Expert insight

on consumer law & regulatory compliance

Contents

Introduction

Welcome to the latest edition of our Expert Insight series focusing on consumer law and regulatory compliance.

As we release this edition, we're already over a year into the COVID-19 pandemic – what a truly extraordinary year it's been. Combined with the pressures and uncertainties of the Brexit transition period coming to an end, many consumer-facing businesses are experiencing a uniquely challenging time.

And yet, now more than ever, falling foul of the consumer protection framework can have real and lasting consequences for businesses.

Our experienced team advises clients on all aspects of consumer law and regulatory compliance, and we're committed to sharing our expertise and experience. We hope you find the insights in this publication helpful and thought-provoking.

Please get in touch if you'd like to discuss any of the issues in more detail, or if you need advice on any consumer law or regulatory compliance matter.

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Lessons from COVID-19 - guide to cancellations and refunds

A key pressure businesses face in the COVID-19 era is that of cancelled or disrupted contracts and, in particular, the dreaded question of **refunds**.

For consumer-facing businesses, this is a particular concern because the law is so protective of consumers' legal rights. There are real, practical implications for businesses as a result of these protections, and the regulators are paying close attention to (and are taking action against) businesses who get things wrong.

Contracts affected by COVID-19

If a contract can't go ahead, or if to go ahead it would need to be radically different from what was agreed, the contract is 'frustrated' and effectively comes to an end. In the context of a consumer contract, the result of this is fairly straightforward (there are nuances, but this is the basic golden rule): **where a consumer has paid for goods or services which are not then supplied, whatever the reason, the consumer is almost always going to be entitled to a full refund.**

In the context of COVID-19, this basic rule of thumb applies where, for example, a business cancels a contract due to lockdown laws, or where it can't provide the goods/services due to those lockdown laws.

Perhaps less obviously, the rule also applies where a consumer is prevented from receiving any goods or services because, for example, lockdown laws in the UK (or abroad) have made it illegal to receive or use the goods or services. Keep in mind, too, that there doesn't have to be a full, national lockdown for the rule to kick in. Other situations might include contracts affected by local/regional lockdown laws, other restrictions imposed by local authorities, or any form of mandatory self-isolation.

See the next page for some key do's and don'ts.

Cancellations and refunds - do's and don'ts

Don't

Mislead consumers.
For example, by giving consumers the impression that they're not entitled to a refund when they are.

Pressurise consumers to take a particular course of action.
For example, to break lockdown laws or other COVID-19 guidance, or to accept an alternative to a refund.

Require consumers to take unreasonable or unnecessary steps to obtain refunds.
For example, by offering an easy online form to obtain vouchers or arrange re-bookings, but requiring customers who want a refund to call a special number or write a letter.

Use unfair contract terms to try and avoid the rules.
Unfair contract terms are not enforceable against consumers anyway and using them may lead to unwanted regulatory action.

Charge an administration fee for issuing a refund,
when a consumer is legally entitled to receive one.

Require consumers to formally communicate with the business before becoming entitled to a refund.
This doesn't reflect the law.

Do

Be transparent with your customers.
Let them know their rights and be clear about your processes.

Communicate with your customers when COVID-19 causes problems.
The regulators aren't likely to come down on a mutually-agreed position, provided that it's fairly reached and the consumer hasn't been pressured to agree.

Refund promptly, without undue delay.
The regulators appreciate that businesses are under a lot of pressure and will give some leeway because of that, but they will not want to see this being stretched to extremes.

Offer credits, re-bookings, re-scheduling, or vouchers as alternatives to refunds.
But make sure that a refund is always an option (and is just as easily available).

Remember that whether a consumer is entitled to a refund will depend on the circumstances.
Including the nature of the goods/services, the sector, the type of impact caused by COVID-19, and the detail of the arrangement between consumer and business – try not to think in absolutes.

