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Our guide to the Digital Markets, Competition and Consumers Bill – focusing on consumer law

The Digital Markets, Competition and Consumers Bill was introduced to the UK parliament on 25 April 2023, following a Green Paper back in 2018 and consultation by the government in 2021. The government said that one of the primary purposes of the Bill is to protect consumers by *strengthening* the enforcement of consumer protection law (including by giving the CMA significant new powers and the prospect of GDPR style fines) and introducing *new consumer rights*, including by tackling subscription traps that it says currently cost consumers £1.6 billion.

In addition to updating consumer laws, the Bill introduces new provisions relating to digital markets and competition law. However, this Guide focuses on the rules about consumer law.

Sarah Cardell of the CMA has called the Bill a "watershed moment" in protecting consumers.

The Bill is currently passing through Parliament and is expected to come into force towards the end of 2024, although the government has recently clarified that the additional rules on subscriptions will be delayed to at least Spring 2026, to give businesses more time to prepare for the changes.

Consumer protection from unfair trading

The Bill repeals and reinstates the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) (CPRs). There are some changes: the Bill amends and supplements the list of commercial practices that are always considered unfair to reflect the fact that consumers and traders increasingly interact online. In addition, it amends some the definitions in the CPRs, such as "average consumer" "commercial practice" and "transactional decision". Although the changes are minor in themselves, cumulatively they enhance consumer protection.

Commercial practices that are always considered unfair

Schedule 1 of the CPRs contains a list of 'blacklisted practices' – these are practices that are considered unfair in all circumstances, without the need to show they affect a consumer's purchasing decision. Many of these have been largely replicated in the new Bill, but in some cases the wording has been slightly tweaked, resulting in a wider application.

For example, the banned practice of "falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice" has been amended to remove the words "very", making this unfair practice wider in scope. This change aligns with the broader regulatory movement to crack down on "Online Choice Architecture" or "Dark Patterns".

As there will be powers to amend the list of unfair commercial practices (see below), additional banned practices might follow in the future.

Power to amend the list of unfair commercial practices

The Secretary of State will have the power to add to the current list of automatically unfair practices using secondary legislation. This aims to allow consumer laws to adapt more quickly than has been possible under previous legislation to changes in the market, consumer practices, and technology. As the banned practices are treated as strict liability offences, without the need to prove consumer harm, any new additions will need to be carefully assessed by the Secretary of State to ensure there isn't room for misapplication.

However, important changes to the list of banned practices are already being made in the latest version of the Bill. The government recently consulted on, and agreed to create, the following new banned practices:

- submitting a fake review, or commissioning another person to write and/or submit a fake review or a review that conceals that it has been incentivised;
- publishing consumer reviews, or consumer review information, in a misleading way; and
- 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 (i) fake consumer reviews, (ii) consumer reviews that conceal the fact they have been incentivised, or (iii) consumer review information that is false or misleading, and removing any such reviews or information from publication.

These additions bring the UK position closer to that of the EU where the Enforcement and Modernisation Directive (also known as the "Omnibus Directive") brought in similar prohibitions on fake reviews and endorsements. Most of the existing banned practices constitute criminal offences, but the new banned practices on fake reviews will not, so the main risks for businesses will be civil liability, including potentially large fines.

The Bill also introduces new rules about so-called "drip pricing" practices. Drip pricing is where only part of an item's price is shown during the early part of the consumer journey, and the total amount to be paid is revealed at or near the end of the buying process, by which time the consumer may feel committed to the purchase. This is a practice the CMA has already declared potentially harmful as part of its investigations into online choice architecture. The Bill prohibits presenting a headline price that does not:

- incorporate in the price any fixed mandatory fees that must be paid by all consumers; and
- disclose the existence of any variable mandatory fees and how they will be calculated.

Drip pricing has not been added to the list of banned practices, but is dealt with in the definition of "material information" that must be considered when assessing whether there has been a misleading action or omission.

The Bill has not been amended to cover optional fees, but the government says that it will keep this under review.

Subscription contracts

For some time, regulators have been concerned about so-called subscription traps, and estimate that they cost consumers over £1.6 billion a year. Therefore, the Bill includes new rules for subscription contracts with consumers which are like the more general rules in the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CCRs).

