



**OFT & CAA Guidance on the requirements of
consumer law applicable to the sale and advertising
of flights and holidays**

NOVEMBER 2012

There are five pieces of legislation (collectively, "the Regulations") on which the OFT and the CAA consider it would be useful to provide guidance:

- Air Services Regulation EC Regulation No 1008/2008 (ASR)
- Carrier Identity Regulation EC Regulation No 2111/2005 (CIR)
- Consumer Protection from Unfair Trading Regulations 2008 (CPRs)
- Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs)
- The Electronic Commerce (EC Directive) Regulations 2002 (ECR)

We have not included guidance on the Package Travel, Package Holidays and Package Tour Regulations 1992 (PTR) as separate guidance on its requirements is available¹. However, where relevant we have referred to the PTR and its requirements.

Introduction

- 1.1 The OFT and CAA have produced joint guidance for industry on the Regulations which they consider set out the key requirements that are applicable to businesses engaged in the sale and marketing of holidays and their component parts, including flights and accommodation. Some of this legislation, such as the ASR and the CIR are specific to the travel industry but other pieces of legislation, such as the CPRs, ECR and UTCCRs are general consumer regulations that apply across all industries and sectors.
- 1.2 This guidance applies to businesses in the travel industry and is intended to ensure that they are aware of the requirements of the legislation that may apply to their business. In addition to this guidance, the OFT has published generally applicable guidance on the CPRs, ECRs and UTCCRs², and where appropriate reference is made to those publications in this guidance in order to ensure businesses have access to the full range of guidance on these pieces of legislation. General guidance for businesses on pricing can also be found in BIS's Pricing Practice Guide³.
- 1.3 It should be noted that this guidance does not replace any laws or regulations and does not constitute legal advice. Only a court can provide a definitive interpretation of the law. Businesses should always seek independent legal advice if they have any specific queries.
- 1.4 The OFT and CAA have both published their prioritisation principles⁴ and enforcement policies⁵, and businesses should expect that the OFT and CAA will, where non-compliance is identified, take forward appropriate action, including civil or criminal enforcement, to ensure there is consistent compliance with this legislation. This will enable competition on a level playing field, so that fair-trading businesses are not disadvantaged. The OFT and CAA have agreed a Concordat⁶ which sets out their agreement to co-ordinate enforcement activity and the division of responsibilities between them.

¹ <http://www.bis.gov.uk/files/file35634.pdf>

² http://www.offt.gov.uk/shared_offt/reports/unfair_contract_terms/offt311.pdf

³ Pricing Practices Guide, Guidance for traders on good practice in giving information about prices, November 2010, URN 10/1312

⁴ http://www.offt.gov.uk/shared_offt/about_offt/offt953.pdf ,

⁵ http://www.offt.gov.uk/shared_offt/reports/consumer_protection/OFT1221,
http://www.caa.co.uk/docs/2516/ConsumerEnforcementStrategy_Final.pdf

⁶ http://www.offt.gov.uk/shared_offt/about_offt/Concordat-oft-caa.pdf

- 1.5 This guidance includes sections on each of the Regulations which set out information about the relevant legislation, its scope, applicability and requirements. Where the requirements of the industry-specific legislation such as the ASR or the CIR are complemented by the requirements of the CPRs or the UTCCRs, this has been made clear. Businesses should ensure they comply with the requirements of all relevant legislation.
- 1.6 In addition there is a section on enforcement which sets out the OFT's and CAA's enforcement powers in respect of the Regulations, our approach to enforcement activity and how the OFT and the CAA will prioritise enforcement activity.
- 1.7 It should be noted that the CAA would generally take the lead on the enforcement of the ASR or CIR.
- 1.8 The OFT will cease to exist as of April 2014 but its competition functions and some of its consumer protection functions will transfer to the Competition and Markets Authority, which will continue to take consumer enforcement action.

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2. Air Services Regulation EC Regulation No 1008/2008 ('ASR')

- 2.1 The ASR sets out a broad range of requirements including the obligations relating to the financial licensing of airlines and insurance requirements. Article 23(1) of the ASR sets out a number of legal obligations relating to the display of prices for air services, and is the only provision relevant to this Guidance. Its requirements are set out in more detail below.
- 2.2 The obligations in Article 23(1) of the ASR are designed to complement the more general consumer protection measures in the Unfair Commercial Practices Directive⁷ which is implemented in the UK by the Consumer Protection from Unfair Trading Regulation 2008. The ASR sets out the specific requirements relating to the way prices for flights are displayed
- 2.3 The core requirements (set out more fully in 2.9 below) are:
- that where a price is displayed it is a final, all inclusive price which includes all unavoidable and foreseeable taxes, fees and charges at all times;
 - that optional price supplements are offered on an opt-in basis only;
 - that optional price supplements are communicated clearly, transparently and unambiguously at the start of the booking process; and
 - that a breakdown of the all-inclusive final price is provided to show the fares, taxes, charges and surcharges.

Application and scope

- 2.4 Enforcement action can be taken against an individual, partnership or body corporate where it has engaged or is engaging in conduct which constitutes an infringement of Article 23. At present, although the ASR is in force in the UK and across all EU Member States, legislation setting out the specific enforcement powers has not yet been adopted in the UK. It is expected that such legislation should be in force in 2013. It should be noted that the OFT and CAA consider that a failure to comply with Article 23 is likely to amount to a misleading omission under the CPRs as it may constitute a breach of Regulation 6(3)(b) as it is an information requirement in relation to a commercial communication that applies as a result of a Community obligation.
- 2.5 These provisions apply to all price indications for air services which depart from an EU airport regardless of whether they are provided by a Community or third-country carrier.
- 2.6 It is important to note that because the ASR applies to the activity of making a public price indication in relation to a flight, its provisions apply not only to an airline but to anyone offering flights to consumers. This would include a business acting in an intermediate capacity, whether as an authorised agent of the airline or not, such as a price comparison website. Where a business is publishing a price indication to which the ASR applies and is not the party generating the original information, that business is equally under a duty to ensure that information remains accurate, inclusive and up to date.
- 2.7 The obligations are confined in their application to air fares or rates which are available to the public. Air fares and rates as defined by the ASR are those for air

⁷ Directive 2005/29/EC

services which are flights carrying passengers or cargo on a paid or hire basis. This means that flights which are only sold as part of a package are *not* covered and these air fares / air rates do not need to be indicated separately. Tour operators who offer flights both as part of packages and on a flight-only basis will need to ensure that for the latter, they comply with the obligations in the ASR. (Further guidance on what amounts to a package can be found in the Department for Business Innovation and Skills' (BIS) Guidance Note for Travel Organisers.⁸

- 2.8 Tour operators should also be aware that the requirements of the CPRs apply to all commercial practices and can therefore apply to pricing displays for flights even where the ASR does not apply. See section 4 for more details on the scope and requirements of the CPRs.

