

Consumer Protection from Unfair Trading Regulations 2008

Guidance

INTERIM

**Guidance on the UK implementation of the Unfair
Commercial Practices Directive**

March 2008

OFT931

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1 USING THE INTERIM GUIDANCE¹

Aim of the Guidance

- 1.1 This Guidance is principally intended to help traders to comply with the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). It will also be of use to enforcers, and to consumer advisors in understanding what actions are prohibited. The Guidance sets out the views of the Office of Fair Trading (OFT) and the Department for Business, Enterprise and Regulatory Reform (BERR). It seeks to illustrate how the CPRs may apply in practice. Ultimately, however, only the courts can decide whether or not a commercial practice is unfair within the meaning of the CPRs. This Guidance should not be regarded as a substitute for, or definitive interpretation of, the CPRs and should be read in conjunction with them.
- 1.2 The examples used in this Guidance seek to illustrate the possible effect of the CPRs. They do not cover every situation or practice in which a breach of the CPRs may occur.

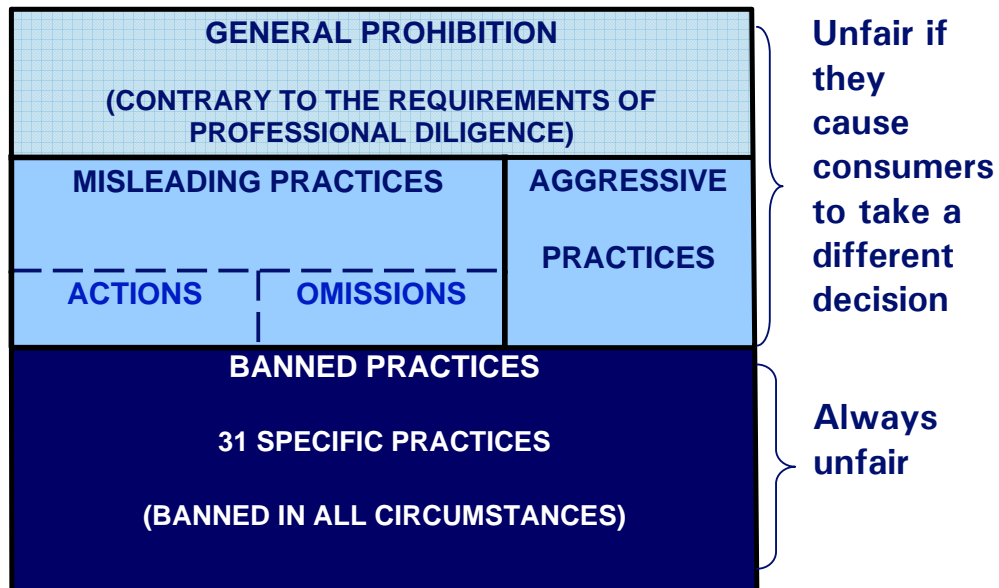
How to use the Guidance

- 1.3 This Guidance is split into four parts. Part 1 contains an introduction and a short overview, including a description of the scope of the CPRs. There is also a flowchart to help the reader assess whether commercial practices are unfair under the CPRs.
- 1.4 Part 2 deals with what is prohibited by the CPRs in more detail. It explains the prohibitions in the order which we consider it most helpful to approach them, starting with the specific prohibitions, then covering

¹ The Guidance is only an Interim document as it has been published prior to the adoption of the Regulations by Parliament. It will be withdrawn if the Regulations are not adopted, and is also subject to Ministerial clearance by BERR at that time.

misleading and aggressive practices and finally the general duty not to trade unfairly.

- 1.5 Part 3 provides information on compliance, enforcement, offences, and investigation powers.
- 1.6 Part 4 starts with a glossary of terms. These terms are printed in **bold** type throughout the Guidance. They refer to key concepts such as '**transactional decision**'. The glossary discusses the concept of the '**average consumer**' in some detail. Note that illustrative examples can be found throughout the text in italics.
- 1.7 Also in Part 4, the Annexes to the Guidance contain some examples which show how an assessment against the prohibitions might work in practice, and information about changes to those legislative measures that were repealed or amended by the CPRs. Finally, there is a list of contacts and references where further information can be found.
- 1.8 A diagram illustrating the key provisions and structure of the Regulations is given below. See page 15 for a more detailed summary of the different prohibitions.



2 INTRODUCTION

The Consumer Protection from Unfair Trading Regulations

- 2.1 The Consumer Protection from Unfair Trading Regulations 2008 (CPRs),² come into force on 26 May 2008, and implement the Unfair Commercial Practices Directive (UCPD) into UK law.³
- 2.2 The UCPD aims to harmonise the legislation across the European Community preventing business practices that are unfair to consumers, so as to support growth of the internal (European) market. Uniform law about unfair **commercial practices** will make it easier for **traders** based in one Member State to market and sell their **products** to **consumers** in other Member States. It will also give **consumers** greater confidence to shop in the UK, and across borders, by providing a high common standard of consumer protection.
- 2.3 The UCPD's broad scope means that it tackles many issues already covered by existing laws. In order to avoid duplication, and so as to modernise and simplify the UK's consumer protection framework, the CPRs partially or wholly repeal provisions in 23 such laws. Twelve of these laws will be repealed outright, including for instance Part III of the Consumer Protection Act 1987. Eleven will be repealed in part, including most of the Trade Descriptions Act 1968. The CPRs will provide similar or greater protection to these laws. See Annexe B for further details on changes to existing law.
- 2.4 The CPRs apply to **commercial practices** before, during and after a contract is made. The CPRs contain a general prohibition of unfair **commercial practices** and, in particular, contain prohibitions of misleading and aggressive **commercial practices**. They also prohibit 31

² [Final Guidance to include a reference to the Statutory Instrument here]

³ Directive 2005/29/EC.

specific **commercial practices** that are listed in chapter 6 on banned practices. These prohibitions are explained in more detail in Part 2 of the Guidance.

- 2.5 Broadly speaking, if **consumers** are treated fairly, then **traders** are likely to be complying with the CPRs. This means that fair-dealing businesses should not have to make major changes to their practices. However, if a **trader** misleads, behaves aggressively, or otherwise acts unfairly towards **consumers**, then the **trader** is likely to be in breach of the CPRs and may face action by enforcement authorities. Details of potential enforcement action (both civil and criminal enforcement is possible under the CPRs) can be found in Part 3 of the Guidance.

3 THE CPRs – AN OVERVIEW

3.1 The CPRs consist of:

- a general prohibition of unfair **commercial practices**,
- prohibitions of misleading and aggressive practices, and
- 31 practices prohibited in all circumstances.

These prohibitions, and the scope of the CPRs, are summarised below. Further explanation appears in the following chapters and in the glossary.

Scope

3.2 The CPRs apply to any act, omission and other conduct by businesses directly connected to the promotion, sale or supply of **products**⁴ to or from **consumers** (whether before, during or after a commercial transaction, if any). They do not apply when only **consumers** are involved in a transaction. Most **commercial practices** covered by the CPRs will involve a direct relationship between businesses (that is, '**traders**') and **consumers**. However there may be instances where the commercial practice could have a sufficiently close connection with **consumers** as to fall within the scope of the CPRs, even though the trader himself does not deal directly with consumers.⁵

General prohibition

3.3 Regulation 3 contains a general prohibition of unfair **commercial practices**.

⁴ This has a wide meaning – see the box at the end of this chapter.

⁵ See chapter 4 on Scope.

3.4 A **commercial practice** is unfair if:

- it is not **professionally diligent**, and
- it **materially distorts**, or is likely to **materially distort**, the economic behaviour of the **average consumer**.

Essentially, for the general prohibition to apply, the **trader's** practice must be unacceptable when measured against an objective standard and must also have (or be likely to have) an effect on the economic behaviour of the **average consumer**. The second condition is likely to be met if, for example, because of the practice, the **average consumer** would buy a **product** they would not otherwise have bought, or would not exercise cancellation rights when otherwise they would have done so.

Misleading and aggressive practices

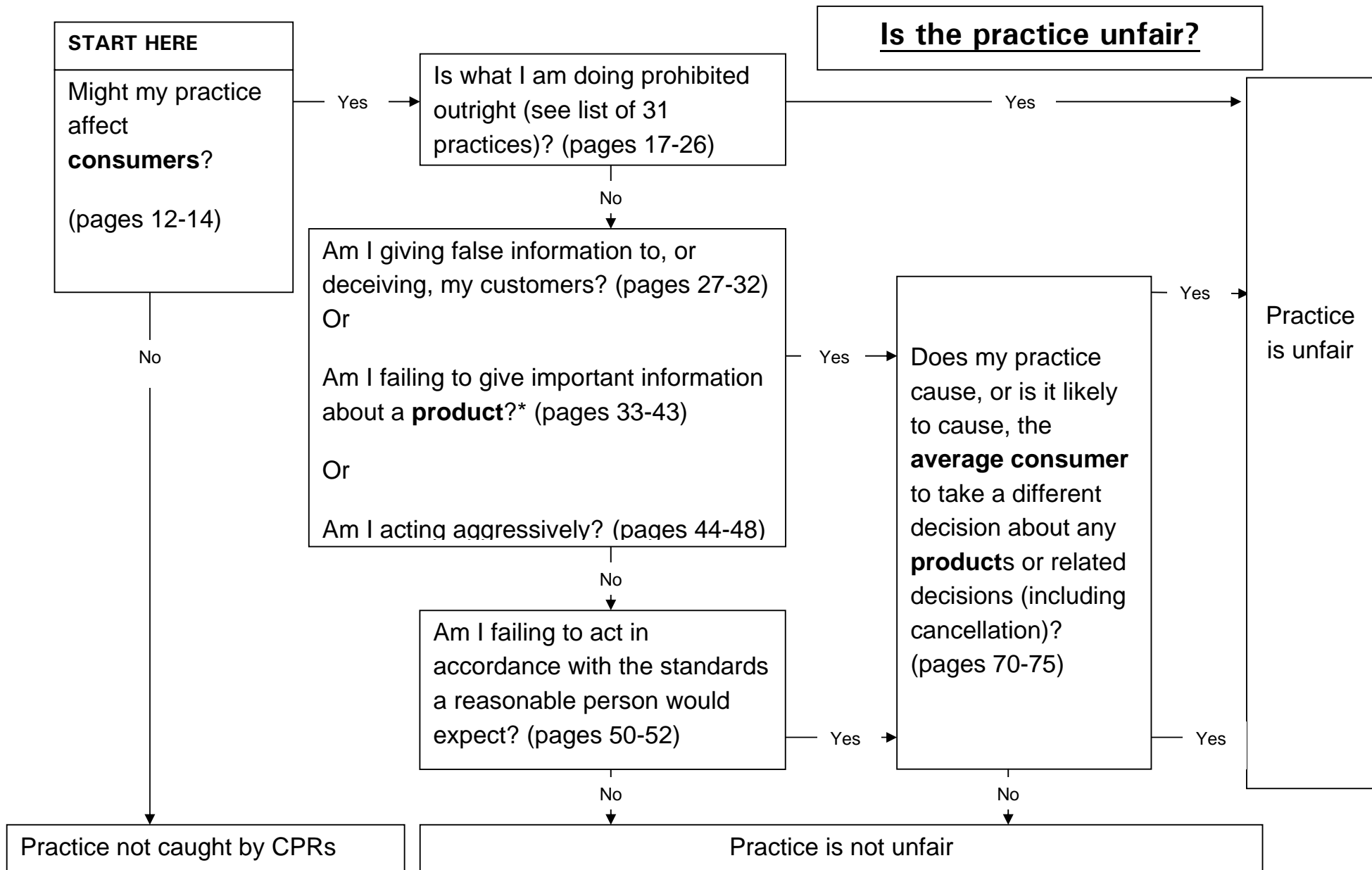
3.5 Regulations 5-7 of the CPRs prohibit **commercial practices** which are misleading (whether by action or omission) or aggressive, and which cause or are likely to cause the **average consumer** to take a different decision.

