CMA CONSULTATION ON DRAFT GUIDANCE ON PROTECTION FROM UNFAIR TRADING PROVISIONS (DMCC ACT), and DRAFT ENFORCEMENT GUIDANCE
DECEMBER 2024 / JANUARY 2025

The following is techUK's response to the CMA's Unfair commercial practices guidance consultation.

About techUK

techUK is a membership organisation launched in 2013 to champion the technology sector and prepare and empower the UK for what comes next, delivering a better future for people, society, the economy and the planet.

It is the UK's leading technology membership organisation, with more than 1000 members spread across the UK. We are a network that enables our members to learn from each other and grow in a way which contributes to the country both socially and economically.

By working collaboratively with government and others, we provide expert guidance and insight for our members and stakeholders about how to prepare for the future, anticipate change and realise the positive potential of technology in a fast-moving world.

Introduction

techUK supported the goals and purpose of this part of the Digital Markets, Competition and Consumers Act throughout the Bill's life and have anticipated the release of this draft guidance for several months. Please find answers to the consultation questions below.

Our members understand that consumer law plays an important role in facilitating economic growth by protecting consumers from unscrupulous traders. That said, at the same time, it is vital that the rules strike the right balance. The DMCC Act should not add to the cost of trading in the UK without delivering meaningful value for consumers and the wider economy.

We have repeatedly urged DBT and the CMA to ensure that the new framework does not place an unnecessary burden on UK businesses. Part of this has been helping DBT understand the 'real world' impact of some of the proposals.

It is important to point out first that this consultation has had a very tight turnaround between the release of draft guidance, just before the Christmas break, and the deadline for responses. Indicative of this tight turnaround is a meeting between the CMA and lawyers in sectors affected by the guidance to clarify the CMA's interpretation of its own guidance, which took place on 9 January. This was only 13 days before the consultation deadline and while some may still have been away for the break. This has reduced the amount of time and resources businesses have had to understand and formulate their responses to the guidance, which is particularly complex and detailed.

These problems were exacerbated by the highly prescriptive nature of certain aspects of the draft guidance, particularly in relation to pricing practices. As the guidance applies to nearly all sectors of the UK economy, the fact that these proposals have been put forward without a detailed pre-consultation phase is concerning from the UK's chief economic regulator. In some cases, the CMA's strict interpretation goes much further than DBT's own commentary on the kind of practices the revised UCPs were designed to regulate. This has taken many members by surprise.

In addition to this, the tight deadline of April 2025 for the commencement of the regime and to implement any required changes, following on from such a short consultation window, places a significant burden on businesses and may lead to unintentional breaches of guidance when the regime is implemented. This is a direct consequence of the limited time that business will have had to understand and respond to the final guidance when it is eventually available.

The CMA have instituted these tight deadlines and been slow to release the guidance for consultation despite the impacts of these incredibly short timelines being made very clear by businesses. Additionally, it was known to the CMA that there would be issues of contention in this guidance that will need to be discussed, and where techUK has not had sufficient time to develop consensus positions amongst the industry. Decisions over these issues will materially impact the burden of the proposed new regulations on different businesses. This has made an already very tight consultation deadline even more challenging, with time lost for discussion over the Christmas period compounding this issue further.

As a result, the actions of the CMA in organising such an important call for feedback over the holiday period, with such a tight deadline, risks undermining the quality of the subsequent regulation as well as impacting the implementation of the guidance. This may well cause both businesses and the CMA to face significant but avoidable issues in the long term

Given these impacts, we urge the CMA to:
(a) work with the industry to mitigate the impact caused by the issues highlighted above;
(b) account for this in its enforcement of the DMCC Act and
(c) make necessary changes to the draft UCP guidance to avoid causing disproportionate 'collateral damage' to responsible traders
(d) incorporate lessons learned from this round of consultation to ensure that future consultations are more likely to result in substantive engagement with industry stakeholders.

