



Unit 3

Marketing Energy

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Reviewed by

This document (or component parts) has been reviewed by the following:

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Introduction

Promoting competition is one of Ofgem's main objectives and there are many energy suppliers available, all wanting us to have contracts with them. This means that there is a lot of marketing activity going on to persuade us to use a particular supplier. This is the starting place for regulation, as well as the beginning of the contracting process. It is tempting for energy companies to make all sorts of promises and throw all kinds of facts at us to persuade us to have our supply contract with them rather than a competitor, so marketing activities need to be controlled to make sure that potential customers are not misled or forced to make contracts they might not wish to enter into.

There are various ways in which the energy suppliers conduct their marketing activities and the main ones are: doorstep and other off-premises selling, distance selling (telephone sales and online), advertising, and direct mail (mail-shots).

The controls that do exist are based within the industry, in the licence conditions and a code of practice, and outside it, within the legislation enforced by TSS and also the codes of practice enforced by the Advertising Standards Authority (ASA). These methods of control will all be covered in this unit along with the most common examples of mis-selling which occur.

Remember that if the consumer enters into a contract and there is a breach of that contract, there may be remedies available. These are discussed in more detail in unit 4 'Energy supply contracts'.

In addition to the basic rights which consumers receive under a supply contract, there may be some extra ones available, which depend on where or how the contract was made and sometimes what the contract is for.

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, (the CCRs or the Regulations) provide general cancellation rights in certain circumstances. These Regulations only apply to consumer contracts. The seller must be acting in the course of their business, i.e. a supplier (S) and the buyer must be acting in a private capacity, i.e. a consumer (C). References to legislation will be to the CCRs unless otherwise stated.



The headings to be addressed in this unit are:

- Section 1:** Selling off-premises
- Section 2:** Distance selling
- Section 3:** Other marketing methods
- Section 4:** Mis-selling

Section 1

Selling off-premises

Since the introduction of competition in the energy supply sector, it has been common for the gas and electricity companies to cold call consumers in their homes, to stop them in the street, or other public places, and try and persuade them to switch supplier. In fact, according to the Energy UK, '12 million houses are called on every year and this has resulted in half the population switching their energy supplier'. This method of selling can be seen as making sure that those who do not have access to the internet can still take advantage of the competition in the marketplace, however, selling off-premises is open to abuse and some consumers, particularly those considered to be vulnerable, may be easily misled or persuaded to switch simply to get rid of a sales person. This type of marketing, therefore, needs to be regulated and both SLC and legislation enforced by TSS are in place to try and ensure that people are protected from overzealous sales staff.

Of course there are people who do wish to switch supplier and there are suppliers who are honest and do not mislead consumers, but you should be aware that this is a common area of complaint.

Standard licence conditions

SLC(G&E)25 covers ALL marketing activities affecting consumers and applies to ALL suppliers but has a particular relevance to selling off-premises. Condition 25 came into force in January 2010, and appears to have been largely modelled on the ERA code (discussed below), which was first launched in 2002.

The provisions, which refer to Marketing and Telesales Activities (MTA), only relate to consumers so, they do not protect businesses (see unit 11 'Business advice'). Condition 25 lays down quite extensive requirements relating to marketing activities and came into force as a result of the Probe (see unit 1 'Understanding the energy industry').

Note: Energy UK was established in April 2012 following a merger of the Association of Electricity Producers, the Energy Retail Association and the UK Business Council for Sustainable Energy, the code is still managed by them.

(a) Overall objective

The overall objective of condition 25 sums up the requirements and states that the provisions are to ensure that all information provided, whether written, electronic or oral:

- ✓ is complete
- ✓ is accurate

- ✓ is capable of being easily understood
- ✓ does not relate to products which are inappropriate
- ✓ does not mislead
- ✓ is fair (in content and presentation)
- ✓ is given appropriate prominence if important

All MTA and all contact with and behaviour towards consumers, should be conducted in a manner which is, all of the following:

- ✓ fair
- ✓ transparent
- ✓ appropriate
- ✓ professional

(b) General requirements

Condition 25, although restricted to consumers, nevertheless applies to all types of marketing activity, and the points highlighted here could be relevant for any type of marketing activity, be it selling off-premises, distance selling (internet and telesales) or general media advertising, such as in newspapers and magazines or on the TV or radio. There should be:

- ✓ appropriate selection procedures for staff who will be involved in marketing
- ✓ provision of appropriate training for marketing staff
- ✓ steps to ensure that consumers can readily identify the supplier whenever they are contacted by them or their representative
- ✓ the provision of certain pre-contract information (listed below) when an offer is made during a MTA, before the contract is entered into, relating to estimates of **annual charges** and **price comparisons** (in certain circumstances)
- ✓ a written copy (for retention) of the estimate and or price comparison ASARP (as soon as reasonably practicable)
- ✓ any unsolicited contact should take place at a reasonable time

- ✓ if the consumer enters into a contract the supplier must take all reasonable steps (ARS) to ensure that they readily understand that they have done so
- ✓ a system to allow for records of estimates and comparisons given, to be maintained for two years

(c) Pre-contract information

If the supplier offers to enter into a contract with a consumer - which is the supplier's preferred outcome of a doorstep sale – then it must make available certain information when it makes the offer but BEFORE entering into the contract. This relates to the amount the consumer will have to pay, in the form of estimates and in certain circumstances, price comparisons:

- **Estimates**

The estimate must be written or electronically displayed and must be for a whole year (total annual charge estimate). It must do all of the following:

- ✓ take account of annual consumption (if known) or be based on a best estimate
- ✓ show the basis for any estimate (which should have regard to any relevant information)
- ✓ give a clear explanation of how any direct debit (DD) representation has been calculated

- **Price comparison**

A price comparison must be given if the consumer is using a PPM or if an indication has been made that charges would be lower than those the consumer is currently paying. It must:

- ✓ be written or electronically displayed
- ✓ be on a like for like basis (same time period – usually a year – and same consumption level)
- ✓ clearly itemise, and explain, any differences, for example, discounts, different charges for different payment methods

(d) Post contract checks

Consumers should be contacted, either in writing or by telephone, within 14 days of a contract being entered into during a visit to their home (or as a result of a conversation in a public place, for example, when stopped in the street) to seek confirmation that the consumer:

- understands they have entered into a contract

- understands the Principal Terms of the contract
- is content to have entered into the contract
- has received the estimate and comparison, if appropriate
- is content with the information provided
- is content with the way in which the marketing activities were conducted

This post contract should be by a supplier representative who is not involved in activities leading to the making of contracts.

Practical tip

The SLC does not require energy suppliers to provide consumers with a right to cancel a contract entered into after doorstep selling has taken place, however, legislation requires a cooling off period to be given to consumers in such circumstances. This will be considered later.

(e) Non-compliance

Remember that a breach of a licence condition does not give rise to a compensation claim, it is something for which Ofgem can impose a sanction or penalty.

However, the Gas & Electricity (Consumer Complaints Handling Standards) Regulations do state that suppliers must include compensation as a remedy, as appropriate, if there has been a failure to comply with SLC(G&E)25.

Example

In December 2008, Npower was fined £1.8m for failing to take adequate steps following complaints from consumers about the company's doorstep sales people.

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (the CCRs)

We have examined the controls which the industry itself has in relation to selling off-premises, based in SLC. We will now see how these are supported by TSS legislation which applies more generally to many goods and services and therefore could be applied to the marketing of energy supply contracts, rather

than being specifically designed to apply to it. Here we will examine the provisions of the CCRs and later we will consider how the CPR may apply to selling off-premises too.

(a) Application

The CCRs may apply when potential consumers are visited in their homes by sales people from energy companies or representatives acting in their name of or on behalf of them.

They provide a cooling off period in relation to certain contracts which a domestic customer may enter into in specific circumstances.

The Regulations only apply to consumer contracts and cover those made:

- ✓ when the sales representative and the consumer are together, somewhere which is not the supplier's usual business premises, for example, during a visit or approach in the consumer's home, the home of another consumer, the consumer's workplace or just in the street
- ✓ when an offer is made by the consumer in any of the above situations and is not accepted by the trader until later
- ✓ on the business premises of the supplier, or representative, or by any distance means, such as an email, if this was immediately after a personal and individual address to the consumer, somewhere which is not the trader's usual business premises
- ✓ during an excursion organised by the trader with the aim or effect of promoting or selling to consumers

There are some exemptions that apply, including contracts for goods or services under £42, but they do not relate to energy supply contracts, which would be covered by these Regulations.

Example 1

A couple of days ago Mary popped next door to have a chat with her neighbour Elsa and while she was there an energy supplier representative called at Elsa's home. Elsa wasn't really interested in changing from her current gas supplier as she was very happy with them but Mary agreed to switch suppliers.

Advice

It does not matter that Mary was not in her own home but in Elsa's, she should still be given the legal cooling off period by the new supplier.

Example 2

Mohammed is visited in his own home by an energy supplier representative and persuaded to switch suppliers on a dual fuel contract. He thinks he is eligible for a particular tariff and the representative says

he will have to check this and let him know the following day. Mohammed completes all the details in an application form which he signs and the representative takes the paperwork away. The following day the representative rings Mohammed and tells him that he is eligible for the tariff in question and that the switch will go ahead in the usual timescale.

Advice

The completion of the application form by Mohammed was an offer to enter into a contract which was not accepted by the supplier until the following day when eligibility for a particular tariff had been checked. Although the contract was not completed on the day of the visit, this is still covered by the CCRs and Mohammed should have been given details explaining his cooling off period at the time of the visit.

Example 3

James and Colleen were approached by an energy supplier representative in their local high street yesterday, and were persuaded to switch electricity supplier. When they got home they decided that they would prefer to stay with their original company.

Advice

As the supplier representative was working away from his normal trade premises this is likely to be classed as an off-premises contract and James and Colleen should have been given some details explaining the cooling off period.

(b) Pre-contract information

So that a fully informed purchasing decision can be made, the CCRs require certain information to be provided before the consumer commits to buying anything. Pre-contract information (PCI) is also required under SLC(G&E)25 but this relates specifically to price comparisons and estimates. The PCI required by the CCRs is more far reaching. It does include details about the product being sold, i.e. the gas or electricity supply, but it also covers details about the supplier, payment and the consumer's rights, in particular the right to cancel, which is discussed in more detail below. The PCI should be provided in a clear and comprehensible manner and it should be given on paper or, if the consumer agrees, on another durable medium. A durable medium means paper or email, or any other format that allows:

- ✓ information to be addressed to the recipient personally, although the information itself does not need to be exclusive or tailored to a specific consumer AND
- ✓ the consumer's personal information to be stored AND
- ✓ for it to remain unchanged and accessible for future reference

The following are all likely to be considered as durable media, if they meet the above criteria: letters, CDs, DVDs, emails, texts and personal accounts on a trader's website, although the latter may not be set up at the pre-contract stage.

If there are any charges that are in addition to the main obligation under the contract, which will be for the supply of gas or electricity, then the consumer must expressly agree to them, for example, insurance or maintenance policies. So any additional payments should not default or negative options. Active consent is required under the CCRs, so the consumer should not have to untick a pre-ticked box to avoid a payment.

A list of the PCI that is required is at the end of this unit.

(c) Contract confirmation

The supplier must also provide contract confirmation to the consumer before they begin supplying any gas or electricity. This enables the consumer to check the terms of the contract against the PCI for any discrepancies. This can be in the form of a copy of the signed contract and can be on paper or another durable medium if the consumer agrees. If it is not a copy of the actual contract then it must contain all the PCI unless this has already been supplied on a durable medium before the contract was concluded.

The burden of proof is on the supplier to show that the PCI and contract confirmation requirements were complied with.

(d) Cancellation rights

The consumer must be given a cooling off period to cancel the contract, which starts on the day the contract is made and finishes at the end of 14 days after the day on which the contract is entered into. This period may be extended by a maximum of 12 months if certain details about the cancellation right are not provided to the consumer before the contract is entered into.

