Annexe D

Legal framework
Introduction

D.1 This Annexe sets out the approach that the OFT intends to take in its use of enforcement powers under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) to certain pricing practices.¹

D.2 Traders should be aware of the OFT’s general guidance on the CPRs: 'Consumer Protection from Unfair Trading Regulations - Guidance on the UK Regulations implementing the Unfair Commercial Practices Directive, OFT 1008,'² as well as the BIS Pricing Practices Guide: 'Guidance for traders on good practice in giving information about prices'.³ In non-broadcast media (for example print, posters, direct marketing and online) the ASA takes voluntary action to secure compliance of advertisements under the British Code of Advertising, Sales Promotion and Direct Marketing (the CAP Code⁴) and in broadcast media under the Code of the Broadcast Committee of Advertising Practice (the BCAP Code⁵). The ASA’s remit will extend to cover advertising on a traders’ own website from 1 March 2011.

D.3 Guidance on the implementation/application of the Unfair Commercial Practices Directive to which the CPRs give effect is

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¹ The CPRs came into force on 26 May 2008, and implemented the Unfair Commercial Practices Directive (UCPD) into UK law. 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 specific commercial practices. These prohibitions are explained in more detail in the next section.


D.4 This Annexe is not intended to be used by traders as a replacement for existing guidance or to otherwise inform them what business practices they should or should not be engaged in. Ultimately only a court can rule on the law. Traders are encouraged to work to a higher standard that benefits consumers beyond the protection afforded by law.

D.5 As set out in the main report the OFT considers that the risk of a consumer being misled by any of the practices we have considered is likely to be reduced if a trader follows the guidelines in the BIS Pricing Practices Guide (PPG) and the ASA’s Codes (CAP and BCAP).

D.6 The BIS PPG is not backed by statutory powers, but is well established amongst traders. The OFT considers that the BIS PPG and the ASA codes provide a robust starting point for traders when considering how to present offers to consumers. In prioritising which adverts to take enforcement action against the OFT will place reasonable weight on whether a trader has adhered to the BIS PPG and the ASA codes. That is not to say that the OFT will take enforcement action against all adverts which do not adhere to the BIS PPG or ASA codes nor that the OFT will not take action where these codes are adhered to. A trader’s pricing practices would be considered on the particular facts of the case.


7 There is other important legislation which may apply to traders, which is not covered in this annexe, which govern or may otherwise impact on pricing practices. These include the Price Marking Order 2004, Business Protection from Misleading Marketing Regulations 2008, the Consumer Protection (Distance Selling) Regulations 2000, the Electronic Commerce (EC Directive) Regulations 2002, Unfair Terms in Consumer Contracts Regulations 1999, Air Services Regulation, Consumer Rights Directive. Traders should ensure where relevant that their pricing practices comply with these requirements.
D.7 The OFT's starting point is whether the practice is prohibited outright by the CPRs; that is irrespective of its effect on consumers’ decision making.

D.8 If the practice is not prohibited outright, analysis would then consider whether the practice is misleading. In other words, whether the practice includes false or deceptive (even if truthful) information or where the practice omits, hides, presents ambiguously or in an untimely fashion key information on price or the existence of a specific price advantage.

D.9 In the absence of breach of an absolute prohibition, the existence of a misleading practice alone is not sufficient, unless it causes or is likely to cause the average consumer to take a different decision. The OFT would therefore consider in its analysis of a particular pricing practice, its impact on the transaction decision.

D.10 Each section of this Annexe considers a different pricing practice and sets out, based on the evidence collated as part of this study, the circumstances where the OFT considers the use of these practices is most likely to be detrimental to consumers. We also identify specific actions that traders can take that go beyond those set out in the BIS PPG and the ASA codes to help ensure compliance with the CPRs. While the OFT is not in a position to interpret the law it is our view that certain actions by a trader are likely to make a breach of the CPRs less likely. To assist traders understanding of our view we set out in this Annexe both the specific actions we have in mind and their relationship with the CPRs.

D.11 As with any discussion of this nature, not all points listed will apply to every trader, nor are the pricing practices or features set out in this Annexe intended to be an exhaustive list of actions a trader should consider. Nevertheless, they address specific points of concern that the OFT has around the use of price frames in price promotions and, as such, should serve as useful aid to traders and others seeking to understand the OFT’s priorities in the context of the application of the CPRs.
Overview of the CPRs

D.12 The CPRs prohibit traders from engaging in unfair business practices when selling goods or services to consumers.

D.13 The CPRs set out broad principles and rules outlining when business practices are unfair. These fall into five main categories.

1. The CPRs ban 31 commercial practices outright.

2. Giving false information to, or deceiving consumers for example through false or deceptive advertisements or statements.

3. Giving insufficient information to consumers, for example leaving out or hiding material information.

4. Acting aggressively, for example through sales techniques that use harassment, coercion or undue influence.

5. Failing to act in accordance with reasonable expectations of acceptable trading practice (honest market practice/good faith).

D.14 For a practice to be unfair under categories 2-5 above, they must cause, or be likely to cause, the average consumer to take a different decision,\(^8\) for example, where they cause the consumer to:

- enter into a shop
- travel to that shop in the first place
- view a product when they would not otherwise have done so
- make a purchase, whether of the product advertised or a different product, either at a higher price or on more

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\(^8\) We use 'take a different decision' as shorthand for 'take a transactional decision that they would not have taken otherwise'.

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disadvantageous terms than they would have otherwise done so

• decide not to purchase a competing product

• in an online environment, visit a website, remain on that site by making further clicks to view content or proceed with an online booking process. The effect of a commercial practice would also potentially include its impact on consumers’ browsing behaviour on a particular site, for example, the time spent considering its content, as opposed to that of its competitors, including a decision, and/or

• not seek a refund or cancellation when they would otherwise have done so.

D.15 Unfair business practices can occur:

• before, during or after a transaction between a trader and consumer. For example, in relation to misleading advertisements or failure to honour after sales service, and

• further up the supply chain between traders, where the practice has the potential to affect both consumers and traders. For example, where a manufacturer and trader agree to an inflated recommended retail price which bears no relation to the eventual price for which it is offered for sale and it is likely that the consumer will be likely to be misled into thinking that the recommended retail price is one at which the product is usually sold.

