



**Competition and Markets Authority Consultation**  
**Draft guidance on the protection from unfair trading provisions in the Digital Markets,  
Competition and Consumers Act 2024**  
**Response of Herbert Smith Freehills LLP**

## **INTRODUCTION**

Herbert Smith Freehills LLP welcomes the opportunity to provide comments in response to the CMA's consultation document *Draft guidance on the protection from unfair trading provisions in the Digital Markets, Competition and Consumers Act 2024 (CMA207con)* of 11 December 2024 (**Draft Guidance**). The comments set out below are those of Herbert Smith Freehills LLP and do not represent the views of any of our individual clients.

The Digital Markets, Competition and Consumers Act 2024 (**DMCC Act**) makes a number of important changes to the UK's consumer protection regime, including to the unfair commercial practices (**UCP**) regime.

We welcome the CMA's updated Draft Guidance on the UCP provisions which will replace the CMA's current guidance on the Consumer Protection from Unfair Trading Regulation in order to reflect these changes, as it will assist traders to comply with the protection from the unfair trading provisions set out in Part 4, Chapter 1 of the DMCC Act.

The Draft Guidance illustrates how the UCP provisions may apply in practice and now includes specific guidance on the offences of "drip pricing" and "fake reviews" that have been added to the list of commercial practices that are prohibited regardless of their impact on the average consumer's transactional decision. There are a number of areas where we consider that the Draft Guidance could be expanded in order to increase legal certainty for businesses affected by these changes.

Our comments focus on the following sections of the Draft Guidance, in the order these appear in the Draft Guidance:

- Part 2: Commercial practices affecting the average consumer's transactional decisions
- Chapter 9: Drip pricing provisions
- Annex B: Guidance on prohibition of fake reviews

### **1. COMMENTS ON PART 2: COMMERCIAL PRACTICES AFFECTING THE AVERAGE CONSUMER'S TRANSACTIONAL DECISIONS**

#### **Section 5: Contravention of the requirements of professional diligence**

- 1.1 Paragraph 5.2 of the Guidance sets out the statutory definition of the 'general prohibition' relating to contravening the requirements of professional diligence – i.e. that practices are prohibited where they: (a) contravene the requirements of professional diligence; and (b)



are likely to cause the average consumer to take a different transactional decision. The relevant definitions for the second limb of this general prohibition (ie the likely impact on the transactional decision of the average consumer) are dealt with in Chapter 3 of the Draft Guidance. It would, in our view, be helpful to include a signpost to these paragraphs in section 5, for ease of navigation across the Draft Guidance.

- 1.2 Paragraph 5.6 appears to address the principles of '*honest market practice*' and '*good faith*' contained in Section 229 DMCC Act which go towards the professional diligence standard. The first sentence of paragraph 5.6 ('[...] *having regard to the consumer's legitimate interests or expectations and taking steps to protect these*') reflects wording relating to the interpretation of the '*honest market practice*' principle that is set out in paragraph 1371 of the Explanatory Notes to the DMCC Act. This concept is then exemplified in the second sentence of paragraph 5.6 by the example of '*not [taking] advantage of the consumer's lack of experience of unfamiliarity with a product*'. However, that language replicates the wording relating to the meaning of '*good faith*' from paragraph 1372 of the Explanatory Notes. To avoid conflating these principles which could cause confusion to traders, we would suggest treating these as distinct and alternate principles as envisaged in Section 229 DMCC Act, and providing exemplification for each of these accordingly.
- 1.3 The use of examples which illustrate the practical application of the full general prohibition test would also be welcomed; at present, the examples given appear to relate solely to the requirements of professional diligence. We consider it would be helpful to draw out more explicitly for the reader how this limb interlinks with the transactional decision limb in practice.