Practices prohibited in all circumstances

- 3.6 Schedule 1 to the CPRs lists 31 **commercial practices** which are unfair in all circumstances and are prohibited.

The CPRs use '**product**' to refer to goods and services in a wide sense, including immovable property, rights and obligations. The prohibitions apply to commercial practices relating to products in this wider sense. It is important to note this because the legislation they replace was in many cases narrower in scope, for instance applying to just goods or services. The Trade Descriptions Act 1968 applied to both goods and services but there were, different sets of rules applied to goods and to services. The CPRs apply in the same way to both goods and services, and also extend to intangible rights such as cancellation or cashback options.

In the text of the Guidance we use '**average consumer**' to refer to each of three types of **consumer** ('average', 'average targeted' and 'average vulnerable'). These concepts are explained in the glossary. We use 'take a different decision' as shorthand for 'take a **transactional decision** that he would not have taken otherwise'. See the glossary entry for '**transactional decision**' for more details.



*In some situations (where an invitation to purchase is made) certain specified information must always be provided unless apparent. (Pages 36-43)

4 SCOPE

Practices affecting consumers

- 4.1 Broadly the CPRs apply to practices that may affect **consumers**. The CPRs sit alongside the other protections for consumers. In particular, the existing system of contract law, including the law on unfair contract terms, remains unchanged by the CPRs.
- 4.2 The CPRs apply to **commercial practices** that can be described as 'business to consumer'. These are acts or omissions by a **trader**, directly connected with the promotion, sale or supply of a **product** to or from **consumers**. **Products** include goods and services, rights and obligations, and range from simple **products** like an item of clothing to the services involved in complex processes such as buying a house.
- 4.3 Whilst most **commercial practices** will occur where a **trader** deals directly with **consumers**, any **commercial practice** that has the potential to affect **consumers** may need to be assessed against the prohibitions in the CPRs. For example where a **trader** sells a **product** to a **consumer**, acts or omissions which occur further up the supply chain may also constitute **commercial practices**.
- 4.4 The CPRs apply to **commercial practices** that occur before, during and after a transaction, if any. Examples of **commercial practices** that occur following a transaction include actions related to debt collection,⁶ after-sales, and the cancellation of an existing contract. This is because these practices are directly connected with the sale or supply of a **product**.

⁶ Although it is important to note that whilst the way in which debts are enforced or collected may lead to unfair commercial practices by the trader or his agents this does not of itself enable consumers to refuse to pay legitimate debts.

Examples:

OUTSIDE SCOPE (not covered by the CPRs)

1. Business to business practices with no potential to affect **consumers**

*A **trader** sells specialist tractor parts to businesses only. As **consumers** do not buy his products, the **trader** does not need to consider compliance with the CPRs. The trader may need to consider the Business Protection from Misleading Marketing Regulations 2008.⁷*

IN SCOPE (covered by the CPRs)

2. Business practices with the potential to affect both **consumers** and businesses

*A **trader** sells spare computer parts over the internet. He sells a range of different **products**. The **trader** needs to consider compliance with the CPRs if **consumers** may buy the **products**.*

3. Any aspect of a business to business practice that is directly connected to the sale of **products** to **consumers**

*A **trader** makes and sells processed cheese slices to supermarkets. Although the **trader** does not sell directly to **consumers**, any labels he produces must be compliant with the CPRs as they are directly connected with the promotion and sale of the cheese slices to **consumers**.⁸*

⁷ [Final Guidance to include a reference to the Statutory Instrument here]

⁸ Other legislation also applies to the labelling of food products. Traders must comply with all relevant legislation, not just the CPRs.

4. Practices by a **trader** where he purchases a **product** from the **consumer**

A **trader** makes statements about the value of a car he intends to purchase from a **consumer**. These statements would need to comply with the CPRs. This does not preclude haggling over the value of the product, but does cover misleading statements and other unfair practices (by the trader) engaged in as part of this process.

A trader who is an expert on Chinese pottery tells a consumer that a Ming vase she wants to sell to him is a fake. If this was not the case the statement would be likely to amount to a misleading action.

A trader offers to buy scrap metal from a consumer and offers £10 a kilo. He states that the metal offered weighs 5 kilos, whereas it actually weighs 9. This would be a misleading action.

5 ASSESSING UNFAIRNESS

Conduct and effect

- 5.1 There are 31 **commercial practices** listed in Schedule 1 to the CPRs which, because of their inherently unfair nature, are prohibited in all circumstances. Evidence of their effect, or likely effect, on the **average consumer** is not required in order to prove a breach of one of these outright prohibitions.
- 5.2 By contrast, for a **commercial practice** to be a breach of the other two prohibitions mentioned above – the general prohibition, and the prohibition on misleading and aggressive practices - the **trader** must exhibit the conduct specified in the prohibition, *and* the practice must have, or be likely to have, an effect on the behaviour of the **average consumer**. To assess the effect, or potential effect, of the conduct it is necessary to consider the concepts of **average consumer** and **transactional decision**, which are explained in the glossary.
- 5.3 The table below summarises the type of conduct to which each of the prohibitions can apply, and (where an effect is needed) the effect on **consumers** that will make such conduct unfair. Please see the relevant chapters for explanations of the terms used in this table. The table refers to the individual Regulations that make up the CPRs. Both the conduct and effect 'tests' relevant to each specific Regulation need to be satisfied before a practice can be considered unfair under the CPRs by reference to that Regulation.

Table for assessing unfairness

Regulation	Conduct	Effect	
Regulation 3	Contrary to the requirements of professional diligence	(Likely to) appreciably impair the average consumer's ability to make an informed decision And as a result	Causes (or is likely to cause) the average consumer to take a different (transactional) decision
Regulation 5	False or deceptive practice in relation to a specific list of key factors	And	
Regulation 6	Omission (or unclear/untimely provision) of material information	And	
Regulation 7	Aggressive practice by harassment, coercion or undue influence	(Likely to) significantly impair the average consumer's freedom of choice or conduct And as a result	
Schedule 1	One of 31 specified practices	DOES NOT APPLY (No impairment or transactional decision tests)	

Read across the page for the relevant conduct and effect tests for each Regulation.

6 BANNED PRACTICES (SCHEDULE 1)

Outright prohibitions

6.1 Schedule 1 to the CPRs lists 31 **commercial practices** which are considered unfair in all circumstances and which are prohibited.⁹ There is no need to consider the likely effect on **consumers**. The text that follows lists these banned practices and provides some illustrative examples in italicised text. Breaches of these provisions may also breach the other prohibitions in the CPRs.

(1) Claiming to be a signatory to a **code of conduct** when the **trader** is not.

(2) Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation.

(3) Claiming that a **code of conduct** has an endorsement from a public or other body which it does not have.

A member of the (voluntary) Pure Water Code displays the code logo in his shop and on his advertising materials and claims beside the logo that the code is 'approved by the Office of Fair Trading'. The code has not been approved. This would breach the CPRs.

(4) Claiming that a **trader** (including his **commercial practices**) or a **product** has been approved, endorsed or authorised by a public or private body when the **trader**, the **commercial practices** or the **product** have not or making such a claim without complying with the terms of the approval, endorsement or authorisation.

⁹ The prohibition is contained in regulations 3(1) and 3(4)(d) of the CPRs.

A plumber claims that he is CORGI-Registered¹⁰ when he is not. This would breach the CPRs.

(5) Making an **invitation to purchase products** at a specified price without disclosing the existence of any reasonable grounds the **trader** may have for believing that he will not be able to offer for supply, or to procure another **trader** to supply, those **products** or equivalent **products** at that price for a period that is, and in quantities that are, reasonable having regard to the **product**, the scale of advertising of the **product** and the price offered (bait advertising).

*A camera firm advertises nationally using the line 'Digital cameras for £3'.¹¹ They had only ever planned to have a very small number of such cameras available at that price. This would breach the CPRs because the number of cameras actually available for £3 would not be sufficient to meet the likely level of demand arising from the scale of the advertising and the **trader** knew this but failed to make clear in the advertisement that only limited numbers were available.*

(6) Making an **invitation to purchase products** at a specified price and then:

(a) refusing to show the advertised item to **consumers**

(b) refusing to take orders for it or deliver it within a reasonable time, or

(c) demonstrating a defective sample of it,

with the intention of promoting a different **product** (bait and switch).

¹⁰ Council for Registered Gas Installers scheme.

¹¹ For the purposes of this example assume it is an invitation to purchase.

A **trader** advertises a television in his shop window for £300.¹² When **consumers** ask him about it, he shows them a model which does not work properly, and then refers them to a different model of television. If the **trader** intentionally used this practice to promote a different model (for instance one offering a higher profit margin), it would breach the CPRs.

(7) Falsely stating that a **product** will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive **consumers** of sufficient opportunity or time to make an informed choice.

A **trader** falsely tells a **consumer** that prices for new houses will be increased in 7 days time, in order to pressurise him into making an immediate decision to buy.

(8) Undertaking to provide after-sales service to **consumers** with whom the **trader** has communicated prior to a transaction in a language which is not an official language of the European Economic Area State where the **trader** is located, and then making such service available only in another language without clearly disclosing this to the **consumer** before the **consumer** is committed to the transaction.

A **trader** based in the UK agrees to provide after-sales service to a **consumer** with whom he has been communicating in German. The **trader** then provides after-sales services only in English, without warning the **consumer** pre-contract that that would be the case. This would breach the CPRs.

(9) Stating or otherwise creating the impression that a **product** can legally be sold when it cannot.

¹² For the purposes of this example assume it is an invitation to purchase.

A **trader** offers goods for sale in circumstances in which the consumer cannot legally become their owner by buying them from him, for instance because they have been stolen and he has no legal title to pass on. This would breach the CPRs.

(10) Presenting rights given to **consumers** in law as a distinctive feature of the **trader's** offer.

A stationer sells pens. He advertises on the following basis: 'Pens for sale. If they don't work I'll give you your money back or replace them. You won't find this offer elsewhere'. If the pen is faulty at the time of purchase the **consumer** would be entitled to a refund, repair or replacement under contract law. The **trader's** emphasis on the unique nature of his offer to refund or replace would breach the CPRs.

(11) Using editorial content in the media to promote a **product** where a **trader** has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the **consumer** (advertorial).

A magazine is paid by a holiday company for an advertising feature on their luxury Red Sea diving school. The magazine does not make it clear that this is a paid-for feature – for example by clearly labelling it 'Advertising Feature' or 'Advertorial'. This would breach the CPRs.

(12) Making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the **consumer** or his family if the **consumer** does not purchase the **product**.

A **trader** selling video door entry systems tells potential customers 'There have been a lot of doorstep muggings in your street recently. There is clearly a gang at work in this area, and you will probably be mugged on your doorstep too, before very long, unless you purchase one of my door entry systems now'. If the risk of doorstep mugging is materially exaggerated the statement would breach the CPRs.

(13) Promoting a **product** similar to a **product** made by a particular manufacturer in such a manner as deliberately to mislead the **consumer**

into believing that the **product** is made by that same manufacturer when it is not.

*A **trader** designs the packaging of shampoo A so that it very closely resembles that of shampoo B, an established brand of a competitor. If the similarity was introduced to deliberately mislead **consumers** into believing that shampoo A is made by the competitor (who makes shampoo B) – this would breach the CPRs.*

(14) Establishing, operating or promoting a pyramid promotional scheme where a **consumer** gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other **consumers** into the scheme rather than from the sale or consumption of **products**.

*A **trader** operates a holiday club which offers **consumers**, on payment of a membership fee, the opportunity of earning large amounts of money by recruiting new members to the club. The other benefits of club membership are negligible compared to the potential rewards of earning commission for introducing new members. This practice would breach the CPRs.*

(15) Claiming that the **trader** is about to cease trading or move premises when he is not.

*A **trader** runs a clothes shop. He puts up a sign in the shop window stating: 'Closing down sale'. Unless the shop was genuinely closing down this would breach the CPRs.*

(16) Claiming that **products** are able to facilitate winning in games of chance.

