

# Review of the Pricing Practices Guide

Response to the Call for Evidence by the  
Trading Standards Institute

## **Response of the Competition and Markets Authority to the Trading Standards Institute's Call for Evidence on the review of the Pricing Practices Guide**

1. The Competition and Markets Authority (CMA) has taken a number of questions raised in the Call for Evidence together, where they raise similar issues or common themes. We have concentrated on those questions where we have direct experience to inform our responses, including from the market study or enforcement work of the Office of Fair Trading (OFT).

- 1. In what way does the current guidance in the PPG promote fair trading practices on price indications?**
- 2. In what way does the current guidance in the PPG fail to promote fair trading practices on price indications?**
- 3. Does the current PPG encourage practices by traders that are counter-productive to the aim of providing consumers with fair pricing information?**

### **Benefits of the PPG**

2. The Pricing Practices Guide (PPG) is important in driving compliance with the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and in building a common understanding of the CPRs across traders in all sectors of the economy. The PPG attempts to give further guidance, beyond that contained in generic guidance already published by the Department for Business, Innovation and Skills (BIS) (formerly the Department for Business, Enterprise and Regulatory Reform (BERR)) and the OFT, relevant to the use, display, advertisement and giving of information about prices and price comparisons. So much trading practice revolves around price indications and the promotion of prices that one can expect that businesses in a variety of sectors (both for goods and services) will have similar and frequently asked questions about the proper interpretation and application of the CPRs. The PPG was intended to cater for this need.
3. The PPG seeks to balance the principles-based nature of the CPRs with the desire of businesses for clarity and explanation. There is much in the introductory sections of the PPG ('Introduction' and 'The relevant legal obligations') which serves as a useful introduction to the application of the CPRs in the context of pricing practices. For example, these sections:

- highlight the importance of the CPRs, and how they have replaced the previous CPA regime and the Code of Practice for Traders on Price Indications
  - accurately describe the CPRs as prohibiting traders from engaging in unfair commercial practices (whether acts or omissions) which harm consumers' economic interests, and note that the giving of information about prices is one form of commercial practice covered by the CPRs
  - stress that the CPRs operate flexibly to catch unfair commercial practices, and that the circumstances of each particular case will always be relevant, including the context of the transaction (and the nature of the product)
  - stress that the factual accuracy of the information provided to consumers is not decisive: a commercial practice may be misleading if it or its presentation is likely to deceive the average consumer, even if the information is factually correct
  - stress the broad concept of 'transactional decision' in the CPRs: this includes, but is not limited to, a decision whether or not to buy the product
4. The PPG seeks to give guidance to traders active in any sector of the economy, whatever goods or services they are offering for sale, and attempts to be useful to both the market-stall sole trader and the largest retail chain alike. Moreover, the PPG covers a broad swathe of pricing and promotional practices. Much discussion between the OFT and traders in recent years has focused on the PPG's 'recommendations' regarding internal reference pricing. However, it is clear that the PPG usefully seeks to address numerous other pricing practices.
  5. The PPG also describes its own limitations, or rather the limitations of any guidance on the CPRs. See particularly paragraphs 1, 3 and 6 of the PPG.

### **Weaknesses of the PPG**

6. The CMA's reservations in connection with the PPG largely relate to how well it reflects the essential point that the principles and requirements embodied in the CPRs have priority over the various 'recommendations' concerning particular pricing practices set out in the PPG.
7. The CMA has not undertaken a line-by-line review of the PPG. Instead, we have considered the OFT's experience and focused on four main areas where review of the PPG would be most likely to improve its effectiveness. The Trading Standards Institute (TSI) may wish to give consideration, as part of its review, to whether the current PPG:

- (a) properly encourages self-assessment and risk awareness by traders;
- (b) puts sufficient focus on the consumer and the consumer's expectations;
- (c) adopts an approach to disclaimers and explanatory text that is in line with the substantive requirements of the CPRs; and
- (d) does enough to protect against selective interpretation of the guidance by some traders.

### **A. Encouraging self-assessment and risk awareness**

#### **BOX 1: Defining the issue**

The current PPG includes statements of general principle and indications of behaviours that are more or less likely to comply with the CPRs (a risk-based approach). However, it also contains proscriptive or prescriptive 'rules' which might be interpreted as defining or setting 'safe harbours' and deflect traders from self-assessing their pricing practices for compliance with the CPRs. For example:

#### **Statements of general principle:**

1.1.2: In general you should compare like with like.

1.2.6: A previous price used as a reference price to make a price comparison should be a genuine retail price.

#### **Likelihood/risk-based approach:**

1.4.4: The risk of misleading should be less where: [...]

2.2.19: [...] its omission is highly likely to be unfair.

#### **Proscriptive/prescriptive 'rules' which might be seen as 'safe harbours':**

1.2.3(a): A price used as a basis for comparison should have been your most recent price available for 28 consecutive days or more.

1.9.3: General notices saying, for example 'half price sale' or 'up to 50% off' should not be used unless the maximum reduction quoted applies to at least 10% of the range of products on offer at the commencement of the sale.

8. With the exception of the 31 prohibited practices listed in Schedule 1 of the CPRs, the CPRs do not seek to prohibit in all circumstances (or to promote) any specific commercial practices (whether marketing activities or otherwise). As regards the general prohibitions in Regulations 3, 5 and 6, the CPRs adopt a flexible, effect-based approach, enshrining a context-specific consideration of the fairness of a trader's commercial practices which looks at the effect on the average consumer's transactional decision.

