

**EXPLANATORY MEMORANDUM TO
THE CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS 2008**

2008 No. 1277

**THE BUSINESS PROTECTION FROM MISLEADING MARKETING REGULATIONS
2008**

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1. This explanatory memorandum has been prepared by the Department for Business, Enterprise & Regulatory Reform and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 The Consumer Protection from Unfair Trading Regulations 2008 (CPRs) introduce a general prohibition on traders in all sectors engaging in unfair commercial (mainly marketing and selling) practices against consumers. It will put in place a comprehensive framework for dealing with sharp practices and rogue traders who deliberately set out to exploit loopholes in existing legislation.

2.2 The CPRs also repeal a number of laws which cover the same subject matter, including most of the Trade Descriptions Act 1968 (TDA), to create a modern, simplified consumer protection framework.

2.3 The Business Protection from Misleading Marketing Regulations 2008 (BPRs) prohibit misleading business-to-business advertising and set out the conditions under which comparative advertisements (which is any advertisement which identifies a competitor or a competitor's product) are permitted. The BPRs are intended to ensure that there is no reduction in business protections following the repeal of certain legislation such as the TDA which protects businesses as well as consumers.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The Unfair Commercial Practices Directive (UCPD) is a maximum harmonisation directive and does not permit Member States to maintain national provisions falling within its scope (unfair commercial practices harming consumers' economic interests) which exceed the provisions of the UCPD (with some exceptions). Accordingly in transposing the UCPD it has been necessary to identify all legislation falling within the scope of the UCPD. The legislation could have been amended so as to make it consistent with UCPD or repealed. The preferred approach following consultation has been to repeal overlapping laws in order that existing laws are replaced with the provisions of the Regulations (see further paragraphs 7.8 to 7.12 below).

3.2 The CPRs repeal much of the Trade Descriptions Act 1968 including the prohibition on false trade descriptions in section 1(1) and the provision on false or misleading statements as to services in section 14. These provisions fall within the scope of the UCPD as they apply in business-to-consumer (B-to-C) cases and could not be maintained consistently with maximum harmonisation. The CPRs offer equivalent protection for consumers in B-to-C cases and the BPRs offer equivalent protection for traders in business-to-business (B-to-B) cases. The provisions in sections 8 and 9 which concern information to be given with goods or in advertisements are also repealed. They could only be used in B-to-C cases consistently with the maximum harmonisation in circumstances where such information would anyway be required under the CPRs. The provisions would be very difficult to use in B-to-B cases without also affecting B-to-C cases in a manner inconsistent with maximum harmonisation.

3.3 The CPRs amend section 12 of the 1968 Act. Section 12 makes it an offence to give a false indication as to Royal approval. This section would cover indications which were commercial practices but could also go beyond commercial practices. In order to maintain compatibility with maximum harmonisation the CPRs amend the section so that where a false indication is a commercial practice no offence is committed unless it is also unfair under the CPRs.

3.4 The CPRs also repeal Part 3 of the Consumer Protection Act 1987 concerning misleading price indications to consumers. This provision falls within the scope of the UCPD and the protections afforded to consumers are provided by the CPRs. As a result of the repeal of Part 3 the Price Indications (Method of Payment) Regulations 1991 (S.I. 1991/199) and the Price Indications (Resale of Tickets) Regulations 1994 (S.I. 1994/3248) which are made under Part 3 cease to have effect. The 1991 Regulations require traders to give consumers certain information where the price indicated does not apply to all methods of payment. The 1994 Regulations require certain information to be given by persons who supply tickets to places of entertainment. The Regulations could not be maintained consistently with maximum harmonisation and the protections they give are broadly replicated by the CPRs. A saving is made for the Price Indications (Bureaux de Change) (No. 2) Regulations 1992 (S.I. 1992/737) which were also made under Part 3. As these regulations concern financial services member States have an option under article 3.9 of the Directive to impose more restrictive provisions,

3.5 The CPRs repeal the Trading Representations (Disabled Persons) Act 1958 which prohibits certain representations when selling goods in the course of business. The Act falls within the scope of the Directive as a restriction on commercial practices to protect the economic interests of consumers. The prohibition could not be maintained consistently with maximum harmonisation.

3.6 The CPRs repeal the saving for orders made under section 22 of the Fair Trading Act 1973 in section 10(2) Enterprise Act 2002. The Orders in question are the Consumer Transactions (Restrictions on Statements) Order 1976 (S.I. 1976/1813) and the Business Advertisements (Disclosure) Order 1977 (S.I. 1977/1918). The 1976 Order restricts the making of statements concerning consumers' rights. The 1977 Order requires persons seeking to sell goods in the course of business to make clear in advertisements that goods are to be sold in the course of business. The protections provided are broadly provided by the CPRs.

3.7 The CPRs repeal the Mock Auctions Act 1961. The Act contains specific prohibitions relating to mock auctions. These cannot be maintained consistently with maximum harmonisation. Although the specific prohibitions are not replicated by the CPRs the overall effect of the Act to prevent consumers being confused at such auctions is provided by the CPRs.

3.8 The CPRs repeal the Fraudulent Mediums Act 1951. The Act makes it an offence for a person to purpose to act as a spiritualistic medium with intent to deceive or uses a fraudulent device. The Act cannot be maintained consistently with maximum harmonisation.