(e) Cancellation details

Certain details about the right to cancel must be given to the consumer as part of the PCI. Failure to provide the details listed in (a) below, is a criminal offence, which should be handled in accordance with RAST protocols (see the practical tip later). In addition, a prescribed cancellation notice should be given at the same time, which the consumer can use to actually cancel the contract. All this information is part of the pre-contract information process and should be legible, clear and comprehensible. The CCRs include some model cancellation instructions which the suppliers may choose to use to provide the relevant details about cancellation.

The details which should be provided are:

- (a) the conditions, time limit and procedures to exercise the right to cancel

- (b) that the consumer will have to pay reasonable costs if they cancel after the supply has begun when they specifically asked for this to happen during the cancellation period

Clearly, the right to cancel and the prescribed cancellation notice are important requirements on top of the SLC. An example is at the end of this unit.

(f) How to cancel

The consumer must inform the supplier, or whoever is specified in the details given to them, of their intention to cancel. The notice will be effective from the date that it is sent. The consumer can use the cancellation form provided by the supplier but does not have to, or can make any other clear statement setting out the decision to cancel. The onus is on the consumer to prove cancellation if required. This is covered in more detail in Unit 4. An example cancellation form is at the end of this unit.

(g) Effects of cancellation

Once the consumer has cancelled the contract, it will be treated as though it had not been made. The main effects are listed below, the rest relate to the supply of goods which is not likely to be relevant for an energy supply:

- ✓ the trader cannot enforce the contract
- ✓ any sum paid becomes repayable, for example, deposits, and this should be done within 14 days
- ✓ any ancillary contracts, such as credit agreements or insurance policies, are automatically terminated
- ✓ the consumer will have to pay reasonable costs if they cancel after making a request on a durable medium, to have their supply started during the cancellation period and the supply is in fact started then

From a practical point of view it is unlikely that a transfer will happen within 14 days, but if a consumer had made such a request and it was actioned, then they would have to pay for the energy supplied during the period up to cancellation. Having said that, if the details in (a) above, namely the conditions, time limits and procedures for cancelling, were not provided before the contract was concluded this would have the effect of extending the cancellation period until the end of 14 days starting the day after such details were provided.

Practical tip

When advising on off-premises selling complaints, remember to find out the following:

- ✓ where has the visit taken place?

- ✓ have the appropriate cancellation details been supplied?
- ✓ has a prescribed cancellation form been given?
- ✓ did the consumer ask for performance during the cancellation period?
- ✓ was the request made on a durable medium?
- ✓ if so has any energy actually been consumed from the new supplier in that time?
- ✓ were the cancellation details given at the right time and did they contain all the right information?
- ✓ when was the contract made?

If a supplier has not given the consumer details about their cancellation right the matter should be handled in accordance with RAST protocols. It is recommended that the consumer still writes to the supplier to cancel the contract.

(h) Doorstep crime

Linked to off-premises sales is the issue of doorstep crime with the possibility of someone posing as an energy supplier representative to gain entry into someone's premises in order to commit a theft or other crime. Such matters should be handled in accordance with RAST protocols.

Since 2005 there has been an increase in the number of No Cold Calling Zones (NCCZ) as promoted by TSS, where house owners and occupiers choose to display a sticker or even just a written piece of paper indicating that they do not wish any doorstep sellers to call. Research by Consumer Focus in July 2009 showed that it was routine practice for energy agents to ignore householders' requests not to receive unsolicited calls, even when they lived in a NCCZ or displayed a sticker, because they felt that such measures were only to deter rogues.

In May 2010 the Big 6 energy suppliers assured TSS that they would respect NCCZ and the following was agreed:

'any visible clearly worded and unambiguous notice displayed on the property that they do not wish to receive uninvited doorstep sales callers, the sales agent will not call on that property'. Such steps are not just to ward off rogue traders but also to protect people from feeling pressured in their homes by salesmen.

The Consumer Protection from Unfair Trading Regulations 2008 (CPR)

These Regulations can also apply to selling off-premises. They make it unlawful for traders to engage in unfair commercial practices (see unit 1 'Understanding the energy industry'). There is a list of 31 practices which are automatically unfair and in addition a commercial practice may be unfair if it is likely to have an adverse effect on decisions made by consumers and relates to:

- a misleading action
- a misleading omission
- aggressive behaviour
- a contravention of the requirements of professional diligence

All of these could cover some form of marketing activity by energy suppliers, however, here we will concentrate on those which are the most relevant for selling off-premises. To some extent, many of the issues are also covered by the SLC and Doorstep Selling Code discussed above. The Regulations will also apply to brokers and representatives, whether they are acting for or on behalf of the suppliers or independently.

(a) Listed unfair practices

Activities listed in Schedule 1 are sometimes referred to as banned practices and are automatically deemed to be unfair. Those which are most likely to relate to the marketing of energy supply contracts are listed in the table below.

Schedule number	Unfair commercial practice	Example
1	Claiming to be a signatory to a code of conduct when the trader is not	A supplier falsely claiming to be a member of the Doorstep Selling Code of Practice
3	Falsely claiming code endorsement	Claiming CMA approval of the REAL Assurance code, when not a member
4	Falsely claiming trader or product endorsement by a public or private body	A broker claiming to be a member of the Utilities Intermediaries Association (UIA) when they are not
5	Bait advertising	Supplier offering a special rate on dual fuel when their only discounts are for electricity or gas rather than both together
6	Bait and switch – offer one product and sell another	Offer a particular tariff with the intention of promoting another, more expensive one
7	Falsely claiming that a product will only be available for a very limited time	New green tariffs – available at this introductory price of 6p per unit, but hurry offer ends today! – when it doesn't end today
9	Illegal sales	Entering into a contract to supply electricity other than through an approved meter
10	Presenting consumer legal rights as a distinctive feature of the trader's offer	We give cancellation rights when you enter into a contract with us after one of our representatives visits you

11	Hidden advertising – using editorial content to promote a product	Showing a doorstep consumer a newspaper editorial sponsored by a supplier which promotes their new tariff, but failing to say the editorial is sponsored
18	False claims about market advantage	Supplier or broker falsely claiming that only they offer a reduced rate for dual fuel
19	Not awarding prizes promised in a competition or promotion	Getting consumers in their homes to enter into supply contracts with suppliers by entering them into a free prize draw and then not awarding the promised prizes
20	Offering free products which are not free	Offering consumers who allow doorstep representatives to visit them and give a quote to switch supplier, a free air conditioning unit, which they then do not deliver unless the consumer actually enters into a supply contract
24	Creating the impression that the consumer cannot leave the premises until they have agreed to a contract	Supplier sales representatives or brokers stopping consumers in the street or in supermarkets to persuade them to enter into energy supply contracts and making them feel they cannot escape until they have done so
25	Visiting the consumer's home and ignoring a request to leave	Doorstep salesman or broker trying to persuade consumers to switch supplier and refusing to leave until they have done so Note – if supplier visiting just to collect arrears this would not be in breach
26	Persistent and unwanted communications by email, fax or telephone	Supplier or broker continues to telephone the consumer despite a request not to do so Note – if supplier contacting consumer just in relation to arrears this would not be in breach
30	Emotional blackmail	'I'll lose my job if you don't sign a contract' – supplier representatives or brokers
31	Prize scams	Creating a false impression that a consumer has already won a prize in a draw when there is no prize it's just a way of getting the consumer to enter into a contract with the supplier

(b) Misleading actions

Marketing activities during selling off-premises can amount to misleading actions if:

- false information is given (there is a fairly comprehensive list of matters which this could relate to)
- the overall presentation of such information is likely to deceive (same listed matters)
- confusion with a competitor's product, trade marks / names or other distinguishing marks is created
- a code, which the supplier has indicated he is bound by, is not complied with

Practical tip

Remember that SLC(G&E)25 has, as its overall objective, that information provided should be accurate, easily understood, not misleading, fairly presented and given appropriate prominence where relevant. In addition pre-contract information relating to estimates and price comparisons may have to be given in certain circumstances.

The CCRs require a prescribed cancellation form to be given when the salesperson visits and it must be easily legible and contain the required information. In addition, certain pre-contract information must be given, in particular, details about the right to cancel.

(c) Misleading omissions

If material information is omitted or hidden or is indicated in a way which is not clear or is unintelligible, ambiguous or untimely, this may amount to an unfair commercial practice. This could be particularly relevant to any written material given out by a doorstep sales person or indeed any verbal statements by them since the definition of a commercial practice includes any representation, advertising or marketing.

This also applies to written and verbal statements made by brokers as well as suppliers and their representatives. For example, if a consumer was offered a free energy efficiency check for switching supplier, and was then later told that they would have to pay £15 for the check, redeemable against any product purchase from the company.

Remember though, that it is difficult for consumers to prove any verbal statements that might have been made.

Practical tip

Remember that SLC(G&E)25 also addresses similar issues and requires all information given to consumers to be complete, given appropriate prominence where necessary, include an estimate and price comparison when required and allow for the supplier to be identified and if a contract is entered into, a written copy of it must be provided at the time or ASARP afterwards. The CCRs require a prescribed cancellation notice to be given at the time of the salesperson's visit, and in addition, pre-contract information, which explains, amongst other things, the right to cancel, how to cancel and when the consumer may still have to pay, as well as requiring specific details to be included, such as

the date, the trader's identity and a name and address for a cancellation form or statement to be sent to.

(d) Aggressive behaviour

If a salesperson or broker uses harassment, coercion or undue influence to significantly impair freedom of choice then this could amount to an unfair commercial practice falling into this category. This might include staying for a long period of time or being particularly intimidating during a sales pitch. Certain behaviour could also fall under some of the practices in the list of banned activities as discussed earlier, e.g. refusing to leave the premises or using emotional blackmail to secure a contract.

Consumer Focus research in July 2009 showed that nearly seven out of ten consumers, who had received a direct sales visit from an energy supplier, rated the experience as negative and a third described the experience as intimidating.

Practical tip

SLC(G&E) 25 requires marketing staff to be selected and trained appropriately, not to market products which are inappropriate for that consumer, make unsolicited contacts at a reasonable time (the Doorstep Selling Code states no later than 8pm), identify the supplier, behave in a fair, transparent, appropriate and professional manner and make sure that if a consumer enters into a contract, they understand that they have done so.

In addition, non-marketing staff must undertake post contract checks to ensure that the visit was conducted properly and the consumer understands that they have entered into a contract.

Example 1

Jan receives a visit from a representative of one of the gas suppliers. The representative tries to persuade her to enter into a contract with that supplier. Jan asks the representative to leave her house but the representative refuses.

Example 2

Joel is visited by a representative from an electricity supplier who informs him that if he does not make a sale that day he will lose his job.

Advice

If you feel that a trader is involved in an unfair practice ensure that you make a comprehensive record of the details in the case notes and handle the call in accordance with RAST protocols. The consumer could also make the supplier aware that their action potentially breaches CPR which may assist them in resolving their dispute with them.

(e) Professional diligence

As a catch-all provision, if a commercial practice is considered to be unfair but does not fit into any of the earlier categories, it may contravene principles of professional diligence. These are the standards of special skill and care which a trader may reasonably be expected to exercise towards consumers, in the trader's field of activity. Professional diligence can be considered to be honest market practice or within the general principles of good faith. Arguably, standards of behaviour and procedural requirements laid down in a code of practice or SLC are what consumers are entitled to expect and so failures to comply with them could well breach this provision too.

Remember that potential breaches of CPR can be referred to TSS in accordance with RAST protocol and the regulations apply to suppliers, their agents and representatives and also independent brokers.

Misrepresentation

When the supplier and the consumer negotiate about energy supply contracts, various matters will be discussed and statements may be made about the gas or electricity supply, which is later contracted for. If any of these statements turn out to be incorrect, the remedy available to the injured party may depend on whether the statement became a term of the contract or not. If it did become a term then the normal remedies for breach of an express contract term will apply and these will be discussed in unit 4 'Energy supply contracts'. Information supplied in compliance with the CCRs will be treated as a term of the contract.

However, if the statement does not become a term of the contract then it is merely a false representation and for a remedy to be available we have to examine whether it amounts to an actionable misrepresentation. There is often a problem of evidence and proof with misrepresentation because such false statements are usually verbal and it will be the word of the consumer against the word of the supplier or their representative, agent or broker.