9. The dividing line between fair and unfair (legal and illegal) pricing practices is unlikely to be one that can be defined with absolute clarity, and the correct answer can only come from an ‘in-the-round’ assessment of a trader’s pricing practices in their given context, with due regard given to the average consumer’s perceptions and expectations in connection with those practices. There are likely to be practices which can, with some certainty, be said always to be illegal, but it may not be possible to define a ‘safe harbour’ (or to indicate that compliance with a proscriptive/prescriptive ‘rule’ will mean that the CPRs can never be infringed).
10. Accordingly, the CMA considers that the TSI may wish to give consideration to how best the revised PPG can:
- encourage self-assessment and guide traders as to the essential principles that underpin the CPRs
  - promote a risk-based understanding of behaviours that are less likely or more likely to breach the law, which looks at the likely effect of traders’ pricing practices on consumers’ transactional decisions
  - suggest practical ways in which traders can organise their business to avoid infringing the CPRs, without suggesting ‘safe harbours’

### ***B. The need to focus on the consumer and the consumer’s expectations***

#### **BOX 2: Defining the issue**

The current PPG is almost entirely silent on the legal basis for its recommendations, including how consumers’ transactional decisions can be affected by misleading actions or omissions. It does not seek to link its recommendations to consumer expectations or to explain whether (and if so why) the practices it promotes (or prohibits) would be (or would not be) fair, meaningful and relevant to consumers. It is striking that the language of consumer ‘expectation’ (or ‘belief’, ‘perception’, etc) is entirely absent from the text of the current PPG.

11. Marketing is a complex field, which by its very nature is designed to encourage or influence a consumer to take a transactional decision.<sup>1</sup> Guidance on pricing practices can assist traders in policing the proper limits of their marketing activities by signalling the types of commercial practices that are likely, under the CPRs, to be misleading or unfair. This requires a

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<sup>1</sup> ‘Transactional decision’ is a broad concept, which includes, but is not limited to, a decision whether or not to buy the product. Choosing to visit a store or look at a product would constitute a transactional decision.

consumer focus and an understanding of the expectations of the average consumer when faced with price indications, price comparisons, promotional claims and other marketing techniques.

12. The TSI may therefore wish to consider whether the revised PPG could better reflect the CPRs by enshrining an up-to-date behavioural understanding of the way that consumers' transactional decision-making can be affected by misleading pricing practices, including the provision (or withholding) of information, the application of pressure or influence to buy (or to buy now, or to buy more), and the manipulation of consumers' behavioural biases, attitudes and preferences.
13. The OFT undertook a substantial amount of work on behavioural economics and the ways in which consumer behaviour can be affected by misleading pricing and promotional activity. The TSI may wish to consider the findings of the OFT's market studies and other research in this area – see further [Annex A](#). The CMA is also willing to assist the TSI by sharing the knowledge gained through the OFT's work.

### ***C. The approach to disclaimers and explanatory text***

#### **BOX 3: Defining the issue**

The PPG states, in paragraph 1.1.3: 'If your comparison is made on a basis which differs on any point from the practice recommended in this Part of the Guide, you should make the basis of the price comparison explicit, so far as it differs. Any such explanation should be clear, and easily accessible to the public: it should be unambiguous, easily identifiable and easily legible by the consumer.' See also paragraph 1.2.4 of the PPG.

Some traders display an over-reliance on disclaimers and explanatory text, whereby they interpret the PPG as suggesting that the CPRs cannot be infringed as long as the trader explains (in a clear, accessible and legible way) the basis on which the price indication or price comparison is being made. It is unlikely that the courts would interpret the CPRs in this way in every situation. For example, although the case concerned the Control of Misleading Advertisements Regulations 1988, in *Director General of Fair Trading v Blinkhorn* (1989, unreported), Vinelott J stated: 'A document may be misleading, though literally everything in it is true, if the way in which what it says is presented carries with it implications and inferences which the ordinary reader would certainly draw.'

14. The TSI might wish to consider whether the revised PPG could, in stressing the need for substantive compliance with the CPRs, discourage over-reliance

on disclaimers and highlight the risks that might arise where explanatory statements are needed to explain the basis of the price indication or price comparison being made. The use of such explanatory text, even where it is clearly and prominently displayed, may not be sufficient to remedy a misleading impression given by a headline price/promotional claim, in situations where that headline claim is likely to be of far greater relevance to the consumers' transactional decision.

15. Pricing practices are more likely to be compliant with the CPRs where any headline promotional claims are clear and easy for consumers to understand, and in line with consumer expectations, without the need for explanatory statements. Where the intent or purpose of the explanatory text is to mitigate the misleading impression given by the headline claim, traders should be aware of the risk of the CPRs being breached. Of course, this does not preclude explanatory statements from being used, for example where they are consistent with the headline claim and provide a helpful and fuller explanation for the consumer.

#### ***D. Protecting against selective interpretation***

##### **BOX 4: Defining the issue**

We have seen evidence of the PPG being used or interpreted selectively by some traders, where individual passages, read in isolation, are held out as promoting or legitimising certain pricing practices which might be contrary to the CPRs in specific circumstances.

For example, most traders that the OFT has engaged with regularly cite paragraphs 1.2.3(a) and 1.2.3(c) of the PPG (taken in isolation) as suggesting that establishing a price for 28 days and then using that price as a reference price for up to six months would be compliant with the CPRs. These same traders seem to have paid less regard to the recommendation set out in paragraph 1.2.3(b) and the more general principles contained in paragraphs 1.1.2 and 1.2.3.

16. The TSI may wish to give consideration to whether the revised PPG could do more, through its structure and through unambiguous language, to ensure that the headline principles in the document are adhered to and to combat the selective interpretation, by some traders, of certain passages of the PPG. For example, it could encourage traders to consider their actions in the round and to comply with the headline principles (and, of course, with the CPRs). It could stress that any more specific examples it contains must be read in the context of the overarching principles.

