

# Consumer Law Update: Who's on the regulatory radar for 2019/20?





## Introduction

The Government and the CMA are intensifying efforts to strengthen consumer protection in the UK with a strategic focus on ambitious enforcement of existing laws and empowering consumers through accessibility to their data.

## Key developments to watch out for in 2019/20

### Data

- Following the implementation of the GDPR, data remains a focus point as we move towards 2020. Businesses operating in regulated consumer markets such as financial services, energy and telecoms in particular should keep an eye on the outcomes of the Smart Data Review.
- This cross-government review focused on how to use new data driven technologies and services (such as automatic-switching services and utility management services) to improve the consumer experience in regulated markets and address issues such as the consumer loyalty penalty.
- The review concluded that there is considerable potential for Smart Data to be used positively across consumer markets and identified 3 key proposals which are currently being consulted on - these are:
  1. How to enable data driven innovation in consumer markets – this involves establishing a new cross-sector ‘Smart Data Function’ to oversee the delivery of data initiatives across multiple markets and introducing an ‘Open Communications’ initiative to require communications businesses (such as mobile network providers) to provide consumers’ data to third party providers at the consumer’s request (which seems likely to go beyond GDPR data portability requirements);
  2. How to use data and technology to help vulnerable consumers – this involves establishing a ‘Vulnerable Consumer Challenge’ to encourage data innovation to improve outcomes for vulnerable consumers and exploring ways that regulators can use data to better support this type of consumer; and
  3. How to ensure consumers and their data are protected – which, notwithstanding GDPR, involves introducing robust data protection requirements on third party providers accessing consumer data.
- Businesses in regulated sectors would be wise to get ahead of the curve by giving thought to the collection, use, accessibility and portability of customer data, especially when designing or procuring new systems. This work will (of course) go hand-in-hand with the steps that businesses should already be taking under GDPR, such as DPIAs. The consultation on the proposals closed in August 2019, so we expect an update shortly.
- All businesses (not just those in regulated markets) should be aware that the use of consumer data now forms a key focus in CMA investigations; for example, in July 2019, the CMA launched a market study into online platforms and digital advertising. The was is designed to assess three broad potential sources of harm to consumers, one of which is whether consumers are able and willing to control how data about them is used by online platforms. The concerns (despite GDPR) are that consumers are not generally aware of the type of data held about them by online platforms or how this is used and shared and that this results in online platforms being able to exploit a lack of consumer choice and understanding to extract data.
- The investigation will look into the business model of online platforms that are funded by digital advertising which is of course highly reliant on the supply of consumer data for segmenting audiences for targeted advertising. It will also investigate other common practices in the industry such as:
  1. default privacy settings (are you still seeing marketing ‘opt-outs?’) which favour the platform’s interests;
  2. requiring consumers to accept third party privacy policies without any real opportunity to read and understand them;
  3. altering terms and conditions following changes to a business’ corporate structure on a ‘take it or leave it’ basis (yes, think s62 CRA and the fairness test).
- Businesses that operate online and in the digital advertising market should be aware that the CMA may take enforcement action off the back of the study if it becomes evident that there are breaches in consumer



law being committed in this market.

### The Loyalty Penalty

- Businesses operating in the consumer mobile, broadband and financial services markets (including cash savings, home insurance and mortgages) will be aware of the CMA's recent investigations into the super complaint raised by Citizens Advice about the 'loyalty penalty'.
- The complaint focused on the 5 key markets mentioned above and looked into how longstanding customers may pay more than new customers for the same service to the tune of almost £900 per person per year.
- In December 2018, the CMA published its response to the complaint which identified various unacceptable practices, including:
  1. making it more difficult to leave a contract than it is to sign up;
  2. rolling over customers onto new contracts without sufficient warning; and
  3. imposing 'stealth' increases in price on renewal year after year, which can lead to significant price increases without customers being aware of it.
- The CMA has provided specific recommendations for each of the 5 key markets (set out in the Response to the Super Complaint) as well as 8 general reforms which include:
  1. Bolder enforcement (are you protected?);
  2. New laws to tackle harmful business practices;
  3. Naming and shaming of perpetrators by publishing the size of the loyalty penalty for key markets and individual suppliers;
  4. Empowering intermediaries, such as Citizens Advice, to support consumers to switch suppliers;
  5. Implementing recommendations from the Smart Data Review in markets such as telecoms where it has the greatest potential to improve practices for consumers;
  6. Capturing and sharing best practice on

