Draft Regulations laid before Parliament under paragraph 2(2) of Schedule 2 to the European Communities Act 1972, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2008 No.

TRADE DESCRIPTIONS

The Business Protection from Misleading Marketing Regulations 2008

Made - - - -	*2008*
Coming into force - -	*26th May 2008*

The Secretary of State, being a Minister designated(**1**) for the purposes of section 2(2) of the European Communities Act 1972(**2**) in relation to measures relating to the control of advertising, makes the following Regulations in exercise of the powers conferred upon him by section 2(2) of that Act;

In accordance with paragraph 2(2) of Schedule 2 to that Act(**3**), a draft of this instrument was laid before Parliament and approved by a resolution of each House of Parliament.

PART 1

DEFINITIONS AND PROHIBITIONS

Citation and Commencement

1. These Regulations may be cited as the Business Protection from Misleading Marketing Regulations 2008 and shall come into force on 26th May 2008.

Interpretation

2.—(1) In these Regulations—

"advertising" means any form of representation which is made in connection with a trade, business, craft or profession in order to promote the supply or transfer of a product and "advertiser" shall be construed accordingly;

"code owner" means a trader or a body responsible for—

(**1**) S.I. 1985/749.
(**2**) 1972 c.68. Section 2(2) was amended by section 27(1)(a) of the Legislative and Regulatory Reform Act 2006 (c.51).
(**3**) Paragraph 2(2) of Schedule 2 was amended by section 27(2)(a) of the Legislative and Regulatory Reform Act 2006 (c.51).

(a) the formulation and revision of a code of conduct; or

(b) monitoring compliance with the code by those who have undertaken to be bound by it;

"comparative advertising" means advertising which in any way, either explicitly or by implication, identifies a competitor or a product offered by a competitor;

"court", in relation to England and Wales and Northern Ireland, means a county court or the High Court, and, in relation to Scotland, the sheriff or the Court of Session;

"enforcement authority" means the OFT, every local weights and measures authority in Great Britain (within the meaning of section 69 of the Weights and Measure Act 1985(**4**)) and the Department of Enterprise, Trade and Investment in Northern Ireland;

"goods" includes ships, aircraft, animals, things attached to land and growing crops;

"OFT" means the Office of Fair Trading;

"premises" includes any place and any stall, vehicle, ship or aircraft;

"product" means any goods or services and includes immovable property, rights and obligations;

"ship" includes any boat and any other description of vessel used in navigation; and

"trader" means any person who is acting for purposes relating to his trade, craft, business or profession and anyone acting in the name of or on behalf of a trader.

(2) In the application of these Regulations to Scotland for references to an "injunction" or an "interim injunction" there shall be substituted references to an "interdict" or an "interim interdict" respectively.

Prohibition of advertising which misleads traders

3.—(1) Advertising which is misleading is prohibited.

(2) Advertising is misleading which—

(a) in any way, including its presentation, deceives or is likely to deceive the traders to whom it is addressed or whom it reaches; and by reason of its deceptive nature, is likely to affect their economic behaviour; or

(b) for those reasons, injures or is likely to injure a competitor.

(3) In determining whether advertising is misleading, account shall be taken of all its features, and in particular of any information it contains concerning—

(a) the characteristics of the product (as defined in paragraph (4));

(b) the price or manner in which the price is calculated;

(c) the conditions on which the product is supplied or provided; and

(d) the nature, attributes and rights of the advertiser (as defined in paragraph (5)).

(4) In paragraph (3)(a) the "characteristics of the product" include—

(a) availability of the product;

(b) nature of the product;

(c) execution of the product;

(d) composition of the product;

(e) method and date of manufacture of the product;

(**4**) 1985 c.72, section 69 was amended by paragraph 75 of Schedule 16 to the Local Government (Wales) Act 1994 (c.19) and by paragraph 144 of Schedule 13 to the Local Government etc (Scotland) Act 1994 (c.39).

(f) method and date of provision of the product;

(g) fitness for purpose of the product;

(h) uses of the product;

(i) quantity of the product;

(j) specification of the product;

(k) geographical or commercial origin of the product;

(l) results to be expected from use of the product; or

(m) results and material features of tests or checks carried out on the product.

