Written evidence submitted by techUK on the Digital Markets, Competition and Consumer Bill (DMCCB38)

Supporting the UK's Pro-Competition Regime and reform to consumer rights and competition in digital markets.

techUK represents almost 1000 companies in the most dynamic sector of the UK economy. Our members comprise firms of all sizes, from SMEs to large, multinational firms, and they play vital role in the UK's digital markets. techUK have consulted thoroughly with its members who each are affected differently by and have a unique role to play in the proposed DMCC Bill.

techUK supports the Digital Markets, Competition and Consumer (DMCC) Bill which we see as a welcome initiative that has the opportunity to boost competition and consumer choice. techUK's members are largely focused on proposals in the Bill regarding reforms to create a Pro-competition Regime for Digital Markets and consumer policy reforms focused on fake reviews and subscription traps.

For these reforms be effective MPs and Peers need to scrutinise the legislation to ensure that the new regulator is accountable, is encouraged to carry out its duties in a proportionate way and there are the right checks and balances in place. New consumer protections should follow best practice, enhance companies ability to comply and not inadvertently undermine legitimate business activity through a rigid approach to the rules.

In the briefing below we provide feedback and suggestions on how to improve the Bill from our members on the parts of the Bill relating to a Pro-competition Regime for Digital Markets and consumer policy reforms. These points are supported by an additional annex.

The DMCC Bill covers a wide range of issues from establishing a new pro-competition regime to competition and consumer policy reform. Each of these parts should be considered as separate initiatives and MPs must be mindful to ensure that as the Bill is passed amendments do not conflate issues and undermine the objectives of each part of the Bill.

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You can read techUK's reaction to the full Digital Markets Competition and Consumer Bill here.

Pro-competition regime for Digital Markets:

Globally there is a push to establish new approaches ensure competition in fast moving and concentrated digital markets. Of the various approaches being taken around the world techUK's membership sees the UK's new pro-competition regime based around the creation of an empowered regulator, the Digital Markets Unit, as the most likely approach to succeed in taking the targeted and proportionate action needed to create a level playing field between firms.

The UK regime is more flexible and has greater powers to intervene in markets than other comparable regimes. It is however also the most resource intensive for the regulator itself to implement.

If executed well the Digital Markets Unit proposals could see an expert regulator with clear and well-known objectives take targeted and informed action to boost competition in digital markets. However, if the regime exercises its powers too broadly and without clear signalling there is a risk that it could create an uncertainty and hazardous environment that runs the risk of damaging the UK's place as an attractive destination for foreign investment as well as well stretching the regime too thin to deliver the most effective interventions.

Therefore, to ensure the success of the regime Parliament must ensure that the regulator is accountable, it uses its powers proportionately and the regime has the correct checks and balances.

Accountability of the Digital Markets Unit:
techUK members welcome the empowerment of the Digital Markets Unit (DMU) to design and act on interventions that have been subject to wide consultation.

Given the significant powers and discretion given to the DMU to implement the regime the market will want a degree of certainty and predictability around how the regulator plans to use its powers. Business will want to see the DMU be up front about which markets it intends to focus on in the near term as well where it may consider taking action over the medium term. Such signals will be important for firms and consumers to have an understanding of the likely remit of the DMU and to be able to plan engagement with the regulator.

Doing this kind of signalling will also allow Parliament and the Government to scrutinise the DMU's plans, levels of resourcing and expertise and respond by issuing Strategic Steers to give the DMU the political cover it needs to act or to signal where Parliament and the Government may feel the DMU is straying beyond its remit or is not fulfilling broader duties such as to support economic growth and innovation.

A Strategic Steer of priorities is issued to the CMA, including the operation of the Digital Markets Unit. However, beyond this there are limited specific reporting requirements for the DMU itself. The DMCC Bill could go further by requiring the DMU to report on its activities and lay an annual report before Parliament. This report should include a summary of the DMU's activities under the DMCC Act, an assessment of the extent to which the DMU believes it has complied with its duties, a statement of the DMU's priorities for the next year and over the medium term and any other relevant matters. Further the DMCC Bill should require a statement of priorities to be issued ahead of the first year of operation of the DMU.

Such requirements are similar to duties that were placed on Ofcom in the Communications Act as well as on the CMA. Doing so will be vital to signal to the market the aims of the regime for the year ahead as well as supporting the accountability of the regime to Parliament.

Parliament should consider increasing the accountability requirements on the Digital Markets Unit by providing a route for the regulator to set out a clear list of priorities for the year ahead and to report on its activities allowing MPs and the Government to scrutinise whether the regulator is fulfilling its duties.

Proportionality of the Digital Markets Unit:

It is vital for the functioning of this regime that it can take targeted action based on evidence. This evidence will need to be gathered from a wide range of market stakeholders, including firms of all sizes and status as well as consumers. Further are a number of unclear terms and process in the legislation which are left to the DMU to define in guidance that will be issued after Bill passage. This guidance will have a large bearing on how the regime operates in practice.