17. An added benefit of this approach would be to better ‘future-proof’ the PPG: the principles can be of universal application and should have a logic that reads across to a variety of related or similar pricing practices, or to variations of existing pricing practices. Any worked examples would merely then be illustrative examples of the headline principle applied to a given pattern of facts. They would not seek to catch or define, or provide absolute clarity in respect of, all possible practices that might comply with or breach the principle.

### ***Internal reference pricing and ‘price establishment’***

18. The CMA concurs with the points made by the TSI on page 9 of its Call for Evidence, in particular the view stated there that the 28-day recommendation contained in the PPG is peculiar to the UK market and may be driving particular behaviours by traders that are effectively unfair commercial practices within the meaning of the CPRs. Certain forms of potentially misleading internal reference pricing are insufficiently discouraged by the current PPG as a direct result of the four issues discussed in paragraphs 7 to 17 above.
19. Reference pricing is a powerful marketing tool, and when used fairly it can be a useful signal to consumers of the existence of genuine savings. The TSI may wish to give consideration to whether the revised PPG could do more to discourage reference pricing practices which are likely to breach the CPRs because consumers are misled into thinking that the ‘now’ price or ‘sale’ price is a (short-term or limited) discount price when it is in fact just the normal or usual selling price of the product.
20. The OFT developed its approach to reference pricing through its CPRs enforcement activity, including in the UK food/drink retail sector and the furniture and carpets sectors. Further information on this work is set out in [Annex B](#), and the TSI may find this helpful to inform any revised PPG.



## **BOX 5: Defining the issue**

### ***'Price establishment'***

The practice of 'price establishment' does not necessarily provide a trader with a 'safe harbour' against an allegation of misleading internal reference pricing contrary to the CPRs, for the following reasons:

- 'Establishing' a price and then using that price as the basis for a price comparison is a practice designed to affect a consumer's transactional decision.
- It follows that, if (for whatever reason) making reference to an 'established' (higher) price misleads the consumer into wrongly believing that the current (lower) price represents a saving from the normal or usual selling price of the product (or is somehow special, unusual or out-of-the-ordinary), then the CPRs will likely still be infringed.

The key issue is whether a reference price is **genuine**. It might not be genuine (and, therefore, its use might not be compatible with the CPRs), even where the price has been 'established' in line with the 28-day recommendation set out in the PPG, where, for example:

- the previous (higher) price was charged in a limited proportion of stores/outlets, with low stock levels and low prominence
- the current (lower) price has existed for longer than the previous (higher) price was charged – see also PPG, paragraph 1.2.3(b)

If merely the passage of a specified period of time (say, 28 days) were sufficient to 'establish' the higher price as the genuine selling price for that product, then the passage of that same period of time might equally have the effect of establishing the lower price as the new genuine selling price for that product.

### ***Genuine price advantage***

A more preferable starting point might be whether a reference to a previous (or future) higher price signals to consumers the existence of a genuine price advantage, beyond the normal or usual selling price of the product. This approach is more likely to result in reference pricing practices that are compliant with the CPRs.

**4. Should the PPG be updated so that it better reflects current trading practices?**

21. The CMA concurs with the points made by the TSI on page 8 of its Call for Evidence, in particular the view stated there that the PPG does not adequately reflect current trading practices, including the growth of e-commerce and the variety of ways or forms by which traders can issue price indications to consumers (including via websites and applications accessible on mobile devices or other Internet-enabled technology). One example of pricing in a new market, namely children's online and app-based games, was the subject of an OFT investigation in 2013.<sup>2</sup>
22. The TSI may wish to give consideration to how the revised PPG could, in effect, become a 'living document' with opportunities for more regular updating. Our experience has shown that guidance may need to adapt and evolve to respond to innovations in technology or to new business practices, including emerging or developing sales/advertising channels.
23. The TSI may also wish to consider whether the pricing practices currently addressed by the PPG are in line with those practices which the enforcement community has identified, through its policy or enforcement work, as priority areas that merit specific treatment (for example, because they have the greatest potential to generate significant consumer detriment). See further [Annex A](#) for information on the market studies and other research undertaken by the OFT in this regard.

**5. Should the PPG better promote fair trading practices by referring to general principles rather than specific practices?**

**6. Should the PPG better promote fair trading practices by providing more detailed guidance?**

**7. Should the PPG better promote fair trading practices by providing specific sectoral guidance?**

24. Having considered the merits of general versus detailed guidance, the CMA has concluded that the following suggested three-tier structure, balancing the need for flexible, high-level principles with traders' desire for explanation and clarity, might be the most pragmatic approach for any revised PPG:

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<sup>2</sup> For more information on this investigation and the principles issued by the OFT in January 2014, please see: [www.of.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-current/childrens-online-games](http://www.of.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-current/childrens-online-games).