*A **trader** advertises a computer program with the claim: 'This will help you win money on scratchcard lotteries'. This would breach the CPRs.*

(17) Falsely claiming that a **product** is able to cure illnesses, dysfunction or malformations.

A **trader** sells orthopaedic beds to the elderly with the advertisement 'Cure your backache once and for all with my special beds'. If untrue, his definitive statement about the curative effects of his **product** would breach the CPRs. The court may order the **trader** to substantiate such a claim in proceedings.

(18) Passing on materially inaccurate information on market conditions or on the possibility of finding the **product** with the intention of inducing the **consumer** to acquire the **product** at conditions less favourable than normal market conditions.

An estate agent tells a **consumer** that he has recently sold several houses in the same area, just like the one the **consumer** is viewing, at a certain price. If this is not true and he is making the claim in order to persuade the **consumer** to buy at an inflated price, the estate agent would breach the CPRs.

(19) Claiming in a **commercial practice** to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent.

A **trader** operates a scratch-card prize promotion with a top prize of £10,000. In fact, he does not print any cards that win this top prize (or does print the cards but does not make them available). As this would mean that no prizes of £10,000 could be awarded, this would breach the CPRs.

(20) Describing a **product** as 'gratis', 'free', 'without charge' or similar if the **consumer** has to pay anything other than the unavoidable cost of responding to the **commercial practice** and collecting or paying for delivery of the item.

A **trader** advertises a 'free' gift. He then tells **consumers** that in order to receive their 'free' gift they need to pay an extra fee. This would breach the CPRs.

(21) Including in marketing material an invoice or similar document seeking payment which gives the **consumer** the impression that he has already ordered the marketed **product** when he has not.

*A **trader** sends letters to **consumers** with his marketing material which are or closely resemble invoices for **products** that have not been ordered. This would breach the CPRs.*

(22) Falsely claiming or creating the impression that the **trader** is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a **consumer**.

*A second-hand car dealership puts a used car on a nearby road and displays a handwritten advertisement reading 'One careful owner. Good family run-around. £2000 or nearest offer. Call Jack on 01234 56789'. The sign gives the impression that the seller is not selling as a **trader**, and hence this would breach the CPRs.*

(23) Creating the false impression that after-sales service in relation to a **product** is available in a European Economic Area State other than the one in which the **product** is sold.

(24) Creating the impression that the **consumer** cannot leave the premises until a contract is formed.

*A holiday company advertise sales presentations at hotels. During the presentations, intimidating doormen are posted at all the exits, creating the impression that the **consumers** cannot leave before buying. This would breach the CPRs.*

(25) Conducting personal visits to the **consumer's** home ignoring the **consumer's** request to leave or not to return except in circumstances and to the extent justified¹³ to enforce a contractual obligation.

*A door to door salesman visits a **consumer** to sell her some cleaning **products**. She tells him she is not interested and asks him to leave. He is determined to try and get her to change her mind and continues his sales pitch on her doorstep. This would breach the CPRs.*

(26) Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified¹⁴ to enforce a contractual obligation.

*A direct seller telephones **consumers** to sell them **products**, but does not record when **consumers** have explicitly asked to be removed from their contact lists. The **trader** calls back **consumers** several times, who have asked him not to. This would breach the CPRs.*

*Note that a **consumer** who has signed up to the Telephone Preference Service is likely to be regarded as a **consumer** who does not want unsolicited telephone calls.*

(27) Requiring a **consumer** who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a **consumer** from exercising his contractual rights.

¹³ Allowed actions would include legitimate debt collection or asset recovery in line with the rules governing such actions.

¹⁴ Allowed action would include, for example, legitimate debt collection. Collectors must, however, comply with CPRs, as well as the Consumer Credit Act 1974 – on which the Office of Fair Trading has issued guidance: *Debt collection guidance* OFT 664.

(28) Including in an advertisement a direct exhortation to children to buy advertised **products** or persuade their parents or other adults to buy advertised **products** for them.

Advertising a comic book for children stating 'read about the adventures of Fluffy the Bunny in this new comic book each week – ask your mum to buy it from your local newsagents'. This (telling children to ask their mothers) would breach the CPRs.

(29) Demanding immediate or deferred payment for or the return or safekeeping of **products** supplied by the **trader**, but not solicited by the **consumer**, except where the **product** is a substitute supplied in accordance with regulation 19(7) of the Consumer Protection (Distance Selling) Regulations 2000 (inertia selling).¹⁵

*A **trader** writes to **consumers** informing them of a new grease eradicating dishcloth which he is selling for £2.99. In the letter the **trader** encloses one of the cloths for the **consumer** to inspect and says that if the **consumer** does not return the cloth within 7 days then action will be taken to collect the £2.99. This would breach the CPRs.*

(30) Explicitly informing a **consumer** that if he does not buy the **product** or service, the **trader's** job or livelihood will be in jeopardy.

(31) Creating the false impression that the **consumer** has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either:

(a) there is no prize or other equivalent benefit, or

(b) taking any action in relation to claiming the prize or other equivalent benefit is subject to the **consumer** paying money or incurring a cost.

¹⁵ Statutory Instrument 2000/2334

*A **trader** sends letters to **consumers** which, at the top of the letter in large characters, state: 'You have won our top prize of £3,000.' This is false – only the small print on the back of the letter mentions that the **consumer** must buy a **product** before being entered into a draw for the money. This would breach the CPRs.*

7 MISLEADING PRACTICES (REGULATIONS 5 AND 6)

- 7.1 The CPRs prohibit misleading actions and misleading omissions (as detailed in regulations 5 and 6),¹⁶ which cause or are likely to cause the **average consumer** to take a different decision.
- 7.2 A practice can mislead by action or omission or both. These prohibitions aim to ensure that **consumers** get from **traders**, in a clear and timely fashion, the information they need to make informed decisions relating to **products**. In addition, in some **commercial practices** (referred to as 'invitations to purchase') certain specific information must be given to **consumers**, unless apparent from the context.

Misleading actions (regulation 5)

Giving false information to, or deceiving, customers

- 7.3 A misleading action occurs when a practice misleads through the information it contains, or its deceptive presentation, and causes or is likely to cause the **average consumer** to take a different decision.
- 7.4 For instance, if a **trader** falsely tells a **consumer** that his boiler cannot be repaired and he will need a new one, he will have committed a misleading action.
- 7.5 The CPRs specify three types of misleading actions:
- misleading information generally (see para 7.6 below)
 - creating confusion with competitors' **products** (see para 7.10 below)
 - failing to honour firm and verifiable commitments made in a **code of conduct** (see para 7.11 below)

¹⁶ The prohibitions are contained in regulations 3(1), 3(4)(a) and 3(4)(b) of the CPRs.

Each of these three types of misleading actions is dealt with in greater detail below.

Misleading information generally

7.6 These are actions that mislead by:

- containing false information OR deceiving or being likely to deceive the **average consumer** (even if the information they contain is factually correct),¹⁷

and

- the false information, or deception, relates to one or more pieces of information in a (wide-ranging) list (see below),

and

- the **average consumer** takes, or is likely to take, a different decision as a result.

7.7 The list of information mentioned above includes the main factors **consumers** are likely to take into account in making decisions relating to **products**, for example the main characteristics of the **product** and the price or the way it is calculated. The full list follows:

- (a) the existence or nature of the **product**,
- (b) the main characteristics of the **product**
- (c) the extent of the **trader's** commitments
- (d) the motives for the **commercial practice**

¹⁷ The deception can occur in any way, including in the overall presentation of the **commercial practice**.

- (e) the nature of the sales process
- (f) any statement or symbol relating to direct or indirect sponsorship or approval of the **trader** or the **product**
- (g) the price or the manner in which the price is calculated
- (h) the existence of a specific price advantage
- (i) the need for a service, part, replacement or repair
- (j) the nature, attributes and rights of the trader or his agent
- (k) the **consumer's** rights or the risks he may face.

The 'main characteristics of the **product**' include:

- (a) availability of the **product**
- (b) benefits of the **product**
- (c) risks of the **product**
- (d) execution of the **product**
- (e) composition of the **product**
- (f) accessories of the **product**
- (g) after-sale customer assistance concerning the **product**
- (h) the handling of complaints about the **product**
- (i) the method and date of manufacture of the **product**
- (j) the method and date of provision of the **product**
- (k) delivery of the **product**

- (l) fitness for purpose of the **product**
- (m) usage of the **product**
- (n) quantity of the **product**
- (o) specification of the **product**
- (p) geographical or commercial origin of the **product**
- (q) results to be expected from use of the **product**
- (r) results and material features of tests or checks carried out on the **product**.

The 'nature, attributes and rights of the **trader** or his agent' include:

- (a) identity
- (b) assets
- (c) qualifications
- (d) status
- (e) approval
- (f) affiliations or connections
- (g) ownership of industrial, commercial or intellectual property rights
- (h) awards and distinctions.

7.8 The 'consumer's rights' include rights the **consumer** may have under Part 5A of the Sale of Goods Act 1979 or Part 1B of the Supply of Goods and Services Act 1982.

Examples:

A **trader** tries to sell a **consumer** a satellite television package. The **consumer** is falsely told that the package includes certain key channels, which are in fact only available at an additional subscription cost. The **trader** has provided false information about the 'main characteristics of the **product**' (in this case, the contents of the package). As this practice is likely to cause the **average consumer** to take a different decision about the package – for example to buy it where otherwise he would not - it will breach the CPRs.

A **trader** advertises televisions for sale saying the price has been substantially discounted. In fact, they have only been on sale at the non-discounted price in very small numbers for a very short period of time in one of the **trader**'s numerous shops. Whilst the **trader**'s advertisement may be factually correct, it is likely nonetheless to be deceptive. The **average consumer** would have been deceived about the existence of a specific price advantage in a way that is likely to cause him to take a different decision about the television – in this case to buy it.

A **trader** advertises a house as having 3 bedrooms, when in fact it has 2; or it does have 3 rooms called bedrooms but the third is physically too small to fit a bed in. This is likely to be a misleading action as the **average consumer** would be likely to take a different decision about the house as a result. The misleading information here about the number of bedrooms would probably relate to 5(4)(a), the 'main characteristics of the product', by virtue of 5(5)(o) the 'specification' of the product, i.e. the house.

- 7.9 The Code of Practice for Traders on Price Indications currently provides detailed statutory guidelines on how not to give a misleading price indication. The code is being changed to reflect the requirements of the UCPD and to clarify its status as non-statutory guidance. BERR is aiming to publish this guidance before 26 May 2008.

Creating confusion with competitors' products

7.10 **Commercial practices** are also prohibited as misleading actions if they:

- market a **product** in a way which creates confusion with any **products**, trade marks, trade names or other distinguishing marks of a competitor,

and

- the **average consumer** takes, or is likely to take, a different decision as a result.

Example:

*A **trader** names or brands his new sunglasses so as to very closely resemble the name or brand of a competitor's sunglasses. If the similarity is such as to confuse the **average consumer** making him more likely to opt for the new sunglasses when he otherwise would not, this would breach the CPRs.*

Failing to honour commitments made in a code of conduct

7.11 The third category of **commercial practices** prohibited as misleading actions is those where:

- the **trader** has undertaken to be bound by a **code of conduct** (or code of practice), and indicates that he is bound by it in the commercial practice,

and

- the **trader** fails to comply with a firm and verifiable commitment in that code,

and

- the **average consumer** takes, or is likely to take, a different decision as a result

Example

*A **trader** has agreed to be bound by a code of practice that promotes the sustainable use of wood and displays the code's logo in an advertising campaign (i.e. in a commercial practice). The code of practice contains a commitment that its members will not use hardwood from unsustainable sources. However, it is found that the **product** advertised by the **trader** contains hardwood from endangered rainforests. This practice is a breach of a firm and verifiable commitment. As the **average consumer** would expect code members to sell **products** which comply with their code, and is likely to decide to buy them on this basis, this practice would breach the CPRs.*

Misleading Omissions (regulation 6)

*Giving insufficient information about the **product***

7.12 Practices may also mislead by failing to give **consumers** the information they need to make an informed choice (in relation to a **product**). This occurs when practices:

- omit or hide material information, or provide it in an unclear, unintelligible, ambiguous or untimely manner,

and

- the **average consumer** takes, or is likely to take, a different decision as a result

7.13 A misleading omission can also occur where a **trader** fails to identify the commercial intent of a practice, if it is not already apparent from the context. The presence of a price, or of a statement making it clear that the practice is commercial (for example: 'this is an advertisement'), are examples of how commercial intent could be made clear.