#### **Section 6: Misleading actions**

- 1.4 The Draft Guidance provides a non-exhaustive list of '*the types of matters in relation to which traders should provide clear and accurate information*'. This list does not originate from the UCP provisions although it mirrors to a large degree text included in Regulation 5 of the Consumer Protection from Unfair Trading Regulations 2008.
- 1.5 As drafted, paragraph 6.5 of the Draft Guidance could be interpreted as introducing a broad positive obligation – i.e. that traders must provide information on all of the matters listed as a minimum, and that failure to do so would amount to a misleading action. This does not appear to be the intention of the UCP provisions / section 226 of the DMMC Act which relate to the provision of false or misleading information. Indeed, a positive requirement to provide information on all such matters regardless of their relevance would in many circumstances lead to illogical outcomes. We would recommend this be clarified in the wording (e.g. '*the types of matters on which information should be clear and accurate*', *to the extent any such information is provided by the trader (NB: the information that a*



*trader is required to provide in relation to a product will depend on the circumstances: see section 7 for further guidance relating to misleading omissions).*'

- 1.6 In addition, regarding the list contained in paragraph 6.5, there are certain terms which would in our view merit further clarification and / or illustrative examples (such as what the Guidance intends by references to the 'execution' of the product, its 'commercial origin', 'delivery of the product', and the 'assets' of the trader).

#### **Section 7: Misleading omissions**

- 1.7 At page 37, the Draft Guidance sets out three examples of material information being omitted by traders. Each example ends by concluding that the omitted information '*is material and has to be given to the customer*' (or similar words to that effect). To assist traders in understanding the legal implications of this, we would suggest the addition of wording that ties this back to the material omission principle (e.g. '*such information is material and has to be given to the consumer (i.e. failure to provide this to the consumer would amount to a misleading omission)*').

#### **Comments on the transactional decision test**

- 1.8 The 'transactional decision test' is an essential concept relevant to determining whether a practice is prohibited and that there is an infringement. It is therefore surprising that the CMA has not expanded its Draft Guidance to elaborate on this concept in further detail, beyond the limited comments made in passing under the definitions in Section 3 on scope. Other than this, however, the Draft Guidance does not seek to assist traders in understanding how in practice the relevant threshold would be met and may be demonstrated (including assessing how the average consumer would have behaved absent the relevant action or omission), and therefore how traders can ensure they are interpreting their obligations correctly in this context.
- 1.9 The CMA's enforcement regime and the powers available to the CMA have grown significantly, including the potential to impose high financial penalties for traders that engage in unfair commercial practices. On that basis, we would urge the CMA to provide much greater clarity around how it will apply the transactional decision test including specific worked examples of how the concept will be assessed in practice.
- 1.10 We also note that the examples in Part 2, which refer to commercial practices that are likely to cause the average consumer to take a different transactional decision, do not materially expand on how the transactional decision test should be assessed as part of the conclusion reached. In certain examples there also seems to be some confusion around



the threshold that should be used, or indeed that the relevant threshold would be met in practice. By way of illustration:

- Example 1 on page 32 refers to potentially misleading advertising which is "likely to cause [the average consumer] to take a different decision about the television". Why that conclusion is "likely" is not explained and, confusingly, the example goes on to note that the practice "may cause the consumer to go to the shop where they otherwise would not have" as opposed to the relevant threshold of being "likely" to cause – which implies a lower threshold than is provided for in the UCP provisions;
- Example 1 on page 33 refers to sales of a sunglasses brand with a similar name to another successful brand. The Draft Guidance notes that the "average consumer is likely to be confused and more likely to buy [the sunglasses brand] than they otherwise would be". A likelihood of being confused and an outcome where a consumer is "more likely" to make a transactional decision are again not the relevant thresholds set out in the UCP provisions; and
- The examples of potentially misleading omissions on page 37 do not refer to the transactional decision test, but rather just simply note that the information in question is "material" and must be given to the consumer.

## 2. COMMENTS ON CHAPTER 9: DRIP PRICING PROVISIONS

### Delivery charges

2.1 The Draft Guidance on the inclusion of delivery charges in the total price of a product raises some queries, which suggest that the Draft Guidance may not currently be well suited to all industries and business models. As an overarching comment, we think that it would be helpful to ensure that the guidance is not over-prescriptive (with the risk of not being adapted to many situations) but recognises that the assessment of traders' compliance with their obligations under the DMCC Act should take account of the specificities of their business model, their activities and offers to consumers, as well as their approach to advertising on a case-by-case basis.

