The UK Digital Markets, Competition & Consumers Bill: should businesses reassess their approach to compliance with consumer laws?

Felicity Forward, Principal Associate, and Matt Ward, Senior Associate, at Shoosmiths LLP, look at how forthcoming new consumer protection laws may lead some companies to take a fresh look at how they do business

Historically, many businesses have taken a risk-based approach to consumer law compliance, rather than following the letter of the law. This approach is typically driven by a perceived low risk of being found to be non-compliant, visibly slow enforcement action, and insufficient deterrence.

The UK Digital Markets, Competition and Consumers Bill (the "Bill") may lead those businesses to reassess their approach. The Bill establishes new consumer rights, introduces new powers to safeguard consumers, and hands the courts and the Competition and Markets Authority (the "CMA") new powers to take action against bad business practices more quickly. The Bill's most attention-grabbing provisions are the new powers allowing the courts or the CMA to impose monetary penalties at a similar level to those currently reserved for breaches of data protection laws.

Sarah Cardell, Chief Executive of the CMA, has described the Bill as having the potential to be a "watershed moment" in the way that consumers are protected in the UK. Could the Bill also be a watershed moment in the way that businesses approach compliance with consumer laws?

This article explores the provisions of the Bill relating to subscription contracts, fake reviews, drip pricing and enforcement powers, before advising on some of the measures that business can take now to prepare for the Bill coming into force, and, finally, assessing whether the Bill is likely to see a sea-change in the way businesses approach consumer law compliance.

The current rules and approach to enforcement

The majority of rights and protections for consumers within the UK are rooted in the Consumer Rights Act 2015 (the "CRA"). The CRA is supported by the Consumer Protection from Unfair Trading Regulations 2008 (the "CPUT") and the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (the "CCRs").

The main provisions of the CRA came into force on 1 October 2015. The CRA sets out consumers' statutory rights in respect of contracts for goods, services and digital content supplied by a trader (such rights become terms of the contract), and the consumer's remedies if these rights are not met. The CRA imposes a fairness test, a requirement for transparency of all written terms, and includes a grey list of terms likely to be unfair.

While the CRA deals with miscellaneous and general matters, including enforcement, its provisions confine the CMA to encouraging and raising compliance across certain "problem" markets, rather than giving it the authority to tackle issues with specific traders head-on. The watchdog can bark out orders for businesses to provide certain information, sniff-out breaches by undertaking investigations, and guard against businesses using unfair terms by seeking injunctions to stop businesses using them. The CMA does not currently have the authority to impose sanctions with real bite, such as a power to impose a civil fine for breaches of consumer laws, although it can bring civil or criminal enforcement action in the courts in respect of infringements of the CPUT.

The CMA's current approach to enforcement is to avoid burdening businesses with the costs of unnecessary interventions. The regulator tends to reserve enforcement action for breaches of the law that point to systematic market failures, instances where it believes that there is a strong need for deterrence or to secure compensation for consumers, or where it is seeking to change the behaviour of one business as an example to others in a particular market.

While the existing laws provide consumers with some strong and well-accepted statutory rights, the enforcement approach is to focus on specific market sectors and then guide the behaviour of would-be flouters in that sector by taking action to set a precedent or put a line in the sand, rather than to pursue each and every non-compliant business.

New regime for subscription contracts

The impact of the Bill upon businesses that offer products on a subscription basis, from streaming services and software subscriptions to food boxes and gym memberships, is likely to be significant.

Subscription contracts, as defined in the Bill, are contracts between a trader and a consumer for the supply of goods, services or digital content that renew or continue automatically, whether for a further fixed period or indefinitely, and commit a consumer to recurring payments, unless the consumer takes steps to terminate the contract. For the purposes of the Bill, a "trader" means a person acting for purposes relating to their business or a person acting in the name of, or on behalf of, a person for purposes relating to that person's business. A "consumer" means an individual acting for purposes that are wholly or mainly outside the individual's business. The meanings of these terms are in line with existing consumer laws.

"The Bill (imposes) additional obligations on businesses that offer subscription contracts while also handing consumers rights to exit such contracts more easily"

The Bill seeks to tackle "subscription traps". Subscription traps involve a consumer unwittingly entering into a subscription contract as a result of a trader advertising a free trial, a reduced price offer, or an apparent one-off purchase, but, instead, finding themselves entering into an ongoing contract if they do not cancel the trial or offer within a set amount of time. The Bill addresses these types of arrangement by imposing additional obligations on businesses that offer subscription contracts while also handing consumers rights to exit such contracts more easily. The most significant provisions in the Bill relating to subscription contracts are:

New duties to provide information

The Bill introduces new duties on businesses offering subscription contracts to ensure that they provide specific information before the consumer enters into a contract. Key pre-contract information traders will be required to provide to a consumer before they become bound by the contract includes:

