

1988 No. 915

CONSUMER PROTECTION

**The Control of Misleading Advertisements Regulations
1988**

Made - - - - - *23rd May 1988*

Coming into force *20th June 1988*

Whereas the Secretary of State is a Minister designated(a) for the purposes of section 2(2) of the European Communities Act 1972(b) in relation to measures relating to the control of advertising;

And whereas a draft of these Regulations has been approved by a resolution of each House of Parliament pursuant to section 2(2) of and paragraph 2(2) of Schedule 2 to that Act;

Now, therefore, the Secretary of State in exercise of the powers conferred on him by section 2(2) of that Act and of all other powers enabling him in that behalf hereby makes the following Regulations:

Citation and commencement

1. These Regulations may be cited as the Control of Misleading Advertisements Regulations 1988 and shall come into force on 20th June 1988.

Interpretation

2.—(1) In these Regulations—

“advertisement” 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 goods or services, immovable property, rights or obligations;

“broadcast advertisement” means any advertisement included or proposed to be included in any programme or teletext transmission broadcast by the IBA and includes any advertisement included or proposed to be included in a licensed service by the reception and immediate re-transmission of broadcasts made by the IBA;

“Cable Authority” means the authority mentioned in section 1(1) of the Cable and Broadcasting Act 1984(c);

“court”, in relation to England and Wales and Northern Ireland, means the High Court, and, in relation to Scotland, the Court of Session;

“Director” means the Director General of Fair Trading;

“IBA” means the Independent Broadcasting Authority mentioned in section 1(1) of the Broadcasting Act 1981(d);

“licensable service” has the meaning given by section 2(2) of the Cable and Broadcasting Act 1984;

(a) S.I. 1985/749.
(d) 1981 c.68.

(b) 1972 c.68.

(c) 1984 c.46.

“licensed service” means a licensable service in respect of which the Cable Authority has granted a licence pursuant to section 4 of the Cable and Broadcasting Act 1984; “publication” in relation to an advertisement means the dissemination of that advertisement whether to an individual person or a number of persons and whether orally or in writing or in any other way whatsoever, and “publish” shall be construed accordingly.

(2) For the purposes of these Regulations an advertisement is misleading if in any way, including its presentation, it deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and if, by reason of its deceptive nature, it is likely to affect their economic behaviour or, for those reasons, injures or is likely to injure a competitor of the person whose interests the advertisement seeks to promote.

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

Application

3. (1) These Regulations do not apply to—

- (a) the following advertisements issued or caused to be issued by or on behalf of an authorised person or appointed representative, that is to say
 - (i) investment advertisements; and
 - (ii) any other advertisements in respect of investment business, except where any such advertisements relate exclusively to any matter in relation to which the authorised person in question is an exempted person; and
- (b) advertisements of a description referred to in section 58(1)(9d) of the Financial Services Act 1986^(a), except where any such advertisements consist of or any part of the matters referred to in section 58(1)(d)(ii) of that Act as being required or permitted to be published by an approved exchange under Part V of that Act.

(2) In this regulation “appointed representative”, “approved exchange”, “authorised person”, “exempted person”, “investment advertisement” and “investment business” have the same meanings as in the Financial Services Act 1986.

Complaints to the Director

4.—(1) Subject to paragraphs (2) and (3) below, it shall be the duty of the Director to consider any complaint made to him that an advertisement is misleading, unless the complaint appears to the Director to be frivolous or vexatious.

(2) The Director shall not consider any complaint which these Regulations require or would require, leaving aside any question as to the frivolous or vexatious nature of the complaint, the IBA or the Cable Authority to consider.

(3) Before considering any complaint under paragraph (1) above the Director may require the person making the complaint to satisfy him that—

- (a) there have been invoked in relation to the same or substantially the same complaint about the advertisement in question such established means of dealing with such complaints as the Director may consider appropriate, having regard to all the circumstances of the particular case;
- (b) a reasonable opportunity has been allowed for those means to deal with the complaint in question; and
- (c) those means have not dealt with the complaint adequately.

(4) In exercising the powers conferred on him by these Regulations the Director shall have regard to—

- (a) all the interests involved and in particular the public interest; and
- (b) the desirability of encouraging the control, by self-regulatory bodies, of advertisements.

^(a) 1986 c.60.