2.2 For example:

- It is not entirely clear from paragraph 9.21 whether a fixed delivery charge has to be included in the headline price if there are options to pay for premium delivery such as next day or for nominated date delivery. A trader may find it difficult to reconcile the provisions in paragraphs 9.19(b), 9.20 and 9.27 which require it to include the delivery charge (if there is no viable collection option available and a flat rate applies to courier services) on the one hand, and paragraph 9.21 which seems to suggest that the



delivery would be treated as an optional charge on the other hand (if the amount of the delivery charge depends on whether the consumer chooses a standard or premium service). In these circumstances, it would be helpful for the CMA to clarify whether (i) a “standard delivery” price should be included in the headline price (making clear that this headline price applies to a standard delivery even if there are other more expensive options), which we anticipate may be the case or (ii) it would be sufficient to add a statement which expressly states that delivery is not included in the headline price, until the consumer has selected the relevant delivery option (e.g. standard, premium, nominated day).

- It is also not clear how fixed mandatory delivery charges should be included in the product headline price when the amount of the delivery charge does not vary depending on the number of products purchased (e.g. online grocery shopping, online clothes retailer). In this case, the delivery charge is often known, e.g. it is a flat fee which applies to any delivery in the UK. Therefore, according to paragraph 9.27 of the Draft Guidance, the quote price for a product must be fully inclusive of the delivery charge. However, including the delivery charge in each product’s headline price would overstate the total basket price (as well as the actual price paid for each product) given a single delivery charge would be paid by the consumer, whether they buy one or ten products. Similarly, before a consumer has selected a product, it would not make sense to include the delivery charge in the price of one product (advertised on the trader’s website) but not in the price of others. Therefore, even if the delivery charge is deemed to be mandatory, it appears illogical to include it in a product’s headline price. In this case (which might be relevant to a number of online retailers across several industries), it would be helpful for the CMA to clarify whether it would be sufficient to pre-populate a basket which includes the fixed delivery charge (similarly to what the Draft Guidance provides for variable delivery charges at paragraph 9.36), rather than including the delivery charge in the headline price of each product.

2.3 Finally, we note the distinction in the Draft Guidance between mandatory and optional delivery charges and the explanation set out at paragraph 9.20 of the Draft Guidance which considers that delivery charges are deemed to be mandatory 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 and yet advertises products to consumers across the UK*”. We note that, in practice, it might be difficult for a trader to assess whether its stores have sufficient national coverage to consider that they have a genuine collection option for these purposes, e.g. whether it is sufficient for a trader to have a collection point in a few large cities across the



UK for delivery to be considered as optional. It would be helpful to provide further guidance on this point.

#### **Variable mandatory charges**

- 2.4 The issue mentioned above regarding premium delivery charges applies to other situations where there are variable mandatory charges. For example, paragraph 9.19(e) of the Draft Guidance lists mandatory insurance cover required for renting a car as a mandatory charge that must be included in the headline price. For each car rental, there will be various levels of insurance coverage available for varying levels of charges. In these circumstances, it would be helpful for the CMA to clarify whether, for the purpose of ensuring compliance with sections 230(1) and 230(4) of the DMCC, it is sufficient to include the amount of the basic insurance coverage (i.e. the cheapest charge that a consumer would have to pay to rent a car), or whether it is preferable to clarify that the insurance coverage is not included in the headline price and add the charge to the headline price as soon as possible once the consumer has selected the level of service they want to purchase. The same question arises in respect of charges relating to payment methods which may vary depending on the payment method chosen by the consumer. Where the trader offers a consumer a lower (or no) charge for the consumer paying in cash or with a debit card, but a higher charge for paying with a credit card, it would be helpful to clarify whether the headline price should include the charges associated with the cheapest realistic payment method, or whether the charge should be added to the headline price as soon as the consumer has selected the preferred payment method.

### **3. COMMENTS ON ANNEX B: GUIDANCE ON PROHIBITION OF FAKE REVIEWS**

#### **Broad definition of the banned practice requires clear guidance**

- 3.1 A new banned practice of fake reviews has been added to the list of practices that are considered unfair in all circumstances.
- 3.2 This is a welcome addition which will help to secure that consumers can have greater confidence in reviews when considering purchases, and that businesses are not undermined by unfair practices by competitors.

