

Guidance for lettings professionals on consumer protection law

Helping you comply with your obligations

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1. PURPOSE AND SCOPE

Aim of this guidance

- 1.1 This guidance is to help lettings professionals comply with consumer protection laws, and laws about dealing with other businesses, in the context of letting privately owned residential property.
- 1.2 It is intended to complement existing industry schemes such as those operated by industry bodies and codes of conduct, which help lettings professionals keep up-to-date with changes to the law, achieve compliance, and provide good quality services to tenants and landlords.

Is this guidance for me?

- 1.3 This guidance is aimed at lettings professionals. By lettings professionals we mean anyone who, as part of their business, supplies services related to the letting of privately owned residential property. It (or parts of it) applies to you if for example you are:
 - a letting agent (providing let only, rent collection and/or management services)
 - a landlord dealing with residential tenants (including prospective ones)
 - a business that provides some form of hosting service/property portal or platform through which prospective landlords and tenants can contact each other
 - anyone acting for or in the name of any of the above.
- 1.4 Not all points listed in the guidance apply to every lettings professional, since the range of services they offer may differ. We expect lettings professionals to be able to identify which sections are relevant to them. However, if we have identified a section as being particularly relevant to one specific audience, we have highlighted it.
- 1.5 It is not always clear where the line should be drawn when deciding whether someone is acting in the course of their business and is therefore a lettings professional. Paragraphs 3.6 – 3.11 set out our views on whether someone might be considered to be acting in the course of their business (trader) or not acting in the course of a business (consumer) in the context of lettings.

1.6 This guidance is **not** intended to inform tenants of their rights and obligations in the lettings process. Other agencies are better placed to do this and have already produced helpful material.¹

What does this guidance cover?

1.7 The focus of this guidance is on activities between lettings professionals and tenants that involve Assured Shorthold Tenancies (AST), or short assured tenancies in Scotland. It is not intended to cover long leaseholds and block management. It does not cover property sales.²

1.8 It covers the following laws:

- the Consumer Protection from Unfair Trading Regulations 2008 (CPRs)
- the Business Protection from Misleading Marketing Regulations 2008 (BPRs)
- the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs)
- the Supply of Goods and Services Act 1982 (SGSA)
- Unfair Contract Terms Act 1977 (UCTA)

1.9 We also make reference to other laws and duties that the Competition and Markets Authority (CMA)³ and Trading standards services (TSS)⁴ can enforce under Part 8 of the Enterprise Act 2002, that we consider are likely to be relevant to lettings professionals.

1.10 This guidance describes how the legislation applies to lettings professionals' practices affecting consumers in England, Wales, Scotland and Northern Ireland. It should be read as being relevant in **all** of these nations. Where there are national differences in the legal context, or requirements, that have an implication for this guidance, we have flagged these.

¹ See, for example, [How to rent](#)

² See [OFT guidance on property sales \(OFT 1364\)](#) for information.

³ On 1 April 2014 many of the functions of the Office of Fair Trading (OFT) along with the functions of the Competition Commission (CC) were transferred to the Competition and Markets Authority (CMA) and these bodies were abolished.

⁴ For the purposes of this guidance, TSS refers to local authority trading standards services in England, Scotland and Wales and also to the Trading Standards Service within the Department of Enterprise Trade and Investment in Northern Ireland.

- 1.11 This document **does not** provide guidance on other law, such as housing law, which is also relevant to letting private residential property, although Annex A provides a brief summary of some key elements, and links to other resources.
- 1.12 This guidance is designed to help businesses that wish to comply with consumer protection law to identify what they need to do to achieve this. It does not attempt to address fraudulent or organised criminal activity, which are matters for enforcement by the appropriate bodies (for example the police).
- 1.13 This guidance sets out the views of the CMA. As we highlight in paragraph 2.7 below, it is not a substitute for the law itself and lettings professionals should seek their own independent legal advice on the law.

Keeping this guidance up to date

- 1.14 This guidance **only** covers relevant law that is in force at the time of drafting. It does not take into account any proposed changes to consumer protection legislation or law implemented from June 2014 onwards, including those referred to below.
- 1.15 The Consumer Rights Act (presently the [Consumer Rights Bill](#)) will, if enacted, replace the UTCCRs and SGSA, together with certain other consumer protection provisions.
- 1.16 The [Consumer Protection from Unfair Trading \(Amendment Regulations\) 2013](#) will, when they come into force amend the CPRs.
- 1.17 [The Consumer Contracts](#) (Information, Cancellation and Additional Charges) Regulations 2013 come into force in June 2014.
- 1.18 The CMA will review this guidance as and when appropriate, in the light of changes in the law and other relevant factors. An electronic version containing any revisions made, will be made available at www.gov.uk/cma
- 1.19 This guidance is compliant with the [BIS Code of Practice on Guidance on Regulation](#).

2. EXECUTIVE SUMMARY

- 2.1 In February 2013, the Office of Fair Trading (OFT), a predecessor organisation to the Competition and Markets Authority (CMA), published the findings of its lettings market review: *The lettings market – an OFT report* (OFT1479). This work was based on an analysis of 3,951 lettings complaints received by Consumer Direct⁵ during 2011, set out in an OFT Intelligence Report.⁶
- 2.2 The OFT’s Intelligence Report identified that the five main areas of complaint were issues relating to:
- fees and charges
 - letting agents providing poor service
 - security deposits
 - delayed and substandard repairs
 - unfair business practices.
- 2.3 The lettings market review concluded, amongst other things, that many of the problems appearing across the market could be dealt with by greater understanding of and compliance with existing consumer protection law and for this reason, the OFT, decided to produce this guidance.
- 2.4 On 1 April 2014 the OFT closed, and most of its relevant functions were transferred (along with the functions of the Competition Commission) to the CMA.⁷ The CMA and the Trading Standards Institute (TSI) share the role of working with businesses to drive up standards through clarifying legal obligations⁸, with the CMA focussing on issues that appear to be problematic across a market. The CMA intends for this guidance to contribute to making the lettings market work well for consumers, businesses and the economy.

⁵ Now Citizen’s Advice ‘Advice Guide’. See www.adviceguide.org.uk for information.

⁶ Annexe D of *The lettings market – An OFT report* (OFT 1479). The OFT did not assume all complaints were valid, but instead took them as an indication of areas of customer dissatisfaction.

⁷ Further information about this, changes to the consumer protection landscape and clarity on roles is available in the National Audit Office publication *Update on consumer protection landscape reforms*, April 2014

⁸ The CMA primarily provides guidance to business on specific issues identified in the course of our market studies, the Unfair Terms in Consumer Contracts Regulations 1999 and issues where our particular knowledge of the market makes us best placed to advise business. Other business guidance on consumer law is produced by the TSI and more information on this is available at www.tradingstandards.gov.uk/advice/advice-business.cfm

- 2.5 The CMA hopes that this guidance will help lettings professionals comply with consumer protection law. We also want the guidance to support consistent enforcement by TSS which, as the OFT identified in its market review, will most likely be best placed to take enforcement action (where appropriate), given the fragmented and localised nature of the lettings market. We have worked closely with TSS in preparing this guidance and other support material to ensure that lettings professionals and TSS share a common understanding of the problems and the likely means of addressing these through Trading Standards' interventions.
- 2.6 Together, improved compliance and enforcement can have real impact and will ultimately improve the way the lettings market functions.
- 2.7 **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. The guidance sets out the views of the CMA and lettings professionals should seek their own legal advice on the law.**
- 2.8 Information on the law covered in this guidance is summarised in the preceding 'Purpose and scope' chapter. Chapter 3 provides an overview of this legislation.
- 2.9 Subsequent chapters in the guidance broadly follow the 'lettings journey', from when letting agents first advertise their services to landlords, through advertising to potential tenants, arranging tenancy agreements and subsequent dealings with tenants in occupation, right up to the termination of a tenancy agreement. Practical steps to help you comply with the law, plus examples of conduct or practices which might breach the law are set out for each stage.
- 2.10 Chapter 10 explains what action you may face if you do not comply with consumer protection law and Annex A is a summary of some of the key laws outside the scope of this guidance, which we consider are likely to be of relevance.
- 2.11 The examples used in the guidance are based on issues which we know are likely to be relevant to consumers. Many of them were identified in the OFT's intelligence review. Others have been brought to our attention during the OFT's consultation on draft guidance⁹. The guidance does not, however, attempt to cover every situation or practice in which a breach of the legislation may occur and the examples are not exhaustive lists. It is also important to

⁹ See [OFT guidance for letting professionals \(OFT1509\)](#)

note that some examples may illustrate more than one type of breach, even though only one breach is highlighted.

2.12 You will need to read the entire document for a comprehensive understanding of how to comply with consumer protection law. However, some key principles to help you comply at each stage of the lettings process are set out below.

Key principles

2.13 **When you are a letting agent advertising to and contracting with landlords you should:**

- Comply with consumer protection law when dealing with landlord clients (unless it is clear that they are acting in the course of their business).
- Make sure that any advertising and marketing of your services to landlords is clear, accurate and not misleading. You should not omit material information. It is particularly important to ensure that you clearly set out the fees that you will charge, and exactly what service you are offering to perform.
- Provide full information about your fees, including those that are variable and optional, and any information given should be accurate and not misleading. We consider you are more likely to ensure compliance with this if you set this information out in a clear tariff of charges that landlords can easily access, and that is quoted inclusive of VAT.
- Ensure the terms of any contract that you use are clear, and do not contain hidden surprises. Your contract terms should not be unfair. Unusual or onerous terms should be set out prominently.
- Ensure you comply with your legal duties towards landlords as their agent – take proper care of their money, disclose any sums or commissions you receive from tenants or tradespeople, and provide accurate advice on compliance with the law.

2.14 When you are advertising and providing information to potential tenants you should ensure that:

- You have appropriate processes in place in order to gather and check information that you present to potential tenants, so that they are not misled, and you are able to answer reasonable questions they ask.
- Your advertising is clear, accurate and not misleading. It should provide all the information a potential tenant needs in order to make informed and therefore efficient decisions about the property being marketed.
- Your advertising provides potential tenants with sufficient information about costs and charges to enable them to compare the full cost of renting one property against another. All information about costs, charges and deposits should be presented together with information about the cost of rent.
- Information that cannot be included, due to restrictions on space, is clearly flagged and made easily accessible (for example no more than one click away on a website).

2.15 When you are negotiating, conducting viewings and arranging and signing the tenancy agreement you should:

- Ensure that prospective tenants understand the nature of your role and are treated fairly throughout the negotiations.
- Ensure that prospective tenants are given an accurate impression of the property's characteristics and are able to view the property (if they so wish).
- Provide prospective tenants with clear information about pre-tenancy checks, including what they will cover and how much they will cost.
- Provide clear information about any guarantor requirements and about the roles and responsibilities of guarantors.
- Provide prospective tenants with clear information about why you are asking them to pay a pre-tenancy payment or holding deposit, the sum that is required and the circumstances in which it will/will not be refunded.
- Ensure that the terms of any tenancy agreement that you provide or recommend for use with a tenant are fair.

- Ensure that the prospective tenant has sufficient time to familiarise themselves with the agreement.

2.16 Immediately before, and at the time the tenant moves in, you should:

- Ensure the property is made available on the date agreed, and the tenant is kept informed of any delays.
- Ensure that when the tenant moves in, the property conforms to all statements previously made to the tenant about its specification (including furniture, fixtures, fittings and any works that had been agreed).
- Provide the tenant with all the information required by law about the condition of the property, along with other material information such as information relating to energy suppliers.
- Ensure that any security deposit is properly protected and the tenant is given information about which scheme it is with.

2.17 When managing the property after the tenant has moved in:

- If you are a landlord, when carrying out any services you provide under the tenancy agreement (including those relating to the property), you should carry them out using reasonable care and skill, and in a timely manner.
- If you are an agent providing such services on the landlord's behalf, you should equally carry them out using reasonable care and skill, and in a timely way.
- You should be fair in your dealings with tenants, not enforce unfair terms and give tenants clear information concerning who is responsible for doing what during the life of the tenancy.
- If you are an agent, you should do what is expected of you under your contract with the landlord, take proper care of the landlord's interests, and keep them informed.

2.18 On renewal or termination of the tenancy you should:

- Act consistently with information already given to the tenant on fees for renewing or exiting a tenancy agreement at the pre-contractual stage.
- Ensure that the tenant has clear, accurate information about what they need to do to give notice, and alert them if they get this wrong.

2.19 Avoid misleading the tenant about whether you propose to retain any money from the security deposit, and if so, how much.

3. OVERVIEW OF LEGISLATION

3.1 This guidance focuses on the obligations that lettings professionals have towards client landlords and tenants (both actual and potential) under consumer protection legislation. It covers:

- marketing, advertising and other statements made in the course of business
- conduct that may be aggressive or otherwise unprofessional
- contract terms
- obligations implied into service contracts
- other duties laid down by law including, for example, the laws of agency, and contract.

What laws do the CMA and TSS enforce?

3.2 The CMA and TSS enforce a number of laws that are particularly relevant to practices related to the letting of privately owned property:

- The Consumer Protection from Unfair Trading Regulations 2008 (CPRs), which apply where one party is a consumer and the other is a business.
- The Business Protection from Misleading Marketing Regulations 2008 (BPRs), which apply when both parties are businesses.¹⁰
- The Unfair Terms in Consumer Contract Regulations 1999 (UTCCRs), which apply when one party is a consumer and the other is a business.¹¹
- The Supply of Goods and Services Act 1982 (SGSA), which implies terms (which cannot be excluded where one party is a consumer) into contracts for services. In Scotland, these provisions do not apply, but the common law places obligations on traders which have substantially the same effect.

¹⁰ Other areas of law also apply where both parties are businesses. These include general contract law, the Unfair Contract Terms Act 1977 and the Misrepresentation Act 1967, all of which are likely to be relevant to professionals engaged in the lettings sector.

¹¹ The planned introduction of the Consumer Rights Act will result in the replacement of several pieces of consumer protection legislation, including the UTCCRs and the SGSA in addition to other legislation.

- The Unfair Contract Terms Act 1977 (UCTA) some of which applies generally and some only when one party is a consumer and the other a business.
- 3.3 In addition there is a range of other laws and duties that CMA and TSS can enforce under Part 8 of the Enterprise Act, that are likely to be relevant to lettings professionals. These include the Accommodation Agencies Act 1953 and the requirements of contract law. More information on the Accommodation Agencies Act 1953 is included in Annex A. Also, information on the law of agency is included in paragraphs 4.3 – 4.4 of chapter 4 where we talk about the agent’s relationship with the landlord.
- 3.4 This guidance is intended to complement existing guidance on these laws, by recasting it in a lettings context.¹² In the chapters that follow we provide detailed guidance on the CMA’s view of the application of the laws and the practical steps that the CMA considers you can take to reduce the risk of your business practices infringing the law. However, it is important to be aware that this is guidance and that **only a court can state definitively what the law requires in any particular situation.**
- 3.5 In this chapter we set out in more general terms how, in our view, the key concepts and provisions of the CPRs, BPRs, UTCCRs, SGSA and UCTA apply to the issues we have identified in the lettings sector.

Trader or consumer?

- 3.6 In general, a trader is someone acting for purposes relating to their business, trade or profession, while a consumer is not acting for any of these purposes. It is a question of fact whether a person is acting as a consumer or as a trader, and it is not always clear where the line should be drawn.¹³

¹² Most references to existing guidance are to OFT guidance documents and publications relevant to enforcement of and compliance with consumer legislation that had been published and were in effect prior to the transfer of the various consumer functions to the CMA on 1 April 2014. Certain of those documents have been adopted by the CMA Board, whereas others now fall outside the scope of the CMA’s responsibility. For further information see [Guidance on CMA approach to use of its consumer powers consultation](#)

¹³ UK and EU case law on this topic has dealt with situations where a person enters into a contract for both consumer and professional purposes, where the contract is for future business purposes and where it is unclear whether the individual is acting for professional purposes or not.

- 3.7 For the purpose of this guidance, the CMA proceeds on the basis that:
- most residential tenants are consumers¹⁴
 - most letting and managing agents are acting in the course of a business.
- 3.8 Ultimately, whether or not an individual is acting in the course of a business will come down to a question of fact and degree, and it is difficult to draw a hard line. Factors the courts have considered relevant when deciding on this question include what the person's day job is, the degree of professional skill the person actually has, whether they actively hold themselves out as acting for business purposes, and to some extent whether the person derives a significant regular income from their activities.
- 3.9 The courts have recognised that certain **landlords** are to be regarded as consumers when dealing with letting agents who are acting in a business capacity. This is consistent with a recognition that members of the public letting out, for example, their homes, or parts of their homes on a one-off or occasional basis, are likely to be in a weaker bargaining position than the lettings agents whose services they seek to use.¹⁵ As businesses, professional landlords, by contrast, do not require the same degree of protection as consumers.¹⁶
- 3.10 Whilst it should not be assumed that every landlord is a consumer for the purposes of the law covered in this guidance, the CMA considers it is advisable for letting agents to comply consistently with the requirements of consumer protection law when dealing with all landlords, unless the landlord is clearly a corporate entity or running a business that lets out many properties. This is because there may be severe consequences for a trader for failing to treat customers as consumers, if this is in fact what they are (as we set out in chapter 10). If you breach consumer protection law you may commit an offence, or your contract terms may be unenforceable, or you may be liable to other enforcement action.
- 3.11 Similarly, the CMA considers it advisable for all landlords to comply with the requirements of consumer protection law whenever dealing with tenants of residential property, for the same reasons as set out at 3.10 above.

¹⁴ Where a tenant enters a tenancy for a property in which they plan to live, the CMA considers it unlikely that a court would rule they are acting in the course of a business (see *Heifer International Inc v Christiansen* [2008] Bus LR D49 at para 250).