Applications to the Court by the Director

5.—(1) If, having considered a complaint about an advertisement pursuant to regulation 4(1) above, he considers that the advertisement is misleading, the Director may, if he thinks it appropriate to do so, bring proceedings for an injunction (in which proceedings he may also apply for an interlocutory injunction) against any person appearing to him to be concerned or likely to be concerned with the publication of the advertisement.

(2) The Director shall give reasons for his decision to apply or not to apply, as the case may be, for an injunction in relation to any complaint which these Regulations require him to consider.

Functions of the Court

6.—(1) The court on an application by the Director may grant an injunction on such terms as it may think fit but (except where it grants an interlocutory injunction) only if the court is satisfied that the advertisement to which the application relates is misleading. Before granting an injunction the court shall have regard to all the interests involved and in particular the public interest.

(2) An injunction may relate not only to a particular advertisement but to any advertisement in similar terms or likely to convey a similar impression.

(3) In considering an application for an injunction the court may, whether or not on the application of any party to the proceedings, require any person appearing to the court to be responsible for the publication of the advertisement to which the application relates to furnish the court with evidence of the accuracy of any factual claim made in the advertisement. The court shall not make such a requirement unless it appears to the court to be appropriate in the circumstances of the particular case, having regard to the legitimate interests of the person who would be the subject of or affected by the requirement and of any other person concerned with the advertisement.

(4) If such evidence is not furnished to it following a requirement made by it under paragraph (3) above or if it considers such evidence inadequate, the court may decline to consider the factual claim mentioned in that paragraph accurate.

(5) The court shall not refuse to grant an injunction for lack of evidence that—

- (a) the publication of the advertisement in question has given rise to loss or damage to any person; or
- (b) the person responsible for the advertisement intended it to be misleading or failed to exercise proper care to prevent its being misleading.

(6) An injunction may prohibit the publication or the continued or further publication of an advertisement.

Powers of the Director to obtain and disclose information and disclosure of information generally

7.—(1) For the purpose of facilitating the exercise by him of any functions conferred on him by these Regulations, the Director may, by notice in writing signed by him or on his behalf, require any person to furnish to him such information as may be specified or described in the notice or to produce to him any documents so specified or described.

(2) A notice under paragraph (1) above may—

- (a) specify the way in which and the time within which it is to be complied with; and
- (b) be varied or revoked by a subsequent notice.

(3) Nothing in this regulation compels the production or furnishing by any person of a document or of information which he would in an action in a court be entitled to refuse to produce or furnish on grounds of legal professional privilege or, in Scotland, on the grounds of confidentiality as between client and professional legal adviser.

(4) If a person makes default in complying with a notice under paragraph (1) above the court may, on the application of the Director, make such order as the court thinks fit for requiring the default to be made good, and any such order may provide that all the costs or expenses of and incidental to the application shall be borne by the person

in default or by any officers of a company or other association who are responsible for its default.

(5) Subject to any provision to the contrary made by or under any enactment, where the Director considers it appropriate to do so for the purpose of controlling misleading advertisements, he may refer to any person any complaint (including any related documentation) about an advertisement or disclose to any person any information (whether or not obtained by means of the exercise of the power conferred by paragraph (1) above).

(6) For the purpose of enabling information obtained under certain enactments to be used for facilitating the performance of functions under these Regulations, the following amendments shall be made in provisions respecting disclosure of information, that is to say—

(a) in section 133 of the Fair Trading Act 1973(a) there shall be inserted—

(i) at the end of paragraph (a) of subsection (2) the words “the Control of Misleading Advertisements Regulations 1988 or”;

(ii) at the end of subsection (3) the words “or the Control of Misleading Advertisements Regulations 1988”;

(b) in section 174 of the Consumer Credit Act 1974(b) there shall be inserted—

(i) after the words “Consumer Protection Act 1987” in paragraph (a) of subsection (3) the words “or the Control of Misleading Advertisements Regulations 1988”;

(ii) after the words “Fair Trading Act 1973” in paragraph (c) of subsection (3) the words “or under the Control of Misleading Advertisements Regulations 1988”;

(c) in section 41 of the Restrictive Trade Practices Act 1976(c) there shall be inserted—

(i) at the end of paragraph (a) of subsection (1) the words “or the Control of Misleading Advertisements Regulations 1988”;

(ii) after the words “Fair Trading Act 1973” in paragraph (c) of subsection (1) the words “or the Control of Misleading Advertisements Regulations 1988”;