But it will also be important to strike a balance between protecting consumers from fake reviews or consumer review information and avoiding imposing such a burden on businesses that it risks deterring them from publishing any reviews at all. This is particularly the case for small businesses that are less likely to have access to the necessary legal advice and may be deterred from publishing reviews. As a result consumers may lose out on genuine reviews that would help them make better informed decisions. It is therefore



important for the CMA's guidance on the prohibition of fake reviews to be as clear and practical as possible.

- 3.3 The examples currently listed throughout the Draft Guidance on fake reviews are all clear-cut and do not address the more difficult areas, which is where practical case scenarios would be helpful. In our view the Draft Guidance could be improved by adding a number of practical worked examples with analysis as to how the prohibition would apply to specific scenarios, in a similar way to the worked examples published in the CMA's Guidance on Horizontal Agreements (CMA184, August 2023)
- 3.4 This will assist with clarifying some of the key components in a practical manner. By way of example, paragraph B.10 of Annex B, on concealed incentivised reviews, provides a number of examples of incentivisation. This includes 'having a financial interest in the trader or the product being reviewed' and 'having any commercial link with the trader being reviewed'. These are broad concepts and would benefit from further clarification in this context.
- 3.5 If this is intended to include employees of the company that produces or distributes the product this should be made clear, and could also be the basis for a worked example analysing different scenarios, eg the case of the employee purchasing the product independently as opposed to being gifted by the trader, or being gifted by a person with no connection to the trader. The worked example could also include practical examples of what would and would not qualify as 'clearly identifiable as incentivised' and which therefore would not be banned.

**Reasonable and proportionate steps to prevent and remove from publication banned reviews and false or misleading consumer review information**

- 3.6 Businesses are also required to actively prevent banned practices and take such reasonable and proportionate steps as are necessary to prevent and remove from publication banned reviews and false or misleading consumer review information. This aspect of the banned practice creates a positive obligation which requires traders to take positive action to comply with the law in addition to refraining from specified action.
- 3.7 The Draft Guidance recognises that there is no 'one size fits all' or tick box approach in order to achieve this, but it sets out a number of necessary steps which all publishers will need to take in order not to infringe the banned practice. These steps mirror those required for an adequate competition law compliance programme, but in that case the business is



responsible for its own conduct, whereas here the publisher is also responsible for reviews that originate from third parties, which makes this even more challenging.

- 3.8 Depending on how it is interpreted, this requirement may discourage small traders from publishing any consumer reviews at all, on the basis that the risk is too great for them as they may not have the capability to proactively identify and tackle fake reviews effectively.
- 3.9 Paragraph B.52 of Annex B provides that 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".
- 3.10 In its original consultation on fake reviews (*Smarter Regulation: Consultation on Improving Price Transparency and Product Information for Consumers, 4 September 2023*), the Department for Business and Trade (DBT) states that "In general, this proposal is unlikely to result in traders being subject to enforcement action on the basis that they publish a single fake review. This would be a very burdensome and disproportionate regulation".
- 3.11 The existence of this kind of *de minimis* threshold, however is not currently reflected in the Draft Guidance and we would therefore recommend that the Draft Guidance makes it clear that traders are unlikely to be subject to enforcement action in these circumstances.

#### **Defence of due diligence**

- 3.12 On liability more widely, the DMCC Act provides that a person accused of an offence due to the act or default of another person, can rely on the defence of due diligence if they can prove that committing 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. In addition, the person accused of the offence must prove that they took all reasonable precautions and exercised all due diligence to avoid committing the offence.
- 3.13 This is covered in the Draft Guidance at paragraph 12.11, but it would be helpful to also add this in the guidance on the prohibition of fake reviews. In the context of publishing banned reviews it is possible to envisage a scenario, where the review is submitted by a reviewer who claimed this to be a genuine review (for example the reviewer concealed that it was an incentivised review, or genuinely believed it was a good faith review) and the





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review was published despite the publisher having taken all reasonable steps to prevent publishing a banned review.

- 3.14 Further guidance setting out more specifically how this would apply in this context, clarifying when the defence would be available and when it would not apply (and a worked example with analysis specifically relating to the publication of banned reviews in such circumstances) should be included.

**Herbert Smith Freehills LLP**

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