¹⁵ A weaker bargaining position is characteristic of a consumer's position in relation to traders generally.

¹⁶ See *OFT v Foxtons* [2009] EWHC 1681 (Ch) para 28.

Clarifying the legal relationship

- 3.12 It is also important to be clear about the nature and extent of the **legal relationship** that exists between you and each of the other people that you deal with during the lettings process.
- 3.13 For example, a landlord using a lettings agent is likely to have both a contract with the agent and a tenancy agreement with a tenant, whilst a lettings agent usually only has a contract with the landlord. Whatever the nature of your business relationship, you should always make sure you have a contractual basis for imposing charges (especially on tenants) before you ask for these to be paid.¹⁷

The Consumer Protection from Unfair Trading Regulations 2008¹⁸

- 3.14 The CPRs came into force across the UK in May 2008. They apply to businesses across all sectors, not just businesses involved in the letting of property.
- 3.15 The CPRs prohibit businesses from engaging in unfair **commercial practices** in their dealings with **consumers**. There are a number of important concepts in the CPRs that are explained below, and contextualised in relation to the lettings sector.

Consumers

A **consumer** is defined as an individual who in relation to a **commercial practice** is acting for purposes outside his trade, craft, business or profession (referred to below as 'his business' for shorthand).¹⁹ As discussed above, it is a question of fact whether a person is acting in the course of his business.

Traders

A **trader** is someone who, in relation to a **commercial practice**, is acting for purposes relating to his business. It also includes anyone acting in the name, or on behalf of, a trader.

¹⁷ In any event, these should only include those charges that you are allowed by law to impose.

¹⁸ See OFT's guidance [Consumer Protection from Unfair Trading Regulations 2008 \(OFT 1008\)](#)

¹⁹ 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.

KEY POINT - Generally speaking, the CMA considers that for the purposes of the CPRs:

- a letting agent is always acting in the course of his business in his professional dealings and needs to follow consumer law, except when dealing solely with other businesses
- tenants of residential property are normally consumers and should generally be treated as such by both letting agents and landlords
- landlords can be consumers in their dealings with letting agents, and the information they are given and the contract terms used with them should reflect the requirements of consumer law unless they are clearly acting in the course of their business.

Commercial practice

The CPRs apply to commercial practices where a trader²⁰ 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 product²¹ to or from consumers. A commercial practice may be a single act or omission, or a course of conduct over a period of time.

²⁰ In this guidance, we use 'trader' to mean any type of business, including, for example, sole traders, companies or partnerships.

²¹ 'Product' is defined very widely. It includes goods and services, including immovable property, rights and obligations. In relation to lettings, this could include for example a leasehold interest in a property or any services that an agent may wish to offer to potential tenants or consumer landlords.

The CPRs apply to all stages of commercial activity before, during or after a commercial transaction (whether or not a contract is concluded) in relation to a product.²² The trader need not themselves be selling, supplying or purchasing the product. For example, an agent acting on behalf of a landlord to find a tenant for a property the landlord wishes to let is likely to be engaging in commercial practices in relation to potential tenants.

Specifically in relation to lettings, commercial practices include, for example, operating an online platform, advertising your services, offering pre-agreement advice to a client, describing a property available to let, interacting with potential tenants, negotiating a letting, taking a holding deposit, managing a property or handling 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).

The CPRs contain broad rules outlining when commercial practices are unfair. These fall into five main categories:

- giving misleading information to consumers, for example through false or deceptive advertisements or statements
- failing to give necessary information to consumers, for example leaving out or hiding important information
- acting aggressively, for example, using rent collection techniques that involve harassment, coercion or undue influence
- failing to act in accordance with reasonable expectations of acceptable trading practice (failing to be professionally diligent), where doing so impairs the consumer's ability to make informed decisions about the product
- engaging in any of 31 specific practices that the CPRs ban outright.

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**'.

²² 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** which is simply a decision in relation to a product and which need not involve the creation of any rights or obligations.

Average consumer

The CPRs are designed to provide a level of protection that is proportionate. What this requires you to do in practice, depends on the circumstances of the case. It will also depend on whether your practices are **targeted** at any particular sorts of consumer, or are likely to impact on any consumers who are **vulnerable**. The usual benchmark is the 'average consumer': this is someone who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors.²³ It is someone who takes reasonable care of their own interests. The 'average consumer' is primarily defined by reference to the way ordinary people behave, with all their limitations. It is not defined by statistical criteria.

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

- pay some attention to documentation, but not necessarily to read or understand the small print unless key points are brought to their attention
- make known their own particular requirements
- in the case of 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 the lettings professional says.

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 in which prices are presented. They are also likely to tend to trust the particular lettings professional with whom they are dealing.

The CPRs also provide that, where a commercial practice is **targeted** at a particular group of consumers,²⁴ the 'average consumer' will refer to the average member of

²³ CPRs 2(2) and European Court of Justice case law.

²⁴ 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.

that group, not the average consumer generally. This is relevant where, for example, advertising is directed at particular groups such as students, tenants claiming housing benefit, people moving from overseas, or people who speak a particular language. In such cases, the type of commercial practice you adopt and how you deal with consumers will be expected to take account of factors that are characteristic of those groups such as language barriers, limited knowledge of legal rights and/or a lack of experience.

The CPRs also provide expressly for groups of consumers who are particularly **'vulnerable'** to a commercial practice, or a product. These are consumers who, because of age, infirmity or credulity, may be more at risk from an unfair commercial practice – for example, people who have disabilities, or the elderly.

If you foresee that you will market property or services to, or otherwise deal with, members of a vulnerable group, for example because of the nature or location of the property, then you will need to adjust your practices accordingly to address the vulnerabilities that are characteristic of that group. The average consumer will, in these circumstances, refer to the average member of the vulnerable group rather than average consumers generally. For example, if you operate in a university town, you are likely to deal with a good number of students, who may be less familiar with the process of renting a property or their legal rights, than older people with more experience of renting.

It is important to note that these protections exist, and need to be taken into account, regardless of whether or not you specifically target your practices at such vulnerable consumers. For example, it is reasonable to expect to deal with people who have disabilities, and you should therefore make sure that your practices reflect this.

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.

KEY POINT – You should consider how your practices might affect consumers with whom you deal, and review whether you need to make any adjustments. Think about what additional steps you may need to take where you target a particular group, and consider what vulnerable groups of people you are likely to deal with or who may see your advertising.

Transactional decision

Consumers need to be able to make properly informed decisions when dealing with a business carrying on a commercial practice.

The CPRs refer to the concept of a 'transactional decision' taken by a consumer. 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 or contractual consequences – for example it would include a decision to enter a shop. A transactional decision is defined as any decision taken by a consumer, including decisions not to act, concerning:

- whether to purchase a product
- whether or not to pay in whole or part for a product
- whether or not to retain or dispose of a product
- whether or not to exercise some contractual right, and/or
- deciding how, and on what terms, to do any of these things.²⁵

Your commercial practices, for example your market appraisal of the property to let, description of it, or the advice you give during interactions with consumers, can affect consumers' **transactional decisions**, for example:

- if you are an agent, a landlord's decision to let a property through you, or to let it to a particular tenant
- a tenant's decision to find out more about a property, view a property, apply to rent it or sign a tenancy agreement
- a tenant's decision to pay a pre-contract deposit to you
- a landlord's or tenant's decision to enforce, or to refrain from enforcing, their statutory rights or rights under a tenancy agreement
- a landlord's or tenant's decision to pay money to you (if you are an agent), or to allow you to keep money you already hold.

²⁵ CPRs 2(1).

KEY POINT – A consumer is likely to make many transactional decisions in the course of their dealings with you, and many of these will not have financial or contractual consequences.

Giving misleading information to consumers

3.16 It is a breach of the CPRs for businesses to give misleading information to consumers, for example by making 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).

3.17 An unfair commercial practice may mislead consumers:

- through the false information it contains
- through the deceptive nature of 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.

3.18 Misleading information may be given verbally, in writing or visually. In the context of lettings, examples of a misleading action could be:

- mis-stating in an advertisement how much it will cost a tenant to rent the property
- providing inaccurate information about the property in particulars
- providing misleading information over the telephone (or in the course of discussions) about when the property is likely to become available, or
- providing misleading information where a tenant makes a specific enquiry, such as whether a particular piece of furniture will be provided in a furnished let, and indicates that the information is important to him.

KEY POINT - You should make sure that what you tell consumers is not misleading. This extends to providing information that is literally true, but is presented in a misleading way.

Failing to give necessary information to consumers

- 3.19 It is a breach of the CPRs for traders to mislead consumers by failing to give them the material 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).²⁶
- 3.20 This might, for example, occur by leaving out or hiding important information, or providing important information in an unclear, unintelligible, ambiguous, or untimely manner, where this has or is likely to have a particular effect on the average consumer.
- 3.21 In determining whether consumers have been misled by omission, the circumstances and the context of the commercial practices involved would be taken into account. For example, restrictions on space (due to the media used) may mean that it is appropriate for more details to be given elsewhere, such as in the property particulars, or through the use of web links. You should consider what additional steps you may need to take if there are genuine practical difficulties in setting out what consumers need to know, so that **material information** is still provided.
- 3.22 In the context of lettings, examples of a **misleading omission** could involve failing to present clearly, and upfront, fees that the tenant may have to pay, or failing to inform a tenant that a property to let does not include the use of a garden that appears to be part of the property.
- 3.23 The duty not to mislead by omission is limited to providing what is **necessary** information, described in the CPRs as '**material information**'.

²⁶ This occurs when a business omits or hides material information, or provides it in an unclear, unintelligible, ambiguous or untimely manner, and the average consumer takes, or is likely to take, a different transactional decision as a result.

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'.²⁷

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, if they are to be able to find the product that is right for them in a straightforward way.

Material information does not necessarily include all of 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 tenant might like to know the lowest rental sum that a landlord would accept. However this is not material information, since knowledge of it is not necessary for the tenant to make a considered decision as to whether or not to take the property at the rental offered.

It is important to consider what information you need to share and at what stage this needs to be done.

For example, where you are an agent advertising your services to potential client landlords, the material information that you should provide at the outset is likely to include:

- a clear description of the services you will provide
- your fees and charges, how they will be calculated and when they will be payable
- the length of the agreement and how it can be terminated.

If you do not know a piece of material information, it could still be a **misleading omission** if you do not disclose it. For example, where you are marketing a property to let, you should obtain sufficient information from the owner in order to avoid misleading potential tenants by leaving out **material information** (such as any restrictions on the use of the property).

²⁷ 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)).

Taking reasonable steps to check things out

You **cannot** avoid liability for misleading by omission by adopting an 'ask no questions' approach to information supplied by third parties, by failing to take reasonable steps to seek out material information where it is needed, or by turning a blind eye to any obvious problems and failing to draw them to attention of consumers.

To clarify what 'taking reasonable steps' to check 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 or its location. In these cases you may be able to identify all the **material information** needed from your knowledge or from the checks you undertake personally.
- In other cases there may still be gaps in the information you have, or you may need to check further (in order to give the required level of information that is reasonable for the service you are providing). If you are an agent you may find you need to ask your client landlord or third parties for further information. For example you will need to check with them that the property complies with relevant safety laws. Depending on the circumstances, you may also need to check for other things, such as whether there is available parking.
- Where you are an agent acting for a landlord and they provide you with information 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 their description of the number of people that could comfortably live in the property appears unrealistic, you should check further.
- Where the response from your client landlord 'rings alarm bells', you will need to probe further or challenge what you have been told. For example, where the landlord states that the gas boiler has undergone a safety check, but he is unable to supply a copy of the landlord's certificate it would be appropriate for you to require the boiler to be checked again, and a certificate produced before finalising the letting.

The requirement not to mislead by omission applies throughout the advertising and management of the property. This means that if you become aware of **material information** later on, you should still disclose it. An example of this would be where you discover that the property a prospective tenant has agreed to rent will not be ready on the agreed or advertised date because, for example, works have overrun or an existing tenant has not moved out on time.

KEY POINT: you should:

- give **material information** to consumers at the right time
- not deliberately hide or leave out necessary information when dealing with consumers
- take reasonable steps to find out information, and to check things out. This includes when you discover a problem or are put on notice there might be one.

Invitation to purchase

Where a commercial practice is an ‘invitation to purchase’,²⁸ the CPRs deem certain information to be ‘**material information**’,²⁹ including:

- the main characteristics of the product
- the identity and address of the trader
- the money that has to be paid (for example, rent, administration charges etc), inclusive of taxes.

This information should be presented together, and not slowly revealed, bit by bit. The aim of the law is that consumers can make a properly informed decision, when they see the invitation to purchase, as to whether they in fact wish to proceed.

KEY POINT:

When you give information about a product and its price, this should be comprehensive. You should not select only some parts of the price, or downplay main characteristics of the product that may be less attractive.

²⁸ The CPRs define an invitation to purchase as ‘a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of that commercial communication and thereby enables the consumer to make a purchase’.

²⁹ This is subject to the same considerations about the context and the limitations of the communication medium as apply to misleading omissions generally (see paragraphs 3.19 – 3.23 above).

Acting aggressively

3.24 It is a breach of the CPRs for businesses to use any commercial practice that, in the context of the particular circumstances, intimidates or exploits consumers such as to restrict (or be likely to restrict) their ability to make free or informed choices in relation to a product, 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).

3.25 In determining whether a practice is aggressive, various factors, set out in the CPRs, may 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.

3.26 In the context of lettings, examples of an aggressive practice might include, for example:

- Entering a tenant's property without their permission in order to discuss late payment of rent.
- Exploiting a position of power to make it hard for someone to pull out of the process of agreeing a tenancy agreement when they are not sure they want to proceed – for example by refusing to return a holding deposit without good reason.
- Threatening the tenant with eviction to dissuade them from exercising rights they have under the tenancy agreement or in law, for example where they wish to make a complaint to a local authority about the condition of the property, or seek damages for disrepair.

- Telling the tenant you are ending the assured shorthold tenancy through the 'no fault' procedure under Section 21 of the Housing Act 1988 to make the tenant leave voluntarily, when the tenant's deposit has not been properly protected. If the deposit has not been protected, the landlord cannot legally use the no fault procedure to end the tenancy.³⁰

KEY POINT: Think about the impact of your business practices on consumers. A practice could be considered aggressive because of the impact it is likely to have on a consumer, and how much pressure it places on him or her.

Professional diligence and the general prohibition against unfair commercial practices

- 3.27 The CPRs place a general prohibition on unfair commercial practices (regulation 3). These include practices 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 practices concerned must materially distort or be likely to materially distort the economic behaviour of the average consumer. This means that it would impair the ability of the average consumer to take an informed decision, causing them, or leaving them likely, to take a transactional decision they would not otherwise have taken.
- 3.28 The standards referred to of honest market practice and good faith are objective ones. This means that they are not determined by how other lettings professionals are acting. If for example, lettings professionals in your area routinely adopt a poor practice, this does not mean the benchmark for what counts as an acceptable practice will be lowered. If you fail to meet the standard considered necessary to be professionally diligent, you would breach the law even if the practice you adopt is widespread in the industry.
- 3.29 In the context of lettings, you are likely to be failing to act in a professionally diligent manner if, for example, you do not comply with recognised standards

³⁰ Section 21 of the Housing Act 1988 applies in England and Wales. It allows a landlord to ask the tenant to leave at the end of the minimum assured shorthold period. As long as the landlord complies with the procedure set out by Section 21, they do not have to give any reason for ending the tenancy (for example that the tenant is in rent arrears). See chapter 9 for more information and pages 84-85 in particular.

in your industry or profession, such as those set by guidance, codes of practice or similar.³¹

KEY POINT: Be aware of industry standards as these are likely to be treated as a **minimum** standard of professional diligence that your business is expected to meet. If you are a member of a code of conduct and tell people that you are a member you must observe its requirements.

Banned practices

3.30 There are a number of specified practices listed in Schedule 1 to the CPRs that are considered unfair in all circumstances and which are always prohibited outright. We have listed some of these below, which may be particularly relevant for lettings professionals, and explained how, and in what situations, they may apply.³² Examples of possible banned practices in the context of lettings are also given in **chapters 4 to 9**.

Membership of codes of practice and claims about your business

- ‘Claiming to be a signatory to a code of conduct when you are not.’ (1)
- ‘Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation.’ (2)
- ‘Claiming that you (including your commercial practices) or a product have been approved, endorsed or authorised by a public or private body when you, the commercial practice or the product have not, **or** making such a claim without complying with the terms of the approval, endorsement or authorisation.’ (4) For example if you are a member of a lettings redress scheme, you should comply with all of its code.

Advertisements and sales techniques

- ‘Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds you may have for believing that you will not be able to offer for supply or to procure another

³¹ The TPO Code of Practice for Letting Agents, the RICS Blue Book (UK Residential Standards 5th Edition) or RICS’ Private rented sector code (still to be published at time of producing this guidance) for example.

³² The numbers shown in brackets indicate the paragraph of the relevant specified practice in Schedule 1.

trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising).’ (5) For example, it would be illegal to advertise that you have many properties available to rent for a low rent, if you only actually have a few of them.

- ‘Making an invitation to purchase products at a specified price and then refusing to show the advertised item to consumers with the intention of promoting a different product’ (sometimes known as bait and switch).’ (6) This could include keeping a desirable property listed on an online portal, in order to attract customers, but not accepting requests to view the property and suggesting alternative properties instead.
- ‘Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.’ (7) This may be relevant if you tell potential tenants that a particular property is about to be rented by someone else and therefore they need to decide immediately if they want to rent it (and, for example, pay a deposit to hold it or sign a tenancy agreement straight away), if this is not the case.
- ‘Stating or otherwise creating the impression that a product can legally be sold when it cannot.’ (9) For example, advertising a property that is not available to rent.
- ‘Presenting rights given to consumers in law as a distinctive feature of the offer.’ (10) For example it would be wrong to suggest that your service involves taking additional care of tenants’ deposits, if you simply put them into a tenancy deposit scheme, as you are required to by law.
- ‘Passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions.’ (18) This is relevant if you suggest to tenants an inaccurate going rent for properties in order to persuade them to agree to pay the rent you are asking.