And finally: always remember the critical watchword – FAIRNESS.
This is the overriding principle of consumer law – treat consumers fairly and you're much more likely to remain on the right side of the law, whether in the context of COVID-19 or not. Plus – bonus – you'll have happy customers.

Lessons from COVID-19 - key contract considerations

Contracting fairly with consumers can be a minefield – contract terms must be timely, fair and transparent.

As businesses have sought to navigate the disruption caused by COVID-19, we've seen some particular contractual pressure points arise.

Existing contracts – variation clauses

Many consumer contracts contain terms which give businesses the right to change the terms of the contract after it has been agreed with the consumer – these are known as "variation clauses". More than ever, businesses are seeking to rely on variation clauses to change the terms of contracts to cover previously unanticipated issues arising from the pandemic.

The problem is that variation clauses are "grey-listed" under the Consumer Rights Act 2015. This means that they are likely to be unfair and therefore unenforceable against consumers, especially if:

- they have the effect of giving the business a 'blank cheque' to change important aspects of the contract at will;
- the business is not required to give the consumer reasonable notice of any changes; and
- the consumer does not have a right to freely cancel the contract without being left worse off.

However, the consumer regulator, the CMA, has said that it's "unlikely to object" to voluntary arrangements entered into between businesses and consumers provided they are fairly agreed and the business does not pressurise or mislead the consumer in any way to accept the new arrangement.

So, if you want to change the terms of a consumer contract, the takeaways are:

- give reasonable advance notice of the changes and allow the consumer to get out of the contract, without penalty, if they don't agree to the new terms;
- don't cajole or mislead consumers; and
- don't leave consumers in a worse position than they were in before.

New contracts – terms specifically relating to COVID-19

Many businesses will want to redraft their standard contract terms for new customers to include new, specific provisions relating to COVID-19. Chief among these new provisions will be those that relate to cancellations and refunds.

Whilst there are nuances and every case will depend on its specific circumstances, contract terms are likely to be unfair and therefore unenforceable if they prevent consumers from obtaining a refund in circumstances where they would otherwise be entitled to one, for example where a contract cannot go ahead because of lockdown laws – see our Guide to Cancellations and Refunds on page 4.

Any terms and conditions relating to refunds and COVID-19, as well as provisions relating to cancellation and refunds more generally, must be clearly and prominently set out in the contract (no hiding them down in the footnotes on page 65) and must be appropriately and clearly brought to the consumer's attention before they enter into the contract.

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Extended reality - a risk worth taking?

Extended reality has seen a huge spike in interest over the last 12 months as millions of people have sought out new and socially distanced ways to interact with their friends, colleagues, and families.

The evolution has also been driven by the growing potential applications of virtual reality (VR), augmented reality (AR) and an array of other technologies that make up the extended reality landscape. There's the potential here to transform numerous industries by creating new ways of providing entertainment, marketing, and even product packaging, to improve the consumer experience.

With high-immersive extended reality systems finally close to achieving 'mass market' status[1], companies are spending huge sums of money trying to better understand how consumers interact with and behave in the digital world.

What are the opportunities?

AR is arguably the most effective method of virtual marketing. It requires only a phone or desktop app to overlay digital images into the real world and is far more accessible and cost-effective for consumers than investing in the VR hardware necessary for a headset experience. Furthermore, if a good set of AR goggles hits the market (opinion is still divided on what form Apple's highly anticipated extended reality offering will take, or whether Microsoft Mesh will deliver on its early promise) then the developing bank of AR applications will find an even stronger foothold.

Brands are already adopting AR marketing to give customers a virtual "try before you buy" option. It's been shown that if consumers can be provided with a complete and integrated view of a product, particularly if placed in the context of their own home or on their own body, then it's significantly less likely that they'll want to return it. Fewer returns mean lower costs and more revenue for businesses. It also means less waste from products that can't be resold.

The ability to take a digital version of a product and 'overlay' it into the physical world is potentially a very powerful tool.