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

The draft guidance contains a great deal of information and detail which requires significant time and resource to fully understand and implement. With the issues outlined in the introduction, this has left techUK members rushing over the holidays to understand the full implications of the draft guidance in order to respond and begin taking any necessary steps for compliance by April.

Our concerns are not necessarily driven by a lack of clarity on the guidance, indeed in some cases (particularly with regards to pricing) the problem is that the CMA has adopted a more expansive and prescriptive interpretation of the law than expected, thereby removing flexibility for our members to meet their compliance obligations. As outlined further below, there are some areas where we consider that it would be more appropriate for traders to develop their own compliance solutions that reflect the unique trading conditions of their company and industry.

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?

The illustrative examples within Annex A describe practices that are unambiguously prohibited and that we would not expect our members to engage in.

We do though have some queries with the existing examples used by the CMA.

On drip pricing, The CMA's examples suggest an interpretation of 'headline price' requirements that is not aligned with the actual purchasing journey. The final price that a consumer pays, including all mandatory charges, depends typically on the contents of a full basket, which can only be calculated once the consumer has selected all of the individual items. For example, any platform charging delivery fees should only need to display this once the full basket has been calculated (i.e as a single total price at the 'basket level'). The guidance could be taken literally as meaning headline product prices would need to change as additional items are added to a basket which would be more misleading for a consumer and risks creating headline fees that are not reflective of what a customer actually pays. (Our response to Q3 goes into further detail on this).

In addition to service and delivery fees, it would be helpful if the CMA could clarify existing examples of how to provide consumers with information of "how the price (or that part of it) will be calculated" when "if owing to the nature of the product, the whole or any part of the total price cannot reasonably be calculated in advance" due to optional extras. Would it be considered appropriate for buyers to use a dynamic dropdown menu for selecting options (such as size, material, etc.) on a product listing page, where the headline price updates automatically based on the buyer's selections, but the original headline price is that of the lowest price option before variable selections have been made? For platforms with a significant portion of highly customizable or made-to-order items, there are a wide range of pricing variables determined by individual sellers (and buyer selection), rather than the platform itself.

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?

techUK members have flagged significant concerns around 'total price' provisions within section 9.17 and sections 9.23-9.30, which could needlessly have far-reaching and adverse impacts for both consumers and businesses. Given the tight deadlines for implementation of the guidance, and the significant questions thrown up by the provisions, techUK urges the CMA to heed the concerns of business and rework the final guidance based on the below feedback.

Concerns around **Section 9.17** include the requirement to include a 'total price' over the course of a fixed-term contract as a blanket approach to prevent drip pricing.

It is common practice across many sectors, for example in telecoms, for traders to display their pricing 'per month' for minimum term contracts with all relevant pricing information and without any hidden fees. Mobile packages, for example, are generally compared by consumers on two metrics: the price per month and the number of months, and the market has evolved under

Ofcom's auspices to facilitate this sort of comparison as it is useful for consumers. This will have a particularly strong distorting effect on the way that consumers consider packages where the number of months varies (e.g. between a 24 month contract and a SIM-only contract). The CMA' s guidance would disrupt this practice through enforcing the use of a total price over a contract period.

We therefore believe that the CMA's stance would disrupt marketing that tens of millions of UK consumers use to compare deals and choose packages, and for traders to also include total prices across the duration of the contract has the potential to further confuse customers. For example, the quoting of a 'total price' would suggest that customers can pay that upfront price, however this is not the reality for products and services under a minimum term contract in telecoms. The 'total price' for a minimum term contract in telecoms also contains several confusing variables such as overall service duration (customers often choose to roll over once their term has ended), add-ons chosen by the customer, or price rises that may occur over the course of the contract. As Ofcom has already very recently progressed regulations in the pricing space, there is a risk of duplication, and the 'total price' requirement increases the regulatory burden without corresponding customer benefit.

