



Government confirms intended changes to UK consumer policy

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On 10 May 2022, the Government announced that it intends to legislate on measures to promote competition, strengthen consumer rights and protect households and businesses as part of its Digital Markets, Competition and Consumer Bill (Bill). This follows on from its response published in April 2022 to its July 2021 consultation “Reforming Competition and Consumer Policy” (Consultation Response).

The reforms are the result of several years of debate by practitioners as well as the UK’s competition and consumer law enforcement agency, the Competition and Markets Authority (CMA). For further details on the proposed reforms to competition policy, **see our alert**.

The Government intends to give the CMA more teeth in its enforcement of consumer laws (to match the extensive powers it has in enforcing competition laws) including the power for the CMA to enforce consumer law directly rather than having to go through the Courts. This is an important win for the CMA whose previous Chair wrote to the Government in 2019 complaining that the “CMA’s consumer law powers are unfit for its current purpose, and far short of what would be required to enable the CMA effectively to fulfil a consumer interest duty”.

Along with the proposed changes to the UK's digital markets regime (**see our alert**), the reforms to the UK's consumer rulebook are intended to bring the regime up to date with changes to how businesses and consumers interact in the digital age. This is clear from the two main areas of focus in the Consultation Response: fake reviews and so-called 'subscription traps'.

The precise timing of the Bill is unclear. We set out below the key amendments and changes as set out in the Consultation Response.

Enforcement: CMA to gain powers to enforce consumer law directly and impose civil penalties

As it stands currently, the CMA issues sector-specific consumer guidance and guidance on unfair terms, and conducts market studies and sector-specific investigations, often publishing the results, but it does not have the power to enforce consumer law directly.

When the CMA identifies infringing conduct, it essentially has three options:

- Engage in consultation with the trader with the aim of reaching a negotiated settlement to bring to an end the offending conduct.
- If the perceived infringement cannot be addressed through a negotiated settlement, or the conduct calls for more rapid action, the CMA can seek a formal "Enforcement Order" through the civil courts. Such an order may be interim or final. To obtain an Enforcement Order, the CMA must persuade the Court that consumer law has been broken or that the law is likely to be broken.
- In the case of the most serious infringements, which constitute criminal offences (for example under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs)), the CMA can bring a criminal prosecution through the Courts.

The CMA's role sits alongside that of National Trading Standards (NTS) and Local Authority Trading Standards Services (LATTS). The CMA has a "market-wide" role and looks to improve consumer protection in the ways described above but it does not currently have the mandate to address "single trader" cases where there is no wider market impact or consumer detriment to address. Single trader cases fall to NTS to prosecute those which reach the NTS threshold of serious criminality or, alternatively, to LATTS.

This enforcement landscape has not been immune from criticism, especially given significant resource cuts for LATTS over the last decade, and it has been suggested that even significant offending can fall between the gaps.

In 2019, Lord Tyrie (former Chair of the CMA) wrote to the Government noting that the current landscape was unfit for purpose and, specifically, that compared to the competition enforcement regime as well as international standards, deterrence is weak in the UK.

More recently, in its response to the Government's consultation, the CMA said businesses have "every incentive to resist a weak enforcement process, frustrate information notice requests or offer undertakings in the knowledge that they can continue the potentially harmful practice and make unfair profits in the interim. This is a key reason why an administrative model for consumer law enforcement is recommended."

In its Consultation Response, the Government notes that it intends to legislate to give the CMA the power it sought to enforce consumer law directly, including issuing determinations as to whether consumer law has been breached and imposing measures to bring to an end infringing conduct. The CMA's powers will be bolstered with the ability to impose turnover-based penalties including:

- **finest of up to 1% of annual global turnover, with an additional daily penalty of 5% of daily global turnover** where businesses do not comply with statutory information requests or provide false or misleading information or take steps to destroy, conceal or falsify information and documents
- **finest of up to 5% of annual global turnover, with an additional daily penalty of 5% of daily global turnover** where businesses do not comply with an undertaking imposed by the CMA
- **finest of up to 10% of annual global turnover** for businesses found to have breached UK consumer law

The CMA will also have the ability to impose fixed monetary penalties on individuals (ranging from GBP30,000 to GBP300,000 with additional daily penalties) for these infringements and will continue to be able to use its enforcement powers via the civil and, in the most serious cases, criminal courts.

Other public consumer enforcers, including NTS and LATTs, will also be able to apply to the civil courts to impose the same monetary penalties for any breaches of the legislation.

In recognition of feedback received by businesses during the consultation period about the need for swift decision making and certainty, the Government also proposes legislation to introduce a statutory duty of expedition for the CMA in dealing with consumer cases (along with its competition functions and functions related to the new digital competition regime).

