

OFT guidance for estate agents

Compliance with the Consumer Protection from Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008

A consultation

September 2011

OFT1364con

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Any enquiries regarding this publication should be sent to us at: Marketing, Office of Fair Trading, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX, or email: marketing@oft.gsi.gov.uk.

This publication is also available from our website at: www.oft.gov.uk.

Scope of this consultation

Topic of this consultation	<p>The consultation concerns the OFT's draft guidance on the application of the Consumer Protection from Unfair Trading Regulations 2008 and Business Protection from Misleading Marketing Regulations 2008 to estate agents (and others) in relation to the buying or selling of property or land in the UK.</p>
Scope of this consultation	<p>We are focusing only on these two regulations. The draft guidance is not intended to cover the full range of legislation applying to this sector.</p> <p>We are covering all sales of property and land except private sales of residential property that are arranged without the use of an estate agent.</p> <p>We are focusing on sales in the UK only. (The OFT is willing to produce similar guidance on lettings and property management. However, at this stage, we keep an open mind whether such guidance is best dealt with in a combined document (with this sales guidance), in a separate document or as part of a broader set of guidance and support materials for the lettings industry. We welcome stakeholder views on the best course to take.)</p>
Geographical scope	<p>UK-wide.</p>
Impact assessment	<p>There is no impact assessment linked to this consultation. We do not conduct impact assessments when producing explanatory guidance.</p>

Basic information

To	<p>We are publishing this consultation on the OFT website and sending it to a range of interested parties to invite comments.</p> <p>The consultation is aimed primarily at estate agents offering property sales services, property developers that market and sell their own developments, relevant trade associations and professional bodies, and the property ombudsmen.</p> <p>It will also be of interest to enforcers, government departments, consumer groups and advisors, and other businesses involved in property sales that are not estate agents themselves.</p>
Duration	<p>The consultation will run from 19 September 2011 to 9 December 2011.</p>
Enquiries	<p>By telephone: David Hart on 020 7211 8849</p> <p>By email to: david.hart@oft.gsi.gov.uk</p> <p>By fax to: 020 7211 8465</p> <p>By post to: David Hart, Goods and Consumer Group, Office of Fair Trading, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX</p>

<p>How to respond</p>	<p>We would welcome your comments on the content of this draft guidance document. We want to ensure that the guidance is clear and comprehensive for its intended users and covers all relevant matters.</p> <p>Please respond to as many of the questions set out in Annexe D as you are able and provide any suggested changes or comments on the draft in writing (by email, or alternatively by letter or fax, to David Hart as indicated above).</p> <p>Note that any evidence that you are able to supply in support of the changes that you propose is likely to add weight to our consideration.</p> <p>When responding to this consultation please state whether you are responding as an individual or whether you are representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were collated.</p>
<p>Additional ways to become involved</p>	<p>If you wish to request a meeting with the team involved please contact David Hart (contact details given above).</p> <p>We also plan to host half day workshops for industry, Trading Standards Officers and consumer groups during the consultation period. If you would be interested in attending a workshop please contact David Hart (contact details given above) as places will be strictly limited.</p>
<p>After the consultation</p>	<p>After the consultation we will publish our final guidance and a summary of responses received. Both documents will be available on our website at www.oft.gov.uk/publications.</p> <p>Following publication, the guidance will be kept under review, and we will consider adding to it on an ongoing basis in the light of user feedback, practical experience and case law.</p>

<p>Compliance with the <i>Code of Practice on Consultation</i></p>	<p>This consultation complies with the Better Regulation Executive's Code of Practice on Consultation. A list of the key criteria can be found at Annexe E, along with a link to the full document.</p>
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Background

<p>Getting to this stage</p>	<p>Following the OFT's Home Buying and Selling market study, published in February 2010 (www.offt.gov.uk/OFTwork/markets-work), the OFT is concerned that the industry's understanding of the Consumer Protection from Unfair Trading Regulations 2008 may be limited. In a market where consumers make the biggest purchase of their lives, purchases are infrequent and first-time buyers account for a large proportion of the market, unfair business practices can cause substantial consumer harm.</p> <p>In addition, the Business Protection from Misleading Marketing Regulations 2008 offer protection against misleading advertising to businesses.</p> <p>The guidance seeks to clarify how the regulations apply to estate agency and what businesses should do to comply with the law.</p>
<p>Previous engagement</p>	<p>We have engaged informally with interested parties, including industry representatives and enforcers, to seek their initial views on the content of this consultation.</p> <p>We are grateful to all those who took the time to provide comments and advice.</p>

Feedback about this consultation

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

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A copy of the key criteria from the Better Regulation Executive's *Code of Practice on Consultation* can be found in Annexe E.

Data use statement for responses

Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. All information received (including personal data) is subject to Part 9 of the Enterprise Act 2002. We may choose to refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, would or might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that business. If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.

Please note that information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000 (FOIA). In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the Enterprise Act 2002.

If you are replying by email, these provisions override any standard confidentiality disclaimer that is generated by your organisation's IT system.

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1 USING THE GUIDANCE

- 1.1 This guidance is intended to help you to comply with the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and the Business Protection from Misleading Marketing Regulations 2008 (BPRs)¹ – 'the regulations' – when you deal with sales of property and land in the UK.

Is this guidance for me?

- 1.2 The guidance applies to traditional high street estate agents, property auctioneers, buyers' agents, online estate agents, solicitors' property centres (in Scotland), and solicitors and online property sites which offer services that count as estate agency work. When we use the term 'estate agent' we include all these businesses and anyone else who may be engaged in estate agency work.² The guidance also applies to property developers that market and sell their own developments.
- 1.3 Parts of the guidance may also be relevant and helpful to businesses that provide services to estate agents, property buyers or property sellers (but which are not estate agents themselves). In addition, the guidance is intended to be of use to enforcers and consumer advisors, to help them understand what trading practices are likely to be prohibited.

What does the guidance cover?

- 1.4 The guidance provides an overview of the regulations and sets out some examples of the kinds of trading practice or conduct specific to the estate agency sector that are likely to breach them. It also sets out some

¹ Statutory Instruments 2008/1277 and 2008/1276, respectively.