Accurately presenting a 'total price' across a fixed term or minimum term contract, particularly if it contains variables as mentioned above, would require software development that would take significant time and resource to build, test, and operationalise. To do so would require amendments across a large range of product marketing, including potentially the layout and format of advertising and webpages, which would be a costly and time-consuming one-off exercise that adds no discernible benefit to consumers. This is especially the case when it is considered that consumers may find themselves comparing the prices of 30-day rolling contracts to the upfront prices of 12 month and 24 month contracts when the monthly price is the better universal form of comparison, as it makes clear the lower monthly cost of taking on a fixed term contract. The draft guidance also contains little information about where a 'total price' for fixed-term contracts needs to be displayed or how prominently, which increases the difficulty of building digital systems that are certain to achieve compliance.

Given that the CMA's stance could create confusion and harm to consumers and businesses, without any corresponding benefit for customers when compared to the current situation, we therefore recommend removing this proposed requirement altogether in favour of the status quo. We believe firmly that the law does not require the change the CMA proposes. Providing 'price per month' and 'number of months' meets the test for the 'total price' under s.230(2)(b), where that is effective to communicate the position and consumers are not misled.

Our recommendation also stems from our concern that the drip pricing rules are now being applied to subscriptions, which overlaps with the separate subscriptions contracts section of the DMCC Act. That section already provides consumers with extensive pre-contract information, including the minimum total amount and the frequency and amount of payments that will occur under a subscription contract. It also provides for renewal reminder notices to ensure that they have sufficient information about the pricing of the products and services that they are agreeing to. The CMA should also consider that for some sectors, such as telecoms, prices are already regulated by Ofcom, and should avoid duplicating existing regulation in this space.

Relatedly, for **Sections 9.23-30**, as mentioned in the response to Question 2, members have concerns about how the prescriptive drip pricing requirements can be met where the 'total price' is dependent upon a number of variables and therefore cannot reasonably be calculated in advance. It is important not to lose sight of the fact that the changes to s225/ s230 of the DMCC Act were driven by a desire to combat drip pricing throughout the checkout process. In other words, all mandatory charges must be disclosed 'up front'. Clearly our members do not dispute this, but the CMA goes further than this and takes the view that all charges must always be included in a single, consolidated headline price, seemingly without exception. We do not agree with this interpretation

Many products will be advertised on online platforms as having a set price, but a delivery and/or service charge may apply to the basket as a whole instead of each individual item. Delivery costs often vary based on factors such as customer location, order value and consolidation, or membership status, making it impractical to present a single, accurate upfront price across all scenarios. Confusion could also be created if the first product added to a basket has to include delivery and/or service costs, and subsequent product prices will have to change to reflect that any delivery/service charge has been accounted for. For example, if a customer adds a burger to their basket, the guidance could be read as meaning the total price of the item must show the delivery and service fees within. However, if the customer adds a second item (e.g. fries) to the basket, then the price for the first product (the burger) would then change (because it has been split now with the fries). This is confusing for customers and may inadvertently lead to misleading pricing in some contexts, as it does not account for the full cost until all variables are confirmed.

We note that section 9.24 of the draft guidance specifically deals with the question of whether or not the total charge can be reasonably calculated in advance. We recognise that the CMA is keen to ensure that traders do not seek to deliberately circumvent the rules on drip pricing by structuring their prices to make them variable without objective justification. However, we note that the CMA sets the bar very high – stating that it must be 'impossible' to reasonably calculate the price or any part of it in advance. We remind the CMA that this question will not always be defined by the core features of the products consumers are purchasing.

Section 9.36 provides an example of how online retailers can provide information about variable mandatory delivery charges with as much prominence as the headline price, in the context of delivery charges varying based on the customer's location. However, in reality, the larger UK online retailers do not typically charge different amounts for delivery depending on customers' location within the UK (particularly given historic concerns about charging higher delivery fees to customers in rural/remote locations). In practice, for most customers, other factors are more likely to affect delivery charge amount or whether or not delivery charges apply (such as whether the customer's total order value exceeds a certain threshold or whether it is their first order, or other offerings that a retailer may choose to implement).

