

Consumer Protection (Unfair Trading) Act 2008

Principal Act

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	<i>Assent</i>	11.11.2008
Amending enactments	Relevant current provisions	Commencement date
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Transposing:

Directive 2005/29/EC
Directive 2011/83/EU

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AN ACT TO IMPLEMENT THE PROVISIONS OF DIRECTIVE 2005/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 11 MAY 2005 CONCERNING UNFAIR BUSINESS-TO-CONSUMER COMMERCIAL PRACTICES.

Title and commencement.

1. This Act may be cited as the Consumer Protection (Unfair Trading) Act 2008 and comes into operation on the day of publication.

**PART I
INTERPRETATION**

Interpretation.

2. For the purposes of this Act—

“business-to-consumer commercial practices” (hereinafter also referred to as commercial practices) means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a service to consumers;

“code of conduct” means an agreement or set of rules not imposed by law, regulation or administrative provision of Gibraltar or of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors;

“code owner” means any entity, including a trader or group of traders, which is responsible for the formulation and revision of a code of conduct and/or for monitoring compliance with the code by those who have undertaken to be bound by it;

“consumer” means any natural person who, in commercial practices covered by this Act, is acting for purposes which are outside his trade, business, craft or profession;

“Consumer Officer” means the person appointed under section 11 of this Act;

“the Directive” means Directive 2005/29 of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices;

“goods” means any tangible moveable items, with the exception of items sold by way of execution or otherwise by authority of law, and water, gas and electricity shall be considered as goods within the meaning of this Directive where they are put up for sale in a limited volume or a set quantity;

“invitation to purchase” means a commercial communication which indicates characteristics of the service and the price in a way appropriate to the means of the

commercial communication used and thereby enables the consumer to make a purchase;

“to materially distort the economic behaviour of consumers” means using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise;

“the Minister” means the minister with responsibility for consumer affairs;

“professional diligence” means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity;

“qualified entity” means any body or organisation entitled to seek an injunction in a Member State for the purposes of consumer protection under Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests;

“regulated profession” means a professional activity or a group of professional activities, access to which or the pursuit of which, or one of the modes of pursuing which, is conditional, directly or indirectly, upon possession of specific professional qualifications, pursuant to laws, regulations or administrative provisions;

“a service” includes, but is not limited to, a service with respect to immovable property, rights and obligations;

“trader” means any natural or legal person who, in commercial practices covered by this Act, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader;

“transactional decision” means any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a service or to exercise a contractual right in relation to the service, whether the consumer decides to act or to refrain from acting;

“undue influence” means exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision.

PART II SCOPE OF APPLICATION

Application of the Act.

3.(1) This Act shall apply to unfair business-to-consumer commercial practices, as laid down in section 5, before, during and after a commercial transaction in relation to a service.

(2) This Act is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract.

(3) This Act is without prejudice to any rules of law relating to health and safety.

(4) In the case of conflict between the provisions of this Act and any rules of law applicable in Gibraltar regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.

(5) This Act is without prejudice to any conditions of establishment or of authorisation regimes, or to codes of conduct or other specific rules governing regulated professions in order to uphold high standards of integrity on the part of the professional.

(6) In relation to “financial services”, as defined in Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, and immovable property, this Act is without prejudice to any more restrictive laws protecting consumers in those sectors.

(7) This Act shall not apply to the laws, regulations and administrative provisions relating to the certification and indication of the standard of fineness of articles of precious metal.

Ordinary hyperbole.

4. This Act is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.

PART III UNFAIR COMMERCIAL PRACTICES

Prohibition of unfair commercial practices.

5.(1) Unfair commercial practices shall be prohibited.

(2) A commercial practice shall be unfair if–

- (a) it is contrary to the requirements of professional diligence; and
- (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the service of the average consumer whom it reaches or to whom it is

addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

(3) Commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying service because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group.

(4) In particular, commercial practices shall be unfair if they—

- (a) are misleading as set out in section 6 and 7; or
- (b) are aggressive as set out in sections 8 and 9.

(5) Schedule 1 to this Act contains the list of those commercial practices which shall in all circumstances be regarded as unfair.

PART IV MISLEADING COMMERCIAL PRACTICES

Misleading actions.