What are the risks?

Hot on the heels on this opportunity is the risk of products and branding being overlaid or even scrubbed away by competitors. What if, for example, a clothes company offers discounts to their customers if they install an app that digitally deletes all competitor branding from their visual field? We've already seen early examples of guerrilla AR brand wars, most prominently when a high-profile fast-food chain created an app that allowed consumers to digitally 'burn' the posters of competing restaurants. This sort of approach will only become more sophisticated as AR develops.

The potential risks can be taken a step further. What if an AR overlay allows a company to imprint their branding across, say, The London Eye, or the kit of Premier League Football team? In this mixed digital reality, how can any company ensure that their IP, reputation and associations are secure, or that their chosen sponsors and collaborators are achieving the publicity and exposure necessary to make that relationship worthwhile?

What next?

In short, if companies are hoping to access customers via extended reality, they need to be aware of the risks presented by this technology and particularly of the more invasive applications of it.

They will also need to carefully monitor their own activities to ensure they aren't treading on the toes of competing copyright and IP. The solution will, inevitably, be an evolving combination of legal protections and technological innovation.

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[1] the recent release of the Oculus Quest 2 VR System by Facebook has been a particular success, capturing over half of all extended reality sales in 2020, according to reports

The do's and don'ts of influencer advertising

Influencer marketing is right at the top of the Advertising Standard Authority's (ASA) long list of hot topics for this year. Despite issuing a large volume of guidance over the past few years, the ASA saw a 55% increase in the number of influencer-related complaints in 2020 compared to 2019[1].

What do the rules say?

Any post published on a non-broadcast medium (Instagram, Facebook, YouTube, Snapchat, Twitter, TikTok, etc.) is subject to the CAP Code.

The key requirement under the CAP Code is that any influencer marketing should be obviously identifiable as such – a social post from an influencer should not falsely imply that the influencer is in fact a consumer with no commercial relationship with the brand paying for the content.

When should a social media post be labelled as an #ad?

If there's a commercial relationship between the influencer and brand, that needs to be made clear to ensure consumers are not misled by an influencer's social post. Examples of a commercial relationship include:

- a brand paying an influencer to promote its products or services via social media;
- an influencer's posts including a discount code or hyperlink to the brand's website as part of an affiliate agreement where the influencer is paid on a commission basis; and
- an influencer receiving free goods or services (e.g. a free subscription) from the brand.

[1] https://www.asa.org.uk/uploads/assets/dd740667-6fe0-4fa7-80de3e4598417912/Influencer-Monitoring-Report-March2021.pdf

How can you make clear a social post is an ad?

The safest label for influencers to use in most cases is "#ad" or "#advertisement".

Although the ASA will look at posts on a case-by-case basis, there have been examples of the ASA deeming the following hashtags to be insufficient to make clear to a consumer that the post is an advertisement: "#spon", "#Sponsored", "#aff", "#Affiliate" and "In association with…". The responsibility not to mislead consumers is on both the individual influencer and the brand.

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Some practical tips for brands and influencers alike

Don't hide your label.
Make sure the appropriate label is included in the post, at the beginning of the video and/or at the start of the description.

Use a reasonable sized font for your label.
Remember that the label must be easily visible on all devices used by consumers (laptop, mobile, tablet, etc.).

Make sure all parts of your posts are correctly labelled.
Labelling an Instagram post but not the accompanying Instagram Story may breach the ASA's rules.

Remember that you may need to add extra labels to your post.
If you are advertising a product that is age-restricted (e.g. alcohol) or one that is subject to further ASA regulation (e.g. food supplements, CBD products).

Data protection - opportunity or obstacle?

Data protection is crucial for consumer-focused businesses[1]. For many, the thought of complying with the GDPR may bring a sense of dread - but detailed planning on data protection and electronic marketing can open up many opportunities and even help you better monetise your customer database.

