


# Business to business promotions and comparative advertisements

A quick guide to the Business Protection from Misleading Marketing Regulations 2008





This guidance provides an overview of the Business Protection from Misleading Marketing Regulations 2008 (BPRs). It should not be treated as a substitute for, or a definitive interpretation of, the BPRs, and should be read in conjunction with the regulations. The BPRs implement the Directive 2006/114/EC of the European Parliament and of the Council concerning misleading and comparative advertising.

The regulations can be found [here](#).

# What do the Business Protection from Misleading Marketing Regulations 2008 (BPRs) cover?

The BPRs:

- prohibit businesses from advertising products in a way that misleads traders
- set out conditions under which comparative advertising, to consumers and business, is permitted.

The BPRs replace large parts of the Control of Misleading Advertisements Regulations 1988 (CMARs), which were repealed in 2008. Generally, the BPRs replace the business to business protections in the CMARs, but there are some differences. For a summary of some of the significant differences see the [BPRs webpage](#).

## Do the BPRs apply to your business?

If your business advertises goods or services to other businesses, or if in your advertisements to businesses or consumers you make comparisons that identify a competitor, or products offered by a competitor, the regulations are likely to apply to your business.

The BPRs also apply to bodies which create and/or monitor business codes of conduct where the members of the code may engage in the above practices.

# Misleading advertising

An advertisement is defined broadly as any form of representation made in connection with a trade, business, craft or profession in order to promote the supply or transfer of a product – products being goods, services, intangible rights and obligations (such as cancellation rights and cash back offers) and immovable property.

The regulations cover advertising as commonly understood, such as broadcast, billboards and print advertising. They also cover other marketing and promotional activities such as oral representations, details in catalogues or websites and descriptions on packaging.

The BPRs prohibit the use of misleading advertisements. An advertisement is misleading if:

- it deceives, or is likely to deceive the traders it addresses or reaches, **and**
- the deception is likely to affect the economic behaviour of those traders **or**
- as a result of the above effect on traders it injures or is likely to injure a competitor in some way.

A trader for these purposes includes anyone acting in the name of, or on behalf of a trader.

An advertisement can be deceptive if it:

- contains a false statement of fact – this may be possible to prove or disprove by evidence
- conceals or leaves out important facts
- promises to do something but there is no intention of carrying it out
- creates a false impression, even if everything stated in it may be literally true.

### **Affect on the trader's economic behaviour:**

An advertisement will be likely to affect the economic behaviour of traders if, for example, it induces or is likely to induce them to part with money for what is being advertised.

### **Injury to a competitor as a result of the effect on the trader's economic behaviour:**

A competitor may be injured as a result of traders being deceived by a misleading advertisement, for example, where an advertiser misleads traders into using their services when the trader actually intended to use the service of company X (a competitor), perhaps by confusing the trader into believing they were actually dealing with company X. This is likely to injure company X (the competitor) as company X loses out on business as a result of the misleading advertisement.

In determining whether an advertisement is misleading account shall be taken of all its features and in particular any information about:

- the characteristics of the product, including:
  - availability
  - nature
  - execution
  - composition

- method and date of manufacture
- method and date of provision
- fitness for purpose
- uses
- quantity
- specification
- geographical or commercial origin
- results to be expected from use
- results and material features of tests or checks carried out
- the price or manner in which the price is calculated
- the conditions on which the product is supplied or provided
- the nature, attributes and rights of the advertiser, including:
  - identity
  - assets
  - qualifications
  - ownership of industrial, commercial or intellectual property rights
  - awards and distinctions.

## Examples of misleading advertising

A trader is contacted by a directory business over the phone, who offers the trader an opportunity to advertise in their business directory for a special offer price of £50. The trader considers this to be a good price and decides to make the purchase. The trader is then sent an invoice for additional monthly payments of £100. The oral representations over the phone are likely to be a misleading advertisement relating to **the price, or manner in which the price is calculated.**

A computer company advertises high definition computers on its website. On purchasing some computers for his office the trader discovers that the computers are not high definition but could be if further software is bought. This requirement was not mentioned on the website. The representations made on the company's website would be considered misleading regarding, amongst other things, **the nature and specification of the product.**

# Comparative advertising

The BPRs also regulate the use of comparative advertisements, whether addressed to consumers or business or both. A comparative advertisement is one that, in any way, identifies a competitor or products offered by a competitor. In such circumstances it must meet certain conditions in order to be compliant with the regulations. Identifying a competitor or a competitor's product can occur explicitly or by implication.

