

# Consultation on draft guidance on the protection from unfair trading provisions in the Digital Markets, Competition and Consumers Act 2024

## Response from Mobile UK and mobile retailers

### 1. Executive summary

- 1.1 This submission is made by the members of Mobile UK, which represents the UK's mobile network operators BT/EE, Three, Virgin Media O2 and Vodafone, and their retail brands and also by Sky and Gamma (we/us or the group). Together, we serve around 60m customers, comprising the substantial majority of the UK mobile market.
- 1.2 This submission responds to the Competition Markets Authority's (CMA) consultation on its draft guidance (Draft Guidance) on the protection from unfair trading conditions in the Digital Markets, Competition and Consumers Act (DMCCA). We are uniting to make this joint submission<sup>1</sup> to ensure that the important and urgent issue we are raising is fully considered by the CMA. It is vital that the UK does not undertake substantial regulatory change without due consideration by the relevant agencies about the best approach for consumers, competition and the government's growth agenda.
- 1.3 We strongly agree with the principles underpinning the DMCCA – that consumers should be protected from unfair trading provisions, and that they should have access to all the information they need to make an informed decision.
- 1.4 The critical points are that:
- (a) The CMA's proposed view of s.230(2)(b) DMCCA as it applies to mobile retail offers would harm consumers, competition and growth. We explain why in section 2 to 5.
  - (b) There is no policy justification or evidence of a problem that would prompt such a radical shift of the way pricing is currently displayed in the mobile sector. Ofcom already sets a rule on offers, with detailed guidance.
  - (c) the guidance will be very unwieldy, complex for providers to execute in practice and potentially just more confusing for consumers.

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<sup>1</sup> This joint submission is made in addition to, and without prejudice to, individual submissions by members of the group.

- (d) The draft guidance is not proportionate, in view of the strong and effective competition prevailing in the mobile market.
- (e) The CMA should exercise its discretion to adopt a more flexible reading of the provision, consistent with the law, to avoid these harmful impacts. We discuss this further in section 6.
- 1.5 To address this issue, the final Guidance could clarify that the question of whether the ‘total price’ has been provided is a matter of fact that depends on whether the offer enables a consumer to know what they will pay. This is consistent with the DMCCA. The CMA could emphasise that if an offer does not include an aggregated price, the CMA would expect evidence that consumers can easily understand the offer, and that this requirement is more likely to be met in markets where there is existing sector-specific regulation governing price clarity and where there is evidence of effective consumer choice working well to support fierce competition (both of which apply with respect to the mobile market). Specific examples could be given in Guidance to avoid abuse. We provide more detail on suggested resolution in section 7.
- 1.6 Adopting this approach would prevent immediate and unnecessary harm to consumers in the short term. It would also align with the approach taken by the Advertising Standards Agency.<sup>2</sup> This approach would not prevent the CMA from reconsidering the issue in light of further evidence of any specific problem.
- 1.7 We seek an urgent meeting with the CMA team to discuss the issue we are raising and this submission. We also urge the CMA team to engage with Ofcom on these issues.
- 2. Market context: today’s offers are well-established, effective and pro-competitive**
- 2.1 There are currently over 97 million personal mobile devices in the UK.<sup>3</sup> A wide diversity of providers (such as the mobile network operators, the mobile virtual operators, and multi-service providers) offer a broad range of tariffs to meet the very diverse needs of the large customer base. Many customers have more than one device (e.g. work and personal), often with different needs for each.
- 2.2 Approximately 76 million customers are on monthly tariffs (with the balance on ‘prepaid’), with 45% of the latter being on rolling 30 day ‘SIM only’ contracts (i.e. no handset provided) and 55% on fixed term contracts with a handset provided. The maximum term allowed for the airtime element is 24 months. The handset can be provided on a split contract over a longer duration, such as 36 months.

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<sup>2</sup> See the current ASA consultation on Amendments to the Advertising Codes following review in response to the Digital Markets, Competition and Consumers Act 2024, Committee of Advertising Practice and Broadcast Committee of Advertising, Practice consultation on amendments based on changes to UK consumer law, pages 12-13, dated 11 December 2024.

