Trustpilot response

CMA: Draft guidance on the protection from unfair trading provisions in the Digital Markets, Competition and Consumers Act 2024
22 January 2025

This document sets out Trustpilot's consultation response to the draft guidance

Introduction
On behalf of Trustpilot A/S "Trustpilot", we appreciate the opportunity to respond to the Consumer and Market Authority's (CMA's) consultation on its *Draft guidance on the protection from unfair trading provisions in the Digital Markets, Competition and Consumers Act 2024*. This response will focus on the elements relating to fake reviews.

Trustpilot has welcomed the introduction of the Digital Markets, Competition and Consumers Act (DMCCA) and has appreciated ongoing engagement with the CMA throughout the Act's development.

Trustpilot began with a simple yet powerful idea that is more relevant today than ever — to be the universal symbol of trust, bringing consumers and businesses together through reviews. Trustpilot is an open, independent, and impartial online reviews service that helps consumers make the right choices, and businesses to build trust, grow and improve.

By open, we mean that consumers have the freedom to share their genuine experiences as and when they choose, for free, without necessarily being invited by a business. Likewise, businesses can invite consumers to leave feedback and respond at any time — using either our free or additional subscription-based services. We allow both service reviews written in response to invitations, as well as 'organic' reviews that are not in response to an invitation from a business. Unlike on closed or pay-to-access platforms, reviews on Trustpilot can be written about *genuine experiences*, which include but are not limited to *purchases*. We believe this provides a more complete and holistic picture that can help consumers make the right decisions and businesses learn, improve and grow drawing on the widest range of feedback about experiences and interactions.

Genuine, honest and real experiences shared online are invaluable, both to the people who write and read them, and to the businesses who can use them to understand their customers and improve their offerings. In turn, this helps to stimulate competition as consumers can voice their views and discover new businesses, whilst businesses of all sizes can hone their products and services, and attract new customers. In respect to this latter point, review platforms can be used as a source of "free" promotion for businesses, as online reviews surface and amplify word of mouth from their customers to help prospective customers. It is important that the integrity of online reviews is upheld so that the benefits can be fully realised for both consumers and businesses, as well as to the wider economy. The DMCCA and the CMA's accompanying guidance has an important role to play in this context.

<u>A summary of Trustpilot's position on the draft guidance</u>

- Trustpilot continues to support the introduction of the DMCCA and believes it can further enhance the fight against fake reviews, ensuring that the benefit of trusted reviews continues to be reaped by consumers and businesses across the UK. However, to do this the guidance must be carefully honed so as to avoid any unintended consequences. Our response focuses on questions 2 and 4.
- We welcome and support the CMA's guidance in prioritising contextualisation over a one-size-fits-all approach. This proportionately balances the responsibility to tackle fake reviews with allowing such services to flourish.
- We welcome and support the clarity provided at B.9 in defining what is considered a fake review. However, the language regarding fake reviews should be clear and consistent throughout the guidance so as to avoid creating confusion with other elements. Action needs to be taken to remedy this at later points.
- To ensure that a holistic approach is taken to tackling fake reviews, we strongly advocate that the opportunity is taken in the guidance to clarify how social media and ISPs should tackle fake reviews offered by review sellers.
- Language relating to "publishers" should be carefully defined, if it cannot be replaced by a better term, given the very specific meaning the term has in other aspects of law.

<u>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?</u>

1. The guidance examples should take the opportunity to illustrate that failing to act against review sellers can contravene the requirements of professional diligence

In order to take a holistic approach to tackling fake reviews via the Act and the draft guidance, it is integral that all stages of the journey of a fake review are addressed, including the middle part — where fake reviews are promoted, marketed and sold via social media and made available on domains hosted by Internet Service Providers (ISPs). Failing to do so leaves a gap in the centre of regulatory action against fake reviews.

Unfortunately, express provisions to clarify the responsibilities of social media and ISPs were not included in the Act. However, there is an opportunity to confirm their professional diligence responsibilities in combating fake reviews via the guidance. **[Confidential information removed]** As such, it is important to explicitly draw out this aspect in the guidance so that this point — and the responsibility — is clear.

To deliver this, we advocate for an additional example to be inserted into this section alongside Example 3 on p27 of the guidance. This should illustrate that it would also be a failure to meet the required professional diligence standard for a platform — such as a social media service — to not take action to address review sellers. For example, it could be a failure to meet responsibilities if a service did not remove groups that sell or offer to carry out banned review practices, including recruiting individuals willing to post fake reviews or conceal incentivised

reviews about a trader's products — particularly where the service holds or has received knowledge about the existence and activities of such groups, e.g. via a flagging function.