3.9 The CPRs repeal section 29 of the Weights and Measures Act 1985 which contains an offence relating to misrepresentations as to quantity. As far as B-to-C cases is concerned this cannot be maintained consistently with maximum harmonisation. The CPRs provide equivalent protection in relation to B-to-C cases and the BPRs provide equivalent protection in relation to B-to-B cases.

3.10 The CPRs repeal similar provisions in 6 local Acts (County of Cleveland Act 1987, London Local Authorities Act 1996, Kent County Council Act 2001, Medway Council Act 2001, North Yorkshire County Council Act 1991 and Nottingham City Council Act 2003). The provisions require persons holding certain types of occasional sale to display certain information. These information requirements are not compatible with maximum harmonisation and broadly equivalent protection is provided by the CPRs.

3.11 The CPRs repeal section 46 of the Consumer Credit Act 1974 which makes it an offence to give a false or misleading credit or hire advertisement. The offence as far as consumer hire could not be maintained consistently with maximum harmonisation. The Directive (article 3.9) provides member States with the option to impose more restrictive national provisions in relation to financial services which would include consumer credit. However the prohibition in this section in relation to both consumer hire and consumer credit is replicated by the CPRs.

3.12 Amendments are also made to sections 77, 78, 79, 85, 97, 103 and 107 to 110 of the 1974 Act. These sections oblige traders to give debtors or hirers under regulated consumer credit or hire agreements certain information on request. The information requirements amount to commercial practices because they directly relate to the supply of a product. As far as the provisions relating to consumer hire are concerned the existence of these information requirements would breach maximum harmonisation unless they are capable of falling outside the scope of the Directive by virtue of the contract law exclusion in article 3.2. However the existence of criminal sanctions in relation to the breach of these requirements would be incompatible with the contract law exclusion. Accordingly the amendments remove the criminal sanctions relating to these provisions and also for consistency to the equivalent provisions relating to consumer credit.

3.13 The CPRs amend section 40 of the Administration of Justice Act 1970. Section 40 makes it an offence to coerce a person to pay money claimed as a contractual debt by certain means. Some of the activities covered by this section are commercial practices.

Accordingly in order to maintain compatibility with maximum harmonisation this section is amended so it does not apply to anything which is done which is a commercial practice under the CPRs.

3.14 The CPRs revoke the Tourism (Sleeping Accommodation Price Display) Order 1977 (S.I. 1977/1877). The Order requires hotels to display room prices in a certain manner. The Order cannot be maintained consistently with maximum harmonisation. The overall effect of the order is broadly maintained by the CPRs.

3.15 The CPRs also revoke the Price Marking (Food and Drink) Services Order 2003 (S.I. 2003/3183). The Order requires certain information relating to food and drink prices to be displayed at premises offering food and drink in a certain manner. The Order is unlikely to be capable of being maintained consistently with maximum harmonisation. The overall effect of the Order is broadly maintained by the CPRs.

3.16 The CPRs amend the Consumer Credit (Advertising) Regulations 2004 (S.I. 2004/1484). These Regulations impose requirements concerning the form and content of advertisements that relate to the provision of credit and the hiring of goods. The amendments made by the CPRs omit the provisions relating to consumer hire in order to maintain compatibility with maximum harmonisation.

3.17 The revocations and other amendments made to secondary legislation under the CPRs are done under section 2(2) European Communities Act 1972. They could have been done under the powers under which such legislation had originally been made. The amendments and revocations concern both regulations and orders and the use of the same powers under which each instrument was made would be procedurally complex and would mean that amendments and revocations were divided up in a number of instruments. Such a course would have resulted in unnecessary complexity for users of the legislation. Some of the powers under which instruments could have been revoked require consultation. There has been full consultation on the repeals and revocations of overlapping laws by the CPRs (as mentioned in paragraph 7.17).

3.18 Both the CPRs (regulations 21 and 22) and the BPRs (regulations 23 and 24) contain powers of entry and investigation. They are modelled closely on those which exist in section 28 of the Trade Descriptions Act 1968. Section 28(1)(e) provides a power to seize and detain goods or documents but only provides a power concerning the breaking open of containers in order to exercise the power to seize goods. This is anomalous in comparison with other comparable powers such as that in section 162(1)(e) of the Consumer Credit Act 1974 which contains a power concerning the breaking open of containers in order to exercise of the power to seize both goods and documents. Regulation 21(2) CPRs and regulation 23(2) BPRs follow the precedent in the Consumer Credit Act 1974 in this respect.

3.19 The BPRs contain a power in regulation 21 for enforcement authorities to obtain information by notice in writing. Similar powers are contained in the Enterprise Act 2002 (sections 226-7) and the Unfair Terms in Consumer Contracts Regulations 1999 (S.I. 1999/2083)

4. Legislative Background

4.1 The CPRs implement the Unfair Commercial Practices Directive (UCPD, Directive 2005/29/EC).

4.2 The BPRs implement the Misleading and Comparative Advertising Directive (MCAD, Directive 2006 /114/EC). That Directive codified the previous 1984 Directive on the subject with amendments made to it by other Directives (including the UCPD which reduced the scope of the provisions on misleading advertising to business-to-business advertising) The previous 1984 Directive is currently implemented by the Control of Misleading Advertising Regulations 1988 which are to be repealed by the CPRs.