7.14 When deciding whether a practice misleads by omission, the courts will take account of the context.¹⁸

Material information

7.15 Material information is information that the **average consumer** needs to have, in the context, in order to make informed decisions. It includes any information required by European (EC) derived law, such as the Package Travel, Package Holidays and Package Tours Regulations¹⁹ and the Consumer Protection (Distance Selling) Regulations.²⁰

7.16 What information is required will depend on the circumstances, for example what the **product** concerned is, and where and how it is offered for sale. This may range from a very small amount of information for simple **products**, to more information for complex **products**.

7.17 The price of a product in most circumstances is material information. Therefore, failing to provide this in a timely fashion before a transactional decision is made is likely to amount to a misleading omission. For example, in restaurants, the prices of the food and drink available will usually need to be given to consumers before they order.

7.18 Material information includes any information which causes or is likely to cause the **average consumer** to take a different decision about the **product**.

Examples:

¹⁸ See the section on 'context' later in this chapter for more information on how this might work in practice.

¹⁹ Statutory Instrument 1992/3288.

²⁰ Statutory Instrument 2000/2334.

A **trader** omits to mention that a contract has to run for a minimum period, or that the consumer has to go on making purchases in future, this would probably be a material omission.

A **trader** advertises mobile phones for sale. If the phones were second hand and/or had been reconditioned, this would be material information, which would need to be made clear to **consumers**.

A **trader** operates a car park. If he fails to clearly display the price(s) of parking at a point before the consumer enters the car park and incurs a charge, this would be failing to provide material information.

A **trader** sells audio-visual equipment. He omits to inform the consumer that a particular product includes only an analogue tuner, and of the implications in the context of the switch from analogue to digital-only television. This is likely to be material information that the consumer needs to make an informed decision.

Context

- 7.19 Consideration of the context includes any limitations of the communication medium used (of space or time) that make it impractical to give the necessary information. In such circumstances, if other means have been used by the **trader** to convey this information, these will be relevant.

Example:

A **trader** sells cereal bars. On their wrappers the **trader** advertises a 't-shirt for £1' offer. In fact, various conditions apply (such as restrictions on the availability of the t-shirts). The outside of the wrapper is too small to include all of this information. The **trader** is less likely to commit a misleading omission if he makes clear on the wrapper that terms and conditions apply and provides details of where they can be found.

Invitations to purchase (regulation 6[4])

7.20 The CPRs make special provision for certain kinds of **commercial practice** known as '**invitations to purchase**'.²¹ They specify information that is automatically regarded as material information unless it is apparent from the context. Its omission may therefore lead to a misleading omission as described in paragraph 7.12 above.

7.21 So, where **traders** make **invitations to purchase** they will need to ensure that their **commercial practices** include the information required by the CPRs, or that such information is apparent from the context. This is not to say that such information *only* needs to be provided where there can be said to be an invitation to purchase. It may need to be provided anyway if consumers need it to make an informed decision. Failure to provide information that is needed for that purpose can constitute a misleading omission, and thus make a commercial practice unfair, whether or not an invitation to purchase is involved. For more details on misleading omissions generally see above para 7.15 following.

Identifying an invitation to purchase

7.22 An **invitation to purchase** has the following elements:

- it is a commercial communication, and
- it indicates characteristics of the **product** concerned and the price, in a way appropriate to the communication medium used, and
- it thereby enables the **consumer** to make a purchase.

²¹ The CPRs concept of '**invitation to purchase**' is not the same as the UK concept of 'invitation to treat'.

- 7.23 The idea behind this concept is that the consumer is given the key information he needs to make an informed purchasing decision.
- 7.24 'Thereby enables' primarily refers to enabling of a purchase through the provision of information. The amount of information that enables the consumer to make a purchase will vary depending on the circumstances. Complex products may require the provision of more information than simple ones before a purchase is enabled.
- 7.25 The following will normally be **invitations to purchase** where the **product's** price and characteristics are given:
- *an advertisement in a newspaper where part of the advertisement is an order form that can be sent to the **trader***
 - *an interactive TV advertisement through which orders can be directly placed*
 - *a page or pages on a web site where **consumers** can place an order*
 - *a menu in a restaurant from which **consumers** can place an order*
 - *a text message promotion to which **consumers** can directly respond in order to purchase the promoted **product***
 - *a radio advertisement for a mobile phone ring tone, which provides a word and number to text in order that the consumer can purchase and pay for (via their phone bill) the jingle to be uploaded to their device.*
 - *a price on a product in a shop.*

Commercial practices which are not invitations to purchase

- 7.26 It is important to note that if a communication is not an **invitation to purchase** it may still mislead by omission if it meets the conditions described in paragraph 7.12 above.

- 7.27 Where a commercial communication does not indicate the characteristics of a specific **product**, through text, image or otherwise, it will not be an **invitation to purchase**.
- 7.28 A commercial communication which does not include a price is not an **invitation to purchase**.
- 7.29 Where a commercial communication does not 'enable the consumer to make a purchase', then it will not be an **invitation to purchase**.
- 7.30 In many cases, advertisements which promote a **trader's** 'brand' rather than any particular **product(s)** will not be invitations to purchase.

Required (material) information

- 7.31 The CPRs deem certain information to be 'material' where **traders** make **invitations to purchase**. Subject to the same considerations about the context and the limitations of the communication medium as apply to misleading omissions generally (see paragraphs 7.19), that information must be provided in a clear, unambiguous, intelligible and timely manner, unless apparent from the context.
- 7.32 Where the required information is apparent from the context then **traders** do not need to provide it separately. An example of information which is likely to be apparent from the context will be the address of a shop which the **consumer** is already in.
- 7.33 Information that is deemed to be material in **invitations to purchase** is set out in regulation 6(4), which is summarised below:
- the main characteristics of the **product** – for example, what it is and what it does – to the extent appropriate to the medium used by the **invitation to purchase** and the **product**
 - the identity of the trader, such as his trading name, and the identity of any other trader on whose behalf the trader is acting
 - the geographical address of the **trader** or **traders**

- the price of the **product** (including taxes) or, where the price cannot be reasonably calculated in advance, the way it will be calculated
- any freight, delivery or postal charges, or, where these cannot reasonably be calculated in advance, the fact that such charges may be payable
- any arrangements for payment, delivery, performance (that is the way in which any work is to be carried out, or a service provided) and complaint handling that differ from **the requirements of professional diligence**
- the existence of any cancellation rights.

This is in addition to any other information the **average consumer** needs, in the context, to make informed decisions and any other information required under other Community law provisions.

Examples of invitations to purchase

7.34 The following are examples of how the information listed in Regulation 6(4) might be provided in differing types of **invitation to purchase**:

Pencil (a simple product)²²

*A shop has a number of pencils for sale and displays the price. This is an **invitation to purchase** because the information given in the context of a shop enables the **consumer** to make a purchase (by taking the pencil to the till and paying for it). The pencils themselves 'indicate' their characteristics (that they are pencils), and the pencils together with the price ticket / label are the commercial communication.*

²² See paragraph 7.24 above.

*In this instance, the material information required is provided on the pricing label or is already apparent from the context. The main characteristics of the **product** – such as the colour or thickness of the lead – are apparent from looking at it. The **trader** trades under his own name and is based in the shop (the address), the price is given, there are no arrangements for payment, delivery, performance or complaint handling that differ from those that **consumers** would reasonably expect. There are no omissions of cancellation rights or information requirements under other Community law provisions.*

Price list in a bar

A licensed premises offers various drinks for sale to consumers. The price list (which is the commercial communication) placed near the bar enables consumers to make informed decisions about the cost of drinks, and is also a reference to what is likely to be available.

*In this instance, the main characteristics are the name (and possibly the name of the brand) of the drinks available. The trader's identity and the name of the establishment are given on the price list, and the address is apparent from the context (because consumers are already at the address). There are no delivery or other arrangements which are contrary to the requirements of **professional diligence** that need noting.*

Mail order advertisement

*An advertisement in a magazine features T-shirts for sale. The prices and sizes of the T-shirts available are given in the advertisement, and the bottom half of the advertisement is an order form which can be filled in, with payment enclosed, and sent direct to the retailers. This would be an **invitation to purchase**.*

*Here, the main characteristics of the **product** are included in the advertisement – such as the size, material and colour). The **trader's** identity is stated in the advertisement, as is his geographical address. So, too, are payment and delivery arrangements. The advertisement also*

mentions the **consumer's** entitlement to cancel any order and the period for which the advertised price would be valid, given this is a contract concluded by mail order and the Consumer Protection (Distance Selling) Regulations 2000 apply.

Car

A car showroom has a used car on display for sale. The price is shown clearly on the car. This (the car and the price) would be an **invitation to purchase**, because the information given in the context of the showroom enables the **consumer** to make a purchase, by asking to purchase the car and paying for it within the showroom.

Here, the main characteristics of the **product** are included in the sales card or are already apparent from the context, such as the make, model, accurate mileage, engine capacity, colour and other physical characteristics of the car. The **trader's** identity is apparent from information in the showroom, the price is given on a sign on the car and there are no arrangements for payment, delivery, performance or complaint handling, that differ from the requirements of **professional diligence**. The car can be purchased and taken from the showroom, and returned there if complaints arise. There are no omissions of cancellation rights or information requirements under other Community law provisions.

Computer (a complex product)

A **trader** sells computers from his website. The site's homepage pictures the range of computers sold by the **trader**. Each picture provides a link to a detailed page which gives the specifications (characteristics) of the relevant computer and that page also gives its full price and has a 'buy now' button (by clicking on which the computer may be purchased). This detailed page is an **invitation to purchase**.

On separate pages on the website that can be reached via a clearly-indicated link on the detailed page, are:

- *the main characteristics of the computer (for example the processor, memory, graphics, software and accessories) including its function (for example 'home multimedia' or 'games package')*
- *the full price (inclusive of taxes and any freight or delivery charge) if this was not given on the previous page*
- *the **trader**'s name and geographic address*
- *the delivery and payment arrangements as well as the complaints/after-sales procedures, and*
- *since the computer is being sold over the internet, information required by the Electronic Commerce (EC Directive) Regulations 2002²³ and Distance Selling Regulations, including cancellation rights.*

²³ Statutory Instrument 2002/2013.

8 AGGRESSIVE COMMERCIAL PRACTICES (REGULATION 7)

8.1 The CPRs also prohibit aggressive **commercial practices** (as detailed in regulation 7)²⁴. These are practices that, in the context of the particular circumstances, intimidate or exploit **consumers**, restricting their ability to make free or informed choices. In order for an aggressive practice to be unfair it must cause or be likely to cause the **average consumer** to take a different decision.

Prohibition on aggressive practices

8.2 The CPRs prohibit **commercial practices** which

- by harassment, coercion (including physical force) or **undue influence**,
- significantly impair, or are likely to significantly impair, the **average consumer's** freedom of choice or conduct concerning the **product**,

AND

- The **average consumer** takes, or is likely to take, a different decision as a result

These elements are described below.

Harassment, coercion and undue influence

8.3 Harassment and coercion are not expressly defined in the CPRs but include both physical and non-physical, (including psychological) pressure.

²⁴ The prohibition is contained in regulations 3(1) and 3(4)(c) of the CPRs.

