

## Linklaters LLP response to the CMA's consultation on the draft consumer protection guidance on unfair commercial practices

### 1 Introduction

We welcome the opportunity to respond to the CMA's consultation on its draft guidance on the protection from unfair trading provisions in the Digital Markets, Competition and Consumers Act 2024 (CMA 207) (**Draft Guidance**). The Digital Markets, Competition and Consumers Act (**DMCC Act**) is the most significant change to UK consumer protection regulation in over half a century.

Whilst we acknowledge that many of the rules in the DMCC Act represent restatements of existing rules on unfair commercial practices under the Consumer Protection from Unfair Trading Regulations 2008 (*SI 2008/1277*) (**CPUTRs**), the DMCC Act includes three significant codifications of recent CMA decisional practices to introduce explicit rules on drip pricing, fake reviews and subscription contracts. We note that the Government has launched a separate consultation on proposed secondary legislation to govern new rules on subscription contracts, whilst the Draft Guidance includes further details of the CMA's likely approach to enforcement as concerns drip pricing and fake reviews.

The enforcement of consumer protection regulations undoubtedly has an important role to play in promoting consumer confidence and engagement and the Draft Guidance in its current form provides useful insights for businesses and their advisers on how to ensure compliance with the DMCC Act. In particular, the extensive use of examples is welcome in illustrating the CMA's proposed approach to certain aspects of the new rules.

However, we could encourage the CMA to ensure that its final guidance does not risk straying beyond the scope of the DMCC Act or give rise to uncertainty or unintended adverse consequences that could hinder effective competition in retail markets, at the expense of consumers and growth in the wider economy, a key objective for the current Government.

For example, certain of the examples contained in the Draft Guidance relating to drip pricing appear to go beyond the precise provisions of the DMCC Act, or risk introducing uncertainty for businesses. We would encourage the CMA to continue to engage with businesses, particularly in relation to the provisions on drip pricing, so that businesses can proceed with suitable compliance initiatives with sufficient certainty ahead of the implementation of the DMCC Act (bearing in mind that any alteration to pricing infrastructure may require businesses to make material changes to existing IT infrastructure, which can be costly, time consuming and divert resources away from other investment).

The remainder of this response raises certain specific points on the Draft Guidance (and the application of the DMCC Act more generally) including areas in which further clarification would be welcome, notably the interpretation (and/or framework for the assessment) of certain key concepts such as the 'average consumer', 'vulnerable consumers' and a 'transactional decision' under the new regime, the evidence that the CMA will consider in its decision-making, and the approach to certain aspects of drip pricing.

## 2 Responses

### **[Question 2] 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?**

Our general observation is that the examples provided by the CMA are helpful and effective, offering businesses and advisers tangible guidance as to how the CMA is likely to approach commercial practices under the new regime. The examples also focus on a range of business practices such that we generally consider them accessible and helpful across different sectors.

We do consider, however, that it would be helpful to include additional examples in certain areas. For example, the CMA has included a significant number of examples in Part 3, paragraph 10.1 (which outlines commercial practices that are prohibited regardless of their impact on the average consumer's transactional decisions) compared to other sections of the Draft Guidance. Whilst we acknowledge that there are some changes to the list of practices included in Schedule 1 of the CPUTRs, most notably the introduction of fake reviews at Paragraph 13 of Schedule 20 to the DMCC Act, the majority of the rules on commercial practices that are prohibited regardless of their impact on the average consumer's transactional decisions are well-established in law and familiar to many businesses.

By contrast, there are relatively few examples in Annex B, which sets out the CMA's proposed approach to fake reviews and paragraphs 9.14 to 9.37, which set out the CMA's proposed approach to drip pricing. As each of these sections relate to 'new' statutory rules under the DMCC Act, we consider that it would be helpful to provide businesses with additional clarity as to how the CMA will approach these practices in its decision-making. We have included further details of areas which would benefit from additional clarity in our responses to consultation questions 4 and 5 below.

