

# **NATIONAL TRADING STANDARDS**

**Estate and Letting  
Agency Team**

Protecting Consumers  
Safeguarding Businesses

## **GUIDANCE ON PROPERTY SALES AND LETTINGS**

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

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This publication is also available from our website at: [www.ntselat.uk](http://www.ntselat.uk)

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a property auctioneer, a letting agent, a property management agent or a solicitor offering services that count as estate agency or lettings agency work), and/or

- sell or let property or land (for example if you are a property developer that markets and sells your own developments), and/or
- buy property or land for resale (for example if you are a company that buys up 'below market value' property as an investment opportunity), and/or
- provide some ancillary service related to any of the above.

Collectively, we refer to all such businesses in this guidance as 'property agents'.<sup>2</sup>

All references to 'you' in this guidance mean property agents.<sup>3</sup>

1.4 The regulations apply to the full spectrum of property agents, including traditional high street agents that provide a wide range of services, online only businesses and businesses that provide a limited service such as introducing potential buyers and sellers or enabling them to exchange contact details. The standards expected to comply with the regulations will depend on the circumstances, including the level of service a business provides. This guidance and the examples used should be read with that in mind.

1.5 The guidance is also intended to be of use to enforcers, consumer advisors, ombudsmen, approved redress schemes and trade/membership organisations to help them understand what trading practices are likely to be prohibited.

### **What does the guidance cover?**

1.6 The guidance provides an overview of the regulations and sets out some examples of the kinds of unfair trading practices or conduct specific to property sales and lettings that may breach them. It also sets out some of the practical steps you may wish to take to help you comply with the law.

1.7 Not all points listed will apply to every property agent (since the range of services they offer may differ). Nor is the guidance intended to be exhaustive; it does not cover every situation or practice in which a breach of the CPRs or BPRs may occur. The examples used focus mainly on more mainstream property agents.

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<sup>2</sup> We make no distinction here between traders who are carrying out estate agency activities for the purpose of the Estate Agents Act 1979, and those who are not.

<sup>3</sup> The guidance is not aimed at surveyors or conveyancers. However, since the regulations also apply to them, parts of the guidance may be relevant and helpful to them too.

1.8 This guidance is not a substitute for the law itself nor does it replace the role of a court which is to provide a definitive interpretation of the law.

1.9 There are also other important laws and regulations that may apply to you, which are not covered in this guidance. Annexes A and D list some of them and provide links to further guidance. Annexe C outlines the requirements regarding client money protection schemes and deposit protection.

### **What do I need to do?**

1.10 It is important that you read and understand the guidance to help you to comply with the law and **treat** consumers, business customers and competitors properly.

1.11 You should:

- consider how the regulations apply to your property business
- if necessary, make changes to your business practices, and
- ensure that your staff understand the regulations and comply with them, as your business may be held responsible for their actions.

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

1.12 If you do not comply with the law you may face civil and/or criminal sanctions. For example you may face enforcement action by your local authority Trading Standards Service (or, in Northern Ireland, the Department for the Economy), or by another consumer enforcement body. See section 6 for more information on enforcement action. If you belong to a professional body, you may face its disciplinary procedures and/or expulsion from its membership.

1.13 In respect of your advertisements, both online and in print media, you could be subject to a published adjudication of the Advertising Standards Authority (ASA).<sup>4</sup>

1.14 You could also lose your customers, some of whom may have the right to take legal action against you. If a consumer complains to an approved redress scheme, and the complaint is upheld, you may be required to pay compensation or make an apology. Annexe B contains more information about redress schemes.

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<sup>4</sup> All advertisers must adhere to the mandatory Advertising Codes. The Committee of Advertising Practice provides advice and guidance at <https://www.asa.org.uk/codes-and-rulings/advertising-codes.html>

## **Where can I get further advice?**

1.15 For further advice you should contact your local authority (or primary authority) Trading Standards Service (or, in Northern Ireland, the Department for the Economy), contact your professional body or trade association, and/or seek independent legal advice.

1.16 Additional guidance on the regulations affecting your business can be found at [www.businesscompanion.org.uk](http://www.businesscompanion.org.uk). Guidance on the requirements of the Estate Agents Act 1979 and the Tenant Fees Act 2019 can be found on our website [www.ntselaat.uk](http://www.ntselaat.uk).

## **Providing feedback on the guidance**

1.17 The guidance will be kept under review and we will consider adding to it on an ongoing basis in the light of user feedback, practical experience, case law and changes in legislation.

1.18 If you wish to comment on any aspect of the guidance, you can do so by email to: [estate.agency@powys.gov.uk](mailto:estate.agency@powys.gov.uk).

## 2 EXECUTIVE SUMMARY

- 2.1 The CPRs and BPRs ('the regulations') have been in force since 26 May 2008 and property agents ('you') are expected to comply with them. The implementation of the regulations subsequently led, on 1 October 2013, to the repeal of the Property Misdescriptions Act 1991.
- 2.2 The regulations have broad coverage and the way they impact on your business will depend on the particular services you offer. Key aspects of the legislation are set out below.
- 2.3 If you treat your consumers, business customers and competitors fairly, then you are unlikely to breach the regulations. However, if you treat them unfairly, you may face criminal and/or civil enforcement action.
- 2.4 The CPRs prohibit you from engaging in unfair commercial practices when you deal with consumers:
- 'Consumers' are individuals who are acting for purposes wholly or mainly outside their business. This goes further than just your actual or prospective clients or actual property buyers. For example, if you are acting on behalf of a seller or landlord, 'consumers' also includes potential buyers/tenants or even potential viewers of the property. [For more detail, see section 3]
  - 'Commercial practices' covers the whole range of your business activities that may affect consumers, for example your practices when you advertise your services, offer pre-agreement advice to a client, describe property for sale/rent, negotiate and agree sales or lettings, offer property management services and handle complaints about your conduct. [For more detail, see section 3]
  - 'Unfairness' may arise from:
    - giving false or misleading information to consumers ('misleading actions') [paragraphs 4.3 - 4.6], or
    - hiding or failing to provide material information to consumers ('misleading omissions') [paragraphs 4.7 - 4.15], or
    - exerting undue pressure on consumers ('aggressive practices'), [paragraphs 4.16 - 4.18] or

- not acting with the standard of care and skill that is in accordance with honest market practice and in good faith (failing to show professional diligence) [paragraphs 4.21 – 4.24], or
- engaging in one of the 'banned practices'. Examples include displaying a trust mark (such as a logo) without authorisation and claiming falsely to be a member of a professional body or an approved redress scheme, when you are not [paragraphs 4.19 – 4.20].

2.5 Apart from the banned practices (which are banned outright), these breaches have a threshold: the commercial practice will be unfair if it affects or is likely to affect the transactional decision making of the average consumer.<sup>5</sup>

- 'Transactional decision' is defined widely and is not simply a consumer's decision to use your services or not, or to buy or let a property or not. It could, for example, be a client's decision to accept an offer, a tenant's or a buyer's decision to enquire about a property, commission a survey or instruct a conveyancer [paragraph 3.4].
- The 'average consumer' is someone who is reasonably well-informed, and reasonably observant and circumspect. For example, an average consumer would pay some attention to documentation given to them, but not necessarily to the small print unless key points in it are brought to their attention. An average consumer would check out publicly available facts for themselves where this is straightforward to do, although what checks they actually make will be influenced by the information that you have given them [paragraph 3.4].
- The important question is whether your act or omission is likely to have an impact on the average consumer, not an actual consumer (who may be more or less well informed, observant or circumspect than the average one).

2.6 The CPRs' prohibition on misleading actions is very similar to the prohibition on making false or misleading statements provided by the (now repealed) Property Misdescriptions Act 1991.

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<sup>5</sup> The general prohibition on unfair commercial practices in regulation 3 of the CPRs requires that the practice materially distorts, or is likely to materially distort, the economic behaviour of the average consumer regarding the product.

2.7 The CPRs' prohibition on misleading omissions places an additional duty on you to provide the 'material information' that the average consumer needs, according to the context, to make an informed transactional decision [paragraphs 4.9 – 4.10].

- The average consumer who is thinking of contracting with you will need to know such things as: what services you will provide, your fees and charges, your terms of business, and any tie-in period.<sup>6</sup>
- In the most straightforward property sales and lets, the material information that you should give to consumers may be quite basic (the asking price, location, number and size of rooms, whether the property is freehold or leasehold, length of lease, amount of service charges and ground rent, and the status of utilities/services). However, depending on the circumstances of each sale or let, material facts could include the length of the lease, the level of charges payable under a lease, known ambiguities concerning title, significant issues or occurrences at the property, major structural defects, cladding, status of connection to mains services/utilities; as well as things which could have an impact on the property such as potential developments, planning issues, highways issues, conservation areas, etc. This information should be provided as early in the marketing process as possible and not left until a potential buyer expresses an interest in a property.
- When acting as a letting agent, the material information you should give to consumers should include information on the length of the tenancy, any fees which will be charged, how to claim a deposit refund, amount and date payable of rent, furnishings included within the property and how any damage will be charged for.
- Should a customer provide you with information you know or suspect to be inaccurate you should inform your customer and ask them to clarify their position as you may breach the CPRs (or BPRs) if you fail to disclose material information. Should a customer provide you with inaccurate information which you do not know or could not reasonably have known to be incorrect, the customer may be liable under the CPRs or BPRs (as appropriate). You are advised to make appropriate checks to verify any information given to you which you later rely on.
- At the outset of the marketing process, you are not expected to research issues that are outside your line of business, for example, where your business is marketing

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<sup>6</sup> The Estate Agents Act 1979 requires certain information to be provided in relation to 'estate agency work' – see [www.nstelat.uk](http://www.nstelat.uk) for further advice.

property and the issues are those that a surveyor or conveyancer would investigate. However, if you are aware of (or have been put 'on notice' about) such information, or become aware of information later on, you cannot ignore or suppress it. If the information is material, you will need to disclose it immediately. This includes, for example, information you become aware of from surveys undertaken from abortive transactions

2.8 The BPRs prohibit you from engaging in misleading activities in your dealings with other businesses. Your advertising to attract new clients is covered as well as your advertising of property for sale or let. The BPRs also set out the conditions under which you are allowed to make comparisons with your competitors [paragraphs 3.5 – 3.8 and 4.25 – 4.31]

2.9 To satisfy your obligations under the CPRs and BPRs, you need to treat consumers, business customers and competitors fairly. It will help if you can show that you act diligently, in keeping with any professional standards and taking reasonable steps to avoid committing a breach. For example;

- You take care in gathering and presenting the information that you will use to advertise your services and market property.
- You have systems and safeguards in place to ensure that your marketing information is accurate, balanced and does not leave out material facts.
- When you see or hear something that puts you on notice that there might be a problem, you take reasonable steps to establish the facts for yourself. For example, you ask questions, carry out your own checks and/or consult official sources, as necessary.
- You act promptly to correct or update your marketing and to pass on information whenever new information becomes available.
- You follow any applicable industry codes (such as the TPO Code of Practice for Residential Estate Agents and Residential Letting Agents, or RICS guidance)
- You keep comprehensive and up to date records of all your dealings with customers
- Where you have exhausted the steps that you can reasonably be expected to take, you are open about any remaining gaps in your knowledge.

### 3 OVERVIEW OF THE REGULATIONS

3.1 The CPRs and BPRs came into force in May 2008. They apply to businesses<sup>7</sup> across all sectors, not just property businesses.

