

Protecting people from illegal harms online – response from the Competition and Markets Authority

Summary

1. The CMA has taken several consumer law enforcement cases against online platforms to ensure that they are taking such proactive steps as are necessary to prevent harm to UK consumers arising from the illegal content which they carry or facilitate.
2. There is potential for certain types of illegal content – specifically, economically harmful illegal content – to be within scope of both the online safety regime and consumer law. It is important that platforms are aware that, at the very least, their legal responsibilities under the Online Safety Act are complementary to their responsibilities under consumer law.
3. Irrespective of which law or regime applies, online platforms must be clearly required to take such steps as are necessary to ensure that UK individuals are protected. The CMA and Ofcom should continue to work together closely to ensure that there is regulatory consistency and certainty for businesses, recognising that the online safety and consumer protection regimes are complementary to one another.

Background

4. The CMA is the UK's principal competition and consumer authority. It is an independent non-ministerial government department and its responsibilities include carrying out investigations into mergers and markets, and enforcing competition and consumer law. The CMA helps people, businesses and the UK economy by promoting competitive markets and tackling unfair behaviour.¹

¹ The CMA's statutory duty is to promote competition, both within and outside the UK, for the benefit of consumers. It is committed to using its tools - including existing consumer and antitrust enforcement, market studies and merger control - to protect consumers and foster innovation in rapidly developing digital markets. A Digital Markets Unit (DMU) has been established within the CMA to begin work to operationalise the future pro-competition regime for digital markets. The CMA is also committed to working with other UK regulators, under the auspices of the Digital Regulation Cooperation Forum, to ensure a greater level of cooperation and coherence, given the unique challenges posed by regulation of online platforms.

5. The CMA has a role in providing information and advice to government and public authorities.² The CMA's advice and recommendations are made with a view to ensuring that policy decisions take account of the impacts on competition and consumers.
6. The CMA is working with fellow authorities to make sure that there is coherence between different regulatory frameworks, looking across the range of our responsibilities and out to data protection, financial services and online safety. For example, the CMA published a [joint statement](#) with Ofcom which sets out our shared views on the interactions between online safety and competition in digital markets.
7. The CMA has prepared this submission in response to Ofcom's first consultation, [Protecting people from illegal harms online](#), as the regulator of the new Online Safety Act (the Act). Under the Act, the providers of internet services which enable the sharing of user-generated content and of search services will have new statutory duties. These new duties require service providers to adopt measures to tackle illegal content, including fraud, and the harm that results from such content.
8. In the CMA's view, there is potential for certain types of illegal content – specifically, economically harmful illegal content – to be within scope of both the online safety regime and consumer law. For example, a representation by a trader concerning a product may constitute both an unfair commercial practice under consumer law and fraud where the representation is false and dishonest. Such representations could, in theory, include fake reviews, unlabelled commercial endorsements or other misleading content relating to the promotion, sale or supply of consumer products.
9. This consultation response focuses on economically harmful illegal content and the potential overlap between the online safety and consumer protection regimes in relation to such content.

The CMA's previous and current enforcement action

10. The CMA and Ofcom have statutory powers to enforce consumer protection legislation, including the Consumer Protection from Unfair Trading Regulations 2008 (the CPRs).

² Under Section 7(1) of the Enterprise Act 2002, the CMA has a function of making proposals, or giving information and advice, "on matters relating to any of its functions to any Minister of the Crown or other public authority (including proposals, information or advice as to any aspect of the law or a proposed change in the law)."

11. In recent years, the CMA has taken several enforcement cases under the CPRs to ensure that platform operators take proactive steps to protect consumers by tackling illegal content effectively when it occurs on, or is facilitated by, their platforms. To date, this has included action to address:
 - (a) the [trading of fake and misleading online reviews](#) on Facebook, Instagram and eBay;
 - (b) [paid-for endorsements](#) of products by social media 'influencers' that were not labelled as advertising, on Instagram;
 - (c) [failures by online intermediaries](#) to take adequate steps to gather and display accurate and comprehensive information from car rental companies about prices and customer liabilities, and
 - (d) [secondary tickets sites'](#) failures to ensure that legally required information about events and tickets was gathered from third party sellers and displayed to consumers.
12. The CMA currently has open consumer enforcement [investigations into Google and Amazon](#) concerning the adequacy of the steps they are taking to prevent fake and misleading reviews on their platforms from impacting consumers' purchasing decisions (via, for example, review counts, overall ratings and product rankings).