The example given at Section 9.36 also relates to delivery price information given on a website/app and assumes that a customer would have provided their delivery address (or that the website/app can determine delivery location in another way). However, customers may be browsing a website/app before they provide delivery information or the website/app may not be able to determine the customer's delivery location in another way. The technical work required by retailers to build the dynamic solution proposed by the CMA as a potential compliance

solution would be extensive, disproportionately affecting (or effectively unavailable to) smaller retailers.

Alongside this, there are practical limitations for businesses in this area as well. Delivery/service fees can vary significantly based on the customer, from location (including higher delivery fees for non-UK addresses), the delivery date/time selected by the customer, the nature of the delivery selected by a customer, the total basket value, and other factors. For instance, items shipped from overseas might appear disproportionately higher priced to UK users compared to users in other regions, potentially distorting perceptions of value. This makes it nearly impossible to provide accurate, universal pricing information in headline prices, whether online or in a physical store, particularly given many cannot be dynamically tailored to specific customers/orders, such as billboard or newspaper ads which are addressed to the public at large. For example, if the CMA intend for 'invitations to purchase' to extend to search results and offsite ads, which are one click away from an items full listing page, this can pose significant challenges when the delivery location is often unknown, optional changes to the product have not been made and shipping fees cannot yet be calculated.

For many customers, this means that a requirement to indicate a headline price inclusive of delivery fees and other potential service fees would result in them seeing an incorrect, and artificially high, headline price, which would confuse customers, affecting their purchasing decision and affecting a retailer's ability to offer a competitive price. The way this price was calculated could also differ between retailers and platforms, making comparing products more difficult for consumers than currently. Clearly, this is an unintended negative consequence of the legislation for both businesses and consumers. We emphasise that our members were not anticipating such detailed guidance on pricing at this stage. For this to be sprung on UK businesses at this late stage in a challenging trading environment with so little time to prepare before April 2025 is deeply concerning.

It would be more beneficial to consumers if accurate pricing is provided at the point when it can be reasonably calculated. Therefore, provided that traders are up-front with consumers about the total price in an invitation to purchase, there should be a degree of flexibility in terms of how that total price is displayed, for example through the CMA clarifying that platforms should need only display the full price at the 'basket' stage of the purchasing process. This will ensure that customers get a good user experience by making user interfaces as easy to understand as possible, as displaying each possible price with one or more optional extras added to a product could quickly make product selection menus and advertisements difficult for consumers to navigate or even simply understand. Therefore, requiring companies only to clearly display a base product price in the headline price, calculated exclusive of delivery/service/extras fees, and then prominently indicating the total price charged to the consumer only at the basket level, is a far better way of indicating to customers how much they will be charged for the product(s) they want to purchase. This approach is better aligned with the spirit of the regulation, namely to make pricing easier for customers to understand.

We appreciate that the CMA may wish to issue further guidance on general pricing transparency, but we query why the CMA has taken this opportunity to issue such prescriptive guidance on how traders across all sectors of the economy structure their pricing within each and every invitation to purchase

In addition to this, the CMA should clarify whether it intends to take account of the differing nature of certain retailers, and act accordingly, when considering the provisions on drip pricing. For example, there are specific concerns regarding the provisions on drip pricing as they relate to purely two-sided marketplace platforms. In these marketplaces, transactions are facilitated between buyers and independent sellers, and such marketplaces operate without their own stock or fulfilment infrastructure. It is important to clarify whether such marketplaces will face obligations as stringent as those applied to vertically integrated platforms.

We would also welcome clarity from the CMA on scenarios where external fees such as import duties may apply - does the CMA expect companies to anticipate these fees, levied by a third party to any online transaction, and then include these predicted fees within the headline price?

Likewise, we would welcome further clarity over the term 'unavoidable' when stating charges that should be included in the headline price. The CMA should clarification that the total price (which as mentioned, should need only be shown at the basket level as the total basket price to avoid difficulties and confusion with headline prices) that consumers will definitely incur and are non-refundable. This will allow certainty over deposits, which imply a consumer may incur a price later but give that consumer the opportunity to withdraw before paying a full amount.

