

## **PARTIAL REGULATORY IMPACT ASSESSMENT**

### **The Business Protection from Misleading Marketing Regulations (BPRs)**

**May 2007**

## **Rationale for Government Intervention**

The Unfair Commercial Practices Directive overlaps with existing consumer protection legislation, including the Trade Descriptions Act 1968 (TDA). The TDA and other pieces of overlapping legislation will be repealed to avoid duplication. This will create a modern, simplified consumer framework fit for the 21<sup>st</sup> century. The TDA applies to both business-to-business and business-to-consumer practices. A breach of the TDA is a criminal offence enforceable by Trading Standards Services. The TDA can also currently be enforced by civil means through Part 8 of the Enterprise Act 2002 where a breach of its provisions harms the collective interests of consumers. The Office of Fair Trading (OFT) and Trading Standards Services (and others) are able to take action using Part 8.

The Control of Misleading Advertisements Regulations 1988 (CMARs), which implement the Misleading and Comparative Advertising Directive (MCAD, 84/450 EEC) in the UK, are enforced by the OFT, through the use of civil injunctions and, in relation to broadcast advertising, by OFCOM through powers available to it under the Communications Act 2003. The CMARs prohibit misleading advertisements and comparative advertisements which are not permitted. The CMARs apply to advertisements directed at businesses and/or consumers. The CMARs can also currently be enforced through Part 8 of the Enterprise Act 2002 where an infringement harms the collective interests of consumers.

The scope of the original MCAD has been narrowed by the Unfair Commercial Practices Directive to cover only business-to-business relationships, although advertising continues to be defined very broadly. The amendments to MCAD have been codified by Directive 2006/114/EC, which repeals the earlier 1984 Directive.

The Unfair Commercial Practices Directive itself covers only business-to-consumer practices. With the repeal of the TDA the Business Protection from Misleading Marketing Regulations (BPRs) will become the main mechanism for regulating unfair business-to-business practices in the UK. These are the regulations that will replace the CMARs.

The repeal of the TDA removes the Trading Standards Services' ability to enforce business-to-business cases, thereby exposing UK businesses to a reduction in protection from other unscrupulous businesses. Furthermore, the OFT does not currently have criminal enforcement powers under CMARs, creating a gap in criminal enforcement at a national level. As business-to-business cases do arise in the UK, there is a strong argument for Government to intervene and amend legislation to continue to protect businesses, especially as small businesses are often in no better position to protect themselves than consumers.

Repeal of the TDA also means that the Trading Standards Services' powers to investigate breaches of the Act will also disappear.

### **Base Case: Trading Standards Services is given civil enforcement powers to enforce business-to-business cases under CMARs**

The Trading Standards Services has historically enforced false and misleading claims affecting business through criminal sanctions and associated investigative powers. The Government intends to repeal the relevant provisions of the TDA, through which Trading Standards Services get these sanctions and powers. Without these, Trading Standards Services cannot continue to exercise a key component of its remit. The Base Case for any government intervention would therefore be to give civil enforcement powers to the Trading Standards Services, to enable them to enforce business-to-business cases under the BPRs. This is because we consider that enforcement will be more effective if both the OFT and Trading Standards Services could enforce the BPRs.

This closes the coverage gap created by the repeal of the TDA, whereby the OFT continues to use civil powers to enforce business-to-business cases under the BPRs but lacks the enforcement support of the Trading Standards Services.

The Trading Standards Services has a long history of enforcing regulatory law, and is well-placed to operate these civil powers because through its use of Part 8 the Trading Standards Services are adapting to using the civil regime.

### ***Costs and Benefits***

The BPRs will not alter businesses' obligations under the CMARs not to use advertisements which mislead other businesses or which are not permitted comparative advertisements. There should therefore be no additional costs for legitimate businesses who comply with the law.

Giving both enforcement agencies civil powers to enforce the Regulations will make it more likely that action will be taken against businesses using misleading marketing techniques. This will produce savings for the business that might otherwise have been misled by these marketing techniques.

Trading Standards Services should not incur additional costs since the cost of taking action through BPRs is likely to be equivalent to the costs of bringing criminal prosecutions through the TDA in the past. There may be some reduction in costs to Trading Standards if disputes can be resolved informally (e.g. by undertakings) rather than formal court action.

### **Option 1: The Trading Standards Services have civil *and* criminal prosecution powers to enforce business-to-business cases**

Option 1 would expand the Base Case to give both civil and criminal enforcement powers to the Trading Standards Services to enforce the BPRs, with the OFT continuing to exercise civil powers alone. However, criminal sanctions would apply only in relation to a breach of the misleading advertising provisions of the BPRs, and not to the use of comparative advertising which is not permitted. This expansion reflects the historical role that the Trading Standards Services has played in enforcing regulatory law using mainly criminal powers.

Adopting Option 1 reinstates the criminal enforcement route (with associated investigative powers) that was available to Trading Standards Services prior to the repeal of the TDA. It also gives Trading Standards Services the power to apply for civil injunctions to stop any breaches of the BPRs. Returning criminal sanctions and associated investigative powers to the Trading Standards Services in relation to false and misleading claims is important as it may become necessary to pursue a criminal prosecution for serious business-to-business cases. Indeed, the seriousness of a breach may not be apparent at the outset of an investigation; enabling criminal powers on top of the civil sanctions proposed in the Base Case gives the Trading Standards Services full capabilities to protect businesses through the most appropriate enforcement route.