The law in this area was originally contained solely in the common law but since 1987 we have had the Misrepresentation Act (MA) which has simplified the matter somewhat (the Law Reform (Miscellaneous Provision) (Scotland) Act 1985 (LRMPA) has some application to this area, although there are some differences between it and the MA).

The following areas will be examined:

- ✓ whether a statement is a contractual term or a representation
- ✓ what constitutes a misrepresentation



- ✓ types of misrepresentation
- ✓ remedies available

(a) Contractual term or representation?

There is no easy way to decide whether a statement is a term of the contract or not, however, the following guidelines have been used by the courts in the past.

Guideline	Reasoning	Application to energy
Was the contract put into writing?	If the contract is later put into writing and the statement is not included in the contract, then it is likely that it will be considered to be a representation	Energy contracts with consumers do have to be put into writing (SLC 22) so it should be easy to check whether the statement has been included
When, during the negotiations, was the statement made?	The closer the statement is to the making of the contract, the more likely it will be considered to be a term	There is not usually a drawn out negotiation about energy contracts so most statements are likely to be close to the making of the contract
Who, if anyone, had the specialist knowledge about the subject matter	If the party making the statement has specialist skill or knowledge, the statement is likely to be a term	The average consumer does not have specialist knowledge about gas and electricity whereas the supplier does
How important is the statement?	If the other party would not have entered into the contract if the statement had not been true, then it is likely to be treated as a term	What exactly is said will be the key here and whether it can be considered to be important

Practical tip

This is quite a complex subject and it is recommended that when advising consumers who claim that false statements have been made, they should simply be told to argue that there has either been a breach of contract and / or a misrepresentation as this would cover most consumer situations that you would be likely to come across. Remember also, that information provided in compliance with the CCRs is treated as being a term of the contract.

(b) What is a misrepresentation?

A misrepresentation is:

- ✓ a false statement of fact
- ✓ made during pre-contractual negotiations
- ✓ as an inducement to enter the contract

Let's now examine each of these elements in further detail.

- **Statement of fact**

The false statement must relate to a matter which is being put forward as a fact.

Example

A supplier representative calls at Danielle's home to persuade her to switch electricity supplier and tells her that paying by direct debit will be cheaper as the company offers a discount for making payments in this way when in fact he knows that there is no discount for paying by direct debit.

If there is nothing about the direct debit discount mentioned in the documentation to make it a term of the contract, this is likely to be a misrepresentation.

Statements of fact should not be confused with the following:

Mere sales talk	'Simply Gas – the best deal in the market'
Statements of intention	A sales representative claiming they are able to offer a 10 per cent saving on the consumer's current tariff before they have any details about the consumer's current tariff.
Opinions	'You will probably experience fewer power cuts if you have your electricity contract with us'
A failure to disclose	Sales representative did not make C aware that the new tariff she was switching to included a standing charge

Special skill or knowledge – if someone has this, then their expression or opinion may become a statement of fact.

Failure to disclose - there is no general duty to disclose information in the law of misrepresentation. However, there are exceptions to this rule, the most relevant of which are:

✓ **partial truths**, which distort the whole picture, for example, a sales representative persuades a consumer to switch supplier by claiming the new supplier could offer lower monthly direct debit payments. After switching, the consumer found that the lower direct debit payments did not cover usage and had to be increased.

✓ **a change of circumstances**, a sales representative persuades a consumer to switch supplier by claiming that they are the cheapest in the market place for a particular tariff, but by the time the switch takes place, some several weeks later, they are no longer the cheapest company for that tariff.

Practical tip

Remember, however, that a failure to disclose information could breach CPR. This will not affect the advice that is given to consumers but the case should be handled in accordance with office RAST protocols.

- **Pre-contractual negotiations**

It is only the discussions that take place before the contract is formed that are relevant here.

- **Inducement**

The consumer must show that they relied on the false statement and that it persuaded them, at least in part, to enter into the contract.

There will be no inducement where the consumer:

- ✓ was not aware of the statement
- ✓ knew that the statement was false
- ✓ did not rely on the statement

However, there is no obligation to check the accuracy of a statement, and indeed consumers may not know how or where to check such statements.

Example

Phillip is visited by a off-premises energy sales representative who he invites into his home to discuss the possibility of switching his electricity contract to the supplier the representative works for. Phillip is very interested in renewable energy and is thinking of having solar panels fitted to take advantage of the feed-in tariff which he has read a bit about.

The representative tells him this is a good idea and states that he will receive a guaranteed minimum of £900 per year for the energy his solar panels make, as a generation tariff. Phillip knows that this figure is rather high as he read on the Energy Savings Trust website that a typical home would expect to receive around £700 as a generation tariff.

Phillip decides to switch suppliers to the representative's company and at the end of the first year he receives a generation tariff of £650. He is not able to argue that there was a misrepresentation as he knew that the figure quoted by the salesman was not correct.

(c) The different types of misrepresentation

A supplier making a false factual statement may do so deliberately, without really caring whether it was true or not, or in all honesty, believing what they have said to be true. The result is the same for the person to whom the statement is made, they are persuaded to enter into the contract on the basis of the false information and suffer loss or damage as a result. Should the law make the statement - maker liable to the same extent in each case? In fact the law draws a distinction between three different types of misrepresentation, and the remedies differ for each one. The three types of misrepresentation are:

- **Fraudulent misrepresentation**

One made either knowingly or without belief in its truth or reckless as to whether it is true or false, which may of course be very difficult to prove.

- **Negligent misrepresentation**

This is where the maker of the statement believed that the facts were true but had no grounds for doing so. The MA places the burden of proof on the statement-maker, who it is assumed was negligent but who can disprove the negligence by showing that it was reasonable to believe in the truth of the statement (the LRMPSA does not reverse the burden of proof).

It is possible for a negligent misrepresentation to be made by someone who does not then enter into a contract with the person to whom the statement is made, for example, an agent or broker. However, in accordance with common law principles, if there is a special relationship between the parties and it was reasonable to rely on what was said and it can be shown that the statement was made negligently, liability can arise. This could apply for example, to statements made by third party agents who visit consumers in their homes on behalf of the suppliers, or independently, to persuade them to switch. It is possible to exclude or limit liability for the type of loss which may occur, namely financial, and this is discussed in more detail in Unit 4.

- **Innocent misrepresentation**

If the supplier honestly and reasonably believes what they have incorrectly stated, this will be an innocent misrepresentation.

(d) Remedies for misrepresentation

Rescission

It is possible to end a contract following a misrepresentation and this is known as rescission (reduction in Scotland), however, this is a discretionary remedy and although in theory it is available for any of the three types of misrepresentation, there may be factors, called bars to rescission, which prevent it from happening.

These include:

- **delay** - although the law is not clear as to how much or how little time needs to pass before it is too late to rescind, after a reasonable period of time rescission is not available as a remedy
- **impossibility** - if gas or electricity have already been used under the contract then it is not likely to be possible to restore the parties to their original position because that energy cannot be given back to the supplier

- **affirmation** – if the consumer does something to indicate that they are happy to carry on with the contract despite the misrepresentation, this will amount to an affirmation of the contract and they cannot later change their mind and end it

Indemnity

An indemnity is an award of money but is more limited than damages and only covers the necessary costs that a person has incurred as a result of the contractual obligation. For example, the victim of an innocent misrepresentation would not be able to make a claim for loss of profit. This is available for all types of misrepresentation but is particularly important for innocent misrepresentation where there is no right to damages.

Damages

These can be claimed instead of or in addition to rescission. Damages are available for fraudulent or negligent misrepresentation but not for an innocent one. The MA gives the court the power to award damages in lieu of (instead of) rescission. This is not something that the party can request (the LRMPSA does not allow for damages to be awarded instead of ending the contract).

Provision of Services Regulations 2009

These Regulations require all service providers (which includes energy suppliers) to make certain information available in certain ways and at certain times. There is a degree of overlap between these requirements and those in the legislation mentioned above for doorstep sales and also SLC(G&E)25. The Regulations apply regardless of the method of selling and so are discussed later in section 3.

Summary

- Doorstep selling is a very common activity for energy suppliers but in May 2010 the Big 6 suppliers agreed to observe NCCZ and indications from householders who do not wish to receive unsolicited visits from sales people.
- Consumers receive some protection in relation to this method of marketing through SLC(G&E)25, and the CCRs.
- The overall objective of SLC(G&E)25 requires information provided to consumers to be complete, accurate, easily understood, not about inappropriate products, not misleading, fair in terms of content and presentation and given prominence where appropriate.
- In addition SLC(G&E)25 also lays down provisions relating to the training and behaviour of sales staff, the provision of estimates and price comparisons in certain circumstances, timing of visits, checking of understanding and also requires non-marketing staff to conduct follow up checks to ensure consumers understand their commitments and are happy with the way the visit was conducted.
- Suppliers are required to provide compensation as a remedy for failures to comply with SLC(G&E)25 where appropriate in certain instances of mis-selling.
- The ERA code preceded SLC(G&E)25 and appears to have formed the basis for its provisions but is a self regulatory measure which only binds its members and lays down requirements for compensation in certain circumstances, the monitoring of performance, corrective action where necessary, sanctions and an appeals procedure.
- Energy UK was established in April 2012 following a merger of the Association of Electricity Producers, the Energy Retail Association and the UK Business Council for Sustainable Energy. The ERA code is still managed by the Energy UK.
- The CCRs provide a cooling off period for consumers and a prescribed cancellation form must be given to them, along with details about their right to cancel, an explanation of how to do this, details of the consequences of doing so and other PCI too.
- Supplies requested and provided during the cancellation period must be paid for providing the consumer was informed of this during the PCI along with the conditions, time limits and procedures for cancelling
- Off-premises sales staff, who engage in unfair commercial practices may breach CPR by giving out misleading information, omitting important information, using aggressive sales tactics, contravening principles of due diligence or undertaking one of the activities in the list of banned practices.
- The law on misrepresentation may provide a remedy if a salesperson made a false factual statement to induce a consumer to enter into an energy supply contract, however, the remedy



may depend on what type of statement was made since the remedies are different for fraudulent, negligent and innocent misrepresentations.

- A misrepresentation is a false statement which does not become a term of the contract but persuades a consumer to enter into a contract and must be distinguished from mere sales talk, a statement of intention, a statement of opinion and in most cases, a failure to disclose.
- The Provision of Services Regulations 2009 apply too and there is some overlap between them and other legislation requiring suppliers to provide information.

Section 2

Distance selling

Another way to persuade consumers to enter into contracts is to cold call them on the telephone (telesales) or advertise on the internet and if a contract is entered into without any face to face contact between the parties, which is a possibility over the telephone and online, this is classed as a distance contract.

The main controls that exist in relation to the marketing of such contracts to consumers are contained in SLC(G&E)25, the CCRs, the CPR and the law of misrepresentation.

There are many price comparison websites around and since they are not actually selling anything there is no requirement for them to comply with the CCRs. They will be discussed in the next section, since they can be considered to be more of a general marketing tool.

Standard licence conditions

The general requirements and pre-contract information in SLC(G&E)25, described above in section 1 will apply here and it may be particularly important to remember that:

- ✓ any unsolicited contact should take place at a reasonable time (relevant for telesales)
- ✓ all reasonable steps must be taken to ensure that a consumer can readily identify who the supplier is
- ✓ if a consumer enters into a contract the supplier must take all reasonable steps to ensure that they readily understand that they have done so
- ✓ all information provided should be complete, accurate, fair, easily understood and not be misleading or relate to inappropriate products
- ✓ all contact with and behaviour of representatives should be fair, transparent, appropriate and professional (relevant for telesales)
- ✓ marketing representatives should be appropriately selected and trained
- ✓ estimates and price comparisons should be provided, as appropriate, before a contract is entered into

There is no requirement to conduct the post contract confirmation questioning as there is for off-premises sales.

Practical tip

SLC do not require energy suppliers to provide consumers with a right to cancel a contract entered into after distance selling has taken place, however, legislation requires a cooling off period to be given to consumers in such circumstances. This will be considered below.

Remember, that suppliers are required to include compensation, where appropriate, as a remedy for consumers if they fail to comply with SLC(G&E)25.

