

CMA Consultations on Changes to UK Consumer Law Guidance

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Euclid Law comments

Euclid Law welcomes the CMA's consultation on its draft updated guidance on material aspects of the UK's new consumer protection regime. This response is sent on behalf of Euclid Law, a law firm, and does not necessarily reflect the views of any of the firm's clients.

Given that the CMA's consultation on its draft Unfair Commercial Practices Guidance and Consumer Protection Enforcement Guidance are being run in parallel, we have prepared a combined response covering both consultations. Our comments are set out below, adopting each consultation's questions for consideration.

I. Unfair Commercial Practices Guidance (CMA207)

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 Do you have any comments on the structure or clarity of the Draft Guidance?

- We consider that the Draft Guidance is well structured and clear, with the possible exception of the inclusion of the fake reviews guidance in an annex (see Q4 below). The illustrative examples and flow charts, such as the one on page 23, are particularly helpful.

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 Are there any areas where you think additional examples could usefully be reflected in the Draft Guidance?

- We have no specific suggestions on this point.

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 Do you have any comments on the Draft Guidance on the 'drip pricing' provisions in the DMCC Act (found in the 'Material pricing information' section of Chapter 9 of the Draft Guidance), including the illustrative examples?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?

- While we appreciate that the Draft Guidance must provide guidance on the law as passed by Parliament, we have some concerns about the practical implementation of the drip pricing provisions. In this context, it would be helpful for the CMA to provide additional guidance on precisely when charges will be viewed as mandatory, compared with "genuinely optional". For example, is the CMA's reference at paragraph 9.19(d) to "local taxes and other fees that are payable *on arrival* at hotels" (emphasis added) imply that unavoidable fees (including local tourist taxes) that are payable *on departure* (as is often the case) are not to be treated as mandatory? If not, this could be made clearer.
- We are also concerned that the discussion at paragraph 9.20 concerning fees that can be avoided in theory but not in practice introduces an unhelpful element of ambiguity in the regime. Although the point is illustrated with an example of a retailer with "a very limited number of physical stores located only in certain parts of the country", on the grounds that in store collection is merely a "notional" option, this does not resolve the ambiguity. In such circumstances, the ability to collect a product from a physical store,

thereby avoiding delivery fees, would presumably be entirely feasible (rather than “notional”) for consumers living close to the retailer’s stores. Is it to be expected in such situations that retailers should display two equally prominent headline prices, for products purchased/collected in-store and those that will be delivered, respectively? Such an approach would appear to be more cumbersome, and potentially more confusing to consumers, than the retailer ensuring prominent messaging indicating that delivery is subject to an additional fee.

- It would also be helpful to clarify how the CMA views compliance in a situation where a retailer charges a single fee for a purchase transaction, rather than per item bought. While it seems clear that an online groceries company would not have to give a separate ‘delivered’ price for each individual grocery item, as such a calculation would be impossible, presumably this should also extend to a situation where, say, a cinema operator charges a £5 transaction fee, regardless of how many tickets are ordered, given that the number of tickets ordered is not clear until the consumer has selected this. Similar considerations may also apply to travel fees that may vary according to the number of travellers, for example cleaning fees, in situations where the number of travellers may not be known at the time of booking. Further guidance on such matters would be helpful.

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)?

- We have no specific comments, other than to suggest that it may be preferable to contain this guidance in the main body of the document, rather than in an annex, as it could otherwise be overlooked. The reason for relegating this specific section to an annex is unclear.

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.

Chapter 6 – Misleading Actions

- While we fully appreciate that CMA enforcement is no longer bound to follow EU law in all respects, we would suggest that the fact that the bulk of the substantive provisions to be applied under the new regime continue to have their origins in the EU consumer protection regime means that some guidance on the CMA’s approach to the relevance of EU precedent may be helpful.

II. Consumer Protection Enforcement Guidance (CMA58ii)

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

- We consider that the Draft Guidance is well structured and clear, subject to the point raised in response to Q2 below.

Q2. Does the guidance offer sufficient clarity about how the CMA proposes to carry out its enforcement functions?

- The CMA’s choice of civil or criminal enforcement is likely to be a critical factor in future cases. Given this, we would suggest that the initial guidance at paragraph 3.4 on choice of powers, which notes that the CMA is more likely to use its criminal powers “where this is likely to have an effect across the market or wider economy”, is unhelpfully vague. The factors indicating that a criminal investigation will be more likely that are set out at paragraphs 6.4 and 6.6 are, in contrast, considerably more informative. As a result, we would suggest that paragraph 3.4 should be aligned more closely with paragraphs 6.4 and 6.6 and a cross-reference added.

Q3. 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.

- We have no specific comments on this point.

Euclid Law Limited