- (a) Make traders aware of the principles upon which the enforcement community would hold them to account (that is, the principles contained in the CPRs).
  - (b) Discuss specific pricing practices through the use of non-exhaustive sets of factors or considerations which will weigh in the balance in determining the fairness of each practice.
  - (c) Set out a number of worked examples of ‘good’ and ‘bad’ behaviours (by which is meant behaviours that are more likely or less likely to comply with the law (tier (a)), bearing in mind the factors/considerations set out in tier (b)).
25. This approach, moving from general principles to the use of non-exhaustive illustrative examples, is one that the OFT found to work well in its recent guidance on online and app-based games.<sup>3</sup> The OFT was keen to provide examples of indicative behaviours that were felt to be more or less likely to comply with the law, but it was careful not to be overly proscriptive or prescriptive, particularly given the innovative and fast-moving nature of this market.
26. The OFT also adopted an approach which defined overarching principles, illustrated by ‘good’ and ‘bad’ examples, during its investigation into the UK food/drink retail sector. The OFT also developed a set of non-exhaustive factors/considerations as part of its investigations into internal reference pricing in the furniture and carpets sectors. More information on these investigations is set out in [Annex B](#), and the TSI may wish to consider this as part of its review of the PPG.
27. It is the CMA’s view that, while it will likely be necessary for guidance to address particular pricing **practices** (eg internal reference pricing), the development of **sector-specific** guidance should generally be avoided. The principles or factors that traders are asked to consider ought to have general applicability irrespective of the sector (although, of course, the weight placed on certain principles or factors may differ according to the precise circumstances of the market and the nature of the product).

**8. Is the PPG clear and practical for traders to apply?**

28. Please see our responses to questions 1 to 3, and in particular the views stated in Boxes 1 to 4 (where we identify the four main areas where we

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<sup>3</sup> See footnote 2.

consider that review of the PPG would be most likely to improve its effectiveness).

29. The greatest lack of clarity appears to us to relate to the practice of internal reference pricing. See also paragraphs 18 to 20 and Box 5.

**9. Should a breach of the PPG be enforceable as a criminal offence and/or civil infringement?**

**10. Should breach of, or compliance with, the PPG be statutorily admissible in enforcement proceedings? (As was the position under section 25 CPA 1987)**

**11. Should the PPG also provide guidance to enforcers?**

30. As noted in paragraphs 1 and 6 of the PPG, the PPG is merely guidance and whether a commercial practice infringes the CPRs will ultimately be a matter for the courts to determine, whether in civil or criminal enforcement proceedings.
31. The primacy of European law, and the need for national law to reflect the (maximum harmonisation) Unfair Commercial Practices Directive (UCPD) effectively prevents the PPG (or any guidance on the CPRs) being turned into statutory guidance or a statutory code of conduct. Any guidance text which purports to be binding and which goes beyond the provisions of the UCPD could mean that the UK infringes its obligations under European law. Even non-binding guidance runs the risk of operating counter to our obligations under European law, hence why it is vital that the revised PPG contains sufficient reference to the CPRs (which implement the UCPD in the UK).
32. Experience has shown that the value placed on the PPG (or any guidance on the CPRs) by the courts can be limited. The courts have tended not to view such guidance as a useful or reliable aid to interpretation of the CPRs/UCPD. More information on the judicial treatment of guidance is set out in [Annex C](#).
33. The CMA considers that the value of accurate guidance on the CPRs does not derive from its admissibility in enforcement proceedings. Rather, guidance is useful if it guides traders in their understanding of the law and their application of it to their own arrangements.
34. While an enforcer would wish to have regard to the contents of the guidance, the guidance should not prevent an enforcer from pursuing traders whose practices, in its view, breach the CPRs. In much the same way that overly proscriptive/prescriptive guidance risks stifling innovation in markets, there is

also a risk that inflexible or insufficiently dynamic guidance might hamper effective enforcement of the law.

35. The review of the PPG also presents an opportunity for presenting a ‘joined-up’ view of partners within the Consumer Protection Partnership (CPP)<sup>4</sup> and, where it is possible to do so, the revised PPG might give traders an insight into the approach and mindset of the enforcement community as a whole by, for example:
- setting out its approach to the kinds of behaviour that are more or less likely to be compliant with the law
  - highlighting those kinds of behaviours which would be considered to constitute enforcement priorities (based, for example, on their potential to cause significant consumer detriment)

**12. Are misleading price indications a greater problem in the United Kingdom than in other European Union countries or elsewhere in the world?**

36. Prior to the UCPD, a number of other EU member states had strict laws governing when sales could take place and how promotions could be carried out, generally requiring pre-authorisation. These laws have largely been removed. However, it is perhaps too soon to say what effect the liberalisation of those laws will have on price promotions within those member states.

**13. What changes should be made to the PPG?**

37. Please see our responses to questions 1 to 3 above. In summary, the TSI may wish to give consideration, as part of its review, to the following themes:
- (a) whether the PPG properly encourages self-assessment and risk awareness by traders;
  - (b) whether the PPG puts sufficient focus on the consumer and the consumer’s expectations;
  - (c) whether the PPG’s approach to disclaimers and explanatory text is in line with the substantive requirements of the CPRs; and

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<sup>4</sup> The CPP was formed in April 2012 to identify and prioritise areas where there is greatest harm caused to consumers, coordinate collective action to deal with such detriment, and use all available tools at the disposal of each member.

(d) whether the PPG could do more to protect against selective interpretation by some traders.

38. One specific priority area for revision may be the PPG's treatment of internal reference pricing (that is, references to a trader's own prices).

**14. Is there anything else you would like to tell us about your experiences of the PPG?**

39. Although guidance might be general and flexible enough to deal with different pricing practices and business models, it is unlikely that it will be able to anticipate innovations in technology or the new business practices that follow them. Accordingly, the TSI may wish to give consideration to how the revised PPG could, in effect, become a 'living document' with opportunities for more regular updating where it is necessary to develop or finesse its principles or to build in further illustrative examples. It might also be updated periodically to incorporate advice issued by enforcers (such as that issued by Primary Authority trading standards services) or to respond to judicial precedent.

40. In conclusion, while we recognise the importance of providing traders with guidance on the application of the law, it is important that traders understand that it is ultimately for them to assess for themselves whether a pricing practice is fair for consumers.

