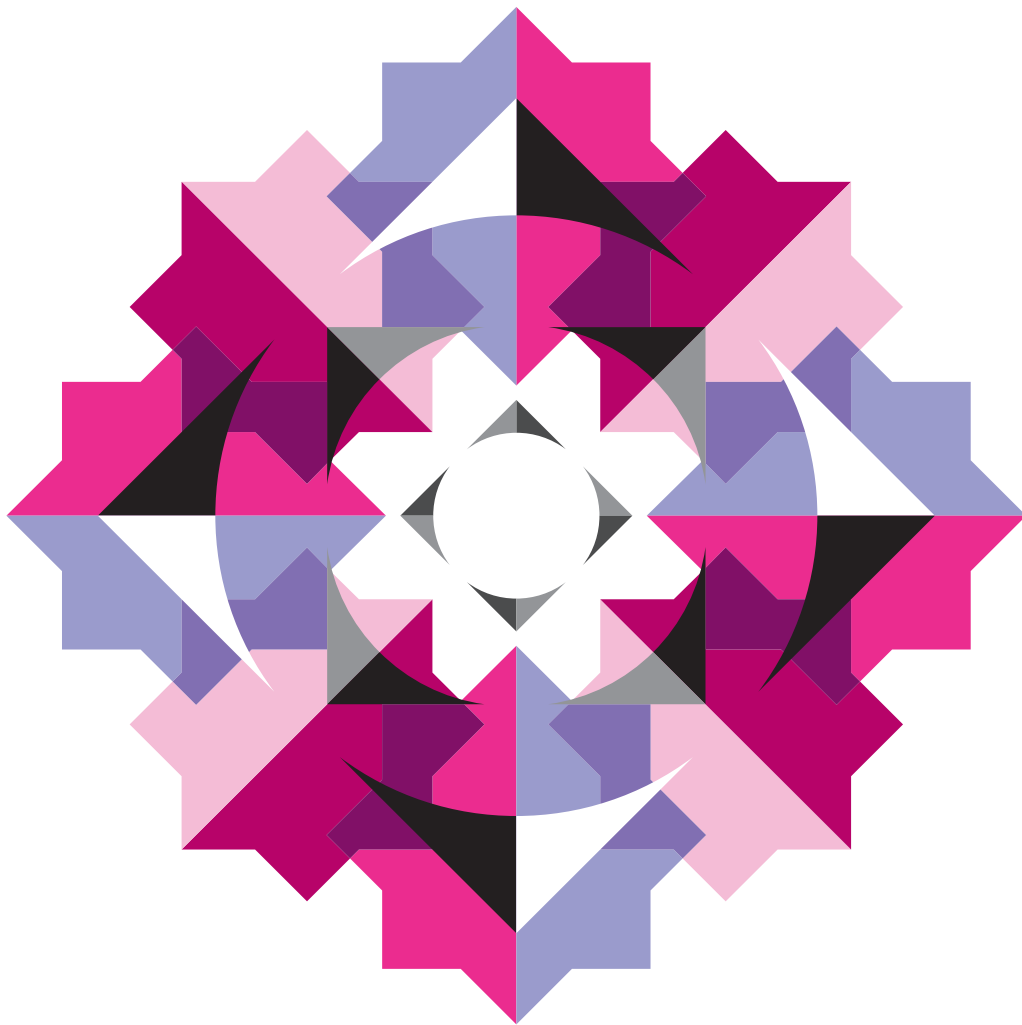


# Important new guidelines for advertising prices to UK consumers





## A triumph of substance over form

*Brinsley Dresden*

The long-awaited Guidance for Traders on Pricing Practices was finally issued by the Chartered Trading Standards Institute (CTSi) in December 2016. The previous guidelines had been around since the old DTI published its first Code of Practice in 1988, with the last iteration published by the Department for Business, Innovation and Skills (BIS) in 2010. Although the BIS guidance has been withdrawn, traders have until April 2017 to comply with the new Guidance. The Guidance will apply to any advertisers targetting UK consumers, including advertisers based abroad.

### What are the key changes from the old guidelines?

The new Guidance adopts the principles-based approach that underpins the main underlying legislation, the Consumer Protection Regulations 2008 (CPRs). This is a triumph for a more flexible approach in deciding whether a pricing practice is misleading. The old formulaic approach enshrined over the years since 1988 gradually led to practices that were compliant with the letter of the guidance, but increasingly at odds with the principles of the CPRs. However, this more flexible approach has come at the cost of certainty, as illustrated by the two areas below.

### No more 28 day 'price establishment' for reference prices

The first key change is in the use of "reference prices" when making a savings claim. It has become common practice for traders to "establish" reference prices immediately before a sale by increasing their prices for 28 days and then starting their sale. This enabled them to follow the old guidance, which stated that traders could compare their sale prices with an earlier, higher reference price, provided that (a) the reference price was the last price applied; (b) the new lower price did not apply for so long that the comparison became misleading; and (c) the old reference price had applied within the preceding 6 months.

In 2010 the BIS guidance required that the reference price had to be "genuine". In other words, the trader had to have a reasonable expectation of selling the goods at the higher price and had to place them on the market in sufficient numbers and for a sufficient period for the offer at the higher, reference price to be genuine.