Notwithstanding the concerns outlined above, we are however pleased to see that some parts of this guidance align with some existing sector-specific requirements such as the CMA's principles for businesses offering online accommodation booking services which relevant members are already meeting.

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)?

Members are encouraged that the CMA's guidance adopts many of the principles that we have advocated for in relation to the content moderation requirements within the Online Safety Act. Taking a systems-oriented and outcomes-focused approach is appropriate given the CMA's recognition that publishers may host fake reviews inadvertently due to the limited information they have about the experiences of third party reviewers. Similarly, our members have experience in applying a risk-based approach to content moderation which targets resources at items with greater potential for harm.

We are also pleased to see the CMA guidance recognise that fake reviews can be both positive or negative about a product or service, and that they often follow from a deliberate intention to undermine a product or service, rather than simply being an account of events with which the trader disagrees. The draft guidance offers a valuable framework for our member companies to assess their current measures against fake reviews and to ensure these align with the CMA's interpretation of what is considered 'reasonable and proportionate.'

Critically though, we encourage the CMA to adopt a flexible approach regarding the types of evidence companies can present to demonstrate compliance, thereby reducing administrative burdens. For instance, many of our members already implement comprehensive and longstanding risk identification procedures, including those mandated by the Online Safety Act. Allowing companies to submit existing documentation generated through these practices (rather than a bespoke template specifically for this regime) would be particularly beneficial.

Furthermore, our members welcome the CMA's position in **Section B.50** that 'what is reasonable and proportionate will depend on the circumstances of each case.' However, this position from the CMA must be reflected throughout the guidance which is currently drafted with explicit and specific requirements. The CMA should therefore make space for what is 'reasonable and proportionate' throughout the guidance.

To enhance the final guidance, we would be grateful if the CMA could please clarify the questions below. Throughout our input we reference the United States Federal Trade Commission's Online Advertising and Marketing Law Update [*"USFTC guidance"*], which we consider to be a helpful document in this space. We encourage the CMA to seek alignment with the USFTC guidance, as regulatory alignment between key markets is helpful in enabling international businesses to comply efficiently across jurisdictions.

- We would appreciate explicit confirmation that evidence provided by companies will not be made public, as doing so would increase the information available to bad actors who wish to circumvent content moderation systems.
- We believe that some of the 'examples of incentivisation' provided in **Section B.10** in relation to concealed incentivised reviews are too broad and likely to create unworkable compliance challenges for publishers:
    - Example **[h]** states that *'having a financial interest in the trader or the product being reviewed'* would be considered as incentivisation. As stated above, we request that this be amended to 'significant financial interest' or similar wording to ensure that this provision does not capture, for example, an authentic consumer that happens to hold a small number of shares in the company that they are reviewing but may not have revealed this to the publisher.
    - Example **[i]** states that *'having any commercial link with the trader being reviewed'* would be considered as incentivisation. This would in practice include any review of a B2B transaction, which by definition requires a commercial link between companies. As stated above, we encourage the CMA to revisit this wording to ensure that legitimate and authentic reviews of B2B transactions can be included without being identified as 'incentivised'.
    - There is an opportunity to refine and target the wording of both of these examples and by doing so, achieve closer alignment with the reasonable expectations of consumers and existing international regulation on incentivised reviews (e.g. in the US, the Federal Trade Commission's rule banning fake reviews and testimonials at 465.4 which emphasises a transactional link between the incentive and the review). Narrowing the examples or expressly linking the incentives to writing the reviews would avoid bringing within scope situations where reviewers could inadvertently or unwittingly contravene the rules, without any intention of doing so. For platforms who in good faith already ban or clearly identify incentivised reviews, refining the guidance examples to mirror a slightly narrower interpretation of incentivisation to encompass those carrying a real risk of bias (and those likely to be top of mind for reviewers) will help avoid undermining their efforts.