(5) In paragraph (3)(d) the "nature, attributes and rights" of the advertiser include the advertiser's —

(a) identity;

(b) assets;

(c) qualifications;

(d) ownership of industrial, commercial or intellectual property rights; or

(e) awards and distinctions.

Comparative advertising

4. Comparative advertising shall, as far as the comparison is concerned, be permitted only when the following conditions are met—

(a) it is not misleading under regulation 3;

(b) it is not a misleading action under regulation 5 of the Consumer Protection from Unfair Trading Regulations 2008(**5**) or a misleading omission under regulation 6 of those Regulations;

(c) it compares products meeting the same needs or intended for the same purpose;

(d) it objectively compares one or more material, relevant, verifiable and representative features of those products, which may include price;

(e) it does not create confusion among traders—

(i) between the advertiser and a competitor, or

(ii) between the trade marks, trade names, other distinguishing marks or products of the advertiser and those of a competitor;

(f) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, products, activities, or circumstances of a competitor;

(g) for products with designation of origin, it relates in each case to products with the same designation;

(h) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;

(i) it does not present products as imitations or replicas of products bearing a protected trade mark or trade name.

Promotion of misleading advertising and comparative advertising which is not permitted

5. A code owner shall not promote in a code of conduct—

(**5**) S.I. 2008/—]

(a) advertising which is misleading under regulation 3; or

(b) comparative advertising which is not permitted under regulation 4.

PART 2

OFFENCES

Misleading advertising

6. A trader is guilty of an offence if he engages in advertising which is misleading under regulation 3.

Penalty for offence under regulation 6

7. A person guilty of an offence under regulation 6 shall be liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum; or

(b) on conviction on indictment, to a fine or imprisonment for a term not exceeding two years or both.

Offences committed by bodies of persons

8.—(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.

Offence due to the default of another person

9.—(1) This regulation applies where a person "X"—

(a) commits an offence under regulation 6, or

(b) would have committed an offence under regulation 6 but for a defence under regulation 11 or 12,

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 regulations 11 or 12, is due to the act or default of some other person "Y".

(2) Where this regulation applies Y shall be guilty of the offence subject to regulations 11 and 12 whether or not Y is a trader and whether or not Y's act or default is advertising.

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

Time limit for prosecution

10.—(1) No proceedings for an offence under these Regulations shall be commenced after—

(a) the end of the period of three years beginning with the date of the commission of the offence; or

(b) the end of the period of one year beginning with the date of discovery of the offence by the prosecutor,

whichever is earlier.

(2) For the purposes of paragraph (1)(b) a certificate signed by or on behalf of the prosecutor and stating the date on which the offence was discovered by him shall be conclusive evidence of that fact and a certificate stating that matter and purporting to be so signed shall be treated as so signed unless the contrary is proved.

(3) Notwithstanding anything in section 127(1) of the Magistrates' Courts Act 1980(**6**), an information relating to an offence under these Regulations which is triable by a magistrates' court in England and Wales may be so tried if it is laid at any time before the end of the period of twelve months beginning with the date of the commission of the offence.

(4) Notwithstanding anything in section 136 of the Criminal Procedure (Scotland) Act 1995(**7**) summary proceedings in Scotland for an offence under these Regulations may be commenced at any time before the end of the period of twelve months beginning with the date of the commission of the offence.

(5) For the purposes of paragraph (4), section 136(3) of the Criminal Procedure (Scotland) Act 1995 shall apply as it applies for the purposes of that section.

(6) Notwithstanding anything in Article 19(1) of the Magistrates' Courts (Northern Ireland) Order 1981(**8**) a complaint charging an offence under these Regulations which is triable by a magistrates' court in Northern Ireland may be so tried if it is made at any time before the end of the period of twelve months beginning with the date of the commission of the offence.

Due diligence defence

11.—(1) In any proceedings against a person for an offence under regulation 6 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.

(**6**) 1980 c.43.
(**7**) 1995 c.46.
(**8**) S.I. 1981/1675 (N.I. 26).