BRC

CONSULTATION ON DRAFT GUIDANCE ON THE PROTECTION FROM UNFAIR TRADING PROVISIONS IN THE DIGITAL MARKETS, COMPETITION AND CONSUMERS ACT 2024

BRC RESPONSE

Background

The BRC is the lead trade association for UK retail.

Our purpose is to make a positive difference to the retail industry and the customers it serves, today and in the future.

Retail is the 'everywhere economy', a vital part of the socio-economic fabric of the UK.

The industry makes up 5% of UK GDP and is the largest private sector employer, providing 3 million direct jobs and 2.7 million more in the supply chain. Retail has a presence in every village, town and city across the country.

Over 200 major retailers are members of the BRC, with thousands of smaller, independents represented by BRC's trade association members. Together, these businesses operate across all retail channels and categories and deliver over £350 billion of retail sales per year.

We build the reputation of the retail industry, work with our members to drive change, develop exceptional retail leaders, and use our expertise to influence government policy so retail businesses thrive and consumers benefit. Our work helps retailers trade legally, safely, ethically, profitably and sustainably.

Preliminary

The Guidance itself makes the important point that it is the legislation that is definitive and not the Guidance – which is there to assist. That should be emphasised – businesses are entitled to mark their work in accordance with the legislation alone if they so choose and their actions must be judged against the legislation alone without any suggestion they have ignored the Guidance rather than the legislation.

Beyond that, the BRC believes it is important that the draft Guidance should be placed in the overall context of the Government's approach to Regulation and enforcement and the very clear mandate that regulators should not be overly interventionist and should focus on boosting – not undermining – growth and competition.

In this respect we would note the following if overpowering enforcement and excessive detailed expectations beyond the specifics of the legislation are not to limit enthusiasm for growth online.

- In enforcing the legislation taking into account the Guidance, the CMA and others should take into account the very short consultation period and the very short period between the final Guidance and implementation. Where a retailer may need to change its practices in any way – not least in relation to the Invitation to purchase – there can be a considerable period required to amend any technology especially if unit pricing changes are also required in much the same period. A heavy-handed approach and a literal interpretation of the Regulations by reference to the Guidance would only serve to undermine growth and innovation.

- The Government's ***growth and innovation*** strategy indicates there should be a recognition of the impact of regulatory activity on growth and innovation in general. In this instance, it is important that the objectives of the legislation (i.e. a requirement not to mislead consumers) should not be overlooked in an attempt to provide detailed provisions that go beyond the actual legislative

requirements – other than very useful indications of how a business might comply with the regulations.

  - The key objective is that consumers should not be misled. In assessing a practice and the more detailed requirements in the Act and whether it requires enforcement action, that key objective should be an underlying guiding principle. For example, the desire to include delivery charges in the headline price (on which we comment further below) could if enforced in one way undermine exports and the expansion of online exports to overseas countries – simply because each country has different costs.

- The Government is committed to ***smarter regulation*** – which we believe includes a commitment to expect regulators to move in the direction of an OBCR (Outcomes based collaborative regulation) approach – meaning the normal expectation for generally compliant businesses is not to jump to prosecution but to engage in discussion to seek a resolution of issues. That is an appropriate approach to much of the detailed Guidance if it is not to become overbearing or disproportionate but rather is to be helpful.

Alongside the CMA, Trading Standards and the ASA - as well as some other private enforcers - have a role to play in ensuring compliance. It is vital that there be one piece of Guidance that everyone regards as the authoritative version (noting the ASA has a slightly different remit).

- This will also go towards ensuring the legal advice provided to businesses does not diverge other than in respect of issues of individual business relevance and that businesses can act in full comfort that their conduct will be viewed to be compliant and acceptable by all regulators. Conflicting approaches/nuances between regulators will result in an undue and disproportionate administrative burden on businesses.

- It will also help to ensure that Primary Authority assured advice can be accepted by the CMA. Businesses cannot be expected to comply with versions of Guidance that differ from each other. The CMA 's role of supporting regulator should also come into play here.

Our responses to the key questions in the consultation are set out below:

Q1. Do you have any comments on the structure or clarity of the Draft Guidance?

The Guidance is very comprehensive and generally clear and the structure works.

- It is, of course, very long – and below we will make some suggestions in a few areas where it might usefully be longer still.

