



Professional Contract Drafting for Business

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# Business Law Newsletter

Winter '23 Edition





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## Editorial

As 2023 gets underway, we can't easily ignore the pressures that have built up for business owners and managers.

Everything from keeping customers loyal and well served, to managing cash flow, has taken on much greater significance.

Vigilance is the new password to maintaining stability but gaining momentum and making that much needed investment can be a tough call.

We are also hearing that record numbers of businesses are in financial stress and could fail during the year.

But at C-D, we're staying positive and helping our clients across a variety of trades and industries to get their contracts drafted or altered to meet the challenges ahead.

As usual, our Newsletter is packed with useful and interesting items. We don't pretend to cover all bases, but we do try to profile what we think (and hope) will be helpful, practical and informative for our SME readership.

Our [Winter Contract Tips](#) may look a bit familiar, as they reflect our Autumn tips, but we have added some more.

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## Autumn Statement- key commercial announcements (in case you missed them!)

### Business rates

Within the Statement, Chancellor Jeremy Hunt set out £13.6bn of support that the government will provide to businesses and the high street in the next five years by reducing the burden of business rates.

Bills across England will be updated from 1 April 2023, to reflect changes in property values since the previous revaluation in 2017, and local authorities will be compensated fully for the loss of income from such measures and receive new burdens funding for administrative and IT costs. The business rates measures outlined seek to build on the existing commitment to reform the business rates system by delivering revaluations more regularly to better reflect current market values, and will consist of freezing the multipliers, the transitional relief scheme, retail, hospitality and leisure relief, support small business scheme and improvement relief.

### Multiplier freeze

In 2023–2024, the business rates multipliers will be frozen at 49.9 pence and 51.2 pence, prevented from increasing to 52.9 pence and 54.2 pence, outlined as bringing a £9.3bn tax cut over the next five years to support all ratepayers and reducing bills by 6% compared to without the freeze.

## Transitional relief scheme

The Upwards Transitional Relief aims to support properties by capping bill increases that result from changes in rateable values as based on the 2023 revaluation. £1.6bn of support will be funded by the Exchequer, and in 2023–2024, the ‘upward caps’ will be 5%, 15% and 30%, for small, medium, and large properties respectively, and this will be applied before any other reliefs or supplements. Hunt’s statement noted how these measures will deliver significant reform to the business rates system and respond to key stakeholder views.

## Retail, hospitality and leisure relief

In 2023–2024, eligible retail, hospitality and leisure businesses will receive further support with business rates relief up to £110,000 per business. An estimated 230,000 eligible properties can receive this support worth £2.1bn.

## Supporting small business scheme

From 1 April 2023, a cap of £600 per year will commence for bill increases faced by the smallest businesses losing eligibility or seeing reductions in Small Business Rate Relief (SBRR) or Rural Rate Relief (RRR), estimated to be worth over £500m over the next three years, supporting more than 80,000 businesses. Chancellor Hunt’s statement outlined how no small business losing eligibility for SBRR or RRR will face a bill increase of greater than £50 per month in 2023–2024.

## Improvement relief

The new improvement relief builds on the Autumn Budget 2021 and will be introduced from April 2024, available until 2028, where the government will further review this measure.

## Investment Zones

Chancellor Hunt’s Autumn Statement 2022 outlined how the government will refocus the Investment Zones Programme towards a limited number of knowledge-intensive clusters with the highest potential for growth, and leveraging local research strengths, while also working with local stakeholders to consider the best means to identify and support these clusters. Maintaining high environment standards was further emphasised in driving growth, where the government aims to announce these clusters in the coming months, and any existing expressions of interest will not be taken forward.

## Retained EU Law

The Chancellor also outlined the government’s commitment to reforming and reviewing retained EU law, particularly within key growth industries including digital technology, advanced manufacturing and financial services. The government aims to identify changes, in addition to those already underway, that can take place in the next year with the greatest potential to unlock growth. The government will further task the Government Chief Scientific Adviser and National Technology Officer, Sir Patrick Vallance, to lead work in better regulating emerging technologies, supporting its quick and safe introduction to market, and bringing the best minds together to advise the UK accordingly.