Obligations

- 2.9 If an air fare or an air rate⁹ is available to the general public, certain obligations are created by Article 23, which are:
- a) When such an air fare or rate is offered or published in any form, including the internet, it must include the applicable terms and conditions;
 - b) When such an air fare or rate is offered or published in any form, including the internet:
 - o the final price to be paid must be indicated at all times;
 - o that final price must include in the applicable air fare or rate all applicable taxes and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication. It should be noted that a fee or charge does not cease being unavoidable just because a means is available to avoid paying it, which few consumers are likely to be able to use.
 - c) A breakdown of certain elements of the final price must be provided by specifying the following, namely:
 - o The air fare or air rate and, if the following have been added to the air fare or air rate:
 - o Taxes;
 - o Airport charges;
 - o Other charges, surcharges or fees such as those related to security or fuel
 - d) Any optional price supplements:
 - o must be communicated in a clear, transparent and unambiguous way at the start of the booking process; and
 - o must be offered to customers on an "opt in" basis.
 - o A list of these could be presented via a hyperlink to a separate webpage.

ASR requirements apply to each price display where it is offered or published in any form

- 2.10 Where a business is displaying prices for flights for a number of different airlines, the requirements of the ASR must be met for each operator. Each must have a final price displayed at all times and optional extras must be clear and not pre-selected for each

⁸ "What is a package?" A guidance note for travel organisers, Department for Business, Innovation and Skills, January 2008, URN 08/570

⁹ Both "air fare" and "air rate" are defined terms in the EC Regulation.

price displayed. Businesses must also display or make accessible the applicable terms and conditions for each airline.

- 2.11 A travel agent or other intermediary must display the final inclusive price at all times. They will be in breach of the ASR if the price quoted for an airfare does not include all unavoidable taxes, fees and charges. If a price is being quoted, there must be an available airline fare on which it is based.
- 2.12 Additionally a travel agent or intermediary, must display the costs of all optional extras offered by an airline at the start of the booking process in a clear, transparent and unambiguous way.
- 2.13 If what is being quoted is only part of the final price the supplier may also be in breach of the CPRs because it is likely to omit material information as what is being offered is not a fully costed flight. Disclaimers in small print are unlikely to affect this position as an attempt to deny liability for misleading information may be an unfair term under the UTCCRs.

EXAMPLE:

A price comparison website offers to find the “cheapest flight”. The search results that the site displays do not include an administration charge that some displayed airlines apply to all bookings. This would infringe the ASR because the advertised price does not include all foreseeable and unavoidable costs.

Price displays must include unavoidable taxes, charges and surcharges

- 2.14 In assessing what is an unavoidable tax, charge or surcharge, it will be important to take account of the practical realities for the average consumer. A charge which cannot simply or readily be avoided by most consumers will need to be included in the headline price. Any purported cost-free alternative to a tax, charge or surcharge must be genuinely free from upfront costs, whether financial or otherwise (such as opportunity/time costs, for example, time spent applying and waiting for a new payment method). The OFT and CAA consider debit card charges to be unavoidable and therefore should be included in the headline price.
- 2.15 Fees charged by an intermediary on all bookings should also be included in all price displays as they will be unavoidable. An agent or intermediary cannot reserve the right to impose a variable fee and only add it later in the process. It is not acceptable to use wording at the beginning of the process such as 'fees/charges apply' and then only later apply such fees or charges to the price further into the sales process.

Requirement to provide a breakdown of elements of final price

- 2.16 Where a business is selling flights as an intermediary, such as a travel agent or price comparison website, particular attention must be paid to the requirement to provide a breakdown of the air fare itself plus any additional taxes, airport charges and any other charge or surcharge. This is of particular importance in the event of cancellation as it allows passengers to identify which elements of the overall price may be refundable. A business that adds a surcharge to the airfare charged by the airline will need to itemise this as the consumer needs to understand that this element may not be refunded by the airline even on a fully flexible ticket. In addition a business will need to display or make available the applicable airline terms and conditions for each fare, which could be made available, for example, via a hyperlink.

It is not acceptable to expect consumers to search for the applicable terms and conditions on an airline's website.

- 2.17 Similarly, where flight prices appear in a brochure, all additional and unavoidable taxes, charges, surcharges and fees known at date of publication should be included in the final price and specified in the breakdown. Where there may be variations, this should be clearly indicated.

Requirements in relation to optional extras

- 2.18 Any presentation of optional supplements as pre-selected will be a breach of the ASR. It will not be sufficient to allow consumers to de-select at will. It is essential that consumers are aware from the start of the booking process what constitutes optional extras and that they are able to make a positive selection.
- 2.19 Examples of items that the OFT and CAA currently consider are often offered as optional extras:

- *pre-assigned seats*
- *checked baggage*
- *travel insurance*

- 2.20 It should be noted that this view may change if there is a change in industry practice or consumer detriment becomes apparent in a particular area.
- 2.21 The obligations apply to advertisements, the whole of the booking process and to the booked ticket. Certain types of media (eg radio) clearly have certain technical limitations and the application of the Regulations to such media requires a common sense approach. In pre-sale information in a technically restricted medium, the key information is the all-inclusive final price, and it would also be necessary to indicate that there may be additional fees for any genuinely optional services required (such as checked-in luggage), if applicable. This will help to ensure that consumers are aware that in addition to the cost of the flight that where they require an optional service there will be an additional cost applied. Once a contract has been made, the price breakdown can remain important as consumers might need to know which elements might be refundable in the event of cancellation.
- 2.22 In summary, all businesses which offer or publish in any form an air fare or air rate to the general public need to ensure that they comply with the requirements of the Regulations.

No contracting out of the ASR

- 2.23 Contract terms which seek to restrict or undermine the requirements of the ASR, particularly the requirement on a business to present prices clearly and transparently, are likely to be unfair under the UTCCRs and so unenforceable against the consumer. Attempting to enforce an unfair term against a consumer can be a breach of the CPRs (see sections 4 and 5 for further details).

3. Carrier Identity Regulation EC Regulation No 2111/2005 ('CIR')

- 3.1 The CIR establishes a list of air carriers that are prohibited from operating within the Community, as a result of safety concerns. This list is updated regularly in the Official Journal¹⁰. The CIR also sets out a requirement that passengers be informed of the air carrier operating their flight at the time of reservation. The CAA is designated as the body responsible for enforcing the CIR.
- 3.2 It is important to note that the expectation created by these Regulations is that the passenger will know the carrier's identity as soon as it is known to the person selling the flight in question. It will not be acceptable to make a general indication of the type or class of carrier if the individual carrier is already known to the person or business selling the flight.

Application and enforcement

- 3.3 The CIR applies to all **air carriage contractors** (see below paragraphs 3.6 – 3.7) providing a service of carriage which starts in the Community, or is operated by an EU based carrier, whether or not any onward flights depart from or arrive in a Member State. It applies to providers of scheduled and charter flights, including if they are sold as part of a package.
- 3.4 The Civil Aviation (Provision of Information to Passengers) Regulations 2006 ('the Provision of Information Regulations') creates an enforcement mechanism for those parts of the CIR (2111/2005) that relate to informing air passengers of the identity of the air carrier they will be travelling with. This is a requirement of the CIR, and is intended to ensure that passengers are aware of the identity of their carrier. The Provision of Information Regulations make the breach of certain provisions of the CIR an offence, set out below at paragraphs 3.11-3.13.
- 3.5 The OFT and CAA consider that a failure to comply with the information requirements in the CIR is likely to amount to a misleading omission under the CPRs as a breach of Regulation 6(3)(b), which sets out that material information is any information requirement in relation to a commercial communication that applies as a result of a Community obligation.