A question of transparency

Compliant data protection practices can help build relationships of trust with customers. Consumer law is to a large degree about transparency, and so too is data protection law. By being up front with customers from the outset, a business can position itself as a brand to be trusted, and this in turn helps ensure an even greater degree of compliance. And as people are more privacy aware now than they ever have been, data protection compliance is an obvious base on which trust can be built (but also lost).

All of this is not to say that data protection compliance is easy. There's always work to be done. But if done correctly, a company's data protection and marketing practices can be an opportunity rather than a burden, and businesses can build customer relationships better, and more quickly.

It's a changing world

The current rules on marketing comms are under review in the EU and will quite possibly be tightened in the near future. If so, the UK may follow suit. We help consumer-facing businesses not only comply with the current law but plan ahead for changes likely to come.

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Direct marketing

The GDPR introduced significant changes to the rules on consent, and its arrival brought a great deal of rhetoric about consent and direct marketing. As a result, businesses may be surprised to learn that an opt-out mechanism[2] is a legitimate way of contacting existing customers with future offers. There are specific rules to observe – such as having to include an 'unsubscribe' in all future communications – but understanding these rules and how they differ from the strict GDPR consent regime can help a business grow its marketing database more quickly. It's also important to note that if you haven't done so already, it's more difficult to sign up existing customers to a marketing database than new customers.

Data mapping

Mapping out and recording your data flows, both current and anticipated, is another important step. It helps demonstrate compliance by showing that you have considered what personal data your business processes and why. But it also allows businesses to evolve on a compliant basis and, if necessary, to pivot (for example to change tack, to obtain investment or to sell) on a data-ready basis without running into problems.

[1] Okay, maybe not if you are running a car boot sale
[2] Rather confusingly this is called the 'soft opt-in'

Consumer disputes - setting the rules of the game

When a consumer claim arises the issue in dispute is usually clear – whether it's late delivery, a defective product, or a negligent provision of services. Sitting alongside this though will be a host of more nebulous questions: how the dispute should be resolved, what law should apply to it and where it should be adjudicated.

Considerations for businesses

While with B2B agreements it's often as simple as looking at the parties' specifically negotiated contract, it's not always so easy in the B2C sphere. Consumer protection policy objectives are in play, B2C terms are heavily regulated (including agreements on how to resolve disputes) and e-commerce means such contracts are often cross-border.

Location considerations

While it's technically open to a consumer and trader to choose any law to govern their contract, if the trader pursues its activities in, or directs its activities to, the UK and the consumer is habitually resident in the UK, mandatory local law provisions will apply in addition to those of the chosen law - a fact which the business must make clear to the consumer at the time.

Provisions from EU law which gave consumers a right to sue in England, even if the contract was performed in a different jurisdiction and the business they are suing is located overseas, have been incorporated into English law post-Brexit. So a consumer resident in England and Wales will generally remain entitled to bring proceedings in England and Wales, even if the business they're acting against is located elsewhere.

Alternative dispute resolution

Under the EU regime, traders were required to provide consumers with information about Alternative Dispute Resolution (ADR) entities and the Online Dispute Resolution (ODR) platform established by the European Commission to better facilitate the resolution of cross-border disputes arising from online sales or service contracts.

Post-Brexit, businesses and consumers in the UK are no longer able to use the ODR platform, so the obligation to provide information about it on the traders' website also falls away.

UK consumers and business will of course still be able to access ADR entities in EU countries, but through alternative means. And if the trader is required to use the services of an ADR entity then it must include those details on its website or sales terms.

Likewise, if a trader has exhausted its internal complaints handing procedure, it must inform the consumer of the name and website address of an ADR entity that would be competent to handle the complaint (although this does not mandate the trader to engage in that process).

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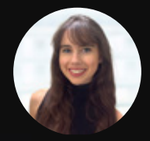

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The Omnibus Directive - is your business ready?

