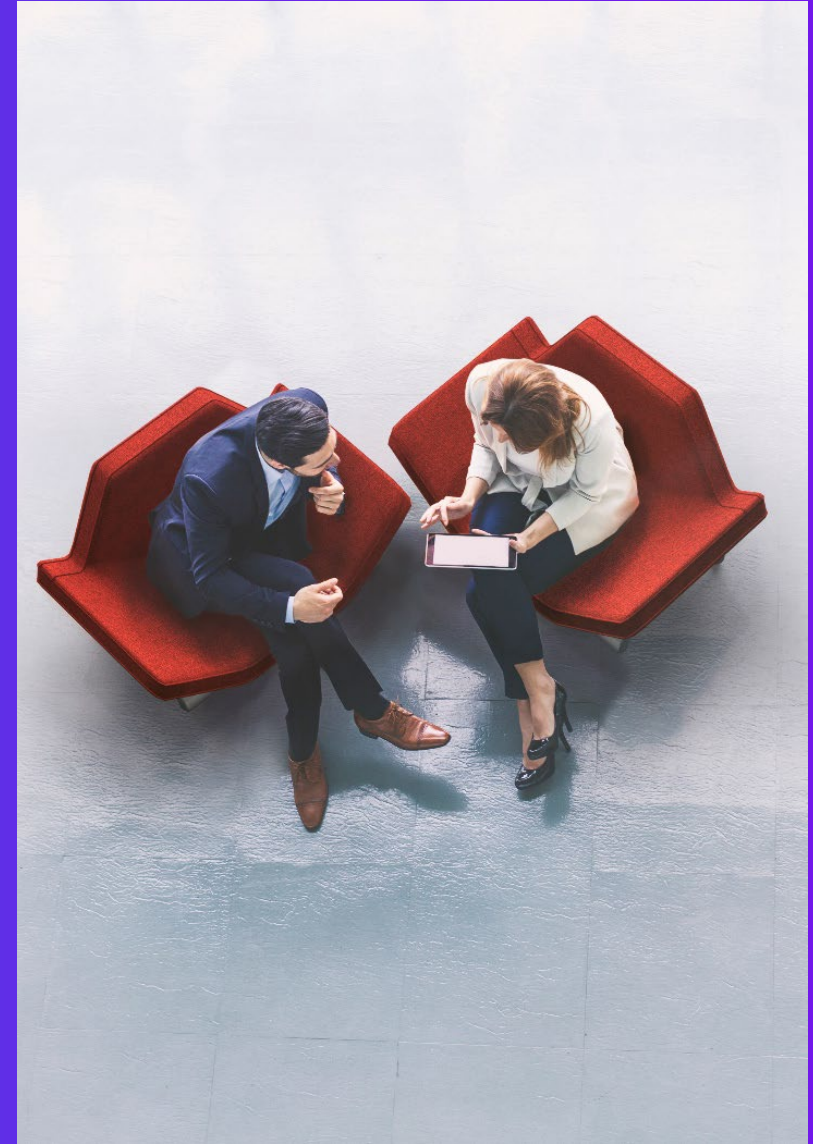




Consumer protection and choice architecture

June 2022



Treating customers fairly

Consumer law – what is it?



Information

What, where and how



Fairness of terms

Are consumers Ts&Cs fair?



