

RESPONSE TO:

- (1) THE CMA'S CONSULTATION ON DRAFT GUIDANCE ON THE PROTECTION FROM UNFAIR TRADING PROVISIONS IN THE DIGITAL MARKETS, COMPETITION AND CONSUMERS ACT 2024 (CMA207); AND**
- (2) THE CMA'S CONSULTATION ON DRAFT GUIDANCE ON CONSUMER PROTECTION: ENFORCEMENT GUIDANCE (CMA58ii DRAFT)**

RESPONSE BY FRESHFIELDS LLP

JANUARY 2025

FRESHFIELDS

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1. Introduction

- 1.1 Freshfields LLP (the **Firm**) welcomes the opportunity to respond to the Competition and Markets Authority (**CMA**)’s consultation on draft guidance on the CMA’s consumer protection enforcement role and powers (the **Draft Consumer Protection Enforcement Guidance**) and the CMA’s consultation on draft guidance on the protection from unfair commercial practices as amended by the Digital Markets, Competition and Consumers Act 2024 (**DMCCA**) (the **Draft UCP Guidance**) (together, the **Draft Guidance**). Thank you for agreeing to a short extension of time for submission of this response.
- 1.2 The Draft UCP Guidance, once finalised, will replace the guidance corresponding to the Consumer Protection from Unfair Trading Regulations 2008, which are soon to be replaced by the unfair commercial practices provisions set out in Chapter 1 of Part 4 of the DMCCA.
- 1.3 The Draft Consumer Protection Enforcement Guidance updates and, once finalised, will replace the existing guidance on consumer protection enforcement, first published in 2016.
- 1.4 This response is based on our significant experience and expertise in advising clients on matters relating to unfair commercial practices and CMA enforcement action in relation to consumer protection and competition issues. In particular, we have acted on many of the major CMA consumer protection investigations over the last decade, including in relation to, for example, secondary ticketing, Covid-19 refunds, online hotel bookings, digital subscriptions, fake and misleading reviews, and supermarket pricing and promotions. We rely on this breadth of experience to provide these comments on the Draft Guidance.
- 1.5 We have confined our comments to those areas of the Draft Guidance which we consider are most significant, by reference to the specific questions contained in the consultation documents for each of the Draft UCP Guidance and Draft Consumer Protection Enforcement Guidance. This response is submitted on behalf of the Firm and does not represent the views of any of the Firm’s clients.

2. General observations

- 2.1 We welcome the Draft Guidance and agree with the CMA’s proposal to update the previous guidance in light of the changes made by the DMCCA, in particular the introduction of the CMA’s new direct enforcement powers. We also note introductory remarks in the Draft Guidance, which indicate it is not intended to serve as a guide to the substantive requirements of the legislation to which it relates.
- 2.2 We note that the Firm previously (on 18 September 2024) submitted a response to the CMA’s consultation on draft guidance and draft rules on the direct consumer enforcement regime set out in the DMCCA. We refer to certain parts of that response in the response below concerning

particular paragraphs of the Draft Consumer Protection Enforcement Guidance. For the most part, the Draft Guidance is appropriate in terms of scope, and generally is sufficiently clear and helpful. There are, however, certain areas where we consider the Draft Guidance would benefit from further clarification or explanation, which we cover below.

3. The Firm's response to the Draft UCP Guidance

Q1. Do you have any comments on the structure or clarity of the Draft Guidance?

- 3.1 As above, at present we consider the Draft UCP Guidance is sufficient in terms of structure and scope and is generally sufficiently clear, subject to a couple of areas where further explanation would be welcome (see below).

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?

- 3.2 We welcome the CMA's provision of specific examples in respect of each of the prohibited practices throughout the Draft UCP Guidance. We note, however, that those examples do not in every case reflect Parliament's intentions or how we think a court would interpret the relevant provisions of the DMCCA (acknowledging, of course, that courts would not be bound by the Draft UCP Guidance in any event).

- 3.3 This fact is acknowledged at paragraph 1.5 of the Draft UCP Guidance ("*This Guidance is not a substitute for, or definitive interpretation of, the UCP provisions and should be read in conjunction with them*") (emphasis added). We welcome this explanatory wording regarding the role of the Draft UCP Guidance but suggest that it would be helpful if the CMA could make this point clearer throughout the Draft UCP Guidance, particularly in respect of the many examples of non-compliant practices. Beyond this, there is one example which we think should be amended or removed – see our response to Q4., below.

Q3. 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?

- 3.4 The Draft UCP Guidance includes a number of examples at paragraphs 9.14 to 9.22 as to what it considers to be "mandatory" charges that should be included in any headline price. The Draft UCP Guidance, however, creates ambiguity through the introduction of the concept of a "*genuinely optional*" service in the Draft UCP Guidance (see paragraph 9.19) and the vaguer concept introduced at paragraph 9.20, where the CMA states 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".