#### **The Consumer Protection from Unfair Trading Regulations 2008 (CPRs)**

3.2 The CPRs prohibit you from engaging in unfair commercial practices in your dealings with consumers. There are a number of important concepts in the CPRs that are explained in this section.

**Consumers** - defined as individuals who in relation to a commercial practice are acting for purposes wholly or mainly outside their trade, craft, business or profession (referred to below as 'business' for shorthand).<sup>8</sup> If they are acting partly for the purposes of their business, but also partly for non-business reasons, it is possible they may still be considered to be consumers.<sup>9</sup>

In relation to property transactions, consumers include:

- clients (who themselves may not be a property agent) who have contracted to use your property services
- potential clients (as above) who are looking to pay for property services and have come into contact with you and/or your marketing
- potential or actual buyers, sellers or tenants (who are not themselves businesses) who come into contact with you and/or your marketing as you act on your client's behalf.

**KEY POINT** - In the CPRs, 'consumer' goes beyond a client who pays for your services or someone who buys directly from you. It also includes: a prospective client, a prospective or an actual viewer, a potential buyer of your property (for example where you are selling homes you have built), someone who buys or seeks to buy from your client, a tenant, a landlord and someone who sells property to you.

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<sup>7</sup> In the regulations, businesses are referred to as 'traders' and are defined as a person acting for purposes relating to that person's business, whether acting personally or through another person acting in the trader's name or on the trader's behalf.

<sup>8</sup> CPRs 2(1). If the person with whom you are engaging is acting in the course of their trade, craft, business or profession, then the BPRs may apply.

<sup>9</sup> In these situations, property agencies should ensure that they comply with the CPRs as the seller /buyer/tenant/landlord may be a consumer. Complying with the CPRs is also more likely to ensure the requirements of the BPRs are met.

**Commercial practice** - the CPRs apply to commercial practices where a business<sup>10</sup> is dealing with a consumer or consumers. Commercial practices refer to the activities and conduct of a business that are directly connected with the promotion, sale or supply of a product to or from consumers. A commercial practice may be a single act or omission, or a course of conduct over a long period of time. 'Product' is defined very widely and includes services and immovable property. The CPRs apply to all stages of commercial activity - before, during or after a commercial transaction (if any) in relation to a product.<sup>11</sup> The business or trader need not be selling, supplying or purchasing the product itself, for example it may be an agent acting on behalf of the buyer or seller.

In relation to property agents, you engage in commercial practices when, for example, you advertise your services, offer pre-agreement advice to a client, describe a property for sale/rent, interact with potential buyers/tenants/landlords, negotiate a sale/purchase/rental, or handle a consumer's complaint about your conduct.

**KEY POINT** - The CPRs apply to the whole range of your business activities that affect consumers (see above for who might be a consumer).

3.3 The CPRs contain broad rules outlining when commercial practices are unfair. These fall into five main categories (see 3.4 in relation to the first four).

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

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<sup>10</sup> In this guidance, 'business' is used to mean either a trader or a business.

<sup>11</sup> CPRs 2(1). A commercial transaction is essentially where rights and obligations are created, usually by a contract. It is distinct from a transactional decision (see para 3.4) which is simply a decision in relation to a product and which need not involve any rights or obligations.

3.4 For a practice to be unfair under the first four categories above, it must cause, or be likely to cause, the 'average consumer' to take a different 'transactional decision'.

**Average consumer** - the CPRs are designed to provide a level of protection that is proportionate. However, the precise level of care that you have to display depends on the circumstances of the case. The benchmark is the 'average consumer': someone who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors.<sup>12</sup>

The CPRs do, however, provide for where a commercial practice is targeted at a particular group of consumers.<sup>13</sup> In these cases, the 'average consumer' will refer to the average member of that group, not the average consumer generally. This will be relevant to you if you are targeting your commercial practice at a particular group of consumers.

The CPRs also provide expressly for groups of consumers who are particularly 'vulnerable' to a commercial practice. These are consumers who, because of age, infirmity or credulity<sup>14</sup>, may be more at risk from an unfair commercial practice. This might, for example, include the elderly and first-time buyers.<sup>15</sup> If services are canvassed at, or property is marketed at, a vulnerable group, then the 'average consumer' will refer to a member of that group, not the average consumer generally. In such cases, your standards will be expected to be higher to address the vulnerability of the average member of that group.

In the CPRs and in this guidance, the average consumer therefore means one of the following (whichever is applicable): the average consumer, the average targeted consumer or the average vulnerable consumer.

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<sup>12</sup> CPRs 2(2) and European Court of Justice case law.

<sup>13</sup> Indications of whether a group is targeted might be found in the way the advertising is placed, the language of a commercial communication, the nature of the product and the context.

<sup>14</sup> 'Credulity' is a state of willingness to believe in one or many people or things in the absence of reasonable proof or knowledge. Credulity is not simply a belief in something that may be false. The subject of the belief may even be correct, but a credulous person will believe it without good evidence.

<sup>15</sup> The elderly may be vulnerable on account of age, for example they may find it harder to resist pressure sales techniques, especially when dealing with sales staff in their own homes. First-time buyers may be vulnerable on account of credulity, since they have no previous experience of the home-buying process. Tenants may be vulnerable on account of lack of experience of the letting process.

In general, in relation to property matters, the average consumer may be expected to:

- pay some attention to documentation, but not necessarily to read or understand small print unless key points are brought to their attention
- make known their own particular requirements
- in the case of potential buyers/tenants, view the property (if this can be done) and take notice of what they can see
- make their own enquiries, for example checking out publicly available facts for themselves where this is easy to do. Note, however, that if you tell the average consumer something, they may decide to rely on what you have told them, rather than making their own or any further checks
- ask questions about some of the things they do not understand, but generally to trust what representatives of property sales businesses say
- instruct other professionals at the appropriate stage of a transaction (for example, surveyors, solicitors or conveyancers).<sup>16</sup>

Generally, there will be limits to how much information the average consumer can take in at one time and they will be influenced by marketing techniques, for example the way prices are presented. They may also tend to trust the particular trader with whom they are dealing. You should therefore take reasonable steps to ensure that consumers have understood any information you have given to them, and that they have had the opportunity to ask questions or clarify anything which they may not have understood.

**KEY POINT** – Your commercial practices will be judged in relation to the average consumer, not an actual consumer (who may be more or less aware than the average consumer).

**Transactional decision** - consumers need to be able to make informed decisions when dealing with a business carrying on a commercial practice. The CPRs express this concept as the 'transactional decision'. A transactional decision can include a decision to find out more about your services, or to rule out using the services of one of your competitors. It is a very broad concept, and is not limited to decisions with financial

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<sup>16</sup> Note that the point at which the seller or prospective buyer instructs other professionals might vary depending on the type of property sale, for example it would take place at an earlier point for property auctions than general estate agency sales.

consequences. A transactional decision means any decision taken by a consumer concerning a 'product' (which includes property), including:

- whether or not to make further enquiries, or arrange a viewing
- whether or not to buy, sell or let
- whether or not to pay in whole or part
- whether or not to pay a deposit and associated fees
- whether or not to retain or dispose of a product
- whether or not to exercise some contractual right, and/or
- how, and on what terms, to do these things<sup>17</sup>

Your commercial practices – for example your advertising, market appraisal, description of property for sale/rent or the advice you give during negotiations – can affect consumers' transactional decisions, for example:

- a client's decision whether and on what terms to sign or renew an agreement with you, or their decision to end an agreement
- a seller's or landlord's decision whether to put their property up for sale/let or take it off the market, to accept or turn down an offer, or to exchange contracts or not
- a buyer's or tenant's decision whether to enquire about, or view, an advertised property,
- a tenant's decision to pay a holding deposit, or
- whether and on what terms to make an offer on a property, instruct a solicitor or licensed conveyancer, commission a survey, apply for a mortgage, or complete on the purchase.

**KEY POINT** – A transactional decision is defined widely and is not simply a consumer's decision to use your services or not, or to buy or rent a property or not. People who

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<sup>17</sup> CPRs 2(1).

want to sell, buy or rent a property are likely to make many transactional decisions before they actually commit to the transaction.

### **The Business Protection from Misleading Marketing Regulations 2008 (BPRs)**

3.5 The BPRs prohibit you from engaging in misleading activities in your dealings with other businesses, for example when advertising your services to potential clients that are businesses or marketing property for sale or rent to businesses.

3.6 Advertising covers not only broadcast, billboard and print advertising, but also other types of marketing and promotional activities such as verbal representations and details in catalogues or websites.

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

- engage your services under terms that they would not otherwise have agreed to, and/or
- incur expenses that they would not otherwise have incurred, and/or
- buy, sell or let a property when they would not otherwise have bought, sold or let (for example, where the fact that only lorries of a certain size or under could gain access to the property is omitted from the property particulars), and/or
- buy or sell or let a property on more disadvantageous terms than they would otherwise have done (for example, where the business being sold is described as the market leader in its field, yet there is no evidence to support such a statement), and/or
- lose a client or a potential client (for example using advertising comparing the performance of another business).

3.8 The BPRs also set out the conditions under which traders are permitted to make comparisons with competitors, whether those competitors are named or merely implied, when advertising or marketing to businesses, consumers or both.<sup>18</sup>

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<sup>18</sup> The list of conditions can be found in the guide to the BPRs on the Business Companion website [www.businesscompanion.info](http://www.businesscompanion.info).

3.9 If the same comparative advertising misleads or is likely to mislead the average consumer, then there may also be a breach of the CPRs.

## **4 THE BREACHES**

- 4.1 In this section, paragraphs 4.3 to 4.24 relate to the CPRs and 4.25 to 4.31 to the BPRs. For the breaches, we look at each type of breach individually. In practice, however, they might be looked at together. For example, under the CPRs it might be the combined effect of a misleading action and misleading omission that causes the average consumer to take a different transactional decision.<sup>19</sup>
- 4.2 The regulations have broad coverage and the types of breaches which could arise will depend on the particular services your business offers. For a traditional estate or letting agency, for example, many of the examples in this section may be relevant. At the other end of the spectrum, a business carrying out a service simply of advertising property for sale by others may have little or no direct contact with buyers or sellers, including on-line. The activities carried out must still comply with the regulations but the standards necessary to ensure this will be different.

### **The Consumer Protection from Unfair Trading Regulations 2008 (CPRs): Giving misleading information to consumers**

- 4.3 It is a breach of the CPRs for businesses to give misleading information to consumers, for example false or deceptive advertisements or statements, where this causes or is likely to cause the average consumer to take a different transactional decision. This is known as a misleading action (regulation 5).
- 4.4 An unfair commercial practice may mislead consumers through the false information it contains, or through the practice itself, or because its overall presentation is deceptive or is likely to be deceptive – even where the information it contains, taken literally, is factually correct.
- 4.5 Misleading information may be given by any means, whether in person or by distance communication including electronic, written, verbal or visual presentation. This could include, for example;
- misleading information given over the telephone or in the course of discussions, for example with prospective clients before taking instructions from them or with potential buyers or tenants when they are arranging to view a property

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<sup>19</sup> *OFT v Purely Creative Limited and others* [2011] EWHC 106 (Ch).  
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- misleading details in property particulars or other marketing material, for example newspaper advertisements, web pages and brochures
- misleading photographs, video clips, floor plans, artist impressions, models or show homes.

4.6 Here are some illustrative examples of misleading actions. It is not an exhaustive list. In each case, the test is whether the average consumer would be misled and, as a result, would take a different transactional decision.