## Digital Markets, Competition and Consumer Bill

Within the Autumn Statement 2022, the Chancellor referred to the government’s intention to advance the progress of the Digital Markets, Competition and Consumer Bill, conferring powers

to tackle anti-competitive practice to the Competition and Markets Authority (particularly the Digital Markets Unit within it) in the relevant markets. This is in an attempt to protect consumers from subscription traps and fake markets as well as boost growth and productivity by increasing competition, thus providing consumers with greater choice and a better quality of products.

### Tariff suspension

The government will impose tariff suspensions, removing tariffs as high as 18% on certain goods, including UK-sourced food ingredients and aluminium for use by UK bicycle manufacturers.

### Online Sales Tax

It has been confirmed that the Online Sales Tax (OST) will not go ahead due to concerns regarding the OST's complexity and unfair outcomes depending on business models. This decision occurred following a consultation, the government's response to which will be published shortly.

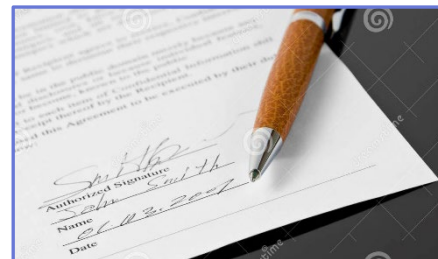
*This article is courtesy of LexisNexis*

## Contracts

### The battle of the forms

It can be real battle to have your business terms and conditions govern the basis of your commercial agreements.

Not being alive to the possibility that, having spent a considerable amount of time, effort and probably cost as well prepping a good set of T&Cs, they simply don't count when it comes to forming a contract, could be prove to be an expensive oversight.



The battle of the forms is all about trying to make sure that your T&Cs prevail when a contract is being formed with the other party.

This is a complex area and fraught with difficulties for the unwary.

Our article on [‘the battle of the forms’](#) explores the ins and outs of this vital area and provides some key insights.

Although there is no guarantee, here are a few general tips to help come out on top in the battle of the forms:

- it's important to have your own bespoke set of T&Cs prepared for your business ready to go when negotiations get under way
- these need to cover all of the key business terms you want and need to support your business (please ask us if you need some help with these)
- include them in any quotation or offer you make for the supply of your products or services

- try to make sure that your T&Cs are clearly drawn to your customer's attention and not hidden away and that they accept them without objection or contradiction
- try not to accidentally accept your customer's T&Cs if presented with them
- faced with being asked to accept your customer's T&Cs, reject them in writing and insist your T&Cs are to apply not theirs
- if faced with an ultimatum to accept a customer's T&Cs or lose the contract, try to negotiate out any terms that are too onerous to accept (we can help with this)

## Incorporating terms and conditions

The High Court has ruled that a set of terms and conditions prepared by a trade association were not incorporated into a contract because, amongst other reasons, there was no written contract between the parties and that an invoice simply referred to the terms and conditions but did not print them on the reverse side or explain where they could be located.

[Read more about the case here](#)

## Express and implied terms

Contractual terms may be either express or implied:

- express terms—are terms which are actually recorded in a written contract or openly expressed in an oral contract at the time the contract is made.
- implied terms—are not stated in the contract but arise 'by implication' to reflect the intention of the parties at the time the contract was made. Terms may be implied by fact, law or custom

For terms to be implied by law, two conditions are required to be satisfied:

- the contract has to be of a common type such that it is possible to identify the usual terms found in such an agreement, and
- the parties must not have addressed the term in any way in the contract as formed.

Some terms are implied into contracts by statute, such as [Sections 10–15A of the Sale of Goods Act 1979](#) and those implied into consumer contracts under the [Consumer Rights Act 2015](#).

Contracts for the sale of goods are subject to four implied conditions:

1. the seller of goods has the right to transfer title in them;
2. the goods will correspond with their description;
3. the goods will be of satisfactory quality and fit for purpose; and
4. where goods are sold by reference to a sample that they will correspond with the sample.

Goods are of satisfactory quality for the purposes of the term implied by SGA 1979, s 14 if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances. The test is objective, that of a reasonable person in the position of the buyer, so that the reasonable buyer has to be attributed with knowledge of all relevant background facts.

Breach of an implied condition gives an affected customer the right to reject goods that do not meet the statutory standards. The right to reject the goods does not apply where the discrepancy is so minor as to make rejection of the goods unreasonable. If that is the case, the condition will become a warranty and only entitle the customer to damages.