4.3 The DTI submitted explanatory memorandum 10904/03 +ADD 1 on 14 June 2003 on the Commission's proposal for the UCPD. The Commons European Scrutiny Committee considered it politically important and cleared it (Report 13, Item 24683, Session 2003/2004. The Lords Select Committee on the EU cleared it from scrutiny in Sub-Committee G (Progress of Scrutiny, 28 May 2004, Session 2003/2004).

4.4. Transposition notes on the CPRs and BPRs are attached at Annexes A and B, respectively.

5. Territorial Extent and Application

5.1 Both instruments apply to all of the United Kingdom.

5.2 Although the UCPD and MCAD could have been implemented by Northern Ireland, the Northern Ireland Departments concerned have agreed that implementation of the UCPD and MCAD can be carried forward on a UK basis.

6. European Convention on Human Rights

The Parliamentary Under Secretary for Trade and Consumer Affairs has made the following statement regarding Human Rights:

In my view the provisions of the Consumer Protection from Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008 are compatible with the Convention rights.

7. Policy background

7.1 The UCPD has two main objectives:

- to strengthen consumer protection by introducing a general prohibition on traders against treating consumers unfairly ; and
- to harmonise unfair trading laws protecting consumers in all EU Member States.

7.2 The Government supports this key Directive, believing it will strengthen our consumer protection regime and achieve its objective of improving cross-border trade.

With the DTI's 2003 benchmarking study showing that a "general duty (not) to trade (un)fairly" strengthens consumer protection regimes, transposing the UCPD will mark an important step towards BERR meeting its Public Service Agreement (PSA) target of ensuring that the UK framework for consumer empowerment and support is at the level of the best by 2008.

7.3 Research by the Office of Fair Trading (OFT) (2000¹) estimated that the level of consumer detriment – defined as losses suffered as a result of defective goods, inadequate redress and poor information - is around £8.3 billion a year, excluding the emotional costs and stress which consumers may suffer. The OFT's research also shows that detriment suffered by low-income consumers causes a greater welfare loss than the same monetary loss for an average consumer. Much of the reported problems are covered by existing legislation, but the wide-ranging scope and principles-based approach of the UCPD will in many cases enhance the ability of enforcers to take effective action.

7.4 The UCPD applies across all business sectors (including immovable property) and will set the framework for how businesses must deal with consumers. These rules apply principally to pre-sale marketing, advertising and selling but also apply to certain behaviours post-sale. The latter include failing to comply with a commitment made pre-sale (e.g. to provide after-sale support) or putting onerous or disproportionate non-contractual barriers to consumers wishing to exercise their rights under the contract. The Directive does not apply to the quality of the goods sold or to the standard of service supplied. These will continue to be regulated by existing legislation on the sale and supply of goods and services.

7.5 The UCPD, and the CPRs which implement the Directive, prohibits unfair commercial practices and sets out rules that determine when commercial practices are unfair. These fall into three categories:

- (i) commercial practices which contravene the requirements of professional diligence (honest market practice/ good faith). It is envisaged that this will act as a safety-net to catch practices which do not come under the categories below,
- (ii) commercial practices which are misleading (by action and omission) and aggressive practices.
- (iii) certain specific commercial practises which are always considered to be unfair.

7.6 The first two categories of commercial practice which are caught by the prohibition are principles-based: they apply only if the effect of the trader's practice is likely to alter consumers' decisions in relation to products. The normal benchmark for assessing the likely effect of the practice is the "average consumer. However, the UCPD and CPRs contain two variations of the "average consumer" test. These apply (i) where a practice is directed at a particular group of consumers; or (ii) where a practice is likely to affect only a clearly identifiable group of vulnerable consumers in a way which the trader could reasonably be expected to foresee. In either case the likely effect of the practice is then assessed from the perspective of the average member of that group. These variations

¹ "Consumer Detriment", February 2000, OFT 296

of the “average consumer” test are intended to provide additional protections for vulnerable consumers. By contrast, the third type of commercial practice caught by the prohibition are not principles based, and are always unfair.

Enforcement

7.7 The UCPD requires that there is adequate and effective means to combat unfair commercial practices. This has to include a procedure that allows court action to stop or prevent breaches of its prohibitions. This is achieved by adding the Directive and the CPRs to the Community infringements regime under Part 8 of the Enterprise Act 2002. In addition the Government has decided that a breach of most the prohibitions in the CPRs will be a criminal offence. The CPRs place a duty on the Office of Fair Trading (OFT), local authority Trading Standards Services and the Department of Enterprise, Trade and Investment in Northern Ireland (DETINI) to enforce the Regulations.

Simplification

7.8 The Government’s Consumer Strategy², published in June 2005 set out the aim of establishing a legal framework that is flexible, fair and transparent.

7.9 The UCPD’s broad scope means that it overlaps with many existing laws. In addition, because the UCPD is a maximum harmonisation Directive (ie setting out the maximum level of restriction permissible in respect of unfair commercial practices which harm consumers’ economic interests) the UK cannot maintain rules that exceed the level of protection set by the Directive.

7.10 A supplementary objective in transposing the UCPD is to achieve, where possible, some regulatory simplification. Transposition of the Directive has required a thorough review of the UK’s consumer protection regime and has provided an opportunity to assess the scope for simplification and rationalisation of the consumer protection regime.

7.11 The CPRs repeal provisions in a number of overlapping laws, including most of the TDA and Part 3 of the Consumer Protection Act 1987 (misleading price indications).