#### General

- Advertising that you are bound by a code of conduct, but failing to comply with the requirements that such a code lays down.<sup>20</sup> This includes using a logo without permission and claiming to belong to a scheme of which you are not a member (these are also banned practices, see paragraphs 4.19-4.20 for detail on this).

#### When you advertise for new business

- Making statements in your advertisements that exaggerate your sales or lettings record, or imply that your business has a presence in a particular area when it does not, or has more offices than it actually has.
- Putting up 'for sale' or 'sold' signs (on boards, on websites or in marketing material), when you are not in fact responsible for marketing the property in question.
- When part of a multi-agency agreement, claiming that you have sold a property when it was sold by another agent.
- Distributing leaflets to homes claiming that you have buyers lined up for these sorts of properties or that you have just sold a similar property when this is not true.
- The use of phrases such as '...contact me urgently' on direct marketing material (business cards, compliment slips etc.) which could create a misplaced sense of urgency or importance (especially with reference to 'vulnerable' groups of consumers).
- Keeping 'to let' boards on properties when they have already been let, or otherwise imply that you have other similar properties to let when this is not true.

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<sup>20</sup> At CPRs 5(3)(b), it says such requirements must be 'firm, capable of being verified and not aspirational'.

### When you gain new clients and instructions

- Advising a likely selling price or rent in the market appraisal that is not based on a fair and honest assessment of current market conditions (but is quoted, for example, as a tactic to acquire the instruction).
- Saying that a property is being bought 10 per cent below market value when you have no good basis for that claim.
- Offering a property management or letting agent service without explaining what the service includes, how long the contract lasts for and how to terminate the contract.

### When you market property

- Misusing words or phrases like 'new instruction', 'new' or 'new on the market', when the property has already been advertised for some time, or has been taken off the market previously for only a very short period.
- Misdetecting the main characteristics of property for sale or let, for example its price, location, number and size of rooms, length of lease, level of service charge, any ongoing maintenance charges, restrictive covenants (in Scotland, real burdens).
- Using photographs that do not depict the property accurately, or altering images to leave out problematic features.
- Falsely claiming or creating the impression that property for sale or let has met building and safety standards, accreditation, guarantees, etc., when it has not, for example saying a property has planning permission when it does not, or that a property has received a cladding assessment when it has not.
- Charging fees which are prohibited
- Making a selling point of a feature when you have contrary information (for example 'secluded garden' when there is a public right of way through the garden, 'peaceful area' when a bypass is planned close to the property, 'nice views of surrounding

countryside' when there is a power plant next to the property, 'off street parking' when the parking is on a public highway).<sup>21</sup>

- Making broad statements about the condition of property (for example 'immaculate condition', 'recently decorated') or its features (for example 'double glazing', 'central heating') when the description only applies to parts of the property, not the whole.
- Giving misleading information about service charges or maintenance payments that must be paid to property managers (in Scotland, factors), landlords (or their agent), or facilities management companies.

#### Marketing a property via virtual viewing

This includes video footage and audio/voiceover. As an agent you should take all reasonable precautions to avoid an offence by yourself or any person under your control, including for example where a video viewing is conducted by a vendor, landlord or other third party. A video viewing should include all the information that a physical viewing would, but care should be taken to ensure that as much as possible is shown and demonstrated including any bad points as well as good. No attempt should be made to avoid bad points as this could constitute a misleading omission under the CPRs. A video viewing could be conducted 'live' as a two-way interaction with the prospective purchaser/tenant which gives the viewer the opportunity to ask questions and to ask for services/fittings such as taps and light fittings to be demonstrated. As with the preparation of other marketing material, agents should make reasonable checks to verify the truth and accuracy of the content of the video. It is recommended that where possible viewers are given a copy of the video viewing, or make their own recording and that a copy is also recorded in the property file and retained by the agent. This may not always be possible and the vendor, landlord, or other person whose information may be divulged, would have to agree and regard must be paid to data protection legislation, security issues, etc.

#### When you negotiate and make sales/lettings

In relation to a seller or landlord who is your client:

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<sup>21</sup> Such statements would be misleading because information has not been given in a full and balanced way. Breaches of this type might also involve misleading omissions.

- giving them a false impression of the interest in their property, for example by inventing or exaggerating feedback from viewings
- telling them a potential buyer will be able to buy without needing a mortgage when you do not have evidence that this is the case (in order to induce the seller to accept the offer)
- telling a potential tenant they will be able to take occupation without the need of a deposit when, in fact, rent has been elevated to incorporate such a deposit
- creating false offers or
- misrepresenting the detail of an offer (for example whether the offer is conditional on something else, such as obtaining finance).
- quoting false high offers to induce a potential buyer to put in their own offer at a higher price (to outbid those 'rival' offers) or false low offers to encourage a seller to accept a genuine offer that would otherwise be rejected as too low.
- informing potential tenants of other parties who are interested in the property when there are no such parties
- refusing to pass on an offer because a potential buyer/tenant does not use businesses you recommend, for example your approved solicitor or mortgage advisor (in the case of buyers), or the refusal of a tenant that does not wish to use a deposit alternative scheme instead of a traditional deposit.

#### When you deal with complaints

- Claiming that you follow a specific code of practice, or have an internal complaints system that has been approved by a recognised body when you do not, or claiming to be a member of a recognised redress scheme when you are not.
- Misinforming a complainant about their rights under a redress scheme, or under the law.

#### **CPRs: Failing to give necessary information to consumers (misleading omission)**

4.7 It is a breach of the CPRs for businesses to mislead consumers by failing to give them the information they need in order to make an informed decision, where this causes or is likely to cause the average consumer to take a different transactional decision. This is known as a misleading omission (regulation 6).

- 4.8 This might, for example, occur by leaving out or hiding important information, or providing important information in an unclear, unintelligible, ambiguous, or untimely manner.
- 4.9 A misleading omission focuses on what you have not said – that is, information you have left out, hidden, not made clear or been slow to disclose, where this has or would have a particular effect on the average consumer. The duty not to mislead by omission is limited to providing what is necessary information, described in the CPRs as 'material information'.

### **Material information**

The CPRs define material information as 'the information that the average consumer needs, according to the context, to take an informed transactional decision'.<sup>22</sup>

In practice, this means equipping the average consumer with all the information they need to make a particular transactional decision on an informed basis. Consumers need to be provided with the right information at the right time, so that they are able to find the product that is right for them in a straightforward way.

Material information is not the same as the information that a consumer might like to have in order to make what would be the best possible decision for them. Rather, material information is the information without which the consumer cannot make a properly informed decision. For example, a buyer might like to know the lowest price that the seller would accept. However, this is not material information, since knowledge of it is not necessary for a buyer to make a considered offer.

What is needed in practice is likely to depend on the stage the consumer has reached in the buying, selling or letting process and what decision they are considering taking. For example, what information is necessary for the average consumer to decide whether to enquire about or view a property is not necessarily the same as that which is needed when deciding whether to make an offer to buy or agree to pay a holding deposit. Some information will, however, remain necessary (and therefore material) at all stages of the process.

Where a consumer is thinking of contracting with you, the material information that you must provide beforehand is likely to include:

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<sup>22</sup> CPRs 6(3)a. Material information is also any information requirement which applies in relation to a commercial communication as a result of a European Community obligation (6(3)(b)).

- a description of the services you will provide
- your fees and charges, how they will be calculated and when they will be payable
- terms of business (for example whether sole agency or with sole selling rights - and when your fees become payable under these arrangements)
- the length of the agreement and how it can be terminated<sup>23</sup>
- if you are acting for a client seller, the services you will offer to potential buyers
- any personal interest you may have in the sale of the property<sup>24</sup>
- the existence of any cancellation rights - if you enter into a contract with a consumer in their home or place of work, or without face-to-face contact (for example online)

#### Material information for selling property

The information that is material and which you should provide to consumers in your general advertising of a property for sale is likely to include, as a minimum, the asking price location, number and size of rooms, the form of ownership (for example freehold or leasehold, including length of lease and associated charges as detailed below), status of connection to services/utilities (see further detail below) and EPC (energy performance certificate) rating. In the most straightforward sales, there may be little you need to add to this as the buyer's interest in the property grows. However, much will depend on the circumstances of each sale. The following is not an exhaustive list, but material information will also include (if relevant):

- any significant incidents which occurred at the property (including events of notoriety if the property was the scene of any crime). Such events would include, but are not limited to unnatural deaths, suicides and sexual offending. Care must be taken not to identify any living victim of sexual abuse. Other factors such as incidents in neighbouring properties and how much time has elapsed since the incident must be considered on a case by case basis. This could include a known sex

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<sup>23</sup> a consumer must be able to cancel the agreement at a time which allows for any notice period to end at the actual end of the term of the agreement. In other words a 12 month agreement with one month's notice, should allow for notice to be served on month 11. It should not be a 12 month plus one month agreement.

<sup>24</sup> Or any personal interest you may have in the supply of an ancillary service to the buyer, for example a referral fee.

offender living nearby (please refer to The Sexual Offences (Amendment) Act 1992), or that the property still attracts attention because of a notorious murder.

- the length of any lease
- the amount of the service charge (including any outstanding charges), ground rent including how often this is reviewed and any other payments required under a lease
- known ambiguities concerning the property's title
- any major structural defects
- cladding and safety
- substantial limitations on the use of the property
- status of connection to mains services/utilities, (such as water, drainage (including whether it is mains drainage or a cess pit/septic tank), electricity, gas, telephone, broadband)
- where the property has a converted loft or other built on or into space, whether the seller has obtained the necessary approval for it (for example planning permission or building regulations consent)
- if the property is a new build, an explanation of the home warranty cover
- if you are providing a financial product to assist the purchase, the financial arrangements that the buyer will enter into
- the buyer's source of funds (to assist a seller in deciding whether or not to accept an offer)

#### Material information for letting property

The information that is material and which you should provide to consumers in your general advertising of a property for let is likely to include, as a minimum, the rent, deposit and holding deposit amount, location, number and size of rooms, status of connection to services/utilities (see further detail below) and EPC (energy performance certificate) rating. You will also need to include the amount of any other permitted fees you will charge. If you can't work out how much this will be, as in the cost of energy bills, you should include how this will be worked out, for example how the gas bill will be split between all tenants sharing a meter. The following is not an exhaustive list, but material information will also include (if relevant):

- all relevant information around a tenancy, such as the length of the tenancy, how is it to be extended or ended
- what happens if you let to a number of people and one tenant leaves
- how any bills will be split between tenants
- once a tenant enters into a tenancy, you will need to give them the deposit protection number and details on how to claim their deposit back
- information on what happens if damage occurs or an item is missing at final inventory
- cladding and building safety
- status of connection to mains services/utilities, (such as water, drainage (including whether it is mains drainage or a cess pit/septic tank), electricity, gas, telephone, broadband)

4.10 There is a requirement on you to make reasonable checks in order to find out if any material information exists. For example, this may include the existence of any planning or conservation issues which directly affect the property. What information a consumer needs to know at each stage of the process in order to make a sufficiently informed decision should be approached objectively. It is not necessarily what you consider the consumer in front of you might need, but what the reasonably well-informed, reasonably observant and circumspect consumer might need. However, in determining whether you have misled by omission, the circumstances and the context of your commercial practices will be taken into account.