We also note that the DMCC Act includes a number of changes to the description of key concepts which, when taken cumulatively, could have a significant impact so as to broaden the scope of the CMA's enforcement remit. In this context, we consider that it would be helpful for the CMA to clarify how it will interpret key concepts under the new regime, and in particular those outlined below.

### **CMA considerations in determining when commercial practices are "likely" to have influenced the average consumer**

In our view, the Draft Guidance would benefit from greater clarity as to how the CMA will decide whether a commercial practice is "likely" to have impacted a consumer's transactional decision-making.

Under the CPUTRs, the language of "likely" has already been employed in relation to misleading actions (Regulation 5), misleading omissions (Regulation 6) and aggressive commercial practices (Regulation 7). Under the DMCC Act, this language has been extended to also cover offences related to contravening professional diligence (Regulation 8, CPUTRs).

Whilst the CMA is experienced in taking decisions by reference to the balance of probabilities and the language of "likely" is not a significant departure from existing

consumer protection enforcement, we would welcome guidance from the CMA as to the kind of evidence which will be considered in its determination of whether a commercial practice is deemed “likely” to have influenced the average consumer’s transactional decision-making.

Whilst we appreciate that there is no duty to demonstrate actual harm to consumers and, to some extent, this will be a case-by-case analysis, some additional clarity from the CMA would be beneficial both in relation to the analytical framework that it will apply and the types of evidence it is likely to rely on in making this assessment - for example, whether (and if so, the extent to which) the CMA will consider the use of consumer surveys, A/B testing, internal documents and sandboxes in order to assess qualitative and quantitative data in its assessment.

## Scope of “vulnerability”

Vulnerable consumers are considered to be a subset of all consumers. The introduction of a broader concept of ‘situational vulnerability’ under DMCC Act, s.247 widens the scope of vulnerability, and it would be helpful for the CMA to include additional examples of where this threshold is likely to be met, especially in respect of credulity, which is a particularly broad concept.

Under the DMCC Act it is no longer necessary for the CMA to prove that a commercial practice influences *only* the vulnerable group in question. Neither is it necessary that such a group is ‘clearly identifiable’. In this context, and - given the considerable discretion at the CMA’s disposal in regard to the identification of vulnerable consumers - we consider it particularly important for businesses to have a clear understanding of vulnerability, including the CMA’s likely approach to assessing whether a trader ‘could reasonably be expected to foresee’ this situational vulnerability to enable them to effectively comply with the DMCC Act, especially in circumstances where businesses may offer a broad range of goods or services to the general population, which could include consumers experiencing one or more forms of vulnerability.

At paragraph 3.22 of the Draft Guidance, the CMA provides that members of any group who *‘because of the particular belief system they have, might believe certain claims more readily than others’* could be considered vulnerable on the basis of credulity. We would welcome examples from the CMA as to when and how they propose to determine credulity in a reasonable and proportionate manner to assist in compliance with the DMCC Act.

More generally, we note that previous CMA work has considered vulnerability in considerable detail. The 2022, Evidence Review of Online Choice Architecture and Consumer and Competition Harm paper (**OCA Evidence Review**)<sup>1</sup> sets out a range of circumstances in which consumers may be vulnerable and more susceptible to influence by certain commercial practices. We understand that some of these are likely to fall short of the standard of vulnerability save, potentially, in very fact-specific cases.<sup>2</sup> Further guidance would be welcome from the CMA to determine whether (and if so, when and the extent to which) such factors will be considered in the new concept of ‘situational vulnerability’ introduced by the DMCC Act.

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<sup>1</sup> Evidence Review of Online Choice Architecture and Consumer and Competition Harm, CMA, 5 April 2022, CMA157

<sup>2</sup> For example, the OCA Evidence Review notes that many women feel most unattractive on Mondays (paragraph 9.57) and that mood has a significant impact on consumers (paragraph 9.58).