Supermarket A comparing the prices of their products to that of supermarket B is an example of an explicit identification. A supermarket comparing their cola product to that of a 'leading brand', without explicitly mentioning the name of the leading brand, would be an example of an implicit identification, where there was an obvious brand leader for cola products.

## Comparative advertising compliance checklist

The following statements give you an indication of whether or not your comparative advertisement is permitted. If your advertisement does not reach or address consumers (individuals acting for purposes outside their business) the first two points will not apply to you. These points relate to a requirement for your advertisement to comply with certain provisions of the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). Further details on the CPRs can be found below.

Your comparative advertisement **must not** contain any of the features listed below. If it does it is not likely to be permitted.

1. The advert gives false information to, or deceives consumers, and this causes, or might cause, the average consumer to take



- a different decision about any goods, services, rights and/or obligations than they otherwise might have taken.
2. The advert fails to give consumers enough information about a product and this causes, or might cause the average consumer to take a different decision about any goods, services, rights and/or obligations than they otherwise might have taken.
  3. The advert is misleading under the BPRs.
  4. The advert compares products that do not meet the same needs or are not intended for the same purpose.
  5. The advert fails to objectively compare one or more material, relevant, verifiable and representative\* features of those products, which may include the price.
  6. The advert creates confusion (among traders) between the advertiser and a competitor or between the trade marks, trade names, other distinguishing marks or products of the advertiser and those of a competitor.
  7. The advert discredits or denigrates the trade marks, trade names, other distinguishing marks, products, activities or circumstances of a competitor.
  8. The product advertised, which has a particular designation of origin, is compared to a product with a different designation of origin.
  9. The advert takes unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor, or of the designation of origin of competing products.
  10. The advert presents goods as imitations or replicas of goods with a protected trade mark or trade name.

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\* features which are characteristic of the product and therefore will be an identifying feature, for example, bagless vacuums or low emission cars.

## Examples of prohibited comparative advertisements

Manufacturer A's website compares the price of their desk chairs to that of manufacturer B's, highlighting the fact that their chairs are £100 cheaper than manufacturer B's. Manufacturer B's chairs are more expensive as they are made of leather, whilst manufacturer A use faux leather. This comparative advertisement could be **misleading under the BPRs** (for example, deceiving traders and as a result affecting their economic behaviour) since it is potentially deceptive in terms of the **lack of information provided about the composition of the product**. If the advertisement also addressed consumers it could also breach provisions of the CPRs by **failing to give consumers enough information about a product**. Comparative advertisements that breach certain aspects of the CPRs are also prohibited under the BPRs (see point 2 of the compliance checklist above).

Posters displayed in a bank compare interest rates on its mortgage account to the interest rates of its competitor's credit card. Here a comparison has been made to a **product that does not meet the same need or is not intended for the same purpose**.

A manufacturer of protective industrial clothing distributes catalogues containing anti-static work wear. The work wear contain logos extremely similar to that of a competing manufacturer. Traders buy the clothing in the mistaken belief that they are actually buying the competitor's product as opposed to the advertiser's poorer quality product. Although the advertiser does not explicitly mention the competitor the logo is so similar to that of its competitor that it confuses the purchaser (a trader) who makes the purchase in the belief

that the product has been manufactured by their competitor when this is not the case. This meets the definition of a comparative advertisement since the comparison has been made by implication. Here the advertisement **creates confusion, among traders, between the advertiser and a competitor**. The advertisement also creates **confusion, among traders, between the distinguishing marks of the advertiser and competitor**. This could also be an example of an advertiser **taking unfair advantage of the reputation of a distinguishing mark or a competitor**. Note here that the confusion caused must be among traders and not consumers. Where this type of behaviour causes confusion among consumers the CPRs contain similar provisions that protect consumers.