Overall, this inclusion is important to ensure a holistic approach to tackling the issue of fake reviews, with proactive steps taken by all relevant actors throughout the entire journey of a fake review — from creation, to sale, to submission. Without addressing the middle part of this ecosystem, the Act and guidance will be failing to address the problem of fake reviews in a joined up way and leaving open a critical regulatory gap.

<u>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)?</u>

Overall, Trustpilot is pleased to see the CMA draft guidance explicitly recognising that fake reviews can be both positive and negative. At **B.9**, it is also helpful that the guidance expressly highlights that fake reviews commonly follow from a deliberate intention to undermine a product or service, rather than simply being an account of events that differs from traders' perspectives. Given the subjective nature of reviews, it is important to recognise that legitimate individual viewpoints can differ.

In addressing multiple parts of the fake review ecosystem, it is helpful at **B.23** that the guidance confirms that it is prohibited to offer complementary services that enhance or boost the chance of fake reviews bypassing fake review detection measures. This is likely to be helpful in assisting platforms who invest heavily in fake review detection measures, such as Trustpilot, to combat bad actors that seek to game them.

We also recognise the usefulness of the CMA building flexibility into the guidance, acknowledging that the diversity of different platforms operating in the space will require adaptation of the requirements to their specific or unique circumstances (see also our comments below regarding **B.27**). This is important to support a thriving and competitive review sector, which can serve the diverse needs of both consumers and businesses.

It is also very positive that the CMA recognises the delicate balance that services must strike between screening and removing suspicious content versus inadvertently removing genuine, lawful and relevant reviews (at **B.38**). The over-removal of content has the potential to not only impact consumers' freedom of expression, but also undermine the integrity of ratings, or risk creating a misleading impression about a business to consumers. Particularly in this balancing endeavour, flexibility and the ability to take the steps most appropriate for the service in question, will be key to achieving a positive and effective outcome in tackling fake reviews in practice.

Further on flexibility, we would also encourage the CMA to extend such an approach with regard to the types of evidence companies can use to demonstrate compliance. This will assist with reducing the administrative burden, without compromising outcomes.

As a final overall comment, we would urge that the final guidance ensure that requirements placed on platforms are balanced and proportionate. As a platform who hosts reviews, Trustpilot invests heavily in people, innovations and technology to tackle the ongoing challenge of fake reviews. We acknowledge that no system is perfect. But it is important not to lose sight of — and compromise — the benefits that genuine reviews can provide in helping people make more informed choices.

1. Incentivisation examples should be refined to ensure they are workable in practice

Trustpilot does not allow incentivised reviews, as set out in our [Guidelines for Businesses](#): 'You shouldn't provide incentives like discounts, monetary rewards, loyalty points, gifts, coupons, referral bonuses and the like when asking for reviews.' Consumers must confirm that they have not been offered an incentive before submitting a review on our website.

As a platform, we previously allowed businesses to provide review incentives when collecting reviews, but changed our policy to prohibit this practice around June 2021. This is because despite most companies using incentives in the right way to get more feedback, we noted a growing concern that any incentive could sway sentiment in a more positive direction.

We are supportive of the CMA seeking to address the issue of concealed incentivised reviews. However, in our view, the CMA guidance takes an overly broad approach to two examples of incentivised reviews, and these may risk counterproductive effects. There is an opportunity to take a more pragmatic approach by adjusting this wording, to assist consumers in writing unbiased reviews and help platforms already taking steps to prevent biased reviews, as well as achieve closer regulatory alignment with similar provisions in other jurisdictions.

At **B.10** in Annex B, on concealed incentivised reviews, the guidance states:

> "The banned practice also applies to reviews that conceal the fact that they have been incentivised. Incentivisation can take many forms and is not limited to monetary payments. Examples of incentivisation include, but are not limited to:
> [...]
> *(h)* having a financial interest in the trader or the product being reviewed,
> *(i)* having any commercial link with the trader being reviewed."

The wording in examples *(h)* and *(i)* is broad, and in our view, extends beyond what is necessary in practice. For example, the application of *(h)* could, in theory, extend to consumers that hold a small number of shares in a particular company. Such consumers would in practice be unable to review any business they own shares in on an independent third party review platform unless that platform provided a specific way to disclose the interest. This seems overly broad and — for many consumers and businesses — will likely not be what they would reasonably be mindful of when considering 'incentives'.

Furthermore, not all platforms provide the option. For example, platforms who take a stronger stand and prohibit incentivised reviews entirely do not provide a mechanism to indicate an

incentive. Where such platforms use a narrower definition of "incentivisation" than the guidance's examples, they would risk being non-compliant with this part of the guidance and contravening requirements not to mislead consumers. An outright prohibition of incentives means that there will be no mechanism for the reviewer to disclose their minor shareholding interest. The seriousness of the consequences that follow from this is confirmed by the guidance at B.12, which states where platforms do not allow incentivised reviews, "it is likely to be misleading to post an incentivised review." It is therefore critical that the definition of "incentivisation" is workable, to avoid undermining the good faith efforts of platforms who already ban incentivised reviews.

