

Response to the CMA's consultation on unfair commercial practices

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Economic
Insight

01

Introduction and Executive Summary

The CMA's new powers under Part 4 of the Digital Markets, Competition and Consumers (DMCC) Act could fundamentally change consumer protection policy and enforcement in the UK. In this context, we welcome the CMA's draft guidance on unfair commercial practices, and the opportunity to comment on it.

As the guidance sets out, "*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*" (emphasis added). Therefore, the key questions for businesses seeking to comply with the UCP provisions are:

- What does behaving fairly mean in practice?
- What would be considered misleading?

Overall, the draft guidance provides helpful detail on how the CMA is considering the application of its new consumer powers. In particular, we are encouraged by the recognition that "*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.*" However, we believe **more clarity around the specifics of when and how the CMA will apply the 'transaction decision test' would be helpful for businesses (and their advisors) who are seeking to ensure that they are complying with these provisions.**

Therefore, in finalising the guidance, therefore, we recommend the CMA consider providing greater clarity on:

- (i) **When** would there be a need for a business to consider a 'transactional decision test'?
- (ii) **What** kind of analysis the CMA would expect businesses to consider?

In this context, we recommend the CMA more explicitly recognises that the scope and scale of this test could vary depending on the circumstance (e.g. the nature of the product and service; the nature of the consumer; etc.). This is because the nature of information consumers need to make the right transactional decision (and, therefore, businesses should provide) would likely be different for someone purchasing a toothpaste vs a financial product. Therefore, appropriately balancing the costs and benefits of any additional expectations on businesses is necessary to align with the principles of good regulation.

In the remainder of the document, we set out our thoughts on Part 1 and 2 of the guidance in turn, as requested in the consultation document.¹

¹ We have no further reflections on Parts 3 and 4 of the guidance.

Reflections on Part 1: Scope and the assessment of unfairness

Chapter 3: Scope

We have two key reflections on this chapter:

- (i) on the definition of the average consumer; and
- (ii) on the inconsistency in the guidance in relation to when a 'transactional decision test' applies and what this involves.

The average consumer

The guidance is helpful in explaining how the CMA is thinking about the 'average consumer'. However, to help businesses use the guidance to understand: (a) who the average consumer is; and (b) what information they need to make the right transactional decision for themselves, further guidance / examples on what the average consumer looks like would be helpful.

Specifically, the guidance provides useful characterisations of the 'average consumer' as each of: (i) the broad 'average consumer'; (ii) the narrow 'average member of the targeted group of consumers'; and (iii) the unique 'average member of a vulnerable group of consumers'. The guidance even goes as far as describing what the 'average consumer' is *not*, but does not provide further specification regarding what this consumer *is*. The inclusion of some examples may be sufficient to address this.

The inconsistency in expectation of when a 'transactional decision test' applies

As we note above and below, we are encouraged by the CMA's recognition that there are some commercial practices which may not be considered unfair in all circumstances (i.e. on principle), but would be regarded as unfair if they cause consumers to take a different transactional decision.

Given this context, it is concerning that this part of the guidance suggests that "[t]here is no requirement to show evidence of actual consumers being affected by an unfair commercial practice" and "[t]he concepts are intended to help the court and/or the CMA [...] decide if a practice is prohibited due to its **potential** impact on relevant consumers" (emphasis added). The concern regarding this is twofold.

- Firstly, this is inconsistent with the notion of there being two, distinct, subsets of practices: (i) *those prohibited regardless of impact on consumers' transactional decisions*; and (ii) *those deemed unfair if they are likely to cause consumers to take a different transactional decision*. This is because, the description of subset (i) equally applies to subset (ii) if there is no requirement to show evidence of an actual impact on the consumer's transactional decision and instead merely a potential or likely one.
- Secondly, this runs the risk that inconsequential practices which have no impact on the average consumer's transactional decision and welfare are deemed unfair under the DMCC Act. The guidance acknowledges that "[d]ifferent practices, and even the same practices in different circumstances, may have different effects depending on the type of consumer they reach or affect". To prevent this blanket 'catch-all' result, **actual** rather than **potential** impact on the relevant customers should be assessed.

