



national consumer agency
gníomhaireacht náisiúnta tomhaltóirí

putting consumers first

Consumer Protection Act, 2007

Overview of the Consumer Protection Act, 2007

Summary

1. Objectives of the Act

The Consumer Protection Act 2007 came into force on 1st May 2007. The Act provides for the most comprehensive reform of consumer legislation in 30 years. It provides a range of measures aimed at fostering compliance with consumer legislation, through self regulation (codes of practice) and through a suite of enforcement measures. The three main elements of the Act are:

- establishment the National Consumer Agency (NCA) on a statutory basis,
- updating and consolidating consumer legislation and repealing some old consumer laws , and
- transposing the EU Directive on Unfair Commercial Practices(UCPD).

2. Establishment of National Consumer Agency

The National Consumer Agency was set up on 1 May 2007 as an independent body. The powers and functions of the Director of Consumer Affairs were transferred to the new Agency. The NCA is charged with promoting and protecting the interests and welfare of consumers through: enforcement of consumer legislation, advocacy, research, education, and awareness.

3. Unfair Commercial Practices Directive (UCPD)

The EU Directive on Unfair Commercial Practices was adopted in May 2005. The common rules set out in the Directive are intended to give consumers the same protection against unfair practices and rogue traders whether they are buying from the local corner shop or buying abroad.

4. Misleading Commercial Practices

The UCPD deals with three distinct types of unfair commercial practices- **misleading practices** (actions & omissions), **aggressive practices**, and **prohibited practices** (Black List).

5. What is an unfair commercial practice?

According to the UCPD “a commercial practice is unfair if;

- a) it is contrary to the requirements of professional diligence, and
- b) it materially distorts or is likely to distort the economic behaviour with regard to the product of the ‘average consumer’ whom it reaches or to whom it is addressed, or of the average member of that group when a commercial practice is directed at that group”.

In other words when a breach of good faith occurs and the ‘average consumer’ is denied the reasonable standard of skill and care which he or she is entitled.

6. When is commercial practice misleading?

A commercial practice is misleading if it contains false or untruthful information or in any way deceive or is likely to deceive the ‘average consumer’, and cause or likely to cause him/her to take a transactional decision that he/she would not otherwise have taken.

In the context of determining if a trader has incurred a **misleading practice** two considerations must be taken into account:

- would the action cause the ‘average consumer’ to take a decision that he/she would not otherwise have taken ‘average consumer test’, and

- the trader's professional diligence i.e. the general principle to act with good faith in the trader's field of activity and the expected standard of skill and care.

The 'average consumer' test also applies in the context of **Aggressive Practices**. The second test does not apply. No test is required in the context of assessing actions under the **Prohibited Practices (Black List)**. These actions are considered unfair in all circumstances.

7. Definition of an 'Average Consumer'

The European Court of Justice interprets the 'average consumer' as "*reasonably well informed and reasonably observant and circumspect, taking into account social cultural and linguistic factors*".

Where a commercial practice is likely to distort the economic behaviour of a clearly identifiable group who are particularly vulnerable because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, the average member of that group would be regarded as the 'average consumer'.

8. Business to Consumer

The Directive is restricted to 'business to consumer transactions'. This means issues which, affect 'business to business' would not come within the scope of the UCPD.

9. Misleading Practices prohibited by the Act

A misleading practice involves providing false misleading and deceptive information. Misleading advertising, misleading information and withholding material information are considered misleading practices. The main characteristics of a misleading action are false or inaccurate information on:

- the existence or nature of the product/service,
- the main characteristics, including its availability at a particular time, place, or at a particular price,

- usage and prior history,
- the price of the product/service, the manner in which the price was calculated or the existence and nature of a specific price advantage, and the legal right of a consumer (whether contractual or otherwise) or matters relating to when and how or in what circumstances those rights may be exercised.

In assessing what is misleading in the context of price advantage, consideration must be given as to whether a product being advertised as having been previously offered at a different price, that the trader had made it clear that this was done openly and at the same location and for a reasonable period of time.

10. Aggressive Commercial Practices

The Act prohibits traders from engaging in aggressive commercial practices. Harassment, coercion, or exercising undue influence are prohibited under the Act. Pressurising, intimidating and taking advantage of vulnerable consumers are examples of harassment.

Among the types of aggressive practices are:

- use of threatening or abusive language or behaviour, and
- exploitation of a consumer's misfortune or circumstance when the trader is aware that the consumer's judgement is impaired.

11. Prohibited Practices

The Act lists 32 commercial practices which are prohibited in all circumstances. False claims such as

- the trader has the endorsement of a regulatory or approved body ,
- about to cease trading,
- cures for illnesses,
- indicating that a product is 'free' when it costs the consumer more than the reasonable costs to respond to the representation or collecting the product or having it delivered,
- limited availability to encourage quick sales,

- running promotions/ competitions without awarding the prizes described or reasonable equivalents,
- disguised business sales,
- false invoicing,
- exhortations directed at children, and
- demanding payment for unsolicited goods.

12. Pyramid Promotion Schemes

The Pyramid Selling Act 1980 (which was enforced by the Gardai) has been repealed and replaced with stronger measures. The Act bans organising, promoting or participating in pyramid schemes. Any person or trader that promotes these schemes is in breach of the Act. 'Gifting' schemes are also prohibited under the new Act.

NCA and the Gardai have powers to take action against individuals operating, participating or promoting pyramid selling schemes. A person convicted of a pyramid selling offence is liable to a fine not exceeding €150,000 or imprisonment for a term of up to 5 years or both.

13. Sanctions and penalties

The National Consumer Agency has a range of powers to help achieve compliance. These are;

- prosecution,
- compliance notices,
- undertakings,
- prohibition orders, and
- fixed payment notices.

14. Defence of Due Diligence

The Act includes a provision for defence of due diligence by a defendant (apart from pyramid selling offences) in cases where

- the offence was due to a mistake or reliance on information supplied to the defendant, or to the act or default of another person, an accident or some other cause beyond the defendant's control, and
- the defendant exercised due diligence and took all reasonable precautions to avoid commission of the offence.