4.11 Context is very important when deciding whether material information has been left out, hidden, not made clear or not given in good time. Context means:

- the factual context (for example what you actually know even if it is something you would not ordinarily be expected to enquire into)
- all the features and circumstances of your commercial practice, including what is expected of you as a property agent and given the services you are offering (for example a business that is only retained by a consumer to market a property for sale would not be expected to carry out its own survey or do conveyancing checks as part of that marketing service) and

- the limitations of the way the commercial practice is communicated, including constraints of space or time (for example the limit on how much information can be included in a newspaper advertisement) and what measures you take to make the information available by other means.

#### 4.12 Provided you:

- give material information to consumers in good time
- do not deliberately hide or leave out necessary information when dealing with consumers, and
- take reasonable steps to find out information and to check things out when you discover a problem or are put on notice there might be one, and respond appropriately

You should avoid misleading by omission.

4.13 Crucially, you cannot avoid liability for misleading by omission by adopting an 'ask no questions, shut one's eyes and close one's ears' approach.

4.14 To clarify what taking reasonable steps and checking things out might mean:

- There will be some material information that is known to you, obvious to you or easy for you to find out (for example the number of rooms in a property, its location, tenure, connection to services etc.). In these cases you may identify all the material information needed from your knowledge or the checks you undertake personally.
- In other cases, there may still be gaps in the information you have, or you need to check further (in order to give the level of information reasonable for the service you are providing). You may find you need to ask your client or third parties for information, for example where you can see there is a loft conversion but you do not know that the work has the necessary approvals and consents. When you do this, you may find it is satisfactory or that it supports what your own checks disclosed and you may decide no further checks are therefore required.
- Where your client or third parties provide you with information that you know is wrong, or have reason to believe may be wrong, you should follow up with questions, ask for documented proof and/or make your own enquiries in order to satisfy yourself what is correct. For example, if your client says there are 160 years left on the lease, but you have marketed other apartments in the same block recently that only had 75 year leases, you should ask your client for proof that the apartment has as long a lease as they claim.

- Where the response from your client or third parties 'rings alarm bells', you will need to probe further or challenge what you have been told. For example, if your client makes particular claims about a property, for example length of remaining lease, but cannot or will not supply written evidence to back up such claims, you should take further action to satisfy yourself of the correct position.
- You must then provide any material information you have identified or that has come to your attention.
- The requirement not to mislead by omission applies throughout the marketing and transaction process of the property. This means that if you become aware of material information later on, you must still disclose it. An example of this would be where you learn of a serious problem with the seller's title over the property, or the structural condition of the property, as a result of a failed sale. In the case of property for sale or let, there may have been previous disputes with the neighbours, e.g. noise, which is the reason why the property is vacant. The duty not to mislead by omission would require you to disclose such issues to subsequent prospective buyers/tenants.
- You may receive information from a variety of sources and some of these sources will be less reliable than others. When considering information, you should use your professional judgement in assessing its credibility and whether it needs further corroboration before you decide whether to disclose it.

4.15 Here are some illustrative examples of misleading omissions. It is not an exhaustive list. In each case, the test is whether the average consumer would be misled and, as a result, would take a different transactional decision.

When you advertise for new business

- Failing to provide sufficient information about the range of relevant services you offer, so prospective new clients are not clear what is included as part of the deal or what you will actually provide yourself.

When you gain new clients and instructions

- Failing to provide a client with full information on fees and charges, such as how they are calculated and when they will be payable, and on the terms of business (for example, sole agency, sole selling rights, length of contract, any tie-in period) before they become contractually bound. Any prices given to consumers should include VAT. It is helpful to write prices out both numerically and in words.

- Failing to adequately highlight or draw to a prospective client's attention unusual or surprising terms in your terms and conditions.<sup>25</sup>
- Failing to inform a prospective client of the types of services that you will offer to the buyer.
- Failing to disclose an interest you have in the sale/let.

#### When you advertise property

- Failing to disclose the property's main characteristics to a prospective viewer (for example its price, location, number and size of rooms, length of lease, level of service charge, restrictive covenants (in Scotland, real burdens)).
- Failing to mention significant non-standard features that you are aware of about a property (for example house is freehold but garage is leasehold, public right of way through garden, shared ownership of parking area and path, property has a sitting tenant, roof space is leased to a solar panel provider, the property has a Green Deal commitment).
- Failing to mention a serious problem with title to the property (for example should you become aware of the problem when a sale fails).
- Failing to provide relevant information that you are aware of about the condition of the property (for example that the property is subsiding and is in need of underpinning, or that major repairs are necessary).
- Failing to clarify that something appearing in a photograph, which a potential consumer would reasonably assume was included in the property, was not included.
- Failing to outline the tenancy deposit and any holding deposit required.

#### When you negotiate and make sales

- Failing to pass on offers to your seller client, unless they have asked you specifically not to do so.
- Failing to inform a potential buyer whose offer has been accepted that the seller wishes the property to continue to be marketed for sale up to exchange of contracts.

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<sup>25</sup> An example would be basing commission on the asking price rather than the final selling price. Note also that where a term which has not been individually negotiated (for example it is one of your standard terms) is onerous and surprising, and you do not draw it to the consumer's attention, you may not be able to rely on it at all, due to the unfair terms in contracts provisions of the Consumer Rights Act 2015.

- Failing to inform your seller client of services that you have been asked to provide to the buyer or referral fees that you will earn (for example for introducing the buyer to a mortgage lender, surveyor or conveyancer).
- Failing to take reasonable steps to find out from a prospective buyer the source and availability of funds for buying the property and pass this information to the seller

#### When you negotiate and agree rentals

- Failing to ensure that the tenant is aware of the length of the tenancy, the amounts that they are required to pay
- Failing to clarify arrangements for certain repairs

#### When you deal with complaints

- Failing to inform clients of your internal complaints system or provide full information on how it operates.
- Failing to inform your clients about your membership of an officially approved redress scheme and how they can contact the scheme provider.

### **CPRs: Acting aggressively**

4.16 It is a breach of the CPRs for businesses to adopt commercial practices that intimidate or exploit consumers, restricting (or likely to restrict) how they act or their ability to make free or informed choices, and which cause or are likely to cause the average consumer to take a different transactional decision. These are known as aggressive practices (regulation 7).

4.17 In determining whether the practice is aggressive, various factors would be taken into account, for example:

- when, where, how and how persistently the business is carrying out the practice
- whether the business is exploiting a specific misfortune or circumstance of a consumer, which is likely to impair their judgement
- whether the business is exploiting a position of power in relation to the consumer, in order to exert pressure on them, in a way that significantly impairs the consumer's ability to take an informed decision
- whether the business has placed excessive barriers on the consumer exercising their rights

- whether the business has used threatening language or threatened to take legal action against a consumer that cannot legally be taken.

4.18 Here are some illustrative examples of aggressive practices. It is not an exhaustive list. In each case, the test is whether the average consumer's freedom of choice or conduct is (or would be likely to be) impaired and, as a result, they take (or would be likely to take) a different transactional decision.

When you gain new clients and instructions

- Imposing onerous or disproportionate requirements which prevent a client from exercising rights to terminate an agreement or switch to another property agency.
- Refusing to allow a consumer to cancel their contract with you, where a cancellation period applies and has not expired.
- Demanding prohibited payments, holding deposits or security (rent) deposits which exceed permitted fees caps

When you market property

- Pressurising a potential buyer to use associated services, for example to take out a mortgage through the in-house mortgage advisor or to use a particular firm of solicitors or licensed conveyancers.

When you negotiate and make sales

- Pressurising (for example by persistent and/or aggressive telephone calls) the buyer to act quickly to put in an offer, raise their price, skip the survey, finalise the sale and/or exchange contracts.
- In order to make commission quickly, pressurising a seller client to accept an offer at a lower price than is reasonable for their property, for example by telling them that they cannot get a better offer<sup>26</sup>.
- Pursuing commission to which you are not entitled.

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<sup>26</sup> Advice about whether offers should be accepted or not is generally inappropriate unless backed up by material facts, past experience and the sale of comparable properties

### When you manage rental properties

- Trying to obtain vacant possession of the property without following correct procedure
- Refusing to undertake repairs to the property unless the tenant complies with unlawful and unnecessary demands
- Making statements or preventing tenants from seeking third party involvement that they are entitled to, such as making complaints to the local authority regarding property condition
- Carrying out actions which interfere with the tenants' quiet enjoyment of the property, such as disconnecting utility services.

### When you deal with complaints

- Intimidating, pressurising or coercing consumers into dropping complaints against your business, for example by the use of threatening or abusive language or behaviour.

### **CPRs: Banned practices**

4.19 There are a number of business practices that are considered unfair in all circumstances and which are prohibited. These are the CPRs' banned practices (schedule 1).<sup>27</sup>

4.20 The following are illustrative examples of banned practices. It is not an exhaustive list. These practices are banned outright, meaning that a breach is not dependent on whether the practice would have any effect on the average consumer. Some may be relevant to property agencies.

### When you advertise for new business

Displaying a trust mark without authorisation (banned practice 2), or claiming that a trader has been approved by a public body when the trader has not or making such a claim without complying with the terms of the approval (banned practice 4). For example, displaying the logo of an ombudsman, trade body or enforcer when not authorised to do so, or claiming falsely to be a member of a professional body or an approved redress scheme.

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<sup>27</sup> CPRs 3(1) and 3(4)(d). The full list of banned practices can be found in the CPR's guidance at [www.businesscompanion.info](http://www.businesscompanion.info)

### When you gain new clients and instructions

- Passing on materially inaccurate information on market conditions with the intention of inducing the consumer to acquire a product<sup>28</sup> at conditions less favourable than normal market conditions (banned practice 18). For example: -
  - i) telling a prospective seller client that you have sold similar properties recently for a certain price when you have not or that you have potential buyers lined up when you do not;
  - ii) telling a prospective buyer that other properties have sold for a particular price, or that other potential buyers are interested in the property, when this is not true;
  - iii) telling a prospective tenant that they must pay a holding deposit to be allowed to view a property.

### When you market property

- Using bait advertising techniques (banned practice 5) - for example, advertising new build properties for sale at a certain price when the only ones available to buy are at a higher price, or using a broad 'guide price' (such as '£250,000 to 300,000') when you have reason to believe that the seller has no intention of accepting an offer at the lower end of the range.<sup>29</sup>
- Falsely stating that a product will only be available on particular terms for a very limited time, in order to facilitate an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice (banned practice 7) - for example, falsely telling a buyer that the price of a new build house is about to go up, when this is not true or telling a prospective tenant that you have a list of other people waiting to view the property when this is not the case.

### When you deal with complaints

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

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<sup>28</sup> As mentioned elsewhere in this guidance, 'product' includes services and immovable property.

<sup>29</sup> Reserve and guide prices are permitted in property auctions, provided the requirements of the Sale of Land by Auction Act 1867 are met. Reserve or guide prices should be genuine, set in accordance with professional judgement and applied in good faith.

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

4.21 The CPRs place a general prohibition on unfair commercial practices (regulation 3).

Unfair commercial practices include where a business fails to act in a professionally diligent way (meaning fails to act in accordance with honest market practice or in good faith) in its dealings with consumers. To be unfair, the dealings must materially distort or be likely to materially distort the economic behaviour of the average consumer.

4.22 The standard you must meet to show professional diligence is defined by honest market practice or general good faith in your area of business (here, that of a property business). This is an objective standard, meaning it is not determined by how other property agencies are acting. If you fail to meet this standard, you could still be in breach of the law even if the practice you adopt is widespread in the industry.