² The Estate Agents Act 1979 defines 'estate agency work'. Broadly, a person is engaged in estate agency work if they, as part of a business and acting on a client's instructions, introduce and/or negotiate with people who want to buy or sell property or land in the UK.

of the practical steps you may wish to take to help you comply with the law.

- 1.5 Not all points listed will apply to every estate agent (since the range of services they offer may differ). Nor is the guidance intended to be exhaustive: it does not cover every situation or practice in which a breach of the CPRs or BPRs may occur.
- 1.6 This guidance is not a substitute for the law itself nor does it replace the role of a court in clarifying the law.
- 1.7 There are other important laws and regulations that apply to you, which are not covered in this guidance. Annexe C lists some of them and provides links to further guidance.

What do I need to do?

- 1.8 It is important that you read and understand the guidance to make sure you are complying with the law and treating your customers properly.
- 1.9 You should:
 - consider how the guidance applies to your property sales business³
 - if necessary, make changes to your business practices, and
 - ensure that your staff understand the regulations and comply with them.

What happens if I don't comply with the law?

- 1.10 **If you do not comply with the law you may face civil and/or criminal sanction.** For example you may face enforcement action by your local

³ You may find the guidance relevant to other parts of your business too, for example the regulations also apply to lettings and property management.

authority Trading Standards Service (or, in Northern Ireland, the Department of Enterprise, Trade and Investment), or by the OFT (see section 5 for more information on enforcement action). You could also lose your customers, some of whom may have the right to take legal action against you. If a consumer complains to an approved redress scheme, and the complaint is upheld, you may be required to pay compensation or make an apology.

Where can I get further advice?

- 1.11 For further advice you should contact your local authority Trading Standards Service (or, in Northern Ireland, the Department of Enterprise, Trade and Investment) and/or seek independent legal advice.
- 1.12 Additional guidance on the regulations can be found in the OFT and BIS's general guidance document on the CPRs, 'Guidance on the Consumer Protection from Unfair Trading Regulations 2008', OFT1008, and the OFT's quick guide to the BPRs, 'Business to Business Promotions and Comparative Advertisements', OFT1056.⁴

Providing feedback on the guidance

- 1.13 The guidance will be kept under review and we will consider adding to it on an ongoing basis in the light of user feedback, practical experience, case law and any changes in legislation.
- 1.14 If you wish to comment on any aspect of the guidance, you can do so by email to: david.hart@oft.gsi.gov.uk..
- 1.15 This Guidance is compliant with the BIS Code of Practice on Guidance on Regulation. A copy of the Code can be found at: www.bis.gov.uk/Policies/better-regulation.

⁴ Call 0800 389 3158 for free copies of these publications or download copies at www.oft.gov.uk/OFTwork/publications and www.oft.gov.uk/business-advice.

2 OVERVIEW OF THE REGULATIONS

2.1 The regulations came into force in May 2008. They apply to all traders, not just businesses involved in the sale of property and land.

The Consumer Protection from Unfair Trading Regulations 2008 (CPRs)

2.2 The CPRs prohibit you from engaging in unfair business practices in your dealings with sellers, buyers, potential sellers and potential buyers of residential property or land (your 'consumers'), where these consumers are not acting for business purposes.

2.3 The CPRs set out broad rules outlining when business practices are unfair. These fall into five main categories.

1. Giving misleading information to consumers, for example through false or deceptive advertisements or statements.
2. Giving insufficient information to consumers, for example leaving out or hiding important information.
3. Acting aggressively, for example through sales techniques that use harassment, coercion or undue influence.
4. Failing to act in accordance with reasonable expectations of acceptable trading practice (honest market practice/good faith).
5. Engaging in any of 31 specific practices that the CPRs ban outright.

2.4 For a practice to be unfair under the first four categories above, they must cause, or be likely to cause, the average consumer⁵ to take a

⁵ An average consumer can be taken to be someone who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors. Where a commercial practice is directed at a particular group of consumers, such as first-time buyers or retired people, the 'average consumer' will refer to the average member of that group.

different decision,⁶ for example where they cause the consumer to:

- sign an agreement with you under terms that they would not otherwise have agreed to and/or
- pay for a survey, conveyancing work or some other service when they would not otherwise have done so and/or
- buy or sell a home when they would not otherwise have bought or sold and/or
- buy or sell a home on more disadvantageous terms than they would otherwise have done.

2.5 Unfair business practices can occur before, during or after an interaction between a trader and consumer – for example when an estate agent advertises its services, offers pre-agreement advice to a client, describes a property for sale, interacts with potential buyers, negotiates a sale, or handles a consumer's complaint about its conduct.

2.6 Unfair business practices can also occur beyond the immediate trader-consumer interaction, for example when they affect other buyers and sellers in a sales chain.

The Business Protection from Misleading Marketing Regulations 2008 (BPRs)

2.7 The BPRs prohibit you from engaging in deceptive activities in your business-to-business advertisements, for example when advertising your services to potential business clients or marketing commercial property for sale to businesses.

⁶ We use 'take a different decision' as shorthand for 'take a transactional decision that they would not have taken otherwise'. A transactional decision is defined widely and not simply as a decision to buy or not.

2.8 Advertisements cover not only broadcast, billboard and print advertising, but also other types of marketing and promotional activities such as oral representations and details in catalogues or websites.

2.9 The BPRs ban misleading advertising to businesses. To prove an advertisement is misleading, it is necessary to show that it deceives or is likely to deceive the businesses that it addresses or reaches, and either: (a) the deception is likely to affect their economic behaviour, or (b) the deception injures or is likely to injure a competitor. This might include cases where the misleading advertising causes a business to:

- engage your services under terms that they would not otherwise have agreed to and/or
- incur expenses that they would not otherwise have incurred and/or
- buy or sell a commercial property when they would not otherwise have bought or sold and/or
- buy or sell a commercial property on more disadvantageous terms than they would otherwise have done and/or
- lose a client or a potential client.

2.10 The BPRs also set out the conditions under which traders are permitted to make comparisons with competitors, whether those competitors are named or merely implied, when advertising or marketing to businesses, consumers or both.⁷

⁷ The list of conditions can be found in the OFT's quick guide to the BPRs (www.of.gov.uk/business-advice).

