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DMCC Act, Part III: Significantly Strengthening UK Consumer Protection Laws and Enforcement

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The Digital Markets, Competition and Consumers Act (DMCC) became law on 24 May 2024. This is the third update in our trilogy series on the DMCC. As we explained in our last update, the DMCC represents a major shift in UK digital, competition and consumer protection regulation. In particular, the DMCC:

1. **Digital markets** – Introduces a new regulatory regime for large digital firms (covered in our first update).
2. **Merger controls** – Gives the Competition and Markets Authority (CMA) broader powers to review mergers and conduct investigations (covered in our second update).
3. **Consumer protection enhancements** – Significantly widens the enforcement remit of the CMA in consumer protection, particularly in relation to online activities.

In this instalment, we set out the key consumer protection enhancements introduced in the UK by the DMCC.

Timeline

Although the DMCC has received Royal Assent, the most significant aspects of the act – including the enhanced consumer protections – are not expected to come into force before autumn 2024.

The precise timeline will be dependent on the legislative priorities of the new government. However, the previous government confirmed that the rules around subscription traps will not come into effect before spring 2026. This is because secondary legislation and CMA guidance are required before these new rules on consumer protection can take effect.

The CMA's new direct enforcement powers

Amongst the most notable reforms under the DMCC is the new and improved public enforcement regime. In the past, public enforcement of consumer law has been criticised as lacklustre, where the risks associated with noncompliance were considered low by comparison to the costs to businesses of ensuring their compliance. The enhanced enforcement regime under the DMCC should incentivise greater consumer protection compliance amongst business-to-consumer traders and will provide the CMA with an enhanced toolkit on a par with its competition law powers. Indeed, the CMA has commented that it will not be afraid to use both sets of powers when investigating companies.

In particular, the DMCC empowers the CMA to directly enforce consumer protections through administrative proceedings, without having to go to court. For the first time ever, the CMA will have the power to:

- Issue direct infringement notices to traders in suspected breach of consumer law.
- Impose fines of up to 10% of annual global turnover.
- Impose fines of up to 5% of annual global turnover for breaching undertakings and procedural breaches, such as failing to comply with information.

Any appeals against the CMA's enforcement decisions will have to go via the High Court.

The CMA has yet to publish guidance on exactly how it will exercise its fining powers. However, they are expected to mirror the existing competition fining guidelines, which include adjustments for duration of breach and aggravating and mitigating factors. They also consider matters such as specific deterrence, proportionality and settlement.

In addition to granting direct enforcement powers to the CMA, the DMCC simplifies and strengthens the existing, court-based enforcement regime for breaches of consumer legislation. The main change is that the DMCC empowers the courts to impose civil monetary penalties on traders in breach, meaning designated enforcers – including the CMA and the Office of Communications (Ofcom) – will be able to apply to the courts for a range of consumer protection orders and to ask the court to impose fines. The court-issued fines will mirror those that can be imposed directly by the CMA (as described above).

Expanded rights for consumers

The DMCC provides increased protections for consumers against misleading or unfair business practices, particularly in relation to the more pernicious behaviours which have emerged in the UK online consumer market.

The key changes for businesses that engage with consumers include:

- **Drip pricing** – New requirements to exhibit total costs upfront in adverts and online product listings in an effort to ban so-called drip pricing.
- **Fake reviews online** – New rules aimed at combatting fake reviews online which include putting in place systems and processes to identify, investigate, report, respond to and/or remove fake or misleading reviews.
- **Subscription traps** – Increased transparency requirements and enhanced rights for consumers with respect to subscription contracts.

1. Cracking down on drip pricing

Drip pricing is the practice of enticing consumers with low prices and then adding nonoptional fees during the purchase process. Examples of this include fees for compulsory baggage or a seat reservation as part of purchasing airfare, as well as variable mandatory fees like delivery fees.

Drip pricing is now a banned practice under the DMCC. All adverts, online product listings and similar promotional materials (referred to in the DMCC as ‘invitations to purchase’) to consumers must display a headline price that incorporates:

- Mandatory fees that are fixed and must be paid by all consumers (e.g., booking fees).
- Mandatory fees that are variable and the manner of calculation (e.g., delivery charges).