4.23 You are likely to be failing to act in a professionally diligent manner if you do not comply with:

- other legislation applying to a property agent business<sup>30</sup> or
- the core requirements of your approved redress scheme (e.g. to publicise that you are registered with such a scheme, to operate and publicise a complaints handling process, and to abide by a final decision made by the scheme, or ombudsman) or other recognised standards in your industry or profession,<sup>31</sup> such as those set by guidance, codes of practice or similar.<sup>32</sup>

4.24 Here are some illustrative examples of breaches of professional diligence.<sup>33</sup>

It is not an exhaustive list. In each case, the test is whether the average consumer's ability to make an informed decision would be impaired appreciably, materially distorting their economic behaviour.

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<sup>30</sup> See, for example, the legislation listed at Annexes A and D.

<sup>31</sup> This may depend on the nature and quality of the standards concerned, including how long they have been in place, what they cover (for example whether requirements go above and beyond the law) and whether they are recognised by regulators or the courts.

<sup>32</sup> The Property Ombudsman's Code of Practice for Residential Estate Agents and RICS' UK Residential Property Standards (the blue book) are two examples.

<sup>33</sup> The unfair practices highlighted at paragraphs 4.3 – 4.20 above may also contravene the requirements of 'professional diligence'.

#### When you advertise for new business

- Falsely listing properties as 'sold subject to contract' or 'let' to create a false impression of your business's success or displaying a 'sold' or 'let' board outside a property you have not sold or let
- Leaving details of properties that you have sold<sup>34</sup> or let on your website or in your office window for a sustained period of time (to the extent that you create a false impression that you are selling or letting more properties than you actually are).

#### When you gain new clients and instructions

- Providing inadequate information to a seller about the legal requirement for certain energy performance information or, in Scotland, for the Home Report (energy report, single survey and property questionnaire).
- Failing to provide adequate information to a seller about the legal requirement to include the details of Green Deal installations in the energy performance certificate.

#### When you market property

- Not carrying out reasonable checks on the accuracy and truthfulness of information that you use in marketing.

#### When you negotiate and make sales/confirm rentals

- Training or permitting staff to use scripts and/or techniques that are intended to mislead consumers.

#### When you manage rental property

- Not using competent tradespeople to undertake repairs/maintenance to the property

#### When you deal with complaints

- Failing to deal with complaints at all or in an honest, fair, reasonable and professional manner.

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<sup>34</sup> For the sake of consistency, 'sold' is taken to mean when contracts have been exchanged

## **The Business Protection from Misleading Marketing Regulations 2008 (BPRs): misleading businesses**

4.25 It is a breach of the BPRs to make representations, advertise or market to other businesses in a way that misleads (or is likely to mislead) them, if this is likely to affect their economic behaviour or injures or is likely to injure a competitor (regulation 3).

4.26 The BPRs apply when you advertise your services to potential new clients that are businesses, when you market property to businesses, and when you make any statement to another trader in order to promote either your own business or the sale/lease of your client's property.

4.27 A representation, statement or advertisement can be misleading if it:

- contains a false statement of fact
- conceals or leaves out important facts
- promises to do something when there is no intention of carrying it out or
- creates a false impression (even where the information itself is literally true), for example that premises are suitable for a type of business where planning permission would be unlikely to be granted.

4.28 The following are illustrative examples of misleading business-to-business advertising. It is not an exhaustive list. In each case, the test is whether the trader (to whom the advertising is addressed or reaches) is misled or likely to be misled and, as a result, alters their economic behaviour or a competitor is harmed or likely to be harmed.

### When you advertise for new business

- Claiming that you have close relationships with potential business occupiers when you do not.
- Claiming that you are the appointed agent of a particular potential business occupier when you are not.
- Putting up 'sold' or 'let' boards outside business properties that you have not sold or let (creating a false impression of your success ).<sup>35</sup>

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<sup>35</sup> Flyboarding – that is, displaying 'For Sale' or 'Sold' boards when no property is for sale or has been sold - is also forbidden by Town and Country Planning legislation.

### When you market property

- Providing misleading information about the property's availability for purchase/lease, its main characteristics, its price, or the conditions under which it can be bought or let.
- Saying or implying to a business buyer that there is planning permission, when there is not, including advertising land as being ready for development when planning permission has not been given.

### **BPRs: making unfair comparisons with competitors**

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

4.30 The conditions relate mainly to ensuring that the advertising:

- is not misleading, whether under regulation 3 of the BPRs or under regulations 5 (misleading actions) or 6 (misleading omissions) of the CPRs
- objectively compares like-for-like, and relevant, representative and verifiable features
- does not create confusion between the advertiser and a competitor
- does not denigrate or discredit the trademarks, trade names or other distinguishing activities of a competitor
- does not take unfair advantage of the reputation of a trademark, trade name or other distinguishing marks of a competitor.<sup>36</sup>

4.31 The following are some illustrative examples of breaches of the rules on comparative advertising.

### When you advertise for new business

- Making comparisons with other property agencies that are not true, for example regarding numbers of property for sale/let, levels of fees and charges, opening hours, number of offices or number of staff.

Advertising that: -

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<sup>36</sup> The full list of conditions can be found in the BPRs guidance at [www.businesscompanion.org.uk](http://www.businesscompanion.org.uk).

- you are the leading property agency in a particular area or field when you are not (or cannot evidence this), and/or
  - you have a particular market share in that area when you do not.
- Providing out-of-date market share information in advertisements.
- Claiming in advertisements that you have more web marketing than any other property agency, when you do not or cannot evidence this.

## **5 STEPS TO HELP YOU COMPLY WITH THE REGULATIONS**

- 5.1 If you are treating consumers, business customers and competitors fairly and honestly, then you are unlikely to fall foul of the regulations. Nonetheless, we suggest that you use this guidance to review your commercial practices and ensure that they are compliant, and to decide for yourself what steps you should take.
- 5.2 In this section, we set out some of the practical steps that we think would help you to demonstrate compliance with the regulations. Following these steps should help you to show that you are acting in an appropriate way and doing what could be reasonably expected of you to treat consumers, business customers and competitors fairly.
- 5.3 What is reasonable to expect of you will depend on the nature of your commercial practice, the services that you provide and the factual context (for example what stage of the marketing or sale/rental process has been reached). At the outset of the property marketing process, it is unlikely that a court would expect you to make detailed enquiries into the issues that a conveyancer or surveyor would look into, for example examining whether the seller has good title to sell or the structural condition of the property – unless, that is, you have led consumers and business customers to believe that these are part of the services that you offer. Later on in the marketing or transaction process, you may discover, or be put on notice about, such problems or difficulties with the property, at which point a court might well expect you to make further enquiries about these matters.
- 5.4 Within the scope of your business activities, you need to consider:
- What systems and safeguards you have and should have in place and what steps you can take to ensure that they work in practice, including appropriate staff training.
  - What audit trails you should maintain to help you to demonstrate that you act in a suitably diligent way.
  - What enquiries and checks it will be appropriate for you to carry out in particular circumstances. If you decide not to make enquiries or undertake checks, you will need to be able to show that you were justified in making that decision and that it was reasonable in the particular circumstances for you to act in that way. Similarly, where you rely on others for information, you need to be able to show that it was reasonable for you to rely on them and to the extent that you did. For example,

while it may be reasonable for you to rely on some information supplied to you at the outset of the instruction process by your client, if later on you discover reasons to doubt its accuracy, you should take appropriate steps to check whether the original information supplied is indeed correct.

### **When you conduct your business (general considerations about criminal offences under the regulations)**

5.5 There is a defence of due diligence to some criminal offences under the CPRs (misleading actions, misleading omissions, aggressive practices and virtually all of the specific banned practices) and BPRs (misleading advertising). In order to prove that you have behaved with due diligence, you need to show that you committed the offence because of:

- a mistake, or
- reliance on information supplied to you by someone else, or
- the act or default of someone else, or
- an accident, or
- another cause outside your control

**AND** that you took all reasonable precautions and exercised all due diligence to avoid committing the offence.<sup>37</sup>

5.6 The key thing to bear in mind is that you need to be able to show that you acted appropriately to minimise the risk of something going wrong (due to a mistake, an accident etc). For example, where you rely on information supplied by someone else (such as your client), you must still exercise your own judgement before including it in your marketing.

5.7 If you are prosecuted for failing to show professional diligence (which the CPRs prohibit generally) you will not have a due diligence defence available to you – what is listed at 5.5 above will not apply. If you knowingly or recklessly allow your conduct to

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<sup>37</sup> The requirements in this bullet are similar to those that were in the (now repealed) Property Misdescriptions Act 1991 (PMA). The courts may draw on PMA case law when considering some aspects of the due diligence defence under the CPRs and BPRs.

fall below the standards of professional diligence, and you do something that materially distorts the economic behaviour of the average consumer, you will be committing a criminal offence under the CPRs.

- 5.8 It is therefore important that you review your conduct, processes and training regularly – and make all necessary changes to demonstrate that you are not behaving recklessly and are not knowingly engaging in conduct that is not professionally diligent.
- 5.9 If you are a company officer, you should also note, in relation to any criminal prosecution under the CPRs or BPRs, that you need to exercise proper control and supervision of your staff. You can be personally liable if an offence is committed by your staff, and it can be shown that this was due to your consent or connivance, or to neglect on your part.<sup>38</sup>
- 5.10 If someone else commits an offence under the CPRs<sup>39</sup> or the BPRs, and they can show that the offence was due to your act or default, you will also be guilty of the offence. Alternatively, if the other person is able to avoid liability by relying on due diligence, you may still be guilty of an offence if it is shown that it was your act or default that led to the situation. To avoid liability, you would then need to prove your own defence of due diligence.<sup>40</sup>

### **When you advertise for new business**

- 5.11 Ensure that any information you provide when marketing your services, in whatever form (for example flyers, websites, newspaper advertisements, verbal discussion), is true and accurate. Take reasonable steps to check the facts stated in advertising, and be aware of findings being made by bodies such as the Advertising Standards Authority and relevant ombudsmen (see Annexe B).
- 5.12 Ensure that any comparisons you make with competitors – for example your record of selling properties compared with theirs or the benefits of clients using your services as opposed to theirs – are fair, objective and can be substantiated.

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<sup>38</sup> CPRs 15(1) and BPRs 8

<sup>39</sup> Apart from that of failing to show professional diligence.

<sup>40</sup> CPRs 16 and BPRs 9.

5.13 Ensure that any information you have made available is not liable to mislead potential new clients, for example that details about the properties you have 'sold', 'sold subject to contract', 'let' or statements about professional qualifications or membership of a professional body, are accurate and not out-of-date.

5.14 When offering to sell services to consumers, you must state your charges and fees inclusive of VAT. Whether you charge a fixed fee or a percentage of an as yet unknown sale price, stating the fee or percentage inclusive of VAT is more meaningful for consumers. In all cases you should make it as easy as possible for consumers to work out how much they will pay overall.

### **When you gain new clients and instructions**

#### Providing advice to prospective clients

5.15 Make sure that you have a sound basis for your claims about market conditions and your advice on prices and prospects for sale or let. If the market advice you are giving to potential sellers, buyers or tenants is inconsistent, despite relating to the same types of properties in the same area, re-examine and adjust your advice.