3 THE BREACHES

Giving misleading information to consumers

- 3.1 It is a breach of the CPRs to give misleading information to consumers, for example false or deceptive advertisements or statements, where this causes or is likely to cause the average consumer to take a different decision (misleading actions – regulation 5).⁸
- 3.2 An unfair business practice may mislead consumers through the false information it contains, or through the practice itself, or because its overall presentation is deceptive or is likely to be deceptive.
- 3.3 Misleading information may be given verbally, in writing or visually. This could include, for example
- Misleading information given over the telephone or in the course of discussions with prospective clients before taking instructions from them.
 - Misleading details in property particulars or other marketing material, for example newspaper advertisements, web pages and brochures.
 - Misleading photographs, video clips, floor plans, artist impressions, models or show homes.

Examples of misleading actions

- Advertising that you are bound by a code of conduct, but then failing to comply with its requirements where they are firm, capable of being verified and not aspirational.

⁸ Broadly, the misdescriptions under the Property Misdescriptions Act 1991 align with the misleading actions and omissions under the CPRs.

- Making statements in your advertisements that exaggerate your sales record, or imply that your business has a presence in a particular area when it does not, or has more offices than it actually has.
- Distributing leaflets to homes claiming that you have buyers lined up for these sorts of properties when this is not true.
- Recommending an asking price in the market appraisal that is unrealistic given current market conditions (in order to acquire the instruction).
- Misusing words or phrases like 'New Instruction', 'New' or 'New on the Market', which may give the impression that property for sale is new to the market when it is not or continuing to describe it as a new instruction for an unreasonable period of time.
- Misdetecting the main characteristics of property for sale, for example its price, location, number and size of rooms, length of lease, level of service charge, restrictive covenants (in Scotland, real burdens).
- Using out-of-date photographs that no longer provide a true depiction of the property, or significantly altering images to omit uncomplimentary features.
- Falsely claiming or creating the impression that property for sale has met standards, accreditation, guarantees, etc., when it has not, for example saying property has planning permission when it has not.
- Making a selling point when you have contrary information (for example 'secluded garden' when there is a public right of way through the garden, 'peaceful area' when a bypass is planned close to the property, 'nice views of surrounding countryside' when there is a power plant next to the property, 'off street parking' when the parking is on a public highway).

- Making broad statements about the condition of property (for example 'immaculate condition', 'recently decorated') or its features (for example 'double glazing', 'central heating') when the description only applies to parts of the property, not the whole.
- Giving misleading information about service charges or maintenance payments that must be paid to property managers, factors or facilities management companies.
- Providing a client (vendor) with a false impression of the interest in their property, for example by inventing or exaggerating feedback from viewings.
- Claiming a potential buyer will be able to buy without need of a mortgage when you do not have evidence that this is the case (in order to induce the seller to accept the offer), creating false offers, or misrepresenting the detail of an offer (for example whether it is a conditional offer).⁹
- Quoting false high offers to induce a potential buyer to put in their own offer at a higher price (to outbid those 'rival' offers) or false low offers to encourage a seller to accept a genuine offer that would otherwise be rejected as too low.
- Claiming that you have an internal complaints system that has been approved by a recognised body when you do not, or claiming to be a member of a recognised redress scheme when you are not.

Giving insufficient information to consumers

3.4 It is a breach of the CPRs to mislead consumers by failing to give them the information they need in order to make an informed decision, where

⁹ These are also likely to contravene the provisions of the Estate Agents Act 1979 and subordinate legislation.

this causes or is likely to cause the average consumer to take a different decision (misleading omissions – regulation 6).

- 3.5 This might, for example, be by omitting or hiding important information, or providing important information in an unclear, unintelligible, ambiguous, or untimely manner.¹⁰

Examples of misleading omissions

- Failing to provide sufficient information to prospective new clients about your range of services, so they are not clear what services you do not or cannot provide.
- Failing to provide the client with full information on fees and charges, such as how they are calculated and when they will be payable, and on the terms of business (for example, sole agency, sole selling rights, length of contract, any tie-in period) before they become contractually bound.¹¹
- Failing to provide adequate information to a seller about the legal requirement for certain energy performance information or, in Scotland, for the Home Report (energy report, single survey and property questionnaire).
- Failing to disclose the property's main characteristics early on, for example its price, location, number and size of rooms, length of lease, level of service charge, restrictive covenants (in Scotland, real burdens).

¹⁰ Whether the estate agent **knew** that they were concealing information is not relevant: if the existence of the information was foreseeable and the estate agent failed to take reasonable steps to obtain it, then an offence may be committed.

¹¹ All of these examples are likely to also contravene the provisions of the Estate Agents Act 1979 and subordinate legislation.

- Failing to mention significant non-standard features that you are aware of about property for sale (for example house is freehold but garage is leasehold, public right of way through garden, shared ownership of parking area and path, property with short lease or high service charge, property has a sitting tenant, major repairs that are necessary).
- Failing to provide relevant information that you are aware of about the fitness of property for sale (for example that there are serious hidden defects).
- Failing to clarify that something appearing in a photograph, which a potential buyer would reasonably assume to be included in the sale, was not included.
- Failing to disclose an interest in the sale, for example selling a retirement home when also acting as the property management company for that building.
- Failing to pass on (acceptable) offers.¹²
- Failing to inform a potential buyer whose offer has been accepted that the seller wishes the property to continue to be marketed for sale up to exchange of contracts.
- Failing to inform your client (vendor) of services that you are providing to the purchaser.

Acting aggressively

3.6 It is a breach of the CPRs to engage in practices that intimidate or exploit consumers, restricting their conduct or ability to make free or

¹² The Estate Agents (Undesirable Practices) (No 2) Order 1991 also requires you to pass on offers promptly and in writing.

informed choices, and which cause or are likely to cause the average consumer to take a different decision (aggressive practices – regulation 7).

- 3.7 In determining whether the practice is aggressive, various factors can be taken into account, for example the nature and persistence of the practice and any exploitation of misfortune or circumstance.