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (The CCRs)

If energy consumers enter into supply contracts online, over the phone, or by completing a marketing leaflet application, they may be entering into a distance contract. The CCRs provide a cooling off period in relation to certain contracts which a domestic customer may enter into in specific circumstances. From a marketing point of view the CCRs protect consumers by requiring the consumer to be provided with certain information before they enter into a contract. The Regulations do not create any criminal offences in relation to distance contracts but breaches of them may amount to a breach of the CPR also, which can be referred in accordance with RAST protocol. The provisions for distance contracts are in many ways very similar to those for off-premises contracts.

(a) Application

The necessary elements that make a contract into a distance contract covered by these Regulations, are listed below and explained further in the table below. The contract must be:

- ✓ for goods or services
- ✓ made exclusively by distance communication
- ✓ concluded under an organised distance sales scheme
- ✓ with a supplier who is acting in a commercial capacity
- ✓ for a buyer who is a consumer

There are some exemptions that apply, including contracts for goods or services under £42, but they do not relate to energy supply contracts, which would be covered by these Regulations.

Example

Joseph receives a telephone call from an electricity supplier. They state that his bills could be significantly reduced if he transferred his electricity supply from his current provider and signed a contract with them. Joseph agrees to this and his supply is transferred at a later date.

This is likely to be a distance contract as it appears to be an organised distance sales scheme that makes exclusive use of distance communication up to the point that the contract is concluded.

Element	Explanation	Energy Example
Goods or service	The contract can be for either goods or services	A contract to supply gas or electricity is for the provision of a service
Distance communication	The supplier and the consumer are not physically present at the same time when the contract is concluded	Internet - online selling Telephone – telesales Leaflets which allow for application forms to be completed*
Organised distance sales scheme	The supplier must have, a system for taking orders by, for example, letter, fax, e-mail or telephone	Energy suppliers use most if not all of these and are clearly prepared to sell in this way
Commercial supplier	The CCRs do not apply to private sellers	All the licensed energy suppliers are businesses
Consumer buyer	The CCRs do not apply to business buyers	Only domestic consumers would be protected by the CCRs

* leaflets which are simply advertising the supplier or their products and require consumers to ring for more information will not be required to comply with the CCRs as it will not be possible to enter into a contract using the leaflet. They will however, have to comply with other legal requirements as discussed in section 3.

(b) Pre-contract information

So that a fully informed purchasing decision can be made, the CCRs require certain information to be provided before the consumer commits to buying anything. This includes details about the product being sold, i.e. the gas or electricity supply, but it also covers details about the supplier, payment and the consumer’s rights, in particular the right to cancel, which is discussed in more detail below. A full list of the requirements can be found at the end of this unit. Please note that not all the items in the list will be relevant for energy supplies, particularly those relating to the supply of goods.

The PCI should be provided in a clear and comprehensible manner and it should be given or made available in a way that is appropriate to the means of distance communication. If it is on a durable medium then it must be legible. If the supplier is ringing consumers or inviting consumers to ring them, then the PCI can be given verbally over the phone, whereas for online sales it could be provided on a website. Some specific requirements related to this type of marketing are detailed in the table below:

Telesales
<p>Traders who ring consumers to conclude distance contracts over the phone, must disclose certain information at the start of the conversation, namely:</p> <ul style="list-style-type: none"> ✓ the commercial purpose of the call ✓ the trader’s identity ✓ the identity of the person on whose behalf they are making the call, if applicable - this will be particularly important when third parties carry out telesales activities for energy suppliers and for independent brokers
Electronic contracts
<p>For any contract made using electronic means, the consumer must explicitly acknowledge any obligation to pay, for example, by activating a button that says ‘order with obligation to pay’ or some comparable wording, for example, ‘pay now’, otherwise the consumer will not be bound by their order</p> <p>Some of the pre-contract information must be clear and prominent directly before the consumer places their order, this applies to items 1, 6, 7, 8, 15 and 16 listed in the PCI</p> <p>Also any trading website used for concluding contracts must indicate, clearly and legibly:</p> <ul style="list-style-type: none"> ● any delivery restrictions ● which means of payment are accepted <p>at the latest by the beginning of the ordering process</p>
Limited space or time
<p>If there is limited space or time to display the pre-contract information, some items from the PCI list must be provided on that means of communication (numbers 1, 2, 6, 7, 8, 15 and 21) but the rest may be supplied in another appropriate way, for example, text or TV advertising referring to the trader’s website</p>

If there are any charges that are in addition to the main obligation under the contract, which will be for the supply of gas or electricity, then the consumer must expressly agree to them, for example, insurance or maintenance policies. So any additional payments should not be required as a default or negative option. Active consent is required under the CCRs, so the consumer should not have to untick a pre-ticked box to avoid a payment.

(c) Contract confirmation

As with off-premises contracts, the CCRs also require suppliers to provide contract confirmation to the consumer before they begin supplying any gas or electricity. This enables the consumer to check the terms of the contract against the PCI for any discrepancies. This must be on a durable medium and it must contain all the PCI unless this has already been supplied on a durable medium before the contract was concluded. This will be particularly important for contracts concluded over the phone when the PCI is likely to have been verbal.

The burden of proof is on the supplier to show that the PCI and contract confirmation requirements were complied with.

(d) Cancellation rights

The consumer must be given a cooling off period to cancel the contract, which starts on the day the contract is made and finishes at the end of 14 days after the day on which the contract is entered into. This period may be extended by a maximum of 12 months if certain details about the cancellation right are not provided to the consumer before the contract is entered into.

(e) Cancellation details

Certain details about the right to cancel must be given to the consumer as part of the PCI. In addition, a prescribed cancellation notice should be given at the same time, which the consumer can use to actually cancel the contract (an example cancellation form is at the end of this unit). All this information is part of the pre-contract information process and should be legible, clear and comprehensible. The CCRs include some model cancellation instructions which the suppliers may choose to use to provide the relevant details about cancellation.

The details which should be provided are:

- (c) the conditions, time limit and procedures to exercise the right to cancel

- (d) that the consumer will have to pay reasonable costs if they cancel after the supply has begun when they specifically asked for this to happen during the cancellation period

Clearly, the right to cancel and the prescribed cancellation notice are important requirements on top of the SLC. Failure to provide the details listed is not a criminal offence under the CCRs, however, there may be a breach of the CPR, which should be handled in accordance with RAST protocols.

(f) How to cancel

The consumer must inform the supplier, or whoever is specified in the details given to them, of their intention to cancel. The notice will be effective from the date that it is sent. The consumer can use the cancellation form provided by the supplier but does not have to, or can make any other clear statement setting out the decision to cancel. The onus is on the consumer to prove cancellation if required. This is covered in more detail in Unit 4.

(g) Effects of cancellation

Once the consumer has cancelled the contract, it will be treated as though it had not been made. The main effects are listed below, the rest relate to the supply of goods which is not likely to be relevant for an energy supply:

- ✓ the trader cannot enforce the contract
- ✓ any sum paid becomes repayable, for example, deposits, and this should be done within 14 days
- ✓ any ancillary contracts, such as credit agreements or insurance policies, are automatically terminated
- ✓ the consumer will have to pay reasonable costs if they cancel after specifically asking for the supply to start during the cancellation period and the supply is in fact started then

From a practical point of view it is unlikely that a transfer will happen within 14 days, but if a consumer had made such a request and it was actioned, then they would have to pay for the energy supplied during the period up to cancellation. Having said that, if the details in (a) above, namely the conditions, time limits and procedures for cancelling, were not provided before the contract was concluded this would have the effect of extending the cancellation period until the end of 14 days starting the day after such details were provided.

Practical tip

When advising on distance selling complaints, remember to find out the following:

- ✓ have the appropriate cancellation details been supplied?
- ✓ has a prescribed cancellation form been given?
- ✓ did the consumer ask for performance during the cancellation period?
- ✓ if so has any energy actually been consumed from the new supplier in that time?
- ✓ were the cancellation details given at the right time and did they contain all the right information?
- ✓ when was the contract made?
- ✓ what type of distance communication was used?
- ✓ was the PCI given in an appropriate way?
- ✓ have the additional requirements for telesales and electronic contracts been met if required?
- ✓ if limited time and space were available, has the correct information been provided using the distance communication means used to conclude the contract?

If a supplier has not given the consumer details about their cancellation right the matter should be handled in accordance with RAST protocols. It is recommended that the consumer still writes to the supplier to cancel the contract.

The CCRs

Trying to decide whether a contract is a distance or off-premises one, for the purposes of the CCRs, can be quite difficult. If the contract is neither of these it will be an on-premises contract, which will require PCI but no contract confirmation or cancellation rights. For example, an energy supplier's representative may visit a consumer at home and leave a quote, which the consumer may decide to accept a few days later. He may then ring the supplier and say he wants to switch over to them. Although there are elements of an off-premises contract (a visit to the consumer's home) and a distance contract (phone call), this will in fact be an on-premises contract. This is because the distance communication is not exclusive, the visit did not involve a contract conclusion or an offer from the consumer and the actual contract conclusion was not immediately following the visit.

For on-premises contracts a reduced list of PCI is acceptable. Items in the list would not be required if the information is already apparent from the context.

(h) Scams and mis-selling

It is possible for consumers to be misled during distance marketing approaches and these are discussed in more detail in section 3.



The Consumer Protection from Unfair Trading Regulations 2008 (CPR)

The CPR provisions that relate to unfair commercial practices were considered in detail in the previous section concerning doorstep sales. Of particular relevance here to distance sales, will be those relating to misleading actions or omissions, aggressive practices and certain ones in the list of banned practices. Specific problems include not making it clear who the caller represents and making repeated calls when the consumer has requested them to cease. Such complaints can be referred in accordance with RAST protocol.

Example

Peter is telephoned by one of the energy companies and is informed that he will receive a dual fuel discount if he has both his gas and electricity supplied by them. Peter later discovers that the company does not provide dual fuel discounts.

Advice

If you feel that a trader is involved in an unfair practice ensure that you make a comprehensive record of the details in the case notes and handle the call in accordance with RAST protocols. The consumer could also make the trader aware that their action potentially breaches these Regulations and this may assist them in resolving their dispute with them.

Other legal controls

(a) Electronic Commerce (EC Directive) Regulations 2002 (ECR)

These Regulations are quite complex and attempt to regulate a very technical industry across Europe, covering all recipients of online services. There is some overlap with the CCRs by requiring additional information to be displayed on business websites, advertisements etc. Since they cover more than just online traders, the price comparison websites would have to comply with their provisions as well as the suppliers. The Regulations apply regardless of the method of selling and so are discussed later in section 3.

Practical tip

Breaches of ECR should be handled in accordance with RAST protocols.

(b) Provision of Services Regulations 2009 (PSR)

These Regulations require all service providers (which includes energy suppliers) to make certain information available in certain ways and at certain times. There is a degree of overlap between these requirements and those in the CCRs and also SLC(G&E)25. The Regulations apply regardless of the method of selling and so are discussed later in section 3.

Practical tip

Breaches of PSR should be handled in accordance with RAST protocols.

(c) Misrepresentation

The law relating to Misrepresentation in relation to doorstep sales was discussed in section 1 of this unit. False statements of fact made during pre-contractual negotiations as an inducement to enter into a contract could equally apply to telesales activities and online marketing.

Example

A supplier representative, who has telephoned Wasim to persuade him to switch gas supplier, tells him that paying by direct debit will be cheaper as the company offers a discount for making payments in this way when in fact he knows that there is no discount for paying by direct debit.

If there is nothing about the direct debit discount mentioned in the documentation to make it a term of the contract, this is likely to be a misrepresentation.

Civil Redress under The Consumer Protection from Unfair Trading Regulations 2008 (CPR)

The CPRs were initially introduced as an enforcement tool with no civil provision for consumers. They have since been amended to allow a consumer to claim in certain circumstances subject to certain criteria being satisfied. The Regulations apply to unfair 'commercial practices' (UCPs). This covers those acting in the course of a business dealing with Cs, or whose practices affect Cs. There are 5 categories of UCP but only 2 of them give rise to civil redress provisions for C.

The 5 categories are:

- ✓ 31 banned practices
- ✓ misleading actions
- ✓ misleading omissions
- ✓ aggressive practices
- ✓ general unfair activities

Criteria for the rights to arise

Definitions [r27A]

The right to civil redress under the CPRs, arises where Ts engage in 2 of the 5 listed UCPs, if certain criteria are satisfied, and they are referred to as prohibited practices. For the remedies to be available, they must have played a significant role in C's decision to enter into a contract with that T or make a payment to them.