It is important to note that these drip pricing requirements will apply to all ‘invitations to purchase’ – this concept is broadly defined and will capture any practices where an offering’s characteristics and price are set out (e.g., in an advert or marketplace listing) and which influence, or are designed to influence, transactional decisions regarding the offering.

2. Tackling fake reviews

The DMCC prohibits various practices related to fake or misleading online reviews. Perhaps most relevant to online platforms, it will be automatically unfair to publish consumer reviews without taking reasonable and proportionate steps to prevent the publication of – and remove from publication – any fake reviews or reviews capable of misleading consumers (e.g., reviews which conceal that they have been incentivised or otherwise paid for).

The government and the CMA expect to issue draft guidance to enable businesses to understand the scope of their obligations in this context. Nevertheless, the CMA, in its response to an earlier government consultation, has given some indication of the measures it would consider to amount to ‘reasonable and proportionate steps’, such as:

- Conducting regular risk assessments.
- Developing and using proactive measures to identify, investigate and respond to fake reviews. Appropriate responses include flagging suspicious reviews for investigations, removing fake reviews and remedying the effects of fake reviews (e.g., by correcting review counts).

- Providing third-party notification systems (e.g., a clear sign-posted tool to enable third parties to report content or activity that might constitute or concern fake reviews).
- Applying sanctions to dissuade, deter and, where necessary, prevent users and other bad actors from engaging in fake review-related activity.

3. New rules for subscription contracts

The DMCC introduces a strict regime for subscription contracts which automatically renew. Businesses will be required to comply with the following:

- **Pre-contract information**: Provide comprehensive information to ensure consumers fully understand the nature of the contract, including potential price changes, subscription termination procedures and required notice periods. This needs to be provided separately from 'terms of use/sale' or similar.
- **Cooling-off rights**:
  - **Initial cooling-off period**: Give consumers an initial 14-day window at the start of the subscription or free trial to cancel their subscription and receive a full refund, without any reason or penalty.
  - **Renewal cooling-off period**: An additional 14-day cooling-off period also must be available to consumers after each 'relevant renewal', including:
    - The first renewal following the end of a free trial or discounted period.
    - When a consumer becomes liable for a renewal payment and the next payment is not due for 12 months or more (e.g., as part of an annual subscription where the consumer pays once a year).
    - When a consumer becomes liable for a renewal payment and no further renewal payments are due, but the contract continues beyond the end of the 12-month period.
- **Renewal reminders**: Issue reminders about upcoming renewals, the right to terminate before the end of a free trial or discounted period, and at regular intervals thereafter. The rules broadly provide that a reminder should be given every six months for monthly subscriptions, and for annual subscriptions, two reminders must be given towards the end of the term.
- **Straightforward termination**: Consumers must be able to easily terminate a contract by providing a 'clear statement' of their intention to do so, without undue barriers. For businesses offering online subscriptions, this means:
  - Allowing consumers to terminate online and providing termination instructions online in a place where a consumer is likely to find them.
  - Acknowledging online cancellation requests within 24 hours by providing the consumer with a written notice confirming when the contract was cancelled or will come to an end.
  - Refunding consumers for any overpayments.

Note that consumers also can use other methods to end a subscription contract, such as by sending a clear email to a business' sales team. As a general rule, traders must acknowledge such cancellation requests within three working days.

Whilst traders are not prevented from making counteroffers to persuade subscribers to stay, they must nevertheless be cautious not to stray into using 'dark patterns' when engaging with their subscribers during the termination process.

4. Further practices

The DMCC also allows for additions to the list of blacklisted offences by the secretary of state in the future. Potential additions might include use of so-called dark patterns, where traders employ deceptive ecommerce design strategies deliberately crafted to manipulate users into making decisions they might not have made if presented with transparent and fair options.

Next steps

To prepare for the DMCC's entry into force (expected in autumn 2024) and to avoid potential penalties, businesses should conduct a thorough review of their business models, particularly with respect to online consumer interactions, and implement any changes necessary to comply with existing and incoming consumer protections.

If you would like assistance in assessing the impact of the DMCC on your business, please contact a member of the Cooley team.

Cooley trainee Olivia Anderson also contributed to this alert.

Key Contacts

Caroline Hobson London	chobson@cooley.com +44 20 7556 4522
Claire Temple London	ctemple@cooley.com +44 (0) 20 7556 4170
Leo Spicer-Phelps London	lspicerphelps@cooley.com +44 (0) 20 7556 4334