Please note: this guidance is for advice only and does not form part of the TPO Code of Practice for Residential Letting Agents. It is based on the Ombudsman’s approach to best practice but may not be accepted as a defence to any action taken by the Trading Standards Service.

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 for consumers 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.

In June 2014, the Competition and Markets Authority (CMA) issued guidance on how the Regulations should be applied by lettings professionals. The guidance can be found at: https://www.gov.uk/government/publications/consumer-protection-law-for-lettings-professionals

The Regulations emphasise that it is the ‘consumer’ who must be treated fairly so although a letting agent is instructed by the landlord there is a clear responsibility also to be fair and even-handed with tenants, prospective tenants and potential viewers of property. 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 so 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 renters. 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 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 to let, negotiating and drawing up tenancy agreements 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, rent, 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. A transactional decision is not just the decision to rent a property 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 Letting Agents which cover in principle terms the obligations under the Regulations. Agents must also comply with the ruling by the Advertising Standards Authority in relation to non-optional fees charged to tenants (Material Information) and the format for disclosing those charges.

In explaining services to landlords the material information that would need to be given will be dependent on the circumstances but...
should involve full disclosure of what services are being offered, the options relating to the level of service, fees and charges, terms of business and the duration of the agreement.

The application of the Regulations is not an easy matter. The nature of those Regulations is that they do not specify precisely how the legislation applies in individual scenarios, rather it is left 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:

• Accurately describe all aspects of the property and what fixtures and fittings will be in the property during the rental period. You should explain to landlords 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 after tenant has committed to the tenancy.

• 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 in regard to an aspect of the property relevant to the letting.

• 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 tenants 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.

• Disclose anything that you are or become aware of in terms of defects in the property that might have a bearing on the well-being, safety or comfort of a tenant. If such defects are apparent you should draw these to the attention of the landlord and request that he deal with the issue or issues.

• Determine what Green Deal arrangements apply to the property. There is a legal responsibility under the Energy Act 2011 to disclose such arrangements at the earliest opportunity (even as early as point of enquiry) and whilst the EPC provides the required form of notification you should establish the precise details of what the arrangements are. Full information about Green Deal responsibilities has been issued by the Department of Energy and Climate Change and can be found at:

https://www.gov.uk/government/collections/green-deal-quick-guides

• Systems and processes must be put in place to ensure that all members of staff have access to up to date and accurate information. You should ensure that appropriate training is provided to all members of staff.

• In regard to sensitive issues such as murders or suicides occurring at a property you should explain these to the consumer at the earliest sensible opportunity and certainly at any viewing.

• Disclose the fact that you will earn a referral fee (not the amount) for referring consumers to third party services if such a fee applies.

• Maintain comprehensive records of your dealings which provide an audit trail should enforcement action be taken against you or a complaint is referred to TPO.

It is effectively the case now that ‘caveat emptor’ does not apply. As agents you will be responsible for equipping individuals with all material information and ensuring that they have been properly advised.