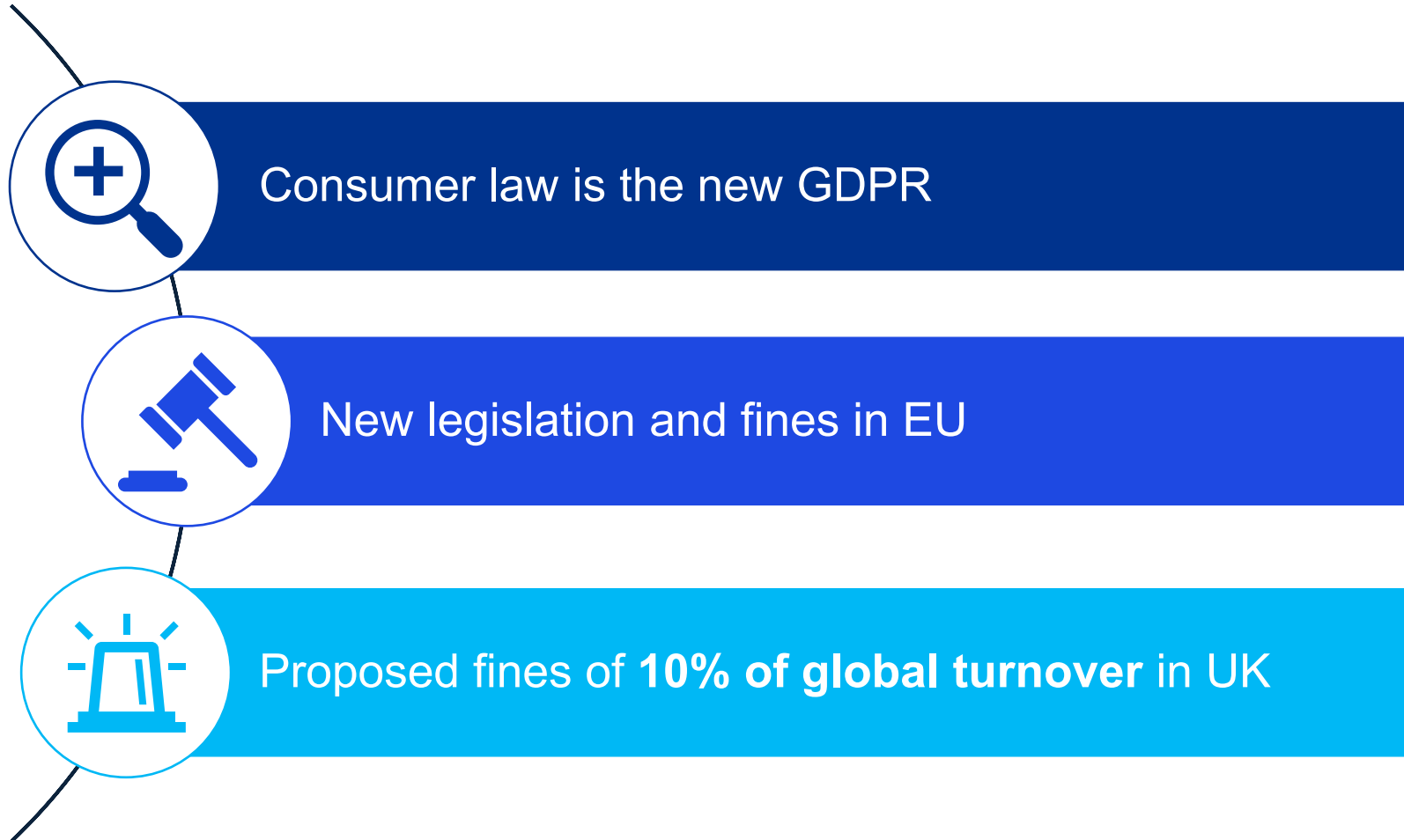
Fairness of practices

Misleading and unfair practices;
contrary to professional diligence

Consumer law in the gambling sector

- **Competition and Markets Authority investigation into online gambling (concluded 2019)**
 - Restrictions on withdrawing funds / dormant accounts / minimum withdrawal limits
 - Unclear requirements and restrictions in promotions
 - Operator discretion to determine “abuse” / “low risk betting strategies” and impose penalties
 - Compulsory publicity
- **Gambling Commission investigations and licence reviews**
 - Recent public statement (February 2022):
 - T&Cs not clear whether an attempt to return a balance is made
 - Right to amend bonus offers when a customer has already signed up
 - Significant conditions of a welcome offer not prominently displayed
- **Targeted UKGC compliance assessments**

Increasing regulator focus and enforcement risk



An increasing area of focus...