D.16 The normal benchmark for assessing the likely effect of the practice is the 'average consumer'. However, the CPRs contain two variations of the 'average consumer' test. These apply:

   (i) where a practice is directed at a particular group of consumers

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(ii) where a practice is likely to affect only a clearly identifiable group of vulnerable consumers in a way which the trader could reasonably be expected to foresee, by virtue of mental or physical infirmity, age or credulity

D.17 In either case the likely effect of the practice is then assessed from the perspective of the average member of that group. These variations of the 'average consumer' test are intended to provide additional protections for vulnerable consumers.¹⁰

¹⁰ Further information on the meaning of 'average consumer' can be found in the OFT’s general guidance on the CPRs OFT1008 (see FN2 above).
Breaches of the CPRs

D.18 Traders that fail to comply with the CPRs will be in breach of the law and, as a consequence, they may commit a criminal offence. There are a number of criminal offences under the CPRs, and breaches can also be enforced through civil court injunctions under Part 8 of the Enterprise Act 2002.

Giving false information to, or deceiving, consumers (misleading actions – regulation 5)

D.19 It is a breach of the CPRs to give false information including on price to consumers, or otherwise to deceive consumers, where this is likely to cause the average consumer to take a different decision (misleading actions).\(^{11}\)

D.20 An unfair business practice may mislead consumers through the false information it contains, or through the practice itself, or because its overall presentation is deceptive or is likely to be deceptive.

D.21 Misleading information about price may be given verbally, in writing or visually. This could include, for example:

- providing price information verbally over the telephone, or in the course of face-to-face or online discussions prior to the sale of a product by a trader
- in writing in advertising such as where a price offer appears in a newspaper or website
- in writing in in-store advertising, including point of sale information, or
- in television or radio advertising.

\(^{11}\) It is often the case that misleading actions and omissions are analysed together. For example, when considering a particular advert, it is important to look at what is said to the consumer alongside what is not said or what is hidden.
Examples of misleading actions:

- Advertising a product using a headline price and then revealing only during the purchasing process, or subsequent to this, that other compulsory charges, such as tax, apply which will increase the total price paid.

- Advertising a product at a special sale or offer price when compared with a recommended retail price (RRP) or similar, when the reference price is false and the product has never been sold at that price, in order to mislead a consumer about the existence of a specific price advantage.

- Advertising a product at a sale price compared to a former 'was' price, when the product was only available at the higher price for a very short period or in a very small number of stores.

Giving insufficient information to consumers (misleading omissions – regulation 6)

D.22 It is a breach of the CPRs to mislead consumers by failing to give them the information they need in order to make an informed decision (misleading omissions).

D.23 This occurs where practices omit or hide material information or provides it in an unclear, unintelligible, ambiguous or untimely manner and where the average consumer takes, or is likely to take, a different decision as a result.

D.24 'Material information' is the information which the average consumer needs, according to the context, to take an informed transactional decision.\(^ {12}\) Where there is an invitation to purchase\(^ {13}\)

\(^{12}\) Regulation 6(3) CPRs

\(^{13}\) Regulation 6(4) CPRs
the material information includes the price, including any taxes; or where the nature of the product is such that the price cannot be reasonably be calculated in advance, the manner in which the price is calculated.\textsuperscript{14} Material information will also, where appropriate, include all additional freight, delivery or postal charges\textsuperscript{15} or where such charges cannot reasonably be calculated in advance, the fact that such charges may be payable.\textsuperscript{16} Material information also includes information required by an EC Obligation.

D.25 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.

**Examples of misleading omissions:**

- Failing to disclose the existence of any additional charges payable, such as postage and packing, insurance etc, until the point of sale.

- Failing to make clear any limitations on a reference price that is referred to in an advertisement. For example, an airline failing to state a price in advertising of its tickets that is inclusive of all compulsory taxes and charges, as required by the Air Services Regulation.

- A price comparison site failing to disclose its commercial links to traders, for example, that pay for prominence in its search rankings.

\textsuperscript{14} Regulation 6(4)(d)(i) CPRs

\textsuperscript{15} Regulation 6(4)(e)(i) CPRs

\textsuperscript{16} Regulation 6(4)(e)(ii) CPRs
Banned practices (schedule 1)

D.26 There are a number of other business practices which are considered unfair in all circumstances under the CPRs and are therefore prohibited (banned practices).

Examples of banned practices:

- Traders must not use 'bait tactics' (banned practice 5). For example, by:
  - making an invitation to purchase in advertising a product at a particular price and not disclosing the reasonable grounds the trader may have for believing that they will not be able to offer the products advertised for supply at the price or in the quantities suggested by the advertisement.

- Traders must not use 'bait and switch tactics (banned practice 6). For example, by:
  - making an invitation to purchase by advertising a base model at a low price, such as a basic mobile phone model and refusing to take orders for it with the intention of taking orders for a higher specification model
  - advertising a desirable product, such as an MP3 player at a 'bargain price', even though the trader knows it no longer has stocks of the product and can't show it to consumers with the aim of promoting a less desirable or more expensive model.

- Traders must not falsely state 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 from the consumer (banned practice 7). For example, by:
  - advertising that prices for cosmetics will be increased in seven days time, in order to encourage the average consumer into making an immediate decision to buy, where prices will not be increased in seven days' time.
Examples of banned practices continued:

- Traders must not use editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content (banned practice 11). For example, by:
  - not labelling as an 'Advertisement' editorial content that has been paid for by the supplier of the goods or services that are the subject of the editorial content appearing in the media of a trader.
  - 'bloggers' advertising or favourably reviewing products that they have been paid to review or advertise.

- Traders must not falsely claim that they are about to cease trading or that they are moving premises when they are not (banned practice 15). For example, by
  - advertising in the shop window a 'closing down sale' when the trader is not about to cease trading.

- Traders must not describe a product as 'free' or 'without charge' or something similar if the consumer has to pay anything other than the unavoidable cost of responding to the advertisement and collecting or paying for delivery of the item (banned practice 20). For example, by
  - advertising home delivery for online shopping as 'free', when in fact it is conditional on the consumer spending £50 or over in one order.

- Traders must not falsely claim or create 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 (banned practice 22). For example, by:
  - Using message boards, social media or other forms of communication to pose as members of the public or as independent reviewers in order post favourable reviews of their products.
Failing to act in accordance with reasonable expectations of acceptable trading practice (general prohibition of unfair business practices – regulation 3)

D.27 It is a breach of the CPRs for traders to fail to act in accordance with honest market practice or in good faith in their dealings with consumers (known as 'professional diligence'), where such dealings are likely to change the decision that an average consumer would make.