6.(1) A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise—

- (a) the existence or nature of the service;
- (b) the main characteristics of the service, such as its availability, benefits, risks, execution, after-sale customer service and complaint handling, method and date of provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use;
- (c) the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the service;
- (d) the price or the manner in which the price is calculated, or the existence of a specific price advantage;
- (e) the nature, attributes and rights of the trader or his agent, such as his identity and assets, his qualifications, status, approval, affiliation or connection and ownership

of industrial, commercial or intellectual property rights or his awards and distinctions;

(f) the risks the consumer may face.

(2) A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves—

(a) any marketing of a service, including comparative advertising, which creates confusion with any services, trade marks, trade names or other distinguishing marks of a competitor; or

(b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where—

(i) the commitment is not aspirational but is firm and is capable of being verified; and

(ii) the trader indicates in a commercial practice that he is bound by the code.

Misleading omissions.

7.(1) A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

(2) It shall also be regarded as a misleading omission when, taking account of the matters described in subsection (1), a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that subsection or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

(3) Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted.

(4) In the case of an invitation to purchase, the following information shall be regarded as material, if not already apparent from the context—

- (a) the main characteristics of the service, to an extent appropriate to the medium and the service;
 - (b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;
 - (c) the price inclusive of taxes, or where the nature of the service means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional charges or, where these charges cannot reasonably be calculated in advance, the fact that additional charges may be payable;
 - (d) the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence; and
 - (e) for services and transactions involving a right of withdrawal or cancellation, the existence of such a right.
- (5) Information requirements established by Community law measures in relation to commercial communication including advertising or marketing shall be regarded as material for the purposes of this Act, and liability under this Act shall be concurrent with any liability under such Community law measures as are incorporated into the law of Gibraltar.
- (6) Schedule 2 to this Act sets out a non-exhaustive list of Community law measures relevant to subsection (5).

PART V
AGGRESSIVE COMMERCIAL PRACTICES

Aggressive commercial practices.

8. A commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the service and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.

Use of harassment, coercion and undue influence.

9. In determining whether a commercial practice uses harassment, coercion, including the use of physical force, or undue influence, account shall be taken of—

- (a) its timing, location, nature or persistence;

- (b) the use of threatening or abusive language or behaviour;
- (c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the service;
- (d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another service or another trader; and
- (e) any threat to take any action that cannot legally be taken.

PART VI CODES OF CONDUCT

Codes of conduct.

10.(1) The Consumer Officer may encourage control of unfair commercial practices by code owners and by recourse to such control bodies.

(2) Recourse to such control bodies shall never be deemed the equivalent of foregoing a means of judicial or administrative recourse as provided for in Part VII of this Act.

PART VII ENFORCEMENT

Enforcement by way of injunction.

11.(1) The Minister may appoint by notice in the Gazette a Consumer Officer to administer the provisions of this Act.

(2) It shall be the duty of the Consumer Officer to consider any complaint made to him that a commercial practice is contrary to the provisions of this Act, unless—

- (a) the complaint appears to the Consumer Officer to be frivolous or vexatious; or
- (b) a person appointed under subsection (3) has notified the Consumer Officer that he agrees to consider the complaint.

(3) Without prejudice to subsection (1), the Minister shall designate by notice in the Gazette, such persons or groups of persons who may apply to him for designation and who, in the Minister's opinion, have as their sole or principal aim the promotion of interests of consumers.

(4) If a person designated under subsection (3) notifies the Consumer Officer that he agrees to consider a complaint that a commercial practice is contrary to the provisions of this Act, he shall be under a duty to consider that complaint.

(5) The following persons or bodies may apply for an injunction against any person appearing to them to be using, or recommending use of, practices contrary to the provisions of this Act—

- (a) the Consumer Officer;
- (b) subject to subsection (6), a person designated under subsection (3); or
- (c) a qualified entity from outside of Gibraltar.

(6) A person designated under subsection (3) may take action only where—

- (a) he has notified the Consumer Officer of his intention to apply at least fourteen days before the date on which the application is made, beginning with the date on which the notification was given; or
- (b) the Consumer Officer consents to the application being made within a shorter period.

(7) The court may, on an application for an injunction, grant an injunction or such other order on such terms as it thinks fit: without prejudice to the generality of the foregoing, the court may direct the person responsible for any commercial practice found to be contrary to the provisions of this Act—

- (a) to publish all or any part of the decision of the court;
- (b) to publish a corrective statement,

in such form and manner, and to such persons, as the court, in its discretion, may see fit.