Examples of aggressive practices

- Putting in place onerous or disproportionate requirements which prevent a client from exercising rights to terminate an agreement or switch between estate agents.
- Pressurising a client (vendor) to market the property at less than its true value.
- Pressurising a potential buyer to use associated services, for example to take out a mortgage through the in-house mortgage advisor or to use a particular firm of solicitors or licensed conveyancers.
- Engaging in high pressure sales techniques, for example persistent and/or aggressive telephone calls, to induce the buyer to act quickly to finalise the sale and exchange contracts.
- Intimidating, pressurising or coercing consumers into dropping complaints against your business, for example by the use of threatening or abusive language or behaviour.

Banned practices

- 3.8 There are a number of business practices that are considered unfair in all circumstances and which are prohibited (CPRs banned practices – schedule 1).¹³ Some could be relevant to estate agency work.

Examples of banned practices

- Displaying a trust mark without authorisation (banned practice 2), or claiming that a trader has been approved by a public body when the trader has not or making such a claim without complying with the terms of the approval (banned practice 4).

For example, displaying the Property Ombudsman and OFT-approved code logo when not authorised to do so, or claiming falsely to be a member of a professional body or an approved redress scheme.

- Passing on materially inaccurate information on market conditions with the intention of inducing the consumer to acquire goods or services at conditions less favourable than normal market conditions (banned practice 18).

For example, telling a prospective client (vendor) that you have sold similar properties recently for a certain price when you have not or that you have potential buyers lined up when you do not.

- Using bait advertising techniques (banned practice 5).

For example advertising new build properties for sale at a certain price when the only ones available to buy are at a higher price, or using a broad 'guide price' (such as '£150,000 to 200,000') when you have reason to believe that the vendor has no intention of accepting an offer at the lower end of the range.

¹³ The full list of banned practices can be found in the OFT and BIS's general guidance on the CPRs (www.oft.gov.uk/OFTwork/publications).

- Falsely stating that a product will only be available on particular terms for a very limited time, in order to facilitate an immediate decision and deprive customers of sufficient opportunity or time to make an informed choice (banned practice 7).

For example, falsely telling a buyer that the price of a new build house is about to go up, when this is not true.

- Giving consumers the impression that their right to use an internal complaints procedure or a redress scheme is a distinctive feature of the trader's services (banned practice 10).

Failing to act in accordance with reasonable expectations of acceptable trading practice

- 3.9 It is a breach of the CPRs to fail to act in accordance with honest market practice or in good faith in your dealings with consumers (known as 'professional diligence'), where such dealings change or are likely to change the decision that an average consumer would make (the general prohibition of unfair business practices – regulation 3).
- 3.10 You are required to deal with consumers professionally and fairly (according to reasonable expectations). If you fail to do so you could be in breach of the law (even if the poor practice is widespread in the industry) and if you are shown to have knowingly or recklessly failed to do so, you will be committing a criminal offence.
- 3.11 You are very likely to be failing to act in a professionally diligent manner if you do not comply with:
- other legislation applying to residential property sales and estate agency business, or
 - the core requirements of your OFT approved redress scheme, for example to publicise that you are registered with such a scheme, to operate a complaints handling process, and to abide by an ombudsman's final decision.

3.12 You may be failing to act in a professionally diligent manner if you do not comply with other recognised standards in your industry or profession, including those set by guidance, codes of practice or other such documents. However, much may depend on the nature and quality of the standards concerned, for example how long they have been in place, what they cover and whether they are recognised by regulators or the courts.

Examples of breaches of professional diligence¹⁴

- Falsely listing properties as 'Sold Subject to Contract' to create a false impression of your business's success selling properties or displaying a 'Sold' board outside a property you have not sold.
- Leaving details of properties that you have sold on your website or in your office window for a long period of time (creating a false impression that you are selling more properties than you actually are).
- Having a sales training course for new staff which instructs them to use sales scripts and/or negotiation/sales techniques that are intended to mislead consumers.
- Failing to deal with complaints at all or in an honest, fair, reasonable and professional manner.

Using misleading advertisements aimed at businesses

3.13 It is a breach of the BPRs to advertise or market to businesses in a way that misleads them (prohibition of advertising which misleads traders – regulation 3).

¹⁴ The unfair practices highlighted at paragraph's 4.2 – 4.8 above may also contravene the requirements of 'professional diligence'.

- 3.14 The BPRs apply when you advertise your services to potential new business clients and when you market commercial property for sale to businesses.
- 3.15 An advertisement can be deceptive if it: contains a false statement of fact, conceals or leaves out important facts, promises to do something when there is no intention of carrying it out, or creates a false impression (even where the information itself is literally true).

Examples of misleading advertising

- Claiming that you have close relationships with potential business occupiers when you do not or that you are the appointed agent of a particular potential business occupier when you are not.
- Providing misleading information about the property's availability for purchase, its main characteristics, its price, or the conditions under which it can be bought – if this induces or is likely to induce a potential buyer to part with money during the process of finding and buying property.
- Saying or implying there is planning permission, when there is not, including advertising land as being ready for development when planning permission has not been given.
- Putting up 'Sold' boards outside properties that you have not sold.¹⁵

Making unfair comparisons with competitors

- 3.16 It is a breach of the BPRs to make comparisons with competitors in your advertising unless you meet the conditions that permit such advertising (comparative advertising – regulation 4).

¹⁵ Flyboarding – that is, displaying 'For Sale' or 'Sold' boards when no property is for sale or has been sold - is also forbidden by Town and Country Planning Regulations (various).

3.17 The conditions relate mainly to ensuring that the advertising is not misleading and to aspects of the fairness of the comparison, for example it must be objective, like-for-like, and relevant, representative and verifiable.¹⁶

Examples of breaches on comparative advertising

- Making comparisons with other estate agents that are not true, for example regarding numbers of property for sale, levels of fees and charges, opening hours, number of offices or number of staff.
- Advertising that you are the leading estate agent in a particular area or field when you are not (or cannot evidence), and/or that you have a particular market share in that area when you do not, or the market share information you provide in advertisements is out of date.
- Claiming in advertisements that you have more web marketing than any other agent, when you do not or cannot evidence this.

¹⁶ The full list of conditions can be found in the OFT's quick guide to the BPRs (www.of.gov.uk/business-advice).