- 3.5 This language is, in our view, an unhelpful gloss on the language of the relevant provisions of the DMCCA, which in turn does not aid businesses which are seeking to understand their obligations under the new rules. The one limited example provided in the Draft UCP Guidance only covers the retail and delivery of a physical product. No further guidance is provided as to how the CMA may interpret this concept in the context of other consumer transactions, leaving significant uncertainty for businesses.
- 3.6 The legislation is clear in its distinction between mandatory and optional charges and many of the "mandatory" examples provided in the Draft UCP Guidance are also clear, such as administration fees, local taxes and joining fees. The new concept of "*genuinely optional*" and the wording at paragraph 9.20 not only unhelpfully blur this clear distinction, but also arguably go beyond the requirements of the legislation. We ask the CMA to either remove these references or provide further guidance on its interpretation of the legislation so as to provide clarity for businesses.

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)?

- 3.7 We reiterate our points at paragraphs 3.2 and 3.3 above with regard to the CMA's provision of specific examples for each of the prohibited practices throughout the Draft UCP Guidance.
- 3.8 More specifically, we wish to comment on the second example provided by the CMA at point B.23 in respect of the prohibition "*to offer services to traders for the facilitating of the submission, commission or publication of banned reviews and information*" set out in paragraph 13(4)(b) of Schedule 20 to the DMCCA (the **facilitation prohibition**).
- 3.9 This example states that the facilitation prohibition includes: "*Running an online platform while being aware of and allowing services to be sold by traders using the platform to offer to post or otherwise arrange for fake reviews or concealed incentivised [sic] to be posted on other sites.*"
- 3.10 We consider that this example reflects an overly expansive view taken by the CMA of the requirements imposed by paragraph 13(4)(b) of Schedule 20 to the DMCCA – a view which does not reflect Parliament's intentions. We note in this regard that amendments that would have expressly extended the application of paragraph 13(4)(b) to social media and internet service providers were rejected during the Report Stage of the DMCC Bill. The example also fails to take account of the limitations on the liability of service providers in this context provided for by (among other things) regulation 19 of The Electronic Commerce (EC Directive) Regulations 2002.
- 3.11 We suggest that the CMA reconsiders this example and considers substituting another in its place which more closely tracks the language of

the facilitation prohibition (for example, concerning a trader who contacts a business offering to obtain 'positive' reviews for one of that business' consumer-facing products or services, while making clear that there is no need for reviewers to have accessed those products or services).

4. The Firm's response to the Draft Consumer Protection Enforcement Guidance

General remarks

- 4.1 A number of our responses below cross-refer to the Firm's response to the CMA's consultation on the draft guidance on the CMA's direct enforcement regime, submitted on 18 September 2024.
- 4.2 **Duty of expedition:** There are references throughout the Draft Consumer Protection Enforcement Guidance to the CMA's duty of expedition (see paragraphs 7.1, 7.14 and 7.15). As we indicated in the Firm's response dated 18 September 2024 on the direct enforcement guidance, it is critical that the CMA interprets this duty appropriately and in line with its public law duties, and does not apply the duty in any way which may override or limit parties' rights to due process.
- 4.3 To guard against the risk of the duty of expedition being misapplied in practice by individual CMA teams, it would be helpful to include a specific reference acknowledging that, despite the CMA's expanded duty of expedition introduced by the DMCCA, it must ensure that the rights of parties are fully respected when carrying out its consumer protection function. We note that the CMA included similar wording in its draft markets procedural guidance as follows:
- "This guidance (Markets Procedural Guidance) sets out the procedures that the CMA follows in carrying out its markets function, in order to fulfil its duty in an efficient manner, while ensuring that the rights of market participants are fully respected."*¹
- 4.4 **Departure from Guidance:** At paragraph 1.6 of the Draft Consumer Protection Enforcement Guidance, the CMA states it will always have regard to the relevant guidance when dealing with a breach of consumer law but may depart when "*the facts of an individual case justify it and it is appropriate.*" The CMA should clarify what individual facts may justify such a departure and should provide examples of the same.

Q1. Do you have any comments on the structure or clarity of the Draft Guidance?

- 4.5 As above, at present we consider the Draft Consumer Protection Enforcement Guidance is sufficient in terms of structure and scope and is generally sufficiently clear, subject to a few areas where further explanation would be welcome (see below).

¹ See para 1.3, Draft Markets Procedural Guidance.

Q2.Does the guidance offer sufficient clarity about how the CMA proposes to carry out its enforcement functions?

4.6 See comments below in response to Q3.

Q3. 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.

Undertakings

4.7 **Publicity and transparency:** Paragraph 4.20 of the current consumer protection enforcement guidance (CMA58) includes the following statement:

"Where the CMA closes or refrains from opening a case in consequence of having accepted undertakings or other statements made as regards future conduct from a business, the CMA will publish as much of these and of other relevant details (including the names of the parties) as it considers appropriate, subject to its legal duties in relation to disclosure (see above, paragraph 3.23). If undertakings are given or statements are made with no admission that any infringement has occurred, the publicity given to them by the CMA will make this clear."

