

Insights

THE DIGITAL MARKETS, COMPETITION AND CONSUMER BILL: WHAT'S NEXT FOR CONSUMER RIGHTS IN THE UK?

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SUMMARY

On 25 April 2023, the UK Government unveiled its draft Digital Markets, Competition and Consumers Bill (the "Bill") with its stated aim to establish a modernised, pro-competitive regime for digital markets. The Bill aims to restrict harmful, anti-competitive behaviour and to drive economic growth whilst ensuring high levels of consumer protection. This comes in the wake of major EU reforms covering the same ground (the Digital Markets Act, the Digital Content and Digital Services Directive and the Omnibus Directive, implementing the EU's New Deal for Consumers).

In this article, we assess the impact of the draft Bill from a consumer protection perspective, focussing on the new rules for subscription contracts, the proposed clampdown on fake reviews and the enhanced enforcement powers of the CMA. Please see our related article "[The UK Government's Digital Markets, Competition And Consumers Bill is Published](#)", which examines the impact of the Bill on the UK's competition regime.

WHAT IS IT, AND WHY THE NEW LEGISLATION?

With digital technologies central to our lives, despite the many benefits, there is a growing level of concern that such technologies are restricting competition and causing harm to consumers, leading to consumer dissatisfaction and a general lack of trust in these markets. Consumer rights must keep pace with the ever developing market innovations, and markets must ensure flexibility to facilitate consumer protection as technology continues to evolve at pace.

The Bill significantly bolsters the consumer law enforcement regime by enabling the Competition and Markets Authority (the "CMA") to take action to enforce consumer laws through administrative proceedings (rather than requiring the CMA to take court action to enforce consumer rights). This is intended to provide faster redress for affected consumers. The CMA will be given powers to issue infringement notices to businesses, and the ability in some instances to issue fines of up to 10% of global turnover, as well as the ability to award compensation to consumers. These enhanced

enforcement rights and increased penalties for non-compliance are intended to drive higher levels of compliance with consumer protection law and businesses can no longer afford to treat consumer protection as a low priority issue.

As trailed in the Government's 2022 consultation on the reforms, the Bill focuses on a number of areas of concern, including fake reviews, subscription contracts and failure to provide sufficient information at the pre-contractual stage, being significant areas of concern for consumer protection in the digital economy.

SUBSCRIPTION CONTRACTS

Subscription contracts are a convenient way for consumers to purchase goods, services and digital content. However, the government identified in its consultation that these contracts are increasingly causing detriment to consumers, where these contracts involve hidden fees, the prospect of indefinite automatic renewal and obstacles to cancellation. So-called subscription traps can prevent consumers from switching providers, in essence weakening competition, setting up barriers to entry for new businesses and often resulting in significant costs to consumers (in particular, those who are more vulnerable or less able to operate confidently in the online ecosystem).

The Bill contains provisions to strengthen consumer protection measures in this area, by introducing a stand-alone regime for subscription contracts including requirements for businesses to:

- provide clear information about the terms and conditions of subscription contracts at the pre-contract stage (with the information required to be provided specified in Schedule 20 of the Bill, as 'key pre-contract information'). This includes any minimum period applicable before a consumer can terminate the contract, details of any higher rate of charges which will be applied, e.g. after the end of a free trial period, the steps which the consumer must take to terminate and a summary of the right for a consumer to cancel during a relevant cooling-off period). Failure to provide this information for off-premises subscription contracts is to be a criminal offence;
- make consumers aware at the time of entry into the contract that the contract imposes payment obligations;
- ensure that there is a clear and accessible mechanism for consumers to cancel and exit contracts during the term, as well as during cooling off periods; and
- send reminder notices at prescribed intervals during the term (to include a reminder that the consumer will be liable for the renewal payment unless the contract is ended, the amount of the renewal payment and due date, the amount of any previous renewal payment and the steps to be taken to bring the subscription contract to an end).