There are various excluded contracts, including contracts for the supply of utilities, financial services, certain healthcare and medical contracts, contracts for the supply of services regulated by Ofcom, residential accommodation rental contracts, leisure activities on a specific date, package holiday and package travel contracts, and contracts for the supply of childcare and school age education. An amendment was tabled at Report Stage in the Lords to include charity subscriptions if they qualify for Gift Aid.

The government has not included in the Bill everything that it proposed during the consultation:

What's in the Bill?	What's not?
"Key" and "full" pre-contract information requirements	Obligation to give consumers a right to opt out of auto-renewal at the beginning of the contract
Reminder notices relating to auto-renewal of subscriptions	Obligation to obtain consent from the consumer to continue the subscription after the end of a free trial or introductory offer
Cancellation rights: "easy exit", initial cooling-off rights, renewal cooling-off rights	Obligation to suspend and stop charging for the subscription where there is evidence of significant inactivity

What pre-contract information must be provided?

Key pre-contract information	Full pre-contract information
What? Amount and frequency of payments, the charges that will apply after the trial period, the minimum total amount that will be payable, details of the auto-renewal mechanism, details of the termination process and the applicable notice periods, details of the cooling-off rights, information about reminder notices	**What?** Information broadly mirroring the requirements set out in the CCRs
When? As close in time to entering into the contract as is practicable	**When?** Before the contract is formed (and confirmed after the contract is formed)
How? Given all together, in writing, separately from the full pre-contract information, without the need to click links or download	**How?** Provided or made available before the contract is formed. Copy provided in a durable medium after the contract is formed

Reminder notices

To help reduce "zombie" subscriptions, the Bill sets out very detailed requirements for the giving of reminder notices about upcoming renewal payments. Broadly, reminder notices will need to include the following information:

- The fact that the consumer will be liable for the renewal payment unless they take action to end the contract;
- The amount of the renewal payment and the date on which the consumer will become liable for it;
- The amount of the previous renewal payment and the difference between it and the current renewal payment;
- The frequency and minimum amount of any other payments;
- The minimum total amount the consumer will be liable for if they don't end the contract;
- When the next renewal payment will be due;
- How to end the contract to avoid the renewal payment.

The Bill provides broadly that, for monthly subscriptions, a reminder should be given every six months, whereas, for annual subscriptions, two reminders must be given towards the end of the term. Originally, the Bill was very prescriptive about the exact timing of these reminder notices, but amendments were made in November 2023 to give traders some discretion in determining how long the reminder notice must be given before the last opportunity for the consumer to cancel. The timeframes determined by the trader must be reasonable to ensure the consumer is aware of their liability and has an appropriate opportunity to consider whether to end the subscription. The relevant timeframes must also be specified in the pre-contractual information provided by the trader when the contract was entered into, and the trader is required to comply with those timeframes.

The current wording of the Bill requires that reminder notices must be given separately from other information, which means they cannot include marketing messages. However, at the Lords Report Stage, the government agreed that it would amend the Bill to allow traders to provide promotional offers or other information in a reminder notice, provided that the reminder information remains the most prominent information in the notice.

Exiting the contract

Consumers must be given a 14-day cooling off period, as well as the ability to exit the contract in a "straight-forward" way without having to take any unreasonable steps to end the contract. Where the subscription contract is entered into online, the trader must also allow termination online.

The Bill originally required the trader to provide a way for the consumer to cancel with "a single communication", but the government proposed the new wording at Lords Report Stage so as to avoid preventing traders from engaging with their subscribers during the exit process and e.g. making counteroffers to persuade them to stay. However, if traders take this approach, they will need to ensure that they are not straying into "dark patterns" territory, "nudging" consumers to keep a subscription that they want to cancel by, for example, repeatedly asking consumers if they are sure, or if they are happy to "lose their benefits".

Consumers will have the:

- Right to cancel at start of contract (as under the CCRs);
- Right to cancel after a free trial; and
- Right to cancel when they renew.

Surprisingly, the Bill does not expressly deal with the liability of the consumer where they exercise their right to cancel during the cooling-off period but have made use of the subscription. This is a key issue for traders and is something that is expressly dealt with in the existing rules set out in the CCRs. However, it was confirmed at the Lords Report Stage that the detail on return and refund rules will be set out in secondary legislation and the Government has committed to consult publicly on those rules. The intention is to introduce a "use it and lose it" rule, whereby consumers lose their right to a full refund if they use a product during the cooling-off period.

