

Consumer Protection from Unfair Trading Regulations 2008

Advice:am
June 2008



CMARs

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Misleading

Comparative

CMARs

Misleading:

“For the purposes of these Regulations an advertisement is misleading if in any way, including its presentation, it deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and if, by reason of its deceptive nature, it is likely to affect their economic behaviour or, for those reasons, injures or is likely to injure a competitor of the person whose interests the advertisement seeks to promote.”

CMARs

Misleading:

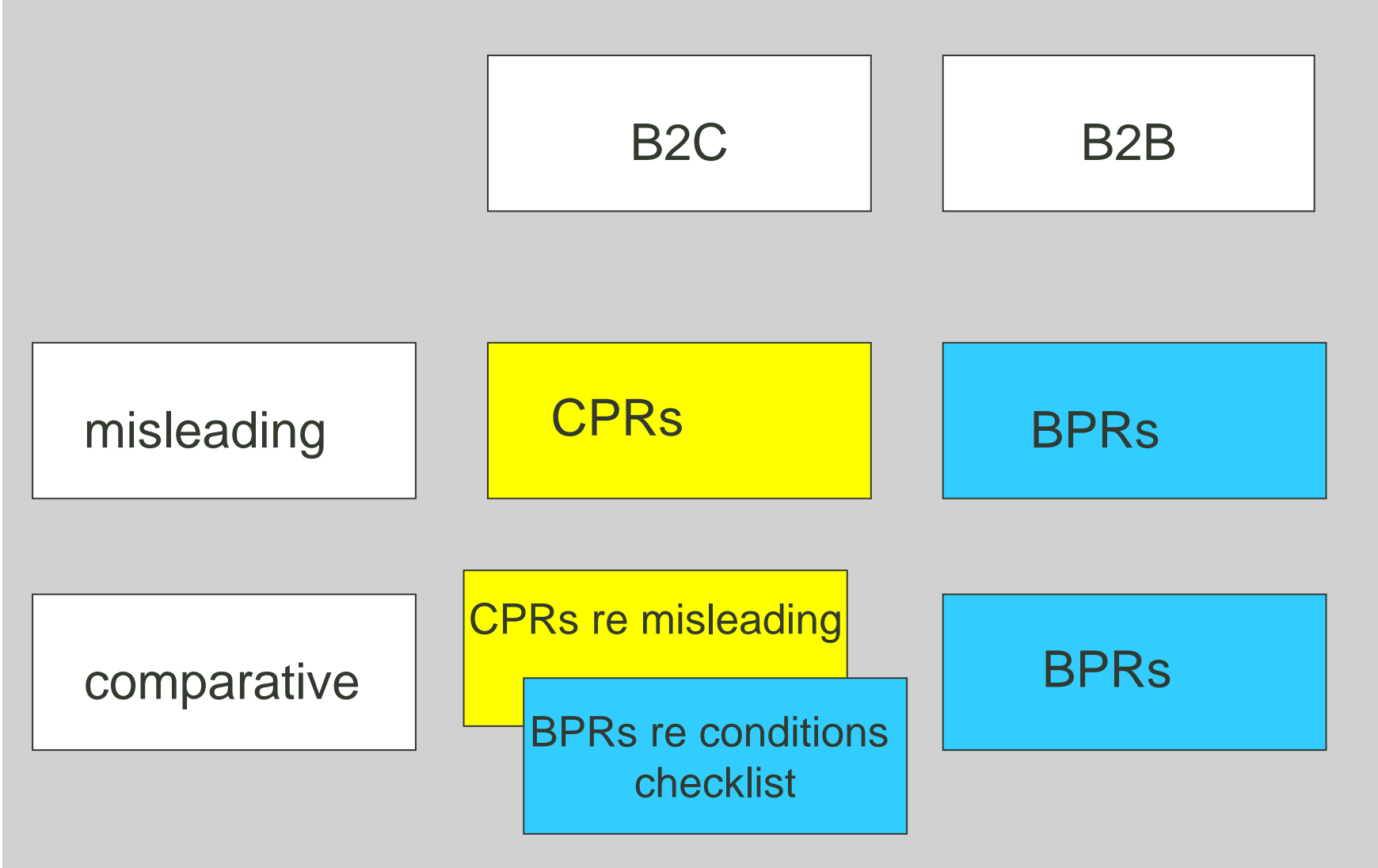
“For the purposes of these Regulations an advertisement is misleading if in any way, including its presentation, it deceives or is **likely to deceive** the persons to whom it is addressed or whom it reaches and if, by reason of its deceptive nature, it is **likely to affect their economic behaviour or**, for those reasons, injures or is **likely to injure a competitor** of the person whose interests the advertisement seeks to promote.”