Definitions in the CIR

- 3.6 An **air carriage contractor** is defined in the CIR as follows:
- The carrier who concludes a contract for or including air transport services (including one where two or more flights operated by the same or different operators are involved);
 - Where the contract comprises a package, the tour operator;
 - Any other ticket seller who arranges a contract for or including air transport services with a passenger whether for a flight on its own or as a part of a package.
- 3.7 The definition of an air carriage contractor means that the scope of commercial activities potentially caught by the offences in the Provision of Information Regulations is quite wide, and would include the activities of airlines, tour operators

¹⁰ <http://eur-lex.europa.eu/JOIndex.do?ihmlang=en>

and travel agents where they are selling flights directly to their customers or arranging flights on their behalf. This would include on websites, on the telephone or any other means. Some examples of the activities of an air carriage contractor are set out below;

- *an air carrier or operating air carrier selling its own flights directly to the public, including any connecting or onward flights*
- *a travel agent arranging or booking a flight with an operating air carrier for a customer, including any connecting or onwards flights*
- *tour operators selling holidays that include a flight with an operating air carrier, including an operating air carrier that is part of their business*
- *a travel agent selling a holiday on behalf of a tour operator where the holiday includes flights with an operating air carrier*
- *online travel agents selling, offering or arranging flights for their customers with an operating air carrier with or without accommodation or other travel services, including any flights that are part of a package or flight plus arrangement*
- *any other business or ticket seller selling, offering or arranging flights for a customer, such as an online travel agent.*

3.8 An **air carrier** is an air transport undertaking with a valid operating licence or equivalent.

3.9 An **operating air carrier** is an air carrier that performs or intends to perform a flight under a contract of carriage with a passenger or on behalf of another person who has made a contract with the passenger.

3.10 A **ticket seller** is anyone who arranges for contract of carriage with a passenger, either for a flight on its own or as part of a package but who is *neither* an air carrier nor a tour operator.

The obligations contained in the CIR

3.11 The Provision of Information Regulations make it a criminal offence to fail to comply with certain obligations in the CIR. The obligations that apply to *air carriage contractors* are as follows:

- Informing the passenger of the identity of the operating air carrier or carriers, whatever the means used to make the reservation
- If the identity of the air carrier or carriers is not known at the time of reservation, the air carriage contractor must tell the passenger who it is likely to be, and/or tell the passenger as soon as the carrier's or carriers' identity is established
- If the air carrier or carriers change after reservation, the air carriage operator must immediately take all appropriate steps to ensure the passenger is informed of the change as soon as possible.

- The air carriage contractor must include the passenger's right to know the identity of the operating air carrier or carriers in any general terms of sale applicable to the contract for the flight or flights.
- Where the Denied Boarding Regulations¹¹ do not already apply and;
 - the operating air carrier becomes subject to an operating ban leading to the flight or flights being cancelled, the air carriage contractor must offer the passenger the right to reimbursement or re-routing as set out in Article 8 of Regulation 261¹²;
 - **or**, if the operating air carrier becomes subject to an operating ban and the flight would have been cancelled if it had been operated in the Community and the passenger chooses not to take the flight, the air carriage contractor must offer the passenger the right to reimbursement or re-routing as set out in Article 8 of Regulation 261.

3.12 The breach of any of the above obligations constitutes an offence under regulation 3.1 of the Provision of Information Regulations.

3.13 An *air carrier* must ensure that the relevant air carriage contractor is informed of the identity of the operating air carrier or carriers as soon as this is known and particularly where there is a change of such identity. It is an offence to breach this requirement under regulation 3.2 of the Provision of Information Regulations.

3.14 A *tour operator* must ensure that the relevant air carriage contractor is informed of the identity of the operating air carrier or carriers as soon as this is known and particularly where there is a change of such identity. It is an offence to breach this requirement under regulation 3.3 of the Provision of Information Regulations.

EXAMPLE

An online travel agent offers a flight for sale, and says that it will be operated by 'a low cost carrier'. This will be a breach of Article 11(1) of the CIR and therefore is a criminal offence under the Provision of Information Regulations.

3.15 The offences contained in regulations 3.1-3.3 of the Provision of Information Regulations are subject to the defences set out below.

Defences

3.16 An air carrier, tour operator or other ticket seller will have a defence to any of the offences described above if they can demonstrate that they took all reasonable steps to avoid committing the offence. If, in putting forward this defence, they are using the fact that they relied on someone else's information, they will have to show that it was reasonable in all circumstances to rely on that information.

¹¹ The Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005

¹² Regulation (EC) No 261/2004 of the European Parliament and of the Council

- 3.17 In addition, a ticket seller will have a defence if it was not informed of the identity of the operating air carrier.

EXAMPLE

A travel agent sells a customer a package holiday that includes flights but at the time of booking has not been informed by the tour operator of the identity of the operating air carrier, nor in the period between the sale and the departure of the flight is the travel agent informed of the identity of the carrier. In these circumstances the travel agent will have a defence.

4. Consumer Protection from Unfair Trading Regulations 2008 (CPRs)

- 4.1 The CPRs prohibit unfair commercial practices. In addition to the guidance set out below businesses may also wish to consider the guidance provided by OFT/BERR¹³, and guidance produced by the European Commission.¹⁴ It should be noted that only a court can determine whether or not a practice is unfair.
- 4.2 The CPRs are general consumer protection measures and are not specific to aviation. They are aimed at preventing unfair commercial practices. Whilst most commercial practices will occur where a business 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 business sells a product to a consumer, acts or omissions which occur further up the supply chain may also constitute relevant commercial practices. The CPRs introduced a general duty not to trade unfairly and seek to ensure that businesses act honestly and fairly towards their customers.

Application and scope

- 4.3 The CPRs apply to the activities of businesses that are engaging in a commercial practice for purposes relating to their business. It also includes anyone acting in the name of or on behalf of a business, including further up the supply chain. Businesses that engage in a prohibited commercial practice can face enforcement action under Part 8 of the Enterprise Act 2002 (see section 7). The CPRs also create a number of criminal offences.
- 4.4 'Commercial practice' covers a wide range of activities including advertising and marketing. Any action by a business directly connected with the promotion, sale or supply of a product to consumers can be covered and this is the case regardless of whether or not a transaction has taken place.
- 4.5 Anyone selling or promoting goods and services needs to be familiar with the categories of unfair commercial practices in the CPRs so as to avoid breaches. The CPRs also prohibit certain unfair commercial practices in relation to codes of conduct.

Obligations

- 4.6 The CPRs prohibit five categories of unfair commercial practice. Trading behaviour that is causing harm to consumers can fall into one or more of these categories. For some of them, it must be shown that there is likely to be an impact on the average consumer's transactional decision. Practices may be considered cumulatively when assessing the impact on consumers.