- Similarly, in regards to **B.26,** the term 'publisher' has very specific meaning in other aspects of law, such as the Defamation Act. As such it would be helpful to have explicit confirmation that the parameters being set via the guidance for publishing are not intended to impact other areas of law where the term 'publisher' is defined more specifically.
- **Definition of publisher**: **At B.27 on recognising that one size does not fit all:** We welcome the CMA acknowledging that it is unlikely that there will be a one-size-fits-all-approach for all publishers to take to prevent fake reviews, but we encourage the CMA to more practically act on this acknowledgement through greater regard for the different types of publishers who host reviews. For example, we would encourage the CMA to clarify that different kinds of publishers may do due diligence differently, due to both their ability to reasonably do so and the practical necessity of doing so. Some publishers may not be able to do due diligence on hosted reviews without significant data collection, which may intrude on user privacy or require a disproportionate processing of user data that would not otherwise take place, and this should be recognised in the guidance. The CMA should therefore look at clarifying whether they will differentiate between different types of publishers in the guidance. This will ensure that those with little control over the reviews they host, for example a publisher that is an intermediary displaying or disseminating third party reviews which it has no control over, can do an amount of due diligence appropriate to their level of abstraction from any reviews they host. This aligns with ensuring a healthy level of competition and diversity of thriving services within the reviews sector, thereby maintaining adequate choice for consumers and 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.
- Similarly, while the CMA acknowledges that assessments will depend on the circumstances of each case, the CMA should also recognise that the same publisher may host reviews tailored to different audience groups. Namely, reviews intended to be displayed to a smaller group should be different to those which are viewed by millions. Applying the same standard across all verticals simply because of overall platform traffic would be disproportionate.
- Regarding Section **B.41**, it is welcome and helpful that the CMA's guidance includes a list to help businesses understand the types of measures that are appropriate, the CMA's guidance should reflect the reality that there are different types of publishers and therefore be less prescriptive, as currently the guidance does not recognise that what might be an appropriate detection measure for one type of publisher may not be appropriate for another.

Q5. 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.

We are very concerned about the proposed implementation date of April 2025 for Part 4, Chapter 1 of the DMCCA. We had hoped to see draft guidance considerably earlier than December 2024, and given that the submission deadline for this consultation is 22 January 2025, there will be only a very small amount of time between the publication of finalised guidance and the proposed implementation date.

While many of our members already have extensive content moderation and risk identification processes in place, there will be insufficient time to ensure that these are aligned with the CMA's expectations. For any companies that require changes to their operations, it is not realistic to expect these to be made within the proposed timeframe, especially given the significant questions around where the CMA's guidance seems to demand changes that will lead to negative outcomes for both consumers and businesses.

We strongly recommend that the implementation date should be moved to 1 year from the date of finalised guidance being published, in line with the anticipated implementation date for the changes relating to subscription contracts in the DMCCA. If this is not accepted, we encourage the CMA to engage companies in dialogue from the implementation date but avoid taking any punitive action (except against particularly egregious malpractice) until at least 1 year after finalised guidance is published. This is an approach similar to the one Ofcom has taken with the OSA.

Failure to extend the deadline could lead to unnecessary yet unavoidable breaches of the regulation, needlessly damage business confidence in the CMA, and create concerns about the UK as a marketplace in which to do business, potentially reducing economic growth.

DRAFT ENFORCEMENT GUIDANCE
Available here : https://www.gov.uk/government/consultations/consumer-protection-enforcement-guidance

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

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

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.

Powers of investigation (Section 7)

The CMA's duty of expedition under the Digital Markets, Competition and Consumers Act 2024 is that "[i]*n making any decision, or otherwise taking action, for the purposes of any of its functions within Schedule 4A, the CMA must have regard to the need for making a decision, or taking action, as soon as reasonably practicable*."