The DMU needs to set out quickly a clear process for how it will consult on key guidance including how SMS designations will operate, the use of enforcement powers, information gathering powers consultation requirements and use of investigative powers. This guidance is fundamental to the operation of the regime and needs to be tested with a wide range of stakeholders before the regime gets underway. The DMU should consider beginning parts of this process ahead of royal assent allowing the regime to begin its work in good time.

There are concerns from a range of companies on how information gathering powers will be used. The regime will only be able to succeed with accurate, confidential, and timely information gathering engagement from industry and regulators; however, information gathering consumes large amounts of resources and capacity of all firms. The Government committed in its consultation that these powers would be used in a proportionate and targeted way and parliament should seek assurances on this point from the DMU.

The DMU should also be encouraged to gather information and conduct market monitoring in novel ways for example through regular panels, networks of sector representatives and stakeholder engagement. This will help support continuous monitoring and information gathering without having to rely on formal powers. This is likely to increase the range of evidence available to the regulator as well as reducing the potential compliance burden on a range of firms.

Further concerns have been raised about the confidentiality of evidence submitted. It is vital that in guidance to be issued by the DMU the regulator finds a balance between allowing evidence to be submitted in a confidential manner by firms of all sizes and consumers while also allowing summaries of evidence to be shared as part of the participatory nature of the regime. Doing so will mean creating clear processes for submitting evidence, including providing concrete reassurance to all participants that they can submit any relevant commercially sensitive evidence in a way that will not be disclosed to their competitors. This will be particularly important for the DMU to build confidence among smaller and competing firms.

Parliament must ensure that the DMU provides clarity on how important parts of the regime which will be issued under guidance will operate. These include how SMS designations will be run, the use of enforcement powers, information gathering powers consultation requirements and use of investigative powers. Parliament should scrutinise the regulators on its plans to consult and develop this guidance and the DMU should consider beginning some consultation ahead of royal assent to ensure the regime can begin its work in good time.

Checks and Balances:

techUK supports the measures within the Bill to address the consequences of market power through conduct requirements and the use of pro-competition interventions (PCIs) to address the root cause of market power that can be demonstrated to have an adverse effect on competition. In exercising both these powers, particularly PCIs, the DMCC Bill grants significant discretion to the DMU to determine the kind of intervention that it will take.

The Bill contains welcome provisions for the DMU to provide a notice and suspected grounds for initiating a PCI as well as to consult on any pro-competition order that is eventually issued. However, the grounds to appeal a significant decision that could have extremely significant and wide-ranging impacts, both on individual firms but also the wider market is weak.

techUK supports a flexible approach to appeals that gives deference to the expertise of the regulator but allows the appeals body, the Competition Appeals Tribunal (CAT), to consider the merits of an appealed decision where that decision has extremely significant and wide-ranging consequences. Further techUK supports steps being taken to reduce the length of appeals to ensure that the appeals mechanism cannot be utilised to bog down the regime in court processes. We view both the flexibility and timeliness of the appeals standard to be essential to making this regime work.

The Government has said that the Judicial Review principles applied in the Bill meet this objective, allowing a range of factors to be considered and for timely decisions to be taken. The Government stated its consultation response that the appeals process should be comparable to the one used by Ofcom, a standard sometimes referred to as Judicial Review plus.

Despite wide ranging consultation techUK has struggled to find a consistent legal view that the Judicial Review principles applied in this Bill would operate as the Government intents. And as applied would not fulfil the objective of giving the CAT the required flexibility to consider factors beyond a narrow interpretation of judicial review principles, such as mistakes on process, factual errors, illegality or unreasonableness.

Further whether court proceedings are timely will depend on factors such as court lists and barrister availability rather than the appeals standard chosen in legislation. No action is taken in the Bill to speed up the process such as by enacting a formal time limit on cases or the period under which evidence has to be submitted or by seeking to fast-track appeals on decisions of the DMU.

Additionally, concerns have been raised with regard to section 99. Section 99 allows for claims of a breach to be made in non-specialist courts, without the DMU first having found and identified that a breach has taken place. Without the right safeguards such as clause runs the risk of undermining the regime by allowing non-specialist courts to determine whether there has been a breach of a conduct requirement without the expert regulator, the DMU, playing a role. While private enforcement must remain an option, steps should be taken to ensure that the DMU is included in any decision to determine whether a breach has taken place.

Parliament needs to ensure the Bill contains effective checks and balances on the regulator. The Government's position on appeals should be tested to ensure it meets the aims of delivering a flexible and timely approach to judicial scrutiny. Parliament should also scrutinise the potential for misuse of section 99 and whether it could undermine the aim of a regime designed to be led by an expert regulator.