15. Prosecutions

Prosecutions in respect of breaches of the Act can be taken within two years from the time the offence has occurred. On summary conviction a fine not exceeding € 3000 or imprisonment for 6 months or both may be imposed.

16. Compliance Notices

An Authorised Officer may issue a compliance notice to a trader who is deemed to have committed a 'prohibited practice' (Price display offences are not subject to compliance notices). The trader has the right to appeal the notice to the District Court within 14 days.

17. Undertakings

If the NCA has reason to believe that a trader is involved in a prohibited act or practice, the Agency may seek and obtain a written undertaking that the trader will comply with the requirements of the Act. If the trader reneges on the undertaking and resumes the prohibited act or practice, the NCA may apply to the Circuit Court for a Prohibition Order.

18. Prohibition Orders

Section 71 enables the NCA apply to the Circuit Court or the High Court for an order prohibiting a trader from committing or engaging in a prohibited act or practice.

19. Fixed Payment Notices

The Act provides for the issue of fixed payment notices (on the spot fines) in respect of contraventions of price display legislation. This is a new sanction and may be used as an alternative to prosecution. The fixed payment is for €300 and must be paid within 28 days. Failure to pay will result in prosecution. More than one fixed payment notice may be issued to a trader.

20. Consumer Protection List & Power to Publish

Section 86 of the Consumer Protection Act requires the NCA to maintain a 'Consumer Protection List'. Details of any enforcement actions must be recorded in this register. The NCA is also empowered to publish details of this list in any manner it considers appropriate. These are new measures.

21. Consumers' Redress

Under section 74, a consumer who has been materially affected by the actions of a trader, may apply to the District, Circuit or High Court for damages including exemplary damages. Under section 81, the NCA may with the consent of the consumer, apply to the court for a compensation order, requiring a trader convicted of an offence to pay compensation in respect of any loss or damage to the consumer resulting from that offence. The compensation order may be instead of, or in addition to any fine or penalty which the court may impose.

Other Matters

22. Codes of Practice

The Act provides for NCA approving and endorsing voluntary codes of practice.

23. Agency Guidelines

Section 90 empowers the NCA to prepare, issue guidelines to traders. Guidelines issued and published by the NCA may be admissible in evidence in court. Failure on the part of any trader to observe the guidelines would not render the trader liable to any proceedings.

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Section I

Introduction

This Guide is drawn up by the National Consumer Agency (NCA) to assist business in understanding the requirements of the Consumer Protection Act 2007.

The Guide also provides a number of working examples for the purpose of illustrating the types of practices or actions, which may breach the various sections of the Act referred to in Section III of this document.

In drawing up these examples the National Consumer Agency has adapted/used several of the scenarios provided by the UK Office of Fair Trading (OFT) in its consultation paper on the proposed transposition of the EU Unfair Commercial Practices Directive into UK law.

This NCA Guide has no legal status. It merely summarises and comments on the main sections of the Act.

It is recommended that businesses or traders should consult their legal advisers should they require a legal interpretation of any aspect of the Act.

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The Act may be accessed on line at www.irishstatutebook.ie

or purchased from the;

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Molesworth St.
Dublin 2

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51 St. Stephens Green
Dublin 2

Note

The European Commission - Health and Consumer Protection Directorate-General has published a Booklet on the Unfair Commercial Practices Directive (UCPD). Information on the UCPD may be obtained by referring to the Website below:

http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/index_en.htm

Section II

Overview of Consumer Protection Act 2007

1. Objectives of the new Act

The Consumer Protection Act 2007 (the Act) came into force on 1st May 2007. The Act provides for the most comprehensive reform of consumer legislation in 30 years. It provides for a range of measures aimed at fostering compliance with consumer legislation, through self-regulation (codes of practice) and through a suite of enforcement measures. The three main elements of the Act are:

- establishment the National Consumer Agency (NCA) on a statutory basis,
- updating and consolidating consumer legislation and repealing some of the old consumer laws, and
- transposing the EU Directive on Unfair Commercial Practices (UCPD) into National Law.

2. Establishment of National Consumer Agency

The Act formally set up the National Consumer Agency as an independent statutory body. It abolished the Office of the Director of Consumer Affairs and transferred the powers and functions of the Director of Consumer Affairs to the new Agency. The NCA, which was formally established on 1st May 2007, has been given a wide-ranging remit. This includes, promoting and protecting the interest and welfare of consumers through enforcement of consumer legislation, advocacy, research, education and information. The Agency has powers to work closely with Regulators (such as the Telecommunications Regulator -ComReg and the Financial Regulator) and other State agencies, to ensure that the interests of consumers are prioritised.

3. Updating and codifying consumer Laws

3.1. Schedule 2 of the Act repealed a number of Acts including the Consumer Information Act 1978, Prices Acts, Merchandise Marks Acts and the Restrictive Practices Amendment Act.1987. It provides, for the retention of certain consumer protection elements of these Acts, including the sections that give effect to the Retail Price (Beverages in Licensed Premises) Display Order 1999 and the Retail Prices (Food in Catering Establishments) Display Order, 1984 and Consumer Information Orders such as the Consumer Information (Advertisement for Airfares) Order 2000.

3.2. A number of other Acts together with the EU Regulations that were in force prior to the Consumer Protection Act coming into effect are listed as 'existing enactments' in Schedule 1 of the Act. These continue to remain in force.

The 'existing enactments' include

- The Consumer Credit Act 1995,
- European Communities (Requirements to Indicate Product Prices) Regulations 2002,

3.3. In addition, the requirements of Sale of Goods and Supply of Services Act, 1980 (which require goods be as described, fit for the purpose intended and that services should be provided with due care and diligence), still apply. The Minister for Enterprise Trade and Employment is considering a review of this Act.