1. for subscription contracts without a free trial period:

- the fact that the contract will continue, or continue for a fixed term, unless the consumer takes steps to bring the contract to an end;
- any minimum periods that apply before the consumer can bring the contract to an end;

2. for subscription contracts involving a free trial, reduced price offer or similar:

- the fact that the consumer will be charged, or be charged at a higher rate, unless the consumer takes steps to bring the contract to an end;
- the date on which the consumer will become liable for the first charge, or first higher charge;

3. for all subscription contracts:

- the fact that until the contract comes to an end, the consumer will continue to incur liabilities under the contract;
- the frequency with which the consumer will become liable for payments under the contract;
- the minimum amount that the consumer will become liable for on each occasion (or how that amount is to be calculated if the amount cannot reasonably be calculated in advance) and (if payment frequency is not monthly) the amount that the consumer would become liable for each month if payment fell due monthly;
- the minimum total amount for which the consumer will become liable under the contract;
- whether the contract permits changes to the frequency or amount of payments and any options the trader has to change these;
- the amount of notice the trader will give the consumer before any renewal of the contract (or when another reminder notice is due);
- a summary of the consumer's right to cancel the contract during an initial cooling-off period; and
- the steps the consumer must take to bring the contract to an end and the amount of notice that must be given to do this.

This information must be provided to consumers as close in time to entering into the contract as is practicable, provided together, and given separately from any other information.

The requirement to provide key pre-contract information is a separate and additional requirement to the obligation on traders to provide consumers with full pre-contract information. The second requirement relates to more general information comparable to that which traders are already required to provide to consumers under the CCRs.

Obligation to make payment

A further duty placed on businesses is that they must obtain express acknowledgment from consumers that the subscription contract imposes an obligation to make payment, for example, via a tick box on screen. This acknowledgment must be the final step which the consumer is required to take to enter into the

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contract. Failure to obtain the acknowledgement will result in the consumer not being bound by the subscription contract.

Reminder notices

Businesses must send reminder notices to consumers where a free or discounted trial (known in the Bill as a "concessionary period") is ending, or where a renewal payment will become due. Reminder notices must include certain prescribed information, including:

- that the consumer will become liable for a renewal payment unless they take steps to bring the contract to an end;
- the date on which the consumer will become liable for the renewal payment and its amount;
- the amount and frequency of any further payments which the consumer will become liable for after renewal;
- the minimum total amount the consumer will become liable for if the contract is renewed;
- details of any price increase in comparison to previous renewal payments; and
- details of how the consumer can exit the contract if they wish to do so.

Reminder notices must be sent within the period specified by the trader in the key pre-contract information. Subscription contracts that renew for a period of 12 months or more require two reminder notices. The notices have to be sent separately from any other information.

Straightforward cancellation process

The Bill obliges businesses to provide a straightforward way for consumers to exit subscription contracts, without them having to take any steps which are not reasonably necessary for bringing the contract to an end. Prior to House of Lords Report stage, the requirement on the trader to make arrangements to enable a consumer to exercise a right to bring a subscription contract to an end was more onerous; the trader had to allow a consumer to do so via a single communication.

The Bill also specifies that, for subscription contracts entered into online, consumers must be able to exit the contract online and businesses must ensure that instructions for doing so are displayed online in a place or places that a consumer seeking to end the contract is likely to find them. On cancellation, the trader must give the consumer a notice acknowledging that the contract has been cancelled and refund any overpayment received from the consumer. The Bill does not state when the refund of an overpayment must be made. Instead, the Bill reserves a power for the Secretary of State to set a time period in future regulations.

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Cooling-off periods

The Bill requires traders to offer consumers a penalty-free right to cancel a subscription contract during an initial cooling-off period. The initial cooling-off period begins with the day the contract is entered into and ends:

- in the case of a contract where the trader is supplying goods, 14 days following the day after the day on which the consumer receives the first supply of goods under the contract; or
- in any other case, 14 days beginning with the day after the day on which the contract was entered into.

Consumers also have a 14-day cooling-off right to cancel a subscription contract (regardless of how the contract was formed) after the consumer becomes liable under the contract for a first renewal payment following the end of a concessionary period, or after each renewal where the contract auto renews for a year or more. Consumers can give notice of cancellation by any means simply by making a clear statement setting out their decision to cancel the contract. Where a consumer exercises their cooling-off rights, their liability for payments ceases and they may be entitled to a refund. A consumer's entitlement to a refund will depend on the information set out in the trader's cooling-off notice, which the trader is required to provide in relation to each cooling-off period.

Certain types of contracts will not be covered by the new rules for subscription contracts. Contracts for the supply of certain utilities, financial services, medical prescriptions, services regulated by Ofcom, rent of residential accommodation, and regular deliveries of food and drink by small businesses are excluded from the regime.