When a T sells a product to C, there are two main remedies. C can either unwind the sale or have a discount, in addition they may be able to claim damages as well. Some of these remedies also apply when C sells goods to T, e.g. cash for gold (not applicable to energy contracts), or when C makes a payment to T.

These may be an alternative to traditional remedy routes, for example, a sale by description under the CRA or a false representation under the Misrepresentation Act, or in addition to such routes, e.g. when T has engaged in an aggressive practice.

So for the rights to arise, it is necessary to show the following:

- ✓ the existence of a consumer contract or other relevant transaction
- ✓ the supply of a relevant product
- ✓ a prohibited practice by T
- ✓ that the prohibited practice played a significant role in C's decision to enter into the contract or make the payment

The following definitions are important for the application of the civil remedies

Prohibited practices [r27B]

The two UCPs, known as prohibited practices, which give rise to the redress provisions are misleading actions or aggressive practices (MAPs) and the main elements of the definitions are the same as they are for enforcement purposes:

Misleading actions [r5]

A misleading action is where T's activity or practice falls into one of the following 4 categories and causes or is likely to cause an average C to take a transactional decision (TD) he/she would not otherwise have taken:

- ✓ false information is given
- ✓ overall presentation is misleading in respect of any of the items listed in the Regulations (appendix E1)
- ✓ any marketing of the product creates confusion with a competitor's products, trademarks, trade names or other distinguishing marks of a competitor
- ✓ T fails to stick to firm commitments made in a code of conduct, which he/she has undertaken to comply with

The list in appendix E1, includes, for example, issues relating to:

- the way that the goods are advertised
- the sales process used
- the use of price comparisons (*Motor Depot Ltd v Kingston Upon Hull City Council*)
- the extent of T's commitments
- the main characteristics of the goods or service, etc.
- the need for a service, part, replacement or repair (*Crimea Price v Cheshire East Borough Council*)

Aggressive practices [r7]

An aggressive practice relates to the way the T behaves and whether that affects the C's freedom of choice or conduct through the use of harassment, coercion or undue influence, e.g. exploiting a position of power that T may have over C.

The CPRs list a variety of factors that should be considered here, such as:

- ✓ the timing, location, nature and persistence of the activity
- ✓ the use of threatening or abusive language or behaviour
- ✓ any exploitation of C's misfortune or circumstances
- ✓ threats to take action that would be illegal

What may be considered aggressive towards one C may not be in relation to another.

In addition, for the practice to be considered aggressive for the Regulations, it is necessary to show that it would cause or be likely to cause an average C to take a TD he/she would not otherwise have taken, e.g. putting a lot of pressure on them to buy something or make a decision that they may not otherwise have bought or made (*OFT v Ashbourne Management Services Ltd and others, R v Rodney Stone and Geoffrey Moore*).

Other categories of unfair practice

It is possible that unfair practices which would usually be considered to be misleading omissions or which appear in the list of banned practices, could also amount to misleading actions or aggressive practices. Sometimes a partial omission can have the overall effect of being a misleading action. There is also overlap between some of the banned practices [Schedule 1] and both categories of prohibited practices, e.g.

- ✓ falsely claiming accreditation by a trader approval scheme (no. 4)
- ✓ falsely claiming that a product is able to cure illnesses (no.17)
- ✓ telling C that if he does not buy the product, T will lose his/her job (no. 30)
- ✓ creating a false impression that C has won a prize when C would incur costs to claim it (no.31) (*OFT v Purely Creative*)

An unfair commercial practice which is purely a misleading omission (*R (House of Cars Ltd) v Derby Car and Van Contracts Ltd*) will not give rise to the redress provisions.

Commercial practice [r2(1)]

A 'commercial practice' covers any act, omission, type of conduct, representation or communication (including advertising and marketing) by T (*R v X Ltd*).

Transactional decisions [r2910 & r27B(2)]

In addition to proving that T has engaged in a MAP, C would also have to show that as a result of such trader activity, the average C is likely to take a TD he or she would not take otherwise. The definition of a TD, is more restrictive than it is for enforcement purposes. From a remedy perspective the only concern is whether C would have made a different decision with regards to actually making the contract or the payment. The wider definition, encompassing activities which take place at other stages in the transactional process, after a sale has occurred for example, will only be relevant from an enforcement point of view (*OFT v Purely Creative*).

Average consumer [r2(2) – (6)]

The definition of an average consumer is the same as it is for enforcement purposes (*OFT v Purely Creative Ltd*) and it encompasses three different categories, as indicated in table E1.

Definitions of average consumer in the CPRs

Average consumer	Considered to be reasonably well-informed, reasonably observant, and circumspect, i.e. cautious
Average targeted consumer	Where the commercial practice is aimed at a particular class of people
Average vulnerable consumer	Where a specific identifiable group e.g. the elderly are concerned, and T could reasonably foresee they would be vulnerable due to the commercial practice or to the underlying product

Product [r2(1), r27C & 27D]

The definition of a product for the redress provisions, differs from that used for enforcement purposes and table below shows the differences:

Differences in the definition of product for enforcement and civil redress provisions in the CPRs

Product	Enforcement provisions	Redress provisions
Goods	✓	✓
Services	✓	Financial services are not included apart from restricted-use credit (unless it is secured by a land mortgage)
Digital content	✓	✓
Immoveable property	✓	Only relevant leases are covered, which means assured tenancies and holiday lets – social housing is not an assured tenancy
Rights and obligations	✓	✓
Full or partial settlement of a consumer's liabilities or purported liabilities in exchange for a payment	✓	✓

Trader [r2(1)]

For enforcement purposes, a T is someone who is acting for purposes relating to their business, including when they do so through another person who acts on their behalf or in their name (*R on the application of Surrey Trading Standards v Scottish and Southern Energy PLC*). However, for civil redress purposes, a person is not treated as a T when they are acting in someone else's name or on behalf of someone else. So agents may not be Ts when it comes to considering who is liable to C and C may have to pursue the business or T using the agent, depending on the relationship between T and the agent.

Remedies for consumer contracts (B2C)

Where T sells products to average Cs and engages in MAPs, remedies are available, providing the unfair practice is a significant factor, but not necessarily the only or even the main factor, in C's decision to enter into the contract. C could either unwind the contract or have a discount, and even claim compensation in some circumstances, all subject to being able to satisfy certain criteria.

Unwinding a consumer contract [r27E]

A consumer can unwind, or undo, a B2C contract if they:

- ✓ do so within 90 days, AND
- ✓ have not fully consumed whatever they bought, AND
- ✓ they have not already asked for and had the discount option

There is no need to show any loss or that T acted dishonestly or negligently.

The period for unwinding must be within 90 days beginning with the later of whichever is the latest from the list below:

- the contract being signed
- the goods being delivered
- the performance of the service starting
- the digital content being first supplied
- the residential lease beginning

The practicalities of unwinding

C must clearly indicate that they are rejecting what they have bought by saying or doing something to demonstrate this, e.g., by writing to T and saying that they want their money back because they were misled or bullied into buying the item [r27E(2)].

The contract will end, when C unwinds it and they should then receive a full refund, even though they may have used the goods or service for a while. If they have been supplied with any goods they must let T collect them [r27F].

An energy contract is likely to be seen as a continuous supply contract

Unwinding continuous supply contracts [r27F(7)-(10)]

If the contract is for the continuous or regular supply of a product, e.g., electricity or broadband services, and C has had more than one month's use, then they will have to pay the market price for what has been used. This will be deducted from the refund.

However, if T's behaviour is particularly bad and its impact on C severe, then C will still be entitled to a full refund.

Discounts for consumer contracts [r27I]

C will be able to have a discount instead of unwinding a B2C contract, if:

- the product cannot be rejected, for example, a service contract which has been fully performed, goods which have been completely consumed or digital content which has been fully downloaded, OR
- the 90 day period has passed, OR
- C does not want to unwind the contract, e.g., because they want to keep the goods or carry on with the service contract

There is no need to show any loss or that T acted dishonestly or negligently. If this option is chosen, or applies instead of unwinding the contract, the contract will continue but the discount can apply to what has already been paid and also any future payments.

Calculating the discount for contracts of £5,000 and under [r27I(4)&(5)]

If C paid £5,000 or less, the percentage discount depends on the seriousness of T's activity. There are four categories, shown in table E3 with examples, and the following factors are relevant:

- the behaviour of T
- the impact of T's activity on C
- the amount of time since the activity took place

Table E3: Discount calculations for contracts of £5,000 and under

Category	Discount	Example
More than minor	25%	T misleads about the delivery date for a product
Significant	50%	A business misleads about the health benefits of a product
Serious	75%	A salesman visits C's home and greatly exaggerates how effective double glazing would be in reducing their energy bills and refuses to leave until they sign an order form
Very serious	100%	A salesman visits C's home and bullies them, as a vulnerable consumer, into signing a contract for work they do not want and misrepresents that it was required by local council regulations

The % should not be discussed specifically with the consumer. Rather they should be advised to follow the supplier's complaints process etc. and that the discount they receive can depend on the circumstances, e.g. if the contract was formed in their home or over the phone, and how the trader's behaviour affected them.

Damages [r27J]

As well as unwinding the sale or having a discount, C might be able to claim damages from T too. This could be for any of the following, if they can show that they have suffered:

- ✓ financial loss, which was reasonably foreseeable
- ✓ alarm or distress

- ✓ physical discomfort or inconvenience

and that this would not have occurred without the MAP taking place.

However, if T can satisfy the due diligence defence, they will not have to pay any damages. They will still have to unwind the sale or give a discount though.

The due diligence defence [r27J(5)]

T will not have to pay any damages if he/she can show that they took all reasonable steps and exercised all due diligence to avoid the occurrence of the MAP, and that it occurred because of one of the five reasons listed below:

- T made a mistake
- T relied on information supplied by someone else (another person)
- it was someone else's fault
- it was an accident
- it was due to some other cause beyond T's control

This defence may be particularly relevant where T has used independent agents, e.g., to do their marketing activities, and the agents have not done as T instructed. This is because as explained above, a T for the civil redress provisions, does not include someone who is acting on someone else's behalf or in their name. So if C complains about aggressive selling practices by a company and independent selling agents were used, it is still the company that C needs to pursue for a remedy. However, the company may be able to satisfy the defence provisions and avoid paying damages, in which case they will only be liable for the unwinding or discounting of the contract.

For enforcement purposes, the agents may be committing a criminal offence or be subject to civil enforcement under the Regulations, even though they may not be responsible for any redress to C.

Remedies in other circumstances

As well as the more traditional consumer contract scenario, some of the remedies may also be available in other circumstances, for example, C makes a payment, even though there may not be a contract in place.

Remedies for consumer payments

Where Cs hand over money to Ts or businesses, following demands that offer to settle their liabilities or purported liabilities in exchange for a payment, this is a specific type of product [r2(1A)&(1B)] and if T acts unfairly by engaging in a MAP, a remedy may be available for C.

This will cover demanding payments in various contexts, such as, wheel-clamping, alleged copyright infringement, so-called "civil recovery" claims, energy bills, and unsolicited products. If such demands are made aggressively or C is misled by them, damages may be claimable for distress, alarm etc., as described above [r27J].

If the money was not actually owed, C may be able to unwind the payment as well [r27H]. Such activities will also be subject to enforcement under the Regulations and should be referred to TSS. Again, as well as demonstrating that a MAP has occurred, C would also have to show that, the unfair practice was a significant factor, but not necessarily the only or even the main factor, in C's decision to make the payment.