Breach of Professional Diligence

- 4.7 A commercial practice is unfair if it contravenes the requirements of professional diligence and it materially distorts the economic behaviour of the average consumer with regard to the product (or is likely to do so).
- 4.8 ***professional diligence*** means 'the standard of special skill and care which a business may reasonably be expected to exercise towards consumers which is

¹³ http://www.offt.gov.uk/shared_offt/business_leaflets/cpregs/oft1008.pdf

¹⁴ http://ec.europa.eu/consumers/rights/docs/Guidance_UCP_Directive_en.pdf

commensurate with either — (a) honest market practice in the businesses field of activity, or (b) the general principle of good faith in the businesses field of activity’.

- 4.9 Practices that depart markedly from industry norms and put consumers at a real disadvantage whether before, during or after they have made a purchase risk falling into this category. An example would be where a businesses practice is not consistent with an established and reputable industry code of conduct. If this has an effect on the average consumer’s ability to make an informed decision, this prohibition may apply.
- 4.10 However, where general industry practice is poor, conforming to that standard will not be enough to avoid falling short of this requirement. Professional diligence is an objective standard which will vary according to the context. Poor current practice that is widespread cannot amount to an acceptable objective standard. This is because it is not what a reasonable person would expect from a business acting in accordance with honest market practice.
- 4.11 An average consumer can be taken to be someone who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors. Where a commercial practice is directed at a particular group of consumers, such as retired people, the 'average consumer' may refer to the average member of that group.
- 4.12 Where a clearly identifiable group of consumers is particularly vulnerable to a commercial practice or to the underlying product because of their mental or physical infirmity, age or credulity in a way which the business could reasonably be expected to foresee and where the practice is likely materially to distort the economic behaviour of only that group, then it is the average member of that group that is the average consumer. (Further information can be found in the OFT/BERR guidance at paragraph 14.35¹⁵)
- 4.13 A breach of professional diligence is the most widely drawn of the categories of unfair commercial practices and is likely to overlap with other prohibited practices. The OFT / BERR guidance on the CPRs should be read in full to ensure practices are compliant with the CPRs.
- 4.14 The OFT and the CAA consider the following to be examples of a failure of professional diligence in the travel sector. These may also breach other requirements of the CPRs:

- *failing to pass on a consumer’s contact details to the final supplier (subject to data protection requirements)*
- *failing to have any kind of proper complaints handling system;*
- *seeking to avoid consumer protection rules by persuading consumers to waive or forfeit their rights;*
- *presenting prices in an unnecessarily confusing and/or complicated way;*
- *structuring a holiday product so that it does not have protection under the Package Travel Regulations, and presenting this in a way that does not make clear to consumers what their actual rights are to financial compensation.*

¹⁵ http://www.of.gov.uk/shared_of/business_leaflets/cpregs/oft1008.pdf

Misleading Actions

- 4.15 This category covers the provision of false, misleading or confusing information to consumers. It also covers failures to comply with a code of conduct if the business has told the consumer it is bound by that code. This section should be read in conjunction with that on misleading omissions, since the impact of these is generally assessed together. (see paras 4.24 – 4.33)
- 4.16 Misleading information can relate to the product being sold but also such matters as the price, the sales process, the business itself or the consumer's rights.
- 4.17 Information that is factually correct but presented in a misleading way can fall into this category.
- 4.18 For a practice to fall within this category it must be likely to cause the average consumer to take a transactional decision he would not otherwise have taken. This is a very broad concept. The practice must therefore be capable of influencing the average consumer to take or not take an action such as entering a contract, choosing a payment method or seeking redress. It could also include ruling out other suppliers, or deciding whether to look further into the service on offer.
- 4.19 An example of a misleading action could be a noticeable promotional statement on a website which is, for example, contradicted or caveated elsewhere in a much less prominent place. This could lead consumers to make a decision that they might not have taken had all relevant matters been given equal prominence. Possible examples of this might be matters such as pricing information or qualifying conditions for a promotion. Because the prominent statement is either not true, or is deceptive, it could be a misleading action. The failure to give proper prominence to the caveats could be a misleading omission (see paragraphs 4.24 – 4.33 on misleading omissions).
- 4.20 Where businesses are selling a number of different products with different attributes, it will be especially important that relevant information is provided clearly to consumers.
- 4.21 Examples of practices which may be misleading:

- *a business that holds an ATOL licence and sells some products which require ATOL protection and some which do not. However the business uses a generic phrase such as "ATOL Protected", or "fully bonded" when in fact this is not true of some of its products;*
- *pre-selecting optional services in any booking process so that it gives the impression they are mandatory and consumers must de-select them if they are not required;*
- *creating the impression that the business is acting as an authorised agent for one or more airlines when this is not the case;*
- *displaying a price that is not the final price that is likely to be paid by consumers;*
- *describing a fee as an airline imposed fee or charge when it is a fee added by an intermediary.*

- 4.22 In general, particular care should be taken that the overall presentation and descriptions fairly reflect what is being sold, even if everything in the advertising is factually correct. The use of certain words and phrases which are included to create a particular legal framework for the dealings between a business or agent and consumer must be clear both in terms of the language used but also how they affect the nature of what the consumer is buying.

EXAMPLE

A holiday has been structured to be sold in separate elements and therefore does not fall within the meaning of a package under the Package Travel Regulations. It would be misleading to describe this as a “package”, or to use some similar wording, which could give consumers the impression the holiday has protection. It would also be misleading to present the holiday in a way that is not clearly distinguishable from a package holiday. Failing to state clearly with whom and on what terms the consumer is contracting, and also other material information such as the consumer’s position in case of insolvency of anyone involved in supplying his holiday, is likely to be a misleading omission.

- 4.23 Statements which mislead consumers as to their legal rights are also likely to fall within this category.

EXAMPLE

A business states that consumers do not have any redress if they do not receive a part of their holiday, such as an excursion, that they have paid for in advance, whereas they would have a right to a refund or a replacement under contract law.

Misleading omissions

- 4.24 This is aimed at commercial practices by businesses which fail to give material information, hide it, or provide it in an unclear, unintelligible, ambiguous or untimely way. If such failure causes a consumer to take, or makes it likely they will take, a different decision as a result of the information provided by the business, it is likely to constitute a misleading omission.
- 4.25 The CPRs define material information as information that the average consumer needs to have, in the relevant context, in order to make an informed decision. This includes, for example, the commercial intent of a practice, unless already apparent from the context.
- 4.26 What is material may depend on how a product is presented. If the overall presentation might raise reasonable expectations for the consumer as to the nature of the product in question, the omission of any information that would be necessary to understand the product fully could be a breach of this prohibition. Businesses must ensure that they do not leave consumers unsure or unsighted on any elements that they need to understand to make an informed choice.