Among the EU Regulations listed in Schedule 1 are:

- European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 & 2000,
- European Communities (Requirement to Indicate Product Pricing) Regulations 2002,
- European Communities (Cancellation of Contracts Negotiated away from Business Premises) Regulations 1999, and
- Various product safety Regulations.

Section III

4. Transposition of Unfair Commercial Practices Directive (UCPD)

4.1 The EU Directive on Unfair Commercial Practices was adopted in May 2005. The Directive must be in force in all Member States by 12 December 2007. The objective of the Directive is to strengthen confidence of European consumers in undertaking cross border transactions and achieve a higher level of consumer protection. The common rules are intended to give consumers the same protection against unfair practices and rogue traders regardless of whether they are buying from the local corner or buying abroad.

4.2. What is a commercial practice?

A commercial practice means any conduct (whether an act or omission), course of conduct or representation by the trader in relation to a consumer transaction, including any such conduct or representation made or engaged in before, during or after the consumer transaction.

4.3. What is an unfair commercial practice?

According to the UCPD “a commercial practice is unfair if

- a) it is contrary to the requirements of professional diligence, and
- b) it materially distorts or is likely to distort the economic behaviour with regard to the product of the ‘average consumer’ whom it reaches or to whom it is addressed, or of the average member of that group when a commercial practice is directed at that group”.

In other words when a breach of good faith occurs and the ‘average consumer’ is denied the reasonable standard of skill and care to which he or she is entitled.

4.4. When is a commercial practice misleading?

A commercial practice is misleading if it contains false or untruthful information or in any way deceive or is likely to deceive the ‘average consumer’, and cause or likely to cause him/her to take a transactional decision that he/she would not otherwise have taken.

5. Types of Commercial Practices

5.1 The UCPD deals with three distinct types of unfair commercial practices- **misleading practices** (actions & omissions), **aggressive practices**, and **prohibited practices** (Black List).

In the context of determining if a trader has committed a **misleading practice** two considerations must be taken into account:

- would the action cause the 'average consumer' to take a decision that he/she would not otherwise have taken 'average consumer test', and
- the trader's professional diligence i.e. the general principle to act with good faith in the trader's field of activity and the expected standard of skill and care.

The 'average consumer' test also applies in the context of **Aggressive Practices**. The second test does not apply.

No test is required in the context of assessing any actions under the **Prohibited Practices (Black List)**. These actions are considered unfair in all circumstances.

5.2 Definition of an 'Average Consumer'

The European Court of Justice interprets the 'average consumer' as "*reasonably well informed and reasonably observant and circumspect*, taking into account social, cultural and linguistic factors".

Where a commercial practice is likely to distort the economic behaviour of a clearly identifiable group who are particularly vulnerable because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, the average member of that group would be regarded as the 'average consumer'.

5.3. No test is required in the context of assessing any actions under the **Prohibited Practices (Black List)**. These actions are considered unfair in all circumstances.

5.4. Business to Consumer

The Directive is restricted to 'Business to Consumer' transactions. This means that issues which affect 'business to business' transactions would not come within the scope of the UCPD. However, if a business practice affects both business and consumers, this would come within the ambit of the Directive. Examples on how both scenarios apply are as follows:

5.5. Scenarios

a)- 'Business to business' practices with no potential to affect consumers

A trader sells specialist machinery parts to businesses only. As consumers would not buy these products, it comes outside the scope of the UCPD.

b)- Business practices with the potential to affect both consumers and businesses

A trader sells spare computer parts over the Internet. He sells a range of different products. The trader needs to consider compliance with the UCPD if consumers are likely to buy the products.

c)- 'Business to Business' practice – Comparative Advertising

A trader advertises products, which he claims, are cheaper and better than those of a rival. The rival trader complains to the NCA that the advertisement is misleading the consumer because of the failure to compare like with like. This case could be investigated on the basis that it could mislead the consumer and may be in contravention of section 43. However, the NCA has discretion under section 8(6) of the Act to decide whether or not to act on the trader's complaint. Section 8(6) gives discretion to the Agency to follow up on

“Business to Business” complaints where it is satisfied that the matter affects the welfare and interests of consumers.

d). ‘Business to Business’ practice – Rules of Origin

Trader A complains to the NCA claiming that a rival business is advertising a product as being ‘made in Ireland’ when in fact a significant element of the processing was carried out in a Third Country.

This could be argued as having an impact on the consumer. Section 43(7) of the Act specifically deals with this issue. However, the NCA has discretion under section 8(6) of the Act to decide whether to act on the trader’s complaint or not.

6. Misleading Commercial Practices

6.1 Section 41. - General prohibition on unfair commercial practices.

This section prohibits traders from engaging in unfair commercial practices and defines a commercial practice as unfair if it is contrary to either or both of the following:

- (a) the requirement of professional diligence
 - (i) the general principle of good faith in the trader’s field of activity;
 - (ii) the standard of skill and care that the trader may reasonably be expected to exercise in respect of consumers, and

- (b) would be likely to cause appreciative impairment of the average consumer’s ability to make an informed choice and influence his/her decision in making a purchase.

This section could be used to address novel practices, or practices consciously designed to fall outside the scope of the legislation.

6.2 Section 43. - False, misleading and deceptive information.

This section defines a misleading commercial practise as providing false, misleading or deceptive information. The main characteristics of a misleading action are false or inaccurate information in relation to

- the existence or nature of the product/service,
- the main characteristics, including its availability at a particular time, place, or at a particular price,
- geographical origin,
- usage and prior history,
- quantity, weight or volume,
- benefits or fitness for purpose,
- expected results,
- composition, ingredients, components or accessories,
- specification of the product including, the grade, standard, style, status or model,
- after supply customer assistance,
- handling of consumer complaints,
- method, date of delivery,
- need for any part, replacement, servicing or repair,
- the price of the product/service, the manner in which the price was calculated or the existence and nature of a specific price advantage, and the legal right of a consumer (whether contractual or otherwise) or matters relating to when and how or in what circumstances those rights may be exercised, and
- in the case of service its execution and performance.

