

COMPANY COMMERCIAL: OVERVIEW:
CONSUMER TERMS AND UNFAIR TRADING

Protection from Unfair Trading

Regulations came into force on 26th May 2008 implementing the Unfair Commercial Practices Directive (2005/29/EC) ('the Regulations'). They enact a general prohibition on traders treating consumers unfairly and impose obligations on businesses not to mislead consumers or expose them to aggressive commercial practices. Existing legislation has been brought up to date by amending:

- o The Consumer Protection Act 1987
- o The Trade Descriptions Act 1968, and
- o The Weights and Measures Act 1985.

Another effect has been the introduction of business protection from misleading marketing implementing the Consolidated Directive on Misleading and Comparative Advertising (2006/114/EC).

Treating consumers fairly

A consumer is an individual who is not acting in the course of their business, trade, craft or profession. A trader is a person who does so act.

The Regulations include a general prohibition of unfair commercial practices covering commercial practices that do not fall into the other specifically stated prohibitions. It is known as the 'general prohibition'. Commercial practices include consumers supplying goods to traders such as selling their car to a dealer and are unfair where they:

- o violate standards of professional diligence, and
- o significantly warp the economic decisions of the average consumer in relation to a product.

The general prohibition is intended to act as a catch all. References in the Regulations to products include services.

Not misleading consumers

Misleading a consumer is the giving of false information that deceives (or will probably deceive) the average consumer causing him to make (or probably make) decisions that he would not ordinarily have made with regard to the product's:

- o existence or nature
- o main characteristics
- o price, or
- o need for service or repair.

Other pertinent factors are the consumer's rights, the character of the trader and the overall status of the trader with regard to the promotion of the product.

A misleading omission is a commercial practice that omits, hides, disguises or delays information which if given openly would cause the average consumer to make

decisions that he would not ordinarily have made. Whether the information withheld is material to the decision to be taken will be considered separately in each case.

Aggressive commercial practices

Aggressive commercial practices are activities which, by virtue of harassment, coercion or undue influence hampers the average consumer's ability to choose freely between products and thereby causes that individual to act in a way that he would not ordinarily have done. Whether a practice is aggressive will be considered in the circumstances in which it arises. The Regulations set out a non-exhaustive list of factors to be considered when deciding whether or not a practice is aggressive.

Outright unfair commercial practices

There are 31 commercial practices that are, in all circumstances, unfair. Liability is strict and evidence is not needed of the effect of the practice on the average consumer.

Consequences of breach

It is an offence to engage in any of the activities set out in the Regulations. Proof of the trader's state of mind is required for breach of the general prohibition but for the other offences, liability is strict.

The Regulations provide for two defences but they are not available with regard to the general prohibition offence.

The penalty on summary conviction is a fine or on indictment a fine, imprisonment or both. Prosecutions can be brought against officers of corporate bodies as well as the corporate bodies themselves.

Limitation for bringing a prosecution is three years from the date of the offence or one year from the discovery of the offence by the enforcer. The Enterprise Act 2002 provides that enforcers can bring civil actions for breach of the Regulations and in exercising their powers, enforcers must have regard to the Regulators' Compliance Code in force since 6 April 2008.

Unfair terms in consumer contracts

All suppliers using standard contract terms with consumers must apply a test of fairness to terms that have not been individually negotiated subject to certain exempt terms. A standard term will be deemed 'unfair' by the Office of Fair Trading or other enforcing bodies if contrary to the requirement of good faith it creates a material imbalance in the parties' rights and obligations under the contract, to the consumer's detriment. Enforcement action will be taken against businesses on behalf of consumers generally but enforcers cannot pursue an offender on behalf of an individual consumer or seek personal redress. Enforcers can also compel a business to amend unfair terms or undertake not to continue using an unfair term.