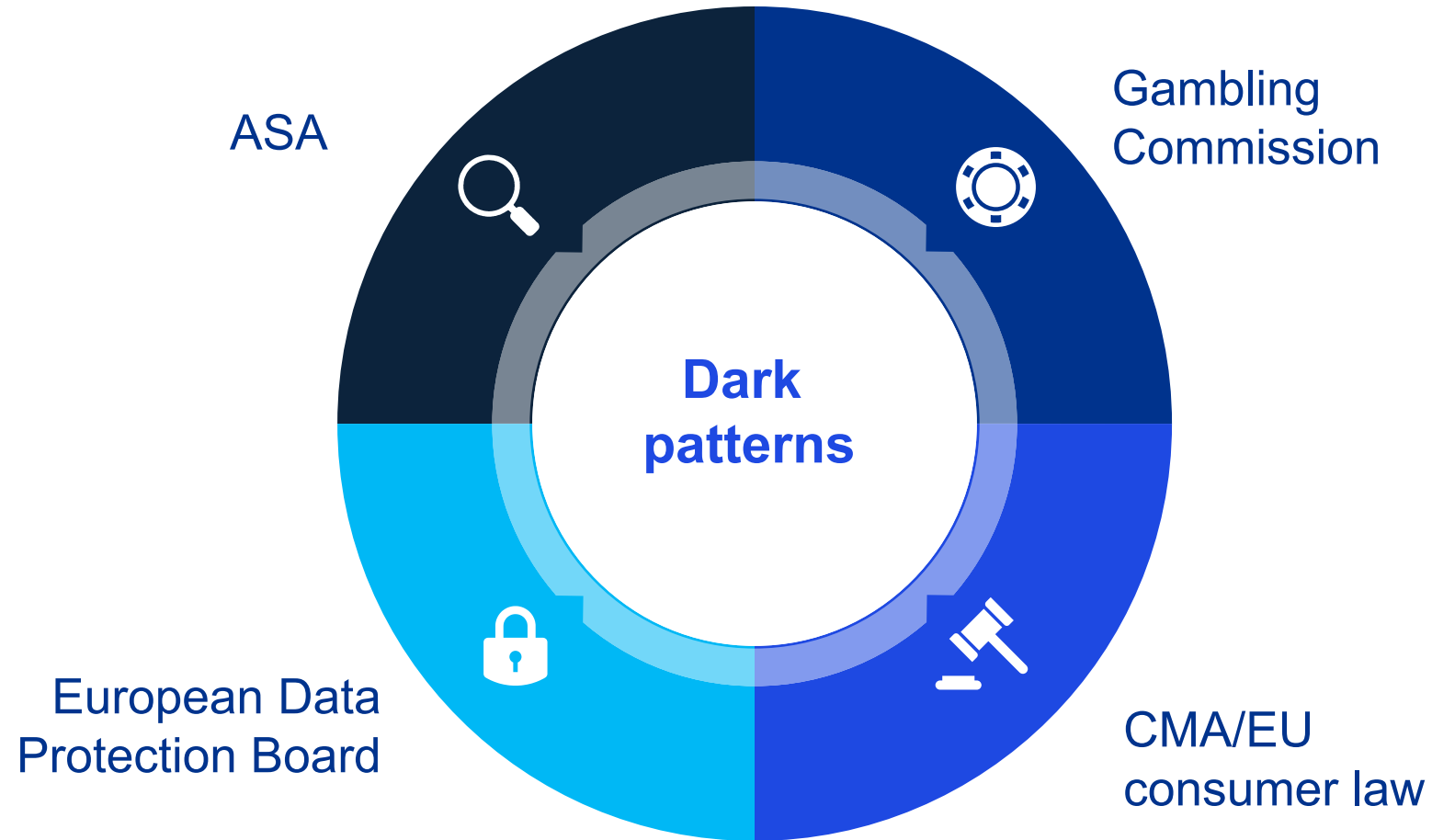


Businesses may design webpages in such a way to nudge consumers towards decisions that they would not otherwise have taken. There is growing evidence of the negative impact of exploitative online choice architecture practices.”

UK Government’s “Reforming competition and consumer policy”



An increasing area of focus



Setting the scene

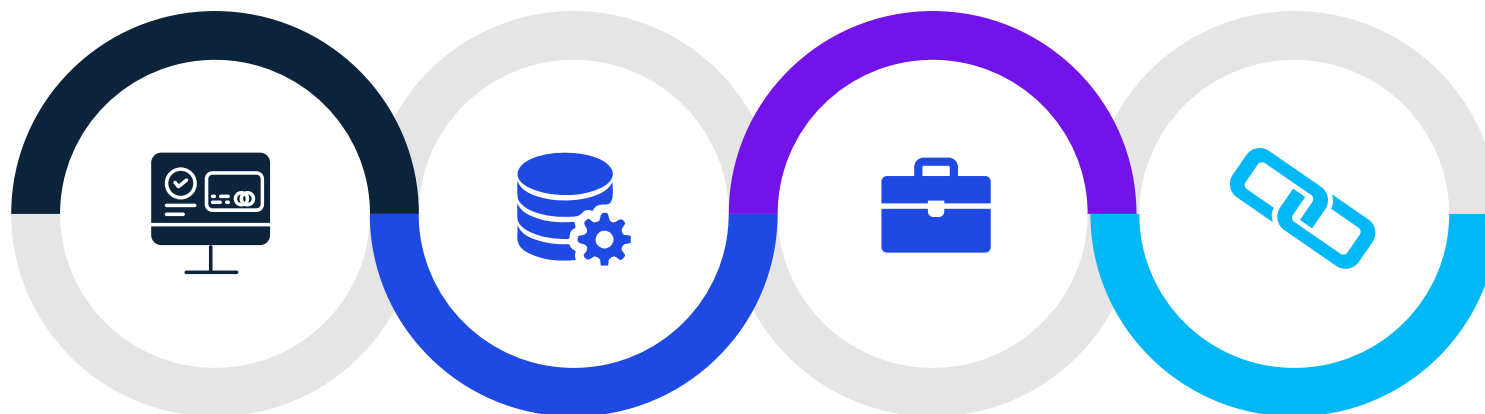
- **Consumers often do not act rationally and are susceptible to behavioural biases**
 - Do not make optimal choices
 - May appear not to have coherent preferences, rely on heuristics
- **This is more than random noise**
 - Systematic biases in decision making by ‘behavioural’ consumers
 - Individuals may be ‘rational’ in one situation and ‘behavioural’ in another
- **Businesses can (and do) exploit these behaviours, non-rationality**
 - Consumers are impacted even they are aware of their biases
- **Experimental evidence is increasingly used to inform policy**
 - “A rapidly growing literature on behavioural economics shows that some errors made by consumers are persistent and predictable...**behavioural economics enables regulators to intervene in markets more effectively.**”
- **Regulator intervention is on the increase**

Emerging thinking – online choice architecture

Online Choice Architecture (OCA) is the design of the online environment where users interact with businesses

OCA design affects our decision making and actions when we browse, compare, play and shop online

There are particular factors that influence users choices online differently compared to offline