7.12 Implementation of the UCPD through the CPRs will represent the biggest change to the consumer protection framework for almost 40 years. It will affect all businesses that deal directly with consumers.

Guidance

7.13 Many of the terms and concepts used in the CPRs are novel to domestic law. The OFT are preparing joint OFT/BERR Guidance, in consultation with a small group of core stakeholder, on how the Government believes these terms and concepts should be interpreted. The OFT consulted on draft Guidance in May 2007. The final Guidance is expected to be published in late February 2008.

² Extending Competitive Markets: Empowered Consumers, Successful Business, DTI 2005

BPRs

7.14 Some of the legislation to be repealed, notably the TDA, protects businesses as well as consumers. TSS have historically enforced false and misleading claims affecting businesses through criminal sanctions and associated investigative powers in the TDA. Without these sanctions and powers TSS ability to enforce business-to-business cases would be removed, thereby exposing businesses to a reduction in protection from other unscrupulous businesses. As business-to-business cases do arise, there was a strong case for the Government to legislate to ensure that there is no reduction in business protection when most of the TDA is repealed, especially as small businesses are often in no better position to protect themselves than consumers.

7.15 The MCAD requires that there are adequate and effective means to combat misleading (business-to-business) advertising and enforce compliance with the provisions on comparative advertising. Comparative advertising is advertising which identifies a competitor or a product of a competitor. In order to be permitted it has to meet all the conditions in regulation 4. These conditions relate mainly to aspects of the fairness of the comparison to a competitor or a competitor's product which is made in the advertisement. If the comparison with a competitor or a competitor's product does not satisfy these conditions the comparative advertising is not permitted even if it does not deceive traders or consumers and alter their economic behaviour.

7.16 The means of enforcement referred to under the MCAD has to include a procedure which allows court action to stop or prevent misleading advertising or impermissible comparative advertising. Regulation 15 allows injunctions to be sought by enforcers to secure compliance with prohibition on misleading advertising in regulation 3(1) or the conditions under which comparative advertising is permitted under regulation 4. In addition the BPRs in regulation 6 provide for an offence for traders to engage in misleading advertising. Regulation 13 places a duty on the OFT, TSS and DETINI to enforce the Regulations.

Consultation

7.17 There were three rounds of written consultation leading up to and during the negotiation of the UCPD. The first was conducted on the basis of the Commission's Green Paper on EU Consumer Protection³, the second in response to the Follow-up Communication, and the third based on the Commission's formal proposal for a Directive on Unfair Commercial Practices. Copies of the two documents and draft Directive were circulated widely amongst stakeholders (businesses and business organisations, consumer organisations and enforcement bodies).

7.18 A further three rounds of written consultation were held on implementation of the UCPD. The first consultation was published in December 2005 and sought views on options for interpretation, enforcement and simplification of existing legislation. The second consultation in December 2006 sought views on how to frame the criminal sanctions in the regulations implementing the UCPD and amended MCAD. The third consultation in May 2007 was on the draft CPRs and BPRs. The responses to these

³ Green Paper on EU Consumer Protection, 2 October 2001 (COM (2001) 531 final

consultations informed the Government's view on how best to implement the UCPD, and formal Government Responses have been published on BERR's webpages.

7.19 Business supports the Government's stated aim to establish a regime that is capable of tackling rogue traders and unfair commercial practices effectively while minimising burdens on legitimate businesses. Business also accept that the purposive approach is the way forward, provided it is underpinned by the adoption of Hampton principles and is accompanied by the removal of existing overlapping legislation.

7.20 Consumer organisations also supported the move towards principles-based legislation which is easy for consumers and enforcers to understand. Both consumer organisations and enforcement bodies supported the inclusion of criminal sanctions in the CPRs which ensure that there is no reduction in existing consumer protection following the repeal of overlapping legislation. Business would have preferred the CPRs to be enforced purely through civil means.

8. Impact

8.1 Impact Assessments on the CPRs and BPRs are attached to this memorandum (Annexes C and D).

9. Contact

Peter Deft at the Department for Business, Enterprise & Regulatory Reform Tel: 020 7215 0341 or e-mail: peter.deft@BERR.gsi.gov.uk can answer any queries regarding the instruments.

Summary: Intervention & Options

Department: Business Enterprise and Regulatory Reform (BERR)	Title: The Business Protection from Misleading Marketing Regulations (BPRs)	
Stage: Final	Version: 1.0	Date: 11/01/2008
<p>Related Publications: Consultations on: (i) Implementing the EU Directive on Unfair Commercial Practices and Amending Existing Consumer Legislation (Dec 2005); (ii) Framing and enforcing criminal sanctions in the Regulations implementing the Unfair Commercial Practices Directive (Dec 2006); and (iii) the draft Consumer Protection from Unfair Trading Regulations 2007 (May 2007).</p>		

Available to view or download at:

<http://www.berr.gov.uk/consultations/index.html>

Contact for enquiries: Peter Deft

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What is the problem under consideration? Why is government intervention necessary?

The Unfair Commercial Practices Directive (UCPD) overlaps with some existing consumer protection legislation, which will be repealed to avoid duplication. One example of this is the repeal of most of the Trade Descriptions Act 1968 (TDA), which protects both businesses and consumers. UCPD only covers business-to-consumer practices, therefore exposing UK businesses to a reduction in protection from other unscrupulous businesses.