In assessing what is misleading in the context of price advantage, consideration must be given as to whether a product being advertised, as having been previously offered at a different price, that the trader had made it clear that this was done openly and at the same location and for a reasonable period of time.

In determining geographical origin of goods where the production involved more than one country, consideration must be given to where the product underwent the last most significant process.

6.3. Examples of infringements of Section 43

a). A trader is selling a satellite television package to a consumer. The consumer is falsely told that the package includes sports channels, which are in fact only available at an additional subscription cost. The trader has provided false information about the 'main characteristics of the product' (in this case, the contents of the package). As this practice is likely to cause the average consumer to take a different decision about the package – for example had he been aware of the additional cost he may not have bought the product.

b). A trader advertises televisions for sale saying the price has been substantially discounted. In fact, they have only been on sale at the non-discounted price in very small numbers for a very short period of time in one of the trader's numerous shops. While the trader's advertisement may be factually correct, it is likely to be deceptive. The average consumer would have been deceived about the existence of a specific price advantage in a way that is likely to cause him to make a different decision about the television – in this case whether to buy it.

c). A trader selling second hand cars displays for sale, on his forecourt, a second hand car which has been 'clocked' (that is, the odometer has been tampered with to show a reduced mileage). The odometer indicates that the car has traveled 55,000 miles. The car has actually traveled 125,000 miles.

N.B. The dealer would also be in breach of the Act if he sold a car, which had been clocked by another dealer. The dealer is required to act with due diligence and as a professional he should have taken appropriate measures to ascertain the prior history of the car.

6.4. Section 44. – Product confusion-misleading about competitor’s products

This section concerns misleading in context of competitors’ products i.e. traders marketing or advertising products which could mislead consumers by confusing a competitor’s product with their own or confuse a competitor’s trade mark, or trade name with theirs.

6.5. Example of infringement of Section 44

A trader names or brands his new sunglasses in a manner that closely resembles the name or brand of a competitor’s sunglasses. The similarity is such as to confuse the average consumer, and thus making him more likely to opt for the new sunglasses when in normal circumstances he would not.

6.6. Section 45. - non compliance with a code of practice.

A trader who gives the false impression that he is abiding by or bound by a code of practice. As a consequence, the average consumer is enticed into making a purchase. This is a misleading practice. (See paragraph 16 codes of practice).

6.7. Example of infringement of Section 45

A trader is a member of a code of practice that promotes the sustainable use of wood and uses the code's logo in an advertising campaign. The code of practice contains a commitment that its members will not use hardwood from unsustainable sources. However, it is found that the product advertised by the trader contains hardwood from endangered rainforests. This practice is a breach of the code. The average consumer would expect code members to sell products which comply with their code.

6.8. Section 46. - Withholding omitting or concealing material information.

A commercial practice is misleading where it omits or conceals information that the average consumer would need to make an informed decision on

whether to purchase a product or service. In such circumstances, it is not a defence to claim that all information in an advertisement is truthful. If key facts or material information are withheld, the advertisement may be regarded as misleading. An advertisement may also be misleading where it contains all the material information to make an informed choice, but presents it in a form that is unclear, unintelligible, ambiguous or untimely.

In addition to the obligation to provide factual and truthful information in advertising, this section requires the disclosure of material facts in the context of an 'invitation to purchase'. This is defined as "a representation by a trader, in the context of a commercial transaction, to indicate the characteristics and the price of the product"-in other words all 'material information'. This is intended to facilitate the consumer in making a decision on whether or not to purchase a product or service. The following constitutes 'material information':

- geographical address and identity of the trader and if the trader is acting as an agent, the geographical address and identity of that trader,
- the main characteristics of the product ,
- freight, delivery or postal charges,
- the handling of consumer complaints, and
- the price of the product/service, inclusive of taxes, or if the nature of the product is such that it cannot be calculated in advance, the manner in which the price is calculated.

In the context of determining if a commercial practice is misleading this section requires that the factual content in its entirety must be considered having regard to the time, space and medium used in the communication. In effect more detailed information would need to be given in a large written advertisement than in a 30 second radio or TV ad.

6.9. Examples of 'Invitation to Purchase'

a). *An advert in a magazine features tracksuits for sale. The prices and sizes of the tracksuits are given in the advert, and the bottom half of the advert is an order form, which may be filled in, with payment enclosed, and sent direct to the retailers. This would be an invitation to purchase.*

b). *A car showroom has a used car on display for sale. The price is shown clearly on the car. This (the car and the price) would be an invitation to purchase.*

6.10. Examples of how to meet invitation to purchase requirements

a) *In the context of the 2nd hand car on sale in the show room, the main characteristics of the product are included in the sales card or are already apparent, such as the make, model, mileage, colour and other physical characteristics of the car. The trader's identity is apparent from information in the showroom, the price is given on a sign on the car and the arrangements for payment, delivery, performance or complaint handling are no different from those that consumers would reasonably expect. The car can be purchased and taken from the showroom, and returned there if complaints arise. There are no omissions of cancellation rights or information requirements under other EU law provisions.*

b) *A trader sells computers from his website. The site's homepage pictures the range of computers sold by the trader. Each picture provides a link to a detailed page which gives the characteristics of the relevant computer and that page also gives its price and has a 'buy now' button (by clicking on which, the computer may be purchased). This detailed page is an invitation to purchase. On separate pages on the website that can be reached via a clearly indicated link on the detailed page, are:*

- *the main characteristics of the computer (for example the processor, memory, graphics, software and accessories) including its function (for example 'home multimedia' or 'games package'),*

- *the full price (inclusive of taxes and any freight or delivery charge) if this was not given on the previous page,*
- *the delivery and payment arrangements as well as the complaints/after sales procedures, and*
- *as the computer is being sold over the Internet, information required by the E-Commerce Regulations and Distance Selling Regulations, including cancellation rights are provided.*

6.11. Examples of infringements of Section 46

a) A trader's business is the sale, or secondary re-sale, of tickets admitting entry to entertainment and other similar events. He sells tickets for 'restricted view' seats without disclosing this fact to the consumers.