D.28 Traders are required to deal with consumers professionally and fairly (according to reasonable expectations). If a trader fails to do so it could be in breach of the law (even if the poor practice is widespread in the industry). If the trader is shown to have knowingly or recklessly engaged in such a commercial practice, it will be committing a criminal offence.
PARTITIONED PRICING

D.29 'Partitioned pricing' (or drip pricing) refers to the practice of advertising a price for a product and adding extra charges during the purchasing process. There are three types of charges:

- optional, which depend on a choice made by the consumer to purchase an additional good or service. In general, optional drips may refer to add-ons and upgrades which the consumer can avoid purchasing. For example, when purchasing a concert ticket a consumer would be able to upgrade to 'speedy delivery' for an additional cost which was not shown in the original advert

- compulsory, which all consumers have to pay. For example, a media package with HD box may be advertised for just £29 a month; however the small print reveals that a compulsory set up fees applies, and

- those for a product or service that is compulsory, but where a range of possible options and charges apply, for example a range of payment or delivery options. In some cases there may be no charge for one or more of these options. Depending on a consumer’s exact circumstances any charges incurred may be in practice compulsory whereas for other consumers they may be genuinely optional.

D.30 In some cases consumers may face a single additional charge, for example for postage and packaging, whereas in other cases there may be several additional charges throughout the process (that is, tax, luggage, booking fee, etc).

D.31 Although some clear examples are given above of when additional charges are either optional or compulsory, it is not always as straightforward to define these costs. For example, a delivery service, incurring a charge, on a large, heavy item dispatched from a warehouse 100 miles distant from the consumer’s home may be offered as an option, but if in practice, it is not possible or cost effective for most consumers (or a subset of consumers) to not take advantage of the option then it is likely to be in practice a compulsory charge.
Both optional and compulsory charges may also vary in the transparency with which they are presented to the consumer from being stated upfront as part of the headlines price to hidden charges which are only revealed at a later stage of the booking process.

Specific concerns with respect to partitioned pricing

The OFT’s view is that a failure to provide upfront information on compulsory charges can constitute a breach of the CPRs contrary to either or both Regulations 5 and 6 of the CPRs, depending on the particular circumstances of the case. There are, however, four specific areas on particular concern:

- excluding compulsory charges from the upfront price information
- price obfuscation that arises in relation to complex products with many options where, at the outset, the consumer may find it difficult to compare the charges of the various options between different traders
- the use of opt-in boxes where the charges for the associated product of service are not included in the headline price
- the exclusion of charges for optional goods and services which in practice, because of the consumer’s circumstances are in practice compulsory.

We discuss these concerns in turn. The finding of a breach would need to consider not only whether material information, such as the existence of a compulsory additional charge that is only revealed subsequent to the initial representation in the advertisement, is omitted, is unclear or provided too late, but also its effect on the consumer’s behaviour.

Compulsory charges and price obfuscation

Had the consumer been aware that the headline price was subject to revision to reflect other compulsory charges they may have
made different transactional decisions. Depending on the circumstances, it may not be sufficient to provide information about the existence of price supplements which are added during a booking process without informing prospective customers of the number and value of these supplements up front. For example, evidence suggests that splitting the price into a base price and surcharge can significantly increase consumers' evaluations of the offer and therefore affect their transactional decision.\textsuperscript{17}

D.36 The OFT would be less likely to prioritise enforcement action against traders that take steps to address these specific concerns. In particular, all of the compulsory charges should be included in the headline price. Furthermore traders offering a range of options with associated charges will want to consider whether offering their customers an upfront schedule of all of the options available and the charges associated with them will make their price offer more transparent and reduce the risk of a breach of the CPRs; the OFT considers that it would.

The use of opt-in boxes

D.37 Some traders automatically select on behalf of their customers certain ancillary goods and services, by ticking the opt-in boxes associated with them. Sometimes this may be done to save the customer time, sometimes this may be to communicate to them that the option is recommended. It is clear, from the research that has been done into such 'default options', that in most cases consumers do not choose to de-select options which the trader selects on the customers' behalf.

D.38 Central to assessing specific adverts is the average consumer's perception of what the product is as distinct from accessories ancillary to the main item. For example, consumers may reasonably expect that shipping insurance will be treated as an

\textsuperscript{17} Pricing Practices: Their Effects on Consumer Behaviour and Welfare. Mountainview Learning April 2010
ancillary not a core element of the product as, depending on the specific circumstances, it may or may not be necessary.

D.39 The level of the OFT’s concern would depend in part on the transparency and timing of the communication of the existence of additional charges and how this affects the total price paid. The OFT will take into account the product concerned and its complexity, and whether in practice an item is genuinely optional. If an ancillary item has been pre-selected for the consumer we would look for the trader to include the costs associated with the ancillary item in the headline price.

D.40 The OFT would be less likely to prioritise enforcement action against traders that take effective steps to address these concerns. In particular, a trader will want to consider whether including the charges with any pre-selected options in the headline price better reflects consumers’ reasonable expectations around the components of the product and the offer. It is the OFT’s view that in many cases it would better reflect these expectations and accordingly would reduce the likelihood of a trader breaching the CPRs.

De facto compulsory options

D.41 Due to their specific circumstances for some consumers some options are in practice compulsory. Specific options, such as for delivery or payment method that incur no charge or a low charge may in some circumstances not be available to some consumers. In other circumstances, the financial costs and time involved with not taking advantage of a particular option may be greater than the costs associated with the option. In these circumstances a difficult balance arises. On the one hand, it is clearly advantageous to consumers and traders alike that the trader continues to offer the option to avoid particular charges. On the other hand it is clearly problematic (and likely a breach of the CPRs) if consumers are in practice faced with compulsory charges that are not included in the headline price.
D.42 To some extent this difficulty can be mitigated by providing consumers with an upfront schedule of charges associated with various options. In some circumstances, however, it may be necessary for a trader to go further. This is most likely to be necessary where a high proportion of consumers do not take advantage of the lowest cost option and choose instead an option that is more expensive because the personal costs of taking advantage of the lower cost option (such as the costs of hiring a delivery vehicle in order to collect an item) exceed any saving associated with it.

D.43 Ultimately, this is a difficult balance and the OFT is less likely to prioritise action against traders who can demonstrate that they have taken reasonable steps to match their headline offers to consumers expectations of the product.
REFERENCE PRICING

D.44 Reference prices are used to create the impression to consumers that they are getting good value, by including a reference to another price. There are four broad types of references:

a) 'was' prices – comparing an advertised price to a price the retailer has formerly charged for the product

b) external reference prices (ERPs) – comparing an advertised price to a price charged by another retailer for the same product

c) recommended retail prices (RRPs) – comparing an advertised price to a price recommended by the manufacturer, and

d) after sales prices (ASPs) which compare the current advertised price to a price the trader intends to charge in the future.

