

IS ALL FAIR IN TRADING AND MARKETING?

New legislation is coming in to regulate fair trading and realistic representation of products more stringently in marketing and advertising. Martin Watt explains why it could affect the rail industry – and how to stay on the right side of the law

No fewer than five new rail operations are commencing in the run up to Christmas. The incoming operators have plenty to think about as they finalise their mobilisations and get to grips with their new businesses. But here's one extra item for the to-do list. The Government has declared its intention to implement EU directives about acceptable practices in business-to-consumer and business-to-business commerce by April 2008.

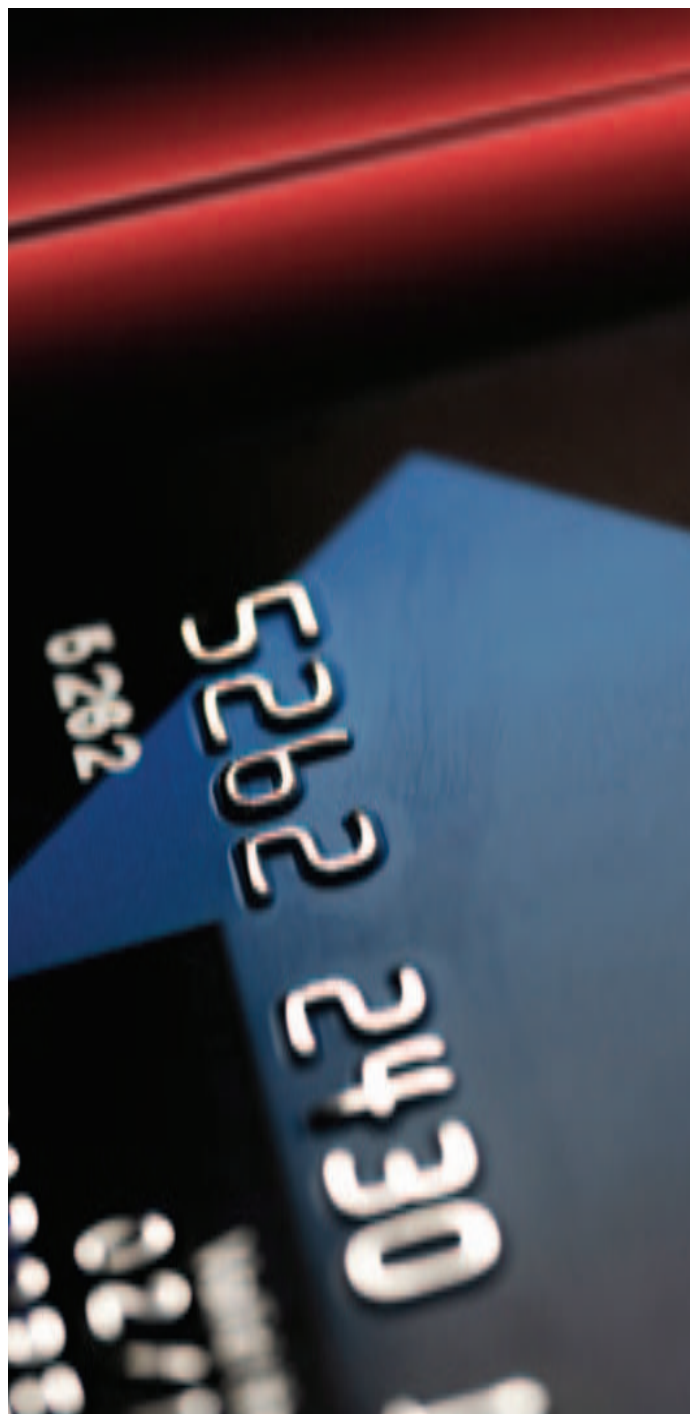
The proposed new rules will consolidate fair trading requirements, and extend the scope of legislative protection. Operators should review their procedures to make sure they comply – there are stiff sanctions for non-compliance. The Government's consultation on the draft regulations closed in August, and the outcome is awaited.

Meanwhile, the likely overall shape of the new rules is known. They will implement separate legislative umbrellas for consumer and business protections: the Consumer Protection from Unfair Trading Regulations 2007 (the 'consumer regulations'), and the Business Protection from Misleading Marketing Regulations 2007 (the 'business regulations').

Notwithstanding a whole host of consumer reforms and counter-measures over the years, the unscrupulous trader remains alive and well. For example, in the Royal Borough of Windsor and Maidenhead, recent prosecutions by the local trading standards office include those against the retailer of plastic jewellery that was described as 'cherry' amber, and the importer and distributor of 'Sudden Change' – a skin product that 'smoothes away lines, wrinkles and puffiness... instantly'. If only.

Existing protections against such business practices fall into two broad categories: contractual and general. On a contractual level, for example, warranties of fitness for purpose and satisfactory quality are inserted into sale of goods contracts by law. On a general level, the Trade Descriptions Act 1968 imposes a blanket prohibition against making false trade descriptions in the course of a business.

In addition, consumers are protected against misleading price indications by the Consumer Protection Act 1987, and the Price Indications (Method of Payment) Regulations 1991. There are also many rules relating to specific industry sectors, as for example under the Consumer Credit Act 1974, and the Hallmarking Act 1973.



