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Consumer Law enforcement: Hot topics harmful online choice architecture and dark patterns

12 March 2025 Emma Roake

With the CMA's consumer protection enforcement powers under the Digital Markets, Competition and Consumers Act 2024 (DMCC Act) due to come into effect next month, we take a look in this article at one of the CMA's enforcement priorities - harmful online choice architecture - which is very likely to be a key area in which the CMA will look to exercise its new direct enforcement powers.

What are the concerns with online choice architecture?

There has been increasing concern over the last few years that consumers are being deceived by design online, with user interfaces which nudge, pressure or manipulate consumers into making decisions they would not otherwise have made. Many retailers have undergone or are in the process of undergoing digital transformation projects, with the upgrade of their websites being a key strategic priority, particularly in the race to collect more data from customers and undertake more analysis about customer behaviour in order to support personalisation and engagement with customers and to drive revenue.

Research has shown, however, that consumers behave differently online (less carefully and with haste) which increases the potential for them to be deceived. In short, consumers online are more vulnerable than they are in-store, and the CMA is very concerned to protect consumers in vulnerable situations. Added to that, consumers that are vulnerable for other reasons (such as age or other characteristics) are usually even more vulnerable online.

Since 2022, concerns have been raised by the CMA about several harmful online choice architecture practices including the following:

- Sludge – this is 'bad' friction that makes it difficult for consumers to achieve what they want to achieve or get the information they need (for example hiding important information about a product in the terms and conditions or making the consumer go through a number of steps to cancel a subscription). Not all friction is bad – for example friction designed to slow down a customer's decision-making process would be "good" friction (but not one that many retailers will want to deploy!).
- Dark patterns – these are user interface design choices which coerce, steer or deceive users into making decisions they didn't want to make. Examples are default settings, 'confirm-shaming' (for example, having to click a button saying "No I'm not interested in being in with a chance to win £1,000" to avoid signing up to a prize draw). They also include:

  - Urgency, scarcity and popularity claims such as the use of countdown timers and claims of products running out ("hurry - only 2 items left!");
  - drip pricing;
  - hidden adverts;
  - sensory manipulation; and
  - price reduction claims which are misleading and don't reflect the actual discount the consumer is getting.

- Dark nudges – such as where friction is deliberately removed to encourage consumers to make bad decisions – subscription traps fall into this bucket, where consumers can easily sign up for a free trial period but cannot so easily end the subscription.

Examples of recent enforcement activity by the CMA

The CMA has in the last few years investigated a number of consumer-facing businesses over their use of dark patterns.

- **Emma Sleep and Simba Sleep**: In 2022, the CMA investigated Emma Sleep and Simba Sleep's online selling practices over concerns that its 'urgency claims' were misleading consumers. The CMA found that discount claims made by Emma Sleep did not reflect the actual savings made by customers, and that its use of countdown timers and claims of high demand were misleading. Emma Sleep has not committed to changing its online selling practices, and as a result the CMA issued court proceedings against Emma Sleep in October last year. (As the investigation was carried out under the CMA's pre-DMCC Act powers, the CMA was not able to impose direct fines on Emma Sleep.)
- **Wowcher**: In July 2024 the CMA concluded its investigation into Wowcher, with the CMA accepting undertakings from Wowcher relating to online choice architecture (amongst other practices). Some of the undertakings Wowcher was required to give concerned the use of 'deals refresh' timers, countdown timers and checkout timers. The undertakings given by Wowcher to the CMA included a requirement to state which part of the deal will change after the countdown clocks run out, and an undertaking not to use timers where products or deals would continue to be offered on much the same terms immediately or shortly after the timer runs out.

What should retailers do?

When it comes to online choice architecture and dark patterns, retailers should be assessing whether the design of their website involves any harmful design features. Some of these features may be incorporated into the user interface, whilst others may be optional features which the retailer can choose to activate or not. There will be a need to ensure teams responsible for the procurement and roll-out of IT systems, for the operation of the website, and for the decisions about product claims are adequately trained to ensure they understand the need for compliance. Retailers should put in place compliance policies in addition to training staff, and senior management will need to actively engage in promoting compliance.

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