

Competition and Markets Authority
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Consultation Response

Which? response to the CMA's consultation on draft guidance on the protection from unfair trading provisions in the DMCC Act 2024

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Summary

Which? welcomes the opportunity to respond to the publication of the draft Guidance on the protection from unfair trading provisions in the Digital Markets, Competition and Consumers (DMCC) Act 2024. The Guidance is a critical component that should help ensure that the Act delivers a high level of business compliance and therefore improved consumer protection.

We are supportive of this guidance as we believe it is clear and well structured, however, given the prevalence of such practices in recent years, we have suggested that some areas of the guidance are expanded to ensure businesses are clearly informed of the steps necessary to avoid actions that mislead and distort consumer choice. These suggestions include:

- Further examples of bait and dynamic pricing, in particular to provide clarity on what should be considered 'reasonable quantities' in relation to bait pricing and to incorporate specific examples of how the legislation applies to dynamic pricing, including adding any issues stemming from the CMA's Ticketmaster/Oasis investigation.
- The examples of commercial practices applying to prohibitions would benefit from more clarity and specific examples regarding what constitutes elements of transactional decision making, misleading omissions. The distinction between harassment, coercion, or undue influence should be made clearer and further illustrations on the rights to consumer redress would aid understanding.
- Further examples to aid compliance with the new drip pricing provisions, including common travel issues, and aspects of material pricing. Examples would be helpful to clarify the distinctions between mandatory and optional charges across a wider range of scenarios and further linking to other relevant legislation.
- Further clarifications regarding the banned practice provisions relating to fake reviews would help business comprehension, including the issues of manipulation of reviews via selective presentation, the restriction of access rights to databases to prevent this, and the issues with sale/brokerage of reviews.

Full response

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 Do you have any comments on the structure or clarity of the Draft Guidance?

We are pleased with the structure and clarity of the Draft Guidance on the protection from unfair trading provisions in the Digital Markets, Competition and Consumers Act 2024. The guidance is a crucial step towards ensuring that consumers are treated fairly and protected from exploitative practices.

We believe that the draft guidance could be further strengthened by including more examples or detailed information regarding potential future areas of exploitative digital practices that could cause significant detriment to consumers. As the digital landscape continues to evolve rapidly, new forms of exploitation are likely to emerge. Therefore, by anticipating these developments and providing examples, the guidance can be made more robust and adaptable to future challenges. Furthermore, incorporating more flowcharts into the guidance would greatly enhance understanding. Flowcharts can simplify complex information, making it more accessible and easier to follow for both enforcers and businesses.

This proactive approach will help ensure that consumer protections remain effective and relevant, safeguarding individuals from emerging threats. It will also provide businesses with clearer expectations and guidelines, promoting fair competition and trust in the digital marketplace. Additionally, this comprehensive guidance would serve as a valuable guide for enforcers, offering them a reliable reference to uphold consumer rights. It would also act as a strong deterrent against illegal business practices, reinforcing the importance of compliance and ethical conduct in the digital economy. We urge the CMA to consider these additions to make the guidance as comprehensive and future-proof as possible.

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?

We are pleased to see the inclusion of illustrative examples of commercial practices in the Draft Guidance. As these examples are invaluable in demonstrating how the prohibitions apply in real-world case scenarios, we would like to see more examples (or more details) provided by the CMA in the guidance regarding the following areas:

- **Bait pricing** - A recent [Travel Which? investigation](#) highlighted how hotel chains and airlines are sometimes advertising the availability of rooms or flights at prices that are not available in the quantity that consumers might reasonably expect, meaning that few people are actually able to take advantage of the advertised price. We have raised this with the ASA and provided evidence as to why we consider some companies to be in breach of the CAP Code. This relates to banned practice 5 Making an invitation to purchase products at a specified price where— (a) the trader has reasonable grounds for believing that it will not be

possible for the trader to offer those products, or equivalent products, for supply at that price, in reasonable quantities, for a reasonable period of time (or to procure another trader to do so). We think that it would be helpful to provide examples within the guidance to aid interpretation of what is considered to be 'available in reasonable quantities' in different circumstances.

