



# Consultation on the Draft Pricing Practices Guide

October 2015

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## FOREWORD

This proposed guidance will replace the Pricing Practices Guide published by BIS in November 2010<sup>1</sup>.

There was concern that the text of the previous guidance was sometimes interpreted without reference to existing legal obligations. We have sought in our proposed guidance to be very clear about what the law requires.

Consumer protection law, like much of EU law, is principles-based and requires business to self-assess and comply. Ignorance of the law is no defence. While the previous guidance was very helpful at a time of transition, when businesses were unsure how the new law would operate, we have now reached a point where there is general understanding of the principles.

Consumers lead busy lives and are subject to an increasingly wide range of products, product options and sophisticated marketing. Businesses have the responsibility to ensure that any information presented to consumers in relation to their products, especially in relation to price, that attempts to affect their transactional decision is clear, accurate and meaningful.

This proposed guidance will not provide prescriptive rules. In preparing this guidance we have renewed the focus on the legal requirement not to trade unfairly. We have removed mention of certain specific rules that the previous document had retained from earlier works as these could, in certain circumstances, have provided the appearance of safe harbours which the law does not provide. The previous indication of a 28 day minimum period for establishment of a 'genuine price' has thus been removed. While a reference price is more likely to be real if it is applicable for a long time, the law provides that business behaviour will be considered in its own particular context without saying how long a price must be offered in order to be a genuine reference price. Therefore we have reservations about the view that adoption of a one to one equivalence in days between high and low prices for a particular product alone is always consistent with compliance. Other factors are relevant too, as we discuss in Section 2.

We have taken account of a range of research that has been conducted into consumer behaviour most notably that commissioned by the Office of Fair Trading and published in its study of Advertising of Prices<sup>2</sup>. This research found that consumers can be misled by reference prices, and we have given particularly careful thought to our guidance on how to help businesses to ensure such prices are genuine and not misleading.

We have also taken account of the content of the Which? supercomplaint on misleading and opaque pricing practices in the grocery market, submitted to the Competition and Markets Authority (CMA) in April 2015. The proposed guidance incorporates the recommendations made by the CMA in their response to Which? in July 2015.

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<sup>1</sup> "Pricing Practices Guide – Guidance for Traders on good practice in giving information about prices"

<sup>2</sup> OFT 1291, published in December 2010.

The guidance needs to strike a balance between calls for a more prescriptive and prohibitive approach (which goes against the permissive principle-based nature of the legislation) and the more achievable objective of clarifying how we believe the legislation applies to certain promotional practices.

The proposed Guidance will encourage businesses to review all pricing practices and reassess their fairness. This should not only help to ensure strict compliance with the law where it is prescriptive (under the Consumer Protection from Unfair Trading Regulations 2008 and the Price Marking Order 2004) but also offers an opportunity to think about good practices in the presentation of information so that consumers make well-informed choices.

We have stressed the need for businesses to take a holistic approach to self-assessment. Businesses should seek advice if they are unsure what the law expects of them.

We have included indicative examples to illustrate how we believe the principles apply in relation to a range of pricing practices but we want to be clear that these examples are not intended to become prescriptive new rules. We have therefore consciously chosen to call these examples of behaviours that are more likely to comply, and less likely to comply because everything can turn on the facts of a particular case. These examples will be amended and updated from time to time to ensure the guidance remains relevant. We encourage businesses to ensure they regularly check they are using the current version of this guidance.

A number of bodies are responsible for investigation and enforcement of consumer protection regulations in the UK. We have consulted widely with these bodies during our review of the Pricing Practices Guide including the Competition and Markets Authority, the Trading Standards Service and other bodies with an interest in ensuring consistent enforcement of the legislation. We have also consulted with other stakeholders including businesses, the British Retail Consortium, the Committee of Advertising Practice and Which?

A handwritten signature in black ink, appearing to read 'Livermore', with a stylized circular mark to the left.

**Leon Livermore**  
**Chief Executive**  
**Chartered Trading Standards Institute**



## INTRODUCTION

This guidance has been produced by the Chartered Trading Standards Institute (CTSI) at the request of the Department for Business Innovation and Skills (BIS) and the Consumer Protection Partnership<sup>3</sup>. It provides an overview of UK and EU consumer protection laws relating to pricing and associated practices for businesses. All businesses **must** comply with these laws when they sell any goods or provide any commercial services to a consumer<sup>4</sup> within the United Kingdom.<sup>5</sup> If you follow this guidance you are more likely to meet the standards of special skill and care that you are expected to exercise towards consumers and therefore comply with the legislation. This guidance has a limited focus. It does not cover all of the other laws that apply to businesses, nor does it cover business to business transactions.

We have provided some straightforward advice in a short section (Quick Guide to Pricing Practices on Pages 9 & 10) which should be particularly helpful to small and medium sized enterprises (SMEs). This section also aims to provide a checklist as to whether to refer to our more detailed guidance on particular pricing practices.

The law requires businesses to trade fairly, act with professional diligence<sup>6</sup> in all of their dealings with consumers and in accordance with honest market practice and good faith. You are required to ensure that you provide information that is not false or misleading in what it says, how it says it, or that it fails to say what ought to be said. Consumers must be able to trust the information you provide about your goods and services and must be able to make fair comparisons between you and other businesses in your sector.

Businesses who trade fairly can expect to generate loyal consumers who bring repeat purchases over many years. Businesses who take a responsible approach based on transparent and honest pricing practices enable consumers to make truly informed choices and obtain best value. Those who do not can expect to have to deal with complaints and may face criminal and civil investigation, risk damage to their reputation and financial penalties.

This guidance provides examples of good practice to assist fair-dealing businesses in assessing their pricing practices. It indicates, with examples, behaviours which are generally likely to comply with the law, as well as providing examples of behaviours which are less likely to comply.

Only a court can determine whether a business has breached the law in a specific case and we have included examples of relevant UK and EU case law. We have also included examples of rulings made by the Advertising Standards Authority (ASA) and the Committee on Advertising Practice (CAP) under their self-regulatory regime.

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<sup>3</sup> The CPP was formed in April 2012. More information at [www.gov.uk/government/publications/consumer-protection-partnership-priorities-2014-to-2015](http://www.gov.uk/government/publications/consumer-protection-partnership-priorities-2014-to-2015)

<sup>4</sup> Any individual who in relation to a commercial practice is acting for purposes which are outside his business.

<sup>5</sup> Anyone who regularly sells, or re-sells products or services is likely to be regarded as a business. UK law applies to websites located outside the UK if they are offering products or services for sale to UK consumers.

<sup>6</sup> The standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either (a) honest market practice in the trader's field of activity or (b) the general principle of good faith in the trader's field of activity

## Summary of Relevant Legislation.

The Consumer Protection from Unfair Trading Regulations 2008 (referred to in this guidance as ‘the regulations’) Regulation (3)(3) prohibits businesses from engaging in unfair commercial practices where the practice contravenes the requirements of professional diligence and it materially distorts the economic behaviour of the average consumer. In broad terms, commercial practices are actions or omissions by a business directly connected with the supply of products and services to consumers.

The giving of information in relation to prices is one form of commercial practice. A commercial practice may be unfair even if the information is factually correct but its overall presentation is likely to deceive the average consumer. Where any such action or omission would cause, or be likely to cause, the average consumer to take a different transactional decision:-

- Regulation 5(4)(g) prohibits businesses from misleading consumers about the price of a product, or the manner in which the price is calculated;
- Regulation 5(4)(h) prohibits businesses from misleading consumers as to the existence of a specific price advantage;
- Regulations 6(4)(d) and (e) prohibits the omission of information on the price or on any related charges including taxes, delivery and postal charges, unless these are already apparent from the context.