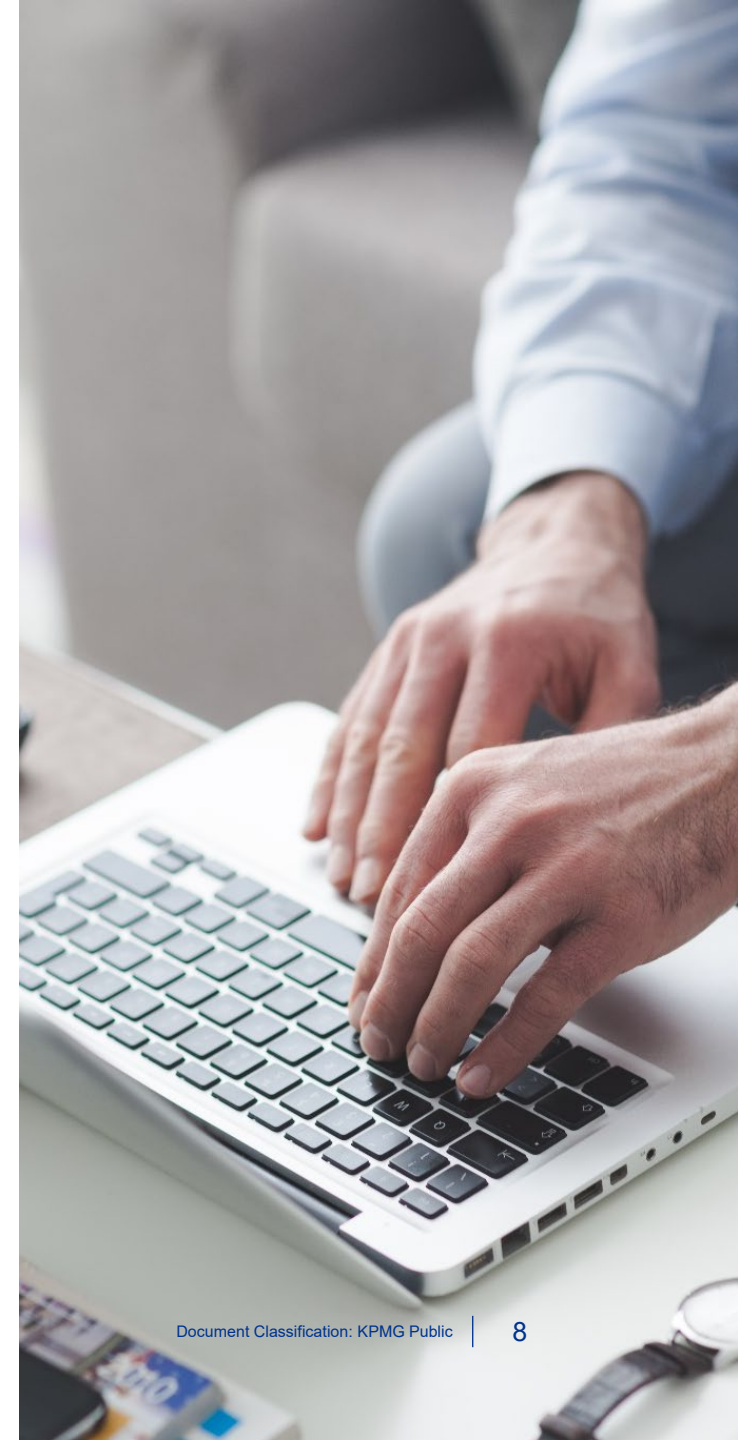


Behavioural biases can be exacerbated online

Impulsive behaviour due to easy access to information and products

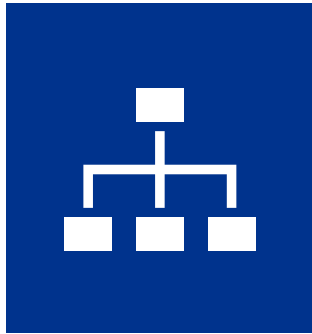
Businesses personalise and optimise interactions with customers

Interlinking online and social interactions, which can be commercialised



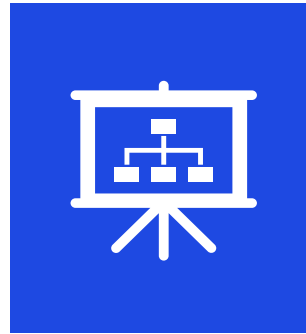
Emerging thinking – online choice architecture

The CMA outlined a taxonomy of 21 OCA practices, categorised into 3 types



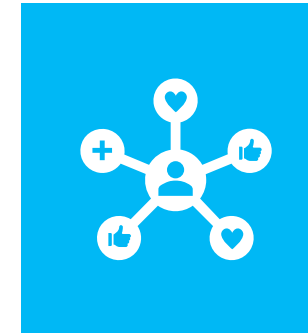
Choice structure

How choices are presented to consumers



Choice information

The information provided to consumers when presenting choices



Choice pressure

How consumers' choices may be indirectly influenced

Disclaimer!

