

## Annexe to the OFT's Principles for online and app-based games: relevant legislative provisions

Principle	UK law provision	Corresponding EU law provision
<p><b>Transparency and material information -</b></p> <p><b>1:</b> Price information</p> <p><b>2:</b> Material information</p> <p><b>3:</b> Business information</p>	<p>CPRs: Regs 3(4)(a) and 5 (prohibition on unfair misleading actions) and Regs 3(4)(b) and 6 (prohibition on unfair misleading omissions).</p> <p>CPRs: Schedule 1, paragraph 20 – commercial practice considered unfair in all circumstances - Describing a product as 'gratis', 'free', 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.</p> <p>CCRs: Reg 13 (information to be provided before making a distance contract) and Reg 14 (requirements for distance contracts concluded by electronic means). Traders should also be aware of and comply with Reg 16 (confirmation of distance contracts).</p>	<p>UCPD: Art 5(4)(a) and Art 6 (prohibition on unfair misleading actions) and Art 5(4)(a) and 7 (prohibition on unfair misleading omissions).</p> <p>UCPD: Annex I, paragraph 20 – commercial practice considered unfair in all circumstances - Describing a product as "gratis", "free", "without charge" or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.</p> <p>CRD: Art 6 (information requirements for distance and off-premises contracts) and Art 8 (formal requirements for distance contracts).</p>

	<p>UTCCRs: Reg 5 (test of fairness), Reg 6 (assessment of unfair terms) and Reg 7 (requirement to express written terms in plain, intelligible language).</p> <p>ECRs: Reg 6 (general information to be provided).</p>	<p>UTCCD: Art 3 (test of fairness), Art 4 (assessment of unfair terms) and Art 5 (requirement to express written terms in plain and intelligible language).</p> <p>ECD: Art 5 (general information to be provided).</p>
<p><b>Clear commercial intent -</b></p> <p><b>4:</b> Commercial content distinguishable from gameplay</p> <p><b>5:</b> Whether payments are required</p>	<p>CPRs: Regs 3(4)(a) and 5 (prohibition on unfair misleading actions) and Regs 3(4)(b) and 6 (prohibition on unfair misleading omissions), in particular, Reg 6(1)(d) (failure to identify commercial intent of commercial practice).</p> <p>CPRs: Reg 3(3) (general prohibition on unfair commercial practices contravening requirements of professional diligence where that materially distorts or is likely to materially distort the economic behaviour of average consumer).</p>	<p>UCPD: Art 5(4)(a) and Art 6 (prohibition on unfair misleading actions) and Art 5(4)(a) and 7 (prohibition on unfair misleading omissions), in particular Art 7(2) (failure to identify commercial intent of commercial practice).</p> <p>UCPD: Art 5(2) (general prohibition on unfair commercial practices contravening requirements of professional diligence where that materially distorts or is likely to materially distort the economic behaviour of average consumer).</p>

<p><b>Aggressive practices and children -</b></p> <p><b>6:</b> Aggressive commercial practices and undue influence</p> <p><b>7:</b> Direct exhortations to children to buy</p>	<p>CPRs: Regs 3(4)(c) and 7 (prohibition on unfair aggressive commercial practices and use of harassment, coercion and undue influence).</p> <p>CPRs: Reg 3(3) (general prohibition on unfair commercial practices contravening requirements of professional diligence where that materially distorts or is likely to materially distort the economic behaviour of average consumer).</p> <p>CPRs: Schedule 1, paragraph 7 - commercial practice considered unfair in all circumstances - Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.</p> <p>CPRs: Schedule 1, paragraph 28 – commercial practice considered unfair in all circumstances – Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.</p>	<p>UCPD: Art 5(4)(b) and Art 8 and 9 (prohibition on unfair aggressive commercial practices and use of harassment, coercion and undue influence).</p> <p>UCPD: Art 5(2) (general prohibition on unfair commercial practices contravening requirements of professional diligence where that materially distorts or is likely to materially distort the economic behaviour of average consumer).</p> <p>UCPD: Annex I, paragraph 7 - commercial practice considered unfair in all circumstances - Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.</p> <p>UCPD: Annex I, paragraph 28 – commercial practice considered unfair in all circumstances – Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.</p>
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<p><b>Payments taken without authorisation -</b></p> <p><b>8: Consent and authorisation of payments</b></p>	<p>CPRs: Reg 3(3) (general prohibition on unfair commercial practices contravening requirements of professional diligence where that materially distorts or is likely to materially distort the economic behaviour of average consumer).</p> <p>CPRs: Regs 3(4)(a) and 5 (prohibition on unfair misleading actions) and Regs 3(4)(b) and 6 (prohibition on unfair misleading omissions).</p> <p>CCRs: Reg 13 (information to be provided before making a distance contract) and Reg 14 (requirements for distance contracts concluded by electronic means). Traders should also be aware of and comply with Reg 16 (confirmation of distance contracts).</p> <p>UTCCRs: Reg 5 (test of fairness), Reg 6 (assessment of unfair terms) and Reg 7 (requirement to express written terms in plain, intelligible language).</p> <p>PSRs: Reg 55 (consent and withdrawal of consent) potentially relevant. Note overlap with OFT Principles on Continuous Payment Authorities.</p>	<p>UCPD: Art 5(2) (general prohibition on unfair commercial practices contravening requirements of professional diligence where that materially distorts or is likely to materially distort the economic behaviour of average consumer).</p> <p>UCPD: Art 5(4)(a) and Art 6 (prohibition on unfair misleading actions) and Art 5(4)(a) and 7 (prohibition on unfair misleading omissions).</p> <p>Art 6 (information requirements for distance and off-premises contracts) and Art 8 (formal requirements for distance contracts).</p> <p>UTCCD: Art 3 (test of fairness), Art 4 (assessment of unfair terms) and Art 5 (requirement to express written terms in plain and intelligible language).</p> <p>PSD: Art 54 (consent and withdrawal of consent) potentially relevant.</p>
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<p><b>The Average Consumer</b></p>	<p>CPRs: Reg 2(2) - (6).</p> <p>The CPRs prohibit traders from engaging in unfair commercial practices which have or are likely to have an effect on the economic behaviour of the average consumer.</p> <p>The CPRs define the average consumer by reference to the concepts of the 'average' consumer, the 'average member' of a targeted group of consumers and the 'average member' of a vulnerable group of consumers.</p> <p>The concepts do not refer to actual consumers, and there is no requirement to show evidence of actual consumers being affected by an unfair commercial practice. This means that different practices, and even the same practices in different circumstances, may be found to have different effects depending on the type of consumer they reach or affect.</p> <p><b>Average consumer (Type 1)</b></p> <p>It is the notional average consumer whom the commercial practice reaches or to whom it is addressed that is relevant.</p>	<p>UCPD: Recitals 18 and 19 and Art 5(2) - (3).</p> <p>In line with the principle of proportionality, and to permit the effective application of the protections given by it, the law takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors, as interpreted by the Court of Justice, but also contains provisions aimed at preventing the exploitation of consumers whose characteristics make them particularly vulnerable to unfair commercial practices.</p> <p>Recital 18 makes clear that, where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of <b>that</b> group.</p> <p>Recital 19 states that, where certain characteristics such as age, physical or mental infirmity or credulity make consumers particularly susceptible to a commercial practice or to the underlying product and</p>
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The average consumer should generally be assumed to be reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors. This is reflected in Regulation 2 of the CPRs. 'Average' does not mean a statistically average consumer.