Words and expressions used in this document are explained below

(definitions are based upon those within the Consumer Protection from Unfair Trading Regulations 2008)

<b>Consumer</b>	Means any individual who in relation to a commercial practice is acting for purposes which are outside of his business
<b>Average Consumer</b>	Reasonably well informed, reasonably observant and circumspect consumer that the practice is addressed to or may reach. This definition is modified if the commercial practice is directed towards a specific group of consumers, or if a clearly identifiable group of consumers is particularly vulnerable to the commercial practice
<b>Transactional Decision</b>	Means any decision taken by a consumer whether it is to act or refrain from acting concerning:-  (a) whether, how and on what terms to purchase, make payment in whole or part for, retain or dispose of a product; or  (b) whether, how and on what terms to exercise a contractual right in relation to a product <sup>7</sup>
<b>Product</b>	Means any goods or services and includes immovable property, rights and obligations

<sup>7</sup> Trento Sviluppo srl and another v Autorita Garante della Concorrenza e del Mercato ECJ 2013 – EU Case – definition of ‘transactional decision’ see Pg 34

<b>Professional Diligence</b>	The standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either (a) honest market practice in the trader's field of activity or (b) the general principle of good faith in the trader's field of activity
<b>Invitation to purchase</b>	Any commercial communication that contains the characteristics of the product and the price in a manner that enables the consumer to make a purchase
<b>Misleading action</b>	A commercial practice is a misleading action if it contains false information or if its overall presentation deceives or is likely to deceive and it causes the average consumer to take a transactional decision he would not have taken otherwise.
<b>Misleading omission</b>	A commercial practice is a misleading omission if it omits or hides material information or provides material information in a manner which is unclear, unintelligible, ambiguous or untimely and it causes the average consumer to take a transactional decision he would not have taken otherwise.
<b>Material information</b>	The information which the average consumer needs, according to the context, to take an informed transactional decision.

### **OFT Supermarket Pricing Principles**

In November 2012 the Office of Fair Trading and eight supermarkets agreed a set of principles to address concerns over special offers and promotions for food and drink. The principles are applicable to food and drink (alcoholic and non-alcoholic) for human consumption off the retail premises. The document sets out some general principles regarding compliance with the regulations and gives some good and bad examples in relation to the specific practice of internal reference pricing. While the principles are part of an agreement with these supermarkets they are relevant and useful to other retailers who should review their practices against them.

The Competition and Markets Authority Board has adopted the principles that were originally published by its predecessor, the Office of Fair Trading (OFT). The original text has been retained unamended, therefore it does not reflect or take account of developments in case law, legislation or practice since its original publication.

These principles are reflected in this guidance.

**Questions**

- Q1a Is the introduction sufficiently clear in explaining that this guidance is addressed to businesses?
- Q1b Does it provide sufficient information to explain what the guidance does and does not cover?



## Evaluation of your Pricing Practice considering Reasonable Consumer Expectations

The *average consumer* is described in the regulations as “reasonably well informed, reasonably observant and circumspect”. However even well-informed, observant and cautious consumers can be misled by any pricing practice that contains misleading information or omits information that would have allowed them to make an informed transactional decision.

Consumers should be able to trust the information that you give them and any implication made therein.

Remember, consumer behaviour may differ according to how often they shop for particular products. A pricing practice may be clear and easily understood by a regular shopper but may not be sufficiently clear for an occasional or first time purchaser to make an informed transactional decision.

Your price promotion must not exploit the credulity, loyalty, vulnerability or lack of experience of any consumer that it is targeted at or may reach. You need to take special care if you are targeting a price promotion at particular groups of consumers who may be vulnerable, for example on the grounds of age, credulity, mental or physical infirmity. Such consumers may be particularly vulnerable to the practice or product and you have a legal obligation to ensure that the economic behaviour of that group is not materially distorted.

Before using any pricing practice you must take account of its likely impact on the transactional decision making process of the *average consumer* that your product or promotion targets or may reach.

- a. Is any of the information included or made reference to false?
- b. Is any information that is material to your consumer’s understanding of the promotion omitted, unclear or given in an ambiguous, unintelligible or untimely manner?
- c. Is the pricing practice likely to mislead because it is unfair or has the potential to deceive?
- d. Is there anything that you know about the promotion that if the consumer knew would make them take a different transactional decision?

If following an honest assessment of your pricing practice the answer to all of the above questions is “No” then your pricing practice is likely to comply with the principles of the regulations.

If any of your answers are “Yes”, or if you have any doubts, you must amend your pricing practice to ensure that the consumer targeted by your pricing practice can make a well informed transactional decision.

### Questions

- Q2a Does this section provide businesses with a clear test to apply to their pricing practices?
- Q2b Do you agree that the test and definitions are an accurate reflection of the law?
- Q2c Does the guidance help businesses to understand how to frame their price promotions a) when they are addressed to or are only likely to reach the average consumer and b) when they are aimed at or likely to reach specific groups that are not the average consumer?

## The Quick Guide to Pricing Practices

This section sets out some simple bullet points that if followed will ensure that the pricing practice used is more likely to be compliant. Where shown the advice is derived from legislation.

- **Do** indicate the selling price of all products offered for sale to consumers<sup>8</sup>;
- **Do** include VAT in the price of all products for sale to consumers<sup>9</sup>;
- **Do** ensure that your prices are as complete as possible including all non-optional fees and charges<sup>10</sup>;
- **Do** highlight any non-optional fees payable that cannot be immediately calculated e.g. “delivery charges payable” and indicate where this will vary, for example, according to items ordered and destination address<sup>11</sup>;
- **Do not** advertise products at a specific price if you have reason to believe that those products will not be available at that price for a reasonable period without making this clear in the promotion e.g. “*When it’s gone, it’s gone*”<sup>12</sup>
- **Do not** advertise products at a specific price but then either refuse to take orders, refuse to agree to deliver the product or demonstrate a defective sample with the intention of switching to a different product;<sup>13</sup>
- **Do not** falsely state that a product will only be available at a particular price for a limited amount of time in order to persuade the consumer to make an immediate decision and deny them the opportunity to make an informed choice;<sup>14</sup>
- **Do not** claim that your prices are reduced for a Closing Down Sale when you are not closing down or are just relocating;<sup>15</sup>
- **Do not** claim that your prices are reduced for a Relocation Sale unless you are relocating;<sup>16</sup>

<sup>8</sup> Price Marking Order 2004 Article 4 <http://www.businesscompanion.info/en/quick-guides/pricing-and-payment/price-marking-of-goods-for-retail-sale>

<sup>9</sup> Price Marking Order 2004 Article 4

<sup>10</sup> Consumer Protection from Unfair Trading Regulations 2008 Regulation 6

<sup>11</sup> Consumer Protection from Unfair Trading Regulations 2008 Regulation 6

<sup>12</sup> Consumer Protection from Unfair Trading Regulations 2008 Schedule 1 Banned Practice 5 (Bait Advertising)

<sup>13</sup> Consumer Protection from Unfair Trading Regulations 2008 Schedule 1 Banned Practice 6 (Bait & Switch Advertising)

<sup>14</sup> Consumer Protection from Unfair Trading Regulations 2008 Schedule 1 Banned Practice 7

<sup>15</sup> Consumer Protection from Unfair Trading Regulations 2008 Schedule 1 Banned Practice 15

<sup>16</sup> Consumer Protection from Unfair Trading Regulations 2008 Schedule 1 Banned Practice 15

- **Do not** describe a product as ‘free’ or similar if the consumer has to pay any more than the unavoidable cost of responding to your offer, collecting the product or paying for delivery; <sup>17</sup>
- **Do not** use statements such as ‘All’ or ‘Everything’ unless the pricing claim associated with the statement applies to all of the products described and/or everything in store/in that category e.g. “All boots 10% off” or “Everything in our Winter Catalogue Half Price”;
- **Do not** use a Recommended Retail Price (RRP), or similar, as a basis of comparison that is false or which differs significantly from the price at which the product is generally sold. You should not use an RRP or similar for products that only you supply. (See Page 22 for more guidance regarding the use of RRP)
- **Do** remember that perishable products e.g. food near to its “Best Before” or “Use by” dates or products that are deteriorating e.g. plants can be reduced in price without referring to the guidance at in Section 2 (Page 19)
- **Do not** use an artificially manipulated higher price to claim a saving. (See Page 19 for more guidance regarding the use of higher reference prices)
- **Do** always include the higher price when claiming or implying a reduction i.e. *Sale £3 Was £5*
- **Do** show unit prices where required<sup>18</sup>. However if you are offering a short term discount by way of a general notice in your store (e.g. 15% off everything in store this weekend) it is not necessary to adjust your individual unit price on the shelf edge label for the duration of the offer provided that the details of your offer are prominently displayed, unambiguous, easily identifiable and clearly legible.<sup>19</sup>

## Questions

Q3a Do you agree that this section provides a useful checklist for small businesses?

