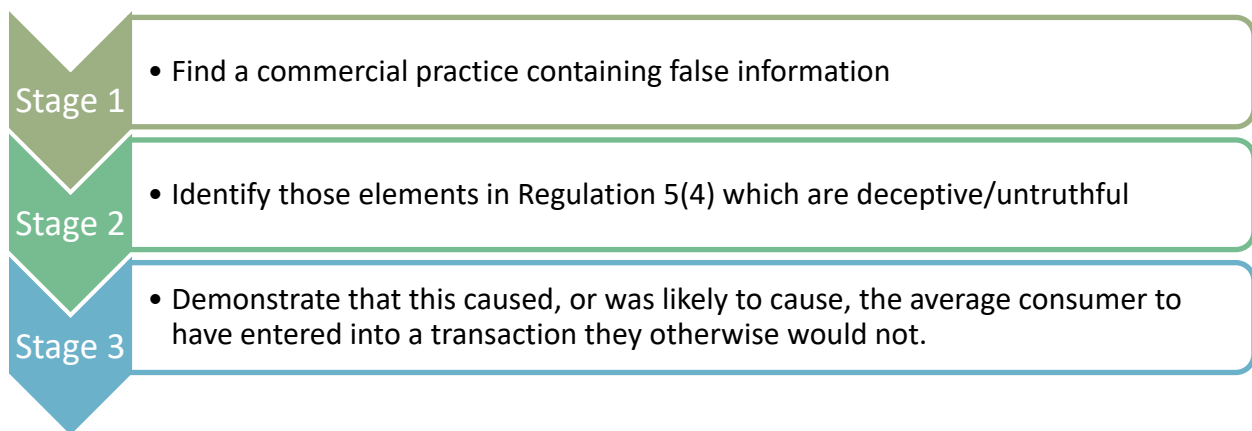
(a) identity;  
(b) assets;  
(c) qualifications;

- (d) status;
- (e) approval;
- (f) affiliations or connections;
- (g) ownership of industrial, commercial or intellectual property rights; and
- (h) awards and distinctions.

(7) In paragraph (4)(k) “consumer’s rights” include rights the consumer may have under Part 5A of the Sale of Goods Act 1979(1) or Part 1B of the Supply of Goods and Services Act 1982(2).

Offences relating to unfair commercial practices: A trader is guilty of an offence if he engages in a commercial practice which is a misleading action under Regulation 5 otherwise than by reason of the commercial practice satisfying the condition in Regulation 5(3)(b).<sup>6</sup>

The stages of bringing a claim for misleading actions are:



### D.3.2 Misleading Omissions

Regulation 6 (which is a strict liability offence) provides :

(1) A commercial practice is a misleading omission if, in its factual context, taking account of the matters in paragraph (2) —

- (a) the commercial practice omits material information,
  - (b) the commercial practice hides material information,
  - (c) the commercial practice provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, or
  - (d) the commercial practice fails to identify its commercial intent, unless this is already apparent from the context,
- and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

(2) The matters referred to in paragraph (1) are —

- (a) all the features and circumstances of the commercial practice;
- (b) the limitations of the medium used to communicate the commercial practice (including limitations of space or time); and
- (c) where the medium used to communicate the commercial practice imposes limitations of space or time, any measures taken by the trader to make the information available to consumers by other means.

<sup>6</sup> Regulation 9.