#### Providing clients with important information before entering into agreements with them

5.16 Give clients the information they need to make an informed and efficient choice, before an agreement is made and at each stage of the process thereafter. Do not leave out or hide such information, or provide it in an unclear way that is ambiguous or hard to understand. You should also always make sure that information is given in good time.

5.17 Your terms and conditions should be clearly set out, and you should particularly highlight any surprising terms, both in the contract, and in brochures. It is good practice to present a tariff of fees and charges, and to explain clearly what services you are going to provide. Fees should be quoted inclusive of VAT to consumers, and in respect of property sales should be stated with an example based upon the marketing price, e.g. 'our commission is 1.2% (including VAT) - if your property sells for the asking price of £300,000 you will pay a fee of £3600'. You must also make sure that clients understand the implications of sole selling and sole agency rights.

5.18 You should provide this information in writing, as this will help you to comply with the requirements of professional diligence. It will also protect both you and your clients should disputes arise later on about what was said.

5.19 In the documentation you give to the client, make sure all material information is clear and prominent. Draw this information to the client's attention before the agreement is signed. It is not enough to include material information in small print or in a bundle of documents handed to the client before a contract is signed.<sup>41</sup>

5.20 For property agencies that are engaging in 'estate agency work' (as defined in the Estate Agents Act 1979) that Act requires you to inform the client about certain types of information prior to agreement. Give clients adequate time to read any written information you provide.

### **When you market property**

#### Gathering information for marketing

5.21 Before marketing a property we would expect a property agent to gather sufficient information about the property in order to market it professionally and honestly. This information should be gathered carefully and in good faith, and you should not simply rely on information provided by others if this is incomplete or you suspect it may be wrong, or you have grounds to doubt it.

5.22 The extent of the information you are required to gather will depend on the circumstances of your business and the services you offer (which should be made clear to a consumer). As set out at paragraph 1.4, while the regulations apply to the full range of property agencies, the standards expected to comply with them, and to avoid liability, will depend on the circumstances and, in particular, the level of service that a business provides.

5.23 For example, at one end of the spectrum, you may be carrying out a service simply of advertising property for sale or let by others (i.e. as a passive intermediary). If so, you may have a defence to prosecution for any misleading acts or omissions in the advertisement, where you receive the advertisement for publication in the ordinary

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<sup>41</sup> Hiding important information in small print may also amount to a breach of the Consumer Rights Act 2015, which means that if those terms were considered unfair, the client would not be bound by them. (Note: the now repealed Unfair Terms in Consumer Contracts Regulations 1999 will still apply to historical contracts)

course of your business (that is, it is drafted by your client, not by you), and you do not know and have no reason to suspect that publication would amount to an offence.<sup>42</sup>

5.24 Another type of service may be providing a hosting service or platform through which prospective buyers and sellers or landlord and tenants can contact each other. In these circumstances you should make sure that the information templates you provide to sellers/landlords are comprehensive, so that all information reasonably likely to be relevant to meet the expectations of platform users is captured (thus avoiding a misleading omission). You should also act promptly to investigate and, if necessary remove, content you are given to publish, where you become aware that it may be in breach of the regulations. Failing to do so may mean you are liable under the regulations.

5.25 Paragraphs 5.26 to 5.27 below are aimed at a traditional high street agency that inspect a property, market it, arrange viewings, communicate offers and negotiate the transaction (although elements of these paragraphs may be relevant to business models which offer some of these services).

5.26 When you gather the information you need for marketing purposes, take reasonable steps to establish its truth and accuracy. The following framework may help you:

Assess the property:

- In general we would expect property agencies to carry out an inspection of the property, and to take reasonable steps to gather relevant information to provide to prospective purchasers/tenants. If you decide not to undertake an inspection or you only carry out a limited one, you may still be in breach of the CPRs if there was material information that you could have discovered and should have disclosed in the marketing of the property, had you carried out an inspection or done a more detailed one.
- Take note of the number and size of rooms, the status of any services, how the property is heated, its general condition, any significant and visible structural defects, and other features that prospective consumers need to know about in order to decide whether or not to view a property.

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<sup>42</sup> CPRs Regulation 18 (Innocent publication of advertisement defence).

- Be observant. During an inspection you may observe things that put you on notice that further enquiries might be needed. This would include, for example, the fact that a property is (sub)let or is occupied by someone who may have rights to remain in the property after a sale. You may also notice other facts such as applications for planning permission displayed at nearby premises, footpaths over the land itself or evidence of flooding or cladding which may need further investigation.
- You should make sure you are in a position where you can answer accurately the reasonable queries of prospective consumers in relation to such matters.
- Draw on your professional knowledge of the local market, for example the prices of comparable properties that have sold recently in the area and any notable local features. For example, where a property is next to a mobile phone mast, a railway line, a nuclear power station or sewage plant, these facts must not be hidden or left out. You should not, for instance, edit photos of the property to remove undesirable features.
- It is clearly material information whether a property is freehold or leasehold, but you may also need to highlight particular features of the title, such as the length of term left on a lease and any unusual payment obligations under the lease or surprising and onerous restrictive covenants (if known).
- Consider whether there is anything about the property that you should know but do not, or which makes you think that something is not quite right or that there may be a problem with you marketing it? If there is, then check things out.

Check things out:

- Ask your client. In some circumstances, it may be sufficient for you to rely on what your client tells you, for example where it puts your mind at rest on a small concern or is fully consistent with other reliable information that you already hold. However, you should not simply rely on the client's information if it is

incomplete or you suspect it may be wrong or it otherwise raises a doubt in your mind, for example because it does not fit with other information you hold.<sup>43</sup>

- Ask your client for supporting documentation. This may give you the reassurance you need. If it does not, further checks may be necessary. If appropriate, probe further.
- Consult official sources (for example Land Registry, Registers of Scotland or local authorities), where appropriate.
- In addition, it may help you to:
  - Explain to sellers/landlords at the outset the importance of them providing honest, accurate and truthful information: that giving misleading or incorrect information is likely to be uncovered later in the conveyancing process and, potentially, could endanger the sale and leave both you and the seller open to legal action.
  - Obtain a commitment (preferably in writing) from clients to tell you if anything changes, for example so a seller/landlord keeps you updated if planning permission expires or they learn of a planning application by an adjoining landowner, or a property developer keeps you updated if the estimated level of the service charge goes up or the planned services, which will be covered by the charge, change.

### **Producing sales particulars and other marketing information**

5.27 Ensure that the information you use in your property particulars and other marketing is true, accurate and unlikely to mislead. For example:

- Before you market the property, ask your client to read your documentation and sign it, confirming that the particulars and other marketing materials are correct. Give them the opportunity to advise you of any errors.

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<sup>43</sup> In Scotland, the Property Questionnaire in the Home Report is filled out by the seller. This will be widely understood and so you will not be expected to check and confirm every answer before you market the property. However, where you use information from the Property Questionnaire in your own marketing of the property, it may be appropriate for you to take steps to satisfy yourself that you are not making any misleading statements or omissions.

- Take care that you present information fairly and fully, and include the material information that the average viewer would need.
- Wherever possible, provide accurate measurements (and, where it is not possible, make clear that the measurements are estimates).
- Bear in mind that, while you are not responsible for the content of information supplied by other professionals (for example energy assessors and surveyors), you are responsible for the way you use this information in marketing and the overall presentation of the property particulars and marketing material.
- Take care with qualifying statements. Those that clarify may be helpful (for example 'boarded loft area' or 'room with potential as bedroom – subject to relevant planning or building regulations consent' when the seller/landlord cannot evidence that a loft conversion has the necessary approval or consent for use as a bedroom). However, using a qualifying statement to try to limit liability such as 'all details provided by the vendor/landlord' will not help you if, given your type of business, it was appropriate for you to check the information yourself.
- Take particular care to verify any feature that you advertise as a particular selling point of a property – for example parking rights, the number of years remaining on a lease, planning permissions and surrounding amenities and views. As a rule of thumb, the more prominently you stress a particular feature, the more likely it is to influence the average consumer's decision making.
- While the property is being marketed, keep particulars and other marketing materials up-to-date. One way to do this would be to periodically check or re-check details, asking clients whether there have been any changes and requiring them to confirm the particulars are up-to-date and correct. To avoid confusion, ensure that you publish only the most up to date copy, but retain old versions (coded as appropriate) as part of your records – most software packages will do this automatically.
- If you discover at any point during the marketing of a property that information is incorrect, act promptly to correct it.

5.28 You are responsible for any information that you pass on to others (such as sub agents or internet property portals) to publish.<sup>44</sup> You should not instruct other agencies or third parties to assist in selling a property without the seller's permission. If the seller gives permission, as the instructing agent, you are liable at law for the actions of an instructed sub-agent and will be held responsible for any failures to comply with the relevant legislation. Furthermore, if you instructed as a sub-agent and you subscribe to a code of practice, you must continue to act in accordance with all relevant provisions of that code of practice.

5.29 If you are auctioning a property, you may have a defence to prosecution for any misleading acts or omissions in the catalogue listing for the property, where you receive the catalogue information in the ordinary course of your business (that is, it is drafted by the seller's solicitor, not by you). You will also need to show that you do not know and have no reason to suspect that publication would amount to an offence. You should therefore take reasonable steps to ensure that they present the information accurately. For example, if you use internet portals or intermediaries to display property particulars or advertisements, check what flags they automatically raise on a property (for example 'new instruction') when you upload to their site and take all reasonable precautions to correct the information if it is inaccurate.<sup>45</sup>

### **Treating potential buyers fairly when they show interest in a property**

5.30 It is important that potential consumers are able to access accurate information and property agencies play a crucial part in this process. You should have taken steps to make sure that you can answer likely questions and that you are open about limits to the service you provide and any gaps in your knowledge. For example, if, for a good reason, you have not seen the property yourself and you have not been able to check basic facts, make this clear from the outset. Similarly, if the information supplied by

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<sup>44</sup> Where the sub agent or portal is relying entirely on what you have told them and is simply reproducing advertising material, they themselves may have a publisher's defence (see 5.23). If the information you pass to them is accurate, but they alter the presentation of the information to make it misleading, or if they become aware that information is misleading and do not correct it (for example where you ask them to correct it), then the responsibility for the breach might fall on them.

<sup>45</sup> The due diligence defence may also be available to an auctioneer in relation to any prosecution for misleading acts or omissions regarding the auction itself, depending on the circumstances and whether the auctioneer is relying on information from, for example, the seller's solicitor. See sections 5.5 to 5.10 above.

the seller is limited, as may be the case on probate or repossession sales, declare this upfront.

5.31 You may wish to signpost potential consumers to where they can find out more detailed information, for example environmental information such as flood risk maps or public information about local amenities.

5.32 Consider what information the prospective consumer might reasonably expect you to provide (given the services you are offering) at the outset, when they are trying to identify properties that they would want to view. This is likely to include the main characteristics of the property and any non-standard features (for example no electricity, no landline or broadband connection). Wherever possible, make this information available to them before they commit to view the property.

5.33 You should also consider whether the particulars are adequate to contain all the material information the average consumer needs to know, and if not, what other means you could use to provide this information.

5.34 Consider especially what information the average consumer might reasonably expect you to provide (given the services you are offering) before they commit to paying money (for example for a survey or paying a holding deposit), and, wherever possible, give them this information.

### **Acting fairly when problems arise**

5.35 If new information comes to light about the property that you are marketing, for example when a transaction falls through, consider:

- whether any previous advice you gave to your client may need to be revised, and
- whether there may be implications for your marketing of the property:
  - are there existing statements in the particulars or other marketing information that may need to be amended?