CMARs

A comparative advertisement shall, as far as the comparison is concerned, be permitted only when the following conditions are met: -

- (a) it is not misleading;
- (b) it compares goods or services meeting the same needs or intended for the same purpose;
- (c) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;
- (d) it does not create confusion in the market place between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor;
- (e) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor;
- (f) for products with designation of origin, it relates in each case to products with the same designation;
- (g) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;
- (h) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name.





CPRs: general

Scope

- commercial practice

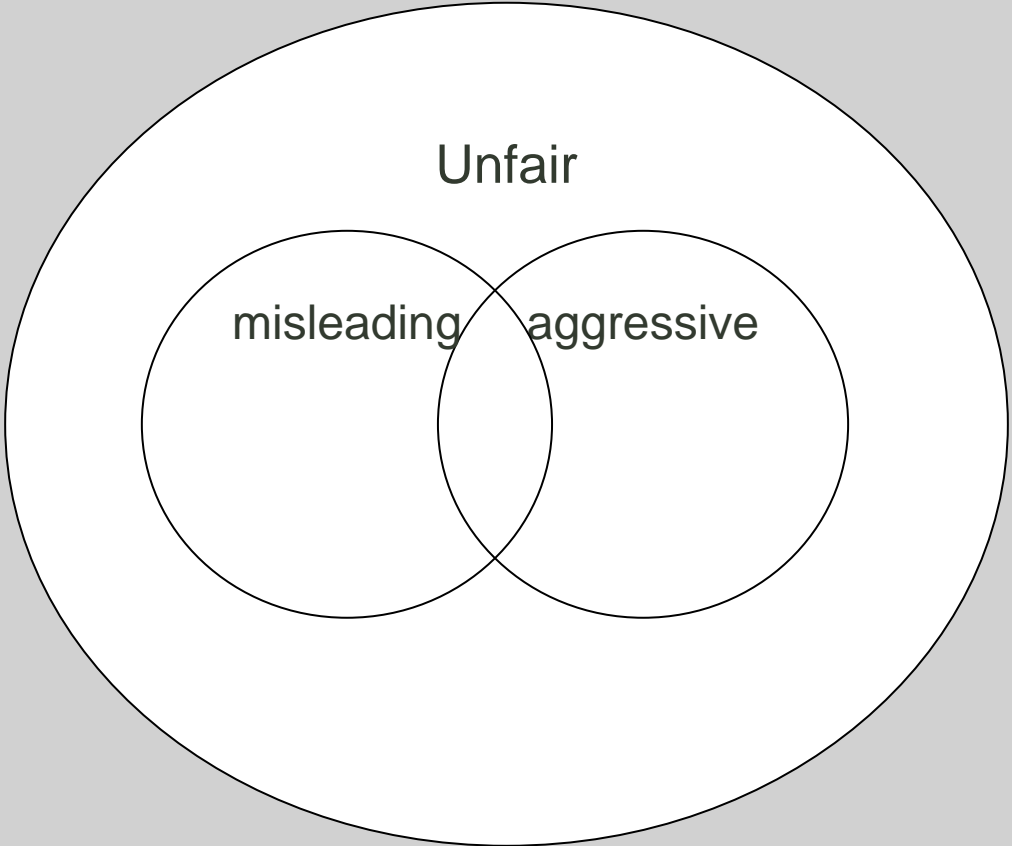
“any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product.”

- product

“any goods or service and includes immoveable property, rights and obligations.”

Scope

- outside Scope (see Directive recitals)
 - B to B
 - mere puffing
 - taste and decency (e.g. street solicitation)
 - health and safety
 - non-commercial advertisements (e.g. charities, causes)



Average consumers

- Default: consider the likely effect of the ad from the point of view of the average consumer whom it reaches or to whom it is addressed
- If it directed at a particular group of consumers, consider the likely effect from the point of view of that group
- If it is likely to be affect only a clearly identifiable group that is particularly vulnerable to the practice or product because of mental or physical infirmity, age or credulity in a way that the trader could reasonably be expected to foresee, consider from the point of view of the average member of that group.

Transactional decision

Any decision taken by a consumer whether to act or to refrain from acting concerning

- whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or
- whether, how and on what terms to exercise a contractual right in relation to a product

Misleading (action)

A commercial practice is a misleading action if it

- contains false information and is therefore untruthful (in relation to any of the listed matters) **or** if it or its overall presentation in any way deceives or is **likely to deceive** the average consumer (in relation to any of the listed matters), even if the information is factually correct; **and**
- it causes or is likely to cause the average consumer to take a **transactional decision** he would not have taken otherwise.

