

Insights

THE DIGITAL MARKETS, COMPETITION AND CONSUMER BILL: TAKING A CLOSER LOOK AT THE IMPACT ON SUBSCRIPTION CONTRACTS

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The draft of the Digital Markets, Competition and Consumers Bill (the “Bill”) was published last week, and among the many objectives, it aims to drive high standards of consumer protection. One area which has attracted much interest (since it was flagged as an area of interest in the UK Government’s 2021 consumer protection consultation and in the earlier [Penrose report](#)) is that of subscription contracts. Subscription contracts are big business, with estimated consumer spending in the UK on subscriptions said to be between £28 billion and £34 billion a year across multiple sectors, with 8 in 10 UK consumers having at least one subscription. However, work undertaken as part of a [BEIS consumer protection study in 2022](#) showed that between April 2020 and April 2021, 69% of consumers in the UK experienced consumer detriment, with consumers more likely to experience detriment with services and subscriptions (55% of consumers who purchased a service or a subscription faced detriment) compared to items (48%). The Government’s impact assessment accompanying its 2021 consultation paper indicated that overall, consumers may be spending as much as £1.8 billion per year on subscriptions they do not think are good value for money.

HEADLINE REQUIREMENTS

To combat the risk posed by so-called subscription traps, the Government has proposed a standalone regime to govern subscription contracts, prescribing:

- the information which is to be provided to a consumer pre-contract;
- requirements for reminder notices to be sent at prescribed intervals during the term;
- user-friendly means for consumers to end or cancel a subscription contract;
- a cooling off period during which the consumer can cancel, both following the initial term and in each subsequent renewal period.

This regime is to replace, for subscription contracts, the current information provision regime in the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations, so that once

the Bill is passed, traders offering subscription contracts will need to comply with these new requirements, whilst the CC(ICAC) Regulations will continue to apply to all other consumer contracts.

EXCLUDED CONTRACTS

Note that certain categories of contract are outside the scope of these new rules (typically those which are already subject to specific sector regulation, such as utilities contracts, financial services contracts, contracts with health care professionals, package holidays, timeshares, but also residential accommodation rental, delivery of food by unincorporated traders, childcare contracts).

INFORMATION PROVISION

As under the CC(ICAC) Regulations, there is a list of information which must be provided to the consumer pre-contract, with the rules requiring that certain 'key' information be given all together, separately from the full pre-contract information, and must be given in writing (and either in a durable medium where the contract is entered into in person or, for online contracts, in such a way that the consumer is not required to take any steps to read the information, other than the steps the consumer must take to enter into the contract). For online contracts, the trader must ensure that the final step which the consumer is required to take to enter into the contract involves the consumer expressly acknowledging that the contract imposes an obligation on the consumer to make payments to the trader. If this is not done, the consumer is not bound by the subscription contract.

To increase transparency, traders must indicate whether there are any restrictions on delivery of the product and which means of payment are accepted in relation to the product.

The key information to be provided includes:

- the duration of the contract;
- any minimum period that must elapse before the consumer can bring the contract to an end;
- details of the applicable charges at the end of any trial / discount period;
- the date from which the consumer will be charged and the frequency of payments;
- the minimum total amount for which the consumer will become liable under the contract (and details of any ability of the trader to change the frequency and amount of payments); and
- details of how the consumer can end the contract (including any notice period) and details of the right to cancel during the initial cooling-off period and any subsequent cooling-off period.

REMINDERS

Traders must send reminder notices at prescribed intervals, and the rules also mandate the content of these notices. They must also be sent prior to each cancellation date, at least 3 working days before the last cancellation date but not more than 5 working days before the last cancellation date (with a requirement to send two reminder notices for contracts where the renewal payment is not due until after the end of a 12 month period, e.g. annual car insurance premiums). This is designed to facilitate consumer switching and tackle the loyalty penalty issue, whereby auto renewing contracts trap consumers in higher rate contracts.

CANCELLATION

The rules require that consumers must be able to end a subscription contract in a single communication – and contracts entered into online must be capable of being ended online (with instructions as to how to do so easily accessible for consumers). The rules also grant a right to cancel all subscription contracts (whether entered into online or otherwise) during an initial cooling-off period – this is a 14 day period from receipt of the goods/date the contract was entered into, and also a right to cancel during each subsequent renewal cooling-off period. Traders are also obliged to provide each consumer with a cooling-off notice, setting out the consumer's right to cancel the contract.

REMEDIES AND SANCTIONS

The Bill provides that a trader's compliance with the information duties, the requirement to send reminder notices and the arrangements for termination/cancellation of the contract are implied terms in every subscription contract, with the consequence that, where a trader does not comply with the requirements, a consumer will have the right to cancel the contract for breach of the implied terms. Consumers are also entitled to claim damages for breach.

In addition, failure to comply with the pre-contract information requirements relating to initial cooling-off rights for subscription contracts entered into off-premises is a criminal offence. . These new rules must also be seen in the context of the CMA's proposed enhanced enforcement powers to issue turnover-based fines and award compensation to consumers, which also apply to subscription contracts.

NEXT STEPS

Businesses offering subscription products should revisit their suite of consumer-facing terms now, to assess which will be within scope of the new rules and which may require revision. At the same time, businesses should review the online architecture underpinning the online purchase of goods/services/digital content to check this will be compliant with the new rules. They 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.

OTHER JURISDICTIONS

The UK is not the only jurisdiction examining this question and in the US, the FTC is taking increased enforcement action in respect of subscription contracts – see BCLP’s [latest insight on the topic](#), which looks at the impact on autorenewal subscription programs in the US. Businesses operating a subscription model cross-border therefore need to consider national laws in each territory where they intend to target consumers. EU law does not specifically address subscription contracts, so the general rules in Directive 2011/83 (as amended by Directive 2019/2161) will continue to apply, as well as member state national law so businesses operating in the EU should take local law advice to ensure they comply with applicable rules. The new EU Digital Services Act also provides scope for the EU Commission to issue guidance for online platform providers on specific aspects of online interface design, which could include guidance on the practice of making a procedure for terminating a service more difficult than subscribing to it.

Please see our team’s related article looking at the impact of the draft Bill from a [consumer protection position more generally](#), as well as our article which examines the impact of the Bill on the [UK’s competition regime](#).

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