D.45 The OFT considers that reference pricing is most likely to be detrimental to consumers where the reference is misleading, for example where the reference price is fictitious or where the reference price has not been established in line with consumer expectations and where consumers are not able to easily verify the reference price.

D.46 Using a reference price in an offer creates an anchor which consumers use as a starting point to assess the 'real' value of the product. Where reference prices have been used in a misleading way, this anchor may result in an average consumer expecting a greater saving than is the case in practice.

D.47 Reference prices may be expected to effect the transactional decisions taken by the average consumer. An advert that contains a misleading claim about a specific price advantage may cause or be likely to cause the average consumer to take a transactional decision that they would not otherwise have taken. The OFT’s view is that misleading consumers on any price or specific price advantage would constitute a misleading action within the meaning of Regulation 5.
Specific concerns with respect to reference pricing

D.48 Our core concern is that consumers will use the reference price as an indication of value or quality which is inaccurate. The research shows that consumers use the reference price when estimating the value of the offer so we would have concerns where the reference price is not indicative of the usual or normal selling price.

D.49 In particular traders should not present to consumers information which has little or no value for their transactional decision. For example, the use of RRP's that are not properly price established, may be meaningful in a discussion between manufacturer and retailer but, in our view, have little value to the consumer as they do represent a valid reference price.

D.50 With respect to reference pricing, we are less likely to take enforcement action where the traders follow the BIS PPG,18 BCAP and CAP Code and where the trader makes allowances for circumstances where a significant proportion of consumers' interpretation of an offer may differ from a traders' use of it and provides appropriate information to educate the consumer. We would also draw specific attention to Banned Practice 18 in Schedule 1 of the CPRs, which makes it offence to mislead consumers as to the market price of a product.

D.51 The OFT has some specific areas of concern in relation to reference pricing chiefly:

- an RRP that is not properly price established is likely to mislead consumers

- indicating higher prices which do not reflect the usual selling price or have not been established in line with consumer expectations may also mislead consumers

18 Part 1 of the BIS PPG, specifically paragraphs 1.1.2, 1.2.3, 1.5.1, and 1.6.1
D.52 With respect to the use of RRPs, traders will want to ensure that manufacturers can provide them with substantiation that the RRP represents a genuine selling price and has been properly price established. The use of RRPs without such substantiation leaves the trader open to the risk that the RRP is fictitious or otherwise misleading.

D.53 In our view and based upon the evidence collected through our consumer survey close adherence to the guidance in the BIS PPG and the ASA Codes will, in most circumstances, keep a trader’s pricing practices close to consumers’ expectations around price establishment. Nevertheless, traders will need to be careful that in those circumstances where they reasonably depart from the guidance they carefully bear in mind consumer’s expectations – or take steps to inform them of the specifics of the offer. For example, in relation to seasonal, perishable produce where commodity prices can change rapidly traders might price establish for a shorter period than recommended in the BIS PPG but, in doing so, would want to ensure that their promotions made clear the specific nature of any price reduction – such as the products being in season (that is, 'lower prices, in season').
TIME LIMITED OFFERS

D.54  To some extent all price promotions are time limited in that they must eventually come to an end. We refer to time limited offers (TLO) as offers which, as part of the promotion, draw attention to the specific period of availability as part of the advertised offer, for example: sales which are promoted as ending at the end of the month or special prices which are available for one day only.

D.55  We also include within our definition of time limited offers, promotions that include an exhortation to act quickly. For example, some volume limited offers by the nature of the way they are presented contain many of the characteristics of a time limited offer (that is, ‘Hurry whilst stocks last: sale now on’).\(^\text{19}\)

D.56  In addition to the general provisions, certain parts of the CPRs directly address the practice of time limited offers. The banned practices (Annex Practices 7 and 15) set out in Schedule 1 CPRs are likely to be relevant.

D.57  Annex Practice 7 concerns false statements that a product is only available for a very limited time or on particular terms for a limited time. This is done in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.

D.58  Annex Practice 15 concerns false statements that the trader is about to cease trading or move premises when he is not.

Specific concerns with respect to TLOs

D.59  Our core concern about TLOs is that consumers will shop around less and potentially obtain worse value than they otherwise would have done because of time pressure that they did not need to experience because the offer was subsequently extended.

\(^\text{19}\) Where offers are volume limited but do not indicate it in the advert they are considered under bait pricing.
With respect to TLOs, we are less likely to take enforcement action where traders follow the BIS PPG, BCAP and CAP Code\textsuperscript{20} and where traders make allowances for circumstances where a significant proportion of consumers' interpretation of an offer may differ from a traders' use of it and provide appropriate information to educate the consumer.

In the case of TLO we have some concerns that may not be addressed by adherence to the BIS PPG and CAP Code. Specifically:

- extending a TLO at short notice
- repeatedly extending a TLO.

These concerns need to be carefully balanced against the benefits of TLOs and the practical realities facing traders. Notwithstanding this, it is the OFT’s view, that traders that, in good faith, announce that an offer will end on a particular date but, in the light of the performance of the sale decide to extend the offer run a significant risk of breaching the CPRs.

With respect to these concerns, the OFT is less likely to take enforcement action where an advert:

- gives consumers due notice that a TLO is going to be extended, and
- where appropriate tells consumers how many times an offer has been extended.

The OFT recognises that traders will often use time limited offers to clear unsold stock in the face of uncertain demand. It can therefore be difficult for traders to ensure, in advance, that the stock will be sold by the end of the offer period. In these circumstances, traders will want to consider whether they should review the performance of the offer prior to the closing date and,

\textsuperscript{20} Specifically section 3.31 of the CAP and BCAP codes.
if it is to be extended, give consumers due warning of the extension of the offer.

D.65 The OFT would consider when assessing its priorities the extent to which the trader had taken effective steps to give consumers reasonable notice that an offer was due to be extended. We would also take into account the particular time period chosen by the trader and whether there was a reasonable basis for that time period.

D.66 If a trader finds that they need to extend a particular offer more than once because they are finding it difficult to gauge demand for that offer then that trader would want to consider carefully whether part of the relevant information they need to provide to consumers is the number of times the sale has been extended. It is the OFT's view that in the case of multiple extensions to the deadline for an offer that the provision of such information will help a consumer make an informed decision about the likelihood of further extensions and so is likely to reduce the risk of a breach of the CPRs.
VOLUME OFFERS

D.67 Volume offers comprise offers where the unit price changes with volume purchased such as '3 for 2' offers or '£6 each or 2 for £10' or 'larger pack, better value'.