Summary of the remedies available under the CPRs

Type of contract or payment	Example	Right to unwind?	Right to a discount?	Right to seek damages?
Consumer contract (B2C) for a PRODUCT	C buys goods, services or digital content from T and is misled about a main characteristic	Yes	Yes	Yes
Consumer to business contract (C2B) for GOODS	C sells a gold necklace to T for cash and T undervalues its worth	Yes	No	Yes
Consumer payment which WAS NOT OWED	Following misleading threats of legal action, C makes a payment to T, which was not actually owed because the goods it related to were unsolicited	Yes	No	Yes
Consumer payment which WAS OWED	Following aggressive conduct by a debt collector, to whom their debt has been assigned, C makes a payment	No	No	Yes

Appendix E1

Misleading actions under the CPRs [r5]

A trader's commercial practice can be a misleading action if it is false or its overall presentation deceives an average consumer about any of the matters listed in box 1:

Box 1 – listed matters for a misleading action [r5(4)(a)-(k)]

- 1) the existence or nature of the product
- 2) the main characteristics of the product (see box 2)
- 3) the extent of the trader's commitments
- 4) the motives for the commercial practice
- 5) the nature of the sales process
- 6) any statement or symbol relating to direct or indirect sponsorship or approval of the trader or the product
- 7) the price or the manner in which the price is calculated
- 8) the existence of a specific price advantage
- 9) the need for a service, part, replacement or repair
- 10) the nature, attributes and rights of the trader (see box 3)
- 11) the consumer's rights or the risks he may face

Box 2 – the main characteristics of a product, include its [r5(5)(a)-(r)]:

- (a) availability
- (b) benefits
- (c) risks
- (d) execution
- (e) composition
- (f) accessories
- (g) after-sale customer assistance
- (h) handling of complaints
- (i) method and date of manufacture
- (j) method and date of provision
- (k) delivery
- (l) fitness for purpose
- (m) usage
- (n) quantity
- (o) specification
- (p) geographical or commercial origin
- (q) results to be expected from use
- (r) results and material features of tests or checks carried out

Box 3 – the nature, attributes and rights, include the trader's [r5(6)(a)-(h)]:

- (i) identity
- (ii) assets
- (iii) qualifications
- (iv) status
- (v) approval
- (vi) affiliations or connections
- (vii) ownership of industrial, commercial or intellectual property rights
- (viii) awards and distinctions

Summary

- Persuading potential consumers to enter into energy supply contracts by cold calling them on the telephone (telesales) or advertising on the internet, without any face to face contact between the parties, is classed as a distance contract.
- The main controls which exist in relation to the marketing of such contracts to consumers are contained in SLC(G&E)25, the CCRs, the CPRs and the law of misrepresentation, although the ECRs and PSRs will also apply.
- There are many price comparison websites around but since they are not actually selling anything there is no requirement for them to comply with the CCRs and so they will be discussed later under general advertising.
- The overall objective of SLC(G&E)25 requires information provided to be complete, accurate, easily understood, not about inappropriate products, not misleading, fair in terms of content and presentation and given prominence where appropriate.
- In addition SLC(G&E)25 also lays down provisions relating to the training and behaviour of sales staff, the provision of estimates and price comparisons in certain circumstances, timing of calls and checking that consumers understand if they have entered into a contract, that they have done so; suppliers are required to provide compensation as a remedy for failures to comply with SLC(G&E) 25 where appropriate.
- Contracts which are for goods or services, made exclusively by distance communication concluded under an organised distance sales scheme will be distance contracts covered by the CCRs and suppliers will have to provide PCI, contract confirmation and cancellation rights.
- PCI should be provided clearly, comprehensibly and in an appropriate way prior to the conclusion of the contract: for telesales, the identity of the supplier and the commercial purpose of the call must be made clear at the beginning of the conversation with the consumer.
- The PCI should include matters such as: the seller's identity, their geographic address, a description of the main characteristics of the service, an inclusive price, arrangements for payment and performance, the existence of the right to cancel, and in the case of an ongoing (rolling) contract, its minimum duration.
- Consumers will generally get a 14 day cancellation, or cooling off period, for an energy contracts concluded over the telephone or online and if they wish to cancel they must do so by using the cancellation form provided by the supplier or by making any other clear statement setting out the decision to cancel.

- Supplies requested and provided during the cancellation period must be paid for providing the consumer was informed of this during the PCI along with the conditions, time limits and procedures for cancelling
- The civil redress provisions in the CPRs cover traders engaging in unfair commercial practices which are **aggressive or misleading actions** (MAPs).
- If the MAP is a **significant factor** in C's decision to enter into a **contract with T or pay money** to them, and it would be **likely to cause an average consumer to do this**, then C can seek redress.
- The forms of redress available are: a **right to unwind or have a discount and also damages** for certain categories of loss or suffering but what is appropriate in each case will depend to some extent on the type of transaction.
- In **B2C contracts**, the right to **unwind** is for **90 days** and a full refund, if there has been no full consumption or performance; however, C may have to pay for what has been used if it is a continuous supply contract, depending on T's behaviour and its impact on C.
- **Alternatively**, in a B2C contract situation, C may have a percentage **discount depending on the seriousness** of the MAP, assessed by reference to T's behaviour, its impact on C and the time since it occurred if the contract price was £5,000 or below; if it was over £5,000, the discount will be the difference between the market price and the actual price, providing there is clear evidence of this.
- **Damages** for reasonably foreseeable **financial loss and/or alarm, distress, physical discomfort or inconvenience** may also be awarded in a B2C contract, unless T can satisfy the three limbed **due diligence defence**.

Section 3

Other forms of marketing

Besides doorstep and distance selling, the other main method of marketing is likely to be advertising in its various forms, such as that found in magazines, newspapers, billboards and on the TV and radio. The general controls which we have already discussed are likely to apply to these, for example, CPR and the law of misrepresentation. The Advertising Standards Authority (ASA) also plays a regulatory role in relation to advertising generally and so will be mentioned here briefly.

We will also consider the price comparison websites, since these can be misleading for potential customers, but are widely used by people thinking of switching suppliers and looking for cheaper prices.

The Advertising Standards Authority

The ASA is an independent regulator for advertising across all types of media, including TV, internet, sales promotions and direct marketing. Its role is to ensure that advertisements are legal, decent, honest and truthful by applying the advertising codes. The codes and ASA adjudications can be found on their website at www.asa.org.uk. Many of the complaints about advertising in the energy sector come, not from consumers, but competitors.

It might be appropriate to signpost incidents of advertising to the ASA if they do not appear to breach the SLC enforced by Ofgem or the legislation enforced by TSS but which are nevertheless the subject of a complaint, for example, a magazine advert using imagery which causes offence. The ASA also deals with misleading advertising.

Legal controls

The general controls which could apply to any form of advertising or marketing are: CPR, the law on Misrepresentation and SLC(G&E)25, all of which have been covered in some detail in the previous two sections in relation to off-premises and distance selling. If advertising is felt to be misleading, the call should be handled in accordance with RAST protocols. The law on misrepresentation, however, can generally only apply if there is a subsequent contract or a special relationship between the parties.

If there is a failure to comply with SLC(G&E) 0 and 25 this will be picked up by Ofgem in their monitoring of data collected.

Example

Samantha has received a flyer through the post offering a free energy efficiency check. When Samantha contacted the trader, she was informed that she would have to pay £15 for the check but that this would be reimbursed if she then purchased any other products or services from the company.

Advice

If you feel that a trader is involved in an unfair practice ensure that you make a comprehensive record of the details in the case notes and handle the case in accordance with RAST protocols. The consumer could also make the trader aware that their action potentially breaches CPR and this may assist them in resolving their dispute with them.

Price comparison websites

There are many price comparison websites around and clearly the aim of this type of service provision is to give details about the prices charged by different suppliers to allow consumers to make decisions about switching. As a form of advertising this could be considered to be a marketing activity if carried out by the suppliers themselves and if they allow people to enter contracts at the same time they will need to comply with the CCRs (see section 2).

However, there are some service providers who are independent of the suppliers and because they are not selling goods or services, merely providing a service, they do not have to comply with the information requirements in the CCRs. There are however, information requirements in two other pieces of legislation, which they may have to comply with, although several of the requirements do overlap. They have both been mentioned earlier in section 2.

- ✓ Electronic Commerce (EC Directive) Regulations 2002 (ECR)
- ✓ Provision of Services Regulations 2009 (POS)

For the consumer market there is, in addition, the protection of a voluntary code called the Confidence Code. Whether a service provider subscribes to the code or not, the information they display on their website will be subject to CPR and should therefore not contain anything misleading or omit anything material.

The Confidence Code

Comparing and switching energy tariff or provider can be a confusing process. Using a price comparison site, particularly one signed up to the Confidence Code, can help Cs to find a better deal and ensure they're not paying more for their energy than they need to.



The Confidence Code is a Code of Practice, managed by Ofgem, that governs independent energy price comparison sites. The Ofgem website can be checked for the most current version of the code as well as accredited PCWs.

Members are required to follow key principles for how they must operate their service. So using a site with the Confidence Code certification mark means that the process of switching energy supplier should be easier and more reliable for clients.

The sites covered by the Confidence Code act independently of suppliers, which means that the options and prices presented to clients should have been calculated and displayed in a fair and unbiased way, although the sites are allowed to accept commission payments from suppliers. PCWs can help clients find the best deal in their local area and provide a free and easy-to-use switching service. They also give detailed information on available tariffs, including gas and electricity unit prices and any discounts that are available.

It is important to note that each site may only allow C to actually switch to a limited number of different suppliers, namely those they have commission deals with. Some tariffs will therefore be exclusive to specific PCWs.

The Citizens Advice public website has two comparison tools. The price comparison tool is powered by Energylinx, but they both only provide information and do not enable clients to actually switch. The tools make comparisons across all suppliers, in relation to:

- customer service
- tariff prices (including an overall customer service rating taken from the tool above)
<https://energycompare.citizensadvice.org.uk/>

How does it work?

The client chooses the site they want to do the comparison with, and then inputs information about their current tariff and usage as well as address details. The site then uses this information to compare their present tariff with others available to them in the market. Estimated current spend can be used if C is unable to provide certain information:

- this can be done by asking questions about property size, number of bedrooms etc.
- it should be made clear that the information is estimated
- the importance of entering accurate information to get the best comparison should be emphasised
- C should be encouraged to input annual consumption figures to do this

Consequently, an estimated cost can also be provided and must be:

- referred to as a personal projection
- provided before a switch is completed through the PCW

From the 1st September 2017, accredited PCWs do not have to display all tariffs as a default results page, but there are rules about what detail has to be displayed at certain stages in the process and how this has to be shown to Cs.

If C cannot automatically switch to their chosen S through the PCW, an alternative S must not be recommended.

There are 2 results pages main different views that C may encounter when using a PCW, either a wide results page or a partial results view depending on the stage in the process and what information has been inputted or selected:

View	Explanation	Comment
Wide results	<p>All tariffs required by the code</p> <p>In effect as much as the market as is possible bearing in mind the permitted exceptions</p>	<ul style="list-style-type: none"> all available tariffs for all payment types for gas, electricity and dual fuel should be included this covers all suppliers, including agents, affiliates and brands they should take into account any opt-in filters selected by C, e.g. a fixed tariff price comparisons must be included for single rate and Economy 7 meters, other meters are optional the following prices do not have to be shown: <ul style="list-style-type: none"> social tariffs tariffs that the supplier has asked to be removed tariffs available only in a specified region (if C is not in that region) exclusive deals between a supplier and another PCW
Partial view	Only those tariffs C can switch to using the PCW	This can be a default option or by allowing C to select a filter option, before displaying a results page
Results page	<p>At least 10 of the cheapest tariffs in C's region VAT inclusive</p> <p>Free from any opt-in filters selected</p> <p>On a single page</p>	<ul style="list-style-type: none"> there must be no implication that results contain every possible tariff from all suppliers, unless this is the case, e.g. by using wording such as "whole of market" or "all tariffs" filters can be provided so C can search using different criteria, e.g. customer service rating they must be opt in only messaging must be prominent, clear and intelligible C must be able to see a list of results without any of the opt-in filters selected the results page must provide: <ul style="list-style-type: none"> quick and easy access to the wide results without C having to re-enter their details or go back to a previous page or link a clear and intelligible statement prominently explaining that a partial view is being seen and that wide results can be accessed

		<ul style="list-style-type: none"> ○ a prominent, clear, intelligible and non-misleading statement summarising the extent of the market coverage provided by the partial view, reflecting the service offered
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Handling contacts about the Confidence Code