Company X sells and installs bathroom suites. To explain their higher than average prices, a routine line in their sales pitch is to point out that competing companies Y and Z provide poor quality installation services, using inexperienced staff. This oral representation would be considered an advertisement which **discredits the products of a competitor**. It could also potentially be considered as **denigrating the competitor**.

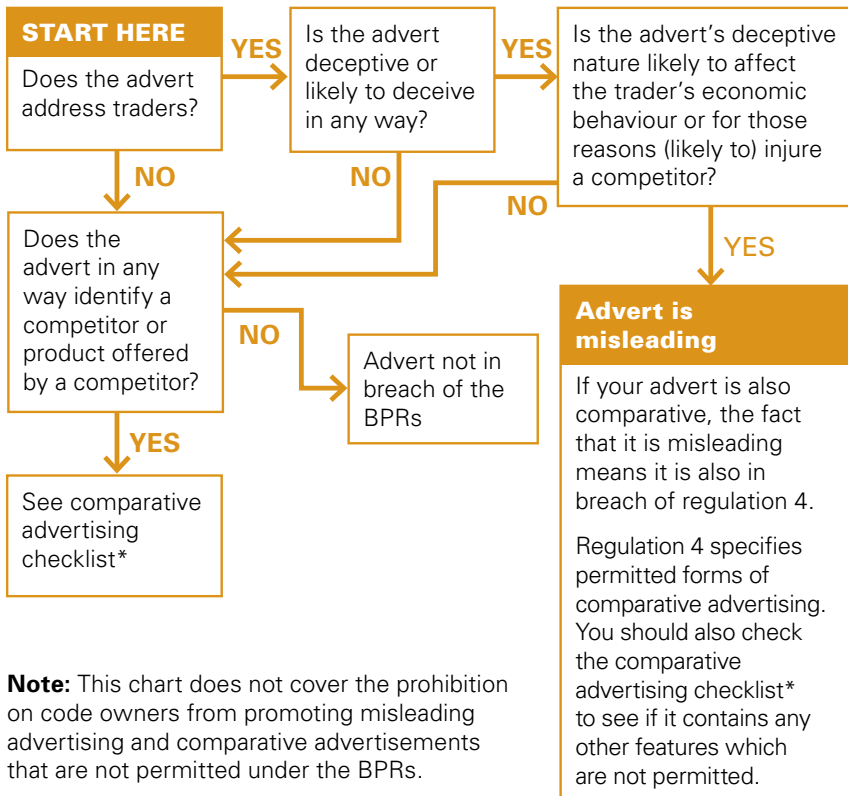
An advertisement compares a Scottish whisky brand with an Irish whisky brand. This is an example of **comparing a product with a certain designation of origin to a product with a different designation**.

A jewellery shop displays a sign with the following statement: 'Imitation Cartier and Rolex watches from £50.' This is an example of an advertiser **presenting goods as imitations or replicas of goods with a protected trademark or trade name**.

# Promoting misleading advertising and comparative advertising which is not permitted

Bodies which create and/or monitor business codes of conduct are also prohibited from using their code to promote misleading advertisements or comparative advertising which is not permitted under the BPRs.

## Does your advertisement comply with the BPRs?



**Note:** This chart does not cover the prohibition on code owners from promoting misleading advertising and comparative advertisements that are not permitted under the BPRs.

\* see page 8


## Enforcement

A breach of the BPRs can be enforced by the Office of Fair Trading, local authority Trading Standards Services (TSS) and the Department of Enterprise Trade and Investment in Northern Ireland.

If it is considered that there has been, or is likely to be a breach of the regulations, enforcement authorities can begin court proceedings for an injunction against the person concerned, or likely to be concerned, in order to prevent or stop a breach of the BPRs. The court may require the person concerned to provide evidence to support any factual claims made in an advertisement. The trader can also be required to publish a corrective statement about the advertisement. Breach of an injunction is considered contempt of court and can lead to up to two years imprisonment and/or an unlimited fine. The OFT will generally seek to ensure compliance with the BPRs through education, advice and guidance in the first instance. An injunction will generally be sought only after the OFT has consulted with the trader in an attempt to obtain compliance and this consultation has failed. Instead of seeking an injunction an enforcer may accept undertakings from the trader, promising not to engage in or repeat the conduct constituting a breach of the regulations.