D.68 Generally speaking volume offers often represent value for consumers. However, where the advertisement omits key information or provides misleading information about the separate unit price or total product or service price including any advantage, price or otherwise, about the main characteristics of the product or service, there may be a breach of Regulations 5 and 6 of the CPRs.

D.69 Potential concerns under Regulation 5 of the CPRs would arise if the volume offer was marketed as a cheaper alternative to the purchasing of individual items, when this was not true. A lack of clarity on the composition of the product, the fitness for purpose or usage of the product would also potentially constitute a breach of Regulation 5\textsuperscript{21} or a misleading omission for the purposes of Regulation 6.\textsuperscript{22} In particular, uncertainty about the components of what is being purchased and how these contribute to the headline price would raise concerns relating to the communication of the price and how it is calculated.\textsuperscript{23}

Specific concerns with respect to Volume Offers

D.70 Our core concern is that consumers will conclude that such an offer represents better value than purchasing a smaller quantity or pack of the same product when in fact it does not and as such spend more and obtain poorer value than they would otherwise have done. In particular, we hold specific concerns regarding:

\begin{itemize}
\item \textsuperscript{21} Regulation 5(5)(e) CPRs
\item \textsuperscript{22} For example, Regulation 6(4)(d) CPRs
\item \textsuperscript{23} Regulation 5(4)(h) CPRs
\end{itemize}
• volume deals (that is, BOGOFs, three for two, etc) where the unit price has been temporarily inflated to facilitate the offer

• larger packs that are presented as being better value than smaller packs when they represent a higher per unit price

• offers that imply (perhaps by omission) that a component of a deal is ‘free’ relative to a contemporaneous assessment of the offer when in practice the price establishment of the ‘free’ offer is historic.24

D.71 With respect to volume offers, we are less likely to take enforcement action where the traders follow the BIS PPG, and the ASA’s codes and where the trader makes allowances for circumstances where a significant proportion of consumers' interpretation of an offer may differ from a traders’ use of it and provides appropriate information to educate the consumer.

D.72 In addition, we are less likely to take enforcement action where traders follow the Price Marking Order25. The Price Marking Order requires that where a trader indicates that any product is or may be for sale to a consumer, he must indicate the selling price and the unit price.

D.73 In some circumstances, it may be necessary for traders to provide additional information beyond that set out in the BIS PPG and ASA codes in order to ensure consumers understand the nature of the offer. As a general rule the OFT would consider a lower priority for enforcement action any advert that provides consumers with the comparative pricing that consumers find most helpful.

24 For example, Product A sells for £10. The price subsequently falls to £8. In addition to the stand-alone offer for Product A the trader offers a bundled deal of Product A plus Product B for £10 and describes Product B as Free. On a contemporaneous assessment of the offer Product B is not free.

BAITING SALES

D.74 Baiting covers a range of practices, but essentially involves consumers being enticed with discounts, but ultimately purchasing a more expensive product either because there are very few items available at the discounted price (baiting sale) or because they are persuaded to upgrade as part of the sales process (sometimes called 'bait and switch'). Although the distinction between these two practices is somewhat artificial we include it here as it clearly distinguishes between baiting where the underlying stock is available and baiting due to sales practices employed at the point of purchase. The issues surrounding these are clearly different.

Baiting

D.75 Baiting can occur in a range of industries for example:

- musical tickets advertised as 'from £20' when no tickets, or very few, are actually available at that price and in reality most consumers end up paying a higher price

- clothes retailers advertising 'up to 75 per cent off' when no, or very few, items are actually available at the full 75 per cent discount and are either full price or only have a lower discount offer.

D.76 Where a few items are available at the advertised price or discount, these statements may technically be true but may nevertheless mislead consumers.

Bait and switch

D.77 The OFT recognises that a consumer’s ultimate decision to purchase a more expensive product may be legitimately influenced by the sales technique of the trader and would therefore not breach the CPRs. However, if the sales personnel refuses to show the product to consumers or makes it difficult for them to purchase it, this would raise concerns. For example, online banner ads and other forms of advertising that present hyperlinks that, on
click through, do not lead the consumer to a webpage where the offer is available is, in our view, a baiting sale.

D.78 The use of a baiting sale may fall within Annex Practice 5 of Schedule 1 CPRs – that is: where a trader makes 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.

D.79 Analysis of a particular price offer under Annex Practice 5 would require consideration of several aspects according to the facts of the particular case.

- Whether the advert constituted an invitation to purchase.\(^{26}\) For example, where the information provided to the consumer from the advertisement enables them to decide whether to make a purchase by providing them with price information as well as potentially a description of the product (although usually for simple products this will be apparent from the product itself).

- Whether the product was in fact not available at all or only in numbers that would be insufficient to meet the likely demand from the scale of advertising (a token amount).

- Whether the trader knew or could reasonably be expected to know that the number of products available was not sufficient to meet the likely demand.

\(^{26}\) This is defined in the CPRs 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' (Regulation 2(1) of the CPRs).
• What, if any, disclosure has the trader made about the product’s availability?

D.80 What would be regarded as 'sufficient' and 'likely demand' will largely depend on the particular circumstances of the case. Amongst other things the scale of advertising and promotional activity undertaken in support of the offer, the emphasis placed on the offer and what the average consumer would reasonably expect.

D.81 The use of **bait and switch** techniques which are not based on legitimate sales tactics would fall within Annex Practice 6 of Schedule 1 CPRs. Annex Practice 6\(^27\) states:

'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).'

D.82 Analysis of (a) would require consideration of several aspects according to the facts of the particular case:

• whether an invitation to purchase products has been made and
• whether the invitation to purchase had been made at a specified price and had been followed by a refusal to show the product to consumers with the intention of promoting a different product.

\(^{27}\) Note potentially other provisions of the CPRs would be likely to also apply however the practices contained in the Schedule 1 Annex are considered automatically unfair and therefore do not require an assessment of its effect on the average consumer and whether it would induce them to take a transactional decision that they would not otherwise have taken. For example, this area is also covered by Regulations 5 and 6 of the CPRs as well.
Specific concerns in relation to baiting sales

D.83  Our main concern about bait pricing is that once prospective customers have invested time and effort in searching for or travelling to a specific offer they are still likely to buy the product at a higher price, or a higher priced alternative, at that retailer because they do not wish to waste the time and effort invested. Even those who walk away will have wasted time, effort and perhaps money. The OFT believes that not advising consumers that stocks are limited at the advertised offer price and to what extent is likely to mislead any consumer who thinks the promotion is generally available and not subject to limited stock.