The SGA 1979 also implies warranties into a contract for the sale of goods:

- the goods are free from undisclosed charges and encumbrances; and
- the customer will have quiet enjoyment of the goods.

Breach of an implied warranty will entitle the affected customer to damages.

Contracts for the supply of services are subject to Supply of Goods and Services Act 1982 (SGSA) under which certain terms are implied:

- services will be supplied with reasonable skill and care;
- services will be supplied within a reasonable timescale, if a time is not expressly stated in the agreement, and
- where no price is agreed or no mechanism for calculating price is set out in the agreement a reasonable price will be paid.

What is reasonable will depend on the specific circumstances of each case.

It's possible to avoid some terms implied by statute, either by excluding or varying them with express wording in the agreement or by the course of dealing between the parties. A freely negotiated business to business contract will not usually be subject to the Unfair Contract Terms Act 1977 (UCTA 1977). However, attempts to limit or avoid liability for an implied term will depend on whether UCTA 1977 allows this.

Permissible exclusions and limits are subject to a test of reasonableness, the basic requirement for which under the UCTA 1977 is that the term must be fair and reasonable having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties at the time the contract was made.

It is also possible to imply terms into a contract by custom and usage, but only when there is clear and sufficient factual evidence that a custom operates within a trade or industry, will the courts be able to imply a contract term giving effect to the custom.

Absent a contrary intention of the parties, the courts can imply into a contract any local custom or usage provided that it can be shown that the custom or usage normally governs the particular type of contract in question. Such a custom will be regarded as part of that contract in precisely the same manner as if it had been expressly agreed between the parties.

## Signing using electronic signatures

A recent updated note by two [Law Society Committees](#) has been published on the execution of a document using an electronic signature. The note was originally published in 2016 to help parties to a transaction, and their legal advisers, who wish to execute contracts using an electronic signature. The note has been updated to reflect developments since 2016, including the more widespread use of e-signing platforms and changes to the legislative framework.

The note states that the main forms of e-signatures are:



**Typed in name:** a person typing their name into a contract or into an email containing the terms of a contract;

**Inserting a signature image:** a person electronically inserting their signature (e.g. in the form of an image) into an electronic (i.e. softcopy) version of the contract in the appropriate place (e.g. next to the relevant party's signature block);

**E-signing platform signature:** a person accessing a contract through a web-based e-signing platform and clicking to have their name in a typed or handwriting font (or an electronic copy of their wet-ink signature) automatically inserted into the contract in the appropriate place (e.g. next to the relevant party's signature block); and

**Touchscreen signature:** a person using a finger, light pen or stylus and a touchscreen to write their signature electronically in the appropriate place (e.g. next to the relevant party's signature block) in the contract.

[Read more about electronic signatures here](#)

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#### Meaning of Good Faith

A recent Court of Appeal case decided that the duty of good faith definitely does include a duty to act honestly and also goes beyond that and includes a duty not to act in bad faith—meaning a prohibition on ‘conduct that reasonable and honest people would regard as commercially unacceptable, but not necessarily dishonest’.

While this aspect of good faith might seem somewhat vague, the Judge said that it would not be ‘appropriate to try to be prescriptive in describing what conduct might fall into this category’.

*“Agreeing to include a good faith obligation in a contract, parties are introducing a greater degree of uncertainty as to future interpretation of that contract. That uncertainty is always likely to favour the ‘weaker’ party (i.e. the one having rights enforced against it), and act as a potential restraint on the ‘stronger’ party.”* [Read more about the case](#)

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## Company Directors

### Fraudulent Care Home Scheme- Directors banned

Two company directors have been disqualified for a total of 25 years after abusing millions of pounds of investors’ funds in a care home investment scheme.



GCC Management was an unregulated company that offered people the opportunity to invest in the purchase of care homes, with the promise of fixed rate returns of 10% to 30%. Amek Solutions advised on and/or arranged investments in GCC Management.

GCC Management produced misleading and unrealistic marketing materials based on a business plan which lacked commercial viability, there were no mitigation plans to help investors if returns couldn't be made, and the company sent false information to investors about when their returns would be repaid.