Misleading (action)

- the main characteristics of the goods or services, including
 - availability
 - benefits
 - risks
 - execution
 - composition
 - accessories
 - after-sales customer service
 - complaint handling
 - method and date of manufacture
 - method and date of provision
 - delivery
 - fitness for purpose
 - usage
 - quantity
 - specification
 - geographical origin
 - commercial origin
 - results to be expected from use
 - results and material features of tests or checks carried out
- the existence of the goods or services
- the nature of the goods or services
- the price or manner in which the price is calculated
- the existence of a [specific] price advantage
- the need for servicing, parts, repair or replacement
- the nature, attributes and rights of the trader or agent, including
 - identity
 - assets
 - qualifications
 - status
 - approval
 - affiliation or connection
 - ownership of industrial, commercial or intellectual property rights
 - awards and distinctions
- the consumer's rights, including the right to replacement or reimbursement under the Sale and Supply of Goods to Consumers Regulations 2000
- the risks the consumer may face

Misleading (omission)

Misleading to

- **omit** or hide material information **or** provide it in an unclear, unintelligible, ambiguous or untimely manner **or** fail to identify commercial intent **and**
- cause a consumer to take a **transactional decision** he would not have taken otherwise.

Material information:

- Information that consumers need, according to the context, to take an informed transactional decision
- Information required by EU legislation

Aggressive

A commercial practice is aggressive if

- the use of harassment, coercion or undue influence is likely significantly to **impair the average consumer's freedom of choice** or conduct and
- it thereby causes or is likely to cause him to take a **transactional decision** he would not have taken otherwise.

Unfair

A commercial practice is unfair if it

- contravenes the requirements of **professional diligence**; **and**
- is likely to materially distort the **economic behaviour** of the average consumer

To materially distort economic behaviour: “to appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise”

	<i>Unfair</i>	<i>Misleading</i>		<i>Aggressive</i>	<i>Specific practices</i>
Conduct	Contrary to the requirements of professional diligence	False or deceptive statement or presentation in relation to a specific list of key factors	Omission of material information	Aggressive practice by harassment, coercion or undue influence	One of 31 specified practices
Effect	AND (Likely to) appreciably impair the average consumer's ability to make an informed decision			AND (Likely to) significantly impair the average consumer's freedom of choice or conduct	NOT APPLICABLE (No impairment or transactional decision tests needed)
	AND (Likely to) cause the average consumer to take a transactional decision they would not have taken otherwise				

Codes

General CPRs prohibitions on

- Misleading by action
- Misleading by omission
- Aggressive practices
- Unfair practices

are to be explained in an appendix at the end of each Code

CPRs: Invitation to Purchase



Invitation to purchase

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

Advertisements must not omit material information if that omission or presentation is likely to affect consumers' decisions about whether and how to buy the advertised product, unless the information is obvious from the context or the advertisement is limited by time or space and the advertiser takes steps to make that information available to consumers by other means.

For advertisements that quote prices for advertised products, material information includes:

- the main characteristics of the product
- the identity of the marketer and any other trader on whose behalf the advertiser is acting
- the geographic address of the advertiser
- the price of the advertised product, including taxes
- delivery charges
- the arrangement for payment, delivery, performance or complaint handling, if those differ from the arrangements that consumers are likely to reasonably expect
- that consumers have the right to withdraw or cancel, if they have that right.

CPRs: Blacklist

Advertisements must not falsely claim that the advertiser, or other entity referred to in the advertisement, is a signatory to a code of conduct. They must not falsely claim that a code of conduct has an endorsement from a public or other body.

Advertisements must not display a trust mark, quality mark or equivalent without the necessary authorisation and must not claim that the advertiser (or any other entity referred to in the advertisement) has been approved, endorsed or authorised by a public or private body if it has not or without complying with the terms of the approval, endorsement or authorisation.



Advertisements must state any reasonable grounds the advertisers might have for believing that they might not be able to supply the advertised or an equivalent product at the advertised price, for a reasonable period and in reasonable quantities.

Marketers must not [licensees must be satisfied that the advertisers will not] use the technique of switch selling, where their sales staff refuse to show the advertised product, refuse to take orders for it or to deliver it within a reasonable time, or demonstrate a defective sample of it, in order to promote a different product.



If an advertisement in a language other than English offers after-sales service, licensees must be satisfied that the advertiser will [marketers must] tell consumers, before a contract is concluded, if the after-sales service is not available in the language of the advertisement.

Advertisements must not state or otherwise create the impression that a product can legally be sold if it cannot.

Advertisements must not present rights given to consumers in law as distinctive features of the advertisers' offer.