D.84  When considering whether to prioritise a baiting sale for enforcement action we would be less likely to take action where a trader:

- follows the BIS PPG, BCAP and CAP Code, specifically sections 3.2.1, 3.3.1 and 3.4.2 – 3.4.4 of the PPG; sections 3.22, 3.28 – 3.30, 8.9 and 8.10 of the CAP code and sections 3.24 and 3.28 – 3.30 of the BCAP code
- where necessary, makes allowances for circumstances where a significant proportion of consumers' interpretation of an offer may differ from a traders' use of it and provides appropriate information to educate the consumer.

D.85  The existing guidance addresses our core concern relating to bait pricing. In particular we would draw traders' attention to sections 3.28 and 3.29 of the CAP code which state:

’3.28 Marketing communications that quote a price for a featured product must state any reasonable grounds the

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28 Available at www.bis.gov.uk/policies/consumer-issues/buying-and-selling/consumer-protection-regulations


marketer has for believing that it might not be able to supply the advertised (or an equivalent) product at the advertised price within a reasonable period and in reasonable quantities. In particular:

3.28.1 if estimated demand exceeds supply, marketing communications must make clear that stock is limited

3.28.2 if the marketer does not intend to fulfil orders, for example, because the purpose of the marketing communication is to assess potential demand, the marketing communication must make that clear

3.28.3 marketing communications must not mislead consumers by omitting restrictions on the availability of products; for example, geographical restrictions or age limits.

3.29 Marketers must monitor stocks. If a product becomes unavailable, marketers must, whenever possible, withdraw or amend marketing communications that feature that product. 31

D.86 We would also draw traders' attention to the application of Annex Practice 6 of Schedule 1 32 in the context of certain internet marketing techniques where retailers, in effect, refuse to show the advertised product, rather than use legitimate sales techniques to encourage consumers to purchase other products.

D.87 In particular, we have a concern relating to the use of banner adverts, sponsored links and other forms of marketing that invite consumers to 'click through' to a webpage or visit a specific website where the promoted offer is difficult, or even impossible, to find. In the OFT's view this falls within the scope of Annex Practice 6.


32 Annex Practice 6 states: '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).'
The OFT would be less likely to prioritise action under Annex Practice 6 in respect of internet offers that invite customers to visit the traders website (such as television adverts, sponsored links and some banner ads) in those circumstances where the landing page for the 'click through' or the promoted web address clearly displays the offer and its availability.
FREE OFFERS

D.89 There are three main variations of free offers.

(i) Free outright

The advertised product or service is genuinely free such as a free sample or free newspaper.

(ii) Free subject to charges

The advertised product is free subject to charges. For example, a product advertised as a 'free gift' for customers who provide answers to an automated telephone questionnaire at the end of which they may provide their contact details in order to receive the product but which gives no details about charges or costs. The telephone number in question is a premium rate number and the automated questionnaire's duration is 10 minutes.

(iii) Free with something else

The advertised product is free contingent on the purchase of another product. For example, buy one get one free offers or 33 per cent extra free offers fall into this category. Similarly, the product or service that is described as 'free' may be a different product to the purchased product. For example, a laptop with free virus detection software or shaving foam with a free razor.

D.90 Whether there is actually a misleading omission will depend, in part, on the consumers understanding of what is implied by use of the word 'free' in the particular context in which it appears. In other words it depends on the average consumer's reasonable expectations.

D.91 The conditions under which a product or service is described as free may vary in the extent to which they are clear. For example, an advertisement by a supermarket for online shopping offers home delivery for free conditional on the consumer spending £50
or over in one order. Similarly, a florist advertisement offers a 'free box of chocolates for online orders'. Alternatively, the conditions may be less clear, such as where a mobile phone network advertises a free mobile phone plus 100 texts for free, without explaining in that advertisement, that this is conditional on the consumer entering into an agreement to pay a fixed amount of £29 per month for a minimum of 12 months. For an offer of this latter type traders should describe the components as 'inclusive' rather than as 'free'.

D.92 Where the good or service (or product) is not available for free, despite being advertised as free, such as where it is only free subject to charges or contingent on purchase of something else, this would be likely to fall within Annex Practice 20 of Schedule 1 CPRs. This says that ‘free’ should mean that consumers shouldn’t pay any more than the minimum unavoidable cost of responding to the promotion, or where applicable, the true cost of delivery or, if the consumer collects, the travel. Traders should not charge for packing, handling or administration.

D.93 Annex Practice 20 does not prevent traders from using the word 'free' when customers are required to buy other items – for example, in a 'buy one get one free' promotion provided that certain conditions are met:

• first, their liability for all costs should be made clear

33 In Guidance on the implementation/application of Directive 2005/29/EC on Unfair Commercial Practices Brussels, 3 December 2009 SEC(2009) 1666 the Commission have said 'To take another example, a mobile-phone subscription offers a certain amount of airtime, a certain number of text messages and a voicemail facility for one all-inclusive price. Each element is intrinsic to the quality and composition of the package being advertised for the package price. Because customers cannot exercise genuine choice over how many elements they receive for the price paid, the elements are all included in the package price and may not be described as ‘free’.'

34 Note potentially other provisions of the CPRs would be likely to also apply however the practices contained in the Schedule 1 Annex are considered automatically unfair and therefore do not require an assessment of its effect on the average consumer and whether it would induce them to take a transactional decision that they would not otherwise have taken.
second, the quality and composition of the products hasn’t been reduced

third, that the price of the paid for items hasn’t been inflated to recover the cost of the free item.\(^{35}\)

D.94 Crucially, the item described as 'free' should be genuinely separate from and additional to the item(s) that the consumer is required to pay for. Some specific examples are set out below:

where the consumer is liable for one-off up front costs, for example to buy or install equipment, this would not necessarily fall within Annex Practice 20 provided that traders adequately inform consumers about the existence and requirement for payment of such up-front fees

if the introductory offer relates to a product that has never been sold before, the trader will be unable to show that the 'free' item is more than what is usually supplied for the price or that it has added the item to an established package without increasing the price. In such a case, the trader would need to show that customers paid the same price regardless of whether they received the 'free' element or that the free item is genuinely separable from the paid-for item(s) and in doing so the consumer’s liability for all costs is made clear

in the case of introductory offers for new customers of existing products, the above criteria would need to be fulfilled to avoid falling within Annex Practice 20. For example, the offer of a free sports bag for new members of a gym would potentially be justified if the sports bag was offered to all new gym members who could choose whether to take it or not and new members paid the same price whether or not they took the bag and the membership hasn’t been increased to cover

the cost of the bag. Otherwise it could not be said to be genuinely 'free'.