- could the new information be material information that must be disclosed to all future prospective consumers?<sup>46</sup>

5.36 The reason why a previous transaction fell through will not always be material, and circumstances will be different for a purchase to a rental agreement. For example where the buyer pulled out because they did not have the finance or did not like the findings of the survey even though those findings did not highlight any major issues. However, where a survey reveals significant problems and you are put on notice that these problems do or may exist, you would be expected to make appropriate enquiries. If you have seen the survey (or a relevant extract), and the information is material, you will be expected to disclose it.

5.37 If you become aware that Japanese Knotweed is growing in the garden of a property you are marketing, perhaps because a consumer pulls out of a transaction and tells you, then you cannot ignore the problem. The appropriate action may be to talk to the seller/landlord and advise that an expert is brought in who can confirm whether there is a problem. The presence of Japanese Knotweed is an example of the type of material information that you would be expected to disclose to prospective consumers once you knew of it.<sup>47</sup>

5.38 You should use your professional judgement to assess new information, for example how credible it is, whether it needs exploring or whether it needs further corroboration. You should take proportionate and reasonable steps to check the information (see the framework at paragraph 5.26):

- If there is not yet enough evidence to satisfy you there is material information, but it nonetheless raises questions, then you should not ignore this, but should take steps to establish the facts.

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<sup>46</sup> In the context of residential property sales in Scotland, this would include a situation where you are put on notice that the Property Questionnaire may contain inaccuracies. In such circumstances, you may need to take steps to ensure that you are not committing a breach of the CPRs, for example you may need to review your own marketing materials and advise your client to correct their answer(s) in the questionnaire.

<sup>47</sup> Japanese Knotweed (or other invasive non-native plants) may cause serious damage to outbuildings, conservatories, drains, garden walls, patios, paths and drives. They can be difficult to control and costly to treat, and their presence may affect property values and deter lenders.

- Where the evidence, or your further steps, clearly shows there is no material information, you will have satisfied yourself there is no new material information and would not therefore need to take any further action.
- Where there is strong enough evidence to satisfy you there is material information, you need to disclose the material information as a matter of course.

5.39 Being thorough in the checks you take will help you to determine whether there is material information to be disclosed. It will also help you to demonstrate that you took all reasonable steps to avoid committing a breach.

5.40 If your checks establish that there is advice to clients to revise, marketing information to amend, and/or material information to disclose, then act promptly to avoid misleading actions or omissions.

### **When you negotiate and agree sales**

#### Keeping the client informed and treating them fairly

5.41 Ensure that you keep clients informed about offers that are made, unless they have instructed you in writing not to do so. It is good practice to keep a written record of all offers made and your related actions, in case there is a dispute later on about whether you passed on an offer (and how much it was) or not.

5.42 Ask the prospective buyer how they would fund the purchase of your client's property, for example whether by a cash payment, by a cash payment once their own property is sold or by a mortgage, and give your client the answer.

5.43 Ensure that you keep clients informed of the:

- nature and extent of any personal interest that you or a person connected to you have in the property or the transaction<sup>48</sup>
- services that you are supplying to interested buyers and
- services you have arranged for the buyer that will lead to you being paid commission or a referral fee.

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<sup>48</sup> A 'connected person' would include, for these purposes, (a) your employer, principal, employee or agent, (b) your business associate, or (c) any associate of (a) or (b), including a spouse or a relative.

5.44 To keep a sale on track for exchange of contracts and completion, you may wish to chase up your client. Where the process does not go smoothly, you should be careful not to put pressure on your client to accept a lower offer than they are willing to accept.

### **Treating potential buyers fairly when they make offers**

5.45 Ensure that you do not pressurise potential buyers into agreeing to receive services such as a mortgage or conveyancing work from you or a person connected to you. For example, do not refuse to pass on their offers or restrict how you deal with those offers where potential buyers refuse to take out these services. Be open with them about any referral fees or commission you will earn if they take up your recommendation.

5.46 Where a prospective buyer has made an offer, but the seller is waiting to see if any better offers are made, inform the prospective buyer promptly about the existence of any new offers.

5.47 To keep a sale on track for exchange of contracts and completion, you may wish to chase up the buyer. If so, you should be careful not to put pressure on them to speed up the process – for example by dissuading them from having a survey done – or to encourage them to increase the price they are willing to pay by the use of any misleading information.

### **When you deal with complaints**

5.48 It is an important part of business practice to have accessible, appropriate and user-friendly procedures in place so that all consumer enquiries are dealt with in an honest, fair, professional and reasonable manner. Where staff fail to handle legitimate consumer complaints properly, or place barriers in the way of a client exercising their contractual rights, this could be an aggressive practice under the regulations, and thus unlawful. It could also of course give rise to complaints under a redress scheme.

5.49 You should have an effective customer complaints procedure that is understood and followed by all staff who may come into contact with the public. It is good practice to have a written complaints procedure that is available to the public.

5.50 Deal with complaints promptly, effectively and in a professional manner.

5.51 Make your best efforts to find a satisfactory solution to any complaints made. Ensure that the steps you take to satisfy the consumer or business customer meet with reasonable expectations.

5.52 Keep a record of all complaints and note the final outcome.

5.53 Cooperate fully with any appropriate representative or intermediary, for example a Trading Standards Service, an ombudsman, redress scheme or a Citizens Advice Bureau, consulted by a consumer in respect of a complaint against you.

## **6 WHAT HAPPENS IF YOU DON'T COMPLY WITH THE REGULATIONS?**

### **What action might an enforcer take?**

6.1 If you do not comply with the CPRs or BPRs you may face enforcement action. A number of consumer enforcement bodies, for example Local Authority Trading Standards Services or the Competition and Markets Authority, have a duty to enforce these regulations.

6.2 This does not mean that formal enforcement action will be taken automatically in respect of each and every breach. Instead, the duty on enforcers obliges them to take steps to promote compliance by the most appropriate means. Enforcement action is one option open to them.

6.3 In deciding whether to act, enforcers will consider (amongst other things):

- the relevance and weight of evidence
- whether action is necessary, proportionate and consistent (given the nature of the breach, the harm caused, your cooperation in putting matters right, and the need to deter future non-compliance)
- whether the alleged misconduct appears to be an entrenched business practice or a one-off event
- whether you have a defence (meaning, for some offences, whether what happened was due to an accident, your reasonable reliance on information given by another person or a cause beyond your control) and you took all reasonable steps and exercised the proper care and attention to avoid breaching the regulations.

6.4 The enforcer (or, in Scotland, the Procurator Fiscal) can choose to take criminal enforcement action. Alternatively, the enforcer can opt for civil enforcement action, which can include applying for a court order to prevent or stop breaches of the regulations.

### **What penalties might you face?**

6.5 If you are convicted of committing a criminal offence under the CPRs or BPRs the penalties are:

- on summary conviction in the Magistrates Court (Sheriff or Justice of the Peace Court in Scotland), an unlimited fine

- on conviction on indictment in the Crown Court (Sheriff Court in Scotland), an unlimited fine or imprisonment for up to two years, or both.
- 6.6 If a civil court orders you to prevent or stop breaches, and you breach that order, you could be liable to up to two years imprisonment and/or an unlimited fine.
- 6.7 Your business itself, a person in charge, an employee or an associate of the business may be the subject of the conviction, fine or civil court order.
- 6.8 There may be additional consequences. If you have breached the CPRs or BPRs it may mean that you are deemed unfit to engage in:
- estate agency work. Under the Estate Agents Act 1979, Powys County Council (the lead enforcement authority for the Act) can issue a prohibition order banning you from undertaking estate agency work, and/or
  - credit-related business. Under the Consumer Credit Act 1974, the Financial Conduct Authority can refuse to issue you with a credit licence or revoke, vary or suspend your existing one, and/or
  - mortgage brokerage. Under the Financial Services and Markets Act 2000, a designated body (currently the Financial Conduct Authority) can cancel or vary an authorised person's authorisation to broker mortgages.
  - some property rental work. If a property licence or landlord registration is required then some offences may mean that you do not meet the 'fit and proper' person criteria.

### **What action might a consumer take?**

- 6.9 In addition to the points above, a consumer may take their specific complaint against you to an approved redress scheme.<sup>49</sup>
- 6.10 Consumers may also have private rights of legal redress which they can enforce through the civil courts. Any action by a consumer does not prevent a consumer enforcement body from taking its own enforcement action. If the complaint is upheld, you may be required to apologise to the complainant and/or pay compensation of up to £25,000. A serious breach of legislation and/or a recognised standard (for example a code of practice) could also lead to your dismissal from the approved redress scheme. As it is a legal requirement for you to belong to such a scheme, you would no longer be

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<sup>49</sup> If you are a solicitor providing estate agency services and you are exempt from the duty to join an approved redress scheme, the consumer may complain instead to a legal ombudsman, which will have its own disciplinary procedures and sanctions that it may impose on you.

able to trade as a property agent. See Annexe B for more information on redress schemes.

6.11 Negative consumer feedback can of course also lead to reputational issues and loss of business.

## **ANNEXE A - SELECTED OTHER LEGISLATION AND RELATED GUIDANCE**

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

These replace the previous Consumer Protection (Distance Selling) Regulations 2000 - often referred to as the Distance Selling Regulations - and the Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008 for all contracts made since 13 June 2014. Although there are many similarities, there are also important differences in the new Regulations, which apply both to contracts made on and away from business premises. The Regulations require detailed information to be given to consumers and introduce a 14 day cancellation period. In addition, the Regulations prohibit the use of premium-rate telephone helplines (for customers contacting you in connection with a contract that they have with you) and the use of so-called negative options to sell additional products to consumers that are incidental to the main contract. The Regulations also deal with the time that you take to deliver goods and who takes the risk when goods are being delivered to a consumer.

For further information, see [www.businesscompanion.info](http://www.businesscompanion.info)

### **Consumer Rights Act 2015**

The Consumer Rights Act replaces a number of laws with regard to business-to-consumer transactions, including the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982. It also:

- outlines a clearer route for consumers interested in understanding their rights and the remedies they have if they feel goods/services fail to do what was promised
- clarifies when terms and conditions can be considered unfair
- clarifies the periods for repair, replacement and refunds related to both goods and services
- simplifies the process by which small businesses can take legal action against bigger companies that are breaking competition laws

The Consumer Rights Act requires you, when using standard contract terms (subject to certain exceptions), to meet the test of fairness, for example:

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

Further information can be found in the guidance on unfair contract terms produced by the Competition and Market Authority <https://www.gov.uk/government/publications/unfair-contract-terms-cma37>

Chapter 3 of Part 3 also contains specific requirements for letting agents to publicise certain information: -

- A letting agent must publicise details of the agents' relevant fees, client money protection membership (CMP) and redress scheme membership at each premises and on the agent's website.

For further information, see [www.businesscompanion.info](http://www.businesscompanion.info).

### **Companies Act 2006, and the Companies, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015**

Requires you, amongst other things, to display your registered company name prominently at the places where you carry out business and your registered company name and registered office address in all of your company correspondence, documents and websites.

For further information, see [www.businesscompanion.info](http://www.businesscompanion.info).

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

Requires you, if you engage in certain consumer credit activities, to be authorised by the Financial Conduct Authority and to adhere to certain rules, for example on advertising, precontract disclosure, credit agreements and post-contractual information.

For further information see [www.fca.org.uk/firms/firm-types/consumer-credit](http://www.fca.org.uk/firms/firm-types/consumer-credit).