Engaging in advertising that is **misleading** is also a criminal offence, which on conviction can lead to up to two years imprisonment and/or an unlimited fine.

In the case of criminal offences by a corporate body, if the offence has been committed with the consent or connivance or as a result of negligence of an officer of the body they will be guilty of an offence along with the corporate body. An officer can be



a director, manager, secretary or similar officer or any person purporting to act as such. In relation to Scottish Partnerships the partner will be liable as well as the partnership.

The offence is one of strict liability which means that it only has to be proved that a trader has engaged in advertising which is misleading under the BPRs. There is no requirement to consider whether the trader had a specific state of mind, for example, whether the trader intended to mislead. There are various defences available however, such as due diligence and innocent publication. Criminal enforcement will usually only be used as a last resort or if the particular circumstance is serious enough to warrant it.

For a variety of reasons, including differing policy and resource, TSS and the Department of Enterprise, Trade and Investment's approach to enforcement may differ from the OFT's – the above principles should, however, remain. The OFT's Enforcement Prioritisation Principles can be found [here](#).

Enforcers are required to consider whether there are established means by which compliance can be obtained, for instance by using some other existing relevant body, or organisation. If enforcers are satisfied that an alleged breach is clearly within the scope of other existing means of securing compliance and can be adequately, and effectively dealt with by another relevant body or organisation, then enforcers will be able to refer alleged breaches of the regulations to such relevant bodies.

## Other legislation

### **Consumer Protection from Unfair Trading Regulations 2008 (CPRs)**

Under the CPRs businesses are prohibited from engaging in unfair commercial practices. This includes using advertisements that mislead consumers and that cause them, or are likely to

cause them, to take a different transactional decision. Failing to provide information adequately or at all is also considered misleading. Comparative advertising which is misleading under the CPRs will also breach the BPRs. Further information on the CPRs can be found [here](#).

## Where to go for further information

### Local authority Trading Standards Services

See [www.tradingstandards.gov.uk](http://www.tradingstandards.gov.uk) for advice on law and details of your nearest TSS office. TSS are co-enforcers of the BPRs and in most cases act when problems can be managed primarily using local or regional resources and capabilities.

If you believe your business is being affected by a misleading or comparative advertisement, you should contact your local TSS in the first instance.

### Advertising Standards Authority (ASA)

The ASA are a key Compliance Partner for OFT. Via the use of self regulatory codes, they regulate all TV and radio advertisements and some non-broadcast media advertisements (for example cinema, direct mail and some online advertisements, such as banner and pop-ups ads). The rules contained in the codes address obligations under the BPRs. However the ASA does not deal with all the forms of advertising covered by the BPRs such as oral representations.

See [www.cap.org.uk/cap/codes](http://www.cap.org.uk/cap/codes) to access the codes.

See [www.asa.org.uk](http://www.asa.org.uk) for more information on the codes and ASA's role in enforcing them.

## **PhonepayPlus**

PhonepayPlus is responsible for regulating the content, promotion and overall operation of premium rate services – those goods and services that are bought by charging the cost to a phone bill or pre-pay phone account.

See [www.phonepayplus.org.uk](http://www.phonepayplus.org.uk) for more information.

## **The Department for Business Enterprise and Regulatory Reform (BERR)**

See [www.berr.gov.uk](http://www.berr.gov.uk) for background information on running a business.

## **Office of Communications (Ofcom)**

Ofcom is the regulator for the UK communications industries, with responsibilities across television, radio, telecommunications and wireless communications services. See [www.ofcom.org.uk](http://www.ofcom.org.uk) for further information.

## **Businesslink**

See [www.businesslink.gov.uk](http://www.businesslink.gov.uk) for free business advice and support.





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