Big changes are on the horizon for consumer-facing businesses. Part of the so-called "New Deal for Consumers", the Omnibus Directive is an EU-wide initiative aimed at strengthening enforcement of consumer law and modernising consumer protection rules.

What?

The Omnibus Directive is the informal name given to the "Directive on Better Enforcement and Modernisation of EU Consumer Protection" (Directive (EU) 2019/2161), also known as the Enforcement and Modernisation Directive, which amends four existing EU consumer protection directives.

When?

The Directive came into force on 7 January 2020. Member States have until 28 November 2021 to adopt and publish their implementing legislation, and those laws must then come into effect on 28 May 2022.

What's changing?

The implications of the Directive are wide-ranging, but the key changes are:

Significantly enhanced enforcement

The big headline-stealer – the introduction of substantial, GDPR-style fines of a minimum of 4% of a company's annual turnover in the relevant Member State (or €2m if a calculation is not possible). Member States are also free to introduce higher fines.

Digital goods and services

The Directive expands the scope of existing consumer rights (previously applying only to physical goods and services) to cover digital goods, content, and services.

"Free" digital services

Certain existing consumer laws which previously extended only to paid-for services (i.e. paid for with money) will now extend to "free" digital services (e.g. cloud services or social media) which are 'paid for' with a consumer's personal data. This is a big change for relevant businesses that, until now, have escaped the reaches of consumer law.

Direct consumer claims

The Directive introduces a new, direct right to individual remedies for consumers harmed by unfair commercial practices.

Increased transparency requirements for online marketplaces

Online marketplaces will be subject to much stricter transparency requirements, including:

- clearly indicating paid placements in search results; and
- providing consumers with information about how offers are ranked in a search, whether consumers are entering a contract with a professional trader or a private individual, and whether consumer protection legislation applies.

Personalised pricing

Consumers must be informed whenever pricing is individualised (i.e. based on an algorithm).

Price reduction claims

For every price reduction claim, businesses will have to indicate the lower price that applied within a period of at least 30 days preceding the price reduction statement.

What about the UK?

As the Brexit transition period has now ended, the UK will not be obliged to implement the Directive and we do not yet know what the UK Government's plans are (though it has, separately, indicated its intention to modernise UK consumer laws and significantly increase enforcement powers).

In any event, UK traders selling to EU consumers will have to comply with the Directive, because EU consumer law applies to, and protects, consumers in Member States regardless of the location of the business.

What steps should I be taking?

If we learned anything from GDPR, it's that preparation is everything. While there's still time until the new laws come into effect, businesses that are going to be affected by the changes should be preparing now.

The first step: understanding the legal changes (more will be known about this once Member States have published their implementing legislation) and determining which aspects of the business and which product/service offerings are going to be affected.

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Decoding the Digital Content Directive

A new EU Directive (the Digital Content Directive) is set to come into force in the next year to more closely align various EU laws around digital content and the rights that consumers have when that content is faulty or doesn't do what it says it will. The directive also sets out when and how companies can update digital content.

Current EU consumer law contains multiple gaps around issues relating to digital content, which is what the Digital Content Directive (DCD) aims to fill. The DCD applies to a wide range of digital content, including games, music, software, ebooks and films. It was largely inspired by an EU impact assessment in 2015 which discovered that around one in three consumers had experienced issues around digital content.

What are the significant parts of the DCD?

The main concept is that of "conformity" (i.e. the content needs to match what the company says it will do). If the content does not conform, then the consumer has a selection of different avenues it can pursue against the company, such as repair or replacement of the content, a price reduction and in some cases the ability to get a full refund.

Another significant part of the DCD outlines how companies can make updates to digital content beyond what is necessary to keep the content "conforming" (e.g. security updates). Here, companies need to set out any updates or changes they want to make in the contract with consumers (e.g. the Terms of Service), that the updates are free of charge and that the consumer is informed of the changes and has the right to terminate.