41. Guidance that focuses on driving compliance with the CPRs, by properly refocusing attention on the essential principles and requirements contained in the CPRs, would assist traders and the enforcement community alike in holding a sensible dialogue on the proper limits of price indications and price comparisons.

42. Please see also the information contained in Annexes A, B and C, which forms part of the evidence supplied by the CMA in response to the TSI's call for evidence.

43. The CMA wishes to support the TSI in the review of the PPG, both through the formal consultation process and by sharing further information and experience about pricing and promotional practices.

## Relevant OFT market studies and research

1. The TSI may wish to consider the conclusions of the following OFT market studies and research reports, which highlight the importance of a full consideration of the likely effect of pricing and promotional activity on the behaviour and transactional decision-making of consumers. Below, we also set out some of the key conclusions from the Advertising of Prices (AoP) market study.

### OFT market studies and research

Internet shopping market study (June 2007)

[www.of.gov.uk/OFTwork/markets-work/internet](http://www.of.gov.uk/OFTwork/markets-work/internet)

Online Targeting of Advertising and Prices market study (May 2010)

[www.of.gov.uk/OFTwork/markets-work/online-targeting](http://www.of.gov.uk/OFTwork/markets-work/online-targeting)

Advertising of Prices ('AoP') market study (December 2010)

[www.of.gov.uk/OFTwork/markets-work/advertising-prices](http://www.of.gov.uk/OFTwork/markets-work/advertising-prices)

Price Comparison Websites report (November 2012)

[www.of.gov.uk/OFTwork/consumer-protection/campaign11-12/price-comparison-websites](http://www.of.gov.uk/OFTwork/consumer-protection/campaign11-12/price-comparison-websites)

Partitioned pricing research (August 2013)

[www.of.gov.uk/shared\\_of/economic\\_research/OFT1501.pdf](http://www.of.gov.uk/shared_of/economic_research/OFT1501.pdf)

[www.of.gov.uk/shared\\_of/economic\\_research/OFT1501A.pdf](http://www.of.gov.uk/shared_of/economic_research/OFT1501A.pdf)

[www.of.gov.uk/shared\\_of/economic\\_research/OFT1501B.pdf](http://www.of.gov.uk/shared_of/economic_research/OFT1501B.pdf)

### Advertising of Prices market study

2. Consumers have certain inherent behavioural biases in their decision making and these can be exploited by traders. The OFT's AoP market study looked at the various forms of 'price framing', where a trader presents a price in a particular way or context that affects consumers' assessment of the value of the offer. Value is an abstract concept and so consumers use cues from the world around them to make sense of whether a particular offer is a good or bad deal. It is because of this that price framing has the power to influence, and sometimes mislead, consumers.

3. As part of its market study, the OFT commissioned and collected considerable evidence, including academic psychology studies, experimental research and consumer surveys.
4. The overarching conclusion reached was that there is compelling evidence that price framing exerts a powerful effect, that the effect can lead to financial loss and other consumer harm when price-frames are used in an inaccurate or misleading way, and that a significant proportion of the population have been affected.
5. Based on the evidence obtained and collated, the AoP report considered that the following ranking of price-frames reflects their potential to cause harm:
  - (a) partitioned or 'drip' pricing;
  - (b) time-limited offers (TLOs);
  - (c) bait pricing;
  - (d) complex offers;
  - (e) reference pricing; and
  - (f) volume offers and free offers.

#### ***A. Partitioned pricing and 'drip' pricing***

6. Details relating to partitioned and 'drip' pricing and their effects on consumers can be found at Chapter 3 of the AoP report and in the subsequent partitioned pricing research report of August 2013.
7. Partitioned pricing exists where the price of a good or service is split into multiple parts.
8. Partitioned pricing can lead to consumer harm because consumers are likely to focus on the first part of the price and may not properly take additional parts of the price into account. This can lead to consumers perceiving that the price of the good or service is lower than it actually is. This, in turn, can increase consumers' demand for the product or can lead to them searching less than they otherwise would have done.
9. It was found that partitioned pricing can impact on consumers' behaviour even when all the parts of the price were presented together. In particular, the research found that improving the transparency of the various parts of the total price – and the transparency of the total price itself – can significantly improve consumer decisions.



10. 'Drip' pricing is a form of partitioned pricing where the price is split into multiple parts with some parts of the price being presented later in the buying process. For example, when buying something online a shopper might only be shown a headline price on the first screen but is not shown an additional fee, such as postage and packaging, until they have clicked through to a subsequent screen.
11. As with partitioned pricing where prices are displayed at the same time, 'drip' pricing can lead to consumers believing the price is lower than it actually is. In addition, having chosen to proceed with the buying process beyond the initial headline price a consumer may feel a sense of ownership. This means that even when the total price payable subsequently rises the consumer still purchases the good or service because to do otherwise would be felt as a loss. These effects can increase consumers' demand for the product or can lead to them searching less than they otherwise would have done.
12. The research into both partitioned pricing and 'drip' pricing suggests that increasing the visibility and clarity of prices to make it easier for consumers to work out and compare the total price of what they are buying will help to improve their decisions.
13. Therefore, the concern in relation to these practices is that consumers may shop around less and potentially obtain less good value than they otherwise would have done, due to parts of the price or the total price being unclear or revealed later in the process. This is a particular concern when parts of the price which are unavoidable are not revealed until late in the buying process.