With the current broad example of incentivisation at *(h)*, there is also a risk that reviewers themselves will inadvertently write reviews of traders they have a financial interest in, without recognising it as problematic. A reasonable consumer may consider whether they have a close relationship with a business if prompted to consider whether their review may be biased, but it is unlikely they would consider *any* financial interest as affecting their eligibility, such as a minor shareholding, or a business that their pension funds are invested in. The wording of the example could be adjusted to reflect this.

Similarly, "any commercial link" with a trader at *(i)* is too widely worded. This could, in theory, extend to customers of B2B businesses who wish to provide useful feedback to a trader they occasionally do business with. A review of a B2B business is, by its nature, likely to be a review which is based on a commercial link. Classifying such reviews as incentivised could prevent a valuable source of feedback for B2B businesses looking to learn and improve. If any such reviews are posted, there is a risk of engaging in misleading conduct — as confirmed by the guidance (see above). This is the result where, as explained above, platforms prohibit incentivised reviews (and therefore have no mechanism to label them), yet take a narrower — and, we would argue — more realistic and practical definition of "incentivisation".

There is an opportunity to refine and target this wording and by doing so, assist platforms in any existing good faith and proactive attempts to prevent biased reviews, while at the same time achieving closer alignment with the likely expectations of consumers, and existing international regulation. While still retaining the benefits of the prohibition, and illustrating the many different forms that incentivisation can take, slightly narrower and more precisely worded examples at *(h)* and *(i)* would be beneficial to provide clarity and avoid bringing within scope the types of situations described above. In both instances, by adding "in exchange for the review" to the end of each subpoint, the needed clarity would be secured and the identified issues resolved.

By way of example, in the US, the Federal Trade Commission's (FTC's) Endorsement Guides provide that "unexpected material connections" such as incentives given in exchange for customer reviews without any requirement as to the sentiment of the reviews must be disclosed clearly and conspicuously (Endorsement Guides, 16 CFR 255.5(a) & (b)(6)(ii)). Also illustrative is §465.4 of the FTC's rule on fake reviews, which highlights the importance of a *transactional* connection — it links the writing or creation of the review explicitly to the

provision of compensation or an incentive. This avoids unintentionally bringing within scope unrelated financial interests in businesses that in practice are unlikely to impact a review.

2. There is an opportunity to clarify how social media and ISPs should tackle fake reviews offered by review sellers

While the guidance includes requirements regarding professional diligence, the Act does not expressly include specific requirements for social media and ISPs that host groups who proactively procure fake reviews. This is an issue Trustpilot has regularly highlighted as a legislative gap in practice, and one that leaves open the middle part of the fake reviews process — where fake reviews are sold online and via social media services.

At **B.22**, the draft guidance references review brokers and states that it is prohibited to offer to procure banned reviews and information for traders. Specifically, it is prohibited to:

> "offer to submit or commission fake reviews or concealed incentivised reviews for traders [...or] offer to traders to publish reviews or consumer review information in a misleading way. This element of the banned practice is aimed at addressing and disrupting the business model of acting as a broker procuring banned reviews and information."

Example 1 in this section clearly brings within scope those administering social media groups for this purpose: "Offering a service to traders that involves setting up and running groups on social media to recruit individuals willing to post fake reviews or concealed incentivised reviews about a trader's products."

However, as has been repeatedly flagged by Trustpilot, it should also be prohibited to fail to take action to remove content and/or suspend such groups where they are reported to social media services. In practice, acquiescence by social media services allows these groups to subsist and flourish, despite action taken to flag them. Their activities are a key source of profit and exposure for trading in fake reviews.

As has been highlighted previously, it is a gap in practice that the Act does not include express, specific requirements for social media and ISPs who host groups proactively procuring fake reviews. We take the view that a holistic approach to tackling the issue of fake reviews would also prohibit failure to take action to remove content and/or suspend users where the existence of such groups are reported to social media services/ISPs.

[Confidential information removed]

We suggest that in the guidance, an additional example at B.22 could clarify that it is also prohibited to, upon receiving actual knowledge about such groups, fail to take action to down-prioritise content or remove groups that offer to carry out banned practices, including recruiting individuals willing to post fake reviews or conceal incentivised reviews about a

trader's products. This would help ensure that responsibilities to tackle fake reviews at all parts of the journey are addressed by the Act or the guidance.