Nature of contact	Advice to be provided
Request for details of price comparison site	<p>Signpost to the Citizens Advice price comparison site and explain that it:</p> <ul style="list-style-type: none"> ● aims to provide tariff information across all suppliers ● contains overall customer service ratings for suppliers ● does not allow clients to actually switch supplier ● can be used by an LCA adviser as part of an EBD session or an EBDx consultation, if their LCA participates in the EBD scheme ● is complemented by a customer service comparator <p>Explain the Confidence Code and signpost client to Ofgem's website.</p> <ul style="list-style-type: none"> ● see above if C wants information about the different views ● or details about what has to be inputted to get results <p>Point out the CMA tips for using comparison sites and apps:</p> <ul style="list-style-type: none"> ● comparison sites can save time and money ● people should choose carefully between comparison sites, like they would for any retailer ● not all sites are the same, so more than one should be tried if possible ● how the site has ordered its results should be checked <p>Telephone numbers for Code members should only be provided to clients who do not have internet access</p> <ul style="list-style-type: none"> ● details of 3 sites should be given ● the same 3 should not be used all the time ● a list of current accredited PCWs and relevant telephone numbers is available on the knowledge base
Complaint about the service provided by accredited site	<ol style="list-style-type: none"> 1. Follow the accredited site's complaints procedure. 2. If complaint is not resolved to client's satisfaction, client should contact Ofgem to follow up the issue with the site concerned. consumeraffairs@ofgem.gov.uk 020 7901 7295
Misleading information contained within the price comparison site	Provide appropriate advice and send a CPR referral to Trading Standards. Also best practice to signpost to the Advertising Standards Authority

Non-compliance with the Code	Send a CPR referral to Trading Standards Signpost the client to the Code manager: confidencecode@ofgem.gov.uk
Complaint about the Code itself, e.g. the consumer thinks the Code should be mandatory, or every site should allow clients to switch to any supplier or tariff	Signpost the client to the Code manager: confidencecode@ofgem.gov.uk
Enquiries about joining the Code	Signpost the client to the Code manager: confidencecode@ofgem.gov.uk

Additional Confidence Code requirements

The code is divided into the following 9 sections and the main requirements have been outlined above in the explanation about the different views that a C can see when using a site. Other requirements are summarised briefly in the table below:

1. Independence and impartiality
2. Tariffs and price comparisons
3. Control and management
4. Payment methods
5. Results and filters
6. Quality of service and signposting to information
7. Accuracy and updating tariffs
8. Audits and monitoring
9. Complaint handling

Code provision	Further detail/comment
Results must be presented strictly by cheapest price first	<ul style="list-style-type: none"> when C chooses to search by price, or when C does not choose an order for the results
Filters to allow C to search based on non-price criteria are permitted	<ul style="list-style-type: none"> the potential impact on the results must be clearly explained, i.e. effect and limitations filters for green or environmental tariffs must have their methodology explained green results should be displayed by order of fuel mix, then price
C must be alerted to the possibility of losing the Warm Home Discount (WHD) by switching	<ul style="list-style-type: none"> the WHD benefit is just one example this applies to any government energy support scheme the messaging may include signposting to relevant websites
Prices and comparisons must be accurate and state when they were last updated	<ul style="list-style-type: none"> the date the PC service and database were updated must also be stated
Links or messages must be on the results page explaining how estimated costs of tariffs are calculated and also how a savings figure is calculated if one is displayed	<ul style="list-style-type: none"> all links/messaging must be prominent, clear and intelligible additional information is required for the compulsory estimated costs of tariffs (minimum requirements): <ul style="list-style-type: none"> if a FT tariff will end before 12 months, it has been assumed that C has done nothing and rolled over onto their current S's relevant cheapest evergreen tariff details of any alternative methodology offered C may incur a termination fee by switching additional information is required for the optional savings figure (minimum requirements): <ul style="list-style-type: none"> the 2 figures used to calculate savings any assumptions behind the 2 figures the savings figure is an estimate only the savings figure may change if C's situation changes
Information and data must not be presented in such a way as to confuse or mislead C	<ul style="list-style-type: none"> as well as breaching the Confidence Code there could be a potential CPR breach

Advice must be impartial	<ul style="list-style-type: none"> ● it must not be biased in favour of or against any particular supplier
PCWs must be independent of all suppliers	<ul style="list-style-type: none"> ● commission from suppliers is allowed ● it must not influence how information/data are provided ● any supplier with whom there is a commission arrangement must be clearly identified ● a single list of all such suppliers is acceptable ● the list must be prominently displayed or be accessible from a prominent and clearly labelled link <ul style="list-style-type: none"> ○ at least once during the consumer journey ○ and on the partial view results page ● alongside the list there must be: <ul style="list-style-type: none"> ○ a brief description of the PCW's business model (minimum: whether commission-based) ○ a statement explaining how any commission influences the displayed tariffs ○ including if there is a choice to only view tariffs that can be switched to through the site ● all messaging must be prominent, clear and intelligible ● a PCW will be considered to be independent when it is not an affiliate or related undertaking of any supplier or of a company that is an affiliate of any supplier
No supplier advertisements on the home/main page	<ul style="list-style-type: none"> ● this includes agents, affiliates or operating brands
PCWs may give suppliers performance ratings and allows C to consider service quality issues	<ul style="list-style-type: none"> ● any methodology must be sent to Ofgem for review or the ratings adopted by other recognised consumer organisations should be used, e.g. Citizens Advice ● any methodology used must adhere to the principles in the Code
New tariff information must be added as soon as possible	<ul style="list-style-type: none"> ● this should be no later than 2 WD after whichever is the later of the following dates: <ul style="list-style-type: none"> ○ details and confirmation of the effective date is provided by the supplier or Ofgem ○ the tariff being made available to consumers ● new tariffs should not be included on PCWs more than 6 weeks before they are available to C
The PCW must provide a copy of the Tariff Information Label (TIL)	<ul style="list-style-type: none"> ● the details of C's current tariff, based on what C has entered, must also be displayed as a TIL ● this TIL must be accessible either within or from the

	<p>main results page</p> <ul style="list-style-type: none"> ● if C's tariff is historic then the PCW should try to include historic tariffs for comparison
There must be an effective consumer complaint and enquiry handling procedure	<ul style="list-style-type: none"> ● the response time must be within 7 WD of receipt ● a contact name and number must be provided to Ofgem for complaint referrals it receives about the PCW ● such referrals must be acknowledged within 2 WD ● PCWs should try to resolve such complaints within 7 WD ● Ofgem should be copied into any response to C
Ofgem must be notified if a supplier asks a PCW to remove a tariff from its site	<ul style="list-style-type: none"> ● if the PCW thinks the tariff is still available to consumers
The length of the comparison period must default to 12 months	<ul style="list-style-type: none"> ● this should be from the date of the comparison ● filters can be used for other comparison periods
An explanation of certain payment methods must be provided	<ul style="list-style-type: none"> ● this applies to: <ul style="list-style-type: none"> ○ standard credit by cash or cheque ○ monthly and quarterly Direct Debits ○ PPM
Signposting to independent sources of energy efficiency advice must be provided	<ul style="list-style-type: none"> ● on the homepage or during the consumer journey ● the minimum requirement is clear signposting to all of the following: ● the signposting should be prominent, clear and intelligible: <ul style="list-style-type: none"> ○ Energy Saving Trust ○ Government energy grants calculator ○ Citizens Advice (provided by LCAs) ● this includes ensuring that C is aware of what information is available within these sources
Tariff information should be updated	<ul style="list-style-type: none"> ● this includes adding tariffs for a new supplier ● any errors/issues highlighted by Ofgem should be corrected ● new tariff information should be added in a manner that complies with the Code ● Ofgem can review any new form of tariff ● Ofgem can issue formal directions as to how a tariff should be treated in relation to compliance with the Code
Audit and monitoring requirements must be adhered to	<ul style="list-style-type: none"> ● there are independent internal and external (Ofgem) requirements to be complied with

<p>PCWs must manage and control their own comparison service</p>	<ul style="list-style-type: none"> • this includes using their own tariff database and calculator • these may be made available to third parties in controlled circumstances, e.g. Energylinx powers the Citizens Advice comparison tool
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Summary

- The ASA is an independent regulator for advertising across all types of media, including TV, internet, sales promotions and direct marketing, and its role is to ensure that advertisements are legal, decent, honest and truthful by applying the advertising codes; the ASA also deals with misleading advertisements;
- The general controls which could apply to any form of advertising or marketing are CPR, the law on misrepresentation and SLC(G&E)25, all of which have been covered in some detail in the previous two sections in relation to off-premises and distance selling;
- Contracts which do not meet the criteria for off-premises or distance contracts under the CCRs, will be classed as on-premises contracts and consumer should be given a reduced list of PCI but will not be entitled to contract confirmation or a right to cancel the contract
- There are many price comparison websites around which give details about the prices charged by different suppliers to allow consumers to make decisions about switching and such sites are subject to control by CPR.
- There is an Ofgem Confidence Code to allow accreditation of internet price comparison sites for consumers which requires independence, declaration of any suppliers payments, DD and PPM explanations, a signpost to energy efficiency information, inclusion of all payment types and tariffs, at least ten prices which should be accurate and displayed on one page and state when they were last updated.
- As service providers, rather than sellers, price comparison websites would not have to comply with the CCRs but they would have to comply with the information requirements in ECR and POS.

Section 4

Mis-selling

As discussed already competition is high amongst energy suppliers and there are many different types of complaints that can arise from marketing activities, some of which can be classed as scams, others which relate to the behaviour of the sales person and some which are simply misleading or unfair.

Scams

Marketing scams which are used by suppliers, their representatives and also independent brokers to try and persuade customers to switch supplier, may include the following. The use of independent brokers is more prevalent in the business market and is discussed in more detail in Unit 11 'Business Advice'.

(a) Forging a consumer's signature

It has been known for sales staff to actually forge the consumer's signature on a contract themselves, particularly during off-premises selling situations. This would be dealt with as an erroneous transfer. This could also amount to a misrepresentation and or a breach of the CPR, which should be handled in accordance with RAST protocols.

(b) Giving false factual information

For example, a sales representative may state

'...your supplier has gone bust and 'X' is taking on all contracts in the area
and if you don't sign then you will be without a supply...'

Or may give false details about the characteristics of a product or service

Or may offer tariffs which are unavailable

These could amount to misrepresentations, if a contract is subsequently entered into, and may also breach SLC(G&E)25 and CPR. However, there are difficulties with evidence and proof when statements are verbal.

(c) Getting someone to sign on the basis that they were not actually signing a contract

For example, the sales person or broker may say 'Just sign here to show one of the following':

-receive more information
-prove that I have visited you today...
- ...show that you agree to us phoning you
-to say that I am here to read the meter so I can get my commission
- ...enter a free prize draw for a holiday / car /etc

If the consumer is switched to a new supplier and they did not realise that this is what was happening then this may be an erroneous transfer and there are set procedures for this to be dealt with (see unit 4 'Energy supply contracts').

Again, there could be breaches of CPR here and also misrepresentations with the same problems to be encountered with verbal statements.

1.2.1 Behaviour

Sometimes consumers believe that they have been subjected to inappropriate behaviour from a sales representative or independent broker which could include the following:

- ✓ rude, aggressive, harassing or intimidating behaviour
- ✓ being asked to agree to a contract when they were not the account holder
- ✓ being contacted at unsociable hours, for example, after 8pm
- ✓ refusing to leave the house until a consumer signs
- ✓ putting pressure on consumers to sign, for example, 'this deal is only available today. You'll lose out if you don't sign now'
- ✓ not checking that the person entering the contract is authorised to do so, for example, because they are a tenant, employee, partner, parent, child, person under 18 and the fuel account is not in their name
- ✓ using tricks to gain entry into the property for example, by stating something along the lines of the following



' I'm from CA / OFT / Ofgem / Transco / the government and I want to tell you about special energy deals or discounts you are entitled to.'

"I know my I.D. card says I'm from a supplier with a different name to yours but we're all part of the same company now.'

'I'm from your existing supplier and I'm here to tell you about discounts you are entitled to or to give you a cheaper PPM key, token or card'

Such behaviour is not acceptable under SLC(G&E)25 or the CPRs and should be referred to TSS for investigation if there is a possible breach of the CPRs in accordance with RAST protocols. Some of these statements referred to as tricks to gain entry, may not even be made by actual energy suppliers. It is possible that some of these are used by rogue traders posing as energy suppliers to gain entry and commit burglary or other crimes (see section 1 on doorstep crime).