If you would like to receive the complete version of this document please email: lexispsl@lexisnexis.co.uk

COMPANY COMMERCIAL: PRECEDENT:
CONFIDENTIALITY AGREEMENT

THIS AGREEMENT is made [*insert day and month*] 20[*insert year*]

BETWEEN:

- 1 [*insert name of party*] [of/a company incorporated in [England and Wales] under number [*insert registered number*] whose registered office is at] [*insert address*] (**Party A**); and
- 2 [*insert name of party*] [of/a company incorporated in [England and Wales] under number [*insert registered number*] whose registered office is at] [*insert address*] (**Party B**).

[(each of Party A and Party B being a Party and together Party A and Party B are the **Parties**)]

RECITALS:

- (A) [*insert details*]
- (B) [*insert details*]

THE PARTIES AGREE:

1 Definitions and interpretation

1.1 In this Agreement, unless otherwise provided:

Authorised Person	means any employee, director, consultant, agent or representative of Party B and any other [named] firm, individual or company engaged in providing services directly to Party B [and/or] who has been previously approved in writing by Party A [including/being those persons whose names are specified in Schedule 1 part A];
Business Day	means a day [other than Saturday, Sunday and public holidays] [when [clearing] banks generally are open for [non-automated] business in [<i>location/city</i>];
Confidential Information	means such Information as Party A may from time to time provide to Party B for the Purpose relating to the Project, [directly or indirectly] disclosed [before or after the date of this Agreement] by Party A to Party B or any Authorised Person whether in existence at the date of this Agreement or which subsequently comes into existence [including/being that Information as specified in Schedule 1 part B];
Information	means all know-how, trade secrets, tactical, scientific, statistical, financial, commercial or technical information of any

	kind including any copies, reproductions, models, duplicates or notes in any form whatsoever (in whatever form including without limitation orally, written, in electronic, tape, disk, physical or visual form);
Key Employee	means those employees of the relevant Party whose names are set out in the Schedule 1 Part C;
Product	means [<i>definition of Product/Business</i>];
Project	means [<i>details of Project, engagement or otherwise</i>];
Purpose	means [<i>details of reason for disclosure – eg evaluation of the Product for possible investment</i>];
Use	means disclose, store, use, analyse, copy, extract, modify, or adapt in whole or in part.

1.2 In this Agreement, unless the context otherwise requires:

1.2.1 each gender includes the others;

1.2.2 the singular and the plural each includes the other;

1.2.3 references to clauses [./or schedules] [or appendices] are to clauses [./or schedules] [or appendices] of this Agreement;

1.2.4 references to this Agreement include its Schedule[s] [and Appendices], and to [both] [all three] as amended hereafter;

1.2.5 references to persons include individuals, unincorporated bodies, government entities, companies and corporations;

1.2.6 [including means including without limitation] [general words are not limited by example];

1.2.7 clause headings do not affect their interpretation;

1.2.8 a document is in agreed terms if initialled or signed by the parties [and annexed hereto]; and

1.2.9 writing includes manuscript, telexes, facsimiles, [emails,] [communications in braille,] and other permanent forms.

2 **Provision of Confidential Information**

2.1 In consideration of the disclosure by Party A to Party B of the Confidential Information Party B undertakes to Party A to keep the Confidential Information secret as set out in this Agreement.

2.2 Party B acknowledges that the Confidential Information is of significant commercial value and importance to Party A and has been supplied by Party A in confidence solely for the Purpose and that although the Confidential Information is supplied in good faith by Party A, Party A makes no representation about the accuracy, efficacy, completeness, capabilities or safety of the Confidential Information or any materials or media by which it is supplied [except to the extent expressly agreed by Party A in writing].

If you would like to receive the complete version of this document please email: lexispsl@lexisnexis.co.uk

COMPANY COMMERCIAL: DRAFTING NOTE:
ASSIGNMENT OF COPYRIGHT AGREEMENT.

This document is intended as a basic precedent for use where copyright is to be assigned. Such an assignment may:

- be for all acts otherwise restricted by copyright, or only some
- be for the full term of the rights assigned, or part only
- be confined to the UK, or extend to other countries where the subject work attracts copyright protection, and
- relate to existing works, or those yet to be created.