- As indicated above, regulators should always remember that the aim is to ***avoid misleading consumers***, and this should inform all approaches to businesses.

- While the lengthy Guidance is important and useful for law firms and larger businesses with their own in-house teams, there are many retailers which are much smaller and need to rely on external advice, which often comes at a cost. It is unlikely that smaller or even medium sized retailers will be able to spend time reading the Guidance in great detail regularly – or testing what they do each time against the detail. For them, it is important there should be some sort of ***authoritative guide to the key aspects*** of how they should approach their communications. We would prefer to avoid a plethora of different short versions cropping up, each emphasising different points or providing different interpretations. We would welcome the CMA producing or endorsing one single such shorter version that would then be endorsed and adopted by all other relevant regulators.

The Guidance is generally clear though there are points that could be clearer still either competition between retailers for (i) products through the addition of examples or amended or with additional wording.

- For retail, how to deal with ***delivery charges*** where these vary by the number or choice of articles a consumer places in the basket is one such example.

- A further example is the requirement to include all the ***legally required information*** on a product in an invitation to purchase – does this mean everything or as seems to be the case everything that is required when advertising the product (ie only in relation to the practice in this regulation).

- We would also like to see it stated very clearly where a ***practice is banned in all circumstances*** (the 32 banned practices) and where it has to be assessed on a case by case basis – and the implications of that. For example, the new section on invitation to purchase is separate from the list of banned practices in all circumstances (to which fake reviews were added) but differs from other unlawful practices in that it is not to be assessed against the transactional decision test and does include a number of specific requirements. It seems to be in a sort of limbo between and betwixt.

- The Guidance should spell out clearly how omission of material information from an invitation to purchase under section 230 differs from the requirements under the list of banned practices in schedule 20 ; the implications of the removal of the transactional decision test from section 230 compared with other practices where it continues; and how enforcement requirements differ in each case in theory and practice – the list of banned practices; section 230; and the other practices.

Q2. Do you have any comments on the illustrative examples of commercial practices applying the prohibitions? Are there any areas where you think additional examples could usefully be reflected in the Draft Guidance?

The examples are useful illustrations of the text. Indeed we would hope that this will ***be a living document*** and additional examples can be added as issues of misunderstandings arise.

- As indicated above we would like to see some ***further examples*** of how delivery charges might be expressed for different types of goods and in different situations – a supermarket delivery where the delivery charge, if any, relates to the service to be provided rather than any particular product; a delivery of a basket of goods where the cost might change in accordance with the number or value of the products in the basket and could ultimately be nil; a delivery charge that varies in accordance with where the consumer lives.

- It would also be useful to see an example of the sort of additional legal information that should – and should not – be included in an invitation to purchase.

Q3. Do you have any comments on the Draft Guidance on the 'drip pricing' provisions in the DMCC Act (found in the 'Material pricing information' section of Chapter 9 of the Draft Guidance), including the illustrative examples? In particular, are there any specific pricing practices that have not been included in the 'drip pricing' illustrative examples which you think it would be helpful to include, and if so, what should such further guidance specifically cover?

This is one of the ***key parts*** of the Guidance for retailers – and specifically in relation to ***delivery charges***. The aim should be to provide consumers with the information they need – not to overload them with information that is not relevant to their choice whether to make a purchase or not.

- In our experience, customers do not expect delivery charges on a normal retail site to be included in the headline price on a product listing page or product description page.

- There is a risk of being overzealous compared to the policy intention. Delivery fees cannot be reasonably predicted per item, they require information about total basket, location etc. A headline fee would not reflect what the customer would likely pay and would mislead the customer.

- We do not believe it is feasible for the headline price to include dynamic / variable delivery fees. It really conflicts with the nature of retail and often depends on where the package is being delivered and what items are in the package. Then there is a need to deal with delivery passes, or free delivery at certain times.

- There is a risk of confusing customers as to both the value of the product being purchased and the cost of any delivery service. Inclusion of the latter in the headline price of each product would make it very difficult for customers to meaningfully compare prices between retailers to assess value for money and could hamper robust price competition between retailers. E.g. if a retailer A offers an online service and include bananas in a price match programme where it matches its price to Retailer B (which does not have an online service) the inclusion in Retailer A's headline price of a delivery charge (which is not applicable to Retailer B) would artificially skew a customer's perception of price and competition.

In retail there are **various types of products that are sold in various ways** – in store, online for collection in store, and online for delivery.