Misleading information

Sometimes when misleading information is given it is done deliberately as a ploy to get someone to enter into a contract, usually by signing something, as above. However, there is also the possibility that care has been taken to try and ensure that all details given are correct and placed in appropriate literature given to the consumer. Such literature could still be misleading, if for example too much prominence was given to certain details and not enough to others. Such instances are unlikely to constitute a misrepresentation but could still breach the CPRs.

Remember that the CPRs are very general regulations which aim to outlaw commercial practices which are unfair to consumers. If the activity complained about appears to be unfair it is likely to be something which TSS can investigate and therefore should be handled in accordance with RAST protocol.

In addition, if the contractual arrangements are unclear because of the presence or use of a third party, then the matter may also need to be referred to clarify which laws apply to who and in order to advise the consumer who they can pursue and on what basis.



'Whistleblowing' Calls

If you receive a call from a current or ex employee who has concerns about the trading practices of a supplier they can use OFGEM's dedicated whistleblowing procedures.

These are detailed on OFGEM's website:

<https://www.ofgem.gov.uk/about-us/transparency/whistleblowing>

Whistleblowing information or disclosures may be emailed to: whistle@ofgem.gov.uk, or alternatively write to:

Whistleblowing Desk

Consumer Affairs

9 Millbank

London

SW1P 3GE

People can also telephone OFGEM's whistleblowing hotline: 020 7901 71

Summary

- Marketing by energy companies is a very prolific activity and there are various scams which occur to try and persuade consumers to change their gas and electricity suppliers to another company.
- Sometimes consumers are subjected to inappropriate conduct from a sales representative which could include rude, aggressive, harassing or intimidating behaviour, calling at anti-social times, not checking that someone is authorised to enter into an energy supply contract, lying about the reason for being there, refusing to leave without a signature or putting pressure on consumers to sign.
- Some of these activities could amount to misrepresentations, if a contract is subsequently entered into, and or breaches of the CPRs, which should be handled according to office protocols.
- Breaches of the SLCs will be picked up by Ofgem when they undertake monitoring activities based on the data collected by CA energy advisors.
- Some of these activities may be carried out by independent brokers who will be covered by some provisions but not others and potentially confusing contractual arrangements may need to be dealt with in accordance with RAST protocols.
- Whistleblowers who have concerns about a supplier's practices can be signposted to Ofgem.

Pre-contract information (CCRs 2013)

	Information	Qualification	On-P Contracts	Off-P Contracts	Distance Contracts
1	Main characteristics of the goods or services	To the extent appropriate to the medium of communication and the product	Yes	Yes	Yes
2	Trader's identity, geographical address & telephone number	Such as a trading name Telephone number only required if available for off-premises and distance contracts	Yes	Yes a telephone number is only required if available	Yes A telephone number is only required if available
3	Trader's fax number and email address	If available, so the consumer can contact the trader quickly and communicate efficiently	No	Yes	Yes
4	Other trader's geographical address and identity	Where the trader is acting on behalf of another trader	No	Yes	Yes
5	Trader's geographical address for complaints if different	Also if the trader is acting on behalf of another trader	No	Yes	Yes
6	Total price [including taxes, for example, VAT]	If the nature of the product is such that the price cannot reasonably be calculated in advance, the manner in which it will be calculated	Yes	Yes	Yes
7	Any additional delivery charges	The fact that additional charges may be payable if they cannot reasonably be calculated in advance	Yes	Yes AND for any other costs	Yes AND for any other costs
8	Total costs per billing period or total monthly costs if fixed rate	For contracts of indeterminate duration or containing a subscription	No	Yes	Yes
9	Cost of using the means of distance communication for contract conclusion	If the cost is calculated at other than the basic rate	No	Yes	Yes
10	Any arrangements for payment, delivery, performance and time by which the trader	Where applicable	Yes	Yes	Yes

	undertakes to deliver/perform				
11	Trader's complaint handling policy	Where applicable	Yes	Yes	Yes
12	A reminder that the trader is under a legal duty to supply goods in conformity with the contract	In the case of sales contracts (goods, with or without services)	Yes	Yes	Yes
13	Existence and conditions of any after-sales services or commercial guarantees	Where applicable	Yes	Yes Also applies to after-sale customer assistance	Yes Also applies to after-sale customer assistance
	Information	Qualification	On-P Contracts	Off-P Contracts	Distance Contracts
14	Existence of relevant codes of conduct and how to obtain copies	Codes which the trader has undertaken to comply with	No	Yes	Yes
15	Contract duration if fixed, or if not fixed or extension is automatic, conditions for termination	Where applicable	Yes	Yes	Yes
16	Minimum duration of the consumer's obligations	Where applicable	No	Yes	Yes
17	Existence and conditions of deposits	Where applicable Includes other financial guarantees to be paid or provided by the consumer at the request of the trader	No	Yes	Yes
18	The functionality of digital content – this will include information about its language, duration, file type, access, updates, tracking, internet connection, geographical restrictions and any additional purchases required	Where applicable, including applicable technical protection measures	Yes	Yes	Yes

19	Any relevant compatibility of digital content with hardware and software	Where applicable and only if the trader is aware of it, or can reasonably be expected to have been aware it	Yes	Yes	Yes
20	Possibility of having recourse to an out-of-court complaint and redress mechanism, for instance, ADR procedures	Where applicable if the trader is subject to one Also the methods for having access to it	No	Yes	Yes
21	Conditions, time limit and procedures to exercise any right to cancel	If there is a right to cancel	No	Yes	Yes
22	That the consumer will have to bear the cost of returning goods after cancellation	Where applicable	No	Yes	Yes AND If the goods, by their nature cannot normally be returned by post, the cost of returning them
	Information	Qualification	On-P Contracts	Off-P Contracts	Distance Contracts
23	That the consumer will have to pay the trader reasonable costs	If the consumer cancels a service contract after an express request for the trader to begin supplying the service before the end of the cancellation period	No	Yes The express request must be on a durable medium	Yes
24	That the consumer does NOT have a right to cancel	Where a right to cancel is not provided for as per items 17- 25 in Appendix A	No	Yes	Yes
25	That the consumer may LOSE the right to cancel	The circumstances in which the right will be lost must also be provided (items 26-30 in Appendix A)			

Notes:

1. For distance contracts, items 1, 2, 6, 7, 8, 15 and 21 must be provided by the distance contract means, however, if there is limited space or time to display all the information, the rest can be provided using a different, but appropriate, method.
2. A failure to provide items 21, 22 and 23 in respect of an off-premises contract, is a criminal offence. The model cancellation instructions can be used.
3. In off-premises and distance contracts, if items 7, 8 and 22 are not given, the consumer will not have to pay these charges.
4. If there is a right to cancel the contract, the consumer should also be supplied with a prescribed cancellation form at the pre-contract stage.
5. Any changes to the items in PCI must be agreed by the trader and the consumer to be effective.
6. A consumer will bear no cost for the supply of a service in the cancellation period, whether in full or in part, if the trader did not provide details of items 21 and 23 in the pre-contract information.
7. A consumer will not have to pay for the diminished value of any cancelled goods if the trader did not provide details of item 21 in the pre-contract information.

Model Cancellation Instructions (CCRs 2013)

Model instructions for cancellation

Right to cancel

You have the right to cancel this contract within 14 days without giving any reason.

The cancellation period will expire after 14 days from the day [See Note 1].

To exercise the right to cancel, you must inform us [See Note 2] of your decision to cancel this contract by a clear statement (e.g. a letter sent by post, fax or e-mail). You may use the attached model cancellation form, but it is not obligatory. [See Note 3]

To meet the cancellation deadline, it is sufficient for you to send your communication concerning your exercise of the right to cancel before the cancellation period has expired.

Effects of cancellation

If you cancel this contract, we will reimburse to you all payments received from you, including the costs of delivery (except for the supplementary costs arising if you chose a type of delivery other than the least expensive type of standard delivery offered by us).

We may make a deduction for the reimbursement for loss in value of any goods supplied, if the loss is the result of unnecessary handling by you.

We will make the reimbursement without undue delay, and not later than -

- (a) 14 days after the day we receive back from you any goods supplied, or
- (b) (if earlier) 14 days after the day you provide evidence that you have returned the goods, or
- (c) if there were no goods supplied, 14 days after the day on which we are informed about your decision to cancel this contract.

We will make the reimbursement using the same means of payment as you used for the initial transaction, unless you have expressly agreed otherwise; in any event, you will not incur any fees as a result of the reimbursement. [See Note 4].

[See Note 5]

[See Note 6]

Notes on instructions for completion:

1. Insert one of the following texts between inverted commas:
 - (a) in the case of a service contract or a contract for the supply of digital content which is not supplied on a tangible medium: “of the conclusion of the contract.”;
 - (b) in the case of a sales contract: “on which you acquire, or a third party other than the carrier and indicated by you acquires, physical possession of the goods.”;
 - (c) in the case of a contract relating to multiple goods ordered by the consumer in one order and delivered separately: “on which you acquire, or a third party other than the carrier and indicated by you acquires, physical possession of the last good.”;
 - (d) in the case of a contract relating to delivery of a good consisting of multiple lots or pieces: “on which you acquire, or a third party other than the carrier and indicated by you acquires, physical possession of the last lot or piece.”;
 - (e) in the case of a contract for regular delivery of goods during a defined period of time: “on which you acquire, or a third party other than the carrier and indicated by you acquires, physical possession of the first good.”.

2. Insert your name, geographical address and, where available, your telephone number, fax number and e-mail address.

3. If you give the option to the consumer to electronically fill in and submit information about the consumer’s cancellation from the contract on your website, insert the following: “You can also electronically fill in and submit the model cancellation form or any other clear statement on our website [insert Internet address]. If you use this option, we will communicate to you an acknowledgement of receipt of such a cancellation on a durable medium (e.g. by e-mail) without delay.”.

4. In the case of sales contracts in which you have not offered to collect the goods in the event of cancellation insert the following: “We may withhold reimbursement until we have received the goods back or you have supplied evidence of having sent back the goods, whichever is the earliest.”.

5. If the consumer has received goods in connection with the contract
 - (a) Insert
 - “We will collect the goods, “; or,

- “You shall send back the goods or hand them over to us or ... [insert the name and geographical address, where applicable, of the person authorised by you to receive the goods], without undue delay and in any event not later than 14 days from the day on which you communicate your cancellation from this contract to us. The deadline is met if you send back the goods before the period of 14 days has expired. “

(b) insert:

- “We will bear the cost of returning the goods.”;
- “You will have to bear the direct costs of returning the goods.”;
- If, in a distance contract, you do not offer to bear the cost of returning the goods and the goods, by their nature, cannot normally be returned by post: “You will have to bear the direct cost of returning the goods, ...EUR [insert the amount].”; or if the cost of returning the goods cannot reasonably be calculated in advance: “You will have to bear the direct cost of returning the goods. The cost is estimated at a maximum of approximately ...EUR [insert the amount].”;or
- If, in an off-premises contract, the goods, by their nature, cannot normally be returned by post and have been delivered to the consumer’s home at the time of the conclusion of the contract: “We will collect the goods at our own expense.”: and,

(c) Insert

“You are only liable for any diminished value of the goods resulting from the handling other than what is necessary to establish the nature, characteristics and functioning of the goods.”

6. In the case of a service contract insert the following: “If you requested to begin the performance of services during the cancellation period, you shall pay us an amount which is in proportion to



what has been performed until you have communicated us your cancellation from this contract, in comparison with the full coverage of the contract.”

Prescribed cancellation form (CCRs 2013)

To [here the trader’s name, geographical address and, where available, fax number and e-mail address are to be inserted by the trader]:

I/We [*] hereby give notice that I/We [*] cancel my/our [*] contract of sale of the following goods [*] / for the supply of the following service [*],

Ordered on [*/ received on [*],

Name of consumer(s),

Address of consumer(s),

Signature of consumer(s) (only if this form is notified on paper),

Date

[*] Delete as appropriate