- 4.27 Similarly, information should be given appropriate prominence. A contract term which may have a significant effect on the consumer's position should not be hidden away in long and detailed terms and conditions. It should be clearly flagged, particularly if it is necessary to understand fully the nature of the product that the consumer is being offered.
- 4.28 The failure to provide information required under a Community obligation, for example, under Article 23 of the ASR, is also a misleading omission.
- 4.29 The circumstances in which a consumer is entitled to a refund are likely to be of particular importance. Any information given to consumers about their rights under the contract should be clear on the circumstances in which a full or partial refund will be given. Where there will be an administration fee for processing a refund, this should be clearly stated.
- 4.30 Other examples of potentially material information are set out below:

- *accurate details about the degree of financial protection that comes with a particular product;*
- *information regarding a change to a flight schedule;*
- *key information about the terms of a price promotion such as its duration or whether a very small number of promotional prices are available;*
- *the identity of the business to whom the consumer will ultimately make payment;*
- *the identity of the business or businesses with whom the consumer will ultimately have a contractual relationship;*
- *whether cancellation by the supplier of one element of the holiday allows the consumer to withdraw from other elements;*
- *whether insolvency of the supplier of one element of a holiday allows the consumer to withdraw without penalty from other elements;*
- *charges imposed for optional services such as checked baggage;*
- *charges which are routinely imposed on consumers by third parties such as airport development fees or landing charges;*
- *surcharges imposed by the business for the use of a credit card;*
- *where the business is acting as an agent for the consumer, any commission he receives from a particular supplier;*
- *important contractual terms, whether imposed by the business or a supplier, such as exclusions of liability or other significant terms of which the consumer should be aware. These could include restrictions on changing the name on the ticket, the date or time of departure and similar;*
- *if the business is an intermediary, such as a price comparison website, whether they charge any fees and the amount of such fees.*

- 4.31 Businesses will need to ensure that material information is provided at an appropriate point in the advertising or booking process. In starting and proceeding through a booking process, a consumer may take a number of transactional decisions within the meaning of the CPRs so omitting material information until the later stages or final stage of a process could constitute an infringement. Information should not be

hidden away or made hard to find, and it should be properly signposted, so that a consumer can find it easily.

EXAMPLE

A business sells flight tickets, but it is only when the consumer gets to the airport that they are told that they must pay a fee in order to access the departure gate. Failing to provide this information at the time of booking, in a clear and prominent manner, such as by including it in the advertised headline price, is likely to be a misleading omission.

- 4.32 A further example is where a business charges a fee for paying by credit card. The existence of this fee should be flagged prominently wherever headline prices are advertised, and the amount of the fee should be accessible via a clear link on the website, one click away from the prices. Similar principles apply to other optional extras, such as baggage charges or seat reservation fees.
- 4.33 In addition where an initial price for a holiday is presented but further mandatory extras are then added during the booking process this may constitute a misleading omission (as well as a misleading action). Where optional services are pre-selected in the booking process so that consumers may be misled by default or through inertia into paying for services they do not require this may also be a misleading omission and action.

ATOL regulations and the CPRs

- 4.34 Timing can also be important for a consumer's rights under the ATOL Regulations. A Flight-Plus¹⁶ booking depends on a number of elements being requested within a specified period of time. If a business has fulfilled a request for a flight and is aware that a consumer intends to request additional elements, it will be highly material for the consumer to know that such additional elements should be requested within a day of the flight request in order to receive ATOL protection. The effect of delay could mean the consumer losing the financial protection available for a Flight-Plus booking. Therefore businesses should be proactive in making sure that consumers are properly informed, so that they can make the right decisions in relation to their purchase.
- 4.35 Travel Agents should also be aware that if they engage in a practice that encouraged consumers to space out the requests so as to avoid creating a Flight-Plus booking, that could also be an unfair business practice in the sense of breaching the requirements of professional diligence and materially distorting the consumer's economic behaviour, (see above at paragraphs 4.7 – 4.14)

Schedule 1 practices

- 4.36 The CPRs set out a list of practices in Schedule 1 which are automatically deemed to be unfair *in all circumstances*. There is no requirement for an enforcement authority to show that the average consumer's behaviour would have been distorted or influenced in a particular way by the commercial practice.

¹⁶ <http://www.caa.co.uk/default.aspx?pageid=12990>

4.37 Not all of the listed practices will have relevance for the travel trade but businesses should be aware of all of them. Those to which travel firms should pay particular attention are:

- **Paragraph 1** Claiming to be a signatory to a code of conduct when the business is not
- **Paragraph 4** Claiming that a business, its commercial practices or its product has been approved, endorsed or authorised by a public body or a private body when they have not or where the business has not complied with the relevant terms for approval/endorsement/authorisation. The OFT and CAA consider that an ATOL licence is an authorisation by a public body for the purposes of this provision.
- **Paragraph 5** Bait advertising – inviting consumers to purchase a product at a price without telling the consumer of any reasonable grounds the business may have for believing that it may not be able to supply the product at that price for the time period that the consumer has been led to believe would be reasonable. Alternatively if the business does not disclose that it may not have as many of the products available as the consumer has been led to believe.
- **Paragraph 6** Bait and Switch –making an invitation to purchase products at a specified price and then refusing to show the advertised item to consumers, with the intention of promoting a different product. Where businesses advertise special offers, it should be possible to find these on their websites. The advertising should not be used as a means of attracting consumers to the website, only for them to be presented with other offers.
- **Paragraph 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. Where businesses advertise time limited sales, these must be genuine.
- **Paragraph 11** Advertorials –using editorial content in the media to promote a product where a business has paid for the promotion without making that clear in the content.
- **Paragraph 22** –falsely representing oneself as a consumer. Consumer and other third party reviews are an important source of information for consumers in deciding what products to purchase. Businesses must not write reviews which purport to be by consumers or pay third parties to write reviews which are not impartial.

EXAMPLE

A business advertises nationally that it is offering a package holiday at an unusually low price. They had only ever planned to have a very small number available at that price. This would breach this prohibition because the number of holidays actually available at the highly attractive low price would not be sufficient to meet the likely level of demand arising from the scale of the advertising and the business knew this but failed to make clear in the advertisement that only limited numbers were available. The same would apply if the business failed to mention that the promotional price was only available in a very restricted time window.

EXAMPLE

An airline advertises a “One Day Sale” of flights for only £15. However in reality flights are routinely available from that airline for £15.

Aggressive practices

- 4.38 A commercial practice is aggressive if, in the context of the particular circumstances, it uses harassment, coercion or undue influence, restricting consumers' ability to make free or informed choices. In order for an aggressive practice to be unfair it must cause or be likely to cause the average consumer to take a different transactional decision.
- 4.39 Practices that deter consumers from exercising their rights under a contract, including the right to terminate a contract or switch to another product, could also be aggressive.
- 4.40 The CAA and OFT would be concerned, for example, if consumers faced a last minute charge or fee in circumstances where they might feel they had no option but to pay to avoid incurring a substantial and non-recoverable loss. This could amount to undue influence within the meaning of CPRs, as it would significantly limit the consumer's ability to make an informed choice.