The Business Protection from Misleading Marketing Regulations (BPRs) will become the main mechanism for regulating unfair business-to-business conduct in the UK

What are the policy objectives and the intended effects?

To provide legislation that is modern and simplified while still maintaining adequate levels of protection for businesses.

What policy options have been considered? Please justify any preferred option.

The BPRs implement the Misleading and Comparative Advertising Directive 2006 (MCAD) which replaces and codifies the changes to the Misleading and Comparative Advertising Directive 1984. This Directive is currently implemented by the Control of Misleading Advertisements Regulations 1988 which will be repealed. The obligations on businesses concerning misleading advertising and comparative advertising remain substantially the same. The policy options revolve around how they are to be enforced.

Option 1: The Trading Standards Services to be able to enforce business-to-business cases civilly and criminally.

Option 2: Extending option 1, by the OFT being able to enforce criminally in business-to-business cases in addition to its existing civil enforcement powers.

Option 2 is the preferred option as it returns the original business-to-business protection mechanisms to the Trading Standards Services as was the case prior to the repeal of the relevant provisions of the TDA and also expands the role of the OFT to ensure a common business-to-business protection among the bodies charged with enforcing the BPRs.

Options 3 to 6 deal with optional provisions in the MCAD. The preferred options ((4 and 6) are to implement these optional provisions

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

Three years from the date the Regulations enter into force..

Ministerial Sign-off For final proposal/implementation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

.....Date:

Summary: Analysis & Evidence

Policy Option:	Description:
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COSTS	ANNUAL COSTS	Description and scale of key monetised costs by 'main affected groups'
	One-off (Transition) Yrs	
	£ 0.0	
	Average Annual Cost (excluding one-off)	
£ 0.0	Total Cost (PV)	£ 0.0
Other key non-monetised costs by 'main affected groups' Small one off familiarisation costs to enforcers.		

BENEFITS	ANNUAL BENEFITS	Description and scale of key monetised benefits by 'main affected groups'
	One-off Yrs	
	£ 0.0	
	Average Annual Benefit (excluding one-off)	
£ 0.0	Total Benefit (PV)	£ 0.0
Other key non-monetised benefits by 'main affected groups' Avoidance of a reduction in protection for businesses from the repeal of most of the Trade Descriptions Act 1968 by the Consumer Protection from Unfair Trading Regulations.		

Key Assumptions/Sensitivities/Risks

The Regulations do not impose any new obligations on businesses. Businesses should therefore incur no new additional costs in ensuring their advertising complies with the Business Protection from Misleading Marketing Regulations which will continue to implement the Misleading and Comparative Advertising Directive. Also, there should be no change in business costs in cooperating with enforcement bodies.

Price Base 2006 Year	Time Period Years	Net Benefit Range (NPV) £ 0.0	NET BENEFIT (NPV Best estimate) £ 0.0
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What is the geographic coverage of the policy/option?	UK
On what date will the policy be implemented?	06/04/2008
Which organisation(s) will enforce the policy?	OFT, Trading Standards and DETINI
What is the total annual cost of enforcement for these organisations?	£0.0
Does enforcement comply with Hampton principles?	Yes

Will implementation go beyond minimum EU requirements?		Yes		
What is the value of the proposed offsetting measure per year?		£ N/A		
What is the value of changes in greenhouse gas emissions?		£ N/A		
Will the proposal have a significant impact on competition?		No		
Annual cost (£-£) per organisation (excluding one-off)	Micro 0	Small 0	Medium 0	Large 0
Are any of these organisations exempt?	No	No	No	No
Impact on Admin Burdens Baseline (2005 Prices)		Increase		
Increase of £0.0	Decrease of £ 0.0	Net Impact	£ 0.0	

Key: Annual costs and benefits: Constant Prices

(Net) Present Value

Evidence Base (for summary sheets)

Strategic Overview

1. The Unfair Commercial Practices Directive (UCPD, Directive 2005/29/EC) overlaps with existing consumer protection legislation, including the Trade Descriptions Act 1968 (TDA). Most of the TDA and provisions in other pieces of legislation which overlap with the UCPD (eg section 29 of the Weights and Measures Act 1985) will be repealed to avoid duplication. This will create a modern, simplified consumer framework fit for the 21st century. The TDA applies to both business-to-business and business-to-consumer behaviours. A breach of the TDA is a criminal offence enforceable by Trading Standards Services. The TDA can also currently be enforced by civil means through Part 8 of the Enterprise Act 2002 where a breach of its provisions harms the collective interests of consumers. The Office of Fair Trading (OFT) and Trading Standards Services (and others) are able to take action using Part 8.
2. The Control of Misleading Advertisements Regulations 1988 (CMARs), which implement the Misleading and Comparative Advertising Directive (Directive 84/450 EEC) in the UK, are enforced by the OFT through the use of civil injunctions and, in relation to broadcast advertising, by OFCOM through powers available to it under the Communications Act 2003. The CMARs prohibit misleading advertisements and set out the conditions under which comparative advertisements are permitted. The CMARs apply to advertisements directed at businesses and/or consumers. The CMARs can also currently be enforced through Part 8 of the Enterprise Act 2002 where an infringement harms the collective interests of consumers.
3. The scope of the 1984 Directive has been narrowed in relation to misleading advertising by the UCPD to cover only misleading advertising directed at businesses, although advertising continues to be defined very broadly. The amendments to the 1984 Directive have been codified by Directive 2006/114/EC, which repeals the 1984 Directive.

