

Hyperoptic's response to the CMA's consultation on draft guidance on the unfair commercial practices provisions in the DMCC Act

About Hyperoptic

Hyperoptic is a nationwide full fibre altnet and internet service provider; our network currently passes over 1.7 million premises and serves over 340,000 customers. We believe that a healthy and dynamic market is enabled through stable regulation and robust consumer protection measures to drive transparency and fairness. This environment supports investment in altnets, which provide competition in the telecoms market and form a vital part of delivering the gigabit rollout with both speed and sustainability.

Summary of response

Although we welcome guidance on how we can comply with our obligations under the Act, we are concerned about two related aspects of the draft guidance:

- The prominence requirements relating to 'pricing information', particularly the implication in Annex C that all information relating to price should be equally prominent. We believe that this interpretation goes beyond the stipulations of the Act; and
- The definition of 'total price' as the sum of the whole term of a fixed-length contract, given the nature of the broadband market in terms of product and regulation.

We consider that these concerns could be addressed in the following ways:

- More precisely defining the terms "pricing information" and "headline price"
- Realigning the interpretation of the prominence requirements to be in step with the Act
- Adopting a more flexible approach to total pricing in fixed-term contracts, rather than defining it as the whole-term cost of the contract in every instance, reflecting the different models of these contracts and the existing regulatory requirements for certain sectors

Understanding of the Digital Markets, Competition and Consumers Act 2024 ('the Act') and of guidance terminology

We understand that Chapter 1 in Part 4 of the Act (and therefore the guidance covering it) applies to all traders and products, including the provision of telecoms contracts. Our response relates to the draft guidance on paragraph 230 of the Act, concerning the omission of material information from invitations to purchase, specifically the aspects of this paragraph that deal with pricing. Our understanding of the Act and of specific terms in the draft guidance is as follows:

- Paragraph 230 of the Act stipulates that any invitation to purchase must include "the total price of the product" (2(b)) and that the 'total price' "includes any fees, taxes, charges or other payments that the consumer will necessarily incur if the consumer purchases the product" (4).
- It also states that this information must not be presented "in a way that is unclear or untimely, or in such a way that the consumer is unlikely to see it" (9).
- Further, for products whose total price cannot be calculated in advance (2(c)), the invitation to purchase must include an explanation of the price calculation with equal prominence to any portion of the price that can be calculated (5, 2(b), 2(c)).
- Exclusion of the material information in (2) from the invitation to purchase may not necessarily be considered an omission if there are limitations resulting from the means of communication that the trader has taken steps to overcome (1, 8).

We gather that the phrase 'headline price' within the draft guidance, which is not used within paragraph 230 of the Act, is intended by the CMA to mean "the price stated in the invitation to purchase". This could cover the 'total price' (2(b)), any calculable portion of a non-calculable total price (2(b) and 2(c)), or any other statement of price relating to the product in the invitation to purchase.

In addition, the phrase 'pricing information', which is not used within paragraph 230 of the act, is used within the draft guidance to describe several types of statement, including: any price statement, total prices, headline prices, and the explanation of how total prices will be calculated in instances where it cannot be done for the invitation to purchase. We therefore understand that this is a general term covering any and all forms of information relating to pricing.

Prominence of pricing information

Annex C

We are concerned that the aspects of the draft guidance that deal with the prominence of pricing information, specifically the 'total price' when this is a calculable figure, is unclear and ambiguous. More seriously, we have concerns that part of the guidance may be interpreted to go beyond the requirements of the legislation.

The Act stipulates that the 'total price' of a product must not be omitted from an invitation to purchase, including by being presented "in a way that is unclear or untimely, or in such a way that the consumer is unlikely to see it." It does not dictate how prominent it must be, whether on its own or in relation to other price statements or material information, other than needing to be likely to be seen. The only prominence requirement relating to pricing is that where a total price is not calculable in advance, the invitation to purchase must include any calculable portion of that price alongside information about how the remainder will be calculated, with these two being equally prominent.

However, page 103 in Annex 3 of the draft guidance describes a change made by paragraph 230 of the Act as "[requiring] that all pricing information must be set out with equal prominence." As noted above, the phrase 'pricing information' has been used broadly within the draft guidance, and the wording "all pricing information" (emphasis added) therefore implies that the description on page 103 covers all pricing statements to which the phrase 'pricing information' has been applied throughout the document.

As the Act only requires equal prominence of the partial-total and calculation explanation for non-calculable total prices, the implication in Annex C that *all* pricing information must have equal prominence therefore appears to go beyond the stipulations of the Act.

We believe that this implication is due to the phrase 'pricing information', which in this instance may have been intended to refer specifically to the explanation of the total price calculation under sub-paragraphs 2(b), 2(c), and 5. Its broader use throughout the draft guidance obscures this meaning, so the matter would therefore be resolved by clarifying that change refers only to instances where the total price cannot be calculated.

Clause 9.31 and related others

The requirement for total prices to be presented in a clear and timely manner is referenced in clause 9.31 of the draft guidance, and this accords with the Act. However, we are concerned that when this clause and broader section of the draft guidance are taken together, the advice becomes ambiguous.

