Consultation on improving price transparency and product information for consumers[1] – response from the Competition and Markets Authority (CMA)

Background

1. The CMA is the UK's principal competition and consumer authority. It is an independent non-ministerial government department and its responsibilities include carrying out investigations into mergers and markets and enforcing competition and consumer law. The CMA helps people, businesses and the UK economy by promoting competitive markets and tackling unfair behaviour.[2]

2. The CMA has a role in providing information and advice to government and public authorities.[3] The CMA's advice and recommendations are made with a view to ensuring that policy decisions take account of the impacts on competition and consumers.

The CMA welcomes the Government's proposals to improve consumer protection.

3. The CMA is supportive of the Digital Markets, Competition and Consumer Bill (referred to here as the DMCC Bill) and welcomes the work by the Government in consulting further on these areas of detail in the area of consumer protection. The CMA particularly supports the Government's intentions to protect consumers from fake reviews and problematic subscriptions and the CMA provides more comments on both key topics in this response.

   (a) Tackling these issues, along with the key issue of price transparency also covered by the consultation and the response, has the power to facilitate

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[1] https://www.gov.uk/government/consultations/smarter-regulation-improving-price-transparency-and-product-information-for-consumers

[2] The CMA's statutory duty is to promote competition, both within and outside the UK, for the benefit of consumers.

[3] Under Section 7(1) of the Enterprise Act 2002, the CMA has a function of making proposals, or giving information and advice, ''on matters relating to any of its functions to any Minister of the Crown or other public authority (including proposals, information or advice as to any aspect of the law or a proposed change in the law).''

informed consumer choice, so that people are protected from 'rip-off' practices. Doing so can also enhance competition by enabling people to shop around and compare competing suppliers' offerings, increasing the incentives on suppliers to offer better value for money. That in turn enhances consumer welfare as well as productivity in the economy as a whole. Without effective laws on these key issues, traders may be driven to compete not on quality, price or customer service but on their ability to mislead consumers or the ability to stop them from cancelling unwanted subscriptions.

(b) Information about the CMA's views on other aspects of the DMCC Bill can be found in our 2021 consultation response document.[4]

Summary of the CMA's Response

6. We have responded in detail below to the questions set out in the Government's consultation and have also provided additional information in support of our answers where relevant. While all of the proposals are important, we would highlight the following areas of our response in particular:

Display of pricing information

- CMA agrees that **traders should be required to adopt consistent unit pricing measurements for comparable products that can be sold by weight or by volume and that the prominence and legibility of pricing information should be improved**. CMA also agrees that **retailers should be explicitly required to display the promotional unit price for all products offered for sale to consumers on promotion, wherever practical**.

- On **deposit return schemes** (DRS), **CMA considers that (for now) the deposit for products subject to a DRS should be included in the *selling price***. We recognise, however, that there are potential benefits in not including the deposit in the *unit price*, as this enables consumers to compare the unit price of products on the basis of the drink (i.e. the liquid product) in the scenario where some packaging materials used for some products may not be included within a DRS while others are. This may be an issue that the Government wishes to test further as part of any wider consumer research it may wish to undertake on DRS.

[4] Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers (publishing.service.gov.uk)

Regardless of the decision of whether to include the deposit in the selling and/or unit price, in our view, the definitions of selling and unit price currently set out in Article 1(2) of the PMO should be updated to take specific account of products subject to DRS. This will provide traders and enforcers with the necessary clarity about pricing requirements in such circumstances and avoid consumer confusion. In particular it is essential that all traders take the same approach to the pricing of products they sell, such that the market does not end up in the situation where some products within the DRS state an inclusive unit price (and/or selling price), while others, also in the DRS, do not.

Hidden fees and drip pricing

- The CMA considers that **there should be a specific banned practice on the drip pricing of all mandatory elements as well as other charges which are 'optional' but which it is reasonably foreseeable that most consumers would pay, or which any consumer would have to pay, even if others could avoid them**. This is to prevent traders from using spuriously variable or 'optional' charges in order to give a fictitious headline price. We think that there should be a requirement that mandatory variable and 'optional' charges are included in the stated headline price, as otherwise some traders are likely to simply make all such charges variable or 'optional' to keep their headline price as low as possible.

- Where the trader will present the consumer with **genuinely optional extras as part of the purchasing process, these should be prominently and fully disclosed with the headline price -** no more than one click away, if there are genuine limitations of space.

Fake reviews and online platforms

- **The CMA supports the Government's proposals to introduce new banned practices in relation to fake reviews**. This is important; i) to clarify traders' legal responsibilities; and ii) to reduce the time and cost associated with any enforcement action – thereby boosting compliance with the law. While in the CMA's view, traders who publish reviews must prevent consumers' decisions from being distorted, compliance will be improved by specifying that they must take effective steps to: i) identify and tackle fake reviews; and ii) avoid publishing inaccurate or otherwise misleading information such as overall ratings, review counts and rankings based on these reviews.

- More generally, **where online platforms publish, provide access to or facilitate content originating from third parties, we consider that professional diligence requires the operator to take or use reasonable, proportionate and effective measures – including proactive measures – to tackle economically harmful illegal content**. While there is no 'one-size-fits-all' approach, the CMA considers that, in practice, such measures are likely to include:

    - Taking proactive steps to identify and assess the systemic risks of harm to consumers from economically harmful content on the platform;

    - Having assessed the risks, implementing specific proactive measures to tackle the harmful content and prevent it from impacting consumers' economic decision-making;

    - Implementing reporting and flagging mechanisms to make it easy for consumers and other parties **–** e.g. law enforcement – to report potentially harmful content. On becoming aware of the presence of such content (through whatever means) the platform operator should investigate promptly and tackle any economically harmful illegal content;

    - Taking additional reasonable steps to effectively mitigate the risks of harm to consumers by identifying and removing similar content e.g. checking other online content posted by the same user;

    - Applying appropriate and effective sanctions to deter this content/activity in future **–** such as banning repeat offenders – and keeping records of sanctions: and

    - Proactively ensuring that systems, policies and processes for the prevention, detection and removal of economically harmful illegal content remain effective and keep pace with evolving threats/patterns of abuse. For example, through regular testing, reviewing and updating systems and processes – including any automated systems – when operators receive or become aware of new information (whether through notifications or their own proactive means).

Display of pricing information

7. In July 2023 the CMA published a report of its findings from its review of how grocery retailers display unit pricing information (referred to here as our **review**).[5] The findings from our review and from the CMA's response to the 2015 Groceries super-complaint[6] inform the CMA's response to this chapter of the consultation.

8. The CMA also commissioned some consumer research to explore shoppers' use of unit pricing information when shopping for grocery products. This research engaged 50 members of the public in a three-stage process to observe their grocery shopping behaviour and understand the factors affecting the use of unit pricing. We refer to some of the findings from this research in our response below. The findings from the research should be considered as indicative rather than representative. This research will be published later in 2023.

9. During our review of unit pricing, a range of stakeholders raised the issue of whether the deposit under any Deposit Return Scheme (DRS) should be included in unit prices. We commissioned some follow-up research reconvening 23 of the participants from the unit pricing consumer research mentioned above, to explore the display of pricing in relation to DRS. This qualitative research explored how selling and unit price information about Deposit Return Schemes could be presented to consumers, so that it is clear and easy to understand. This follow-up research will also be published later in 2023.

Unit pricing method

1. Traders are currently required to unit price certain items. Should traders be required to adopt consistent unit pricing, per kilogram or per litre, for comparable products that can be sold by weight or by volume?

2. If you answered 'no', please could you explain why.

3. Are there products for which you think exceptions should be made, or continue to apply, for example herbs and food colourings are currently required to be provided in unit measurements of per 10 grams? If so, which ones and why?

4. Is there anything else you would like to add?

10. We agree that traders should be required to adopt consistent unit pricing measurements for comparable products that can be sold by weight or by volume. We are aware that this is a longstanding issue for certain types of products such

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[5] CMA Review of unit pricing in the groceries sector (publishing.service.gov.uk)
[6] https://www.gov.uk/cma-cases/groceries-pricing-super-complaint

as ‘semi-solid’ products and is something that has tried to be addressed previously through guidance e.g. by WELMEC (the representative organisation of national legal metrology authorities in Europe)[7] and by OIML (the International Organization of Legal Metrology).[8]

11. However, during our recent unit pricing review, we found that grocery retailers were still inconsistently displaying the unit price for certain ‘semi-solid’ products such as ketchup and mayonnaise which are permitted to be sold by weight or volume. All of the supermarkets that we reviewed were displaying inconsistent unit metrics for comparable products within their stores and online platforms. One notable example is highlighted on page 16 of our recent unit pricing review report[9] where we found that one supermarket offered 27 different mayonnaise products on its website of which 15 were unit priced by weight and 12 were unit priced by volume. We are concerned that this can make it difficult for consumers to make comparisons about relative value for money when choosing between products of the same type. This was also an issue we identified in our response to the 2015 Groceries super-complaint.[10]

12. Currently, the default position under the Price Marking Order 2004 is that products have to be unit priced in units of 1 kilogram or 1 litre[11] unless the product is listed in Schedule 1 to the PMO, in which case they are unit priced by reference to the unit specified in Schedule 1.

13. In our view, some of the unit measurement consistency issues arise from the drafting of Schedule 1 to, and Article 14 of, the PMO.

EXAMPLES

The potential for different interpretations of the legislative provisions leading to inconsistent pricing practices is illustrated by the example of ketchup:

- Schedule 1 contains an entry for ‘Sauces, edible oils’, with the corresponding unit being ‘100’. This somewhat general description could be interpreted as including ketchups within the meaning of ‘sauces’, but there is no specific reference to ‘ketchup’ in the entry or elsewhere in Schedule 1. Assuming that ketchup does fall within the meaning of

[7] WELMEC has produced guidance has sought to define liquid products that should be unit priced by volume.

[8] OIML R 79 gives the labelling requirements for prepackages and notes that semi solids may be labelled in units of mass, volume or both mass and volume. It also includes a table suggesting split points where it is appropriate to use differing orders of magnitude.

[9] Paragraph 58, CMA Groceries unit pricing: review of compliance report, July 2023

[10] Paragraph 5.49, CMA’s response to the Groceries Super-complaint, July 2015

[11] The PMO also provides that products can be unit priced per square metre, cubic metre, and, where sold by number, per item.

'sauces' in Schedule 1 then reference must be made to Article 14 of the PMO to determine the relevant unit i.e. whether the '100' refers to grams or millilitres.

- Article 14 of the PMO states that, with regard to products listed in Schedule 1, the unit specified will be: (a) grams where the product is sold by weight; (b) millilitres where the product is sold by volume; and (c) either grams or millilitres, as indicated by the manufacturer of the product, where the product is permitted to be sold by either weight or volume.

- Also relevant to the issue of the correct unit for semi-solids is The Weights and Measures (Packaged Goods) Regulations 2006 which require, in Article 8, that liquid pre-packed foods must display the net volume and other products the net weight, except where the law provides otherwise or, in the absence of a legal requirement, trade practice provides otherwise.

- However, there does not appear to be clarity in law as to the correct treatment of semi-solids such as ketchup for the purposes of volume or weight indications on packaging. Appropriate clarification would result in the same unit being required to be used for such products in accordance with Article 14 of the PMO[12]. Grocery retailers told us that, for some products, in particular, semi-solids, manufacturers decide whether weight or volume is used depending on a number of factors including based on the type of equipment they have available to measure their products.