## “Average targeted consumer”

The Draft Guidance includes a brief description of the ‘average targeted consumer’, a concept which will be relevant when a commercial practice is directed at certain groups of consumers (paragraphs 3.24 to 3.25, Draft Guidance). We note that in these circumstances, the ‘*average targeted consumer is assumed to be reasonably well informed and reasonably observant and circumspect, subject to the characteristics of that group*’ [emphasis added]. We would welcome examples of factors which the CMA will consider when determining characteristics of the relevant group of targeted consumers.

## Transactional decision test

Under the CPUTRs, a transactional decision must be ‘*any decision... concerning whether... to purchase*’ (Regulation 2). However, under the DMCC Act, this can now be ‘*any decision... relating to the purchase [etc.] of a product, including whether to purchase*’ (s.245) [emphasis added]. The Draft Guidance provides that a ‘transactional decision’ could therefore include, for example, the decision to click through a website or to make a viewing appointment without ever making or substantively considering whether to make a purchase (paragraph 3.30(b), emphasis added).<sup>3</sup> Accordingly, under the DMCC Act, the concept of a ‘transactional decision’ appears to apply more broadly to any consumer decision.

We would welcome further guidance from the CMA on whether (and if so, how) it expects its assessment of the impact of a commercial practice to differ depending on the type of transactional decision taken by the consumer. For example, a commercial practice which is likely to encourage a consumer to click through a website, or attend a real estate viewing, when they would not have otherwise done so, is likely to have a much lesser impact on the consumer than a commercial practice which is likely to make the consumer take a decision to purchase, which they would not otherwise have taken.

**[Question 3] 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 understand the need to address the harm which drip pricing can cause for consumers, it is in our view important to build a framework of guidance which effectively implements the provisions of the DMCC Act without overreaching, particularly given that requiring businesses to make changes to pricing practices, including for the avoidance of doubt the presentation of prices, can frequently involve significant changes to IT and business infrastructure which are costly and time consuming to implement.

With this in mind, we have the following comments in respect of Chapter 9 of the draft Guidance.

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<sup>3</sup> This is consistent with the [Explanatory Notes](#) to the DMCC Act which state that the concept of a transactional decision ‘covers a wide range of decisions, including decisions pre-contract (regardless of whether a contract is made or not), at the time of contract, and post-contract (paragraph 1296).

## The relevant provisions in the DMCC Act

Section 230(2) of the DMCC Act provides, amongst other things, that the following constitutes material information which must not be omitted from an invitation to purchase:

- (a) *the main characteristics of the product (to the extent appropriate considering the means used to communicate the invitation to purchase and the nature of the product);*
- (b) *the total price of the product (so far as paragraph (c) does not apply);*
- (c) *if, owing to the nature of the product, the whole or any part of the total price cannot reasonably be calculated in advance, how the price (or that part of it) will be calculated;*
- ...
- (g) *any freight, delivery or postal charges, including any taxes, not included in the total price of the product but which the consumer may choose to incur (or where those additional charges or taxes cannot reasonably be calculated in advance, the fact that they may be payable).*

Section 230(4) states that “*For the purposes of subsection (2)(b) the total price of a product includes any fees, taxes, charges or other payments that the consumer will necessarily incur if the consumer purchases the product.*”

Section 230(5) states “*For the purposes of subsection (2)(c) (and subject to the matters mentioned in subsection (8)) the information given must— (a) be such that it enables the consumer to calculate the total price, and (b) be set out with as much prominence as any information that is set out in compliance with subsection (2)(b)*

Section 230(8) provides for consideration to be given to “*(a) any limitations resulting from the means of communication used in the commercial practice (including limitations of space or time), and (b) any steps taken by the trader to overcome those limitations by providing information by other means.*”

## Approach to “mandatory charges” in Draft Guidance

The Draft Guidance provides that, “[i]f, in addition to paying the price stated in the invitation to purchase (the headline price), a consumer cannot in practice purchase, receive or use a product without the payment of any fee, tax, charge or other payment (‘charge’ in short), then that charge is mandatory” (paragraph 9.16).