4 STEPS TO HELP YOU COMPLY WITH THE REGULATIONS

- 4.1 We set out below some of the practical steps you may wish to take to help your business comply with the CPRs and BPRs. Given the services you provide, you need to consider what reasonable precautions you can take to ensure that you treat consumers fairly and honestly, for example what systems and safeguards you should have in place and what steps you can take to ensure that they work in practice, including staff training.
- 4.2 If you are treating your consumers fairly and honestly, then you are unlikely to fall foul of the regulations and will not need to make major changes to your practices.

When you advertise for new business

- 4.3 Ensure that any information you provide when marketing your services, in whatever form (for example flyers, websites, newspaper advertisements, verbal discussion), is true and accurate.
- 4.4 Ensure that any comparisons you make with competitors – for example your record selling properties compared with theirs or the benefits of clients using your services as opposed to theirs – are fair, objective and can be substantiated.
- 4.5 Ensure that any information you have made publicly available is not liable to mislead potential new clients, for example that details about the properties you have 'sold' or 'sold subject to contract', or statements about professional qualifications or membership of a professional body, are accurate and not out-of-date. For residential sales business, where possible, state your charges and fees inclusive of VAT.¹⁷

¹⁷ Adhering to the BIS Pricing Practices Guide (November 2010) and the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (CAP Code, September 2010) will

When you gain new clients and instructions

Providing advice to prospective clients

- 4.6 Ensure that you have a sound basis for your claims about market conditions and your advice on asking prices and prospects for sale. If the market advice you are giving to potential sellers and buyers (for the same sorts of properties in the same area) is inconsistent, then you probably need to re-examine and recast the advice.

Providing clients with important information before agreement

- 4.7 Give clients the information they need to make an informed and efficient choice, **before** an agreement is made and at each stage of the process thereafter. Do not omit or hide such information, or provide it in an unclear, unintelligible, ambiguous or untimely manner.
- 4.8 Examples of the types of information you should inform the client about prior to agreement are covered in the Estate Agents Act 1979¹⁸ and include:
- your fees and charges and when they will be payable
 - terms of business (for example whether sole agency or with sole selling rights)
 - how the agreement can be terminated
 - services you will offer to potential buyers
 - any personal interest in the sale of the property.

help you to comply with the CPRs (see www.bis.gov.uk/publications and www.cap.org.uk/The-Codes/CAP-Code).

¹⁸ For guidance on the Estate Agents Act 1979, see www.offt.gov.uk/OFTwork/publications.

- 4.9 Provide this information in writing, as this will help you to comply with the requirements of professional diligence and will also protect both you and your clients should disputes arise later on about what was said.
- 4.10 In the documentation you give to the client, make sure the most important information is clear and prominent. Draw this information to the client's attention before the agreement is signed. It is not sufficient to include such material information in small print or in a bundle of documents handed to the client before a contract is signed.¹⁹ Give clients time to read any written information.
- 4.11 As a matter of good business practice, the OFT would strongly recommend that key information is provided in the form of a short summary document, such as a checklist.

When you market property

Gathering information for marketing

- 4.12 When you gather the information you need for marketing purposes, take reasonable steps to establish its truth and accuracy. For example:
- Before asking the seller questions about the property, explain to them the importance of providing honest, accurate and truthful information: that giving misleading or incorrect information is likely to be uncovered later in the conveyancing process and, potentially, could endanger the sale and leave both you and the seller open to legal action.
 - If appropriate and reasonable, in order to establish or confirm key facts, ask to see documentation or carry out checks yourself. Relying on the seller's word may not offer you a defence if it can be shown

¹⁹ Hiding important information in small print may also amount to a breach of the Unfair Terms in Consumer Contracts Regulations 1999.

that you could have taken other reasonable steps to verify the information.

- Obtain a written commitment from clients to tell you if anything changes, for example so a property developer keeps you up-to-date if building materials change from initial plan to actual construction.
- If you inspect the property before marketing, carry out the obvious and easy-to-do checks.
- If you think there are significant gaps or uncertainties in the seller's information, check with official sources.

4.13 What is reasonable to expect of you will vary depending on what services you are providing, but might include

- drawing on your knowledge (as an estate agent) of the locality
- asking your client pertinent questions about the property and, where appropriate, requesting to see supporting documentation
- establishing certain facts about the property when you inspect it, and
- consulting official sources (such as the Land Registry and local authorities), where appropriate.

Unless you have led consumers to believe otherwise, it would not be reasonable for them to expect you to carry out the specialised checks done by others in the sales process (surveyors, conveyancers, etc).

Producing sales particulars and other marketing information

4.14 Ensure that the information you use in your property particulars and other marketing is true, accurate and not likely to mislead. For example:

- Before you market the property, require the client to read your documentation and sign it, confirming that the particulars and other

marketing materials are correct. Give them the opportunity to amend anything that is wrong.

- Take care that you present information fairly and fully.
- Bear in mind that, while you are not responsible for the content of information supplied by other professionals (for example energy assessors and surveyors), you are responsible for the way you use this information in marketing.
- Take care with qualifying statements. Those that clarify may be helpful (for example 'boarded loft area' or 'room with potential as bedroom - planning permission required' when the seller cannot evidence that a loft conversion has planning approval for use as a bedroom). However, those that seek to limit liability such as 'all details provided by the vendor' may not help you if it was appropriate for you to check the information yourself.
- If you make a selling point of a particular feature of the property which turns out to be misleading (for example parking rights, planning permissions, number of years remaining on the lease, surrounding views), and you have not taken reasonable steps to check the facts, you may increase the risk of committing a CPRs or BPRs breach.
- While the property is on the market, keep particulars and other marketing materials up-to-date. Have a system in place to periodically verify details, asking clients whether there have been any changes and requiring them to confirm the particulars as up-to-date and correct. To avoid confusion, it may help to include on particulars the date on which they were compiled or revised.
- If you discover that an error or honest mistake has been made, act promptly to correct it.

4.15 If you decide **not** to undertake certain checks you will need to be able to show that you were justified in making that decision and that it was

reasonable in those particular circumstances for you not to do those checks.

Putting details on internet property portals

- 4.16 If you use internet portals or intermediaries, check what flags they automatically raise on a property (for example 'new instruction') when you upload to their site and take all reasonable precautions to correct the information if it is inaccurate.