Tackling fake reviews

An additional important part of the Bill is its provisions for tackling fake reviews. The government is concerned that there has been an increase in traders submitting

or commissioning fake product reviews in order to benefit their own business, resulting in a deterioration in consumer confidence.

The Bill itself did not originally include any express prohibitions or controls on fake reviews, with the government, instead, content to include a power to add to, amend and delete the list of commercial practices that are automatically banned under CPUT.

However, following consultation, the Bill was amended to add a number of commercial practices to the list of banned practices. The consultation asked 171 respondents for their views on whether certain practices related to fake reviews should be added to the list of commercial practices that are automatically banned under CPUT. Eight out of ten respondents agreed that each of the proposed commercial practices should be added to the banned list. The banned list of commercial practices relating to fake reviews that will now in all circumstances be considered unfair are:

- submitting, or commissioning another person to submit or write:
  - ◊ a fake consumer review; or
  - ◊ a consumer review that conceals the fact it has been incentivised;
- publishing consumer reviews, or consumer review information, in a misleading way;
- publishing consumer reviews, or consumer review information, without taking such reasonable and proportionate steps as are necessary for the purposes of:
  - ◊ preventing the publication of:
    - ♦ fake consumer reviews;
    - ♦ consumer reviews that conceal the fact they have been incentivised; or
    - ♦ consumer review information that is false or misleading, and
  - ◊ removing any such reviews or information from publication.

The Bill also prohibits offering services to businesses for doing or facilitating to be done anything covered in the practices summarised above.

The Bill clarifies the meaning of a "consumer review" by defining the term as a review of a product, a trader or any other matter relevant to a transactional decision. The amended Bill also defines a "fake consumer review" as a consumer review that purports to be, but is not, based on a person's genuine experience.

Further, the amended Bill provides examples of a business publishing in a "misleading way". These examples include: failing to publish or removing negative consumer reviews whilst publishing positive ones; giving greater prominence to positive consumer reviews over negative ones; or omitting information that is relevant to the circumstances in which a consumer review has been written.

By banning these practices, the Bill seeks to create a legal framework that holds businesses accountable for the integrity of reviews on their platforms so that consumers can trust the authenticity of the reviews they read online. The changes will have significant implications for online traders (even the good ones) that allow their customers to leave reviews on their websites, as well as third party platforms that publish reviews, as they may fall into the practice of publishing or providing access to a fake review simply by reason of hosting that review.

Traders will owe a legal duty to consumers to take reasonable and proportionate steps to ensure that reviews are genuine. Whilst it is still uncertain what these steps will be for businesses, it is likely that they could include third party moderation or cross-checking reviews against purchase records.

The government has said that it will work with the CMA to publish guidance to explain the law and set out what 'reasonable and proportionate' steps traders will be expected to take to remove and prevent consumers from encountering fake reviews. The CMA is expected to consult on this guidance before it is finalised.

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Drip pricing

The Bill, as amended at House of Lords Report stage, now includes measures to address drip pricing.

Drip pricing occurs when consumers are initially presented with a base price for a good or service, but additional fees and charges are gradually revealed as they progress through the purchasing process. This practice can be seen to undermine price transparency and make it difficult for consumers to make informed decisions about their purchases.

When and how the price must be communicated to consumers is already subject to significant regulation, including under CPUT, which controls the provision of false or misleading information about prices. In particular, traders must not provide false information or deliver an overall impression that deceives (or is likely to deceive) a consumer about the price (including how it is set), even if the information is factually correct.

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The Bill builds on these existing rules by making the omission of material information, including the total price of the product, from an invitation to purchase, such as an advertisement or online product page, a separate unfair commercial practice. Traders will need to provide consumers with information that the average consumer would require to make an informed transactional decision.

In addition to providing the consumer with the total price of the product, the new rules will mean that traders will need to tell consumers about any freight, delivery or postal charges, including any taxes, not included in the total price of the product but which the consumer may choose to incur right at the start of the purchasing process.

If the total price of the product cannot reasonably be calculated in advance, then the trader must tell the consumer how the price will be calculated. Where additional charges or taxes cannot reasonably be calculated in advance, the trader must tell the consumer that they may be payable.

The requirements are designed to ensure that businesses make clear any fixed mandatory fees in their headline prices, which means the total price of the product including fees, taxes, charges or other payments that the consumer will necessarily incur if the consumer purchases the product, displayed at the start of the consumers' purchase journey. Variable mandatory fees, such as delivery fees, are also considered to be compulsory charges. However, as these may not be reasonably calculated in advance, traders must instead make clear, alongside the headline price, that variable fees will be added and provide detail as to how such fees will be calculated.

By way of example, fixed mandatory fees will include VAT or booking fees for cinemas and train tickets, whilst discretionary optional fees, such as airline seat and luggage upgrades for flights, will not be included under these measures.

