

Annex I

**CASE HANDLING PRINCIPLES AGREED BETWEEN THE OFFICE OF
FAIR TRADING & ADVERTISING STANDARDS AUTHORITY**

DEALING WITH PART 8 ENTERPRISE ACT CASES INVOLVING MISLEADING ADVERTISEMENTS

Introduction

1. The Office of Fair Trading ('OFT') and the Advertising Standards Authority ('ASA') previously agreed case handling principles in relation to cases involving misleading advertisements under the Stop Now Orders (EC Directive) Regulations 2001 (SNORS). These case handling principles have been updated to reflect the fact that SNORS has been replaced by Part 8 of the Enterprise Act 2002. The underlying principles, however, remain unchanged.

2. The principles set out in full below provide that the OFT will normally refer cases to the ASA. In exceptional cases, however, where there is clear evidence of an act contrary to the relevant legislation, which harms the collective interests of consumers, the OFT may consider it needs to act straightaway using the Part 8 powers. The OFT will discuss with the ASA in advance the use of Part 8 powers where these are considered best suited to deal with the problem rather than referral to the ASA.

3. These case handling principles are intended to provide a useful guide to other general or designated enforcers on some issues to take into account when considering Part 8 action against misleading advertisements. The OFT encourages other enforcers to adopt its approach when considering enforcement action.

Background

4. The OFT enforces the Control of Misleading Advertisements Regulations 1988 as amended ("the CMARs"), which implement an EC Council Directive. The CMARs provide protection against misleading and unacceptable comparative advertisements and empower the OFT to apply for a court injunction to end continued publication of such advertisements.

5. Under Part 8 of the Enterprise Act, other general or designated enforcers can act against domestic or community infringements, including breaches of the CMARs, which affect the collective interests of consumers.

6. Although the CMARs protect the interests of consumers, other businesses and the public at large, Part 8 only provides for action to protect the collective interests of consumers. Consequently, neither the OFT nor any other enforcer can take Part 8 action to prevent misleading advertising aimed only at business. The OFT continues to have the power to apply for an injunction under the CMARs regime in all other cases and will use it where appropriate.

7. Under the CMARs, the OFT's role is mainly to support and reinforce existing advertising controls or 'established means', such as the Advertising Standards Authority (ASA) which ensures compliance with the British Code of Advertising, Sales Promotion and Direct Marketing and the Trading Standards Service. The Trade Descriptions Act 1968 and other more specific legislation, e.g., Part III of the Consumer Protection Act 1987 (misleading price indications) allows the Trading Standards Service to take action against false or misleading advertising. Before the OFT considers a complaint, it may require the person making the complaint to satisfy it that the 'established means' (e.g. ASA etc) of dealing with the complaint have been tried and that, despite being given reasonable opportunity to do so, those means have not dealt with the complaint adequately.

8. The OFT and ASA have successfully worked together to tackle misleading advertising under this framework.

9. Any queries about the principles, or about the CMARs more generally, should be addressed to Karen Hale (Tel: 020 7211 8860).

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Handling of cases involving misleading advertising under Part 8 of the Enterprise Act 2002

1. OFT and ASA share a common goal to act against misleading advertising which causes detriment to consumers. The overarching principle agreed is that both organisations will seek the most proportionate effective and speedy resolution of cases in which they share a common interest. In determining how to act ASA and OFT will consider the level of consumer detriment caused or likely to be caused by advertising, the nature and history of the advertiser and the time pressure to act.
2. The ASA is a body or person having responsibility for the regulation of misleading and comparative advertising in non-broadcast media in the UK, pursuant to Regulation 4(2)(c) of the Control of Misleading Advertisements Regulations 1988. Self regulation under the Committee of Advertising Practice Code that the ASA administers is one of the "other means" referred to in regulation 7(2) of CMARs.
3. OFT believes that in virtually all cases, the consumer interest will be best served by action by the ASA under the self-regulatory regime. OFT will use established means wherever possible and will encourage other regulatory bodies with power to act against misleading advertising to adopt the OFT approach to established means.