What does the DCD mean for digital companies?

The DCD will likely affect a number of established business practices. For example, the app and games industries are known for commercially releasing products which are still 'under development' which are later updated and bugs patched out. However, under the DCD, if an app / game does not function as expected a consumer may be entitled to have the game brought up to the expected level of quality / functionality, receive a price reduction or terminate the contract (and be fully reimbursed).

Advertisements or statements made by companies (e.g. on social media) may impact what a consumer can expect from digital content, which means marketing teams may need to be more aware of what impression of the product / service is being made public.

The requirements around updates will also likely mean that many companies will need to set out more clearly in their Terms of Service what updates it may make to its digital content and make sure there are processes in place to inform consumers about those updates.

Will the DCD apply to the UK?

The UK already has some of its own laws providing for consumer rights in relation to digital content. The UK is not planning to implement the DCD, but it's possible that it may choose to align with the EU standards itself at a later date. However, UK-based companies supplying digital content to EU consumers will need to be aware of the DCD in any event as it will apply in those circumstances.

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Consumer protection in telecoms - change is coming

Towards the end of 2020, the UK communications regulator, Ofcom, introduced a new set of measures that seek to protect broadband, mobile, pay TV and landline customers, and largely mirror the European rules proposed pre-Brexit. The enhanced consumer protection regime covers not only individual consumers but also small businesses and not-for-profit organisations and, in certain cases, large businesses too. We've outlined the key measures and their entry into force below.

Ban on selling locked devices (December 2021)

Some providers currently sell devices that are locked to a particular network and can't be used on other networks until they are unlocked. This discourages people from changing providers. The sale of locked devices will be prohibited altogether.

Access to information for disabled users (December 2021)

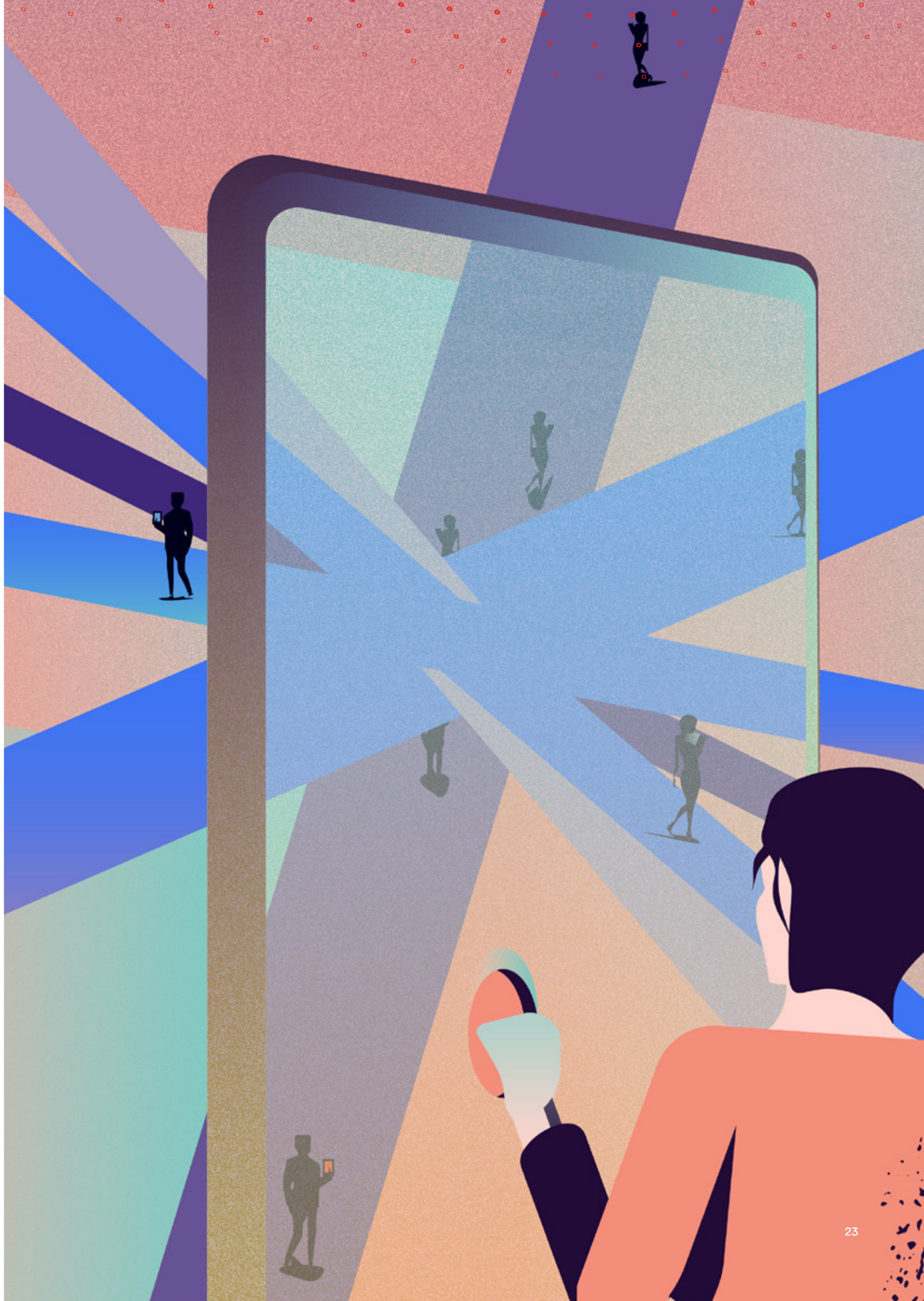
The existing rules enable blind or vision impaired customers to request certain correspondence in a format that is accessible (e.g. braille or large print), free of charge. The new rules will cover all communications, such as price changes or payment reminders, and benefit all customers who need alternative formats due to disability.