Choice architecture is a neutral term

While there is a wealth of evidence on some of the biases and practices described, there is less evidence on others and even less on how these play out in terms of real-life market outcomes.

Cases will be determined on their merits

Choice structure

Defaults****

Applying a predefined setting that the consumer must take active steps to change

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Ranking***

Displaying the order of options in a particular way

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Presenting individual price components without sharing the total or estimated total costs with the consumer

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Sensory manipulation***

Employing visual, aural, and tactile features to steer consumers towards certain options

Choice structure

Another domain where **dark nudges are especially prevalent** is the gambling industry ... electronic machines optimise each step of the gambler's experience by removing friction from the gambling experience through touchscreen buttons that minimise the physical effort of long gambling sessions with the jump to "remote" online and mobile gambling, gamblers today can overcome physical limitations and bring those activities into the home and on the go **generating a new dimension of gambling harm**

Dark nudges***

Making it easy or removing friction for consumers to make inadvertent or ill-considered decisions. (See Newall 2019 for gambling examples)

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Virtual currencies**

Creating elements of a virtual currency to be used as a substitute for the 'real-world' currency

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Choice overload and decoys***

Providing too many options to compare; adding an option to the choice set to make the other option(s) look more attractive to the consumer

Sensory manipulation***

Employing visual, aural, and tactile features to steer consumers towards certain options

Sludge***

Creating excessive or unjustified friction that makes it difficult for consumers to get what they want or to do as they wish

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Making it easy or removing friction for consumers to make inadvertent or ill-considered decisions. (See Newall 2019 for gambling examples)

Virtual currencies**

Creating elements of a virtual currency to be used as a substitute for the 'real-world' currency

Choice structure examples – sludge

Sludge***

Creating excessive or unjustified friction that makes it difficult for consumers to get what they want or to do as they wish

The CMA's cases so far include 'online gambling, where our concerns included the use of 'sludge' and the potential for bonus promotions to be designed in ways that commit people to repeat wagering'

Correspondence

Joint letter from the CMA and the Gambling Commission

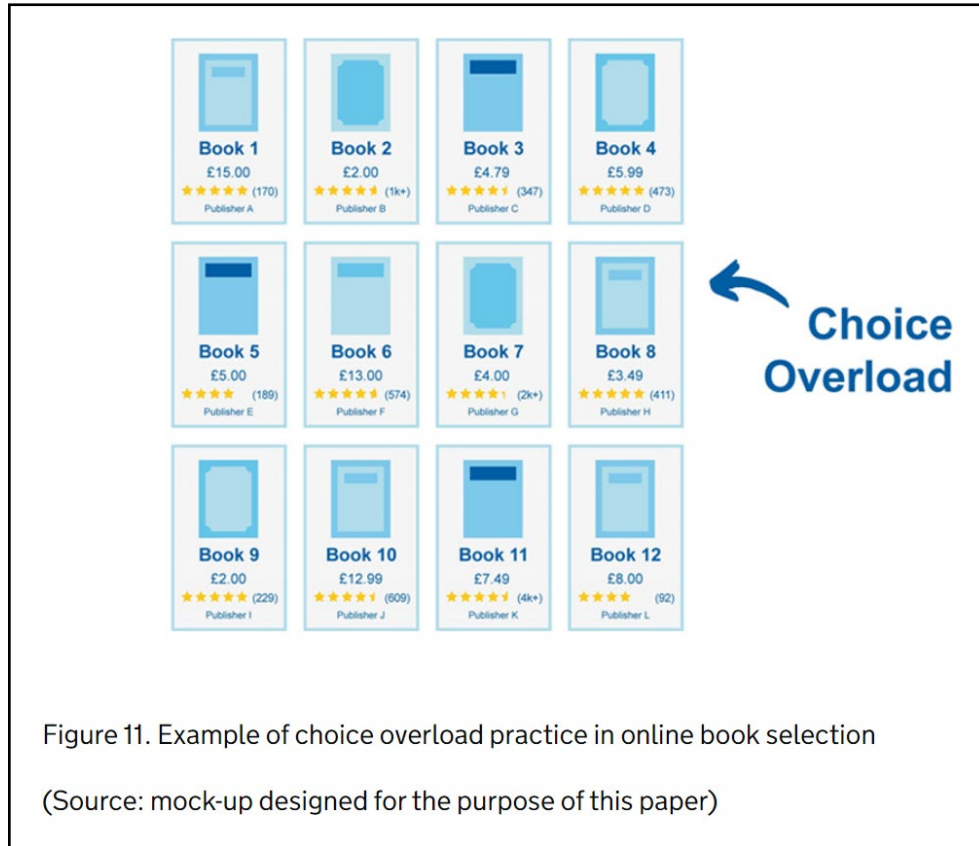
The CMA and the Gambling Commission have published a letter to mark the closure of their joint programme of work in the remote gambling sector.

From: [Competition and Markets Authority](#)

Published 29 April 2019

Sludge is not the same as friction – not all friction is harmful...