Claims about whether you are in business or not

- ‘Falsely claiming or creating the impression that you are not acting for purposes relating to your trade, business, craft or profession, or falsely

representing yourself as a consumer'. (22) As mentioned above, landlords should not purport to be consumers if they are in fact acting in the course of a business.

Contact with the consumer, including dealing with problems and making personal visits

- 'Conducting personal visits to the consumer's home ignoring the consumer's request to leave or not to return, except in circumstances and to the extent justified, under the law, to enforce a contractual obligation.' (25) This is a relevant consideration if your practices mean you enter the tenant's property and may be especially relevant if you visit to collect rent.
- 'Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under the law to enforce a contractual obligation.' (26) This is important to bear in mind if you market your services to potential clients or tenants by email or telephone: you should make sure that you remove people from your marketing database who request not to be contacted.

Business Protection from Misleading Marketing Regulations 2008³³

- 3.31 It is a breach of the BPRs to make representations, advertise or market to other businesses in a way that deceives (or is likely to deceive) them, if this is likely to affect their economic behaviour or injures or is likely to injure a competitor (regulation 3). The deception may derive from false information, or from the way the information is presented, including its omission.
- 3.32 The BPRs will apply when you advertise your services to potential new clients that are businesses, when you market property to let to businesses, and when you make any statement to another trader in order to promote either your own business or the letting of your client's property.
- 3.33 A representation, statement or advertisement can be misleading under the BPRs if it:
- contains a false statement of fact
 - conceals or leaves out important facts

³³ See the OFT's quick guide to the BPRs, [Business to business promotions and comparative advertisements \(OFT 1056\)](#) for more information.

- promises to do something when there is no intention of carrying it out
- creates a false impression (even where the information itself is literally true).

3.34 The BPRs will apply, for example, to an agent in their dealings with a landlord who is not a consumer. 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 who is addressed or reached by the advertising 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. Examples include:

- Misleading a university accommodation service about the quality of properties you have available for students to rent.
- Providing misleading information about the level of rent that you will be able to obtain for a property, or the number of tenants you have waiting for properties, in order to obtain business from a professional landlord.

Making unfair comparisons with competitors

3.35 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).

3.36 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.

3.37 The regulations cover advertising as commonly understood, such as broadcast, billboards and print advertising. They also cover other marketing and promotional activities such as oral representations, details in catalogues or websites and descriptions on packaging.

3.38 The following are some illustrative examples of breaches of the rules on comparative advertising:

- making comparisons with other property lettings businesses that are not true, for example regarding numbers of properties for rental, levels of fees and charges, opening hours, numbers of offices or number of staff
- advertising that you are the leading property lettings business in a particular area or field when you are not (or cannot prove this)
- advertising that you have a particular market share in that area when you do not
- making inappropriate use of a competitor's trade mark to draw attention to the comparison.

Unfair Terms in Consumer Contracts Regulations 1999³⁴

3.39 The UTCCRs apply in relation to contracts you conclude with consumers, subject to some exceptions. Their aim is to ensure that terms in consumer contracts are fair, and that unfair terms are removed from the market. They do this by requiring terms to be clear and balanced, and by requiring courts and enforcers to take action when unfairness is identified.

3.40 The UTCCRs require all terms to be in plain intelligible language, meaning that they must be legible, and set out clearly what the consumer's rights and obligations under the contract are, so that the consumer can understand their nature and effect. Terms should be in plain English, and should not use property-specific jargon or terminology without explanation. Even if a term would be clear to a lettings or property specialist or to a lawyer, it may be unfair if it is likely to mislead, or be unintelligible to, a consumer.

3.41 Terms which describe the main subject matter of the contract and the price or remuneration to be paid – which set out the 'core' bargain - may only be assessed for fairness in a limited way, provided they are expressed in plain, intelligible language. You should not, however, assume that all terms involving payments by the consumer, will be part of the 'price' to be paid.³⁵

³⁴ See the OFT's general guidance on the UTCCRs, [Unfair contract terms guidance \(OFT311\)](#) for more information. See also paragraph (1.15) regarding the impact of the Consumer Rights Act on the UTCCRs.

³⁵ Examples of 'non price' payment terms include penalties, late payment clauses, terms likely to surprise the typical consumer, commissions and charges for rectifying damage caused by the tenant.

- 3.42 Generally, the UTCCRs require that other standard contractual terms must be fair, meaning they do not, contrary to the requirement of good faith, cause a significant imbalance in the rights and obligations of the parties to the detriment of the consumer. The assessment of fairness is carried out taking into account the nature of the goods or services to be supplied, and all the circumstances surrounding the conclusion of the contract. Where the fairness of a term is challenged, the term will be assessed for fairness in the context of the contract as a whole.
- 3.43 'Good faith' has generally been taken by the courts to represent a requirement of openness and fair dealing. It follows from this that the terms within a tenancy agreement or other contract should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate to the consumer's disadvantage, who, in relation to a lettings agent, may be either a tenant or a landlord. Fair dealing requires that the stronger party should not, whether deliberately or unconsciously, take advantage of the consumer's weaker bargaining position, including his or her needs, lack of resources, lack of experience or unfamiliarity with the subject matter of the contract.
- 3.44 Schedule 2 to the UTCCRs contains an indicative and non-exhaustive list of terms that may be unfair.
- 3.45 An unfair term is not binding on the consumer, and may not be included in a contract, recommended or enforced.
- 3.46 Examples of where unfair terms may be particularly relevant are:
- the agent's contract with the landlord (for instance certain fee commission terms have been found to be unfair by the courts)
 - the terms on which a holding deposit is paid by the tenant
 - the terms of the tenancy agreement itself³⁶
 - any other contract the tenant enters into with the agent.

Supply of Goods and Services Act 1982³⁷ and Scottish common law

- 3.47 The SGSA in England, Wales and Northern Ireland and the common law in Scotland, require lettings professionals to provide services with reasonable

³⁶ See the OFT's [Guidance on unfair terms in tenancy agreements \(OFT356\)](#) for more information.

³⁷ See *A Trader's Guide: The Law Relating to the Supply of Goods and Services*, April 2005 for more information.

care and skill, within a reasonable time frame and, where no price is agreed, at a cost that is no more than a reasonable charge. The SGSA and the common law in Scotland imply such terms into all contracts, including a contract for a lettings professional's services (to a landlord or a tenant). These terms can be excluded where both parties are professionals.

- 3.48 The SGSA is likely to be especially relevant in relation to the way that agents carry out their services for landlords, for example in managing a property and collecting rent. The Act also applies in relation to work that is carried out by or on behalf of a landlord, to discharge the landlord's contractual duties to the tenant – such as conducting repairs, or organising tradespeople.

Unfair Contract Terms Act 1977

- 3.49 UCTA operates alongside the UTCCRs, often to the same or similar effect despite technical differences, but applies to contracts generally, not just consumer contracts.³⁸ Under UCTA certain contract clauses and notices are unenforceable whilst others are subject to a reasonableness test,³⁹ which is very similar in effect to the test of fairness in the UTCCRs.
- 3.50 UCTA does not apply to certain kinds of contracts, including those for the creation or transfer of an interest in land, but it applies to most kinds of service contracts including letting agency contracts.
- 3.51 Under UCTA a trader cannot use a contract term to exclude or restrict his liability for breach of contract or providing a substantially different service from that agreed, or providing no service at all unless he can show that the clause satisfies the test of reasonableness.
- 3.52 UCTA also prevents any person excluding or restricting their liability for negligently causing death or personal injury, and makes the use of terms that exclude or restrict liability for other kinds of loss or damage subject to the test of reasonableness.
- 3.53 Only a court can determine whether a term is or is not reasonable.

³⁸ The Consumer Rights Bill, if enacted, will bring these two pieces of legislation together.

³⁹ UCTA does not define this reasonableness test, but instead sets out, in Schedule 2 to the Act, factors that the courts will consider, when applying the reasonableness test in individual cases.

4. ADVERTISING TO AND CONTRACTING WITH THE LANDLORD

4.1 This chapter is of most relevance to letting agents. It sets out information on your contractual relationship with the landlord and aims to help you comply with the law – particularly, but not only consumer law - when you are:

- advertising to prospective landlord clients
- providing important pre-contractual information to prospective landlord clients about your services, fees and charges.

OVERVIEW

As a letting agent you should:

- Comply with consumer protection law when dealing with landlord clients (unless it is clear that they are acting in the course of their business).
- Make sure that any advertising and marketing of your services to landlords is clear, accurate and not misleading. You should not omit material information. It is particularly important to ensure that you clearly set out the fees that you will charge, and exactly what service you are offering to perform.
- Provide full information about your fees, including those that are variable and optional, and any information given should be accurate and not misleading. We consider you are more likely to ensure compliance with this if you set this information out in a clear tariff of charges that landlords can easily access, and that is quoted inclusive of VAT.
- Ensure the terms of any contract that you use are clear, and do not contain hidden surprises. Your contract terms should not be unfair.⁴⁰ Unusual or onerous terms should be set out prominently.
- Ensure you comply with your legal duties towards landlords as their agent – take proper care of their money, disclose any sums or commissions you receive from tenants or tradespeople, and provide accurate advice on compliance with the law.

⁴⁰ By 'unfair' we refer primarily to terms that would be considered unfair under the UTCCRs. However you should be aware that UCTA also provides protection against certain unfair terms in business contracts.

The agent's relationship with the landlord

4.2 As set out in chapter 3, we think that, in general, letting agents should treat their landlord clients as consumers except where it is clear that all those they are dealing with, are acting in the course of business. However, agents should also bear in mind that even when dealing solely with professional landlords that do not need to be treated as consumers, the BPRs, and many provisions of UCTA and SGSA are still applicable. In our view, the practical effect of legislation such as the BPRs and UCTA is to provide businesses with a comparable level of protection to that enjoyed by consumers in relation to misleading information, particularly in advertising, and as regards at least some major forms of contractual unfairness.

4.3 Letting agents also owe landlords (their principals) duties under the law of agency.⁴¹ These include:

- A duty to comply with lawful instructions. These are likely to be set out in the contract, but may be supplemented by separate written or oral instructions. There is, however, no duty to comply with an instruction to do something that is unlawful (either for the landlord or the agent) to do. So, for example, if you are an agent, you should not follow an instruction from your landlord client that would cause you to mislead a potential tenant, since this would put you, and possibly the landlord, in breach of the CPRs.
- A duty of care and skill. This duty is similar to that implied by the SGSA. It also requires the agent not to act negligently. Landlord clients may look to you to guide them through the lettings process, so in carrying out your duties, you should do them with care and skill. Where you give landlords advice, this should be accurate, to enable them to comply with the law.
- A duty of loyalty. The agent's responsibility is to represent the interests of their principal, and not to allow any other interest (their own, or someone else's) to conflict with this. If a potential conflict of interest arises, the agent must make full and frank disclosure of this to their principal. This duty also restrains agents from making 'secret profits', meaning money the agent is paid in addition to their agreed commission from the landlord client, and which the landlord client does not know about. So, for example, you should tell the landlord of any sums you propose to charge potential

⁴¹ The duties set out in the bullet points are broadly similar under Scottish common law, although it is important to note that the law of agency in Scotland is not identical to the law of agency in England.

tenants, and disclose any commissions or other benefits you receive from workmen for passing work to them.

- A duty not to sub-contract.⁴² If an agent wishes to sub-contract, he must obtain the express permission of the principal, otherwise he will remain entirely responsible for any work that is done. So for example you should take care to ensure that you are able to exercise sufficient control over the workmanship of contractors you instruct to advertise, clean or repair the landlord's property.

4.4 Although you may be entitled to contract out of these duties in some circumstances and if your landlord client agrees, you will need to ensure that any exclusions would be neither unreasonable under UCTA nor (unless it is clear your landlord client is a business) unfair under the UTCCRs. In all circumstances, if you want to be sure that any terms you want to use to contract out of these duties will be legally effective, you will need to flag them up clearly to your landlord client, and explain what their effect will be.

Information about your services

4.5 You should ensure that any information that you provide when marketing your services, in whatever form (including flyers, websites, newspaper advertisements, and verbal discussion), is clear, accurate and not misleading. You should also not mislead by omission whether dealing with business clients, who are protected by the BPRs, or consumer clients, who are protected by the CPRs.

4.6 The purpose of these requirements is to make sure prospective client landlords are not misled in any way and so they can make informed and therefore efficient **transactional decisions** about using your services. For example, you should not give a misleading impression regarding the size of your business, the numbers of properties on your books or the amount of rent you think you will be able to obtain for a property.

4.7 You should make sure that any comparisons you make with competitors, for example your record of letting properties compared with theirs or the benefits of clients using your services as opposed to theirs, are fair, objective, can be substantiated and are not misleading.

4.8 You should ensure that details about properties that you have let, or are in the process of letting, or statements about whether you hold professional

⁴² Entering an agreement for someone else to carry out your duties.

qualifications or are a member of a professional body or redress scheme, are accurate.⁴³ Where you are a member of a redress scheme, you should identify which one.⁴⁴

4.9 Where you are a member of a professional body, redress scheme or code, you should ensure you comply with its rules. Failure to do so could result in you committing a banned practice, that is, claiming that you are approved by a body but failing to comply with the terms of that approval.⁴⁵

4.10 Your pre-contract information should provide a summary of the key features of your service. It should also draw attention to any terms or exclusions that are likely to be unexpected or surprising to a potential landlord client. You should not leave out **material information**, or hide it by including it only in small print or not making it as prominent as it needs to be.

4.11 **Material information** about your services is likely to include:

- what steps you will take to secure a tenant for the landlord and manage the property (if providing a management service)
- things you do not offer as part of your services, if these are significant and would or might usually be done by a lettings professional
- things the landlord will remain responsible for in terms of managing the rental property, if these are significant and would or might usually be done by a lettings professional
- the timescale within which you will pass on rent to the landlord
- any minimum period to be covered in the contract with the landlord, or any restrictions the contract imposes on the landlord if they want to terminate their liability to pay fees to you.

⁴³ Where you belong to a professional body, the fact that you do, and the identity of it, may constitute material information to a landlord.

⁴⁴ The fact you belong to a redress scheme and the identity of that scheme, may constitute material information to a landlord or tenant.

⁴⁵ Paragraph 4 of Schedule 1 to the CPRs: 'Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when the trader, the commercial practices or the product have not or making such a claim without complying with the terms of the approval, endorsement or authorisation.'

Further examples of potential breaches of consumer law when advertising to prospective landlord clients

- It may be a **misleading action** to claim you have a large number of tenants seeking property to rent, if that is not the case.
- It may be a **misleading action** to state you can get more rent for the property than you know you can actually achieve.
- It may be a **misleading omission** if you fail to make sufficiently clear what is covered by any pre-tenancy vetting service you provide, and a **misleading action** to give the impression that you will find tenants of a particular quality, if you cannot guarantee this given the extensiveness of the checks you carry out.
- It may be a **misleading action** to state that you are a member of a tenancy deposit protection scheme, or a redress scheme, when you are not.

Information about your fees and charges

- 4.12 To remove the risk of breaching consumer and other law, you should provide information about your fees and charges that is full, accurate and not misleading, so that potential landlord clients can assess how much it is going to cost them to use your services. It is likely to be misleading to provide information about some charges and not others, or only to reveal them gradually. All non-optional fees and charges should be set out up front.
- 4.13 Your description of your services should fairly reflect the way you charge for them. For example, it may be misleading to state that you charge a specific percentage (eg 11%) for a comprehensive management service, when in fact you make extra charges for particular aspects of this service. It may also be misleading to describe your services as 'let only' or similar, if in fact you have terms providing for renewal commission to be paid should the tenant remain in occupation at the end of the fixed period of the tenancy agreement.
- 4.14 Fees that are genuinely variable or optional should be clearly set out and brought to the attention of a potential landlord client early on, and not merely included in the small print of the contract. For example, we consider you are more likely to comply with the law if you provide, at the outset, a summary of fees and charges in a single tariff that landlords can easily access. Where fees and charges are variable, or optional, such a tariff should outline the

factors affecting the calculation of the charges involved. It will aid clarity if you provide worked examples of calculations of this kind.

- 4.15 Advertising that includes any fee information should set out all the non-optional fees that landlord clients will be asked to pay under the contracts you use, and indicate clearly where the landlord can find out further information about any variable or optional fees (for example, in on-line advertising, by means of a link no more than one click away from the initial fee information to a detailed tariff).
- 4.16 Where a charge is likely to be unexpected, or to come as a surprise to a potential landlord client, you should highlight the details individually. We would consider renewal commission to be an example of a charge that should, in particular, be drawn to the attention of a client in this way (see paragraphs 4.22 – 4.31) below for more information on renewal and sales commission).
- 4.17 Further examples of charges that we consider should be given particular prominence in pre-contract information, as well as in the contract, include (but are not limited to):
- charges for providing a tenancy agreement
 - charges for familiarising yourself with a tenancy agreement provided by the landlord
 - any fees the landlord will have to pay for a minimum period
 - ‘check-in’, or ‘check-out’, fees
 - security deposit handling fees.
- 4.18 You should also make it clear if you will only provide certain services on payment of an additional fee. This might include things such as dealing with call outs, serving notices and drafting renewal documentation.
- 4.19 Because your clients are likely to include consumers and possibly businesses that will not be able to reclaim Value Added Tax (VAT), we consider that any charges you advertise should be inclusive of VAT (including charges that are expressed as a percentage, for example those expressed as a percentage of rent). This should not prevent agents from providing landlords with a breakdown of the VAT amount if requested. The CPRs require that an invitation to purchase should display the price inclusive of taxes. Where the price is stated to be a percentage of a future fee, we consider that the percentage stated should include any additional tax, and the resulting percentage may reasonably be calculated in advance. Further, we consider

that a VAT exclusive percentage is more likely to mislead consumers about how much they will actually have to pay, and it is therefore less meaningful for them.⁴⁶ There is a risk that this would constitute a **misleading action** under the CPRs.