Chapter 4: Assessing unfairness of commercial practices

We are encouraged by the recognition in this chapter that “*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*” (emphasis added).

However, it remains unclear when the practices for which the transactional decision test applies might be considered unfair, i.e. what “effect” on consumers would deem practices to be considered unfair. By way of an example:

- would it be sufficient if even one average consumer is misled?
- could the answer to this question be different for different circumstances (e.g. if the product under question was a toothpaste vs a cancer drug)?

The consideration of the appropriate threshold of effect (in scale², scope³ and the amalgamation of the two⁴) for a practice to be considered unfair under the transaction decision test is important to give businesses clarity. In doing so, we encourage the CMA to consider the appropriate balance of costs and benefits, in line with principles of good regulation.

03

Reflections on Part 2: Commercial practices affecting the average consumer’s transactional decisions

Our primary concern regarding the guidance provided for commercial practices requiring the transactional decision test (Part 2), is that it is not wholly consistent (and at times contradictory) to the guidance set out in Part 1. In addition to this, there are instances where the ‘threshold’ at which the commercial practice is proposed to be assessed appears counter-intuitive and runs contrary to the principles of good regulation as it does not seek to efficiently balance the costs and benefits.

We have 4 reflections on these chapters:

- (i) On the risk of commonplace unfair practices disproportionately persisting;
- (ii) On the inconsistent application of the transactional decision test requirement when assessing misleading actions;
- (iii) On the lack of clarity regarding information requirements; and
- (iv) On the lack of sufficient guidance required to differentiate between categories of commercial practices which do and do not require the transactional decision test for omitted material information.

Firstly, when considering professional diligence, the guidance states “[t]he 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 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”. The implication of this is that when a suspected

² The scale of effect refers to the number or proportion of customers that are affected.

³ The scope of effect refers to the significance of the effect experienced by the average consumer i.e. the impact on consumer welfare.

⁴ The required scope of consumer effect may subsequently inform the required scale (and vice versa).

unfair practice is commonplace in the trader's field, one has to provide evidence of negative consumer impact in order for it to be deemed unfair. However, when a suspected unfair practice is not commonplace in the trader's field, the practice could be deemed unfair if it is likely to cause the average consumer to take a different transactional decision. Therefore, a higher threshold is required to conclude the commercial practice is unfair if it is commonplace in the field (likely impacting most/all customers) compared to when it is not commonplace in the field (likely impacting a smaller subset of customers). This risks commonplace unfair practices disproportionately persisting relative to trader-specific unfair practices.

Secondly, the guidance states that "*no consumers need to have in fact been misled or deceived for a trader to have infringed the UCP provisions*", which is inconsistent with Part 1. Part 1 indicates that an infringement (of this subset) is reliant on the practice likely causing the average consumer to make a different transactional decision. However, in order for this to occur due to the misleading action, it is reasonable to infer that the consumer must have been misled or deceived otherwise it is not likely they would have made a different decision. Without this transactional decision requirement, the assessment of unfairness of misleading practices appears no different to 'banned practices' which are deemed unfair in and of themselves.

Thirdly, whilst we are encouraged by the recognition that "*[w]hat information is required will depend on the circumstances, for example what the product concerned is, and where and how it is offered for sale*" and that "*[t]his may range from a very small amount of information for simple products, to more information for complex products*", we consider it does not go far enough to provide the necessary clarity to businesses to be confident in their compliance. For example, the average consumer's preference for information may not be clear to the business, and may vary significantly across the consumer base.

Lastly, we consider that the CMA does not provide sufficient guidance to differentiate between: (i) omitting material information (characterised as 'misleading omissions') which are captured under the category of commercial practices which require the transactional decision test; and (ii) 'required (material) information' which does not require any decision test. This should be addressed by providing further clarity in both chapter 7 as well as chapter 9.