Treating potential buyers fairly when they show interest in a property

- 4.17 Explain to potential buyers what information has been taken at the seller's word, what appears to be supported by documentary evidence seen by you, and what has been confirmed by your own checks. If, for a good reason, you have not seen the property yourself and thus not been able to check basic facts, make this clear from the outset. Similarly, if the information supplied by the seller is limited, as may be the case on probate or repossession sales, declare this upfront.
- 4.18 Consider what information a prospective buyer might reasonably expect you to provide (given the services you are offering) at the outset, when they are trying to identify properties of possible interest. This is likely to include the main characteristics of the property and any non-standard features (for example no parking, no electricity). Try to make this information available to them before they commit to view the property.
- 4.19 Consider what information a prospective buyer might reasonably expect you to provide (given the services you are offering) once they have expressed serious interest in the property and, in particular, before they commit to paying money (for example on a survey), and give them this information where possible. It might include:
- fitness for purpose, including defects (both defects that can be seen and hidden defects that you know about)
 - any problems regarding mortgage suitability which you are aware of

- any issues about title that you know of.

Of course, depending on your understanding of what the potential buyer wants or does not want, it may be appropriate to disclose this information early on.

- 4.20 Bear in mind that, with the CPRs, if information is significant and its omission is likely to cause the average consumer to take a different decision, then you will be expected to disclose what you know and, if you could take reasonable steps to obtain the information, what you should know. Tell potential buyers what you do know of hidden defects, the need for planning consent or major repairs, the risk of flooding, restrictions on the use of the land, etc.

When you negotiate and make sales

Keeping the client informed and treating them fairly

- 4.21 Ensure that you keep clients informed about offers that are made, unless you have been instructed not to do so if the offer falls below a certain price or unless you have good reason not to pass it on. Keep a record of all offers made and your related actions.
- 4.22 Establish how the prospective buyer would buy your client's property, for example by a cash purchase, a cash purchase once their own property is sold or a mortgage, and pass on the information to your client.
- 4.23 In keeping with the provisions of the Estate Agents Act 1979, ensure that you keep clients informed of
- the nature and extent of any personal interest you or a person connected to you may have in the transaction and
 - the services that you are supplying to interested buyers.

Treating potential buyers fairly when they make offers

- 4.24 In keeping with the provisions of the Estate Agents Act 1979, ensure that you do not discriminate against potential buyers who have declined to take services (such as a mortgage or conveyancing work) from you or a connected person. If you decide not to pass on an offer, explain to the potential buyer why not.
- 4.25 Keep all prospective buyers with offers under consideration informed promptly of any new offers submitted to the seller.

When you deal with complaints

- 4.26 Have accessible, appropriate and user-friendly procedures in place so that all consumer enquiries are dealt with in an honest, fair, professional and reasonable manner.
- 4.27 Have an effective customer complaints procedure, understood and followed by all staff who may come into contact with the public. We recommend that you have a written complaints procedure that is available to the public.
- 4.28 Deal with complaints promptly, effectively and in a professional manner.
- 4.29 Make your best efforts to find a satisfactory solution to complaints. Ensure that the steps you take to satisfy the consumer are in accordance with reasonable expectations.
- 4.30 Keep a record of all complaints and note the final outcome.
- 4.31 Cooperate with any appropriate representative or intermediary, for example a Trading Standards Service, an ombudsman or a Citizens Advice Bureau, consulted by a consumer in respect of a complaint.

5 WHAT HAPPENS IF YOU DON'T COMPLY WITH THE REGULATIONS?

What action might an enforcer take?

- 5.1 If you do not comply with the CPRs or BPRs you may face enforcement action. The OFT, Local Authority Trading Standards Services (TSS) and the Department of Enterprise, Trade and Investment in Northern Ireland (DETI) have a duty to enforce these regulations.
- 5.2 This does not mean that formal enforcement action will be taken automatically in respect of each and every breach. Instead, the duty on enforcers obliges them to take steps to promote compliance by the most appropriate means. Enforcement action is one option open to them.
- 5.3 In deciding whether to act, enforcers will consider (amongst other things):
- the relevance and weight of evidence
 - any mitigating factors (for example whether what happened was due to an accident or a cause beyond your control)
 - whether you took all reasonable steps and exercised the proper care and attention to avoid breaching the regulations
 - for certain CPRs breaches, whether your practice would cause or likely cause the average consumer to take a different decision.
- 5.4 The enforcer (or, in Scotland, the Procurator Fiscal) can choose to take criminal enforcement action. Alternatively, the enforcer can opt for civil enforcement action, which can include applying for a court order to prevent or stop breaches of the regulations.

What penalties might you face?

- 5.5 If you are convicted of committing a criminal offence under the CPRs or BPRs the penalties are:
- on Summary conviction in the Magistrates Court (Sheriff or Justice of the Peace Court in Scotland), a fine not exceeding the statutory maximum – currently £5,000
 - on Conviction on indictment in the Crown Court (Sheriff Court in Scotland), an unlimited fine or imprisonment for up to two years, or both.
- 5.6 If you are subject to a civil court order requiring you to prevent or stop breaches, and you breach that order, you could be liable to up to two years imprisonment and/or an unlimited fine.
- 5.7 The business itself, a person in charge, an employee or an associate of the business may be the subject of the conviction, fine or civil court order.
- 5.8 There may be additional consequences. Under the Estate Agents Act 1979, if the OFT deems you to be unfit to engage in estate agency work, it can issue a prohibition order banning you from doing so. Under the Consumer Credit Act 1974, if the OFT considers you to be unfit to engage in credit-related business, it can refuse to issue you with a credit licence or revoke, vary or suspend your existing one.

What action might a consumer take?