- 4.20 You should fully disclose to your potential landlord client all charges that you will, or may, impose on prospective tenants, for example for carrying out pre-tenancy checks.⁴⁷ This is important information since the level of any charges you ask tenants to pay you, may have an impact on the number of tenants who may be willing to rent the landlord's property, and so affect a landlord's **transactional decision** whether to use your services. In some cases, where a cost is shared between the landlord and tenant, it is important that each party knows what the other is paying, in order that each can assess whether the portion they are being asked to pay is reasonable.

Further examples of potential breaches of consumer law

- It may be a **misleading omission** if you fail to inform a landlord client that fees for drafting renewal documentation are not included in your standard/regular fee.
- It may be a **misleading action** to describe your service as a 'full management service' or similar, or to emphasise the benefits of the comprehensive nature of your services, when you in fact make additional charges for certain management activities, such as organising maintenance work.
- It may be a **misleading action** if you fail to disclose fully to your client landlord what fees you may charge to any tenant for introducing them to the landlord's property or, in Scotland, if you give the landlord the impression that fees can be recovered from tenants, when in fact it is unlawful to charge such fees.

⁴⁶ You should note also that rule 3.18 of the Committee of Advertising Practice (CAP Code) requires prices to be stated as VAT inclusive unless all persons to whom the advert is addressed are able to recover VAT.

⁴⁷ These fees must be legally permitted, however, before you can require a tenant to pay them.

The agent's contract with the landlord

4.21 In order to comply with the requirements of the UTCCRs in your contracts with landlord clients, you should:

- Use plain intelligible language. You are more likely to achieve this if contracts are intuitively laid out, use meaningful headings, and are written in plain English. Landlords should be able to understand easily what their rights and obligations are.
- Avoid hidden pitfalls. Terms that are particularly significant or that are likely to come as a surprise to your prospective client, such as additional charges, should appear prominently in the contract, rather than appearing only in small print.
- Avoid creating a significant imbalance in the parties' rights that operate to the landlord's detriment. You should take care that protecting your commercial interests does not come at the expense of consumers' interests. For example where you place obligations on consumers, you should be careful that they do not apply in surprising or unduly wide circumstances.
- Set out clearly what services you will provide, and what will remain the responsibility of the landlord.
- Set out clearly what the landlord has to pay under the contract and when these sums will fall due.
- Avoid requiring or allowing behaviour that would conflict with your ordinary legal or statutory duties to your clients, or interfere with your client's ordinary legal rights.
- Avoid including terms that are prohibited by any code or redress scheme that you (the agent) belong to.

Renewal commissions and sale commission

4.22 We consider that renewal commissions and sale commissions deserve particular mention because they may surprise potential clients and because they have already been scrutinised by the courts under the UTCCRs. In *OFT v Foxtons Limited*⁴⁸ the High Court analysed the fairness of certain commission terms used in a lettings agreement. In light of this judgment, the

⁴⁸[2009] EWHC 1681 (Ch).

CMA considers the following terms, in particular, are likely to be found to be unfair. As such they would not bind consumers even if they had signed a contract agreeing to be bound by them, and therefore we consider they should not be used or relied upon in contracts with consumer landlords:

- Terms which require landlords to pay agents renewal commission after the sale of their property to a third party ('third party renewal commission') because the original tenant remains in occupation.
- Terms which require landlords to pay agents a 'sales commission' in the event that the landlord sells the property to the tenant, unless the agent is instructed separately, and in specific terms, to carry out estate agency services for that sale.

4.23 In addition, terms which require a landlord to pay 'renewal commission' to an agent:

- in circumstances where there is no further work after the introduction of the tenant, or where the landlord may decide not to continue instructing the agent in relation to any work, or
- where this is contingent solely on a tenant (or an associate) remaining in occupation after the initial period,

attract a significant risk of being found to be unfair as in the Foxtons ruling, which has also been followed in the County Courts. Agents who wish to charge renewal commission may therefore wish to seek legal advice to satisfy themselves that their commissions are structured and presented in a fair and transparent way.

4.24 Where an agent provides a tenant finding service only, and does not provide any ongoing property management or other services after the introduction of a tenant, we consider that it would be a surprising contractual term to require the landlord to pay commission for any events that take place after a tenant has been introduced. We consider that this would be an unexpected term because it would not be clear what service the agent provided for this additional fee. Moreover, a term of this kind could give rise to a situation where a landlord would become liable to pay commission to two agents in respect of the same event, for instance where he has instructed a different agent to manage the property.

4.25 Any contractual provision requiring payment of renewal commission, must, as a basic requirement (as was emphasised by the High Court in the Foxtons case), be transparent and clearly brought to the attention of the consumer.

- 4.26 If you wish to charge a renewal commission you should therefore, as early as possible, actively draw to your client's attention the following:
- the fact that you may charge them this commission
 - the circumstances in which it is payable, including making clear if commission will be payable even if you do no further work for the landlord
 - the amount or rate of commission.
- 4.27 We consider you may be more likely to be able to show that a renewal commission term is fair if you have obtained the landlord's specific agreement to such a term and you have first given him the option not to pay it. For example, it will be more likely to be fair if the landlord is given the option to pay a lower initial fee, in exchange for agreeing to the obligation to pay a further commission if the tenancy is renewed.
- 4.28 You are also more likely to be able to demonstrate fairness if your commissions are structured in a balanced way. For example, if your justification for taking a renewal commission is the benefit that you have obtained for the landlord by securing the income stream of the tenant's continued rent, the contractual terms should also provide the landlord with a pro-rata refund of commission if the tenant defaults on the rent, or leaves the property, before the end of any period over which the commission is calculated (including any initial minimum period).
- 4.29 Additionally, a renewal commission term may be more likely to be fair if the agent's entitlement to commission decreases over time and ceases within a reasonable period of time (unless it is demonstrably linked to the amount of work undertaken by the agent and that work does not diminish). If a renewal commission is payable only when you are instructed to carry out work, it is more likely to be considered fair.
- 4.30 We consider that renewal commission terms are likely to be unfair, and therefore should be avoided, if they require landlords to pay commission fees in circumstances where they have terminated the agent's contract for good reason (for example where the agent has breached the contract or has not carried out services with reasonable care and skill).
- 4.31 Further, a failure to inform a landlord at the outset about the existence of renewal commission terms, including the amount and the circumstances in which they will have to be paid may be a **misleading omission**. It may also be a **misleading omission** to fail to provide a reminder, in the period leading up to the renewal when the landlord is deciding whether to keep the tenant or change agent, that renewal commission will be payable.

Further examples of potential breaches of consumer law in relation to contracts

- It may **breach the UTCCRs** if you include a contractual term that unfairly limits a landlord's ability to change agent (for example a sole agency term for a period of time that cannot be justified) or makes him pay a fee when you do nothing in return for it (for example a fee you charge if the landlord terminates his agreement with you, even if you do no further work in finding a tenant).
- It may be a **misleading action** to give the impression that the landlord is paying purely for a tenant finding service if in fact the contract obliges him to pay any sum that relates to matters that take place after the tenant has moved into the property, for example renewal commission or rent collection fees.

5. MARKETING PROPERTY: ADVERTISING AND PROVIDING INFORMATION TO TENANTS

5.1 This chapter aims to help you to comply with consumer law when you are:

- marketing properties to prospective residential tenants, including by way of online portals
- drawing up property particulars.

Overview

You should ensure that:

- You have appropriate processes in place in order to gather and check information that you present to potential tenants, so that they are not misled, and you are able to answer reasonable questions they ask.
- Your advertising is clear, accurate and not misleading. It should provide all the information a potential tenant needs in order to make informed and therefore efficient decisions about the property being marketed.
- Your advertising provides potential tenants with sufficient information about costs and charges to enable them to compare the full cost of renting one property against another. All information about costs, charges and deposits should be presented together with information about the cost of rent.
- Information that cannot be included, due to restrictions on space, is clearly flagged and made easily accessible (for example no more than one click away on a website).

Gathering information before marketing a property

5.2 You should have appropriate processes in place to gather and verify all the information that potential tenants will need in order to decide whether a property that you market is suitable for them. You should aim to collect all of the information that you will need to include in advertising and property particulars, and also any information that the average prospective tenant would need to be provided with during the letting process.

5.3 If you are an agent, this is likely to require ensuring that you obtain sufficient information from the landlord, making further enquiries if information is

incomplete or appears inaccurate, and satisfying yourself that the property is properly marketable.

- 5.4 In some circumstances you may need to ask the landlord to carry out further work before you market the property. For example, if you are marketing a property with gas appliances, we consider that the property's compliance with the Gas Safety (Installation and Use) Regulations 1998 is likely to be **material information**. In order to comply with the CPRs, you should check that the landlord has complied with his obligations (such as obtaining a gas safety certificate), and if not, advise him of the steps he must take before the tenancy agreement is finalised.
- 5.5 Because you are responsible for the information you publish, you should not publish information that you know is, or suspect may be, inaccurate. If you provide inaccurate or misleading information about the property, you may have difficulty showing that you acted with professional diligence if you did not inspect the property for yourself.
- 5.6 You should take particular care to verify any attractive feature that you intend to rely upon to advertise the property, for example, parking rights, surrounding amenities and views.

Providing information in advertisements and property particulars

- 5.7 All information provided to potential residential tenants should be clear, accurate, and not misleading, and should not omit **material information**.
- 5.8 The purpose of the legal requirements applicable here is to enable consumers to make informed and therefore efficient **transactional decisions** about the property and any other product on offer. For example this could include whether to click on a property displayed on a website, to go into a letting agent's premises to make further enquiries, to arrange a viewing, or to take more formal steps such as paying over money or signing an agreement, as well as decisions about whether to exercise any legal rights the consumer has.
- 5.9 Information that you provide is likely to have an impact on consumers' decision making, so you should make sure it is clear. For example if you use phrases such as 'fully furnished', 'unfurnished' or 'partly furnished', you should explain clearly what you mean by this from the outset in terms of what principal fixtures and/or fittings may be provided, and indicate that a detailed list will be included in the inventory.
- 5.10 In the documentation you give to prospective tenants, make sure all **material information** is clear and prominent and draw this to the tenant's attention.

5.11 In general we consider that **material information** is likely to include:

- charges and costs associated with renting the property (see paragraphs 5.16 – 5.28 below)
- property characteristics such as the location, number and size of rooms, the type of energy supply and heating, sufficient information about council tax, for example, the amount payable or band
- the condition of the property, including any significant features that are likely to put a person off entering into a tenancy (such as defects, serious damp or potentially unsafe gas or electrical wiring)
- when the property will be available
- the terms of the tenancy agreement, and in particular any restrictions on the use of the property (such as whether smoking or pets are permitted), or any other unusual or onerous terms
- any requirement to use a particular third party trader (such as an energy or communications supplier)
- any restrictions on the type of tenant (such as housing benefit claimants), or circumstances in which a guarantor may be required (for example if required for student tenants, or tenants earning below a certain income level).

5.12 **Material information** should be provided in all circumstances, whether or not the prospective tenant requests it, and it should be presented accurately from the outset. Where tenants do have questions, you should of course answer them accurately and as fully as possible. This may mean asking someone for further information (for example the landlord if you are the agent). Be open about any gaps in your knowledge. Do not repeat information given to you if you think it may not be true or accurate, or that it is incomplete. You should, instead, take steps to establish the true, accurate and complete information that the tenant needs to know and communicate that information to him or her.

5.13 Restrictions on space may mean that it is appropriate for more details to be given in the property particulars, or through the use of web links. However, web links should not be used in a way that would tend to obscure information that consumers need to know when looking at an advert.

- 5.14 While the property is being advertised for let, you should keep particulars and other marketing materials up-to-date, periodically checking or re-checking the details to make sure you have accurate information and do not mislead prospective tenants.
- 5.15 If you discover at any point during the marketing of a property to let that information is incorrect, you should act promptly to correct it. This includes information being displayed by others on your behalf, (for example, displayed on property portals).

Further examples of potential breaches of consumer law when providing information in advertisements and property particulars to tenants

- It may be a **misleading action** to describe a property in a way that is literally true, but fails to reflect or take account of, an important factor or piece of information. For example, if you describe a property as being in a 'quiet area', even if this is literally true, where it is located above a late night bar.
- It may be a **misleading action** to use photographs that do not depict the property and fixtures accurately, or that give a misleading impression about what is included (for example the use of a garden that appears in a picture but is not actually included), or to alter images to leave out problematic features.
- It may be a **misleading action** to make broad statements about the condition of the property for example 'immaculate condition', 'recently decorated'; or about its features, for example 'double glazing', 'central heating', 'security locks on all windows', when the description is misleading and/or when such statements only apply to parts of the property.
- It may be a **misleading omission** or a **banned practice** under paragraph 9 of Schedule 1 to the CPRs to offer for rent a property that cannot be rented. (For example, if you advertise a property that should not be let to tenants because it does not conform to the relevant housing safety standards).
- It may be a **banned practice** under paragraph 5 of Schedule 1 to the CPRs to advertise to tenants that you have properties to rent at a specific rental rate, when you do not actually have enough properties on your books at that rental rate to satisfy likely demand.

Information about costs and charges

- 5.16 Information about charges provided in advertising and other promotional material should be full, accurate, clear, and not misleading. It may be misleading to include information about only some charges, whilst failing to disclose other fees that will be charged, or only revealing additional charges gradually through the advertising and negotiation process. We consider that the existence and size of fees of any description is likely to have an impact on the average consumer's decision making, and we set out some more detailed guidance on making different types of fees transparent below.
- 5.17 Rent and other charges should be presented inclusive of VAT, including where the charge is a percentage of something else (see paragraph 4.19 for more information on this).
- 5.18 Fees should be accurately described, and clear information should be given about the nature and extent of the service being provided in return. This will help consumers to form a view on the reasonableness of the fees and to decide whether or not they wish to proceed on that basis. For example, you might charge a substantial fee (several hundred pounds) for drawing up a tenancy agreement. In some circumstances, this may involve a good deal of work and be commensurate with the fee charged. However, if a substantial fee is charged but little or no work is done (for example merely printing off a standard contract) then it could be misleading not to make the extent of service clear.⁴⁹
- 5.19 Landlords and agents should not attempt to impose charges on a tenant or prospective tenant unless they are set out clearly in a contract the tenant has already agreed to, and the terms being relied on are fair.
- 5.20 Some types of fees are prohibited by housing-specific legislation. In Scotland, it is illegal to charge or receive any premium other than the rent, a refundable deposit (not exceeding two months' rent) and/or any payment under a Green Deal plan, as a condition of the grant, renewal or continuance of a tenancy. A premium includes any fine or other sum and service or administration fee or charge. This includes, for example, fees for carrying out credit checks, taking up references, checking and preparing an inventory or arranging duplicate copies of the tenancy agreement. The law in England, Wales and Northern Ireland does not prohibit agents from offering services to tenants and charging them money for these, except in some limited circumstances, for example where the Accommodation Agencies Act 1953 applies. It would be misleading

⁴⁹ See example on page 55.

under the CPRs (as well as prohibited under the specific law mentioned) to ask for such fees to be paid at all.

Non-optional fees

- 5.21 Where an advert provides details of the property and any other cost information (such as rent), all other non-optional fees and charges should be included there as well. You should include non-optional fees and charges, whether or not they can be calculated in advance.
- 5.22 The Advertising Standards Authority (ASA), in a ruling that we consider reflects the legal position under the CPRs, has held that non-optional fees relating to consumers taking on a tenancy, need to be included in online adverts and there is also Committee of Advertising Practice (CAP) guidance on this.⁵⁰ Following the ASA ruling, the CAP provided detailed guidance to lettings agents, advising them of the new requirements for residential lettings agents when advertising on their websites and placing advertisements on property portals and in other media.⁵¹
- 5.23 Where you are advertising specific properties along with the rental costs, the CAP guidance advises that non-optional fees that can be calculated in advance (for example, a fixed administrative fee) must be included with the quoted asking rent (for example £1500pcm + £150 admin fee per tenant).
- 5.24 If the non-optional fee cannot be calculated in advance, the CAP guidance explains that relevant advertisements must:
- make the existence of the charge clear
 - note that it is excluded from the advertised asking rent
 - provide information to allow consumers to establish easily how the charge is calculated.
- 5.25 Although the ASA ruling deals with fees relating to taking on a tenancy, the CAP detailed guidance for lettings agents extends beyond this and includes as material information, other financial information a consumer would need in order to make informed decisions, such as refundable deposits.⁵²

⁵⁰ [Guidance for letting agents and private landlords](#)

⁵¹ [Letter, 10 September 2013](#)

⁵² See paragraph 5 of 'interpreting the Ruling' of CAP Compliance Team letter, 10 September 2013.

- 5.26 Both the ASA ruling and the CAP guidance emphasise the importance of making sure you set out all the fees a tenant must pay clearly and up front and you should familiarise yourself, and comply, with this guidance.
- 5.27 Non-optional fees should always be presented up front and made clear. If a landlord or agent charges tenants for any services that do not apply to all tenants but are non-optional for tenants to which they apply (for example a guarantor's fee), they should also be considered non-optional⁵³.
- 5.28 Where you are promoting specific properties along with details of the rental cost, we consider it is likely to be a **misleading omission** for you to fail to include in your marketing materials, advertisements or other promotional literature, information such as:
- fees that the tenant has to pay for his application to be processed, such as the cost of any reference and/or credit checks
 - fees for the initial setting up of the tenancy, including inventory costs or other administration fees
 - fees which must be paid in certain circumstances, such as charges for additional tenants, the use of a guarantor, or pets
 - any ongoing or future fees or charges likely to be incurred by the tenant, for example, costs to extend, renew or terminate the tenancy and inventory check out fees.

Variable and optional fees

- 5.29 Fees that vary depending on the tenant's circumstances and optional fees (namely those which any consumer could genuinely choose to pay or not to pay) should be presented up front and made clear, unless there are genuine restrictions on space. If there are such restrictions, you should clearly set out the fact there is a fee in addition to the rental figure, what the fee is for, and provide information that will make it easy for the prospective tenant to find out the detail and work out how the fee is calculated.
- 5.30 For example, in online advertising, you could do this by providing a prominent 'click through' to a tariff of all fees and charges, or in the case of off line advertising, by making the tariff available in any of your offices that tenants might visit. We consider that you are more likely to comply with the law if this tariff is easy to find and clearly set out. You might, for example, consider

⁵³ Paragraph 7 of 'Interpreting the Ruling', CAP Compliance Team letter, 10 September 2013.

grouping charges according to how much the tenant has to pay to move in, how much it will cost them per month, and how much it will be likely to cost them to move out at the end of the tenancy.

- 5.31 There may be some situations where a charge could in theory be optional or variable, but in practice, because of its nature, it will in fact be paid by the vast majority of tenants at a particular rate.⁵⁴ In such a case you should consider treating these as non-optional and foreseeable, in order to avoid the risk of misleading consumers.

Future contingent charges

- 5.32 Some charges will be harder to predict because you may not know immediately whether a particular tenant will have to pay them. This is because the charge relates to costs you incur as a result of some future conduct on the part of the tenant and these costs may fall due a long time in the future. Where this is the case, you should make this clear, and indicate what the fee is likely to be, and how it will be calculated.
- 5.33 Charges the tenant **may** become liable to pay after they have moved into a property (such as charges to compensate the landlord for damage to the property, for consents, or to discharge any other duty the tenant owes under the tenancy agreement) need not be set out in advertising. However we consider that all such fees do need to be provided for in the tenancy agreement (which the tenant should be given the opportunity to read in good time before being asked to sign). This type of charge can be assessed for fairness under the UTCCRs and you should ensure that they are set at a reasonable level to avoid a risk they are found to be unfair or a penalty and therefore not applicable. As a general rule a fee is more likely to be found to be **fair** if it simply covers a disbursement that you incur, and more likely to be found to be **unfair** if it is surprisingly high.

Further examples of potential breaches of consumer law when providing tenants with information about the costs of renting a property

- It may be a **misleading omission** to provide material information exclusively in a form that tenants cannot reasonably be expected to see. For example, even if you provide information about additional fees on your website, this may be insufficient if it is not prominent enough for consumers to find it easily.⁵⁵

⁵⁴ Further information on [card surcharges](#).

⁵⁵ A misleading omission includes hiding material information or providing it in a manner which is unclear, unintelligible, ambiguous or untimely.

- It may be a **misleading action** to describe a fee as merely covering a disbursement at cost (for example in relation to carrying out of a pre-tenancy check) if in fact it includes a profit element.
- It may be both a **misleading action** and a **misleading omission**) to charge a substantial fee (for example, £300) to 'draw up the tenancy agreement', if in fact the agent simply prints off a standard form tenancy agreement. This could mislead consumers by misrepresenting (both through what is said and what is not said) the scale of the work involved, and the complexity of the task, such that it could cause a consumer to agree to pay more than they would have done had they known what work was actually involved.

Advertising online using platform operators

- If you are a business that provides a platform or portal through which prospective landlords and tenants can contact each other, you are responsible for the lawfulness of the content that is displayed.
- You should ensure that the information you give to potential tenants is clear and presented in a way that they can understand easily. You should not include anything likely to mislead them and you should not leave out any material information.
- You should make sure that the information templates you provide to landlords and agents are comprehensive, so that all information reasonably likely to be required is captured. In particular, you should collect enough information from advertisers to enable the display of accurate fees that neither mislead by what they say, nor in what they leave out. Where an agent or landlord charges specific fees that are known, these should be stated. We do not consider that a statement that 'fees may apply' would, in these circumstances, be sufficient to meet your obligations. Where optional or variable additional fees may be charged, you should display the actual fees that landlords and agents charge, rather than giving general examples of what such fees might be. These fees should be presented in a tariff no more than one click away from the rental figure.
- You should act promptly to investigate and, if necessary, remove content you are given to publish where you become aware it may breach the requirements described above.

6. NEGOTIATING, CONDUCTING VIEWINGS AND ARRANGING AND SIGNING THE TENANCY AGREEMENT

6.1 This chapter aims to help you to comply with consumer law when you are:

- conducting viewings
- starting negotiations with a prospective tenant
- carrying out pre-tenancy checks and explaining any guarantor requirements
- taking pre-tenancy and holding deposits
- arranging and signing the tenancy agreement.

Overview

You should:

- Ensure that prospective tenants understand the nature of your role and are treated fairly throughout the negotiations.
- Ensure that prospective tenants are given an accurate impression of the property's characteristics and are able to view the property (if they so wish).
- Provide prospective tenants with clear information about pre-tenancy checks, including what they will cover and how much they will cost.
- Provide clear information about any guarantor requirements and about the roles and responsibilities of guarantors.
- Provide prospective tenants with clear information about why you are asking them to pay a pre-tenancy payment or holding deposit, the sum that is required and the circumstances in which it will/will not be refunded.
- Ensure that the terms of any tenancy agreement that you provide or recommend for use with a tenant are fair.
- Ensure that the prospective tenant has sufficient time to familiarise themselves with the tenancy agreement.

Be clear about your duties to the parties

- 6.2 Agents will usually be acting for the landlord and not the tenant. It is important in these circumstances that agents do not give prospective tenants a misleading impression that they are acting for them where that is not really the case, and to make it clear that the agent and landlord are two separate parties.
- 6.3 As a lettings professional, you are required to comply with your consumer law duties where applicable, and if you are an agent you should not seek to promote your landlord client's interests in such a way as to jeopardise your compliance with these requirements. In particular you should not mislead prospective tenants, treat them aggressively or seek to get them to agree to unfair terms.
- 6.4 You should make sure prospective tenants are treated fairly and kept properly informed throughout all of the negotiations, during viewings, when conducting pre-tenancy checks and making any guarantor arrangements, and in concluding the tenancy agreement. Prospective tenants should be given clear information about what the process will involve (including any pre-tenancy checks) as soon as they have expressed an interest in renting a particular property. This should be made available before any viewing is arranged.

Viewings by prospective tenants

- 6.5 In most situations, we consider that a prospective tenant will wish to view a property before deciding whether to rent it, although there may be some circumstances where this does not happen. One such circumstance might be where the tenant is arriving from overseas or a distant part of the UK (as may sometimes, for example, be the case with students). Where a tenant does not view the property, it is important for you to ensure that anyone authorised to view the property on his behalf, has received the **material information** needed to help them decide whether or not to rent the property.
- 6.6 Where a prospective tenant does view the property, all parts should be made available for inspection, wherever possible. If it is not possible for them to inspect all parts of the property, you should describe accurately to the prospective tenant the room(s) or part of the property not seen. If you do not do so, you may be committing a **misleading action**. Defects or other factors that are likely to have an impact on the decision to rent the property should not be concealed.
- 6.7 As mentioned in paragraph 5.9 it is important you make clear to prospective tenants what principal fixtures and fittings are included with the letting. For

example, it could be a **misleading omission** if you fail to mention that white goods in situ at the time of viewing a property will not be included as part of the agreement.

- 6.8 It could be a **misleading omission** not to make the prospective tenant aware of key terms of the tenancy, or important restrictions on the use of the property, or to make information about costs or fees they will be asked to pay available only after the viewing has taken place.

Pre-tenancy checks

- 6.9 The information that agents give to tenants and landlords about pre-tenancy checks should be clear, accurate and not misleading. **Material information** should not be omitted.
- 6.10 As we set out in paragraph 6.4, we consider that tenants should be given clear information about what any pre-tenancy check involves as soon as they have expressed an interest in renting a particular property. Although a check may be designed to protect the landlord's interests, because tenants often pay for the check, and because it involves analysis of their personal data, we consider there will be **material information** the prospective tenant requires, before they are able to make a fully informed decision as to whether to proceed. They should be able to assess up front whether they are likely to pass the check, and so whether it is worth pursuing their interest in the property. This is particularly important where the tenant is being asked to pay for the pre-tenancy check.
- 6.11 The **material information** a prospective tenant is likely to need includes:
- what criteria the check will assess, for example credit worthiness, unpaid judgements
 - what data sources it will use
 - what, if anything, it will cost
 - what the potential outcomes could be, including whether other people are being checked at the same time and if so what the implication of this might be (for example whether someone else could be offered the property even if the prospective tenant passes the pre-tenancy check).
- 6.12 This information should be given before the tenant is asked to pay any fees, or a holding deposit (including a refundable deposit), and should be made available before any viewing is arranged.

- 6.13 If a prospective tenant does not pass the pre-tenancy check, or must take any additional steps in order to qualify for the property, you should inform them of the reasons.⁵⁶ It may be a **misleading omission** if you do not provide this information as the person may need it to help them decide whether to provide additional information to try and secure the property.
- 6.14 It is important to bear in mind that information about prospective tenants is personal data, and so there are rights and obligations around its collection and use.⁵⁷
- 6.15 If you are an agent, you should describe accurately to the landlord how comprehensive the check will be and if there are any restrictions on passing on information you find out (for example, because of data protection law). The advice you give to the landlord as to whether a tenant is suitable to rent the property should be clear, accurate and not misleading. You should carry out the check with reasonable care and skill, and highlight any gaps in your knowledge.

Guarantor requirements

- 6.16 Where a guarantor is required, landlords and agents should provide the potential guarantor and the prospective tenant with clear, accurate and full information that is not misleading about what this involves. You should not omit **material information**.
- 6.17 **Material information** the tenant and guarantor need is, in our view, likely to include:
- any criteria the guarantor has to meet to be considered suitable, such as income level
 - the extent of the liability the guarantor would be accepting, including the obligation to pay for rent arrears, damage to the property and any other breaches of the tenant's covenants (with information about what these could amount to)
 - the terms of the actual tenancy agreement the guarantor will be party to
 - whether the property will be in joint occupation and if so whether there is a risk that the guarantor will be asked to pay the cost of rectifying damage,

⁵⁶ Subject to any legitimate restrictions you may face about sharing all of this information, in which case you should be as specific as you can.

⁵⁷ For further see the [Information Commissioner's Office guidance](#)

or pay any other money owed by anyone other than the tenant for which they are acting as guarantor, or that they will be asked to pay for other breaches of the tenancy agreement by the tenant or others.

6.18 The terms governing any guarantor agreement should be fair. Examples of potentially unfair terms include:

- a requirement for the guarantor to continue to receive income that significantly exceeds the rent
- any terms included in a tenancy agreement that the guarantor has not seen or confirmed that they agree to be bound by (for example by signing the tenancy agreement as guarantor)
- terms requiring the guarantor to compensate for damage caused by occupants who are not joint tenants with the tenant they are acting for, or for damage to common parts. This may be particularly relevant in the context of student lets. For example where the property is let to a number of students, each student is unlikely to be able to control who else becomes a resident, or what damage they may cause to the common parts of the property. It may therefore be unfair to require guarantors to be responsible for paying such sums in these circumstances
- terms requiring the guarantor to pay sums that cannot be recovered from the tenant's deposit (for example because the Tenancy Deposit Scheme has ruled against the landlord), or terms requiring a guarantor to compensate the landlord for damage caused, which allow the landlord or their agent to determine the extent of the damage.

Further examples of potential breaches of consumer law relating to pre-tenancy checks and guarantor requirements

- It may be a **misleading action** to give a prospective tenant the impression that a pre-tenancy check is more extensive than it actually is, when he is being asked to pay for it, because the tenant needs to decide whether the amount being charged is reasonable, and therefore whether he will agree to pay it.
- It may be a **misleading action** to tell a guarantor that their role is a 'mere formality' or give the impression that it does not carry significant risks, responsibilities and obligations, since the guarantor needs to assess the risk they are taking in order to decide whether to proceed.

- It is unlawful to demand a fee for undertaking a pre-tenancy check in Scotland and doing so is also likely to amount to a **misleading action** under the CPRs because it cannot be charged.
- It may be a **misleading omission** if, where a number of people are separately interested in a property and you carry out pre-tenancy checks on them all, you allow any of them to assume that they are the only prospective tenant.

Pre-tenancy payments and holding deposits⁵⁸

- 6.19 Information about pre-tenancy payments should be clear, accurate and not misleading. **Material information** should not be omitted and the terms governing the circumstances in which pre-tenancy payments are to be made, should be fair. Tenants should not be pressurised into paying over money.
- 6.20 Pre-tenancy payments should not be requested where they are unlawful. For example, in Scotland, the Rent (Scotland) Act 1984 prohibits the payment of 'premiums' (see paragraph 5.20 for more information).
- 6.21 The purpose of any pre-tenancy payment should be made clear to the prospective tenant. You need to be clear, for example, if its purpose is to indicate that the prospective tenant is serious about renting (but is otherwise refundable); or alternatively if it is to protect the landlord from loss if the prospective tenant pulls out later in the process. Where the purpose of the payment is to cover specific disbursements the landlord or their agent has to pay to process the tenant's application, money should only be spent on disbursements if this has been clearly explained to the prospective tenant and he specifically agrees to this.
- 6.22 It could be a **misleading action**, for example, to describe a payment as a 'deposit' if it is not refundable, or is used to cover disbursements.
- 6.23 The tenant should be given all of the **material information** that he needs to make informed transactional decisions, including decisions about whether to

⁵⁸ For the purpose of this guidance, we draw a distinction between pre-tenancy holding deposits, which are taken before the agreement is signed in order to reserve the property, and security deposits, which may be taken when the tenancy agreement is signed. Lettings professionals should, however, take care when taking a holding or pre-tenancy deposit, to check whether it has to be treated as a security deposit. Where a security deposit is taken, it is required by law to be protected with a Tenancy Deposit Scheme. We talk more about this in chapters 7 and 9.

pay any pre-tenancy payment, and also whether in the circumstances he wants to pursue renting the property.

6.24 **Material information** is likely to include:

- The details and sums of any costs and disbursements to be taken out of the deposit, and the approximate dates or stages in the process when these will be incurred.
- Whether or not payment of the deposit means that the property will be taken off the market. We consider it likely that many prospective tenants will assume that once they have paid a holding deposit, they will be able to take up a tenancy and move in as long as they pass the pre-tenancy checks and complete all the formalities. If this is not the case, it should be made clear.
- Whether the holding deposit, or any part of it, is to be used as payment towards future rental costs in the event that the tenancy agreement goes ahead.
- The circumstances in which the deposit (or any part of it) will or will not be refunded, including whether a refund would be made if the tenant simply changes his mind about renting the property.

6.25 The terms on which a pre-tenancy payment or holding deposit is taken should be fair. Terms that allow the landlord or their agent to retain a holding deposit without a clear rationale or justification are likely to create a significant imbalance, and so be unfair⁵⁹. We consider that a term that makes a pre-tenancy payment or holding deposit non-refundable in all circumstances is likely to be found unfair. This is because there are likely to be at least some circumstances in which these sums should be refunded.

6.26 The following are examples of the types of circumstances in which we consider that holding deposits or pre-tenancy payments should, in principle, be refundable:

- The tenant pulls out of the deal before the relevant costs or disbursements covered by the pre-tenancy payment have actually been incurred by the landlord or agent.

⁵⁹ See paragraphs 3.67 to 3.69 of the OFT's [Guidance on unfair terms in tenancy agreements \(OFT 356\)](#).

- The agent continues marketing the property and the landlord has not suffered any loss by the property being ‘held’.
- Any loss the landlord suffers is smaller than the amount of the deposit or pre-tenancy payment (in which case the amount left over should be refunded).
- The property is not ready on the date the tenant was told it would be, and the tenant therefore needs to pull out to rent somewhere else.
- The property does not conform to its description, or its condition does not comply with the requirements of housing legislation⁶⁰ when the tenant is due to move in.
- The landlord decides not to let the property to the prospective tenant because the landlord decides the tenant’s pre-tenancy checks are unsatisfactory, even though the prospective tenant has been truthful and not misled the landlord or agent.⁶¹
- The tenant discloses, in the pre-tenancy check, information that means they are not suitable to rent the property⁶² but before carrying out the pre-tenancy check, the landlord or agent failed to explain clearly that these matters would be checked and to give the prospective tenant the option not to proceed.
- The landlord decides not to let to the tenant for any other reason, but the tenant is still prepared to proceed.⁶³

6.27 A landlord or agent’s practices should not place the prospective tenant under undue pressure to pay a deposit or any other pre-tenancy payment. For example it could be an **aggressive practice** to require a deposit from a prospective tenant before they have been given the opportunity to inspect the property or the tenancy agreement.

6.28 Landlords and their agents should also take care to treat tenants fairly in situations where the deposit is taken a long time before the tenancy is due to commence. For example in the context of student lettings it can sometimes be many months between when the tenant looks for a property and they are able to move in. In some situations the ability to go ahead with the tenancy may

⁶⁰ See Annex A for further information.

⁶¹ See paragraphs 3.67-3.69 of the OFT’s [Guidance on unfair terms in tenancy agreements \(OFT 356\)](#).

⁶² For example, the prospective tenant fails the pre-tenancy checks because of their credit history.