4.8 This is not included in the Draft Consumer Protection Enforcement Guidance, leaving ambiguity as to the CMA's and other enforcers' likely approach in this regard. Where a party has given an undertaking but strictly without any admission that it has infringed consumer protection law, it is clearly important that, in circumstances where the CMA or another enforcer intends to make a public statement, this fact is also made known publicly. For example, publishing the undertakings without providing appropriate context (i.e., that the trader has not admitted liability) could expose the trader to litigation risk and/or reputational harm unnecessarily. We therefore recommend that this wording is included in the guidance to make the position clear.

4.9 Indeed, we observe that without such certainty, there is a risk that businesses subject to CMA inquiries may be less willing to engage in offering undertakings to remedy the CMA's concerns at an early stage, particularly in circumstances where there is no clear case of an infringement but the business in question may otherwise be willing to do so to bring the inquiry to an end and avoid the further cost and burden of a detailed investigation.

Court-based enforcement regime

4.10 **Consultation before an interim enforcement order/enforcement order:** Paragraph 5.9 of the Draft Consumer Protection Enforcement Guidance notes that the enforcer will "usually" consult with the parties under investigation. The CMA should clarify the circumstances in which such consultation will not take place, if any, beyond those listed in

paragraph 5.12. In our view, those situations should be very limited indeed.

Written information requests

- 4.11 **Materially false/misleading information:** Paragraph 7.6 of the Draft Consumer Protection Enforcement Guidance stipulates the possibility of a penalty for providing information that is materially false or misleading, without a reasonable excuse. As we indicated in the Firm's response dated 18 September 2024 on the direct enforcement guidance, the CMA should clarify what is meant by "materially" false or misleading information in this regard, with reference to specific examples (for example, if such information would only be considered "materially" false or misleading if it were to have a substantive impact on the CMA's findings).
- 4.12 **Response to Information Notices:** Paragraphs 7.14-7.15 of the Draft Consumer Protection Enforcement Guidance highlight the CMA's expectation that parties will comply with a request within the given deadline, in the interest of the duty of expedition, and that the CMA's duty will *"be reflected in the deadlines set for compliance with information requests and will also be taken into account when considering any representations received about difficulties in meeting that deadline"*. As we indicated in the Firm's response dated 18 September 2024 on the direct enforcement guidance, it is important that the CMA's expectations are tempered with a realistic acknowledgement of the difficulty and cost associated with responding to complex or extensive information notices (or complying with orders imposed by the CMA), particularly where businesses' information-gathering and reporting systems do not align with the information being requested. Such an acknowledgement from the CMA is particularly important in circumstances where it has powers to fine undertakings at any stage of a proceeding for failing to respond to requests in a manner that the CMA considers adequate.
- 4.13 In the context of setting deadlines for responses to information requests and written representations, the CMA must set reasonable deadlines. Deadlines set for such requests in CMA investigations are often unreasonable, and frequently have to be negotiated upwards. There is no basis in the DMCCA for any suggestion that the duty of expedition weakens the existing requirements for the CMA to set deadlines that are reasonable (e.g., for information-gathering), or to consider valid, reasoned requests for extensions of time (and for the process for requesting such extensions to be dealt with reasonably). In practice, therefore, we do not consider that the duty of expedition should be used as an excuse to set shorter deadlines than those currently imposed by the CMA.
- 4.14 **Delivery of draft Information Notices:** We encourage the use of draft information requests, as noted at paragraph 7.13 of the Draft Consumer Protection Enforcement Guidance. Similar to the above, the duty of expedition should not be used as a "good reason" not to share in draft the questions that the CMA intends to send to businesses using its statutory information-gathering powers (rather, in our practical experience, sharing

these questions in draft form often leads to an overall more efficient and effective information-gathering process for the CMA, as parties are able to inform the CMA as to the type, format and accessibility of information held).

- 4.15 ***The use of the Procedural Complaints Adjudicator:*** The Draft Consumer Protection Enforcement Guidance allows for procedural complaints to be referred to the Procedural Complaints Adjudicator (the **PCA**) (see, for example – paragraph 7.18 of the Draft Consumer Protection Enforcement Guidance). We understand that the PCA replaces the role previously held by the Procedural Officer, who was employed by the CMA but independent from CMA investigations, case teams and decision makers.
- 4.16 As we indicated in the Firm's response dated 18 September 2024 on the direct enforcement guidance, having the Procedural Officer hear the complaints provided parties with reassurance that the complaint would be heard by someone who is genuinely impartial, and has the requisite experience. As currently envisaged, we have serious concerns that complaints handled by a PCA will not be subject to the same level of impartial assessment as those handled by the Procedural Officer.

Freshfields LLP

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