Choice structure examples – choice overload



Choice overload and decoys***

Providing too many options to compare; adding an option to the choice set to make the other option(s) look more attractive to the consumer

Figure 11. Example of choice overload practice in online book selection

(Source: mock-up designed for the purpose of this paper)

Choice structure examples – choice overload

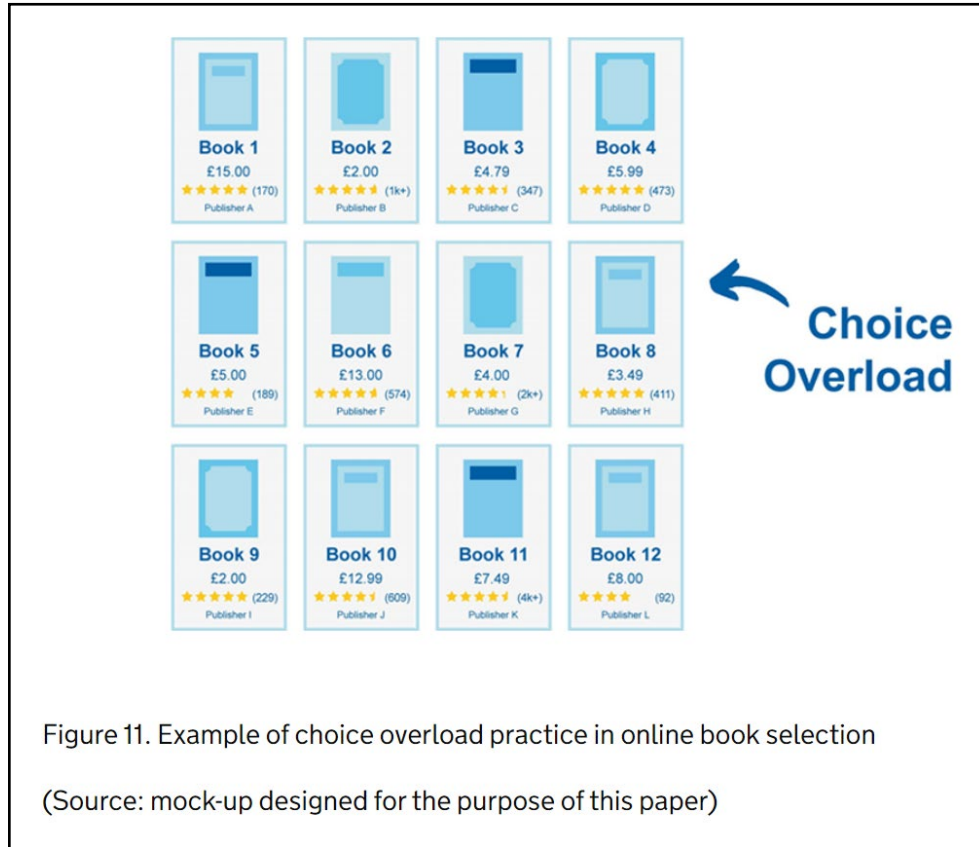
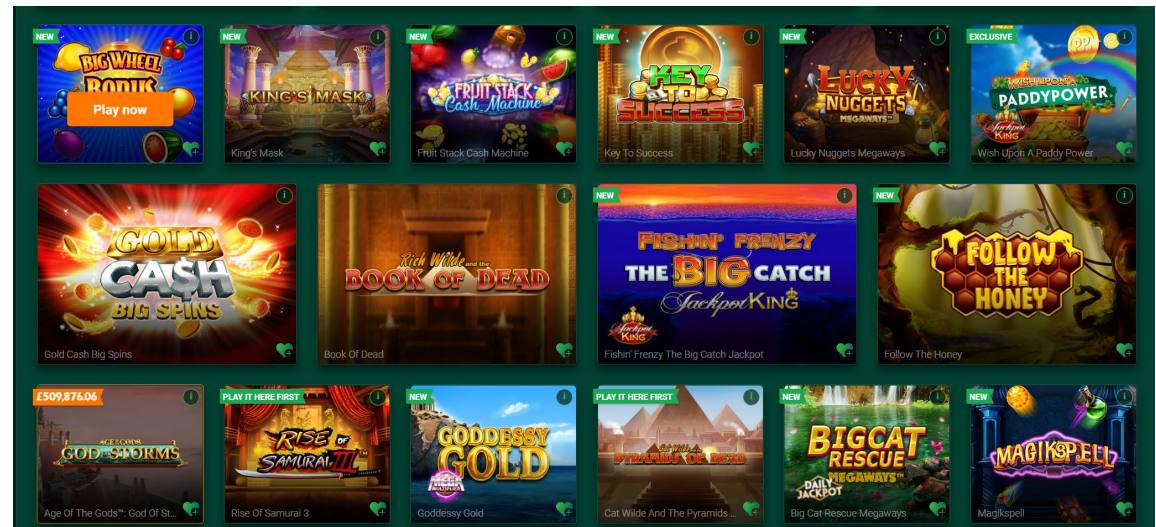


Figure 11. Example of choice overload practice in online book selection

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Providing too many options to compare; adding an option to the choice set to make the other option(s) look more attractive to the consumer



Personalisation as a remedy?