### ***Costs and Benefits***

The costs and benefits from the base case apply to option 1 also. Again there could be some savings for business and Trading Standards Services if less serious breaches can be dealt with through undertakings rather than formal court (civil or criminal) action.

### **Option 2: Extending Option 1, whereby the Trading Standards Services obtains civil *and* criminal enforcement powers, and the OFT is given criminal enforcement powers, on top of its existing civil enforcement powers, to enforce business-to-business cases**

Option 1 returns the criminal enforcement powers to stop unfair business-to-business practices enjoyed by the Trading Standards Services prior to the repeal of the TDA. The OFT retains only civil sanctions under this option however. Thus, Option 2 would give the OFT the same range of powers as Trading Standards Services has, by extending its enforcement capacity to include criminal sanctions for business-to-business cases relating to misleading advertising. This mirrors similar criminal powers being given to OFT under the regulations implementing the Unfair Commercial Practices Directive.

Given the OFT's national and international work it is disproportionate for traders to face lesser or arbitrarily different sanctions from the OFT from those they may face from the Trading Standards Services.

For example, a criminal prosecution for an offence affecting one or two small businesses in a local authority area currently potentially attracts a criminal penalty, whereas a nation-wide (e.g. directory entry) scam affecting hundreds of small and medium sized businesses, pursued by the OFT through the civil route, will not attract a criminal penalty (unless there is a later, further breach). Clearly, the nature and effect of the breach should be determining factors in choosing the most appropriate enforcement action, not the identity of the body taking the enforcement action.

Furthermore, for maximum flexibility and to reflect Macrory principles, all enforcers should have the ability to move between criminal and civil actions. Part way through an investigation it may become apparent that a change is necessary to reflect the greater or lesser seriousness of a breach, as the impact and cause of a trader's conduct is not always clear at the beginning of an investigation.

It would create unnecessary duplication of effort by enforcers, potentially slow down enforcement action and create evidential difficulties if partial investigations by one enforcer had to be referred to another enforcer to complete them, simply because the enforcer initiating the investigation lacked suitable powers to conclude the case appropriately itself.

### ***Costs and Benefits***

The costs and benefits from option 1 apply to option 2 also. This option might also bring cost benefits to enforcers. Under this action, the OFT can take co-ordinated action against a national business, rather than local Trading Standards Services attempting to do so. In addition, it gives the OFT the flexibility to move between criminal and civil actions, rather than duplicating effort and having to refer a matter to a different enforcer.

### **Preferred Option**

Option 2 both returns the original business-to-business protection powers enjoyed by the Trading Standards Services prior to the repeal of the relevant provisions of the TDA and also expands the role of the OFT to ensure a common business-to-business protection approach among the bodies charged with enforcing the BPRs. Thus, Option 2 is our preferred option. The Trading Standards Services has historical expertise in protecting mainly small and medium sized businesses, principally in their local authority area and will retain the enforcement powers and tools to continue this following the repeal of the TDA. The OFT also has a wide remit and resources as a national enforcement body and we believe that it should have the ability, where necessary, to apply those resources to prosecute businesses which mislead other businesses. These dual sanctions are important if business-to-business infringements are to continue to be penalized efficiently. This would also mirror the powers these

bodies have to enforce the broadly equivalent consumer protection legislation (the Unfair Commercial Practices Directive).

Granting the OFT access to criminal enforcement powers endows it with an important tool to tackle business-to-business breaches whose degree of seriousness may only become apparent as investigations unfold. To limit the OFT to civil business-to-business enforcement, where it currently stands, restricts its ability to enforce business-to-business infringements that, historically, have at times necessitated criminal prosecution. Without doing this there is a risk that a national business-to-business case pursued by the OFT would be under-penalized should it become clear that criminal sanctions were necessary for an offender on this level. This will also give OFT, who may be best placed to take such action, the ability to prosecute businesses carrying out nation-wide scams. The Government, in its response to the December 2005 consultation, accepted that the OFT's current powers appear anomalous in comparison with the Trading Standards Services, and that its enhanced enforcement responsibilities (see below) make it appropriate for it to be given additional enforcement powers.

In the Chancellor's Pre-Budget Report 2005: Britain meeting the global challenge: Enterprise, fairness and responsibility, the OFT's responsibilities were widened to include promoting consistency and proportionality in consumer protection, as well as an increased role in working with the Trading Standards Services. Closer working in this way includes providing regulatory leadership and 'championing' the Trading Standards Services; giving the OFT access to the same sanctions as the Trading Standards Services enables the former to achieve this role. Bringing both bodies to a common level of enforcement capability in this way ensures that only the nature and effect of a business-to-business breach will determine the choice of the most appropriate enforcement action, not the identity (and legal powers) of the body taking the enforcement action.

## **OFCOM**

The CMARs place a duty on OFCOM to consider any complaint that an advertisement included or proposed to be included in any licensed programme service or S4C is misleading or does not comply with the conditions under which comparisons are permitted in advertisements, unless the complaint seems to OFCOM to be frivolous or vexatious. OFCOM may, if it considers it appropriate to do so, require a licence holder to exclude the advertisement from its programme. OFCOM has contracted-out these functions to the ASA.

These provisions are retained unchanged in the BPRs. The special nature of broadcast advertising and the wide power already available to OFCOM to deal with broadcasters who do not comply with their license conditions means that the Government does not believe it is necessary to give OFCOM criminal enforcement powers. However, this would not prevent the OFT or Trading

Standards Services from taking separate civil or criminal action under the BPRs against the trader responsible for placing the advertisement.