Other changes

The CMA had asked for changes to the laws on secondary ticketing. The government rejected this, but the latest version of the Bill following Lords report stage states that secondary ticketing facilities must not allow tickets to be listed for resale without the business/trader providing proof of purchase or title to the tickets, and resellers must not be permitted to sell more event tickets than they can legally purchase from the primary market. In addition, the face value of the resale ticket (and the trader or business's name and trading address) must be clearly visible, in full, on the first page of the ticket and not hidden behind an icon.

A secondary ticketing facility must make it clear to traders and businesses based overseas that sell tickets to UK consumers and target UK consumers through paid or sponsored advertisements or paid infomercials that they are subject to UK legislation.

The Bill also reforms Christmas Club savings schemes and alternative dispute resolution schemes.

Enforcement changes

So, what happens if you don't comply with the above? The Bill substantially enhances the CMA's role in enforcing the consumer protection regime. Currently, the CMA must rely on court proceedings to enforce any breaches of consumer law, which it says causes delays and limits its impact. However, the Bill allows the CMA to directly investigate suspected infringements and practices that may harm the collective interests of consumers in the UK, and issue enforcement notices without going to court first. Other regulators such as the FCA will also have enhanced rights but will have to go to court first.

The CMA will have powers to:

- issue provisional and final infringement notices where the respondent has engaged or is an accessory to a relevant consumer law infringement;
- take enhanced 'consumer measures', taking into account the likely benefit and associated costs of any issued measures;

- apply for online interface notices to traders operating websites, apps or other digital content promoting the sale of services, goods or digital content which may (among other things) require the removal of certain content or the deletion of a domain name;
- seek undertakings after an investigation (instead of issuing an infringement or online interface notice) and issue enforcement notices if they are not complied with;
- enforcement directions; and
- information notices.

The CMA will also have the power to impose significant fines. If the Bill passes in its current form the CMA will be able to impose fines of up to:

- £300,000 or 10% of annual global turnover (whichever is higher) in relation to final infringement notices;
- £150,000 or 5% of annual global turnover (whichever is higher), plus an additional daily penalty if breach persists thereafter of up to £15,000 or 5% daily global turnover (whichever is higher) for failing to comply with an enforcement direction or a breach of an undertaking made to the CMA under the DMCC Bill; and
- £30,000 or 1% of annual global turnover (whichever is higher), plus an additional daily penalty if breach persists thereafter of up to £15,000 or 5% daily global turnover (whichever is higher) for non-compliance with an information notice or for the provision of materially false or misleading information.

Individuals may also be fined as part of this regime.

There have been calls by the House of Lords to introduce a collective redress regime for consumer protection cases, as already exists for competition cases. It will be of interest to see if this is ultimately taken up by the UK government.

What isn't in the Bill?

Other than some changes to subscription contracts, there are other items which were anticipated to be in the Bill but have been omitted. For example, the Bill does not cover specific rules about greenwashing, as the government has said this can be dealt with as a misleading practice. In addition, there are only limited changes in respect of Online Choice Architecture (or "dark patterns").

What happens next?

The Bill will come into effect as soon as possible following parliamentary approval. Secondary legislation and guidance will be issued.

The new consumer protection measures of the Bill are intended to apply to the whole of the UK. Consumer protection policy is devolved to Northern Ireland but reserved for Scotland and Wales. As a result, legislative consent will be required from the Northern Ireland Assembly.

The Bill is expected to come into force towards the end of 2024. However, the rules on subscription contracts will not come into force until the spring of 2026, to allow businesses to prepare. The Bill will only apply to contracts entered into after it comes into force.

What does this mean for businesses?

With the introduction of the DMCC Bill, the UK will be entering into a new era for consumer protection. The CMA has already been making moves to improve and modernise how it works – a point it highlighted in last year's annual plan. With its new powers under the DMCC Bill, businesses can expect more regulatory action. With potentially eye-watering fines on the table, many companies who previously took a "risk-based approach" to compliance with consumer laws will need to reassess their position. Cross-border businesses will also now need to take account of the divergence in consumer law between the UK and EU.

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