The average consumer may in some circumstances be determined by reference to a smaller group than the population as a whole, and accordingly have characteristics that differ from those of an average consumer determined by reference to the whole population.

**Average member of a targeted group of consumers (Type 2)**

The average targeted consumer will be relevant where a commercial practice is directed to a particular group of consumers. If a practice is targeted like this then it is the average member of that group and that member's characteristics which are relevant. Indications of whether a group is targeted might be found in the way advertising is placed, the language of a commercial communication, the nature of the product and the context.

the economic behaviour only of such consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee, it is appropriate to ensure that they are adequately protected by assessing the practice from the perspective of the average member of **that** group.

The average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgment, having regard to the case law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.

**Average member of a vulnerable group of consumers  
(Type 3)**

*Where a 'clearly identifiable group of consumers is particularly vulnerable to the practice or to the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee' and 'where the practice is likely to materially distort the economic behaviour of only that group', then it is the average member of that group that is the relevant average consumer. This does not apply if the 'particular vulnerability of the group arises only from the commercial practice being the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.'*

This offers protection to consumers who may be particularly vulnerable either to a commercial practice or to the underlying product and whose economic behaviour may, as a result of the commercial practice in question, be distorted. A commercial practice will be assessed from the perspective of an average member of that group whose vulnerability the trader could reasonably be expected to foresee. The test is objective. It is not necessary that the trader actually foresees the effect (or likely effect) on

vulnerable consumers, only that he could reasonably have been expected to do so.

Consumers are only treated as vulnerable, to a practice or to the underlying product, if they are vulnerable because of infirmity, age or credulity. For example, it may be appropriate to consider a practice from the perspective of a younger consumer. Children may, for example, be particularly vulnerable to commercial messages contained in online games that are likely to appeal to them.

Consumers may also be vulnerable to a practice because of their *credulity*. This covers groups of consumers who may more readily believe specific claims. The term is neutral, so the effect is to protect members of a group who are for any reason open to be influenced by certain claims. For example, children might believe certain claims more readily than adults.



## Abbreviations

CPRs:	<a href="#">Consumer Protection from Unfair Trading Regulations 2008</a>
CCRs:	<a href="#">The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013</a> – coming into force 13 June 2014
CRD:	<a href="#">Consumer Rights Directive (Directive 2011/83/EC)</a> - provisions shall apply to contracts concluded after 13 June 2014
UTCCRs:	<a href="#">Unfair Terms in Consumer Contracts Regulations 1999</a>
ECRs:	<a href="#">Electronic Commerce (EC Directive) Regulations 2002</a>
PSRs:	<a href="#">Payment Services Regulations 2009</a>
UCPD:	<a href="#">Unfair Commercial Practices Directive (Directive 2005/29/EC)</a>
UTCCD:	<a href="#">Unfair Terms in Consumer Contracts Directive (Directive 93/13/EEC)</a>
ECD:	<a href="#">Electronic Commerce Directive (2000/31/EC)</a>
PSD:	<a href="#">Payment Services Directive (2007/64/EC)</a>