Traders should note that the unfair commercial practice of omitting material information from an invitation to purchase under the Bill allows for consideration of 'any limitations resulting from the means of communication used in the commercial practice (including limitations of space or time), and any steps taken by the trader to overcome those limitations by providing information by other means'. Enforcers will, therefore, take account of the medium via which pricing information is displayed to consumers when assessing whether there has been a failure to provide information on mandatory fees to consumers up-front.

Enforcement: what could happen if businesses get things wrong?

The Bill grants significant new enforcement powers to the CMA and the courts. The courts and the CMA will be able to award compensation to consumers and directly impose monetary penalties for breaching consumer laws. The headline monetary penalties that the CMA or the courts will be able to impose are:

- a penalty of up to £300,000 or, if higher, 10% of global turnover for breaches of core consumer protection laws;
- a penalty of up to £150,000 or, if higher, 5% of global turnover, for breaching without a reasonable excuse an undertaking given to the court or a consumer protection enforcer. The courts or the CMA can impose an additional daily penalty of up to £15,000 or 5% of daily global turnover, whichever is higher, while non-compliance continues; and
- in the case of the CMA only, a penalty of up to £150,000 or, if higher, 5% of global turnover, for breaching without a reasonable excuse an administrative direction given by the CMA. Again the CMA can impose an additional daily penalty of up to £15,000 or 5% of daily global turnover, whichever is higher, while non-compliance continues.

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While there is undoubtedly potential for businesses to face large fines, significant monetary penalties are likely to be reserved for businesses that carry-on non-compliant behaviour regardless of the CMA's warnings.

For example, before the CMA is able to impose a penalty for breaching consumer laws, there are a number of steps it must take.

Firstly, the CMA must have reasonable grounds for suspecting that a business has been, is, or is likely to be non-compliant with consumer protection laws. The CMA is then likely to conduct an investigation. Only once this investigation has started and the CMA has established reasonable grounds, can the CMA give the business a provisional infringement notice. The business then has the opportunity to make representations to the CMA and modify its behaviour.

Only once time has run out for the business to make representations can the CMA give the business a final infringement notice. Even then, the business benefits from the safeguard of a 60-day right to appeal to the High Court. Therefore, the risk of having a monetary penalty imposed is not immediate and can be mitigated by a business putting forward its own side of the story by making represen-

tations to the CMA, or demonstrating that it has modified the offending behaviour.

In addition to monetary penalties, the Bill gives the CMA power to either apply to court for an online interface order or issue an online interface notice direct to businesses. These powers amount to takedown demands that the CMA can use to force businesses to shut their website, remove or modify certain online content, show warning notices, or even seize their domain name. They are available where the CMA believes a business has engaged, is engaging, or is likely to engage in a relevant infringement.

Practical steps to manage the risk of non-compliance

At the time of writing, the Bill is in its final stages and is heading back to the House of Commons for consideration of amendments made by the House of Lords. However, with a General Election on the horizon, it remains to be seen when the Bill will receive Royal Assent.

Many businesses will want to adopt a wait-and-see approach before changing their trading and marketing practices to mitigate new risks arising from the Bill. However, it is our opinion that businesses should use the window afforded to them to prepare for the new regime. There is, potentially, much to do for some businesses to achieve compliance, from reviewing existing consumer-facing terms and conditions and auditing website customer journeys, through to checking customer communications and refreshing staff training.

Our top line recommendations for businesses wishing to prepare for the new regime are:

- if offering a subscription service, review and potentially revise your operational processes to ensure compliance with the new requirements. This may involve updating consumer-facing terms, website customer journeys and communication strategies. You should also include a review of technical processes and solutions to ensure that you have the technical capabilities to comply with requirements, such as issuing reminder notices at the correct time and actioning cancellation requests immediately;
- to reduce the risk of infringing the rules relating to fake reviews, consider whether changes to the business are necessary to ensure diligent monitoring is undertaken;
- to reduce the risk of infringing the new rules around drip pricing:
    - ◊ check that headline prices include any fixed mandatory fees and make sure that communication of non-optional charges is not delayed, with any variable mandatory costs made clear to consumers from the outset. For example, do not wait to inform consumers of delivery charges only at the final checkout stage;
    - ◊ undertake a review of your website customer journeys to check that additional fees are not revealed as consumers proceed with their purchase.

The Bill marks a tidal shift in consumer protection laws. Whether the new legislation will result in an upsurge in businesses complying with consumer protection laws will depend on the extent to which its provisions are enforced by the courts and the CMA.

If a sea-change in the way that businesses approach consumer law compliance follows in the Bill's wake, businesses would be well-advised not to delay or avoid compliance. Those businesses that do so are at risk of finding themselves legally and reputationally set adrift from their competitors.

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