<sup>3</sup> Ofcom communications market report 2024

- 2.3 Ofcom has recently introduced measures whereby, if an in-term price adjustment is applicable, it should be expressed in absolute terms, rather than by reference to an inflation index. All operators have just put in place all the measures required to be compliant with the updated Ofcom rules. This updated approach was underpinned by [very detailed research](#) and came into force for new contracts (for mobile but also broadband) on 17<sup>th</sup> January 2025.
- 2.4 There is no indication that the absence of an aggregate cost figure (i.e. a sum for the whole contract duration) is causing any issues with consumers. At the moment, consumers are given a price per month (and upfront notification of any in-term adjustment, if applicable) and a contract duration. There are no hidden elements to this. It is not ‘drip’ pricing.
- 2.5 In choosing a pay-monthly mobile service<sup>4</sup> on the basis of price<sup>5</sup>, there are two relevant questions consumers generally consider:
- How much do I want to pay per month?* For most consumers, this is a calculation that fits with other personal or household budget items, to be weighed against disposable income. All of these other factors are generally considered in terms of monthly or periodic expenditure.
  - How long am I prepared to be committed?* For most consumers, this is an obvious and intuitive assessment. Some consumers strongly value the flexibility of not being tied to a contract.
- 2.6 Of course, each consumer will have their own unique combination of concerns and factors they value in weighing these questions, reflecting their circumstances.<sup>6</sup> Equally, in the competitive UK retail market, there are an enormous range of offers, structured in different ways to attract consumers. The choice available to consumers makes it difficult to compare ‘like for like’ offers based on aggregated price alone. There are a range of other factors such as the data use, contract duration which will all depend on individual circumstances. Adding another component to the well-understood pricing model seen in mobile services today is likely to lead to customers finding it harder to make comparisons and potentially mislead given that it adds a further layer of complexity to their decision making process.

### 3. The Draft Guidance risks making things more difficult, not simpler, for consumers

- 3.1 Although we appreciate that the CMA is seeking to improve transparency and consumer choice generally, in the context of mobile offers, force-fitting the two elements of price

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<sup>4</sup> The issue raised in this submission does not arise in relation to PAYG packages, because the consumer pays in advance, and so there can be no issue of subsequent unrevealed prices. As noted, around 80% of mobile contracts are pay monthly.

<sup>5</sup> This is a very simplified picture – in practice, consumers are also taking into account a range of other factors, including quantity and capacity of data/voice packages, available information about how a particular network quality is experienced in the specific places they live and work or are likely to be, other bundled goods or services (including a handset or non-mobile services like broadband or TV services).

<sup>6</sup> See also CMA V/T FR at para 8.65 as to the extent to which the importance of different parameters varies between consumers in a range of different dimensions.



information that consumers currently do use (price per month, and the number of months) into a single piece of information that they do not use is counter-intuitive and, relative to the position today, more difficult. All else equal, the competitive constraint provided by consumer choice is likely to be reduced (see section 4).

- 3.2 Furthermore, the guidance will be very unwieldy, complex for providers to execute in practice and potentially confusing for consumers. The monthly charge is very familiar (most customers have owned a mobile for many years). It will be complex to present an aggregated price in a comparable way, when the industry has such a broad choice of term lengths (from one month up to the statutory maximum, 24 months for services or longer in some cases for handset purchase).
- 3.3 The available evidence makes it clear that the approach in the Draft Guidance will actually be much harder for consumers to evaluate (is a £257 12 month contract better value than a £485 24 month contract?) The result is that a customer ends up having to disaggregate the price in order to make a fair comparison.
- 3.4 There will also be complexity in communicating an aggregated price where in-term adjustments apply. For ease of communication and administration, mobile operators tend to apply an in-term adjustment on one anniversary in the year. This means that a customer's aggregate price will depend on the date their contract begins so the aggregate price included in an advert will either need to explain this or will not accurately reflect the total price.
- 3.5 Mobile devices and services are promoted and sold through multiple direct and indirect, online and physical channels. It is hard to overstate the enormous amount of cost and difficulty that will be required to implement this new requirement in a way that actually delivers accurate information to the consumer in a timely and relevant way. All of this effort will be additional cost that is borne by consumers, simply to return the degree of ease of comparison that consumers already have today, where the average consumer is in possession of all material information to make an informed decision (as required by the DMCCA) and to make comparisons with other options in the market (such as SIM-only contracts).