Action Under Part 8 of the Enterprise Act 2002

4. The Enterprise Act does not alter the principle that OFT will have regard to established means. The main changes to the enforcement action against misleading advertising resulting from Part 8 of the Enterprise Act (and previously under the Stop Now Orders (EC Directive) Regulations 2001) are:

- Other general, designated and Community enforcers can act against misleading advertising that harms the collective interests of consumers;
- Part 8 enforcement action can be taken in County Courts. Action may be quicker and cheaper than action in the High Court.

When would OFT wish to take action under Part 8 of the Enterprise Act?

5. In exceptional cases, where there is clear evidence of an act contrary to the relevant legislation, which harms the collective interests of consumers, OFT or another general or designated enforcer will want to act straight away using the injunctive powers provided by Part 8 of the Enterprise Act. OFT may need to act (without referral to the established means for investigation) in cases assessed against the following non-exhaustive criteria:

- evidence of serious and intentional malpractice, such as scams;
- the level of economic detriment being caused, taking into account the number of people likely to see a misleading advertisement and the seriousness of the deception. These cases - whilst not constituting scams - are likely to involve immediate and severe consumer losses, with little likelihood that consumers will get their money back as a result of losses caused by misleading advertising;
- evidence of serial offending of the advertising code;
- whether any particularly vulnerable consumers affected or likely to be affected;
- cases raising immediate public safety concerns;
- adverse information about the trader's previous trading practices;
- multiple breaches of legislation requiring a greater need for OFT to act quickly, and where misleading advertising is central to the damage being caused.

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6. Where OFT considers that a case is best suited to action under Part 8 of the Enterprise Act under these criteria, rather than referral to the ASA, OFT will discuss with the ASA in advance. There will be cases where a trader is in breach of more than one domestic or community obligation, and whereas the matter relating to misleading advertising will be considered by the ASA, the OFT when writing to the trader will nevertheless reserve its position to proceed against misleading advertising where the trader does not comply with the ASA ruling or, the ASA refers the matter back to the OFT for action. This will avoid criticism by the court.

7. Where OFT was contemplating action, it would check early with the ASA whether it was already acting. Where ASA was not already acting, OFT might consider that it would be in the public interest (based on the criteria above) not to refer to established means, but to initiate action under Part 8 of the Enterprise Act. If discussions revealed that ASA was already acting, or wished to act, in relation to particular advertising, OFT might choose from the following courses of action:

- a. to act in parallel. OFT could also attack the advertisement and any other infringements of domestic or community legislation. If ASA's action was successful, OFT could drop action on the advertisement and carry on with the other concerns.
- b. leave action entirely to ASA. In such cases, OFT would report its concerns to the ASA's attention and ASA would outline the scope of its investigations and investigate any areas of additional concern highlighted by OFT (if within the scope of its Code). OFT could nevertheless bring a separate action if it later identified serious concerns falling outside the Code.
- c. where a case was being considered by ASA, and evidence subsequently emerged that the advertising was part of a wider scam, OFT might elect to take immediate Enterprise Act action (i.e., before ASA action completed).

8. ASA should provide information to OFT on the scope of its concerns, and (where appropriate) the text of assurances being negotiated (for both Enterprise Act and CMARs cases) so that OFT can be satisfied that established means have succeeded in stopping the misleading advertising.

Referral of cases by ASA to OFT

9. Examples of types of case where ASA should refer or consider referring to OFT are as follows:

- a. where cases fall under one or more of the list of non-exhaustive criteria at para 4 above (should refer);
- b. where CAP Codes do not cover the main mischief (should refer);
- c. where ASA has had limited success in stopping the advertising. For example, when a trader has not replied to ASA approaches, or where ASA had acted but advertising continued or where an advertiser complies with the ASA's ruling but then causes further problems by new advertising which is misleading. ASA should consider whether continued action or referral to OFT would be most likely to lead to cessation of advertising.
- d. where it appears that the trader is of doubtful repute (for example, where trader is known to ASA, and has operated dubiously in the past). (ASA should consider referral).