This duty applies to the CMA and its decision-making timeframes - for example, if the CMA receives a request for an extension of time, the CMA is required to make a decision as soon as reasonably practicable. However, the duty does not apply to those under investigation / other

recipients of information notices, nor does it impact how much time they need to accurately and fully respond to information requests or override their right for matters to be dealt with fairly and proportionately as described in the Draft Guidance.

The following sentences should therefore be deleted from the Draft Guidance:

- 7.14: *Given the CMA's duty of expedition, it expects recipients to comply fully with any information request within the given deadline*.
- 7.15: *The CMA's duty of expedition will also 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*.

Power to enter premises (From paragraph 7.26)

Entering premises without a warrant

The power to enter business premises without a warrant is not commonly available to other regulators. The warrant process usually acts as an important check and balance on a power that so severely interferes with the rights of a business.

In accordance with the CMA's principles of fairness and proportionality described in the Draft Guidance, this power should only be used where there is a reasonable suspicion of non-compliance or infringement. This is also the requirement under paragraph 20, Schedule 5 of the Consumer Rights Act 2015 which requires a higher bar of "reasonable suspicion" of failure to comply or infringement.

- "The words "*to ascertain compliance with consumer laws it enforces as a domestic enforcer*" should therefore be replaced with either: (a) "*where it reasonably suspects a failure to comply with consumer laws it enforces as a domestic enforcer*"; or (b) "*in the circumstances described in Paragraph 20 of Schedule 5 of the Consumer Rights Act 2015*."

"When carrying out routine inspections the CMA must give the occupier at least two working days' notice before exercising its powers of entry" (Paragraph 7.27). Our view is that this time frame is relatively short and should be reconsidered by the CMA. Furthermore, it would be useful if the guidance defined 'routine inspections'.

Entering premises with a warrant

- Paragraph 7.31 should be amended with the text underlined below, which accords with Paragraph 32 Schedule 5 of the Consumer Rights Act 2015:

"The CMA can apply for a warrant where, for example, access to the premises is likely to be refused and notice of the enforcer's intention to apply for a warrant under this paragraph has been given to the occupier of the premises, it is likely that products or documents would be concealed or interfered with if notice was given or the premises are unoccupied."

Offence of obstruction

- Paragraph 7.47(c) should be amended as per the underlined text, which accords with paragraph 36 Schedule 5 of the Consumer Rights Act 2015:

"without reasonable cause fails to give the CMA or an officer of the CMA any other assistance or information which the officer reasonably requires of the person for a purpose for which the officer may exercise a power under Part 4 of Schedule 5 of the Consumer Rights Act 2015."

Handling Confidential Information (from paragraph 7.57)

When documents are provided or seized, it is vital that the CMA properly respects trade secrets and rights of confidentiality in accordance with the CMA's principle of transparency (as described in the Draft Guidance).

At paragraph 7.62, the Draft Guidance states that "*[w]here the CMA proposes to disclose information for which confidentiality has been claimed, the CMA will take such steps as it considers reasonable and practicable in the circumstances of the case to seek further views on confidentiality from the person who provided the information, or the person to whom the information relates*." We do not think this includes sufficient safeguards; giving the CMA unfettered discretion over what steps to take undermines the principle of fairness. Instead, the CMA should be required to take reasonable steps to allow the relevant parties to make representations. The CMA should also be required to inform them of the final decision, so that they can take action if necessary.

- We therefore suggest amending paragraph 7.62 to to add the wording that appears in the "Guidance on the CMA's investigation procedures in Competition Act 1998 cases" - where the CMA proposes to disclose information for which confidentiality has been claimed, "*the CMA will give the person or business that provided the information prior notice of the proposed action and will give them a reasonable opportunity to make representations. The CMA will then inform the party whether or not the CMA still intends to disclose the information, after considering all the relevant facts*."
- We also think that this paragraph should state that where disclosure of information is required, the CMA should be required to disclose the minimum level of information so as to meet its proportionality requirements and the reasons for disclosure. Where possible, it should aggregate, summarise or redact data or other information so as to alleviate any sensitivities.