Specific concerns in relation to the use of the word free

D.95 Our core concern with products offered for 'free' is that consumers will conclude that such an offer represents better value than a smaller quantity of the same product when in fact it does not and as such spend more and obtain poorer value than they would otherwise have done.

D.96 We would be less likely to prioritise an advert for enforcement action if the advert follows the BIS PPG and ASA BCAP and CAP Codes.

D.97 Specifically we have concerns about adverts that imply (perhaps by omission) that a component of a deal is 'free' relative to a contemporaneous assessment of the offer when in practice the price establishment of the 'free' offer is historic.

D.98 For example, Product A sells for £10. The price subsequently falls to £8. In addition to the stand-alone offer for Product A the trader offers a bundled deal of Product A plus Product B for £10 and describes Product B as Free. On a contemporaneous assessment of the offer Product B is not free. If most consumers understand the use of the word free in this context to be relative to a contemporaneous assessment then they are likely to be mislead.

D.99 Traders will want to consider whether the specific meaning they attribute to the word free is likely to be understood correctly by most consumers. The OFT is less likely to prioritise enforcement action against an advert that has taken steps to ensure the consumer understands whether a free offer is based on a contemporaneous assessment or a historic one.
COMPLEX PRICING

D.100 Complex pricing describes offers where the unit prices of the products can be difficult or impossible to discern. This, in turn, can make it difficult to compare between offers where the components of the offer differ.

D.101 Complex pricing offers may be split into two broad groups: multi-part pricing and bundled or tied pricing.

D.102 Multi-part pricing applies to offers where the product or service comprises two or more parts, each with a separate unit price. One example of this is mobile phone packages which may include separate prices for the handset, call time, text messages and internet access.

D.103 'Bundled' or 'tied' pricing applies to offers where there is a single headline price but the underlying product comprises a collection of different products or services which may be available separately (bundled pricing) or not (tied pricing). For example, an offer for a media package may include broadband access, television services and fixed line telephony combined but these services may be available separately or in different combinations.

D.104 Alternatively, the product may only be available as part of a bundle of products. For example, a particular mobile phone handset may only be available with a call package from a particular supplier. The offer may be fixed, that is, comprised of specific items that form part of the bundle, or flexible, that is, the consumer may customise the package by combining different types of products. For example, in the mobile telephony example above the consumer may be restricted to a call package from a particular supplier if they choose a particular handset but there may be a variety of call packages to choose from.

D.105 Whether the practice of multi-part pricing raises concerns under CPRs will depend on the information presented by the trader to the consumer in the advertisement. Where the advertisement omits key information or provides misleading information about the separate unit price or total product or service price including any advantage, price or otherwise, about the main characteristics
of the product or service, there may be a breach of Regulations 5 and 6 of the CPRs.

D.106 The use of combined offers was considered in the recent European Court of Justice case of Total Belgium.\(^{36}\) This noted that '…combined offers constitute commercial acts which clearly forms part of an operator’s commercial strategy and relate directly to the promotion thereof and its sale’s development. It follows that they do indeed constitute commercial practices within the meaning of Article 2(d) of the Unfair Commercial Practices Directive and consequently fall within its scope.'\(^{37}\)

D.107 Potential concerns under Regulation 5 of the CPRs would arise if the bundled product was marketed as a cheaper alternative to the purchasing of individual items, when this was not true. A lack of clarity on the composition of the product, the fitness for purpose or usage of the product would also potentially constitute a breach of Regulation 5\(^{38}\) or a misleading omission for the purposes of Regulation 6.\(^{39}\) In particular, uncertainty about the components of what is being purchased and how these contribute to the headline price would raise concerns relating to the communication of the price and how it is calculated.\(^{40}\)

**Specific concerns in relation to complex pricing**

D.108 Our core concern with complex pricing offers is that the inherent complexity of some products or offers may be presented in such a manner as to obfuscate the full commitment the consumer may be making and is presented in such a way as to make it difficult

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\(^{36}\) Joined cases C-261.07 (VTB-VAB NV v Total Belgium NV) and C-299/07 (Galatea BVVA v Sanoma Magazine Belgium NV), 23 April 2009

\(^{37}\) Ibid. Paragraph 50.

\(^{38}\) Regulation 5(5)(e) CPRs

\(^{39}\) For example, Regulation 6(4)(d) CPRs

\(^{40}\) Regulation 5(4)(h) CPRs
for the consumer to shop around and compare prices. In particular, we have specific concerns relating to:

- offers that do not state the full financial commitment that subscribing to the offer involves could mislead by omission
- not providing information in a manner that allows comparison between products could mislead by omission especially for those consumers who are actively trying to compare offers.

D.109 When considering whether to prioritise an advertisement for enforcement action we would be less likely to take action where a complex pricing offer:

- follows the CAP Code section 3.21 and BCAP Code sections 3.21 and 3.23.

D.110 In some circumstances it may be necessary for traders to make allowances for circumstances where a significant proportion of consumers’ interpretation of an offer may be incorrect due to difficulties with arithmetic. In this regard, the OFT is less likely to prioritise enforcement action against a complex offer that:

- provides consumers, upfront, with the total **minimum** financial commitment they are entering into
  - for example, a trader offers a health club membership contract package with a 12-month term. The first three months cost £9.99 and the next nine months cost £49.99. The total minimum financial commitment is £479.88.

- provides consumers, upfront, with the average minimum monthly charge for the purpose of comparison with other offers
  - for example, a trader offers a health club membership contract package at an introductory price of £9.99 per month for a 12-month contract. However, after a three-month period, the price rises to £49.99 per month. The average monthly cost is therefore £39.99.
PRICE COMPARISON SITES

D.111 Consumers use price comparison sites to compare offers across a wide range of products and services in particular insurance products, travel, electrical products, mobile phones, broadband, and energy providers. There are a range of different types of price comparison sites, including general sites, and industry or product specific sites.

D.112 Price comparison sites can clearly be of great benefit to consumers if they are accurate, comprehensive and transparent.

D.113 In general level price comparisons undertaken by traders other than price comparison sites are subject to Guidance in the BIS PPG. There is, however, little guidance for Price Comparison sites more generally. Notwithstanding this the CPRs apply to price comparison businesses.

D.114 Price comparison businesses operated by traders have to comply with the CPRs. In contrast, individuals or other parties which provide price comparison information purely on a non-professional basis, that is, they are not concerned with promotion, sale or supply, may not be considered as engaging in commercial practices and may not have to comply with the provisions though this will depend on the facts of the particular case.