Consumer policy reforms to tackle fake reviews and subscription traps:

Regarding Part 4 of the DMCC Bill, techUK's membership have strong concerns that the Bill, as currently drafted, will place excessive regulatory burden on businesses due to the overly prescriptive nature of the proposals and challenges in demonstrating paths to compliance.

We hope to work with legislators to ensure that key terms within the regulations are clearly defined and provide operational certainty to businesses, and to deliver the Government's objectives without creating excessive burdens on service providers. We emphasise the diversity of online user experiences and business models that this Bill seeks to cover, and believe it is critically important to ensure that primary legislation is sufficiently flexible and non-prescriptive to provide reasonable routes for different platforms, and businesses of all sizes operating in the digital economy, to demonstrate compliance and to protect future innovation. A more thorough briefing on this can be found below in the annex.

Reforms to online reviews markets: There are currently a range of different competing and complementary services that collect and host product or service reviews for free, or via paid models. Ensuring a competitive online reviews market that accommodates a diverse range of review sources and models will benefit consumers, by allowing them to choose the type of insights that best suit their situation.

It is important that the Bill does not result in a reduction of variety in the market, nor a reduction in consumers' ability to voice their experiences and access the experiences of others. Likewise, it would also be detrimental should the Bill result in reviews which only encompass the narrow aspects of what businesses would like you to see. More information on this is provided in "Annex 2: Additional Briefing on Part 4 of the DMCC Bill."

Reforms to subscription contracts: techUK understands the Government's intention behind introducing new rules regarding pre-contractual information, auto-renewal reminders, and providing more straightforward means of exiting subscription contracts while attempting to mitigate concerns raised around business costs. techUK and its members have had substantive engagement on this topic with the Department for Business & Trade prior to the introduction of the Bill, and we are encouraged to see that the Bill avoids regulatory overlap by exempting services already covered by other regulatory regimes (subject to the area of clarification listed below), and ensures regulatory alignment by referencing key existing consumer protection enactments such as the Consumer Rights Act 2015, thereby maintaining differentiation between types of services (e.g. digital content vs. physical goods).

Still, techUK and its members have identified concerns on pre-contract information and reminder notices requirements. Members view this approach as overly prescriptive and unnecessary to achieve the aims of the Bill. This could prevent companies from providing reminders to consumers in ways that are most relevant and proportionate for the services being rendered. Additionally, the very-prescriptive nature of the requirements could also disproportionately impact smaller traders without sufficient in-house capacity, alongside unnecessary dampening of competitiveness for firms of any size. Members have also raised concern that some of the requirements appear to be outdated and do not leave space for flexibility through market innovation in the future.

techUK would suggest that primary legislation take a more principles-based approach with detailed requirements coming through secondary legislation and extensive consultation with industry. More information on this is provided in "Annex 2: Additional Briefing on Part 4 of the DMCC Bill."

Annex

Annex 1: Additional information on the Pro-competition regime for Digital Markets

The DMU's consultation process and designation of "Strategic Market Status": There are concerns about the effects of the timeline for designation. The consultation process to investigate and designate Strategic Market Status must take into account a dynamic and rapidly changing industry, and a fully consultative process will require extensive engagement from a wide range of industry actors. While timeliness should remain a priority for the regime, it must be able to consider the realities of capacity from firms being designated as well as third parties. Parliament should seek assurances that the DMU will have sufficiently efficient processes and adequate resources to ensure the designation process is smooth and manageable for all parties. This should include the DMU setting out details on how it intends to run the designation process and the potential uses of the 'Stop and Start' procedure included in the Bill.

Additionally, given the need for the regime to be fair on all firms including designated firms that compete with each other, it should seek to designate all firms within a particular digital activity area at the same time.

Further clarity is also needed on the requirement for the SMS status to take a forward look over the next five years. The DMU must provide greater clarity on how these assessments are weighted, the information it will seek to gather and the criteria for assessing market power into the future.

Resourcing of the regulator: the spirit of the legislation implies the pro-competition regime will be supported by a sufficiently resourced and expert regulator, able to act quickly and flexibly. Parliament and the Government must ensure through its scrutiny of the regulator that the DMU remains sufficiently resourced and focused to carry out its duties as intended.

Definition of Digital Activities: the Government has said that hardware components will likely be captured under the definition of digital activities used. However, concerns have been raised that this may not apply to all product and service scenarios. The Government needs to further clarify the exact scope of what it means by digital activities and how hardware components will be considered.

Consumer Benefits: the Government has proposed a consumer benefits exemption in relation to breaches of a conduct requirement, subject to specific criteria. However, with regard to pro-competition interventions the consumer benefit test is not subject to any criteria. The Government needs to clarify the purpose behind the two different standards and clarify how consumer benefits will be assessed when a decision is being made on the application of a pro-competition order.

Consumer benefits in relation to a pro-competition order should be weighed up in the round and consider factors such as desires for privacy and security. However the case for any such benefits should be thoroughly tested by the regulator and be considered against the anticipated benefits of intervention to address anticompetitive conduct, for example behavioural changes such as requirements for interoperability, data sharing and data portability.

