Introduction

The Consumer Protection from Unfair Trading Regulations 2008 (the Regulations) came into force on 26 May 2008. They are based on certain European Directives which require a minimum level of protection to be provided across all member states. They are not specific to the property sector but aim to prevent commercial practices that are unfair to consumers in general.

Failure to comply with the law could mean that an agent would face civil and/or criminal sanctions as a result of enforcement action by Trading Standards.

The National Trading Standards Estate Agency Team (NTSEAT) issued guidance in September 2015 on how the Regulations apply to property sales to assist agents in compliance. That guidance makes clear that if agents treat consumers and competitors fairly then they are unlikely to breach the Regulations.

The Regulations emphasise that it is the ‘consumer’ who must be treated fairly so although the agent is instructed by the seller there is also a clear responsibility to be fair and even-handed with prospective buyers and potential viewers.

Agents must ensure that they do not engage in any unfair commercial practice by saying, doing or omitting to do something which causes, or is likely to cause, the average consumer to take a different transactional decision. Agents should provide all material information that the average consumer needs to take an informed transactional decision.

Important Definitions

- The definition of a consumer is an individual acting for purposes outside their business.
- The definition of an ‘average’ consumer is someone who is reasonably well-informed, and reasonably observant and circumspect. It is expected that such a person would pay some attention to documentation but not necessarily to the small print unless key points are brought to their attention; they would check out publicly available facts if that is easy to do but they could be influenced in those checks by what information they have been given.
- The Regulations also provide expressly for groups of consumers who are ‘vulnerable’ to commercial practice. This might for example, include the elderly and first time buyers. If services are canvassed at, or property is marketed at, a vulnerable group, then the average consumer will refer to a member of that group and not the average consumer generally.
- Unfairness may arise from:
  - Giving false or misleading information to consumers (a misleading action)
  - Hiding or failing to provide material information to consumers (a misleading omission)
  - Exerting undue pressure on consumers (an aggressive practice)
  - Not acting with the standard of care and skill that is in accordance with honest market practice and in good faith (a failing to show professional diligence)
  - Engaging in any one of 31 banned practices (as set out in Schedule 1 of the Regulations) such as claiming to be a member of a redress scheme or professional body when you are not.
- Commercial Practices cover the whole range of an agent’s business activities that may affect consumers including advertising of services, pre-agreement advice to clients, describing property for sale, negotiating and making sales and handling complaints about service.
- A transactional decision is any decision taken by a consumer whether it is to act or refrain from acting on whether, how and on what terms to view, purchase, make payment in whole or in part, retain or dispose of a product or whether, how and on what terms to exercise a contractual right in relation to a product. Bearing in mind that the Regulations apply to all businesses this definition might be unwieldy for the property sector. An appropriate shorthand would therefore be causing the consumer to ‘take a different decision’.
- Material information is that information which the average consumer needs, according to the context, to take an informed transactional decision – this includes information that you are or should be aware of as a professional estate agent. A transactional decision is not just the decision to purchase but includes, for example, a decision to view a property. The Regulations also apply to an agent’s dealings with a seller.

Application of the Regulations to the property sector

Agents should follow closely the standards laid down in the TPO Code of Practice for Residential Sales Agents which cover in principle terms the obligations under the Regulations.

The NTSEAT guidance makes clear that in the most straightforward sales the material information that would need to be given to
When carrying out a market appraisal you must follow up and correctly and fully describe all aspects of the property such as negative factors about existing property and specific negatives. Maintain comprehensive records of your dealings which provide systems and processes must be put in place to ensure that all how familiar they are with the house buying / selling process, reason for the move. Determine if Green Deal arrangements apply to the property. Use photographs that give an accurate portrayal of the property. Disclose the fact that you will earn a referral fee for referring. In regard to sensitive issues such as murders or suicides occurring, funding of the proposed purchase in terms of where funds are open to interpretation by the agent according to the circumstances presented to him. It is not possible therefore to specify how an agent should act in individual cases.

The TPO Code of Practice will help compliance with the obligations but it is important that agents review the way they approach business. To assist in ensuring that a diligent approach has been taken to meeting their legal obligations and to lessen the chance of consumer disadvantage agents should now:

- When carrying out a market appraisal you must follow up and ascertain the precise position on any aspect that does not feel / appear right or that you are aware is not consistent with other properties in the same road, for example loft conversions, oversize garden for type of property, temporary looking access etc. Even if the seller is forthright on a particular matter you must make further enquiries if you are ‘on notice’ about something.
- Not use disclaimers where there is a responsibility on you as agent to provide the information accurately and openly. You should confine matters to a factual statement, for example, that electrical appliances have not been tested or that you have been unable (despite appropriate enquiries) to ascertain the precise position.
- Correctly and fully describe all aspects of the property such as outlook, tenure, local services and restrictive covenants to the extent that you can do so given the sources of information available to you. The Property Misdescriptions Act 1991 has long been repealed but you should ensure that you have disclosed as appropriate information related to the 33 specified matters under that legislation. You should explain to sellers the importance of providing accurate information since any action could be taken against them under the Regulations (Regulation 16), as well as you, should incorrect information be discovered for example during the conveyancing process.
- Use photographs that give an accurate portrayal of the property and do not deliberately hide neighbouring ‘features’ if those ‘features’ are unusual or are likely to have a bearing on an individual’s transactional decision.
- You should signpost prospective buyers to publicly available information about the area which may have a bearing on their decision about a property but this does not supersede your own diligence.

It is effectively the case that ‘caveat emptor’ no longer applies. As agents you will be responsible for equipping individuals with all material information and ensuring that they have been properly advised. Therefore as best practice the agent will now have to carry out a fact-find of the seller and buyer. This need not be as detailed as a financial services ‘know your customer’ process but should, in addition to the routine determination of requirements also include:

- Reason for the move.
- How familiar they are with the house buying / selling process (for example are they first time buyers, regular movers).
- Particular requirements beyond the nature of the accommodation / facilities into such aspects as proximity of schools, transport links, access to shops/ countryside etc, workplace.
- Negative factors about existing property and specific negatives in relation to the current search.
- Funding of the proposed purchase in terms of where funds are coming from, availability of those funds (for example if they are in accounts requiring notice of withdrawal), what the consumer is expecting / aiming to spend on refurbishments etc.