Q3b The text has been written to be applicable to all sectors and pricing practices. Are there any sectors for whom the text is not fit for purpose? Are there any practices for which the text is not fit for purpose?

Q3c Are there any further points about pricing practices that should be added to this list for SMEs?

<sup>17</sup> Consumer Protection from Unfair Trading Regulations 2008 Schedule 1 Banned Practice 20

<sup>18</sup> Price Marking Order 2004

<sup>19</sup> Price Marking Order 2004 Article 9

## 1. Price Promotions

The Consumer Protection from Unfair Trading Regulations 2008 is the primary piece of legislation that regulates pricing practices. It is principles based – it therefore does not provide detailed rules about how best to present your promotion to ensure that it is clear and fair to the consumer (subject to the banned practices mentioned in the Quick Guide to Pricing Practices). The regulations set out a number of principles that your business needs to comply with when creating a promotional strategy and running price promotions.

Businesses must consider whether their pricing practice is fair and transparent to consumers, enabling them to make informed transactional decisions. This guidance is intended to help with that process.

It is possible for you to offer goods and services for sale without price promotions. However if you do wish to promote your products by making claims in relation to price that are straightforward and can be easily understood by consumers at first glance, it is likely that you will need to spend little time and effort assessing the ease of interpretation and impact on the consumer.

But if you wish to do something more complex – a more complicated price promotion - or if the scope of your promotion will be wide, for example if it's a national campaign or you are a multi-site retailer, there are conditions the consumer needs to meet to qualify for the offer, or a combination of these, you must take more care when devising and advertising your offer. Consumers should be able to have confidence that they can rely on the information that you provide when making their transactional decisions.

### 1.1. Is your pricing practice fair?

The business needs to focus on the overriding principles in the regulations.

- Is the price comparison fair?
- Does the promotion or price comparison contain false information about the price or the price advantage that the consumer will get from the offer?
- Does the overall presentation of the price comparison deceive or is it likely to deceive even though the information is factually accurate?
- Have you left out any crucial information that the consumer needs to understand how the offer works and that will allow them to make a fully informed transactional decision?
- Have you omitted any information that if the consumer knew they might make a different transactional decision?
- If you have given additional information to explain the promotion in smaller text or as a footnote, is it clear, legible, unambiguous and timely? Will the consumer understand it? Can the consumer easily find it? Is it bold, precise and compelling? (See Pages 17-18 for more guidance if you wish to use small print to explain your pricing practice)

### Getting it wrong could:-

- Lead consumers to purchase a product at a higher price than they would have done otherwise;
- Persuade consumers to purchase a product when they would not have done so at all;
- Make consumers less likely to shop around;
- Create an illusion of savings that don't exist or are greater than they really are;
- Generate confusion amongst consumers – they will take up your time asking about the offer and challenging you if they think it's not clear, or they will walk away;
- Generate adverse publicity if consumers share their stories through the media or social media regarding the offers;
- **Attract the interest of enforcement bodies and if the matter is serious enough lead to enforcement action, fines and negative media exposure.**

#### 1.1.1. Are you behaving with professional diligence?

The regulations contain the requirement that you should behave with professional diligence<sup>20</sup>. You are expected to formulate pricing practices using your experience and knowledge of your sector in accordance with honest market practice or the general principles of good faith within your field of activity. Enforcers will take account of wider practices by fair dealing businesses in your sector in deciding whether a particular trading practice may be unfair.

This does not mean that any unfair pricing practices in a particular sector are condoned, but that particular attention will be given to any business that appears to treat consumers unfairly (for example by using misleading practices, false information, information that was likely to deceive, or omitting material information) compared to those that set out to use fair and honest commercial practices consistent with the sector they operate in.

#### 1.1.2. Assessing the impact of the price promotion on the average consumer

The principles based nature of the regulations sets out broad concepts, requiring that consumers must be treated fairly. So from the outset you have the responsibility of deciding when presenting price promotions what is “fair” and what is “unfair”.

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<sup>20</sup> Consumer Protection from Unfair Trading Regulations 2 (1) “professional diligence” means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either (a) honest market practice in the trader’s field of activity or (b) the general principle of good faith in the trader’s field of activity

Consider:-

Who is this promotion aimed at?

What will they think it means?

Does that differ from reality?

Is there anything about the price promotion that if the consumer knew they would make a different transactional decision?

Your pricing practice is unfair if it causes the consumer to make a different transactional decision than they would have otherwise made if given the relevant facts and circumstances. Make this the starting point for your assessment of your proposed pricing practice – would it influence the consumer's transactional decision based on false or incomplete information?

- Will the consumer understand the offer that is being made?
- Would the consumer have visited your store if they had known what was actually on offer?
- Will they regret their purchase (or their decision not to purchase) and feel they have been misled?
- Does the pricing practice fully explain the nature of the offer being made, any terms and conditions and any other material information that the consumer will need to make an informed transactional decision?
- Will the consumer be able to trust and validate the information that you are giving them about third parties e.g. if you are comparing yourself to a competitor?

The pricing practice must be fair, there can be no false information about price, how the price is calculated, any additional charges or any price advantage claimed. If the price promotion contains any misleading statements, false information, information that is likely to deceive, or if material information was omitted or given in an unclear, unintelligible, ambiguous or untimely manner an offence under the regulations may have been committed.

If the consumer is not given the relevant facts of the price promotion then they must make assumptions or trust the information given and if their assumptions are wrong or the information is false this can lead them to take a transactional decision that they would not otherwise have taken.

The effect of the pricing practice must be assessed on the impact it will have on the behaviour of the average consumer. The average consumer is defined in the regulations as reasonably well informed, reasonably observant and circumspect.<sup>21</sup>

However there are two situations where this definition must be modified:-

- If the practice is directed at a specific group of consumers (for example a targeted email or an advert in a specialist publication) then the assessment of the average consumer is based on the average member of that targeted group
- If your price promotion may reach and influence specific groups of people whose level of understanding may be different, for example children or the elderly.

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<sup>21</sup> Consumer Protection from Unfair Trading Regulations 2008 Regulation 2(2)

You must consider how your promotion will be perceived by these consumers. If you are targeting a group of consumers that are particularly vulnerable to the pricing practice e.g. children, then additional care must be taken in the compiling of your promotion. Your price promotion must not exploit the credulity, loyalty, vulnerability or lack of experience of any consumer that it is targeting at or may reach.

### **1.1.3. Misleading Actions - Does your price promotion contain false information about the price or the price advantage that the consumer will get from the offer?**

Price promotions must not contain false information. The regulations refer to false information about “*price or the manner in which price is calculated*” or “*the existence of a specific price advantage*”.

For example this prohibits situations where:-

- A product is advertised at a price that does not exist i.e. the product is not available at the stated price;
- A current price is compared to a reference price that is not genuine (See Page 19 for more guidance regarding the use of reference prices)
- You refer to a higher price that is not your price nor has it ever been charged elsewhere (i.e. it is falsely presented as a competitor’s price or a manufacturer’s recommended retail price)
- The existence of a non optional charge, how much it will be or how it will be calculated is not mentioned;
- A claim is made of a discount (e.g. *10% off all Main Courses – discount will be made at the till*) but the price paid by the consumer is not adjusted accordingly;
- A situation where the extent of the offer is overstated, where the message is inclusive e.g. *10% off all package holidays booked before end September 2015*, but not all products as stated are included in the offer.
- The pack states ‘Larger Pack - Better Value’ care should be taken to ensure that any such offer is not made to be unfair by better value being offered on the same product elsewhere in your business.<sup>22</sup>

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<sup>22</sup> For more advice on volume offers, see page 24.



#### 1.1.4. Misleading Actions - Is there any way in which your pricing practice could deceive or be likely to deceive the average consumer - even if it is factually accurate?

This consideration is extremely important in the presentation of price promotions – a situation when information provided may be factually accurate (it is true, or has been true in the past) but is presented in such a way that it is opaque, misleading or is likely to deceive the average consumer and causes them to make a transactional decision that they would not otherwise have taken.

