RESPONSE TO CONSULTATION

CMS welcomes the opportunity to respond to the CMA's consultations on the draft Consumer Protection: Enforcement Guidance (CMA58ii) and the draft Unfair Commercial Practices Guidance (CMA207).

The Draft Guidance, published on 11 December 2024, requested responses by 22 January 2025. As with other consultations on upcoming consumer law changes, the continued compressed timelines pose significant challenges, even for larger businesses, in providing timely, comprehensive and thoughtful feedback. With this in mind, we set out below some high-level observations on some concerns related to the draft guidance:

- **Guidance is welcome and is generally of real assistance.** The draft CMA58ii and CMA207 guidance is welcomed, can be very useful in bringing the legislation to life, and greatly assists businesses in seeking to apply the law and law firms advising businesses on the same. The practical examples provided in, particularly, CMA207 are of real use and are welcome. We would encourage the CMA to continue to develop further practical examples in each area, particularly focusing on less clear-cut scenarios.

- **Deadlines for responding to information requests and balance in the duty of expedition.** In our experience of the current consumer law enforcement regime, the deadlines imposed by the CMA to respond to information requests are very short – often over typical national (and international) holiday periods – and the CMA has taken months (or longer) to consider those responses, before then seeking further information from businesses within extremely short and unreasonable deadlines. There are a number of references through draft CMA58ii to the CMA's duty of expedition. To the extent this duty is used to impose tight timeframes on respondents, this must apply equally to the CMA. It cannot be reasonable or proportionate for a business to be required to respond to an information request within a few weeks, for the CMA to then consider that information for a number of months, then issue a further information request requiring additional information within a matter of weeks.

  The draft CMA58ii guidance helpfully recognises the burden on recipients of responding to extensive information requests but seeks to distinguish smaller firms or consumer organisations as being subject to greater impact. The implication is that larger businesses would not necessarily feel this impact, and therefore shorter timeframes could be imposed. This is often not actually the case, where larger businesses have much more complex document storage solutions, multiple teams based across offices and jurisdictions, and with much more extensive escalation and sign-off processes, such that it can take much longer to accurately respond to information notices than with smaller businesses having far fewer records and a single decision maker (or small group) who can sign-off on any responses much more efficiently.

  The most helpful aspect of the draft CMA58ii guidance on this point is the proposal to provide advance notice of information requests and/or a draft information request. Where this has taken place informally to-date, it has been of great assistance in enabling relevant individuals and

teams within businesses to be prepared, and as a result to respond more efficiently once the information request lands. We would strongly encourage the CMA to adopt this approach as much as possible.

- **Average member of a vulnerable group of consumers.** The draft CMA207 guidance helpfully seeks to clarify elements of potential vulnerability of groups of consumers, recognising the additional protections that may be needed, but also the potential complexity. The different aspects covered at section 3.22 may warrant further consideration and clarity of practical compliance, as whilst businesses will of course need to consider the aspects listed, a number of the aspects may well not be immediately apparent, resulting in real compliance challenges for businesses, particularly circumstantial vulnerabilities of which many businesses will not be aware (or reasonably able to ascertain).

- **Material pricing information and prohibition on drip pricing**. The draft CMA207 guidance on the new provisions relating to invitations to purchase and display of pricing information warrant further careful consideration by the CMA. By way of example, the current position adopted by the CMA in relation to the inclusion of mandatory charges in headline prices is problematic in relation to delivery costs. In practice, delivery costs are often not dependent on the nature of the product, and their application or amount may depend on various factors. It may also be impossible to link a delivery cost to a specific product. For example, if a consumer wishing to order groceries online is looking at a bottle of milk, it is normally not possible to order a single bottle of milk. Instead, consumers must place an order above a certain threshold, so the delivery cost relates to the order as a whole, rather than specific products and it does not make sense to include the delivery cost for that order in the price of a bottle of milk.

  Inclusion of delivery costs in the headline price also risks misleading consumers (as a price shown in an invitation to purchase may not be representative of the price the consumer will actually pay, given that the application or amount of delivery cost may vary depending on various factors), and potentially impacts competition, to the detriment of consumers. For example, a business that operates both online and bricks and mortar stores may choose to exclude delivery costs from the product price in an invitation to purchase (on the basis that a consumer can collect a product from a store free of charge), whereas the draft guidance appears to require an online only retailer which does not offer free delivery or collection to all consumers to show a price which includes delivery fees. In this scenario, the online retailer's price may appear higher, whereas for some consumers it may actually be lower than the first retailer's price (once delivery fees are removed from the price). This situation would make it difficult for consumers to compare product prices. Whilst the same could be said in relation to an approach where product prices exclude delivery charges, the latter approach actually makes it easier for consumers to compare prices given that in many cases, delivery charges will not apply (or will apply across a broad range of products, not attributable to a single product).

- **Information required under other legislation as part of an invitation to purchase.** The draft guidance states that one of the categories of information that must be given as part of an

invitation to purchase is "*any information which the trader is required under any other legislative provision to give to a consumer as part of an invitation to purchase*". This reflects section 230(2)(j) of the DMCC Act. In the draft CMA207 guidance, there is a footnote connected with this requirement, at footnote 87, which references the information that must be provided to consumers before entering into a subscription contract under Chapter 2 of Part 4 of the DMCC Act. Given that those subscription contract provisions do not appear to impose obligations on businesses specifically relating to invitations to purchase, the inclusion of these provisions in footnote 87 may well create confusion as to compliance obligations. Section 230(2)(j) appears to refer to other legislation which requires certain information to be provided in invitations to purchase specifically, and not which requires the provision of information generally. We would encourage the CMA to revisit this and consider the removal of the reference to subscription contracts in the footnote completely or clarify the precise circumstances in which the CMA believes there are specific obligations flowing from Chapter 2 of Part 4 of the DMCC Act relating to invitations to purchase.

- **Prohibition on fake reviews**. It is very helpful to see the CMA's views on compliance with the new banned practices relating to fake reviews. There are two aspects of the draft guidance which we would encourage the CMA to consider further. First, the examples in the early part of Annex B to CMA207 are (as with other examples throughout the guidance) very helpful. However, the draft guidance from B.31 through to B.53 is much more dense and not straightforward to follow, particularly for businesses looking to ensure compliance without necessarily having access to expert legal advice. We would encourage the CMA to consider ways for these aspects of the guidance to be communicated more clearly, including using helpful practical examples of what compliance does (and does not) look like, as with elsewhere in the draft guidance. Secondly, at various points the CMA indicates that genuine reviews which have been incentivised should be given different weight than non-incentivised reviews, including not counting towards a product or trader's overall rating or ranking. Given how widely "incentivised" is being defined by the CMA, we would encourage the CMA to reconsider its guidance on both the examples of "incentivised" and on the exclusion of incentivised reviews – which are representative of genuine experience (good or bad) – from ratings or rankings. The CMA's approach has the potential to particularly harm businesses that are new market entrants and/or introduce new products, where it is not uncommon for some (often low level) incentive to be used for consumers to provide a review, which will be a genuine reflection of the reviewer's experience.

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22 January 2025