#### ***B. Time-limited offers***

14. Details relating to TLOs and their effects on consumers can be found at Chapter 8 of the AoP report.
15. The combined findings of the research suggest that TLOs have a clear influence on consumers' transactional decisions; in particular, by giving an impression of scarcity, they make people far more likely to respond to the offer. TLOs can increase perceptions of the value of the offer, purchasing intentions and willingness to buy. There is also some evidence to show that the effects of the TLOs are not cancelled out by consumer learning.
16. Consumers are often attracted to a trader because of a TLO as they are worried about missing out on a good deal and, because of the time pressure created by the offer, they do not shop around to verify the offer. Even if consumers are aware that TLOs may not always be genuine, they have no way of verifying if a particular TLO is genuine.

17. The core concern about TLOs is that consumers may shop around less, and potentially obtain less good value than they otherwise would have done, due to time pressure that they did not need to experience because the offer was subsequently extended. This is a particular problem where traders, through the extension of TLOs, in effect create a series of 'must buy now' offers one after another.
18. A TLO might mislead consumers when due notice of any extension, that is, notice in advance of the end date being extended, is not given.
19. In addition to the general provisions of the CPRs, there are some banned practices that directly address TLOs: Annex Practices 7 and 15 set out in Schedule 1 of the CPRs are likely to be relevant.

### ***C. Bait pricing***

20. Details relating to bait pricing and its effects on consumers can be found at Chapter 5 of the AoP report.
21. Bait pricing has a clear effect on consumers' shopping decisions. Most people expect the advertised offer to be available and choose the trader based on the advertised offer. The AoP study's consumer survey found that, once they get to the trader and find that the advertised offer is not available, a third of respondents still purchase a product from the same trader. There are also high levels of emotional detriment in terms of consumers being frustrated and annoyed by the practice.
22. The fact that such a high proportion of consumers think that an offer will be available means it is potentially very easy to mislead consumers if an advertisement does not make it clear if a product has very limited availability.
23. The main concern about bait pricing is that once prospective customers have invested time and effort in searching for or travelling to a specific offer they are still likely to buy the product at a higher price, or a higher-priced alternative, from that trader. Even those who walk away may have wasted time, effort and perhaps money. We believe that not advising consumers if stocks are particularly limited at the advertised offer price is likely to mislead any consumer who thinks the promotion is generally available and not subject to limited stock.
24. Unlike some of the other pricing practices discussed in the AoP report, baiting sales fall within Annex Practice 5 of Schedule 1 of the CPRs. The related practice of Bait and Switch – where traders refuse to show the advertised product, rather than using legitimate sales techniques to encourage consumers to purchase other products – falls within Annex Practice 6 of

Schedule 1. For details of how baiting sales might be considered under Regulations 5 and 6 of the CPRs, please see the legal framework at Annexe D of the AoP report.

#### ***D. Complex pricing***

25. Details relating to complex pricing and its effects on consumers can be found at Chapter 7 of the AoP report.
26. Purchasing products in a package can be efficient and convenient for consumers and allow pricing to be tailored to individual consumption profiles. The products and services which tend to use complex pricing offers are not purchased very frequently, and the difficulties understanding and comparing prices mean they are not very popular with consumers. Nevertheless they are good at attracting consumers to particular traders and products, particularly online.
27. The core concern with complex pricing offers is that some products or offers are presented in such a manner as to obfuscate the full price, making it difficult for the consumer to shop around and compare prices despite their extensive effort. Consumers often find the offers confusing and find it difficult to decide which product to purchase or which supplier to choose, resulting in shopping errors. It appears that complex offers do not prevent consumers shopping around (indeed consumers seem to put in more effort with complex offers), but price obfuscation by traders may raise consumer search costs, resulting in consumer detriment.

#### ***E. Reference pricing***

28. Details relating to reference pricing and its effects on consumers can be found at Chapter 4 of the AoP report.
29. Reference pricing is very effective at encouraging consumers to visit a trader to check out an offer and ultimately purchase a product. In the AoP study's consumer survey, it was found that of the people who encountered a reference price offer and did not believe that the offer was genuine, over half still went on to purchase the product from the trader.
30. The AoP research provides clear evidence that reference pricing reduces the extent to which consumers shop around and compare prices. By affecting the searching behaviour of consumers, fictitious or misleading reference pricing can result in consumers paying higher prices and purchasing more of a product than they would have if they had fully understood the offer. The evidence shows that although consumers learn, this learning is not complete

and does not protect them from suffering detriment from false or misleading reference pricing.

31. A reference price may mislead and harm consumers where the reference price is fictitious or not easily verifiable, or where consumer expectations regarding the reference price are not in line with the reality of the offer.

#### ***F. Volume offers and free offers***

32. Details relating to volume offers and free offers and their effects on consumers can be found at Chapter 6 of the AoP report.
33. Consumer engagement with volume offers suggests a high degree of acceptance of the pricing practice and a high degree of in-store shopping around, for example comparing the offer with the price of a similar product or a previous price that is remembered.
34. When manipulated, however, a volume offer may well lead to purchasing errors. Shopping around between traders is low and acceptance and trust in volume and free offers is high. Therefore, a misleading volume offer is likely to result in purchasing errors and financial loss.
35. The main concern with volume offers and products offered 'for free' is that consumers will conclude that such an offer represents better value than a smaller quantity of the same product when in fact it does not and, as such, spend more and obtain poorer value than they would otherwise have done.

## Relevant OFT enforcement action, including guidance provided in specific sectors

1. The TSI may wish to consider the subject matter and the outcomes of the following OFT enforcement action related to pricing and promotional practices. In particular, we highlight the OFT's investigations regarding airline payment card surcharges and the practice of internal reference pricing in the food/drink retail sector and the furniture and carpets sectors.