The consumer must be able to trust the information that you have provided them and rely on it as they have no cause to question its accuracy. The information may well be true in some sense or at a particular time or place, but is not sufficiently or universally accurate for the consumer to base their transactional decision upon it.

e.g. “Was £1000 – Now £500”, “Larger Pack Better Value” or “Our price £10 - Competitor price £20”

In all of these cases the claim may be true however the consumer may make a different transactional decision if they were aware of all the circumstances regarding the price promotion.

<i>Was £1000 – Now £500</i>	The higher price was charged for less time than the lower price is available. The longer that the higher price was charged compared to the time that the lower price is available, the more likely it is that the higher price is the genuine price for the product and the pricing practice is fair. <sup>23</sup>
<i>“Larger Pack - Better Value” claim on packaging</i>	Care should be taken to ensure that any such offer is not made to be unfair by better value being offered on the same product elsewhere in your business. <sup>24</sup>
<i>Our price £10 - Competitor price £20</i>	You become aware that your competitor has lowered their selling price but you take no steps to withdraw or amend the promotion. <sup>25</sup>

The addition of information (explanatory text, qualifiers or disclaimers) may mean that the pricing practice will no longer be unfair or likely to deceive. However it is important to ensure that headline message is truthful, robust, clear and consistent and does not rely on explanatory text to make it so. (See Pages 17-18 for more guidance regarding the use of additional text)

<sup>23</sup> See table on Pages 15 & 16 for a non exhaustive list of factors to be considered to establish if your reference price is genuine and therefore your pricing practice is fair.

<sup>24</sup> For more advice on volume offers, see page 19.

<sup>25</sup> For more advice on comparing your prices to other trader’s prices, see pages 20 – 22.

### Point to note

You must take the time to ensure that your pricing practices are meaningful and treat consumers fairly, based on what consumers are likely to expect and what will enable consumers to identify the best choices for themselves and their families. Consumer must be able to have confidence in the integrity of your pricing and promotional practices.

### 1.1.5. Misleading omissions

In addition to prohibiting misleading actions, the regulations also prohibit misleading omissions.

If any material information is omitted, hidden or is provided in a manner that is unclear, unintelligible, ambiguous or untimely and as a result the average consumer is likely to make a different transactional decision - then a breach of the regulations may have occurred.

Any commercial communication to a consumer that contains the characteristics of the product and the price in a manner that enables the consumer to make a purchase (called an “invitation to purchase” in the regulations<sup>26</sup>) must contain the following price related material information:-

- The price including any taxes
- The manner in which the price is calculated (where the nature of the product means that the price cannot reasonably be calculated in advance)
- All delivery or postal charges or that such charges may be payable where such charges cannot reasonably be calculated in advance

Your pricing practice can therefore be considered unfair if:-

- It omits material information
- It hides material information
- It provides material information in a manner which is unclear, unintelligible, ambiguous or untimely

Material information is all of the information that the average consumer will need to make an informed transactional decision and obtain best value by assessing the benefit of the offer to them by comparing price, quality and other relevant factors. Is there anything about your offer that, if the consumer knew, would affect their transactional decision? Would they have visited your store if they knew the full picture?

<sup>26</sup> Consumer Protection from Unfair Trading Regulations 2008 Regulation 6(4)

### 1.1.6 Use of additional text to support a pricing message

Omission is not just limited to material information being missed completely but requires you to assess the transparency of the offer due to the size, location, timing and clarity of all text that supports the offer. The regulations do not prohibit the use of small print and this guidance does not provide an exhaustive list of what must be in the headline copy, the body copy or can be in small print.

You must assess exactly what you wish to offer your consumers and how best it should be presented to ensure that they are given all the material information they need so that they can make fully informed transactional decisions. Consider how the offer is expressed – a simple offer can be communicated in straightforward terms using direct language. As your offers become more complex you need to determine how the details of the offer can best be presented to ensure that the consumer fully understands the offer – this may well necessitate the use of additional text in the body copy or small print.

Wherever possible the headline text must contain all of the key details of the promotion and not need any additional explanation. However if there are more details that are essential to the understanding of the promotion, the headline may be supported by body copy that explains the offer in greater detail. Only use small print where it is absolutely necessary and it is clear, intelligible, unambiguous and timely.

The information that you place in any additional text must never contradict the headline claim nor come as a surprise to the average consumer. You need to consider how to present that text – it must be given in a clear, intelligible, unambiguous and timely manner to enable the consumer to make an informed transactional decision.

***Headline text - that provides all the material information needed to make a fully informed transactional decision about the offer.***

<b><i>Headline Text</i></b>
Body copy - any additional text needed to explain the offer.

<b><i>Headline Text</i></b>
Body copy - any additional text needed to explain the offer.
Small Print - e.g. qualifying statements; disclaimers; specific conditions of the offer; exclusions; unit price.

Additional material information could be:-

- Qualifying statements
- Disclaimers
- Specific conditions of the offer
- Exclusions
- Unit Price

And this can be presented in a number of ways:-

- Provided as body copy to the headline text;
- Provided in the small print;
- Provided elsewhere with a prominent reference to where the information can be found. (This is permitted by the regulations if space or time is limited<sup>27</sup> however it is subject to the requirement that it is provided in a clear, intelligible, unambiguous and timely manner.)

Including important material information in the small print is not likely to be sufficient to ensure that the consumer fully understands the price promotion or that pricing practice is fair.

If you are considering providing additional text somewhere other than the main headline or body copy of the price promotion, you need to consider the impact of this on the integrity of the price promotion and the understanding of the offer by the average consumer. You must deploy strategies that make it as easy as possible for consumers to find and understand any additional text.

Where you place any additional text and still have a pricing practice that is fair varies according to the complexity of the offer, the impact of the details presented in the additional text and the type of media used. The greater the distance between the body copy and any additional text, the more likely the material information would be effectively unavailable to the consumer to enable them to make a fully informed transactional decision.

If you use digital communications, use technology in such a way that it places any additional text as close as possible to the body copy – one click to reach the information (or seeing it by hovering with a mouse) is fairer to the consumer than needing to work through multiple pages.

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<sup>27</sup> Consumer Protection from Unfair Trading Regulations 2008 Regulation 6

## 2. Comparing with your own previous or future price - Using reference prices

Reference pricing calls for a high level of trust. It is most unlikely that the consumer will have a record of the previous prices of your products so that they could check that your claim of a reduction is meaningful and relevant to them. This guidance is not prescriptive about what must be done to ensure that the price comparison is fair or what specific circumstances render a reference price comparison likely to be unfair. All the circumstances of the particular pricing practice must be taken into consideration and this guidance is intended to help with this assessment.

Set out below is a non-exhaustive set of matters you need to consider when using a reference price to ensure that the offer represents genuine savings and that the basis of the promotional offer is transparent allowing consumers to make informed decisions and obtain best value.

Any specific price advantage claimed that is intended to influence the economic behaviour of the consumer must be fair. If your proposed pricing practice explicitly or implicitly indicates a saving against another price (the higher reference price) you must be able to satisfy yourself that the quoted saving is genuine and is therefore not unfair.

The initial point that must be determined is has the higher price *ever* been charged? If your answer is “No” the pricing practice is likely to be unfair, see the sections on Page 14 on price comparisons that contain false information.

If the answer is “Yes” then the information is factually correct but it may still have the ability to deceive, depending on the circumstances. There are a number of factors that need to be considered to ensure that the price comparison is fair and that it will not deceive nor is likely to deceive.

If a price is artificially inflated with a view to a saving being claimed, then the pricing practice is likely to be unfair.

This non exhaustive list of factors should be considered to establish if your reference price is genuine and therefore your pricing practice is fair:-

**1. When was the higher price charged?**

The more recently the higher price was charged the more likely the pricing practice is fair.

**2. For how long was the higher price charged?**

The longer the higher price was charged compared to the time that the lower price is available the more likely it is that the higher price is the genuine price for the product and the pricing practice is fair.