The discretion afforded to manufacturers therefore gives rise to an inconsistency of approach to package labelling and therefore, following limb (c) of Article 14 set out above, an inconsistency in unit pricing.

Inconsistencies arising due to retailers interpreting relevant legislation differently is not limited to products that can be sold either by weight or by volume. For example, as highlighted on page 15 of our unit pricing review report, we found that toilet roll was a product being unit priced in some instances per 100 sheets and in others per roll. In our view, this inconsistency in approach appears to arise from a lack of clarity as to whether toilet roll falls within the definition of 'cosmetic products' for the purposes of Schedule 1 of the PMO. If a retailer interpreted the definition as including toilet roll then Schedule 1 requires it to be priced per '100'. However, Article 14 of the PMO, which, as noted above, determines the relevant unit to be applied to

[12] In addition, clarity in the characterisation of semi-solid products which do not fall within Schedule 1 would ensure consistency of unit pricing under the 'default' provisions of the PMO.

products listed in Schedule 1, does not provide an option for the unit to be per ‘100 items’.

14. There is also a complex interaction with weights and measures legislation which specifies when or how products must be weight marked, or which specifies when certain products must be sold by weight or may be sold either by weight or by number of items. For example, during our review we identified that supermarkets often price loose fruit and vegetables by weight and prepackaged fruit and vegetables by item making it extremely difficult for consumers to make value for money comparisons. This difficultly was underpinned by our consumer research in which participants said it was hard to compare fresh fruit and vegetables because of the mixture of unit measurements.

15. Our consumer research found that inconsistency of unit measurements can act as a barrier to consumers using unit pricing information.

16. It is not obvious that there is a need to retain Schedule 1 of the PMO; removing it would lead to consistency in unit pricing as retailers would be required to price all products by standard unit metrics. However, if it is to be retained, in our view Schedule 1 should be updated, along with the related weights and measures legislation, to ensure that only one unit measurement can be used per product type across retailers and sales channels. We recognise that there are drafting challenges in describing types of products, but this could be addressed by defining the exceptions very clearly and with specific products in mind. The exceptions should also be drafted to ensure that they cover all products which consumers might compare for value (for example so that meat and meat alternative products are unit priced consistently). We consider that the number of products that can be unit priced by reference to different measurements should be limited and clearly defined in the PMO. We also consider that the list of products specified in Schedule 1 to the PMO, if it is to be retained, should be few in number and reviewed on a periodic basis to ensure that it reflects product development.

17. In addition, in order to prevent unintended inconsistencies the definition of ‘unit price’ contained in Article 1(2) of the PMO should be reviewed, and other relevant weights and measures legislation updated, to ensure that consumers are able effectively to compare unit pricing of the same type of product in-store, and to reduce the scope for retailers to unit price items of the same type variously by item or by weight. This means that if a product could fall within the schedule, but it is unclear, retailers should take a consistent approach to unit pricing all items of that type of product, across their store.

Legibility and prominence

5. Are there examples of poor displays of pricing (for example, in relation to illegibility, ambiguity or proximity) that Government should consider when updating the PMO?

6. If you said 'yes', please can you provide more detail.

7. We intend to balance the PMO requirement of display of pricing, so they are useful to businesses without being overly prescriptive and burdensome. Do you have views on how we can ensure pricing information is clear to consumers?

18. We saw issues with the legibility of unit pricing information during our review, particularly with the display of information in-store. Issues included:

    - use of small font sizes for unit pricing information compared with other information on shelf edge labels;
    - unit pricing information being obscured by other information on shelf edge labels; and
    - shelf edge labels or other pricing displays being obscured making unit pricing information difficult to read.

19. We also identified instances where selling and unit pricing information was not being displayed in close proximity to the relevant product as required by Article 7(1)(b) of the PMO in-store and online. In our view, unit prices should be displayed alongside the selling price at the first point at which the selling price is displayed with a product on a retailer's website.[13] We consider that it should be presented in a way that consumers do not need further assistance e.g. traders should not be permitted to use functionality such as hover text to display unit pricing information online.

20. Our consumer research found that some participants were aware of unit pricing but did not use it frequently. One of the reasons cited for not using unit pricing was the way in which unit pricing was often displayed by retailers. For example, if the font is small, muted in colour, or positioned after the selling price, it is easy to overlook while scrolling online or when quickly selecting items in-store.

21. Participants described unit pricing as 'hard to see' or 'read' in comparison to special offers and discounts. Participants believed that unit pricing was not displayed in a way that was likely to catch their eye, and consequently they had

[13] Paragraphs 84-85, CMA Groceries unit pricing: review of compliance report, July 2023

to make an active decision to seek out the unit price when shopping. They also considered that making unit pricing information easier to read and more obvious would drive increased use.

22. Our view, as highlighted in our recent unit pricing review report, is that the requirement of Article 7(1)(a) of the PMO that pricing information must be 'unambiguous, easily identifiable and clearly legible' means that the unit price should be capable of being read in the normal course of a shopping trip. We think that this requirement also means that it is relevant where the label is placed in proximity to where the shopper if positioned (such that labels positioned at floor level for example should be in larger font than those at eye level). In addition, it should be obvious to the shopper that it is a unit price and not the weight or volume of the product, the selling price, or other information for use only by the trader.

23. However, the concept of legibility in the PMO is currently open to interpretation. For example, it does not specify what (minimum) font size should be used to enable easy reading, in particular considering the needs of the visually impaired. In addition, the concept of proximity does not specify exactly how close to the product the selling price and the unit price should appear, whether on shelves or online. But the CMA recognises the need for balance so that the PMO's requirements are useful to consumers without being overly prescriptive and burdensome to business. It is also important that consumers are better able to spot and understand unit pricing information. We consider therefore that there should be greater prescription about what is required, for example by revising the legibility and proximity requirements in Article 7 of the PMO, and clarifying specifically that the unit price must be given with the selling price, so there is no doubt about this. In our view this should be done by aligning the requirements of Article 7 with the principles set out in ISO Standards on Unit Pricing e.g. on font type, font size, and proximity of unit pricing information to selling price.

Offers and promotions

8. Should the display of the promotional *unit* price be explicitly required for all products offered for sale to consumers on promotion, wherever practical e.g. where the same products in the same quantity are sold together on promotion?

9. Should the display of the promotional *selling* price be explicitly required for all products offered for sale to consumers on promotion?

10. Are there examples of items on promotion which should be excluded from unit pricing, such as 'meal deals'? Please provide detail on your answer.

24. We agree that retailers should be explicitly required to display the promotional unit price for all products offered for sale to consumers on promotion, wherever practical. We are concerned that where a unit price is not given for products on promotion it is difficult for consumers to compare products on offer with products that are not and to work out which is best value. Consumers may focus on the fact that a product is on promotion and wrongly assume that it is better value than a different product that is not on promotion.

25. We found during our review that for different types of promotion retailers adopted inconsistent approaches to displaying unit prices for products on promotion and some retailers were not displaying the promotional unit price for promotions where they could and where we think they should. For example, we saw: instances of supermarkets not displaying a unit price on any of their loyalty promotions; others giving unit price information for both the standard selling price and the loyalty promotion selling price; and retailers taking different approaches to the display of unit prices across their sales channels for certain types of promotion such as loyalty promotions and multi-buy/volume promotions.

26. Deal seeking was a commonly observed heuristic or rule of thumb during our consumer research and some of the participants said that offers and promotions strongly influenced their purchasing decisions and was often the main information they used to consider whether a product was best value.

27. Dual pricing with discount and loyalty cards: Unit pricing information was observed to be used by some participants to confirm whether a deal was good value for money before purchasing. Among some of the participants there was a feeling that unit pricing was not communicated clearly when used alongside discounts and loyalty card prices. For example, it was unclear to these participants whether the unit price referred to the discounted or loyalty card price, or the regular price of the item (they assumed the former).

28. Promotions: There is potential for consumer confusion if there is no consistent approach across the groceries sector to the display of unit pricing information for products on promotion. In our view not displaying promotional unit prices can make it difficult for consumers to compare products according to value for money. We consider that the promotional unit price is information that consumers require to make an informed decision.

29. Stakeholders told us during our review that the wording of Article 9 of the PMO allowed for differing interpretations of what is required when pricing products on promotion and this led to inconsistencies. We submit that Article 9 of the PMO needs to make clear that the promotional unit price needs to be given for all forms of promotions where this is feasible – along with the old unit and selling prices and the new promotional selling price.

30. We recognise that some types of multi-buy promotions such as meal deals and mix and match deals, where products are different sizes and prices, may not be compatible with unit pricing because the promotional unit price could differ depending on what else is purchased. However, we consider that where the multi-buy promotion is made up of products of the same size and same selling price, the promotional unit price would be helpful information for consumers comparing products on promotion with those that are not.

Small shops

11. Should the small shops exemption continue to apply?

12. If you answered 'no', please can you explain why.

13. Are there other ways Government can clarify or improve the threshold used to determine the small shops exemption in the PMO?

31. The focus of the CMA's unit pricing review has been the practices of large retailers that sell groceries. Convenience stores did not form part of our recent unit pricing review, and as such we are unable to offer specific views on the small shop exemption.

Deposit Return Schemes (DRS)

15. To make it clearer to consumers, we propose that retailers should display the cost of the deposit separately, so consumers know how much money they will get back if they return the eligible item to a return point. Do you agree?

16. Should the displayed unit price be calculated exclusive of the deposit so that the price per unit of drink remains comparable?

17. If you answered 'no', could you please explain why.

32. We are unclear whether, in proposing in its consultation that the cost of the deposit be displayed separately, the Government is proposing that the selling price itself would be shown exclusive or inclusive of the deposit. If it is exclusive of the deposit, then consumers would have to add the deposit to the selling price to understand the total they would have pay at the till.

33. As mentioned in paragraph 3 above, we commissioned some consumer research into issues concerning selling and unit pricing in the context of DRS. In this research the CMA wanted to explore the various options for presenting selling and unit price information and to seek to identify those which are clearer and easier for consumers to understand. It involved 23 participants who were

reconvened from the consumer research we commissioned on unit pricing.[14] This was a small piece of research and the Government may wish to conduct further research in this area before making a final decision.

34. As no decisions have yet been made about the details of such schemes, for example deposit amount(s) and what types of containers fall within scope, hypothetical examples were used in our DRS research to help participants discuss potential options. The examples included variables such as:

    - deposit amount(s)
    - different ways of displaying the selling price and unit price information (with the deposit fee amount included or shown separately)
    - the deposit when buying a multi-pack item (where each item in a multi-pack has a deposit)

35. We consider that the findings from this research, some of which we have set out below, are relevant to Government's consideration of the display of pricing information in the context of a DRS.

Findings

- Almost all participants preferred the selling price to include the deposit. Participants said it was important that consumers know what they will have to pay for a product at the checkout.
- There were mixed views on the best approach to unit pricing. Specifically, current users of unit pricing had a preference to exclude the deposit from the unit price, as they considered it made it easier to compare different products. Non-users of unit pricing had a preference to include the deposit in the unit price, to ensure consistency with the selling price.
- There were several behaviours that participants believed would emerge from the introduction of the schemes that may influence the use of unit pricing. These were:
    - Most users of unit pricing said they would expect to rely on the selling price to understand how much they would need to pay in the case of multi-packs of drinks if each drink container attracted a separate deposit. Understanding the impact of the deposit on the unit price would be of secondary importance. Participants said this was because the total deposit amount would be large, and knowing

[14] As noted above, both pieces of research will be published later this year.

the price paid at the checkout in such circumstances would be the most important factor in their purchasing decision. Further, comparative value for money can still be assessed as long as all products are consistent in excluding the deposit from the unit price.

- All participants felt that the introduction of deposits would increase the complexity of pricing information, and especially unit pricing information.

- Overall, DRS were seen by participants to increase the cognitive effort needed to compare the value of products, and potentially create barriers to them using unit pricing information.

36. In addition to the findings set out above, our wider research also found that most participants felt the current presentation of unit pricing was a problem due to the placement (generally bottom left and read last), the size relative to other information on the label, faint font colours, and/or the general busyness of labels and displays. Information needing to be displayed resulting from a DRS would be joining and competing with this already busy landscape, possibly further exacerbating an existing problem for consumers of information overload.

37. It is important that consumers are presented with information that is clear and easy for them to understand. We also consider it important that consumers understand, without having to do the maths themselves, what they will have to pay at the till at the point they are putting items into their shopping trolleys or baskets.

38. We are also aware of the recent judgment of the Court of Justice of the European Union (CJEU)[15] which held that the deposit amount payable on drinks containers does not form part of the 'selling price' as defined by Article 2(a) of EU Directive 98/6/EC (implemented in the UK as the PMO 1999, now 2004). As such it is required to be stated separately from the selling price. The case concerned sales practices under a German DRS which, we understand, has been in operation for many years and with which German consumers are familiar. The position in the UK is, in our view, materially different. Consumers in the UK will, at least for a period of time following introduction, be unfamiliar with the concept and operation of a DRS. This may, in turn, result in consumers facing unexpected additional costs at checkout. In particular in the context of consumers in the UK, the remarks made by the CJEU as to the average consumer's ability to calculate the total price have less relevance in the UK, not only because consumers will be less familiar with the DRS, but also because they will still be grappling with the

[15] Case C-543/21, *Verband Sozialer Wettbewerb eV v famila-Handelsmarkt Kiel GmbH & Co. KG*

process of returning items to secure a return of their deposit. We would expect that it will take time for this new pattern of shopping to bed in.

39. It is plausible that, over time, as the DRS becomes established in practice in the UK and in the minds of British consumers, this potential for confusion will diminish. We would suggest that there may be merit in considering, if the Government has a preference for the deposit amount to be stated separately from the selling price, that this be reviewed after an appropriate period of time after the introduction of the DRS. If the conclusion of the review is that consumer awareness and understanding of the DRS is such that a move from the deposit being included in the selling price to being stated only separately would not give rise to significant confusion, then this change could be implemented at that time.[16]

40. Therefore, we consider that (for now) the deposit for products subject to a DRS should be included in the *selling price*.

41. We recognise, however, that there are potential benefits in not including the deposit in the *unit price*, as this enables consumers to compare the unit price of products on the basis of the drink (i.e. the liquid product) in the scenario where some packaging materials used for some products may not be included within a DRS while others are. As highlighted in paragraph 35, bullet 3, above there were mixed views from the participants in our consumer research on the inclusion of the deposit in the unit price. This may be an issue that the Government wishes to test further as part of any wider consumer research, it may wish to undertake, on DRS.

42. Regardless of the decision of whether to include the deposit in the selling and/or unit price, in our view, the definitions of selling and unit price currently set out in Article 1(2) of the PMO should be updated to take specific account of products subject to DRS. This will provide traders and enforcers with the necessary clarity about pricing requirements in such circumstances and to avoid consumer confusion. In particular it is essential that all traders take the same approach to the pricing of products they sell, such that the market does not end up in the situation where some products within the DRS state an inclusive unit price (and/or selling price), while others, also in the DRS, do not.

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[16] We note that the Primary Authority Supermarkets Group and Society of Chief Trading Standards Officers of Scotland (SCOTSS) have both issued guidance which says that in their respective opinions that the DRS deposit should be included in the selling price so that consumers know what they will be paying at the checkout and to avoid consumers being surprised by unexpected costs.

Hidden fees and drip pricing

43. The CMA considers that there should be a specific banned practice on the drip pricing of all mandatory elements as well as other charges which are 'optional' but which it is reasonably foreseeable that most consumers would pay, or which are mandatory for any consumer to pay, even if other customers can avoid them. This is to prevent traders from using spuriously variable or 'optional' charges in order to give a fictitious headline price. The CMA (and previously the OFT) have conducted a lot of research and enforcement on these issues and this demonstrates consumers tend to 'anchor' on the first price they see and find it very challenging to take on board price drips later in the transaction – this was seen in the 2010 research carried out by the OFT.[17] It also leads to higher prices.

44. Dripped prices weaken effective competition, not only because consumers find them a serious obstacle to effective comparisons, but also because it drives traders to compete not on the price but on their ability to hide the real price from the consumer. Consumers cannot exercise informed choice on these mandatory elements and therefore there is a weakening of competitive pressure on the trader to set them at efficient or low levels. We have seen a proliferation of such 'junk' fees – booking fees, venue restoration fees etc – across the economy. In a period of inflation, these practices cause particular difficulty for consumers struggling with the cost of living.

45. We think that there should be a requirement that mandatory variable and 'optional' charges are included in the stated headline price, as otherwise some traders are likely to simply make all such charges variable or 'optional' to keep their headline price as low as possible. We have already seen this happen in the holiday accommodation sector with cleaning fees and other elements that are entirely controlled by the trader and not subject to competition. It also occurred in the airline sector with additional charges being made for the use of common payment cards, which could be avoided only if the customer had a bespoke payment card.

46. We consider that consumers face mandatory variable charges or 'optional' charges, simply because traders have chosen to structure their prices that way. However, prices could just as easily be structured differently, so that consumers are presented with a single price -as they generally are in markets for goods.

47. Therefore one way better price transparency could be achieved for services is by bringing services pricing into line with the Price Marking Order 2004 for goods.

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[17] https://webarchive.nationalarchives.gov.uk/ukgwa/20140402160448/http://oft.gov.uk/OFTwork/markets-work/advertising-prices/#named4

48. Where the trader will present the consumer with genuinely optional extras as part of the purchasing process (such as a charge to choose one's seat on a plane), these should be prominently and fully disclosed with the headline price (no more than one click away, if there are genuine limitations of space).

49. This position is consistent with Advertising Standards Authority rulings, CMA enforcement and research by the CMA and its predecessor the OFT.

18. To what extent do you think current law protects consumers from any detriment that may be caused by drip pricing?

50. As the consultation notes, dripped fees are estimated to cause UK online consumers to spend at least an additional £595 million a year, and on some estimates as much as to £3.5 billion each year. The CMA's position is that the current law could be made clearer to address consumer detriment associated with drip pricing. The CMA's recently published report on the harms associated with online choice architecture practices recognises that drip pricing has been shown to lead consumers to 'buy more, overspend, underestimate the total price, make mistakes when searching, and be less happy with their purchases'.[18]

51. Drip pricing differs from other forms of partitioned pricing by introducing a temporal separation of the price through the different stages of the purchasing process, with consumers tending to 'anchor' on a low headline price presented at the start of the transaction.[19] The relevant literature has established that drip pricing relies on behavioural mechanisms that encourage consumers to make these 'sticky' initial selections supported by a sense of imagined or anticipated ownership of a product or service despite 'dripped' costs.[20]

52. Research and enforcement action conducted by the CMA (and before it the OFT) demonstrates that there is real detriment to consumers caused by drip pricing. As early as 2010, the OFT's Advertising of Prices market study concluded that, of a series of different price framing practices, drip pricing was the most harmful frame for consumers in terms of purchasing and search errors, and that raised levels of consumer learning did not fully mitigate issues.[21] Consumers may spend more than they would otherwise have intended as a result of drip-pricing – one recent study suggests that consumers were 14% more likely to buy a ticket where additional fees were hidden until the checkout stage than in an environment with

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[18] CMA (2022) "Online Choice Architecture: How digital design can harm competition and consumers", p30.
[19] Research suggests studies or frames which manipulate the total exposure time of decision-makers exert the greatest influence on choices, suggestive of the consumer detriment associated with drip pricing beyond other forms of partitioned pricing; see R. Bhatnagar and J.L Orquin (2022). "A meta-analysis on the effect of visual attention on choice". *Journal of Experimental Psychology*, 151(10), 2265–2283.
[20] CMA (2022) "Research and analysis: Evidence review of Online Choice Architecture and consumer and competition harm"
[21] OFT (2010). Advertising of Prices (OFT1291), paragraphs. 2.17, 3.22, 3.31-3; see also Steffen Huck and Brian Wallace. "The impact of price frames on consumer decision making: Experimental evidence"

upfront fees.[22] Drip pricing can particularly cause consumer detriment in combination with other forms of hidden fees and partitioned pricing, which can increase consumer search costs and reduce the comparability of products and services.[23]

53. The CMA is aware that drip pricing is prevalent across online and offline markets, and commends the research recently conducted by the Department for Business and Trade with Alma Economics, shedding light into its prevalence across sectors.[24]

54. The CMA has taken enforcement action on drip pricing in the past which resulted, for example, in several major online hotel booking platforms committing in 2019 to display all compulsory charges in the headline price in the UK.[25] In the car rental intermediary market, the CMA worked in 2017-2018 to ensure that all mandatory charges are included in the headline price at the start of the booking process. Previously, during 2011–2012, the OFT secured formal undertakings or changes in lieu of undertakings from a series of airlines that resulted in debit card charges being included in all headline prices.

55. Since January 2018 the law in the UK has prohibited retailers from charging consumers more depending on which payment card they use.[26] Part of the rationale for this prohibition is that it is retailers, rather than consumers, who are in the position to negotiate with payment intermediaries on the level of fees charged for payments. The same rationale, however, should also be applied to other additional services, the costs of which are frequently passed on to consumers by way of a separate additional charge, such as administration fees, cleaning fees, and booking fees.

56. The CMA's view is that the harm to consumers caused by drip pricing should be addressed through changes to the current law, particularly considering current cost-of-living pressures. Consumers should be able to trust the prices they are presented with and not spend more than they would otherwise plan to because of unclear and misleading drip pricing.

57. In summary:

    - A specific ban on any **mandatory** price elements being left out of headline prices would go some way towards addressing this consumer detriment

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[22] CMA (2022) "Research and analysis: Evidence review of Online Choice Architecture and consumer and competition harm"
[23] S.S. Fung, J, Haydock, A. Moore, J. Rutt, R. Ryan, M Walker, and I Windle, (2019). Recent Developments at the CMA: 2018-2019. *Review of Industrial Organization*, p591.
[24] DBT/ Alma Economics (2023) *Estimating the Prevalence and Impact of Online Drip Pricing*.
[25] See case page here.
[26] Card surcharge ban means no more nasty surprises for shoppers - GOV.UK (www.gov.uk)

and would make future enforcement action simpler and swifter. As well as assisting consumers, this would also offer greater clarity to fair-dealing businesses that they should compete on the actual price rather than a deceptively low headline price, which should help drive more effective price competition.

- It has, however, been the CMA's experience that when mandatory charges are prohibited, some retailers have a tendency to use charges that are theoretically optional, but which in practice are paid by the majority of their customers. For example, this is what happened in the airline sector after the EU Air Services Regulation 2008/1008 required all mandatory taxes and charges to be included in the headline price. The ban should therefore also encompass other **theoretically optional charges that the retailer can reasonably foresee that the most consumers will pay**, even if these are theoretically avoidable. The headline price should also **include any fee which is it mandatory for any customer to pay**, even if some customers may be able to avoid it.

- Where the retailer proposes to offer **genuinely optional extras** to customers during the purchasing process, these **should be prominently and fully disclosed with the headline price** (itemised no more than one click away, if there are genuine limitations of space).

19.Are there further steps the Government should take to better explain or promote these rules, to improve consumer protection?

58. The CMA submits that there should be a specific banned practice in relation to the dripping of mandatory price elements, as well as charges which the retailer can reasonably foresee the consumer paying.

59. The CMA would also welcome any initiatives to inform businesses about the implications of these and the current rules around drip pricing, and about the potential penalties if they do not comply with these rules. This could include engaging with advisers who would be hired by businesses to support compliance to ensure they are implemented in line with the law.

20.Would an explicit requirement on traders to include all mandatory fixed fees in the up-front price be effective in reducing consumer detriment? Or would better guidance explaining the existing rules be more appropriate?

60. The CMA's position is that there should be a specific banned practice of not including mandatory fixed fees in upfront prices, as well as charges which the retailer can reasonably foresee the consumer paying (either because the majority will pay a particular fee, or because the fee will be unavoidable for any customers even if other customers can avoid it). There should also be a specific requirement

on traders to disclose prominently, with the headline price, the tariff of additional genuinely optional extras they propose to offer the consumer as part of the purchasing process.[27] As noted above, increased consumer learning does not mitigate issues with the 'dripping' of mandatory fixed fees – OFT research suggests that drip pricing still confuses consumers even if they generally learn more about the practice the more they encounter it.[28] Even when consumers who have experienced drip pricing are aware of the total price and are given the option to change their selection, many do not, despite being dissatisfied.[29]

61. Moreover, excluding compulsory costs from the headline price can worsen consumer decision making and can lead to consumers making more expensive purchases or purchases they would otherwise not have made.[30] Many of these mandatory fixed fees do not offer any added value for the consumer but are purely administrative, such as 'booking' or 'service' fees.[31] Further, in so far as they do represent a service which is provided as part of the purchase, it is the retailer who is in the best position to negotiate the price to be paid, rather than the consumer. By separating out the fee from the headline selling price, this reduces the competitive pressure on the retailer, with the consequence that the fees may be higher than they would otherwise be if they had to be included in the headline selling price. The prohibition we are suggesting would create a pro-competitive incentive for retailers to negotiate harder with their service providers to achieve lower prices and better-quality service.

62. Clear regulation and resulting enforcement action is likely to have a stronger deterrent effect on traders than simply publishing guidance and is likely to be more effective in addressing the consumer detriments outlined above.

21. Is the provision of mandatory variable fees a problem that Government should seek to address? Please explain the reasons for your answer.

63. The CMA is of the view that mandatory variable fees should be included as a banned practice, as these still involve the harms to consumers associated with mandatory fixed fees. Indeed, based on its experience, the CMA is concerned that, if only fixed mandatory fees were required to be included in the headline price, some retailers would adapt their pricing practices to make them variable (for example, according to the number of items in the consumer's basket), thereby making it hard to calculate the total price until a late stage in the booking

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[27] To note that the CMA does not consider such a step to be an alternative to the necessary complementary prohibition on dripped mandatory prices.
[28] OFT1291, paras 3.38 to 3.40.
[29] CMA (2022) "Online Choice Architecture: How digital design can harm competition and consumers", p29; see also S. Santana, S.K. Dallas, and V.G. Morwitz, (2020). "Consumer reactions to drip pricing". *Marketing Science*, 39(1), 188-210
[30] See CMA (2022) *Evidence review of Online Choice Architecture and consumer and competition harm.*
[31] DBT/ Alma Economics (2023) *Estimating the Prevalence and Impact of Online Drip Pricing,* p.16.

process. To avoid this situation, the same principles should apply to both fixed and variable mandatory charges.

64. As noted in our response to the Government's previous consultation on Reforming Competition and Consumer Policy in October 2021, where additional fees and charges are not genuine options and a sale cannot proceed without their addition – such as delivery fees and mileage fees for car rentals – we do not consider there is any legitimate reason for them not to be included in the upfront cost.[32] This applies to mandatory variable fees which are compulsory charges.

65. The CMA also considers that mandatory variable fees may even pose a larger risk to consumer detriment than mandatory fixed fees, as their variability might mean they are still difficult or opaque for consumers to evaluate when they are eventually disclosed. Examples of such variable fees include admin fees which might be added to a ticket purchase, where the trader's chosen pricing structure means they cannot give the amount of the admin fee until the consumer has placed their chosen tickets into their shopping basket. This might be because the admin fee is calculated based on the number of tickets and the total price of those tickets.

66. The CMA believes this could be addressed partly by bringing the legal standard for pricing of services into line with the requirements of the Price Marking Order 2004 to state the final selling price for goods. The Price Marking Order explicitly requires traders to give the final selling price of a unit of the goods (including any variable fees). The CMA considers that this explicit requirement has helped to reduce the ability of traders to benefit from harmful dripping extra fees for goods, and the absence of a similar legislation for services has contributed to the proliferation of harmful dripped fees.

67. The CMA considers that extending this approach to services and digital content would have the effect of requiring traders to give a final, fully inclusive price which is meaningful and not misleading to consumers. Where a service is sold as a single unit (e.g. a one-off service of drafting a will) the price of delivering that agreed service would have to be given; and where a service is sold by multiples of units (for example several nights' stay in a hotel, or advice provided by the hour), it would be appropriate to give the final price for that unit. In addition, the Consumer Protection from Unfair Trading Regulations 2008 (or subsequent replacement legislation) may require a total to be given as well.

22.Should traders be required to make clear the existence of mandatory variable fees, and how they will be calculated, when they display the price for a

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[32] As with other variable elements in a transaction such as destination or date, these could appear as drop-down options (or similar) as part of the core process rather than deliberately left until after the price is presented.

product? Or would better guidance explaining the existing rules be more appropriate?

68. As noted in our response to Q21, the CMA is of the view that mandatory variable fees should be included in the advertised price.

23.Are there any circumstances in which traders would not be able to inform consumers about the existence of mandatory variable fees and how they will be calculated at the time of providing them with the price of a product?

69. As noted above, how traders structure their pricing is within their control, and the CMA does not consider there to be any situation where a retailer would not be able to give a fully inclusive price to prospective customers. However, traders face strong incentives to structure their pricing so that they can indicate a low headline price, and then charge separately for other items. It is sometimes said that traders face difficulties in ascertaining an accurate price for each additional item, for example because they are trying to pass on the exact cost charged to them by a third party, or because they have deliberately structured their pricing in a way which makes early calculation difficult. However, neither of these problems arises if the retailer has an obligation to give a fully inclusive final price from the outset. For example the prohibition on payment card surcharging means retailers can now give a simple headline price.

70. This view is in line with previous rulings and enforcement. For example, the 2018 ASA investigation into secondary ticketing websites considered Get Me In's[33] and viagogo's[34] practice of charging mandatory variable 'admin' fees based on the number of tickets in the customers' basket and the total price of those tickets. The ASA adjudicated against both parties, saying this pricing structure was misleading for consumers. The ASA subsequently worked with viagogo to encourage it to change its practice to ensure VAT and variable admin charges were included in the headline price.[35]

71. This view also reflects our response to Q21, that the legislation for services should be brought in line with the requirement to state a final selling price for goods set out in the Price Marking Order, where final prices must be given, but can be given on a per unit basis.

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[33] https://www.asa.org.uk/rulings/get-me-in--ltd-a17-394326.html

[34] https://www.asa.org.uk/rulings/viagogo-ag-a17-392814.html

[35] ASA secures changes to viagogo's website – misleading pricing information removed and costs now clearly displayed and transparent to consumers - ASA | CAP

24.When should traders that provide optional fees for products present these to consumers in the purchasing process? Please explain the reasons for your answer.

72. There is a distinction between genuinely optional add-ons and upgrades on the one hand, and other fees which, although theoretically avoidable by certain consumers, are in practice paid by most. The CMA considers that the latter category should be included in the advertised selling price for all products, in order to prevent businesses from misleading the average consumer about the final price to be paid. If there is a genuine opportunity to enjoy a lower price by opting out of the optional feature, this could be presented as a discount from the higher advertised price. A fee should also be regarded as mandatory if any consumer would be obliged to pay it (even if some consumers may be able to avoid it), and it should then be included in the headline price shown to all consumers.

73. However, even if genuinely optional, dripped fees can still cause harm if they occur late in the checkout process.[36] As with other forms of dripped pricing, consumers may still choose the lowest headline price without focusing on the cost of optional extras they may require that are only revealed late on during the booking process.[37] As a result, consumers may find it harder to compare total prices and find the best deal for them, which can lead them to pay more than would otherwise have been the case, as well as impeding comparisons and 'shopping around' and so weakening competition.[38]

74. If a fee is truly optional, then traders should provide all of the optional fees as early as possible during the purchasing process and alongside the headline price.[39] The CMA considers that this is already a requirement of the Consumer Protection from Unfair Trading Regulations 2008, but a specific requirement would encourage compliance and improve the speed of enforcement action if necessary. These fees should be described clearly as optional, and without misconstruing the optional fee as mandatory, confusing or tricking the consumer through choice architecture (e.g. making it difficult to find how not to add the optional fee) or pressuring the consumer to pay the optional fee.

25.Are there any types of optional fees that cannot be presented to consumers early in the purchasing process? If so, what are these, and why?

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[36] DBT/ Alma Economics (2023) *Estimating the Prevalence and Impact of Online Drip Pricing,* p.8.
[37] CMA (2015) "Short-term car rental in the European Union", p28.
[38] CMA (2015) "Short-term car rental in the European Union", p28.
[39] This is in line with the CMA's expectations on pricing set out in, for example, CMA (2015) "Short-term car rental in the European Union", p29. Where there are genuine limitations of space, the tariff of charges could be set out in full no more than 1 click away from the headline price, as long as this is indicated clearly and prominently

75. There is a distinction between additional features of the advertised product, and completely separate standalone products which might be offered in addition to that which is advertised. Where the optional fee is for an additional feature, it should be presented upfront, with the headline price (see our response to Q24). Where a product is truly severable and separate (e.g. a separate product which the customer might also like to buy), then it might not necessarily be presented to consumers at the same time as a base product. The CMA considers that these optional products should be treated as separate purchases, albeit they may be added to one basket.

76. If an additional product or feature is mandatory, then, as described in our response to Q23, the CMA does not consider there to be any circumstances in which the trader cannot include its cost in the upfront price.

26.Are there any other features of products or services that are presented as optional fees but are in practice unavoidable for most, or certain groups of consumers? For example, is it really optional, when buying airplane tickets for parents with young children to choose to sit together?

77. The CMA considers that if a product, feature or fee is unavoidable or mandatory for some or all groups of consumers, then it is not optional and should be incorporated into the upfront price. For example, if airline safety regulations require parents to sit with their children, then there should be no extra charge made to those parents for choosing seats that are together.

78. Some of the factors that make a product or feature more likely to count as unavoidable are if:

- There are legal requirements for it to be included for some or all consumers. For example, sitting parents and children together on a plane is already required of airlines for safety reasons. Similarly, the provision of essential safety features for cars such as seatbelts is mandatory according to the relevant safety regulations.

- Some consumers cannot reasonably use or shop around for alternatives. For example, this would be the case in relation to a fee charged for using anything other than a particular type of credit card. The CMA investigation into credit card fees in 2012 found many consumers only had one credit card, and could not therefore reasonably use an alternative payment option, or shop around if the product was only available from that trader.[40] This also potentially creates the incentive for traders to limit the types of

[40] Airlines payment card surcharges investigation; Card surcharge ban means no more nasty surprises for shoppers - GOV.UK (www.gov.uk)

cards which are not charged an additional fee, such that they can take advantage of the dripped fee for the majority of consumers. The headline price should therefore also include any fee which is it mandatory for any customer to pay, even if some customers may be able to avoid it.

- The majority of consumers pay it. Where a feature is not essential for the functioning of a product, but the majority of consumers purchase it or the trader can foresee the average consumer as purchasing it, then the CMA considers that the feature should be treated as if it was mandatory. This is especially important if consumers are not reasonably able to enjoy the main component of the product (such as a flight), unless they purchase an additional product (such as the right to bring a bag). The CMA recognises the possibility of traders making products or features artificially or technically optional to avoid strict definitions of "mandatory", but in practice, it amounts to degrading the core service in order to achieve the same harmful outcome from dripped mandatory fees. For example, if a trader were to charge customers to use a digital admission ticket, while making it free to print the ticket off, many consumers may wish to use the digital admission ticket, and would therefore suffer from the effects of drip pricing if the price of this were not included in the headline price.

79. The following is a non-exhaustive list of examples which we consider to be mandatory:

    - Admin fees, booking fees, routine cleaning fees and venue restoration fees are not optional, do not provide additional value to consumers and should therefore be included in the headline price.

    - Local taxes and resort fees charged at hotels on arrival should be included in the headline price charged by online hotel booking websites.

    - Pick up fees by car rental companies are part of the cost of renting a car, so should be included in the advertised headline price.

    - Delivery fees could also fall into this category, because some form of delivery is required for the majority of online purchases.

80. The CMA also agrees with the research conducted by DBT and Alma Economics that optional dripped fees are especially likely to be harmful if they are large relative to the product price, pre-selected, or presented late in the process or numerous.[41]

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[41] DBT/ Alma Economics (2023) *Estimating the Prevalence and Impact of Online Drip Pricing,* p7.

27.In what circumstances might it be reasonable for traders to charge for features that are presented as optional but are in practice unavoidable for certain groups of consumers? What might the consequences be of any action to limit this practice?

81. If an 'optional' feature is in fact unavoidable for some consumers, then this should instead be viewed as a mandatory fee and treated as such. This could include 'add-ons' that are in practice essential for a product or service to function.

28.Should the law be strengthened to address optional dripped fees that are detrimental to consumers, or should guidance be produced for specific sectors that sets out how to provide optional fees in a way that is fair, transparent, and lawful? Please explain the reasons for your answer.

82. The CMA considers that the law should be strengthened to address optional dripped fees, as set out above, so that any charges which the trader can reasonably foresee the majority of their customers are likely to pay are included in the headline price. The headline price should also include any fee which is it mandatory for any customer to pay, even if some customers may be able to avoid it. This will improve consumer decision making and inhibit practices by traders which seek to circumvent a clear prohibition on excluding mandatory charges from their advertised headline prices.

83. Consumers make better-informed decisions when traders increase the transparency and clarity of upfront prices.[42] Research also suggests that when sellers are required to charge an all-inclusive price, overall total prices charged are lower than would otherwise be the case.[43] Practices which rely on the dripping of fees, however 'optional', are likely to be more harmful to consumers than those that present a transparent and inclusive upfront price.

84. Even if fees are genuinely 'optional' extras, the presence of multiple dripped fees during a checkout process (such as when booking a flight) ensures that the total consumer spending influenced by dripped fees is likely to be higher than would otherwise be the case.[44] The cumulative impact of optional dripped fees, then, is likely to be detrimental to consumers.

29.Should any guidance that is produced on optional fees be targeted to specific sectors? If so, which sectors should guidance focus on?

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[42] CMA (2022) *Evidence review of Online Choice Architecture and consumer and competition harm.*
[43]A. Rasch, M. Thöne, and T Wenzel. (2020). Drip pricing and its regulation: Experimental evidence. *Journal of Economic Behavior and Organization*, 176, pp353 – 370, cited in CMA (2022) *Evidence review of Online Choice Architecture and consumer and competition harm.*
[44] DBT/ Alma Economics (2023) *Estimating the Prevalence and Impact of Online Drip Pricing,* p46.

85. In line with our responses above, the CMA is of the view that regulation is likely to be more effective than guidance. In line with the findings of DBT and Alma Economics' recent research, the CMA's view is that the key sectors for further attention should include entertainment (particularly event tickets) and transport (such as plane and train travel).[45] Other sectors which feature additional fees include food delivery services and car rental.

[45] DBT/ Alma Economics (2023) *Estimating the Prevalence and Impact of Online Drip Pricing,* p8.

Fake reviews

86. Online reviews have huge potential to help consumers make good shopping decisions and to increase competition between traders, so enhancing value for money and increasing incentives to greater innovation, efficiency and productivity. However, fake reviews are likely to seriously undermine this. Over recent years, tackling fake reviews has been a key priority of the CMA and we have taken forward several enforcement cases aimed at reducing their impact.[46]

87. The CMA supports the Government's proposals to introduce new banned practices in relation to fake reviews. They have the potential: i) to clarify traders' legal responsibilities; and ii) to reduce the time and cost associated with any enforcement action – thereby boosting compliance with the law.

88. Traders which publish or provide access to reviews have, or should have, the data and the tools available to them to tackle the issue most efficiently. Government's proposals in relation these traders' responsibilities therefore have the potential to make a significant positive impact in tackling fake reviews. Further, in the CMA's view, these traders already have a legal responsibility under consumer law to take the action necessary to prevent consumers' transaction decisions being distorted by taking sufficient steps to: i) identify and tackle fake reviews, and ii) avoid publishing inaccurate or otherwise misleading information such as overall ratings, review counts and rankings based on these reviews. Explicitly clarifying this position would benefit consumers, traders and enforcers.

30.Do you agree with the addition of the following commercial practices to Schedule 18 of the DMCC Bill?

89. Yes. Subject to the responses that follow, we support the additions of these practices to Schedule 18.

31.Do you agree that adding the misrepresentation of consumer reviews in ways which are likely to mislead consumers to Schedule 18 of the DMCC is sufficient to prohibit traders from:

- **deleting or suppressing negative reviews;**
- **only publishing positive reviews;**
- **applying different weightings to reviews based on the source consumer;**

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[46] See for example: Online reviews - GOV.UK (www.gov.uk).

- **publishing or providing access to incentivised reviews that are not clearly labelled as such;**
- **disabling the consumer from changing default sorting options; and**
- **presenting reviews of a different product as relating to the product a consumer is considering (sometimes known as review hijacking, review merging, or catalogue abuse).**

90. The CMA has previously taken enforcement action in relation to the misrepresentation of reviews.[47] In the light of this experience, our view is that the misrepresentation of reviews is very likely to result in consumer harm and that traders which engage in this practice should be taken to infringe the law in all circumstances, irrespective of the other measures they take or use e.g. where traders 'cherry pick' positive reviews for publication. To avoid confusion – and a potential weakening of the current standard of consumer protection – we recommend that the prohibition on traders misrepresenting reviews is clearly distinguished from a requirement for traders to take 'reasonable and proportionate steps' to address fake reviews.

91. The CMA considers that the prohibition on misrepresenting reviews is likely to apply to the practices described in Question 31. In particular, we consider that misrepresenting reviews via 'catalogue abuse' is likely to be harmful to consumers in all circumstances and should be prohibited. In practice, catalogue abuse may result from the acts of third party traders who are granted a degree of control over a platform's functionality e.g. sellers who use the platform's catalogue controls to 'merge' or 'hijack' reviews (which may be genuine in their original context) to promote their products. The CMA considers that catalogue abuse should be prohibited both where a trader does it themselves and where a trader allows third parties to do it on their platform (depending on the circumstances). It is important that all traders that engage in or otherwise facilitate the misrepresentation of reviews in this way have explicit clarity about their legal responsibilities and when they will be taken to have infringed the law – in particular, those traders who publish or provide access to those reviews.

32.Do you agree that guidance should be published to help traders understand and comply with the proposed requirements concerning "reasonable and proportionate steps"? If so, what form should this guidance take?

92. The CMA agrees that guidance should be published to ensure that traders are aware of and understand their legal obligations in relation to reviews. We would

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[47] https://www.gov.uk/cma-cases/retailer-hosting-reviews-on-its-website-improvement-of-practices; https://www.gov.uk/cma-cases/review-sites-handling-of-negative-reviews

expect such guidance to be primarily principles-based and for those principles to be illustrated using practical examples based on the CMA's significant enforcement experience across different types of practices and platforms.

93. The CMA would expect to work closely with the Government on the production of this guidance. To ensure its effectiveness, we consider that the guidance would ideally be 'statutory guidance' and published to coincide with the introduction of the new legislation.[48]

94. It will be important to ensure that such guidance is kept up-to-date to reflect any remedy that is secured as part of the CMA's (or other consumer enforcers') enforcement work.

33.What reasonable and proportionate steps do you consider traders should take to remove fake reviews and prevent consumers from encountering them?

95. Traders (including online platforms) which publish or provide access to reviews should be explicitly required by law to take or use proactive measures to prevent consumers from encountering fake reviews or from being misled by other information that is influenced or determined by reviews. We recognise that intermediaries which publish other traders' reviews (such as online platforms) will often not be the authors of fake reviews, so that 'strict liability' may be inappropriate. Nevertheless, a 'reasonable, proportionate and effective' approach needs to be taken to protect consumers from these harms.

96. The required steps should be designed to address the problem of fake reviews effectively, as these reviews not only mislead consumers but also determine or influence other published information, such as overall ratings, review counts, rankings – enhancing their attractiveness to consumers. It will not be enough for traders merely to engage in a 'tick box' exercise of measures; they will need to ensure that their measures are designed and applied to achieve this objective and that they are regularly evaluating their effectiveness, so that the incidence of fake reviews appearing on their sites is minimised. Where traders identify inadequacies in this respect, they must act to address them.

97. The CMA considers that there is unlikely to be a 'one-size-fits-all' approach to tackling fake reviews and preventing consumers from being misled. In practice, the measures that a trader will need to take or use will depend on, among other things, the nature of the harmful content that is present on or facilitated by the platform and the particular risks of harm posed to consumers – a trader operating

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[48] By 'statutory guidance', we mean guidance required by legislation to which the courts must have regard and which operators should follow to ensure they comply with the law. See, by way of example, section 6(5) of the Equality Act 2010 concerning the meaning of 'disability': this provision enables a Minister of the Crown to issue guidance about matters to be taken into account when determining whether a person is a disabled person (providing illustrative examples).

a platform that presents a higher risk of harm to consumers will reasonably be expected to deploy more extensive means to tackle the problem – as well as the trader's resources and technological capabilities. What is 'reasonable and proportionate' will ultimately depend on the facts and identifying what the trader needs to do to prevent fake reviews from impacting consumers' transactional decisions via the information they present.

98. Based on the CMA's enforcement experience we have identified measures which we would expect a trader which publishes or provides access to reviews to take or use to prevent reviews from misleading consumers. These include:

    a. Conducting regular risk assessments – traders should take an evidence-led approach to assessing the risks of harm to UK consumers' economic decision making arising from review-related content and activity and identifying measures to address those risks effectively.

    b. Developing and using appropriate proactive measures to identify and address fake reviews and their impact on other online content. Traders should have systems and processes in place to proactively identify, investigate and respond to fake reviews (whether before or after publication on the trader's platform). Appropriate responses will include flagging suspicious reviews for investigation, removing reviews that are identified as fake and taking action to remedy the effects of fake review-related activity e.g. correcting review counts and mitigating the impact of fake reviews on other published information such as overall ratings, rankings and endorsements.

    c. Providing third party notification systems – such mechanisms should be clearly and prominently signposted, and should be easy to access and use, enabling third parties (including platform users and enforcement bodies) to effectively report content or activity that might constitute or concern fake reviews.

    d. Applying sanctions to dissuade, deter and where necessary prevent users and other bad actors from engaging in fake review-related activity – sanctions should be effective as a means of dissuading and deterring platform users from submitting fake reviews and third parties from procuring or otherwise arranging for fake reviews for publication on the platform; and

    e. Conducting regular internal evaluations – such evaluations are essential to enable traders to regularly assess the effectiveness of the measures that they are taking or using to tackle fake reviews and preventing harm to

consumers' economic interests and identifying further measures to address any inadequacies in this respect.

34.What reasonable and proportionate steps should traders take to prevent any other information presented on the platform that is determined or influenced by reviews from misleading consumers?

99. As described above, traders which publish or provide access to reviews must take or use measures to prevent consumers from being misled. Critically, this means not only identifying and tackling fake reviews, but also preventing those reviews from impacting aggregated information such as overall ratings, review counts and rankings. Therefore, as part of the measures described in response to Question 33, traders must ensure that they are taking or using measures to prevent published information that is influenced or determined by reviews – particularly aggregated information - from misleading consumers.

35.Should traders in scope of these requirements be expected to: a) Have proactive detection processes in place to identify suspicious reviews; b) Have procedures for removing and preventing consumers from encountering fake reviews; and c) Sanction users and businesses in response to fake views.

100. The CMA's enforcement experience has focussed primarily on dedicated user review websites and larger platforms publishing or providing access to reviews. Our experience has shown that the scale, frequency and rapid dissemination of fake reviews means that it is impossible to address this issue effectively on a reactive case-by-case basis.

101. Based on our enforcement experience the CMA agrees that traders which publish or provide access to reviews should take or use appropriate proactive measures to tackle fake reviews and their impacts on aggregated information (as described in response to Question 33), rather than relying on, for example, third parties to report problems before acting and addressing content on a piecemeal basis. We would therefore expect traders in scope to be able to take or use the measures described in Question 35.

102. The precise measures that are necessary for a trader to implement will depend on what is necessary to effectively prevent fake reviews from impacting consumers' transactional decisions, and traders should regularly assess the effectiveness of their measures against that objective - including whether additional measures may be necessary to adequately protect consumers from harm.

36.Do you agree that some traders should also be expected to: a) have a process for assessing the risk that fake reviews will appear on their website;

b) a reporting mechanism that allows people to report suspicious activity; and c) undertake regular evaluation of the effectiveness of these systems?

103. Based on the CMA's enforcement experience in this area, we consider that it is essential that all traders that publish or provide access to reviews:

- conduct regular risk assessments, whereby the trader uses available evidence to self-assess the risks of harm to UK consumers arising from fake reviews on the trader's platform and the identification of measures to address those risks;
- take action as a result of those risk assessments to implement measures to prevent and minimise the incidence of fake reviews effectively;
- provide easily accessible notification systems to enable third parties to report content or activity that may constitute or concern fake reviews - which the trader will then investigate promptly and thoroughly; and
- conduct regular internal evaluations, comprising an assessment by the trader of the effectiveness of the measures that it is taking or using to tackle fake reviews and prevent consumer harm, and the identification of further measures to address inadequacies in this respect.

104. Where traders do not take these steps, they are unlikely to be able to understand and remain aware of the risks of harm presented to consumers by reviews on their platforms and, as a result, are unlikely to be able to implement systems and processes that are effective as a means of preventing fake reviews from impacting consumers' decisions.

37.Are there any kinds of review that are (a) missing from the description above, or (b) that you think should not be in scope? If so, please explain why.

105. The CMA considers that a 'review' is information (e.g. text) and/or a rating which purports to be a person's opinion on or experience of a product or trader – that is, products that may be purchased, experienced or used by consumers, or traders that may sell, promote or supply such products. Subject to the further views set out in response to Question 39, the CMA considers a review to be 'fake' where it is not the reviewer's honest and impartial opinion or where it does not reflect their genuine experience of the relevant product or trader. This would include, for example, where a trader is reviewing their own product.

106. As the Government has recognised, reviews can also come from persons who may not be 'consumers' as defined by legislation – for example, product testers and 'influencers' who are paid or otherwise rewarded for talking about consumer products. These reviews are likely to be influential to consumers' decisions and it

may not always be clear when that person is reviewing a product in their professional or personal capacity – for example, it is not uncommon for a person to build up a reputation by regularly reviewing products, and then to start receiving remuneration for doing so as brands begin to notice them. Where such persons are submitting reviews for publication on websites/platforms that publish or provide access to reviews by consumers, we would expect them to come within the new prohibitions (and so references to 'consumer reviews' may be unhelpful).

107. Where reviews are 'hijacked' or 'merged' as a result of catalogue abuse[49] they are likely to mislead consumers, since the review will not represent the reviewer's experience of the relevant product. Accordingly, we consider that such reviews can also be considered 'fake', even though they may have been genuine in their original context. Those reviews will also contribute to aggregate indicators such as overall ratings, review counts, rankings and endorsements, and so traders that publish or provide access to those reviews have a legal responsibility to tackle this abuse when it occurs on or is facilitated by their platform. As set out in response to Question 31, it is important that all traders that engage in or otherwise facilitate this practice are provided with explicit clarity about their legal responsibilities and when they will be taken to have infringed the law - in particular, traders who publish or provide access to these reviews.

108. As indicated above, reviews do not need to contain text – they may take the form of a symbol or graphic representation. The CMA is aware of examples of platform users "up-voting" suspicious reviews e.g. to indicate that they found the review to be helpful. Depending on the facts, a rating/endorsement of a review may qualify as a 'review' itself. Where this practice results in fake reviews becoming more prominent and more likely to be seen by consumers, or where the fake review is given greater weighting in the calculation of overall ratings/rankings, this can amplify the harmful effects on consumers. Accordingly, traders have a responsibility to address this activity when it is capable of misleading consumers.

38.Do you think that the definition of fake review should require a consumer to have bought or used the relevant product?

109. A consumer may not have bought a product but may nevertheless have used it (e.g. if they received it as a gift); in that case, they will be able to submit a genuine review. In some cases, such as where the review is about a holiday

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[49] 'Catalogue abuse' occurs where reviews which have been written about or submitted for one product ('Product A') are subsequently applied to a different product ('Product B'). Where a trader engages in this abuse it is likely to mislead consumers because the reviews (which may have been correctly submitted and genuine in their original context) do not reflect the reviewer's genuine experience of Product B and are likely to impact other information that is determined or influenced by those reviews e.g. aggregated product ratings.

apartment or hotel room, the consumer may not have actually ‘used’ the product (e.g. because they left on seeing the state of the room) but can still provide a genuine opinion (e.g. because they felt unsafe when they arrived or it was not clean enough). What is important is that the review reflects their genuine experience of the relevant product/trader and that they are providing their honest and impartial opinion.

39.Do you agree with the policy on incentivised reviews above? Are there any forms of incentivisation that would not be covered by it?

110. The CMA considers an incentivised review to be any review for which a person has received (or will receive) any form of incentive or reward – including money, commissions, discounts, leases or loans free of charge or in more favourable terms than those offered to the general public, free products or gifts of any products – and they then go on to review a product in connection with that incentive. The content of incentivised reviews may not be misleading in all cases; there may be circumstances where such reviews are interesting and useful to consumers.

111. To avoid misleading consumers, however, incentivised reviews must always be clearly and prominently labelled so that consumers are aware of the existence of the incentive. If published on a website/platform, the trader publishing or providing access to the reviews must be able to visually and structurally distinguish the incentivised review from other reviews, so that it is able to take appropriate steps to prevent it from misleading consumers e.g. not counting the review towards a product’s or trader’s overall rating or ranking.

112. The CMA has seen examples as part of its enforcement work of consumers being offered incentives in return for leaving a review of a product on major platforms e.g. discounts, refunds after review. Where an incentivised review is submitted to a platform that does not allow them, that review will inevitably not be labelled or distinguished, misleading consumers. It is therefore important that ‘fake’ is clearly defined so that the prohibitions cover not just those reviews described in response to Question 37, but also those commissioned/incentivised reviews that will not be clearly labelled and distinguishable to consumers reading online reviews.

40.Should the proposed new banned practices on fake reviews be subject to criminal liability? If so, which? Please explain the reasons for your answer.

113. Most of the practices (29 of 31) on the current banned list are subject to criminal sanctions and the CMA considers that, generally speaking, new additions should also be capable of being prosecuted criminally, in addition to being enforced in the civil courts. This is because all of these practices are

presumed to distort consumer decision making, and so they pose a serious threat to consumers and the well-functioning of consumer markets.

114. The CMA has described above how fake reviews cause harm to consumers and to competition, and these are all reasons why there should be clear prohibitions which are capable of being enforced effectively by all UK enforcement bodies. In particular, we do not see any reason why submitting a fake review, commissioning or incentivising someone else to submit a fake review, or offering or advertising to submit, commission or facilitate a fake review should not attract criminal sanctions.

41.Are the current banned practices in Schedule 18 relevant? If no, please identify which you think are redundant and explain why?

115. The CMA considers that the current banned practices are relevant and should be retained.

42.Do any of the banned practices require updating or clarifying? If yes please elaborate which one, what in your view needs changed and why.

BP 11 *– "Presenting rights given to consumers by law as a distinctive feature of the trader's offer."*

116. We consider that misleading people as to their statutory rights is unjustifiable and can occur in more ways than as described in this clause. Whilst this prohibition goes some way towards addressing such practices, we consider further related protection is necessary to provide a more effective deterrent to those traders that seek to exploit consumers and gain unfair competitive advantage over law-abiding businesses.

117. **We therefore recommend that the Government expand clause 11 of Schedule 18 to include also the following unfair practices**:

a. Providing misleading information to consumers about rights available to them under any UK consumer protection enactment.

b. Failing to make clear to consumers that any aspect of a trader's offer is something a consumer can obtain as a result of a statutory right or otherwise obtain at lower cost from a public body or authority.

BP 12 *– "Using editorial content in the media to promote a product 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."*

118. As the Government is aware, we have spent several years investigating hidden advertising online and published our enforcement outcomes. The CMA's

view is that this clause requires “paid” to be construed expansively and whilst we shall continue to take this approach in our casework, it would be helpful to traders to define the term explicitly.

119. The CMA also considers the reference to ‘editorial content in the media’ unnecessarily limiting. Given the prevalence of hidden advertising, it is as important to tackle it wherever it occurs and across the full range of content types in which it appears today, as well as to reflect more fully the way in which people are incentivised to promote products today or may be in future.

120. **Accordingly, we recommend that the Government expand clause 11 of Schedule 18 as follows:**

a. Define ‘paid’ explicitly as **including any form of incentive or reward, monetary or otherwise and solicited or otherwise. Monetary forms of payment include money, commissions or discounts, for example. Non-monetary forms of payment include, for example, gifts of any products, leases or loans of any products that are either free of charge or on more favourable terms than those offered to the public.**

   It is important that the definition above make clear that gifts given by traders constitute ‘payment’ for the purposes of this clause even in circumstances where there may not be an explicit obligation or an adduceable agreement that the recipient or his agent publishes a corresponding promotion. This practice is deployed with the ‘hope’ or ‘expectation’ that the trader or the trader’s product will be promoted by the recipient. Without such clarification, this common practice could be exploited or used as a loophole. The underlying principle must be that consumers are made aware in promotions of the involvement of any gifts so that they can make informed decisions.

b. Amend the clause so that it also **includes payments offered,** not just payments made. This would reflect practices, such as the use of affiliate links or promotional codes, whereby payments may be made at a specific time or over a rolling period of time after the promotion concerned has been published.

c. Amend the clause so that the prohibition is not limited to ‘editorial content in the media’. We consider this would be a proportionate response to the huge growth of the advertising industry (since the CPRs 2008 came into effect in the UK), its scale and the fact that advertising occurs in many more forms today such that it is no longer appropriate to limit the scope of the clause to ‘editorial’ content. Conducting assessments or entering into legal arguments as to whether content is editorial in nature or whether a

place where it appears constitutes 'media' appears to us unnecessary as the overriding purpose of this clause should be to **prohibit *any* hidden advertising *wherever* it may appear.**

BP 22 – *Describing a product 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 delivery of the item.*

121. It may not be sufficiently clear what "unavoidable" means in this clause. If the only method made available to a consumer to secure a product characterised as free of charge is for the consumer to purchase another product or to contact the trader by means of a premium rate text message or telephone call, we consider that such costs may not be characterised as unavoidable because standard rate response methods are clearly available. The clause prohibits such practices.

122. However, there may be instances where, for example, a) traders describe a product as free of charge but require consumers to pay a delivery charge that is higher than the appropriate delivery charge available publicly in the market;[50] or b) where the cost of collection or delivery is disproportionate to the market value of the product concerned such that it renders the concept of a product described as free of charge misleading or meaningless. Whilst we recognise that (b) may fall within the scope of other provisions in the DMCC Bill, **we recommend that the Government:**

a. **clarify the meaning of 'unavoidable' in the light of our observations so that it is clear to traders, consumers, enforcers and courts how the term should be interpreted;[51] or, for simplicity,**

b. **on the basis that any cost is avoidable because a trader can choose not to charge it, amend the clause such that it prohibits any type of cost being charged in relation to products that traders choose to describe as free of charge.**

BP 25 and BP 26

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 to enforce a contractual obligation.

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[50] For example, a trader may use Royal Mail's Special Delivery service to dispatch a perishable or valuable product to a consumer but charge the customer more than Royal Mail's publicly advertised price for the service.
[51] Note that section 3.4 of the UCPD Guidance provides helpful guidance which could be drawn on for the purposes of providing clarity as to the effect clause 22 should have in DMCC Bill.

Making persistent and unwanted solicitations by any means, other than by attending at the consumer's home, except in circumstances and to the extent justified to enforce a contractual obligation.

123. These clauses use the term '*except in circumstances and to the extent justified to enforce a contractual obligation*'. **We recommend that the Government clarify these terms** so that traders are clear as to how to avoid infringing the prohibition. In doing so, the overriding principles must be that, in the context of a difference of views between trader and consumer, i) only an independent enforcer or court can determine whether a contractual obligation is owed and by which party; and ii) only a court can authorise a trader to override a consumer's will in respect of unwanted solicitations by a trader or any agent of the trader.

43.Are there any practices you think should be added to Schedule 18? If yes, please identify which and why?

124. We support the Government's proposals to tackle fake reviews and subscription traps.

Fake reviews

125. The CMA supports the proposed text for banned list additions regarding **fake reviews**. The CMA considers these should be added to the DMCC Bill now. In particular, we do not see any reason why submitting a fake review, commissioning or incentivising someone else to submit a fake review, or offering or advertising to submit, commission or facilitate a fake review should not attract criminal sanctions. 29 of the existing 31 are criminal offences and these are important for TSS enforcement as they largely enforce using prosecution and only criminal offences are referred from Citizens Advice to TSS. See paragraphs 113 to 114 for more details.

Subscription traps

126. On subscriptions, the CMA recommends that the **renewal of consumers' recurring payments be banned unless separate and active consent is explicitly and freely given**. The CMA also considers that this should be added to the DMCC Bill now and made a criminal offence. The CMA considers that traders should always secure active consent from consumers to take payments from them, and consumers should never find themselves in a position where money is being taken from their bank account where they have not given permission for this. Consumers should be given a choice whether to enter into a recurring subscription or whether to opt for a non-renewing trial of a product, or a fixed period during which they will receive the product.

127. Although ongoing subscriptions can provide convenience for consumers, they can also be severely exploitative and lock consumers into paying for products they no longer want or need. Where this is the case, not only can individual consumers be seriously harmed by being forced to pay for something they no longer want or need, but also competition itself can be harmed, as better, cheaper or more appropriate products are locked-out while consumers are locked-in.

128. The CMA considers that there should be an express requirement for traders to offer the consumer a genuine choice, at the pre-contract stage, to take any subscription without auto-renewal or rollover (i.e. the consumer must freely and actively 'opt-in' to auto-renewal). The CMA considers that a focus on explicit upfront consent is a vital safeguard to ensure consumers have exercised choice. This should be in addition consumers being given transparent and timely pre-contract information to enable them to make an informed choice on whether or not to take the contract with auto-renewal, including the amount of the renewal fee, the circumstances in which the renewal fee might increase and how any price rise would be calculated, the nature and timing of steps the consumer must take to stop the renewal, and refund rights if renewal takes place. These proposals add crucial levels of detail to the provisions which already exist in UK law such as regulation 40 of the Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013.

129. Based on our experience of consumer complaints, discussions with a range of digital subscription providers and exposure to wider global concerns about subscription 'traps', the CMA is also of the opinion that traders should not be able actually to take payments without the consumer explicitly and actively agreeing to it, in addition to agreeing to their subscription renewing, preferably by means of their payment scheme provider requesting their express consent to the payment, or at least notifying them clearly that the payment is a recurring one (and providing a clear and straightforward method to prevent future payments from being taken).

Drip pricing

130. In addition to fake reviews and subscription traps, CMA agrees with the Government that the **drip pricing of mandatory elements be banned outright**. Please see our more detailed text above (paragraphs 43 to 85) on drip pricing where we also mention improved disclosure of foreseeable voluntary charges.

Misleading environmental claims

131. We also repeat our previous recommendation that **making claims about the environmental impact of a trader's products or business that the trader**

cannot substantiate should be treated as a banned practice. Consumers are increasingly concerned about the environmental impact of the goods and services they use, and want this to guide their purchasing decisions. It is important that they can make well-informed choices on the basis of reliable claims. Additionally, if traders can make unsubstantiated environmental claims, this can also make it harder for fair-dealing businesses, which may have innovative products and services tackling their environmental impact, to compete.

132. While the CMA is already able to take action against misleading claims and has published the Green Claims Code to provide further guidance to traders on the use of environmental claims, there is a clear information asymmetry that exists between traders and consumers about the environmental impact of the trader's products and business. There is no justification for a trader making false claims about their product's or business's environmental impact, and consumers often have no choice but to rely on the trader's claims. The CMA, therefore, supports a ban on traders making false claims or creating a false impression about the environmental impact of their products or business, including, in particular, making environmental claims that the trader cannot substantiate, in all circumstances. We would be happy to provide further input to the Department for Business and Trade on how such a ban might be implemented.

Online platforms

44. Which consumer harms are particularly prevalent and/or detrimental on online platforms?

133. Online platforms play an increasingly significant role in people's lives, ensuring that a vast range of content from many sources has greater visibility and reach than ever before. This undoubtedly brings huge benefits for UK citizens in how they work, shop and communicate with each other. It is also *capable of* facilitating effective and well-informed choices for consumers, which in turn allows consumers to shop around more easily, intensifying competition, to general benefit for individuals and for the economy as a whole – *provided that* the information is reliable and trustworthy, and that selling tactics that subvert proper choice (such as drip pricing or pressure selling) are not used.

134. However, the greater visibility and reach of information on online platforms also have the effect, in the CMA's experience, that economically harmful illegal content reaches consumers more easily and frequently. As a result, online platforms are likely to facilitate large numbers of transactions involving breaches of consumer protection law (and significant harms to consumers) arising from such content. Vast numbers of consumers' economic decisions are distorted by, for example, their being misled about the nature or quality of products (whether being sold on that platform, on another platform or even offline).

135. The Parliamentary Joint Committee on the Draft Online Safety Bill (OSB) said in December 2021 that, while the inclusion of 'fraud and scams' in the OSB was welcome, the Government should ensure that the inclusion of some forms of economically harmful content within the scope of the OSB does not compromise existing consumer protection.[52] Further, the Joint Committee considered that other economic harms adversely affecting consumers are an online problem that must be tackled and that, while the OSB is not the best piece of legislation to achieve this, the Government should address these other forms of economic harm in legislation. The CMA agrees with those recommendations and considers that the Government should bring forward legislative proposals to make it explicitly clear that, under consumer protection law, platform operators should take reasonable, proportionate and effective measures to address such content present on or facilitated by their platform.

136. In recent years, the CMA has conducted several investigations into the presence or facilitation of economically harmful illegal content on online platforms. By this, we mean content originating from third parties and involving an

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[52] https://committees.parliament.uk/publications/8206/documents/84092/default/

unfair commercial practice under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). For example, we have taken action to address our concerns in relation to:

- the trading of fake and misleading online reviews on Facebook, Instagram and eBay (commenced 2019);
- the publication of paid-for endorsements of products by social media 'influencers' on the Instagram platform that were not clearly labelled as advertising (2020);
- failures by online intermediaries to take adequate steps to gather and display accurate and comprehensive information from car rental companies about prices and customer liabilities (2018); and
- secondary tickets sites' failures to ensure that legally required information about events and tickets was gathered from third party sellers and displayed to consumers (2018).

137. Further examples of where consumers are likely to be at risk of economic harm as a result of content that is present on or facilitated by online platforms include:

- Misleading or deceptive offers for third party products on online marketplaces.
- Counterfeit or unsafe goods being offered for sale on marketplaces.
- Hidden third party advertising appearing on online video sharing platforms.
- The continued proliferation of large fake review trading groups on social media and fake consumer reviews being displayed on major platforms like Amazon and Google
- Economically harmful third-party products or services being advertised or presented to consumers in response to search queries on search engines or other comparison websites.
- New forms of harmful content that may emerge in the future on platforms such as online marketplaces, social media, user review tools, search engines, video sharing sites, collaborative economy platforms, digital comparison platforms and secondary ticketing platforms.