(8) The Consumer Officer or, subject to subsection (6), a person designated under subsection (3)—

- (a) may, if he considers it appropriate to do so, have regard to any undertakings given to him or to the Minister by or on behalf of any person as to the continuation of such a commercial practice;
- (b) shall give reasons for his decision to bring or not to bring proceedings, as the case may be, for an injunction in relation to any complaint which this Act requires him to consider.

(9) Notwithstanding a decision not to bring proceedings for an injunction under subsection (8)(b), any person may bring such proceedings in his own name.

(10) An injunction or other order may relate not only to a particular commercial practice but to any similar practices having like effect, used, recommended or intended to be used by any party to the proceedings.

(11) The Minister may arrange for the dissemination, in such form and manner as he considers appropriate, of such information and advice concerning the operation of this Act as may appear to him to be expedient to give to the public and to all persons likely to be affected by this Act.

Offences.

12.(1) Where the Consumer Officer may bring an application under section 11(5) for an injunction against a person using, or recommending the use of, commercial practices contrary to the provisions of the Act, the Consumer Officer may further or alternatively apply to the court to impose a penalty.

(2) An application for a penalty made against a body corporate may also include an application that a penalty be imposed on an officer of that body.

(3) The court shall only impose a penalty against an officer of a corporate body, if the relevant practice was—

(a) committed with the consent or connivance of an officer of the body; or

(b) attributable to any neglect on his part.

(4) In subsection (2), the reference to an officer of a body corporate includes a reference to—

(a) a director, manager, secretary, or other similar officer; and

(b) a person purporting to act as a director, manager, secretary or other similar officer.

(5) The court shall impose such penalty as it believes is fair, just and reasonable taking into account the scale of the practice, its effect on consumers, the degree to which the trader had profited from the practice, and the degree of recklessness, intention or dishonesty, or the lack of the same by the trader.

(6) The court may impose the following by way of penalties—

(a) a warning;

- (b) a fine of up to ten per cent of the trader's turnover in Gibraltar or an estimate of the same;
- (c) a fine of up to the statutory maximum for a summary offence as against an officer of a body corporate; or
- (d) the removal of, or limitations to, any licence, permission, authorisation to trade in or from Gibraltar,

and the court may impose a combination of the above where appropriate.

(7) For the avoidance of doubt, the imposition of a penalty under this section shall be without prejudice to any action taken to enforce stricter and more restrictive regulations, or greater penalties, in respect of consumer services supplied in respect of financial services and immovable property, providing always that any duplication of penalties imposed under this Act and any other provision of law shall be concurrent and not cumulative.

Powers of investigation.

13.(1) The Consumer Officer and any person employed to assist him shall have the same powers of search, seizure and entry, questioning and the same right to apply for warrants from any judicial authority, as a police officer has in the course of investigating an offence triable on indictment.

(2) The use of all powers conferred by subsection (1) shall be subject to the same legal restrictions, safeguards and codes of practices as shall from time to time exist in respect of police investigations into offences triable on indictment.

(3) The Consumer Officer, or any person employed to assist him, shall only execute a search warrant where assisted by a police officer.

Burden of proof.

14. Insofar as the accuracy of factual claims in relation to a commercial practice is in issue, the burden of proof shall be on the trader to prove, on the balance of probabilities, that the claim was accurate.

Inertia selling.

14A.(1) This section applies where a trader engages in the unfair commercial practice described in paragraph 29 of Schedule 1 (inertia selling).

(2) The consumer is exempted from any obligation to provide consideration for the products supplied by the trader.

(3) The absence of a response from the consumer following the supply does not constitute consent to the provision of consideration for, or the return or safekeeping of, the products.

(4) In the case of an unsolicited supply of goods, the consumer may, as between the consumer and the trader, use, deal with or dispose of the goods as if they were an unconditional gift to the consumer.

**PART IX
MISCELLANEOUS**

Amendment to Misleading and Comparative Advertising Act.

15. Section 4(1)(a) of the Misleading and Comparative Advertising Act, 2001 shall be amended by adding after “this Act” the words “or the Consumer Protection (Unfair Trading) Act 2008”.

Amendment to the Exhibition of Prices Order.

16. After paragraph 3 of the Exhibition of Prices Order there shall be inserted–

“Order without prejudice to other consumer protection laws.

4. This Order is without prejudice to the requirements of the Consumer Protection (Unfair Trading) Act 2008, and in particular the requirements of section 7 thereof.”.

SCHEDULE 1

Section 5(5)

**COMMERCIAL PRACTICES WHICH ARE IN ALL CIRCUMSTANCES
CONSIDERED UNFAIR**

Misleading commercial practices.