(3) In paragraph (1) “material information” means —

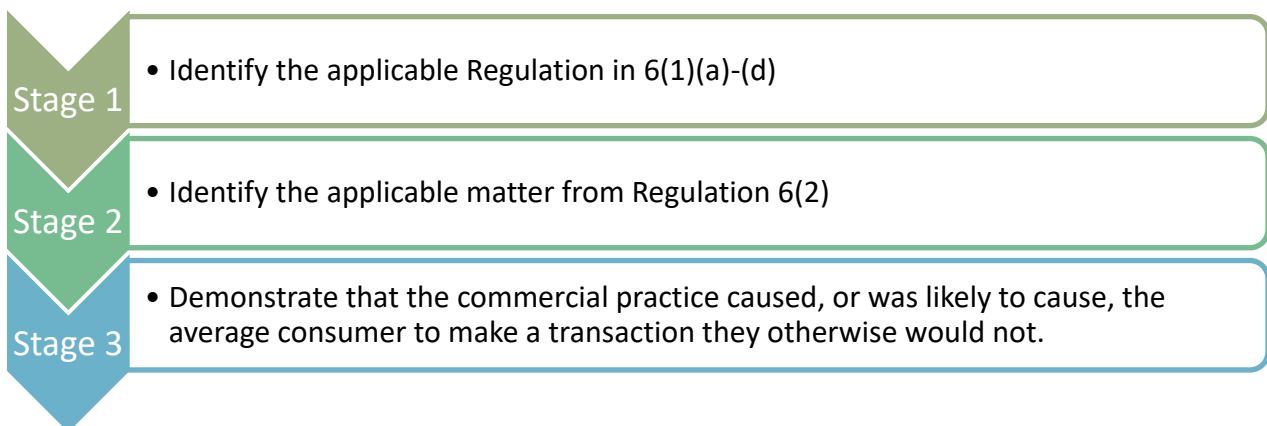
- (a) the information which the average consumer needs, according to the context, to take an informed transactional decision; and
- (b) any information requirement which applies in relation to a commercial communication as a result of a Community obligation.

(4) Where a commercial practice is an invitation to purchase, the following information will be material if not already apparent from the context in addition to any other information which is material information under paragraph (3) —

- (a) the main characteristics of the product, to the extent appropriate to the medium by which the invitation to purchase is communicated and the product;
- (b) the identity of the trader, such as his trading name, and the identity of any other trader on whose behalf the trader is acting;
- (c) the geographical address of the trader and the geographical address of any other trader on whose behalf the trader is acting;
- (d) either —
  - (i) the price, including any taxes; or
  - (ii) where the nature of the product is such that the price cannot reasonably be calculated in advance, the manner in which the price is calculated;
- (e) where appropriate, either—
  - (i) all additional freight, delivery or postal charges; or
  - (ii) where such charges cannot reasonably be calculated in advance, the fact that such charges may be payable;
- (f) the following matters where they depart from the requirements of professional diligence—
  - (i) arrangements for payment,
  - (ii) arrangements for delivery,
  - (iii) arrangements for performance,
  - (iv) complaint handling policy;
- (g) for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.

Offences relating to unfair commercial practices: A trader is guilty of an offence if he engages in a commercial practice which is a misleading omission under Regulation 6.<sup>7</sup>

The stages of bringing a claim under misleading omissions are:



<sup>7</sup> Regulation 10.

## D.4 Aggressive Practices

Regulation 7 provides aggressive commercial practices in the following:

7(1) A commercial practice is aggressive if, in its factual context, taking account of all of its features and circumstances —

- (a) it significantly impairs or is likely significantly to impair the average consumer's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence; and
- (b) it thereby causes or is likely to cause him to take a transactional decision he would not have taken otherwise.

(2) In determining whether a commercial practice uses harassment, coercion or undue influence account shall be taken of—

- (a) its timing, location, nature or persistence;
- (b) the use of threatening or abusive language or behaviour;
- (c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgment, of which the trader is aware, to influence the consumer's decision with regard to the product;
- (d) any onerous or disproportionate non-contractual barrier imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader; and
- (e) any threat to take any action which cannot legally be taken.

(3) In this regulation—

- (a) "coercion" includes the use of physical force; and
- (b) "undue influence" means exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision.

Offences relating to unfair commercial practices: A trader is guilty of an offence if he engages in a commercial practice which is aggressive under Regulation 7.<sup>8</sup>

## D.5 Banned Practices

The 31 banned / blacklisted practices are identified below. It is important to remember that these practices are unfair in all circumstances. Traders who carry out such practices will have breached the Regulations whether this had or had not affected the decisions of the 'average consumer.'

1. Falsely claiming / faking credentials: This would be where, for example, a trader claims to be a member of or signatory to a code of conduct to which he/she is not.
2. Falsely displaying a mark: For example, displaying a trust mark (such as a builder) or some quality mark without having the necessary accreditation.
3. Falsifying an endorsement: Claiming a body has provided the trader with an endorsement when it has not.
4. Falsifying an endorsement: Claiming a trader or a product has been approved, endorsed or authorized by a body when he/she has not or he/she has failed to comply with the requirements of such endorsement.
5. Bait advertising: For example, making an invitation to purchase products at a specified price, without the trader disclosing evidence of reasonable grounds that he/she may have for not be able to supply the products or equivalent products at that price / quantities of the product etc.

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<sup>8</sup> Regulation 11.

6. Falsely providing limited offers: Where a trader has falsely identified that a product is available for a particular price for a limited time. This affects consumers requiring immediate decisions without having the opportunity to make a more informed choice.
7. Illegally selling goods: Offering for sale, or giving the impression that a product would be legally sold when it cannot.
8. Trader's presentation of legal rights: Where a trader presents legal rights already available to the consumer as a distinctive feature of the trader's offer.
9. False promises: Falsely claiming a product's capacity to perform functions that it cannot – e.g. cure illnesses.
10. Promoting a product not for sale: Where a trader invites a purchase for a product but refuses to show the item to the consumer; or refuses to take an order for the product and to deliver it within a reasonable time; or demonstrating the product as defective and then promoting a different product (bait and switch).
11. Scare tactics: Falsely making inaccurate claims with the intention to coerce the consumer to purchase a product to protect him/her or his/her family.
12. Adding bureaucracy when claiming on a policy: For example, making a consumer complete unnecessary / unreasonable paperwork and other administrative duties to claim on an insurance contract.
13. Paid adverts: Using editorial content in the media to promote a product without expressly declaring this to the consumer.
14. Passing-off goods: Deliberately misleading the consumer as to the manufacturer of a product.
15. Claiming closing down sales: A trader claims to be closing down the business / ceasing to trade when he/she is not.
16. Inaccurate information: Passing on inaccurate information to induce the consumer to purchase a product on less favourable terms than is available in normal market conditions.
17. Invoicing before order: For example, sending a consumer an invoice which gives the consumer the impression that he/she has already entered a contract / ordered the product.
18. Falsely claiming to be a consumer when in reality acting as a trader.
19. Advertising directly to children to buy products or to persuade their parents / other adults to purchase the advertised product.
20. Operating / promoting / establishing a pyramid scheme.
21. Claiming prizes are available to facilitate winning in games of chance.
22. Claiming prizes will be won in competitions without awarding the prize or a reasonable alternative.
23. Describing goods as free where the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice / paying for delivery.
24. Falsely claiming a consumer has won / will win / or on doing a particular act will win a prize (or equivalent) when in fact there is no prize or claiming the prize is subject to the consumer paying money or incurring a cost.
25. Forcing sales: Creating an impression that the consumer may not leave the premises until a contract has been concluded.
26. Visits to consumers' homes and ignoring requests to leave / not to return, except where allowed in law to enforce a contract.
27. Persistent solicitations through remote media (telephone, fax, email etc) except where permitted through law to enforce a contract.
28. Making the consumer believe that if he/she does not buy a good / service the trader's employment will be in jeopardy.
29. Inertia selling: demanding payment for the return of products supplied by the trader but not solicited by the consumer (except when in accordance with the Consumer Protection (Distance Selling) Regulations 2000).
30. Providing after-sales service to consumers in a language which was not communicated in, and this was not brought to the consumer's attention prior to the transaction.
31. Misleading after-sales information.

## D.6 How is Breach Assessed

Practices may be unfair for the purposes of the Regulations where they harm, or are likely to harm, the economic interests of the average consumer. As way of an example here, guidance practices established for businesses provide that where a consumer makes, for example, a decision he/she would not have done had correct / accurate information been provided, or he/she would not have entered into a contract but for the application of unfair / aggressive practices being adopted, the business will have breached the Regulations.

The Regulations apply to offences committed by corporations:

15(1) Where an offence under these Regulations committed by a body corporate is proved—

- (a) to have been committed with the consent or connivance of an officer of the body, or
- (b) to be attributable to any neglect on his part,

the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.

(2) In paragraph (1) a reference to an officer of a body corporate includes a reference to—

- (a) a director, manager, secretary or other similar officer; and
- (b) a person purporting to act as a director, manager, secretary or other similar officer.

(3) Where an offence under these Regulations committed by a Scottish partnership is proved—

- (a) to have been committed with the consent or connivance of a partner, or
- (b) to be attributable to any neglect on his part,

the partner as well as the partnership is guilty of the offence and liable to be proceeded against and punished accordingly.

(4) In paragraph (3) a reference to a partner includes a person purporting to act as a partner.