- It would be confusing to have to have 3 headline prices in an invitation to purchase as defined – the price for in store purchases; the price for ordering and collecting in store; and the price for home delivery which may itself vary. In any event, combining the product price and potential delivery charge into a single headline price would confuse customers and unduly conflate competition between retailers for (i) products and (ii) delivery services.

As well as different ways of selling, there are differences in assessing delivery charges, if any:

- Some large items clearly require delivery (with choices often available of installation; delivery to a specific room; removal of an old item each with their own cost). The actual charge may well depend on the customer's location – and indeed whether there is a single charge for several items or an additional charge per item. In other words what would seem to be a simple requirement to include a charge in the headline price is actually not so simple at all – and this applies in face-to-face sales as well as online purchases. In our view, the simplest and most useful answer is to indicate there is a delivery charge and provide a link to the variables and charges for each.

- Home deliveries of supermarket goods is another type of sale. In this case, the customer may be asked to pick a slot for which the charge is variable by day or time of day etc - but is totally clear and is the same regardless of how many items are chosen – or it may be that he fills his basket and then gets to pick a slot for which the charge may vary depending on issues such as the total value or number of items selected. The point is that the delivery charge cannot always be known upfront and cannot be assigned to a particular product rather than the service as a whole.

- Then there are websites where the delivery charge will depend on the number or value of the goods selected – and indeed whether the customer wants a premium delivery or standard delivery. None of this is known before the customer makes his choice and cannot be assigned to a particular product.

The aim should be to avoid potentially undermining competition and innovative ways of charging so there is less variety but to ensure the consumer is not misled, is clear there will be a charge and knows where he can find the basis on which it can be calculated.

Examples covering each of these situations would be useful – or at least some textual recognition of the issues.

Overall, our understanding is that the drip charges section of the DMCC is only intended to capture charges that are (i) mandatory (i.e. cannot be avoided to use, receive or purchase a product); and (ii) capable of precise, accurate calculation on a reasonable basis in advance of building a basket. Delivery fees charged by retailers are unlikely to satisfy (i), (ii) or both.

- In any event, a fee charged to deliver an item to a chosen address represents a separate charge (often unrelated to the price of the product(s) being delivered) for a stand-alone, optional additional service that is calculated on a transaction-specific basis depending primarily on the delivery timing and delivery location.

The guidance itself suggests that not all delivery charges are mandatory (e.g. paragraph 9.19(b) and paragraph 9.20 suggest that a delivery fee would not be mandatory if a customer could avoid it by arranging collection through viable collection options).

- It would be helpful if the CMA could make this explicit through additional examples that demonstrate compliance with section 230 where (i) a delivery *option* is made available to customers; and / or (ii) any applicable delivery fee is not capable of reasonable advance calculation due to the nature of the delivery service (e.g. number of items to be delivered, time and location of delivery); rather than it being related to the nature of the product (as contemplated in section 230(2)(c)).

- Our assumption is that where either (i) or (ii) apply, a retailer need only make it explicit to a customer that "*delivery charges apply*", as per section 230(2)(g).

Overall we need clarity on displaying delivery at basket building level when the charge may depend on the items added. In our view, the most appropriate approach to ensure clarity would be (i) indicate in any advert / invitation to purchase that delivery fees may/will apply where a customer chooses to purchase products online; (ii) include all potentially applicable delivery fees (e.g. by day / timeslot) on an easily accessible webpage during online shopping user experience; and (iii) clearly indicate the applicable delivery fee once a customer has built their basket and selected desired delivery location and time, and prior to payment step.

Some other specific concerns include:

- Concerns for companies that operate worldwide. UK businesses still deliver to Isle of Man, Guernsey, Northern Ireland, EU and elsewhere at different costs.
- Using an IP address as suggested in the guidance assumes the package is being delivered to the same destination as where the order is placed and requires cookies. There are real concerns with how this interacts with important cookie laws and thus goes against another regulator's requirements. Today customers can reject cookies with one button meaning this is not a simple solution.
- Guidance does not account for a customer logging in to their account. It might be the case that once a customer has logged in there is information about their location however there are concerns 1) assumes package is being delivered to a certain address, and 2) only certain customers will get the protection.
- The situation re DRS (Deposit Returns Scheme) deposits should follow the PMO rules and the fact that the DMCC Act rules and this Guidance do not apply needs to be explicit.