⁶³ See paragraphs 3.67-3.69 of the OFT’s [Guidance on unfair terms in tenancy agreements \(OFT 356\)](#).

also be dependent on what grades students attain. It may be an unfair term (by creating a significant imbalance) to require a deposit that is non-refundable where there is a significant likelihood that the prospective tenant will have to pull out in circumstances where the landlord can still let the property to someone else without incurring any loss. Using such a term to generate a financial advantage may be an unfair commercial practice.

Further example of potential breaches of consumer law relating to pre-tenancy payments or holding deposits

- It may be a **misleading action** to take holding deposits from more than one prospective tenant for the same property, whilst giving each of them the impression that their deposit has secured the property.
- It may be an **aggressive practice** to get a prospective tenant to act quickly to rent a property by misleading them into thinking they have to decide early, or into thinking the property is about to be rented by someone else, when this is not in fact the case.
- It may be an **aggressive practice** to delay or refuse returning a holding deposit where the prospective tenant is entitled to it, in particular where this may have the effect of denying the refund.
- Where pre-tenancy checks are carried out on several tenants, and the landlord selects one because he has a higher income level, any term that prevents the unsuccessful applicants from getting their holding deposit back in full may be unfair.

Fairness of the tenancy agreement

6.29 In our view, if you are a landlord or agent presenting a tenancy agreement to a prospective tenant you should:

- **Ensure:** that the terms of any contractual agreement are fair, and written in plain and intelligible language.
- **Check:** that the terms in any agreement you use, or recommend for use, are fair and do not include any terms that you know are, or may be, unenforceable. Lettings professionals are likely to find it helpful to have

regard to the OFT's guidance, (now adopted by the CMA), on unfair terms in tenancy agreements⁶⁴ when drafting, recommending or enforcing terms.

- **Explain:** the nature of the agreement to prospective tenants before they sign, so that they are able to navigate the paperwork and understand their rights and obligations under the tenancy agreement. We consider that it is likely to be particularly helpful in ensuring your compliance with consumer law, to explain to them how either party can end the tenancy, and what steps and formalities are required to do so.
- **Highlight:** any terms that are likely to be surprising to the prospective tenant or are unusually onerous. These should be brought specifically to the tenant's attention before they sign the agreement. In our view tenants are likely to assume that the 'small print' is standard, so surprising clauses (for example to do with payments, restrictions on use or treatment of the property) may take consumers by surprise unless you take care to ensure that they are aware of them and understand their impact.
- **Provide:** prospective tenants with a copy of the tenancy agreement so that they can decide if they are happy with the obligations it would place on them, and so that the tenant has sufficient time to familiarise themselves with the agreement, before signing it or paying any money in relation to it.

6.30 You should not assume that consumer law does not apply where a term is 'individually negotiated'. This is only true of certain elements of the law on unfair contract terms, and in any case only applies where there is an actual negotiation (rather than the tenant being presented with a choice between alternative standard clauses). We consider it most likely to apply only where a term is inserted at the tenant's specific request.

⁶⁴ This guidance is currently drafted with a focus on England and Wales, however the UTCCRs apply across the whole of the UK.

Further examples of potential consumer protection breaches relating to fairness of the tenancy agreement

- Examples of potentially unfair terms include:
 - unusual or overly restrictive requirements the tenant will have to satisfy
 - unreasonably high charges for permissions (for example keeping pets) or conducting repairs, where the level of the charge is likely to come as a surprise to the tenant
 - terms that require tenants to pay charges, the amount of which can be set at the trader's discretion or varied unilaterally
 - terms which require the tenant to use a particular third party such as a specified energy or telecommunications supplier throughout the whole of the tenancy
 - standard charges for breaches that do not reflect the landlord's actual loss, or which require the tenant to pay charges to the agent that are not invoiced to the landlord
 - a requirement that imposes longer notice periods for ending the tenancy on the tenant than the landlord
 - fees that apply in surprising circumstances or relate to matters that would not usually attract a charge (for instance rent collection, or processing the rental payment)
 - terms that the tenant has not had the chance to read before being bound by them
 - terms that require the tenant to carry out repairs that are the landlord's responsibility.
- Additionally, it may be a **misleading omission** to fail to inform prospective tenants of any important obligations under the tenancy agreement, for example, a requirement to undertake maintenance of common areas (for example a garden in shared student accommodation).

7. WHEN THE TENANT MOVES IN

7.1 This chapter aims to help you comply with consumer law when you are:

- getting the property ready and making it available for occupation by the tenant
- giving tenants the information they need immediately before and on entering a property
- taking a security deposit
- handing over the property.

Overview

You should:

- Ensure the property is made available on the date agreed, and the tenant is kept informed of any delays.
- Ensure that when the tenant moves in, the property conforms to all statements previously made to the tenant about its specification (including furniture, fixtures, fittings and any works that had been agreed).
- Provide the tenant with all the information required by law about the condition of the property, along with other material information such as information relating to energy suppliers.
- Ensure that any security deposit is properly protected and the tenant is given information about which scheme it is with.

Giving tenants the information they need before they move in

7.2 The information you give to tenants about the condition of the property when they move in should be accurate, clear and not misleading.

7.3 You must provide a tenant with all the **material information** they need about a property (including information required under housing-specific law), so they can make an informed decision about whether to proceed with the letting.

7.4 You should ensure that in the time between the tenant agreeing to take a tenancy, and actually moving in, they are kept properly informed. If **material**

information that was accurate and given in good faith at the time it was given ceases to be true at a later date, it must be corrected if it remains **material information** for the tenant at that point.

7.5 You should check in particular that:

- The property has any items the landlord has agreed to include in the tenancy (this is particularly important where these are items that the tenant has expressly requested during the course of negotiations).
- Any work the landlord has agreed to carry out, or is required due to housing legislation, is done.
- The property is ready on the date agreed with the tenant.

7.6 Care should be taken not to mislead tenants about their contractual or other legal rights in the event of any failure, or delay, in making the property available, or carrying out agreed work to the property prior to them moving in.

7.7 Where a tenancy agreement has been signed and arranged, it could be an **aggressive practice** to refuse to let a tenant enter the rental property unless they:

- pay last minute fees that were not previously discussed and agreed with them,
- agree to a tenancy condition that was not previously discussed and agreed with them (for example, that they use a particular energy supplier).

7.8 Certain information, for instance about the condition of the gas and electrical appliances, is required to be given to tenants by housing-specific law. Sometimes it also has to be given in a particular form (such as a gas safety certificate). This is also **material information** that the tenant needs in order to decide whether to exercise their rights under the tenancy agreement (for example whether to require the landlord to rectify a problem with a gas appliance).

In Scotland there has been a legal requirement since 1 May 2013, on landlords who provide assured or short assured tenancies, to provide new tenants with a tenant information pack by the tenancy start date. The pack is a standardised document which contains information about the tenancy agreement, the property, the responsibilities of the tenant and the landlord and where to get further advice and support. All of this information is likely to be **material information** under the CPRs.

Further examples of potential infringements of consumer law

- It may be a **misleading action** if in the course of negotiations about the tenancy, the landlord promises to provide certain pieces of furniture, but then fails to do so.
- It may be a **misleading omission** not to keep a tenant properly informed about progress and appraised of risks that the agreed moving in date would change.

Energy supply

Landlords and agents should make sure tenants have the **material information** they need so they can make informed decisions about energy suppliers. This is likely to include information such as:

- in what circumstances the tenant can change energy supplier (when the tenant is responsible for paying the bill),
- whether they need to get the landlord's consent before changing supplier,
- whether the tenant will need to return the account to the original supplier at the end of the tenancy.

If tenants are required to seek the landlord's consent, landlords should not unreasonably withhold or delay their consent and any terms of an agreement between landlords and letting agents should not have the effect of preventing or unreasonably delaying the landlord's consent.

Handing over the property

7.9 You should make sure that if you take an inventory of the property, it is carried out and recorded accurately. Providing the tenant with an incorrect inventory could be a **misleading action**. One way to mitigate this would be to give the tenant sufficient opportunity to review the inventory, challenge any points of disagreement, and agree a final version. The tenant should be given a copy, together with other important information such as the gas and electricity meter readings, and contact details for the landlord and their agent.⁶⁵

⁶⁵ In some situations it may be acceptable for only the agent's details to be given, but only where the agent will deal with all of the landlord's duties.

- 7.10 A tenant is entitled to expect the landlord or their agent to prepare any inventory with reasonable care and skill so that it accurately reflects both the condition of the property and its contents.
- 7.11 **Material information** the tenant needs will include information as to who to contact if there is a need to discuss the property and (or) the tenancy agreement. The tenant should be given clear information about the circumstances in which they should contact the agent or landlord, and have sufficient information to get in touch with them. For example, the tenant will need to know who he should contact if the boiler stops working, if repairs to the property are needed and who he should contact to give notice. Contact information needs to be kept updated and any changes notified to the tenant.

Further examples of potential breaches of consumer law

- When taking the inventory, the landlord does not record several stains on the carpets, and describes the dining chairs as in good condition, when in fact there are scratches on the woodwork. Making these statements could be **misleading actions**, particularly given that the inventory is likely to be used to recover money from the tenant's deposit in the event of a dispute about the condition of the property at the end of the tenancy.
- It may be a **misleading action** to inform the tenant that the landlord's preferred energy supplier is cheaper than a competitor, when this is not the case.
- It may be an **aggressive practice** and also a **banned practice** under paragraph 25 or 26 of Schedule 1 to the CPRs, to repeatedly contact tenants to try and persuade them to use a particular energy supplier, for example pressurising the tenant to retain the supplier that is the landlord's choice.
- It could be a **misleading omission** to fail to give the tenant contact details and clarity about when they should contact the landlord or when they should contact the agent to resolve an issue, as it may hinder the tenant from exercising their contractual rights in relation to the tenancy agreement.

Taking a security deposit

- 7.12 In many cases, landlords may wish to take a security deposit to protect themselves in relation to risks such as breakages and unpaid rent. If a security deposit is taken, it must be protected in accordance with statutory

requirements and registered with a statutory scheme.⁶⁶ Landlords and their agents must comply with the rules of the scheme.

7.13 Tenants should be given full, clear and accurate **material information** about any requirement to provide a security deposit. We consider that **material information** is likely to include:⁶⁷

- an explanation of the purpose of the security deposit
- details of what, exactly, the deposit protects, and the nature of the protection that it offers
- confirmation as to whether it is the landlord or his agent who will be protecting the deposit
- details of exactly where, and by whom, the deposit will be held
- information about when the tenant can expect to receive the statutory prescribed information about the scheme that is being used to protect the security deposit.

7.14 Tenants should not be given any misleading information about their rights in relation to repayment of security deposits. If a deposit is not properly protected, the tenant should be informed of this as soon as possible.

7.15 Landlords will usually have primary responsibility for protecting (in accordance with the statutory requirements) any security deposit they take. Letting agents cannot be considered to be meeting any duty they may have to advise their landlord clients if they fail to take reasonable steps to ensure that the landlord understands his obligations in relation to this, and agree with the landlord how the deposit will be protected to meet the statutory requirements. An agent who has agreed to be responsible for handling the deposit, should ensure the deposit is properly protected. An agent who has agreed to take the deposit from the tenant, but passes it to the landlord in order that he should arrange for it to be protected, should inform the tenant that they have done this.

⁶⁶ The requirements differ across the UK and further information is available in Annex A. Non-compliance may lead to agents and/or landlords incurring liability to pay penalties.

⁶⁷ Statutory schemes specify certain prescribed information that the tenant must be provided with when a deposit is taken. In England and Wales, this information needs to be given again if the tenancy is renewed, or rolls over into a statutory periodic tenancy, and the security deposit is being retained.

7.16 This is an area where there have been legislative and case law developments in recent years⁶⁸ and keeping up to date with this type of information is likely to help landlords and their agents comply with the law.

Further examples of potential breaches of consumer law in relation to the security deposit

- It may be a breach of **professional diligence** to fail to register a deposit taken from a tenant with an approved tenancy deposit scheme.
- It may be a **misleading omission** not to tell the tenant that their deposit is not (as it is legally required to be) protected, and that the effect of this is that the tenant can recover the deposit, with compensation, through the courts.
- It may be a **misleading action** to inform the tenant that their deposit is protected, when you know it is not or you have not checked.
- It may be a **misleading action** for an agent to tell a landlord they have protected the deposit, if in fact they have not. If you mislead landlords about whether or not you would protect deposits, you may also breach the BPRs.

⁶⁸ For example *Superstrike Ltd. vs Marino Rodrigues*, on which there is joint guidance available which has been agreed with all of the [statutory deposit protection schemes](#).

8. MANAGING THE PROPERTY

8.1 This chapter aims to help you to comply with consumer law when you are:

- an agent or a landlord dealing with the tenant during the life of the tenancy
- an agent managing a property on behalf of a landlord.

Overview

- If you are a landlord, when carrying out any services you provide under the tenancy agreement (including those relating to the property), you should carry them out using reasonable care and skill, and in a timely manner.
- If you are an agent providing such services on the landlord's behalf, you should equally carry them out using reasonable care and skill, and in a timely way.
- You should be fair in your dealings with tenants, not enforce unfair terms and give tenants clear information concerning who is responsible for doing what during the life of the tenancy.
- If you are an agent, you should do what is expected of you under your contract with the landlord, take proper care of the landlord's interests, and keep them informed.

Agents' and landlords' duties to tenants

8.2 In carrying out services in order to fulfil their duties to tenants under a tenancy agreement, landlords and their agents need to have regard to the SGSA and in Scotland, to the common law. These require services to be carried out with reasonable care and skill and within a reasonable time (and where relevant, for reasonable remuneration).

8.3 In addition, landlords and their agents need to take care that they do not seek to enforce terms of the tenancy agreement that are unfair, that they do not mislead tenants about their rights or obligations and that they ensure the tenant is given all the **material information** they need to make informed transactional decisions.

8.4 **Material information** that the tenant needs throughout the tenancy is likely to include that set out in paragraph 7.11.

- 8.5 Tenants should not be required to accept additional services from landlords or their agents, for which they must pay, unless this is provided for in the tenancy agreement and is fair. The full extent of the tenant's obligations should be set out in the tenancy agreement. It could be an **aggressive practice** or an unfair term to require the tenant to accept services in addition to what is agreed in the tenancy agreement and to make the tenant pay for them (for example, introducing a requirement for the tenant to pay a rent collection fee after the tenancy has already commenced, or requiring a tenant to agree to pay a rent collection fee, if the tenant is willing and able to pay their rent by standing order bank transfer and the agent / landlord could receive the rent in this way).

Accessing the property

- 8.6 There will be instances when, as a landlord or their agent, you will need to be able to access a property that is being let, for example to undertake an inspection/check, carry out maintenance or repairs, or to show prospective tenants or purchasers around the property. In these types of circumstances you should provide tenants with the notice specified in the agreement, which must be reasonable, unless there are exceptional circumstances which justify not giving that amount of notice. More information on this is set out in the [OFT's *Guidance on unfair terms in tenancy agreements* \(OFT 356\)](#). You should not use aggressive or deceptive means to gain access to the property, since doing so is likely to impact on the consumer's contractual right to enjoy quiet possession of the property.

Repairs

- 8.7 See also paragraphs 8.19 – 8.22 which set out the duties of an agent when undertaking repairs on behalf of a landlord.
- 8.8 If you are a landlord undertaking repairs on the property, these should be undertaken within a reasonable period of time and with reasonable care and skill. Requests and notifications for repairs should be prioritised according to urgency, risk, seriousness, and completed to a satisfactory standard and within a reasonable time. What is reasonable will depend on the circumstances including the urgency of the problem and the complexity of the work, and if in doubt you should seek legal advice. We consider, however, that it will be difficult to show the timescale of repair is reasonable if there is undue delay in carrying out repairs. This may mean, for example, you have to choose different (but still satisfactory) tradespeople to repair the property, if the person you would usually use is too busy or unavailable to do it within this timescale.

- 8.9 Disputes sometimes arise about repair or replacement of furniture that has been supplied with the property. You should not assume that where a piece of furniture is damaged or ceases to be usable, that this is always the tenant's fault or is due to excessive wear by the tenant. You should be prepared to replace items where they have failed as a result of reasonable wear and tear. Where this is the case, replacements should be of satisfactory quality. We consider that in practice, this means you should expect to replace the item with something of comparable (or even better) quality.
- 8.10 In some situations the tenant will be responsible under the tenancy agreement to carry out repairs. You should inform them what these circumstances are as it will be **material information** that they need to know.
- 8.11 If you become aware of damage to the property that needs to be repaired and the tenant will be liable for the work or cost, you should point this out to the tenant as soon as possible, highlighting the relevant terms of the agreement, so that they can take the necessary remedial action. Failing to notify the tenant could be a **misleading omission** if it might leave them in a position where they do not undertake the repair, or the damage worsens because the repair is not done quickly or straight away.
- 8.12 Where the landlord or his agent carries out repair work during the life of the tenancy that is the tenant's responsibility, and for which the tenant will be asked to pay, this should be done only with the tenant's agreement and after agreeing the price with him. Terms that require a tenant to pay any price you choose to charge for a repair are liable to be considered to be unfair. When assessing what it is fair to require the tenant to pay for a repair, regard should be had to appropriate guidance such as that produced by the authorised tenancy deposit schemes. Landlords should not charge tenants more than is reasonable in the light of such guidance.

Tenant's breach of tenancy agreement

- 8.13 You should deal professionally with tenants who are in arrears or otherwise in breach of the terms of their tenancy agreement, to avoid any risk of behaviour that may constitute a breach of the CPRs.
- 8.14 It could be a **misleading action** if you tell a tenant, who is in arrears (or give them the impression), they may face immediate eviction if they do not pay at once, without also making clear that a court order would be required to evict them.