Re-use of existing market studies and evidence: the DMU should have the ability to build upon market studies and evidence gathered by the CMA when it seeks to carry out its functions. The Bill does not explicitly state whether the DMU can or cannot utilise this existing evidence base. Confirmation via Parliamentary questions should be sought to clarify the Government's

policy intent here. techUK's view is that existing market studies and evidence should be able to be utilised. The DMU should also have the flexibility to update older studies or re-run parts of their analysis where markets have significantly changed in the interim period.

Pro-Competition Interventions (PCIs): PCIs are meant to offer an iterative and graduated approach to interventions to boost competition in digital markets. PCIs should be flexible in response to a changing competition landscape, however, the processes proposed in the Bill seem to suggest that PCIs can't be modified while they are in place. Rather clause 50 sets out a process to revoke a PCI and then introduce a new PCI via a fresh investigation, consultation, decision and order. Parliament needs to examine the gap between the legal structures of the Bill and Government's stated policy intent.

Conduct Requirements: conduct requirements will play a fundamental role in the implementation of the new pro-competition regime; however, many of techUK's membership have concerns regarding the proportionality, functionality, and accountability of the use of them. Across techUK's membership there are a variety of views and questions on conduct requirements, including the following:

- Much of techUK's members welcome a targeted and effective use of conduct requirements, but questions remain regarding the consultation process and the potential burden imposed on firms through information gathering during both the SMS designation process and issuing of conduct requirements. Greater clarity on the sequencing and development of conduct requirements in guidance to be issued by the DMU on SMS designations would be helpful. Ultimately the DMU should seek to issue conduct requirements at the same time as an SMS designation following appropriate consultation with the potential SMS firm, wider market participants and consumers.
- The conduct requirement, clause 20(3)(c), sometimes referred to as the 'leveraging principle' is not clear on its application. The Government needs to provide additional clarification on its intended used. Conduct requirements should provide to level the playing field between SMS firms and their competitors. This clause should therefore have the aim of preventing SMS firms from finding routes to gain unfair advantages in their designated activity area or circumnavigate their conduct requirements. The clause however should not seek to create a hazard or cautious approach to innovation or product launches or other improvements outside of the activity area where SMS has been designated. The clause must also not prevent SMS firms from engaging in fair competition with other incumbents in other markets.

Final Offer Mechanism (FOM): techUK supports the final design of the FOM. This step-by-step approach appears to strike the right balance between providing a strong incentive to compromise and reach a fair deal between either party. The Government has set out its clear intention that the FOM mechanism relates only to payment terms. However, interpretations may vary. Further SMS firms will have concerns about the principle of 'freedom to contract' and the potential impacts an FOM mechanism could have on this. The Government should be clear that FOM relates only to payment terms and should set out how the 'freedom to contract' principle will be respected as part of the FOM process.

Annex 2: Additional Information on Consumer policy reforms to tackle fake reviews and subscription traps

techUK, the industry association for the UK tech sector, welcomes the opportunity to provide feedback on the Consumer Rights and Disputes clauses of the Digital Markets, Competition and Consumers (DMCC) Bill.

We have had productive engagements with the Department for Business & Trade in the development of this Bill and believe that the Bill's overarching objectives of protecting and empowering consumers within online platforms can be an effective means of building consumer confidence within the digital economy.

While we support these objectives, we have concerns that – as currently drafted - the Bill and accompanying annexes place excessive regulatory burden on businesses due to the overly prescriptive nature of the proposals and challenges in demonstrating paths to compliance. The independent Regulatory Policy Committee's assessment of the Bill gives a very poor review of the impact assessment of the subscriptions proposals and cites that the incremental costs to business have increased to hundreds of millions of pounds and far exceeds initial expectations.

We look forward to working with legislators to ensure that key terms within the regulations are clearly defined and provide operational certainty to businesses, and to deliver the government's objectives without creating excessive burdens on service providers. We emphasise the diversity of online user experiences and business models that this Bill seeks to cover, and believe it is critically important to ensure that primary legislation is sufficiently flexible and non-prescriptive to provide reasonable routes for different platforms, and businesses of all sizes operating in the digital economy, to demonstrate compliance and to protect future innovation.

Below we provide some initial feedback from techUK members about specific clauses within the draft DMCC Bill and accompanying instruments.

Part 4, Chapter 1: Protection from Unfair Trading

techUK has been actively engaged with the Department for Business and Trade to highlight the work that our members are already doing to address fake reviews through their content policies and integrity teams, intelligent fraud detection software, and creating avenues for users to flag suspicious content.