The application of consumer law to online platform operators

13. The CPRs establish a high level of consumer protection and, generally speaking, prohibit unfair business practices which are capable of distorting consumers' economic decision making. The CPRs apply to platform operators where they are 'traders' – i.e. where they are acting for business purposes - and are engaged in a 'commercial practice' concerning the promotion, sale or supply of products to consumers.³
14. The CPRs prohibit traders from (amongst other things) engaging in misleading commercial practices (whether by action or omission) and include a general prohibition on unfair trading which requires traders to exercise

³ 'Commercial practice' is a broad concept and is interpreted accordingly. For example, the publication of reviews and review-related content such as review counts and star ratings will amount to a commercial practice as it is directly connected with the promotion, sale or supply of products to consumers.

‘professional diligence’ towards consumers, including those consumers who are not their direct customers.⁴

15. Where an online platform operator publishes misleading information or fails to act with professional diligence – such as, for example, failing to take effective steps to address economically harmful illegal content on their platforms – and this is likely to distort consumers’ economic behaviour, they will infringe the CPRs.
16. The CMA considers that the effect of these provisions is that platform operators must take the steps necessary to prevent economically harmful illegal content from harming consumers to comply with consumer law.⁵ Such steps include:
 - (a) Conducting regular risk assessments – platform operators should take an evidence-led approach to assessing the risks of harm to UK consumers’ economic decision-making arising from economically harmful illegal content and identify measures to address those risks effectively.
 - (b) Developing and using appropriate proactive measures to identify and address economically harmful illegal content and its impact on other online content – platform operators should have systems and processes in place to proactively identify, investigate and respond to this content, removing it when it is identified and mitigating its impact on other published information which is derived from or influenced by that content.
 - (c) Providing third party notification systems – such mechanisms should be clearly and prominently signposted, and should be easy to access and use, so that third parties (including platform users and enforcement bodies) can effectively report content or activity that might constitute or concern illegal content.
 - (d) Applying sanctions to dissuade, deter and where necessary prevent users and other bad actors from engaging in economically harmful illegal activity – sanctions should be effective as a means of dissuading and deterring platform users from submitting illegal content, and third parties from procuring or otherwise arranging for such content to be published on the platform.

⁴ Regulation 3(3), CPRs. The CPRs define ‘professional diligence’ as ‘the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either (a) honest market practice in the trader’s field of activity, or (b) the general principle of good faith in the trader’s field of activity’ - Regulation 2(1), CPRs.

⁵ These steps are set out in more detail in the CMA’s [response](#) to the Department for Business and Trade’s *Consultation on improving price transparency and product information for consumers* at paragraph 86 et seq.

- (e) Conducting regular internal evaluations – such evaluations are essential to enable traders to regularly assess the effectiveness of the measures that they are taking or using to tackle this content and preventing harm to consumers' economic interests and identifying further measures to address any inadequacies in this respect.
17. In assessing the steps a platform operator needs to take, the CMA would expect platform operators to have regard to the nature of the risks posed to consumers by the platform, but any steps must still be effective in preventing consumer harm. Platforms where higher risks of harm are posed to consumers are therefore likely to require more extensive measures. Even small, nascent websites and platforms may be required to implement more onerous measures where their content poses a high risk of harm – in the CMA's view, the size of the platform is not determinative of platform operators' obligations under consumer law.

Overlap between the application of consumer law and the Act

18. Illegal content constituting an offence under the CPRs has been explicitly excluded from the scope of the Act.⁶ However, fraud and financial crime are included and have been designated as 'priority' illegal content.⁷ Platforms within scope will therefore have a duty to use proactive means to tackle this content under the Act.
19. There are likely to be overlaps between economically harmful illegal content which infringes consumer law and fraudulent, user-generated content within the scope of the Act. For example, depending on the circumstances, content such as fake online reviews and hidden celebrity endorsements may, in some cases, constitute fraud.
20. While consumer protection and online safety are separate legal regimes, the steps that businesses take to comply with these regimes share the same aim: to ensure that UK individuals are adequately protected from harm. Where the interpretation and application of the two regimes results in different outcomes, this is likely to cause uncertainty for businesses and potentially jeopardise effective enforcement action under both regimes.
21. The CMA would welcome the opportunity to work closely with Ofcom as it produces its guidance on the steps that platforms will need to take to comply with the Act. In our view, this join up will help mitigate the risk of the standard

⁶ Section 59(6)(b) of the Online Safety Act 2023

⁷ By virtue of Section 59 of, and Schedule 7 to, the Online Safety Act 2023

of protection for users under consumer law being inadvertently undermined, and uncertainty being created for businesses.

22. It is important that platform operators are aware that, at the very least, their legal responsibilities under the Act are complementary to their responsibilities under consumer law. It would be helpful for Ofcom's guidance to make clear that platforms operators' duties under the Act are without prejudice to their responsibilities under other legal regimes, including consumer protection law.

Competition and Markets Authority

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