'nudge' remedies across markets. For example, an obligation on suppliers to remind consumers of last year's price on renewal. This is already mandatory in the insurance sector (as required by FCA rules);

7. Considering targeted pricing regulations such as limiting price differentials or price caps alongside other measures where there is clear harm; and
  8. Assessing the feasibility of matching price data to a recurring, large scale UK survey to improve understanding of who pays the loyalty penalty across markets.
    - The CMA has set up a working group to oversee the implementation of the recommendations. In June 2019 the CMA published a 6 month progress update, highlights of which are:
      1. Two enforcement cases investigating harmful business practices have been launched by the CMA:
        - one into the anti-virus software market to establish whether business practices and terms and conditions associated with the automatic renewal of subscriptions are fair; and
        - into auto renewal practices in the console video games market.
- Both cases are still at the information gathering stage at the date of publishing;
- The CMA has set out a framework giving guidance to businesses about the difference between healthy competition and unacceptable practices;
  - Regulators are looking into how to publish loyalty penalty metrics; and
  - Work on measures such as the use of Smart Data in key markets to tackle the loyalty penalty is ongoing.

**In addition to preparing for this, here are our five top tips to consider when drafting consumer terms for use in England & Wales**

1. **All terms in consumer contracts must be**

**fair. Approach with caution if you are using any terms which might be unfair, especially if listed in Sch 2 of the CRA!**

- A term is considered unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. Unfair terms will not be binding on consumers.
  - Common examples of Schedule terms which might be considered unfair include:
    1. A term which has the object or effect of permitting a trader to increase the price of goods, digital content or services without giving the consumer the right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded.
    2. A term which has the object or effect of automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express a desire not to extend the contract is unreasonably early.
    3. A term which has the object or effect of requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation or for services which have not been supplied.
    4. A term which has the object or effect of enabling the trader to alter the terms of the contract unilaterally without a valid reason which is specified in the contract.
- 2. Avoid, at all costs, using unfair commercial practices**
- A commercial practice is unfair if it contravenes the requirements of professional diligence and materially distorts, or is likely to materially distort, the economic behaviour of the average consumer with regard to the product.
  - As well as this, there are 31 blacklisted unfair commercial practices listed in the Consumer Protection from Unfair Trading Regulations 2008 (CPUT) which should be avoided, and these include:



1. Using editorial content in the media to promote a product where the trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer.
2. 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.
3. Presenting rights given to consumers in law as a distinctive feature of the trader's offer
4. Promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not.
5. Describing a product as 'gratis', 'free', 'without charge' or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.

**3. Ensure you include the right information in your terms as required by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013; for example, terms should include:**

- The total price of the goods, services or digital content inclusive of taxes or, if the price cannot be reasonably calculated in advance due to the nature of the goods, services or digital content – the basis on which the price will be calculated;
- In the case of indeterminate duration contracts or subscriptions, the total costs per billing period or (where such contracts are charged at a fixed rate) the total monthly costs; and
- Where a right to cancel exists, the conditions, time limit and procedures for exercising that right in accordance with specified regulations.

**4. Write terms in plain and intelligible language, and take into account the recently published BEIS best practice guide to: (a) improve consumer understanding of contractual terms and privacy policies; and (b) improve engagement with such documents. For example (and the stats are from the study undertaken):**

- Consider displaying key terms as FAQs. Presenting information as simple questions and answers improved understanding by 36%;
- Use icons to illustrate key terms. Using simple icons such as a stop-clock icon to show a timeframe for returning items increased understanding by 34%;
- Showing customers your terms within a scrollable text box instead of requiring them to click to view increased understanding by 26%;
- Provide information in short chunks and at the right time. The use of pop-ups or comments to the side of forms which didn't interrupt a customer journey or task increased understanding by 9%;
- Use illustrations and comics. Step-by-step guides were found to increase understanding by 24%;
- Tell customers how long it will take to read a policy. This technique was found to increase the likelihood of people opening a policy by 105%; and
- Tell customers when it is their last chance to read information before they make a decision – this increased opening rates by 41% (although we question this as terms should always be viewable...)

**5. Feel free to ask for a steer**

- Consumer law is complex and time consuming to get right – taking the time to review your terms is more likely to lead to happy customers, more sales and positive PR, thus avoiding consumer backlash, adverse PR and (of course) the cost and hassle of regulatory action. If you wish, feel free to get in touch with one of our consumer law experts.

**For further information on this subject please contact:**

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