Once the Bill is passed, businesses operating subscription models will need to follow these rules (and not the existing rules in the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, which will no longer apply to subscription contracts. Businesses should therefore revisit their suite of consumer-facing terms now, to assess which will be within scope of the new rules (as certain types of contract are excluded) and which may require revision. Alongside, businesses should review the online architecture underpinning the purchase of goods/services/digital content to check this will be compliant with the new rules. Businesses operating cross-border should also continue to monitor the US FTC's enforcement activity relating to autorenewal subscription contracts. Our colleagues in the US have [commented on the key elements of the FTC's proposals](#).

FAKE REVIEWS

This was another topic addressed in the Government consultation on its proposed reforms in 2022. The proposed solution to tackle the endemic problem of fake/untrustworthy reviews is by means of secondary legislation, and the accompanying Government press release indicates that it will consult on new rules preventing a person:

- commissioning someone to write or submit a fake review;
- posting consumer reviews without taking reasonable steps to check they are genuine; and
- offering or advertising to submit, commission or facilitate fake reviews.

In addition, commercial practices which contravene the requirements of professional diligence will be unfair if the practice falls short of the standard of skill and care are reasonably to be expected of businesses dealing with consumers, taking into account honest market practice and the general principle of good faith in the trader's field of activity. So it is likely that failing to check consumer reviews before posting could also fall short of the requirements of professional diligence expected of traders.

UNFAIR COMMERCIAL PRACTICES

The Government has also reserved a power (using secondary legislation) to modify the existing list of unfair commercial practices which are automatically unfair, by including new ones – the current list in the Bill largely replicates that in the Consumer Protection from Unfair Trading Regulations (“CPUT”), which is to be repealed once the Bill is passed. Despite expectations, the Bill does not mandate that use of misleading green claims is an *automatically* unfair commercial practice, so these types of claims will remain to be assessed on a case by case basis as unfair commercial practices (or assessed by the Advertising Standards Authority when a complaint is made about a marketing claim). We are anticipating that the Government will include rules relating to fake reviews as unfair practices in any revised list of unfair commercial practices.

Again, the test in the Bill as to whether a particular practice is unfair largely follows the existing test in the CPUC Regulations, requiring the complainant to show:

- it is likely to cause the average consumer to take a transactional decision it would not have taken otherwise as a result of the practice involving (i) a misleading action; (ii) a misleading omission; (iii) an aggressive practice; or (iv) a contravention of the requirements of professional diligence; or
- it omits material information from an invitation to purchase; or
- it is one of the *automatically* unfair practices.

OTHER AREAS TO NOTE

The Bill also introduces more stringent requirements for operators of consumer savings schemes (including requiring operators to have insurance to cover consumer deposits) and requirements for most consumer ADR providers to be accredited. This follows in the wake of the high profile collapse of Farepak, a Christmas savings club, which left tens of thousands of customers out of pocket.

TAKEAWAYS - WHAT DOES IT MEAN FOR BUSINESSES?

As the Bill progresses through Parliament, it will be critical for businesses to monitor developments, and adapt their practices accordingly to ensure they are compliant with the proposed consumer protection law. In particular, those businesses offering subscriptions and dealing online should take steps now to track the online customer journey and the customer touchpoints offered during the term of the contract, to assess where changes may need to be made to ensure compliance with the new requirements. Businesses should assess how their current processes operate, as implementation of changes to online architecture may take time and involve significant cost, when adapting business models and online interfaces to accommodate the new requirements. As such, now is the time for businesses to be revisiting their terms and conditions with customers, in particular examining the conditions attached to any subscription contracts, as well as their processes for monitoring customer reviews.

Although the rules concerning unfair practices are not changing materially, the increased powers being given to the CMA in relation to enforcement, in particular the potential of significant fines means that businesses will need to pay close attention to consumer law compliance.

If you would like to discuss how the Bill might affect your business, please get in touch with your usual BCLP contact, or any of the authors of this article.

Our next alert will cover the specific rules on subscription contracts in more detail.

RELATED PRACTICE AREAS

- Commercial Contracts
- Retail & Consumer Products

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