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High Court's Emma Sleep judgment offers insights into misleading reference prices

Overview

On 30 July 2026, the High Court handed down its judgment regarding an enforcement order sought by the CMA against Emma Sleep (**Emma**) to regulate the company's use of reference pricing as part of its "high price/high discount" pricing strategy.

The High Court rejected the CMA's request for an enforcement order, holding that the CMA's proposed 1:2 fixed volume requirement between full-price and discounted sales was both unworkable and unjustified. The Court found that the CMA's position had failed to take account of factors relevant to the average consumer's perception as to whether the price may be misleading.

This is not the end of the road for the CMA's case against Emma, however. Emma admitted certain infringements during the proceedings, and the parties have been invited to seek to agree an enforcement order that addresses the Court's findings. If they are unable to do so, the Court will determine an appropriate enforcement order based on further submissions by the parties. In the meantime, though, the CMA immediately withdrew its 2024 guidance on retail online mattress sales.

Although the case relates to mattresses, it serves as a useful roadmap for all businesses that use reference pricing in their discounting and promotional activities – particularly for those that use "was / now" advertising. The Court's judgment also comes at a time when the Government is highly focussed on tackling misleading behaviours that impact the cost of living. Most recently, on 9 August, the Prime Minister announced that a consultation will be launched this autumn to curb the use of "was" prices that may mislead consumers.

Case background

This case arose out of a CMA investigation opened on 28 November 2022 into the online selling practices of Emma, a German mattress retailer. The investigation was commenced before the CMA's direct consumer protection enforcement powers came into force under the Digital Markets, Competition and Consumers Act 2024 (**DMCCA**), and so the CMA had to pursue enforcement through the courts under the pre-DMCCA regime.

The CMA expressed initial concerns about the volume of products being sold at their full price and that discounts were not genuine. It also expressed concerns over sales end dates being misleading and Emma's use of "urgency messaging" (including countdown timers).

In August 2024, the CMA issued guidance to the online mattress retail sector on discounting and reference pricing. Reference pricing involves a product being advertised against a higher comparison price, whether backward-looking ("Was £1,000, now £500") or forward-looking (an introductory offer that will later increase in price). Reference pricing can be misleading where the comparison price is not genuine – e.g. where it is artificially inflated to mislead the consumer into believing they are receiving a good deal at the discount offered.

The CMA's guidance established two key requirements for the use of reference pricing – the "duration requirement" and the "fixed volume requirement":

- Under the duration requirement, businesses could not present a reference price unless the product had genuinely been offered for sale at that price for a

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sufficient period (i.e. a period no shorter than that of the discounted price).

- Under the fixed volume requirement, businesses had to have sold at least one product at the reference price for every two products sold at the discounted price, i.e. a 1:2 ratio.

Following the publication of its guidance, court proceedings were commenced by the CMA against Emma.

In May 2026, the strand of the case relating to Emma's use of countdown timers, high demand messages and discount claims was resolved by consent order, with Emma acknowledging these infringements and undertaking not to repeat that conduct.

That left one outstanding issue: Emma's use of "reference pricing". Whilst Emma was willing to accept the duration requirement in the CMA's guidance, the parties' positions diverged on the legitimacy of the fixed volume requirement.

High Court's rejection of the fixed volume requirement

In defence of the fixed volume requirement, the CMA argued that if only a small fraction of sales are ever made at the higher reference price, that price cannot be a genuine reflection of value, and advertising a discount against it necessarily misleads consumers into thinking they are getting a better deal than they really are. The CMA's proposal included a number of "safety valves", such as a special provision for clearance sales, and a 15% margin of error intended to protect Emma from an unintentional breach. Emma argued instead that the fixed volume requirement went beyond the legislative requirements that its pricing not be misleading or unfair.

The High Court rejected the CMA's arguments in favour of a fixed volume requirement, focussing on the following key reasons:

A fixed ratio ignores the perspective of the average consumer. The Court noted that the "touchstone" of "misleading action is the perception of the average consumer" – someone reasonably well-informed, reasonably observant and circumspect. The Court reasoned that such a consumer is not "entering a competition to beat other consumers" by paying less than a given proportion of the market; their decision about whether they are getting a good deal does not turn on how many other people bought at the reference price. The Court also accepted that consumers in the market for a mattress are generally able to compare prices and even delay their purchase until they find a deal they are willing to accept (i.e. it is rare that a mattress purchase is urgent).