## **Electronic Commerce (EC Directive) Regulations 2002**

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

For further information, see [www.businesscompanion.info](http://www.businesscompanion.info).

## **Energy Performance of Buildings (England and Wales) Regulations 2012**

Where a building is placed on the market for sale or rent, the relevant person (e.g. the seller or landlord), and their agent, must ensure that a valid energy performance certificate (EPC) has been obtained for the property. If there is no valid EPC then they must satisfy themselves that an EPC has been commissioned for the property before it is placed on the market and before it is marketed, and must make all reasonable efforts to ensure that the EPC has been obtained within seven days of first marketing the property. An EPC must be made available free of charge to prospective tenants and buyers at the earliest opportunity.

For further information, see [www.businesscompanion.info](http://www.businesscompanion.info).

(For information about EPCs in Scotland search [www.gov.scot](http://www.gov.scot) and in Northern Ireland search [www.dfpni.gov.uk](http://www.dfpni.gov.uk))

## **Estate Agents Act (EAA) 1979, as amended**

Requires you, when carrying out estate agency work (as defined by the EAA), to comply with certain rules of conduct when acting for clients, for example:

- providing them with full and detailed information about fees and charges for your services
- disclosing any personal interest that you may have in the sale
- keeping them promptly informed about offers received
- handling their money properly and
- being a member of or registered with an officially approved consumer redress scheme.

For further information, see [www.ntselat.uk](http://www.ntselat.uk) .

### **Financial Services and Markets Act (FSMA) 2000**

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

For further information, see [www.fca.org.uk](http://www.fca.org.uk)

### **Housing (Scotland) Act 2006 and subordinate legislation**

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

For further information, see [www.gov.scot](http://www.gov.scot)

### **Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (the MLRs)**

When you are carrying out estate agency work, these require you to take necessary steps to prevent money laundering or terrorist financing, for example to put in place procedures to identify clients and verify their identities before entering into a business relationship or transaction. Supervision of estate agents is carried out by HMRC.

For further information, see [www.gov.uk/hmrc](http://www.gov.uk/hmrc)

### **Competition Act 1998**

The Competition and Markets Authority (CMA) investigates mergers and anti-competitive practices in markets and can enforce a range of consumer protection legislation.

For further information, see [www.gov.uk/cma](http://www.gov.uk/cma)

## **ANNEXE B - REDRESS SCHEMES**

### **Estate agents**

Since October 2008, unless exempted<sup>50</sup>, all persons engaging in residential estate agency work in the UK have been required by law to belong to an officially approved estate agents redress scheme.

### **Letting and property management agents**

It has been a legal requirement for all lettings agents and property managers in England to belong to a Government approved redress scheme since 1 October 2014<sup>51</sup>.

A redress scheme provides a free and independent service for consumers and landlords who are in dispute with a property agent that belongs to the scheme. It can investigate complaints and, if appropriate, require the property agent to pay compensation or apologise to the complainant.

Schemes in the UK are approved by NTSELAT, which is hosted by Powys County Council in its capacity as lead enforcement authority for the Estate Agents Act 1979. There are currently two approved schemes and you must ensure that you have the correct membership for the type of work that your property business undertakes:

- **Property Redress Scheme (PRS)**

You can contact the Property Redress Scheme by phone on 0333 321 9418, by email at [info@theprs.co.uk](mailto:info@theprs.co.uk), via its website at [www.theprs.co.uk](http://www.theprs.co.uk), or by writing to its address at: Property Redress Scheme, Premiere House, 1st Floor, Elstree Way, Borehamwood, WD6 1JH.

- **The Property Ombudsman (TPO)**

You can contact The Property Ombudsman by phone on 01722 333306, by email at [admin@tpos.co.uk](mailto:admin@tpos.co.uk), via its website at [www.tpos.co.uk](http://www.tpos.co.uk), or by writing to its address at Milford House, 43-55 Milford Street, Salisbury, Wiltshire SP1 2BP.

Property agents who are members of The Property Ombudsman may also agree to follow their relevant Code of Practice for the type of work that you undertake. For more

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<sup>50</sup> s1(2) Estate Agents Act 1979

<sup>51</sup> The Redress Schemes Letting Agency Work and Property Management Work (Requirement to belong to a scheme) (England) Order 2014

information on the code, see the TPO website (above). Note: failure to follow an established industry code could render you liable under CPRs for not acting with professional diligence – see para 4.22 onwards).

Solicitors that engage in estate agency work within their solicitor practices are exempt from the requirement to join an officially approved scheme. However, they are subject to oversight by other bodies that can investigate complaints against legal practitioners. These services are also independent and free of charge to complainants, and they too can require the business to pay compensation (or provide other redress) if the complaint is upheld

- **Legal Ombudsman (for England and Wales)**

Consumers can contact the Legal Ombudsman by phone on 0300 555 0333, by email at [enquiries@legalombudsman.org.uk](mailto:enquiries@legalombudsman.org.uk), or by writing to its address at PO Box 6806, Wolverhampton WV1 9WJ. The Legal Ombudsman's website is at [www.legalombudsman.org.uk](http://www.legalombudsman.org.uk)

- **Scottish Legal Complaints Commission (SLCC)**

Consumers can contact the SLCC by phone on 0131 528 5111, by email at [enquiries@scottishlegalcomplaints.org.uk](mailto:enquiries@scottishlegalcomplaints.org.uk), or by writing to its address at The Stamp Office, 10 - 14 Waterloo Place, Edinburgh EH1 3EG. The SLCC's website is at [www.scottishlegalcomplaints.org.uk](http://www.scottishlegalcomplaints.org.uk)

## **ANNEXE C – CLIENT MONEY PROTECTION AND DEPOSIT PROTECTION SCHEMES (LETTING AND PROPERTY MANAGEMENT AGENTS)**

### **Client money protection**

You must join a client money protection scheme if you are a letting or property management agent in the private rented sector in England and hold clients' money. These schemes make sure landlords and tenants are compensated if agents cannot repay their money, for example if they go into administration. For further information see <https://www.gov.uk/client-money-protection-scheme-property-agents> . Client money protection is different to tenancy deposit protection (see below).

**Agents may be fined up to £30,000 if they do not join a client money protection scheme.**

The rules are different in:

- [Scotland - https://www.mygov.scot/letting-agent-registration/protecting-client-money-and-professional-indemnity-insurance/](https://www.mygov.scot/letting-agent-registration/protecting-client-money-and-professional-indemnity-insurance/)
- Wales - agents need to join a money protection scheme before they apply for an agent licence through [Rent Smart Wales - https://www.rentsmart.gov.wales/en/agent/](https://www.rentsmart.gov.wales/en/agent/)
- Northern Ireland - agents do not currently have to join a client money protection scheme

### **Agents must:**

- hold clients' money in an account with a bank or building society authorised by the Financial Conduct Authority
- get a certificate confirming membership of the scheme they join, and provide it to anyone who asks, free of charge

### **Agents need to display the certificate:**

- in any office where they deal with the public
- on their website

**Agents may be fined up to £5,000 if they do not display a certificate of membership or provide it when asked.**

### **Approved schemes**

The schemes are approved by MHCLG and there are currently six approved schemes:

- [Client Money Protect - https://www.clientmoneyprotect.co.uk](https://www.clientmoneyprotect.co.uk)
- [Money Shield - https://money-shield.co.uk](https://money-shield.co.uk)
- [Propertymark - https://www.propertymark.co.uk/working-in-the-industry/member-requirements/client-money-protection.aspx](https://www.propertymark.co.uk/working-in-the-industry/member-requirements/client-money-protection.aspx)
- [RICS - https://www.rics.org/uk/upholding-professional-standards/standards-of-conduct/client-money/](https://www.rics.org/uk/upholding-professional-standards/standards-of-conduct/client-money/)
- [Safeagent \(previously NALS\) - https://safeagents.co.uk](https://safeagents.co.uk)
- [UKALA Client Money Protection - https://www.ukala.org.uk/client-money-protection/](https://www.ukala.org.uk/client-money-protection/)

### **Deposit protection schemes**

In England and Wales you must place a tenant's deposit in a tenancy deposit protection scheme if a property is rented out on an assured shorthold tenancy that started after 6 April 2007. If you receive a valuable item as a deposit instead of money (for example a car or watch), you do not have to put it in a tenancy deposit scheme. These government-backed schemes ensure the tenants will get their deposit back if they:

- Meet the terms of the tenancy agreement
- Do not damage the property
- Pay the rent and bills

The tenant's deposit must be put in a scheme within 30 days of receiving it. For further information see: <https://www.gov.uk/deposit-protection-schemes-and-landlords>

In England and Wales you can use any of the following schemes:

- Deposit Protection Service - <https://www.depositprotection.com>
- MyDeposits - <https://www.mydeposits.co.uk>
- Tenancy Deposit Scheme - <https://www.tenancydepositscheme.com>

Separate schemes exist in Scotland <https://www.mygov.scot/tenancy-deposits-landlords/> and Northern Ireland <https://www.nidirect.gov.uk/articles/tenancy-deposit-scheme-information-landlords>

## **ANNEXE D – SELECTED OTHER LEGISLATION (LETTINGS)**

The role of NTSELAT in respect to lettings legislation applies to England only (although of the legislation highlighted below only the Tenant Fees Act applies in England only, the other legislation has wider applicability). It should be noted that this is a small selection of information and there is a broad and varied range of legislation that covers the private rented sector more widely, including on repair, safety, standards, electrical, gas, fire and licensing. Since housing matters overall are a devolved function the legislative frameworks relating to lettings are different in Wales, Scotland and Northern Ireland.

### **England**

#### **Tenant Fees Act 2019**

This legislation bans most letting fees and caps tenancy deposits paid by tenants. As of 1 June 2019, the only payments that landlords or letting agents can charge to tenants in relation to new contracts are:

- Rent
- A refundable tenancy deposit capped at no more than five weeks' rent where the total annual rent is less than £50,000, or six weeks' rent where the total annual rent is £50,000 or above
- A refundable holding deposit (to reserve a property) capped at no more than one week's rent
- Payments associated with early termination of the tenancy, when requested by the tenant
- Payments capped at £50 (or reasonably incurred costs, if higher) for the variation, assignment or novation of a tenancy
- Payments in respect of utilities, communication services, TV licence and Council Tax
- A default fee for late payment of rent and replacement of a lost key/security device giving access to the housing, where required under a tenancy agreement

For further information see:

<https://www.gov.uk/government/collections/tenant-fees-act>

## **Consumer Rights Act 2015**

This contains a specific requirement for letting agents to publicise certain information on relevant fees, client money protection membership and redress scheme membership at each premises and on the agent's website. For further details see Annexe A above.

## **Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015**

These regulations set a minimum energy efficiency level for domestic private rented properties. For more information see:

<https://www.gov.uk/guidance/domestic-private-rented-property-minimum-energy-efficiency-standard-landlord-guidance>

See also the requirement for an energy performance certificate where a building is placed on the market for sale or rent (Energy Performance of Buildings (England and Wales) Regulations 2012) as detailed in Annexe A above.

## **Wales**

For information see:

<https://gov.wales/landlords-letting-agents>

<https://gov.wales/rent-smart-wales>

## **Scotland**

For information see:

<https://www.gov.scot/policies/private-renting/regulation/>

## **Northern Ireland**

For information see:

<https://www.nidirect.gov.uk/articles/landlord-and-tenant-obligations>