While, in certain contexts, it may be clear what constitutes mandatory charges, in others it may be more difficult to distinguish “mandatory charges” from charges which the consumer may choose to incur.

Examples include where a consumer purchases goods online. The Draft Guidance suggests that ‘charges should not be excluded from the headline price if consumers could in theory avoid them but doing so is not viable in practice. This includes, for example, delivery fees 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 yet advertises products to consumers across the UK’ (paragraph 9.20). In our view, this example goes beyond the provisions of the DMCC Act. One could easily imagine a scenario where goods are advertised by a national retailer

which provides that the goods may be collected for free from a particular site, collected from a site closer to the consumer for a fee or delivered to their address for another fee. A trader may not know at the time of the invitation to purchase where the consumer is located (or their ability to collect a product, for example if it is bulky) and thus there may be an element of subjectivity as to when a charge becomes in practice necessary for the consumer to incur in order to purchase, receive or use a product or, in the alternative, what the charge is for that particular customer (discussed further below).

Similarly, there is a risk that taking an overly restrictive approach to including charges in a total price may undermine or complicate the presentation of unit pricing, which would be a disadvantage for consumers. The inclusion of delivery charges within the headline price may confuse customers, conflating competition between retailers for (i) the product; and (ii) the separate delivery service, increasing the overall opacity of the pricing. It should be sufficient (and compliant with Section 230(2)(g) of the DMCC Act) for the retailer to indicate that delivery charges may be payable.

## **When might it not be possible to calculate the total price?**

The Draft Guidance provides that *'[w]hether the total price of a product can reasonably be calculated in advance is an objective question which requires an assessment of whether there is anything about the product that makes it impossible reasonably to calculate the price or any part of it in advance'* (paragraph 9.24). This is further strengthened by the statement that *'[a]ny non-calculability of mandatory charges must strictly reflect the nature of the product which the consumer is deciding whether to purchase or take another transactional decision about'* (paragraph 9.25).

While we recognise the need to limit the ability of traders to circumvent the drip pricing rules, we consider that stating that any non-calculability must "strictly relate to the 'nature of the product'" is unnecessarily restrictive, is not reflective of the provisions of the DMCC Act and may have unintended consequences that could result in consumer harm. While there may be circumstances (such as that set out in footnote 96 of the Draft Guidance) where charges that are entirely unrelated to the nature of the product may be considered misleading, it is accepted in other contexts that traders may compete on a range of variables beyond "headline price", including on delivery charges, and that such competition can be beneficial for consumers.

For example, providing free delivery for purchases above a certain amount, or alternative delivery charges for express / standard delivery, or peak / off-peak slots are all examples of frequently used delivery mechanisms that are not capable of upfront calculation for the purposes of displaying a total price, and it would be helpful for the Draft Guidance to recognise these scenarios more explicitly. In particular, the final guidance should clarify that there is no requirement for retailers to adjust IT infrastructure so that delivery charges are incorporated into individual unit prices or – in the case of a multi-product basket – spread across those products, as (even leaving aside the complexity that this would introduce for traders) this would not be meaningful for customers, provided that the total basket price including the delivery charge is clear (or, where alternative delivery options are available, information on those options is clearly displayed) .

As an alternative, the guidance provides that *'[w]here it is not reasonable for a trader to calculate the total price in advance'*, they must provide information which clearly stipulates how the total price will be calculated and enables the consumer to calculate the price

themselves,' (paragraph 9.28), provide a full pricing tariff (paragraph 9.29) or not provide any pricing until they have received sufficient information from the consumer (paragraph 9.30).

In relation to paragraph 9.30, this is unlikely to be tenable for businesses, or especially helpful for consumers. In most cases, consumers will often find it helpful to filter options by reference to indicative prices at a very early stage in their transactional decision-making. It is important for businesses to allow consumers to take these decisions in an efficient manner, even if these decisions are based on incomplete information sets.