8.4 **Undue influence** is defined in regulation 7(3)(b) of the CPRs as:

*'exploiting a position of power in relation to the **consumer** so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the **consumer**'s ability to make an informed decision'.*

*An example of this might be a mechanic who has a **consumer**'s car at his garage and has done more work than agreed, and who refuses to return the car to the **consumer** until he is paid in full for the work. The mechanic did not check with the **consumer** before he went ahead with the extra work. As he has the car, he has power over the **consumer**'s decision to pay for the unauthorised work. He has exploited his position of power, by demanding payment for doing more than was agreed and refusing to return the vehicle until the **consumer** has paid for all the work.*

*Another example might be a trader selling credit²⁵ who pressurises an existing borrower to take out an additional loan. This could amount to harassment, coercion or **undue influence**.*

See the glossary for more information.

Significant impairment or limitation

8.5 The CPRs refer to practices that 'significantly impair' and those that 'significantly limit' decisions (the latter is in the definition of **undue influence**). These are likely to have a very similar meaning and both will depend on the context.

²⁵ Additional examples of unfair (including aggressive) debt collection practices can be found in the OFT's *Debt collection guidance* – OFT 664.

8.6 Significant impairment might occur when, for example, a **trader** stays in a **consumer's** home for so long that they feel compelled to sign a contract for a **product**.²⁶

Freedom of choice or conduct

8.7 The concept of freedom of choice is not limited solely to decisions about whether to purchase a **product** or not. It covers a wide range of choices that are likely to impact on **transactional decisions**.

8.8 For example, coercion might cause **consumers** to purchase the **product** at a much higher price or on disadvantageous terms. Breaches of the CPRs could occur even if:

- **consumers** might still have bought the **product** from the same **trader**, but on different terms
- **consumers** might still have bought the **product**, but from a different **trader**.

Factors indicating an aggressive practice

8.9 The CPRs list factors which shall be taken into account when determining whether a **commercial practice** is aggressive. It is not necessary for all of these factors to be present for a practice to be aggressive and therefore unfair (provided that the **commercial practice** uses harassment, coercion or **undue influence**).

8.10 The factors are:

²⁶ This practice could also breach paragraph 25 of Schedule 1 to the Regulations, the list of practices that will always be unfair – 'Conducting personal visits to the **consumer's** home ignoring the **consumer's** request to leave or not to return except in circumstances and to the extent justified, under national law, to enforce a contractual obligation'.

- (a) Timing, location, nature or persistence,
- (b) The use of threatening or abusive language or behaviour,
- (c) The exploitation by the **trader** of any specific misfortune, or circumstance, of such gravity as to impair the **consumer's** judgement, of which the **trader** is aware, to influence the **consumer's** decision with regard to the **product**,
- (d) Any onerous or disproportionate non-contractual barriers imposed by the **trader** where a **consumer** wishes to exercise rights under the contract, including rights to terminate a contract or switch to another **product** or **trader**,
- (e) Any threat to take any action that cannot legally be taken.

Possible aggressive practices

- 8.11 The examples below assume that the **average consumer** would or would be likely to take a different decision as a result of the practice(s) described.

*Staff working in a funeral parlour put pressure on a recently bereaved relative, who is deciding on a coffin, to buy a more expensive coffin to avoid bringing shame on the family. This could amount to coercion or **undue influence**. (Exploitation of specific misfortune, and timing)*

*A **trader** takes **consumers** to a holiday club presentation at a distant location, with no apparent return transport unless the **consumers** sign a contract. This could amount to coercion and/or **undue influence**. (Nature / location)*

*A doorstep **trader** pressures a **consumer** to pay in cash for home repairs immediately. He insists on giving the **consumer** a lift to the bank to withdraw the money. This could amount to coercion or **undue influence**. (Nature, persistence, location)*

*A debt collector²⁷ pressurises existing borrowers/debtors to repay a debt, for example, by contacting debtors at unreasonable times (such as late at night) or at unreasonable locations (such as at work when they have been requested not to). This could amount to harassment, coercion or **undue influence**. (Timing, persistence, nature and location, exploitation of circumstances – this might amount to exploitation of the imbalance of power between the creditor and debtor, as well as of the specific circumstances of the debtor)*

*A debt collector threatens **consumers** with recovery of money by bailiffs for unenforceable debts.²⁸ This could amount to harassment, coercion or **undue influence**. (Exploitation of circumstances and threat to take action which cannot legally be taken)*

²⁷ Additional examples of unfair (including aggressive) debt collection practices can be found in the OFT's *Debt collection guidance* – OFT 664.

²⁸ This could also breach the prohibitions on misleading actions as well as the prohibition on aggressive practices.

9 PROMOTING UNFAIR PRACTICES IN CODES OF CONDUCT

- 9.1 The CPRs also prohibit the promotion of unfair **commercial practices** by a **code owner** in a **code of conduct** (see regulation 4).
- 9.2 Note that there is no criminal offence attached to this prohibition. Any enforcement action, if needed, will be taken through the civil route via Part 8 of the Enterprise Act 2002. Action will be against the relevant code owner (including, in some situations, specific individuals).
- 9.3 In order for this prohibition to be infringed, the code owner must in a **code of conduct** promote a practice that is unfair as determined by one (or more) of the other prohibitions contained in the Regulations.
- 9.4 Enforcers are likely to rely on this prohibition where the promotion takes the form of a statement in the code of conduct and altering the code of conduct is therefore likely to be a more effective method of dealing with the unfair practice than taking action against any individual trader or traders who are engaging in the practice.

Possible unfair practices promoted by a code of conduct

- 9.5 *A code owner is responsible for a code of practice relating to the online sale of personal computers. The code states that there is no need for member businesses to give a geographic address when advertising in any circumstances. As this a material omission in certain circumstances, promotion of the resulting commercial practice via this statement would be prohibited.*

10 GENERAL PROHIBITION OF UNFAIR COMMERCIAL PRACTICES (REGULATION 3)

Failing to act in accordance with reasonable expectations of acceptable trading practice

10.1 Regulations 3(1) and 3(3) of the CPRs set out the general prohibition on unfair business to **consumer commercial practices**, also known as the general duty not to trade unfairly. This prohibition allows enforcers to take action against unfair **commercial practices**, including those that do not fall into the more specific prohibitions of misleading and aggressive practices, or into the very specific banned practices. This means it acts as a safety net. It is designed to 'future-proof' the protections in the CPRs, by setting standards against which all existing and new practices can be judged.

General prohibition

10.2 The general prohibition is made up of two tests. It prohibits practices that:

- contravene the requirements of **professional diligence**

and

- materially distort the economic behaviour of the **average consumer** with regard to the **product** (or are likely to).

10.3 The first test is concerned with the conduct itself – that is the standards of the **trader's** practice. The second is concerned with the actual or likely effect the practice has on the **average consumer's** economic behaviour.

Test 1: Professional diligence

10.4 **Professional diligence** is defined (in Regulation 2) as: '*the standard of special skill and care which a **trader** may reasonably be expected to exercise towards **consumers** which is commensurate with either – (a)*

*honest market practice in the **trader's** field of activity, or (b) the general principle of good faith in the **trader's** field of activity'.*

- 10.5 **Professional diligence** is an objective standard which will vary according to the context. The word 'special' is not intended to require more than would reasonably be expected of a **trader** in their field of activity. However, poor current practice that is widespread in an industry/sector cannot amount to an acceptable objective standard. That is because this is not what a reasonable person would expect from a **trader** who is acting in accordance with honest market practice or good faith.
- 10.6 The CPRs do not define honest market practice or good faith. They are similar and overlapping principles. They require **traders** to approach transactions professionally and fairly as judged by a reasonable person.
- 10.7 Guidance and codes of practice, including OFT-approved codes, may be drawn upon to help establish whether a **trader** is behaving in a professionally diligent manner. However, complying with these codes and Guidance may not be necessary, or, alternatively, sufficient of itself in order for a **trader** to be **professionally diligent**.

Test 2: Material distortion

- 10.8 **Material distortion** is defined (in Regulation 2) as:

*'appreciably to impair the **average consumer's** ability to make an informed decision thereby causing him to take a **transactional decision** that he would not have taken otherwise'. It applies either when a practice distorts or is likely to distort **average consumers'** behaviour.*

- 10.9 '**Material distortion**' means that a practice impairs the **average consumer's** ability to make an informed decision. The impairment must be significant enough to change the decisions the **average consumer** makes. This means that practices that do not affect, or are unlikely to affect, the economic behaviour of **average consumers** are unlikely to be unfair under the general prohibition in the CPRs.

10.10 The CPRs define '**the average consumer**' by reference to the concepts of the 'average' **consumer**, the 'average' member of a targeted group of **consumers** and the 'average' member of a vulnerable group of **consumers**. Different types of average consumer may react differently to the same practice. These concepts, and their relation to each other, are discussed in the Glossary.

11 COMPLIANCE AND ENFORCEMENT

11.1 Local Authority Trading Standards Services (TSS), the Department of Enterprise, Trade and Investment in Northern Ireland and the Office of Fair Trading have a duty to enforce the CPRs. This does not mean that (civil or criminal) enforcement action must be taken in respect of each and every infringement. Instead, enforcers should promote compliance by the most appropriate means, in line with their enforcement policies, priorities and consistent with available resources.

11.2 Enforcers can use a range of tools to ensure that businesses are complying with CPRs. The main options, which are explained below, are:

- education, advice and guidance
- established means
- codes of conduct
- civil enforcement
- criminal enforcement.

11.3 When considering action under the CPRs enforcers will have regard to the principles of proportionality, accountability, consistency, transparency and targeting and where formal enforcement action is taken this should seek to:

- change the behaviour of the offender
- eliminate any financial gain or benefit from non-compliance
- be responsive and consider what is appropriate for the particular offender and regulatory issue
- be proportionate to the nature of the offence and the harm caused
- restore the harm caused by the regulatory non-compliance, where appropriate, and

- deter further non-compliance.

11.4 Enforcers taking action under the CPRs will act in accordance with the Regulators' Compliance Code in carrying out enforcement action.²⁹

Education, advice and Guidance

11.5 The OFT will generally seek to obtain compliance by education, giving advice and guidance in the first instance unless circumstances indicate that enforcement action is the appropriate first step which may include a criminal investigation and prosecution.³⁰ Other enforcers may have their own enforcement policies in this regard.

'Established means'

11.6 There are alternative well-founded and effective systems of regulation (including self-regulation) in place in the UK. If enforcers are satisfied that complaints and cases are clearly within the scope of these systems and can be adequately dealt with by them, they will be able to refer such complaints and cases to the relevant body (to ensure that businesses comply with the CPRs).

11.7 As under the previous consumer protection regime, the Advertising Standards Authority (ASA) and PhonepayPlus are considered to be established means in the areas described below, and, appropriate cases falling within their areas of expertise will usually be referred to them for action.

²⁹ The Regulators' Compliance Code only applies to the enforcement of the CPRs in England, Scotland and Wales and not Northern Ireland where consumer protection is devolved. See section 24(3) of the Legislative and Regulatory Reform Act 2006 and article 4 of The Legislative and Regulatory Reform (Regulatory Functions) Order 2007 Statutory Instrument 2007/3544.

³⁰ See the OFT's *Statement of consumer protection enforcement principles* – OFT 964.

- 11.8 The ASA regulates all TV and radio advertisements under the Broadcast Committee of Advertising Practice (BCAP) TV Advertising Standards Code and the BCAP Radio Advertising Standards Code. The ASA regulates advertisements in non-broadcast media (for example print, posters, cinema, direct marketing and online, such as banner and pop-ups ads) under the British Code of Advertising, Sales Promotion and Direct Marketing (the CAP Code). All of the Codes can be accessed at www.cap.org.uk/cap/codes
- 11.9 The ASA is considered as the 'established means' for ensuring compliance with the CPRs and BPRs in non-broadcast advertising. For broadcast advertising, the ASA (Broadcast) and BCAP are formally contracted under a co-regulatory partnership with Ofcom to regulate TV and radio commercials. ASA(B) and BCAP's responsibility for protecting consumers from misleading advertising is therefore derived from the Communications Act 2003 and Ofcom operates as the backstop to the system.
- 11.10 PhonepayPlus (formerly ICSTIS) is responsible for regulating premium rate telephony services in the UK. Premium rate services can be defined as those which offer some form of content, product or service that is charged to a user's phone bill. PhonepayPlus regulates content, promotion and overall operation of these services as an agency of Ofcom, as designated under s120 (1) of the Communications Act 2003.
- 11.11 Where the remits of ASA and PhonepayPlus overlap in relation to the promotion of a premium rate telephony service, the two organisations will work together to ensure an appropriate solution.