#### **4. Ofcom regulates mobile marketing already, setting specific rules including on price clarity**

- 4.1 Because mobile services are regulated by Ofcom under the UK's sector-specific regime for electronic communications, mobile retail offers are already governed by existing sector-specific rules set by Ofcom, including in relation to clarity in pricing specifically. Ofcom has a long and well-documented track record of acting to promote competition and protect consumers from unfair practices in mobile markets, including in relation of switching (including number portability), end of contract notifications, annual 'best tariff notifications and so on.<sup>7</sup>
- 4.2 Ofcom's General Conditions (GCs) require that consumers have clear and accurate pricing information, but do so in a way that reflect the specific characteristics and needs of the sector.

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<sup>7</sup> See *Ofcom's future approach to mobile markets and spectrum, Conclusions paper*, Dec 2022, para 3.15.

For example, as noted, this month, changes set by Ofcom in relation to inflation-linked contract variation clauses set in July 2024, took effect.

- 4.3 Indeed Ofcom has already considered the ‘total price’ requirement in its Statement on prohibiting inflation linked price rises. The CMA (in its response to Ofcom’s consultation) encouraged Ofcom to ensure that when making changes in pricing it ensures that providers fully comply with the requirements of the CPRs and equivalent rules to be enacted when part 4 of the DMCCA takes effect – arguing price comparisons between providers’ deals should be based on the total price to be applied for the fixed period (i.e. an aggregate), rather than just the entry or initial price.<sup>8</sup>

- 4.4 In its Statement Ofcom concluded that:

*the impact and benefits of such a requirement may be undermined where providers offer bundles that contain elements with contract periods of different lengths or rolling subscription elements that customers may cancel at any time. Given that, 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. (our emphasis added)<sup>9</sup>*

- 4.5 In June 2022, Ofcom issued guidance in relation to the relevant GC, General Condition C1 (GC C1) affirming that consumers must be provided with contract information that includes the ‘Core Subscription Price’ in offers and before they buy.

- 4.6 GC C1, by Ofcom’s own description, serves to ensure that consumers have clarity on pricing to enable them to make ‘an informed choice’ of mobile provider:

*This condition [GC C1] aims to protect consumers and end-users by ensuring that contracts for public electronic communications services include key information about the services they are receiving and that such information is provided to them before they enter into their contract to allow them to make an informed choice. This includes information about any changes to the price that consumers and end-users will face during their contract, in order to provide them with certainty as to the amounts they will be required to pay. It also sets out requirements about contract duration, contract renewal, end-of-contract notifications, annual best tariff information, facilitating changes of communications provider and end-users’ rights to terminate a contract, which are designed to ensure that end users are treated fairly and able to switch to a different provider in appropriate cases.*

- 4.7 It is highly relevant to the CMA’s consideration of what guidance it should adopt, that Ofcom as the specialist regulator has chosen to set rules that require the contract price and the contract duration to be provided as separate and individual pieces of information. These rules have been set following extensive consultation, and consumer research, to establish what is likely to be the outcome best suited to Ofcom’s statutory duty to further the interests of

<sup>8</sup> See CMA response to Ofcom Consultation on Inflation linked price rises, Feb 2024 para 11.

<sup>9</sup> See Ofcom Statement on Inflation Linked Price Rises, paras 4.70-4.72, 19 July 2024

consumers. Each intervention has been designed with Ofcom's regulatory principles in mind, including that the intervention is effective and proportionate. As a result, it is possible to infer from the current rules:

- (a) First, a positive point – what GC C1 requires is the format of information that Ofcom considers is the correct and best-adapted format to support consumer choice in communications markets, including ensuring that consumers know what they will end up paying before they make a purchase (which is the core objective of s.230(2)(b)).
- (b) Second, a negative point – Ofcom has never seen any need to go further (as it clearly could have done) and include an aggregate price within the information to be provided to consumers prior to purchase. The implication is that this is neither necessary nor proportionate to protect consumers or promote or competition in these markets.

4.8 We urge the CMA team to engage with Ofcom to assess the likely impact on consumers of the proposed position in the Draft Guidance.

4.9 Mobile suppliers have invested heavily in development and change to meet Ofcom's new requirements for presenting in-contract price rises clearly. Mandating further changes, particularly so quickly, would be inefficient and would not allow any opportunity to assess whether Ofcom's new measures are having the desired effect on customer understanding of price. We are not aware of any research which suggests the presentation of aggregate price for mobile services would deliver any incremental consumer benefit.

## 5. The wider context: the draft Guidance risks harming investment and growth

5.1 Finally, we believe the guidance is not proportionate in view of the strong and effective competition prevailing in the mobile market. Moreover, imposing further compliance costs without the evidence to show that such an intervention would be justified would fly in the face that the Government is trying to do in terms of promoting investment and economic growth.