Pre-contract information & summary of key contract terms (June 2022)

The new information obligations aim to ensure that customers are given clear and comprehensive information about their communications services, and the terms and conditions that apply to them, before they enter into a binding contract with service providers. They also apply to small businesses and not-for-profit organisations.

There are important repercussions for the customer contracting process - Ofcom made clear that:

- a contract shall become effective after such information has been received by the customer and the customer has provided an express consent to enter into a contract; and
- the same information becomes an integral part of the contract that cannot be altered without the express consent of both parties.



Consumer protection in telecoms - change is coming

Exit rights (June 2022)

Customers will have broad rights to exit their contract if providers choose to make changes to their contractual terms during the term of the contract unless the change is:

- exclusively to the customers' benefit;
- purely administrative with no negative effect on the customer; or
- required by law.

Currently, customers only have this right if a contractual change is likely to be of material detriment to them.

From June 2022, the new rules will apply to all contracts including both new and existing contracts. The exit cannot be subject to exit fees other than for the remaining value of any retained equipment.

This broad exit right applies to all categories of customers including large enterprise customers with a small exception of M2M services. This may create interpretation difficulties over the order of precedence and other provisions in heavily negotiated B2B contracts. This right will also apply to other services or equipment bought as part of a bundle with a communications service.

New rules on bundles & maximum duration of a contract (June 2022)

The new regime extends to bundles with the aim to further limit possibilities for customers' lock-in. Put simply, all elements of a bundle of telecom (i.e., voice or internet) and non-telecom services will be regulated.

The maximum duration of a contract/ commitment period must not exceed 24 months whereas this rule will now apply to all elements of bundles (including subsidised handsets). These rules will also prevent service providers from extending the duration of a contract (i.e. re-setting the commitment period) when a customer subsequently purchases an additional service or terminal equipment.