EXAMPLE

A consumer books a flight that departs from an airport that imposes an Airport Development Fee (ADF,) payable at the airport before being allowed access to the departure gates. If the consumer is unaware of the ADF at the time of booking and only becomes aware of it on arrival at the airport they may feel they have no option but to pay this unavoidable charge in order to avoid missing their flight. This could amount to undue influence.

5. Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs)

- 5.1 The UTCCRs apply to contracts made between businesses and consumers. These are typically standard form contracts drafted in advance, which the consumer has no chance of influencing, and which are presented to consumers as “small print” or “terms and conditions.” However the UTCCRs also apply to any term that the consumer has not individually negotiated.
- 5.2 The UTCCRs aim to ensure that consumers are not put at an unfair disadvantage because of their weaker bargaining power through the use of unfair standard terms and are not presented with terms that cannot readily be understood. Contracts should be drawn up in a way that respects consumers' legitimate interests. Whilst businesses naturally draft contracts so as to protect their commercial interests, they must not do so in a way that takes away protection that consumers would otherwise enjoy in law, or otherwise disadvantages consumers unfairly.
- 5.3 There are special provisions about assessing the main subject matter of the contract and the price, as well as terms which are required by law, but otherwise all terms must be fair. Schedule 2 to the UTCCRs sets out a list of terms that are presumed to be unfair.
- 5.4 It should be noted that only a court can determine whether or not a term is unfair. An unfair term is not enforceable against a consumer. Furthermore, the enforcement or attempted enforcement of an unfair term against a consumer, as well as including it in the contract in the first place, can be a breach of the CPRs (see section 4). Finally, businesses should not recommend terms to other businesses that are unfair.

Application and scope

- 5.5 The UTCCRs apply to contract terms which have not been individually negotiated, between sellers or suppliers (ie businesses) who are acting for purposes relating to their trade, business or profession, and consumers who are acting for purposes outside their trade, business or profession.

Unfair terms.

- 5.6 A contract term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer' The requirement of *'good faith'* embodies a general 'principle of fair and open dealing'. It means that terms should be expressed fully, clearly and legibly and that terms that might disadvantage the consumer (for example, because they run counter to the reasonable expectations of the consumer), should be given appropriate prominence.
- 5.7 When looking at whether the term causes an imbalance or not, the OFT and CAA consider the term in the context of the whole agreement, and whether or not there are other terms which mitigate or exacerbate its effect.
- 5.8 A term may be unfair because of the way that it could be used. A term is open to challenge if it is drafted so widely that it could cause consumer detriment. It may be considered unfair if it could have an unfair effect, even if it is not at present being used unfairly in practice, and there is no current intention to use it unfairly. In such cases fairness can generally be achieved by redrafting the term more precisely, so that it reflects the practice and current intentions of the business.

- 5.9 Businesses should also remember that consumers need adequate time to read terms before becoming bound by them, especially in lengthy or complex contracts, and this can also be a factor in assessing fairness.
- 5.10 Transparency is also fundamental to fairness. The UTCCRs require that contract terms are drafted in plain intelligible language. This allows the consumer to make an informed choice. Terms that would be clear to a lawyer could have the potential for unfairness if they are likely to be unintelligible to consumers, or are set out in such a way that they are hard to find and read coherently, or if they are misleading in which case its use may also be an unfair commercial practice under the CPRs (see section 4).

Illustrative list of potential unfair terms

- 5.11 Schedule 2 to the Regulations¹⁷ lists a number of types of term which may be regarded as unfair. The terms listed are not necessarily unfair – it is a 'grey' not a 'black' list. But terms are under suspicion of unfairness if they either have the same purpose or can produce the same result as terms in the 'grey' list. They do not have to have the same wording or structure. The use of such terms has been considered by the Court of Justice of the European Union to be fairly conclusive of unfairness. The grey list should also be read alongside the provisions of the Unfair Contract Terms Act 1977, which prevent a number of exclusion clauses, such as excluding liability for negligence, or poor performance.
- 5.12 Generally the illustrative terms listed in Schedule 2 have the object or effect of altering the position which would exist under the ordinary rules of contract if the contract were silent about that point, and doing so in a way that puts the consumer at a disadvantage.
- 5.13 Below are some of the kinds of terms that appear in Schedule 2 for guidance purposes. It is not an exhaustive list. Businesses need to scrutinise their own contracts against the full list to identify whether there are terms which correspond to ones on the list and to consider whether they are likely to pass the test of fairness under the UTCCRs discussed above.
- 5.14 Examples of terms excluding or limiting liability

- *Disclaimers of liability for death or injury caused by the business*
- *Disclaimers relating to faulty, mis-described or unsatisfactory goods or services, for example, excluding or limiting liability for services provided by third party suppliers.*
- *Disclaimers of liability for failure to do what was agreed*
- *Disclaimers reducing the amount or availability of redress*
- *Terms unreasonably restricting the consumer's right to a refund*
- *Terms imposing a disproportionate penalty on the consumer if they cancel the contract*
- *Binding the consumer to hidden terms*
- *Terms which allow the supplier a wide right to cancel without giving the same right to the consumer*

¹⁷ <http://www.legislation.gov.uk/ukxi/1999/2083/schedule/2/made>

- *Terms denying liability for statements made by agents and employees of the business*
- *Terms allowing the business to vary the contract at will, for example, by permitting them to impose further charges following purchase, without a corresponding right for the consumer to withdraw from the contract without penalty*
- *Terms requiring the consumer to declare they have read or acknowledged matters where this may not be true ('read and understood' clauses).*

Package Travel Regulations ('PTRs') and the UTCCRs

- 5.15 In the travel sector, it is particularly important that terms do not attempt to undermine the protection set out in other legislation; in particular, the PTRs. Terms that do not accurately reflect the requirements of the PTRs are potentially unfair under the UTCCRs and attempting to enforce them may be a breach of the CPRs. This means that businesses should ensure contract terms do not contradict the provisions of the PTRs. In addition, consumers will generally be unaware of their rights under the PTRs and therefore a term may be unfair if, by not reflecting the PTRs, it could mislead or confuse consumers.
- 5.16 Further detailed guidance on the application of the UTCCRs to booking conditions in package travel can be found in the OFT guidance document¹⁸

¹⁸ http://www.of.gov.uk/shared_of/reports/unfair_contract_terms/oft668.pdf

6. The Electronic Commerce (EC Directive) Regulations 2002 (ECR)

- 6.1 Businesses that market or sell electronically (such as over the internet, or by email or text message) also need to comply with the ECR.
- 6.2 The ECR sets out certain conditions for commercial communications which are, or form part of, an 'information society service'. Essentially this means the website operated by a business, and any electronic means of communication with consumers. It would also include the use by businesses of social media.

Application and scope

- 6.3 The ECR governs the provision of 'information society services', which are any services normally provided on request, for payment, at a distance, by means of electronic equipment. It includes, for example, any marketing or selling of goods or services to consumers and businesses on the internet or by email.
- 6.4 The ECR applies to all businesses which provide or market such services.