Investigators calculated that at least 243 people invested more than £11.6m with GCC Management. 166 of these investors transferred more than £7.8m from their existing pensions. When the company entered into liquidation, investors were owed £13.2m.

[Read about the case here](#)

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### Director's disqualification for accounts failure

In a recent High Court case, the judge held that the sole director of a company should be disqualified from being a director for a period of eight years because he had caused the company to file inaccurate VAT returns and as a result was unfit to be concerned in the management of the company.

He was the sole director of the company and as such had ultimate responsibility for the company's returns.

Company directors are responsible for accurate tax returns being filed on behalf of a company and should take steps to ensure they comply with this obligation.

Directors should therefore:

- ensure that company records are up to date and accurate so that accountants are provided with sufficient information to allow them to provide accurate tax returns; and
- in addition to keeping accurate records, upon request for a legitimate purpose by the likes of an insolvency practitioner deliver up the company's books and records for inspections. It is likely to be more beneficial to both the director and the company if those records are provided promptly.

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## Contract Tips for Winter



### Tip#1 Changing your pricing

In these time financially stressed times, it's not a surprise that many businesses are looking to change their pricing policy.



Where there's a contract in place with a fixed price for a service or product, it's usually necessary to agree a price change with the customer. If you're the supplier, that is usually going to be a price increase or an improvement in payment terms, such as shortening a credit period.

An existing contract may be varied in writing, provided that the variation satisfies the usual requirements for the creation of a binding agreement i.e. offer, acceptance, consideration and contractual intention of the parties.

Consideration can take a number of forms, such as payment of a nominal sum to the customer. But that is not always possible or appropriate. So, other valuable consideration has to be given, such as the abandonment of a legal right, like not pursuing a debt. Where there is no obvious benefit to be given, the contract may need to be varied under a deed.

[Read more about contract variations here.](#)

### Tip#2 Sort out your terms of business

Now is the time to batten down the hatches and get ready for the long haul through the winter.

This means taking some time to check that the right sort of agreements are in place to support your business and give it the best chance of surviving and thriving.

Some examples of what to look out for:

1. Are your written contracts up to date with the commercial terms you are trying to agree with your customers?
2. Check if contracts are coming to an end and if they are renewable or lapse?
3. If renewable, can their terms be improved?
4. Can better terms be obtained by engaging with others?
5. Are your payment terms as tight as the need to be?
6. Have you made sure that you have protected your intellectual property rights?
7. Do you need shorter or longer term agreements?
8. Can you place more responsibility and risk on to your customers?
9. Can you improve your pricing by increasing some of the risk you take?

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### Tip#3 Communicate

This is less contractual and more business sense. But at times of stress and uncertainty, it's best to stay in touch with customers and prospects.

They need to know you are there for them and aware they could be struggling with some very real problems.

Communications are outgoing (yours) and incoming (theirs) and listening ought to take up no less than 50% of your communication time.

Your outgoing messages will help reassure that you are open and ready to adapt if the need arises and they will mean there are no unwelcome surprises for your customers.

## Tip#4 Collaborate

We have said this before and we're saying it again.

Find kindred or complementary businesses and people that will help sustain you and your business and reinforce and improve your offering.

Collaborating with like-minded or complementary people and businesses can improve your own business and help sustain it through difficult times. It is not an admission of weakness and need not lead to a loss of control if you look to collaborate with others.

Joint Ventures can add much needed resources or capacity to your business, at a reduced and affordable cost, and can spread risk.

Speak to us if you're contemplating a Joint Venture, so that we can help you draw up an agreement that will work for both parties. More information can also be found via link in comments.

[Read more about business collaborations \(joint ventures\) here.](#)

## Tip#5 Don't procrastinate

For this Autumnal tip, we look to business mentor and author, [Tara Jackson](#), who offers these helpful prompts to counter the old mantra "*he or she who hesitates is lost!*" in her excellent book "**Embodied Business**" (available through Amazon UK):

- ✓ *"What are you putting off doing?"*
- ✓ *"What are you afraid of happening if you do take action?"*
- ✓ *"What are you afraid of happening if you don't?"*
- ✓ *"Is it something you really want to do? Why?"*
- ✓ *"What do you need to support you and how can you give it to yourself?"*
- ✓ *"Do you still want to take the action now?"*

The long and short of these prompts is not to permit the mantra "*time waits for no man or woman*" overtake you making and taking key decisions and actions.