In light of the above, it would be helpful for the CMA to provide additional clarity on what types of indicative pricing are likely to be considered compliant with the DMCC Act. Paragraph 9.30(b) of the Draft Guidance indicates that indicative pricing must be "realistic, meaningful and attainable". It would be helpful for the CMA to clarify the meaning of these terms in more detail. This applies both in the context of dynamic pricing, and also in situations where mandatory charges are not calculable (for either the consumer, or the trader), for example, the service charge associated with a real estate property. We would welcome additional clarity from the CMA as to how businesses can comply with this need for pricing information.

## **Limitations resulting from means of communication**

The Draft Guidance suggests that "*where the nature of the product means that the total price cannot be reasonably calculated, the means of communication will often pose no barrier to prominently providing the headline price alongside information enabling the consumer to calculate the total price*". As above, this may not be the case for online products with a range of delivery options, and it would be helpful for the Draft Guidance to clarify this.

## **[Question 4] 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)?**

As the rules on fake consumer reviews are new, businesses are likely to benefit from fulsome guidance from the CMA as to what constitutes a banned practice, and how businesses can ensure compliance with the new rules under the DMCC Act.

We would value additional clarity from the CMA on this topic. In particular, we note that Annex B to the Draft Guidance includes relatively few examples of how the CMA is likely to consider compliance, and would benefit from additional case studies.

## **Scope of the banned practice – facilitation offenses**

Paragraphs B6 to B8 of Annex B clarify the scope of 'review' and 'consumer review information', noting that this may include speech, text or a graphic representation such as a star. However, the scope of commercial practices which are likely to be deemed unfair is far less certain.

We would welcome CMA clarification as to the type of commercial practices which are likely to be considered to offer '*services to facilitate the: (i) submitting of fake/concealed incentivised reviews, or (ii) publishing of consumer reviews or consumer review information in a misleading way*'. At present, this drafting is considerably broader than the other offences for which guidance is provided in Annex B, and we would welcome examples from the CMA to confirm the scope of behaviour which is deemed to 'facilitate' the submission and/or

publication of fake reviews. In particular, examples of reasonable steps which the CMA would expect traders to take to avoid facilitating these practices would be beneficial.

We note that the CMA has provided examples of conduct which is likely to be non-compliant with the new rules on fake reviews in relation to (a) submitting a fake review, (b) submitting concealed incentivised reviews, (c) commissioning fake reviews or concealed incentivised reviews and (d) offering to procure banned reviews and information for traders (Draft Guidance, pp. 85, 86, 88).

In its present form, the offence of facilitation could apply to a broad range of stakeholders in the fake review 'supply chain' including third parties who have minimal, if any, control over how consumers use technology supplied by those third parties.

## **Feedback v customer testimonials**

The Draft Guidance provides that publishing consumer reviews in a misleading way is prohibited. We note that certain traders may use customer testimonials or case studies, ie an endorsement of a product or service from a satisfied customer, when advertising their products or services. In our view, the use of such testimonials – provided that they are otherwise compliant with requirements around incentivisation and reflecting genuine experience - is not a banned practice for the purposes of the DMCC Act. We would welcome this point being confirmed in the final guidance.

## **Evidence considered in the CMA's assessment**

As explained in response to question 2 above, we consider that this section would benefit from further detail of the evidence which the CMA will consider in its assessment of whether commercial practices are likely to have impacted the average consumer's transactional decision-making.

**[Question 5] 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.**

The Draft Guidance does not provide much information regarding its approach to a 'due diligence' defence. In particular, it would be helpful if the CMA could provide examples of the steps it would expect a trader to take in order to prove that they "took all reasonable precautions and exercised all due diligence to avoid committing the offence or to avoid someone under their control committing it" in accordance with section 238 of the DMCC Act.