The requirement to include ***all the legally required information*** on a product also needs further explanation.

It would be helpful if the Guidance could indicate whether there is any latitude on which information is genuinely material from the list in sec230(2) (eg particularly traders addresses as per (e) and information that may be required on a product specific basis (such as detergent information that would have to be displayed on product packaging) as per (i) in an invitation to purchase and would lead to information overload on an invitation to purchase.

- So does the all legally required information mean literally everything or as seems to be the case everything that is required in that legislation specific to an invitation to purchase when advertising the product (ie in relation to the practice in the regulation).

- The guidance provides an example in relation to Package Travel and Linked Travel Arrangements Regulations 2018. However, there are many consumer product regulations that require information to be present at point of sale, including when online. e.g. for Declarations of Conformity, Toy safety warnings on age suitability, food allergens/ingredients, energy related product efficiency rating etc. If the intention is that all this information must be included in an invitation to purchase as opposed to just at other times the CMA and DMCC will effectively become the enforcer for all product legislation that requires information to be present on the web at the point of sale.

- If material information does extend to all of the product specific regulations requiring content online at point of sale, what guidance can be provided for advertisements that include the price (deemed an invitation to purchase) in relation to the amount of information that should be included. e.g. would an online advertisement for a food product that includes a price, be expected to include the ingredients and allergens etc. We assume not as that would often be impractical and overload the customer with unnecessary information at that stage of the transaction journey.

- It would also be useful to see an example of the sort of additional legal information that should – and should not – be included.

- If all of that information is required in an invitation to purchase / advert, it would often be impractical (e.g. where there is limited physical space) and / or amount to an· information overload.
    - Beyond the simple car park example, there are concerns about the volume of information that could fall under this requirement e.g. toy safety, washing detergent etc.
    - The same applies to advertising a product - how much material information would be required to advertise a product e.g. allergens, DRS? etc.
    - Similarly in relation to business address on adverts and different addresses if not trading from there (all our store addresses?) - CMA need to consider sector by sector what is material - for example people know how to contact Currys, Sainsburys, Boots, Tesco

Q4. Do you have any comments on the Draft Guidance on the banned practice relating to fake consumer reviews (found in Annex B to the Draft Guidance)?

- It would be desirable to make clear any distinction between the due diligence expected of a retailer that has reviews on its own site about its own services and products compared with a site dedicated to reviews of many different products/sellers. The due diligence requirements for the former seem to be excessive in relation to the nature of the seller.

- To what extent can a product change overtime before a review is considered misleading? Many products change over time – and indeed services. Will the CMA provide any guidance for the scenario of products that change over time. Batch to batch variability, reformulation, seasonal crop variations etc. are all examples of product variation. Will the CMA include guidance for what

actions (if any) are required to genuine reviews posted at the time, if products change over time? Is it sufficient to ensure they are ordered chronologically etc. so customers can see the date of the reviews to judge if they are still relevant, or if a product changes over time, could previous reviews that continue to be published be deemed misleading consumer review information?

  - An example is vintage wine - product could be entirely different from the one tasted and reviewed yet presented as a whole review.

- The Definition of 'incentivise' needs to be clear on a regular type of offer - - is offering a customer the chance to win a £50 voucher in return for a review considered incentivising?

- Clarify whether there is an expectation for businesses to check syndicated reviews or is that the responsibility of suppliers
- We assume that merely emailing and asking a customer to leave a review does not mean it is incentivised

- Retailers can be very large employers and have significant workforces, both directly and indirectly in the supply chain. Regarding B.10(h) having a financial interest in the trader or the product being reviewed. The guidance should clarify if a review posted by an employee who makes a review as a consumer and without any other form of incentivisation would require to be flagged as being incentivised simply because they are an employee (who may or may not have performance related targets linked to bonus)? To do so could be considered almost impossible due to use of personal email addresses etc

- Aside from flagging individual reviews as being incentivised where appropriate, guidance should include the actions that are required of aggregated data that uses the review. For instance average star ratings etc. Would the CMA expect there to be two aggregated average star ratings? One for incentivised reviews and one for non-incentivised reviews.

Q5. Do you have any other comments on topics not covered by the specific questions above? If so, the CMA requests that respondents structure their responses to separate out their views in relation to each of the Draft Guidance's chapters.

N/A