### OFT enforcement action related to pricing and promotional practices

#### ***Sport Newspapers Ltd (March 2005)***

*Summary:* The OFT believed that advertisements for a promotional magazine costing 5p or 10p on the front page of newspapers such as the *Daily Sport* and *Sunday Sport* were misleading because they gave the impression that this was the price of the newspaper when in fact the actual prices were 40p on weekdays or 70p on Sundays.

*Outcome:* undertakings received.

[www.of.gov.uk/news-and-updates/press/2005/43-05](http://www.of.gov.uk/news-and-updates/press/2005/43-05)

#### ***Basebuy Ltd, trading as Eisenegger and Foxhole (March 2005)***

*Summary:* The trader used advertising in its shop windows stating: 'Closing down prices – absolutely everything reduced'. The OFT believed that these advertisements were misleading as they gave the impression that prices had been reduced in order to clear stock before closing down – when there was no evidence that the stores were closing down – and that price reductions were only likely to be available for a short period of time before the store closed down.

*Outcome:* undertakings received.

[www.of.gov.uk/news-and-updates/press/2005/44-05](http://www.of.gov.uk/news-and-updates/press/2005/44-05)

#### ***The Officers Club Limited (May, August 2005)***

*Summary:* The OFT had challenged the retailer's permanent '70% off everything' advertising strategy as it created the misleading impression that the company was offering a reduction from its own genuine previous prices. The 'reduced' prices were in fact the company's standard selling prices.

*Outcome:* High Court ruling and High Court undertakings.

[www.of.gov.uk/news-and-updates/press/2005/102-05](http://www.of.gov.uk/news-and-updates/press/2005/102-05)

[www.of.gov.uk/news-and-updates/press/2005/148-05](http://www.of.gov.uk/news-and-updates/press/2005/148-05)

(Continued overleaf)

**WCF Fuels Ltd, Boiler Juice Ltd and Johnston Oils Ltd (September 2011)**

*Summary:* The OFT found that some websites offering to find consumers the best price for heating oil were not clear about whether they were price comparison sites or sites for ordering heating oil directly from a single supplier. The OFT was concerned that consumers might be misled or confused by websites giving the impression they were price comparison sites when they were not. The OFT was also concerned that price comparison sites should make it clear how many prices have been compared and whether there is any connection between the supplier providing the quotation and the price comparison site.

*Outcome:* undertakings received from two of the three traders and all made voluntary changes to their websites.

[www.offt.gov.uk/news-and-updates/press/2011/96-11](http://www.offt.gov.uk/news-and-updates/press/2011/96-11)

[www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/heating-oil](http://www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/heating-oil)

**MyCityDeal Ltd, trading as Groupon (March 2012)**

*Summary:* In respect of its pricing practices, the OFT wished to ensure that Groupon's reference pricing was accurate, honest and transparent.

*Outcome:* undertakings received.

[www.offt.gov.uk/news-and-updates/press/2012/19-12](http://www.offt.gov.uk/news-and-updates/press/2012/19-12)

[www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/groupon](http://www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/groupon)

**GB Oils Ltd (July 2012)**

*Summary:* The OFT was concerned that prices for some types of heating oil delivery were not as transparent as they could be. With respect to 'spot' orders, the OFT was concerned that GB Oils Ltd had clauses in its contracts that allowed it to vary the price of heating oil between the time it was ordered and the time of delivery. This meant that, in principle, under the contract the customer could be charged a price higher than the price they had been quoted.

*Outcome:* undertakings received.

[www.offt.gov.uk/news-and-updates/press/2012/64-12](http://www.offt.gov.uk/news-and-updates/press/2012/64-12)

[www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98/closure/heating-oil](http://www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98/closure/heating-oil)

**Nixon & Hope Ltd (January 2014)**

*Summary:* The OFT was concerned about whether claimed price advantages were accurate and whether stated selling prices included VAT.

*Outcome:* trader agreed to amend its website.

[www.offt.gov.uk/news-and-updates/press/2014/02-14](http://www.offt.gov.uk/news-and-updates/press/2014/02-14)

[www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/carpet-flooring](http://www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/carpet-flooring)

(Continued overleaf)

### **United Carpets Group plc (January 2014)**

**Summary:** The OFT was concerned about whether advertised recommended retail prices (RRPs) were genuine and were those at which the products were typically sold throughout the year. The OFT was also concerned about the use of time-sensitive promotions (such as ‘closing down sale’) without giving consumers clear information and an explanation of the circumstances of the promotion.

**Outcome:** undertakings received.

[www.offt.gov.uk/news-and-updates/press/2014/02-14](http://www.offt.gov.uk/news-and-updates/press/2014/02-14)

[www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/carpet-flooring](http://www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/carpet-flooring)

### **Airline payment card surcharges**

#### **Summary**

In 2011, the OFT opened an investigation into airline payment card surcharges, following a super-complaint by *Which?* The airlines under investigation were charging consumers an additional fee for making a payment by debit card, which was not included in the headline price, and/or were not presenting their credit card charges in a clear and transparent manner.

The OFT was concerned that airlines’ payment surcharges were a ‘drip’ pricing or price partitioning device which concealed the true or genuine price of their services. This is because the average consumer was not in a position to pay by those payment cards which were presented by airlines as a free payment mechanism. The OFT was further concerned that there was no reasonable or legitimate reason for the airlines’ failure to provide headline prices which included all unavoidable charges, such as any cost for paying by debit card. These practices made it difficult for consumers to compare prices easily, damaged consumer confidence and impeded effective competition.