Further examples of potential breaches of consumer law when dealing with tenants

- It may be a **misleading action** to give a tenant inaccurate information about what work needs to be carried out in the property, for example by informing them that building work is needed to rectify damage for which they are responsible, when only minor redecoration is required.
- It may be a **misleading action** and an unfair term to try to make the tenant responsible for repairs that it is the landlord's duty to carry out. For example, informing the tenant they are responsible for keeping the exterior or certain installations in good repair or checking and testing gas and electrical appliances when it is not the tenant's legal responsibility to do so.⁶⁹
- It may be an **aggressive practice** to let yourself into the rental property without the tenant's permission to discuss certain matters (for example the late payment of rent), if the tenant is willing to discuss these matters with you through other methods such as in writing or by telephone.
- It may be an **aggressive practice** to lock a tenant out of the property until arrears are paid. An example of this might be a landlord who limits a tenant's electronic key card access to the property, to make them pay rent arrears.
- It may be a **banned practice** under **paragraph 25 of Schedule 1** to the CPRs to make an unreasonable number of visits to a tenant in their home or to ignore their request to leave, for example when collecting rent, inspecting the property or showing prospective tenants around.
- Terms in tenancy agreements may be **unfair** if they purport to permit landlords or their agent to access the property at unreasonable times, or without giving reasonable notice. It is likely to be an unfair practice to rely on a term that is unfair and unenforceable. This will apply to agents, even where they are not responsible for including the term in the tenancy agreement.
- It may demonstrate a **lack of reasonable care and skill** under the SGSA or common law to delay carrying out repairs, or to carry out substandard repairs to the property (including failing to take reasonable care not to damage tenants' property). An example might be failing to undertake work to repair a

⁶⁹ See Annex A for further information on legislation which imposes obligations on landlords.

faulty extractor fan which as a consequence causes a ventilation problem, resulting in the tenant's property being damaged by mould.

Agents' duties to the landlord

General contractual duties

- 8.15 In general the management contract will set out the agent's duties to the landlord. However agents will also be well-advised to remember their duties under the law of agency, and be aware that terms may be implied into their contracts. If an agent engages in a practice of breaching the terms of his contracts with adverse consequences for the interests of consumers he may face enforcement action under Part 8 of the Enterprise Act.⁷⁰
- 8.16 If you are an agent acting for a landlord, terms are implied into your contract with the landlord by statute⁷¹ (except in Scotland, where common law applies) that you will carry out your services with **reasonable care and skill, and in a timely manner** where no timescale is agreed.
- 8.17 You should consider carefully before seeking (via terms in your management contract) to contract out of (or qualify) these implied duties. Doing this is subject to legal constraints under UCTA and where a landlord client could be considered a consumer is liable to be unfair and unenforceable under the UTCCRs.
- 8.18 You should bear these implied terms in mind when considering how you provide your service to the landlord including, for example, carrying out repairs, collecting rent, registering a tenant's deposit, and visiting the property.

Repairs

- 8.19 Where as an agent you have agreed to carry out repairs on the landlord's behalf, your contractual relationship with him means that these should be done within a reasonable time. What is reasonable will depend on the

⁷⁰ See chapter 10 for more information.

⁷¹ This is under the SGSA. In addition, agents have a more general duty of care to clients under the law of agency.

circumstances including the urgency of the problem and the complexity of the work, and if in doubt you should seek legal advice.

8.20 Where the landlord has a duty to the tenant to carry out repairs, and you are contracted to carry out this duty as his agent, you should carry out the landlord's duties with reasonable care and skill as well (see paragraph 9.2 above, which sets out what reasonable care and skill is likely to involve in these circumstances).

8.21 In circumstances where letting agents use third parties (such as a builder contracted to undertake repairs) to carry out duties that are the agent's responsibility under his contract with the landlord, the agent should act in the landlord's best interests and inform the landlord of any commissions they receive. We consider that:

- the amount of work that needs to be done
- the amount of work actually completed, and therefore subject to a charge

is likely to be **material information**. Any failure to share this information with the landlord may be a **misleading omission**.

8.22 Agents must not charge landlords for work that isn't actually carried out, or claim that work is necessary when it is not. Doing so is likely to be a **misleading action** under the CPRs or BPRs as well as possibly constituting a criminal offence under the law generally. Agents should clearly distinguish in any invoice between the amount of the actual disbursement and any additional fee or commission charged by the agent. Leaving out these details is likely to be a **misleading omission**, and impair the landlord's ability to assess whether the agent's invoice is properly payable under their contract.

Rent collection & handling money

8.23 If you are a letting agent, you should take proper care of any rent you collect for the landlord, or any money you retain to cover incidental expenses. We consider that proper care means, in practice, not mixing it with your own money or using it to cover your running expenses, unless you have the landlord's clear agreement to do this. We consider it should be kept in a ring fenced client account. In our view failing to keep the landlord's money separate from your own is likely to fall below the standard of special care and skill of an agent, and would not be commensurate with honest market practice or good faith. It exposes the landlord to the risk of losing their money in the event of your insolvency and it is hard for the landlord to predict what the

scale of this risk might be. Our view is that it is unlikely that a landlord, properly informed of the facts, would agree to allow their agent to use the rent that an agent has collected, to pay the agent's staff wages or other business running expenses.

- 8.24 You should pay the rent you have collected to the landlord promptly and as agreed in the contract, so you can demonstrate that you are passing this on in reasonable time. A term that permits you to retain the money for an excessive period of time may be unfair. Many landlords need money to be paid promptly to cover bills and other outgoings. In our view, landlords should generally be able to expect payment within five working days of receipt of cleared funds. Where a longer period for payment is unavoidable for practical reasons, for instance because of a firm's banking arrangements or the configuration of its computer software, this should be flagged to landlords before they sign up to the contract. We would expect all agents' systems to permit rents to be paid within one calendar month of receipt of cleared funds at the outside.
- 8.25 In circumstances where the tenant falls into arrears you should keep the landlord informed about the arrears, and take appropriate steps to secure rent for landlords, to show you are carrying out your services with reasonable care and skill. We consider that it may be a **misleading omission** not to inform the landlord that the tenant is in arrears, since information about the arrears is likely to be **material information** the landlord would need to know in order to decide whether to take steps, such as court proceedings, to recover the rent or repossess the property.
- 8.26 In some situations, for example where the tenant has to ask for permission to do something under the tenancy agreement (such as keep a pet in the property), it may be appropriate for agents to deal with a tenant's application for permission and collect a charge for doing this if it is provided for in the tenancy agreement, and if the amount charged is reasonable. The agent should inform the landlord and pass on promptly to the landlord, any money paid where this is owed to the landlord.

Other services

- 8.27 The SGSA requires that all other services an agent provides to a landlord should be carried out with reasonable care and skill and in a timely way. For example agents should:
- carry out accompanied viewings or inspect the property in such a way that it avoids putting the landlord in breach of their obligation to allow the tenant quiet enjoyment of the property

- carry out routine property inspections in a reasonable way, in particular ensuring that they are thorough and regular, and seek to resolve satisfactorily any issues identified
- undertake all repair work on the landlord's behalf for which the agent is responsible under the contract. For example, arranging for an electrical appliance to be fixed when the contract says the agent is responsible for any electrical repairs
- keep the landlord properly informed about tenants being in breach of their tenancy agreement, if the agent is aware of this.

9. RENEWAL/TERMINATION OF THE TENANCY

9.1 This chapter aims to help you to comply with consumer law when you are:

- giving and accepting notice to end the tenancy
- charging tenants fees for renewing or exiting a tenancy agreement
- refunding the security deposit, or making deductions from it.

9.2 Issues that arise when a landlord wishes to terminate their agreement with a lettings agent are covered in chapter 4.

Overview

You should:

- Act consistently with information already given to the tenant on fees for renewing or exiting a tenancy agreement at the pre-contractual stage.
- Ensure that the tenant has clear, accurate information about what they need to do to give notice, and alert them if they get this wrong.
- Avoid misleading the tenant about whether you propose to retain any money from the security deposit, and if so, how much.

Giving and accepting notice

9.3 All information you give to tenants about notice periods and the form of the notice should be clear, accurate, and not misleading, and you must not omit **material information**.

9.4 When you give notice to a tenant, you must not mislead them about their rights in law, or as provided for in the tenancy agreement. For example:

- You should not attempt to give the tenant Notice Requiring Possession if you are not lawfully allowed to (for example in circumstances where a security deposit has not been properly protected).⁷²

⁷² Under Section 215 of the Housing Act 2004, you cannot give the tenant notice under Section 21 of the Housing Act 1988 that you require possession of the property, if you are not holding their deposit correctly in one of the

- You should not purport to give a shorter period of notice than is provided for in the tenancy agreement.
- You should take care to rely only on notice terms in the tenancy agreement that can safely be considered fair and enforceable. A term which allows the landlord to end the tenancy at shorter notice than the tenant, or requires the tenant to give more notice than is set out in law (even if only as a default in the absence of agreement) may be unfair.

9.5 Landlords should clearly set out the form of notice they are willing to accept as this is **material information** the tenant needs. If, for example, you require the notice to be given in writing you should clearly explain which forms of writing you are willing to accept.⁷³

9.6 If a tenant gives you notice in a way that you know means it is incorrect (for example, because it is not in writing, or it expires on the wrong day), and it is capable of being corrected, you may be under a duty, before attempting to rely on the error as invalidating the notice, to take steps to enable the tenant to correct it.

9.7 In our view, a court might find that the **professional diligence**⁷⁴ requirements of the CPRs mean you should point out to the tenant that they have given notice incorrectly and remind them where to look (for example the tenancy agreement) to identify how to give notice correctly.

9.8 Alternatively, the court might find that where you know the tenant has given notice incorrectly, your knowledge of their error and the fact the notice they have given is ineffective, constitute **material information**. Failure to provide that information to the tenant at the appropriate time could therefore be a **misleading omission**.

Charging tenants fees for renewing or exiting a tenancy agreement

9.9 As highlighted earlier any fees for renewing or exiting a tenancy agreement should have a clear contractual basis and should have been drawn to the tenant's attention before he committed to the tenancy. For example, charges

Tenancy Deposit Schemes or, where you have failed to give the tenant prescribed information required about their deposit, until you have given the tenant that information (in the prescribed form).

⁷³What 'in writing' means is an area where case law is likely to develop given technological advances such as SMS messaging and social media. Courts may hold a different view to your interpretation, and so keeping up to date with case decisions will help ensure you comply with the law.

⁷⁴ See paragraphs 3.27 – 3.29 and in particular the requirement to act in good faith and with honest market practice.

for checking the inventory or for cleaning should have been brought to the tenant's attention at the pre-contractual stage.

- 9.10 Introducing a new charge at this stage may be both a **misleading action** and an **aggressive practice** under the CPRs if it gives the tenant the impression that he cannot leave the property, or receive his security deposit back, unless he contracts to pay a further sum.
- 9.11 Where a tenant wishes to remain in the property, he should not be charged any additional fee for holding over under a statutory periodic tenancy, or given the impression that he is obliged to agree to a new fixed term agreement.
- 9.12 It may be a **misleading action** and an unfair term to seek to charge a tenant to renew a tenancy where this fee was not set out in the original tenancy agreement and brought to potential tenants' attention in the pre-tenancy advertising and other materials.
- 9.13 It may also be an **aggressive practice** to seek to introduce a charge to renew a tenancy agreement at this stage, as doing so may take advantage of the tenant's limited security of tenure – they effectively have no choice about whether to pay the renewal fee if the alternative is to be given a Notice Requiring Possession.

Exiting the property and dealing with the security deposit

- 9.14 If the tenancy agreement is not renewed, and the tenant moves out, the 'check out' process, including dealing with the security deposit, should be transparent and fair. You should not attempt to rely on terms that are unfair.
- 9.15 Information given to tenants, and to the tenancy deposit schemes, about proposed deductions from the tenant's deposit, should be accurate, clear and not misleading.
- 9.16 If you are a landlord or agent, and consider that some of the security deposit should be withheld, exaggerating the sums necessary, or the scale of work required, to deal with damage caused or cleaning required could be a **misleading action**. The terms of tenancy agreements requiring payment for damage caused by the tenant should be fair. You should not try to charge for damage that is not recoverable, or which would not be allowed by the courts or tenancy deposit protection schemes. You should have regard to appropriate guidance (see paragraph 8.12) in particular the importance of accounting for fair wear and tear, avoiding betterment and you should also be sure that you are able to prove any damage you allege.

9.17 Where the security deposit has not been properly protected you should not seek to make any deductions at all, but should return it immediately to the tenant. It is likely to be a **misleading action** if you attempt to deduct any sums without also having informed the tenant, at the outset of the tenancy agreement, that the deposit is not protected, that he has legal rights to secure a court order to recover the deposit and also, potentially, to be awarded compensation.⁷⁵

Further examples of potential breaches of consumer law on renewal/termination of the tenancy

- At the end of the tenancy, the tenant cleans the property before handing it back. Even though the tenant has cleaned the property appropriately, the landlord or agent has the property cleaned professionally and deducts this from the tenant's deposit or charges the cost to the tenant. The fact the property will be cleaned professionally is likely to be material information the tenant needs to know and it may be a **misleading omission** if the landlord or agent does not inform the tenant of this before the tenant takes steps to clean the property himself. Where you do not have agreed evidence about how clean the property is at the start of the letting, or the landlord needs to carry out other decorating due to fair wear and tear, which means the property would need to be cleaned afterwards in any event, it may be a **misleading action** to claim that the tenant has to pay the additional cost of cleaning at all.
- A landlord who seeks to retain sums from a deposit where the deposit is not protected in a Tenancy Deposit Scheme, may be committing an **aggressive practice**, because the landlord might exploit the position they have by possessing the tenant's money and the tenant's likely need to get back that deposit swiftly.
- A landlord may commit an **aggressive practice** if, having failed to protect the tenant's deposit correctly, they persuade the tenant to leave by threatening to serve a Notice Requiring Possession under Section 21 of the Housing Act 1988⁷⁶ (a 'no-fault eviction notice') and make the tenant think they are legally required to leave⁷⁷.

⁷⁵ See information provided in footnote 72.

⁷⁶ Applies only in England and Wales.

⁷⁷ Section 213 of the Housing Act 2004 requires landlords to protect tenants' deposits and provide them with prescribed information. Section 215 of the 2004 Act prevents a landlord from being able to rely on a Notice Requiring Possession under section 21 of the Housing Act 1988 to terminate a tenancy, if the landlord has failed to meet the requirements imposed by Section 213.

- A landlord may commit an **aggressive practice** if they serve a no-fault eviction notice in response to a tenant or tenants raising legitimate complaints about the state of the property, including where a tenant asks the landlord to repair it so that it complies with housing-specific law requirements. Alternatively, this may breach the requirements of **professional diligence**.
- Examples of terms that may be unfair, and which we consider should not be relied on at the renewal stage, include those which:
 - give the landlord or his agent discretion to determine whether the tenant is in breach of contract in relation to the state of repair of the property
 - require the tenant to pay fixed fees for cleaning or repairing the property, without reference to the actual work carried out.

10. WHAT HAPPENS IF I DON'T COMPLY WITH THE LEGISLATION?

- 10.1 If you do not comply with the legislation you may face enforcement action.
- 10.2 Local authority trading standards services, the Department of Enterprise, Trade and Investment in Northern Ireland (DETI) and the CMA all have powers to enforce the consumer protection legislation referred to in this guidance.
- 10.3 This does not mean that enforcement action must or will be taken in respect of each and every infringement. Instead, enforcers will usually promote compliance by the most appropriate means, in line with their enforcement policies, priorities and available resources. Enforcement action is one option open to them.

What enforcement action might an enforcer take?

- 10.4 Enforcement action taken may be:
- civil enforcement (for all legislation set out in paragraph 1.8)
 - criminal enforcement under the CPRs (available, in parallel with the availability of civil enforcement, in respect of the majority of breaches of the CPRs), or under the BPRs.

Civil enforcement

- 10.5 Enforcers may take civil enforcement action in respect of breaches of a range of consumer protection legislation, including the CPRs, the UTCCRs and the SGSA, as Community Infringements (breaches of EU-derived legislation) under Part 8 of the Enterprise Act 2002. Enforcers may also seek an injunction (interdict in Scotland) to require compliance with the BPRs, or to stop the use of unfair terms.
- 10.6 Under the Part 8 procedure, enforcers may apply to a court for an enforcement order to prevent community or domestic infringements (breaches of a range of specified domestic law) where the requirements of the Enterprise Act 2002 are met, which include demonstrating that the interests of consumers collectively are adversely affected. Breach of an enforcement order could be contempt of court which could lead to up to two years imprisonment and/or an unlimited fine. The process for seeking an injunction (interdict in Scotland) is similar.

- 10.7 Where the infringer is a company, civil proceedings may be brought against an accessory; this means a person who has a special relationship with the company by virtue of being a director, manager, secretary or other similar officer (or person purporting to act in such a capacity) or a person who is a controller of the company who has consented to or connived in the infringement.
- 10.8 Enforcers will normally seek to stop an infringement through a statutory consultation process⁷⁸ with the trader before applying to the court for an enforcement order. Instead of seeking an order, they may accept an undertaking from the trader not to engage in or repeat the conduct constituting an infringement.
- 10.9 Further information on enforcement under Part 8 of the Enterprise Act 2002 is contained in the OFT's published guidance on this subject. Further information on enforcement under the BPRs is contained in the OFT's published guidance on the BPRs.⁷⁹

Criminal enforcement under the CPRs and BPRs⁸⁰

- 10.10 The CPRs and BPRs also contain criminal offences. These can be prosecuted by:
- the CMA
 - TSS
 - in Scotland, only by the Crown Office and Procurator Fiscal Service.
- 10.11 The CPRs offences are:
- contravention of requirements of the general prohibition misleading actions (except 5(3)(b) – code commitments)
 - misleading omissions (including the omission of specified information in invitations to purchase) aggressive practices

⁷⁸ A process provided for in the Enterprise Act 2002 where the enforcer engages with the trader about the conduct in question and why the enforcer considers it constitutes a breach of consumer protection legislation.