- |  |  |
|--|--|
| 3. Have there been any other prices charged for this item?   | Where the answer is “Yes” then consider when those other prices were charged and whether they were higher or lower than the proposed offer price or higher or lower than the reference price. Consider the impact that this will have on the integrity of the price comparison.  |
| 4. Has the item ever been on sale previously at the offer price?   | If the offer price has been charged previously, could this be considered to be the ‘normal’ price of the products?   |
| 5. The existence of other, lower, prices for this product does not in itself render the pricing practice to be unfair, but is likely to have an impact on the integrity of the claim of savings. | If the product has gone up in price relative to a previous lower price and a saving is still claimed, the presentation of this situation has to be carefully considered to avoid it being unfair or likely to deceive.   |
| 6. The locations where the higher price was charged.   | If the product has been offered at the same store (or via the same media channel) where the discount is applied the pricing practice is likely to be fair. The more outlets the higher price was offered in and the greater the exposure of this price to consumers through different channels or media the more likely the pricing practice is to be fair.  |
| 7. Is your reference price a realistic one?  | <p>Consider objective criteria:-</p> <ul style="list-style-type: none"> <li>• whether the reference price is a realistic price at which you have a legitimate expectation of significant sales relative to the number of sales at the discounted prices;</li> <li>• Have you repeatedly used a reference price, knowing that it had not previously sold a significant number of units of the product?</li> </ul> <p>The more realistic your reference price is, the more likely your pricing practice is to be fair to the consumer.</p> |
| 8. Relative volume of units sold   | Is the reference price the price at which you have sold a significant number of units of the product relative to the sales at the discounted prices?   |

- |  |  |
|--|--|
| <p>9. Is the reference price the last price charged?</p>   | <p>If a savings claim and a higher reference price are added after the price of the product has already been lowered for a period, the reference price is not the <i>last</i> applicable price and the price comparison is likely to be unfair.</p>                      |
| <p>10. During the period that the reference price is the current selling price, has the product been subject to other price promotions e.g. volume offers?</p> | <p>If other price promotions have been running whilst your reference price is offered this will affect the integrity of your higher reference price. The more credible your reference price is, the more likely your pricing practice is to be fair to the consumer.</p> |

## 2.1 After Promotion Price

You can make a comparison against a price that you will subsequently charge for a product.

This type of pricing practice will only be fair if you actually do increase the price of the product to the advertised “after promotion price” at the end of the promotional period and the reference price meets the criteria set out in the table above.

If your business uses “after promotion prices” you must also provide any material information that the average consumer needs to allow them to make an informed transactional decision, including when the price will rise to the reference price. If an after promotion price is advertised but the product is not increased to the after promotion price on the date stated, this would be considered an unfair pricing practice as the consumer was encouraged to make a transactional decision based on false information.

## 2.2 Introductory Price

This is similar to the “after promotion price” described above, however there is a further requirement to this particular claim, in that the product must be new to your business. This claim can only be used where you are offering a new product to consumers at a genuine discount compared to your intended regular sale price. It is therefore likely that the use of “introductory price” would be false or deceptive if the item had been previously available.

Businesses must consider carefully the use of “new” or “introductory price” in price related statements. You must assess what consumers in your particular sector would consider as new and therefore how long the claim can be made before the new or introductory price becomes the normal price, or an introductory offer no longer has integrity. The claim “new” could be used longer where the product is rarely purchased, compared to a regularly purchased product.

As with the “after promotion price” the business needs to assess the circumstances under which the introductory offer is conducted to ensure the integrity of the claim is assured – consider the criteria in the table above.

### 2.3 Seasonal Lines

Care needs to be taken when reference prices are used in relation to products that are only in demand for short periods each year.

For example:-

- Christmas trees
- Easter eggs
- Winter tyres
- Garden furniture
- Ski boots
- Strawberries

A reference price is unlikely to be realistic and credible if it was charged when the product(s) were out of season. Such a reference price would likely fail the objective tests set out in the table above.

### 2.4 Recommended Retail Price (RRP)

An RRP must not be false; it must not be created by the retailer, supplier or manufacturer purely in order to present the appearance of a discount. An RRP must be credible, it must reflect a price that is being charged or has been generally charged to consumers in the market place.

If you wish to use an RRP as a reference price and you have sold the item or it has been on sale elsewhere at the RRP, this will make it less likely that the pricing practice misleads consumers.

#### Point to note

Use of recommended retail prices is contentious – there have been calls to prohibit the practice completely but this cannot be done due to the principle based nature of the regulations. The use of an RRP as a reference price is permitted provided that the RRP is not false and the overall presentation is not deceptive. Businesses using RRPs must assess carefully if their use is fair and meaningful to consumers. You must have the necessary substantiation to support their use.



## 2.5 Comparison with prices of products in different circumstances

If you wish to compare prices between products that you sell but with different circumstances this will still be considered fair provided that the claims are not false and the overall presentation is clear, relevant and meaningful.

This type of comparison includes:-

- Where the comparison is between products in a different state or condition;
- Where the comparison is between products sold in a different location;
- Where the comparison is between products offered via a different sales channel.

Before using this type of pricing practice you must take great care to ensure that what differentiates the two products is clearly evident and relevant to the consumer when they are making their transactional decision. You must always provide sufficient information (in a clear, timely, legible and unambiguous manner) to ensure that your average consumer understands the pricing practice and that they can rely on this evidence to make an informed purchasing decision.

The situation where the information is factually correct but the overall pricing practice will deceive or be likely to deceive consumers must be avoided. Explanatory text may be useful to ensure that the pricing practice has integrity and can be clearly understood by the average consumer. See notes on the use of Explanatory Text on Pages 15-17.

Explanatory text may assist with the factual accuracy of the comparison, but it may still result in a pricing practice that is unfair if the consumer:-

- Cannot verify the comparison;
- If the circumstances of the comparison do not relate to your average consumer or has no relevance to them;
- The differences between the circumstances simply do not allow for a fair comparison to be made.

## 2.6 Time Limited Offers

For short term promotions where consumers need to act quickly to take advantage of the offer, the offer ends date must be included.

Once the end date for any price promotion has been published (e.g. in store, in press or TV advertising or online) this must not be extended or altered other than due to reasons outside of your control e.g. severe weather. It is a breach of the regulations<sup>28</sup> if consumers are deprived of sufficient opportunity or time to make an informed choice by falsely stating that a product is only available on those terms for a very limited time.

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<sup>28</sup> Consumer Protection from Unfair Trading Regulations 2008 Schedule 1 Banned Practice 7

If a business makes a time-limited offer on a website it must make clear to consumers whether the time limit applies to the placement of an order or the delivery of goods.

## 2.7 Volume Offers

**For examples:-**

- Multibuys – *buy one get one free; buy two get a third free; buy one get a second half price*
- Linked purchases - *buy a sandwich and get a piece of fruit half price*
- Enhanced quantity for same price - *50% extra free*
- *Bigger Pack – Better Value*

These pricing practices must be assessed by the business under the principles of the regulations – the practice must be fair, the savings claimed must be genuine, there can be no false information about price, how the price is calculated or any price advantage claimed. The overall pricing practice must not be deceptive or likely to deceive. You must ensure that the promotion provides all of the material information that the consumer needs to understand it and get best value and that this information is provided in a clear, intelligible, unambiguous and timely manner. Consumers are less likely to be misled if promotions are easy to understand. The integrity of the comparison must be assessed on the effect it will have on the purchasing behaviour of the average consumer. The consumer must be able to trust the information that you provided in your price promotion.

Any reference price used must be a genuine one and not be inflated prior to the start of the volume offer to suggest greater savings. Care should be taken to ensure that any such offer is not made to be unfair by better value being offered on the same product elsewhere in your business.

### 2.7.1 Unit pricing of volume offers

If the product that you wish to offer in a volume related promotion is required to display a unit price<sup>29</sup>, then, wherever possible, the unit price for each item at its (volume) discounted price must be also displayed. For example if your volume offer is a simple offer relating to one type of product (*e.g. buy one get one half price on the same brand and size of shampoo*) the unit price for each item at its offer price should be shown. However if your offer is multifaceted (*e.g. lunch deal – sandwich, soft drink & chocolate bar for £5*) then the unit price for each item at its offer price need not be shown as this would be more likely to confuse than inform the consumer.

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<sup>29</sup> Price Marking Order 2004

## 2.8 Use of “Free”

Use of the term ‘free’ is specifically covered in the regulations<sup>30</sup>, in that it (and similar phrases) must not be used unless the only cost that the consumer incurs is in responding to the commercial practice.