OFCOM

4. The CMARs place a duty on OFCOM to consider any complaint that an advertisement included or proposed to be included in any licensed programme service or S4C is misleading or does not comply with the conditions under which comparisons are permitted in advertisements, unless the complaint seems to OFCOM to be frivolous or vexatious. OFCOM may, if it considers it appropriate to do so, require a licence holder to exclude the advertisement from its programme. OFCOM has contracted-out these functions to the ASA.
5. These provisions are removed from the Business Protection from Misleading Marketing Regulations (BPRs) because OFCOM now has a duty under the Communications Act 2003 to control broadcast advertisements. To include such provisions in the BPRs would now amount to double banking because it would mean that OFCOM would have two duties to consider the same material with similar enforcement powers.

The Issue

6. The UCPD itself covers only business-to-consumer commercial practices. With the repeal of the TDA the BPRs will become the main mechanism for regulating misleading advertisements in the business-to-business sector in the UK. These are the Regulations that will replace the CMARs.
7. The repeals made to the TDA removes Trading Standards Services' ability to enforce business-to-business cases, thereby exposing UK businesses to a reduction in protection from other unscrupulous businesses. As the CMARs do not provide for any criminal sanctions the OFT does not currently have criminal enforcement powers under CMARs, creating a gap in criminal enforcement at a national level. As business-to-business cases do arise in the UK, there is a strong

argument for Government to intervene and amend legislation to continue to protect businesses.

Objectives

8. The objective of the policy is to ensure that there is no reduction in business protections following the repeal of the TDA.

Options Identification

9. The options that have been considered are concerned with the enforcement of business-to-business cases:

Base case: Trading Standards Services is given civil enforcement powers to enforce business-to-business cases under CMARs.

10. Trading Standards Services have historically enforced false and misleading claims affecting business through criminal sanctions and associated investigative powers. The Government intends to repeal the relevant provisions of the TDA under which Trading Standards Services are able to conduct enforcement. Without these, Trading Standards Services cannot continue to exercise a key component of its remit. The Base Case for any government intervention would therefore be to give civil enforcement powers to the Trading Standards Services, to enable them to enforce business-to-business cases under the BPRs. This is because we consider that enforcement will be more effective if both the OFT and Trading Standards Services could enforce the BPRs.

11. This closes the coverage gap created by the repeal of the TDA, whereby the OFT continues to use civil powers to enforce business-to-business cases under the BPRs but lacks the enforcement support of the Trading Standards Services.

12. The Trading Standards Services has a long history of enforcing regulatory law, and is well-placed to operate these civil powers because through its use of Part 8 of the Enterprise Act 2002 the Trading Standards Services are adapting to using the civil regime.

Option 1: The Trading Standards Services to be able to enforce business-to-business cases criminally as well as civilly

13. Option 1 would expand the Base Case by allowing Trading Standards Services to enforce the BPRs both civilly and criminally, with the OFT continuing to enforce only civilly. However, criminal sanctions would apply only in relation to a breach of the misleading advertising provisions of the BPRs, and not to the use of comparative advertising which is not permitted. This expansion reflects the historical role that the Trading Standards Services has played in enforcing regulatory law using usually the criminal route.

14. Adopting Option 1 reinstates the criminal enforcement route (with associated investigative powers) that was available to Trading Standards Services prior to the repeal of the TDA. It also gives Trading Standards Services the power to apply for civil injunctions to stop any breaches of the BPRs. Returning criminal sanctions and associated investigative powers to the Trading Standards Services in relation to false and misleading claims is important as it may become necessary to pursue a criminal prosecution for serious business-to-business cases. Indeed, the seriousness of a breach may not be apparent at the outset of an investigation; enabling criminal powers on top of the civil sanctions proposed in the Base Case gives the Trading Standards Services full capabilities to protect businesses through the most appropriate enforcement route

Option 2: Extending option 1, by giving the OFT the ability to enforce criminally, on top of its existing ability to enforce civilly in business-to-business cases.

15. Option 2 would extend to the OFT the same range of powers as the Trading Standards Services has, by extending the OFT's enforcement capacity to include criminal sanctions for business-to-business cases relating to misleading advertising. This would mirror similar criminal powers being given to OFT under the Regulations implementing the UCPD.

16. Given the OFT's national and international work it is disproportionate for traders to face lesser or arbitrarily different sanctions from the OFT from those they may face from the Trading Standards Services.

17. For example, a criminal prosecution for an offence affecting one or two small businesses in a local authority area currently potentially attracts a criminal penalty, whereas a nation-wide (e.g. directory entry) scam affecting hundreds of small and medium sized businesses, pursued by the OFT through the civil route, will not attract a criminal sanction. Clearly, the nature and effect of the breach should be determining factors in choosing the most appropriate enforcement action, not the identity of the body taking the enforcement action.

18. Furthermore, for maximum flexibility and to reflect Macrory principles, all enforcers should have the ability to move between criminal and civil actions. Part way through an investigation it may become apparent that a change is necessary to reflect the greater or lesser seriousness of a breach, as the impact and cause of a trader's conduct is not always clear at the beginning of an investigation.