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## Tip#6 Cash flow management (Don't panic. Plan it.)

With tightening business conditions, we are repeating an earlier message about the importance of managing cash flow.

[Steve Jebson of Business Doctors](#), discusses the steps to be taken in managing cash at times of stress.

We first published this article in April 2020 in response to the COVID pandemic and it is no less relevant today.

Here is just one screen grab from the article [Managing Cashflow](#);

# Survival

## Control the controllables

Focus	Strategy	Action / Tip
Cash Flow Forecasting	<p>Actively manage your cash balance:</p> <ul style="list-style-type: none"> <li>Finalise a 12 week rolling cash flow forecast</li> <li>Include all budget holders</li> <li>Review all revenue, by customer. What is the confidence level against each customers numbers?</li> <li>Instigate a daily cash meeting, hold people to account</li> <li>Share this with your accountant, banks and other key stakeholders – this demonstrates your level of business control</li> <li>Be proactive when asking for payments</li> </ul>	<p><b>For business with stock</b></p> <ul style="list-style-type: none"> <li>Lower stock levels (don't automatically replace what you sell)</li> <li>Reduce to clear old stock (and don't replace)</li> <li>Can you buy from a supplier with longer payment terms (this could be at a higher price?)</li> <li>Can you buy from a supplier with lower minimum order quantity or ask your current supplier to reduce MOQ's to reduce outgoings (this could be at a higher price?)</li> </ul> <p><b>Maximising the cash in the business</b></p> <ul style="list-style-type: none"> <li>Review all customers orders, positions and likely future orders</li> <li>Chase all outstanding cash balances – talk to your customers, check they are going to pay, what is your confidence judgement?</li> <li>Shorten payment days for customers – think about potential early payment discounts?</li> <li>Consider other forms of financing – such as invoice discounting etc</li> <li>Speak to creditors about payment holidays or deferment (HMRC, banks, landlords, suppliers, etc)</li> <li>Limit or freeze all business expenses – develop a simple approval system and limits</li> <li>Are there any assets which you can sell or lease?</li> <li>What government relief / grants can you apply for?</li> </ul> <p><b>ASK ALL STAKEHOLDERS TO HELP – THEY TOO WILL HAVE ISSUES AND HELPING OTHERS CREATES GREAT FUTURE RELATIONSHIPS</b></p>

**Don't panic. Plan it.**



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### Tip#7 Watch your Ts&Cs

With pressure mounting on businesses, it's increasingly important to try to ensure trading is done on terms that are both suitable and acceptable.

Often (too often) we find that a trader has not realised that it has entered into a binding contract that is on the other party's terms and conditions, rather than on its own.

This can come as a nasty shock, especially if those Ts&Cs are onerous and contain provisions that disadvantage the trader who thinks it is dealing on its specially prepared terms.

To help avoid falling into the trap of losing out like this, read our item on ['the battle of the forms'](#).

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### Tip#8 Avoiding tears: 'subject to contract'

If you find yourself in a contract discussion or negotiation, try to be as clear as possible in what you are trying to achieve for your business.

It is never a waste of time to write down the key objectives. There's sometimes a temptation- e.g. time pressure or lack of confidence or bigger counter-party etc- to try to 'wing it', bluff your way to a solution. This seldom works.

Remember to make it clear negotiations are 'subject to contract'- say it in person when on a call or in a meeting and write it on correspondence and emails etc that are exchanged with the other side during negotiations.

Don't agree to or sign anything until you have read the text of the deal thoroughly and satisfied yourself that it's one that you and your business can accept, even if there are compromises that you have had to make.

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## Data Protection- end of year video review

Watch this informative video from Freshfields law from covering data protection developments in 2022 and a brief look ahead to 2023:

<https://www.youtube.com/watch?v=GoOzU1dNJlk>

## E-commerce

### App developers- a new code of conduct

The Department for Digital, Culture, Media & Sport (DCMS) has published a voluntary Code of Practice for app store operators and app developers, following a call for views on app security and privacy interventions. The DCMS received 59 responses, with the vast majority of respondents supporting the introduction of the Code. Under the Code, app store operators and developers will be required to share security and privacy information in a user-friendly way with consumers, put in place a vulnerability disclosure process, allow apps to work even when optional functionalities and permissions are disabled by the user, implement an app vetting process which ensures only apps which meet the Code's minimum security and privacy rules are published on their stores, and ensure developers keep their apps up to date.