- Dynamic pricing - We appreciate that the CMA is currently conducting a specific investigation into the Ticketmaster/ Oasis sale of tickets which was described as 'in demand' pricing, although it has also been described as dynamic, surge or bait pricing. Which? is of the view that this practice, where consumers saw an advertised price, queued for hours to buy tickets at that price, only to be told that the price offered was now no longer available and that the cost had increased significantly, could be in breach of the CPRs on the basis that consumers were misled about the advertised price and were not given key pricing information needed to make a choice about their purchase. Consumers had to make a quick decision about whether they were prepared to pay the new higher price after queuing for so long. The guidance could therefore use this as an example once the CMA's investigation has concluded as to how the CPRs may apply to this type of practice.
- Transactional decision and professional diligence: In paragraph 5.7, with examples 1 and 2, if these are intended to be examples of practices that could be actionable under section 229 (Contravention of the requirements of professional diligence), we feel it would be beneficial for users if the guidance can explicitly clarify the application of the transactional decision element. In particular, regarding example 1, we would suggest more clarity on whether the hindrance of consumers from securing redress constitutes the making of a different transactional decision. Example 2, at first glance, appears to be more appropriately addressed under the Consumer Rights Act so we feel there should be further explanation of why this could also be actionable under section 229.
- Misleading omission: In paragraph 7.10, we think there could be more clarity as to whether the example given is intended to be an example of a practice that could be actionable as a misleading omission. If this is the case, we think it would be helpful if the example could state the transactional decision that the consumer would be induced to take that they wouldn't have taken otherwise. For example, in this scenario, is it the case that this practice would cause the consumer to be more likely to purchase an alarm system, compared to if the commercial intent had been revealed at the outset? In paragraph 7.11 (consideration of context for omitting information), we feel it would be beneficial to provide illustrative examples of both compliant and non-compliant practices.
- Harassment, coercion and undue influence: In paragraph 8.5, example 3, we feel there should be further clarification to establish which specific practice - harassment, coercion, or undue influence- is applicable to this practice, either individually or in combination, and the rationale behind this determination. In paragraph 8.7, examples 4 & 5, while the element of 'onerous action' is evident, we would suggest further clarity is needed as to which specific practice - harassment, coercion, or undue influence - is most applicable, either individually or in combination, and to provide the user with some discussion of the rationale behind this determination.

- Illustrations of consumers' private rights to redress: Additionally, we believe it would be beneficial to include more examples that illustrate consumers' private rights of redress in case of certain infringements of the Consumer Protection from Unfair Trading Regulations (CPUTRs). While we appreciate that the DMCC Act provides for these rights to be replaced by new arrangements detailed in a forthcoming statutory instrument, seeing these rights in practical examples would greatly enhance understanding and application. By providing these additional examples, the guidance will offer clearer insights into how consumers can seek redress and how these new arrangements will function in practice. This will not only aid consumers in protecting their rights but also help businesses understand their obligations under the updated regulations.

We urge the CMA to consider these additions to make the guidance as comprehensive and practical as possible.

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?

We welcome the new rules on drip pricing introduced by the Digital Markets, Competition and Consumers Act 2024. These rules are crucial in ensuring that the total price of a product includes all fees, taxes, and other payments that consumers will necessarily incur are clearly communicated to consumers up front. This transparency is vital for protecting consumers from hidden costs and ensuring they can make informed purchasing decisions. However, we hope that the guidance the CMA is developing can interpret these requirements more broadly to include:

- Travel matters and price information
From a [recent Which? investigation](#), we know that the use of 'drip pricing' can make it very difficult for consumers to compare prices and assess what the best value is when booking flights. In particular, we found that the cost of cabin bags or seat selection is often not included in the headline price, although these add-ons can increase the price significantly. Inconsistent approaches across airlines can also make it difficult to compare prices. We also have concerns about the practice of charging parents to sit next to their child. Some of these charges can, in our view, be considered as charges that consumers must necessarily incur, while others are optional. It would therefore be very helpful to have a section in the guidance that explains how the law would apply in different scenarios.
- Material price information
In relation to the above point, in the 'Material pricing information' section of the guidance, there are references such as *'a consumer cannot in practice purchase, receive or use a product without the payment of any fee, tax, charge or other payment ('charge' in short), then that charge is mandatory'* and *'In addition, charges should not be excluded from the headline price if consumers could in theory avoid them but doing so is not viable in practice.'* We feel it would be helpful for the guidance to reflect whether these references should be read as meaning 'all consumers', 'the average consumer' or whether it should be applied to an individual consumer's specific circumstances. An example we've previously cited is the fee that some airlines charge

passengers to book a seat next to their child on a plane (in some circumstances). Not all consumers would have to pay this fee (e.g. those travelling without children and able to sit anywhere, or those parents who bought their ticket earlier when it was possible to have two seats together free of charge), but some passengers will, as a matter of necessity, be obliged to pay the fee to ensure they are seated with their child. It would be helpful for the guidance to clarify whether such practices would in the CMA's view be prohibited, including where the fee in question would be (in practice) mandatory for only some passengers, depending on their circumstances, as opposed to all.

- Mandatory vs optional charges

In the section of the guidance in relation to *When charges are mandatory versus optional?* further examples of potential drip pricing that consumers are likely to experience on a regular basis are:

- being charged for service by a restaurant, cafe or other catering business. These charges may sometimes be presented as optional although the default is that consumers are expected to pay or in other cases they may be mandatory. It would therefore be helpful to provide examples on how prices should be presented by businesses so that consumers understand what the final price is likely to be before they are presented with the bill - and what practice should be in relation to 'optional' service charges that are automatically included.
- the joining fees that new members pay on top of their first regular payment when joining gyms or getting other subscriptions, and examples of how these prices should be presented.

