

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.

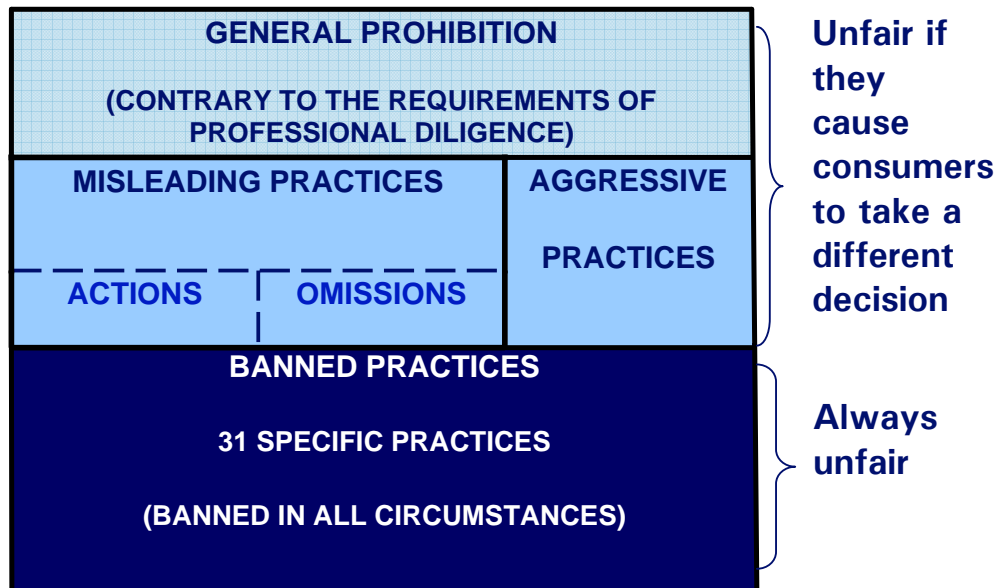
How to use the Guidance

- 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 It will be withdrawn if the Regulations are not adopted, and is also subject to Ministerial clearance by BERR at that time.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 Annex 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

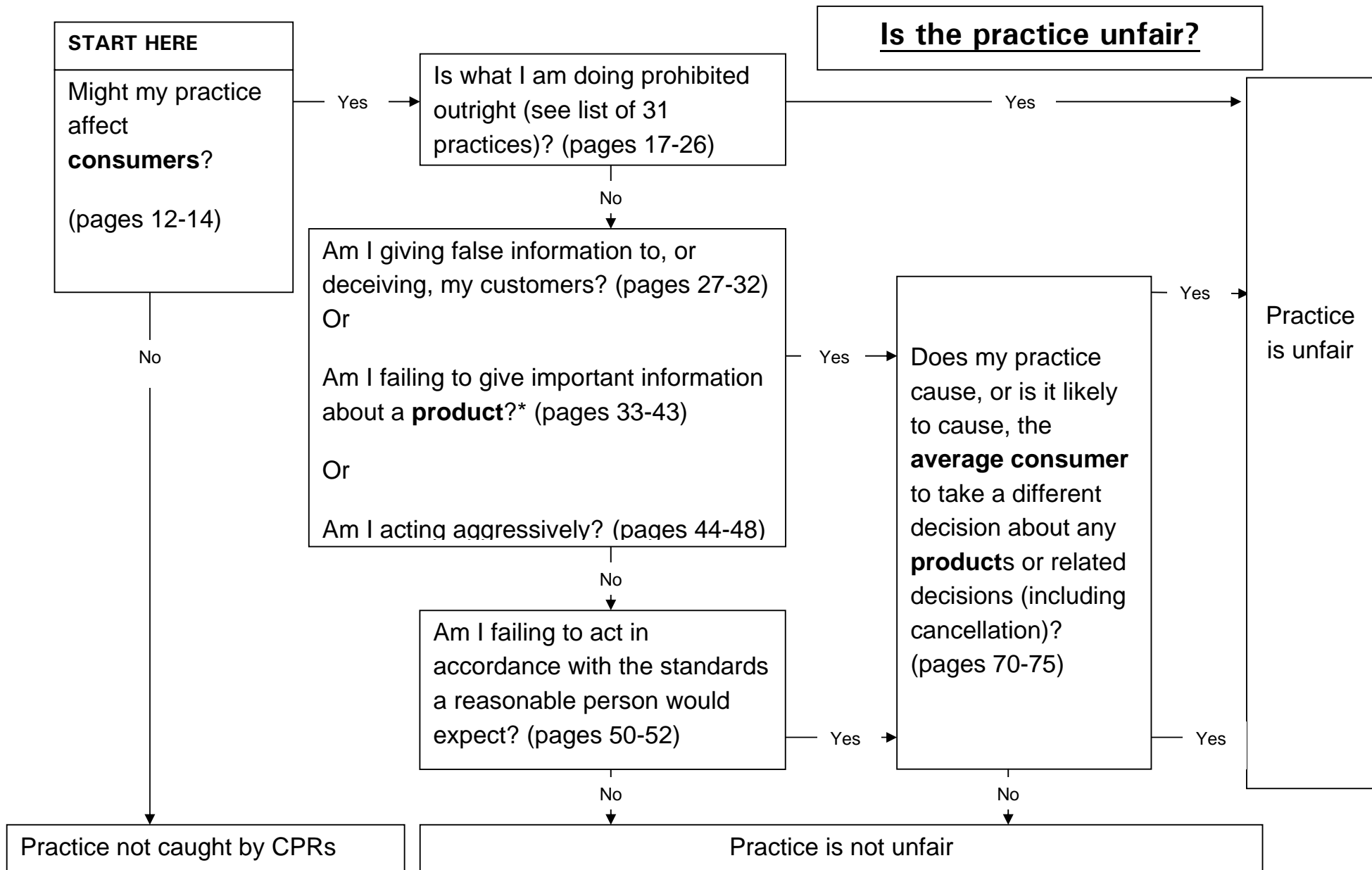
3.5 Regulations 5-7 of the CPRs prohibit **commercial practices** which are misleading (whether by action or omission) or aggressive, and which cause or are likely to cause the **average consumer** to take a different decision.

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.