Choice information examples

Drip pricing****

Showing initially only part of the price and revealing the full price of the product or service at later stages of the consumer journey

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Complex language***

Making information difficult to understand by using obscure word choices and/or sentence structure

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Giving a consumer too much information about a product or service such that information about the most relevant attributes is difficult to find and access

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Reference pricing****

Displaying a previous (or future) price with the current price, which makes the current price look more attractive

Framing***

Describing and presenting decision-related information to a consumer in a particular way

Complex language***

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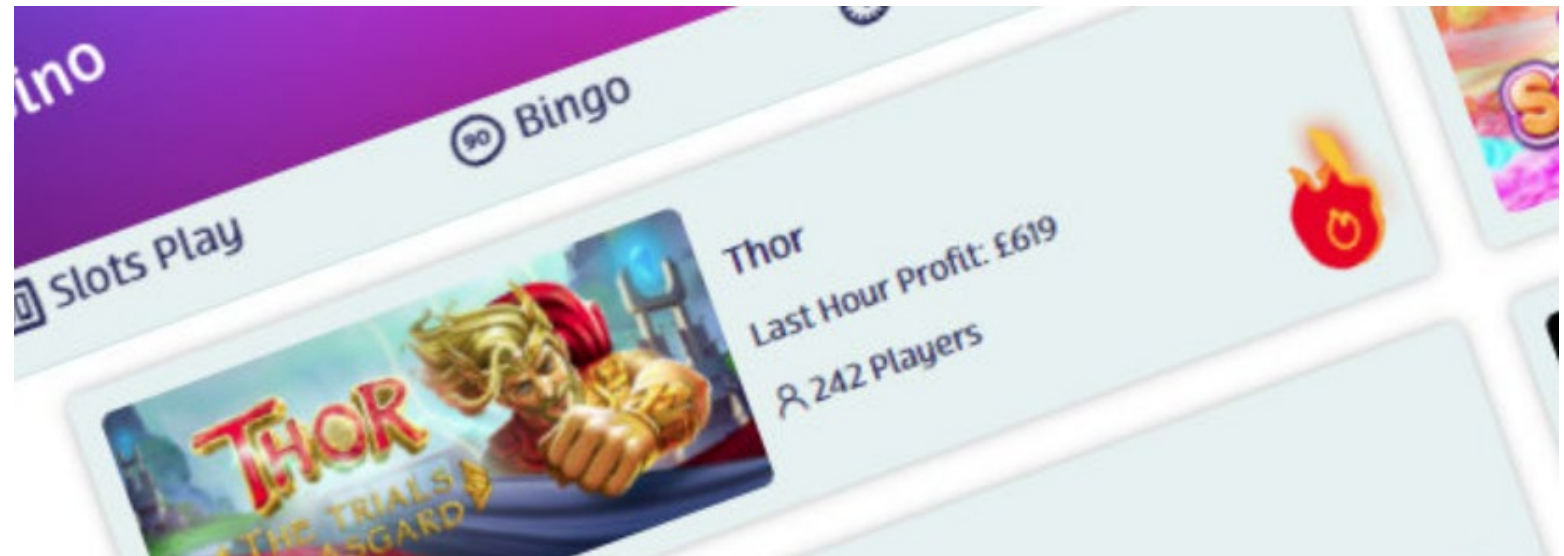
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Choice information examples - framing

ASA Ruling on Skill on Net Ltd

⚠ Upheld in part | Television | 04 May 2022



Framing***

Describing and presenting decision-related information to a consumer in a particular way

Positive framing can help – read across to interaction?

Choice information examples – reference pricing

Reference pricing****

Displaying a previous (or future) price with the current price, which makes the current price look more attractive

Imperative that these are accurate and not misleading

In-Play Price Boosts		1 BOOST ^
	Latest	Boost
Rory McIlroy or Jon Rahm to win Outright	3/1	10/3

Price Boost Round 2		1 BOOST ^
<i>i</i> • Rd 1- McIlroy 67 and Rahm 69. Par 70		
	Latest	Boost
Rd 2 - McIlroy & Rahm both shoot 69 or less	5/1	6/1

Choice pressure examples

Scarcity and popularity claims***

Informing consumers about limited stock, limited time to buy, or high popularity of an item

Prompts and reminders**

Contacting the consumer to induce an action and/or follow up on a previous interaction

Messengers**

Providing a platform on which a specific person or group can communicate with consumers

Commitment**

Facilitating commitment by consumers to a particular behaviour in the future (e.g. bonuses)

Feedback**

Providing consumers with feedback. (e.g. profit and loss as a potentially positive OCA example, LDW as a negative)