Millions of people around the world use reviews to understand what their peers are saying about personal experiences with businesses. Genuine experiences shared online are invaluable in guiding both the people who write and read them, and the businesses who use them to understand their customers and improve their offerings – and for building trust between both. While it is important to tackle the issue of fake reviews, it is vital that the scale of the problem is kept in perspective and that trust in reviews is not undermined due to this legislative focus,

There are currently a range of different competing and complementary services that collect and host product or service reviews for free, or via paid models. Ensuring a competitive online reviews market that accommodates a diverse range of review sources and models will benefit consumers, by allowing them to choose the type of insights that best suit their situation.

It is important that the Bill does not result in a reduction of variety in the market, nor a reduction in consumers' ability to voice their experiences and access the experiences of others. Likewise, it would also be detrimental should the Bill result in reviews which only encompass the narrow aspects of what businesses would like you to see.

While we welcome the government's proposed approach of a delegated act, with additions being made to the Consumer Protection Regulations (CPRs), we would like to raise the following concerns and queries:

Review sellers and sites hosting fake review sales. The Government's proposed additions to amending the CPRs (as set out in Annex 4: Impact assessment of wider measures) includes the targeting of review sellers. Honing in on the issue at its source is a positive step, however the proposed approach does not extend to sites or services hosting the sale of fake reviews. To holistically address the issue of fake review sales, this aspect should be brought into the scope of the CPR's list to enhance the effectiveness of these measures and minimise the ability of review sellers to operate.

Requirements on review platforms. 'Annex 4: Impact assessment of wider measures' states that platforms will be in breach of CPRs if presenting reviews as *'genuine'* without taking *'reasonable and proportionate steps'* to check this. How the government defines these key terms will be pivotal.

- We are concerned that the government has not yet made clear how platforms can be expected to determine whether reviews are 'genuine', nor confirmed that they will not be required to distinguish between opinion and fact. While it is noted in Annex 4 that the intention is not to verify the accuracy of the content of genuine consumer reviews, it should be unequivocally clarified that 'genuine' does not relate to the review's content, but rather whether the review follows an experience of a product, service or retailer.
- Furthermore, it is unclear whether there will be any differentiation between reviews of products and reviews of services and/or businesses where no transaction has necessarily occurred but the reviewer's account of their experiences may nonetheless be genuine.
- Regarding what are 'reasonable and proportionate steps', we emphasise the breadth of different review platforms used by consumers and the diverse models of these platforms. This definition and accompanying guidance will need to be flexible and applicable to different types of platform. What is 'reasonable and proportionate' will differ depending on the type of reviews, business model, setup, etc., which is why flexibility and avoiding a one-size-fits-all approach is key.
- It would be of significant concern should a restrictive approach be taken or one which does not accommodate the range of different business models, and which therefore results in less variety and competition in the market for review services and less choice for consumers to access and share their genuine experiences via both product and service/business reviews.

Furthermore, we would like to raise some concerns around specific definitions and proposals within this section of the Bill which we believe should be amended to provide greater legal certainty and reasonable compliance routes to platforms:

- **Definition of 'vulnerable consumers'.** Clause 239 defines "vulnerable persons" as a particular group, and whether a consumer is considered 'vulnerable' is a factor to be considered when evaluating whether something amounts to an 'aggressive practice'.
    - While we support the objective of this Clause, we have concerns about the current inclusion of *"the circumstances they are in"* as a contributory factor.

- We are concerned that this criteria is too vague and uncertain – whereas the other criteria (age, physical and mental health, credulity) are relatively objective and provide legal certainty to companies, this latter factor is a lot more subjective, with the Explanatory Notes describing being in mourning, going through a divorce, or losing a job as 'circumstances' that could make a consumer vulnerable.
- This places an unrealistic and unreasonable expectation on platforms to ascertain an individual's circumstances, and we recommend that this criteria be removed.
- Furthermore, we recommend that Clause 220(2)(d) should be reworded to ensure that vulnerability factors that traders could not reasonably be expected to foresee are excluded.

- **Definition of 'persistent and unwanted solicitations'.** Schedule 18, which defines commercial practices which are in all circumstances considered unfair, includes 'making persistent and unwanted solicitations by any means'.
  - While again we support the policy intention, our members have highlighted that persistent and unwanted solicitations are sometimes necessary for a range of legitimate reasons which are beyond contractual obligations.
  - Examples would include if there has been a security breach and the consumer needs to take action to protect themselves or others, or firms are under some legal obligation to make the consumer aware of information.
  - It is therefore important that this provision be reworded to exempt solicitations that are required to fulfil other legal (non-contractual) obligations, or to protect the interests of the consumer or another person.

- **Clarity around limited-time statements.** Schedule 18 includes '*Falsely stating that a product will only be available for a limited time, or that it will only be available on particular terms for a limited time…*'.
  - We recommend that this Clause be aligned with the language used within the existing Consumer Protection from Unfair Trading Regulations 2008, which refers to 'a **very** limited time'.
  - Taking the word "very" out would significantly widen the blacklisted offence because any time limit, however long, would potentially be caught. This means the offence will capture practices which would not always be reasonably considered to be unfair and would create additional legal uncertainty.