1. Claiming to be a signatory to a code of conduct when the trader is not.
2. Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation.
3. Claiming that a code of conduct has an endorsement from a public or other body which it does not have.
4. Claiming that a trader (including his commercial practices) or a service has been approved, endorsed or authorised by a public or private body when he/it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation.
5. Making an invitation to purchase services at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those services or equivalent services at that price for a period that is, and in quantities that are, reasonable having regard to the service, the scale of advertising of the service and the price offered (bait advertising).
6. Making an invitation to purchase services at a specified price and then—
 - (a) refusing to show the advertised service to consumers; or
 - (b) refusing to take orders for it or provide it within a reasonable time; or
 - (c) demonstrating a defective sample of it,

with the intention of promoting a different service (bait and switch).

7. Falsely stating that a service 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.
8. Undertaking to provide after-sales service to consumers with whom the trader has communicated prior to a transaction in a language which is not an official language of the Member State where the trader is located and then making such service available only in

another language without clearly disclosing this to the consumer before the consumer is committed to the transaction.

9. Stating or otherwise creating the impression that a service can legally be provided when it cannot.
10. Presenting rights given to consumers in law as a distinctive feature of the trader's offer.
11. Using editorial content in the media to promote a service where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial). This is without prejudice to Council Directive 89/552/EEC and such legislation as from time to time implements that Directive, or any successor thereto, in Gibraltar.
12. Making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the service.
13. Promoting a service similar to a service provided by a particular supplier in such a manner as deliberately to mislead the consumer into believing that the service is made by that same supplier when it is not.
14. Establishing, operating or promoting a pyramid promotional scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or consumption of services.
15. Claiming that the trader is about to cease trading or move premises when he is not.
16. Claiming that services are able to facilitate winning in games of chance.
17. Falsely claiming that a service is able to cure illnesses, dysfunction or malformations.
18. Passing on materially inaccurate information on market conditions or on the possibility of finding the service with the intention of inducing the consumer to acquire the service at conditions less favourable than normal market conditions.
19. Claiming in a commercial practice to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent.
20. Describing a service as “gratis”, “free”, “without charge” or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for provision of the service.

21. Including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that he has already ordered the marketed service when he has not.
22. Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.
23. Creating the false impression that after-sales service in relation to a service is available in a Member State other than the one from which the service is provided.

Aggressive commercial practices.

24. Creating the impression that the consumer cannot leave the premises until a contract is formed.
25. 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 national law, to enforce a contractual obligation.
26. Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under the laws of Gibraltar to enforce a contractual obligation. This is without prejudice to Article 10 of Directive 97/7/EC and Directives 95/46/EC and 2002/58/EC and such legislation as from time to time implements those Directives or any successors thereto.
27. Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights.
28. Including in an advertisement a direct exhortation to children to buy advertised services or persuade their parents or other adults to buy advertised services for them. This provision is without prejudice to Article 16 of Directive 89/552/EEC on television broadcasting and such legislation as from time to time implements that Directive or any successor thereto.
29. Demanding immediate or deferred payment for services supplied by the trader, but not solicited by the consumer except where the service is a substitute supplied in conformity with section 14A.
30. Explicitly informing a consumer that if he does not buy the service, the trader's job or livelihood will be in jeopardy.
31. Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either–

- (a) there is no prize or other equivalent benefit; or
- (b) taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.

SCHEDULE 2

Section 7(6)

**COMMUNITY LAW PROVISIONS SETTING OUT RULES FOR ADVERTISING
AND COMMERCIAL PRACTICES**

1. Articles 4 and 5 of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.
2. Article 3 of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours.
3. Article 3(3) of Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of a right to use immovable properties on a timeshare basis.
4. Article 3(4) of Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers.
5. Articles 5 and 6 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).
6. Article 1(d) of Directive 98/7/EC of the European Parliament and of the Council of 16 February 1998 amending Council Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit.
7. Articles 3 and 4 of Directive 2002/65/EC of 23 September 2002 concerning the distance marketing of consumer financial services.
8. Article 1(9) of Directive 2001/107/EC of the European Parliament and of the Council of 21 January 2002 amending Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) with a view to regulating management companies and simplified prospectuses.
9. Articles 12 and 13 of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation.
10. Article 36 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance.

11. Article 19 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments.

12. Articles 31 and 43 of Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance (third non-life insurance Directive).

13. Articles 5, 7 and 8 of Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading.