# Unfair commercial practices

CMA207

Draft guidance on the protection from unfair trading provisions in the Digital Markets, Competition and Consumers Act 2024

11 December 2024

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# PART 1: Introduction and scope

# 1. Using the guidance

## Aim of the Guidance

1.1 This Guidance is intended to help traders to comply with the protection from unfair trading provisions in Chapter 1 of Part 4 of the Digital Markets, Competition and Consumers Act 2024 (DMCC Act). It will also be of use to enforcers, and to consumer advisers in understanding what actions are prohibited.

1.2 This Guidance updates and replaces Consumer Protection from Unfair Trading Regulations: OFT1008.

> This Guidance uses 'unfair commercial practices provisions' or ‘UCP provisions’ as a shorthand for the provisions contained in Chapter 1 of Part 4 of the DMCC Act, which replace and update the Consumer Protection from Unfair Trading Regulations 2008 (CPUTRs).

1.3 Prior to the DMCC Act only a court could determine whether a commercial practice had been unfair within the meaning of the CPUTRs. After the DMCC Act’s consumer law enforcement provisions come into force, in addition to the courts, the Competition and Markets Authority[1] (CMA) will also be able to decide whether a commercial practice is unfair within the meaning of the UCP provisions.[2] The CMA’s decisions will be appealable to the High Court in England and Wales or in Northern Ireland, or to the Outer House of the Court of Session in Scotland.

1.4 This Guidance illustrates how the UCP provisions may apply in practice. It sets out the views of the CMA at the time of publication. The examples used in this Guidance do not cover every situation or commercial practice in which a breach of the UCP provisions may occur.

1.5 This Guidance is not a substitute for, or definitive interpretation of, the UCP provisions and should be read in conjunction with them.

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[1] The CMA is the UK’s primary competition and consumer enforcement body. It helps people, businesses and the UK economy by promoting competitive markets and tackling unfair behaviour. More information about the CMA and its powers can be found here: About us - Competition and Markets Authority - GOV.UK (www.gov.uk).

[2] Sections 148 and 180 and Schedule 16 to the DMCC Act.

1.6 The courts are not bound by this Guidance. The CMA will have regard to this Guidance when it exercises its direct consumer enforcement powers[3] in respect of the UCP provisions. However, a determination by the CMA of whether a commercial practice is unfair within the meaning of the UCP provisions will be made on a case-by-case basis and depending on the facts at hand.

## How to use the Guidance

1.7 This Guidance is split into four parts. Part 1 contains an introduction and a short overview, including a description of the scope of the UCP provisions. There is also a flowchart to help the reader assess whether commercial practices are unfair under the UCP provisions.

1.8 Part 2 deals with practices that involve prohibited conduct and are likely to cause the average consumer to take a different transactional decision.[4] It explains the prohibitions in the following order:

*(a)* contravention of the requirements of professional diligence (Chapter 5),

*(b)* misleading practices, which include

(i) misleading actions (Chapter 6), and

(ii) misleading omissions (Chapter 7),

and

*(c)* aggressive practices (Chapter 8).

1.9 Part 3 details the practices that are prohibited regardless of their impact on the average consumer's transactional decisions, ie:

*(a)* the omission of material information from an invitation to purchase, including a prohibition of 'drip pricing'[5] (Chapter 9),

*(b)* 32 commercial practices that are banned in all circumstances (Chapter 10), and

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[3] Where this Guidance refers to 'direct consumer enforcement powers', this means the CMA's powers, pursuant to Chapter 4 of Part 3 of the DMCC Act, to investigate, determine and take enforcement action to address infringements of certain consumer protection laws (including the UCP provisions).
[4] The concepts of 'average consumer' and 'transactional decision' are explained further in Chapter 3 (Scope).
[5] 'Drip pricing' occurs when consumers are shown an initial price for a product and additional fees are introduced (or "dripped") as consumers proceed with a purchase or transaction.

(c) promoting unfair commercial practices in codes of conduct (Chapter 11).

1.10 Part 4 provides information on criminal offences relating to unfair commercial practices (Chapter 12).

1.11 Finally, the Annexes to the Guidance contain:

(a) some examples of how the different prohibitions contained in the UCP provisions may be applied in practice (including how they may overlap in the context of a single commercial practice) (Annex A),

(b) a detailed explanation of the new banned practice in relation to fake consumer reviews, introduced by the DMCC Act, and the steps that traders need to take to comply (Annex B), and

(c) a summary of the changes that the DMCC Act makes to the CPUTRs (Annex C).

1.12 A diagram illustrating the key UCP provisions is given below.

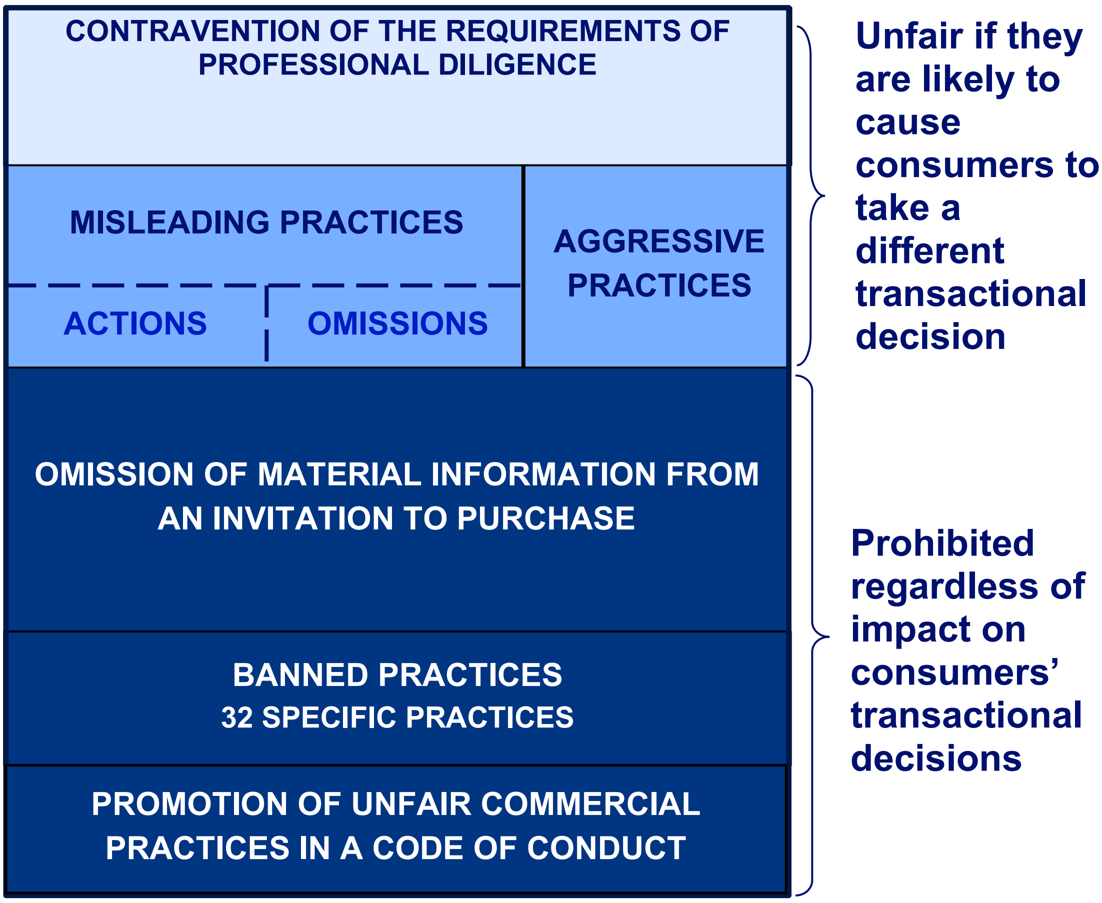


**Figure 1: Overview of the prohibitions contained in the UCP provisions**

# 2. Introduction

## Chapter 1 of Part 4 of the Digital Markets, Competition and Consumers Act 2024: Protection from unfair trading

2.1 The provisions in Chapter 1 of Part 4 of the Digital Markets, Competition and Consumers Act 2024 (DMCC Act) prohibit unfair commercial practices, replacing and updating the Consumer Protection from Unfair Trading Regulations 2008 (CPUTRs).[6]

2.2 The CPUTRs originated as domestic regulations implementing the European Union's (EU) Unfair Commercial Practices Directive (UCPD) into UK law.[7] The CPUTRs modernised and simplified the UK's consumer protection framework by partially or wholly repealing provisions in 23 previously existing laws and providing similar or greater protection to these laws.[8]

2.3 Following the UK's exit from the EU, the CPUTRs continued to have effect as a result of section 2 of the European Union (Withdrawal) Act 2018. This means that the common standard of consumer protection that applied across the EU immediately before the UK's exit from the EU at 11.00 p.m. on 31 December 2020 has continued to apply in the UK ever since. The unfair commercial practices (UCP) provisions in Chapter 1 of Part 4 of the DMCC Act revoke and replace the CPUTRs (see the section on transitional arrangements below for details) and have the same core objective of protecting consumers from unfair commercial practices. Any substantive changes made to the EU's consumer protection framework or by the DMCC Act and other domestic legislation since the UK's exit from the EU will result in divergence from the common standard of consumer protection that had been in place before 2021.[9]

2.4 The UCP provisions require traders to behave fairly and with professional diligence in their dealings with consumers. If a trader misleads, behaves aggressively, or otherwise acts unfairly towards consumers, then the trader is likely to be in breach of the UCP provisions and may face action by

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[6] Statutory Instrument 2008/1277.
[7] Directive 2005/29/EC.
[8] See Annex B to Consumer Protection from Unfair Trading Regulations: OFT1008 for further details on changes to previously existing law.
[9] The UCPD was amended in 2019 by Directive (EU) 2019/2161, which amended EU consumer protection rules on consumer rights, on unfair terms in consumer contracts and on indicating prices. In 2024, further rules were introduced by Directive (EU) 2024/825 in relation to practices associated with the early obsolescence of goods, misleading environmental claims ('greenwashing') and misleading information about the social characteristics of products or traders' businesses. The 2024 UCPD updates have no effect in the UK.

enforcement authorities. Details of potential enforcement action (civil and criminal enforcement by the CMA and others, as well as direct enforcement by the CMA only) can be found in the CMA's Consumer protection enforcement guidance (CMA58) and Direct consumer enforcement guidance (CMA200) (pending).

2.5 The UCP provisions apply to commercial practices before, during and after a contract is made or a transaction takes place. Commercial practices covered by the UCP provisions include anything traders do that could affect consumers in some way. This is very wide in scope. For example, it covers where a trader supplies their own product to a consumer, where they are promoting another trader's product to consumers, where they are persuading a consumer to hand over a product to a trader, as well as where they are facilitating transactions between consumers.

2.6 The UCP provisions:

*(a)* contain prohibitions of practices that are likely to cause the average consumer to take a different transactional decision as a result of a misleading action, misleading omission, aggressive practice, or a contravention of the requirements of professional diligence.[10]

*(b)* prohibit the omission of material information from an invitation to purchase, 32 specific commercial practices specified in Schedule 20 to the DMCC Act, and the promotion of unfair commercial practices in codes of conduct.

2.7 The table below summarises the conduct prohibited under each UCP provision. These prohibitions are explained in more detail in Parts 2 and 3 of the Guidance.

[10] The concepts of 'average consumer' and 'transactional decision' are explained further in Chapter 3 (Scope).

| Provision in the DMCC Act | Summary of prohibited conduct |
|---|---|
| Section 229 | Falling short of the requirements of professional diligence |
| Section 226 | • Provision of false or misleading information<br>• Deceptive overall presentation<br>• Creating confusion with competitors' products<br>• Failing to comply with requirements in a code of conduct |
| Section 227 | • Omission (or unclear/ untimely/ obscure provision) of material information<br>• Omission of legally required information<br>• Failing to identify the commercial intent of a practice |
| Section 228 | Aggressive practice using harassment, coercion or undue influence |
| Section 230 | Omission of any information that must be contained in an invitation to purchase |
| Schedule 20 | 32 specified practices which are in all circumstances considered unfair |
| Section 225 | Promotion of unfair commercial practices in a code of conduct by anyone responsible for the content of, or for monitoring compliance with, a code of conduct |

**Table 1: Overview of the prohibitions contained in the UCP provisions**

2.8 The UCP provisions seek to achieve a high level of consumer protection and maintain much of the scope and effect of the CPUTRs, with some amendments, including new or more detailed prohibitions of practices relating to fake consumer reviews and drip pricing. The UCP provisions also streamline and/or remove certain tests from the CPUTRs in relation to assessing the unfairness of commercial practices. A summary of the changes that the DMCC Act makes to the CPUTRs is included in Annex C.

## Transitional arrangements

2.9 Section 251 of the DMCC Act revokes the CPUTRs. The UCP provisions in the DMCC Act come into force on the commencement date[11] and apply only in relation to commercial practices that take place on or after that date.[12] The

[11] A commencement date may be specified in the Act itself or on a date appointed by statutory instrument. The Government has made a statement that it expects to commence the UCP provisions (ie Chapter 1 of Part 4 of the DMCC Act) in April 2025: Written statements - Written questions, answers and statements - UK Parliament.

[12] Section 252(1) DMCC Act.

CPUTRs continue to have effect in relation to any act or omission which takes place before then.[13]

2.10 Given that the DMCC Act maintains the effect of the majority of the provisions in the CPUTRs, traders can generally expect the same or similar requirements and prohibitions to apply to their commercial practices before and after the UCP provisions formally come into effect. Where the UCP provisions substantially change or introduce new requirements for traders, these will apply only after commencement.

2.11 Consumers currently have private rights of redress for certain infringements of the CPUTRs. The DMCC Act provides for these to be replaced by new arrangements that will be detailed in a new statutory instrument. Until that new statutory instrument becomes law, consumers will continue to have the rights of redress set out in the CPUTRs, notwithstanding the coming into force of the UCP provisions in the DMCC Act.

[13] Section 252(2) DMCC Act.

# 3. Scope

3.1 The UCP provisions apply to ‘commercial practices’ by ‘traders’ that may affect ‘consumers’.[14] To determine whether there is an infringement of certain UCP provisions (ie a contravention of the requirements of professional diligence or a misleading or aggressive practice), the court and/or the CMA must establish that the commercial practice is likely to cause the ‘average consumer’ to take a ‘transactional decision’ that the consumer would not have taken otherwise.

3.2 These concepts are defined in the DMCC Act and set out the parameters for what and whose activities are in scope of the UCP provisions. They are further explained below.

## Commercial practice

3.3 A commercial practice is ‘an act or omission by a trader relating to the promotion or supply of—

*(a)* the trader’s product to a consumer,

*(b)* another trader’s product to a consumer, or

*(c)* a consumer’s product to the trader or another person’.[15]

### *Product*

3.4 The definition of ‘product’ covers both physical and intangible things, including goods (including immovable property, rights and obligations), services and digital content.[16] For example:

*(a)* a pencil, a car, music purchased online, a right to use a caravan for a certain period, membership of a club and premium rate phone calls would all fall within the definition.

*(b)* immovable property is included, and so the UCP provisions apply to the practices of traders concerned with the sale or lease of land to consumers.

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[14] Note that the UCP provisions sit alongside other protections for consumers, in particular, the existing system of contract law, including the law on unfair contract terms.

[15] Section 225(3) DMCC Act.

[16] Section 248 and section 249 DMCC Act.

*(c)* the definition also covers intangible rights such as cancellation or cashback options.

*(d)* the provision of credit to consumers is also covered, as are payments demanded from a consumer by a trader in settlement of actual or purported liabilities. This means that consumers are protected under the UCP provisions where they are subjected to ‘liability management services’, eg when their vehicle is clamped, or they are subjected to debt collection.

3.5 Any act or omission by a trader relating to the promotion or supply of a product to or from consumers could be a commercial practice. A commercial practice is each single act or omission, whether or not these are repeated or form part of a course of conduct. The definition also makes clear that it is immaterial whether the acts or omissions involved in a commercial practice occur before, during or after the promotion or supply in question.[17] Therefore, commercial practices include matters such as advertising, sales, supplies and post-contractual matters such as after-sales services and debt collection.

3.6 The act or omission must ‘relate to’ the promotion or supply of a product to or from a consumer. This means that although a trader may not be selling to consumers themselves, they may still have to take into account the UCP provisions to the extent that a practice they engage in relates to the promotion or supply of a product to or from any consumer.

3.7 A commercial practice includes any act or omission by a trader relating to the promotion or supply of another trader’s product to a consumer. Therefore, for example, the activities of online platforms that facilitate the promotion or supply of products to and from consumers, amount to commercial practices and are within the scope of the UCP provisions.

3.8 Commercial practices also include practices by a trader that enable private individuals (ie consumers) to provide products either to that trader (eg where a trader purchases a used car or an antique from a consumer, or asks the consumer to make a donation of unwanted clothes) or to another person (eg where an online marketplace is used for consumer-to-consumer transactions).

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[17] Section 225(5) DMCC Act.

## Consumer

3.9 The UCP provisions define a consumer as 'an individual acting for purposes that are wholly or mainly outside the individual's business'.[18]

3.10 The words 'wholly or mainly' in the definition of consumer mean that an individual is still a consumer when acting for dual purposes (a consumer purpose and a business purpose) as long as the consumer purpose is the main purpose.[19] Likewise, where a person engages in profit making activities, they may still be a consumer if the main purpose of the activity is not part of their main business. This means, for example, that:

*(a)* a person who buys a kettle for their home, works from home one day a week and uses it on the days when working from home would still be a consumer.[20]

*(b)* an individual who occasionally sells their unwanted and used clothes on an online marketplace or sells their personal vinyl record collection to a second-hand record shop is also likely to be a consumer.[21]

*(c)* an individual who invests some of their spare money in shares or property could still be a consumer where making such investments is not part of their main business.

3.11 Conversely, a sole trader or a partner in a firm would only benefit from the protection provided by the UCP provisions where, and to the extent that, they are acting for purposes outside of their business. For example, a sole trader who operates from a private dwelling and buys a printer of which 95% of the intended use is for the purposes of their business, is unlikely to be a consumer for the purposes of this purchase.[22]

## Trader

3.12 The UCP provisions define a trader as:

*(a)* 'a person ("P") acting for purposes relating to P's business, or

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[18] Section 225(3) DMCC Act.
[19] Paragraph 1343(a) DMCC Act explanatory notes.
[20] Paragraph 1343(a) DMCC Act explanatory notes.
[21] Paragraph 1343(a) and (b) DMCC Act explanatory notes.
[22] Paragraph 1343(a) DMCC Act explanatory notes.

(b) a person acting in the name of, or on behalf of, P for purposes relating to P's business'.[23]

3.13 'Business' in turn includes a trade, craft or profession (whether or not they are carried on for gain and reward), the activities of public bodies and the activities of others carried on for gain or reward.[24] 'Gain or reward' is broader than simply monetary remuneration and includes things like offering free gifts to consumers (for example to obtain goodwill or reputational advantage) or providing services in exchange for personal data.

3.14 The broad definition of trader can therefore capture:

*(a)* agents, subcontractors, representatives or other associates of the trader acting on behalf of the trader. It is irrelevant whether a person acting in the name of, or on behalf of, another is also acting for their own business in relation to the same act or omission.[25]

*(b)* individuals who regularly sell goods from their homes through online marketplaces. The assessment of whether the individual is acting as a trader will depend on whether the relevant activity is done in the course of business. An individual person selling goods on the internet, merely as a means by which to dispose of unwanted goods from time to time, would not be likely to fall within this definition.

*(c)* organisations pursuing charitable or ethical goals when they engage in commercial activities towards consumers such as selling clothes in a charity shop or soliciting donations.

*(d)* public bodies when they engage in commercial transactions with consumers such as charging a fee to get a passport or renew a driving licence.

3.15 Whether or not a person is a trader in any particular circumstance must be assessed on a case-by-case basis. When determining whether a person is acting as a trader, a number of factors are likely to be relevant, such as whether there is a profit-seeking motive, the number and frequency of transactions, and the time between the purchase and sale of products. A person may be a trader in some transactions and a consumer in other transactions.

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[23] Section 225(3) DMCC Act.

[24] Section 249 DMCC Act.

[25] Paragraph 1345 DMCC Act explanatory notes.

## Examples

**OUTSIDE SCOPE** (not covered by the UCP provisions)

1. Business-to-business practices with no potential to affect consumers

> A trader sells specialist tractor parts to businesses only. As consumers do not buy the trader's products, the trader does not need to consider compliance with the UCP provisions. The trader should however consider the Business Protection from Misleading Marketing Regulations 2008 (Statutory Instrument 2008/1276).

**IN SCOPE** (covered by the UCP provisions)[26]

2. Practices with the potential to affect both consumers and traders

> A trader sells spare computer parts over the internet. They sell a range of different products. The trader needs to consider compliance with the UCP provisions if consumers may buy the products.

3. Any aspect of a business-to-business practice that relates to the promotion or supply of a product to consumers

> A trader supplies waterproof clothing to retailers which market themselves to consumers as suppliers of sustainable 'ecofriendly' fashion products. The trader tells retailers that all its products are comprised of a specified minimum percentage of recycled material. Although the trader does not sell directly to consumers, the trader must ensure that any claims, statements or representations they make to retailers are truthful and accurate as they relate to the ultimate promotion or supply of the product to consumers.

[26] There can be several traders involved in the promotion or supply of a product to and from consumers, such as manufacturers, retailers, marketing professionals, brand representatives etc. The practices of each of these traders would be covered by the UCP provisions.

A trader makes and sells processed cheese slices to supermarkets. Although the trader does not sell directly to consumers, any labels they produce and information they give to retailers must be compliant with the UCP provisions as they relate to the promotion and sale of the cheese slices to consumers.

Note that other legislation also applies to the labelling of food products. Traders must comply with all relevant legislation, not just the UCP provisions.

4. Practices by a trader where they purchase a product from the consumer

A trader makes statements about the value of a car they might purchase from a consumer. These statements would need to comply with the UCP provisions.

5. Practices by a trader where they enable consumers to sell products to other persons (including other consumers)

An online marketplace designs their website to showcase featured deals, including listings from consumers who wish to sell their unwanted and used household appliances. The online marketplace's own practices must comply with the UCP provisions (for example they may be carrying out a banned practice if they falsely state that a particular featured appliance is available for a limited time only when in fact the consumer has not listed it as such).

## The average consumer

3.16 Whether a commercial practice breaches the requirements of professional diligence or the prohibitions of misleading and aggressive practices will be judged by reference to the 'average consumer', the 'average member' of a targeted group of consumers and the 'average member' of a vulnerable group of consumers (as appropriate).[27] This Guidance uses 'average consumer' as a shorthand for each of these three types of consumers.

[27] Sections 246 and 247 DMCC Act.

3.17 Where a practice is directed to a particular group of consumers, the 'average consumer' refers to the average member of that group. This type of average consumer is referred to in this Guidance as the ‘average targeted consumer’.

3.18 Where a group of consumers is vulnerable to a commercial practice in a way that the trader could reasonably be expected to foresee, the 'average consumer' refers to the average member of that group.

3.19 There is no requirement to show evidence of actual consumers being affected by an unfair commercial practice. Different practices, and even the same practices in different circumstances, may have different effects depending on the type of consumer they reach or affect. The concepts are intended to help the court and/or the CMA (as the case may be) decide if a practice is prohibited due to its potential impact on relevant consumers. The provisions concerning vulnerable consumers are there to ensure that traders do not unfairly exploit vulnerable people, even if their practices may not change non-vulnerable consumers' decisions.

***Average member of a vulnerable group of consumers***

3.20 Where:

*(a)* there is a group of consumers,

*(b)* the group is particularly vulnerable to a commercial practice, and

*(c)* the trader could reasonably be expected to foresee that the group of consumers is vulnerable to the commercial practice,

then it is the average member of that group that is the relevant average consumer.[28] In relation to the breaches mentioned in paragraph 3.16, whether a commercial practice is unfair hinges on whether that vulnerability is likely to cause an average member of the group to take a transactional decision that they would not have taken otherwise.

3.21 This offers protection to consumers who may be particularly vulnerable either to a commercial practice (eg to particular selling techniques) or because of the underlying product (ie where the product may be only or mainly of interest to the vulnerable group).[29] A commercial practice will be assessed from the perspective of an average member of that group whose vulnerability the trader could reasonably be expected to foresee. The test is objective. It is not

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[28] Section 247(1) and (2) and section 246(5) DMCC Act.

[29] Section 247(1) and (3) DMCC Act.

necessary that the trader actually foresees the effect (or likely effect) on vulnerable consumers, only that they could reasonably have been expected to do so.

3.22 Consumers are treated as vulnerable to a practice or because of the underlying product within the meaning of the UCP provisions, if (among other things) they are vulnerable because of age, physical or mental health, credulity or the circumstances they are in.[30]

*(a)* **Age:** it may be appropriate to consider a practice from the perspective of an older or younger consumer. For example, the elderly might be particularly vulnerable to certain practices connected with burglar alarm sales, or children might be particularly vulnerable to advertisements relating to toys shown on daytime television or within apps that they use.

*(b)* **Mental or physical health:** this covers a range of health issues or conditions including sensory impairment, limited mobility, psychological difficulties or distress, and other disabilities. For example, consumers who need to use wheelchairs might be a vulnerable group in relation to advertising claims about ease of access to a holiday destination or entertainment venue, or those with a hearing impairment may be a particularly vulnerable group in relation to advertising claims about 'hearing aid compatibility' in a telephone advertisement. Consumers who cannot see may need additional assistance to read the terms and conditions of a contract. Consumers who experience eating disorders might be particularly vulnerable in relation to claims promulgated on social media about the weight management benefits of a product.

*(c)* **Credulity:** this covers groups of consumers who may more readily believe specific claims. The term is neutral, so the effect is to protect members of a group who are for any reason open to be influenced by certain claims. An instance might be members of a group who, because of a particular belief system they have, might believe certain claims more readily than others.

*(d)* **Circumstances:** vulnerability can also be context dependent and is not limited to factors that are intrinsic to the person. This may include, among other things, being in mourning, going through a divorce, or losing a job. For example, the advertising of training opportunities for people who have recently been made redundant is likely to be assessed from the

[30] Section 247(4) DMCC Act.

perspective of a consumer who is vulnerable because of the circumstances of having lost their job.

3.23 These categories are non-exhaustive and are not mutually exclusive. Some consumers might be vulnerable as a result of a combination of personal characteristics, including ones not specified in the categories above (eg neurodiversity), and/or external circumstances.

***Average targeted consumer***

3.24 The average targeted consumer will be relevant where a commercial practice is directed to a particular group of consumers. If a practice is targeted, then it is the average member of that group and that member's characteristics which are primarily relevant. The average targeted consumer is assumed to be reasonably well informed and reasonably observant and circumspect, subject to the characteristics of that group.[31]

3.25 Indications of whether a group is targeted might be found in the way advertising is placed, the language used in a commercial practice, the nature of the product and the context. Examples include:

*(a)* television advertisements during children's programmes or adverts displayed within online games that children play, which would be directed at children (and/or their parents).

*(b)* advertisements for a particular type of credit product directed at 'non-status' or 'sub-prime' borrowers.

***Average consumer***

3.26 When a group of consumers is not particularly vulnerable to a commercial practice in a way that the trader could reasonably be expected to foresee, and the commercial practice is not directed at a particular group, the ‘general’ average consumer is the relevant average consumer. The notional average consumer should generally be assumed to be reasonably well informed and reasonably observant and circumspect. While the standard is objective in character, it recognises that an average consumer is likely to not be a technical expert, nor does 'average' mean a statistically average consumer. The definition is not a statistical test or statistical average.[32]

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[31] Section 246(2) and (4) DMCC Act.
[32] Paragraph 1434 DMCC Act explanatory notes.

3.27 In addition, the average consumer cannot be expected to do their own research to find out any relevant information if the trader hides it.[33]

## Transactional decision

3.28 This Guidance uses 'take a different decision' as a shorthand for a transactional decision that an average consumer would not have taken otherwise.

3.29 The UCP provisions define a transactional decision as ‘any decision made by a consumer relating to—

*(a)* the purchase or supply of a product (including whether, how or on what terms to make the purchase or supply);

*(b)* the retention, disposal or withdrawal of a product (including whether, how or on what terms to retain or dispose of it);

*(c)* the exercise of contractual rights in relation to a product (including whether, how or on what terms to exercise such rights)’.[34]

3.30 'Transactional decision' is an important concept covering a wide range of decisions that have been or may be taken by consumers in relation to products. There does not need to be an actual transaction between the consumer and trader for there to be a transactional decision as the concept is broader and includes decisions on whether to do something or not to do something.[35] The wording makes clear that transactional decisions may occur before a consumer has taken any in principle decision whether to purchase a product. It covers decisions taken before, during and after a contract is made or a transaction takes place[36] and includes, for example:

*(a)* whether to visit a shop,

*(b)* whether to click through a website,

*(c)* whether to agree to a sales presentation or view a property,

*(d)* whether to buy a product,

[33] Section 246(3) DMCC Act.
[34] Section 245 DMCC Act.
[35] Paragraph 1429 DMCC Act explanatory notes.
[36] Paragraph 1430 DMCC Act explanatory notes.

*(e)* whether to sell a product (to a trader or another consumer),

*(f)* whether to enter a contract,

*(g)* whether to exercise a cancellation right, a right to a refund or replacement, or a right in relation to an after-sales service,

*(h)* whether to pay a debt.[37]

[37] Although it is important to note that whilst the way in which debts are enforced or collected may lead to unfair commercial practices by the trader or his agents, this does not of itself enable consumers to refuse to pay legitimate debts.

## 4. Assessing unfairness of commercial practices

4.1 Under the UCP provisions, a subset of commercial practices is prohibited regardless of their impact on the average consumer's transactional decisions (ie the transactional decision test does not apply), whereas others are only unfair if they are likely to cause the average consumer to take a different decision. The flowchart below illustrates how certain commercial practices are always prohibited, whereas the unfairness of other practices depends on their effect on consumers. The prohibition on contravening the requirements of professional diligence (which is subject to a transactional decision test) acts as a backstop as it may extend to practices that would not infringe the other prohibitions.

4.2 The omission of any information that must be contained in an invitation to purchase is not subject to a transactional decision test. In addition, there are 32 commercial practices listed in Schedule 20 to the DMCC Act which are prohibited in all circumstances, as is the promotion of unfair commercial practices in a code of conduct.

4.3 For a commercial practice to be a breach of the prohibitions on misleading and aggressive practices, or of the requirements of professional diligence, it must involve the conduct specified in the prohibition **and** the practice must be likely to cause the average consumer to take a different decision. This Guidance explains these prohibitions first, before moving on to the prohibitions which do not involve the transactional decision test.

# Is the commercial practice unfair?

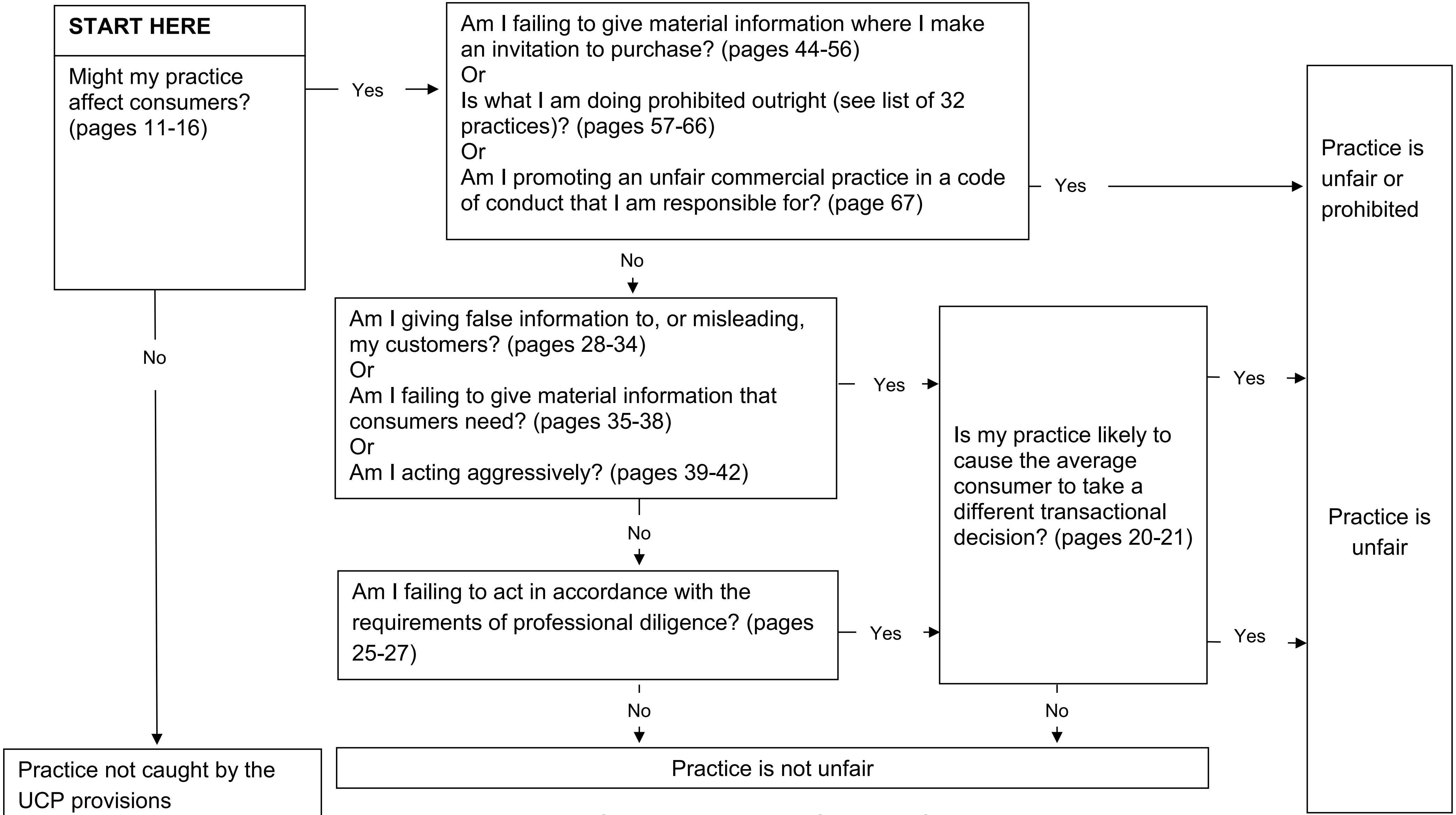


**Figure 2: Flowchart for assessing the unfairness of commercial practices**

# PART 2: Commercial practices affecting the average consumer's transactional decisions

## 5. Contravention of the requirements of professional diligence

5.1 The UCP provisions include a general prohibition on unfair business-to-consumer commercial practices.[38] This prohibition may apply to a wide range of commercial practices, including those that do not fall into the more specific prohibitions of misleading and aggressive practices, or banned practices. This means it acts as a safety net, setting a standard against which new as well as existing practices can be judged.[39]

### General prohibition

5.2 The prohibition is made up of two components. It prohibits practices that:

*(a)* contravene the requirements of professional diligence,

and

*(b)* are likely to cause the average consumer to take a different decision.[40]

5.3 The first component is concerned with the conduct itself – that is the standards of the trader's practice. The second is concerned with the likely effect the practice has on the average consumer's decision making.

### Professional diligence

5.4 Professional diligence is defined as: 'the standard of skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either—

*(a)* honest market practice in the trader's field of activity, or

*(b)* the general principle of good faith in the trader's field of activity.'[41]

5.5 Professional diligence is an objective standard applying both to the skill that a trader uses and the care with which they treat consumers. The practices that are prevalent in the trader's field are relevant. However, where a sector has evolved in such a way that practices which negatively impact on consumer decision making have become entrenched or commonplace, applying the

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[38] Section 225(4)(a)(iv) DMCC Act.
[39] This is consistent with the corresponding provision in the CPUTRs and the UCPD.
[40] Section 225(4)(a)(iv) DMCC Act.
[41] Section 229 DMCC Act.

requirements of honest market practice and the general principle of good faith may mean that these practices are contrary to professional diligence even though there are few or no examples of countervailing good practice in the trader's field.[42]

5.6 Acting in a professionally diligent manner includes having regard to the consumer's legitimate interests or expectations and taking steps to protect these. For example, a trader should not take advantage of the consumer's lack of experience or unfamiliarity with a product.[43]

5.7 Guidance and codes of practice may be drawn upon to help establish whether a trader is behaving in a professionally diligent manner. However, complying with these codes and guidance may not always be sufficient in itself for a trader to be professionally diligent.

***Examples***

1. An online trader supplies a dog walking service. Sometimes customers want to complain about the service they received, but the trader ignores their emails and takes a long time to answer phone calls. When they do answer the phone, customer service staff are dismissive and have been trained to say that no compensation is available. The complaint handling is not carried out with the standard of care that should be expected. As a result, consumers are hindered from securing redress in a timely manner.

2. A builder carries out work on a customer's roof. After finishing the job, the roof leaks. The task has not been carried out with the standard of skill that should be expected. As a result, the customer needs to instruct a different builder to repair the work.

[42] Paragraph 1371 DMCC Act explanatory notes.

[43] Paragraphs 1371 and 1372 DMCC Act explanatory notes.

3. An online platform enables consumers to find sellers of collectable items. Many of the sellers purport to be private individuals, and so not bound by consumer law. The platform could tell from the sales history of those sellers that they sell sufficient volumes of products with sufficient regularity that they are clearly acting for business purposes, but it continues to allow the sellers to hold themselves out as private individuals. This is contrary to the standard of care and skill to be expected of the platform and as a result consumers buying collectable items are hindered from exercising their contractual rights against sellers if things go wrong.

# 6. Misleading actions

6.1 The UCP provisions prohibit misleading actions which are likely to cause the average consumer to take a different decision.[44]

6.2 This prohibition contains four types of misleading action:

*(a)* provision of false or misleading information,

*(b)* an overall presentation that is likely to deceive the average consumer,

*(c)* marketing which creates or is likely to create confusion with another trader, or their product or distinguishing mark,

*(d)* failing to comply with a requirement in a code of conduct which a trader purports to be complying with.

6.3 It would be an infringement of the UCP provisions if any one of these practices occurs and the average consumer is likely to take a different decision as a result. Importantly, no consumers need to have in fact been misled or deceived for a trader to have infringed the UCP provisions. Each of these types of misleading action is dealt with in greater detail below.

## False or misleading information

6.4 These are actions that mislead by:

*(a)* containing information relating to a product, a trader or any other matter relevant to a transactional decision that is false or misleading,[45]

including

*(b)* information which, although true, is presented in a misleading way,[46]

and

*(c)* as a result, it is likely to cause the average consumer to take a different decision.[47]

[44] The prohibition is contained in section 225(4)(a)(i) and section 226 of the DMCC Act.
[45] Section 226(1)(a) DMCC Act.
[46] Section 226(2) DMCC Act.
[47] Section 225(4)(a)(i) DMCC Act.

6.5 Unlike the CPUTRs, the UCP provisions do not expressly set out the types of information that are relevant to a transactional decision. While the list of relevant information in the CPUTRs is not restated in the UCP provisions, it may help to illustrate the types of matters in relation to which traders should provide clear and accurate information. Non-exhaustively, these matters include:

*(a)* the existence or nature of the product,

*(b)* the main characteristics of the product, including

(i) its availability, quantity and specification,

(ii) its benefits or risks,[48]

(iii) fitness for purpose of the product,

(iv) usage or results to be expected from use of the product,

(v) execution, composition or accessories of the product,

(vi) geographical or commercial origin of the product,

(vii) the method and date of manufacture or provision of the product,

(viii) results and material features of tests or checks carried out on the product,

(ix) delivery of the product,

(x) after-sale customer assistance concerning the product,

(xi) the handling of complaints about the product,

*(c)* the extent of the trader's commitments,

*(d)* the motives for the commercial practice,[49]

*(e)* the nature of the sales process,[50]

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[48] This could include, for example, the environmental impact of a product.

[49] This could include, for example, any statements that the trader might make about their intention for the proceeds of their commercial practice, such as stating that they intend to donate some profits to charity.

[50] This could include, for example, an indication of how many steps there are before the consumer can conclude a purchase.

*(f)* any statement or symbol relating to direct or indirect sponsorship or approval of the trader or the product,

*(g)* the price or the manner in which the price is calculated,

*(h)* the existence of a specific price advantage,

*(i)* the need for a service, part, replacement or repair,

*(j)* the nature, attributes and rights of the trader or their agent, including

(i) identity,

(ii) assets,

(iii) qualifications,

(iv) status,

(v) approval,

(vi) affiliations or connections,

(vii) ownership of industrial, commercial or intellectual property rights,

(viii) awards and distinctions,

*(k)* the consumer's rights or the risks they may face.

6.6 The 'consumer's rights' could include, for example, rights the consumer may have under core consumer protection law such as Parts 1 and 2, Chapter 5 of Part 3 and Schedules 2 and 3 to the Consumer Rights Act 2015,[51] and under various sector-specific legislation such as The Package Travel and Linked Travel Arrangements Regulations 2018.[52]

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[51] Consumer Rights Act 2015 (legislation.gov.uk)

[52] Statutory instrument 2018/634.

***Examples***

1. A trader tries to sell a consumer a 'premium' package for an online television streaming service. The consumer is falsely told that the package includes certain key channels, which are in fact only available at an additional subscription cost. The trader has provided false or misleading information relating to the product (in this case, the contents of the 'premium' package). This practice is likely to cause the average consumer to take a different decision about the package, for example to buy it where otherwise they would not.

2. A trader advertises a house as having 3 bedrooms, when in fact it has 2; or it does have 3 rooms called bedrooms but the third is physically too small to fit a bed in. This is likely to cause the average consumer to take a different decision in relation to the house as a result (eg decide to view the house).

## Overall deceptive presentation

6.7 A commercial practice involves a misleading action if it involves:

*(a)* an overall presentation which is likely to deceive the average consumer about a matter relating to a product, a trader or any matter relevant to a transactional decision,[53]

and

*(b)* as a result, it is likely to cause the average consumer to take a different decision.[54]

6.8 This includes a situation where the information that consumers receive is not actually false, but it is arranged, displayed or otherwise presented in a way that is likely to deceive the average consumer.[55]

6.9 The non-exhaustive list of matters in paragraph 6.5 above is also relevant to this type of misleading action.

[53] Section 226(1)(b) DMCC Act.
[54] Section 225(4)(a)(i) DMCC Act.
[55] Section 226(3) DMCC Act.

***Examples***

1. A trader advertises televisions for sale saying the price has been substantially discounted. However, a footnote explains that only a very small number of the televisions are on sale and only for a very short period of time in one of the trader's numerous shops. Whilst the trader's advertisement may be factually correct, the way in which the information is presented is likely to deceive the average consumer about the existence of a specific price advantage in a way that is likely to cause them to take a different decision about the television. For example, it may cause the consumer to go to the shop where they otherwise would not have.

2. A trader uses attention-grabbing pop-up messages on their website to tell consumers of interest in or demand for a product and urging them to act quickly. One message states 'Be quick! We've sold 10 in the last 5 mins.' While it is literally true that the stated number of people have just bought the product, the trader's stock levels are high and there is no need for consumers to hurry.

3. A trader highlights just one of several charges for a product on their website and provides less conspicuous information about the other charge(s). The information provided may be misleading by creating the impression that the product is cheaper than it really is. A practice like this could also amount to a misleading omission (see Chapter 7) and/or omission of material information from an invitation to purchase (see Chapter 9).

## Creating confusion with competitors' products

6.10 Commercial practices are also prohibited as misleading actions if:

*(a)* they market a product in a way which creates, or is likely to create, confusion with any products, trade marks, trade names or other distinguishing marks of another trader,[56]

and

[56] Section 226(1)(c) DMCC Act.

(b) this is likely to cause the average consumer to take a different decision as a result.[57]

***Examples***

> 1. A major sunglasses retailer is selling "Sunspex", a highly successful brand with signature pink colour. A competing trader launches "Sunspeks" in a slightly different shade of pink. The average consumer is likely to be confused and more likely to buy Sunspeks than they otherwise would be.

> 2. A trader pays for search results to be shown to consumers who search for a competitor's product, which lead to a website with a domain name that suggests it is operated by that competitor (while in fact it is not), and as a result consumers purchase products from that website.

## Failing to comply with requirements in a code of conduct

6.11 The fourth category of commercial practices prohibited as misleading actions is where:

*(a)* the trader indicates that they act in compliance with a code of conduct,[58]

and

*(b)* the trader fails to comply with a requirement in the code in relation to which the trader does not have discretion and that failure can be verified,[59]

and

*(c)* as a result, it is likely to cause the average consumer to take a different decision.[60]

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[57] Section 225(4)(a)(i) DMCC Act.
[58] Section 226(1)(d) DMCC Act.
[59] Section 226(5) DMCC Act.
[60] Section 225(4)(a)(i) DMCC Act. In general, membership of a code of conduct is likely to enhance consumer trust in traders which are members, and accordingly in the CMA's view failing to comply with the requirements of a code is highly likely to impact consumer decision making.

***Example***

A trader has agreed to be bound by a code of practice that promotes the sustainable use of wood and displays the code's logo in an advertising campaign. The code of practice contains a clear requirement that its members will not use hardwood from unsustainable sources. There is no discretion afforded to the trader in relation to the requirement, which is capable of being verified. It is found that the product advertised by the trader contains hardwood from endangered rainforests. As the average consumer would expect code members to sell products which comply with their code, this is likely to cause the consumer to take a different decision, for example to buy the hardwood product when they otherwise would not.

# 7. Misleading omissions

7.1 The UCP provisions prohibit practices that may mislead by failing to give consumers the information they need to make an informed transactional decision (in relation to a product).[61] This occurs when practices involve one or more of the following:

*(a)* omitting material information,

*(b)* omitting information which the trader is required under any other piece of legislation to give to a consumer as part of the practice,

*(c)* failing to identify their commercial intent unless it is already apparent from the context,

and

*(d)* as a result, the average consumer is likely to take a different decision.

## Omitting material information

7.2 Information is omitted when it is not included. However, information may also be considered omitted where it is provided to a consumer, but it is provided in a way:

*(a)* that is unclear or untimely, or

*(b)* that the consumer is unlikely to see it.[62]

7.3 Therefore, consideration also needs to be given to how the information is displayed, such as the font size used, the positioning and colour of text, the use of click-through windows, and whether material information is sufficiently prominent.

7.4 Where information is concealed by the trader in some way, the consumer is taken as not knowing it, even if they might know it from some other source, for example by conducting some research.[63]

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[61] The prohibition is contained in section 225(4)(a)(ii) and section 227 of the DMCC Act.
[62] Section 227(4) DMCC Act.
[63] Section 246(3) DMCC Act.

***Examples***

1. A trader operates a car park. They fail to display the price(s) of parking clearly at a point before the consumer enters the car park and incurs a charge.

2. A trader lists a biomass boiler for sale on a webpage on their website. The webpage contains an image and a brief description of the boiler, alongside a claim 'cut your bills by £1,700 each year with a pellet boiler'. A separate hyperlink is given to find out important qualifying information, including that the running costs would depend on the size of the property the boiler is installed in. The consumer does not open the link as it is placed at the bottom of the webpage in a font that makes it difficult to pick out.

***Material information***

7.5 Material information is 'information that the average consumer needs to take an informed transactional decision'.[64] What information is required will depend on the circumstances, for example what the product concerned is, and where and how it is offered for sale. This may range from a very small amount of information for simple products, to more information for complex products.

7.6 The price of a product in most circumstances is material information. Therefore, failing to provide this in a timely fashion before a transactional decision is made is likely to amount to a misleading omission. For example, in restaurants, the prices of the food and drink available will need to be displayed to consumers before they order, and in many cases before they enter the restaurant. See also Chapter 9 (Omission of material information from an invitation to purchase) in relation to pricing information and other types of information that are likely to be material.

[64] Section 227(2) DMCC Act.

*Examples*

1. A trader omits to mention (at all or until the final checkout) that a contract has to run for a minimum period, or that the consumer must make purchases in future. Such information is material and has to be given to the consumer.

2. A trader advertises mobile phones for sale but omits to mention that the phones are second hand and/or have been reconditioned. Such information is material and needs to be made clear to consumers.

3. A trader makes a claim that a product is 'greener'. The claim does not make clear the basis for the comparison. It is unclear whether the product is 'greener' than other products the trader sells, or those sold by a competitor, or what is meant by the term 'greener'. This is material information that the consumer needs to make an informed decision.

## Information required by legislation

7.7 Various pieces of legislation impose specific requirements on traders to provide consumers with certain information about matters ranging from product features to the consumer protection rights that apply (eg cancellation rights). The omission of such information may constitute an infringement under those other pieces of legislation, which may carry a variety of civil and/or criminal sanctions. For example, the Package Travel and Linked Travel Arrangements Regulations 2018[65] require that travellers must be provided with information about whether a trip is generally suitable for persons with reduced mobility before the conclusion of the package travel contract.[66] Failure to do so is an offence punishable by a fine.[67]

7.8 In addition to being a breach of the underlying legislation, a failure to provide consumers with the required information may also amount to a misleading omission under the UCP provisions (if that omission is likely to cause the average consumer to take a different decision).[68] This extends to

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[65] Statutory instrument 2018/634.
[66] Regulation 5(1) and Schedule 1, paragraph 10 to the Package Travel and Linked Travel Arrangements Regulations 2018.
[67] Regulation 5(5) of the Package Travel and Linked Travel Arrangements Regulations 2018.
[68] Section 227(1)(b) DMCC Act.

infringements of other parts of the DMCC Act (eg in relation to subscription contracts and consumer saving schemes).[69]

## Commercial intent

7.9 A commercial practice involves a misleading omission if it fails to identify its commercial intent, unless this is already apparent from the context.[70] A situation where the context may make clear that the intent is commercial includes, for example, information on a billboard that is obviously intended to market or advertise a product.[71]

7.10 A failure to identify the commercial intent of a practice could include giving consumers the impression that there is no commercial aim, as well as failing to identify the specific commercial intent.

***Example***

> A trader contacts consumers by telephone and asks them to take part in a survey about their views on personal security in the area. However, during the call the trader asks consumers if they want to purchase a burglar alarm system. The commercial practice did not identify its commercial intent at the outset of the call.

## Consideration of context for omitting information

7.11 The UCP provisions specify that, when considering whether a practice involves a misleading omission, regard should be had to the context and, in particular, to any limitations of the means of communication used that make it impractical to give the necessary information.[72] This includes limitations of space or time, such as the size of packaging or the duration of a radio advertisement, that cannot practicably convey the terms and conditions that apply in relation to that product. In such circumstances, if other means have been used by the trader to convey this information, these need to be considered.[73]

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[69] Section 227(1)(b) specifies that a commercial practice involves a misleading omission if it 'omits information which the trader is required under any other enactment to give to a consumer'. Section 1 of the Interpretation Act 1978 makes clear that 'enactment' means every section of an act.
[70] Section 227(1)(c) DMCC Act.
[71] Paragraph 1361 DMCC Act explanatory notes.
[72] Section 227(3)(a) DMCC Act.
[73] Section 227(3)(b) DMCC Act.

# 8. Aggressive practices

8.1 The UCP provisions prohibit a commercial practice where:

*(a)* it uses harassment, coercion or undue influence,[74]

and

*(b)* the average consumer is likely to take a different decision as a result.[75]

## Harassment, coercion and undue influence

8.2 'Harassment' is not expressly defined in the UCP provisions. 'Coercion' is non-exhaustively defined as including 'the use or threat of physical force'.[76]

8.3 'Undue influence' is defined as 'exploiting a position of power in relation to a consumer so as to apply pressure in a way which significantly limits the consumer's ability to make an informed decision'.[77] There are various circumstances where a trader may be in a position of power. For example, this may arise because of the trader's expertise regarding a product, the consumer's unfamiliarity with technology, or as a result of the particular circumstances of the consumer, such as if the consumer is indebted to the trader or is otherwise in a vulnerable position.

8.4 Harassment, coercion or undue influence are techniques that intimidate, exploit or otherwise pressure consumers. Each may apply physical or non-physical (including psychological) pressure as well as the threat of such. Such techniques may be likely to cause, for example, consumers to purchase a product at a much higher price or on disadvantageous terms. This could happen even if:

*(a)* consumers might still have bought the product from the same trader, but on different terms, or

*(b)* consumers might still have bought the product, but from a different trader.

8.5 The examples below illustrate what harassment, coercion and undue influence may entail in practice. These are not mutually exclusive concepts. It

[74] Section 228(1) DMCC Act.
[75] Section 225(4)(a)(iii) DMCC Act.
[76] Section 228(3)(a) DMCC Act.
[77] Section 228(3)(b) DMCC Act

is possible for certain practices to amount to more than one of these techniques.

***Examples***

1. A debt collector pressures borrowers to repay a debt by contacting them at unreasonable times (such as late at night) or at unreasonable locations (such as at the debtor's workplace unless the consumer has specifically requested this).

2. A doorstep trader pressures a consumer to pay in cash for home repairs immediately. The trader insists on giving the consumer a lift to the bank to withdraw the money.

3. A trader measures up for an extension to a consumer's property, and when they indicate the price, they offer the consumer a 50% discount if they agree to sign a contract immediately, which puts pressure on the consumer to agree without any further shopping around.

4. A mechanic has a consumer's car at their garage and has done more work than agreed, and refuses to return the car to the consumer until they are paid in full for the work. The mechanic did not check with the consumer before they went ahead with the extra work. As the mechanic has the car, they have power over the consumer's decision to pay for the unauthorised work. They have exploited their position of power, by demanding payment for doing more than was agreed and refusing to return the vehicle until the consumer has paid for all the work.

## Factors indicating an aggressive practice

8.6 When considering whether a commercial practice uses either harassment, coercion or undue influence, the following factors must be taken into account.[78] It is not necessary for all of these factors to be problematic for a practice to be aggressive and therefore unfair.

8.7 The factors are:

[78] Section 228(2) DMCC Act.

*(a)* the nature of the practice,

*(b)* the timing and location of the practice,

*(c)* whether the practice involves the use of any threatening or abusive language or behaviour,

*(d)* whether the practice exploits any vulnerability of a consumer (which includes factors such as the consumer's age, health, credulity and the circumstances they are in),

*(e)* whether the practice involves a threat to take action which cannot legally be taken,

*(f)* whether the practice requires a consumer to take onerous or disproportionate action in order to exercise rights that the consumer has in relation to a product.

## Examples

1. A trader takes consumers to a timeshare presentation at a distant location, with no return transport unless the consumers sign a contract. (Nature / location of the practice; exploitation of a consumer's vulnerability)

2. A debt collector threatens consumers with recovery of money by bailiffs for unenforceable debts. (Threatening behaviour and threat to take action which cannot legally be taken) This may also amount to a misleading action (see Chapter 6).

3. Staff working in a funeral director put pressure on a recently bereaved relative, who is deciding on a coffin, to buy a more expensive coffin to avoid bringing 'shame' on the family. (Exploitation of a consumer's vulnerability)

4. A consumer contacts a car retailer about a fault on a vehicle they have purchased recently. The retailer ignores this communication for several weeks. Eventually they inform the consumer they will need to book the car in for a check by phoning a special number, but no one answers when the consumer tries to call. (Requiring a consumer to take onerous action in order to exercise their rights)

5. An online retailer builds a contract termination process that requires customers to click multiple times to confirm their decision to terminate and enter additional details about their reasons for termination. The retailer also provides unnecessary messages about the risks of terminating.

# PART 3: Commercial practices that are prohibited regardless of their impact on the average consumer's transactional decisions

# 9. Omission of material information from an invitation to purchase

## Invitations to purchase

9.1 The UCP provisions regulate certain kinds of commercial practice known as 'invitations to purchase'.[79] They specify information that is automatically regarded as material information. In contrast to the misleading omissions prohibition described in Chapter 7 (Misleading omissions), the omission of material information from an invitation to purchase is an unfair practice regardless of whether it is likely to impact a consumer's transactional decision.[80]

9.2 Where traders make invitations to purchase, they will need to ensure that they include the information required by the UCP provisions, or that such information is apparent from the context.

## Identifying an invitation to purchase

9.3 The UCP provisions define an invitation to purchase as 'a commercial practice involving the provision of information to a consumer—

*(a)* which indicates the characteristics of a product and its price, and

*(b)* which enables, or purports to enable, the consumer to decide whether to purchase the product or take another transactional decision in relation to the product'.[81]

9.4 The idea behind this concept is that the consumer should be given the key information they need to make an informed transactional decision. An invitation to purchase can exist even where the information indicating the price and characteristics of a product is minimal. This includes, for example, where the lowest price for which the advertised product can be bought is indicated or where a single visual reference is used to describe a product that is available in a variety of forms.[82]

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[79] The UCP provisions concept of 'invitation to purchase' is not the same as the UK concept of 'invitation to treat'.
[80] The prohibition is contained in section 225(4)(b) and section 230 of the DMCC Act.
[81] Section 230(10) DMCC Act.
[82] Paragraph 1374 DMCC Act explanatory notes.

9.5 An invitation to purchase can exist before the consumer makes an in principle decision to purchase a product[83] and before it is possible to make a purchase. It can occur even where the information given is far from complete. For example, an advertisement that advertises the monthly price of a broadband package will still be an invitation to purchase, even though it omits other important pricing information such as a one-off connection fee.

9.6 Further, an invitation to purchase does not need to include an actual opportunity to enable the consumer to purchase the product.[84] For example, a poster advertising a broadband package at or starting from a particular price, which appears above the seats inside a train carriage, will still be an invitation to purchase even if the poster does not specify the mechanism for ordering the package.

9.7 The following are examples of invitations to purchase where the product's price and characteristics are given:

*(a)* a price on a product in a shop,

*(b)* an item listing on the website of an online marketplace,

*(c)* a menu (including a physical menu card or a digital menu that can be accessed through the scanning of a QR code) in a restaurant,

*(d)* an advertisement of a product on TV or in a social media post,

*(e)* a text message promotion,

*(f)* an advertisement in a newspaper displaying a car with a 'drive away from' price,

*(g)* a banner that appears within a mobile application advertising an ad-free version of the app or in-app purchases.

## Commercial practices which are not invitations to purchase

9.8 Where a commercial practice does not indicate the characteristics of a specific product, through text, image or otherwise, it will not be an invitation to purchase. A commercial practice which does not include a price is not an invitation to purchase.

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[83] See 'Transactional decision' section in Chapter 3 (Scope).

[84] Paragraph 1375 DMCC Act explanatory notes.

9.9 In many cases, advertisements which promote a trader's 'brand' rather than any particular product(s) will not be invitations to purchase.

9.10 It is important to note that if a commercial practice is not an invitation to purchase a trader may still be required to provide certain information if consumers need it to make an informed decision. Failure to do so may constitute a misleading omission, subject to meeting the transactional decision test (see Chapter 7 (Misleading omissions)).

## Required (material) information

9.11 The UCP provisions deem certain information to be 'material' where traders make invitations to purchase. A list of the categories of information that the consumer must be given is set out in section 230(2) of the DMCC Act and is summarised below:

*(a)* The main characteristics of the product – for example, what it is and what it does – to the extent appropriate to the means used to communicate the invitation to purchase and the nature of the product. The main characteristics described should correspond to the price indicated – for example, where the price given is for a basic model, the main characteristics should make clear the product is a basic model.

*(b)* Either the total price of the product (including any mandatory fees, taxes, charges or other payments that the consumer must pay if they purchase the product), or

*(c)* where, because of the nature of the product, the total price cannot be reasonably calculated in advance, the way it will be calculated, such as to enable the consumer to calculate the price.[85]

*(d)* Any optional freight, delivery or postal charges, including any taxes, not included in the total price of the product (or where these cannot reasonably be calculated in advance, the fact that such charges may be payable).

*(e)* The identity of the trader, such as their personal or trading name, and the identity of any other person on whose behalf the trader is acting.

[85] Information about how a mandatory charge (that cannot be calculated in advance) will be calculated must be set out with as much prominence as the pricing information given under s.230(2)(b). See the ‘Material pricing information’ section in this chapter for further details.

*(f)* The contact information of the trader, ie:

(i) the address of their place of business,

(ii) if different from the above, the address at which they will accept service of documents,

(iii) any existing email address used by the trader for conducting business.

*(g)* If the trader is acting on behalf of another person (eg as an agent, subcontractor or representative), that other person's contact information.

*(h)* For products involving a right of withdrawal or cancellation, the existence of such rights.

*(i)* If the trader is using any arrangements for payment, delivery, performance[86] or complaint handling that are different from the trader's published practice, information about these alternative arrangements.

*(j)* Any information which the trader is required under any other legislative provision to give to a consumer as part of an invitation to purchase.[87]

9.12 To ensure that traders do not breach the prohibition on the omission of material information from an invitation to purchase, they must provide consumers with information about all of the matters set out in the preceding paragraph. This requirement is subject to the same considerations about the context and the limitations of the communication medium as apply to misleading omissions generally (see Chapter 7 (Misleading omissions)). Where the required information is apparent from the context, traders do not need to provide it separately. An example of information which is likely to be apparent from the context will be the address of a shop which the consumer is already in.

9.13 In addition to providing all the information deemed material under section 230(2) of the DMCC Act, the information must be provided clearly, in a timely fashion and in a way that the consumer is likely to see it.

[86] That is the way in which any work is to be carried out, or a service provided.

[87] This includes requirements to provide information in a broad range of primary and secondary legislation. For example, it includes the information that must be provided to consumers before entering a subscription contract under Chapter 2 of Part 4 of the DMCC Act or before making on-premises, off-premises and distance contracts under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (Statutory instrument 2013/3134). It could also include information which is required by section 227 of the DMCC Act as material information.

## Material pricing information (including prohibition of drip pricing)

9.14 As set out above, the UCP provisions oblige traders to indicate to consumers in an invitation to purchase 'the total price of the product'[88] which 'includes any fees, taxes, charges or other payments that the consumer will necessarily incur if the consumer purchases the product'.[89]

9.15 The purpose of this provision is to ensure that consumers know up front what they will end up paying, instead of additional mandatory pricing information being revealed gradually, to ensure that such pricing information is given accurately and in a full and timely manner. This requirement is in addition to the other UCP provisions, including in relation to misleading actions and omissions.

9.16 If, in addition to paying the price stated in the invitation to purchase (the headline price), a consumer cannot in practice purchase, receive or use a product without the payment of any fee, tax, charge or other payment ('charge' in short), then that charge is mandatory. Failure to give the total price could amount to an infringement of the prohibition of omission of material information from an invitation to purchase.[90] The practice of showing consumers an initial headline price for a product and subsequently introducing additional mandatory charges as consumers proceed with a purchase or transaction – sometimes called 'drip pricing' – is prohibited under the UCP provisions.

9.17 A consumer may be presented with an invitation to purchase at multiple points during the process of deciding whether to purchase or take another transactional decision about a product. Each commercial practice that is an invitation to purchase, even if taking place early on in the consumer journey, has to be lawful. The trader may give pricing components, but where they do so, they must also give the 'total price' which includes all mandatory charges (subject to limited exceptions where these charges cannot be reasonably calculated in advance – see below). The requirement to include all mandatory charges means that where the invitation to purchase relates to a contract for the purchase of a product over a fixed period, the 'total price' advertised by a trader must be the price that the consumer will necessarily incur over the course of the contract. For example, if a trader advertises a £22 per month

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[88] Section 230(2)(b) DMCC Act.
[89] Section 230(4) DMCC Act.
[90] The prohibition is contained in section 225(4)(b) and section 230(1) and (2)(b) of the DMCC Act. Section 230(2)(b) of the DMCC Act is subject to section 230(2)(c) which concerns the provision of information about mandatory charges where, owing to the nature of the product, the whole or any part of the total price cannot reasonably be calculated in advance.

gym membership for a fixed 6 months’ contract, the invitation to purchase should state that the membership costs £132. The trader may still advertise the monthly price in addition to the total price.

***When charges are mandatory versus optional?***

9.18 Mandatory charges are not limited to the price of the advertised product, eg a broadband package. They also include any charges that the consumer must pay (ie cannot avoid) to purchase, receive or use the advertised product such as broadband installation or activation fees.

9.19 In some cases, a trader may wish to offer a genuinely optional service in addition to the product they are selling. This does not have to be included in the headline price if it is genuinely optional. However, merely presenting a charge separately to the headline price or describing it as a service does not make it optional. If the consumer will have to pay the additional charge in order to purchase, receive or use the advertised product, it must be included in the headline price. Such mandatory charges include:

*(a)* administration fees, however described, such as booking or processing fees, quality assurance charges, platform charges, routine cleaning fees and venue restoration fees,

*(b)* delivery charges where consumers cannot arrange for their own collection or delivery of the product being advertised (eg where a consumer is selecting food items from a food delivery app),

*(c)* mandatory cover or service charges at a restaurant,

*(d)* local taxes and other fees that become payable on arrival at hotels or on departure at an airport,

*(e)* pick-up fees or mandatory insurance cover required for renting a car,

*(f)* joining fees that new members pay on top of their first regular payment when joining gyms or getting other subscriptions.

9.20 In addition, charges should not be excluded from the headline price if consumers could in theory avoid them but doing so is not viable in practice. This includes, for example, delivery fees where a collection option is notionally available, but a product cannot be feasibly collected by other means, for example because a trader has a very limited number of physical stores located only in certain parts of the country yet advertises products to consumers across the UK.

9.21 Any delivery charges that are genuinely optional must be provided[91] but may be indicated separately from the headline price. These include delivery fees where the product is advertised on the basis of collection (and a viable collection option is in fact available) or there is an option to pay for a premium delivery option such as next day or nominated date delivery. However, any unclear, untimely or obscure presentation of such optional delivery charges (as with mandatory charges) may still amount to omission of material information from an invitation to purchase[92] and to a misleading omission more generally.[93]

9.22 The headline price should also include any mandatory charges resulting from the trader's input costs, which should not be sprung on consumers separately. For example, a trader who lets a property out to holiday makers may wish to impose an additional fee for cleaning costs on top of the nightly rate for the accommodation. However, as consumers have no control over such expenses (for example, they cannot compare and select the service provider or cleaning products used) and no way of opting out of them, the trader will need to ensure that any such charges are included in their advertised headline price. If a trader wants to present the total price, together with a breakdown of how that price is made up, then that is permissible, although in some cases traders may find it more straightforward to show only the total price.

***When might it not be possible to calculate the total price?***

9.23 In certain limited circumstances, 'if, owing to the nature of the product, the whole or any part of the total price cannot reasonably be calculated in advance', the UCP provisions require that consumers are given information about 'how the price (or that part of it) will be calculated'.[94] Further, such information must 'be such that it enables the consumer to calculate the total price, and be set out with as much prominence as'[95] the headline price.

9.24 Whether the total price of a product can reasonably be calculated in advance is an objective question which requires an assessment of whether there is anything about the product that makes it impossible reasonably to calculate the price or any part of it in advance. If it can be calculated, but the trader

[91] Section 230(2)(g) DMCC Act.

[92] Section 230(9) DMCC Act.

[93] Section 227(4) DMCC Act. Whether a commercial practice amounts to a misleading omission depends on whether it is likely to cause a consumer to take a different decision – see Chapter 7.

[94] Section 230(2)(c) DMCC Act.

[95] Section 230(5) DMCC Act.

chooses not to do so, or has structured their pricing so it is hard to calculate, this will not be 'reasonable' and the relevant mandatory charges should be included in the headline price.

*Example*

> An online seller of tickets excludes mandatory service fees from the headline price because the trader has chosen to base these charges on the total value of a basket of products which is unknown by the trader until the consumer builds their basket. There is nothing about the nature of the product being sold which means that the price could not reasonably be calculated in advance, so this could breach the UCP provisions. It may also constitute a breach of other regulations, eg the Advertising Standards Authority's Codes.[96]

9.25 Traders should not deliberately structure their pricing practices in such a way that prevents them from providing consumers with a total price that includes all reasonably calculable mandatory charges. Any non-calculability of mandatory charges must strictly reflect the nature of the product which the consumer is deciding whether to purchase or take another transactional decision about.

9.26 The nature of certain products (such as those sold by a unit of measurement) is likely to mean that their price cannot always be reasonably calculated in advance as the trader would not know the parameters of what an individual consumer needs and therefore the total price in each case. Examples of products sold by a standard unit of measurement include those sold by:

*(a)* weight – for example, minced meat,

*(b)* length – for example, rope,

*(c)* time – for example, solicitor services charged by the hour; or hotel stays charged per night,

*(d)* distance – for example, airport transfer services charged according to the distance from the pick-up location to the airport,

*(e)* a combination of measurement units – for example, curtains, which are typically priced based on their width and the curtain drop (ie the length from the top to the bottom of the curtain); or courier services which are

[96] The ASA has previously ruled that charging mandatory admin fees based on the number of tickets in the customers' basket and the total price of those tickets is misleading: GET ME IN! Ltd - ASA | CAP, Viagogo AG - ASA | CAP.

typically priced according to an item's weight and the distance between where the parcel is coming from and where it is going.

9.27 In such cases, traders may still be able to reasonably calculate the total price or may choose to provide an inclusive headline price. For example, despite shipping costs being inherently variable, some courier service providers may choose to charge a flat rate for shipping a package, regardless of its weight or destination, within a designated area. Where they choose to do so, the quoted price must be fully inclusive.

9.28 Where it is not reasonable for a trader to calculate the total price in advance, they must provide information which clearly stipulates how the total price will be calculated and enables the consumer to calculate the price themselves. For example, where products are sold by a single unit of measurement, a fully inclusive unit price would both inform the consumer how the total price will be calculated (ie by the price of a given unit) and enable the consumer to calculate the total price themselves (ie by multiplying the unit price by the quantity or volume of the product they wish to buy).

9.29 In more complex circumstances, where the total price would depend on a multitude of factors, providing the required information which would enable the consumer to calculate the total price may mean that the trader should provide a full tariff of the various options for what the total price may ultimately be. For example, the price of portrait photography services may depend on the duration of the photo session, the number and format (eg digital images and/or prints) of photos ordered. If a photographer makes an invitation to purchase for portrait photography, one way of complying with the law to enable a consumer to calculate the total price, would be to provide their hourly rate for the session, the price per photo and the price for each format that the images can be ordered to be provided in. In some cases, such a tariff may be given for each element of the total price, while in other cases it could be given for different packages with pre-determined parameters (eg a 30-minute photo session, with 20 photos, plus digital files of all the pictures) for a given price.

9.30 If a full tariff cannot be provided in an invitation to purchase, for example because the consumer would have to make a number of choices during the purchasing process or the trader would need to undertake further assessment of the consumer's circumstances, traders must still ensure that they do not mislead consumers with the pricing information they provide. Therefore, it may be more appropriate for traders:

*(a)* not to provide a price at all until they have received enough information from the consumer to be able to calculate the total price that would apply to a particular consumer. For example, it is common for home

improvement services, removal services, courier services, cleaning services, holiday booking agents etc. only to quote a price after the consumer has provided information about their circumstances and individual needs or the trader has been able to assess these independently (eg where the consumer does not have the technical knowledge to provide such information).

*(b)* to provide an indicative price, provided it is realistic, meaningful and attainable.[97] For that to be the case, the headline price should not exclude mandatory elements of the total price merely because consumers might have a choice about which mandatory charge to select. Instead, the headline price must include all the mandatory elements. For example, the total price of a cruise holiday may be comprised of several mandatory charges such as cabin, board, port taxes etc. An invitation to purchase may advertise the cruise holiday 'from' a particular price because the consumer has to choose among a variety of cabin options (eg inside cabins with no view, ocean view cabins that have a window, balcony cabins etc.). Nevertheless, the headline price given in the invitation to purchase should include a sum for each mandatory element, including the cabin, as that is a charge that the consumer will necessarily incur if they purchase the cruise holiday. The trader should not include the lowest charge that a consumer might conceivably be able to pay if in fact this is not realistic, meaningful and attainable.

***Presentation of material pricing information***

9.31 All pricing information must be provided clearly, in a timely manner and in a way that the consumer is likely to see it. Where, owing to the nature of the product, the price (or a part of it) cannot be reasonably calculated in advance, the information about how any non-calculable (parts of) prices will be calculated must be provided with as much prominence as the headline price.[98]

9.32 The format for displaying such information is likely to vary depending on the medium used for the invitation to purchase. However, traders must ensure that the presentation of the pricing information utilises space and time as equitably as possible for conveying both the headline price and the information enabling the consumer to calculate the total price. For example,

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[97] Otherwise, such prices could amount to a misleading action (subject to meeting the transactional decision test – see Chapter 6) and/or a breach of the banned practice in paragraph 5 of Schedule 20 to the DMCC Act (making an invitation to purchase products at a specified price that cannot be fulfilled in reasonable quantities).
[98] Section 230(5)(b) DMCC Act.

where a headline price is displayed on a webpage, information enabling the consumer to calculate the total price should not be presented in smaller text at the bottom of the page.[99]

*Limitations resulting from the means of communication*

9.33 An assessment of whether material pricing information has been omitted from an invitation to purchase has to consider ‘any limitations resulting from the means of communication used in the commercial practice (including limitations of space or time), and any steps taken by the trader to overcome those limitations by providing information by other means’.[100] The requirements to provide information, with equal prominence as the headline price, enabling the consumer to calculate the total price are also subject to an assessment of relevant limitations and steps taken to overcome them.[101]

9.34 Invitations to purchase can take many forms such as a price tag on a product in a shop, an item listing or a landing page on a mobile app or a desktop webpage, a pop-up banner for purchases in a mobile app game, a tv or radio commercial, an ad read in a podcast, in-store banners, ad spreads in a magazine, billboards etc.

9.35 In many cases, traders should be able to provide material pricing information in a full and timely manner regardless of the means of communication used. A single price figure inclusive of all mandatory charges will be able to fit on or within all types of devices and media. In addition, where the nature of the product means that the total price cannot be reasonably calculated in advance, the means of communication will often pose no barrier to prominently providing the headline price alongside information enabling the consumer to calculate the total price. For example, where products are sold by a standard unit of measurement and therefore what constitutes ‘a single product’ is inherently variable, giving the unit price (such as £X per pound, square metre, hour etc.) would be acceptable.

9.36 In other cases, the means of communication may afford opportunities for traders to provide the required information with equal prominence as the headline price. For example, where part of the total price of a product is a variable mandatory delivery charge that depends on the distance to the consumer’s location, a website or an app which enables the consumer to enter their postcode, or which uses the consumer’s location, could enable an

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[99] Paragraph 1378 DMCC Act explanatory notes.
[100] Section 230(1) DMCC Act.
[101] Section 230(5) DMCC Act.

immediate calculation of the variable delivery charge such that it is provided with(in) the headline price. This could take the form of prepopulating a basket on the screen with an £X for the delivery fee, which changes as the consumer selects the items they wish to purchase.

9.37 Where the means of communication used has limitations, the trader should take steps to overcome these to provide material pricing information clearly, promptly and unambiguously. If it is genuinely not practicable to do so within the invitation to purchase that contains the headline price, the information enabling the consumer to calculate the total price should be provided in as close proximity as possible and by requiring as few additional actions by the consumer as possible (such as being no more than one click away).

*Example*

A trader sells laptops through an online platform. The product listing page pictures a range of laptops sold by different traders alongside basic information about each laptop (such as the model name and display size) and a 'from' price, which is the price of the basic version in which a particular laptop is available (eg 'From £999'). This 'from' price includes all mandatory charges, including mandatory delivery charges (if any). There is a limited amount of space for each laptop listing. Each listing is an invitation to purchase.

Given the limitations on space to list all the material information required for each laptop on the product listing page, a clearly-indicated 'Learn more' link is provided next to each laptop's picture on the product listing page, taking the consumer to a detailed page. This detailed page is also an invitation to purchase. It includes the remaining specifications (characteristics) of the relevant laptop and that page also gives the total price for each version/configuration in which the laptop is available. It lists:

- the main characteristics of the laptop (for example, its processing capacity, memory, number and type of ports, software and accessories), including a gallery of detailed pictures of the laptop,
- the total price (inclusive of taxes such as VAT and any other charges that the consumer will necessarily incur to receive the laptop) of the basic version of the laptop, which gets automatically updated if an optional upgrade (eg more storage space, a faster-charge adapter, pre-installed software etc.) is selected,
- any optional additional delivery charges or collection arrangements (as applicable) as well as the complaints/after-sales procedures,
- the trader's name and business address, and
- since the laptop is being sold over the internet, information required by the Electronic Commerce (EC Directive) Regulations 2002[102] and the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013,[103] including cancellation rights.

[102] Statutory Instrument 2002/2013.
[103] Statutory Instrument 2013/3134.

# 10. Banned practices

## Outright prohibitions

10.1 Schedule 20 to the DMCC Act lists 32 commercial practices which are considered unfair in all circumstances and are prohibited.[104] There is no need to consider the likely effect on consumers. The text that follows lists these banned practices[105] and provides some illustrative examples. Breaches of these provisions may also breach the other prohibitions in the UCP provisions.

1. Claiming to be a signatory to a code of conduct when the trader is not.

> 1.1. A heating engineer displays the logo of an industry code of professional standards on their website and in the letterhead in their correspondence. Their membership credentials cannot be verified as they are not in fact a signatory to the code of conduct.

2. Claiming that a code of conduct has an endorsement from a public or private body which it does not have.

> 2.1. A member of the (fictional) voluntary Quality House Sales Code displays the code logo in its shop front and on its advertising materials and claims beside the logo that the code is 'approved by the Chartered Trading Standards Institute'. The code has not been approved.

3. Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation.

> 3.1. A trader puts a kitemark logo, which certifies the safety and quality of an item, on a safety helmet they are selling. In fact, their product does not qualify for it as the safety helmet has not undergone the necessary repeat testing to renew its certification.

4. Claiming that a trader, a trader’s commercial practice, or a product has been approved, endorsed or authorised by a public or private body when—

(a) the claim is false, or

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[104] The prohibition is contained in section 225(4)(c) of the DMCC Act.

[105] Note that the list contained in the predecessor Schedule 1 to the CPUTRs has been rearranged and therefore the numbers of the banned practices differ.

(b) the terms of the approval, endorsement or authorisation have not been, or are not being, complied with.

4.1. A plumber claims that they are registered and approved by a well-known trader recommendation platform when they are not.

5. (1) Making an invitation to purchase products at a specified price where—

(a) the trader has reasonable grounds for believing that it will not be possible for the trader to offer those products, or equivalent products, for supply at that price, in reasonable quantities, for a reasonable period of time (or to procure another trader to do so), and

(b) the trader does not disclose that fact.

(2) In sub-paragraph (1), the references to reasonable quantities and a reasonable period of time are references to what is reasonable having regard to—

(a) the nature of the product,

(b) the extent of advertising for the product, and

(c) the price offered for the product.

5.1. An electronics firm advertises nationally using the line 'wireless headphones for £9'. They have planned to make only 10 sets of headphones available at that price. The number of headphones actually available for £9 would not be sufficient to meet the likely level of demand arising from the scale of the advertising. The trader knew this but failed to make clear in the advertisement that only limited numbers were available.

6. Making an invitation to purchase products at a specified price and then—

(a) refusing to show the advertised item to consumers,

(b) refusing to take orders for it or deliver it within a reasonable time, or

(c) demonstrating a defective sample of it,

with the intention of promoting a different product.

6.1. A trader advertises a television for £300 in a sponsored post on social media. When consumers click through to the trader's website, it shows them a range of television models which are different to and more expensive than the one advertised on social media. The trader intentionally uses this practice to promote a different television model.

7. Falsely stating that a product will only be available for a limited time, or that it will only be available on particular terms for a limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice.

7.1. A trader falsely tells a consumer that prices for new houses will be increased in 7 days' time, in order to pressure them into making an immediate decision to buy.

7.2. An app-based game offers 'skins' to change the appearance of the player's avatar in the in-game store. A new skin is offered for £1.99 with the message 'exclusive opportunity – only available for 5 days'. However, 10 days later, the same skin is offered in the store again.

8. Undertaking to provide an after-sales service to consumers and then making such service available only in a language which is different to the language used in communication with the consumer for, or prior to, the transaction without clearly disclosing this to the consumer before the consumer committed to the transaction.

8.1. A trader selling luxury footwear includes on their website information about their after-sales service to consumers and takes orders from consumers with whom the trader has been communicating in English. The trader then provides after-sales services only in French, without warning English speaking consumers pre-contract that that would be the case.

9. Falsely claiming or creating the false impression that an after-sales service is available, including falsely claiming that it is available in, or accessible from, any particular country or location.

9.1. A trader sells washing machines on their website and states that they deliver to all parts of the UK. Their FAQs describe how to call an engineer out in the event of a problem. However, in fact the trader only services products on the mainland of the UK and not in the Outer Hebrides.

10. Stating or otherwise creating the impression that a product can be legally sold when it cannot.

10.1. Sellers operating on a large online marketplace offer so called ‘zombie knives’ for sale to consumers. The sale of such knives is prohibited in the UK.

11. Presenting rights given to consumers by law as a distinctive feature of the trader’s offer.

11.1. A retailer of men’s suits advertises its clothing for sale online with the following statement: ‘We don’t care what the reason is, if you aren’t happy with your purchase, you can return it to us within 14 days and we’ll refund you your money no questions asked – you won't find this offer elsewhere!' Even where there is nothing wrong with the suit, the consumer will ordinarily have 14 days to cancel and withdraw from the contract pursuant to the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

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.

12.1. An online influencer is gifted a free holiday with the expectation they will post content about it on their social media account. Their content does not make it clear that this is a paid-for feature – for example by clearly labelling it #Ad.

13. (1) Submitting, or commissioning another person to submit or write—

(a) a fake consumer review, or

(b) a consumer review that conceals the fact it has been incentivised.

(2) Publishing consumer reviews, or consumer review information, in a misleading way.

(3) Publishing consumer reviews, or consumer review information, without taking such reasonable and proportionate steps as are necessary for the purposes of—

(a) preventing the publication of—

(i) fake consumer reviews,

(ii) consumer reviews that conceal the fact they have been incentivised, or

(iii) consumer review information that is false or misleading, and

(b) removing any such reviews or information from publication.

(4) Offering services to traders—

(a) for the doing of anything covered by sub-paragraph (1) or (2);

(b) for the facilitating of anything covered by sub-paragraph (1) or (2) to be done.

The full text of the banned practice can be found in paragraph 13 of Schedule 20 to the DMCC Act. Explanation and illustrative examples in relation to banned practice 13 are provided in Annex B to the Guidance.

14. Making a materially inaccurate claim concerning the nature and extent of the risk to the personal security or safety of the consumer, a member of the consumer's family or anyone living in the consumer's home, if the consumer does not purchase the product.

14.1. A trader selling video door entry systems makes exaggerated statements of the risk of doorstep mugging to potential customers such as: 'There have been a lot of doorstep muggings in your street recently. There is clearly a gang at work in this area'.

15. Promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not.

15.1. A trader designs the packaging of shampoo A so that it very closely resembles that of shampoo B, an established brand of a competitor. The similarity was introduced deliberately to mislead consumers into believing that shampoo A is made by the competitor (who makes shampoo B).

16. (1) Establishing, operating or promoting a pyramid promotional scheme.

(2) In sub-paragraph (1), a pyramid promotional scheme means a scheme where a consumer gives consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the supply or consumption of products.

16.1. A trader sets up a rewards scheme, under which they invite consumers to join if they pay a £3,000 fee. Each new joiner tries to recruit others, and when a certain number have joined, the person at the top of the pyramid receives £23,000. The pyramid is then split, so that the two people below now head their own pyramid, and have the chance to gain £23,000 when enough new people join. The other benefits of the scheme are negligible compared to the potential rewards of introducing new members and having the chance to receive the £23,000 payout.

17. Claiming that the trader is about to cease trading or move premises when the trader is not.

17.1. A trader runs a clothes shop. They put up a sign in the shop window stating: 'Closing down sale' when the shop is not actually closing down.

18. Claiming that products are able to facilitate winning in games of chance.

18.1. A trader advertises an app with the claim: ‘This will help you win money on scratchcard lotteries’.

19. (1) Falsely claiming that a product is able to—

(a) prevent or treat disease or a malformation,

(b) restore, correct or modify a physiological function, or

(c) modify a person’s appearance.

(2) For the purposes of sub-paragraph (1), ‘disease’ includes any injury, ailment or adverse condition, whether of body or mind.

19.1. A trader sells orthopaedic beds which they offer for sale on an online marketplace with the description: 'Ward off backache with these special beds'. There is no proof that the bed prevents backaches.

19.2. A trader sells an ‘antiviral misting spray’, advertising it via social media with the description: ‘Prevent COVID-19 with one spray a day’ when in fact there are no medicines licensed specifically for the treatment or prevention of COVID-19.

20. Providing (including passing on) materially inaccurate information about market conditions or about the availability of the product with the intention of inducing the consumer to acquire the product under conditions that are less favourable than normal market conditions.

20.1. An estate agent tells a consumer that they have recently sold several houses in the same area, just like the one the consumer is viewing, at a certain price. This is not true and the trader is making the claim in order to persuade the consumer to buy at an inflated price.

21. Claiming to offer a competition or prize promotion without awarding the prizes described or a reasonable equivalent.

21.1. A trader operates a scratch-card prize promotion with a top prize of £10,000. In fact, they do not print any cards that win this top prize or print the cards but do not make them available, meaning that no prizes of £10,000 could be awarded.

22. Creating the false impression that the consumer has already won, will win, or will on doing a particular act win, a prize or other equivalent benefit, when in fact either—

(a) there is no prize or other equivalent benefit, or

(b) taking any action in relation to claiming the prize or other equivalent benefit requires the consumer to pay money or incur a cost.

22.1. A trader sends letters to consumers which state the consumer has won a prize. In fact, the consumer can only collect the prize by making a purchase from the trader, phoning a premium rate number to obtain a special code, or sending a stamped addressed envelope by post.

23. 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.

23.1. A trader advertises a ‘free’ gift. They then tell consumers that in order to receive their ‘free’ gift they need to pay an extra fee.

24. Including in marketing material an invoice or similar document seeking payment which gives the consumer the impression that the consumer has already ordered the marketed product when the consumer has not.

24.1. A trader sends emails to consumers with marketing material which are or closely resemble invoices for a product that has not been ordered.

25. Falsely claiming or creating the false impression that the trader is not acting for purposes relating to the trader's business or falsely representing oneself as a consumer.

25.1. A second-hand car dealership puts a used car on a nearby road and displays a handwritten advertisement reading 'One careful owner. Good family run-around. £2000 or nearest offer. Call Jack on 01234 56789'. The sign gives the impression that the seller is not selling as a trader.

26. Creating the impression that the consumer cannot leave the premises until a contract is formed.

26.1. A holiday company advertise sales presentations at hotels. During the presentations, intimidating doormen are posted at all the exits, creating the impression that the consumers cannot leave before buying.

27. Ignoring a request from a consumer to leave or not return to the consumer's home except in circumstances and to the extent justified[106] to enforce a contractual obligation.

27.1. A door-to-door salesman visits a consumer to sell them some cleaning products. The consumers tells the trader that they are not interested and asks them to leave. The trader is determined to try and get the consumer to change their mind and continues their sales pitch on the consumer's doorstep.

28. 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[107] to enforce a contractual obligation.

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[106] Allowed actions would include legitimate debt collection or asset recovery in line with the rules governing such actions.

[107] Allowed action would include, for example, legitimate debt collection. Collectors must, however, comply with the UCP provisions, as well as the Consumer Credit Act 1974.

28.1. A direct seller telephones consumers to sell them products, but does not record when consumers have asked to be removed from their contact lists. The trader calls back consumers several times, who have asked the trader not to. Note that a consumer who has signed up to the Telephone Preference Service would be regarded as a consumer who does not want unsolicited telephone calls.

29. Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to correspondence, in order to dissuade a consumer from exercising the consumer's contractual rights.

29.1. A trader sells electrical goods. If a consumer complains about a problem with a purchase, the trader ignores their communications or fails to respond for many weeks, with the effect that many consumers give up on trying to get the problem resolved.

30. Including in an advertisement a direct appeal to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.

30.1. A trader advertises a comic book for children called 'The adventures of Fluffy the Bunny' stating 'read about the adventures of Fluffy the Bunny in this new comic book each week – ask your mum to buy it from your local newsagents!'

30.2. A trader operates a mobile phone game which clearly appeals to children because it features a popular children's television character. An ad banner in the game directly encourages children to make purchases, using real money, in the in-game shop.

31. Supplying products to a consumer that have not been requested by the consumer and demanding that the consumer—

(a) pays for the products,

(b) returns the products, or

(c) safely stores the products.

31.1. A trader writes to consumers informing them of a new grease eradicating dishcloth which the trader is selling for £2.99. In the letter the trader encloses one of the cloths for the consumer to inspect and says that if the consumer does not return the cloth within 7 days then action will be taken to collect the £2.99.

32. Explicitly telling a consumer that if the consumer does not buy the product, the trader's job or livelihood will be at risk.

32.1. A doorstep sales representative tells a consumer that if the consumer does not buy the product, the sales rep will be sacked by their employer for failing to hit their targets.

# 11. Promoting unfair commercial practices in codes of conduct

11.1 The UCP provisions also prohibit the promotion of unfair commercial practices by any person who is responsible for the content of, or for monitoring compliance with, a code of conduct.[108]

11.2 The UCP provisions define a code of conduct as 'an agreement or set of rules which defines the behaviour of traders who choose to be bound by it'.[109]

11.3 This prohibition will be infringed where a person responsible for a code of conduct promotes a practice that is unfair as determined by one (or more) of the other prohibitions contained in the UCP provisions. They might, for example, promote the practice by including a provision in the code which involves a misleading omission, or by giving advice to traders in connection with compliance with the code that a practice is legitimate, when in fact it would be a misleading action. Engaging in the promotion of unfair practices would be a breach regardless of whether such promotion is likely to cause the average consumer to take a different decision. Whether a practice that is being promoted in a code of conduct is unfair needs to be assessed separately and may depend on whether it is likely to impact on consumer decision making (see Chapter 4 for more information about assessing unfairness of a commercial practice).

11.4 Enforcers may rely on this prohibition, in particular, where the promotion takes the form of a statement in a code of conduct and taking action in respect of the code of conduct is therefore likely to be a more effective method of dealing with the unfair practice than taking action against any individual trader or traders who are engaging in the practice.

## Example

> A person is responsible for the content of a code of conduct relating to the online sale of personal computers. The code states that there is no need for member businesses to provide their identity and business address when advertising in any circumstances. As this a material omission in certain circumstances, promotion of the resulting commercial practice via this statement would be prohibited.

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[108] The prohibition is contained in section 225(2) of the DMCC Act.

[109] Section 249 DMCC Act.

# PART 4: Offences

# 12. Offences relating to unfair commercial practices

12.1 The UCP provisions contain criminal offences.[110] This chapter sets out when unfair commercial practices amount to criminal offences and the applicable defences, penalties and time limits for prosecution. Further information about the use of criminal enforcement powers by enforcement authorities can be found in the CMA's Consumer protection enforcement guidance (CMA58). CMA58 and the CMA's Direct consumer enforcement guidance (CMA200) (pending) also detail a range of other tools, such as education and advice, civil enforcement and, for the CMA only, direct enforcement, that may be used to secure compliance with the UCP provisions.

## Offences

12.2 It is an offence to engage in a commercial practice which involves:

*(a)* contraventions of the requirements of professional diligence – see Chapter 5,

*(b)* misleading actions (see section on exempt practices below) – see Chapter 6,

*(c)* misleading omissions – see Chapter 7,

*(d)* aggressive practices – see Chapter 8,

*(e)* omission of material information from an invitation to purchase – see Chapter 9,

*(f)* specific unfair commercial practices listed in Schedule 20 to the DMCC Act (see section on exempt practices below) – see Chapter 10.

12.3 The offences above are all strict liability offences, apart from contravention of the requirements of professional diligence. For strict liability offences, it only needs to be shown that there has been a prohibited act or omission, although it may be open to the trader to prove a defence (see below).

12.4 For a person to be convicted of a contravention of the requirements of professional diligence, it must also be shown that they had a specified state of mind, ie knowledge or recklessness in engaging in a commercial practice in a manner that is not professionally diligent. The mental element only needs to be shown in relation to contravention of the requirements of professional

[110] Section 237 DMCC Act.

diligence. It does not need to be shown in relation to the effect on the average consumer, assessed against the transactional decision concept.

***Unfair commercial practices not amounting to criminal offences***

12.5 There are no criminal offences attached to the following prohibitions:

*(a)* a failure to comply with a requirement in a code of conduct in circumstances where the trader asserts that they are acting in compliance with that code,[111]

*(b)* 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,[112]

*(c)* carrying out prohibited practices in relation to fake consumer reviews,[113] and

*(d)* including in an advertisement a direct appeal to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.[114]

12.6 Any enforcement action, if needed, can be taken through the civil route via the court-based enforcement regime or the CMA direct enforcement regime under Part 3 of the DMCC Act.[115]

## Bodies of persons

12.7 Where a body corporate commits an offence with the consent or connivance of an officer of that body, both the officer and the body corporate can be prosecuted and punished.[116] The same applies if the offence is attributable to neglect on the part of the officer. Where a limited liability partnership (LLP) commits an offence with the consent or connivance of a member who holds a

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[111] The prohibition is contained in section 226(1)(d) of the DMCC Act. See Chapter 6 (Misleading actions) for details.
[112] The prohibition is contained in paragraph 12 of Schedule 20 to the DMCC Act.
[113] The prohibition is contained in paragraph 13 of Schedule 20 to the DMCC Act.
[114] The prohibition is contained in paragraph 30 of Schedule 20 to the DMCC Act.
[115] Chapter 3 of Part 3 of the DMCC Act sets out a court-based regime for the civil enforcement of consumer protection law to protect the collective interests of consumers. That regime simplifies, enhances and replaces the regime provided by Part 8 of the Enterprise Act 2002. Chapter 4 of Part 3 of the DMCC Act provides a new direct enforcement regime for the CMA in respect of the consumer protection laws listed in Schedule 16 to the Act, including the UCP provisions.
[116] Section 239(5) DMCC Act.

management function in that LLP or due to neglect on the part of such a member, both the member and the LLP can be prosecuted and punished.[117] Where a Scottish partnership commits an offence with the consent or connivance of a partner or due to neglect on the part of a partner, both the partner and the partnership can be prosecuted and punished.[118]

## Act or default of another

12.8 If a person commits an offence (other than a contravention of the requirements of professional diligence) or would have done but for the defences discussed below, and this is due to the act or default of another person, that other person can also be charged with an offence under the UCP provisions, regardless of whether action is taken against the original offender.[119] That other person may seek to rely on the defences discussed below.

## Penalties

12.9 The penalties are:[120]

*(a)* on summary conviction in England and Wales, a fine,

*(b)* on summary conviction in Scotland or Northern Ireland, a fine not exceeding the statutory maximum,

*(c)* on conviction on indictment, a fine or imprisonment not exceeding two years or both.

## Time limits

12.10 Time limits apply to the prosecution of offences.[121] No prosecution may be commenced after three years of the offence taking place or after one year of the discovery of the offence by the prosecutor,[122] whichever is earlier.

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[117] Section 239(6) DMCC Act and paragraph 1416 DMCC Act explanatory notes.
[118] Section 239(7) DMCC Act.
[119] Section 239(1) to (3) DMCC Act.
[120] Section 240 DMCC Act.
[121] Section 241 DMCC Act.
[122] In England, Wales and Northern Ireland prosecutions will generally be conducted by the CMA, local weights and measures authorities (also known as Trading Standards Services) or the Department for the Economy in Northern Ireland. In Scotland, prosecutions are conducted by the Crown Office and Procurator Fiscal Service on behalf of the Lord Advocate.

## Defences

12.11 Breach of most of the prohibitions contained in the UCP provisions means that an offence may have been committed, unless one of the following defences can be shown. The defences available for the strict liability offences[123] are those of due diligence and innocent publication.

### *Due diligence*

12.12 To be able to rely on the defence of due diligence, the person accused of an offence must prove that the commission of the offence was due to a mistake or accident, reliance on information given by another person, the act or omission of another, or another cause beyond their control.[124]

12.13 In addition, the person accused of an offence must prove that they took all reasonable precautions and exercised all due diligence to avoid committing the offence or to avoid someone under their control committing it.[125]

12.14 The enforcer prosecuting the offence must be given written notice of a defence based on the actions of a third party seven days in advance of the hearing.[126] It is not sufficient to show that due diligence procedures are in place, it is also necessary to show that they are applied in practice. Courts are likely to expect different standards of due diligence from traders of different sizes.

12.15 The offence of contravening the requirements of professional diligence does not have the due diligence defence, because the offence already requires proof of a certain state of mind.

### *Innocent publication*

12.16 An alternative defence in cases involving the use of advertisements (including catalogues, circulars and price lists) is that of innocent publication. The person accused of a relevant offence[127] who wishes to rely on this defence must prove that they are a person whose business is to publish or arrange the

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[123] These are the offences under section 237(1) (misleading actions), 237(2) (misleading omissions), 237(3) (aggressive commercial practices), 237(6) (omission of material information from an invitation to purchase) and 237(7) (specific unfair commercial practices – that is the practices listed in paragraphs 1-11, 14-29, and 31-32 of Schedule 20 to the DMCC Act).

[124] Section 238(1)(a) DMCC Act.

[125] Section 238(1)(b) DMCC Act.

[126] Section 238(4)(b) DMCC Act.

[127] See footnote 123.

publication of advertisements, that they received the advertisement in the ordinary course of business, and that they did not know and had no reason to suspect that the publication would amount to an offence.[128]

12.17 The offence of contravening the requirements of professional diligence does not have this defence.

***Example***

> A trader sells printer ink cartridges. Some of their cartridges are found to contain blue ink instead of the advertised black ink. The advertisement may amount to a misleading action under the UCP provisions. However, if the trader could show that this was the result of an accident and that they had taken all reasonable precautions and exercised all due diligence to ensure that the cartridges only contained black ink (possibly by demonstrating that their processes had high levels of quality assurance and safeguards), and that the blue ink had been a genuine mistake, then they would likely be able to rely on the due diligence defence.

[128] Section 238(3) DMCC Act.

## Annex A: Illustrative examples

A.1 These examples are intended to show how the different prohibitions contained in the UCP provisions might be applied in practice. They illustrate that prohibitions can overlap and that it may be possible to find breaches of several different UCP provisions within the same set of facts.

A.2 The examples below deliberately show breaches of multiple prohibitions in order to illustrate different issues within each example. Not all the unfair commercial practices mentioned in each example need to be present for there to be a breach of the UCP provisions. The examples may also constitute a contravention of the requirements of professional diligence.

A.3 The court and/or the CMA (as the case may be) will decide if a practice is unfair depending on the facts of a particular case, but these are illustrations of practices that are likely to be considered unfair.

**Examples**

(1) A trader selling second hand cars displays for sale, on their forecourt alongside other second-hand cars for sale, a second-hand car which has been 'clocked' to show a reduced mileage of 25,000 miles. In reality, the car has actually travelled 95,000 miles.

- False information is given to consumers relating to the product (or a matter relevant to a transactional decision) – that is the mileage that the car has travelled.
- The misleading statement may cause the average consumer to take a different decision – for example to decide to buy the car at the indicated price. The average consumer may be unlikely to buy the car at that price, or even at all, had they known its true mileage, given that the value of a second-hand car is generally determined, in part, by its past usage.
- False information that is likely to cause the average consumer to take a different decision, would amount to a misleading action in breach of the DMCC Act.
- The genuine mileage of the car is information that the average consumer needs to take an informed transactional decision. It is therefore material information. A failure to provide material information that is likely to result in the average consumer taking a different

decision would amount to a misleading omission in breach of the DMCC Act.

- The clocking of the car itself is likely to contravene the requirements of professional diligence, as tampering with the mileage is conduct that falls short of the standard of care and skill reasonably to be expected of a trader in the second-hand car sector, for example because doing so is not commensurate with honest market practice. Equipping a car with a false odometer reading is likely to cause the average consumer to take a different decision.

- The 'clocker' does not need to sell the car to breach these UCP provisions in this way.

(2) A trader whose business is carrying out home improvement work 'cold calls' potential customers and attempts to sell the trader's services to them on their doorstep. During the course of the sales pitch, the trader refuses to leave when consumers ask them to. In addition, the trader starts work without the explicit permission from the consumers as a means of pressuring them to accept, and pay for, the trader's services, and does not provide the consumer with any information about their cancellation rights. The trader also tells consumers that their roofs are in need of repair when this is not, in fact, the case.

- The trader's practice of refusing to leave when requested to do so would amount to a breach of paragraph 27 of Schedule 20 to the DMCC Act.

- Where the trader starts work without an express request to do so in writing from the consumer, this is likely to infringe regulation 36 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, and under that regulation the consumer has no liability to pay for the work done. Accordingly, should the trader make any demand for payment, this is likely to amount to a misleading action.

- Starting work without consent may constitute harassment, coercion or undue influence and, if it is likely to cause the consumer to take a different decision, would amount to an aggressive practice in breach of the DMCC Act. In this case, the practice of commencing work exploits a position of power in relation to the consumer so as to apply pressure in a way which significantly limits the consumer's ability to make an informed decision (and so amounts to undue influence), because unfinished work is likely to cause damage to the consumer's home, and so the consumer is pressured to agree to the completion of the work. It also prevents the consumer from assessing, independently, the actual need for the work, because the trader has already damaged the roof, thus removing the evidence of the original state of the building.

- In these circumstances, the consumer has a right to cancel the contract under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, and specific documentation about this right must be provided under regulation 10 of those regulations. A failure to provide this information is an offence under the 2013 regulations, but it is also an omission of information within section 227(1)(b) of the DMCC Act, ie information which the trader is required under any other enactment to give to a consumer. Where it is likely to cause the average consumer to take a different decision, this would amount to a misleading omission in breach of the DMCC Act.

- False statements about the need for a repair may cause the average consumer to take a different decision (such as to decide to have the work carried out, and/or to engage that trader to carry out the work, and/or to pay that price, and/or to agree to have the work done by that trader straightaway). Where such false information is likely to cause the average consumer to take a different decision, this would amount to a misleading action in breach of the DMCC Act.

- The combination of these practices, taken together, may be found by the court or the CMA to be likely to cause the average consumer to take a different decision, even if any one of these on their own might not otherwise have had that effect.

(3) A trader employs various practices to recover debts owed by consumers. The trader sends letters to consumers containing demands that state: 'pay now or we'll take criminal proceedings against you in court', when such action cannot legally be taken. Some of the demands that the trader sends to consumers are made to look as if they are court papers, although they do not have such a status. The trader offers consumers an opportunity to 'reduce' their debts, and delay the requirement to repay, by signing up to a debt consolidation loan product with a 'very advantageous' interest rate. The trader tells consumers who say that they cannot pay their debts that they have no choice but to sign up to the product offered by the trader, and states that it has the lowest interest rate on the market for such a product. In fact, the interest rate on the offered product is unusually high.

- The letters sent to consumers contain false or misleading information or are likely to deceive through their overall presentation. This includes the references to criminal proceedings, the claims about how advantageous the interest rate is, and the statement about the range of choices open to consumers.

- Where the letters are likely to cause the average consumer to take a different decision (for example, to pay the debt sooner than they might otherwise have done, or to sign up to the offered debt consolidation loan product more hastily than they might otherwise have done or without first shopping around for alternative and more advantageous means of consolidating their debt), this would amount to a misleading action in breach of the DMCC Act.

- Several elements of the trader's practices, such as threatening court action or the manner in which the trader offers a debt consolidation loan product, may cause the average consumer to be frightened or to feel unduly pressured. Such practices may constitute harassment, coercion or undue influence and be likely to cause the average consumer to take a different decision as a result, in which case they would amount to aggressive practices. In assessing this, it would be relevant to take into account the fact the practices include threats to take action which cannot legally be taken, as well as the use of threatening language generally.

(4) A trader selling household products to consumers includes a prize draw advertisement with their mail-order catalogue of goods. The advertisement creates the impression that the recipient has won a major prize when they have not. In fact, along with the vast majority of the recipients of the mailing, they will only receive a low value give-away item which is being distributed by the trader described as a prize. In order to discover what they have in fact won, the consumer must either phone a premium rate number, place an order from the catalogue or send a stamped addressed envelope to the trader.

- The advertisement gives the impression that the recipient has won a major prize when this is not the case. This overall presentation of the advertisement may deceive the average consumer as a result of a mixture of false or misleading statements made in the advertisement, and the omission from the advertisement of certain information, eg the value of the prize, the terms and conditions attached to the competition or to individual prizes, and the number of prizes of each description that will be awarded. Where the practices involved are likely to cause the average consumer to take a different decision (for example, by placing an order that they would not have done were it not for the prize on offer), this would amount to a misleading action and/or a misleading omission in breach of the DMCC Act.

- The low value give-away item which is in fact being distributed by the trader would amount to a breach of paragraph 22 of Schedule 20 to the DMCC Act which prohibits the trader from creating the false impression the consumer has won a prize, when in fact taking any action in relation to claiming the prize requires the consumer to pay money or incur a cost.

(5) A trader's business is the sale, or secondary re-sale, of tickets admitting entry to entertainment and other similar events.[129] They sell tickets for 'restricted view' seats without telling consumers that the seats in question are subject to a restricted view.

- The information that the seats are subject to a restricted view is material information that the average consumer would need in order to take an informed transactional decision.

- The average consumer may be unlikely to buy the tickets at the price sought had they known that they would have only a restricted view of the event in question.

- Where the trader's failure to provide consumers with the information that the tickets they are selling are for seats with a restricted view is likely to cause the average consumer to take a different decision, this would amount to a misleading omission.

- Depending on the facts, this practice may also constitute an 'invitation to purchase'. In such a case, the fact that the tickets are restricted view is likely to be material information relating to the 'main characteristics' of the product. Where, taking into account any limitations resulting from the means of communication used and any steps taken by the trader to overcome these, the trader has failed to provide this information and that it is not already apparent from the context, this would amount to an omission of material information from an invitation to purchase in breach of the DMCC Act.

[129] Other legislation will also be relevant to secondary ticketing, including Chapter 5 of Part 3 of the Consumer Rights Act 2015.

# Annex B: Guidance on prohibition of fake reviews

## Introduction

B.1 Schedule 20 to the DMCC Act lists 32 commercial practices which, because of their inherently unfair nature, are prohibited in all circumstances. Evidence of their effect, or likely effect, on the average consumer is not required in order to prove a breach of one of these outright prohibitions. The list includes banned practice 13 (the banned practice) which imposes several prohibitions in relation to:

*(a)* consumer reviews – specifically fake consumer reviews (fake reviews),

*(b)* consumer reviews that conceal the fact that they have been incentivised (concealed incentivised reviews), and

*(c)* information that is derived from, or is influenced by, consumer reviews (consumer review information) – specifically, consumer review information which is published in a misleading way or is otherwise false or misleading.

> This Guidance uses 'banned reviews' as a shorthand for fake reviews and concealed incentivised reviews. It also uses 'banned reviews and information' as a shorthand for fake reviews, concealed incentivised reviews and consumer review information which is published in a misleading way. Consumer review information that is false or misleading is discussed separately – see section on 'Prevention and removal of banned reviews and false or misleading consumer review information' below.

B.2 The prohibitions contained in the banned practice address distinct commercial practices involved in the supply chain for banned reviews and information, ie:

*(a)* submitting or commissioning fake reviews and concealed incentivised reviews,[130]

*(b)* publishing consumer reviews or consumer review information in a misleading way,[131]

*(c)* offering services to procure banned reviews and information for traders,[132]

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[130] Paragraph 13(1) of Schedule 20 to the DMCC Act.
[131] Paragraph 13(2) of Schedule 20 to the DMCC Act.
[132] Paragraph 13(4)(a) of Schedule 20 to the DMCC Act.

*(d)* offering services to traders for the facilitating of the procurement of banned reviews and information.[133]

B.3 In addition to prohibiting the commercial practices set out above, the banned practice imposes a positive obligation on anyone who publishes or provides access to consumer reviews or consumer review information to take such reasonable and proportionate steps as are necessary to prevent and remove from publication banned reviews and false or misleading consumer review information.[134] Failure to take these steps amounts to an infringement of the banned practice.

B.4 These prohibitions are not mutually exclusive and they do not all have to be present in order to prove an infringement of the banned practice. The same set of facts can give rise to multiple infringements by one or more parties, including infringements of other banned practices and UCP provisions.[135] Some of the practices that are subject to the banned practice may also constitute breaches of other legislation or regulation (eg the Fraud Act 2006, the Advertising Standards Authority's Codes etc).

B.5 The diagram below provides an overview of the commercial practices to which the banned practice applies. Each element of the banned practice is discussed in more detail below.

[133] Paragraph 13(4)(b) of Schedule 20 to the DMCC Act.
[134] Paragraph 13(3) of Schedule 20 to the DMCC Act.
[135] In particular, conduct relating to banned reviews could infringe paragraphs 12 and 25 of Schedule 20 to the DMCC Act.

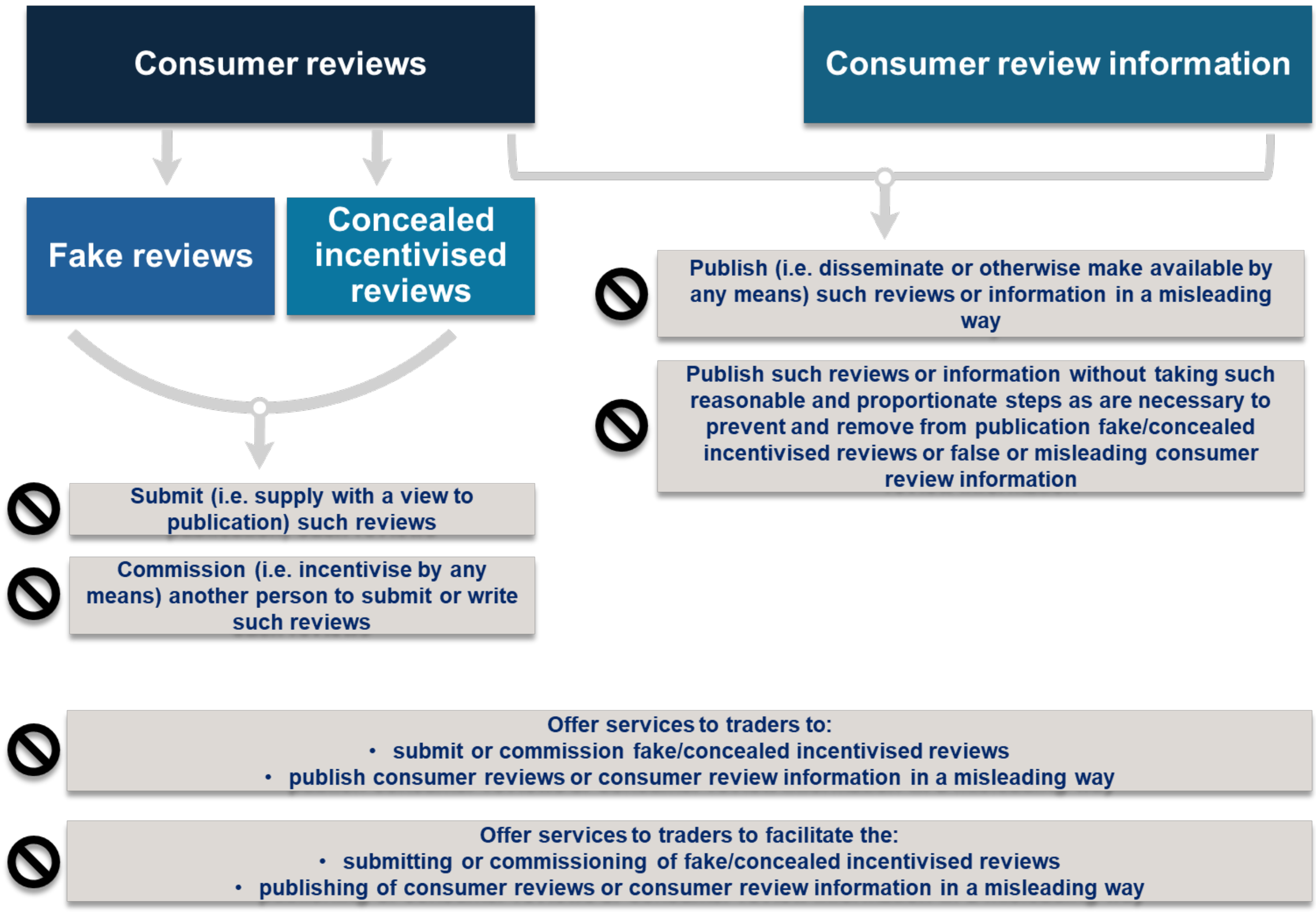


**Figure 3: Overview of the banned practice related to consumer reviews and consumer review information**

## Scope of the banned practice

B.6 The banned practice is focused on both consumer reviews and information derived from or influenced by those reviews (consumer review information).

B.7 A consumer review means 'a review of a product, a trader or any other matter relevant to a transactional decision'.[136] It is a broad concept and includes reviews which focus on matters such as the delivery or after-sales care of the product. Reviews can take various forms, including text (eg a written blog or a comment posted under a product listing on a website), speech (eg a verbal opinion expressed in a video on a sharing platform) and graphic representations (eg a star rating appearing next to a restaurant's name in search engine results or a thumbs up next to a 'helpful' review).

[136] Paragraph 13(5)(a) of Schedule 20 to the DMCC Act.

B.8 While online reviews have become very popular as consumers increasingly research or purchase products online, consumer reviews can also be found in analogue forms such as within marketing letters or adverts in print media.

### *Fake reviews*

B.9 A fake review is a consumer review 'that purports to be, but is not, based on a person's genuine experience'.[137] Fake reviews could be positive or negative. A fake positive review makes false, positive claims about an experience with a product or trader. Such reviews often claim satisfaction with the subject of the review, helping to boost sales, rankings or ratings in comparison to rivals. Fake negative reviews are often written with the intention of undermining a product or trader in the eyes of consumers. A review is not fake merely because the trader who it is about does not like or agree with it, as long as it reflects the reviewer's genuine experience. The banned practice applies to both types of fake reviews regardless of the form they take (text, speech, image etc.) and the medium (online or analogue) through which they can be accessed by consumers.

### *Concealed incentivised reviews*

B.10 The banned practice also applies to reviews that conceal the fact that they have been incentivised.[138] Incentivisation can take many forms and is not limited to monetary payments. Examples of incentivisation include, but are not limited to:

*(a)* money,

*(b)* commissions,

*(c)* discounts,

*(d)* leases or loans free of charge or on more favourable terms than those offered to the general public,

*(e)* products given free of charge ('freebies'),

*(f)* free stays,

*(g)* invitations to events,

[137] Paragraph 13(5)(b) of Schedule 20 to the DMCC Act.

[138] Paragraph 13(5)(c) of Schedule 20 to the DMCC Act.

*(h)* having a financial interest in the trader or the product being reviewed,

*(i)* having any commercial link with the trader being reviewed.

B.11 It is not illegal in itself for traders to pay or otherwise incentivise others to review products on their behalf, or for a person to submit an incentivised review, where the review nonetheless reflects the reviewer's genuine experience, ie it is not a fake review, and it clearly discloses that it is incentivised. Failing to disclose clearly that the review is incentivised is likely to mislead consumers and is prohibited.

B.12 Many websites and platforms do not allow incentivised reviews, and where this is the case, it is likely to be misleading to post an incentivised review. Further, the platform operator will take steps to prevent their publication and remove them. The steps that platforms ('publishers') must take to ensure that they do not infringe the banned practice are set out in paragraphs B.24-B.53 of this Guidance, below.

B.13 Where it is permissible to post a review that has been incentivised, the review must be clearly identifiable as incentivised. This must be made clear to anyone engaging with the review, so that it is immediately apparent that they are viewing incentivised content. Usually, it will be necessary for the reviewer at least to label the review prominently as incentivised, ie as an advert. The label should not have an ambiguous meaning or be placed where it might not be seen.

B.14 Where a website or platform publishes incentivised reviews, the trader publishing or providing access to the reviews must distinguish the incentivised review from other reviews and take appropriate steps to prevent incentivised reviews from misleading consumers, eg not counting the review towards a product's or trader's overall rating or ranking.

***Consumer review information***

B.15 Consumer review information is 'information that is derived from, or is influenced by, consumer reviews'.[139] Consumer review information typically indicates, or purports to indicate, the quality, value, performance or reputation of products or traders, and can enable consumers to compare quickly the options available to them. Such information includes aggregated information in the form of overall ratings, review counts and rankings. Because of the

[139] Paragraph 13(5)(d) of Schedule 20 to the DMCC Act.

value of this information to consumers' decision making, it is important it is accurate.

B.16 The banned practice applies to consumer review information which is published in a misleading way[140] and consumer review information that is false or misleading,[141] eg because it is derived from fake reviews, or because it has been influenced by incentivised reviews which have not been separated from other reviews.

## Submitting or commissioning fake reviews and concealed incentivised reviews

B.17 The following practices are prohibited:[142]

*(a)* submitting fake reviews and concealed incentivised reviews (banned reviews). Submitting a banned review means supplying it with a view to publication.[143] This includes:

(i) providing it to a trader to publish it, for example to post it on their website after verifying the reviewer[144] or to include it in their marketing materials, or

(ii) the reviewer publishing the review themselves, for example by posting it in the review section of a website or on social media.

*(b)* commissioning another person to submit or write (or create by any other means) banned reviews. Commissioning includes incentivising by any means.[145]

B.18 Anyone who engages in the commercial practice of either submitting or commissioning banned reviews will be in breach of the banned practice. This includes professional reviewers, journalists, content creators (such as bloggers, influencers, online streamers, celebrities, social media

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[140] Paragraph 13(2) of Schedule 20 to the DMCC Act.
[141] Paragraph 13(3) of Schedule 20 to the DMCC Act requires anyone who provides access to consumer review information to take such reasonable and proportionate steps as are necessary to prevent and remove from publication false or misleading consumer review information.
[142] Paragraph 13(1) of Schedule 20 to the DMCC Act.
[143] Paragraph 13(5)(e) of Schedule 20 to the DMCC Act.
[144] This may be the case with 'closed systems' where only a confirmed buyer of the product or service is able to submit a review. For example, the 'closed' review site receives a data feed on all sales transactions from the business client's order processing system and sends out emails to all customers inviting them to submit feedback.
[145] Paragraph 13(5)(g) of Schedule 20 to the DMCC Act.

personalities), marketing companies, individuals acting on behalf of traders, etc. In some cases, a person may be both submitting and commissioning banned reviews, such as a trader who writes fake positive reviews about themselves or their products while at the same time, for example, giving away free samples to influencers in return for providing a positive review.[146]

***Examples***

*Submitting fake reviews*

1. Stating in a review that a product or trader met expectations, when in fact it did not, or the reviewer had not used the product or trader.

2. Making a video that claims to demonstrate the results of using a specific product, but in fact using a different product.

*Submitting concealed incentivised reviews*[147]

1. Submitting a review about a product without disclosing the fact that the reviewer has a commercial relationship with the trader whereby they receive products for free.

2. Making a disclosure of incentivised reviews in a way that would require the consumer to take additional steps to discover that the review has been incentivised, such as having to access a profile page or bio, to open links for more information or to read ‘episode descriptions’ of audio or video content.

*Commissioning fake reviews or concealed incentivised reviews*

1. Offering an existing customer a free or discounted product in exchange for a five-star review (which is not reflective of their genuine experience) of their previous purchase.

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[146] Depending on the facts, those who submit or commission banned reviews may also infringe other banned practices, such as banned practice 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) or banned practice 25 (falsely claiming or creating the false impression that the trader is not acting for purposes relating to the trader’s business or falsely representing oneself as a consumer). The UCP provisions are not mutually exclusive.
[147] The CMA has published guidance for those who post incentivised reviews, endorsements etc. setting out how to correctly label these and ensure they are clearly identifiable: Hidden ads: Being clear with your audience - GOV.UK

2. Requesting a customer to give a review of a free or discounted product without making clear to the reviewer that they must clearly disclose the incentivisation, for example by labelling their review as an advertisement.

3. Sharing a post on social media asking for five-star reviews in exchange for free products.

4. Contacting a customer who has left a negative review and offering them a refund and/or a gift card if they amend their review to remove any negative commentary (so that it is no longer reflective of their genuine experience).

5. Asking consumers to buy items with their own money and telling them they will be reimbursed once they have submitted a positive review.

6. Buying reviews which look like they have been written by individual consumers but have in fact been generated by software applications (such as bots).

## Publishing consumer reviews in a misleading way

B.19 Consumer reviews may be published in a variety of ways, both online and in analogue form. This may be done by the trader that is being reviewed or whose products are being reviewed (eg on their own website) or by intermediaries who publish reviews about third-party traders. Such intermediaries include:

*(a)* platforms (or third-party traders operating on platforms), including search engines, online marketplaces and social media,

*(b)* specialist review sites,

*(c)* trader recommendation platforms,

*(d)* retailers,

*(e)* booking agents.

B.20 Publishing consumer reviews in a misleading way is prohibited.[148] Misleading publication involves a range of practices that mislead consumers based on the information they are presented with or based on any information being withheld or obscured. Examples of publishing reviews in a misleading way include:

*(a)* 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),

*(b)* suppressing negative reviews, including by editing, withholding or removing negative reviews,

*(c)* cherry picking positive reviews for publication over negative ones (either through suppressing negative reviews that have been submitted or by encouraging just those who are satisfied to leave reviews),

*(d)* highlighting certain reviews over others because they are especially positive (unless the consumer has chosen for reviews to be ordered in this way),

*(e)* missing, obscure or hidden disclosure of the fact that reviews have been incentivised.

## Publishing consumer review information in a misleading way

B.21 Publishing consumer review information in a misleading way is prohibited.[149] Consumer review information may be false or misleading in circumstances such as where a trader:

*(a)* displays a star rating or review count that is based on the aggregation of a number of reviews, but fails to address the impact of fake reviews, eg by failing promptly to update a product's star rating and review count where reviews have been identified and removed as fake.

*(b)* ranks traders in a way that gives comparable weight to incentivised reviews as to non-incentivised reviews in determining traders' rankings and overall ratings.

*(c)* allows consumer review information to be determined or influenced by accepting commissions from the trader who is being reviewed in return for

[148] Paragraph 13(2) of Schedule 20 to the DMCC Act.
[149] Paragraph 13(2) of Schedule 20 to the DMCC Act.

greater prominence in rankings. Commissions must not determine rankings of reviews or consumer review information and sponsored results should be visually and structurally distinguished, eg not counting the review towards a product or trader's overall rating or ranking.

## Offering to procure banned reviews and information for traders

B.22 It is prohibited to offer to submit or commission fake reviews or concealed incentivised reviews for traders. It is also prohibited to offer to traders to publish reviews or consumer review information in a misleading way.[150] This element of the banned practice is aimed at addressing and disrupting the business model of acting as a broker procuring banned reviews and information.

***Examples***

1. Offering a service to traders that involves setting up and running groups on social media to recruit individuals willing to post fake reviews or concealed incentivised reviews about a trader's products.

2. Selling reviews which look like they have been written by individual consumers but have in fact been generated by software applications (such as bots).

3. Offering a search engine optimisation service that promises to improve a trader's rating, when one of the means that will be used is generating fake reviews.

## Offering services that facilitate the submission, commissioning or publication of banned reviews and information

B.23 It is also prohibited to offer services to traders for the facilitating of the submission, commissioning or publication of banned reviews and information.[151] Such practices include, for example, offering services that increase the chance of a fake review being successfully posted on a platform or website by virtue of their expertise in bypassing the platform or website's fake review detection measures.[152]

[150] Paragraph 13(4)(a) of Schedule 20 to the DMCC Act.
[151] Paragraph 13(4)(b) of Schedule 20 to the DMCC Act.
[152] Paragraph 1351 DMCC Act explanatory notes.

***Examples***

> 1. Offering services to traders that enable accounts to be set up in a way that avoids or reduces the risk of detection.

> 2. Running an online platform while being aware of and allowing services to be sold by traders using the platform to offer to post or otherwise arrange for fake reviews or concealed incentivised to be posted on other sites.

## Prevention and removal of banned reviews and false or misleading consumer review information

B.24 In addition to the prohibited practices described above, failing to take such reasonable and proportionate steps as are necessary to prevent and remove from publication banned reviews and false or misleading consumer review information is also an infringement of the banned practice.[153]

B.25 This element of the banned practice creates a 'positive' obligation, meaning it requires traders who publish consumer reviews or consumer review information by any means to take effective action to comply with the law, rather than merely refraining from a specified action.

B.26 'Publishers' in this context include traders who display or make available by any means consumer reviews or consumer review information on their own media (retailer websites, print publications etc.) and various intermediaries who display or make available reviews of other traders or their products (eg specialist review sites, online marketplaces, search services, social media, trader recommendation platforms etc.).

B.27 There is unlikely to be a 'one size fits all' or 'tick box' approach which is appropriate for all publishers to deploy to prevent and remove from publication banned reviews and false or misleading consumer review information. What is appropriate for one publisher may not be appropriate for another, for example because of the nature of the content that is posted by third parties.

B.28 However, all publishers will need to have a clear policy on the prevention and removal of banned reviews and false or misleading consumer review information, and in addition assess the risks of such material appearing on their media and take such further proactive steps as are reasonable and

[153] Paragraph 13(3) of Schedule 20 to the DMCC Act.

proportionate to the need identified. Publishers will need to ensure that the steps they take are designed and applied for the purpose of preventing and removing these reviews and information, that they regularly evaluate the effectiveness of these steps and that where they identify inadequacies, they address them.

B.29 Where banned reviews and false or misleading consumer review information are being shown to consumers, this may indicate that the publisher is not taking such reasonable and proportionate steps as are necessary to prevent and remove these reviews and information (and may also mean that other UCP provisions are being infringed). While the precise steps which are required will depend on the circumstances of the case, this Guidance sets out several general steps which are likely to constitute necessary steps to be taken by publishers of consumer reviews or consumer review information in order to not infringe the banned practice. The diagram below provides an overview of these general steps.

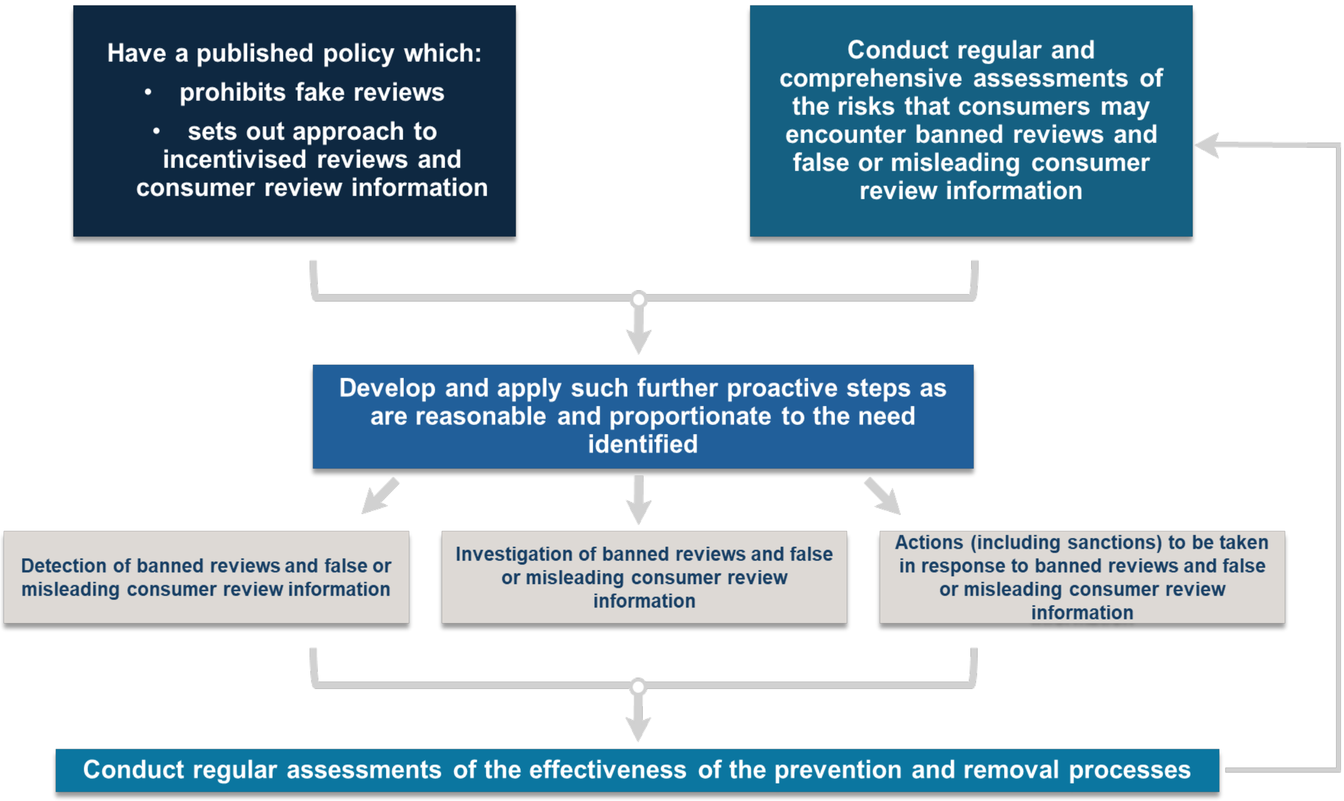


**Figure 4: Overview of the general steps required of publishers of consumer reviews or consumer review information**

B.30 For each of these general steps, the Guidance sets out a non-exhaustive list of examples of specific steps which, depending on the circumstances, might be required to comply with the law (see also the explanation of what is reasonable and proportionate in a given context at paragraphs B.49-B.53 below).

### *Prevention and removal policy*

B.31 Publishers should all have published policies which clearly prohibit fake reviews. Such policies should also confirm the publisher's approach to incentivised reviews and consumer review information. For example, where incentivised reviews are not allowed, the publisher's policy should clearly prohibit them, and where they are allowed, the policy should require that incentives are clearly and prominently disclosed – in either case concealed incentivised reviews must be prohibited. Likewise, where a publisher allows users any control over the functionality of how consumer reviews and consumer review information is presented, the publisher must make clear what is and is not permitted to ensure the law is complied with.

B.32 Publishers should make these policies readily available to users (including third-party traders and consumers). Policies may take various forms, but they should be accessible intuitively, using clear and prominent signposting from relevant parts of the medium used (eg a website), and not tucked away in a hard-to-find place.

B.33 Where relevant, it should also be clear to consumers how they can submit reviews. Publishers will often have other processes in place that consumers can use for feedback on their experience with products or traders, such as complaints procedures. Publishers should explain the difference between leaving a review which is intended for publication and making a complaint. In particular, publishers should not:

*(a)* try to persuade consumers to submit a complaint, rather than leave a review for publication,

*(b)* try to dissuade consumers from leaving a review of their experience even if their initial problem has been resolved through the complaints process,

*(c)* treat a negative review intended for publication as a complaint and not publish it.

### *Assessing the risks*

B.34 Publishers should conduct regular and comprehensive risk assessments to:

*(a)* assess the risks that consumers may encounter banned reviews and false or misleading consumer review information on the publisher's media, and

*(b)* identify appropriate measures to address such risks effectively.

B.35 Such assessments should be evidence-led, taking account of relevant internal and external sources of information that are reasonably available to the publisher, such as:

*(a)* content or activity on the publisher's media, including by using technology designed to identify banned reviews and false or misleading consumer review information,

*(b)* third-party reports to the publisher, and

*(c)* the findings of investigations or internal evaluations.

B.36 The information gained through assessing the specific risks which apply to the publisher's particular activities will inform the development of appropriate prevention and removal measures to address such risks (including by improving existing prevention and removal measures). Depending on the nature of the material being published, it is possible that a publisher may reasonably identify the risk of banned reviews or false or misleading consumer review information appearing as low, such that only limited further steps are necessary. However, publishers should regularly review and update their risk assessments – this is not a one-off exercise. Other publishers will rightly identify a higher risk of banned reviews or false or misleading consumer review information appearing (in particular, if such material has appeared already or where functionalities of the medium facilitate the presence or dissemination of this content), in which case they should take the appropriate steps that are necessary to address the problem.

B.37 At a minimum, where there is a risk of banned reviews or false or misleading consumer review information appearing, such steps should include systems, processes and policies relating to:

*(a)* the detection of banned reviews and false or misleading consumer review information,

*(b)* the investigation of banned reviews and false or misleading consumer review information,

*(c)* actions to be taken in response to banned reviews and false or misleading consumer review information.

B.38 In developing and implementing these measures, the publisher should balance the need for rigorous screening and response to suspicious activity with the need not to prevent genuine, lawful and relevant reviews from being displayed (for example, removing a negative review that was genuinely created may mislead consumers as much as publishing a fake positive review). In particular, the measures should encompass:

*(a)* how the publisher collects and checks reviews, ensuring that appropriate checks are in place for both negative and positive reviews,

*(b)* the basis on which the publisher makes decisions about publishing and removing reviews,

*(c)* how its ratings (or other aggregation-related systems such as rankings) work.

B.39 The measures should reflect how the detection, investigation and response procedures would apply before and after the publication of consumer reviews and consumer review information.

***Detection***

B.40 Publishers must take proactive steps to identify banned reviews and avoid the presentation of false or misleading consumer review information (whether before or after publication). There are various methods of detection that a publisher may adopt; the reasonable and proportionate steps that are necessary will depend on the facts of the case. Publishers should use the information obtained from their risk assessments to inform their choice of detection methods.

B.41 Appropriate detection measures include, but are not limited to:

*(a)* Controls over review sources, such as:

(i) having clear rules, applied consistently, for who can submit a review. For example, depending on the type of publication medium concerned, this could involve requiring the reviewer to provide identifying information and/or to have an account. It may also involve allowing users to submit a review only if it is possible to verify that they have used or purchased the product in question.

(ii) where relevant, vetting traders before allowing them to join a trader recommendation platform.

*(b)* Regular checks by the publisher, such as:

(i) monitoring, considering and keeping sufficient records of the review submission history and the profile of traders, products and reviewers using the site, to be able to spot patterns of behaviour,

(ii) manual checks, eg regularly analysing a sample of reviews of traders or products and proactively looking for suspicious content,

(iii) using automated software designed to identify banned reviews and spot anomalies or other patterns that may be indicative of banned reviews (eg reviews written by different reviewers from the same email or IP address, networks of reviewers reviewing the same products or businesses, average review length, a spike in highly positive or negative reviews over a short period of time etc). If a publisher is not able themselves to create an automatic detection system, they could consider using a third-party provider who can offer such services.

*(c)* Third-party notification systems, including:

(i) providing publicly accessible mechanisms to enable consumers, traders and other third parties (including enforcement authorities) easily to report suspected banned reviews or false or misleading consumer review information. Such notification systems should be coupled with a policy that sets out publishers' criteria for investigation of these reports and how they will make determinations.

(ii) letting users see a reviewer's public review history. This may help users to consider whether to rely on and/or to report suspicious content. However, publishers should not rely on users (especially consumers) to police suspected banned reviews or false or misleading consumer review information. The publisher is ultimately responsible for taking such reasonable and proportionate steps as are necessary to prevent and remove from publication banned reviews and false or misleading consumer review information.

***Investigation***

B.42 Publishers must have a process for conducting investigations in response to suspicious reviews and information which they have detected or have been notified of. Investigations should be used, as appropriate, to support the detection measures outlined above (eg to determine whether reviews are fake) and to establish what a suitable response should be (eg determining whether to apply a sanction).

B.43 In many cases the publisher may be able to determine automatically that identified content is unlawful based on the available information and remove it without further investigation, eg using appropriate automated detection measures. In other cases (such as where there is a dispute about the factual accuracy of a review) forming a definitive view may be more difficult. Publishers should consider in advance when further investigation is likely to be necessary and what sort of evidence they may require to establish the facts when becoming aware or notified of suspicious content and how long they will give traders or reviewers to provide information required to make a determination.

B.44 It is important that such investigations are both thorough and timely to ensure that:

(a) there are no unreasonable delays before publication of genuine reviews,

(b) genuine reviews are not removed merely because a trader objects to the reviewer's assessment of their experience of the trader or their product,

(c) in respect of reviews which have already been published, there are no delays to correction or removal of banned reviews and false or misleading consumer review information.

B.45 If publishers apply temporary measures during investigations of suspicious content (such as withholding reviews, or marking them as pending or suspicious) the publisher should set out how users should interpret these messages (for example, so they know it is being investigated). Further, where a review is identified as suspicious but has not yet been determined to be a banned review, the publisher should consider taking steps to ensure that it cannot improperly contribute to consumer review information (eg overall ratings) in the interim.

***Response***

B.46 Where the publisher determines that identified content constitutes banned reviews or false or misleading consumer review information, the publisher must take steps to prevent consumers from being misled as a result of encountering it. Publishers should therefore adopt a combination of measures to tackle:

*(a)* the outputs of the unlawful activity, ie the banned reviews, by removing them to ensure that they are not seen by consumers and do not impact consumer review information, and

(b) the effects of banned reviews-related activity on consumer review information by, for example, correcting published review counts, overall ratings, rankings and AI-generated review summaries, and removing their product or trader endorsements that are based on banned reviews and false or misleading consumer review information.

B.47 Publishers should also take such measures, based on the circumstances of the case, as are appropriate to address the sources of the unlawful activity, ie sanctioning those who submit, commission, procure or facilitate banned reviews and information on the publisher’s media. Such sanctions should be effective so as to dissuade, deter and prevent this activity from taking place in future. It may be appropriate for escalating sanctions to be imposed, with increasing severity based on the nature and frequency of the content or activity that has been identified. Appropriate measures, depending on the circumstances, may include:

*(a)* suspending or revoking privileges (eg a user may still be able to visit/use a site but may not be able to leave reviews any longer, or reviews may not be written or submitted for a particular trader),

*(b)* putting clear and prominent warnings on the pages of traders that have been assessed to have benefited from banned reviews-related activity, eg an alert which notifies consumers that banned reviews have been identified for this trader,

*(c)* banning user accounts that have submitted or benefited from banned reviews and preventing the creation of new accounts,

*(d)* removing from public view all published reviews on the website for traders who have submitted or benefited from banned reviews,

*(e)* terminating memberships of trader recommendation platforms or contracts with clients (i.e. reviewers or sellers) for traders who have submitted or used banned reviews (in addition to removing product endorsements based on banned reviews and information),

*(f)* keeping sufficient records of actions previously taken in relation to reviewers and traders so the publisher can monitor and escalate sanctions accordingly.

***Internal evaluations***

B.48 Publishers should conduct regular assessments of the effectiveness of their prevention and removal processes, including in response to observed and emerging practices. Where inadequacies are identified, steps should be taken to ensure that they are addressed appropriately, eg by adjusting applicable processes.

### *What is reasonable and proportionate in a given context*

B.49 The banned practice requires traders that publish consumer reviews or consumer review information to take ‘reasonable and proportionate steps’ to prevent and remove from publication fake reviews, concealed incentivised reviews or false or misleading consumer review information. This requirement reflects the fact that consumer reviews originate from third parties and the publisher may therefore make such banned reviews and false or misleading consumer review information available inadvertently.

B.50 What is reasonable and proportionate will depend on the circumstances of each case and on what is proportionate to the need (as identified by the publisher when carrying out regular and comprehensive risk assessments) to effectively prevent and remove from publication this content on the publisher’s media. It will require publishers to take an outcomes-focused approach to compliance.

B.51 In particular, the steps publishers must take to prevent and remove banned reviews and false or misleading consumer review information will depend on the nature of the risks of consumers encountering such content. For example, practices that pose higher risks (whether by seriousness or by volume) will require publishers to implement more extensive measures to address banned reviews and false or misleading consumer review information.

B.52 Publishers cannot avoid implementing effective prevention and removal steps solely due to the (lack of) resources and capabilities available to them. Even a small trader publishing only reviews from their own customers or a nascent platform which presently enables a relatively small number of users to upload consumer reviews directly is required to implement effective measures where their content poses a risk. Ultimately, where a publisher cannot put in place effective measures that are reasonable and proportionate in their circumstances to address the need to prevent and remove banned reviews and false or misleading consumer review information, they should not publish consumer reviews or consumer review information.

B.53 Considerations that would help determine what is reasonable and proportionate in each case include:

*(a)* the publisher’s business model – for example, the steps required of a trader operating a search platform which publishes user reviews about third-party products may differ from, and be more significant than, a trader

operating a website which publishes reviews from its own customers and where there is likely to be direct proof of a purchase or genuine experience.

*(b)* the publication medium's functionality – for example, the risks of encountering banned reviews and false or misleading consumer review information could be greater where website users (such as traders whose products are being reviewed or other third parties) are granted a degree of control over the website's functionality. This includes where users can take actions to merge reviews for different products, create 'variants' of existing products or recycle reviews from previously listed products, thereby creating a risk of catalogue abuse.

*(c)* the type of content shown to consumers – for example, the publisher might reasonably be expected to take more significant steps where they use consumer reviews to influence or determine consumer review information concerning the reliability or trustworthiness of traders, products or reviewers presented to consumers on the website, eg the awarding or presentation of trader or product endorsements.

*(d)* the potential impact of the trader's activity – while size is not determinative, publishers' media which enable many users to generate and read reviews about third-party traders or their products, or which facilitate many potential transactions, may pose higher risks, eg by creating a strong incentive for third-party traders to procure banned reviews and obtain high overall ratings. In such cases, the publisher might reasonably be expected to take more significant steps to address such risks, eg applying automated tools designed to spot suspicious networks of reviewers and other anomalies.

*(e)* any additional risk (including the risk of harm to other traders) stemming from the impact or potential impact of banned reviews on aggregated consumer review information.

# Annex C: Summary of changes made by the DMCC Act to the CPUTRs

C.1 The UCP provisions seek to achieve a high level of consumer protection and maintain much of the scope and effect of the CPUTRs, with some amendments, including new or more detailed prohibitions of practices relating to fake consumer reviews and drip pricing.

C.2 The UCP provisions also streamline and/or remove certain tests from the CPUTRs in relation to assessing the unfairness of commercial practices. Most notably, it is no longer necessary:

*(a)* to demonstrate that a contravention of the requirements of professional diligence ‘materially distorts the economic behaviour’ of the average consumer (or is likely to), meaning that it ‘appreciably impairs their ability to make an informed decision’ thereby causing them to take a different transactional decision. For such a commercial practice to be unfair, it is sufficient to show that ‘it is likely to cause the average consumer to take a transactional decision that the consumer would not have taken otherwise’.

*(b)* to show that a misleading action relates to any particular listed feature – it needs only to relate to a matter relevant to a transactional decision.

*(c)* to prove that the omission of material information from an invitation to purchase causes a consumer to take a different transactional decision. The omission of material information from an invitation to purchase is now unfair regardless of whether it is likely to impact a consumer’s transactional decision.

*(d)* to demonstrate that an aggressive practice has caused or is likely to cause significant impairment of the average consumer’s freedom of choice or conduct. It is sufficient to show that a practice uses harassment, coercion or undue influence and is likely to impact a consumer’s transactional decision.

C.3 In addition, the DMCC Act clarifies the breadth of the definitions of ‘commercial practice’ and ‘transactional decision’. See Chapter 3 (Scope) for a detailed explanation of these terms.

C.4 The table below provides a non-exhaustive summary of the changes made by the DMCC Act to the CPUTRs. It should be read alongside the relevant legislation to which it refers. The contents of the table below, including the list of notable changes to predecessor provisions, are not a substitute for the law itself.

| Chapter 1 of Part 4 of the Digital Markets, Competition and Consumers Act 2024 | The Consumer Protection from Unfair Trading Regulations 2008 | Description of changes |
|---|---|---|
| *Introduction* | | |
| s.224 Overview | N/A | N/A |
| *Prohibition of unfair commercial practices* | | |
| s.225 Prohibition of unfair commercial practices | • Regulation 3<br>• Regulation 4 | Definition of 'commercial practice':<br>• Clarifies that it may be a single act or omission and that it has to be 'relating to' the promotion or supply of a product (rather than it having to be 'directly connected with' that promotion or supply)<br>• Clarifies that where the practice relates to the supply or promotion of a consumer's product, this can be to <u>any person</u> (not just to the trader)<br><br>Professional diligence:<br>• Removes the condition that a contravention of the requirements of professional diligence is unfair if it 'materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product', replacing this with the transactional decision test that a commercial practice is unfair 'if it is likely to cause the average consumer to take a transactional decision that the consumer would not have taken otherwise'<br><br>Invitation to purchase:<br>• Removes the transactional decision test from the omission of material information when there is an invitation to purchase. The omission of material information from an invitation to purchase is now unfair regardless of whether it is likely to impact a consumer's transactional decision |

| | | |
|---|---|---|
| Schedule 20 Commercial practices which are in all circumstances considered unfair | Schedule 1 | • The list in Schedule 1 to the CPUTRs has been rearranged. Most banned practices have not been changed substantially, even if the wording has been tweaked.<br>• Drafting revisions have been made to the following banned practices: paragraphs 2, 4, 5, 7, 8, 9, 14, 16, 19, 20, 25, 27, 28, 30, 31, 32 of Schedule 20 to the DMCC Act.<br>• Paragraph 13 of Schedule 20 to the DMCC Act introduces a new banned practice in relation to consumer reviews. |
| s.226 Misleading actions | Regulation 5 | • Removes the detailed list of 'matters' relevant to transactional decisions and replaces it with 'information relating to a product, trader or any other matter relevant to a transactional decision'<br>• Extends the scope of what is considered misleading action from a commercial practice that 'contains false information and is therefore untruthful' to 'the provision of false **or misleading** information'<br>• Misleading actions relating to 'codes of conduct':<br>  o Changes the condition for a misleading action to occur to where a trader falsely 'asserts that the trader acts in compliance with' a code of conduct (as opposed to where a trader 'indicates in a commercial practice that he is bound by that code of conduct')<br>  o Changes the characteristics of codes of conduct to which the prohibition applies, ie the requirement (previously 'commitment') in the code no longer has to be 'firm', 'capable of being verified' and 'no more than aspirational'. Instead, for the prohibition to apply the requirement in a code of conduct must be non-discretionary and **compliance with it** must be 'capable of being verified' |
| s.227 Misleading omissions | Regulation 6 | • Moves the provisions for a commercial practice that is an invitation to purchase to a separate provision (see row for s.230)<br>• A misleading omission can occur if the commercial practice omits information required under 'any other enactment', ie no longer just EU-derived law. |

| | | |
|---|---|---|
| | | <ul><li>It is not a requirement for the required information that is omitted to be 'material', ie that the average consumer needs such information to take an informed transactional decision.</li><li>Information 'required under any other enactment' is limited to information which the trader is required to give to consumers (ie it does not include information that must be given to traders</li></ul>• Removes the requirement for express consideration required of 'all the features and circumstances of the commercial practice' in assessing whether a commercial practice involves a misleading omission |
| s.228 Aggressive practices | Regulation 7 | • Removes the requirement to show that a commercial practice 'significantly impairs or is likely significantly to impair the average consumer's freedom of choice or conduct in relation to the product concerned'. Instead, it is sufficient to show that a commercial practice 'uses harassment, coercion or undue influence' and is likely to impact a consumer's transactional decision.<br>• 'Coercion' also includes the **threat** of physical force (in addition to the use of such force).<br>• Exploitation of vulnerable consumers no longer requires consideration of the gravity of the misfortune, or trader's awareness of whether it might impact the consumer.<br>• When determining whether a commercial practice uses harassment, coercion or undue influence, account must now be taken of contractual, as well as non-contractual, barriers to exercising rights, which may themselves be contractual or non-contractual. |
| s.229 Contravention of the requirements of professional diligence | Regulation 2 | • Standard of skill and care is no longer defined as 'special' skill and care<br>• It is no longer a requirement to show it 'materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product'<br>• Instead, it is sufficient to show that:<ul><li>the commercial practice falls short of the standard of skill and care reasonably expected, and</li></ul> |

| | | |
|---|---|---|
| | | ○ it is **likely to** cause the average consumer to take a different transactional decision |
| s.230 Omission of material information from invitation to purchase | Regulation 6 | • Definition of ‘invitation to purchase’ clarifies that it occurs where it ‘purports to enable’ the consumer ‘to decide whether to purchase the product or take another transactional decision in relation to the product’<br>• Removes the ‘transactional decision’ test for assessing whether a commercial practice involves the omission of material information when there is an invitation to purchase<br>• Requires that the total price of the product must be presented to consumers when there is an invitation to purchase (including any fees, taxes, charges or other payments which will be necessarily incurred)<br>• Requires that where the nature of the product means that there are mandatory charges that cannot be reasonably calculated in advance, information about how these charges will be calculated must be provided to the consumer and be such that it enables the consumer to calculate the total price of the product<br>• Requires that all pricing information must be set out with equal prominence<br>• The details about the trader that must be provided in an invitation to purchase now include:<br>○ the identity of any other person (not just a trader) the trader is acting for<br>○ the address for service (but not necessarily geographical address) of the trader and any other person the trader is acting for<br>○ the email address (if they have one) of the trader and any other person the trader is acting for<br>• An invitation to purchase must specify where arrangements for payment, delivery, performance or complaints handling are different from what the trader has published (rather than where those arrangements are different from the requirements of professional diligence)<br>• An invitation to purchase must include any information which the trader is required under any other enactment to give to a consumer as part of an invitation to purchase |
| *Public enforcement* | | |

| | | |
|---|---|---|
| s.231 Public enforcement | Regulation 19 | Substantially equivalent provisions |
| *Consumers' rights of redress relating to unfair commercial practices* | | |
| s.232 Rights of redress | • Regulation 27A<br>• Regulation 27B | Introduces a fourth condition for the rights of redress to apply, ie that the products are not excluded products by regulations under s.233 |
| s.233 Rights of redress: further provision | • Regulation 27E<br>• Regulation 27F<br>• Regulation 27G<br>• Regulation 27H<br>• Regulation 27I<br>• Regulation 27J | Regulations 27E-27J remain in place, until they are replaced by regulations made under s.233 (a power for the Secretary of State to provide for the exercise of rights of redress for a consumer in relation to a right to unwind in respect of a contract; a right to a discount in respect of a supply of a product under a contract; and a right to damages) |
| s.234 Enforcement of rights of redress | Regulation 27K | Substantially equivalent provisions |
| s.235 Relationship between rights of redress and other claims relating to prohibited practices | Regulation 27L | Substantially equivalent provisions |
| *Inertia selling* | | |
| s.236 Inertia selling | Regulation 27M | Substantially equivalent provisions |
| *Offences relating to unfair commercial practices* | | |
| s.237 Offences | • Regulation 8<br>• Regulation 9 | • Excludes the new banned practice in relation to fake reviews from the list of criminally enforceable offences |

| | | |
|---|---|---|
| | • Regulation 10<br>• Regulation 11<br>• Regulation 12 | • Makes the omission of information from an invitation to purchase a standalone offence |
| s.238 Defence of due diligence and innocent publication | • Regulation 17<br>• Regulation 18 | Substantially equivalent provisions |
| s.239 Offences: criminal liability of others | • Regulation 15<br>• Regulation 16 | Substantially equivalent provisions |
| s.240 Penalty for offences | Regulation 13 | Substantially equivalent provisions |
| s.241 Time limit for prosecution | Regulation 14 | Substantially equivalent provisions |
| *Miscellaneous* | | |
| s.242 Powers to amend this Chapter | N/A | New delegated power for the Secretary of State to:<br>• add, delete or modify commercial practices in Schedule 20<br>• extend the private rights of redress to unfair commercial practices to which redress rights currently do not apply or remove rights of redress that have been added<br>• add, delete or modify descriptions in the list of categories deemed to be 'material information' in the context of an invitation to purchase |
| s.243 Crown application | Regulation 28 | Substantially equivalent provisions |
| s.244 Validity of agreements | Regulation 29 | Substantially equivalent provisions |
| *Interpretation* | | |
| s.245 Meaning of "transactional decision" | Regulation 2 | • Decision must be 'any decision…relating to <u>the purchase</u> [etc.] of a product, including whether to purchase…'. The CPUTRs definition is 'any decision… concerning whether … to purchase' |

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| s.246 Meaning of "average consumer": general | Regulation 2 | • Provides that the average consumer cannot be expected to know information that a trader hides from the consumer, even if the consumer might know the information from another source |
| s.247 Meaning of "average consumer": vulnerable persons | Regulation 2 | • Tracks through the removal of the 'material distortion of economic behaviour' etc. test, replacing this with a direct 'transactional decision not otherwise taken' test<br>• Introduces the concept of 'situational vulnerability', ie provides that consumers could fit the 'vulnerable persons' definition for any reasons including by virtue of 'the circumstances they are in' (in addition to becoming vulnerable due to, among other things, their age, physical or mental health or credulity)<br>• A 'group of consumers' particularly vulnerable to a commercial practice no longer has to be 'clearly identifiable'<br>• The commercial practice does not have to be shown to influence the behaviour of **only** that vulnerable group<br>• It is specified that the concept of being vulnerable relates to impact on transactional decisions<br>• There is no longer any exclusion for 'the common and legitimate advertising practice of making exaggerated statements that are not meant to be taken literally' |
| s.248 Meaning of "product" | Regulation 2 | Substantially equivalent provisions |
| s.249 General interpretation | Regulation 2 | Definition of 'business':<br>• 'trade, craft or profession' includes non-monetary activities<br>• extends scope of 'trader' to where purpose is an undertaking carried on for gain or reward<br>• covers non-monetary trading (eg supply in exchange for personal data)<br><br>Definition of 'code of conduct': |

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| | | • Definition removes the exemption of codes imposed by legal or administrative requirements. Codes of conduct can now include agreements or sets of rules which may be imposed by legal or administrative requirements, as long as traders still have a choice about whether to be bound by them.<br><br>The definition of 'goods' now includes immovable property, rights and obligations |
| s.250 Index of defined terms | N/A | N/A |
| *Consequential amendments and transitional provision* | | |
| s.251 Consequential amendments relating to this Chapter | N/A | • Revokes the Consumer Protection from Unfair Trading Regulations, subject to the transitional provisions in s.252<br>• Introduces Schedule 21 |
| Schedule 21 | N/A | Citations and references made to the CPUTRs in other pieces of legislation have been amended to reflect that those regulations have been revoked and their provisions replaced by those in the DMCC Act |
| s.252 Transitional and saving provision relating to this Chapter | N/A | • Sets out that Chapter 1 of Part 4 of the DMCC Act applies to an act or omission which takes place on or after the commencement date. The CPUTRs will apply to any act or omission which takes place before the commencement date<br><br>• The private rights under the CPUTRs continue to apply, even after the commencement of the DMCC Act, until the relevant private rights SI has been made under section 233. The effect of this is that consumers can secure redress, but applying the law as set out in the CPUTRs, rather than in the DMCC Act. Accordingly, the CPUTRs remain binding on traders for this purpose. |