(d) in section 10 of the Estate Agents Act 1979(d) there shall be inserted—

(i) after the words “Consumer Protection Act 1987” in paragraph (a) of subsection (3) the words “or the Control of Misleading Advertisements Regulations 1988”;

(ii) after the words “other enactments” in paragraph (c) of subsection (3) the words “or subordinate legislation”;

(e) in section 19 of the Competition Act 1980(e) there shall be inserted

(i) after the words “the enactments” in paragraphs (a) and (c) of subsection (2) the words “or subordinate legislation”;

(ii) after the words “the enactments” in subsection (3) the words “and subordinate legislation” and after the words “Consumer Protection Act 1987” in that subsection the words “(k) the Control of Misleading Advertisements Regulations 1988”;

(f) in section 101 of the Telecommunications Act 1984(f) there shall be inserted—

(i) after the words “the enactments” in paragraphs (b) and (d) of subsection (2) the words “or subordinate legislation”;

(ii) after the words “the enactments” in subsection (3) the words “and subordinate legislation” and after the words “Consumer Protection Act 1987” in that subsection the words “(i) the Control of Misleading Advertisements Regulations 1988”;

(g) in section 74 of the Airports Act 1986(g) there shall be inserted

(i) after the words “the enactments” in paragraphs (a) and (c) of subsection (2) the words “or subordinate legislation”;

(a) 1973 c.41.
(d) 1979 c.38.
(g) 1986 c.31.

(b) 1974 c.39.
(e) 1980 c.21.

(c) 1976 c.34.
(f) 1984 c.12.

- (ii) after the words "the enactments" in subsection (3) the words "and subordinate legislation" and after the words "Consumer Protection Act 1987" in that subsection the words "(j) the Control of Misleading Advertisements Regulations 1988";
- (h) in section 42 of the Gas Act 1986(a) there shall be inserted—
 - (i) after the words "the enactments" in paragraphs (b) and (e) of subsection (2) the words "or subordinate legislation";
 - (ii) after the words "the enactments" in subsection (3) the words "and subordinate legislation" and after the words "Consumer Protection Act 1987" in that subsection the words "(k) the Control of Misleading Advertisements Regulations 1988".

(7) Subject to paragraph (5) above, any person who knowingly discloses, otherwise than for the purposes of any legal proceedings or of a report of such proceedings or the investigation of any criminal offence, any information obtained by means of the exercise of the power conferred by paragraph (1) above without the consent either of the person to whom the information relates, or, if the information relates to a business, the consent of the person for the time being carrying on that business, shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding £2,000 or to both.

(8) The Director may arrange for the dissemination in such form and manner as he considers appropriate of such information and advice concerning the operation of these Regulations as may appear to him to be expedient to give to the public and to all persons likely to be affected by these Regulations.

Complaints to the IBA

8.—(1) It shall be the duty of the IBA to consider any complaint made to it that a broadcast advertisement is misleading, unless the complaint appears to the IBA to be frivolous or vexatious.

(2) The IBA shall give reasons for its decisions.

(3) In exercising the powers conferred on it by these Regulations the IBA shall have regard to all the interests involved and in particular the public interest.

Control by the IBA of misleading advertisements

9.—(1) If, having considered a complaint about a broadcast advertisement pursuant to regulation 8(1) above, it considers that the advertisement is misleading, the IBA may, if it thinks it appropriate to do so, refuse to broadcast the advertisement.

(2) The IBA may require any person appearing to it to be responsible for a broadcast advertisement which the IBA believes may be misleading to furnish it with evidence as to the accuracy of any factual claim made in the advertisement. In deciding whether or not to make such a requirement the IBA shall have regard to the legitimate interests of any person who would be the subject of or affected by the requirement.

(3) If such evidence is not furnished to it following a requirement made by it under paragraph (2) above or if it considers such evidence inadequate, the IBA may consider the factual claim inaccurate.

Complaints to the Cable Authority

10.—(1) Subject to paragraph (2) below, it shall be the duty of the Cable Authority to consider any complaint made to it that any advertisement included or proposed to be included in a licensed service is misleading, unless the complaint appears to the Authority to be frivolous or vexatious.

(2) The Cable Authority shall not consider any complaint about an advertisement included or proposed to be included in a licensed service by the reception and immediate re-transmission of broadcasts made by the IBA or the British Broadcasting Corporation.

(3) In exercising the powers conferred on it by these Regulations the Cable Authority shall have regard to all the interests involved and in particular the public interest.