- **Definition of 'material information'.** Clauses 217 and 222 introduce a new offence of "omission of material information from an invitation to purchase". We emphasise that the proliferation of information requirements mean that consumers are increasingly being presented information. Any additional information requirements should only be added if they add real value to the consumer and enable a genuinely more informed decision.
  - We do not believe that requiring a legal name, business address [or email] in every advert including a price adds any value to consumers nor enables them to make more informed decisions. This is particularly the case as this information is required as part of the online purchasing process under the CCRs and E-Commerce Regs and therefore consumers will be provided this information in any event – at a time when they are more likely to want to contact the trader.
  - In most cases much of the information listed is inevitably self-evident to consumers. For example, adverts typically seek to communicate the name of the

trader and the main characteristics of the goods. However, this is not always done in a formulaic way. For example, the name of the trader may be communicated by branding rather than writing out the trader's name. The previous legislation allowed for this by saying that the information was only required if it was "not already apparent from the context". This was an important point for traders as it allowed flexibility on how to communicate information without diminishing consumer rights.

- **Including fake review on the face of the Bill:** We support the aims of this Bill to tackle the issue of fake reviews. However, in order to do this we need to get the approach right. The Government has recognised this point and intends to carry out further consultation both to inform what will be included in the CPRs, but also what guidance will accompany it. Given that most of the discussion to date, and indeed the government's own research, has only focused on one type of review - product reviews on e-commerce platforms. We would urge caution and consideration so that we can ensure that measures introduced are workable and appropriate for other types of reviews - such as those which provide reviews of people's experiences of merchants, businesses and services. Putting 'fake reviews' on the face of the Bill while key terminology is unclear and the evidence base is incomplete risks jumping the gun and becoming a backward step should this Bill, which is meant to stimulate digital competition, ultimately result in less competition and variety in the space of online reviews - both businesses and consumers would be the worse for this.

Part 4, Chapter 2: Subscription Contracts

We understand the government's intention behind introducing new rules regarding pre-contractual information, auto-renewal reminders, and providing more straightforward means of exiting subscription contracts while attempting to mitigate concerns raised around business costs. Again we have had substantive engagement on this topic with the Department for Business & Trade prior to the introduction of the Bill, and we are encouraged to see that the Bill avoids regulatory overlap by exempting services already covered by other regulatory regimes (subject to the area of clarification listed below), and ensures regulatory alignment by referencing key existing consumer protection enactments such as the Consumer Rights Act 2015, thereby maintaining differentiation between types of services (e.g. digital content vs. physical goods).

Following consultation with techUK members that provide subscription services, we would like to raise concerns around the following provisions within the Bill:

- **Pre-Contract Information and Reminder Notices – requirements**. We are concerned that this section of the Bill is excessively prescriptive. Clauses 248, 249, 250, 251 and Schedule 20 list exactly what needs to be included in pre-contract information and renewal reminders and at which intervals (e.g. specifying a window of three working days when they need to be sent).
    - We do not believe that this approach is necessary to deliver the Bill's objectives and could prevent companies from providing reminders to consumers in the ways that are most relevant and proportionate for the services being rendered. The simpler and more concise this list of pre-contract information is, the more likely the consumer will actually read and understand it.

- The very prescriptive nature of the requirements could also disproportionately impact smaller traders who may not already have in place tooling that is sufficiently sophisticated to cope with managing exacting timing requirements across a membership base and/ or the resources available to implement and oversee the system changes required to comply with the Bill.
- Some of the requirements seem to be outdated – for example, it doesn't seem practical for large multinational companies to be required to provide a business e-mail address and phone number to consumers. This seems overly prescriptive as long as other methods are provided for users to be able to contact the company e.g. – live chat (which is often much quicker and more efficient).
- Furthermore, the requirements on *how* the information must be presented to the consumer, as described in Clause 248(3), again are overly prescriptive. Consumers purchase subscriptions for a wide and growing range of products and services and no list will either apply equally to all of them or include every piece of information that is important for consumers to understand when they enter into a subscription agreement. Consumers need to be able to quickly and easily navigate to the information of importance to them. The best way to do this is to create a user experience that helps users read and understand key terms, rather than to mandate presenting large dense blocks of information that consumers will skip over.
- Without limited time/space allowances, the Bill will not be flexible for future innovations, with the methods for consumer contracting already spanning wearable devices with very small interfaces such as smart watches. This might dissuade innovation.
- The pre contract information Clauses provide that the trader must 'give' 'key pre-contract information' and 'give or make available' the 'full pre-contract information'. The threshold to be reached to make the information 'available' has been included but there is no equivalent provision to help traders understand how far they need to go to in order to 'give' the key pre-contract information compliantly. For contracts entered online, if the 'key pre-contract information' is displayed on screen in the order funnel, is that compliant?
- Similarly, guidance is needed to explain what is intended in Clause 248 (3) (d) by the words 'the consumer is not required to take any steps to read the information other than the steps the consumer must take to conclude the contract' - what this means in practice is not obvious.
- Furthermore, Clause 249(2) requires the trader to ensure "that the final step which the consumer is required to take to enter into the contract involves the consumer expressly acknowledging that the contract imposes an obligation on the consumer to make payments to the trader". On this Clause, we request clarification that this essentially preserves the current legal requirement of prescriptive wording in the final purchase button (e.g. "Buy now" or "Purchase here").
- We propose that primary legislation should take a more principles-based and outcomes-oriented approach to pre-contract information and reminder notices, including the mode of presentation, so that the regulator responsible for overseeing these interactions will be empowered to engage with different business models in a more flexible manner. Rather than including an exhaustive list of information that must be disclosed to consumers, we recommend a more flexible standard, such as that traders must disclose all material terms of the contract during sign-up (the "key pre-contract information").