In clause 9.31, this line is immediately followed within the same paragraph by a reference to non-calculable totals. As noted above, invitations to purchase with non-calculable totals have very different requirements in relation to the prominence of information. Clause 9.32 uses the phrases "such information" and "pricing information" without clarifying until later in the paragraph that this refers to calculation explanations, and the rest of the section on prominence (clauses 9.31-9.37) uses the terms "material pricing information" and "information" to refer both to calculation explanations and to total prices (under 2(b)).

The breadth of the references to "information," particularly "pricing information," brings a lack of clarity to the advice on the presentation and prominence of pricing statements. Particularly in combination with the wording of Annex C, as discussed above, this occludes the meaning of the advice and its alignment with the Act.

We therefore ask that the CMA revisit the wording of this section of the draft guidance to delineate more clearly between the different requirements of products with calculable total prices and products with non-calculable total prices.

Total pricing of fixed-term contracts

Our understanding of the draft guidance in relation to fixed term contracts (paragraph 9.17) of the kind commonly sold by ISPs (a set monthly price over a specific number of months, with or without an activation fee or similar) is that the CMA has interpreted the 'total price' of such contracts to be the sum of every monthly payment (plus any one-off fees). For example, a 24-month contract with a monthly charge of £20 and an activation fee of £10 would have a 'total price' of £490 and a 12-month contract under the same pricing terms would have a total price of £250.

We believe that this blanket approach to fixed-term contracts is not in the best interests of consumers and does not reflect the differences between such contracts across products and sectors. Moreover, as far as broadband is concerned, the approach in the draft guidance runs counter to the existing regulatory framework that places stringent requirements on providers in relation to pricing.

Broadband contracts are overwhelmingly sold on the basis of a monthly fee for a set number of months, sometimes with a one-off activation or connection fee. The use of monthly, rather than whole-term, costs is not an example of drip pricing, which this section of the Act seeks to address (as per paragraph 9.15 of the draft guidance). We believe that the monthly fee is the correct and relevant 'total price' for this specific product and that the existing approach is therefore already in compliance with the Act.

The Advertising Standards Authority requires that the monthly price of a broadband contract is presented in a way that makes clear to consumer what they will pay each month, and any variations to this price are presented as the whole new fee in 'pounds and pence' (thus avoiding the need to do more complex percentage calculations) under a new requirement from Ofcom. As such, the existing pricing requirements on invitations to purchase are extremely well-regulated and clear to consumers. No additional information is required to determine the price of the contract as a whole (which is simply the number of months multiplied by the relevant prices).

In addition, the telecoms regulator also specifically defines the Core Subscription Price of a broadband contract to be "the sum (however expressed in the contract) that the Subscriber is bound to pay to a Communications Provider at regular intervals for services and/or facilities the Communications Provider is bound to provide in return for that sum" [emphasis added]. The relevant 'total price' for broadband is defined by the regulator to be the total monthly fee.

Importantly, Ofcom recently and specifically considered whether providers should present the whole-term cost of a contract when deciding to introduce the new 'pounds and pence' requirement last year. They concluded that it "may be difficult to implement a requirement to present the total contract cost or average monthly price of all services subject to the GCs effectively" (such as bundles of different contract lengths or with rolling subscriptions included). The regulator added that due to this difficulty and "the fact the £/p requirement will mean customers would have sufficient clarity and certainty about the price they will pay, so that they are able to make more informed decisions on the best deal for them, we did not think this was required."

Part of the importance of the monthly fee is because of the need for comparability across different contract lengths. Broadband contracts are very commonly sold with different fixed lengths – usually 12, 18, and 24 months. – and almost always on the basis that longer overall terms will have cheaper monthly fees. As such, the provision of the whole-term contract cost will make longer contracts appear more expensive and shorter contracts appear cheaper, despite the opposite being true on a monthly basis and over time. The only way to compare between contracts is to find a common denominator, which in this case is the monthly price. As the cost of the contract depends on the length – a variable factor – the pricing of broadband is more akin to products sold by units of measurement, dealt with in paragraph 9.26 of the draft guidance.

Taking all the above into account, we strongly believe that the current use of the monthly price as the 'total price' is compliant with the intentions and requirements of the Act. A move away from this approach, as suggested in paragraph 9.17 of the draft guidance, would not benefit consumers and may be detrimental to their understanding of the price of the service, and would be a deviation from the robust framework that regulates the telecoms market.

Conclusion

As set out above, we have concerns that the draft guidance does not fully accord with the Act and that it does not reflect the ability of some fixed-term contracts to comply with the Act without using the whole-term cost of the contract. We believe that these aspects of the draft guidance could lead to adverse outcomes for consumers and traders, and that it is therefore important to amend the draft guidance.

In relation to the prominence requirements, we ask that the draft guidance be amended to increase clarity over the difference between types of pricing statement and the requirements placed upon them. We would suggest that this could be achieved by defining the terms used to describe different types of pricing information, as well as by making the guidance on calculable total prices more distinct from the guidance on non-calculable pricing scenarios. We also ask that the description of the changes effected by the Act on page 103 in Annex C be amended to remove the implication that all forms of pricing statement must be presented with equal prominence.

In relation to 'total prices' for fixed-term contracts, we request that the guidance be made more flexible to account for different models of such contracts and the regulatory requirements of certain sectors.