19. It would create unnecessary duplication of effort by enforcers and potentially slow down enforcement action if partial investigations by one enforcer had to be referred to another enforcer to complete them, simply because the enforcer initiating the investigation lacked suitable powers to pursue the case appropriately itself.

Other Options

20. The MCAD includes a number of optional enforcement provisions which Member States can choose whether to implement. These include provisions dealing with the responsibility of code owners and the power of the court to order the publication of its decisions and/or corrective statements.

Responsibilities of code owners

21. MCAD Article 5(2) allows Member States to decide whether enforcement action can be taken against a code owner where the relevant code promotes non-compliance with legal requirements.

Option 3: Do nothing.

22. Not allowing action to be taken against code owners where codes promote non-compliance with the MCAD reflects the current position under the CMARs which did not implement this optional provision.

Option 4: Make it possible for civil action to be taken against code owners where their codes promote non-compliance with legal requirements.

23. This would reflect similar provisions being included in the Consumer Protection from Unfair Trading Regulations which implement the UCPD.

Power of the court to order the publication of its decision and/or a corrective statement

24. MCAD Article 5(4) allows Member States to confer upon the courts powers enabling them to order the person against whom a final injunction has been made to publish at his expense the injunction (in full or in part) in such form as deemed adequate and/or the publication of a corrective statement with a view to eliminating the continuing effects of misleading or unlawful comparative advertisements.

Option 5: Do nothing.

25. This reflects the current position under the CMARs which did not implement this optional provision.

Option 6: Give the court the power to order the person against whom a final injunction has been made to publish its decision and/or a corrective statement.

26. This would reflect similar powers made available to the courts under Part 8 of the Enterprise Act 2002. Part 8 currently applies to breaches of the CMARs which harm the collective interests of consumers.

Analysis of the Options

Base Case Costs and Benefits

27. The BPRs will not alter businesses' obligations under the CMARs not to use advertisements which mislead other businesses or which comparative advertisements which are not permitted. There should therefore be no additional costs for legitimate businesses who comply with the law.

28. Giving both enforcement agencies civil powers to enforce the Regulations will make it more likely that action will be taken against businesses using misleading marketing techniques. This will produce savings for the business that might otherwise have been misled by these marketing techniques.

29. Trading Standards Services should not incur additional on-going costs since the cost of taking action through BPRs is likely to be equivalent to the costs of bringing criminal prosecutions through the TDA in the past. There may be some reduction in costs to Trading Standards if disputes can be resolved informally (e.g. by undertakings) rather than formal court action. However, there are likely to be some small one-off costs to enforcers in familiarisation with the new regime.

Option 1 Costs and Benefits

30. The costs and benefits from the base case apply to option 1 also. Again there could be some savings for business and Trading Standards Services if less serious breaches can be dealt with through undertakings rather than formal court (civil or criminal) action.

Option 2 Costs and Benefits

31. The costs and benefits from option 1 apply to option 2 also. This option might also bring cost benefits to enforcers. Under this action, the OFT can take co-ordinated action against a national business, rather than local Trading Standards Services attempting to do so. In addition, it gives the OFT the flexibility to move between criminal and civil actions, rather than duplicating effort and having to refer a matter to a different enforcer.

Other Options

Option 3: Costs and Benefits

32. Not allowing action to be taken against a code owner where the relevant code promotes non-compliance with the BPRs would mean that individual businesses who inadvertently followed the advice in the code could face the cost of legal action being taken against them. Enforcers could face additional costs if they have to take action against a number of businesses rather than deal with the problem at source.

Option 4: Costs and Benefits

33. Although this goes further than the MCAD requires it is justified because the ability to bring a civil action against a code owner where the relevant code promotes non-compliance with legal requirements under the MCAD would be a more proportionate and cost-effective response than bringing actions against individual businesses who may inadvertently breach the BPRs by following the advice given in a code. Though there is a small risk that this option might deter code owners from operating, this risk is likely to be low. That is because code owners are unlikely to knowingly promote non-compliance with legal requirements and therefore any inadvertent non-compliance would normally be resolved through voluntary agreement with an enforcer. Only in the very unlikely event that agreement could not be reached would formal court action be considered. This mirrors the approach taken in the Consumer Protection from Unfair Trading Regulations which allow for action to be taken code owners where the relevant code promotes the use of unfair commercial practices.

Option 5: Costs and Benefits

34. Businesses could continue to suffer detriment if they take decisions based on old advertisements which the courts have ruled to be unlawful.

Option 6: Costs and Benefits

35. Legitimate businesses are less likely to deal with, and therefore suffer loss from, unscrupulous businesses if court decisions are published in a manner that is likely to bring these to their attention.

Competition Assessment

36. The obligations on businesses concerning misleading advertising and comparative advertising remain substantially the same as under the CMARS which are to be repealed. Consequently, there is no impact on competition.

Small Firms' Impact Test

37. Not giving Trading Standards Services the power to enforce the BPRs civilly and criminally would result in a reduction in protection for small business who are often the victims of scams by other unscrupulous businesses.

Race Equality/Disability Equality/Gender Equality

38. After initial screening as to the potential impact of these Regulations on race, disability and gender equality it has been decided that there will not be a major impact upon minority groups in terms of numbers affected or the seriousness of the likely impact, or both.