D.115 In addition to the general provisions of the CPRs there are a number of elements of particular relevance to the activities of price comparison sites.

Identity of the trader

D.116 The price comparison site should not mislead consumers as to the identity of the trader operating that site.\(^4\) Commercial practices by a trader relating to identity may constitute breaches of Annex Practices 11 and 22 of Schedule 1 CPRs. Similarly, a price comparison site should mislead consumers as to the nature of its

\(^4\) Regulation 5(6)(a) CPRs
relationship with other traders. For example, it should not state or imply that it is authorised to resell products when it is not.

D.117 Further, statements that the site is independent of a vendor or vendors of the products compared, or that creates this impression, when this is not the case, would also be likely to constitute a misleading action for the purposes of Regulation 5. A claim of independence would have to cover not just independent ownership but equally independent behaviour.

D.118 Similarly, the omission, concealment or failure to identify the commercial intent of the price comparison business including, where the commercial practice constitutes an invitation to purchase, the identity of the trader, such as his trading name, would constitute a breach of Regulation 6 of the CPRs. This would also apply to the identity of any other trader on whose behalf the trader is acting. For example, where a trader pays for prominence on the price comparison site so that price comparisons present that trader’s products more favourably, such as on the first page of returns or at the top of a list of most favourable prices.

Price

D.119 A trader operating a price comparison site should not give false or misleading information, omit material information or use deceptive presentation. False or misleading information may encompass misleading information about different traders’ product prices as well as the characteristics of the price comparison site as a

42 Regulation 6(1)(d) CPRs

43 See Regulation 2(1) CPRs for definition Note that in any case there will be an obligation to reveal the identity of the trader under other consumer protection legislation such as the Consumer Protection (Distance Selling) Regulations 2000, The Electronic Commerce (EC Directive) Regulations 2002, whether or not the practice constitutes an invitation to purchase.

44 Regulation 6(4)(b) CPRs

45 Regulation 6(1)(a)-(d) CPRs
product (or service) in itself and the results that may be expected from its use.\textsuperscript{47}

D.120 Prices displayed on a price comparison site must be accurate and as far as possible up to date.\textsuperscript{48} Pricing information will also require clarity on constituent elements that make up a headline price (for example, whether they are inclusive of accessories, exclusive of additional freight, delivery or postal charges), the date that the prices applied, and any differences between these, and the prices used in the comparison.

**Independence**

D.121 Traders should provide clear accessible information about its identity and any affiliations or connections it may have to traders of the products that are advertised on its site, such as sponsored links. Traders should not make claims of independence when this is not genuinely the case. Traders should highlight which links are sponsored clearly and in a timely and an unambiguous manner, such as including prominent words 'sponsored link' prior to the point at which a consumer might otherwise have taken a transactional decision had there been no such flag.

D.122 Consumers may take a transactional decision based on the identity, independence, or comparisons made by a site such as the decision to visit the site in the first place, to enter details or take a decision based on the results it generates. False or misleading information about the identity of the trader and concealing of the fact that it is acting on behalf of another trader would be likely to constitute an unfair commercial practice. This is because it would be likely to cause a consumer to take a transactional decision that they would not otherwise have taken.

\textsuperscript{46} For example, Regulation 5(5)(c) and (m) CPRs

\textsuperscript{47} Regulation 5(5)(q) CPRs

\textsuperscript{48} Regulation 5(4)(g)
D.123 For example, traders should not say that they provide impartial, independent comparisons without disclosing any content that is generated as part of its service which is sponsored.

**Specific concerns relating to price comparison sites**

D.124 Our concerns in relation to price comparison sites relate to circumstances where consumers may believe, or be encouraged to believe, that the comparisons made by a price comparison business are different to the comparisons actually being made. This might relate to a number of aspects of the search but in particular: its comprehensiveness; its timeliness; and its accuracy. Specifically, a consumer might be mislead where:

- the consumer believes the search is comprehensive of a particular market place where it is not
- the consumer believes the results returned are on like-for-like products and services when they are not
- the consumer believes that all the search results returned include requirements or features they have stipulated when they do not
- where prices returned do not include compulsory extra charges or charges for elements the consumer has requested
- where prices returned are out of date or otherwise not available
- where the price comparison businesses has itself levied a charge but not clearly disclosed this to the consumer.

D.125 In the absence of specific guidance in the BIS PPG price comparison site businesses may want to consider the OFT's position that it is less likely to take enforcement action against a price comparison business that undertakes the following:
• avoids implying that a market search is comprehensive when it is not (or advises consumers that some suppliers are not covered by the site)

• advises consumers if the search results returned are not for like-for-like goods or services

• advises the consumer if they return a search listing that does not include all the features they requested

• takes reasonable steps to ensure that prices include any compulsory extras or additional charges for elements of the good or service the consumer has requested in the search

• takes reasonable steps to ensure prices are up to date

• where the price comparison businesses itself has levied a charge to present this clearly to the consumer and label it as an 'intermediary fee' (or similar).

D.126 We recognise that in some circumstances not all of these steps will be necessary in order for a trader to be compliant with the CPRs. Nevertheless, in the event of a breach of Regulation 5 or 6 we would be less likely to prioritise enforcement against a price comparison businesses that had undertaken the steps listed above.

D.127 We note that in all instances it will be necessary for a price comparison business that levies a charge for its services to tell consumers about the existence and size of this charge and to do so in language that they can clearly understand and which does not lead to it being confused with charges associated with the product being searched for.
WHAT HAPPENS IF TRADERS DON’T COMPLY WITH THE CPRs?

D.128 If traders do not comply with the CPRs they may face enforcement action. The OFT, local authority Trading Standards Services (TSS) and the Department of Enterprise, Trade and Investment in Northern Ireland (DETI) have a duty to enforce the CPRs. Enforcers can use a range of tools to ensure that traders are complying with the CPRs, including criminal and/or civil enforcement.

D.129 If a trader is convicted of committing an offence under the CPRs the penalties are:

- on summary conviction in the Magistrates Court (Sheriff or District Court in Scotland), a fine not exceeding the statutory maximum – currently £5,000

- on conviction on indictment in the Crown Court (Sheriff or High Court of Justiciary in Scotland), an unlimited fine or imprisonment for up to two years, or both.

D.130 TSS, the DETI and the OFT may also take civil enforcement action under Part 8 of the Enterprise Act 2002 for a breach of the CPRs (as well as in respect of breaches of other consumer related legislation). This can include applying for a court order to prevent or stop breaches. Breach of any order could lead to up to two years’ imprisonment and/or an unlimited fine.