## D.7 Offences under the Regulations

According to Regulation 8(1), a trader is guilty of an offence if

- (a) he knowingly or recklessly engages in a commercial practice which contravenes the requirements of professional diligence under regulation 3(3)(a); and
- (b) the practice materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product under regulation 3(3)(b).

(2) For the purposes of paragraph (1)(a) a trader who engages in a commercial practice without regard to whether the practice contravenes the requirements of professional diligence shall be deemed recklessly to engage in the practice, whether or not the trader has reason for believing that the practice might contravene those requirements.

The important aspect of an offence under Regulation 8 is that only traders can commit the offence, and the issue of 'knowingly or recklessly engages' instills a *mens rea* (guilty mind) element to the transgression.

## D.8 Enforcement

Failure to comply with the Regulations may lead to investigation by local trading standards service and the Office of Fair Trading. The consequences of the investigation may be that a business is prosecuted and fined, but



also much time and resources in assisting with the investigation could be required. Further, successful prosecution can have a damaging effect on the business' relationship with its customers and it could face damage to its reputation.

## D.9 Available Defences

### D.9.1 Due Diligence Defence

Regulation 17(1) provides - In any proceedings against a person for an offence under Regulation 9, 10, 11 or 12 it is a defence for that person to prove —

(a) that the commission of the offence was due to —

- (i) a mistake;
- (ii) reliance on information supplied to him by another person;
- (iii) the act or default of another person;
- (iv) an accident; or
- (v) another cause beyond his control; and

(b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.

The Regulation continues:

(2) A person shall not be entitled to rely on the defence provided by paragraph (1) by reason of the matters referred to in paragraph (ii) or (iii) of paragraph (1)(a) without leave of the court unless —

- (a) he has served on the prosecutor a notice in writing giving such information identifying or assisting in the identification of that other person as was in his possession; and
- (b) the notice is served on the prosecutor at least seven clear days before the date of the hearing.

### D.9.2 Innocent Publication of Advertisement Defence

Regulation 18 provides a defence to an advertiser who receives an advert in the course of business, and did not know, and/or had no reason to suspect, that publication of the advertisement would constitute an offence under the Regulations:

(1) In any proceedings against a person for an offence under regulation 9, 10, 11 or 12 committed by the publication of an advertisement it shall be a defence for a person to prove that —

- (a) he is a person whose business it is to publish or to arrange for the publication of advertisements;
  - (b) he received the advertisement for publication in the ordinary course of business; and
  - (c) he did not know and had no reason to suspect that its publication would amount to an offence under the regulation to which the proceedings relate.
- (2) In paragraph (1) "advertisement" includes a catalogue, a circular and a price list.

### D.9.3 Offence Due to the Default of Another Person

The defence under Regulation 16 is an interesting aspect to consider, particularly for potential liability for the actions of consumers.

Regulation 16(1) applies where a person "X" —

- (a) commits an offence under regulation 9, 10, 11 or 12, or
- (b) would have committed an offence under those regulations but for a defence under regulation 17 or 18,

and the commission of the offence, or of what would have been an offence but for X being able to rely on a defence under regulation 17 or 18, is due to the act or default of some other person “Y”.

(2) Where this regulation applies Y is guilty of the offence, subject to regulations 17 and 18, whether or not Y is a trader and whether or not Y’s act or default is a commercial practice.

(3) Y may be charged with and convicted of the offence by virtue of paragraph (2) whether or not proceedings are taken against X.

The effects of this Regulation can be seen in the case of *Olgeirsson v Kitching*<sup>9</sup>, albeit decided under the Trade Descriptions Act. A private motorist sold his car to a car dealer, having informed the dealer of the mileage on the odometer as true, despite the fact that he knew it to be false. The dealer sold the car on, using the mileage as part of the description. It was discovered by this buyer that the description was false. The private motorist was ‘another person’ who was guilty under the Act. This is despite the fact that as he was not acting in the course of business (he was a private seller – a consumer) and as such could not have been guilty of any other offence under the Act.

## Conclusion

The Regulations have codified important existing legislation, and transposed the EU Directive,<sup>10</sup> in so doing they have provided consumers with important protection. Despite the limitations of direct actions by consumers under the Regulations, the criminal liability and punishment available for breach should prove powerful disincentives for falling below the ‘safety net’ established by the Regulations.

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<sup>9</sup> [1986] 1 WLR 304.

<sup>10</sup> The Unfair Commercial Practices Directive.