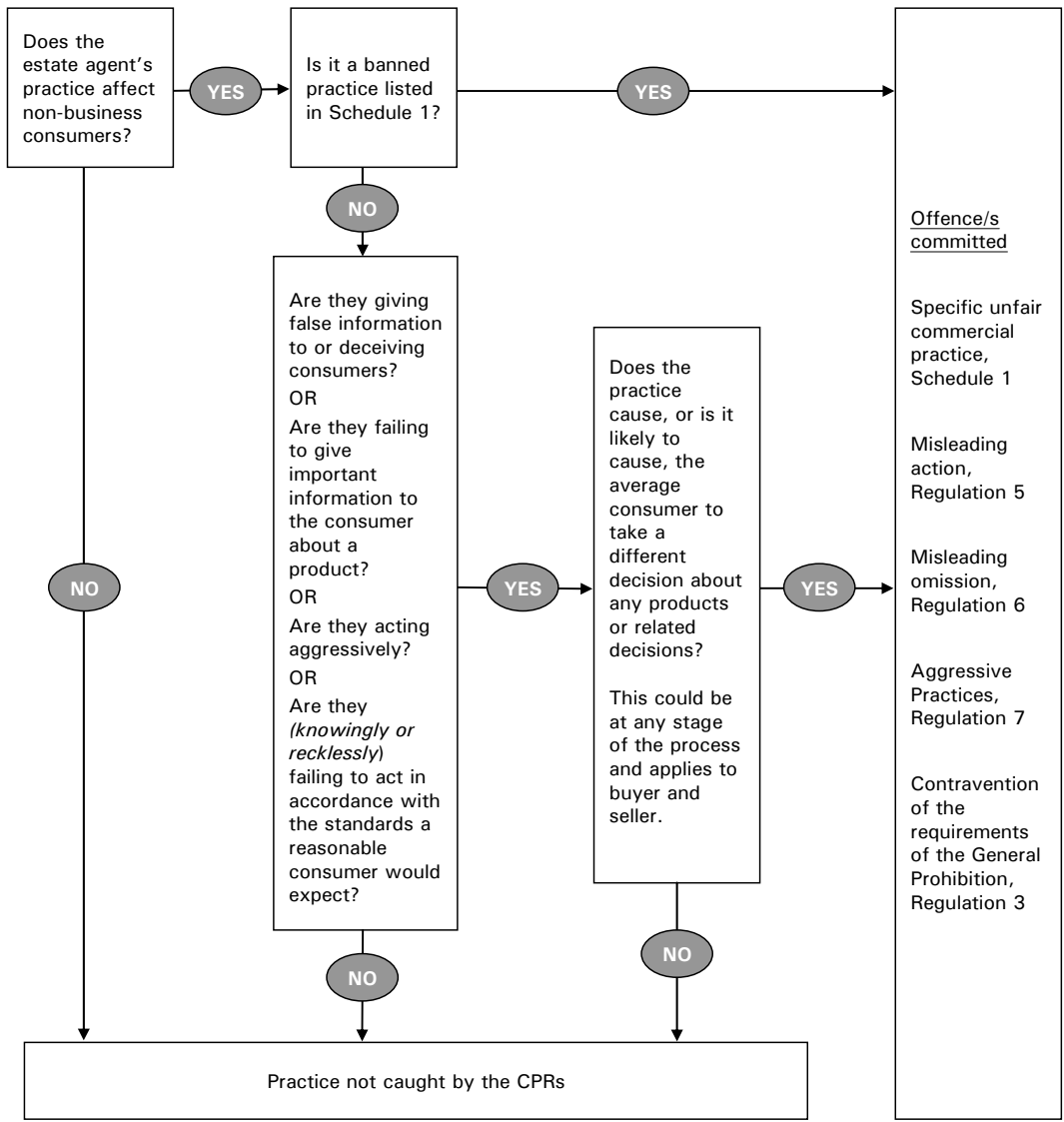
- 5.9 A consumer may take their specific complaint against you to an approved redress scheme.²⁰ If the complaint is upheld, you may be

²⁰ If you are a solicitor providing estate agency services **and** you are exempt from the duty to join an approved redress scheme, the consumer may complain instead to your professional body or a legal ombudsman, which will have its own disciplinary procedures and sanctions.

required to apologise to the complainant and/or pay compensation of up to £25,000. A serious breach of legislation and/or a recognised standard (for example a code of practice) could also lead to your dismissal from the approved redress scheme. As it is a legal requirement for you to belong to such a scheme, you would no longer be able to trade as an estate agent.

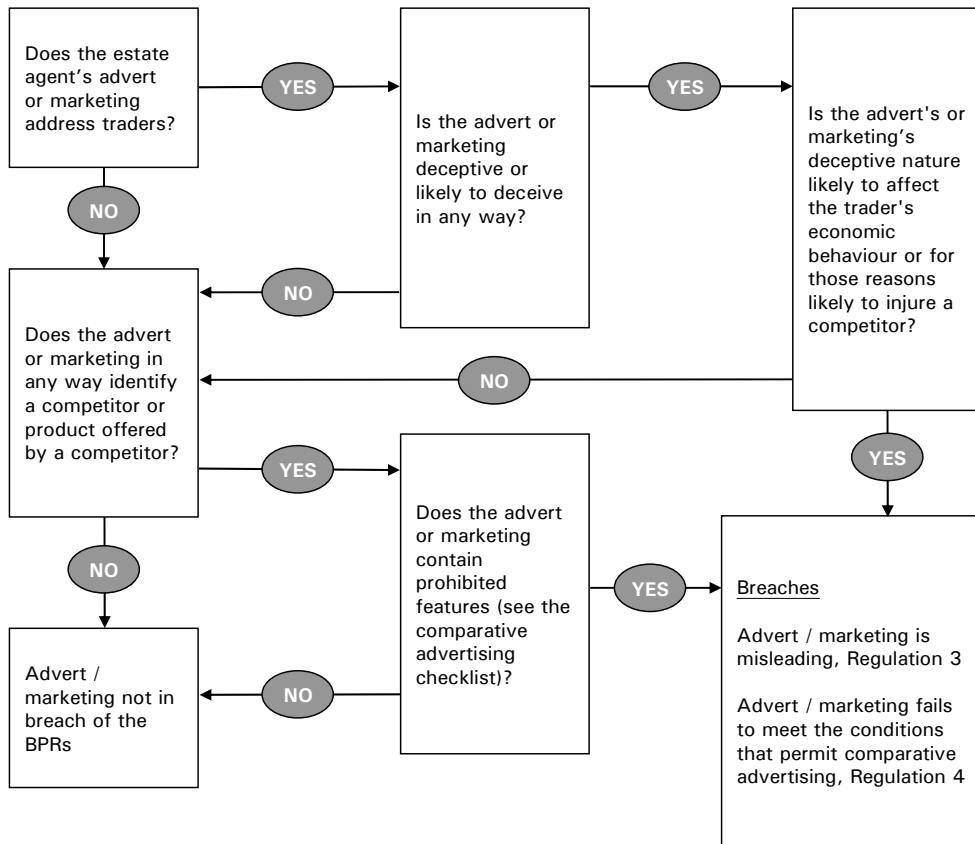
ANNEXE(S)