In the alternative, if an express example on this point is not included, the guidance could confirm that social media and ISPs bear responsibility in the fight against fake reviews. We would highlight that the FTC has provided a welcome step in this regard, and one that we would support the CMA echoing in its guidance. The FTC's final Rule on the Use of Consumer Reviews and Testimonials conveyed an explicit steer regarding the expectations on third-party platforms. Due to the Rule's focus on "review hosting", it does not set direct requirements on social media companies and internet service providers to address the sale of fake reviews. However, in the final publication, the FTC did state in the commentary sitting alongside the Rule to explain its approach that "This focus should not be taken to signal that third-party platforms do not bear significant responsibility for combating fake reviews".

A similar steer from the CMA on this aspect would be incredibly helpful given the need for an holistic approach to be taken across the fake review landscape.

3. We welcome and support the CMA's guidance in prioritising contextualisation over a one-size-fits-all approach

The CMA recognises at **B.27** of the guidance that it is unlikely that there will be a one-size-fits-all-approach for all publishers to take to prevent fake reviews, and that appropriate action will depend on the particular circumstances and the type of content in question:

> "There is unlikely to be a 'one size fits all' or 'tick box' approach which is appropriate for all publishers to deploy to prevent and remove from publication banned reviews and false or misleading consumer review information. What is appropriate for one publisher may not be appropriate for another, for example because of the nature of the content that is posted by third parties."

We welcome and strongly support this approach.

This aligns with the view Trustpilot has consistently taken regarding the range and diversity of services potentially within scope. Flexibility is key to allow a range of different services, who are each set up differently, to take action to combat fake reviews in a way that is most appropriate and effective for their particular circumstances.

This proportionately balances the responsibility to tackle fake reviews with allowing such services to flourish. Importantly, this is also consistent with facilitating a level of choice for consumers in the review sector, via a range of different options that allow them to consult and read reviews about products, services and merchants on both open and closed platform models.

4. The language regarding fake reviews should be clear, consistent, and avoid creating confusion with other elements

At **B.9** the guidance cites the Act and confirms that:

> "A fake review is a consumer review 'that purports to be, but is not, based on a person's genuine experience.' [...] A review is not fake merely because the trader who it is about does not like or agree with it, as long as it reflects the reviewer's genuine experience."

This is unequivocal and provides a clear and useful lens through which to understand the guidance. It highlights the fact that a reviewer's *genuine experience* is the basis for a review.

However, at **B.43** in the context of investigations, the guidance refers to difficulty in forming a perspective about reviews "where there is a dispute about the factual accuracy of a review".

This wording, situated alongside commentary about determining whether reviews are fake, could raise confusion about when a review should be considered to "reflect a genuine experience." Referencing the element of "factual accuracy" risks being seen to diverge from the definition above, and introducing an objective test into an area (online reviews) that is inherently subjective, by its nature.

Specifically, each person's genuine experience is likely to be unique to them. We see in reviews on Trustpilot that there are cases where different people's accounts of the same set of circumstances diverge. This is to be expected with personal experiences, people's recollections of them, and their thoughts, feelings and opinions about them. In fact, the value that reviews bring is collecting and presenting these different perspectives.

Given the subjective nature of experiences, it is therefore difficult for others to establish facts — other than whether there is evidence that a genuine experience was had.

We would therefore caution against references to determining facts, without care to ensure that there can be no confusion about these concepts. For example, it might be useful to emphasise that reviews are by their nature subjective opinions, where accounts of the same event from two different parties (such as a consumer and trader) could be expected to diverge. For clarity, the guidance could expressly confirm that whether or not a review is fake will not be determined by whether agreement can be reached about the factual accuracy of its contents.

5. Special note on use of the terminology "publishers" in the guidance

We note that the Act refers to the act of "publishing" reviews. However, the guidance refers to "publishers". Specifically, at **B.26** of the guidance, "publishers" is explained as including platforms and those who make reviews available.

We note that the term 'publisher' has a very specific meaning in other contexts, and specifically with regard to both the Defamation Act 1996 and the Defamation Act 2013. These statutes provide that a "publisher" is potentially liable for defamation in the event that online speech is determined to be defamatory.

Since the definition in the guidance is distinct from, and contrary to, the definitions in defamation law, another term should be used in the guidance to avoid confusion. In the alternative, there should be explicit confirmation that the parameters being set via the guidance with regard to publishers are not intended to be understood in the same way as — or have any impact on — other areas of law where the term 'publisher' is defined more specifically, including the Defamation Act. This is necessary to avoid any risk of confusion regarding liability in the event that speech in online reviews is found to be defamatory. It is also necessary to ensure that platforms are not targeted with vexatious defamation claims that are made in an effort to unduly pressure platforms to remove negative online reviews.

We look forward to continuing to work with the CMA as it develops and implements this guidance. As ever, Trustpilot would be happy to provide further information with regards to our response.