⁷⁹ Both pieces of guidance are available on the CMA website

⁸⁰ Further information is available in [The Consumer Protection from Unfair Trading Regulations 2008 \(OFT 1008\)](#) and [Business to Business Promotions and Comparative Advertisements \(OFT1056\)](#) published by the OFT.

- banned practices in (Schedule 1) apart from numbers 11 and 28 (see paragraph 3.30).

10.12 The BPRs offence is misleading advertising.

10.13 The offences above are all strict liability offences, apart from contravention of the general prohibition contained in the CPRs, which requires proof of 'intention' (*mens rea*).⁸¹

Under what circumstances might enforcers be likely to take enforcement action?

10.14 In deciding whether to act, enforcers will generally 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
- where breach of the legislation might be an offence and therefore prosecution is considered and whether you have a defence⁸²
- if they, or another enforcer, is best placed to take action.

What penalties might you face?

10.15 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), a fine not exceeding the statutory maximum – currently £5,000

⁸¹ This is a legal term which sets out the requirement of a mental element in the offence, for example knowledge or recklessness.

⁸² See below for information on defences.

- on conviction on indictment in the Crown Court (Sheriff Court in Scotland), an unlimited fine or imprisonment for up to two years, or both.

10.16 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 both:

- that you committed the offence because of:
 - a mistake
 - reliance on information supplied to you by someone else
 - the act or default of someone else
 - an accident
 - another cause outside your control
- and that you took all reasonable precautions and exercised all due diligence to avoid committing the offence.

10.17 If you wish to put yourself in a better position to be able to rely on the due diligence defence, the key thing to bear in mind when reviewing your conduct, processes and training, 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 a landlord if you are a letting agent), you should still exercise your own judgement before including it in your marketing.

10.18 If you are prosecuted under the general prohibition contained in the CPRs⁸³ (acting in a manner that is contrary to the requirements of **professional diligence**), you will not have a due diligence defence available to you. If you knowingly or recklessly allow your conduct to 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.

10.19 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.

⁸³ Regulations 3(1) and 3(3) of the CPRs.

- 10.20 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.
- 10.21 If someone else commits an offence under the CPRs 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.
- 10.22 The second defence, which may be relevant if your business involves publishing advertisements put together by other people, is the **innocent publication defence**. To benefit from this defence you must prove that the advert in question was received in the ordinary course of your business and you did not know and had no reason to suspect that publication would amount to an offence.
- 10.23 The defences of due diligence and innocent publication are not available to you in the context of civil proceedings. However because granting an enforcement order or injunction is a discretionary remedy, requiring consideration of whether there is harm to the collective interests of consumers, the courts will generally have regard to whether there is a risk of repetition of the infringement.⁸⁴ Therefore accidents or mistakes that are truly one offs, or which you could not have reasonably prevented from occurring, are less likely to be the subject of successful enforcement action – particularly if you can demonstrate that your business processes and staff training methods are robust.
- 10.24 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.
- 10.25 There may be additional consequences. If you have breached certain legislation (in particular the CPRs or BPRs) these breaches may be used in assessing whether you are fit to engage in certain other activities, some of which you may currently also be carrying out.
- 10.26 Under the Estate Agents Act 1979, a designated body (currently Powys County Council Trading Standards Services) can issue a prohibition order

⁸⁴ See *OFT v Vance Miller* [2009] EWCA Civ 34 para 44.

banning you from undertaking estate agency work, even if you do not presently carry it out.

- 10.27 Breaches of legislation (for examples the CPRs or BPRs) can also be taken into account by the Financial Conduct Authority (FCA) in terms of suitability to be authorised or an appointed representative in respect of regulated mortgage contracts or consumer credit agreements, or other credit-related activities.
- 10.28 It is also important to be aware that any advertisements that are inaccurate or otherwise deceptive or inappropriate could be subject to Advertising Standards Authority adjudications.

What action might a consumer take?

- 10.29 In addition to the points above, a consumer may take their specific complaint against you to a redress scheme if you are an agent and you belong to a lettings redress scheme.
- 10.30 Consumers may also have private rights of legal action 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.
- 10.31 Negative consumer feedback can of course also lead to reputational issues and loss of business.
- 10.32 In Scotland consumers may complain to the Private Rented Housing Panel which was introduced in 2007 to deal with complaints in relation to repairing standards.

ANNEX A – SOME RELEVANT HOUSING LAW

This Annex provides some brief information on material that is out of scope of the CMA’s guidance, but may be a useful reference for lettings professionals. It should be noted that it is **not** a comprehensive list of everything landlords and letting agents need to know, and that there will be other obligations and duties that are not covered in this Annex. Information in this Annex does not include any proposed changes to housing law implemented from June 2014 onwards.

Information is grouped under the headings of:

- Creation and ending of tenancy agreements
- Fees and charges
- Security deposits
- Maintenance and repair
- Landlord registration

Additionally, Annexe B of ‘*The lettings market – an OFT report*’ (OFT 1479) provides useful information on industry bodies, consumer groups and other Government resources.

Creation and ending of tenancy agreements

England & Wales	<p>Housing Act 1988</p> <p>This Act creates Assured and Assured Shorthold Tenancies, and lays down the rules for creating and ending such tenancies. The general right to quiet enjoyment is also reinforced by this Act. www.legislation.gov.uk/ukpga/1988/50/contents</p> <p>Protection from Eviction Act 1977</p> <p>Section 3 of the Act prevents an owner of residential premises from recovering possession against certain occupiers of residential premises after the end of the tenancy or licence without first obtaining a court order. www.legislation.gov.uk/ukpga/1977/43</p>
Scotland	<p>Housing (Scotland) Act 1988</p> <p>This Act creates assured and short assured tenancies in Scotland, and sets out the requirements for creating and ending such tenancies. www.legislation.gov.uk/ukpga/1988/43/contents</p> <p>The Act (as amended) also introduced a duty from 1 May 2013 on landlords to provide new tenants with a tenant information pack by the tenancy start date. Failure to comply with this duty is a criminal offence.</p> <p>Further information for landlords and letting agents about the tenant information pack can be found at: www.scotland.gov.uk/Topics/Built-Environment/Housing/privaterent/tenants/tip/landlords</p> <p>The pack is a standardised document and is available on the Scottish Government website at: www.scotland.gov.uk/Publications/2013/02/8719</p>

	<p>Rent (Scotland) Act 1984</p> <p>Part III of the Act makes provision for the protection of tenants from unlawful eviction and harassment. www.legislation.gov.uk/ukpga/1984/58/contents</p>
Northern Ireland	<p>Rent (Northern Ireland) Order 1978</p> <p>Article 54 of this Order sets out rules regarding harassment and illegal eviction in Northern Ireland. www.legislation.gov.uk/nisi/1978/1050/contents</p> <p>Private Tenancies (Northern Ireland) Order 2006</p> <p>This legislation means that landlords must give tenants a written statement of tenancy terms within 28 days of the start of the tenancy. These are set out in the Tenancy Terms Regulations (Northern Ireland) 2007. www.legislation.gov.uk/id/nisi/2006/1459/contents</p>

Fees and charges

England, Wales and Scotland	<p>Accommodation Agencies Act 1953</p> <p>This Act prohibits an agent from advertising a property to be let without the authority of the owner of the house. In addition, the Act further prohibits certain specific practices of an agent including demanding or accepting money from any member of the public for supplying them with a list of properties available to rent, or for registering their interest in obtaining a tenancy. www.legislation.gov.uk/ukpga/Eliz2/1-2/23/contents</p>
Scotland	<p>Rent (Scotland) Act 1984</p> <p>Under sections 82 and 90 of the Act as amended, it is a criminal offence to charge or receive any premium other than the rent, a refundable security deposit (not exceeding two month's rent) and/or any payment under a Green Deal plan, as a condition of the grant, renewal or continuance of a tenancy. A 'premium' means any fine, sum or pecuniary consideration, other than the rent, and includes any service or administration fee or charge. www.legislation.gov.uk/ukpga/1984/58/contents</p> <p>Private Rented Housing (Scotland) Act 2011</p> <p>This Act defines premiums as being any fine or sum other than rent, a refundable deposit (not exceeding two months' rent) and payment under a Green Deal plan. www.legislation.gov.uk/asp/2011/14/contents</p>
Northern Ireland	<p>The Commission on Disposals of Land (Northern Ireland) Order 1986</p> <p>Any stipulation which has the effect, on a disposal of land, of obliging the person acquiring the land to pay commission (including fees, charges, disbursements, expenses and remuneration) due to an agent acting for the person disposing of the land, is void by virtue of this Order. The following disposals of land are covered: selling, leasing, exchanging, surrendering, and granting licences, easements, profits or other rights. In addition, in relation to lettings of land, any stipulation which has the effect of obliging the tenant to pay commission due to an agent acting for the landlord in connection with rent reviews or rent renewals/extensions, is void by virtue of this Order. Money paid by a person under a stipulation which is void by virtue of this Order, is recoverable by that person. www.legislation.gov.uk/nisi/1986/767/contents</p>

Security deposits

England & Wales	<p>Housing Act 2004</p> <p>Chapter 4 of the Housing Act 2004 introduced a compulsory scheme under which private landlords granting Assured Shorthold Tenancies must safeguard security deposits paid.</p> <p>There is no obligation for the landlord or agent to require a security deposit but, where one is taken, they must register it with an authorised protection scheme, which may be a custodial scheme, or an insurance based scheme.</p> <p>Within 30 days of receiving the deposit the landlord or their agent must give the tenant information such as the scheme contact details, a summary of the law on deposits, how the deposit may be recovered, and how disputes are resolved. Where a deposit has been paid and any of the requirements have not been met, or the scheme administrator has not confirmed that the deposit is being held in accordance with the scheme, an application may be made to the county court. www.legislation.gov.uk/ukpga/2004/34/contents</p> <p>Tenancy Deposit Solutions Ltd (TDSL) www.mydeposits.co.uk The Deposit Protection Service (DPS) www.depositprotection.com The Tenancy Deposit Scheme (TDS) www.tds.gb.com</p>
Scotland	<p>Housing (Scotland) Act 2006</p> <p>Part 4 of the Act makes provision for the establishment of tenancy deposit schemes. www.legislation.gov.uk/asp/2006/1/contents</p> <p>Tenancy Deposit Schemes (Scotland) Regulations 2011</p> <p>The Regulations set out the requirement for landlords to pay any deposit received from a tenant into an approved tenancy deposit scheme, and makes provision about the establishment and operation of the schemes. www.legislation.gov.uk/ssi/2011/176/contents/made</p> <p>Three schemes have been approved by the Scottish Government: Letting Protection Service Scotland www.lettingprotectionscotland.com</p> <p>SafeDeposits Scotland www.safedepositsscotland.com</p> <p>My deposits Scotland www.mydepositsscotland.co.uk</p>
Northern Ireland	<p>The Private Tenancies (Northern Ireland) Order 2006 Articles 5A and 5B of the Private Tenancies Order makes provision for Tenancy Deposit Schemes</p> <p>The Tenancy Deposit Schemes Regulations (Northern Ireland) 2012 set out what a landlord must do in relation to a Tenancy Deposit.</p> <p>There are three scheme providers in Northern Ireland: Letting Protection Service NI www.lettingprotectionni.com My Deposits www.mydepositsni.co.uk The Dispute Service NI www.tdsnorthernireland.com</p>

Maintenance and repair

England & Wales	<p>Defective Premises Act 1972</p> <p>This Act imposes obligations upon the landlord to the tenant in relation to the maintenance or repair of the premises, where the landlord has a duty or a right to carry out repairs. www.legislation.gov.uk/ukpga/1972/35</p> <p>Landlord and Tenant Act 1985</p> <p>This Act sets out the rights and responsibilities of both landlords and tenants. Section 11 of the Act sets out who is responsible for repairing a property whilst it is being rented. It generally applies to short tenancies of less than seven years.</p> <p>In broad terms, the landlord is responsible for maintaining the structure and exterior of the property, and to keep the installations in repair and proper working order. These responsibilities cannot be placed on the tenant by contract.</p> <p>Examples of the structure and exterior include the walls, pipes, roof, windows and external doors. Examples of installations include toilets and baths, heating systems, and water systems.</p> <p>The landlord and the landlord's agent are also given a statutory right to enter the premises for the purpose of viewing the condition and state of repair on giving the tenant 24 hours' notice in writing (Section 11(6) of the LTA 1985). www.legislation.gov.uk/ukpga/1985/70</p> <p>Occupiers' Liability Act 1957</p> <p>This Act confers upon the landlord a common duty of care to all visitors to the property except to the extent that he lawfully restricts liability. The duty of care is to take such care as is reasonable in all the circumstances to ensure that a visitor will be reasonably safe when on the premises for the purpose for which he or she was invited.</p> <p>The OLA prohibits any attempt by a landlord or agent to exclude or restrict the landlord's obligations to visitors in the terms of the tenancy agreement.</p> <p>Where the tenancy sets out a right to enter the property for repairs or maintenance on the landlord or agent then the landlord or agent has a positive duty to ensure that their failure to carry out that repair or maintenance does not cause personal injury or property damage. www.legislation.gov.uk/ukpga/Eliz2/5-6/31/contents</p>
England, Wales & Scotland	<p>The Furniture and Furnishings (Fire) (Safety) Regulations 1988</p> <p>These Regulations impose requirements upon landlords in relation to domestic furniture and the fire resistance requirements. They must check on the fire safety of fixtures and furnishings that go with the tenancy. These duties apply from the moment the tenancy begins. www.legislation.gov.uk/uksi/1988/1324/contents/made</p> <p>The Gas Safety (Installation and Use) Regulations 1998</p> <p>These Regulations impose obligations upon landlords in certain tenancies to ensure the safe installation, maintenance and use of gas systems, including gas fittings, appliances and flues mainly in domestic and commercial premises.</p> <p>The Electrical Equipment (Safety) Regulations 1994</p> <p>Landlords are responsible for the safety of some services within the property and must inspect and maintain electrical appliances under these regulations. . www.legislation.gov.uk/uksi/1998/2451/contents/made</p>
Scotland	<p>Housing (Scotland) Act 2006</p> <p>This Act sets out the requirement on landlords to ensure that Scottish properties they let meet the 'repairing standard' at the start of the tenancy and at all times during the tenancy.</p>

	<p>A house meets the repairing standard if:</p> <ul style="list-style-type: none"> • the house is wind and water tight and in all other respects reasonably fit for human habitation • the structure and exterior of the house (including drains, gutters and external pipes) are in a reasonable state of repair and in proper working order • the installations in the house for the supply of water, gas and electricity and for sanitation, space heating and heating water are in a reasonable state of repair and in proper working order • any fixtures, fittings and appliances provided by the landlord under the tenancy are in a reasonable state of repair and in proper working order • any furnishings provided by the landlord under the tenancy are capable of being used safely for the purpose for which they are designed, and • the house has satisfactory provision for detecting fires and for giving warning in the event of fire or suspected fire. <p>The Act also established the private rented housing panel, the primary role of which is to enforce the repairing standard obligation. www.legislation.gov.uk/asp/2006/1/contents</p> <p>The Act also established the Private Rented Housing Panel, the primary role of which is to enforce the repairing standard obligation. www.prhpscotland.gov.uk/prhp/1.html</p> <p>Occupiers Liability (Scotland) Act 1960</p> <p>The Act sets out a landlord's duty of care towards any person who or whose property may be on their premises in respect of dangers arising from any failure on the landlord's part in carrying out his or her responsibilities for maintenance or repair. www.legislation.gov.uk/ukpga/Eliz2/8-9/30/contents</p>
Northern Ireland	<p>Private Tenancies (Northern Ireland) Order 2006</p> <p>This Order sets out rules on ending tenancies and the repairing obligations for landlords and tenants in Northern Ireland. www.legislation.gov.uk/nisi/2006/1459/contents</p>

Landlord registration

England & Wales	<p>The Housing Act 2004</p> <p>This Act introduced the requirement for landlords with houses in multiple occupancy (HMOs), mainly blocks of flats, to be licensed under the Management of Houses in Multiple Occupation (England) Regulations 2006. The Regulation requires that the HMO manager keeps a property in good repair, a statutory version of what many local authorities already provide as guidelines.</p> <p>The Act also provides for other selective licensing with attached conditions. www.legislation.gov.uk/ukpga/2004/34/contents</p>
Scotland	<p>Antisocial Behaviour etc (Scotland) Act 2004</p> <p>This Act introduced a requirement on private landlords of property in Scotland to register with the relevant local authority, and made other provisions in relation to</p>

	<p>landlord registration and removal from the register of landlords. www.legislation.gov.uk/asp/2004/8/contents</p> <p>www.legislation.gov.uk/asp/2011/14/contents</p> <p>Housing (Scotland) Act 2006</p> <p>Part 5 of the Act (as amended) sets out the requirements for HMO registration in Scotland. www.legislation.gov.uk/asp/2006/1/contents</p>
Northern Ireland	<p>The Housing (Northern Ireland) Order 1992</p> <p>Part IV of this Order sets out requirements for HMO registration in Northern Ireland. www.legislation.gov.uk/nisi/1992/1725/contents</p> <p>The Private Tenancies (Northern Ireland) Order 2006</p> <p>Article 65A of the Private Tenancies Order makes provision for the Landlord Registration Scheme.</p> <p>The Landlord Registration Scheme Regulations (Northern Ireland) 2014 set out the requirement for landlords to be registered and the information which they must provide</p>