Obligations

- 6.5 **Provision of information to consumers:** Businesses which are providing an information society service must supply certain information under the ECR about their business and the prices they charge when they advertise or sell.
- 6.6 This information must be easily, directly and permanently accessible. The easiest way to achieve this will often be for a business to set it out on their website so that it is available to consumers before a contract is concluded and at the time of advertising or the provision of information society services.
- 6.7 The ECR does not expressly state when this information should be supplied but the OFT and the CAA consider that it must be available prior to concluding a contract.
- 6.8 This information includes:
- the full name of the business;
 - the geographic address of the business, its contact details, including an email address, to enable rapid, direct and effective communication with it. The Court of Justice of the European Union (CJEU) has held that the business must also include another means of communication, which does not have to be a telephone number, but may include a webform if queries are answered within 60 minutes;
 - details of any publicly accessible trade or similar register with which the business is registered, including the name of the register and its registration number or other means of identification in the register;
 - if the businesses service is subject to an authorisation scheme such as ATOL, details of the relevant supervisory authority;
 - the businesses VAT registration number (if they are subject to VAT);
 - where they refer to prices, a clear and unambiguous indication of those prices and whether the prices include taxes and delivery costs (see also section 2 on the ASR and 4 on the CPR for further requirements relating to the display of prices)
- 6.9 **Pre-contract information required under the ECR – where contracts are concluded by electronic means** (for example, on a website or interactive

television), but **not** by emails or other individual communication, businesses must provide the following information to customers:

- the different technical steps to follow to conclude the contract
- whether or not the contract will be kept by the business and whether the concluded contract will be accessible by the business
- how customers can identify and correct input errors prior to placing the order
- the languages offered for conclusion of the contract
- any relevant codes of conduct to which the business subscribes and information about how they may be consulted electronically

6.10 The information must be provided in a clear, comprehensible and unambiguous manner before an order is placed. This will often be done by placing the information on the businesses website.

6.11 ***Pre-contract information required under the ECR – when sending any electronic commercial communications:*** Under the ECR, any electronic commercial communication (anything which promotes goods, services or a business) must set out the following *before* customers decide to buy:

- that it is a commercial communication
- the business making the communication
- if it includes any promotional offer (including any discount, premium or gift), that the conditions that must be met to qualify for it are easily accessible and presented clearly and unambiguously
- if it includes any promotional competition or game, that any conditions for participation are easily accessible and presented clearly and unambiguously.

EXAMPLES

A travel businesses website does not provide contact details including an email address so that consumers can easily get in touch and pursue queries about a booking. This will breach the ECR (as well as other legislation including the CPRs).

A consumer is booking a flight and inadvertently selects an optional extra such as seat selection or car hire that he does not require. If the website does not allow the consumer to review their mistake before committing to the purchase, this will breach the ECR. Similarly, if the website does not explain how the consumer can correct the mistake and de-select the optional extra before they commit to a booking, there will be a breach of the ECR. (Presenting optional extras in a misleading way can also amount to a breach of the ASR and CPR: see sections 2 and 4 for further details)

Details of Terms and Conditions

6.12 The business must make the terms and conditions applicable to the contract available in a way that allows their customers to store and reproduce them.

Requirements for ordering under the ECRs

- 6.13 Customers who place orders through websites or other electronic means need certainty about the terms of their order, so under the ECR businesses must
- acknowledge the receipt of the order electronically without delay
 - provide customers with effective and accessible technical means allowing them to identify and correct input errors before their order is placed.
- 6.14 These requirements do not apply in the case of contracts concluded through email or other equivalent individual communications.
- 6.15 If businesses do not allow customers to correct input errors and they enter into a contract to which the ECR applies, the consumer can rescind the contract unless a court orders otherwise.

EXAMPLE

A consumer selects an optional seat selection service by mistake but there is no easy way to correct the error before being committed to the booking. The consumer would be legally entitled to withdraw from the contract and get their money back.

- 6.16 More information and guidance is available on the Distance Selling Hub area of the Office of Fair Trading's website¹⁹.

¹⁹ <http://www.offt.gov.uk/business-advice/treating-customers-fairly/dshome/>

Section 7: Compliance and Enforcement

Introduction

- 7.1 This section gives an overview of how the OFT and CAA enforce the consumer legislation for which they have responsibility.
- 7.2 Along with other bodies, including Trading Standards Services, the OFT and the CAA can enforce certain consumer legislation under Part 8 of the Enterprise Act 2002 ("EA02"). A breach of the following legislation can constitute a Community Infringement, if it harms the collective interests of consumers:
- UTCCR
 - DSR
 - ECR
 - CPR
- 7.3 The OFT and the CAA would generally seek to ensure compliance with relevant legislation through consultation under the Enterprise Act 2002 ('EA02'). However, if the breach was considered sufficiently serious, either may seek an enforcement order or interim enforcement order without first engaging in consultation, though the CAA would have to inform the OFT before doing so.
- 7.4 The OFT and the CAA have recently published a concordat on enforcing the CPR, available on both the OFT's and CAA's website:
http://www.offt.gov.uk/shared_offt/about_offt/Concordat-offt-caa.pdf /
<http://www.caa.co.uk/default.aspx?catid=2107&pagetype=90&pageid=13493>
- 7.5 The CAA has only civil powers to enforce consumer legislation, whereas the OFT (along with Trading Standards and the Department for Enterprise, Trade and Investment in Northern Ireland) may prosecute for a breach of the CPRs. The OFT's criminal powers are dealt with at paragraphs 7.25 – 7.30 below. Generally speaking, the OFT would only use its criminal powers in the most serious of cases.

Other key guidance documents on enforcement

- 7.6 The CAA has published a set of Prioritisation Principles²⁰ to explain how it will decide which issues and cases to pursue. The OFT also has published prioritisation principles²¹.
- 7.7 The CAA has published its consumer enforcement guidance.²²
- 7.8 The joint BERR/OFT guidance²³ on the CPR contains a chapter on Compliance and Enforcement (Chapter 11) and the OFT's investigative powers (Chapter 13).
- 7.9 The OFT's guidance on enforcement under Part 8 EA02 is also available²⁴.
- 7.10 Both organisations also publish a range of other documents such as the OFT's Annual Plan which outline priorities for the organisation²⁵

²⁰ <http://www.caa.co.uk/docs/2107/Prioritisation%20Principles.pdf>

²¹ http://www.offt.gov.uk/shared_offt/about_offt/offt953.pdf

²² http://www.caa.co.uk/docs/2516/ConsumerEnforcementStrategy_Final.pdf

²³ http://www.offt.gov.uk/shared_offt/business_leaflets/cpregs/offt1008.pdf

²⁴ http://www.offt.gov.uk/shared_offt/business_leaflets/enterprise_act/offt512.pdf

Civil Enforcement - Enterprise Act 2002

- 7.11 When investigating a potential infringement in the travel sector, both authorities will consult with each other to ensure that the best placed authority takes enforcement action, under the terms of their published concordat.
- 7.12 Part 8 of the EA02 sets out the powers of enforcement authorities to enforce certain consumer legislation. It applies to two types of infringements “domestic infringements” (breaches of UK legislation) and “Community infringements” (breaches of European legislation listed in Schedule 13 of EA02). It applies where there is an infringement which harms the collective interests of consumers, and it is aimed at stopping businesses from continuing to engage in business practices that harm consumers. Enforcement can be against a company and against company officers who are responsible for infringements by the company.

Consultation

- 7.13 If either the OFT or CAA considers that an infringement has occurred, or is likely to occur, it may seek an enforcement order under s.215 EA02. Prior to doing so, the enforcer will generally engage in "appropriate consultation" with the business, for the purpose of achieving the cessation of the infringement, and/or ensuring that it is not repeated, and/or that it does not take place if it has not already taken place.
- 7.14 Appropriate consultation should not be confused with consultation under a public law duty to consult. Under the EA02 it is an opportunity for the business to change their conduct or provide undertakings as to future conduct. In some circumstances it may be an opportunity for the business to explain why they think their conduct does not amount to an infringement. However, the consultation period is not open ended, and if a resolution is not reached within 14 days under s.214(4) EA02 the enforcer is no longer under a duty to consult and may consider initiating court proceedings. As set out above at paragraph 7.6, in taking any such decision the OFT and CAA would have regard to their published prioritisation principles.
- 7.15 If the OFT considers, however, that an application for an enforcement order should be made without delay, the enforcer need not engage in consultation with the business, and may proceed straight to court.
- 7.16 The business may offer undertakings to the OFT or CAA under s.219 EA02 in lieu of a court order being sought. The undertakings will relate to the specific aspects of the case and normally require that the business will not engage, continue or repeat the conduct which constitutes or would constitute an infringement, nor consent to and/or connive in such conduct. In some circumstances it may also be appropriate for undertakings to be given by company officers personally.
- 7.17 The CAA or OFT may publish the undertakings they receive from a business or individual. They may also apply to the court for an enforcement order if a business fails to comply with an undertaking that has been provided to the CAA or OFT. The CAA must notify the OFT of any undertakings it has received.

²⁵ <http://www.oft.gov.uk/about-the-oft/annual-plan-and-report/annual/>

- 7.18 Examples of undertakings given under s.219 EA02 are available on the OFT's website²⁶.

Enforcement order

- 7.19 If an application for an order is made under s.215 EA02, and the court finds that the business named in the application has engaged or is likely to engage in conduct which constitutes an infringement, the court may make an enforcement order that the business does not engage, continue, repeat or consent to and/or connive in such conduct. The court must have regard to whether the business has previously given an undertaking to an enforcer under s.219 EA02, and whether the business has failed to comply with the undertaking.
- 7.20 If it appears to the court that the business is engaging or likely to engage in conduct which constitutes a Domestic or Community infringement, that if the application had been an application for an enforcement order it would be likely to be granted, and that it is expedient that the conduct is prohibited or prevented, it may make an interim enforcement order.
- 7.21 An order may require the business to publish the order and/or a corrective statement.

Information gathering powers

- 7.22 Under s. 224 EA02 the OFT may give notice to any person or business requiring the person or business to provide it with the information specified in the notice. Similarly, under s. 225 EA02 the CAA may require any person or business to provide it with information. This information is to enable the OFT or the CAA to consider whether or not to exercise its powers under Part 8 or to monitor compliance with an Enforcement Order or undertaking. If they are using this power, both the OFT and the CAA must issue a notice to the person or business detailing the information it requires and the purpose for the request. The enforcer may specify the time and manner of compliance, the form in which information is to be provided, and may require production of documents. If a business fails to comply with a notice under s.224 or s.225 EA02, the CAA or OFT may seek an order from the Court under s.227 EA02, to require compliance and to pay the costs of the application.

Inspection Powers

- 7.23 The Enterprise Act also provides powers of inspection and allows the OFT or CAA to enter premises with or without a warrant (if proper notice has been served first). See the OFT guidance on on-site inspection powers²⁷.
- 7.24 Under s.227A EA02, the OFT and CAA must give a notice at least two working days' in advance of the intention to enter premises without a warrant, setting out why the entry is necessary, unless it has not been possible to serve such notice, despite all reasonable efforts to do so. Where it is not possible to serve the notice in advance, the enforcer will produce the notice when the premises are entered. Once on the premises, the enforcer may observe the carrying out of business, inspect goods or documents and/or seize goods or documents. In some circumstances, where entry is under warrant, the enforcer may also search for documents, break open containers

²⁶ <http://www.of.gov.uk/OFTwork/consumer-enforcement/undertakings-court-action/>

²⁷ http://www.of.gov.uk/shared_of/business_leaflets/general/of858.pdf

and take steps to prevent interference with evidence. It is an offence under s.227E EA02 to obstruct or fail to co-operate with the enforcer's powers of inspection.

Criminal Enforcement – the CPRs

- 7.25 The OFT, but not the CAA, has the power to prosecute under the CPR. The OFT has published guidance on criminal enforcement of the CPR²⁸. It sets out the circumstances in which the OFT would be likely to consider prosecuting, including persistent and flagrant breaches by the business, or if the business has been deliberately or recklessly using deceptive, misleading or fraudulent practices.
- 7.26 Part 3 of the CPR sets out the offences. Under regulation 8, a business is guilty of an offence if it knowingly or recklessly engages in a commercial practice which contravenes the requirements of professional diligence under regulation 3(3)(a) and the practice materially distorts or is likely to materially distort the economic behaviour of the average consumer.
- 7.27 Similarly, a business is guilty of an offence if it engages in a commercial practice which is a:
- Misleading action (Regulation 9)
 - Misleading omission (Regulation 10)
 - Aggressive Practice (Regulation 11)
 - Specified "Schedule 1" practice, that is, 1-10, 12-27 and 29-31
- 7.28 There is a statutory "due diligence" defence under regulation 17, that is, if the business can prove that the commission of the offence was due to, for example a mistake or reliance on information supplied to it by another person. There is also an "innocent publication" defence under regulation 18.
- 7.29 The OFT has a separate set of investigation powers under the CPR, including powers to enter premises and inspect goods and documents. These are broadly similar to powers under the EA02, and there is a similar offence to obstruct an enforcement officer acting under the CPR. This offence also extends to intentionally failing to comply with an information requirement made under the CPR, and failing to give an enforcement officer such assistance or information that is reasonably required. More information on these powers can be found in the BIS/OFT CPRs Guidance²⁹.
- 7.30 If found guilty of an offence, a business would be liable:
- On summary conviction, to a fine not exceeding the statutory maximum;
 - On conviction on indictment, to a fine or imprisonment not exceeding 2 years or both.
- 7.31 CAA has recently published its consumer enforcement guidance which sets out its approach to enforcement³⁰. The OFT has published a Statement of Enforcement Principles³¹ which plays a similar role.

²⁸ http://www.of.gov.uk/shared_of/policy/OFT1273.pdf

²⁹ http://www.of.gov.uk/shared_of/business_leaflets/cpregs/oft1008.pdf

³⁰ http://www.caa.co.uk/docs/2516/ConsumerEnforcementStrategy_Final.pdf

³¹ http://www.of.gov.uk/shared_of/reports/consumer_protection/oft964.pdf