Subjective belief matters. The CMA framed its case as one that did not depend on Emma's state of mind – i.e. it was irrelevant whether Emma believed it could sell products at the higher reference price. The mismatch between sales volumes was sufficient on its own. The Court disagreed, concluding that an average consumer would care whether the retailer genuinely believed its reference price was competitive and capable of generating sales and therefore may be misled if the seller presented a price without such a belief.

Unclear what the "right" ratio should be – or whether it would capture illegal conduct. The Court illustrated its hesitancy imposing the fixed volume requirement with a simple hypothetical: Emma lists a mattress for sale at £1,000 but sells zero (or very few) units. Emma learns that a competitor sells a similar product for £800, which prompts Emma to discount its product to £750, and sales begin to pick up quickly. On the CMA's logic, every subsequent buyer at £750 would have been misled by the higher reference price, but the Court held this was unrealistic. Well-informed consumers using price comparison tools would simply decline to buy at £1,000 in the first place and would feel their patience vindicated once the price dropped. The Court was also concerned that a 1:2 ratio may not be appropriate given Emma's own admitted breaches involved far more extreme ratios, in one case, roughly 1:50,000. Emma had also submitted evidence that when it previously tried to comply with the 1:2 ratio, its revenue fell 40-60% in a single quarter. The Court ultimately considered that imposing a blanket 1:2 ratio risked "drawing the line in the wrong place".

Safety valves could not cure a flawed starting point. The CMA suggested its proposed safeguards would prevent unfair enforcement, but the Court disagreed. The underlying premise that a preponderance of discounted sales alone establishes a breach was itself unsound, and that layering safety valves onto an unsound rule does not fix it.

Proportionality. Although this matter proceeded under the pre-DMCCA court enforcement model, the DMCCA regime still influenced the Court's reasoning. The Court noted that a breach of an enforcement order under the DMCCA carries serious consequences, including turnover-based fines and potential criminal penalties. Given the uncertainty over whether a breach of the fixed volume requirement ratio would even constitute an actual infringement, the Court considered it disproportionate to make an enforcement order that would expose Emma to those enhanced sanctions in the event of a breach.

The Fallout: CMA's withdrawal of 2024 guidance and practical takeaways for businesses

In response to the Court's judgment, the CMA immediately withdrew its 2024 guidance. The withdrawal is temporary while the CMA considers the impact of the judgment – we will be monitoring closely for updates on whether the guidance will be reinstated, and if so, what revisions may be made.

The judgment provides helpful insights to all businesses, and not just those in the mattress sector, into the use of reference price discounting, introductory offers, or other reference price-related advertising that will likely influence future CMA enforcement strategy and the types of evidence it seeks.

For businesses, there are several practical takeaways:

- **Have a genuine belief in the reference price (and document this).** A sincere and reasonable belief that a price is realistic and achievable was influential in the Court's reasoning. The CMA chose not to address Emma's subjective belief in their prices as part of its arguments to the Court; however, given the Court's commentary, evidence of a company's subjective belief could have important probative value in an enforcement scenario. Businesses should be able to evidence how reference prices are set – e.g. by reference to competitor pricing, product cost, or market positioning, and should evidence that they anticipate making significant sales at a particular price.
- **Reference price duration matters**. In reference to the hypothetical above (where a vendor makes no (or very few) sales at the higher reference price), the Court acknowledged that the £1,000 reference price becomes more misleading the longer it is used. The time during which a price remains fixed as the 'reference' or 'discounted' price is relevant to its sincerity – and therefore whether it is misleading.
- **Sales volume at the reference price is still relevant**. The Court confirmed that a low proportion of sales at a headline reference price can be a red flag, albeit not determinative of a breach. Sales for certain Emma products included extreme ratios between the reference price and the discount. Although the Court was unwilling to create a fixed volume ratio of sales as part of the enforcement order, it left open the possibility that a lopsided ratio may be indicative that the reference price is misleading.
- **Market context also matters**. The Court acknowledged the market context in which Emma sells its product – i.e. mattresses are a high-value, infrequent, and considered purchase. Consumers considering purchasing a mattress are generally well-informed, compare prices, and are ordinarily in a position to delay a purchase while they wait for the right price. Businesses should assess their own pricing strategy in the context of the market in which they operate and the behaviour of consumers in that market.

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