Codes of conduct

- 11.12 Enforcers may, where appropriate as a means of seeking to prevent or stop breaches of the CPRs, enlist the help of those responsible for self-regulatory **codes of conduct**, or practice, adopted by businesses to govern their dealings with **consumers**. This would include a range of self-regulatory codes, and those approved by the OFT under its Consumer

Codes Approval Scheme (CCAS).³¹ The OFT has updated its core criteria for these approved codes in line with the CPRs³².

11.13 The CPRs prohibit **code owners** from using their codes to promote unfair **commercial practices**.

11.14 A **trader** who has agreed to be bound by a self-regulatory **code of conduct** may breach the CPRs if he fails to comply with commitments in the code which are firm, capable of being verified, and not purely aspirational, when he has indicated in a **commercial practice** that he is bound by the code and **consumers' transactional decisions** are (likely to be) affected by this.

11.15 The two prohibitions above are enforceable only via injunctive civil action and are not subject to criminal sanctions.

Civil enforcement

11.16 Enforcers may take civil enforcement action in respect of any breach of the CPRs as Community Infringements (breaches of EU-derived legislation) under Part 8 of the Enterprise Act 2002. Currently, a number of bodies, including the OFT and TSS can take enforcement action in this way.³³

11.17 Under this procedure, enforcers may apply to a court for an enforcement order to prevent Community or domestic infringements. Breach of an

³¹ More details on the OFT CCAS scheme can be found at: www.offt.gov.uk/Codes/default.htm

³² See www.offt.gov.uk/shared_offt/Approvedcodesofpractice/oft390.pdf for more details.

³³ The full list of enforcers for Part 8 of the Enterprise Act 2002 can be found on BERR's website, www.berr.gov.uk/consumers/enforcement/orders/index.html Details can also be found in the OFT's Guidance: *Enforcement of Consumer Protection Legislation – Guidance on Part 8 of the Enterprise Act* – OFT 512.

enforcement order could be contempt of court which could lead to up to two years imprisonment and/or an unlimited fine.

11.18 Enforcers will normally seek to stop an infringement through consultation with the **trader** before applying to the court for an enforcement order. Instead of seeking an order, they may accept an undertaking from the **trader** not to engage in or repeat the conduct constituting an infringement.

11.19 Further information on enforcement under Part 8 of the Enterprise Act 2002 is contained in the OFT's published Guidance on this subject.³⁴

11.20 Courts can order a trader to produce evidence to substantiate a factual claim made in a commercial practice.

Traders offering credit

11.21 There is likely to be some overlap of practices prohibited by the CPRs and the provisions relating to 'unfair relationships' introduced by the Consumer Credit Act 2006. Enforcement action in this area of overlap may be taken under either or both pieces of legislation. The OFT has published Guidance indicating how it expects the unfair relationships provisions to interact with Part 8 of the Enterprise Act 2002.³⁵

³⁴ This is available on the OFT website: www.offt.gov.uk

³⁵ *Unfair relationships – enforcement action under Part 8 of the Enterprise Act* - OFT 854, also available on the OFT website: www.offt.gov.uk

Consumer Protection Cooperation Regulation

- 11.22 The EC Regulation on Consumer Protection Cooperation (2006/2004) (CPC)³⁶ creates a network of public consumer protection enforcers (competent authorities) throughout the European Community.³⁷
- 11.23 Within the European Community unfair practices should be dealt with by enforcers in the jurisdiction where the **trader** responsible for the practice is situated. The Regulation allows Member States to share information and to request enforcement action to be taken to stop breaches of the legislation implementing the UCPD (the CPRs in the UK) and other Community consumer protection rules. This could result in cross-border referrals both to and from the UK.
- 11.24 In the UK, the OFT is the single liaison office, responsible for co-ordinating initial requests for information and referrals of cases.³⁸

³⁶ Regulation (EC) No. 2006/2004 of the European Parliament and the Council of 27 October 2004.

³⁷ See OFT Guidance: *The EU Regulation on Consumer Protection Cooperation (the CPC) – on-site inspection powers OFT858*.

³⁸ A complete list of UK enforcers for the CPC can be found at: www.offt.gov.uk/news/press/2007/3-07

12 CRIMINAL OFFENCES

12.1 The CPRs also contain criminal offences. These can be prosecuted by:

- the OFT
- Weights and Measures authorities (TSS)
- the Department of Enterprise, Trade and Investment in Northern Ireland
- in Scotland, only by the Lord Advocate.

12.2 The offences are:

- contravention of requirements of the general prohibition - see chapter 10 on the general prohibition
- misleading actions (except 5(3)(b) – code commitments) - see chapter 7 on misleading practices
- misleading omissions (including the omission of specified information in invitations to purchase) – see chapter 7 on misleading practices
- aggressive practices – see chapter 8 on aggressive practices
- specific unfair **commercial practices** (Schedule 1) apart from numbers 11 and 28 – see chapter 6 on banned practices.

12.3 The offences above are all strict liability offences, apart from contravention of the general prohibition, which requires proof of *mens rea*.³⁹

³⁹ This is a legal term implying a mental element in the offence, for example knowledge or recklessness.

- 12.4 For strict liability offences it need only be shown that there has been a prohibited act or omission.
- 12.5 For a person to be convicted of a contravention of the general prohibition, which is a *mens rea* offence, it must also be shown that he had a specified state of mind. The specified state of mind will be knowledge or recklessness in engaging in a **commercial practice** which fails to comply with the requirement of **professional diligence**.
- 12.6 In the case of a prosecution for contravening the general prohibition, the mental element ('knowingly or recklessly') only needs to be shown in relation to contravention of 'the requirements of **professional diligence**'. It does not need to be shown in relation to the effect on the **average consumer**, assessed against the **material distortion** and **transactional decision** concepts.

Bodies of persons

- 12.7 Where a body corporate commits an offence with the consent or connivance of an officer of that body, both the officer and the body corporate can be prosecuted and punished. The same applies if the offence is attributable to neglect on the part of the officer. Where a Scottish partnership commits an offence with the consent or connivance of a partner or due to neglect on the part of a partner, both the partner and the partnership can be prosecuted and punished.

Act or default of another

- 12.8 If a person commits an offence (other than a breach of the general prohibition) or would have done but for the defences discussed below, and this is due to the act or default of another person, that other person can also be charged with an offence under the CPRs, regardless of whether action is taken against the original offender. That other person may seek to rely on the defences discussed below.

Penalties

12.9 The penalties are:

- on summary conviction, a fine not exceeding the statutory maximum⁴⁰
- on conviction on indictment, a fine or imprisonment not exceeding two years or both.

Time limits

12.10 Time limits for prosecution apply, either within three years of the offence taking place, or within one year of the discovery of the offence by the prosecutor, whichever is earlier.

Defences

12.11 Breach of most of the prohibitions contained in the CPRs⁴¹ means that an offence may have been committed, unless one of the following defences can be shown. The defences available for the strict liability offences are those of due diligence and innocent publication.

Due diligence

12.12 To be able to rely on the defence of due diligence, for offences under Regulations 9 (misleading actions), 10 (misleading omissions), 11 (aggressive commercial practices) and 12 (specific unfair commercial practices – that is the practices listed in paragraphs 1-10, 12-27, and 29-31 of Schedule 1 to the Regulations) the person accused must prove that the commission of the offence was due to a mistake, reliance on

⁴⁰ This is currently (as of 2007) £5,000.

⁴¹ See above for the list of prohibitions which are covered by criminal offences.

information given by another person, the act or default of another, an accident, or another cause beyond his control, and, in addition, that he took all reasonable precautions and exercised all due diligence to avoid committing the offence or to avoid someone under his control committing it. The enforcer prosecuting the offence must be given written notice of a defence based on the actions of a third party seven days in advance of the hearing. It is not sufficient to show that due diligence procedures are in place, it is also necessary to show that they are applied in practice. Courts are likely to expect different standards of due diligence from businesses of different sizes.

- 12.13 The *mens rea* offence of breaching the general prohibition does not have the due diligence defence, because the offence already requires proof of a certain state of mind.

Innocent publication

- 12.14 An alternative defence in cases involving use of advertisements (including catalogues, circulars and price-lists) is that of innocent publication. For offences under Regulations 9 (misleading actions), 10 (misleading omissions), 11 (aggressive commercial practices) and 12 (specific unfair commercial practices – that is the practices listed in paragraphs 1-10, 12-27, and 29-31 of Schedule 1 to the Regulations) the person accused who wishes to rely on this defence must prove that he is a person whose business is to publish or arrange publication of advertisements, he received the advertisement in the ordinary course of business, and that he did not know and had no reason to suspect that the publication would amount to an offence.

- 12.15 The general prohibition does not have this defence.

Examples

Offence and defence

A trader sells printer ink cartridges. Some of his cartridges are found to contain blue ink instead of the advertised black ink. The advertisement

would probably amount to a misleading statement under the CPRs. However, if the **trader** could show he had taken all reasonable steps to ensure that the cartridges only contained black ink (possibly by demonstrating that his processes had high levels of quality assurance and safeguards), and that the blue ink had been a genuine mistake, then he would be able to rely on the due diligence defence.

Mens Rea

A **trader** breaches the general prohibition by acting contrary to the requirements of **professional diligence** and distorting **consumer** decisions. In order to prosecute, enforcers would need to show that he had engaged in the practice knowingly or recklessly. If the practice was well known to be unfair, or unprofessional, then it would be easier to demonstrate that the **trader** engaged in it knowingly or recklessly.

13 INVESTIGATIVE POWERS

- 13.1 The CPRs provide investigation powers for use by the OFT, TSS and the Department of Enterprise, Trade and Investment in Northern Ireland. These powers are modelled on those that exist at present for the enforcement of the Trade Descriptions Act 1968, although these have been modernised.

Testing of products

- 13.2 Enforcement officers have the power to check compliance with the CPRs by purchasing or securing the provision of **products**.

Entry to premises

- 13.3 Enforcement officers can also enter premises under certain circumstances.
- 13.4 Enforcement officers are able at all reasonable hours and without a warrant:
- (a) to inspect goods, and to enter premises which are not used only as a dwelling, in order to ascertain whether a breach has been committed
 - (b) to require **traders** to produce any documents relating to their business (including documents held on a computer), to take copies and to require that documents be produced in a legible form, if they have reasonable cause to suspect that a breach has been committed in order to ascertain whether this is the case
 - (c) to seize and detain goods if they have reasonable cause to believe that a breach has been committed in order to ascertain, by testing or otherwise, whether this is the case.
- 13.5 Enforcement officers can also seize and detain goods or documents without a warrant if they have reason to believe these may be required as evidence in proceedings against a person for a breach. This power –

along with that in (c) – may include the power to break open containers or require another person to do so.

13.6 Enforcement officers under a warrant are also able to enter premises that are dwelling premises. A warrant to enter premises (whether it be for a dwelling or non-dwelling premise) can only be granted by a justice of the peace (or their equivalents in Scotland and Northern Ireland) who is satisfied that there are reasonable grounds for believing that the following conditions are met:

- there are goods or documents on the premises which an enforcement authority has power to inspect and their inspection is likely to disclose evidence of a breach of the CPRs, or a breach of the CPRs has been, is being, or is about to be committed on any premises, and
- either admission to the premises has been or is likely to be refused and a notice of intention to apply for a warrant has been given; or applying for admission or giving a notice of intention to apply for a warrant would defeat the object of the entry; or the premises are unoccupied; or the occupier is absent and it might defeat the object of the entry to await his return.