In its simplest form this could be a DVD provided free inside a magazine or could mean the consumer collecting their free item whilst visiting your store. Receiving the free product can be conditional on the purchase of goods or a service provided this is made clear. However the item must be truly free – the cost of the free item cannot be recovered by reducing the quality or composition or inflating the price of the goods/service that is a pre-condition of obtaining the free product. You must not exaggerate the value of any free items to induce consumers into qualifying purchases.

The term must be used carefully if you wish to offer ‘free valuations’ or ‘free call-outs’ as this would preclude you from then making any charge if the consumer decided not to proceed after receiving the ‘free valuation’ or ‘free call-out’.

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<sup>30</sup> Consumer Protection from Unfair Trading Regulations 2008 Schedule 1 Banned Practice 20

### 3. Another trader's price

It is a legitimate practice to compare the price of goods or services that you are selling against goods or services being sold by other businesses. This can be helpful to consumers who are looking for the best price. The comparison must objectively compare one or more material, relevant, verifiable and representative feature of the goods or services. For example, this may include the price, speed, material of manufacture or technical features of the goods.

This is however a complex area – the law<sup>31</sup> allows comparisons provided they comply with the principles summarised below.

All comparative adverts must:-

- Not be misleading nor omit material information
- Compare goods or services meeting the same needs or intended for the same purpose
- Objectively compare one or more material, relevant, verifiable and representative feature of the goods or services - this may include price
- If your product has a declaration of origin, relate to products of the same origin
- Not discredit or denigrate the trademark, trade name or other distinguishing mark, goods, services, activities or circumstances of a competitor
- Not take unfair advantage of the reputation of a trade mark, trade name or distinguishing mark of a competitor or of the designation of origin of competing products
- Not present goods or services as imitations or replicas of goods or services bearing a protected mark or trade name
- Not create confusion between you and your competitor or between your trademarks, trade names, other distinguishing marks, goods or services and those of your competitor.

The business making the comparison needs to be certain it has met all these requirements – this is relatively straightforward where the comparison is between two products, particularly if those products are identical e.g. a particular identical branded product in the same size pack.

You can make comparisons with products which, whilst not identical, meet the same needs or are intended for the same purpose. For example, one brand of shampoo could be compared with a different brand of shampoo. The basis of the comparison, however, must be made clear - there must be no misleading statements or omissions and the overall presentation of the advert must not mislead, or be likely to mislead, consumers.

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<sup>31</sup> Business Protection from Misleading Marketing Regulations 2008

The information that needs to be included in a comparative advert to ensure that it is fair to consumers will vary depending upon the particular comparison. Relatively straightforward comparisons between identical products should generally include:

- The name of the competitor
- Details of the goods or service
- Your price and the other trader's price (which must be accurate and up to date)

When making such comparisons care should be taken to make sure the price is relevant in the locality where the comparison is made. The comparison could be between a price charged in your store and your competitor's local store. If the price used is based on information made available centrally by your competitor e.g. the price is obtained online, care needs to be taken to make sure this price is valid everywhere where the comparison is to be made. The prices may be valid nationally (due to a national pricing policy), but there may also be local variations. You need to be sure that the prices are the relevant prices for all consumers that will see the comparison.

Any characteristics of the goods or services being compared that are different and will need to be brought to the attention of a potential purchaser.

**For example:-**

Garden chairs – a comparison can be made because the goods meet the same needs and they fulfil the same purpose but there may be differences which are likely to influence a consumer's transactional decision.

Such as:-

- Type of wood
- Any treatment the wood has been subjected to
- Method of manufacture (screwed, jointed, glued)
- Self-assembly or ready assembled

Businesses should consider carefully if there is anything about the goods or services being compared that if the consumer knew would influence them to make a different purchasing decision.

Don't forget that even though the information may be factually correct the presentation of the comparison could still deceive the average consumer. The average consumer should be able to quickly understand the comparison being made and easily verify the comparison – comparisons must be objective, not subjective.

You must not compare items where there is designation of origin protected by law unless you compare like-for-like products e.g. Cheddar Cheese or champagne.

It is really important that the details of any comparison can be relied upon by the average consumer, in particular that the verification of the comparison is easily accessible by the consumer. Information should be supplied in a manner that is clear and transparent, available in an appropriate place - online, in store or if necessary both and in plain English.

Any business making a competitor comparison must take all reasonable steps to ensure that the comparison does not become misleading after it has been published - for example if a competitor changes its price. You must take appropriate steps to monitor the situation whilst you continue to make the claim to ensure that the comparison does not become false or unfair and take prompt action to withdraw claims if necessary.

It is particularly difficult for complete guidance to be given on this type of promotion. Businesses that wish to use this type of promotion strategy may wish to seek advice from their Primary Authority, Home Authority or Local Authority, from a legal firm or other commercial compliance advisors. The Advertising Standards Authority have considered a number of these promotions, and the Committee for Advertising Practice have issued guidance on this topic ([cap.org.uk](http://cap.org.uk)) which businesses may find useful.

### Questions

- Q4a Do you agree that the detailed guidance accurately reflects the principles of the CPRs?
- Q4b Are you aware of any widespread pricing practices that have not been covered by the principles described in this section? If so, please provide outline details.
- Q4c Does the guidance cover the situation where there is a legal obligation to give unit price information and situations where the presentation of that information could be confusing or of no use to the consumer?

## 4. ILLUSTRATIVE EXAMPLES

The examples used in this section are intended to illustrate the principles set out in this Guidance. The illustrations describe practices that are more likely or less likely to comply with the law and are intended to assist your assessment of your own pricing practices.

Following on from the tables below, on Pages 35-36, there are actual examples of pricing practices that have been the subject of ASA rulings, regulatory action or appear in other guidance.

Promotion	More likely to comply	Less likely or unlikely to comply
1. <b>Reference pricing - comparison with own previous (or future) price</b>	Reference price been (or will be) charged by the business for exactly the same product/pack size.	The pack size is smaller or the product is different to when the reference price was (or is to be) offered.
2. <b>Reference pricing - comparison with own previous (or future) price.</b>	Evidence can be provided to show sales at the 'Was' price or that this is a realistic selling price for the product.	No evidence of sales or evidence to show that the business know, or ought to have known that the higher price is not a realistic selling price for the product.
3. <b>Reference pricing - comparison with own previous price.</b>	'Was' price was charged immediately before the offer price.	'Was' price had been charged a number of months earlier and in the intervening period there has been a range of prices both above and below the 'Now' price.
4. <b>Reference pricing - comparison with own previous price.</b>	Product is a seasonal one and price reductions are made at the end of the seasonal period to clear remaining stock.	'Was' price is offered prior to the start of the main season and reductions are shown against this price throughout the seasonal period.

Promotion	More likely to comply	Less likely or unlikely to comply
5. <b>Reference pricing - comparison with own previous (or future) price.</b>	Reference price has been (or will be) offered in the store at which the price reduction has been (or will be) offered.	Reference price has not been (or will not be) offered in the store at which the reduced price will be offered.
6. <b>Introductory or after sale promotions</b>	Higher reference price is offered immediately after the end of promotional period from the date stated.	Higher reference price is not offered immediately after the end of promotional period – the offer is allowed to run on indefinitely.
7. <b>Comparison with other trader's prices.</b>	Comparison is made with an identical product that competitor currently has for sale. An explanatory note is included to indicate where and when the competitor offered the product for sale.	Competitor has never sold the product or sells a product that is significantly different. Competitor lowers their price and no steps are taken to withdraw or amend the promotion.
8. <b>Comparison with own website prices</b>	Sale prices in store compared with higher reference prices offered (or to be offered) online and this information is prominently given with each price indication in store.	Sale prices in store compared with higher reference prices online where the website accounts for a small percentage of the turnover of the company.



Promotion	More likely to comply	Less likely or unlikely to comply
9. <b>RRP</b>	RRP is provided by a manufacturer to all of its stockists and represents the price that the product is generally on sale.	<p>An RRP is agreed bilaterally with a manufacturer but has never actually been offered.</p> <p>An RRP is provided by a manufacturer which refers to a price offered by a high end London store, and is not representative of the general selling price of the product.</p> <p>An RRP is provided by the manufacturer as their online price but their website is not transactional.</p>
10. <b>Value or worth claims</b>	The value or worth of the item is based upon recent or current sales.	<p>The value or worth claim is based upon sales via a different type of sales channel or is based upon an estimation of value or worth.</p> <p>No evidence available to substantiate this claim.</p>
11. <b>Buy one get one free</b>	Promotional material states clearly that the cheapest item will be free. Products not increased in price or reduced in size or quality to accommodate cost of the promotion.	Products increased in price or reduced in size or quality to cover the cost of the promotion.