45. What do you understand the requirements of professional diligence require in practice from online platforms?

138. Where a trader operating an online platform is engaged in a commercial practice (as defined broadly by the CPRs and interpreted by case law) it must not contravene the requirements of 'professional diligence' – that is, the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either honest market practice or the general principle of good faith in the trader's field of activity. 'Consumers' includes consumers who do not make purchases on or from that platform.

139. Where that online platform publishes, provides access to or facilitates content originating from third parties, we consider that professional diligence requires the operator to take or use reasonable, proportionate and effective measures – including proactive measures - to tackle economically harmful illegal content. While there is no 'one-size-fits-all' approach, the CMA considers that, in practice, such measures are likely to include:

- Taking proactive steps to identify and assess the systemic risks of harm to consumers arising from economically harmful content on or facilitated by the platform.

- Having assessed the risks, implementing specific proactive measures to tackle economically harmful illegal content and prevent it from impacting consumers' economic decision-making. Subject to the nature and extent of the systemic risks posed to consumers, this is likely to include implementing appropriate automated and manual moderation systems to prevent this content appearing and to identify and remove it when it does appear, as well as responding to evolving threats or abuse.

- Implementing reporting and flagging mechanisms to make it easy for consumers and other parties - e.g. law enforcement - to report potentially harmful content. On becoming aware of the presence of such content (through whatever means) the platform operator should investigate promptly and tackle any economically harmful illegal content.

- Taking additional reasonable steps to effectively mitigate the risks of harm to consumers by identifying and removing similar content e.g. checking other online content posted by the same user.

- Applying appropriate and effective sanctions to deter this content/activity in future - such as banning repeat offenders – and keeping records of sanctions.

- Proactively ensuring that systems, policies and processes for the prevention, detection and removal of economically harmful illegal content remain effective and keep pace with evolving threats/patterns of abuse. For example, through regular testing, reviewing and updating systems and processes – including any automated systems – when operators receive or become aware of new information (whether through notifications or their own proactive means).

140. The CMA considers that these are currently all required under the existing law, but this is often contested by online platforms (see answer to Q47 below). Therefore statutory clarification would be helpful.

46. Are you aware of any examples of where the requirements of professional diligence have hampered innovation in the online platforms sector?

141. The requirements of professional diligence require traders to exercise the standard of skill and care that can be reasonably expected of them to protect consumers - not more. As reflected by case law, professional diligence is intended simply to reflect good standards of commercial morality and practice.

142. The CMA does not consider that a requirement for traders to take reasonable, proportionate and effective steps in relation to economically harmful content would hamper innovation. On the contrary, where traders are not professionally diligent – that is, where they do not act in a manner commensurate with honest market practice or the general principle of good faith in the platform operator's field – this is likely to lead to poorer outcomes in a sector: where platforms are not incentivised to compete on the accuracy, safety and reliability of the content they present or facilitate, consumers are more likely to make poor choices, damaging consumer confidence. It will also hinder competitive rivalry and innovation.

47. Are there particular practices of online platforms where the application of the professional diligence requirements is uncertain?

143. The CMA has been clear that platform operators qualifying as 'traders' must always comply with consumer protection law as far as their own commercial practices are concerned. However, in the CMA's experience, the absence of express clarification in relation to online platforms often results in uncertainty among platform operators about what they are required to do to comply with the law in relation to economically harmful illegal content. For example, contrary to the CMA's clear understanding of the legal requirements (see answer to Q45 above), operators sometimes contend that existing consumer protection legislation may not make them responsible for the unfair commercial practices of third parties using their platform, or that they are only required to remove illegal

content when notified of it pursuant to e-commerce legislation. Even where platforms accept their legal responsibilities, they may be unclear as to what type of specific measures the law would expect them to have in place to comply.

144. The CMA has set out in response to Question 44 examples of practices where consumers are likely to be at risk of economic harm. The CMA has not taken action in relation to all the examples listed and there may be further examples that we have not considered. It is therefore important that express clarity is provided in the law in relation to platform operators' responsibilities - not only to enable swifter and more efficient enforcement in these areas, but to ensure that platform operators have certainty about their obligations and are proactively putting in place effective measures to protect consumers from this harmful content.

48. How should best practice for complying with the requirements of professional diligence for online platforms be set out and communicated?

145. The CMA considers that the law should first be explicitly clarified in this area – ideally in the DMCC Bill. This would remove the scope for dispute between platform operators and regulators about the extent of operators' responsibility for this content and, for consumers, provide the necessary protections, by:

- Putting it beyond doubt (and dispute) that platform operators have a proactive responsibility under consumer protection law to protect consumers from the harmful effects of this content, including by taking steps to prevent harmful content from appearing in the first place.

- Confirming the proactive nature of that responsibility i.e. that it encompasses proactively seeking out and removing unlawful content, as well as preventing it from appearing.

- Enabling traders to adopt clear compliance measures to meet their responsibilities in respect of both fraudulent user generated content (within the OSB) and other economically harmful illegal content (under consumer protection law) on or accessed via their platforms.

146. To ensure that traders are clear on these legal requirements, we recommend that the Government publish principles-based guidance to coincide with the new legislation – ideally statutory guidance to which the courts must have regard. Such principles could be illustrated using examples from completed CMA cases. The CMA would expect to work closely with the Government on the production of such guidance. The guidance – and any enforcement assessment - would reflect the principle of proportionality, having regard to (among other things) the different

business models that platforms use, the types of illegal content that are likely to appear on platforms and the specific risks of harm posed to consumers.

147. Critically, the guidance would make clear that, as part of this obligation, platforms need to take steps to ensure that their systems remain effective – this has been a particular problem in our enforcement cases, where platforms may agree to put a system in place for the time being but have limited legal or business incentives to ensure that they take ongoing responsibility for compliance (requiring further interventions).

49. Is the current definition of professional diligence appropriate for regulating online platforms? If not, how do you consider it could be improved?

148. As described above, the CMA considers that, where a platform operator is engaged in a commercial practice, the operator must exercise professional diligence in relation to its own practices by taking reasonable, proportionate and effective steps in relation to the content they carry or facilitate. However, as described above, traders often dispute the nature and extent of their legal responsibilities.

149. To achieve the Government's aim of ensuring a high standard of consumer protection in relation to online platforms, we would recommend that an explicit statutory duty of care is created. We consider that a clear, specific provision is likely to be a better means of achieving this aim rather than amending existing definitional provisions: put simply, clarifying and simplifying existing law would make its application and enforcement more effective without increasing the burden on platform operators.

150. The main feature of this new duty would be that it would require traders operating platforms which publish, provide access to or facilitate content originating from third parties to take or use reasonable, proportionate and effective measures to tackle unfair commercial practices comprised in that content. The new provision would therefore broadly reflect the illegal content safety duties in the OSB, thereby ensuring consistency with that legislation and clarity for platform operators - who will need to design and implement similar proactive systems and processes to comply with the OSB in relation to fraudulent content facilitated through user-generated content or search results.

Protection from unfair trading: further issues

50.Should the Government add further commercial practices that are unfair under Part 4, Chapter 1 to the list of prohibited practices which attract private rights of redress? Please explain your answer

151. Yes. The CMA does not consider there are good arguments for restricting private rights of redress to misleading actions and aggressive practices. In particular, it is necessary to consider the impact of all of the commercial practices on consumer transactional decision making: a misleading action may have an impact because information was omitted; an aggressive practice may include elements of lack of professional diligence. Therefore the crucial test that should be applied in respect of individual redress is simply whether the unlawful practice was a significant reason why the consumer entered into the contract, or paid the money, rather than to differentiate on the basis of type of commercial practice. It is also invidious to expect consumers to be able to make such distinctions themselves, in the context of individuals trying to make private litigation claims. Such actions are inherently daunting and complicated for individuals, so it is important that the process and legal analysis they have to engage in is as simple as possible. Public enforcement cases are often pursued by enforcers relative to the scale of national consumer detriment but this may not necessarily address all the harms suffered by individuals because of their specific circumstances, so there is an important role for individual consumers to play in upholding their rights, and thereby exercising discipline on traders who might not otherwise comply fully with the law.

152. The CMA does not see any benefit in continuing this carve out of rights, from the perspective of the UK economy or the work of the courts. If private actions across all of the practices prohibited by Part 4, Chapter 1 of the DMCC Bill can be determined by the courts, that will materially improve the competitive landscape and trading environment in the UK for fair-playing businesses. For clarity, CMA considers that all breaches of the CPRs, not only the banned practices, should be backed up by effective private rights of action. This would include expanding the existing private rights to cover misleading omissions and failures to comply with professional diligence as well as the existing private rights attached to the misleading actions and aggressive practices prohibitions.[53]

[53] Consumer Redress for Misleading and Aggressive Practices - Law Commission; Unfair commercial practices directive (europa.eu) in particular Article 11a on redress CL2005L0029EN0010010.0001_cp 1..1 (europa.eu)

Online interface orders

51. Should the power to make applications to the court for online interface and interim online interface orders under Part 3 of the Digital Markets, Competition and Consumers Bill be extended to additional enforcers (listed in clause 144 of the DMCC bill)?

153. Yes. The same policy reasons apply to other enforcers as to the CMA, in terms of having access to these powers. In some respects it is even more important that TSS has access to these powers, because TSS has primary responsibility for tackling scams -many of which originate outside the UK, and are difficult to tackle through normal enforcement means. Sometimes the only way to prevent scams from impacting consumers is to prevent those engaged in scams from being able to make contact with consumers in the first place, such as by blocking access to their website, preventing their product from appearing in search results, or having their website taken down.

52. In what circumstances do you expect this power to be used by non-CMA enforcers if it is so extended?

154. The CMA's experience is that sometimes traders who are located outside the UK use this as a basis for evading compliance with UK law. For example they may rely on potential difficulties in serving proceedings on them (including the time this takes), and complications around securing compliance with any UK court order. They may also hide their identity or otherwise refuse to engage with the enforcer. In such situations, the ability to take action to take down their website or block access to it can be a powerful, yet proportionate means of either ending the harm to UK consumers.

53. Are there any downsides to extending this application power to additional enforcers, provided the decision to make online interface and interim online interface orders will continue to rest with the court?

155. There is a need for enforcers to co-ordinate to avoid overlaps but this is enabled by the notification functions in the DMCC Bill inherited from the Enterprise Act 2002.

54.Should either or both public designated enforcers and private designated enforcers, as defined in clause 144 of the DMCC Bill, be empowered to seek online interface and interim online interface orders from the court?

156. Public designated enforcers are likely to be best placed.

55. Please explain your answer to the question above.

157. We can see a theoretical argument in favour of private enforcers taking action if appropriate safeguards arere in place (for example to ensure a lack of conflict with any other organisational objectives). In practice experience of formal consumer protection enforcement is concentrated within a subset of the public enforcers, especially Trading Standards (including Northern Ireland's Department for the Economy), the CMA, the Financial Conduct Authority and some of the other sectoral regulators.

Competition and Markets Authority
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