Advertisements must not mislead about the nature or extent of the risk to the personal security of consumers or their families if consumers do not buy the advertised product.

Advertisements must not mislead consumers about who manufactures the product.

Advertisements must not promote pyramid promotional schemes.

- *Pyramid schemes are those under which consumers give consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme, not the sale or consumption of products.*



Advertisements must not falsely claim that the advertiser is about to cease trading or move premises. They must not falsely state that a product, or the terms on which it is offered, will be available only for a very limited time in order to deprive consumers of the time or opportunity to make an informed choice.

Advertisements must not claim that products or services can facilitate winning in games of chance.



Advertisements must not pass on misleading information to consumers about market conditions or the possibility of finding the product elsewhere in order to induce consumers to buy the product at conditions less favourable than normal market conditions.

Marketers should award the prizes as described in their marketing communications or reasonable equivalents.

TV Code

(a) Advertisements must not describe an offer as 'free', or similar, if there are costs to consumers other than actual postage or carriage, non-premium rate telephone charges or reasonable travel required to collect the offer. Advertising must make clear the extent of the consumer's liability for any costs

b) No element of an offer may be described as 'free' if viewers are likely to be misled as to whether it is genuinely additional to the offer

Radio Code

Advertisements must not describe products or samples as 'free', or similar, unless they are supplied at no cost or no extra cost (other than postage or carriage) to the recipient.



CAP Code

Consumers' liability for costs should be made clear in all material featuring the offer. An offer should be described as free only if consumers pay no more than:

- a the minimum, unavoidable cost of responding to the promotion, eg the current public rates of postage, the cost of telephoning up to and including the national rate or the minimum, unavoidable cost of sending an e-mail or SMS text message
- b the true cost of freight or delivery
- c the cost, including incidental expenses, of any travel involved if consumers collect the offer.

Promoters should not charge for packing, handling or administration.

32.2 Promoters must not try to recover their costs by reducing the quality or composition or by inflating the price of any product that must be bought as a pre-condition of obtaining the free item.

32.3 Promoters should not describe an individual element of a package as "free" if the cost of that element is included in the package price.

32.4 Promoters should not use the term "free trial" to describe "satisfaction or your money back" offers, "buy one get one free" offers or other offers where a non-refundable purchase is required. If appropriate, promoters should provide a cash refund, postal order or personal cheque promptly to free trial participants.



Marketers must not falsely imply that consumers have already ordered the marketed product by including in marketing material an invoice or similar document that seeks payment.

Advertisements must not create a false impression that the advertisers are acting as consumers or for purposes that do not relate to their trade, business, craft or profession.

Advertisements must not falsely claim or imply that after-sales service is available in an EU member state other than the one where the advertised product is sold.

Marketers should not make persistent and unwanted solicitations by telephone, fax, e-mail or other remote media.

Marketing communications addressed to or targeted at children:
[...] should not make a direct appeal to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.

Marketers should not ask consumers to pay for or return unsolicited products, except for substitute products supplied in conformity with clauses 30.4 and 42.5a.



Advertisements must not explicitly claim that, if consumers do not buy the advertised product or service, the advertiser's job or livelihood will be jeopardised.

Marketers should not falsely claim or imply that the consumer has already won, will win, or will on doing a particular act win a prize (or other equivalent benefit) if the consumer must incur a cost to claim the prize (or other equivalent benefit) or if the prize (or other equivalent benefit) does not exist.

Maintained rules

- Separation of advertising and editorial
- Falsely claiming that a product is able to cure illnesses, dysfunction or malformations.
- TV and Radio Code prohibitions on direct exhortation to children

Outside ASA remit

- Creating the impression that the consumer cannot leave the premises until a contract is formed.
- Conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return except in circumstances and to the extent justified, under national law, to enforce a contractual obligation.
- Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights.

Consultation

TV and Radio Codes

- Consultation closes 22 July
- To take effect early autumn

CAP Code

- Published 24 June
- Takes immediate effect

www.cap.org.uk



Guidance on ads

- TV Ads: Clearcast (formerly the BACC):
<http://www.clearcast.co.uk/clearcast>
- Radio Ads: Radio Advertising Clearance Centre (RACC):
<http://www.radiocentre.org/radioCentre/>
- Non-broadcast Ads: CAP Copy Advice
www.cap.org.uk; copyadvice@cap.org.uk.



Other resources

- BERR Pricing Practices Guide:
<http://www.berr.gov.uk/consumers/buying-selling/Adprice/Price-indications/page8174.html>
- OFT interim guidance:
http://www.oft.gov.uk/shared_oft/business_leaflets/530162/oft931int.pdf

Questions?