Promotion	More likely to comply	Less likely or unlikely to comply
12. <b>'Free' items</b>	Promotion makes clear which items are available 'free' and clearly states any conditions that apply to the promotion. If the item has to be obtained remotely it only requires payment of unavoidable costs.	Promotion does not state clearly that conditions apply to the promotion or make it clear which items are covered by the promotion.  Redemption of the offer requires payments of costs that are avoidable <sup>32</sup> .
13. <b>'Sales'</b>	Promotional advertising makes clear which products are included the 'Sale'.	The claim 'Sale' applies to a small proportion of stock despite the implication that the claim 'Sale' applies to the whole store. No clear labelling is provided that enables consumers to quickly identify stock covered by the promotion.
14. <b>Store advertises "Black Friday 10% off everything" promotion (or similar general notice).</b>	All stock is reduced at the till during the Black Friday promotion.	No price reductions are made or price reductions are made on limited stock in the store.
15. <b>Closing down</b>	Business is closing down and selling all remaining stock at lower than usual prices.	Business is not closing down. (This is a banned practice under the Consumer Protection from Unfair Trading Regulations 2008 <sup>33</sup> )
16. <b>Clearance events</b>	Promotional advertising makes clear the purpose of the 'Clearance' event and the stock that is included.	No clear information for consumers to identify the purpose of the 'Clearance' event or the stock within it.

<sup>32</sup> Consumer Protection from Unfair Trading Regulations 2008 Schedule 1 Banned Practice 20.

<sup>33</sup> Consumer Protection from Unfair Trading Regulations 2008 Schedule 1 Banned Practice 31

Promotion	More likely to comply	Less likely or unlikely to comply
17. <b>Series of reductions</b>	Discount offered against a reference price <sup>34</sup> then subsequent reductions made that offers better value  e.g. $\frac{1}{3}$ off $\rightarrow$ $\frac{1}{2}$ price.	Discount offered against a reference price <sup>35</sup> then subsequent reduction made that does not offer better value. e.g. $\frac{1}{2}$ price $\rightarrow$ $\frac{1}{3}$ off.

## Questions

Q5a Do you support the approach taken, of providing examples that more likely to comply or less likely (or unlikely) to comply given that only a court can decide on the facts of an individual case?

Q5b Are you aware of any widespread and potentially non-compliant pricing practices that have not been covered by the examples in this section? If so, please provide outline details.

<sup>34</sup> See notes on Pages 15&16 regarding using reference prices.

<sup>35</sup> See notes on Pages 15&16 regarding using reference prices.

## 5. ACTUAL EXAMPLES

### 5.1 Examples following Court Cases

#### 5.1.1 Sale of strawberries by a major supermarket - Trading Standards Prosecution - Reference Pricing

In August 2013 a supermarket pleaded guilty to a number of charges of misleading actions under the Consumer Protection from Unfair Trading Regulations 2008.

The supermarket had advertised punnets of strawberries over a 17 week period as follows:

Date	Offer
24/04/11 - 30/04/11	£3.99
01/05/11 - 07/05/11	£2.99 save £1.00
08/05/11 - 18/06/11	£1.99 half price, were £3.99
19/06/11 - 25/06/11	£1.99 +free fresh single cream
26/06/11 - 20/08/11	£1.99 half price, were £3.99

The supermarket pleaded guilty to charges relating to the half price claims, but they made it clear that they did not intend to mislead consumers but had failed to follow their own internal rules on comparative advertising.

With regard to the reference pricing the Judge, whilst passing sentence, stated that if a product is offered at half price, it is implicit that the reference price was the normal price for the product. The product should have been on offer at the full amount for a much longer period, so as to be fairly and properly characterised as the normal price and so the product would be a genuine advantageous bargain at half that price.

#### 5.1.2 Trento Sviluppo srl and another v Autorita Garante della Concorrenza e del Mercato ECJ 2013 – EU Case – definition of ‘transactional decision’

This case concerned sales promotions in a number of branches of COOP Italia. An advertising leaflet claimed, ‘reductions of up to 50% and many other special offers.’ One of the products included in the promotion was a laptop computer.

A consumer complained to AGCM that the promotion was misleading because when he went to his local store the laptop was not available.

The Court had to decide whether this misleading promotion was likely to cause a consumer to take a transactional decision that they would not otherwise have taken.

The Court held that the concept of a transactional decision was broadly defined. This covered not only the decision whether or not to purchase the product, but also the other decisions leading to that decision. Therefore the decision by the consumer to enter the shop to attempt to purchase the product that was subject of the price promotion was within the definition of a ‘transactional decision’.

## 5.2 Examples following Advertising Standards Authority (ASA) Rulings

NB ASA rulings are not legally binding and relate to the application of the CAP and BCAP Codes as opposed to the regulations. These examples are therefore intended as illustrations of general principles only.

### 5.2.1 Savings claims on furniture - Advertising Standards Authority (ASA) ruling - Reference Pricing

A furniture retailer advertised a sofa as “Was £649, now £499” and a chair as “Was £329, now £269”. A consumer complained that the higher price was not genuine because the products had been on sale for £490 and £265 respectively.

The retailer was able to show that the products were on sale at the higher price for three non-sales periods, totalling 7 months in the 10-month period before the advert was published. There had been fluctuations in the lower selling price in two separate six week sales periods. The retailer was able to show that a reasonable number of these items had been sold at the higher price in the non-sales periods.

The ASA concluded that the ‘Was’ prices represented the price at which the product was usually sold and the advertisement was, therefore, not misleading.

### 5.2.2 Savings claims on furniture - ASA ruling - Reference Pricing

A furniture retailer made a claim for a nest of tables, “Now only £169. Was £378”. A consumer complained that the higher price was not a genuine retail price and could not be substantiated.

The ASA understood, from the retailer, that the product had been on sale for approximately 6 months at the time the advert appeared. During this period it had been on sale at the higher price for 28 days at all 50 of the retailer’s stores and subsequently for 28 days in two identified stores. The latter period was referred to as the basis for the savings claim, in line with the (then) Department of Business, Innovation and Skills Pricing Practices Guide. Apart from the two identified stores, the product had been on sale at £169 for five of the last 6 months.

The ASA, therefore concluded that the normal selling price of the product was £169 and it was misleading to refer to £378 as a ‘Was’ price and to make a savings claim on that basis.

### 5.2.3 Savings claim on a television - ASA ruling - Reference Pricing

In June 2014, an electrical retailer made a savings claim on a television “Now £899 Save £400 ..... Was £1299 from 09.06.13 to 01.07.13”. A consumer complained that the savings claim was misleading because it was based upon a price at which the product was sold for a short period a year before.

The retailer stated that the price claim was made following the (then) BIS Pricing Practice Guide and that it had also been on sale at the higher price from 27<sup>th</sup> March 2013 to 8<sup>th</sup> June 2013, making a total period of 97 consecutive days.

The ASA found that in the 11 months following July 2103 the price of the item had varied but has always been lower than £1299. They considered that the claim that consumers would save £400 against a price that had been recently sold was not the case. The ASA stated that they *“considered that consumers would regard the ‘Was’ price as the normal selling price of the product and simply stating when a price applied did not remove the misleading impression that a significant saving could be made on the price at which the TV set had been sold before the offer.”*

The ASA held that the savings claim was not based upon a meaningful price and, therefore, gave a misleading impression of the saving available.

### 5.3 Competitor Comparisons – ASA Rulings

Competitor comparisons are a difficult area – in particular a “typical shopping basket” where the comparison relates to a collection of products. There have been no precedents set through the courts but there have been a number of useful ASA rulings. These rulings help businesses, intending to make competitor comparisons, understand the steps they need to take to make their adverts more likely to be fair to consumers.