(a) 1986 c.44.

Control by the Cable Authority of misleading advertisements

11.—(1) If, having considered a complaint about an advertisement pursuant to regulation 10(1) above, it considers that the advertisement is misleading, the Authority may, if it thinks it appropriate to do so, exercise the power conferred on it by section 15(1) of the Cable and Broadcasting Act 1984 (power to give directions) in relation to the advertisement.

(2) The Authority shall give reasons for its decision to give or not to give, as the case may be, a direction in accordance with paragraph (1) above in any particular case.

(3) The Authority may require any person appearing to it to be responsible for an advertisement which the Authority believes may be misleading to furnish it with evidence as to the accuracy of any factual claim made in the advertisement. In deciding whether or not to make such a requirement the Authority shall have regard to the legitimate interests of any person who would be the subject of or affected by the requirement.

(4) If such evidence is not furnished to it following a requirement made by it under paragraph (3) above or if it considers such evidence inadequate, the Authority may consider the factual claim inaccurate.

23rd May 1988

John Butcher
Parliamentary Under-Secretary of State,
Department of Trade and Industry

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement Council Directive No. 84/450/EEC (OJ No. L 250 19.9.1984, p.17) relating to misleading advertising.

The Director General of Fair Trading is required to consider complaints (other than frivolous or vexatious ones) about misleading advertisements. The Director is not required to consider complaints about commercial radio or television advertisements or cable advertisements. Before he considers a complaint the Director may require the person making the complaint to satisfy him that appropriate means of dealing with the complaint have been tried and that, despite being given a reasonable opportunity to do so, those means have not dealt with the complaint adequately. (Such means might include complaining to a local authority trading standards department or to a self-regulatory body, such as the Advertising Standards Authority. It is, however, for the Director to determine what means he considers appropriate in any particular case.) In dealing with complaints the Director is required to bear in mind all the interests involved, including, in particular, the public interest, and the desirability of encouraging the control, by self-regulatory bodies, of advertisements (regulation 4).

The Director is given power to bring proceedings for an injunction to prevent the publication or continued publication of an advertisement which he considers misleading. He is required to give reasons for his decision to bring or not to bring proceedings for an injunction (regulation 5).

The IBA is placed under a similar duty to consider complaints about commercial radio and television advertisements. It is required to give reasons for its decisions and in exercising its powers under the Regulations, to have regard to all the interests involved and, in particular, the public interest (regulation 8).

The IBA may refuse to broadcast an advertisement which it thinks is misleading. It may also require, having regard to the interests affected by the requirement, substantiation of factual claims in advertisements. Failing substantiation of them, it may treat such claims as inaccurate (regulation 9).

The Cable Authority is placed under a similar duty to consider complaints about misleading cable advertisements, but is not to consider complaints about advertisements included in IBA or BBC broadcasts where, after being received, those broadcasts are immediately retransmitted by cable. The Authority is required, in dealing with complaints, to bear in mind the same matters as the IBA (regulation 10).

The Cable Authority is given power to give directions (including a direction not to transmit it) in relation to an advertisement which it thinks is misleading and is required to give reasons for its decisions to give or not to give directions. The Authority is given the same powers as the IBA in relation to the substantiation of factual claims in advertisements and to treating such claims as inaccurate (regulation 11).

The Court is given power to grant applications by the Director General of Fair Trading for injunctions preventing the publication of advertisements it considers misleading, including advertisements likely to convey the same impression as the advertisement to which the application relates. Where the application is for an interlocutory injunction, the Court need not be satisfied that the advertisement is misleading. The Court has the same powers to require substantiation of factual claims and to treat them as inaccurate as are conferred on the IBA and the Cable Authority. No proof of loss or damage to anyone or of intent on the part of the person responsible for publishing an advertisement is needed before the Court may grant an injunction (regulation 6).

Provision is made for the obtaining and disclosure of information by the Director General of Fair Trading and others and for the dissemination of information and advice by the Director (regulation 7).

Various expressions used in the Regulations, including "advertisement" and "misleading advertisement", are defined (regulation 2).

The Regulations do not apply to certain investment advertisements and advertisements in respect of investment business as defined in the Financial Services Act 1986 nor to advertisements which relate to the official listing of securities as provided for by Part IV of that Act (regulation 3).

The 1986 Act makes separate provision in relation to those advertisements.