13.7 Should an enforcement officer enter premises under a warrant, he is required to produce the warrant to the occupier of the premises.

13.8 In entering any premises either with or without a warrant, an enforcement officer may take with him any persons and equipment that he deems necessary. For example, the authorised officer may take portable computer equipment and tape recording equipment.

13.9 The powers set out above which are available to enforcement authorities relate to a breach of the CPRs and do not determine how the breach will be tackled – which could be either through criminal or civil means.

Enforcers using these powers for criminal proceedings must however comply with the Police and Criminal Evidence Act 1984 and the accompanying codes of practice.⁴²

- 13.10 Enforcement authorities are also obliged in specified circumstances to notify **traders** of the results of any test conducted on goods purchased or seized and detained pursuant to the inspection powers; and to compensate owners of goods seized who suffer loss because those goods are lost, damaged or deteriorate. The requirement to compensate persons having an interest in the goods only applies where there has been no breach of the Regulations in respect of those goods and the seizure is not due to neglect or default by the person concerned.
- 13.11 Any intentional obstruction of an officer of an enforcement body, or making false statements to an officer, is a criminal offence.

⁴² See <http://police.homeoffice.gov.uk/operational-policing/powers-pace-codes/pace-code-intro/> for more information.

14 GLOSSARY

14.1 This section provides definitions and explanations of concepts and words used in the CPRs. Most definitions can be found in regulation 2 of the CPRs.

Average consumer

14.2 The CPRs define the **average consumer** by reference to the concepts of the '**average** consumer, the '**average member**' of a **targeted group**⁴³ of consumers, and the '**average member**' of a **vulnerable group of consumers**. See below in paragraphs 14.28 following for information on these concepts.

Commercial practices

14.3 The CPRs apply to **commercial practices**. These are defined as '*any act, omission, course of conduct, representation or commercial communication (including advertising and marketing), by a **trader**, which is directly connected with the promotion, sale or supply of a **product** to or from **consumers**, whether occurring before, during or after a commercial transaction (if any) in relation to a **product***'.

14.4 **Commercial practices** may include matters such as advertising, sales, supplies and post-contractual matters such as after-sales services and debt collection. They would also include business practices where the business is buying a **product** from a **consumer**. This would include a representation by a **trader** in connection with the purchase of a used car or an antique from a **consumer**. The definition of a **product** is very broad – please see '**Product**', below.

⁴³ This is shorthand for the text in Regulation 2(2).

14.5 A practice is governed by the CPRs if it is directly connected with the promotion, sale or supply of **products** to **consumers**. This means that although a **trader** may not be selling to **consumers** himself, he may still have to take into account the CPRs to the extent that a practice he engages in is directly connected with the promotion, sale or supply of a **product** to **consumers**. See chapter 4 on Scope for more details.

Code of conduct and code owner

14.6 The CPRs define a **code of conduct** as '*an agreement or set of rules (which is not imposed by legal or administrative requirements) which defines the behaviour of **traders** who undertake to be bound by it in relation to one or more **commercial practices** or business sectors*'.

14.7 A **code owner** is defined as '*a trader or body responsible for – (a) the formulation and revision of a **code of conduct**; or (b) monitoring compliance with the code by those who have undertaken to be bound by it*'.

14.8 Please refer to the chapter on compliance and enforcement for further details of the role of codes in enforcing the CPRs.

Consumer

14.9 The CPRs define a **consumer** as '*any individual who in relation to a **commercial practice** is acting for purposes which are outside his business*'.

14.10 Generally, breaches of the CPRs are assessed by reference to different types of **consumer** that might be affected by unfair practices. These are the '**average**' consumer, the '**average member**' of a **targeted group** and the '**average member**' of **certain types of vulnerable groups**. See the end of this chapter for more information on these different types.

14.11 A sole **trader** or a partner in a firm would only benefit from the protection provided by the CPRs where, and to the extent that, he is acting for purposes outside of his trade, business, craft or profession.

Invitation to purchase

- 14.12 The CPRs define an **invitation to purchase** as '*a commercial communication which indicates characteristics of the **product** and the price in a way appropriate to the means of that commercial communication and thereby enables the **consumer** to make a purchase*'.
- 14.13 These are certain types of commercial communication, including some advertising, where specified information must be given to **consumers**, unless apparent from the context. See the chapter on misleading omissions for more detail.

Material distortion

- 14.14 The CPRs define '*materially distort the economic behaviour*' in relation to the **average consumer** as '*appreciably to impair the **average consumer's** ability to make an informed decision thereby causing him to take a **transactional decision** that he would not have taken otherwise.*'
- 14.15 Where the practice is being assessed against the **vulnerable consumer** concept, it is the behaviour of the average member of the relevant group of **vulnerable consumers** that must be (or be likely to be) materially distorted in order for the relevant test to be met.
- 14.16 This concept is relevant (only) in assessing potential breaches of Regulation 3, or when assessing if the protections for **vulnerable consumers** are relevant to the practice. As is apparent from the definition, **material distortion** is comprised of an appreciable impairment test and a **transactional decision** test. See the chapter on the general prohibition of unfair **commercial practices** for more detail.

Product

- 14.17 The CPRs define a **product** as '*any goods or service*' and includes immovable property, rights and obligations.
- 14.18 This broad definition covers both physical and intangible things. For example: a pencil, a car, music purchased online, a right to use a

caravan for a certain period, membership of a club and premium rate phone calls would all fall within the definition. Immovable property is included, and so the CPRs apply to the practices of **traders** concerned with the sale or lease of land to **consumers**. The provision of credit to **consumers** is also covered.

Professional diligence

14.19 The CPRs define **professional diligence** as *'the standard of special skill and care which a **trader** may reasonably be expected to exercise towards **consumers** which is commensurate with either – (a) honest market practice in the **trader's** field of activity, or (b) the general principle of good faith in the **trader's** field of activity'*. A simple way of understanding **professional diligence** would be to ask: 'Is the **trader** acting to a standard that a reasonable person would expect?'

Trader

14.20 The CPRs define a **trader** as *'any person who in relation to a **commercial practice** is acting for purposes relating to his business, and anyone acting in the name of or on behalf of a **trader**'*.

14.21 This includes companies. It could also include individuals who regularly sell goods from their homes on the internet using auction websites. The assessment of whether or not the individual is acting as a **trader** will depend on whether or not the relevant activity is done in the course of business. An individual person selling goods on the internet, merely as a means by which to dispose of unwanted goods from time to time, would not be likely to fall within this definition.

14.22 Whether or not a person is a **trader** in any particular circumstance must be assessed on a case by case basis. When determining whether or not a person is acting as a **trader**, the courts are likely to take a number of factors into account, such as whether there is a profit-seeking motive, the number and frequency of transactions, and the time between the purchase and sale of **products**.

Transactional decision

14.23 The CPRs define a **transactional decision** as *'any decision taken by a **consumer** whether it is to act or refrain from acting concerning – (a) whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a **product**, or (b) whether, how and on what terms to exercise a contractual right in relation to a **product**'*.

This Guidance uses 'take a different decision' as a short-hand for a **transactional decision** that an **average consumer** would not have taken otherwise.

14.24 '**Transactional decision**' is an important concept covering a wide range of decisions that have been or may be taken by **consumers** in relation to **products**. This is wide in chronological scope, covering decisions taken before, during and after a contract is formed, for example:

- whether to buy a **product**
- whether to pay a debt⁴⁴
- whether to exercise a cancellation right, a right to a refund or replacement, or a right in relation to an after-sales service

Undue influence

14.25 The CPRs define **undue influence** as *'exploiting a position of power in relation to the **consumer** so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the **consumer**'s ability to make an informed decision'*.

⁴⁴ See footnote [6] on page 12.

- 14.26 When assessing whether a **commercial practice** is aggressive, enforcers will consider whether a **trader** has used harassment, coercion or **undue influence**.
- 14.27 **Undue influence** occurs when a **trader** exploits a position of power, so as to act in such a way as to significantly limit a **consumer's** ability to make informed choices. A **trader** may be in a position of power because of the particular expertise he has, or as a result of the particular circumstances of **consumers**, for example the **consumer** is indebted to the **trader**, or for some reason in fear of the **trader**. See the chapter on aggressive practices for further information.

Average consumers

This Guidance uses '**average consumer**' elsewhere as a short-hand for each of the three types of **consumer** described below

- 14.28 Whether a **commercial practice** breaches the general prohibition and the prohibitions relating to misleading and aggressive practices will be judged by reference to the '**average consumer**', the '**average member of a targeted group of consumers**' and the '**average member of a vulnerable group of consumers**' (as appropriate). The concepts do not refer to actual **consumers**, and there is no requirement to show evidence of actual **consumers** being affected by an unfair **commercial practice**.
- 14.29 Where a practice is directed to a particular group of consumers, the '**average consumer**' refers to the average member of that group. This type of **average consumer** is referred to elsewhere in this Guidance as the **average targeted consumer**.
- 14.30 Where a practice is likely to **materially distort** the economic behaviour of only a certain vulnerable group, the '**average consumer**' refers to the average member of that group. See below (14.35 following) for further details on the particular types of vulnerability that are covered by these provisions.

14.31 This means that different practices, and even the same practices in different circumstances, may be found to have different effects depending on the type of consumer they reach or affect. However, this concept is intended to help the courts decide if a practice is prohibited due to the impact or potential impact it has on the relevant consumers. The provisions concerning vulnerable consumers are there to ensure that traders do not unfairly exploit vulnerable people, where their practices might not change non-vulnerable consumers' decisions.

Average consumer (Type 1)

14.32 It is the notional **average consumer** whom the **commercial practice** reaches or to whom it is addressed that is relevant. The concept of the **average consumer** has been developed in the case law of the European Court of Justice. The Court has indicated that the **average consumer** should generally be assumed to be reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors. This is reflected in Regulation 2 of the CPRs. 'Average' does not mean a statistically **average consumer**.

14.33 The **average consumer** may in some circumstances be determined by reference to a smaller group than the population as a whole, and accordingly have characteristics that differ from those of an **average consumer** determined by reference to the whole population. For example, the **average consumer** of a Welsh language magazine could be expected to read Welsh. The characteristics and the effect of any unfair practices on this first group could differ from the **average member of a targeted group** which might be Welsh language students, depending on the circulation and content of the magazine, for example if the magazine was an academic publication about Welsh linguistics.

Average member of a targeted group of consumers (Type 2)⁴⁵

14.34 The **average targeted consumer** will be relevant where a **commercial practice** is directed to a particular group of **consumers**. If a practice is targeted like this then it is the **average member** of that group and that member's characteristics which are relevant. Indications of whether a group is targeted might be found in the way advertising is placed, the language of a commercial communication, the nature of the **product** and the context. Examples are:

- *television advertisements during children's programmes may be directed at children (and/or their parents)*
- *advertisements for a particular type of credit **product** may be directed at 'non-status' or 'sub-prime' borrowers*
- *the sale of products related to a certain disability may be directed at consumers who are vulnerable because of that disability.*

Average member of a vulnerable group of consumers (Type 3)

14.35 Where a *'clearly identifiable group of **consumers** is particularly vulnerable to the practice or to the underlying **product** because of their mental or physical infirmity, age or credulity in a way which the **trader** could reasonably be expected to foresee'* and *'where the practice is likely to materially distort the economic behaviour of only that group'*; then it is the average member of that group is the relevant average consumer. This does not apply if the *'particular vulnerability of the group arises only from the **commercial practice** being the common and legitimate*

⁴⁵ This is shorthand for the text in Regulation 2(2) which refers to where a practice is 'directed to a particular group of consumers'.

advertising practice of making exaggerated statements or statements which are not meant to be taken literally.'

14.36 This offers protection to **consumers** who may be particularly vulnerable either to a **commercial practice** or to the underlying **product** and whose economic behaviour may, as a result of the **commercial practice** in question, be distorted. A **commercial practice** will be assessed from the perspective of an **average member** of that group whose vulnerability the **trader** could reasonably be expected to foresee. The test is objective. It is not necessary that the **trader** actually foresees the effect (or likely effect) on vulnerable **consumers**, only that he could reasonably have been expected to do so.