The trader's failure to provide consumers with the information that these tickets are for seats with a restricted view is a misleading omission for the purpose of this section. The information that the seats are subject to a restricted view is material information that the average consumer would need in order to take an informed transactional decision (that is, to decide whether or not to buy the tickets at the offered price). This misleading omission may cause the actual consumer to make a different decision. The average consumer may be unlikely to buy the tickets at the price sought, had he known the seats had restricted view of the event in question.

b) A gym and leisure fitness club operator omits to mention that a person joining the club must do so for a minimum period and the membership would role over unless the member cancels; this would be regarded as a misleading omission.

c) A trader advertising reconditioned mobile phones omitted to mention that the phones were not new. This would be material information, which would need to be made clear to consumers.

d) A promotion initiative by a trader who sells chocolate bars; the wrappers advertise 'shirt offer for €2'. Various conditions apply (such as restrictions on

the availability of the t-shirts, a requirement to collect a fixed number of wrappers; postage and packaging is extra). Failure to disclose this information is a misleading omission. If the wrapper is too small to facilitate the provision of all material information the trader would be less likely to commit a misleading omission if he makes it clear on the wrapper that terms and conditions apply and provides details of where these can be found e.g. at the sales desk or website.

6.12. Section 47. - provides that a trader engaging in a misleading commercial practice described in section 43 commits an offence. The misleading commercial practices described in sections 44, 45, and 46 are not prosecutable offences, though the other enforcement options under the Act would apply. (See Section V).

6.13. Sections 48. - and 49. - Credit Card Surcharges

The Minister for Enterprise Trade and Employment is currently carrying out a consultation process before deciding on making an Order on the bringing of these two sections into effect.

7. Aggressive Commercial Practices

7.1. Section 52. - Prohibition on aggressive practices.

This prohibits traders from engaging in aggressive commercial practices.

7.2. Section 53. - Aggressive commercial practices.

A commercial practice is aggressive if by harassment, coercion or undue influence it would be likely to

- (a) cause significant impairment of the 'average consumer's' freedom of choice or conduct, and
- (b) cause the 'average consumer' to make a transactional decision that he/she would not otherwise make

Among the types of aggressive practices are:

- use of threatening or abusive language or behaviour,
- exploitation of a consumer's misfortune or circumstance when the trader is aware that the consumer's judgement is impaired,
- imposition of onerous or disproportionate non contractual barriers by the trader when the consumer wishes to terminate a contract or switch to another trader,

7.3. Examples of aggressive commercial practices.

a). A mechanic has a consumer's car at his garage and has done more work than had been agreed; he refuses to return the car to the consumer until he is paid in full for the work. The mechanic had not checked with the consumer before carrying out the extra work. As he has the car, he has exploited his position of power, by demanding payment for doing more than was agreed and refusing to return the vehicle until the consumer has paid for all the work.

b). Staff working in a funeral home put pressure on a recently bereaved relative, to buy a more expensive coffin as a mark of respect. This could amount to coercion or undue influence. (Exploitation of specific misfortune and timing).

c). A trader takes consumers to a holiday club presentation at a distant location, with no apparent return journey unless the consumers sign a contract. These practices could amount to coercion and/or undue influence. (Nature/location).

d). A doorstep trader puts pressure on a consumer to pay immediately in cash, for home repairs. He insists on giving the consumer a lift to the bank to withdraw the money. This could amount to coercion or undue influence. (Nature, persistence, location).

e). A debt collector pressurises borrowers/debtors to raise further funds via increased borrowing or sale of personal assets; for example, contacting

debtors at unreasonable times (such as late at night) or at unreasonable locations (such as at work when requested not to). This could amount to harassment, coercion or undue influence. (Timing, persistence, nature and location, exploitation of circumstances – this might amount to exploitation of the imbalance of power between the creditor and debtor, as well as of the specific circumstances of the debtor).

f). A trader whose business is carrying out home improvement work 'cold calls' potential elderly customers in remote rural areas. He attempts to sell his services to the consumer on the doorstep. During the course of his sales pitch, the trader ignores a request to leave. He also uses threatening language and behaviour in an attempt to intimidate the consumer into engaging his services. To increase the pressure, the trader starts work without explicit permission. The trader also tells the consumer that the roof is in need of repair when this is not the case.

This has elements of both aggressive and unfair practices. The trader's practice of refusing to leave when requested and the use of threatening language and behaviour to intimidate consumers could be an aggressive practice

The trader starting work without the explicit permission of the owner could also amount to an aggressive practice and would be likely to be regarded as coercion.

Where work is started without consent, this could be a breach of section 43 as the consumer should have the opportunity of making an informed decision about whether or not to engage another person to carry out the home improvement.

8. Prohibited Practices

8.1 Section 55. – Prohibited commercial practices

This section lists 32 commercial practices, which are prohibited in all circumstances. A trader who engages in any of these practices is committing an offence and on conviction, is liable to the relevant fines and penalties referred to in section 12.1.