The precedent may therefore require amendment depending on the circumstances.

The law relating to copyright is set out in the Copyright, Designs and Patents Act 1988 (CDPA88).

Copyright, Designs and Patents Act 1988

Clause 1.2.3

Where details specific to the Agreement, eg of the Work, are set out in a Schedule.

Clause 1.2.7

For alternatives to this clause, see Boilerplate (clause bank). If this wording is used it will be necessary to monitor legislation carefully to avoid unexpected changes to the Agreement not intended by the parties.

Clause 2 — Assignment

A copyright assignment may be for all purposes listed as restricted acts in CDPA88 s.16(1), or for some only. In the latter case, the purposes should be listed, eg *the [non-] exclusive right to adapt the Work [and to authorise others to adapt the Work] for performance as a stage play in the United Kingdom*.

Copyright, Designs and Patents Act 1988 s 16(1)

Under LP(MP)A94, s. 1, assignments with full title guarantee include a warranty by the assignor that he has power to assign, and that the copyright has not been charged and is not affected by adverse rights except as disclosed; assignments with limited title guarantee include a warranty only that the assignor has not himself charged the copyright or allowed it to be charged, and is not aware that anyone else has done so. These matters are dealt with under clause 4.1 below, and the references to title guarantee or assignment as beneficial owner may thus be regarded as optional.

Law of Property (Miscellaneous Provisions) Act 1994, s 1

Clause 3 — Consideration

The price may be payable in instalments, particularly for Works still to be created.

Clause 4.1

The warranties assume that the Assignor is the creator of the copyright, and that no other interest exists in it. They should be amended where this is not so, eg where the Assignor is himself an assignee of the copyright. Where ownership is joint, all owners should be party to the assignment.

Clause 4.1.3

Under CDPA88 s.90(4), a licence granted by a copyright owner does not bind a purchaser of the copyright in good faith for valuable consideration without notice of the licence. Such a situation will cause problems between an assignee and the licensee. This warranty is therefore important.

Copyright, Designs and Patents Act 1988, s 90(4)

Clause 4.1.6

This term is defined in CDPA88, s.154.

Copyright, Designs and Patents Act 1988, s 154

Clause 4.1.7

Some countries require registration of copyright as a condition of copyright protection. The UCC notice is intended to satisfy such requirements.

Clause 5 — Moral rights

Moral rights may be relevant. They comprise: (i) the right to be identified as author (s. 77; the right must be asserted to be exercisable (s.78)) and (ii) the right to object to derogatory treatment (s.80). The right does not apply to employer-owned creations and certain works, and is subject to certain other restrictions (s.79).

Copyright, Designs and Patents Act 1988, ss 77–80

Clause 6 — General

For further comments on the provisions below, and wording for other clauses the parties may wish to insert, please see the corresponding sections of the Boilerplate (clause bank).

Clause 6.9.2

The parties may, alternatively, wish to provide for alternative dispute resolution, or for arbitration. The former route is the least formal and least disruptive to the relationship, and for that reason is increasingly favoured. In terms of cost and time taken, arbitration may not offer a significant advantage over trial in court. Both, however, enjoy the advantage of privacy. For examples of submission to these means, see Boilerplate (clause bank).

Under Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (available on the European Union's EUROPA website), applicable in Member States of the European Union, a submission to the jurisdiction of the courts of an EU state will be exclusive unless the agreement clearly states that it is to be non-exclusive. If the agreement does so state, the first party to take legal action in respect of a dispute can, should it so choose, to bring such action in another court, eg that of its own domicile. In that case, however, it will normally still be necessary to prove the law of the contract set out in the agreement. The parties may also confer exclusive jurisdiction on the courts of more than one country, eg by providing that a party bringing a legal action will do so in the courts of the state where the other is domiciled or trades; a party bringing an action should also consider in what jurisdiction the other has substantial assets.