#### 5.3.1 The advertisement should be clear as to what is included in the comparison and what is not.

A complaint was upheld as the details of the items that were purchased as part of the basket comparison were not specified in the advert nor made available for reference elsewhere. The comparison included core grocery items and excluded items that were not deemed as such (clothing, DVDs, “special” pharmacy items, special buy electronics, clothing and furniture) but this was not made clear in the advert, so the ASA found that the lack of detail of which products had been compared made the advert misleading.

In a further case the term “Your Big Christmas Shop” was used as a description of a basket comparison. The basket included 33 items that the advertiser claimed are traditionally purchased at Christmas time. The ASA did not uphold this complaint as it agreed that the 33 items were typical of a traditional Christmas shop so the consumer would understand the claim and in addition the details of the 33 items were published so consumers could verify the basis of the comparison.

### 5.3.2 The competitor being compared to should be identifiable

A retailer used the broad claim “No one is cheaper”. The ASA upheld this complaint as they considered that the claim was not substantiated as only five other competitors had been compared.

### 5.3.3 Is it a “lowest price” claim or a “price promise”?

A supermarket claimed “Only one supermarket is always 10% cheaper or we'll give you the difference guaranteed”. The ASA ruled that this statement plus the presentation of a number of indicative statements such as “Sale”, “half price”, “price drop”, “50% off”, “1/2 price” “cheap”, with the “...always 10% cheaper” in bold, created the impression this was a ‘lowest price’ claim i.e. that the supermarket was always cheaper than its competitors, when in fact it was actually a ‘price promise’ i.e. that if it wasn't 10% cheaper the advertiser would refund the difference. The ASA required the advert to be clearer that it was a ‘price promise’ so as not to confuse it with a ‘lowest price’ claim.

### 5.3.4 A saving claim should be verifiable

The ASA upheld a complaint where the advertiser claimed that one of their customers had saved £45 on a week's shopping. When in fact the saving was an average over four weeks and this was not revealed in the advert. Further the advertisement contained no information regarding the products included in the basket. The ASA also considered the advert to be misleading as it created the impression the savings could be made into the future whereas this had not been substantiated.

Using a customer testimonial, with the statement in quotation marks, was found to be acceptable provided that the facts (i.e. that particular customer had saved £15 on the specific shop in question) are true e.g. “We've saved £15 against <competitor>” and the advert contains a footnote “comparable grocery shopping”.

A further ASA ruling confirmed that verification data must be readily and freely available – having to purchase a magazine or take out a subscription to a website was not acceptable.

A number of rulings have been published where advertisers claim to have a number of products cheaper than their competitor e.g. “In a survey 5000 baskets at <our supermarket> were cheaper than <our competitor>” or “On DD/MM/YY we had 300 products cheaper than our competitor”. This type of claim needs to be transparent and clear. The ASA upheld a complaint on the grounds that “significant limitations and qualifications to the basis of the price comparison were not included in the advert or in the terms and conditions on the advertiser's website”.

### 5.3.5 The comparison should be against recent data

The ASA upheld a complaint because it considered that the information was out of date. The complaint concerned an advert published in September/October based in information gathered in April /May of the same year. The ASA clarified that this may have been acceptable if there was additional evidence to substantiate that the information remained relevant i.e. prices had not changed or fluctuated in the intervening period.

In a further ruling there was an issue regarding the price of cheese. A price comparison was made in a press advertisement on the 21<sup>st</sup> March to a price checked on the 20<sup>th</sup> March. The ASA found this to be acceptable, a footnote on the advert also confirmed the price was a promotional price. The price was charged for four weeks after the advert was published which was deemed to be acceptable.

In the example previously mentioned “Your Big Christmas Shop” the claim was based on data assembled on the 10<sup>th</sup> December and published in a magazine on the 14<sup>th</sup> December. The ASA stated that this was fair and not misleading even though the price of goods may have fluctuated after the claim had been made.

The ASA did not uphold a complaint that a TV advert became misleading immediately it was broadcast even though it was likely competitors would reduce their prices to match the price being compared within a very short period of time (24 hours). The ASA stated that it was not misleading provided that the claim was true when broadcast. In this case the prices were checked on the 20<sup>th</sup> of October and the advert broadcast on the 25<sup>th</sup> of October and the advert contained the date the price check was carried out and the advert was only broadcast for “a few days”.

### 5.3.6 Any comparison should be between normal prices, not reduced prices unless this is made clear

The ASA ruled upheld a case where scones were offered for 50p by one retailer and £1 by two others. The scones had been offered for 50p for 41 of the 52 weeks prior to the advert being published and nine weeks afterwards. The ASA found the 50p to be the normal price rather than a promotional price and therefore the advert was not misleading nor did it require clarification through additional text.

### 5.3.7 Significant conditions must be made clear

The ASA upheld a complaint in relation to an advert that compared the advertiser’s prices to a competitor supermarket with any price differences resulting in the advertiser’s customer receiving a money-off coupon to redeem against a subsequent shop. This only applied to shopping baskets over £20 but this was not made clear in the advertisement. The information was given as a footnote but the ASA found that it contradicted the headline statement rather than qualifying it.

## Questions

**Q6a Businesses** – will you find these examples helpful? Are there any other recent examples that you think could be included? If so please provide outline details.

**Q6b Regulators** – will you find these examples useful when advising business? Are there any other recent examples that you think could be included? If so please provide outline details.



## AND FINALLY

### Questions

- Q7 Has the guidance provided you with sufficient insight into the principles to enable you to review your own pricing practices and those of your competitors (should you wish to complain about them)? If not, which principles or practices need further explanation?
- Q8 Do you think that the document strikes the right balance for business between using plain language to explain principles while also incorporating precise legal references?

# Annexe 1

## Consultation questions

### Section: Introduction

- Q1a Is the introduction sufficiently clear in explaining that this guidance is addressed to businesses?
- Q1b Does it provide sufficient information to explain what the guidance does and does not cover?

### Section: Evaluation of your Pricing Practice considering Reasonable Consumer Expectations

- Q2a Does this section provide businesses with a clear test to apply to their pricing practices?
- Q2b Do you agree that the test and definitions are an accurate reflection of the law?
- Q2c Does the guidance help businesses to understand how to frame their price promotions a) when they are addressed to or are only likely to reach the average consumer and b) when they are aimed at or likely to reach specific groups that are not the average consumer?

### Section: Quick Guide to Pricing Practices

- Q3a Do you agree that this section provides a useful checklist for small businesses?
- Q3b The text has been written to be applicable to all sectors and pricing practices. Are there any sectors for whom the text is not fit for purpose? Are there any practices for which the text is not fit for purpose?
- Q3c Are there any further points about pricing practices that should be added to this list for SMEs?

### Section: Price Promotions

- Q4a Do you agree that the detailed guidance accurately reflects the principles of the CPRs?
- Q4b Are you aware of any widespread pricing practices that have not been covered by the principles described in this section? If so, please provide outline details.

Q4c Does the guidance cover the situation where there is a legal obligation to give unit price information and situations where the presentation of that information could be confusing or of no use to the consumer?

### Section: Illustrative Examples

Q5a Do you support the approach taken, of providing examples that more likely to comply or less likely (or unlikely) to comply given that only a court can decide on the facts of an individual case?

Q5b Are you aware of any widespread and potentially non-compliant pricing practices that have not been covered by the examples in this section? If so, please provide outline details.

### Section: Actual Examples - Court Cases and ASA Rulings

Q6a **Businesses** – will you find these examples helpful? Are there any other recent examples that you think could be included? If so please provide outline details.

Q6b **Regulators** – will you find these examples useful when advising business? Are there any other recent examples that you think could be included? If so please provide outline details.

### AND FINALLY

Q7 Has the guidance provided you with sufficient insight into the principles to enable you to review your own pricing practices and those of your competitors (should you wish to complain about them)? If not, which principles or practices need further explanation?

Q8 Do you think that the document strikes the right balance for business between using plain language to explain principles while also incorporating precise legal references?

## Annexe 2

### How to respond.

#### **Consultation: Draft Pricing Practices Guide**

You can respond by email or post to the Chartered Trading Standards Institute.

Email: [ppgreview@tsi.org.uk](mailto:ppgreview@tsi.org.uk)

Postal Address:

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**This consultation will close on 5th January 2016.**