8.2 Examples of these are as follows

a). False claim that the commercial action of the trader has approval or endorsement

- i) A member of Code of Practice displays the code logo in his shop and on his advertising materials and claims beside the logo that the code is 'approved by the National Consumer Agency'. The code has not been approved. This is a prohibited practice. S. 55(1)(a).*
- ii) A service supplier claims that the terms and conditions of his/her contract had been approved by the NCA when no approval had been given. S. 55(1)(a).*

b). False claim to be a member of a code

An electrician claims that he is a member of a self-regulatory body when he is not. This is a prohibited practice. S. 55(1)(b).

c). Closing down or moving to new premises sale

A trader runs a clothes shop. He places a sign in the shop window stating: 'Closing down sale'. Unless the shop was genuinely closing down this would be a prohibited practice. S. 55(1)(c).

d). Unsupported claims that a system would help to win games of chance

A trader claiming that his formula will help you to win the National Lottery'. This would be a prohibited practice. S. 55(1)(e).

e). Unsupported or untrue cure claims

A trader sells orthopedic beds to the elderly with the advertisement 'Cure your backache once and for all with my special beds'. If untrue, his definitive statement about the curing effects of his product would be a prohibited practice. S. 55(1)(g).

f). Representation that the consumer has won a free gift if the consumer has to incur out of pocket expenses to claim the gift

A trader advertises a 'free' gift. He then tells consumers that in order to receive their 'free' gifts they need to pay an extra fee or they may be asked to make a premium rate call to claim their gifts. This would be a prohibited practice. At most, consumers should only be expected to pay is the cost of responding to the notification (standard phone call or letter) and possible collection or delivery costs. S. 55(1)(h).

g). 'Switch and Bait' or bait advertising

A trader advertises a television in his shop window for €300. When the consumer asks about it, he shows him a set, which has a "sold" tag on it and advises that the only other similar model available is faulty. He then refers the customer to a different make of television. If the trader intentionally used this practice to promote a different make/model, this would be a prohibited practice. S. 55(1)(m).

h). Providing after supply information in a different language than the official language of the relevant State where the consumer is located or in a language different to that used in prior communications

A trader based in Ireland agrees to provide after sales service to a consumer with whom he has been communicating in German. The trader provides after sales services in English only, without warning the consumer prior to the contract that this would be the case. S. 55(1)(o).

i) Trader pretending that his offer is unique when in fact the terms are laid down in legislation.

A trader selling DVD players advertises in the following basis: “DVD players for sale. If they don't work you will get your money back or I will replace them. You won't find this offer elsewhere”.

If the DVD is faulty at the time of purchase, the consumer would be entitled to a refund, repair or replacement under the Sale of Goods and Supply of Services Act 1980. The trader's emphases on the unique nature of his offer to refund or replace would be a prohibited practice. S. 55(1)(p).

j). Using editorial content in the media to promote a product paid for by promoters of the product

A magazine is paid by a holiday company for an advertising feature. The magazine does not make it clear that this is a paid-for feature – for example, by clearly labeling it 'Advertising Feature'. This would be a prohibited practice as it fails to make clear that the feature is a paid promotion. S. 55(1)(q).

k). Security companies using exaggerated claims to scare consumers into purchasing a product to protect themselves or dependents

A trader selling security alarm systems to potential customers claims that “there has been a recent spate of burglaries and assaults in your area- 20 in the past month. None of these premises had been fitted with a proper burglar alarm system. It is clear that a gang is targeting houses in your area that do not have sophisticated alarm systems. Your home will probably be burgled and you or a member of your family could be beaten up, unless you install one of my state of the art alarms”. If the risk of burglary is materially exaggerated this would be a prohibited practice. S. 55(1)(r).

l). Misleading consumers that a second product is manufactured by the same company as the well known branded product

A trader designs the packaging of a new soft drink, so that it closely resembles that of a well-known, and well-established brand of a competitor.

If the similarity were deliberately introduced to mislead consumers into believing that the soft drink is being produced by the competitor (who owns the established brand) – this would be a prohibited practice. S. 55(1)(s).

m). Disguised Business Sale –Trader acting as a consumer

A second-hand car dealership puts a used car on a nearby road and displays a handwritten advert reading 'One careful owner. Good family run-around €2000 or nearest offer. Call Jack on mobile no...' The sign gives the impression that the seller is not selling as a trader. S. 55(1)(x).

n). Creating the impression that the consumer has won or will win the top advertised prize or equivalent value prize when there is no prize or if the consumer has to make payment or incur a loss

A trader operates a scratch-card prize promotion with a top prize of €10,000. In fact, no cards with the top prize have been printed (or does print the cards but does not make them available). This would mean that no prizes of €10,000 could be awarded. This is a prohibited practice. S. 55(1)(v).

o). Including invoices for similar products with marketing material

A trader sends letters to consumers with his marketing material that are, or closely resemble invoices for products that have not been ordered. *This would be a prohibited practice. S. 55(1)(w).*

p). Failing to comply with a request to leave the Consumer's residence

A door-to-door salesman visits a consumer to sell her some cleaning products. She tells him she is not interested and asks him to leave. He is determined to try and get her to change her mind and continues his sales pitch on her doorstep. This is a prohibited practice, S.55 (3)(b). It could also be regarded as an aggressive practice.

q). Persistently failing with a consumer's request to cease unwanted communications

Businesses or marketing companies who fail to comply with a consumer's request to cease and continue to communicate or initiate unwanted or unsolicited contacts, through mail, e mail, telephone or any other means are engaging in a prohibited practice, S. 55(3)(c). In addition it could also be in breach of the Data Protection legislation.

r). Including in advertisements a direct exhortation to children.

A trader selling mobile phones includes in his advertisements "all young people must have this new state of the art mobile phone. Don't be the odd one out." Any direct approach to children to buy advertised products or which pressurises their parents into buying the item is "pester power" and is a prohibited practice. S. 55(3)(e).

s). Seeking payment for unsolicited products

A trader sends books to a consumer. The consumer had never ordered these items. Some weeks later the trader sends a demand for payment for the items to the consumer. This would be a prohibited practice. S. 55(3)(f).

8.3. Comment on Disguised Business Sales

A disguised business sale is where, in the course of a transaction, a trader falsely claims or creates the impression that he is not acting for purposes relating to his trade or business; or if he gives the impression that he is acting as a consumer rather than in his business capacity; e.g. a second hand car dealer who gives the impression in his car sales advertisement that he is acting as a consumer rather than as a second hand car dealer.

If a second-hand car dealership places a small advertisement in a paper, the advertiser (paper) is required to make it clear that the advertisement had been placed by a trader. Failure by either the person placing the advert or the paper, to do this would be a prohibited practice. It would also be in breach of the Consumer Information (Advertisement) (Disclosure of Business Interests) Order 1984. It is considered that any person offering more than three cars for sale in the course of a year is likely to be involved in the car business.