#### **Outcome**

In July 2012, the OFT closed its investigation. Most airlines gave formal undertakings to the OFT, and others made changes to their pricing practices and these changes were accepted in lieu of undertakings by the OFT. It is now the industry standard for airlines to include compulsory charges such as debit card fees upfront in the headline price rather than adding these at the final stage of payment. For more information on this investigation, please see:

[www.offt.gov.uk/news-and-updates/press/2012/58-12](http://www.offt.gov.uk/news-and-updates/press/2012/58-12)

[www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/card-surcharges](http://www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/card-surcharges)

## **Retail food/drink pricing and promotional practices: principles agreed**

In 2012, the OFT opened an investigation into the food and drink retail sector to consider concerns that shoppers could be confused by the way food and drink prices are displayed, advertised and promoted. The OFT found that there was a variety of approaches to interpreting and applying the CPRs across the supermarket sector.

For more information on this investigation, please see:

[www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/retail-food-pricing](http://www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/retail-food-pricing)

### ***Status of the PPG***

The OFT gathered information on retailers' internal policies, procedures and staff training materials, and also hosted a round-table session. These revealed the widespread reliance by a number of retailers' trading law and sales/marketing teams on the text of the PPG.

The OFT read and heard arguments that the PPG 'required' the supermarkets to establish their prices for 28 days and 'allowed' or 'permitted' them to then make price comparisons for up to six months. At the same time, however, other, perhaps contradictory, passages of the PPG tended to be overlooked (such as the recommendation that the period of time for which the new (lower) price will be available should not be more than that for which the old (higher) price was available).

### ***The OFT's principles***

The OFT worked with a number of major UK supermarkets and developed a set of principles to establish a more consistent approach across the sector and to help to ensure that promotional claims are meaningful and accurate. The principles addressed internal reference pricing and pre-printed value claims (such as 'bigger pack, better value'). Eight supermarkets agreed to use these principles within their businesses.

**We draw the TSI's attention to the text of the OFT's principles, which can be found here:** [www.offt.gov.uk/shared\\_offt/consumer-enforcement/oft1527.pdf](http://www.offt.gov.uk/shared_offt/consumer-enforcement/oft1527.pdf)



## **Furniture and carpets investigations: factors regarding internal reference pricing**

In 2012, the OFT opened investigations to consider whether retailers in the furniture and carpets sector were engaging in the use of misleading reference pricing. For more information on these investigations, please see:

[www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/furniture-carpet](http://www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-completed/furniture-carpet)

As part of its investigations, the OFT identified a list of factors which would assist the CMA in deciding whether it would be appropriate to take action in the future.

### ***What factors would call into question whether a reference price was genuine?***

All the relevant circumstances would have to be considered. However, the presence of one or more of the following non-exhaustive list of factors would call into question whether genuine reference prices were being used:

- A. Relative volume of units sold:** Whether the reference price is the price at which the retailer has sold a significant number of units of the product relative to the number of sales at the discounted prices. The greater the proportion of sales made at the higher price the less this will call into question whether that higher price was a genuine retail price.
- B. Legitimate expectations:** Whether the reference price is a retail price at which the retailer has a legitimate expectation of significant sales of units of the product relative to the number of sales at the discounted prices. The following practices suggest a lack of legitimate expectation:
  - (i) Repeated use:** Whether the retailer repeatedly uses a reference price, when the retailer knew that it had not sold a significant number of units of the product at the reference price relative to the number of sales at the discounted prices.
  - (ii) Duration:** Whether a reference price is advertised to show a specific price advantage and/or discount, in circumstances where the sale price has been used for longer than the reference price, whereby the sale price has, in fact, become the usual retail price.
  - (iii) Proportion of stores:** Whether the reference price was used in all or a significant proportion of stores before and/or after the advertised discount.

(Continued overleaf)

**(iv) Online:** Whether a reference price was available on a retailer's main online store or only through a secondary or lower profile business or website, before being used to promote savings and/or discounts in all its stores.

**(v) Parallel discounts:** Whether, during the time that the reference price is the current retail price, a retailer runs parallel discount offers to attract sales. For example, by offering money-off vouchers, in-store discounts and/or 'bundling' offers whereby discounts are offered for multiple purchases.

## Judicial treatment of the Pricing Practices Guide and other guidance on the Consumer Protection from Unfair Trading Regulations 2008/Unfair Commercial Practices Directive

### Relevant cases

#### ***OFT v Purely Creative Ltd* [2011] EWHC 106**

Briggs J, at paragraph 40 of the Judgment: '[...] the primary recourse of the national court is to the jurisprudence of the ECJ. The national court may also obtain assistance from, but is not bound by, guidance issued by the Commission, and by the decisions of other national courts as to the meaning of the relevant directive.'

#### ***OFT v Purely Creative Ltd* – Court of Appeal hearing**

The Court of Appeal's Judgment does not address the use of guidance but the matter was raised at the hearing. Attempts were made by both sides to refer the Court to the European Commission's guidance and also to the BERR/OFT CPRs guidance of 2008. The Court did not wish to consider either, questioning their relevance as neither were aids to construction of the UCPD/CPRs.

#### ***R on the application of Helidon Vuciterni & others v Brent Magistrates' Court & others* [2012] EWCA 2140**

Davis LJ, at paragraph 20 of the Judgment, states that the Court was referred to the BERR/OFT CPRs guidance of 2008 and notes that it is 'not perhaps strictly admissible on the question of interpretation'.

#### ***R v Tesco Stores Ltd* – Sentencing remarks of 19 August 2013**

Judge Chambers QC stated, in sentencing the Defendant: 'At the time, the relevant guidance for best practice in pricing for such promotions was set out by the Department of Business Innovation and Skills Pricing Practices Guide issued in November of 2010. [...] It seems to me irrespective of any guidance. It is a matter of common sense.'