Nevertheless, following consultation, the Competition and Markets Authority (CMA) concluded that, while traders may well have been complying with the letter of the guidance on the 28-day rule, they were not complying with the principle of the CPRs. The old rule has therefore been expunged and now traders must ensure that the "average consumer" would not consider the savings claim to be misleading or unfair. Despite this ambiguity, the Guidance provides a useful steer in the form of the following 5 questions:

- 1. How long was the product on sale at the higher price compared to the period for which the price comparison is made?** Traders should apply a 1:1 ratio at most, so if the higher price applied for one month, the comparison should apply for no more than one month. Tesco was fined for making a savings claim on strawberries many months after the short-lived higher price had ceased to apply.
- 2. How many, where and what type of outlets will the price comparison be used in compared to those at which the product was on sale at the higher price?** The Officers' Club was prosecuted for making savings claims for a range of shirts sold in many of their stores when the higher, reference price had only been applied in a couple of stores and to a limited range of shirts.
- 3. How recently was the higher price offered compared to when the price comparison is being made?** The new Guidance suggests that if the reference price applied less than 2 months ago, and with no intervening prices, that would be a genuine comparison. However, as with all the examples, that comes with the caveat that it will depend on all the circumstances.
- 4. Where products are only in demand for short periods each year, are you making price comparisons with out-of-season reference prices?** A genuine "end-of-season" sale is fine, such as reducing the price of ski gear in April. However, a trader raising the price of ski gear in August to make a savings claim in time for the start of the new ski season in December would not be behaving legitimately.



**5. Were significant sales made at the higher price prior to the price comparison being made, or was there any reasonable expectation that consumers would purchase the product at the higher price?** There is no explanation of “significant sales”, but traders should make sure that they keep evidence of sales at higher prices, as well as other evidence for reference prices, such as screen grabs of competitor prices, so that they can defend any allegation of bad practice.

#### **No more 10% rule for general savings claims such as “save up to 50%”**

For many years, the guidance stated that if a trader wanted to make a general savings claim such as “save up to 50%”, then that saving needed to apply to at least 10% of the range of products on offer. Canny retailers found ways to comply with the letter of the old guidance, if not the spirit, by using less popular or profitable items to make up the numbers to hit the 10% threshold.

The new Guidance merely repeats the requirement that general savings claims must not be misleading and must reflect the reality of the offer. The maximum saving must apply to a “significant proportion” of the range of goods on offer and represent the true overall picture of the price promotion. The Guidance also states that the “up to” and “from” claims must be shown clearly and prominently.

Unfortunately, while the old 10% rule provided some clarity and certainty, its demise may have been necessary to comply with the underlying EU Directive. It is also not a rule founded on principle. It would be unwise to assume that 10% is synonymous with a “significant proportion”. A higher proportion is likely to be needed, although we have no way of knowing at this point. There may be no single figure. For example, if the maximum saving of 50% applies to 10% of the products on offer, but the remaining 90% are discounted by 35%, will it be acceptable to claim “save up to 50%”?

#### **Where do we go from here?**

One source of guidance will be adjudications by the Advertising Standards Authority (ASA) who have recently published decisions on issues such as the use of RRP as reference prices and the failure to specify delivery charges until after a consumer has made a “transactional decision” to add goods to an online shopping basket.

**Delivery Charges:** In August 2016, the ASA published an adjudication about Amazon’s presentation of delivery charges on its website. The investigation concerned a search listing which stated information about speakers sold by Amazon, including the price of £18.49 and text stating “Eligible for FREE UK delivery”. The related product page stated “Price: £18.49 & FREE Delivery in the UK on orders over £20.” The decision is long and complicated, but the key issue was that these claims were something of an over simplification. In order to obtain all the relevant detail, the user of the site had to take a “transactional decision” to proceed through the website and place the goods in their basket. Only at the end of the process would the user ascertain the amount of the delivery charge and whether any additional items would mean that the entire basket would qualify for free delivery. The ASA accepted that there were a number of factors that determined whether there would be a delivery charge, and if so how much. However, the cost for delivery of the product could be seen after it had been added to basket by clicking on text on the basket page which stated “Estimate VAT, Postage and Packaging”. This brought up a pop-up box which stated the delivery and packaging charge. The ASA concluded that it was misleading to omit this information from the search listing and the product page because users had to make a transactional decision to proceed through the site and place the product in the basket. The estimated delivery charge could have been provided at an earlier stage in the process, before the consumer had made the transactional decision.

**Recommended Retail Prices:** Amazon were then pulled up again in December 2016 in another rather complicated investigation. This time the issue concerned the use of Recommended Retail Prices (RRP) as the reference price for a savings claim by Amazon. The RRP had been inserted by Amazon, rather than the seller. The ASA believed that consumers would understand the RRP to be price at which the product was generally sold by most retailers, so as the basis for a savings claim, it was likely to influence their transactional decision.

The ASA concluded that Amazon could not simply pass the responsibility for the accuracy of the RRP to the supplier. In addition, the ASA has not been provided with substantiation, such as sales data or invoices, which proved that the item was generally sold at the RRP price by them and/or other sellers. The ASA therefore concluded that the ad was misleading.

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**Dynamic Pricing and Availability:** Retailers who use dynamic pricing face particular challenges when making price claims. In January 2017, the ASA upheld a complaint against lastminute.com who had advertised a package of flights and a hotel in New York for £569. Less than one hour after making the transactional decision to submit a booking, the complainant received an email saying that prices had gone up since she had seen the ad on their website, and that she would have to pay a further £70.77 if she wanted to proceed, although she could also exercise the option to cancel the transaction. Nevertheless, the ASA concluded that as the package was not available at the stated price, the ad was misleading.

## Conclusion

The new guidance is going to have a profound impact on all B2C businesses. They need to be considering whether and how to change familiar pricing practices. In addition, we know that the ASA is going to be giving a high priority to investigating price advertising that will enable them to establish a new body of decisions and guidance. Meanwhile, the CMA is also going to be on the look out for opportunities to impose 'enhanced measures' under the Enterprise Act on advertisers that are guilty of particularly egregious practices.

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