## 6. The CMA's approach goes further than the DMCCA requires and beyond the intended purpose

6.1 In this section, we explain why the CMA's Draft Guidance can be changed in the way we suggest whilst remaining consistent with the proper construction of the DMCCA.<sup>10</sup>

6.2 We recognise that the finalised Guidance cannot amend the effect of the legislation, and so the question of whether 'total price' under s.230 encompasses the existing practice in the mobile sector is, ultimately, a question of law.

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<sup>10</sup> These points are made as submissions to the CMA to assist it in developing the Guidance. They are without prejudice to the position of each member in relation to the question of s.230 or the DMCCA. All members' positions are reserved.



6.3 That said, we are firmly of the view that the proper construction of s.230(2)(b) should not require a change in the vast majority of offers made in the mobile sector – that is, that the existing approach is entirely lawful. That is because:

(a) It is settled law that the task of construction is to understand and give effect to legislative intent or purpose – from the meaning of the words in the statute, but also where relevant by considering other material that sheds light on that purpose.

(b) In the case of s.230, the CMA’s view of purpose of the provision is:

*to enable consumers to know up front what they will end up paying, instead of additional mandatory pricing information being revealed gradually, to ensure that such pricing information is given accurately and in a full and timely manner.<sup>11</sup>*

(c) This includes an intention to prohibit the practice of ‘drip-pricing’, the practice of a trader

*showing consumers an initial headline price for a product and subsequently introducing additional mandatory charges as consumers proceed with a purchase or transaction.<sup>12</sup>*

(d) The essence of the prohibited conduct, whether in general or in relation to drip-pricing is that the information that the consumer needs to understand ‘what they will end up paying’ is not available to them at the point at which they consider the invitation to purchase but is only revealed subsequently.

(e) That implies that the ‘totality’ of the price information should be considered by reference to the comprehensive nature of the information provided at the point when the invitation to purchase is considered, not the question of whether that is a calculated aggregate or individual elements that combine to give a clear picture of the ‘total’ information enabling that aggregate to be known.

(f) Applying that reasoning to mobile offers that provide a price per month and a number of months:

(1) All of the information is available to the consumer at the time they are invited to purchase and no information is held back and only made available subsequently; and

(2) The only ‘information’ not provided is the calculation of per month rate times the number of months. This is information that the typical consumer does not need or seek in relation to that invitation to purchase, and in any event, is readily

<sup>11</sup> Draft Guidance, paragraph 9.15.

<sup>12</sup> Draft Guidance, paragraph 9.16.

available to the consumer should they wish to consider the invitation to purchase in that light.

- (g) As a result, a mobile offer that provides a comprehensive picture on pricing, that is not aggregated but is otherwise clear and enables a consumer to know what they will end up paying will comply with the requirement to provide the 'total price'.

## 7. The CMA can solve this issue without diluting strong consumer enforcement

- 7.1 The best way to address the issue is for the CMA to indicate in its final Guidance that provided there is no evidence that consumers are misled, a clear statement that enables a consumer to understand the price that they will pay is consistent with the DMCCA. This test would be a matter of fact: is the price information the 'total price' information that communicates the price that will be paid?
- 7.2 The CMA could provide in Guidance that if an aggregated price is not included, the CMA would expect the supplier to be able to justify that its offer met this test. The CMA could also emphasise this requirement is more likely to be met in markets where there is existing sector-specific regulation governing price clarity and where there is evidence of effective consumer choice working well to support fierce competition (both of which apply with respect to the mobile market). Specific examples could be given in Guidance to avoid abuse.
- 7.3 In adopting the approach we suggest now, the CMA remains free to reconsider in light of further evidence.
- 7.4 If the CMA did not feel able to reach a concluded view on this issue at this stage, we suggest that the CMA may wish to engage with Ofcom to consider whether a separate consultation on the issue might be a useful way to secure better information to support the CMA's decision-making with respect to the Guidance.
- 7.5 It may be the case that the CMA views this issue as wholly a matter of statutory construction, and that it considers that it has no discretion to adjust the Guidance in the way that we suggest. We think that assessment would be incorrect, and fail to take into account the clear role played by the CMA's Guidance in this regime (as in the regime it updates).
- 7.6 In any event, this submission is made without prejudice to the position of any of the members of the Group, each of whom reserves their position.

22 January 2025

*Contacts for individual participating companies available on request*