A THE CPRS - ASSESSING WHETHER YOUR BUSINESS PRACTICES ARE UNFAIR



Flowchart of CPRs breaches

B THE BPRS - ASSESSING WHETHER YOUR BUSINESS PRACTICES ARE MISLEADING



Flowchart of BPRs breaches

C SELECTED OTHER LEGISLATION AND RELATED GUIDANCE

Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008 (the 'doorstep selling regulations')

Require you, when entering into contracts with consumers away from your business premises, to provide a minimum seven-day cooling off period and to notify consumers clearly in writing that they have the right to cancel and how they can do this.

For further information, see www.businesslink.gov.uk/bdotg/action.

Consumer Credit Act (CCA) 1974 as amended by the Consumer Credit Act 2006

Requires you, if you engage in certain consumer credit activities, to be licensed by the Office of Fair Trading and to adhere to certain rules, for example on advertising, pre-contract disclosure, credit agreements and post-contractual information.

For further information see www.offt.gov.uk/about-the-offt/legal-powers.

Electronic Commerce Regulations 2002 (the ECRs)

Require you, if you have a web presence, to provide certain information about your business, for example the geographic address at which your business is based, your contact details to enable consumers to communicate with you, and details of any professional bodies and trade associations to which you belong.

For further information, see www.offt.gov.uk/OFTwork/publications.

Estate Agents Act (EEA) 1979 as amended by the Consumers, Estate Agents and Redress Act (CEARA) 2007

Requires you, when buying or selling property, to comply with certain rules of conduct when acting for clients, for example:

- providing them with full and detailed information about fees and charges for your services
- disclosing any personal interest that you may have in the sale
- keeping them promptly informed about offers received

- handling their money properly and
- being a member of an OFT approved consumer redress scheme.

For further information, see www.oft.gov.uk/OFTwork/publications.

Financial Services and Markets Act (FSMA) 2000

Requires you to establish whether your business is a 'regulated activity' (for example advising, arranging or administering home finance activities) and, if it is, to obtain authorisation or exemption from the Financial Services Authority.

For further information, see www.fsa.gov.uk/pages/Doing/.

Housing (Scotland) Act 2006

Requires you, when marketing residential property for sale in Scotland, to provide a Home Report, comprising a Property Questionnaire (filled in by the seller), an Energy Report (produced by a surveyor) and a Single Survey (a surveyor's assessment of the condition and value of the home).

For further information, see www.homereportscotland.gov.uk.

Money Laundering Regulations 2007 (the MLRs)

Require you to take necessary steps to prevent money laundering or terrorist financing, for example to put in place procedures to identify clients and verify their identities before entering into a business relationship or transaction.

For further information, see www.oft.gov.uk/mlr.

Property Misdescriptions Act (PMA) 1991

Requires you to describe residential and business properties for sale truthfully. The specified matters covered by the legislation are wide ranging, and include location or address, aspect or view or outlook, measurements and sizes, and physical or structural characteristics.

For further information, see www.businesslink.gov.uk/bdotg/action.

The Government is considering whether to repeal the PMA. For further information on that see www.bis.gov.uk/Consultations/category/closedawaitingresponse.

Unfair Contract Terms Act (UCTA) 1977

Requires you, when selling to other businesses, to observe restrictions on the use of clauses that seek to exclude or restrict liability for breach of contract, negligence or other breaches of duty.

For further information, see www.businesslink.gov.uk/bdotg/action.

Unfair Terms in Consumer Contracts Regulations 1999 (the UTCCRs)

Require you, when using standard contract terms (subject to certain exceptions), to meet the test of fairness, for example:

- to express terms fully, clearly and legibly, giving due prominence to terms that might disadvantage the consumer and
- to respect consumers' legitimate interests, not taking advantage of their weaker bargaining position, or lack of experience, in deciding what their rights and obligations shall be.

For further information, see www.ofc.gov.uk/OFTwork.

D QUESTIONS FOR CONSULTEES

Content

- Q.1 Overall, is the draft guidance sufficiently clear and helpful?
- Q.2 Does the draft guidance have any significant omissions? If so, what's missing?
- Q.3 Do any parts of the draft guidance need clarification and, if so, in what respect?
- Q.4 Which parts of the draft guidance are not needed? For example, are the flowcharts useful?
- Q.5 Are the illustrative examples useful? Are there better ones that we should use instead? Are there important extra ones that we should add? What changes would you advise?
- Q.6 Are the steps to take reasonable? What changes would you suggest?

Format

- Q.7 Is the draft guidance in the right format and length for the intended audience?
- Q.8 Is the draft guidance sufficiently user friendly for the intended audience?

General

- Q.9 What suggestions do you have on ways to improve the draft guidance?
- Q10. What do you suggest will be the best ways to disseminate the final guidance to those who need to see it?
- Q.11 Are there any further comments you wish to make?

E CONSULTATION CRITERIA

Public bodies are required to perform consultations in accordance with the following criteria wherever possible:

- E.1 **When to consult** – formal consultation should take place at a stage when there is scope to influence the policy outcome.
- E.2 **Duration of consultation exercises** – consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
- E.3 **Clarity of scope and impact** – consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
- E.4 **Accessibility of consultation exercises** – consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
- E.5 **The burden of consultation** – keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
- E.6 **Responsiveness of consultation exercises** – consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
- E.7 **Capacity to consult** – officials running consultations should seek guidance in how to run effective consultation exercises and share what they have learned from the experience.
- E.8 The full *Code of Practice on Consultation* can be found on the website of the Department for Business, Innovation and Skills:
www.bis.gov.uk/policies/better-regulation/consultation-guidance.