14.37 **Consumers** are only (within the meaning of the CPRs) treated as vulnerable, to a practice or to the underlying **product**, if they are vulnerable because of infirmity, age or credulity:

- *infirmity (mental or physical)*: this covers a range of infirmities including sensory impairment, limited mobility and other disabilities. For example, **consumers** who need to use wheelchairs might be a vulnerable group in relation to advertising claims about ease of access to a holiday destination or entertainment venue, or those with a hearing impairment may be a particularly vulnerable group in relation to advertising claims about 'hearing aid compatibility' in a telephone advertisement.
- *age*: it may be appropriate to consider a practice from the perspective of an older or younger **consumer**. For example, the elderly might be particularly vulnerable to certain practices connected with burglar alarm sales, or children might be particularly vulnerable to advertisements relating to toys shown on daytime television.
- *credulity*: this covers groups of **consumers** who may more readily believe specific claims. The term is neutral, so the effect is to protect members of a group who are for any reason open to be influenced by certain claims. An instance might be members of a group who,

because of a particular misfortune, might believe certain claims more readily than others.

ANNEXES

A ILLUSTRATIVE EXAMPLES

- A.1 These examples are intended to show how the different prohibitions contained in the CPRs might be applied in practice. They illustrate that prohibitions can overlap and that it may be possible to find breaches of several different CPRs prohibitions within the same set of facts. They also show that the CPRs can be used to tackle key areas of detriment previously handled by other legislation as well as practices that were formerly difficult to take action against.
- A.2 The examples below deliberately show breaches of multiple prohibitions in order to illustrate different issues within each example. Not all the unfair practices mentioned in each example need to be present for there to be a breach of the CPRs. The examples may also constitute a breach of the general prohibition.
- A.3 The courts alone can decide if a practice is unfair, but these are illustrations of practices that are likely to be considered unfair.

Examples:

(1) **A trader selling second hand cars** displays for sale, on his forecourt alongside other second hand cars for sale, a second hand car which has been 'clocked' (*that is, the odometer has been tampered with to show a reduced mileage*). *The odometer states that the car has travelled 25,000 miles. The car has actually travelled 95,000 miles.*

- *False information is given to **consumers** about a main characteristic of the **product** - that is the mileage that the car has travelled.*
- *The misleading statement could cause the **average consumer** to take a different decision. For example to decide to buy the car at the indicated price. The **average consumer** may be unlikely to buy the car at that price, or even at all, had he known its true mileage, given that the value of a second hand car is generally determined, in part, by its past usage.*

- *Where it can be shown that the false information would cause or be likely to cause the **average consumer** to take a different transactional decision, there will be a breach of regulation 5.*
- *Where it can be shown that material information (in the context) was not provided and that this would cause the **average consumer** to take a different decision, there will be a breach of regulation 6.*
- *The clocking of the car itself is likely to breach regulation 3, as tampering with the mileage cannot constitute honest market practice, and would almost certainly materially distort the **average consumer**'s economic behaviour, causing him to take a different decision. The 'clocker' does not need to sell the car to breach the Regulations in this way.*
- *A breach may arise even if the **trader** selling the vehicle was not responsible for the car being clocked, as it may be judged to be likely to lead to a breach.*
- *If the **trader** had placed a disclaimer on the car, a breach could still occur if the disclaimer did not alter the impact of the misleading statement or omission sufficiently to stop the **average consumer** from taking a different decision. Much will depend upon the actual circumstances, the wording of the disclaimer and the context in which it is applied. In any case the **trader** must not mislead the **consumer**, either by false information or by the lack of material information.*

*(2) **A trader whose business is carrying out home improvement work** 'cold calls' potential customers and attempts to sell his services to them on their doorstep. During the course of his sales pitch, the **trader** refuses to leave when **consumers** ask him to. He also uses threatening language and behaviour in an attempt to intimidate **consumers** into accepting his services or agreeing his terms of service. In addition, the **trader** starts work without the explicit permission of the **consumers** as a means of pressurising them to accept, and pay for, his services. The **trader** also*

tells **consumers** that their roofs are in need of repair when this is not, in fact, the case.

- The **trader's** practice of refusing to leave when requested to do so is a breach of paragraph 25 of Schedule 1 to the CPRs.
- The **trader's** use of threatening language and behaviour to intimidate **consumers** could be an aggressive practice for the purpose of regulation 7. It is likely to be regarded as harassment.
- Where the **trader** starts work without the explicit permission of the owner then this could also amount to an aggressive practice and would be likely to be regarded as coercion. Where work is started without consent, **consumers** may be discouraged from shopping around, or from deciding not to have the work done.
- In the second and third bullet points above it is also necessary to consider the likely effect on **consumers**. Broadly the practices would have to be likely to significantly impair **consumers'** freedom of choice so as to cause the **average consumer** to take a different decision.
- Where the **trader** tells **consumers** that repairs are needed when this is not in fact the case, this practice may be a misleading action for the purpose of regulation 5. False statements about the need for a repair may cause the **average consumer** to take a different decision (that is to agree to decide to have the work carried out, and/or to engage that **trader** to carry out the work, and/or to pay that price, and/or to agree to have the work done by that **trader** straightaway).

(3) A trader employs various practices to recover debts owed by consumers. He sends letters to **consumers** containing demands that state: 'pay now or we'll take criminal proceedings against you in court', when such action cannot legally be taken. Some of the demands that he sends to **consumers** are made to look as if they are court papers, although they do not have such status. The **trader** offers **consumers** an opportunity to 'reduce' their debts, and delay the requirement to repay, by signing up to a debt consolidation loan **product** with a 'very

*advantageous' interest rate. He tells **consumers** who say that they cannot pay their debts that they have no choice but to sign up to the **product** offered by him, and states that it has the lowest interest rate on the market for such a **product**. In fact, the interest rate on the offered **product** is unusually high.*

- *The letters sent to **consumers** by the **trader** could be misleading actions for the purpose of regulation 5, as they contain false and/or deceptive information, or deceive through their manner of presentation.*
- *These misleading actions could cause the **average consumer** to take a different decision (for example, to pay the debt sooner than he might otherwise have done, or to sign up to the offered debt consolidation loan **product** more hastily than he might otherwise have done or without first shopping around for alternative and more advantageous means of consolidating his debt).*
- *Several elements of the **trader's** practices could be aggressive practices (that is by threatening court action). All of these practices may cause the **average consumer** to be frightened or to feel unduly pressurised. This is likely to significantly impair **consumers'** freedom of choice so as to cause the **average consumer** to make a different decision.*
- *The manner in which the **trader** offers a debt consolidation loan **product** could be a misleading action for the purpose of regulation 5 through the **trader's** provision of misleading information about the interest rate. It could also be an aggressive practice for the purpose of regulation 7, as the **trader's** use of his position of power to pressure **consumers** to sign up to the loan **product** is likely to constitute **undue influence** and/or coercion such as to significantly impair **consumers'** choice. Both factors are likely to cause the **average consumer** to make a different decision.*

*(4) A trader selling household products to consumers includes a prize draw advertisement with his mail-order catalogue of goods. The advertisement creates the impression that the recipient has won a major prize when he has not. In fact, the vast majority of the recipients of the mailing will only receive a low value give-away item which is being distributed by the **trader** as a prize.*

- *The **trader**'s practice could breach paragraphs 19 and 31 of Schedule 1 to the CPRs. Paragraph 19 will be breached if the **trader** claims, in his promotion, to offer a particular prize described in it, but in fact the **trader** has not awarded, and does not have in place any means by which that prize (or a reasonable equivalent) could be awarded. Paragraph 31 will be breached if a **trader** gives a false impression that a **consumer** has won a prize (or that he will win it, or will win it if he takes some particular action) when in fact there is no prize, or the **consumer** must pay money or incur a cost in order to claim the prize.*
- *The advertisement gives the impression that the recipient has won a major prize when this is not the case. This misleading impression is likely to be created by a mixture of false or deceptive representations made in the advertisement, and the omission from the advertisement of certain information. For example, the value of the prize, the terms and conditions attached to the competition or to individual prizes, and the numbers of each available prize that will be awarded, may all be misrepresented and/or omitted from the advertisement. Accordingly there is likely to be a misleading action (regulation 5). The advertisement may also hide information by placing it within sections of extremely small print which it is difficult for **consumers** to read. This may have relevance both to misleading actions and misleading omissions (regulations 5 and 6).*
- *The misleading actions would be likely to cause the **average consumer** to take a different decision, for example by placing an order that he would have done were it not for the prize on offer.*

*(5) A trader's business is the sale, or secondary re-sale, of tickets admitting entry to entertainment and other similar events. He sells tickets for 'restricted view' seats without telling **consumers** that the seats in question are subject to a restricted view.*

- *The **trader's** failure to provide **consumers** with the information that the tickets he is selling are for seats with a restricted view is a misleading omission for the purpose of regulation 6. The information that the seats are subject to a restricted view is material information that the **average consumer** would need in order to take an informed **transactional decision** (that is, to decide whether or not to buy the tickets at the offered price).*
- *This misleading omission may cause the **average consumer** to take a different decision. The **average consumer** may be unlikely to buy the tickets at the price sought had they known that they would have only a restricted view of the event in question.*

B EFFECT ON UK LAW⁴⁶

B.1 Due to the implementation of the UCPD into UK law, the Government has decided that certain pieces of legislation be repealed in whole or part or cease to have effect. Please refer to Schedules 2-4 to the CPRs for more information on these measures which are affected or for which there are transitional and saving provisions

B.2 The following is an illustrative list of key changes:

- Administration of Justice Act 1970, section 40 is amended
- Business Advertisements (Disclosure) Order 1977 ceases to have effect
- Consumer Protection Act 1987, Part III is repealed
- Consumer Protection (Code of Practice for Traders on Price Indications) Approval Order 2005 ceases to have effect
- certain provisions of the Consumer Credit Act 1974 and the Consumer Credit (Advertisements) Regulations 2004 are repealed or amended
- Consumer Transactions (Restrictions on Statements) Order 1976 ceases to have effect
- Fraudulent Mediums Act 1951 is repealed
- relevant provisions of six local Acts (County of Cleveland Act 1987, London Local Authorities Act 1996, Kent County Council Act 2001,

⁴⁶ Derived from the BERR Government Response to the Consultation the Unfair Commercial Practices Directive, December 2006, www.berr.gov.uk/files/file35750.pdf

Medway Council Act 2001, North Yorkshire County Council Act 1991, Nottingham City Council Act 2003) are repealed

- Mock Auctions Act 1961 is repealed
- Price Indications (Method of Payment) Regulations 1991 cease to have effect
- Price Indications (Resale of Tickets) Regulations 1994 cease to have effect
- Price Marking (Food and Drink Services) Order 2003 is revoked
- Tourism (Sleeping Accommodation Price Display) Order 1977 is revoked
- the majority of provisions of the Trade Descriptions Act 1968 are repealed
- Trade Descriptions Act (Sealskin Goods) (Information) Order 1980 ceases to have effect
- Trading Representations (Disabled Persons) Act 1958 is repealed
- Weights and Measures Act 1985, section 29 is repealed

B.3 In order to ensure that business-to-business protections are adequately provided in the new fair trading framework, the Control of Misleading Advertisements Regulations 1988 (CMARs) – will be revoked and replaced by the Business Protection from Misleading Marketing Regulations 2008 (BPRs).

B.4 Apart from CMARs, European derived legislation such as the E-Commerce regulations and the Unfair Terms in Consumer Contracts

Regulations⁴⁷ are not affected by the implementation of the CPRs and remain in force. The CPRs exist alongside other European legislation and apply in parallel. If the requirements of other Community law directly contradict the CPRs, the former will apply, but generally businesses will need to comply with CPRs as well as other relevant law.

⁴⁷ Note this is not an exhaustive list. See the OFT's guidance on Part 8 of the Enterprise Act for more details on Community law on consumer protection.

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