Recommendation and Summary Table of Costs and Benefits for the Options

39. Option 2 both returns the original business-to-business protection powers enjoyed by the Trading Standards Services prior to the repeal of the relevant provisions of the TDA and also expands the role of the OFT to ensure a common business-to-business protection approach among the bodies charged with enforcing the BPRs. Thus, Option 2 is our preferred option. The Trading Standards Services has historical expertise in protecting mainly small and medium sized businesses, principally in their local authority area, and will retain the enforcement powers and tools to continue this following the repeal of the TDA. The OFT also has a wide remit and resources as a national enforcement body and we believe that it should have the ability, where necessary, to apply those resources to prosecute businesses which mislead other businesses. These dual sanctions are important if business-to-business infringements are to continue to be penalized efficiently. This would also mirror the powers these bodies have to enforce the broadly equivalent consumer protection legislation (the Consumer Protection from Unfair Trading Regulations which implement the UCPD)).

40. Granting the OFT the ability to enforce through the criminal route endows it with an important tool to tackle business-to-business breaches whose degree of seriousness may only become apparent as investigations unfold. To limit the OFT to civil business-to-business enforcement, where it currently stands, restricts its ability to enforce business-to-business infringements that, historically, have at times necessitated criminal prosecution. Without doing this there is a risk that a national business-to-business case pursued by the OFT would be under-penalized should it become clear that criminal sanctions were necessary for an offender on this level. This will also give OFT, who may be best placed to take such action, the ability to prosecute businesses carrying out nation-wide scams. The Government, in its response to the December 2005 consultation, accepted that the OFT's current powers appear anomalous in comparison with the Trading Standards Services, and that its enhanced enforcement responsibilities (see below) make it appropriate for it to be given additional enforcement powers.

41. In the Chancellor's Pre-Budget Report 2005: Britain meeting the global challenge: Enterprise, fairness and responsibility, the OFT's responsibilities were widened to include promoting consistency and proportionality in consumer protection, as well as an increased role in working with the Trading Standards Services. Closer working in this way includes providing regulatory leadership and 'championing' the Trading Standards Services; giving the OFT access to the same sanctions as the Trading Standards Services enables the former to achieve this role. Bringing both bodies to a common level of enforcement capability in this way ensures that only the nature and effect of a business-to-business breach will determine the choice of the most appropriate enforcement action, not the identity (and legal powers) of the body taking the enforcement action.

42. Being able to take action against a code owner who promotes non-compliance with the BPRs would allow enforcement bodies to tackle potential

harm at source. In particular, this would avoid having to take action against businesses which were merely following the advice provided in the relevant code. For this reason, BERR has opted for Option 4.

43. Trading standards and consumer bodies supported giving the courts the power to order the defendant at his expense to publish its order (in full or in part) and/or a corrective statement. Although a majority of businesses opposed, a minority of business agreed arguing that the threat of adverse publicity that would inevitably come with the publication of injunctions and corrective statements would provide a huge incentive on traders to comply with the regulations. BERR has opted for Option 6 which will ensure consistency between the business-consumer and business-to-business cases.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	No	No
Rural Proofing	No	No

Annexes

TRANSPOSITION NOTE

Business Protection from Misleading Marketing Regulations

These Regulations implement Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version) ('the Directive') (OJ L376, 27.12.2006, p.21). The Regulations do what is necessary to implement the Directive.

Article	Objective	Implementation	Responsibility
Article 2(b)	Definition of "misleading advertising".	regulation 3(2) (meaning of advertising which is misleading).	Secretary of State
Article 3	Requires account to be taken in determining whether advertising is misleading of all its features. It also includes a non-exhaustive list of matters in relation to which advertising may be misleading.	regulation 3(3) to 3(5) (factors to be taken into account in determining whether advertising is misleading).	Secretary of State
Article 4	Sets out the conditions under which comparative advertising directed at both consumers and businesses is to be permitted.	regulation 4 (comparative advertising)	Secretary of State
Article 5.1, paragraph 1	Requires Member States to ensure that adequate and effective means exist to combat misleading advertising and enforce compliance with the provisions on comparative advertising in the interests of traders and competitors.	regulation 3(1) prohibits misleading advertising. regulation 13 places a duty on enforcement authorities in the UK to enforce the Regulations. Part 4 (enforcement) gives them powers in relation to criminal and civil enforcement	Secretary of State
Article 5.1, paragraph 2	Requires Member States to give persons or organisations regarded under national law as having a legitimate interest in combating misleading advertising or regulating comparative advertising to take legal action described in article 5.3 against such advertising.	regulation 15 (injunctions to secure compliance with the Regulations).	Secretary of State
Article 5.3	Sets out the powers that must be available to the courts to stop or prevent the use of misleading advertising and comparative advertising which is not permitted.	regulation 18(1) to (3) and (7) (powers of the court on application of enforcement authority).	Secretary of State
Article 6	Clarifies that the Directive does not prevent Member States encouraging the control of misleading and comparative advertising through self-regulatory bodies provided this is in addition to court or administrative proceedings provided for in Article 5.	regulation 13(4) provides that in determining how to comply with its duty of enforcement every enforcement authority shall have regard to the desirability of encouraging control of misleading advertising and impermissible comparative advertising by	Secretary of State

		such established means as it considers appropriate.	
Article 7	Requirement for court in civil proceedings referred to in article 5 to have the power to require evidence as to the accuracy of factual claims	regulation 18(5) and (6) (evidence of accuracy of factual claims).	Secretary of State