Finally, in an important safeguard, the Government has confirmed that decisions of the CMA which could directly or indirectly lead to the imposition of a monetary penalty will be the subject of a full merits appeal and penalties or redress measures will be suspended during the appeal process. The Government resisted calls for a specialist consumer tribunal or an expansion to the Competition Appeals Tribunal and has indicated that appeals will lie to the High Court in England and Wales and the Court of Session in Scotland. The Appeal Court will be able to review issues of fact and law, admit new evidence, quash CMA decisions and substitute its own decision for that of the CMA.

Subscription traps: enhanced requirements for businesses offering automatically renewing subscriptions

In the Consultation Response, the Government cites evidence that UK customers may be spending up to GBP1.8 billion on subscription services that they regard as poor value for money. The Government's concerns centre on the potential for subscription services to "lock in" customers, eg by the use of automatically renewing contracts which extend a customer's original term. The Government refers to these contracts as subscription traps.

Specifically, the Government highlights contracts where the roll-over period was lengthy (eg one year) and where important information about the operation of any renewal mechanism is not provided to customers in a clear and prominent fashion. This has been an area of focus for the CMA in recent years, with investigations into the antivirus and online console video gaming sectors having concluded with companies entering into undertakings to amend their business practices.

The Government intends to legislate in order to:

- impose requirements on businesses to clarify and enhance existing pre-contract information requirements for subscription contracts
- introduce a specific requirement on businesses to send reminders to consumers before a contract rolls over (or auto-renews) onto a new term
- create a specific obligation requiring traders to remind consumers that a free trial or low-cost introductory offer is coming to an end
- create a specific requirement for businesses to ensure consumers are able to cancel their subscription in a straightforward and timely way

Citing potential costs to business as well as feedback that any impact would only be limited, the Government has decided against pursuing certain reforms. These include changes that would have seen businesses be forced to offer customers the choice to take a subscription without automatic renewal (ie for a fixed term only) or to require businesses to stop charging money for goods and services where there had been evidence of inactivity for a reasonably long period of time. While the Government refused the chance to legislate on the latter, it remains to be seen whether the CMA will nevertheless intervene in such circumstances using its broader powers on a case-by-case basis – see, for example, the CMA’s guidance issued to antivirus companies in October 2021 which requires such companies to provide appropriate safeguards for customers who are no longer using a product following automatic renewal.

Fake reviews: ban on commissioning and a requirement for businesses to filter and monitor websites to ensure reviews are genuine

Recognising the importance of genuine consumer reviews for supporting consumer choice and the proper functioning of markets, the Government intends to crack down on reviews that deliberately mislead consumers for the benefit of businesses selling goods or services (“fake reviews”). This is aligned with a similar crackdown by the European Commission **announced in January 2022** which carried out an extensive review of 223 websites, finding that two-thirds of the online shops, marketplaces, booking websites, search engines and comparison services sites analysed triggered doubts about the reliability of the reviews.

The CPRs already prohibit conduct which misleads consumers in a number of ways and fake reviews could already amount to either misleading actions or misleading omissions. However, for additional clarity and certainty and to indicate its attitude towards the practice, the Government intends to update Schedule 1 of the CPRs, which sets out a list of commercial practices which are, in all circumstances, to be considered automatically unfair, to specifically address fake reviews.

The Government will consult in due course on using such powers to prohibit the following practices:

- commissioning or incentivising any person to write and/or submit a fake consumer review of goods or services
- hosting consumer reviews without taking reasonable and proportionate steps to check they are genuine
- offering or advertising to submit, commission or facilitate fake reviews

The Consultation Response does not go into much further detail as to what “reasonable and proportionate” steps businesses are expected to take to tackle fake reviews, and the Government has noted that it will work in consultation with business and consumer groups on this issue.

Other reforms: strengthening prepayment protections and streamline protection for consumers booking package trips

The Government intends to legislate to ensure that consumer prepayment schemes (such as Christmas Savings Clubs) must fully protect customer payments by way of trust or insurance.

It also intends to revise the Package Travel and Linked Travel Arrangement Regulations 2018 (PTRs), simplifying these for consumers and further boosting protection for those who have booked package holidays. This follows the strain imposed on PTRs throughout the Covid-19 pandemic, and the Government intends to continue working with stakeholders in the tourist industry as well as consumer groups to provide greater clarity for businesses and consumer alike.

The devil will be in the (legislative) detail

While the Consultation Response sets out the key aspects of the Government's intentions to reform the UK consumer regime, there remain some questions about how these changes will operate in practice.

We now await the publication of the Bill to see the full scope of the reforms and their impact on businesses.

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