Broadband switching (December 2022)

Ofcom will introduce new rules to ensure a customer's new broadband provider leads the switch with the aim of ensuring the shortest possible timelines. While there are already established processes for switching within the UK fixed copper networks and between mobile providers, there are currently no regulated processes for residential customers switching between providers on different fixed networks/ using different technologies which will be key in the new fibre and 5G mixed environment.

There will be detailed rules on the process of switching, including specific rules for residential customers where, for example, any loss of service must not exceed one working day.

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Green -v- Betfred - key lessons for online gambling operators

In April 2021 the High Court granted summary judgment in favour of Mr Green, a customer of Betfred who sought recovery of £1.7m in winnings to which he claimed to be entitled. Betfred argued that they were not obliged to pay Mr Green because the winnings arose from a game defect, and the terms of the contract between them excluded their liability to him in those circumstances.

Betfred lost on each attempt to rely on its contractual exclusions for wins attributable to the defect. The court found that:

- the wording of the exclusion clauses was inadequate – they just didn't work as a matter of language;
- even if they had been effective to exclude liability, the way the relevant exclusion clauses were presented and the failure to adequately 'signpost' them to Mr Green meant they weren't incorporated into the contract between Betfred and Mr Green; and
- even if the clauses were adequate to encompass the defect in the game and had been incorporated into the contract, they were not transparent or fair in terms of the Consumer Rights Act 2015 so Betfred would not have been entitled to rely on them.

Lessons to be drawn

This case doesn't mean that exclusions of liability to pay out winnings in the event of a game error are necessarily going to fail. That said, a number of lessons can and should be drawn from the judgment:-

Clarity

Terms and conditions must be clear and readily understandable to the average player. This has long been a requirement of both operators' licence conditions and consumer law more generally, but this case is a timely reminder of the vital importance of clear drafting and regular re-examination of terms.

Signposting

Exclusions of liability need to be clearly signposted in a timely way to the player if they're to stand a chance of being enforceable.

Context

Exclusions of liability need to be considered in their specific context. The Judge was obviously influenced by the fact that it seemed to be accepted by Betfred that the error in the game was not detected or detectable by Mr Green. Clearly the Judge felt that to successfully exclude liability in such circumstances would require a particularly high degree of drafting clarity, signposting, etc.

Specificity

When seeking to exclude liability, using broad, vague, 'catch-all' language will not do. Drafting needs to be specific, so that its meaning is clear and unambiguous.

Presentation

Presentational factors are not merely cosmetic. If terms and conditions are put to the test, these factors will go towards the question of transparency and fairness (and therefore enforceability).

Acceptance/Incorporation

The Judge emphasised that she did not make any finding that acceptance of terms by means of so-called "click wrap" is inadequate to form a binding contract that contains exclusions of liability. However, there were incorporation issues in this case, including the fact that it was not obligatory to access the specific game rules in order to play the game, and the inadequacy of the 'incorporation by reference' language used in one of the relied-upon sets of terms.

Steps operators should take

There's an obvious need for operators to review their terms and conditions in light of this case. There are never any guarantees of enforceability when it comes to exclusions of liability against consumers, but operators should take note of the Judge's criticisms in this case, and review/update their terms and conditions accordingly.

Operators should also consider what additional steps might be taken to adequately signpost exclusion clauses (and indeed other key terms) on which they want to rely. These steps should include:

- reviewing the player registration journey and acceptance of terms and conditions (and any updates to the same);
- reviewing the acceptance processes for individual product terms (particularly when the product is first accessed);
- producing a summary of key terms which are made clearly known to the player and which the player can easily access at any time (and potentially introducing periodic reminders of the key terms); and/or
- considering the introduction of clear warnings that 'wins' will be subject to checks and will not be paid if found to be the result of a fault or defect.

You can read the full judgment at https://www.bailii.org/ew/cases/EWHC/QB/2021/842.html

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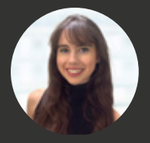

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