- Explanations/Footnotes in the guidance

We feel it is important to include a footnote referencing the specific rules on ticket pricing information for airlines as outlined in Article 23 of the [operation of air services regulation](#). This footnote should clarify that these provisions will also apply, thereby providing stakeholders with precise guidance on the regulatory requirements. By doing so, it will enhance clarity and ensure that all parties are well-informed about the applicable rules, facilitating compliance and reducing the risk of any potential discrepancies.

On a similar basis, we recommend including a cross-reference to the updated price marking rules, which are set to come into force in October 2025 to ensure stakeholders will be better informed and prepared to adhere to the new guideline.

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)?

We are pleased to see the inclusion of the examples regarding the DMCC Act provisions imposing a positive obligation on those who publish or provide access to consumer reviews or review information. This is a significant step forward in banning these practices. Adding these to the list of banned practices ensures that platforms and businesses must actively monitor and manage the content they host, taking reasonable and proportionate measures to prevent and remove banned reviews and false or misleading information. The provision also serves as a strong deterrent against businesses that might otherwise engage in or benefit from deceptive practices, i.e. knowing that platforms are obligated to take action against false reviews reduces the incentive for such behaviour. We encourage the guidance to also include the following additions:

- The guidance could include more openly that review hosting platforms should notify other platforms and the regulator when they identify brokers selling reviews or groups soliciting reviews. This collaborative approach will help to curb the spread of fake

reviews across different platforms in a consistent way. To ensure comprehensive understanding and adherence, it is crucial to include an illustrative case study example in section B.21 on review 'suppression' or 'reordering.' This is a particularly important aspect of paragraph 13 of Schedule 20. By providing a concrete example, stakeholders will gain clearer and practical implications of these provisions, thereby reducing the risk of any potential issues arising from misunderstandings.

- In relation to example 4 on page 86, it would be beneficial to clarify in the guidance the CMA's view on a situation where a trader contacts a customer who has left a negative review and offers customers a refund or gift card if they delete their review.
- In section B20, further clarification is needed on point (a) regarding the presentation of reviews for a different product as if they relate to the product a consumer is considering. Specifically, it is important to define how different a product must be for such a practice to be considered misleading. For instance, guidance is required on whether modifications to the product since the review was provided, or changes to aspects such as colour, would render the review misleading. Clear criteria on these points will help ensure that consumers are not misled by reviews that do not accurately reflect the product they are evaluating. It is also important that businesses are not given access to special reporting tools that could allow them to unduly influence the reviews that appear, ensuring that the review process remains unbiased and fair.
- In paragraph B.20(d), we would suggest clarifying whether this includes a practice where the publisher of the reviews only allows consumers to view customer reviews in descending order (for example, ordering reviews so that 5-star ratings come first, and not allowing consumers to view by recency as an alternative). If this is the case, we believe it is important to be stated explicitly in the guidance.

Finally, the guidance could include that platforms should be expected to publish regular transparency reports. These reports should provide a high-level description of the measures taken to tackle fake reviews and include statistics on the number of reviews removed at each stage of the process. This level of transparency will help to build trust with consumers and demonstrate the platform's commitment to maintaining the integrity of the review system.

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 have three further comments on topics not covered by the specific questions as follows:

- Transactional decision:
 - Paragraph 3.29(c) refers to 'contractual rights in relation to a product'. We feel it would be beneficial for users of the guidance to clarify the CMA's view as to whether this includes statutory rights as well, and if so for this to be reflected in the guidance.
- Banned practices:
 - On practice 5 (bait pricing), the wording of the provision refers to 'a specified price'. It would be helpful for the guidance to state whether this banned practice would capture situations where the 'bait' is a percentage discount (rather than a specific price). For example, if a trader advertises 'up to 75% off hotels in Mallorca', on a strict interpretation this doesn't state a specific price. We do note that the definition of an 'invitation to purchase' requires a price to be indicated, which advertisements of the type described above do not, but if they are out of the scope of practice 5 then this seems to be a potential loophole for traders to

be able to exploit (notwithstanding the fact that other provisions such as sections 226 and 229 may still apply).

- Claiming on an insurance policy: On practice 29, we feel it would be helpful to clarify if this refers to two distinct practices, i.e. i) Requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, and ii) Failing systematically to respond to correspondence. The example given in 29.1 appears to describe behaviour that falls within the scope of ii), but not i). Therefore, we would like to see some clarification on this included within the guidelines.

About Which?

Which? is the UK's consumer champion, here to make life simpler, fairer and safer for everyone. Our research gets to the heart of consumer issues, our advice is impartial, and our rigorous product tests lead to expert recommendations. We're the independent consumer voice that works with politicians and lawmakers, investigates, holds businesses to account and makes change happen. As an organisation we're not for profit and all for making consumers more powerful.

For more information contact:

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