Shutterstock

The EU directives on which the new rules are based require maximum harmonisation, meaning member states must implement them, but cannot go above the levels of protection they provide for. The Government, therefore, plans to consolidate general protections in one place, and repeal some existing protections. The net effect is that the new rules impose general prohibitions against unfair practices that are more widely applicable than the existing law.

The consumer regulations forbid unfair commercial practices and apply before, during and after contract formation. They set out tests to decide whether a commercial practice is 'unfair', whether an action or omission is misleading and whether an action is aggressive. The tests focus on the nature and content of the practices, and their likely impacts on typical consumers. The general prohibition of 'unfair practices' applies to commercial arrangements that breach the requirements of professional diligence, and that impair a consumer's informed decision, so that a transactional decision is made that would not otherwise have been taken. There are also specific prohibitions of misleading actions and omissions, and of aggressive practices:

- Misleading actions, including those containing false information that is likely to deceive the typical consumer in relation to a list of specified matters – like, for example, the main characteristics of a product;
- Misleading omissions, such as those which omit or hide material information that a typical consumer needs in order to make an informed transactional decision; and
- Aggressive actions including those which, by using harassment, coercion, or undue influence, significantly impair a consumer's freedom of choice.

Usually, the requirement is that to be unfair, a practice must be likely to cause a 'typical consumer' to make a transactional decision he or she would not otherwise have taken. However, there are also 31 specific practices that are always classed as unfair. For example it is always unfair to use so-called 'bait advertising': that is, to invite the purchase of products at a specified price without reasonable grounds for believing it will be possible to supply goods at that price in quantities that are realistic, having regard to the scale of advertising and the price offered.

An illustrative example in the rail industry is where an operator advertises trips to a given destination using the line 'travel for just £10'. The operator had only ever planned to have a very small number of fares available at that price. This is bait advertising and is automatically banned because the number of fares actually available for £10 would not be sufficient to meet the likely demand arising from the scale of the advertising, and the operator knew this but failed to make it clear in the advertisement.

Another example comprises a station retailer that displays an advert saying: 'Pens for sale. If they don't work we'll give you your money back or replace them. You won't find this offer elsewhere.' This advert is automatically unfair under advertising law, because, in fact, the offer is not unique as suggested: consumers are already entitled under contract law to a refund, repair or replacement if a product is faulty at the time of purchase.

The idea of a 'typical consumer' may be important, particularly for businesses with a diverse customer base. A 'typical consumer' can be the average member of a clearly identifiable group of customers who are particularly vulnerable to the commercial practice or to the underlying product due to their mental or physical infirmity, age or credulity.

During an earlier consultation, the Government highlighted the need to do more to protect vulnerable groups such as the elderly, disabled, or mentally ill. Customer segments like these might, therefore, require special consideration in relation to their susceptibility to a marketing practice,

It is always unfair to use so-called 'bait advertising': that is, to invite the purchase of products at a specified price without reasonable grounds for believing it will be possible to supply goods at that price in quantities that are realistic

although there is confirmation that advertising puffery is not caught by the rules. Industry bodies such as Atoc may be affected by the consumer regulations. They are aimed at individual businesses, but also forbid the promotion of an unfair commercial practice in a code of conduct by a person responsible for the forming of a code, or for overseeing compliance with it.

The business regulations are also broad. They apply to what are collectively called 'indications', which include any form of representation made either in connection with business, or with the promotion of the supply of goods or services. The regulations ban misleading indications, and make it a criminal offence for any person acting in the course of a business to make one. To be misleading, an indication must be likely to deceive, and to affect the economic behaviour of someone acting in the course of a business.

Both the consumer regulations and the business regulations will be enforced by the OFT, and contain criminal sanctions for breach. Some of the criminal offences are so-called 'strict liability', meaning there is no need to prove knowledge or recklessness on the part of the offender. The criminal sanctions that a breach may attract include imprisonment for company directors and managers.

A key impact of the consumer regulations will be to broaden the scope for challenge and complaint about commercial practices outside the contract between buyer and seller. Businesses can be reassured, however, that the consumer regulations do not give consumers an individual right to instigate action to enforce the prohibitions. Nor do they give consumers a specific right of compensation for unfair commercial practices.

Rights and duties between buyers and sellers will continue to be governed by contract law, and this already occupies some of the ground covered by the consumer regulations. The law relating to contractual misrepresentation, for example, means that businesses have long lived with the reality that a consumer induced to enter a contract because of a false representation might be entitled to claim damages, or even to rescind the contract.

Even so, businesses, as a minimum, will need to:

- Review existing business practices to analyse their fairness, and to ensure that none falls within the 31 practices banned in all circumstances under the consumer regulations;
- Consider not only actions but also omissions, to analyse if anything they are failing to do amounts to a misleading omission;
- Identify customer segments and think about any particular vulnerability of the 'typical consumer' within each; and
- Review their relationships with other businesses to consider if they might infringe the consumer regulations or the business regulations.

The key difficulty is to assess whether current practices are unfair or misleading – inevitably this is a matter of judgment and is open to interpretation. Corporate governance may require businesses to take a cautious view. In any event, now is the time to start considering what changes, if any, are necessary.

Martin Watt is part of the rail team at Denton Wilde Sapte.