- Requirements to this level of detail should be covered in secondary legislation / guidance upon consultation with industry.

- **Reminder Notices**
  - We are concerned that a blanket obligation to send reminder notices could have counterproductive effects in certain situations. This provision seems to be premised on an assumption that a majority of consumers forget which services they are subscribed to and are unwittingly charged for them. In many cases, however, consumers use their favourite subscription services on a daily or weekly basis. We would urge the Government to consider a more nuanced approach to this requirement to avoid consumers receiving frequent reminders for services they consistently engage with, and the undue costs this will impose on businesses.
  - For example, a more flexible approach could provide consumers with the option to opt out of further reminders if they choose, or for firms to cease reminders after two consecutive affirmative responses that consumers want to continue. There should also be the possibility to streamline the reminder system for people with multiple subscriptions to the same service.
  - We also have concerns about the frequency of the 6-monthly reminders. Where consumers have longstanding subscriptions contracts that they are actively using and engaged with, we do not believe that reminders every 6 months are necessary to achieve the objectives of the Bill.
  - Similarly, in the case of monthly subscriptions, a first renewal reminder being sent a few weeks after a consumer has received the pre-contract information containing details of the payment amount and frequency does not seem to us to be effective in avoiding the harms that the Bill seeks to address.
  - We believe that requiring two renewal reminders to be sent before subscriptions of 1 year or longer renew is unnecessary.
  - Such measures are disproportionate to the problem that the Bill is trying to address and go beyond some of the requirements that exempted regulated sectors have to adhere to. The number of notices (confirmation, renewal, cooling-off) required by this Bill should be rationalized to avoid contacting consumers an excessive number of times, which risks consumers ignoring notices because they start to seem like spam.

- **Arrangements for consumers to exercise rights to end contract** – Clause 252(1)(a) requires traders to allow consumers to bring subscription contracts "in a single communication" and clause 252(2) and (6) says that a consumer can notify a trader to end a subscription "by any means".
  - We are very concerned that this is such a wide definition that it could encompass not just the cancellation methods provided by traders, but also a direct tweet, Facebook Post, or even responding to a 'Do not reply' email to the trader, for example.
  - We do not believe this to be the government's intent but emphasise that the legislation as currently worded would be extremely complex and burdensome to implement.
  - Requiring businesses to permit consumers to cancel "by any means" also risks harming consumers who believe they've taken steps necessary to cancel, when their cancellation may not have been effective because it failed to reach the

business or did not include the necessary information for the business to identify the consumer's contact and complete the cancellation.
    - Furthermore, we are concerned that the phrase "in a single communication" leaves open the possibility that it could be interpreted as a 'single click' cancellation law, which would be problematic as there are legitimate reasons for companies to verify the identity or confirm the intent of a user before cancelling a contract. We request that the terminology be clarified to make clear that a single click cancellation requirement is not the government's intent.
    - Finally, these requirements go beyond what was in the Government's April 2022 consultation response, which said traders would be required to ensure consumers could exit contracts in a "straightforward and timely way".

- **Contract cancellations – verification and ID processes.** It is reasonable to expect that some businesses will need to verify that a request to cancel a subscription service does indeed come from the consumer that holds the contract. We request clarification from DBT that reasonable verification and ID processes that may be required to validate a consumer request would be permitted and would not cause companies to be non-compliant with the 'single communication' requirement within Clause 252.