Personalisation**

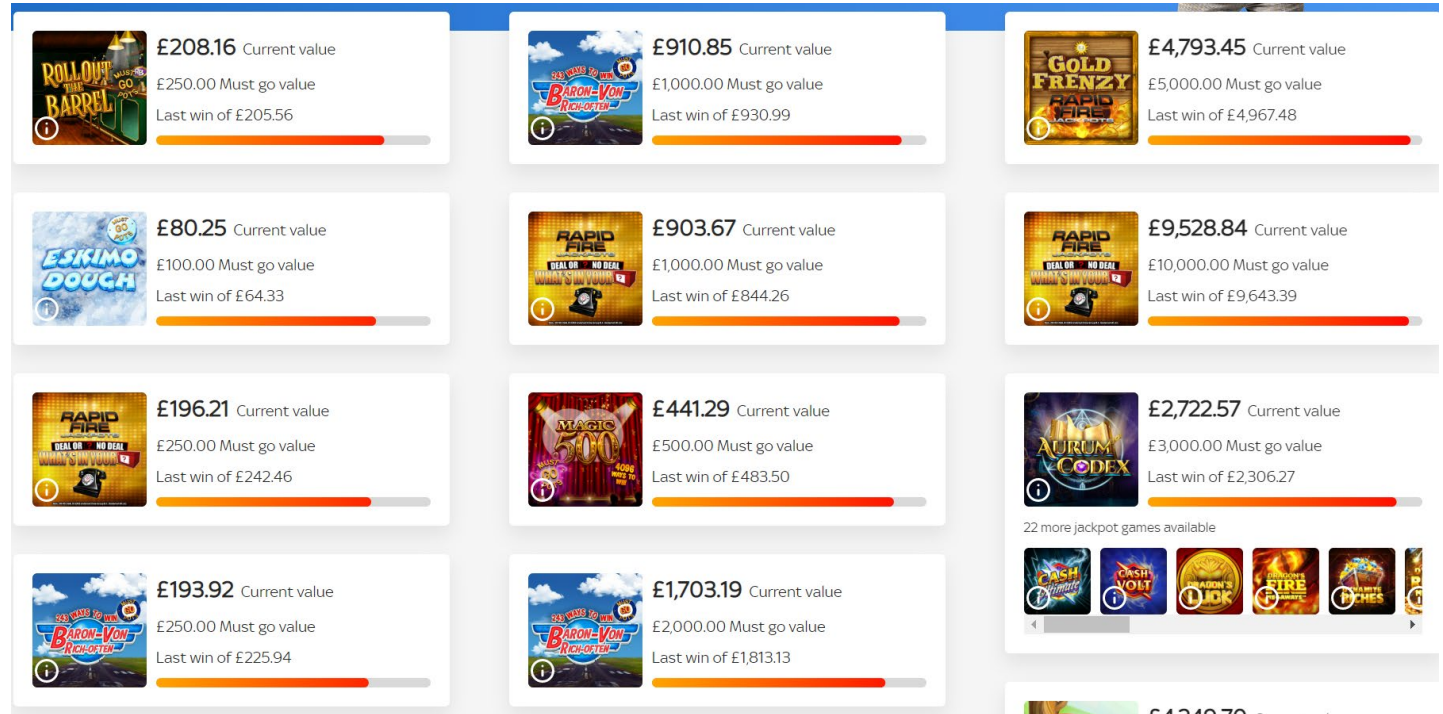
Using data to personalise offers

Choice information examples – scarcity and popularity

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Informing consumers about limited stock, limited time to buy, or high popularity of an item

Reduction in search – pricing implications?



What are Must Drop Jackpots?

Our Must Drop Jackpots are a selection of slots that give you the chance to land one of three jackpots whenever you play.

- **Hourly Drop Jackpot** – must be won every hour
- **Daily Drop Jackpot** – must be won before midnight
- **Big Drop Jackpot** – a popular jackpot that can be won at random

There are tons of Must Drop Jackpots to play. Just head to the jackpots tab and take your pick from a range of top titles and popular games.

OCA – Further considerations

Vulnerability

In certain contexts and markets, OCA practices can disproportionately affect vulnerable consumers due to their personal characteristics or circumstances. Vulnerable customers might also be specifically targeted

“OCA practices used by businesses that rely on repeated engagement, such as gambling or gaming, can be particularly harmful for people at risk of addiction or who are less able to make good decisions, for example, because of age or health”

Algorithms

Algorithms are often jointly deployed with specific OCA practices. While the use of algorithms can benefit consumers, they also may increase the impact of OCA in ways that harm consumers or competition

Moving forward



OCA has already played a role in previous consumer and competition cases in the UK and abroad.



But this role is expected to increase as the CMA learns more about how OCA affects consumers and markets

- Understanding OCA practices will be key to the work of the DMU unit at the CMA.



The CMA has pledged to continue to challenge harmful OCA practices

- And in doing so, it will use the full range of powers and tools, including enforcement cases, as well as guidance to support businesses in ensuring they comply with the law



CMA plans market investigation into mobile browsers and cloud gaming



Conclusions

Don't let consumer law become a blindspot

Increasing scrutiny from multiple regulators & increasing enforcement risk

Consumer law is not just Ts&Cs

Common myth - "it's ok - everyone else does it"

Move to a "compliance by design" approach



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