[Read the Code of Practise here](#)

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### Email Direct Marketing- ICO fines companies

The Information Commissioner's Office (ICO) has fined a company £125,000 for sending more than 3 million direct marketing emails and text messages without obtaining a valid consent from customers, contrary to [Regulation 22 of the Privacy and Electronic Communications \(EC Directive\) Regulations 2003](#) (PECR).

[Read the ICO's announcement.](#)

The ICO has also fined another company £70,000 for send sending 463,360 unsolicited direct marketing SMS messages, of which 409,468 were delivered, to subscribers who had not consented to receiving them.

[Read the ICO's announcement.](#)

PECR cover several areas:

- ✓ Marketing by electronic means, including marketing calls, texts, emails and faxes.

- ✓ The use of cookies or similar technologies that track information about people accessing a website or other electronic service.
- ✓ Security of public electronic communications services.
- ✓ Privacy of customers using communications networks or services as regards traffic and location data, itemised billing, line identification services (e.g. caller ID and call return), and directory listings.

For further information please see [the ICO's Guide to the PECR](#)

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### Direct Marketing- Guide

The Information Commissioner's Office (ICO) has published detailed guidance and resources on direct marketing to assist organisations to comply with the law and benefit from their direct marketing activities. The ICO recognises that direct marketing plays an essential role in helping businesses grow, but also that it can cause nuisance, harm and distress to consumers. The guidance and resources aim to help businesses use direct marketing to make people aware of new products and services responsibly and legally.

Direct marketing is any type of advertising or promotional material aimed at a particular person. Mass marketing, such as an advertisement in a magazine, isn't aimed at anyone in particular.

The direct marketing rules apply to any type of communication. They'll apply to if you're sending someone information about your latest products, services, fundraising or other campaigns by email or post. They also apply if you're contacting people through social media or calling to ask if they're interested in something you offer.

[Read the ICO's Guidance here](#)

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## Fintech

### UK-Singapore Cooperation

The UK and Singapore have agreed a new MoU boosting fintech trade and cooperation. The FinTech Bridge seeks to support continued growth, investment, and technological innovation in this sector, building on active interest of FinTech players in the areas of payments, RegTech and wealth management.

Andrew Griffith MP, Economic Secretary to the Treasury said:

"The UK and Singapore are among the world's leading jurisdictions for fintech investment – and today's announcement will only accelerate growth and innovation in our respective sectors."

[Read about the bi-lateral Fintech cooperation here](#)

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## Social Media



### Hidden Ads: Principles for Social Media Platforms

The Competition & Markets Authority (CMA) has published its Guidance for social media platforms who have responsibilities under consumer law to prevent and tackle unlawful practices such as hidden advertising, where they are occurring on their services (including sites in 'desktop', 'mobile' and 'app' based formats).

Principle 1 – Inform users that incentivised endorsements are required to be clearly identified as advertising and clearly distinguishable from other content.

Principle 2 – Provide content creators with tools so they are easily and effectively able to label any content as advertising.

Principle 3 – Take appropriate, proportionate, proactive steps and use available technology to prevent hidden advertising from appearing on your site.

Principle 4 – Make it simple for users to report suspected hidden advertising easily and effectively.

Principle 5 – Facilitate legal compliance by brands.

Principle 6 – Enforce your terms and conditions and take appropriate action when violations occur.

The principles outline what the CMA considers platforms should be doing now, based on current market practices and technology. However as new practices and technology develop, it is important that platforms continue to keep their compliance under review. The CMA also recognises that each platform is different, and that platforms may develop ways of complying which are not specified in these principles.

Other Guidance published by the CMA:

#### **Hidden ads: Being clear with your audience**

This outlines how content creators should comply with consumer protection law when endorsing products, brands or services on social media

#### **Business responsibility and social media endorsements**

This provides information on complying with consumer protection law when working with content creators and influencers on social media

- [Social media users set to benefit from new hidden advertising protections](#)
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