- **Provisions to better balance trader and consumer interests with respect to cooling-off rights.**
    - Clauses 256-258 require cooling-off periods for subscriptions, including following the end of a concessionary period and after any renewal of a subscription with a term of one year or longer. There do not appear to be provisions to prevent purchasers of digital services from signing up, benefiting from the services, and then cancelling within the cooling-off period.
    - Under this Bill, businesses will already be required to provide consumers with regular renewal remainders, and such reminders must include information regarding how to cancel if the consumer does not wish to be charged to continue their subscription.
    - Requiring traders to then also enable consumers to cancel for an additional 14 days after renewal is both unnecessary and could prove detrimental to consumers - if traders are required to implement these additional cooling off periods, it will be less economically viable to offer consumers in the United Kingdom the opportunity to sample goods and services through free and discounted trials, as well as to provide options for longer subscription terms at a discounted price. Existing and prospective service providers may question the commercial viability of their business models within the UK due to these new proposals.
    - In particular, we are very concerned that these provisions on cooling off rights – which typically trigger a refund right - do not strike the right balance between consumer and trader interests, particularly with regard to short-term subscriptions of 30 days or less, or services that consumers can access immediately in exchange for waiving their cooling off rights, such as in the case of digital content subscriptions.
    - For short-term subscriptions, renewing every month or less and with an introductory period, we are concerned the Bill is disproportionately weighted in favour of the consumer by giving a second cooling off period shortly after the contract has begun. For example, for a monthly subscription with a free/ reduced

price for the first month, this second cooling off period begins as early as the start of the second month. This does not tackle the issue of long-term unwanted subscriptions that consumers no longer use, offers little consumer benefit given the close proximity to the initial cooling off period and requires traders to manage complex operational challenges to administer it.

- Regarding the removal of the existing option to waive cooling-off rights where there is immediate performance of digital services, we do not believe that the existing option is detrimental to the consumer interest and we would welcome clarification from the government on which perceived problem it is seeking to address.
- To remove this option would have a particular negative impact on the viability of copyright licensed businesses, as businesses would need to pay copyright licensing fees/royalties to third parties where a consumer accesses the content and would be unable to claim that back where a cooling-off right is exercised. This would make the UK much less friendly for copyright licensed businesses.
- Furthermore, we question the necessity of requiring two separate cooling off periods and would like to further understand the harm that the Government is seeking to guard against.
- We are also concerned about the layering of renewal reminders and cooling off notices, when sent in closely together. This will be the case for these short-term subscriptions with an initial concessionary period (as referenced in Clause 257 (3)). We foresee this could lead some customers to experience information fatigue, where they become overwhelmed with the information provided to the point, they cease to engage with it. This problem will be more acute for customers with multiple subscription contracts where this layering occurs.
- Furthermore, as with other types of cancellations, the Bill permits notice of cancellation during cooling-off periods to be given “by any means.” As discussed above, this standard will be impossible for traders to effectively implement and has the potential to harm consumers.

- **Clarification on the definition of a ‘subscription contract’.** Clause 246 defines a ‘subscription contract’. We understand that the government intends for the regime to apply only to contracts involving a payment of **money** by consumers and emphasise the need for language to be refined to make this unambiguously clear.

- The effect would be to clarify that ‘paid with data’ products are outside the scope of this new regime and do not constitute ‘money’s worth’ for the purposes of Clause 272 (2)(b). This certainty is especially important in light of consumer protection policy in other jurisdictions (such as the EU) targeting products paid with personal data and the FCA’s inclusion of data volunteered by the consumer in a firm’s fair value assessments. Without this clarification, there is potential for "payment" to be interpreted as “money’s worth” or "consideration" and inclusive of payment with data.

- **Sector-specific provisions** – our pre-draft discussions with DBT have emphasised the need for pragmatic exceptions for specific sectors due to the nature of the goods being delivered. In particular, we emphasise the need to confirm that consumers should not be entitled to refunds for perishable goods if cancelling contracts within cooling-off periods, as this would place unreasonable cost burden on providers of such goods which do not retain economic value in the same way as non-perishable goods. It is our understanding

that this matter is intended to be addressed through secondary legislation (259 Cancellation of subscription contract: further provision), and we request written confirmation from DBT on this issue.

- **Excluded contracts –** clarification is needed on whether services of a 'credit…nature' for the purposes of Schedule 19 includes services centred around data related to credit arrangements, with the effect that these subscription contracts are excluded from this Chapter of the Bill. Relevant techUK members believe the intention is for sectoral provisions in the FCA's Handbook to apply instead to these subscription contracts. We think linking the definition back to the regulated activities in Section 19 of the Financial Services and Markets Act 2000, in the same way that the 'excluded arrangements' definition does, would be sufficient. Clarification to remove this uncertainty would be very welcomed by affected members whose resources are already heavily utilised in delivering the Consumer Duty requirements and navigating the complex overlay driven by the Credit Information Market Study.

- **Implementation timeline** – The Bill does not include a transition period or implementation date for any of the subscription-related requirements. While the Bill does state that a commencement regulation will need to be laid post Royal-Assent, this still creates ambiguity and does not support businesses to properly plan and prepare for the changes they have to make. We recommend there should be a transition period of at least 2 years, which would align with the periods connected to other pieces of legislation that contained substantial new requirements (e.g. GDPR passed in 2016 and came into force 2018).

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