Linked to this business interest disclosure requirement, Section 69 of the Consumer Protection Act requires advertisers (media) who accept or agree to publish an advertisement by a trader, to maintain a record of the trader's details for two years from the date the last ad was published.

9. Offences of trader due to actions of another

Under the provisions of section 70, when a trader commits an unfair commercial practice due to the act or default of another person, that person would also be guilty of an offence and may be charged and convicted. This is an exception to the 'business to consumer' rule. It provides for breaches involving a 'consumer to trader' transaction or a 'business to business' transaction.

Example

A consumer /trader clocked a car and then sold it to a second hand car dealer. The trader was subsequently convicted for selling a clocked car (Section 43). As already indicated, the NCA may also prosecute the person who initially clocked the car. On conviction this person would be subject to the fines and penalties outline in Section V of this document.

10. Pyramid Promotion Schemes

Pyramid selling is a prohibited practice, black listed under the UCPD. Under the Consumer Protection Act, this issue is considered so serious that a separate part of the Act is devoted specifically to this issue. The Consumer Protection Act has repealed the Pyramid Selling Act 1980 (which was enforced by the Gardai) and replaces it with stronger measures to combat this fraudulent practice. The new measures ban organising, promoting or participating in pyramid schemes.

A 'pyramid promotional scheme' centres on providing a gift in money or money's worth for an opportunity to receive compensation, which is derived primarily from the introduction of other persons into the scheme rather than from the supply of a product.

While the other sections of the Consumer Protection Act deal with the impact by a trader's actions on the consumer i.e. "business to consumer" the ban on pyramid selling equally applies to "consumer to consumer" transactions. In fact virtually all pyramid promotion schemes are generated by a number of individuals who set out to make money at the expense of other people.

Both the NCA and the Gardai have powers to take action against individuals operating, participating in or promoting pyramid selling schemes. A person convicted of a pyramid selling offence is liable to a fine not exceeding €150,000 or imprisonment for a term of up to 5 years, or both.

If after conviction, the person continues to contravene the pyramid selling laws, he/she is guilty of a further offence in respect of each day that the contravention continues and for each offence (each day) may be liable on conviction on indictment to a fine not exceeding €10000.

Persons who suffer significant financial loss arising from participation in a pyramid scheme are excluded from seeking redress under the provisions of section 74. Pyramid schemes are excluded on the grounds that any agreement between the promoter of a pyramid promotional scheme and another person is void. The reason for this is to underline the inherent unlawfulness of pyramid schemes.

Section IV

11. Pricing and Price Display

11.1.Section 59 requires traders in the retail grocery business to provide weighing scales to facilitate consumers in seeing the weight of food products (other than pre-packed products).

11.2. Section 60 makes it an offence for a trader to prevent without reasonable cause, a person from reading prices of products on display.

11.3.Section 61 empowers the Government to make Orders in cases of emergency in respect of the supply of certain products.

11.4.Section 62 empowers the Government to set Maximum Prices Orders in respect of products covered by an “Emergency Order”.

Section V

12. Sanctions and penalties

The National Consumer Agency has been given a range of powers to help achieve compliance with the requirements of the Consumer Protection Act and the 'existing enactments ' listed in Schedule 1. These are as follows:

- Prosecution
- Compliance notices
- Undertakings
- Prohibition Orders
- Fixed Payment notices

Not all of these sanctions would apply in respect of each infringement or offence. For example;

- Fixed Payment Notices would only apply in respect of infringements of price display offences.
- Compliance Notices would not apply to price display offences.
- Undertakings or Prohibition Notices would not apply in respect of contraventions relating to the reading of prices & providing weighing scales requirements.

12.1. Prosecutions

A prosecution can be taken within two years from the date when the offence has occurred in respect of breaches of the Act.

Persons who are summarily convicted in respect of offences under the Act are liable to a fine not exceeding € 3000 or imprisonment for 6 months or both. Any subsequent conviction for the same offence is liable for a fine of up to €5000 or imprisonment for 12 months, or both.

If after being convicted a person continues to contravene the requirement or prohibition to which the offence relates he is guilty of a further offence for

each day that the contravention continues and is liable on summary conviction, to a fine not exceeding €500 in respect of each such offence (each day).

On indictment the maximum penalty is €60000 or imprisonment for 18 months or both. The maximum penalty for any subsequent conviction for the same offence is €10000 or 24 months imprisonment or both.

The court may order a person convicted of offences relating to misleading commercial practices, prohibited commercial practices or pyramid selling to publish corrective statements.

On conviction, the court can order the person to pay the Agency's costs and expenses in relation to the investigation, detection and prosecution. These costs are in addition to any fine or penalty, which may be imposed.

The NCA may prosecute traders in respect of any of the EU Regulations or enactments listed in Schedule 1. The penalties for offences in respect of actions taken under the EU Regulations or any of the enactments listed in Schedule 1 are set down in the relevant legislation.

12.2. Compliance Notices

This is new enforcement tool. If an Authorised Officer of the NCA is of the opinion that a trader has committed/is engaging in a 'prohibited practice', she/he may issue a notice to the trader: advising him of the breach and requiring him to comply with the law by a given date. (Price display offences are not subject to compliance notices). The trader has the right to appeal the notice to the District Court within 14 days. If the trader loses the appeal, the compliance notice goes into effect and remains in force unless it is withdrawn by the NCA. If the trader fails to comply with the notice he is guilty of an offence and if convicted is liable to the penalties outlined in paragraph 12.1.

Compliance notices may also be issued in respect of certain other pieces of legislation. These are listed in Schedule 5 and include the Sale of Goods and Supply of Services Act, 1980; Package Holiday and Travel Trade Act, 1995;

Consumer Information, (Advertisement) (Disclosure of Business Interests) Order, 1984; Consumer Information (Advertisements for Airfares) Order, 2000 and the Consumer Information (Advertisements for Concert and Theatre Performance) Order, 1997.

12.3. Undertakings

If the NCA has reason to believe that a trader is involved in a prohibited practice under the Act or other enactments listed in Schedule 4*, It may accept a written undertaking that the trader will comply with the requirements of the legislation and cease the practice.

The undertaking may include, in addition to giving a commitment to comply with the Act or Regulations under the Act:

- a commitment to compensate the consumer, including reimbursement, or
- a commitment to publish at the trader's expense an advertisement containing a corrective statement relating to the prohibitive practice.

If the trader reneges on the undertaking and resumes the prohibited act or practice the NCA may apply to the Circuit Court or the High Court for a Prohibition Order. (See paragraph 12.4).

**Among the Acts and Regulations listed in Schedule 4 are: Sale of Goods and Supply of Services Act 1980, Package Holiday Act 1995, EU Regulations on Unfair Terms in Consumer Contracts and Product Pricing Regulations.*

12.4. Prohibition Orders

Section 71 enables the NCA and any other prescribed public body to apply to the Circuit Court or the High Court for an order prohibiting a trader from

committing or engaging in a prohibited act or practice, [*except infringements of section 59(2) – relating to weighing facilities in grocery retail and section 60(1) –preventing the reading of prices*]. Failure to comply with the Court Order, without a reasonable excuse is an offence and the trader is liable on conviction to the fines and penalties outlined in paragraph 12. 1.

In cases where a code of practice or a code owner promotes any prohibited act or practice, the NCA is empowered under section 72, to apply to the Circuit Court for an Order requiring the code owner to withdraw or amend the code (see paragraph 16 relating to codes of practice).

12.5. Fixed Payment Notices

Section 85 provides for the issue of fixed payment notices (on the spot fines), in respect of contraventions of price display legislation (e.g. Product Prices Regulations and failure to display notices detailing prices as required by the Catering, Drinks, Hairdressing, Petrol & Diesel and VAT inclusive Orders). This sanction is an alternative to prosecution. The Act empowers an authorised officer of the NCA, if he/she is of the opinion that a trader is in breach of any of the price display Regulations/ Orders, to issue a fixed payment notice. This may be done either personally or by post.

It is the NCA's intention that all fixed payment notices will be issued by post. The notice will be for a fixed payment of €300. More than one notice may be issued, if multiple breaches of the price display legislation were found. The trader is given 28 days to pay the fine from the date of the issue of the notice. If the trader pays the fixed payment fine/fines within the 28-day period, prosecution proceedings will not be initiated. Failure to pay within the 28-day statutory period will result in prosecution.

Payment of a fine under the fixed payment procedure is not a conviction. It should also be noted that the NCA, where it considers appropriate, might go direct for prosecution as provided under the various Regulations/ Orders.

13. Consumer Protection List and Power to Publish

13.1. Section 86 of the Consumer Protection Act requires the NCA to maintain a 'Consumer Protection List'. Details of any enforcement actions must be recorded in this list. (See paragraph 12 for list of enforcement Actions).

13.2. The NCA is also empowered under this section to publish details of this list in any manner it considers appropriate.

14. Defence of Due Diligence

The Act includes a provision for defence of due diligence by a defendant (apart from pyramid selling offences) in cases where

- the offence was due to a mistake or reliance on information supplied to the defendant, or to the act or default of another person, an accident or some other cause beyond the defendant's control, and
- the defendant exercised due diligence and took all reasonable precautions to avoid commission of the offence.

Section VI

15. Consumers' Redress

15.1 Under section 74, a consumer who has been materially affected by the actions of a trader, who has committed or engaged in a prohibited act or practice may apply to the District, Circuit or High Court for damages including exemplary damages. [Non-compliance with a code of practice (section 45) and pyramid selling are excepted].

15.2. Under section 81, the NCA may on behalf of and with the consent of the consumer, apply to the court for a compensation order, requiring a trader convicted of an offence (other than Pyramid Selling offences), to pay the amount of money which the court deems appropriate compensation in respect of any loss or damage to the consumer resulting from that offence. The compensation order may be instead of, or in addition to any fine or penalty, which the court may impose.

15.3. A compensation order cannot be sought if the consumer has already brought a civil action against the trader in respect of the same misleading practice. If compensation was paid to a consumer under an order and if the consumer subsequently took a civil action under section 74, the amount awarded under the compensation order will be taken into account in the context of any award being made on foot of the civil action.

Section VII

Other Matters

16. Codes of Practice

16.1. Section 88 of the Act provides for voluntary codes of practice to be submitted to the NCA for review and approval. Any code approved by the Agency may not be changed without the prior approval of the NCA. If the Agency is of the view that the implementation or operation of the code fails to protect consumer interests it may withdraw its approval.

16.2. Under Section 45 a trader who pretends that he is bound by a code of practice as a means of enticing the average consumer to purchase his product or service or who fails to comply with a commitment of the code is engaging in an unfair commercial practice.

16.3. Additionally, under section 55 (1) (b) a trader, who is pretending to be a signatory to a code of practice, is engaging in a prohibited practice, which is black listed under the UCPD.

16.4. Section 72 empowers the NCA to apply to the Circuit or High Court for a Prohibition Order in cases where the code of practice or the code owner promotes any prohibited act or practice. A code owner who fails to comply with the requirements of the Order is guilty of an offence and liable to prosecution and on conviction be subject to the fines and penalties outlined in paragraph 12.1.

17. Agency Guidelines

17.1. Section 90 empowers the NCA to prepare, issue and publish guidelines relating to traders:

- a. consumer welfare or consumer protection,
- b. practical guidance to traders relating to commercial practices,
- c. quality assurance schemes, and the form and manner of submitting codes of practice for approval.

Before issuing and publishing guidelines the NCA may prepare draft guidelines for consultation.

17.2. Guidelines issued and published by the NCA may be admissible as evidence in court. However, failure on the part of any trader to observe the guidelines would not render the trader liable to any proceedings.